

CALIFORNIA PUBLIC DEFENDERS ASSOCIATION
RESPONSE TO FOCUS QUESTIONS
ON PROFESSIONAL RESPONSIBILITY ISSUES
(Hearing Date: July 11, 2007)

CALIFORNIA COMMISSION ON THE
FAIR ADMINISTRATION OF JUSTICE
Focus Questions for Hearing on Professional Responsibility Issues

Response to Question 1

Question: Should amendments to the California Rules of Professional Conduct be recommended to provide greater specificity in defining the ethical standards to guide prosecutors and defense lawyers engaged in handling criminal cases? In what areas is greater specificity desirable? The areas of particular concern brought to the attention of the Committee thus far include the prosecutor's discovery obligations pursuant to *Brady v. Maryland*; prosecutorial duties in the investigation of post conviction claims of innocence; prosecutorial and defense lawyer competence in addressing issues of forensic science; the defense lawyer's duty to decline representation if commitments to other clients or lack of adequate expertise or resources preclude competent representation; the defense lawyer's to investigate before recommending acceptance of a plea bargain; the defense lawyer's duty to fully advise clients of the collateral consequences of conviction; and the reporting of violations of the Rules of Professions Conduct by other lawyers, or the Code of Judicial Ethics by judges.

Prosecutors
Short answer:

The California Commission on the Fair Administration of Justice should recommend amendments to the California Rules of Professional Conduct to provide greater specificity in defining the ethical standards to guide prosecutors engaged in handling criminal cases.

Analysis:

Given the critical role as gatekeepers that prosecutors have in our criminal justice

system, prosecutors must be held to the highest standards of ethical conduct. In order to continue to ensure the highest standards of prosecutorial responsibility and accountability within the criminal justice system, it helps to first examine the role the justice system demands of prosecutors. First and foremost, because the burden of proof in a criminal case rests with the prosecution, prosecutors are responsible for ensuring justice through a fair presentation of the evidence. “Prosecutors have a special obligation to promote justice and the ascertainment of truth. ... ‘The duty of the district attorney is not merely that of an advocate. His [or her] duty is not to obtain convictions, but to fully and fairly present... the evidence...’” (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378.) The prosecutor “ ‘...represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” (*Berger v. United States* (1935) 295 U.S. 78, 88.)’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 820.) The law requires a prosecutor to timely disclose exculpatory evidence (see, e.g., *Brady v. Maryland* (1963) 373 U.S. 83, the leading case on how nondisclosure of exculpatory evidence violates Due Process of Law and *Kyles v. Whitley* (1995) 514 U.S. 419, 439-440 [When in doubt about whether an item must be disclosed, prosecutors are encouraged to disclose information out of an abundance of caution.]) In California, prosecutors are also duty-bound to comply with specific discovery obligations as set forth under the reciprocal discovery rules of Penal Code sections 1054-1054.10.

However, despite the elaborate system of well-established and well-intentioned checks and balances designed to protect both the innocent and the guilty, several recent published California cases have demonstrated that prosecutorial misconduct is still often cited as a factor when judges or appellate panels dismiss charges (before, at or after trial), reverse convictions or reduce sentences. According to one recent nationwide study, the nature of the questionable prosecutorial conduct which has led to most wrongful convictions includes, but is not limited to, (1) mishandling physical evidence (such as hiding, destroying or tampering with evidence, case files or records), (2) failing to timely disclose exculpatory physical and testimonial evidence, (3) threatening, badgering or tampering with witnesses, (4) using false, misleading or otherwise faulty evidence, (5) harassing or otherwise displaying a bias against the defendant (including selective or vindictive prosecution), and (6) other courtroom misconduct or improper behavior during grand jury proceedings (including making inappropriate or inflammatory comments in the media, introducing or attempting to introduce inadmissible, inappropriate or inflammatory evidence; mischaracterizing the evidence or the facts of the case to the court or jury; committing violations pertaining to the selection of the jury; or making improper closing arguments.)¹ Even though two of these factors in particular – making

¹ See, e.g., “Harmful Error,” a Prosecutorial Misconduct Study Report **WRITTEN BY THE CENTER FOR PUBLIC INTEGRITY** that studied 590 California cases from 1970 to the present in which the defendant alleged prosecutorial misconduct. In 75 cases, judges ruled a prosecutor's conduct prejudiced the defendant. In 41 cases, a dissenting judge or judges thought the prosecutor's conduct warranted reversing or remanding the defendant's conviction, sentence or indictment. Of all the defendants who alleged misconduct, one later proved his innocence.

inflammatory and inappropriate comments to the media, and failing to timely disclose the exculpatory results of DNA tests to defense counsel – recently led to the disbarment of Duke University Lacrosse prosecutor Mike Nifong, most of the time, California prosecutors who commit acts of prosecutorial misconduct are never subjected to any discipline.

In order to ensure the highest ethical standards for prosecutors and to reduce the number of wrongful convictions in California, the California Commission on the Fair Administration of Justice should recommend amendments to the California Rules of Professional Conduct in order to provide prosecutors engaged in handling criminal cases with specific guidelines in at least three specific problem areas which have been proven to be direct causes of wrongful convictions:

1. *Brady* material and Police Misconduct evidence

Prosecutors have a responsibility under *Brady* to provide the defense with exculpatory material in a timely fashion, and to ensure that evidence presented at trial is not based on police or governmental misconduct. In light of the recent “Ramparts” scandal in Los Angeles, as well as the Oakland “Riders” scandal and other incidents of police misconduct, the California Commission on the Fair Administration of Justice should support implementation on a statewide basis several of the Recommendations for Improving the California Criminal Justice System in the Wake of the Ramparts Scandal, compiled in 2003 by the Los Angeles County Bar Association Task Force on the State Justice System. Specifically, the California Commission on the Fair Administration of Justice should advocate statewide implementation of the following recommendations: (1) prosecuting agencies should be required to establish procedures to gather *Brady* material in a systematic fashion from all appropriate sources; (2) in order to assist prosecutors in fulfilling their obligations, governmental agencies should establish procedures to gather all *Brady* material and to provide that material to prosecuting agencies in a timely manner; (3) prosecutors should be obligated to use any and all options for obtaining *Brady* material, including but not limited to *Pitchess* motions; (4) *Brady* material should be collected in a central database under the control of the prosecuting agency; (5) individual prosecutors must be obligated to tender production of *Brady* material to the defense in a timely manner; (6) *Brady* material tending to establish factual innocence or police misconduct should be revealed before a guilty plea is entered; and (7) in all criminal cases, individual prosecutors should be required to execute a declaration affirming that inquiries have been made of all appropriate sources and that all *Brady* material and evidence of police misconduct has been reviewed and disclosed. In addition, the Commission should recommend to the Legislature that it change the law to give prosecutors direct access to *Brady* material contained in police officer and custodial officer personnel files. Additionally, in order to provide specific guidelines to prosecutors

