

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

SURVEY OF *BRADY/PITCHESS*

CPDA emailed a comprehensive survey dealing with *Pitchess* and *Brady* issues to Public Defender Offices in California.

Responses were received from 15 counties.

The bottom line for the Defenders who responded is that *Brady* discovery is a real crap shoot, most often dependent upon the whim of the individual prosecutor. This was the situation even if the District Attorney's office had a *Brady* policy, whether formal or informal.

Information about police officers contained in their personnel files is not considered *Brady* information unless it is extremely serious misconduct.

District Attorneys do not provide *Brady* information in a timely manner.

With rare exception, prosecutors are not fulfilling their *Brady* obligation, particularly as it involves police officer misconduct.

**QUESTIONS AND ANSWERS SUMMARIZED**

1) Does the District Attorney's Office in your county have a *Brady* discovery policy, protocol, or practice?

2) Is it formal, written or informal?

6 counties have a *Brady* policy.

3 counties have informal policies, 3 have formal policies.

9 counties have no known policy.

The counties with formal written policies tended to be the large population counties.

3) Summary of the protocol:

One county has a written policy that, as far as the defense can tell, is either not followed or is implemented poorly.

One county will comply with its *Brady* obligation and err on the side of disclosure.

Two counties have a stipulated discovery agreement between the prosecution and the defense.

One county's *Brady* practice varies widely between Deputy District Attorneys.

One county has a policy however its application is hit and miss with miss the more accurate descriptor.

One county would not provide a copy of their *Brady* policy, stating it was confidential.

3a) Does your District Attorney consider evidence of police officer misconduct to be *Brady* discovery?

In 9 Counties, officer misconduct is not considered *Brady*.

In 2 counties, officer misconduct is considered *Brady* most of the time if the misconduct is more than just *Pitchess* and is serious.

In 4 counties, officer misconduct is sometimes considered *Brady* if the misconduct is more than just *Pitchess* and is serious.

3b) Briefly describe how your District Attorney handles evidence of police officer misconduct in relation to *Brady*

1 county does nothing to look for police *Brady* unless the defense advises it exists.

Another county's district attorney may use its internal investigative unit to investigate officers and will disclose some info.

2 counties may send letters to the defense.

1 county's *Brady* system is ineffective and is not believed to contain much information.

In 1 county, if the deputy district attorney has evidence that the officer is currently pending disciplinary proceedings, the defense will be advised, most often orally. They will not seek out such information but when it is brought to their attention the defense will be informally notified. The interpretation of what is significant to require disclosure is often left up to the individual prosecutor.

4) Does your District Attorney have a protocol in place to gather *Brady* material in a systematic fashion from all appropriate sources?

No County has such a protocol or at least none is known to exist.

5) Do the law enforcement agencies in your county have protocols or procedures so that *Brady* material in their possession is gathered and provided to the District Attorney in a timely manner?

No law enforcement agency is known to have such a protocol.

6) Does your District Attorney compile *Brady* information into a central database or some other central repository?

Only 2 counties are known to have some sort of repository for *Brady* information.

6a) If your DA has such a database or repository, does it contain *Brady* information on officers and other professional witnesses, such as experts?

1 county keeps a database on DEFENSE expert witnesses.

1 county keeps this information.

Another county purports to database this information.

6b) What is the standard for inclusion of officer/professional witness in this database or repository?

In one county the standard is clear and convincing evidence as contained in their published policy.

1 county reports the standard would be absolute certainty the officer committed misconduct.

6c) If the District Attorney keeps officer/professional witness information in its database or repository, are prosecutors required to check it for pertinent information in every case?

Only in 1 county does the protocol require checking in every case pursuant to their published policy.

6d) What are the sources of the officer/professional witness information maintained in the District Attorney's database or repository?

**Prosecution Sources**, such as misconduct reports from individual prosecutors?

**Defense Sources**, such as defense attorneys, defendants and witnesses

**Judicial Sources**, such as reports of misconduct

**Public Sources**, such as law suits, newspaper articles

2 counties might use all sources.

1 county might use all sources if deemed accurate.

7) Does your District Attorney provide *Brady* discovery in a timely manner?

Only 1 county answered yes, but also stated that sometimes it is provided late.

10 counties answered no or not usually.

In 1 county it is hit or miss.

3 counties answered sometimes.

7a) Does your District Attorney provide *Brady* material tending to establish factual innocence or an affirmative defense at the early stages of the proceedings, such as early disposition court, prior to preliminary hearing, etc.

Only 1 county reported that *Brady* was provided early and that depended upon the individual prosecutor and the type of information.

8) Do your District Attorneys provide a declaration or otherwise affirm that they have reviewed all appropriate sources and that all *Brady* discovery has been reviewed and disclosed?

Every county answered no.

9) When the District Attorney discloses *Brady* material, does he/she ask the court for a protective order limiting use of the material to the specific case in which it was disclosed?  
9a) If the District Attorney seeks such a protective order, how often does the court order it?

Only one county answered yes, occasionally to this question.

10) In general, how would you say that the District Attorney in your county handles *Brady*?

Every county answered this question by saying *Brady* discovery is a real crap shoot depending upon the individual DA. One county noted that prosecutors would not know *Brady* if it hit them in the face. Another county noted that only in high profile cases the obligation is generally met.

### ***Brady* Discovery - City Attorney/Prosecutor**

1) In some counties, local misdemeanors may be prosecuted by a City Attorney or City Prosecutor. Does the City Attorney/Prosecutor for your local city have a *Brady* discovery policy, protocol, or practice? (If your county has more than one city prosecuting misdemeanors, select either the largest city or the city that has the most active misdemeanor prosecution practice)

Only 3 counties indicated that cities prosecuted misdemeanors.

