



“to promote justice by enhancing prosecutorial excellence”

Position Statement of the California District Attorneys Association Regarding “Focus Questions for Hearing on Professional Responsibility Issues” of the California Commission on Fair Administration of Justice, July 11, 2007

Executive Summary

This document sets forth the California District Attorneys Association’s (CDAА) response to the “Focus Questions for Hearing on Professional Responsibility Issues” of the California Commission on Fair Administration of Justice. CDAА’s response is limited to those questions that relate to prosecutors and prosecutorial offices. In responding to the Commission’s questions, CDAА continues to focus on issues it perceives to be important for the protection our citizens and the fair administration of justice for all people.

In summary, CDAА’s position includes the following -

1. Levels of training and continuing education for prosecutors are adequate to support the fair administration of justice.
2. Prosecutors, through a variety of training and educational programs, are competent in meeting their ethical responsibilities.
3. Amendments to the California Rules of Professional Conduct “to provide greater specificity in defining the ethical standards to guide prosecutors” are neither needed nor well-advised.
4. The requirements of Business and Professions Code section 6086.7, requiring that the State Bar be notified when a modification or reversal of a judgment is based on misconduct, incompetent representation, or a willful misrepresentation of an attorney, is an adequate and proven safeguard in assuring fairness.
5. “Independent special masters,” acquainted with professional standards for prosecutors and defense lawyers, should not be utilized by regulating bodies tasked with recommending or upholding action in cases involving prosecutors.
6. Neither legislative nor administrative changes are needed to assure full compliance with the requirements for the disclosure of evidence.

CDAА supports ongoing inquiry and discussion with all interested parties concerning issues of professional responsibility. In terms of a prosecutor’s ethical responsibilities and discovery (*Brady*) obligations, California’s prosecutors have been in the forefront in meeting their obligations to provide fair and balanced justice for all of our citizens.

**Position Statement of the
CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION**

Regarding

“Focus Questions for Hearing on Professional Responsibility Issues”
of the California Commission on Fair Administration of Justice

July 11, 2007

Introduction

The California District Attorneys Association (CDAA) received notice that at a public hearing on July 11, 2007, the Commission will focus a discussion on various professional responsibility issues relevant to California prosecutors and criminal justice.

In its notice, the Commission identified various areas of concern including an attorney’s ethical as well as discovery obligations under *Brady v. Maryland*,¹ prosecutorial duties in the investigation of post-conviction claims of innocence, attorney competence in addressing forensic evidence, and the reporting of violations of the Rules of Professional Conduct by other lawyers. We wish to offer our input in advance of the scheduled hearing with respect to the discussion dealing with prosecutorial standards or obligations. In doing so, the Association will provide the perspective of California’s prosecutors.

It is the opinion of the Association, as borne out by a careful examination of the facts, that California has in place sufficient mechanisms, regulations, and laws to ensure the highest quality administration of justice. Mistakes will occur, but intentional misconduct is already prohibited by a multitude of laws and regulations, and addressed by numerous agencies within local, state, and federal governments. Aggressive and thorough enforcement of existing standards and expectations will assure the minimization of inappropriate prosecutions or convictions.

The Association believes that before the Commission can accurately and credibly address the issues identified, actual problems within the criminal justice system must be accurately represented and evaluated.

California prosecutorial offices and agencies receive resources adequate to support and assure the fair administration of justice with levels of training and continuing education for prosecutors sufficient to assure their competency and ethical responsibility

California’s prosecutorial offices and its over 3,000 prosecutors, represented by the California District Attorneys Association, receive adequate support to assure the fair

¹ *Brady v. Maryland* (1963) 373 U.S. 83, hereinafter “*Brady*.”

administration of justice. For example, in terms of *Brady* evidence, California's prosecutors support legitimate truth searching efforts by every litigant as well as supporting California's liberal discovery policy as approved by the voters by Initiative Measure Proposition 115 on June 5, 1990, and as provided for by statute in Penal Code sections 1054 et seq.

Specifically, support for prosecutors concerning the apparent focus of the Commission's questions concerning ethical standards and *Brady* obligations, is maintained through a multi-tiered level of education, training and supervision by the California State Bar, individual prosecutorial offices, CDAA, nationally-based organizations and educational institutions.

With respect to prosecutorial training, there is an abundance of such training in California, it is of extreme high quality, and it is available to prosecutors throughout the state as part of their official duties or for little or no cost.

California State Bar

California prosecutors receive ample, clear guidance on the standards of ethics and professionalism required by the existing California Rules of Professional Conduct, the California Business and Professions Code, and voluminous case law that describes what prosecutor conduct constitutes misconduct.

Prosecutors, as with all attorneys admitted to practice in California, begin their professional career only after successfully passing the Multistate Professional Responsibility Examination (MPRE) in accordance with Rule VIII of the *Rules Regulating Admission to Practice Law in California*. And, as with all California lawyers, whether practicing criminal or civil law, prosecutors meet all of the educational requirements imposed upon members of the bar, are subject to the same stringent background check and pass the same Bar Examination.

Like most other attorneys in California, prosecutors are required to comply with the state bar minimum requirement of 25 hours of continuing education every three years.² At least half of the requirement must be fulfilled with activities approved for "participatory credit," four of the hours must involve legal ethics, and one hour each must relate to substance abuse and elimination of bias training. In compliance with the Minimum Continuing Education of the Bar (MCLE), prosecutors, not exempt from compliance requirements as are some Members of the Bar, complete a mandated ethics requirement every three years.

² Some groups of attorneys in California are exempt from continuing education requirements. These groups include officers and elected officials of the State of California, full-time professors at law schools accredited by the State Bar or American Bar Association, and attorneys and administrative law judges working for the State of California. (Business and Professions Code section 6070, subd. (c).)

The State Bar also provides a toll-free Ethics Hotline that assists attorneys in identifying and analyzing their professional responsibilities.³ Also available to all California attorneys on the State Bar website are the California Rules of Professional Conduct, the California Compendium on Professional Responsibility Index, and numerous other legal references relevant to ethics, training, and continued education.

Prosecutorial Offices

In addition to the training requirements and opportunities available to prosecutors throughout the state, many district attorney offices have their own internal training programs. Upon assuming their responsibilities as a prosecutor, prosecutorial offices provide their new employees with an initial period of in-house training usually ranging from several days to several weeks.

In a partial survey of district attorneys' offices, initial in-house training invariably includes modules on prosecutorial ethics and discovery. For instance, the Riverside County District Attorney's Office mandates a six-week training academy for new and lateral prosecutors hired into the office. Topics during this training academy include Professionalism and Ethics, and Discovery and *Brady* obligations, and the academy has historically concluded with an Ethics Lecture by former Riverside County District Attorney Grover Trask. Riverside County has openly invited prosecutors from other agencies to participate in the academy training, and materials used in the academy are freely shared with prosecuting agencies throughout California. Riverside County also holds mandatory updated ethics training.

