

**OFFICE OF THE DISTRICT ATTORNEY  
LOS ANGELES COUNTY**

Response to California Commission on the Fair Administration of Justice  
Focus Questions for Hearing on Professional Responsibility Issues

July 11, 2007

The Office of the District Attorney of Los Angeles County remains committed to the fair and ethical prosecution of criminal cases within the State of California and in that vein hereby responds to the focus questions posed by the California Commission on the Fair Administration of Justice as follows:

## **1. Amendments to California Rules of Professional Conduct**

**Focus Question 1** suggests that amendments to the California Rules of Professional Conduct should be enacted, providing "greater specificity in defining the ethical standards" to guide prosecutors and defense attorneys in the handling of criminal cases.

**The California Rules of Professional Conduct sufficiently provide express and specific rules that effectively guide the ethical conduct of prosecutors and defense attorneys. Ample secondary sources and case law are also readily available in assisting attorneys in their ethical duties. Additional rules are unnecessary.**

Numerous provisions of the California Rules of Professional Conduct apply to prosecutors and defense lawyers. The primary sources of legal ethics for California prosecutors and defense lawyers are:

State Bar Act: Business and Professions Code sections 6000, et seq. See specifically Business and Professions Code Sections 6068, 6106, and 6086.7.

California Rules of Professional Conduct [CRPC] specifically applicable to California prosecutors:

- 1-100 - Rules of Professional Conduct, In General
- 2-100 - Communication with Represented Party
- 3-110 - Failing to Act Competently
- 3-210 - Advising the Violation of Law
- 3-310 - Avoiding Representation of Adverse Interests
- 3-320 - Relationship with Other Party's Lawyer
- 3-500 - Communication
- 3-510 - Communication of Settlement Offer
- 3-600 - Organization as Client
- 5-100 - Threatening Criminal, Administrative or Disciplinary Charges
- 5-110 - Performing the Duty of Member in Government Service

- 5-120 - Trial Publicity
- 5-200 - Trial Conduct
- 5-210 - Member as Witness
- 5-220 - Suppression of Evidence
- 5-300 - Contact with Officials
- 5-310 - Prohibited Contact with Witness
- 5-320 - Contact with Jurors

Secondary sources on legal ethics include:

- A. California Compendium on Professional Responsibility published by the State Bar, Professionalism: A Sourcebook of Ethics and Civil Liability Principles for Prosecutors published by the California District Attorney's Association, Doing Justice, published by the National District Attorneys Association, ABA Model Rules and ABA Model Code, ABA/BNA Lawyers' Manual on Professional Conduct.
- B. Revision of the California Rules of Professional Conduct, State Bar of California Website: <<http://www.calbar.ca.gov>>

In addition, the Professional Responsibility Unit of the Los Angeles County District Attorney's office, the California District Attorney's Association, and the State Bar all operate "hotlines" for questions from attorneys concerning ethics issues.

There is no dearth of ethics rules, cases, treatises or help hotlines. Ethics cases like all other cases turn on their facts, and in our adversary system, the law of ethics develops through the application of these rules to specific factual situations. For example, in a recent ethics case, *In re Halsey*, a former prosecutor (hereafter referred to as prosecutor) was suspended for, *inter alia*, intentional suppression of evidence, seeking to mislead a judge, failure to comply with California law, failure to avoid the representation of adverse interests, and misrepresentations.<sup>1</sup> The prosecutor's suspension

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1. *In re Brooke Powell Halsey, Jr*, State Bar Court Case No. 02-O-10195 (Ca. S. Ct. December 13, 2006). The Supreme Court of California issued only a one page order disciplining Halsey. In that Order, however, it referred to the decision of Hearing Department of the State Bar Court issued on August 1, 2006. That decision contains the findings of fact and conclusions of law leading to the Supreme Court's Order. See *In the Matter of Brooke P. Halsey, Jr*, State Bar Court Case No. 02-O-10195-PEM (State Bar Ct. of California August 1, 2006).

