CHAPTER 1

OFFICE ORGANIZATION

1.01 THE DISTRICT ATTORNEY

The District Attorney is the public prosecutor. The District Attorney attends the courts, and within his or her discretion initiates and conducts on behalf of the People all prosecutions for public offenses. (Gov. Code § 26500.) The District Attorney draws all indictments and informations. (Gov. Code § 26502.)

The District Attorney prosecutes criminal and civil actions on behalf of the People of the State of California. The District Attorney is a non-partisan official who is elected every four years.

The District Attorney, as a constitutional officer and the public prosecutor acting on behalf of the People, is vested with the independent power to conduct prosecutions for public offenses, detect crime and to investigate criminal activity. The District Attorney advises the Grand Jury in its investigations. The District Attorney sponsors and participates in programs to reduce crime and improve the administration of justice.

The Community Liaison reports directly to the District Attorney. The Community Liaison facilitates communications between the Los Angeles County District Attorney's Office (Office) and community groups, such as crime prevention organizations, neighborhood councils, faith-based groups, business associations and educational institutions. The Community Liaison also addresses questions and concerns from members of the community and serves as liaison in situations involving emerging criminal activity in neighborhoods.

The Law Enforcement Liaison reports directly to the District Attorney. The Law Enforcement Liaison facilitates communications between the Office and law enforcement agencies. The Law Enforcement Liaison also addresses questions and concerns from law enforcement.

1.01.01 BUREAU OF COMMUNICATIONS

The Bureau of Communications consists of the Media Relations Division and the Public Affairs Division. The Bureau manages the day-to-day handling of media requests for interviews and case updates, sets up news conferences and performs other media-related duties on behalf of the Office. The Director of the Bureau of Communications serves as the Office's chief spokesperson.

The Public Affairs Division is responsible for the administration of the Criminal Justice Institute, Project LEAD, and the Los Angeles County Prosecutors Association. The division also produces major office events, such as the Jemison/Noyes/Lamb Awards Luncheon, the Courageous Citizen Award programs and the annual Employee Recognition Ceremonies. The Public Affairs Division includes the Graphics Unit, which produces the Office's biennial reports, pamphlets, scrolls, event programs and other published material.

1.02 THE DISTRICT ATTORNEY'S OFFICE

The Office is dedicated to protecting the community through the fair and ethical pursuit of justice and the safeguarding of crime victims' rights.

The Office prosecutes all felony crimes committed in Los Angeles County. The Office also prosecutes all misdemeanors committed in unincorporated areas of the county and in 78 of the 88 incorporated cities within Los Angeles County. The Office is the largest local prosecutorial office in the nation. The Office serves 10 million people in a jurisdiction that covers 4,083 square miles.

The Office is divided organizationally into four operational components: Administration, Line Operations and Special Operations, each managed by an Assistant District Attorney, and the Bureau of Investigation managed by a Chief. The Assistant District Attorneys and the Chief of the Bureau of Investigation report directly to the Chief Deputy District Attorney.

1.03 THE CHIEF DEPUTY DISTRICT ATTORNEY

The Chief Deputy is responsible for overseeing the day to day operations of the Office. The Assistant District Attorneys and the Chief of the Bureau of Investigation report directly to the Chief Deputy. The Chief Deputy District Attorney reports directly to the District Attorney.

1.03.01 SACRAMENTO LEGISLATIVE OFFICE

The Office maintains a full-time legislative office in Sacramento managed by the Office's Legislative Advocate. The Chief Deputy is responsible for coordinating the Office's legislative program.

1.03.02 EMPLOYEE RELATIONS DIVISION

The Employee Relations Division handles all employee relations matters for the Office. The Employee Relations Division is managed by a Division Chief who reports directly to the Chief Deputy.

1.03.03 PROFESSIONAL RESPONSIBILITY ADVISOR

The Professional Responsibility Advisor is responsible for developing a comprehensive, consistent and proactive approach to advise, teach and support a precise understanding and practice of ethics and professional conduct throughout the Office. The Advisor teaches and supports principles relating to the elimination of bias and competency. The Advisor assists in responding to state bar inquiry letters, and advises Deputy District Attorney (deputies) and supervisors about self-reporting requirements. The Advisor reports directly to the Chief Deputy.

CHAPTER 2

CRIME CHARGING - GENERALLY

2.01 EVIDENTIARY SUFFICIENCY

Crime charging is one of the most important functions a deputy district attorney (deputy) can perform. A deputy's primary responsibility is to determine whether there is sufficient credible evidence to warrant the filing of charges and to convict the accused of the charges. Deputies shall be familiar with the Uniform Crime Charging Manual to perform this critical function.

All felony and misdemeanor cases shall be reviewed by a deputy before filing.

Only a law enforcement officer with actual knowledge, or information and belief, of the truth of the facts stated in the complaint may sign a felony complaint.

2.01.01 BASIC CRITERIA FOR CHARGING

A deputy may file criminal charges only if the following four requirements are satisfied:

- There is legally sufficient, admissible evidence of all of the elements of the crime(s) to be charged;
- There is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime(s) to be charged;
- The deputy, based on a complete investigation and a thorough consideration of all pertinent facts readily available, is satisfied the evidence proves the accused is guilty of the crime(s) to be charged; and
- The deputy has determined that the admissible evidence is of such convincing force that it would warrant conviction of the crime(s) charged by a reasonable and objective fact finder after hearing all the evidence available to the deputy at the time of charging and after considering the most plausible, reasonably foreseeable defense(s) inherent in the prosecution's evidence.

Commentary

Filing deputies are expected to go through this four-step process in evaluating a case even though these steps are integrally related and the issues often overlap. This evaluation will help prevent filing inappropriate charges because of a failure to consider one or more of these requirements.

2.01.02 IMPROPER BASES FOR CHARGING

The following factors constitute improper bases for charging:

- The race, color, religion, ancestry, national origin, sex, sexual orientation, occupation, economic class or political association or position of the victim, witness or the accused;

- The mere request to charge by a police agency, private citizen or public official when any of the four basic filing criteria are not met;
- Public or media pressure to charge;
- To facilitate an investigation; or
- To intentionally assist or impede the efforts of any public official, candidate or prospective candidate for elective or appointed public office.

2.02 CASE INVESTIGATION AND EVALUATION

Before deciding whether to charge, a deputy shall insist on a complete investigation.

2.02.01 INITIAL INVESTIGATION

All material witnesses should be interviewed, preferably in person and by trained police investigators. Statements obtained from witnesses who might be likely to change or forget them should be taped, handwritten or typed and signed, or otherwise recorded. However memorialized, all witness statements should be clear and detailed so they can be used later in court to refresh the witness's memory or for impeachment purposes, if necessary.

As a general rule, an attempt should be made to obtain a legally admissible statement from the accused. The statement should be taped, handwritten or typed and dated and signed, or otherwise recorded. The police reports should reflect if the accused refused to make a statement.

When the accused makes a statement that if true, in whole or in part, negates criminal liability, the statement should be investigated, if possible, no matter how implausible it may seem. Also, statements of potential defense witnesses should be obtained, documented and investigated.

Scientific examinations should be completed as expeditiously as possible, especially when there is some doubt as to the outcome of the examination. Attempts should be made to lift fingerprints and make comparison tests whenever relevant, even if it is unlikely the attempt will prove fruitful. Any request made to a law enforcement agency for a scientific examination should be noted in the file with the date of the request.