Almost every district attorney's office has a policy & procedures handbook. These handbooks, policy guides for prosecutors and their staffs, provide a clear basis for both ethical behavior and *Brady* material policy compliance.

Continuing in-service training remains an important component of city and district attorney offices. For example, the Alameda County District Attorney's Office provides a "Weekly Video Surveillance of Criminal Law Approved for Credit Toward California Criminal Law Specialization," entitled *Points and Authorities*, used internally and distributed to many other district attorney offices. Topics frequently focus on a prosecutor's ethical and *Brady* obligations.⁴

³ 1-800-238-4427 (1-800-2-ETHICS).

⁴ Examples of ethics and discovery training include *Prosecutor Commits Misconduct By Arguing That a Police Witness Would Risk Job Loss By Testifying Falsely and By Arguing The "Social Ramifications" of Reaching a Guilty Verdict* *United States v. Witherspoon* (9th Cir. 2005) 410 F.3d 1142 (Oct. 17, 2005); *Defense is Required by Discovery Statute to Disclose Notes and Oral Reports of Defense Expert Witness Even Though Defense Witness Did Not Write Any Report* *People v. Lamb* (2006) 136 Cal.App.4th 205 (Mar. 27, 2006); *A Prosecutor Must Reveal Any Agreement Reached Between Witness' Attorney and Prosecutor Regarding Benefits to be Provided to Witness, Regardless of Whether Witness is Made Aware of Agreement* *Hayes v. Brown* (9th Cir. 2005) (April 3, 2006); *Asking One Witness if Another Witness is Lying is Improper When Argumentative or Designed to Elicit Irrelevant or Speculative Testimony But Not If the Witness Being Asked Has Personal Knowledge About Other Witness that Could Potentially Resolve a Credibility Issue* *People v. Chatman* (2006) 38 Cl.4th 344 (May 28, 2007); *A Prosecutor Who Implies the Existence of*

California District Attorneys Association

CDAA, an approved legal education provider in California pursuant to Legislative mandate and State Bar certification,⁵ with a professional training staff of eight, conducts about 60 formal trainings every year. There are approximately 2,000 yearly attendees for these trainings. In 2005, CDAA presented 58 training seminars for 678 hours of instruction to 3,654 prosecutors, investigators and allied professionals. In 2006, CDAA presented 60 seminars for 700 hours of instruction to 3,600 prosecutors, investigators and allied professionals.

The Association also provides on-line training, and makes many of its training seminars available for little or no cost on CD and DVD. It releases more than 90 prosecutorial publications each year, and operates its own anonymous ethics hotline. One of the most popular and highly distributed publications is *Professionalism, A Sourcebook of Ethics and Civil Liability Principles for Prosecutors*, by the Ethics Committee of CDAA, which addresses a full-range of professional issues for prosecutors.

CDAA's cycle of annual training includes a full-day *Ethics Seminar* which is certified for 4 MCLE hours of ethics credit. This year the seminar was held on January 19 in Riverside. CDAA also conducts an annual *Discovery & General Ethics Seminar* which is certified for 15 MCLE hours, including 7 hours of ethics credit. The most recent *Discovery & General Ethics Seminar* was held on October 4 – 6, 2006, in San Luis Obispo. Furthermore, CDAA conducts an annual *Discovery Seminar* which is also certified for MCLE credit. The most recent *Discovery Seminar* was held on January 23 - 24, 2006, in Riverside, and the next one is scheduled for March, 2008.

Other trainings provided by CDAA have an ethics and discovery component. CDAA's annual *New Prosecutors Seminar*, attended by most new prosecutors, has a substantial emphasis on ethics and "Discovery and the Requirements Delineated by the Brady Rule." The most recent *New Prosecutors Seminar* was held this year in Anaheim on February 26 – March 1. Thus, almost every individual, before completing their initial training as a prosecutor, is well-grounded in understanding his or her ethical and discovery obligations.

Other examples of CDAA seminars with ethics and discovery as a part of the curriculum are the recent CDAA *Advanced Topics in Environmental Enforcement Seminar*, held June 4 – 6, 2007, which, among other things, covered both ethical and *Brady* issues; and this year's CDAA Basic Asset Forfeiture Course – South, held May 14 – 17, featured a presentation of "Professional Ethics in Asset Forfeiture Cases."

The Association also co-sponsors training programs with other entities such as District Attorney's offices, the Highway Patrol, the California Narcotic Officers' Association, the

Facts and Suggests the Defense Has an Obligation to Present Evidence May be Found to Have Engaged in Prosecutorial Misconduct *People v. Woods* (2006) 146 Cal.App.4th 106 (June 4, 2007).

⁵ See Business and Professions Code section 6070, subdivision (b); MCLE Provider no. 1123.

California Coalition for Children’s Internet Safety, and the National Adult Protective Services Association.⁶

National

Chapman University School of Law is inaugurating a Master of Laws degree program, co-sponsored by CDAA, on its City of Orange campus. This LL.M. in Prosecutorial Science, is the first of its kind in the nation, has as its mission “a high-caliber educational opportunity for prosecutorial leaders throughout the state of California, and the nation.”⁷ To make this program accessible to trial-level prosecutors, up to 20 scholarships are being provided to members of the California District Attorneys Association by the Institute for the Advancement of Criminal Justice.⁸ This post-JD degree program begins with a required 3-unit course on Prosecutorial Ethics. The casebook for this class is R. Michael Cassidy’s *Prosecutorial Ethics*.⁹

The National District Attorneys Association (NDAA), through its Education Division, the National College of District Attorneys at the Ernest F. Hollings National Advocacy Center in Columbia, South Carolina, offers a full curriculum in trial advocacy which includes a strong emphasis on prosecutorial professionalism. Many of California’s prosecutors have participated in this program.

The Commission queries whether “joint or combined training of prosecutors and defense lawyers regarding their ethical obligations” should be encouraged. Such training can be valuable, and there are a significant number of law schools, alumni associations, and private legal education providers who welcome criminal attorneys from both sides of the table to attend. It is the opinion of the Association, however, that there would be little benefit to requiring such training opportunities, as it may simply be a more efficient use of training resources to have classes filled with attorneys with similar backgrounds and interests.

In sum, California has some of the highest standards for criminal prosecutors and the highest quality training available for those practitioners. Prosecutors and the agencies that employ them are collegial in nature and readily share their experiences, knowledge, and prosecutorial tactics. Without being aware of a significant number of problems in California criminal trials that are caused by insufficient or poor quality training, the Association believes there would be little practical benefit in increasing the mandated levels of training and continuing education of California prosecutors. Enforcement of

⁶ In addition, the National District Attorney’s Association provides training available to California prosecutors. (See <http://www.ndaa.org/education/index.html>.)