Although not relevant here, the State Bar Court also found that Halsey had acted improperly in dismissing a case to help someone he had

was stayed and he was placed on probation for five years with conditions, including an actual suspension of three years from the practice of law. The former prosecutor did not appeal his suspension to the California Supreme Court.<sup>2</sup>

In reaching its decision, the State Bar Court referenced numerous rules of professional conduct as well as sections of the Business and Professions Code as summarized below:

#### Summary of the State Bar Court's Findings

The State Bar Court<sup>3</sup> found a violation of California Business and Professions Code section 6068, subdivision (a), in that the prosecutor violated California Penal Code section 1054.1, subdivisions (e) and (f) by failing to comply with the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. California Business and Professions Code section 6068, subdivision (a) provides that an attorney has a duty to support the Constitution and the laws of the United States and those of the state of California. California Penal Code section 1054.1 (prosecuting attorney; disclosure materials to defendant) requires the disclosure to the defendant of all of the following material information if it is in the possession of the prosecuting attorney or if the prosecutor knows it to be in the possession of its investigating agencies: (e) any exculpatory evidence, [and] (f) relevant written or recorded statements of witnesses or reports of the statements of

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known in college. *Id.*

2. *In re Brooke Powell Halsey, Jr*, State Bar Court Case No. 02-O-10195 (Ca. S. Ct. December 13, 2006).

3. California's disciplinary process differs in a couple of significant ways from that in place in most other jurisdictions. The State Bar of California investigates complaints against attorneys. If it is determined that an attorney's actions involve probable misconduct, the Bar's prosecutors file formal charges in the State Bar Court. The State Bar Court, which consists of independent professional judges, hears the charges and, if it finds that the attorney committed professional misconduct or has been convicted of serious crimes, it may either issue a reprimand or, if a more serious punishment is determined to be necessary, recommend a punishment to the California Supreme Court. It is also interesting to note that, in addition to addressing allegations of violation of the state's rules of professional conduct, the State Bar Court and Supreme Court also address allegations that attorneys have violated the State Bar Act.

witnesses the prosecutor intends to call at the trial, including any reports and statements of experts made in connection with the case.<sup>4</sup>

The State Bar Court found that Halsey violated his duty, under both the State Bar Act and the Rules of Professional Conduct which require attorneys to comply with their constitutional and legal obligations to provide discovery.

Numerous state laws and ethics rules are referenced by the State Bar Court in this opinion. Additional rules are not necessary.

## **2. Reporting of findings of misconduct notwithstanding the final ruling on the judgment**

**Focus Question 2** asks whether Business and Professions Code § 6086.7 should be amended to require a court to notify the State Bar whenever a finding is made that an attorney engaged in misconduct, incompetent representation or willful misrepresentation, regardless of whether such finding results in modification or reversal of a judgment?

**Such a requirement is unnecessary because nothing in current law prohibits making such a report.**

Under Business and Professions Code section 6086.7, subdivision (a) (2), a court must notify the State Bar, "Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney." This reporting requirement is supplemented by the requirement found in Business and Professions Code section 6068, subdivision (o) (7), mandating that attorneys report themselves to the State Bar whenever there has been a, "Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney."

The question presented is whether the judicial reporting standard should be modified so that a judge would be required to report attorney malfeasance in the absence of a reversal. This change is not necessary as nothing in current law prohibits or inhibits a judge, another attorney, or any one else from reporting misconduct by an attorney at any time to the State Bar. (2006 Report on the State Bar of California Discipline System (hereafter Report) (Apr. 2007) The State Bar of California, p. 2.) In fact, in 2006, the State Bar opened an inquiry into 11,647 cases as a result of non-mandated complaints received from "a client, *the court*, opposing counsel

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4. *Id.*

or other member of the public..." (*Ibid.*, italics added.) The State Bar also opened its own inquiries based on news reports, court decisions "or any other information obtained or received by the State Bar." (*Ibid.*)