With the advent of technology, many law enforcement agencies have equipped officers and patrol vehicles with audio and video recording devices to record suspects and witnesses for criminal and civil liability purposes. In addition, many law enforcement officers are using personal audio and video recording devices during the course of an investigation, often times for employment-related reasons.

It is incumbent upon deputies to determine whether such recordings exist. When presented with either a misdemeanor or felony case for filing consideration, deputies should inquire of the filing officer whether any such audio or video recordings exist. If recordings exist, a request for copies of the recordings shall be made. A notation of the inquiry and response, including the date and name of the filing officer, shall be written in the file.

2.02.02 SUBSEQUENT INVESTIGATION

If the initial case investigation appears significantly incomplete for any reason, a deputy shall insist that the law enforcement agency conduct further investigation prior to filing to resolve any major deficiencies. This policy shall be observed even if it means the accused must be released from custody and rearrested after the investigation is completed. However, if the investigating officer knows of specific, articulable facts to support a firm belief that the accused will not be readily available for later arrest, a complaint may be filed if there is a reasonable likelihood of conviction based on the evidence available to the deputy.

If the initial investigation is sufficient for filing, but additional investigation is needed, the request for such an investigation shall be made on the "Further Investigation/Case Preparation Checklist" form. A deputy shall set a reasonable deadline for the completion of the investigation, preferably before the preliminary hearing. If the result of the supplemental investigation leads a deputy to believe there is a reasonable doubt as to the defendant's guilt, the deputy shall promptly initiate the process for dismissal.

The responsibility for carrying out subsequent investigation lies with the investigating law enforcement agency. If that agency has inadequate resources to carry out such an investigation, a deputy should ask the Bureau of Investigation for assistance.

Commentary

Deputies shall make every effort to encourage thorough investigations. Investigations should include attempts to obtain probative evidence (such as admissions or fingerprints) even though these attempts may be unsuccessful. Unless there is no reasonable possibility of, for example, lifting or identifying prints, defense attorneys are free to comment on the deputy's failure to try. Such arguments are difficult to rebut.

Reliance on post-filing investigations to correct deficiencies is strongly discouraged since the deputy has not had the opportunity to thoroughly evaluate all the facts of a case. Furthermore, a deputy shall not request the issuance of an arrest warrant unless he or she has evaluated the case.

2.02.03 ADMISSIBLE EVIDENCE

Before deciding whether to charge, a deputy shall thoroughly evaluate all available evidence whether such evidence is admissible in court or not.

Before deciding whether to charge, a deputy shall:

- Review all available police reports and the accused's background and prior record; the fact that the accused's alleged conduct is consistent or inconsistent with prior proven conduct may remove or create a reasonable doubt;
- Review all written reports on relevant scientific examinations unless the result would not affect the charging decision; while a prosecutor may rely on an oral report of test results from law enforcement personnel to file a case, a deputy shall request all written reports to confirm the initial conclusions;

- Review all defense statements; and
- If possible, personally interview witnesses whose later cooperation is doubtful or whose demeanor and credibility are crucial to the outcome of the case. Such interviews should be recorded. Some examples of situations in which witnesses should be interviewed are:
  - Domestic violence victims;
  - Sexual assault victims;
  - Minor victims and witnesses;
  - Eyewitnesses who provide the only evidence of identity;
  - Accomplices who are key witnesses for the prosecution;
  - Informants who are key witnesses for the prosecution.

Commentary

Personally interviewing witnesses enables a deputy to: (1) establish a personal rapport with the witness; (2) evaluate the likelihood of future cooperation; (3) evaluate the witness's demeanor; (4) anticipate and consider problems which might develop on cross-examination; and (5) assist the witness in preparing for the various problems likely to be encountered in court.

2.02.04 INADMISSIBLE EVIDENCE

A deputy may also consider the following types of evidence in deciding whether to charge, regardless of their admissibility in court:

- Evidence which may be suppressed;
- Inadmissible statements by an accused;
- Polygraph evidence.

2.02.05 DIRECT EVIDENCE CASES

After evaluating all available, relevant evidence a deputy shall be satisfied that the evidence warrants conviction of the crime(s) to be charged.

In evaluating direct evidence cases, a deputy shall consider potential witness problems relating to:

- Eyewitness identification;
- Motive to fabricate;
- Ability to recall and communicate.

2.02.06 CIRCUMSTANTIAL EVIDENCE CASES

In evaluating circumstantial evidence cases, a deputy shall consider all reasonable interpretations of the uncontested facts. A deputy shall consider the validity of every reasonable defense and whether, under the uncontested facts, the defense might be true.

2.03 EVIDENCE OF A CORPUS DELICTI

2.03.01 EXISTENCE OF A CRIME

A deputy shall be reasonably certain a crime has been committed before charging. In cases posing novel or unclear questions of law as to whether an act is a crime, a deputy may file charges if the following requirements are satisfied:

- There is a reasonable possibility that a court will later rule that a crime has been committed;
- The act is a substantial one affecting significant personal or property rights of others; and
- A prosecutor can reasonably argue that a crime has in fact been committed.

Commentary

Questions involving the existence of a crime will rarely arise in practice. However, a deputy may do the Office, the victim, and the accused a service by obtaining a judicial resolution of novel or unclear issues. Unlike cases in which the issues involved are factual, the resolution of legal issues affects not only the outcome of the present case, but also future conduct and charging decisions.

2.03.02 EVIDENCE TO PROVE THE ELEMENTS OF A CRIME

A deputy shall be reasonably certain there is legally sufficient evidence to prove each element of the crime alleged. A deputy is responsible for knowing the relevant case law interpreting criminal statutes so that he or she can make a correct and informed filing decision. In cases posing novel or unclear questions of law as to whether legally sufficient evidence to prove any element of a crime exists, a deputy may charge if the basic criteria for charging set forth above are satisfied.

In cases in which an admissible confession clearly shows a crime has been committed, but it appears difficult to prove the existence of a corpus delicti as required by case law, a deputy should charge if the following requirements are satisfied:

- There is enough independent evidence from which a deputy can reasonably argue that the corpus delicti has been established; and
- A deputy believes there is a reasonable possibility the court will rule that a corpus delicti has been independently established.

Commentary

Only slight evidence is required to prove the existence of a corpus delicti independent of a confession. Corpus delicti problems are most difficult with crimes in which a negative must be proven as an element of the crime (e.g., making a false report) and special caution should be exercised in these cases.

2.03.03 ADMISSIBILITY OF EVIDENCE OF A CORPUS DELICTI

A deputy shall be reasonably certain that a court would rule that the evidence necessary to establish a corpus delicti is admissible under current statutory, case or constitutional law. The standard of reasonable certainty applies to both issues of law and fact relating to admissibility of evidence.

The standard of reasonable certainty should be based on an informed judgment of how the highest court entitled to decide the issue would rule if confronted with it. The fact that a local court frequently rules contrary to current appellate law should not be considered in deciding whether to charge.

Commentary

As with other legal issues, a deputy owes a duty to society, the victim, the accused, the police and the prosecution to obtain a prompt resolution of unclear constitutional issues so there will be greater certainty of action by all in the future. However, if it is reasonably clear there is not enough admissible evidence to establish a corpus delicti, a deputy shall not file a case. A deputy has a responsibility to abide by constitutional principles as defined by appellate courts regardless of a deputy's opinion of the correctness of the definition.