⁷ See http://www.chapman.edu/law/programs/LLM_Prof_Sci/default.asp.

⁸ The Institute for Advancement of Criminal Justice is located in Sacramento, and one of its stated purposes is “To advance the science of criminal jurisprudence and to encourage the highest educational and ethical standards of all persons engaged in the administration of justice under the state and federal laws within California.” (<http://www.iaj.org/>.)

⁹ Cassidy, R. Michael, *Prosecutorial Ethics*, Thompson-West, 2005. Professor Cassidy, an Associate Professor at Boston College, is an expert on the subject of prosecutorial ethics.

existing standards of training expectations will assure the professionalism of prosecutors and the minimization of inappropriate prosecutions or convictions

Amendments to the California Rules of Professional Conduct should not and need not be recommended to provide greater specificity in defining the ethical standards to guide prosecutors and defense lawyers engaged in handling criminal cases.

Prosecutors quickly learn they can run afoul of these rules in ways too numerous to count. Consequences range from the publically devastating (suppression of evidence, sanctions, case dismissal) to the professionally devastating and personally catastrophic (loss of reputation, license, and livelihood). There is nothing to be gained from an attempt to tailor these broad rules to specific situations; indeed the “cure” may well be O worse than any currently perceived harm.

The Commission solicits feedback on numerous issues, but its primary interest is clearly the prosecutorial discovery obligation pursuant to *Brady*. We know from California Rule of Professional Conduct 5-220 that prosecutors shall not suppress any evidence that we have a legal obligation to reveal or produce. We know what evidence falls into that category from reciprocal discovery statutes, from established case precedent, and from ongoing ethics training required for every working prosecutor in the state. We learn through experience when evidence is material, exculpatory and in our possession. We also learn the hard lesson of what evidence is in our constructive possession; i.e., that we can lose our case or our license for not providing evidence we never personally possessed or even knew existed. Unlike judges, prosecutors do not have the luxury of committing “error.” Unlike defense attorneys, prosecutors do not have the privilege of being considered merely “ineffective.” If a prosecutor makes a mistake, in fact or in judgment, he or she has committed misconduct, and has the laboring oar to prove the conduct was not intentional or malicious. Human errors of this sort are almost never without consequence in the courtroom, and on occasion the result is that instead of achieving justice for a victim, “the criminal is to go free because the constable has blundered.”¹⁰ Of course, in addition to the court’s punitive sanction, the State Bar discipline ranges from public reproof to disbarment.

The Commission is apparently considering whether to recommend amending the Rules to provide a requirement that prosecutors investigate post-conviction claims of innocence. A major problem of definition comes with this territory – what type of claim of innocence would trigger that duty? Many defendants claim innocence both pre- and post-conviction. Prosecutors are obligated pursuant to Rule of Professional Conduct 5-110 to fully investigate before trial; indeed we “shall not institute criminal charges” when we know or should know the charges are unsupported by probable cause. If we find out after bringing charges that the charges are not supported by probable cause, we have a duty to inform the court promptly. Also, it is standard discovery training that the *Brady* duty is ongoing and prosecutors are required to turn over any *Brady* material they receive long after any conviction has occurred.

¹⁰ *People v. Defore* (1926) 242 N.Y. 13, 21 [opinion by Justice Benjamin Cardozo].

Post conviction, any prosecutor would take a hard look at a case if it appeared based on credible evidence that a mistake had been made. Examples? Deputy District Attorney Mark Curry in Sacramento convicted a man of murder, then learned he had the wrong guy. Even when law enforcement would not re-open the case, Curry worked within the District Attorney's Office and brought the true killer to justice. Years ago in San Diego, with the progress in DNA technology, prosecutors started re-visiting every case where there was a consistent claim of innocence and the potential existed for additional information from improved DNA testing. The District Attorney's Office did that on its own without any pressure from the defense bar. In addition, federal habeas corpus review has become routine in most felony cases involving lengthy sentences, rather than merely review for egregious constitutional error in limited cases.

Indeed, claims of prosecutorial misconduct, and especially claims of ineffective assistance of trial counsel have become standard appellate and habeas corpus claims in every death penalty appeal and a large percentage of non-capital appeals. Such claims are often made without respect to the actual facts and evidence in a given case, and there is absolutely no consequence to making false allegations of misconduct or ineffectiveness.¹¹ Unfortunately, an obvious side-effect to such specious claims is a lack of desire by the most-qualified defense attorneys to handle the most serious trials with the highest stakes. Without consequences for making false claims of ineffective assistance, the criminal justice system could lose its best attorneys out of their unwillingness to suffer the libel and slander.

The issue of professional competence has always existed, particularly in the private defense bar. Rule of Professional Conduct 3-110 already requires prosecutors and defense attorneys to act in a competent manner. The Rule already requires lawyers to be diligent, and if they do not know how to do something, to either figure it out or work with somebody who is competent. Any revision to the Rules that would require criminal lawyers to thoroughly understand forensic science is doomed to fail; lawyers either can and will be good at their jobs or they cannot and will not. The rules on ineffective assistance of counsel exist to protect defendants against such lawyers. The protection of society against prosecutors who lack skill lies with supervisors, and most offices are set up to channel serious cases to the prosecutors best able to do the job.

Business and Professions Code section 6086.7 currently requires that the State Bar to be notified when a modification or reversal of judgment is based on misconduct, incompetent representation, or a

¹¹ "An unfortunate offshoot of death penalty litigation has been the recurrent demonization of prior counsel -- no doubt sometimes justly, but sometimes not -- through the inevitable filing of *Strickland* claims. Death penalty counsel, whether trial or appellate, face the most demanding challenges the profession has to offer. . . . Reviewing their performance years later is never easy." (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1470, fn. 3, citing *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1333 (Reinhardt, J., concurring).) It must be remembered that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. (*Strickland v. Washington* (1984) 466 U.S. 668, 691.)

willful misrepresentation of an attorney. There is no need that section 6086.7 be modified to require notification under circumstances of misconduct, incompetent representation or willful misrepresentation whether or not it affected the judgment.

As is stands currently, anyone, whether private citizen or lawyer, can file a complaint against a lawyer with the State Bar. The complaint can allege a violation of a Rule of Professional Conduct, or a violation of any other conduct described in the Business and Professions Code sections 6000 et seq.; specifically Business and Professions Code sections 6068, 6106, and 6086.7. Under section 6068, attorneys are legally obligated to uphold all laws – failure to do so can lead to misdemeanor punishment in terms of jail and fines. Under section 6106 any act of dishonesty, whether committed on or off the job, is grounds for misdemeanor conviction and professional discipline. The ethical standards required of lawyers are already very high, and any effort to further legislate a higher standard is meaningless.