Of the cases in which judges ruled a prosecutor's conduct prejudiced the defendant, 48 involved improper trial arguments or examination, 11 involved withholding evidence from the defense, eight involved discrimination in jury selection, three involved improper pre-trial tactics, two involved threatening a witness and the three remaining cases involved destruction of evidence, breaching an agreement and eavesdropping. The report can be found on the web at <http://www.publicintegrity.org/pm/default.aspx>.

handling criminal matters, as well as ensure consistency and conformity to these practices, the California Commission on the Fair Administration of Justice should recommend incorporating these ethical guidelines for prosecutors as specific amendments to the California Rules of Professional Conduct.

2. Criminal Informant, or so-called “Snitch,” Testimony

Courts have long recognized the perils of criminal informant testimony and have established that a “prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system [and courts] expect prosecutors and investigators to take all reasonable standards to safeguard the system against treachery.” *Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1109, 1116. According to Northwestern University Law School’s Center on Wrongful Convictions, 45.9% of documented wrongful capital convictions have been traced to false informant testimony, making “snitches the leading cause of wrongful convictions in U.S. capital cases.”² Prosecutors have special obligations related to criminal informants because (1) prosecutors and members of their prosecution team, including police officers and other prosecutorial agents, enlist, control and reward informants, they are in a unique position to evaluate the informant’s reliability, and (2) the prosecutor, as the representative of the state, has an ethical obligation to ensure that the defendant is given a fair trial. (See *Bowie*, supra, at 1089, citing *Berger v. United States* (1935) 295 U.S. 78, 88.)³ However, despite these special obligations, most prosecuting agencies do not have in place any standards for using informant testimony, training for prosecutors who use informant testimony, or special rules or guidelines for tendering discovery on the use of informants. The California Commission on the Fair Administration of Justice should recommend developing, incorporating and implementing ethical guidelines to the use of informant testimony by prosecutors as specific amendments to the California Rules of Professional Conduct.

3. Prosecutorial Use of Forensic Evidence

According to “200 Exonerated: Too Many Wrongfully Convicted⁴,” an Innocence Project Report on the first 200 DNA exonerations in the United States, 65% of those who were later exonerated were wrongfully convicted based at least in part on fraudulent, unreliable or limited forensic science.⁵ (See also E. Imwinkelreid, “Forensic Hair Analysis: The Case Against The Underemployment of Scientific Evidence, 39 Wash. & Lee L. Rev. 41, 44 [citing the Law Enforcement Assistance Administration’s Laboratory Proficiency Testing Program, which documented “a very real possibility of

2 Alexandra Natapoff, “Beyond Unreliable: How Snitches Contribute to Wrongful Convictions,” *Golden Gate University Law Review*, Volume 37, p. 107.

3 *Id.* at p. 125.

4 <http://www.innocenceproject.org/200/report.html>

5 It should be noted that 8 of the 200 cases of wrongful convictions listed in the report were men who were convicted in California.

error in the forensic analyses conducted by police laboratories in the United States.”]) Currently, no standard of competence currently exists to ensure prosecutors do not put on expert testimony related to “junk science.” The California Commission on the Fair Administration of Justice should recommend developing, incorporating and implementing ethical guidelines to the use of forensic evidence by prosecutors as specific amendments to the California Rules of Professional Conduct.

Conclusion:

For all these reasons, the California Commission on the Fair Administration of Justice should recommend amendments to the California Rules of Professional Conduct to provide greater specificity in defining the ethical standards to guide prosecutors engaged in handling criminal cases.

Defense Attorneys

Individual attorneys representing indigent criminal defendants in our state should be required to familiarize themselves with and comply with the Rules of Professional Conduct and the Guidelines on Indigent Defense Services Delivery Systems promulgated by the State Bar of California in 2006 since these answer the question asked.

Individual attorneys accepting appointments directly from the court or operating in an assigned counsel system should personally abide by said rules and guidelines. Attorneys working as deputies within institutional public defender offices or for contract defender offices should also comply but do so under the direction of Chief Defenders or contract executives and managers, who are all directly and personally responsible and accountable for ensuring that their entities adhere to and meet all of the guidelines cited, supra, and the Rules of Professional Conduct. Should Chief Defenders or contract executives fail to adhere to the guidelines and/or the Rules of Professional Conduct, it is incumbent on subordinate attorneys to report the matter to the State Bar.

Currently, the Rules Revision Commission of the State Bar is considering recommending changes in the Rules of Professional Conduct to the Bar. For example, said Commission favors changing “party” to “person” in Rule 2-100, which currently prohibits an attorney from directly or indirectly communicating with a represented party regarding the subject of the representation without the consent of the party’s attorney.

Changing “party” to “person” would unduly impede and interfere with the ability of defenders to properly investigate and prepare their cases due to the proscription on having investigators or others interview non-party witnesses who are represented by counsel. Should this change be adopted there would undoubtedly be a variety of challenges due to the disastrous impact on the right to adequate counsel (6th Amendment).

There are other recommendations being developed by the Rules Revision Commission that could create significant problems for defenders and defender offices. It is essential that the work of that Commission be carefully and continuously monitored and relevant input be provided to the Commission and, if necessary, to the officers and board of Board of Governors of the Bar.