The State Bar, for record keeping purposes, segregates the non-mandated inquiries from those where a party is mandated to report attorney misconduct under a statutory reporting requirement such as section 6086.7. (Report, pp. 4-5.) In 2006, the State Bar received 134 mandated reports of misconduct from courts. (*Id.* at p. 5.) Of the court mandated reports, however, the statistics do not differentiate between those triggered by section 6086.7, subdivision (a) (2), the subject under review, and those from a final contempt order or sanctions in excess of \$1,000 or imposition of a civil penalty under Family Code section 8620. (§ 6086.7, subd. (a).) Nonetheless, the State Bar's statistics show that attorney misconduct is being reported.

While present procedures allow a bench officer to report the type of conduct at issue, it should be noted that there are other reasons why the present statute should not be altered. Currently a court is not required to report misconduct unless it results in a reversal. (§6086.7, subd. (a) (2).) The proposed change would require a report when there had been a "finding" of some misconduct. The proposal does not define the term "finding", but likely is using the common legal definition of "A decision upon a question of fact reached as a result of a judicial examination or investigation by a court, jury, referee, coroner, etc." (Black's Law Dict. 5th Ed. 1979) p. 569, col. 1.) Apparently, the reason for the change would be to increase the reporting of alleged attorney misconduct. (No documentation has been presented to support, even anecdotally, that criminal justice attorney misconduct is underreported to the State Bar.)

The goal of increased reporting, however, needs to be viewed in its proper context. First, approximately 82% of all State Bar members' fees are used to support the discipline system. (Report, p. 1, see *In re Atty. Discipline Sys.* (1998) 19 Cal.4th 582, 611 [noting that present discipline system was set up to replace the previous volunteer one which was overloaded with backlogged discipline cases].) The Bar receives a large number of telephone calls each year related to discipline issues, e.g., 72,916 in 2006. (*Id.* at p. 2.) Those inquiries ultimately resulted in 11,647 written complaints in 2006, which includes *non-mandated reports* from judges. (*Ibid.*) Of those written complaints, only 3,151 were deemed worthy of further investigation. (*Id.* at pp. 2-3.) Those selected for further investigation reflect complaints in which the State Bar believed a member *may* have violated the Rules of Professional Conduct and/or the State Bar Act. (*Id.* at p. 3.)

The State Bar Discipline report offers no explanation for the high rate of unsubstantiated complaints, but perhaps the problem is best illustrated by a recent Supreme Court decision, *In re Aguilar* (2004) 34 Cal.4th 386, 388. In *Aguilar*, the Supreme Court considered a contempt citation for two attorneys who failed to appear for oral argument in that court. Despite the seeming ease of the inquiry (the attorneys either had or did not have a valid excuse for failing to appear), the Supreme Court after conducting an order to show cause hearing, including written filings by the parties and oral argument, referred the matter to the State Bar Court "for further investigation, an evidentiary hearing or hearings, and a report...on specified questions." (*Id.* at pp. 388-389.) After all of these proceedings, the Supreme Court found the two attorneys in contempt for failing to appear at the oral argument. (*Id.* at p. 389.)

Both *Aguilar* and the State Bar's high initial complaint closure rate demonstrate that accusations of misconduct require a full and complete examination. This is why the present standard, mandating a report only where a decision has been rendered by an appellate court on a fully briefed and complete record, assists the State Bar in preventing the use its of limited resources in reviewing and dismissing meritless cases. The present procedure also acknowledges the reality that the Constitution, as the Supreme Court has observed, guarantees a defendant a fair, but not a perfect trial. (*United States v. Hasting* (1983) 461 U.S.499, 508-509 [76 L.Ed.2d 96, 103 S.Ct. 1974].)

### **3. Procedures for discipline of deputy district attorneys and public defenders**

#### **Special Masters and the Civil Service Commission**

**Focus Question 3**, in a two-part question, first asks if procedures for discipline within the offices of the District Attorney and Public Defender "unreasonably limit or compromise" adherence to professional standards of conduct.