In court, judges already have the authority to take almost any action they see fit against a lawyer who has committed misconduct. A judge can already suppress evidence, exclude witnesses, reduce felony charges to misdemeanors, dismiss counts, sanction lawyers monetarily, hold lawyers in contempt, and refer lawyers to the State Bar for prosecution, if warranted. The reality is that the proposed change to add a reporting requirement for judges whenever a finding is made, short of a judgment modification or reversal, is to place an unreasonably onerous burden on the judiciary. Judges need to have the power to control cases before them as they see fit, taking in the totality of the circumstances. They clearly have this authority under the current law. Moving the State Bar into the courtroom and removing judicial discretion is wildly inappropriate.

Indeed, in many instances of claims of misconduct or ineffective representation, the reviewing courts will not directly address whether the attorney did anything improper if the court can clearly determine that no prejudice resulted. In such cases, the reviewing court may “assume” for purposes of reaching the prejudice prong that a prosecutor or defense attorney did something improper, but that it did not result in prejudice to the defendant. The United States Supreme Court has repeatedly encouraged this manner of addressing claims of ineffective assistance of counsel.¹² Given the sheer numbers of meritless claims of ineffective assistance and prosecutorial misconduct, and the reviewing courts' reasonable tendency to decide many of the claims on the basis of no prejudice, it would be difficult - or in many cases extremely unfair - to require reporting of misconduct or ineffectiveness that had no effect on the verdict or judgment.

Existing procedures for discipline of employees of District Attorney offices do not unreasonably limit or compromise the ability to insure adherence to the professional standards that apply to prosecutors and defense lawyers. “Independent special masters,” acquainted with

¹² In clear cases, a reviewing court may consider only the prejudice prong without considering whether counsel's conduct was deficient. (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

professional standards for prosecutors and defense lawyers, should not be utilized by regulating bodies tasked with recommending or upholding action in cases involving prosecutors.

For over a hundred years, the California Supreme Court has set a high standard for California prosecutors in the discharge of their duties. In the decision of *People v. Lee Chuck* (1889) 78 Cal. 317, our high court rebuked an overzealous prosecutor and stated that “Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial”. Years later, the United States Supreme Court in the decision of *Berger v. United States* (1935) 295 U.S. 78 made it very clear that the primary ethical duty of prosecutors is to seek justice. As such, prosecutors have the highest ethical responsibility of any practicing lawyers and are responsible along with the courts to insure that defendants receive due process when they become involved with the criminal justice system.

In California, each district attorney’s office is independent. Some function with at-will employment arrangements and others have civil service systems for their attorneys. Regardless of the employment arrangement, the same ethical standards apply to all offices. The elected head of each office is ultimately responsible to build appropriate management systems to insure compliance with the California Rules of Professional Conduct. Although employees under either system have important rights, they do not trump the right of the defendant to receive due process within the criminal justice system.

Furthermore, public employers are already covered by a variety of statutes and regulations that control matters of employment relations. The Meyers-Milias-Brown Act (Government Code sections 3500 et seq.) contains provisions governing wages, hours, terms or conditions of work which include employee discipline; and many other local employees are covered by local charters, ordinances, regulations and civil service systems which provide for employee discipline.

If a lawyer were to become involved in a disciplinary proceeding, presumably the manager of that employee and the elected head of that office would be aware of the issues involving that attorney. As managers, they would remain responsible for insuring compliance with the Rules of Professional Conduct and taking appropriate action to protect the public if necessary until the proceedings for that attorney were completed. In addition, the State Bar could take appropriate action independently if the situation warranted it. At present, elected district attorneys have sufficient flexibility to protect the rights of those accused of crimes as well as the rights of their employees.

Hundreds of thousands of criminal cases are processed in California’s criminal courts each year. Reports of prosecutorial misconduct are relatively rare. Evidence that employee discipline systems deter ethical conduct is even rarer. As such, the question as to whether or not special masters are needed provides a possible answer to a problem that probably doesn’t exist.

Prosecutorial ethics change to reflect the concerns of society as the definition of due process evolves with changes in statutes and caselaw. While not perfect, the existing system works well to protect both society and those accused of violating the law. Changing employee discipline systems at this time is not needed to insure proper adherence to professional standards of conduct.

Existing office policies and procedures implemented by District Attorneys are adequate to ensure full compliance by all deputies with discovery obligations, and neither legislative nor administrative changes are needed to assure full compliance with the requirements of disclosure of evidence.

It is not office policies and procedures that mandate compliance with discovery obligations, but statutes and decisions at every level of the appellate courts have mandated such compliance at the pain of reversal, dismissal, or state bar punishment.¹³ Additionally, Penal Code section 1054 sets forth clearly that the intent underlying the criminal discovery laws is to “promote the ascertainment of truth in trials by requiring timely pretrial discovery.” Section 1054.1 sets forth the types of evidence to be disclosed by a prosecutor, and expressly includes “[a]ny exculpatory evidence.” Violations of discovery rules are never just ignored; in California, any defendant convicted of a felony and sentenced to prison may, as a matter of right, obtain DNA testing of evidence.¹⁴ Furthermore, defendants sentenced to death or life without the possibility of parole have available broad post-conviction discovery rights to assist in the preparation and filing of habeas corpus petitions.¹⁵ Ultimately, a finding by any court that prosecutorial misconduct or ineffective assistance of defense counsel resulted in prejudice to a defendant’s case, must be reported to the State Bar.¹⁶

Consistent with existing statutes and requirements, many district attorneys’ offices have their own policies and procedures to implement the constitutional and statutory mandates. For instance, the Riverside County District Attorney’s Office has a “*Brady*-Compliance Officer” to provide assistance to trial prosecutors, and trial deputies have access to a database of information that may need to be provided in discovery in a given case. Riverside County, rather than having a specific policy regarding discovery compliance, has adopted the CDAA’s comprehensive book, *Professionalism*, “A Sourcebook of Ethics and Civil Liability Principles for Prosecutors” as the guide for its prosecutors to follow on ethical issues. Each prosecutor within that office is a member of the

¹³ See *Brady v. Maryland* (1963) 373 U.S. 83, 87 [the suppression by the prosecution of evidence favorable to an accused (exculpatory information) violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith of the prosecutor]; *People v. Ruthford* (1975) 14 Cal.3d 399, 406 [there is a duty on the part of the prosecution, even absent a request, to disclose all substantial material evidence favorable to an accused, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness]; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1314-1315 [prosecution’s duty extends to evidence in possession of the “prosecution team,” which includes the investigating law enforcement agency].

¹⁴ See Penal Code, § 1405.

¹⁵ See Penal Code, § 1054.9.