2.04 EVIDENCE OF IDENTITY

A deputy shall be satisfied there is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime(s) to be charged.

2.04.01 DIRECT EVIDENCE CASES

In cases resting primarily on direct evidence of identity, a deputy shall be reasonably certain the available evidence, standing alone, would result in a finding of guilt. Because of the nature of direct evidence, it will generally be clear whether this requirement has been satisfied. When identity is in issue and the proof of identity rests solely on the testimony of a single independent witness without further corroboration, a deputy shall only charge when one of the following is present:

- The witness knows the accused so there is no reasonable possibility of mistake;
- The opportunity to observe was substantial so there is no reasonable possibility of mistake;
- The perpetrator of the crime possessed unique physical characteristics similar to those possessed by the accused.

2.04.02 SINGLE PHOTOGRAPHIC IDENTIFICATION

When identity is in issue, a deputy shall not charge based solely on a single photographic identification without further corroboration. In rare and unusual circumstances, the Head Deputy may authorize a deviation from this policy.

Commentary

In certain situations, a lineup may be required before filing. The purpose of requiring a lineup is to: (1) assess the ability of an eyewitness to make an identification in court; (2) enhance the convincing force of a subsequent in-court identification; and (3) reduce the possibility of a mistaken identification. If the eyewitness is acquainted with the accused or if there is independent corroborative evidence of identification, no useful purpose is served by requiring a lineup.

2.04.03 CIRCUMSTANTIAL EVIDENCE CASES

In cases resting primarily on circumstantial evidence of identity, a deputy should not simply consider whether the evidence presented is legally sufficient to convict, but whether, in view of all reasonably foreseeable defenses relating to identity, the evidence is of such convincing force that an appellate court would sustain a conviction on appeal regardless of the defense raised at trial.

Commentary

There is a distinction between mere probable cause to arrest and legally sufficient evidence to convict. This distinction is most meaningful in circumstantial evidence cases where the evidence might warrant a strong suspicion of guilt but not a finding of guilt beyond a reasonable doubt. While a deputy is legally justified in charging based on mere probable cause, a deputy serves no useful, legitimate purpose in doing so.

2.04.04 ADMISSIBILITY OF EVIDENCE OF IDENTITY

A deputy should believe there is a reasonable possibility that a court would rule that the evidence necessary to establish identity is admissible under current statutory, case or constitutional law. The standard of reasonable possibility applies to both issues of law and fact relating to admissibility of evidence.

The standard of reasonable possibility should be based on an informed judgment of how the highest court entitled to decide the issue would rule if confronted with it. The fact that a local court frequently rules contrary to current law should not be considered in deciding whether to charge.

Commentary

The same principles that apply to the admissibility of evidence of the corpus delicti apply to the admissibility of evidence of identity. If there is a reasonable possibility that evidence of identity is admissible under current constitutional, case or statutory law, a deputy should assume, for charging purposes that it will be ruled admissible.

2.05 PROBABILITY OF CONVICTION

A deputy shall consider the probability of conviction by an objective fact finder after hearing the admissible evidence and after considering the most plausible, reasonably foreseeable defense(s) inherent in the prosecution evidence.

2.05.01 JURY PANELS

A deputy should not decline to charge because local juries, due to political or social attitudes, may unreasonably refuse to convict. A deputy's responsibility to enforce the law is a responsibility owed to the People of the State of California. The standard of reasonableness must inevitably be a statewide standard based upon an ideal jury drawn from a representative cross section of the community who will obey the oath of jurors to follow the court's instructions and the law and not be affected by any biases that, if revealed, would subject them to challenge for cause.

Commentary

Unreasonable jurors pose a continuing problem for prosecutors. A deputy shall not permit the likelihood of unreasonable actions by jurors to deter a deputy from carrying out the Office's assigned duty to prosecute violations of the law.

2.06 AFFIRMATIVE DEFENSES

A deputy should not decline to charge because of an alleged affirmative defense unless:

- The affirmative defense, if established, would result in the accused's complete exoneration; and
- The affirmative defense cannot be refuted by substantial evidence currently available to the prosecution.

Only if these two requirements have been satisfied should a deputy decline to charge.

Commentary

Affirmative defenses are treated differently because the facts necessary to establish them are usually unavailable at the time of filing and because the accused has the burden of raising them at trial. The most common affirmative defenses are insanity, entrapment and double jeopardy. Self-defense and defense of third parties, while technically affirmative defenses, should be carefully evaluated at the charging stages as corpus issues. Alibi and the statute of limitations are not affirmative defenses and should be treated as identity and corpus issues respectively.

2.07 CHARGE SELECTION

The filing deputy has the responsibility to select the charge or charges that appropriately describe the crime(s) committed and provide for an adequate sentence if the accused is convicted.

2.07.01 MISUSE OF CHARGE SELECTION PROCESS

The filing deputy shall not use the charging process to obtain leverage to induce a guilty plea to a lesser charge. There must be a reasonable expectation of conviction on the filed charge(s).

Commentary

The use of the charging process simply to obtain leverage without any reasonable expectation of conviction of the filed charge(s) cannot be reconciled with any legitimate prosecutorial goal.

2.07.02 OVERLAPPING STATUTES - DIFFERENT PENALTIES

When identical criminal conduct may be punished under two or more similar statutes providing significantly different penalties, a deputy should select the most appropriate charge after considering the following factors:

- Which charge most adequately and fully describes the accused's conduct;
- Which charge provides the most appropriate penalty for the accused in view of the nature of the offense and the accused's prior criminal record;
- Whether there is a specific evidentiary or prosecutorial function to be served by selecting a particular charge; and
- Whether case law or legislative intent suggests the selection of a particular charge.

Commentary

This policy applies to criminal conduct punishable under two or more statutes that provide substantially different penalties. It does not apply to special statutes that, under the law, preclude the use of general statutes.

2.07.03 OVERLAPPING STATUTES - SIMILAR PENALTIES

Alternative charges providing similar penalties may be filed when there is a specific evidentiary or prosecutorial function to be served.

2.07.04 EFFECT OF AFFIRMATIVE DEFENSES

Nothing in this section should be interpreted to preclude the filing of a greater offense when the final determination of the appropriate offense or degree of offense depends in significant part on possible affirmative defense(s).

Commentary

A common example is the filing of a murder charge even when a possible affirmative defense exists which could result in a conviction of manslaughter. However, if the evidence clearly shows the accused committed manslaughter and not murder, the lesser charge should be filed.

2.08 CHARGING MULTIPLE COUNTS

A deputy has the authority to charge all crimes committed. However, reasonable limitations, as defined below, should be placed on the exercise of this authority to avoid unwieldy prosecutions and conserve judicial resources.

2.08.01 JOINDER OF MISDEMEANORS WITH FELONIES

Misdemeanors should not be joined with felonies except in the following situations:

- The evidence relating to the misdemeanor directly or indirectly strengthens the evidence relating to the felony;
- It is necessary to charge the misdemeanor in order to adequately describe the accused's conduct;
- Conviction of the misdemeanor carries significant punitive consequences in addition to the likely consequences of a felony conviction;
- The misdemeanor involves a significant invasion of another's rights and cannot be prosecuted independently based upon *Kellett v. Superior Court* (1966) 63 Cal.2d 822 and *People v. Flint* (1975) 51 Cal.App.3d 333; or
- There is a reasonable possibility that a jury might not convict on the felony count even though the policies relating to evidentiary sufficiency set forth above have been satisfied.