2) Is it a formal, written policy, protocol, or practice or is it informal?

1 county said the City Attorney/Prosecutor's policy is formal but they have never seen it. Another county reported that the City Attorney/Prosecutor has no known policy other than to leave it up to the individual prosecutor.

3) Does your City Attorney/Prosecutor consider evidence of police officer misconduct to be *Brady* discovery?

In 1 county, the City Attorney/Prosecutor considers police misconduct *Brady* if the misconduct is more than just *Pitchess* and is very serious.

In another county, the City Attorney/Prosecutor does not believe the police ever commit misconduct.

In another county, city prosecutors rarely provide discovery but, in any event, do not consider police misconduct to be *Brady* material.

3a) Briefly describe how your City Attorney/Prosecutor handles evidence of police officer misconduct in relation to *Brady* discovery

1 city attorney's discovery practices are sloppy and inconsistent.

Another City Attorney/Prosecutor's office is seriously lacking prosecutorial ethics when it comes to *Brady* discovery of police misconduct.

The city prosecutors in another county rarely provide discovery.

4) Does your City Attorney/Prosecutor have a protocol in place to gather *Brady* material in a systematic fashion from all appropriate sources?

In 1 county it is not believed that the City Attorney/Prosecutor does anything at all to gather *Brady* material, systematic or not.

Another county did not know.

5) Do the law enforcement agencies in your county have protocols or procedures so that *Brady* material in their possession is gathered and provided to the City Attorney/Prosecutor in a timely manner?

No police agency is believed to have any such protocol..

6) Does your City Attorney/Prosecutor compile *Brady* information into a central database or some other central repository available to prosecutors?

6a) If your City Attorney/Prosecutor has such a database or repository, does it contain *Brady* information on officers and other professional witnesses, such as experts?

6b) What is the standard for inclusion of officer/professional witness in this database or repository?

6c) If the City Attorney/Prosecutor keeps officer/professional witness information in its database or repository, are prosecutors required to check it for pertinent information in every case?

6d) What are the sources of the officer/professional witness information maintained in the City Attorney/Prosecutor database or repository?

No City Attorney/Prosecutor is believed to compile *Brady* material.

7) Does your City Attorney/Prosecutor provide *Brady* discovery in a timely manner?

7a) Does your City Attorney/Prosecutor provide *Brady* material tending to establish factual innocence or an affirmative defense at the early stages of the proceedings, such as early disposition court, prior to preliminary hearing, etc.

In 1 county, *Brady* is sometimes provided in a timely manner.

In 1 county, *Brady* discovery is not provided in a timely manner at all, if it is ever provided.

In another county, city prosecutors do not provide *Brady* early.

8) Does your City Attorney/Prosecutor provide a declaration or otherwise affirm that they have reviewed all appropriate sources and that all *Brady* discovery has been reviewed and disclosed?

No for all reporting counties.

9) When the City Attorney/Prosecutor discloses *Brady* material, does he/she ask the court for a protective order limiting use of the material to the specific case in which it was disclosed?

9a) If the City Attorney/Prosecutor seeks a protective order, how often does the court order it?

1 county reports that the City Prosecutor occasionally asks for a protective order and it is granted some of the time.

1 county reports that the city prosecutors do not ask for protective orders.

10) In general, would you say that the City Attorney/Prosecutor in your county:

Three counties reported that the City Attorneys/Prosecutors would not know *Brady* if it hit the prosecutor in the face.

### **Pitchess Discovery - District Attorney**

1) Does the District Attorney in your county make Pitchess motions to obtain police officer personnel records?

1a) How often does the District Attorney make Pitchess motions?

District Attorneys in 14 counties never make *Pitchess* motions.

District Attorneys in 1 county virtually never make *Pitchess* motions, although they have been known to try to join in defense *Pitchess* motions.

2) Does the District Attorney collect Pitchess information in a central database under its control?

2a) Is this database available to trial prosecutors?

14 counties reported there is no such central database or that they did not know if there is such a database.

1 county reported it is unlikely that any *Pitchess* information ever makes it in the DA database but this cannot be stated with certainty.

### **Pitchess Discovery - City Attorney/Prosecutor**

1) Does the City Attorney/Prosecutor in your county make *Pitchess* motions to obtain police officer personnel records?

1a) How often does the City Attorney/Prosecutor make *Pitchess* motions?

All counties reported that their City Attorney/Prosecutor never makes *Pitchess* motions.

2) Does the City Attorney/Prosecutor collect *Pitchess* information in a central database under its control?

2a) Is this database available to trial prosecutors?

Two counties reported that their City Attorney/Prosecutors are not known to database *Pitchess*.

### **Pitchess Discovery - In General**

1) Does the trial court order the production of the statements of *Pitchess* witnesses in response to the initial *Pitchess* motion?

2 counties report that witness statements are occasionally released in response to the first *Pitchess* motion.

The remainder of counties reported that judges never release statements at the first motion.

2) When does the court hold the in camera hearing?

14 counties report the in camera is held the same day.

1 county reported that it is often held later.

3) What kind of protective order does the court issue when it grants *Pitchess* discovery?

In 1 county, the courts issue whatever protective order is requested by Law Enforcement.

In 2 counties the courts generally issue whatever the police agency requests.

In 1 county, it is generally an Evidence Code section 1045, subdivision (e), order, worded individually by the judge.

In 1 county, it is an Evidence Code section 1045, subdivision (e), order.

4) Do law enforcement witnesses disclose (whether upon prosecution request or without a request) their personal *Pitchess* information to the prosecution after a defense *Pitchess* motion is granted?

This does not happen in any county.