Response to Question 2

Question: Should California Business and Professions Code § 6086.7, which currently requires a court to notify the State Bar whenever a modification or reversal of judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney, be modified to require a court to notify the State Bar whenever a finding is made that an attorney in a criminal proceeding engaged in misconduct, incompetent representation or willful misrepresentation regardless of whether the misconduct, incompetence or misrepresentation results in modification or reversal of judgment?

Yes, California Business and Professions Code § 6086.7 should be modified as proposed. Any act of unethical misconduct remains unethical and misconduct regardless of whether or not it leads to a reversal or modification of the judgment. Attorneys must be deterred from such misconduct, instead of knowing that they will most probably not be subject to any discipline or other sanctions unless it leads to reversal or modification of the judgment.

If there is to be a mandatory duty to report all instances, it should also be required that notice go to the head of the prosecutor or public defender office or the contractor of defender services or the administrator of an assigned counsel program, or the presiding judge who controls appointment of individual attorneys.

Moreover, the Rules of Professional Conduct should provide that upon receiving such notice the person in authority be obligated to cause an inquiry or investigation to be conducted to determine what action, if any, is warranted. This could include retraining or remedial training, counseling, and/or disciplinary action.

Finally, note is taken of the fact that the California State Bar Guidelines on Indigent Defense Services Delivery Systems (2006), provide several suggestions for institutional public defenders to handle the kinds of ethical issues raised by this question. The said Guidelines provide, among other things (at p. 37):

“Institutional public defenders should promulgate written policies or guidelines and provide training to staff regarding the ethical rules binding employees of such defenders and explaining the process whereby ethical issues are resolved. There should be a special emphasis on ensuring that defender managers are fully conversant with the California Rules of Professional Conduct, statutory and case law progress, county regulations and internal defender ethical provisions, and be available to defender

employees to provide guidance in how to avoid ethical dilemmas or how to sort them out once they occur. In particular, great care must be taken to avoid the possibility of an ethical conflict occurring as a result of flawed performance that may constitute inadequate assistance of counsel (IAC) or malpractice.”

It is suggested that similar Guidelines be developed by the State Bar that pertain to the prosecutor’s role within the criminal justice system, so that California’s district attorney offices are subject to the same kinds of internal controls as are presently imposed upon institutional public defender offices.

Response to Question 3

Question: Do procedures for discipline of employees of District Attorney and Public Defender offices unreasonably limit or compromise the ability to insure adherence to the professional standards that apply to prosecutors and defense lawyers? Should independent Special Masters, who are acquainted with professional standards for prosecutors and defense lawyers, be utilized by Civil Service Commissions or similar bodies in recommending or upholding action in cases involving prosecutors or defense lawyers?

The interface between Civil Service Commissions and various personnel actions of Public Defender management can be problematical due to a lack of familiarity by commissioners with our specialized area of practice. Issues may arise out of actions to terminate an employee due to substandard performance. However, it is more likely that the genesis of the Civil Service Commission’s involvement will involve an employee who is grieving a reduction in rank, a suspension, a reprimand, a low performance evaluation or appraisal of promotability. Likewise, it may be due to an employee being dissatisfied by a lack of promotion or due to not receiving an assignment that would reflect a very high level of confidence by management in the employee’s skill level.

The Civil Service Commission’s impact cannot be viewed in the abstract. Other factors will be very influential in the outcome. For example, are there clear written performance standards? Has there been candid well-documented feedback provided by managers or supervisors to the employee on a regular or ongoing basis? Are the actions or decisions of managers or supervisors clearly related to the performance standards, and has the employee been treated fairly?

Having said all of that, having a knowledgeable experienced advisor who understands our business available for the Civil Service Commission’s edification would be beneficial. (From Michael Judge)

Response to Question 4

Question: Are existing office policies and procedures implemented by District Attorney Offices and Public Defender offices adequate to ensure full compliance by all deputies with discovery obligations? Are any legislative or administrative changes needed to assure full compliance with the requirements for disclosure of evidence?

The first question is whether Public Defender and District Attorney office policies ensure full compliance with discovery rules. Most, if not all District Attorney and Public Defender offices have policies governing discovery. Most if not all simply state that their employees will comply with PC 1054 *et. seq.* More organizational guidance with regard to “general” discovery obligations does not appear necessary. However, District Attorney Offices may benefit from very specific guidance on *Pitchess* and *Brady* type discovery. Any organizational attempt to “fix” or supplement the discovery statutes may result in unintended consequences that do more harm than good.

The second part of the question concerns any legislative or administrative fix that is needed. It seems unlikely that “problems” with the discovery statute can be rectified legislatively to the satisfaction of both prosecutors and defenders. Administrative changes may help if focused on education and training of all sides to the equation.

The best immediate fix for the difference of opinions and attitudes toward discovery may be to have seminars on discovery that are attended by a combination of judges, prosecutors and defense attorneys. Group education may foster more of a consensus than any legislative or administrative fix. The presenters would meet beforehand to discuss what issues they will present at the seminar itself to get some consensus but also to get a sense of the profound differences of opinion and the gray areas that criminal discovery contains. These seminars ought to be officially sponsored and/or sanctioned by the Prosecutor’s association, the defense attorney’s guilds (CPDA, CACJ) the California Judges Association, and also the State Bar, which either underwrites them or endorses their presentation through CEB, or some other legal education neutral. And there ought to be a requirement that criminal law attorneys get 1 or 2 of their required MCLE credits each year in discovery.

Response to Question 5

Question: To what extent have the California State Bar Guidelines on Indigent Defense Services Delivery Systems been implemented? Are adequate resources

available for full implementation?

Absent time to conduct actual surveys of indigent defense offices throughout the State, it is impossible to give a fully accurate and comprehensive answer to this question. That being said, the following are a few observations from several indigent defense offices:

The Guidelines are a valuable tool in setting standards for the adequate and zealous representation of indigent defendants.

The Guidelines will help indigent defense offices try to obtain adequate funding for the defense of indigent defendants. The simple fact that they are published by the California State Bar adds credibility to the Guidelines.

The Guidelines help define the duty of a public defender to declare “unavailability” when caseloads become excessive, and that in determining when caseloads become excessive, the Chief Defender must look not only at the number of attorneys available to handle the caseload, but also at the number of support staff, i.e., investigators, secretaries, research staff, etc. available.