Commentary

Unless one of the above exceptions applies, joining a misdemeanor with a felony typically does not benefit the prosecution. Proving a misdemeanor can waste limited resources and divert attention from the more serious felony. The above exceptions implicitly recognize that some misdemeanors carry greater penalty or stigma than some felonies, may increase punishment for future crimes or vindicate a victim's rights.

Including misdemeanor charges in a felony complaint may preclude a defendant from eligibility for mandatory drug treatment under Proposition 36, the Substance Abuse and Crime Prevention Act of 2000. (PC § 1210.1b(2).) Precluding Proposition 36 drug treatment is an inappropriate reason to join a misdemeanor with a felony.

This policy is not intended to discourage the filing of a misdemeanor separately when not precluded by Kellett v. Superior Court (1966) 63 Cal.2d 822.

2.08.02 NUMBER OF COUNTS

A deputy shall not file a case with more than 15 counts without the approval of the Head Deputy or Deputy-in-Charge.

Commentary

The purpose of this policy is to avoid unmanageable cases and over-filing. However, it should be applied in a flexible manner and should not preclude filing more than 15 counts when appropriate.

Related Crimes

Notwithstanding the multiple punishment limitations of Penal Code § 654, a deputy should file all appropriate charges relating to a single course of conduct when:

- The policies on evidentiary sufficiency have been satisfied as to each count;
- The policies relating to the appropriate charge level have been satisfied; and

- The charge is not merely a technical one but accurately describes separate criminal conduct or a separate theory of culpability.

Unrelated Crimes

Unless the number of counts is patently excessive, a deputy should not limit the number of counts filed except as provided above. The counts charged must, of course, comply with the rules of joinder.

Exceptions can be made for certain crimes against property, such as forgery, when multiple counts stem from a single initial violation of law (e.g., theft, burglary or robbery). A deputy may restrict the number of counts filed to avoid the use of an excessive number of witnesses provided the counts charged adequately describe the accused's conduct.

Commentary

Since at least one charge will be filed, mere multiplicity of charges does not prejudice the rights of the accused. On the other hand, a deputy's case could be prejudiced by arbitrarily limiting the number of counts filed. Because consecutive sentences for charges relating to a single event are rare, there is little danger of wrongfully inducing a guilty plea. Penal Code § 654 provides adequate protection to the accused and should be applied at the time of plea or sentence.

2.08.03 NEW CHARGES AGAINST ACCUSED WITH CHARGES PENDING

If the basic requirements for charging are met, a new complaint shall be filed against an accused who has a case pending case:

- If the new crime was committed while the accused was on bail or own recognizance on a pending charge; or
- If the new charge is willful failure to appear after being released on bail or own recognizance on the pending charge.

If it appears that other felonies the accused has committed are being investigated by other agencies, a deputy shall endeavor to consolidate these cases in one place for filing.

2.08.04 CONSOLIDATION OF CASES

When there is a pending felony case in Los Angeles County, a deputy shall try to consolidate, whenever possible, the new felony filing with the pending case and add a Penal Code § 12022.1 enhancement (commission of a new crime while on bail or own recognizance).

Whenever a new felony is filed against an accused who is already being prosecuted by the Office for a felony offense, the filing deputy shall prepare a "Memorandum of Related or Pending Felony Case(s)." A copy of the memorandum should be placed in the new case file and a copy should be forwarded to the office or division handling the pending case.

In addition to preparing the "Memorandum of Related or Pending Felony Case(s)," the deputy filing the new case should contact the deputy handling the pending case in order to facilitate consolidation. In taking steps to consolidate cases, deputies should consider where the most serious offense occurred and which location will be best for the prosecution of the case and will best serve the convenience of the witnesses and the police agencies. In all cases in which consolidation is under consideration, a deputy shall confer with the appropriate supervisor.

Whenever a deputy handling a pending case becomes aware of the possibility of new felony charges against the defendant, but has not received a "Memorandum of Related or Pending Felony Case(s)," he or she should attempt to determine the status and nature of the new case and document the findings in the pending case file.

2.09 ALTERNATIVE FELONY/MISDEMEANOR CRIMES

An alternative felony/misdemeanor crime (i.e., a wobbler) shall be charged as a felony unless a deputy believes that a misdemeanor sentence is warranted under all the circumstances. The current Penal Code § 17(b)(4) Operational Agreement Schedule I delineates when a wobbler may be directly filed with a local prosecutorial agency.

2.09.01 PRESUMPTIVE FELONY FILINGS

The following factors normally warrant a felony prosecution:

Prior Record

A misdemeanor prosecution should not normally be considered if the defendant:

- Has been committed to the Department of Juvenile Justice (formerly known as the California Youth Authority or CYA) or camp or suffered more than one felony sustained petition within the previous five years; or
- Has a record of charges and/or convictions for any type of criminal conduct within the past five years demonstrating the defendant's habitual criminality.

When the present crime involves domestic violence or child abuse, prior similar crimes or a past history of violent behavior shall be considered, even if the prior incidents were not brought to the attention of the criminal justice system. It is important to remember that crimes of domestic violence and child abuse are frequently repetitive and escalating in degree.

Severity of the Crime

A misdemeanor prosecution should not normally be considered if the defendant:

- Attempted to injure another with the use of a deadly weapon or instrument, whether successfully or not;
- Regardless of the means used, caused permanent injuries, temporary injuries requiring hospitalization, or temporary injuries substantially incapacitating another for a significant

period. In mutual combat situations, all circumstances should be considered including the relationship between the parties and any prior criminal history of the parties;
- Physically attacked and injured in any significant way a child, an elderly or disabled person, in the commission of the crime;
- Possessed a loaded firearm at the time of the commission of the crime, and the crime is such that a loaded firearm could be used to facilitate its commission;
- Committed a battery on a police officer inflicting other than minor injuries; or
- Was engaged in bookmaking related to an extensive bookmaking operation or to organized crime.

Probability of Continued Criminal Conduct

Because a probability of continued criminal conduct may be inferred from the following factors, a misdemeanor prosecution should not normally be considered if the defendant:

- Has demonstrated that he or she is a professional criminal by modus operandi, the tools used in the commission of the crime, his or her criminal associations, or other similar circumstances; or
- Has committed a crime related to gang activities or organized crime.

Eligibility for Probation

Except in unusual cases when the interests of justice demand a departure, if the accused is statutorily ineligible for probation, a felony charge should be filed.

Commentary

Penal Code § 17(b)(4) gives a prosecutor a unique crime charging tool. These policies provide a framework for considering the application of Penal Code § 17(b)(4). This framework can be systematic without being rigid. Most cases do clearly and properly fall into a felony or misdemeanor category. However, the use of the words "should not normally be considered" leave a prosecutor with the discretion necessary for reaching a proper decision in those cases that cannot be easily categorized.

The factors stated are proper factors to consider in determining whether a particular accused appears to deserve a felony or misdemeanor sentence. Factors which should not be considered include (1) the attitude of the victim, witnesses, or law enforcement toward the decision (unless it illuminates the legitimate factors for consideration), and (2) the accused's family, economic, immigration or professional status.

In applying these policies, a deputy shall consider the threatened or potential provable loss as well as the actual loss. For example, if an accused is arrested at the scene of a commercial burglary before having the opportunity to steal, a deputy shall consider what the provable loss might have been considering the nature of the premises, the time, the modus operandi, and the nature of the objects available for theft.