¹⁶ See Bus. & Prof. Code, § 6086.7, subd. (a)(2).

Association and receives that publication, as well as numerous other legal publications, on a regular basis.

Other offices, such as the Sacramento County and Alameda County District Attorney's Offices have opted not to have a specific policy, but to require their deputies to follow the statutory and case law on these subjects. The San Diego County District Attorney's Office expressly requires within its policy that every deputy district attorney be aware of and comply with *Brady v. Maryland* and its progeny, as well as comply with Penal Code section 1054, et seq. San Diego County also refers its deputies to a well-known resource on criminal discovery written by L. Douglas Pipes which is available throughout their offices.¹⁷ Significantly, the San Diego County policy notes that discovery law is dynamic, and when dealing with discovery issues, deputies must be confident they are reviewing the most current discovery law.

The Ventura County District Attorney's Office has a "discovery desk" to assist in evaluating discovery obligations, and declares in its Legal Policies Manual that "[a]ll information favorable to the defense shall be disclosed to the defense or shall be submitted by the prosecution to a court for an in camera review, unless clear authority permits nondisclosure." The Los Angeles County District Attorney's Office has chosen to draft a comprehensive policy on *Brady* disclosure, and has made it available online. The focus of that policy, like every other similar policy within a District Attorney's office, is to comply with *Brady v. Maryland* and its progeny. In addition to the written policy, the Los Angeles County District Attorney's Office has a "*Brady* Compliance Division" that is "the central repository of . . . known *Brady* information and is charged with answering any *Brady* questions that might arise."¹⁸

A growing number of district attorney offices are using proprietary software systems for handling documents and their discovery. For example, Santa Barbara County uses Damian®, a proprietary automated pagination system for assuring that discovery is handled in a competent, no-fail manner.

As observed by San Diego County, discovery law can be dynamic. For instance, Penal Code section 1054.9 regarding post-conviction discovery was enacted in 2003 and has been the subject of numerous appellate court decisions since that time. Internal office policies and procedures can never fully apprise prosecutors on their ethical and discovery obligations without reference to case authority. Similarly, legislative and administrative requirements can never be kept up-to-date sufficiently to address possible problems with attorney inadvertence or error. As it stands, associations such as CDAA, as well as the collegiality of prosecutor's offices throughout California, are effectively addressing the needs of the People of the State of California in assuring that prosecutors are fully and openly complying with criminal discovery obligations. The Association believes, that existing policies and procedures are adequate to ensure full compliance, and no legislative or administrative changes are needed to assure continued full compliance with evidence-disclosure requirements.

¹⁷ California Criminal Discovery, 3d Ed.

¹⁸ See <http://da.co.la.ca.us/sd02-08.htm>.

It is neither needed nor necessary that some of the Recommendations for Improving the California Criminal Justice System in the Wake of the Rampart Scandal, compiled in 2003 by the Los Angeles County Bar Association Task Force on the State Justice System, be implemented on a statewide basis.

The Rampart scandal was an extreme case in which existing laws were not followed. It is not typical of the conscientious job performed by law enforcement officers and prosecutors. The events associated with the Rampart Division of the Los Angeles Police Department do not warrant overhauling California statutory and case law regarding *Brady* or *Pitchess*.

The recommendations upon which the Association comments were made by a task force of the Los Angeles County Bar Association (LACBA), based on questionnaires sent primarily to attorneys and judges in Los Angeles County. They are not necessarily appropriate for smaller jurisdictions which, for example, have smaller volumes of personnel records, and where officers with credibility problems are more readily known to those in the legal community.¹⁹

In discussing *Brady* evidence, it is helpful to differentiate between three general categories: case-related evidence (e.g., physical evidence, inconsistent witness statements, results of scientific tests, evidence mitigating defendant's responsibility); evidence for impeachment of credibility of civilian witnesses (e.g., prior criminal record, informant agreements); and evidence for impeachment of peace officer witnesses (e.g., incidents of untruthfulness, moral turpitude conduct, evidence of racial bias).

Case-related evidence is routinely provided by the prosecution to the defense as part of the discovery process. (Penal Code section 1054 et seq.) Credibility of material civilian witnesses is accomplished in the context of individual prosecutions by running criminal history checks for the witnesses and disclosing any informant consideration that has been given. (See Evidence Code section 788; Penal Code sections 701.5, 1054.1(d), 1127a, 4001.1; *People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.)

The LACBA recommendations, particularly those regarding databases, focus primarily on the third category of *Brady* evidence, evidence relevant to the credibility of peace officers. The Association agrees that a systematic method is appropriate for the prosecution to learn of such evidence, evaluate it, collect it, and disclose it to the defense. The management of information for a large county like Los Angeles, with a large number of branch offices, law enforcement agencies, police divisions, and officers, would be different than a smaller county with the District Attorney's office in one or two locations, and a smaller number of law enforcement agencies and officers. For that reason, some flexibility should be retained as to the specific mechanism for each jurisdiction.

¹⁹ The Los Angeles District Attorney's Office is not a member of CDAA, and CDAA's comments do not reflect the opinions of the Los Angeles District Attorney's Office.

“2.1 To implement prosecutors’ responsibility for obtaining and producing *Brady* material, prosecuting agencies should establish procedures to gather *Brady* material in a systematic fashion from all appropriate sources. To assist prosecutors in the fulfillment of their obligations, governmental agencies should establish procedures to gather all *Brady* material and to provide that material to prosecuting agencies in a timely manner. Other options for obtaining *Brady* material should be utilized by prosecutors before resorting to *Pitchess* motions.”²⁰

The Association agrees that prosecuting agencies should have procedures to gather *Brady* material in a systematic fashion *from the investigating agencies* in each case. For case-related information, this should include some mechanism to ensure that all of the law enforcement agency’s reports have been furnished to the prosecuting agency. The specific procedures should be a local matter for each prosecutor’s office and will depend upon factors such as the volume of cases it handles, the seriousness, size and complexity of the particular cases, and the manner in which information is transmitted to the prosecutor’s office. For serious cases like homicide or sexual assault, it is advisable for the prosecutor to personally examine the police agency’s file and physical evidence to ensure that both the prosecutor and defense attorney have received discovery.

It is not clear from what “appropriate sources” the proposal is suggesting the prosecution seek information. The Discussion of Recommendations refers to “other governmental agencies not directly under the prosecutor’s control,” “material that is not easily accessible to a particular prosecutor” and “other relevant government agencies.” The law requires prosecuting agencies to disclose to the defense material exculpatory evidence in the possession of “the prosecution team,” i.e., the prosecutor’s office (regardless of where the prosecutor obtained the evidence) and the *investigating agency*. (*In re Brown* (1998) 17 Cal.4th 873, 879.) This obligation does not include evidence in the possession of governmental agencies with no connection to the investigation or prosecution of the case. (*In re Steele* (2004) 32 Cal.4th 682, 697.) It would be unreasonable to expand the law to require the prosecution to conduct an independent investigation in every case to search court records, records of administrative agencies, etc., to determine if exculpatory evidence exists. The defense in a criminal prosecution is capable of conducting such a search of external sources when it deems it appropriate so to do.