The Guidelines clearly set forth the ever increasing responsibilities that indigent defense offices have regarding their juvenile clients, thus lending credence to requests for increased funding to adequately represent these most vulnerable clients.

Response to Question 6

Question: To what extent are low bid contracts being used to meet the obligation of California counties to provide competent representation to indigent accused? Do such contractual arrangements provide the requisite assurance of competent representation?

Twenty-two California counties contract for the services provided by a public defender. In addition, at least six other counties contract for some portion of indigent criminal defense services. Many, if not most, of these contracts are awarded to the low bidder.

There have been many articles that address problems that can occur in contracts for indigent legal defense services.

Some contracts provide that the contractor shall handle all cases assigned under the contract, even those involving codefendants. In some instances, the contractor is responsible for paying the codefendant’s attorney out of the proceeds of the contract. Other contracts require the attorney to pay for expert and investigative services from the

contract funds. Such a situation creates an unavoidable conflict of interest. *People v. Barboza* (1981) 25 Cal.3d 375. (See: Unconscionable Contracting For Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed-Fee Contracts, 39 *U. Mich. J.L. Reform* 773.)

Low-bid contracts can create a myriad of problems in providing constitutionally adequate defense for persons accused of crime. In some instances, the contracting procedures do not have adequate safeguards in place to assure that the attorneys who will be handling the cases are even minimally qualified to do so, or that attorneys working on the contract have received adequate training in the past or will be required to attend specified relevant continuing legal education during the period covered by the contract.⁶ Other contracts do not contain requirements that the contracting attorneys spend a specific portion of their time handling criminal cases or even cases assigned pursuant to the contract. Many contracts also do not require that the performance of the attorneys be supervised by the chief contractor or anyone concerned with the adequacy of the efforts put forth on behalf of the clients. In some instances, there is no requirement that renewal of the contract will be tied to adequate performance under the existing contract. Often, the contracts do not provide for the provision of support services, including access to experts and investigative assistance. Finally, there is often no link between the compensation levels and the number and complexity of cases the contracting attorney must handle.

Nearly a decade ago, problems inherent in the low-bid contract system were highlighted in: *Low Bid Criminal Defense Contracting: Justice in Retreat*, an article in the November 1997 issue of the *Champion*, published by the National Association of Criminal Defense Lawyers.

Within the last several years, a number of states have scrapped low-bid systems due, in large part, to the number of problems that have existed in such systems. In 2005, North Dakota established a State Commission on Indigent Defense to monitor the provision of indigent defense services. In 2001, Texas overhauled its criminal defense system and instituted requirements for minimum training and experience for attorneys representing indigent defendants.

In 2006, the California State Bar published “The State Bar of California Guidelines on Indigent Defense Services Delivery Systems” These guidelines address the sort of representation that should be provided to indigent defendants, and the Guidelines also specifically discuss “contract defenders”. Reference to these Guidelines is helpful in assessing the quality of representation to be afforded the indigent accused.

The Criminal Justice Section of the American Bar Association has promulgated

⁶ While California attorneys are required to complete Continuing Legal Education training, this training does not specifically deal with issues relating to criminal defense. Business and Professions Code § 5070. See also: Standard IV A. of The State Bar of California Guidelines on Indigent Defense Services Delivery Systems (2006)

standards for criminal justice. Standard 5 deals with providing defense services, and Standard 5.3 specifically deals with the practice of contracting for defense services. Standard 5.3.3 recommends elements that should be part of any contract for the legal defense of indigents. It says:

Standard 5-3.3 Elements of the contract for services

(a) Contracts should include provisions which ensure quality legal representation and fully describe the rights and duties of the parties, including the compensation of the contractor.

(b) Contracts for services should include, but not be limited to, the following subjects:

(i) the categories of cases in which the contractor is to provide services;

(ii) the term of the contract and the responsibility of the contractor for completion of cases undertaken within the contract term;

(iii) the basis and method for determining eligibility of persons served by the contract, consistent with standard 5-7.1;

(iv) identification of attorneys who will perform legal representation under the contract and prohibition of substitution of counsel without prior approval;

(v) allowable workloads for individual attorneys, and measures to address excessive workloads, consistent with standard 5-5.3;

(vi) minimum levels of experience and specific qualification standards for contracting attorneys, including special provisions for complex matters such as capital cases;

(vii) a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses;

(viii) limitations on the practice of law outside of the contract by the contractor;

(ix) reasonable compensation levels and a designated method of payment;

(x) sufficient support services and reasonable expenses for investigative services, expert witnesses and other litigation expenses;

(xi) supervision, evaluation, training and professional development;

(xii) provision of or access to an appropriate library;

(xiii) protection of client confidences, attorney-client information and a work product related to contract cases;

(xiv) a system of case management and reporting;

(xv) the grounds for termination of the contract by the parties.

Further comparison of various standards relating to contracts for indigent defense have been collected by the United States Department of Justice Office of Justice Planning and can be found at:

<http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1i.htm>

In order to provide an answer to the second question posed by the Commission, one would have to examine each of the contracts utilized by individual counties within the state to determine whether or not the contract creates any of the problem situations that have been documented in other jurisdictions.

Response to Question 7

Question 7: Do California prosecutorial offices and agencies receive resources adequate to assure the fair administration of justice?

Short Answers:

- Funding for prosecutorial agencies cannot be seen in a vacuum. If one is seeking to assure the fair administration of justice, the inquiry must include a discussion of whether all criminal justice stakeholders are adequately funded to assure fairness and meaningful access to the justice system.
- Funding for prosecutors and indigent defense offices should be balanced, resulting in proportionally fair funding to both sides to assure the fair administration of justice.
- Prosecutorial funding should be viewed in the context of all law enforcement funding such that there is legislative transparency as to the amount of funding prosecution and law enforcement agencies receive.
- A further important question to ask is: what will the additional funding actually accomplish? A discussion of funding to assure the fair administration of justice must include the input of all criminal justice stakeholders to assure that the money spent actually goes to assuring the fair administration of justice.