**Internal department procedures for discipline, include discipline for ethical violations. Consistent with an employee's right to due process, procedures for discipline do not inhibit this Department's ability to ensure that its prosecutors comply with their ethical obligations.**

**Focus Question 3** also queries whether a Special Master should be used by civil service commissions in disciplining public attorneys.

**Los Angeles County Civil Service Rules would allow for testimony by a Special Master as an expert in professional standards of conduct. Civil**

**Service rules would *not* allow such an expert to *counsel* the Commission, without violating the employee's right to due process.**

We presume that the question regarding discipline procedures seeks to determine if employee discipline procedures inhibit a public agency's ability to ensure that prosecutors comply with their ethical responsibilities. We conclude that they do not.

Deputy District Attorneys in Los Angeles County may be disciplined for "Unethical conduct in violation of the State Bar Act, California Business and Professions Code section 6600 et seq., ... the State Bar of California Rules of Professional Conduct, [and] California Rules of Court." (Los Angeles County District Attorney Personnel Policies Handbook (Mar. 2003) (hereafter Personnel), Ch. VIII-2.) This discipline may include a written warning, a reprimand, suspension without pay for up to 30 days, or reduction in grade or discharge. (*Id.* at pp. VIII-2 - VIII-3.)

A deputy district attorney disciplined with a penalty of something less than a 5-day suspension may challenge that action through an internal departmental grievance procedure. (Personnel, VIII-2.) Discipline involving a 5-day or more suspension is appealable as a matter of right to the Los Angeles County Civil Service Commission. (*Ibid.*, see Los Angeles County Charter, § 35.) Before the Commission, an employee has a right to a hearing with a guaranteed right to cross-examine any witness, to subpoena witnesses in his or her behalf and to be represented either by counsel or a representative. (Los Angeles County Code, Title 5, Appendix 1, rule 4.07.)

As to the question presented, the District Attorney of Los Angeles County can discipline a prosecutor who fails to comply with his or her ethical responsibilities. However, we believe due process protections, as guaranteed by the County Code, are consistent with our legal system and the fair administration of justice. Therefore, such due process guarantees do not in any manner limit or compromise the employee discipline system nor do they inhibit this agency from insuring that prosecutors comply with their ethical responsibilities.

With regard to the appointment of a Special Master, we presume that this part of the question seeks to learn whether it would be beneficial, if expert witnesses were permitted to *counsel* the Civil Service Commission, as opposed to providing testimony. If the former, then the proposal is in direct conflict with Los Angeles County Civil Service rules which guarantee employees the right to both cross examine and impeach witnesses against them at a hearing into the appropriate level of discipline. (Los Angeles County Code, Title 5, Appendix 1, rule 4.07.)

By contrast, if the question only contemplates whether an expert on attorney professional standards might *testify* in support of an agency's recommendation to discipline an attorney, current rules permit such evidence. This is because under the Los Angeles County Code pertaining to Civil Service hearings, "Any relevant evidence shall be admitted if it is the sort of evidence which responsible persons are accustomed to rely [on] in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence or objection in civil actions." (Los Angeles County Code, Title 5, Appendix 1, rule 4.10 A.) Since expert evidence concerning professional standards would be relevant, it could be presented by the agency in support of its desire to discipline or discharge an employee. Of course, such testimony would be subject to cross-examination.

**4. Office policies and procedures implemented by the Los Angeles County District Attorney's Office and the need for legislative action**

**Focus Question 4** asks if existing policies of prosecutor's offices adequately ensure full compliance by its deputies with its discovery obligations or whether legislative or administrative action is needed.

**Every deputy of the Los Angeles County District Attorney's Office is able to fully comply with his or her Brady obligations by way of an established computerized database, managed by two full-time attorneys and a staff member. An individual's Brady obligation is well-established by case law; legislative changes to ensure compliance are unnecessary .**

The policies and procedures implemented by the Los Angeles County District Attorney's Office ensure full compliance with its discovery obligations pursuant to *Brady v. Maryland* (1963) 373 U.S. 83.