2.09.02 PRESUMPTIVE MISDEMEANOR FILINGS

A misdemeanor prosecution pursuant to Penal Code § 17(b)(4) should normally be considered regardless of the provisions set forth above, if the case meets the criteria delineated in the current Penal Code § 17(b)(4) Operational Agreement.

Commentary

The criteria for direct filing delineated in the current Penal Code § 17(b)(4) Operational Agreement provide guidance when determining whether a crime should be classified as a felony or a misdemeanor. However, there are exceptions when a felony sentence may be warranted, even if the crime otherwise meets the criteria. The exceptions are difficult to define legislatively and are frequently applicable. It is, therefore, not suggested that any of these crimes be reduced by the legislature from alternate felony/misdemeanors to simple misdemeanors.

However, these crimes should not be treated as misdemeanors when the gravamen of the crime is something other than the taking of property or possession of contraband (e.g., burglary, where the gravamen of the crime may be invasion of privacy or the intent to cause a greater loss).

2.09.03 OTHER FACTORS THAT WARRANT CONSIDERATION

In close decisions regarding the use of Penal Code § 17(b)(4), a deputy may consider the following additional factors in weighing the propriety of a felony sentence:

- The defendant's cooperation as demonstrated by his or her voluntary confession, assistance in the recovery of property, information regarding other criminal activity of the accused or others, voluntary restitution, or other like factors; or
- The defendant's age if it may result in a commitment to the Department of Juvenile Justice (formerly known as the California Youth Authority or CYA) rather than to state prison.

2.09.04 MULTIPLE DEFENDANTS

When multiple defendants can be charged with a felony, and at least one appears to deserve a felony sentence for the crime(s), all should be charged initially with a felony. The legislature has expressed a preference for joining defendants as evidenced by article I § 30 of the California Constitution, and Penal Code § 1050.1.

Commentary

The use of separate felony and misdemeanor prosecutions for codefendants would waste judicial resources, unnecessarily inconvenience witnesses, and should be avoided. Misdemeanor dispositions are still possible for the eligible codefendant(s) under Penal Code § 17(b)(5).

2.10 CHARGING SPECIAL ALLEGATIONS

When a complaint is filed, a deputy shall charge all applicable special allegations that enhance the penalty or result in the mandatory denial of probation (e.g., all prior serious or violent felony

convictions, possession or use of weapons and the infliction of great bodily injury) whenever the policies on evidentiary sufficiency have been satisfied.

2.10.01 CHARGING STANDARD

A deputy shall charge a special allegation and not delay filing a complaint or information if there is sufficient evidence to establish probable cause to believe that the particular allegation is applicable. If further supporting documentation concerning the allegation is needed, the deputy shall fill out a "Further Investigation/Case Preparation Checklist" form. Such investigations should be completed before the preliminary hearing.

2.10.02 UNRESOLVED LEGAL ISSUES

If the application of a special allegation presents a novel or unclear question of law, a deputy shall allege the special allegation when there is a reasonable possibility that a court will later rule that the allegation is applicable and the evidence in support of the allegation is such that a deputy can reasonably argue that the allegation is applicable.

Commentary

Care in charging is necessary to prevent the prosecution of innocent individuals and to promote the proper and effective allocation of prosecutorial and judicial resources. Once the decision to charge has been made, however, neither purpose is served by limiting the use of special allegations when there is sufficient admissible evidence to believe the allegation is applicable. Special allegations exist to provide for the imposition of additional punishment. The choice of the appropriate penalty among a range of possible penalties should be deferred to the sentencing stage. The accused is not prejudiced by this policy. A contrary policy would prevent the later determination of an appropriate sentence and prejudice the People's case.

2.10.03 SUPPORTING DOCUMENTATION FOR CERTAIN SPECIAL ALLEGATIONS

If a prior conviction is necessary to establish the corpus delicti in a felony case (e.g., PC §§ 666, 25400(c)(1), 25850(c)(1), and 290), it is the investigating officer's responsibility to order and secure the necessary certified documentation before the preliminary hearing.

2.10.04 GREAT BODILY INJURY ALLEGATIONS

Great bodily injury allegations can greatly increase punishment for certain felonies. Accordingly, the use of such allegations should be limited to situations in which the accused:

- Has inflicted a permanent bodily injury (other than a minor scar); or
- Has inflicted serious bodily injury causing hospitalization or incapacitation for a significant period of time.

Commentary

The law defines "great bodily injury" as a significant or substantial physical injury, language that is somewhat vague. This policy is intended to avoid overcharging when the injuries are minor or temporary.

2.10.05 SERIOUS FELONY ALLEGATIONS

A filing deputy shall allege the five-year enhancement under Penal Code § 667(a)(1) when the accused has a prior serious felony conviction and the current charge is also a serious felony. This five-year enhancement must be served in addition to any term imposed under the Three Strikes law. A court cannot strike this allegation. (PC § 1385(b).) Penal Code § 1192.7(c) defines "serious felony."

2.11 JURISDICTION

2.11.01 CRIMES CHARGEABLE IN MORE THAN ONE COUNTY

Whenever the jurisdiction for a crime is proper in another county as well as Los Angeles County, the filing deputy shall notify his or her Bureau Director, through the chain of command, prior to filing. If, after a review of the facts and a consideration of the factors listed below, there remains some doubt whether charges should be filed in Los Angeles County, an explanatory memorandum with attached police reports should be prepared and submitted as rapidly as possible to the Bureau Director. Notification by e-mail or fax is acceptable. The Bureau Director will consult with the appropriate person(s) in the other county.

If the decision is made to file the case in Los Angeles County, the filing deputy shall send a letter to the appropriate prosecutorial office in the other county notifying them of the facts of the case and the decision to charge. The investigating officer shall be instructed to notify the other law enforcement agencies involved.

Inquiries received from other counties regarding jurisdiction in a particular case shall be referred to the Director of the bureau which would prosecute the case should it be filed in Los Angeles County. If more than one bureau might be affected, the inquiry shall be referred to the Chief Deputy.

2.11.02 FACTORS TO BE CONSIDERED

In selecting the appropriate county or counties in which to prosecute a particular case, the following factors should be considered:

- The relative ability to prove that the crime was committed in whole or in part in each of the counties;
- If multiple crimes are involved, the relative ability to prove that the crimes were committed within each of the counties should be weighed against the relative seriousness of the crimes;
- The convenience of prosecution witnesses;

- The ability to consolidate and successfully prosecute the greatest number of significant appropriate charges within each county;
- The ability to consolidate and prosecute cases against multiple suspects within each county; and
- The location of the place where the most serious crime was committed.
  - In cases involving thefts when stolen property is moved from one county to another, the county where the property is recovered is the appropriate county to file charges unless it can be proven that the accused committed the theft and can be successfully prosecuted in the county where the theft took place.
  - In cases involving escapes from penal institutions, the county where the escape actually occurred is generally the appropriate county to file charges, other factors being relatively equal.

Commentary

Because of the many variables involved in the prosecution of multi-jurisdictional cases, it is impossible to formulate exact rules. Certain preferences are set forth above.

Multi-jurisdiction cases can be complex. Each of the above-described factors should be carefully considered in such cases.