Analysis:

- I. Assuring the fair administration of justice through equity in funding and staffing for prosecution and indigent defense offices.

Understanding that the question primarily calls for an answer from the prosecution community, we respectfully offer the comments below to assist the Commission in assessing the important issue that the question focuses on.

Assuring the fair administration of justice is not just a prosecutorial prerogative. It is a responsibility that is held by all stakeholders in the criminal justice system. If there is to be a fair administration of justice, it must include fairness in funding for indigent defense offices as well as prosecutorial agencies. Indigent defense offices have always faced an uphill battle, in comparison to prosecution agencies, when it comes to funding. Moreover, prosecution offices not only have their own sizeable budgets, but they are also able to leverage the budgets of the law enforcement agencies they serve to create a prosecution funding source of great magnitude. Prosecution agency budgets, thus, should be seen in a larger context to assess the true level of legislative funding

A review of prosecuting agency budgets from throughout California shows that they are dealing with large multi-million dollars budgets that support a variety of programs and that also reflect revenue sources from a variety of local, state and federal funding sources. A similar review of public defender budgets reveals that they rely primarily, if not for the most part solely, on local county general funds and charges for services.

In addition, indigent defense offices often face staffing disparities that cannot adequately be appreciated unless one sees the criminal justice system up close. Often district attorney offices are staffed by twice the number of attorneys as indigent defense offices. Prosecution agencies have greater access to crime labs and high tech equipment, and they are able to utilize law enforcement agencies for investigation and trial support. In a comparison of staffs it is clear that prosecution offices have more attorneys, support and investigative staff than comparable indigent defense offices.

Assuring the fair administration of justice demands a meaningful dialogue on the elements of fairness. To allow an indigent defendant true access to justice means giving his legal representative the tools to meaningfully defend the case before a court of law. The community will have confidence in the administration of justice when it sees that an indigent criminal defendant has the same access to justice as the prosecuting agency that a criminal defendant faces in a court of law.

Thus, to assure the fair administration of justice it is essential not only to fund prosecuting agencies fairly, it is equally as important to fund indigent defense offices so that the community has confidence that the administration of justice is truly fair.

II. How will additional funding assure the fair administration of justice?

While additional funding would be welcomed by any prosecutorial office or agency, the question this Commission should also ask is: what will additional funding actually accomplish? The goal of additional funding should be in keeping with the focus of the Commission's question. In other words, how will additional prosecutorial funding

lead to solutions that assure that the dollars given to prosecutorial agencies achieve results that support the fair administration of justice?

Of great concern is that additional funding to prosecutors may result in what is often a response to such funding: the creation or expansion of unit within a prosecutorial agency. If additional funding is used in this manner then the concomitant rise in prosecutions, additional defense costs, expanding incarceration costs and a further jammed criminal justice system will likely be the result. If, on the other hand, additional resources are used to fund successful programs that lessen costly prosecutions, reduce litigation costs, decrease incarceration costs and relieve congestion in the criminal courts then additional funding will achieve much in assuring the fair administration of justice.

Indeed, a prosecutorial focus on the fair administration of justice could mean a radical departure from the prosecution model most agencies now utilize. Such a change in focus could realistically mean collaboration with all other stakeholders in the criminal justice system and the potential for creating new and successful programs, such as drug and mental health courts, which truly further the fair administration of justice.

Response to Question 8

Question: Are the current levels of training and continuing education of California prosecutors, public defenders and private defense lawyers adequate to assure their competency and ethical responsibility? Should joint or combined training of prosecutors and defense lawyers regarding their ethical obligations be encouraged?

There are two separate issues regarding the current levels of training and continuing education for defense attorneys in California. First is the availability of training for criminal defense practitioners. Second is the accessibility of such training, in other words, can criminal defense practitioners participate in available training due to expense, location, etc.

Availability of Training Opportunities

California Continuing Education of the Bar (CEB)

CEB provides few, if any, training programs specifically designed for the criminal defense practitioner. They do offer some written criminal practice materials.

Private Membership Organizations

The California Public Defenders Association (CPDA) provides approximately two-dozen specialized training programs for criminal defense practitioners on a yearly basis. These continuing legal education programs are open to both public defenders and private defense attorneys. These “on-site” (typically held in the larger California cities),

address the substantive and trial advocacy aspects of criminal defense practice. A select few topics per year also address the ethical issues that arise in criminal defense practice. In addition to the “live” or “on-site” continuing legal education programs, with few exceptions, each program is videotaped and made available on DVD and videotape, the viewing of which qualifies the attorney for MCLE self-study credits with the California State Bar.

Local Bar Associations may also provide training specific to criminal law. Typically, this type of training is provided only by the large bar associations, for example, the Los Angeles County Bar Association, or the Santa Clara County Bar Association.

Public Defender Offices typically present some level of in-house training. The quantity of such training is often governed by the size of the office, with larger offices often providing more substantial training. Public defender offices also afford the opportunity for training through the assignment of less experienced lawyers to work with more experienced lawyers, or formal mentoring programs. The given, however, is that through whatever means, a chief defender must assure that lawyers are adequately trained to perform their assignments in a competent manner. Well over 50 percent of the 34 county agency public defender offices have no particular staff attorney assigned to the task of developing on-going continuing legal education programs “in house”, and thus the role of the CPDA in providing training throughout the state is not an additional resource for those local defender offices, it is the only training resource they have for continuing legal education of their staff attorneys.

Accessibility of Training Opportunities

While there are perhaps several dozen continuing legal education programs available each year held throughout the state by the noted providers, the accessibility has presented a serious problem for those who are in need of those resources. The sheer size of California makes it difficult if not impossible for attorneys to attend programs held at opposite ends of the state. Defenders and defender offices do not have the financial resources to enable their staff to travel and attend such programs. The solution is for the service providers to provide similar continuing legal education programs at a variety of locations during the year. The problem is that the financial resources are not available to meet the need.