A database has been established documenting *Brady* material and each deputy in the office has access via his or her computer terminal to that information. Office policy requires that a check for a witness in the *Brady* database is to be conducted at arraignment on an information and again before any matter goes to trial. Any deputy must also report potential *Brady* information to the office's *Brady* Unit. These policies have been promulgated throughout the office via Special Directives and our Legal Policies Manual and newly hired deputy district attorneys are trained by members of the *Brady* Unit.

We believe that legislative or administrative changes to ensure a public office's *Brady* obligations are met are unnecessary and unwise. A

prosecutor's obligation to disclose favorable evidence under *Brady* is well-established. While an office may develop policies and procedures that aide a prosecutor in disclosing such information, it is ultimately an individual prosecutor's responsibility. The dissemination of *Brady* material beyond a particular case is also regulated pursuant to *Alford v. Superior Court* (2003) 29 Cal.4th 1033.

An office the size of the Los Angeles County District Attorney's Office needs, and has therefore established, a computerized database in order to meets its *Brady* obligations and ensure that each deputy has access to *Brady* material. The size of this office's staff also enables it to devote two full-time deputies and a full-time staff member to a *Brady* unit. This method for ensuring compliance with its *Brady* obligations however, is not a one-size fits all program. Offices in smaller counties throughout the state may not need, nor have the finances for, a full-time *Brady* unit or computer database. A much smaller file system may adequately serve their needs. A county with a mere handful of deputies, may very well be able to meet their *Brady* obligations by requiring its deputies to contact local law enforcement or a public agency to obtain necessary information. It is therefore impractical to create legislation that would dictate the operation of a *Brady* unit other than to legislate a deadline for the formation of a *Brady* policy within an office. Such legislation is unnecessary however, as case law already requires every individual deputy to comply with *Brady* now.

## **7. Resources to assure the fair administration of justice**

**Focus Question 7** asks whether California prosecutorial offices and agencies receive resources adequate to assure the fair administration of justice?

**In the case of the Los Angeles County District Attorney's Office, the answer is yes.**

In order to assure the fair administration of justice, prosecutors must take seriously the duty to ensure the administration of criminal justice operates impartially and evenhandedly to the public, as well as the accused. This is a duty that is recognized in the CDAA's Professionalism : A Sourcebook for Ethics and Civil Liability Principles for Prosecutors, as well as the Rule of Professional Conduct 5-110 and Business and Professions Code 6068.

This sense of duty embraces the view of a prosecutor's professional responsibility and role as defined by the United States Supreme Court in *Berger v. United States* (1935) 295 U. S 78, 88 when the High Court stated that a prosecutor

is the representative not of an ordinary party to a controversy, but of 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Id.* at p. 88.)

We subscribe to the standard of conduct and professional responsibility of a prosecutor set forth in *Berger*. Our office maintains and encourages fairness and impartiality in the administration of justice by hiring competent attorneys with a commitment to these objectives in the prosecution of cases. It introduces new prosecutors to a training regimen that stresses these objectives as an integral part of trial advocacy. This training also emphasizes prosecutorial vigilance in upholding the protection afforded to individuals by the federal and state constitutional prohibitions against unreasonable searches and seizures and against self-incrimination, and the rights to counsel and due process of law. Our office offers regular training to all prosecutors that includes ethics topics and also training on a variety of topics to ensure that our prosecutors are aware of and follow current law consistent with the federal and state constitutions.

**8. Current levels of training and continuing education and the possibility of joint training of prosecutors and defense attorneys**

**Focus Question 8** asks if current levels of training and continuing education of California prosecutors, public defenders and private defense lawyers are adequate to assure their competency and ethical responsibility and if joint training of prosecutors and defense lawyers should be encouraged?