The Association agrees that *Pitchess* motions (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evid. Code, §§ 1043-1047) are a cumbersome means of obtaining information. The courts and the Legislature, however, have imposed procedural requirements for obtaining information from peace officers’ personnel files in order to protect the officers’ rights to privacy. Unlike most civilians, the job of the peace officer requires that he or she have daily confrontations with criminals. Some of these individuals have no moral compunction against making false accusations against officers if they believe that it will help them escape punishment for their crimes or result in a monetary benefit. CDA therefore opposes reducing these protections for peace officers.

²⁰ From “A Critical Analysis of Lessons Learned, Recommendations for Improving the California Criminal Justice System in the Wake of the Rampart Scandal” Los Angeles County Bar Association Task Force on the State Criminal Justice System, April 2003.

Alford v. Superior Court (2003) 29 Cal.4th 1033 holds that the prosecution has no automatic right to police personnel records that are disclosed to the defense pursuant to a defense *Pitchess* motion. To obtain this information, the prosecution may make its own *Pitchess* motion. (*Id.* at p. 1046.) This holding assumes that peace officer personnel records are not in the constructive possession of the prosecution. Similarly, in *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475, the court held that the prosecution is not required to search the personnel files of peace officer witnesses, but can seek disclosure only by making its own *Pitchess* motion.

The *Pitchess* requirements do “not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney’s office, or the Attorney General’s office.” (Penal Code section 832.7(a).) The district attorney may examine peace officer personnel records pursuant to this provision without a court order. (66 Ops. Cal. Atty. Gen. 128 (1993); *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607.) However, the District Attorney may not reveal information so obtained without compliance with *Pitchess*. (*Fagan v. Superior Court, supra.*) A reasonable interpretation of section 832.7(a) is that it be used to allow the District Attorney access to peace officer personnel records only when the peace officer is a suspect in an investigation and is not merely a witness in a criminal case. (See Ventura County District Attorney’s External Brady Policy, section IV, paragraph 1 (p. 9), which adopts this limitation as a matter of policy.)

“2.2 *Brady* . . . material should be collected in a central database under the control of the prosecuting agency.”

Collection of *Brady* material regarding peace officer credibility in a central location under the control of the prosecuting agency can be an appropriate part of a *Brady* policy to ensure that appropriate disclosure of such information is made.

The Association disagrees, however, with the statement in the Discussion portion for this recommendation that this database include “*Brady* information gleaned from successful *Pitchess* motions.” (Recommendations, p. 10.) Doing so would violate Evidence Code section 1045(e) and *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1042, which provide that information obtained pursuant to a *Pitchess* motion may be used only for purposes of that case. (Pursuant to the format of Commission’s Focus Questions, the portion of Recommendation 2.2 regarding collection of *Pitchess* materials is discussed in a later section below.)

“2.3 Production of *Brady* material to the defense must be timely. In particular, *Brady* material tending to establish factual innocence or an affirmative defense should be revealed before a guilty plea is entered.”

The Association agrees with this recommendation. The duty of disclosure does not apply to impeachment evidence in which the defendant pled guilty or no contest. (*United*

States v. Ruiz (2002) 536 U.S. 622.) But cases including *McCann v. Mangialardi* (7th Cir. 2003) 337 F.3d 782, 788; *Ferrara v. United States* (D. Mass. 2005) 384 F.Supp.2d 384, 408-409; and *State v. Harris* (2004) 272 Wis.2d 80, 105, 680 N.W.2d 737, 750, suggest that while under *Ruiz*, there is no *Brady* obligation as to impeachment evidence, exculpatory evidence of actual innocence must be disclosed before a guilty plea. While these cases are not binding authority in California, they reflect good public policy that should be followed.

This distinction appropriately places greater significance on case-related evidence as opposed to evidence that might be used to impeach the credibility of a witness. It also strikes an appropriate balance regarding a practical problem for prosecutors. If, for example, the prosecution learns that a police officer engaged in moral turpitude conduct such as spousal battery or tax evasion, it would be burdensome to identify and provide notification in each case in which the officer would have been a potential prosecution witness had the defendant not pled guilty or no contest.

“2.4 In felony cases, prosecutors should be required to execute a declaration affirming that inquiries have been made of all appropriate sources and that all *Brady* material obtained has been reviewed and disclosed.”

This proposal is neither necessary nor appropriate. There are already adequate sanctions to deter a prosecutor’s failure to obtain and disclose *Brady* information. Violation may result in reversal of the conviction, a significant sanction in itself, which may also trigger a report to the State Bar. (Business and Professions Code section 6068.7(a)(2).) Suppression of evidence a lawyer has an obligation to reveal or produce is a violation of rule 5-220 of the Rules of Professional Conduct, and if it vitiates probable cause would also violate rule 5-110. The criminal discovery statute requires the prosecution to disclose “[a]ny exculpatory evidence” (Penal Code section 1054.1(e)), and failure to comply may result in a variety of sanctions including contempt. (Penal Code section 1054.5.) Under some circumstances, the prosecutor may have civil rights liability for *Brady* violations. (*Broom v. Bogan* (9th Cir. 2003) 320 F.3d 1023.)

It is not appropriate to single out the *Brady* obligation of the prosecutor for a personal declaration that the law has been followed. Defense attorneys often, if not frequently, fail to provide discovery to the prosecution as required by Penal Code section 1054.3, and “wrongful convictions” may result from defense attorneys failing to adequately investigate cases, but they are not required to execute declarations that they have properly performed their legal duties.

“2.2 . . . *Pitchess* material should be collected in a central database under the control of the prosecuting agency.”

As discussed above, the Association agrees that the portion of Recommendation 2.2 regarding collection of *Brady* material regarding peace officer credibility in a central location under the control of the prosecuting agency is an appropriate means to ensure appropriate disclosure of such information. *Pitchess* materials should not, however, be

under the control of the prosecuting agency. These materials are personnel records properly maintained only by the employing law enforcement agency.²¹ . Allowing the prosecution to maintain “shadow” personnel files for police officers would violate their privacy rights and would meet strong and justifiable opposition from organizations that represent rank and file police officers. Maintaining such records would also violate Evidence Code section 1045(e) and *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1042, which provide that information obtained pursuant to a *Pitchess* motion may be used only for purposes of that case.

“2.5 Courts should order the production of the text of witness statements in response to the first *Pitchess* motion.”