Training For Public Defenders By The California Public Defenders Association

Since 1983, the state has contracted with the California District Attorneys Association (CDAA) and California Public Defenders Association (CPDA) to provide on-site continuing legal education. Each year CPDA presents roughly eight such programs with that state funding assistance. With a total of well over 2,500 deputy public defenders, the prospect of eight training programs being adequate in meeting the in

service training for those defenders is out of the question. Additionally, for well over a decade, the state training grants to CDAA and CPDA have remained at the same funding level. Given the continuing rise in the cost of everything related to the production of continuing legal education programs, the level of services and resources made available to those local deputy district attorneys and deputy public defenders has actually gone down. In 1991 the CPDA was able to provide 13 on-site training programs with state training funds, whereas today that number has dropped to eight such programs, and even those programs are only possible as a result of the allocation of the organization's own corporate resources to fill in the gaps in funding.

Well over 60 percent of the post-program evaluation sheets collected by the CPDA indicate that the attendees are provided either little or no training by their employer offices – public defender offices. Defender offices also lack adequate funding needed to purchase the audio/visual and publications made available following each training program provided.

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While there are several dozen continuing legal education programs available each year held throughout the state, the accessibility has presented a serious problem for those who are in need of those resources. The sheer size of California makes it difficult, if not impossible, for attorneys to attend programs held at opposite ends of the state. Defenders and defender offices do not have the financial resources to pay for their staff to travel and attend such programs. The solution is for the service providers to provide similar continuing legal education programs at a variety of locations during the year. The problem is that the financial resources are not available to meet the need.

Training for new Deputy Public Defenders

Each year since 1971 the CPDA has developed and produced a “Basic Trial Skills Institute” for newly hired county deputy public defenders. Sometimes referred to as “Defender Camp,” this program, held in San Diego at the University of San Diego each July, provides an entire week of lectures, demonstrations, and performance analysis workshops for new defense attorneys. Approximately 150 newly hired defenders attend the program each year. The CPDA enlists the volunteer assistance of, on average; over 50 highly experienced criminal defense attorneys from throughout the state to act as mentors, faculty members, and lecturers at the week-long program. This is a significant undertaking each year and mobilizes volunteer resources of a substantial nature. The attorneys typically qualify for over 22 hours of State Bar approved MCLE credits by the end of the course.

In past years, it was the practice of the CPDA to provide full “scholarships” to the newly hired deputy public defenders. This enabled those new hires to attend the program free of charge. With few exceptions, the attendee's tuition, room and board in the USD dormitories, and their travel expenses were reimbursed. As a result of the increased costs associated with conducting the program, the ability of the organization to reimburse those

expenses and waive the tuition fees have been eliminated. Local defender offices do not have the resources to fill in that gap, and we are at the time of this writing watching carefully to determine the repercussions on attendance at the program as a result of the hard reality of inadequate funding for this type of training program. For over 30 years local defender offices have relied upon this particular program for the training of their newly hired defense attorneys, and for the first time the CPDA is in the midst of having to curtail its level of assistance in ensuring that those with a need to access those resources can in fact partake of them.

Legislation That Might Address The Training Resources Shortfall

The California District Attorneys Association and the California Public Defenders Association are aware of a legislative measure, making its way through the California Assembly and Senate this year that will address to a large extent this shortfall in funding for training and continuing legal education. The bill is part of a larger measure addressing the need for child abuse recovery centers and other victim assistance grants needed throughout the state (SB 153 Runner). The legislative measure has a good chance of getting to the Governor this year, but it is unknown what action the Governor will take on the bill.

Joint or Combined Training of Prosecutors and Defense Lawyers

The nature of the adversarial process in the criminal prosecution and defense system makes it such that there are few if any areas where joint programs can be held. It has been the experience of our training coordinators that lecturers at continuing legal education programs prefer developing their topics based on their own personal knowledge and skills acquired over a career as a defense attorney, and as such, the feedback from lecturers at programs is that they feel they are more effective if they can gear their talk in the same adversarial tone and content that actually exists in the criminal justice system.

It might be possible, and even valuable, for an organization such as CEB to host, produce, and disseminate a joint presentation on the ethical responsibilities of prosecutors and defense attorneys.

Response to Questions 9 and 10

Question 9: Should the following Recommendations for Improving the California Criminal Justice System in the Wake of the Ramparts Scandal, compiled in 2003 by the Los Angeles County Bar Association Task Force on the State Justice System, be implemented on a statewide basis?

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.

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

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.

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.

Question 10: Should the following Recommendations for Improving the California Criminal Justice System in the Wake of the Ramparts Scandal, compiled in 2003 by the Los Angeles County Bar Association Task Force on the State Justice System, be implemented on a statewide basis?

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

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

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

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.

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.

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.

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 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 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.

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.

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.

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.

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

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.

In 1963, the United States Supreme Court decided *Brady v. Maryland* (373 U.S. 83), a landmark case that held that a criminal defendant's due process rights are violated by a prosecutor's failure to turn over evidence that is favorable and material to guilt or punishment. Subsequent decisions have explained that *Brady* material includes evidence that impeaches a prosecution witness, that tends to exonerate a defendant, or that might mitigate punishment. In order to fulfill its Constitutional obligation, the prosecution is *required* to seek, obtain, and disclose *Brady* evidence to the defense in a timely manner.

In 1974, the California Supreme Court decided *Pitchess v. Superior Court* (11 Cal.3d 531), another landmark case. The Supreme Court determined that fundamental fairness and an overriding interest in providing defendants with a fair trial mandated that criminal defendants be afforded the ability to obtain relevant information from peace officer personnel files. With this case, which did not in any manner rely upon *Brady*, the Supreme Court famously created the *Pitchess* motion. This process was later codified by the California Legislature.

The Los Angeles County Bar Task Force recognized that *Brady* material may exist in police personnel files. A citizen complaint that an officer was dishonest might be used to impeach the officer at trial. A defendant charged with resisting arrest or battery might seek access to citizen complaints of excessive force in order to bolster his claim that it was the police who used unreasonable and unlawful force.