2.12 HARRIS REPORT - CRIME CHARGING POLICY AND PROCEDURE

Deputies shall follow a uniform approach to writing the Statement of Facts at the time of filing. The Statement of Facts shall include the defendant's complete criminal history, facts surrounding the offense(s), and any strengths, weaknesses and possible defenses. In the event a pre-filing interview was conducted, the Statement of Facts shall include the filing deputy's impressions of the victim and the level of danger, if any, posed to the victim.

The deputy filing the case shall complete a protective order form at the time of filing a VIP category case. Protected parties should include any appropriate victim or witness in any case falling within one of the VIP categories. The deputy assigned to appear at the arraignment is responsible for presenting the protective order application to the court and shall be prepared to argue good cause for issuance of the order.

Legal Policies Manual Chapter 11, Felony Case Management, and Chapter 12, Felony Case Settlement Policy, also incorporate changes in policy effected as a result of the Harris Report.

2.13 MARSY'S LAW RIGHTS

Proposition 9, The Victims' Bill of Rights Act of 2008, also known as "Marsy's Law," was added to the California Constitution by the voters on November 4, 2008. It amended Article I, § 28 enumerating crime victims' rights. Pursuant to Article I, § 28(b)(17), victims have a constitutional right to be informed of their "Marsy's Rights" as enumerated in Article I, § 28(b), of the California Constitution. To that end, Penal Code § 679.026(c)(1), requires:

> [e]very law enforcement agency investigating a criminal act and every agency prosecuting a criminal act shall, . . . at the time of initial contact with a crime victim, during follow-up

investigation, or as soon thereafter as deemed appropriate by investigating officers or prosecuting attorneys, provide or make available to each victim of the criminal act . . . a "Marsy's Rights" card.

The California Constitution defines "victim" as ". . .a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term 'victim' also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated." (Cal. Const. Art. I, § 28(e).)

It is the policy of this office that **all** victims who have suffered direct or threatened physical or financial harm shall be notified of their Marsy's Law rights in **all felony, misdemeanor and juvenile filings.** In most cases prosecuted by our office where there is a crime victim, PIMS requires that the victim be named in the Complaint, Indictment, Information or Petition. Some charges, however, such as evading (VC § 2800.2 and § 2800.3), hit and run (VC § 20002 and VC § 20003), arson (PC § 451 et seq.), child pornography (PC § 311 et seq.), pimping and pandering (PC § 266 et seq.), and solicitation for prostitution (PC § 653.22) do not prompt for a victim's name.

Special Procedures for Child Pornography/Exploitation cases

The Child Victim Identification Program (CVIP) of the National Center for Missing and Exploited Children (NCMEC) serves as the central repository in the U.S. for information relating to child victims depicted in sexually exploitive images and videos. http://www.missingkids.com/home Information regarding many child pornography victims are in the NCMEC database. Some child pornography victims and/or their attorneys have requested to be notified when their images are discovered. Some victims have indicated that they never want to be informed when their images are discovered. Some victims and/or their attorneys have filed a Victim Impact Statement and have requested that this Victim Impact Statement be submitted in all cases where their images are found. Victims and/or their attorneys have made these requests via NCMEC. Prosecutors in the Cyber Crimes Division can provide direction on how to read NCMEC reports for this purpose.

In all child exploitation cases, in which a victim or victim's attorney requests notification of any defendant who possessed a specific image of child pornography depicting their client, the victim or attorney shall be sent a Marsy's Law letter. The names of victims who have requested notification shall be entered into PIMS to receive notifications of future court hearings, etc. Notification will only be provided if:

(1) a formal written request on letterhead by a licensed attorney with a specific series and named victim seeks information from our office on a child pornography defendant possessing a named series of images of their client; and/or

(2) a NCMEC CVIP report states the attorney's name and contact information and a request for the name of a defendant who possessed the named series of images.

Victims of child pornography are rarely called to testify. When it is anticipated that a victim will not be required to come to court to testify, the filing prosecutor is reminded to mark this on the filing worksheet so that the victim does not receive a subpoena to appear for court hearings.

Warrant or Extradition Cases

Victims in cases filed for Warrant or Extradition shall be sent a notification packet by support staff, except in cases where it is determined by the filing deputy that sending notification may endanger a victim or witness or jeopardize the prosecution of a case. In those cases, the packet shall remain in the DA file until the first court appearance at which time the notification packet will be mailed.

Office Personnel Responsibilities

In homicide cases, all personnel shall ensure that the check box indicates "deceased" after the victim's name on the Victim/Witness screen in PIMS. Checking "deceased" ensures that letters are not addressed to and/or issued for a deceased victim. A contact name for next of kin should be entered, when known, so that the next of kin will receive notification. PIMS allows for more than one contact person to be entered.

Filing Prosecutor: It is the responsibility of the filing prosecutor to ensure that all victims are listed with the correct "witness type" code on the Felony, Misdemeanor and Juvenile Filing Worksheets regardless of whether PIMS prompts for a victim's name. When the victim is a minor or a dependent adult, filing prosecutors are reminded to also include the minor's parent or guardian and the dependent adult's caretaker or conservator as a witness. When it is anticipated that a victim will not be required to come to court to testify, the filing prosecutor is reminded to mark this on the filing worksheet so that the victim does not receive a subpoena to appear for court hearings.

Head Deputies and Deputies-in-Charge: Head Deputies and Deputies-in-Charge at each office shall designate clerical support staff to send Victim Notification packets via U.S. mail on the day the case is filed. In offices that do not have a full-time Victim Service Representative (VSR), the Head Deputy and Deputy-in-Charge shall designate a primary and back up clerical support who will be responsible for forwarding all Victim Request Response forms received via FAX and U.S. mail to the assigned deputy.

Support Staff: Support staff are responsible for sending initial victim notification packets to victims when a case is filed, checking PIMS daily and sending out Marsy's Law Notice letters when victims have requested notification.

All employees: If a notification packet is returned as "non-deliverable" the assigned deputy, Head Deputy or Deputy-in-Charge shall be notified so that they can take necessary steps to locate the victim.

2.13.01 VICTIMS' RIGHTS TO NOTIFICATION AND TO REASONABLY CONFER

Pursuant to California Constitution Article I, § 28(b)(17), victims have an automatic right to be informed of all of their Marsy's Law rights as defined in §§ 28(b)(1) – (16). For the purposes of Marsy's Law, a victim is defined in California Constitution article I, § 28(e). Upon the filing of criminal charges, the Office shall notify victims, and any identified next of kin or guardians, of these rights. Furthermore, upon request by the victim, or identified next of kin or guardian, the Office shall provide the requestor with reasonable notice of and the opportunity to reasonably confer with the prosecuting attorney regarding the arrest of the defendant, if known by the prosecutor, the charges filed, and the determination of whether to extradite the defendant. (Cal. Const. Art I., § 28(b)(6).)

2.13.02 VICTIMS' RIGHTS ASSISTANCE UNIT (VRA)

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

2.14 ALTERNATIVE MISDEMEANOR/INFRACTION CRIMES

Under the provisions of Penal Code §§ 19.8 and 17(d), specified misdemeanor offenses may be handled as infractions upon action by a prosecutor or by the court. These offenses are commonly referred to as "wobblettes." A misdemeanor offense enumerated in Penal Code § 19.8 may be prosecuted as an infraction when the prosecutor files the offense as an infraction (unless the defendant objects at the time of his or her arraignment), or when the court, with the consent of the defendant, reduces the offenses to an infraction.