As noted in the Discussion for this Recommendation, courts generally require disclosure of “only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question.” (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.) If a showing is made that this information is inadequate, the court can order disclosure of additional material such as citizen complaints and witness statements. (*Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 828-829; *People v. Matos* (1979) 92 Cal.App.3d 862.) The courts should retain their discretion as to what materials to release.

“2.6 In appropriate cases, *in camera* inspections of *Pitchess* documents should be scheduled for a date after the *Pitchess* hearing.”

In general, holding the *Pitchess* motion and conducting the *in camera* inspection on the same day is the best practice since it avoids duplicate court appearances and unnecessary delays. However, courts have the discretion to allow the custodian of records to return on another day with the records and often do so when requested by the agency.

The Discussion adds a recommendation that the notice time for *Pitchess* motions be reduced. Currently, the motion must be filed and served at least 16 court days in advance, plus 5 days for mailing or 2 days for overnight delivery or fax. (Code of Civil Procedure section 1005(b); Evidence Code section 1043(a).) For *Pitchess* motions in criminal cases, in order to avoid unnecessary delay of trial, a statutory change might be appropriate to adopt the time limit of 10 calendar days that is currently used for most other pretrial motions in criminal cases. (Cal. Rules of Court, Rule 4.111.)

“2.7 Prosecutors should be present for the *in camera* review. When *Pitchess* motions are granted, material should be produced to both the prosecution and the defense.”

The Association does not agree that the prosecution should be present for the *in camera* review of the personnel records or conduct their own review of the personnel records. Doing so would violate the statutory *Pitchess* scheme and the privacy rights of the officers in their personnel files.

²¹ See Penal Code section 832.5; *Alford v. Superior Court* (2003) 29 Cal. 4th 1033, 1045

The Association agrees that material disclosed to the defense pursuant to a *Pitchess* motion should also be turned over to the prosecution. In response to *Alford*, some prosecution offices are currently filing “me too” People’s *Pitchess* motions. This requires an unnecessary duplication of effort. Also, if the defense *Pitchess* motion is filed on or near the statutory deadline, it may not be practical for the prosecution to file and serve its motion to be heard the same day as the defense *Pitchess* motion. A legislative abrogation of this portion of the *Alford* case would make good sense.

The Discussion suggests that once the prosecution obtains the *Pitchess* materials, they should be incorporated into a prosecution database. As discussed above regarding Recommendation 2.2, CDAA opposes this recommendation.

The Association agrees with the observation in the Discussion regarding the importance of *Brady* and *Pitchess* disclosures in misdemeanor cases as well as felonies.

2.8 The Legislature should amend Evidence Code section 1045(e) so that it does not require issuance of a protective order restricting the use of *Pitchess* information to a single case.

The Association opposes this recommendation. The information that the court discloses in a particular case will be dependent to some extent upon the issues in that case. For example, a prior incident of excessive force would be relevant to a prosecution for resisting arrest, but would not be relevant to a case that does not involve a physical confrontation. An incident of racial bias would only be relevant in a case involving a member of a racial minority. Moreover, this proposal would have the effect of abolishing the limitation that only incidents within the preceding 5 years be disclosed (Evidence Code section 1045(b)(1)), and that “remote” facts not be disclosed (section 1045(b)(3)), which appropriately limit the extent to which a peace officer’s credibility can be attacked based on old information with little current relevance.

“6.1 The standard for referring information concerning witness credibility issues to the District Attorney should be reasonable suspicion or some other standard less than probable cause. A written policy should be established setting forth the standard in detail.”

Prosecutors, judges and defense counsel should be encouraged to report to the District Attorney potential *Brady* information, including information regarding the credibility of a peace officer. The district attorney’s office should evaluate all such reports to determine whether they are sufficient to warrant additional investigation.

In evaluating such reports, certain principles should be kept in mind. The government has no *Brady* obligation to “communicate preliminary, challenged, or speculative information.” (*United States v. Agurs* (1976) 427 U.S. 97, 109 fn. 16.) Thus, a mere conflict in the evidence does not establish that the officer is untruthful and does not trigger a duty to advise the defense in future cases. Moreover, a prosecutor’s personal

doubts as to the credibility of a witness need not be disclosed under *Brady*. (*People v. Seaton* (2001) 26 Cal.4th 598, 647-648; see *Morris v. Ylst* (9th Cir. 2006) 447 F.3d 735, 742 (prosecutor’s opinions regarding trial are “opinion work product” and not discoverable under *Brady*.) *Brady* requires disclosure of *material evidence*, not suspicions.

The Task Force recommends a “reasonable suspicion” standard for making a report. The following standard is employed in the Ventura County District Attorney’s Internal Brady Policy, Section III-A (p. 5): “Upon learning of any apparently credible allegation involving law enforcement employee or expert witness misconduct or credibility that may be subject to discovery under *Brady*, deputy district attorneys and district attorney investigators shall timely report this information to their immediate supervisor. For example, evidence of untruthfulness may come to light during a criminal trial, or from credible reports of other law enforcement employees based on sources other than personnel records. Such allegations must be substantial and may not be limited to a simple conflict in testimony about an event.” Such reports are then investigated and evaluated.

The Discussion recommends that reports to the District Attorney not be “official” because parties may be reluctant to endanger a career or place themselves at odds with the police agency. CDAA disagrees with this recommendation. Anonymous complaints may be based on any number of improper motives to make trouble for an officer rather than a legitimate concern for the integrity of the judicial system.²² To expect the district attorney to rely upon anonymous or informal complaints would be to impose a double standard in our judicial system: anonymous reports of crime do not constitute probable cause, even in situations in which the reporting party might have compelling reasons to fear the suspect being reported.

A district attorney generally will not spend time investigating anonymous complaints, whether against police officers or criminal suspects, unless they contain verifiable corroboration.

“6.2 A database organized and maintained by the prosecutor’s office should be created pursuant to procedures and standards established by that office and containing the names of police officers and other recurring witnesses whose required in *Giglio v. United States*, 405 U.S. 150 (1972), *Brady v. Maryland*, 373 U.S. 83 (1963), and their progeny. Data collected in the prosecution database may not necessarily end up in a *Brady* database.”

²² See *People v. Jordan* (2003) 108 Cal.App.4th 349, which held that the prosecution is not required to catalogue the testimony of every defense witness in every criminal trial, cull out complaints about peace officers, and disclose whenever that officer is a witness in another case. “Defense attacks upon the integrity of a police officer are a common feature of criminal trials. Given that the proponent of the evidence has a strong incentive to avoid conviction, such complaints do not immediately command respect as trustworthy or indicate actual misconduct on the part of the officer . . . [e]ven if the unrelated trial results in acquittal. . . .” (*Id.* at p. 362.)