The first recognition must be that police personnel files may contain *Brady* material. Although this would seem to be self-evident, and surely clear from the comments of the Los Angeles County Bar Association Task Force, it is not so clear that prosecutors concur. If they did concur, then they would of necessity have a Constitutional obligation to access those files in order to obtain and disclose the *Brady* information. The fact they do not do so is very telling. Prosecutors do *not* want to know about police misconduct that might impact their cases and they refuse to access police files, claiming they do not have the ability to do so. Prosecutors have abandoned their *Brady* obligations and shifted them to the defense, often stating it is the defense burden to file a *Pitchess* discovery motion. Prosecutors in California have tried to create their own “get it yourself” exception to *Brady* - an exception not found in any United States Supreme Court decision.

The immediate problem, then, is how do prosecutors access police personnel files in order to seek, obtain, and disclose the *Brady* information contained therein? The short and honest answer is that prosecutors do not have to worry about *how* to obtain this information because they virtually never make any effort to do so.

There are two common methods by which the prosecutor may obtain information from a police officer’s personnel file. The first is to file a *Pitchess* motion, pursuant to Evidence Code sections 1043-1045. This requires a noticed motion and a showing of good cause for disclosure. It is not an exaggeration to state that prosecutors throughout the state virtually never file *Pitchess* motions.

The prosecutor may also simply ask the involved officers if they have anything in their personnel files that might be relevant to the criminal case. Although one would hope the officer would be forthcoming to the prosecutor, the fact is that the officer could simply decline to answer. At any rate, there is no evidence that prosecutors bother to ask.

A third option would seem to be apparent from the language of the second sentence of Penal Code section 832.7, subdivision (a), which states:

“Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall 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.”

The proposition has been advanced^{7/} that this latter sentence is an exception allowing the prosecution direct access to peace officer personnel files of officers who will be testifying or who participated in a given case in a material manner because the prosecution is, in fact, investigating its case, including its witnesses. The California Attorney General seems to have agreed in its 1983 opinion in 66 Ops. Atty Gen. 128. Despite this, prosecutors have not adopted this approach and, in truth, actively refuse to seek peace officer personnel information regardless of the manner in which it might be obtained.

The bottom line is that when it comes to *Brady* information found in peace officer personnel files, California's prosecutors have utterly failed to fulfill their Constitutional obligation.

Are there exceptions? The Los Angeles County District Attorney has implemented its own *Brady* Alert System with a database purporting to contain evidence of misconduct of peace officers and governmentally employed expert witnesses who are part of the prosecution team. That office has a *Brady* protocol requiring its deputies to peruse the system for *Brady* information. The District Attorney has specified criteria for investigation of complaints of police misconduct and inclusion in the system^{8/}.

It all sounds good. But it isn't. The Los Angeles County District Attorneys are mostly show, with little actual substance. The protocols represent a compromise for what was politically acceptable (the police hate the entire idea) instead of what was really needed to get the job done. For many reasons, the District Attorney's protocols are impractical and of minimal utility.

- The trigger for the District Attorney to ask the police to look in their files for *Brady* is set ridiculously high. The District Attorney *only* asks the police to look for *Brady* material in their files *if* the police report *on its face* shows that a law enforcement employee is a material witness and there may be *Brady* evidence. This means that the police report has to give District Attorney some reason to believe an officer is lying or committed other misconduct. In reality, this will virtually never occur.

- The defense may initiate a request that the District Attorney seek out *Brady* information. However, defense requests are always insufficient under the L.A. District Attorney's policy *unless* the defense provides the prosecutor with a declaration signed under penalty of perjury from a person with personal knowledge. This means the defense would have

^{7/} See, for example, "Client Alert Memorandum" from the Law Offices of Jones and Mayer at <http://www.jones-mayer.com/clientalerts/ca1403.html>

^{8/} The Los Angeles County District Attorney's *Brady* protocols are available at <http://DistrictAttorney.co.la.ca.us/topdocs.htm#brady>

to provide the District Attorney with a signed statement from either the defendant or a defense witness. The reality is that this practice violates the 5th Amendment and violates reciprocal discovery.

- *If* the District Attorney does decide to seek *Brady* info from police files, its protocol requires the trial Deputy District Attorney to file a *Pitchess* motion. The trial deputy is also required to seek an order restricting use and disclosure only to the specific case. The reality of this, however, is that the District Attorney *never* makes *Pitchess* motions. The District Attorney should be using Penal Code section 832.7 and the above referenced Attorney General's opinion to directly access personnel files to find *Brady* information. In addition, the District Attorney should absolutely *not* be seeking protective orders limiting use of the *Brady* material to the specific case. This allows the District Attorney to repeatedly hide its head in the sand and to claim that its knowledge of police misconduct only extends to the specific case, when in fact the District Attorney is on notice and now has a *Brady* obligation in any case in which the officer is material.

- Deputy District Attorneys are not required to conduct a *Brady* check until arraignment on an information. The prior policy (02-04) specified this check would be done at time of filing. The reality is that there is no valid reason to wait until after filing and after preliminary hearing to look for *Brady* information. This search should be done as early as possible.

- The Los Angeles District Attorney is using a post-conviction standard to determine what constitutes *Brady* material. The standard requires the District Attorney to assess if there is a reasonable probability that the result of a proceeding would have been different if the material had been disclosed. The appropriate standard pre-conviction is that found in *People v. Coddington* (2000) 23 Cal.4th 529, 598 (overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046): if it helps the defense or hurts the prosecution it must be disclosed. The perception is that the District Attorney's standard is unreachable and is being used to keep information out of the *Brady* Alert System and withheld from the defense.

- The District Attorney's standard for inclusion in the *Brady* Alert System is "clear and convincing evidence" which is too high. For example, a police officer could have a sustained Board of Rights or Civil Service Commission complaint and have received discipline or even be fired and this might not be in the *Brady* Alert System because these administrative tribunals uses the lower preponderance of the evidence standard. A police officer could be referred to the District Attorney for a criminal filing which is ultimately declined, however it is unlikely this information would be in the District Attorney's *Brady* system unless the allegations rose to the level of clear and convincing evidence. In addition, complaints found to be unsustainable or unfounded by the *police* would not be in the system. The reality is that the standard is set so high that virtually nothing will ever be inputted into the *Brady* Alert System.