2.14.01 PRESUMPTIVE MISDEMEANOR FILINGS

The following circumstances warrant a misdemeanor prosecution:

- Violations of Vehicle Code § 12500(a), where the defendant has been convicted of one or more prior violations of Vehicle Code § 12500(a) or Vehicle Code § 14601 et seq.;
- Violations of Vehicle Code § 12500(a) committed in conjunction with another misdemeanor or felony offense (See also LPM § 2.08.01, *ante*, on Joinder of Misdemeanors with Felonies).

Law enforcement requests for charge evaluation shall be accompanied by a standard filing packet that includes a written narrative establishing the facts of the offense and the probable cause for the arrest, as well as documents containing the defendant's CLETS, CCHRS and DMV criminal history.

2.14.02 PRESUMPTIVE REFERRALS FOR PROSECUTION AS INFRACTIONS

The following circumstances warrant a referral for handling as an infraction:

- Violations of Vehicle Code § 12500(a), where the defendant does not have any prior convictions for violations of Vehicle Code § 12500(a) or Vehicle Code § 14601 et seq.; and
- Violations of Vehicle Code § 12500(a), where the defendant is not concurrently charged with another misdemeanor or felony offense.

If both of the above circumstances exist, a law enforcement officer may issue the citation as an infraction and file the matter in traffic court for processing and adjudication.

The above policy regarding first-time Vehicle Code § 12500(a) offenses is presumptive. If circumstances exist that appear to justify a misdemeanor charge, a law enforcement officer may issue a citation as a misdemeanor and submit the offense to the Office for charge evaluation. Deputies reviewing requests for charge evaluation shall determine the appropriate charge, as well as whether an offense should be appropriately prosecuted as a misdemeanor or referred for handling as an infraction.

2.15 SUBMISSION OF LAW ENFORCEMENT REPORTS TO THE COURT

Penal Code § 964 requires that prosecutors and the courts ensure the protection of confidential personal information regarding any witness or victim contained in police, arrest or investigative reports if submitted by the prosecutor in support of a criminal complaint, indictment, or information.

For purposes of Penal Code § 964, "confidential personal information" is defined as including, but not limited to, an address, telephone number, driver's license number, California Identification Card number, Social Security number, date of birth, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number.

In order to meet the requirements of Penal Code § 964, the Office will not provide police reports to the courts upon the filing of a complaint, indictment or information unless the case is filed for warrant. Upon filing a case for felony or misdemeanor warrant, redacted copies of police reports shall be submitted to the court. It is the responsibility of the filing deputy to ensure that all "confidential personal information" is redacted from the reports before they are submitted to the court in the filing package.

In all cases other than those filed for felony or misdemeanor warrant, if a situation arises necessitating the submission of police reports to the court, the deputy submitting the reports shall ensure that all "confidential personal information" concerning witnesses and victims is redacted prior to submission of the reports. Should the court order the submission of unredacted reports, the deputy submitting the reports in compliance with this order should request on the record that

the court issue a protective order prohibiting the release of the reports to anyone not authorized by the court.

2.16 PROSECUTION OF LOCAL CITY ORDINANCES

There are 88 incorporated cities in the County of Los Angeles. Many of these cities have adopted local city ordinances creating offenses for conduct not otherwise prohibited by state law or county ordinance. These offenses can be punished as either misdemeanors or infractions. Some of the cities retain their own city attorney or city prosecutor to pursue violations of these ordinances. Others, however, rely on the Office to prosecute violations of these ordinances on behalf of the city. These cities have contracted with the County of Los Angeles for this service at standard contract rates and must reimburse the county for the cost incurred by Office staff in prosecuting these ordinances.

Whenever one of the cities with established contracts with the county asks the Office to file a criminal complaint for a violation of a city ordinance, the code for Contract Cities (CC) shall be entered in the box at the bottom of the Misdemeanor Filing Worksheet by the filing deputy. This information shall then be entered into PIMS by support staff assigned to complete the filing paperwork and prepare the case file.

In preparing the misdemeanor case file in a Contract Cities case, support staff shall attach the Contract Cities Billing Sheet to the file in lieu of the standard Misdemeanor Filing Worksheet Comments page. The Billing Sheet shall be placed in the file behind the Misdemeanor Filing Worksheet. Whenever any Office employee, including an attorney, investigator, support staff or hearing officer, handles one of these cases, the employee shall write the amount of time the employee spent handling the case, in 15 minute increments, on the Billing Sheet.

When the case is closed, a copy of the Billing Sheet shall be forwarded to Bureau of Administrative Services, Accounting Section. Accounting will calculate the charges and bill the city for Office services.

All filing documents referenced above can be located in the **DA Filing Forms** icon in Lotus Notes and in PIMS.

2.17 CASE PROCESSING IN PIMS

The utility of eFolder is enhanced when more deputies create documents electronically in PIMS. (See LPM § 26.17 eFolder.) In order to maximize eFolder and move toward an electronic filing system, it is necessary that all deputies who file cases learn how to electronically decline cases and create felony statements of facts in PIMS. All deputies transferred into a filing assignment shall be trained on how to electronically decline and create statements of facts within one month of the transfer. See Filing Resources on LADAnet for instructional manuals and guides to electronically file and decline cases. The Filing Deputy Training Team is able to assist with on-site training if requested.

In addition to the above training requirements, all deputies shall abide by the following filing protocols:

- All felony filings shall contain a basic statement of facts, either created using PIMS or uploaded into eFolder immediately after filing. All felony statements of facts shall contain a summary of the defendant's criminal history (including the defendant's status on probation, parole or Post Release Community Supervision), a brief summary of the facts, a list of key witnesses and the name of the Investigating Officer. Managers may require more detail in the statement of facts, depending on the needs of the office.
- Special units may choose to upload a more comprehensive opening memorandum, in addition to the statement of facts. If the memorandum contains sensitive or confidential information, it should be uploaded to the restricted Z Folder within eFolder.
- Deputies who have cases specially assigned to them, especially cases assigned for vertical prosecution, should ensure that PIMS is updated to reflect this assignment.

CHAPTER 3

CRIME CHARGING - SPECIAL POLICIES

3.01 MAJOR CRIMES AND SIGNIFICANT CASES

Major crimes and significant cases of public interest require special handling. This section defines these offenses and outlines the procedures to be followed in charging, declining to charge and prosecuting them. Cases meeting the criteria of a major crime/significant case may arise anywhere in the county. The procedures delineated in this section pertain to the handling of a major crime/significant case prosecuted anywhere within the office.

3.01.01 MAJOR CRIMES/SIGNIFICANT CASES DEFINED

A major crime is a particularly aggravated felony offense. A significant case is any crime, felony or misdemeanor, of significant public interest. In most cases, it will be clear at the time of charging whether a case falls into one of these two categories. However, if during the pendency of a case, circumstances arise or change such that the case meets the criteria of a major crime, or begins to generate significant public interest, the case shall be treated as a major crime/significant case and the procedures set forth herein shall be followed. Major crimes and significant cases include the following:

- Crimes that are particularly serious, brutal or heinous, such as multiple murders, serial killings, kidnappings, and violent or bizarre crimes against the person;
- Crimes capable of arousing widespread public interest or concern;
- Crimes offending public sensibilities;
- Extraordinary white collar crimes;
- Negligent deaths or serious bodily injuries to workers;
- Environmental crimes that may have serious consequences to the public;
- Crimes involving any prominent person, including public officials and law enforcement officers;
- The killing or serious injury of a law enforcement officer or firefighter while on duty; and
- The maiming or killing of any animal or serious animal attacks on humans.