“c) Access to the database should be limited to the prosecution with the understanding that it is the duty of the prosecution, by designated senior deputies, to review the database and determine whether material contained therein should be discoverable. Toward that end, the prosecution shall seek this material and will be held accountable for its dissemination or lack thereof. A purging process should be in place for information that turns out to be clearly false or that is too remote in time. honesty and truthfulness may be in question, as set forth below”.

“a) Data should include information obtained from prosecution, defense, judicial and public sources. Information obtained from the defendant should be relayed through defense counsel (or the defendant, if proceeding *in pro per*).”

“b) The standard for entry into the database should include fact-based allegations relating to public integrity, honesty and truthfulness. It is recommended that the criteria be a broader standard than that.”

Placing an officer’s name on a *Brady* list can have a devastating effect on the officer’s career. Many law enforcement agencies have adopted the philosophy of “you lie, you die,” meaning that when an officer has been found to be dishonest, his usefulness to law enforcement is destroyed and his employment must be terminated. This can be an appropriate outcome when an officer’s dishonesty or other moral turpitude conduct has been established. But care must be taken to ensure that challenges to an officer’s credibility be thoroughly investigated and based upon objective facts.

There are, at least, two ways in which information regarding peace officer credibility can be handled. The evaluation can be done at the “front end” or at the “back end.” In the “front end” model, such as that followed by the Ventura County District Attorney, complaints regarding the credibility of a peace officer are evaluated as they are received, with an opportunity for the officer and the employing law enforcement agency to provide input.

If the investigation determines that the officer was not untruthful or did not engage in moral turpitude conduct, the officer’s name is not placed on a *Brady* list. In Ventura County, for example, a confidential administrative file is created to document the complaint and investigation. If a later complaint is received regarding the same officer, the administrative file is consulted. This serves the Task Force’s interest in detecting patterns of misconduct. It should be noted, however, that the mere repetition of similar complaints does not necessarily establish peace officer misconduct. Some peace officers are aggressive in performing their jobs and for that reason are disliked and distrusted by some defense counsel even though the objective evidence does not establish dishonesty. If the District Attorney’s Office concludes, however, that material evidence exists regarding an officer’s credibility, the officer’s name is placed on a *Brady* list. Past cases in which the officer testified are researched and the defense is advised of the new

information. In future cases in which the officer will be a prosecution witness, the assigned prosecutor consults with a designated supervisor as to how to proceed. Usually the answer is to avoid using that officer as a witness, or disclosure of the *Brady* information. In some occasions, however, the prosecutor and supervisor may determine that disclosure is not required because the information is too old or would have little or no bearing on the issues in the present case, or may seek an in camera evaluation for a judicial recommendation as to disclosure.

The approach apparently contemplated by the Recommendation is a “back end” approach, which is used in at least some counties. In that approach, a lower standard is used to place the officer’s name on a *Brady* list. Only when the officer is to be used as a prosecution witness in a future case is the complaint evaluated to determine whether disclosure is required. This approach has the disadvantage of requiring decisions to be made under the time pressures of an impending criminal prosecution. However, this approach can be used to handle *Brady* evidence in a satisfactory manner.

In establishing policies for *Brady* databases, one size does **not** fit all. Each prosecutor’s offices should design and implement procedures to deal with *Brady* evidence that works for that jurisdiction.

“6.3 In order to ensure the completeness of the database, the Task Force recommends that when a court has reason to believe perjury may have been committed, the court should report it to the prosecutorial agency for appropriate action and inclusion in the database.”

Complaints that a judicial officer “has reason to believe perjury has been committed” will receive serious consideration for inclusion on the *Brady* list and/or perjury prosecution. The mere receipt of such a report should not require a prosecutorial agency to place the officer’s name in a database. If evaluation of the complaint fails to establish that the officer was dishonest, the disposition of that information should be handled under whatever recordkeeping system has been established by that prosecutor’s office.

“7.1 Law enforcement agencies are encouraged to implement automated data systems in which personnel and other records are maintained in a centralized computer database.”

The Association is aware of the problems that result when large agencies have records for individual officers spread out at several locations. *Pitchess* information may not be properly compiled if the records of past misconduct are left behind at the officer’s previous work station. But the problems of Los Angeles, and the solutions to those problems, should not be generalized statewide. Issues with records maintained at several locations are not present in smaller police departments, such as departments that have only one police station. Individual departments should be free to design and maintain recordkeeping systems that make sense for that department.

“7.2 Automated databases maintained by law enforcement should retain information relating to sustained citizen complaints for at least ten years.”

As noted in *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 11, the five-year limit for *Pitchess* discovery (Evid. Code § 1045(b)(1)) and the five-year cut-off for retention of citizen complaints (Penal Code section 832.5) “may well reflect legislative recognition that after five years a citizen’s complaint of officer misconduct has lost considerable relevance.” The 5-year *Pitchess* limit is not contrary to *Brady* and is not unconstitutional on its face. (*Id.* at pp. 10-12.) Destruction of records after five years is not unconstitutional unless its exculpatory value to a particular criminal case is readily apparent prior to its destruction. (*Id.* at pp. 11-12.)

“7.3 The courts, district attorneys, and public defenders should develop technical compatibility with law enforcement agencies to facilitate transmission and accessibility of *Brady* and *Pitchess* information by prosecutors, defense attorneys, and judges in criminal cases.”

Computers and computer-based storage media will play an increasing role in the storage and transmission of all types of data in the justice system. In the context of *Brady* and *Pitchess* information, such innovations must include safeguards to protect the privacy rights of the police officers who are the subject of the records.

Conclusion

The familiar aphorism, “if it ain’t broke, don’t fix it” carries with it a great deal of wisdom and sage advice. And so it is with the fair administration of justice and, in particular, matters of ethical responsibility. It is for the reasons set forth in this position statement that CDAA believes that levels of training and continuing education for prosecutors are adequate to support the fair administration of justice; prosecutors are consistently competent in meeting their ethical responsibilities; amendments to the California Rules of Professional Conduct “to provide greater specificity in defining the ethical standards to guide prosecutors” are neither needed nor well-advised; the requirements of Business and Professions Code section 6086.7, requiring that the State Bar be notified when a modification or reversal of a judgment is based on misconduct, incompetent representation, or a willful misrepresentation of an attorney, is an adequate and proven safeguard in assuring fairness; “independent special masters,” acquainted with professional standards for prosecutors and defense lawyers, should not be utilized by regulating bodies tasked with recommending or upholding action in cases involving prosecutors; and neither legislative nor administrative changes are needed to assure full compliance with the requirements for disclosure of evidence.

CDAA reiterates its support in maintaining the highest levels of professional responsibility by all members of the Bar.

Respectfully submitted,
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