- This in return leads to prosecutors claiming there is no *Brady* material because they have checked the *Brady* Alert System and it has nothing. The reality is that this claim is either false or seriously misleading because: 1) the system appears to have very little information in it and 2) the standard for inclusion is too high. This type of blanket statement seriously misleads the court and defense counsel and causes the public to lose faith in the fairness of the judicial

system, and consequently juries as well..

There undoubtedly is *some* valuable information in the District Attorney's *Brady* alert system. However, in totality, the District Attorney's system and its protocols are widely derided as the spawn of political expedience. The District Attorney gets to look like it is doing something when, in reality, it is not. It most certainly does not help that the District Attorney refuses to even disclose how many officers it has in its system; this alone makes the District Attorney's system suspect.

For the most part, the production of *Brady* information by prosecutors seems to be very hit- and-miss, highly dependent upon the individual assigned to prosecute the case. Prosecutors, by and large, do not gather *Brady* information in a systematic manner. They do not utilize databases, although they seem to be adept at collecting negative information about defense expert witnesses and investigators. Law enforcement, as a matter of routine, does not provide *Brady* information about its officers to prosecutors or defenders.

The said truth is that it is very difficult to trust either law enforcement or the prosecution as an institutional entity to be honest and forthcoming when it comes to *Brady*. Throughout the state, the refrain is the same: *Brady* discovery from the prosecution is very hit and miss, mostly depending upon the integrity of the specific prosecutor who acts within the constraints set forth by his or her office. Unfortunately, another common refrain is that prosecutors often would not know *Brady* discovery if it hit them in the face. It is because of this that the very first reform which must be implemented, a reform not suggested by the Rampart Task Force, is that prosecutors must undergo specific, detailed training explaining *Brady* and *Pitchess* and how those obligations dovetail. Hand-in-hand with training is the understanding and expectation that prosecutors who do not appropriately disclose *Brady* material will be subject to State Bar discipline. In all criminal cases, prosecutors must 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. (Rampart Task Force Recommendation 2.4.)

Prosecutors, not the police, must be tasked with collecting *Brady* material in a systematic fashion from all appropriate sources and must establish appropriate protocols. This includes protocols to make sure *Brady* and *Pitchess* are gathered in a systematic manner and timely disclosed. No defendant should ever enter a guilty plea until the prosecutor certifies all available *Brady* information has been obtained and disclosed. (Rampart Task Force Recommendations 2.1, 2.3.) Prosecutors must utilize Penal Code section 832.7, subdivision (a) and 66 Ops. Atty Gen. 128 to directly access police personnel information. If not, then relevant laws must be amended to give prosecutors direct access to police personnel files for *Brady* purposes. The police, and any other agency holding police personnel information, must establish procedures to gather *Brady* material and provide it to the prosecution in a timely manner. (Rampart Task Force Recommendation 2.1.)

The prosecution, not the police, must assume the responsibility of collecting all *Brady* information and *Pitchess* information in a centralized database or databases under its control. (Rampart Task Force Recommendation 2.2.) The prosecution's *Brady* database must include information about police and other governmental witnesses (not civilian crime victims or

witnesses) from all available sources: police personnel files, administrative tribunals such as Civil Service Commissions and Boards of Rights, judicial referral, lawsuits, the defense bar, the public, and other public sources. (Rampart Task Force Recommendations 6.2, 6.3.) The prosecution must obtain the criminal offender record information of all its law enforcement and government witnesses. The standard for inclusion should be reasonable suspicion - not probable cause and most definitely not "clear and convincing evidence." (Rampart Task Force Recommendation 6.1.) The prosecution's databases must be maintained with the utmost security and use of the data contained therein should be limited only to criminal cases in which it is relevant - which means *any* criminal case in which it is relevant, not only the case for which it was disclosed. (Rampart Task Force Recommendations 2.8.)

The *Brady* procedures suggested herein will minimize the need for either the prosecution or the defense to utilize the *Pitchess* procedure, which will end up mostly being utilized in civil matters and in the rare criminal case. That being said, the *Pitchess* procedures also need additional modification. In response to the initial *Pitchess* motion, *courts* should order (1) the disclosure of the statements of the complainant and all witnesses. (Rampart Task Force Recommendation 2.5.), as well as (2) all evidence obtained during the course of the investigation(s) and subsequent hearing(s), if any, triggered by the complaint, including but not limited to tapes, videos, re-enactments, and any real-evidence obtained. Transcripts of any subsequent hearings triggered by the complaint, as well as the discipline imposed, if any, should be disclosed.

Although the Rampart Task Force (section 2.7) recommends that prosecutors be present for the *in camera* inspection of police files and should obtain the discovery given to the defense, this recommendation should only be implemented if the *Brady* reforms suggested above are adopted. If they are not, then the prosecutor has no right to defense discovery and is not a party to third-party discovery. The Rampart Task Force's suggestion (section 2.6) that *in camera* inspections should be scheduled for a date after the *Pitchess* hearing should not be implemented unless the time frame for *Pitchess* discovery is reduced to 10 calendar days. The *in camera* hearing must be scheduled to occur not more than 5 calendar days after the hearing. These short time frames are necessary to avoid prejudicing in-custody defendants, particularly those in misdemeanor cases. *Pitchess* information should be retained by law enforcement for at least 10 years, preferably for at least 5 years beyond the officer's separation from the department. (Rampart Task Force Recommendation 7.2.) In addition, law enforcement should be encouraged to computerize its personnel records and to make those databases compatible with systems operated by the courts, public defenders, and prosecutors. (Rampart Task Force Recommendations 7.1, 7.3.) Finally, *Pitchess* protective orders should not limit use to the specific case but instead should allow use in any case in which it is relevant as determined by the trial judge. (Rampart Task Force Recommendation 2.8.)

The Rampart Task Force issued its recommendations in April 2003 after 21 months of diligent investigation into the problems of California's criminal justice system. When it comes to *Brady* and *Pitchess* discovery, for the most part the recommendations have been ignored. Law enforcement and its powerful unions have frustrated attempts to introduce reform. District attorneys, afraid of losing cases, have stalled and proceeded as if the Rampart Task Force never existed.

It is time to implement these reforms.