3.01.02 PROCEDURES

Most major crimes/significant cases understandably arouse widespread public concern. These procedures are designed to enable the Office to respond appropriately to that concern.

3.01.03 PRIOR TO CHARGING OR DECLINING TO CHARGE

Before charging or declining to charge a major crime/significant case, it is mandatory that the Bureau Director be notified. The deputy handling the case shall apprise his or her Head Deputy or Deputy-in-Charge who shall then notify the Bureau Director.

The Head Deputy or Deputy-in-Charge shall be responsible for making a recommendation to the Bureau Director whether the case should be processed by the Grand Jury. The Chief Deputy shall make the final decision regarding which cases should be presented to the Grand Jury.

3.01.04 AFTER CHARGING OR DECLINING TO CHARGE

When a major crime/significant case is filed or an indictment returned, the filing deputy/assigned deputy shall prepare a confidential memorandum to be forwarded through the chain of command to the Bureau Director. The memorandum shall contain:

- The names of all accused;
- The number of the case and the name of the filing office and prosecutor;
- The counts filed;
- A concise factual summary of the case including the reason why it is a major crime/significant case; and
- A description of any notable or unusual legal problems which might arise in the case.

A copy of the memo shall also be forwarded to the Media Relations Division.

In the event of a declination, a copy of the written declination shall be transmitted through the chain of command to the Bureau Director.

3.01.05 NOTIFICATION TO THE CHIEF DEPUTY AND DISTRICT ATTORNEY

It shall be the responsibility of the Bureau Director to bring major crimes/significant cases submitted for charging or declination to the immediate attention of the Chief Deputy and to forward, as soon as it is available, a copy of the confidential memorandum or declination to the Chief Deputy and Assistant District Attorney.

The District Attorney shall be kept informed by the Chief Deputy. The Chief Deputy shall assign such personnel as are deemed necessary to the processing of such cases. In appropriate cases, the Chief Deputy will assign these cases to the Major Crimes Division for prosecution.

If a special circumstances case meets the definition of a major crime/significant case, the procedures in this section are applicable as well as the specific procedures for handling cases involving special circumstances covered in the *Special Circumstances Cases* chapter.

Any proposed disposition of a major crime/significant case shall conform to the provisions of the felony and misdemeanor case settlement policies set forth elsewhere in this manual. The proposed disposition shall be brought promptly to the attention of the Bureau Director. At the conclusion of a trial in a major crime/significant case, the result of the trial shall be brought promptly to the attention of the Bureau Director.

3.02 THREE STRIKES

The Three Strikes law, Penal Code §§ 1170.12(a)-(d), provides a powerful tool for obtaining life sentences in cases involving habitual criminal offenders. However, unless used judiciously, it also has the potential for injustice and abuse in the form of disproportionately harsh sentences for relatively minor crimes. The Three Strikes statutory scheme appropriately authorizes the use of prosecutorial discretion in its implementation. Deputies have a legal and ethical obligation to exercise this discretion in a manat assures proportionality, evenhanded application, predictability and consistency. Moreover, the potential for coercive plea bargaining must be avoided.

3.02.01 CHARGING POLICY

All qualifying prior felony convictions shall be alleged pursuant to Penal Code § 1170.12(d)(1). In all instances in which a case is pursued as a second strike case, all Penal Code § 667.5(b) priors shall be pled and proved or admitted.

For Three Strikes case settlement rules, see the Three Strikes section of Chapter 12, Felony Case Settlement Policy.

3.03 JUVENILE CRIME CHARGING

The Juvenile Division prosecutes all crimes committed by minors countywide. The charging standards and guidelines used in juvenile cases are the same as for adult prosecutions. Deputies should refer to the most recent edition of the *Juvenile Delinquency Practice Manual* published by the Office for detailed descriptions of juvenile law and procedures. In any case where a person under the age of 18 is accused of a crime, and law enforcement is seeking charges, the case shall be presented to the appropriate Juvenile Division Office for filing consideration.

The provisions of Proposition 21 involving the discretionary direct filing of juveniles in adult court under certain circumstances were abrogated by Proposition 57. Pursuant to Proposition 57 (Prop 57), only juvenile offices may consider filing charges in cases in which a minor is accused of a crime.

In order to charge a minor in adult court, the prosecution shall make a "Motion to Transfer Minor from Juvenile Court to a Court of Criminal Jurisdiction" in the appropriate juvenile court. (WIC § 707(a).) The approval of the Head Deputy of the Juvenile Division is required to authorize a Motion to Transfer.

The Juvenile Division Head Deputy shall consider the following factors:

- Degree of criminal sophistication exhibited by the minor;
- Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction;
- The minor's previous delinquent history;
- Success of previous attempts by the juvenile court to rehabilitate the minor;

- The circumstances and gravity of the offense alleged in the petition to have been committed by the minor;
- Existence of a companion adult defendant; and,
- Any special consideration for victims and witnesses.

The first five factors listed above are based on the statutory criteria set forth in Welfare and Institutions Code § 707, subdivision (a)(2). The last two factors represent additional significant considerations that might warrant transfer of the minor from juvenile court to a court of criminal jurisdiction. If the Juvenile Division Head Deputy determines that a Motion to Transfer is appropriate, the Juvenile Division Head Deputy shall consult with the Head Deputy of the office responsible for prosecution in adult court.

3.03.01 CASES CERTIFIED TO ADULT COURT

If, after a transfer hearing, the juvenile court certifies the minor to adult court, the adult court filing deputy shall file the case. The adult court filing deputy may not reject the case or deviate from the juvenile court charges without prior approval of the Head Deputy. Juvenile court filing deputies use the same charging standards as those used in adult cases. Therefore, unless the facts or the law have changed, the same charges should be filed in adult court. Prior filing errors or omissions may justify deviating from the original juvenile charges.

3.03.02 CASES CERTIFIED TO JUVENILE COURT

Whenever a case is pending in adult court and it is suggested or appears to the judge that the defendant was under 18 years of age at the time of the offense, the adult court must immediately suspend proceedings and "examine into the age of the person." (WIC § 604.)

A deputy confronted with a defendant who challenges the adult court's jurisdiction should not necessarily concede the issue. Adult defendants sometimes lie about their age to get their cases transferred to the juvenile court in order to avoid what they perceive to be the harsher penalties of adult prosecution. If a claim of minority appears untruthful, the adult court deputy shall present any available evidence to counter the claim (such as the date of birth given by the defendant to police in this or other cases) and make appropriate arguments on the issue. The accused has the burden of proof to establish minority by a preponderance of evidence. (*People v. Nguyen* (1990) 222 Cal.App.3d 1612.)

If after hearing the evidence, the adult court finds the defendant was a minor at the time of commission of the offense, the adult court shall immediately certify the matter to the juvenile court. The adult prosecution should be suspended, but not dismissed. The juvenile court is the final arbiter regarding the accused's age. If the juvenile court, after a hearing, finds that the accused has not proven minority by a preponderance of the evidence, it can certify the case back to the adult court. In addition, the juvenile court has the option, under appropriate circumstances, to hear a motion to transfer jurisdiction from the juvenile court and certify the case back to the adult court. In either event, the case would then resume at whatever stage was reached before the defendant's certification to juvenile court.

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. *Sirmons* (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.