**We are not familiar with the training and continuing education programs of the Public Defender's Office or the private bar, other than state MCLE requirements. However, the Los Angeles County District Attorney's Office provides substantial and continuing education on a prosecutor's ethical obligations, sufficient to ensure that its deputies fulfill their professional responsibilities. Because of the very different**

**roles and obligations of prosecutors from the defense bar, joint training is neither practical nor necessary.**

We are not familiar with the levels of training and continuing education, other than state MCLE requirements, that are mandatory and/or available to public defenders and private defense lawyers

The current quality and quantity of training and continuing education required and available to prosecutors in the Los Angeles County District Attorney's Office (see the response to question 7 above), are adequate to assure they are competent, ethical and fulfill their professional responsibilities.

Prosecutors and defense attorneys have the opportunity to participate in additional training with each other and also with non-criminal lawyers. The State Bar, local bar associations, inns of court, et al., provide a myriad of opportunities for training on ethics and other issues that apply to lawyers uniformly. Encouragement of more participation in such training would be useful. However, prosecutors and defense lawyers are not held to identical standards of professional responsibility within the criminal justice system. Just as the Supreme Court in the *Berger* case enunciated the professional responsibility of the prosecutor, Justice White in *United States v. Wade* (1967) 388 U. S. 218, recognized a lower standard for defense attorneys when he wrote:

[D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth.

(*Id.* at pp. 256-258.)

Because of the different roles played by defense counsel and prosecutors within the criminal justice system, combined training in ethics solely for these two groups is unnecessary.

**9. Possible statewide implementation of the Recommendations of the Los Angeles County Bar Association Task Force in 2003 on a prosecutor's *Brady* obligations**

**Focus Question 9** queries whether recommendations of the Los Angeles County Bar Association Task Force in its 2003 report should be implemented statewide. Recommendations include the following:

- 2.1 Establishment of procedures to gather *Brady* material in a systematic fashion
- 2.2 Collecting *Brady* material in a central database under the control of the prosecuting agency.
- 2.3 Production of *Brady* material to the defense must be timely and material tending to establish factual innocence or an affirmative defense should be revealed before a guilty plea is entered.
- 2.4 In felony cases requiring a declaration affirming that inquiries have been made of all appropriate sources and that all *Brady* material obtained has been reviewed and disclosed.

**The Los Angeles County District Attorney's Office has established a *Brady* Unit and protocol for the gathering of *Brady* material in a central database. Exculpatory evidence is disclosed, but the United States Constitution does not require disclosure of impeachment evidence prior to the entry of a guilty plea. Further, neither case law nor statutory law requires a prosecutor to execute a declaration affirming that his or her obligation has been fulfilled.**

In 2002, District Attorney Steve Cooley established the *Brady* Compliance Unit of the Los Angeles County District Attorney's Office. The primary function of the unit is to maintain a computer-based "*Brady* Alert System." The system includes both known historical and current *Brady* material. Sources for the information contained in the computer database include information that has been received pursuant to a *Pitchess* motion when a court has released material without a protective order prohibiting its dissemination, and from investigations resulting in a criminal charge filed by the District Attorney against the employee. In addition, complaints by defense counsel or bench officers generate a request by the District Attorney's Office to the appropriate agency for investigation. If

misconduct by an officer is proven, an entry is made into the computerized database.

All deputy district attorneys have access to the system. It is the office's policy that at arraignment on the information, the assigned deputy shall access the system to determine whether impeachment material exists for any witness, with any additional check of the system to be made at least 30 days before trial. The assigned deputy on a case has the responsibility of notifying the defense of any *Brady* material learned from the system before the commencement of trial.

As the United States Supreme Court made clear in *United States v. Ruiz* (2002) 536 U.S. 622, the United States Constitution does not require the state to provide *Brady impeachment* material to a defendant prior to a plea of guilty. As a result, our policy requires exculpatory evidence to be disclosed consistent with our obligation under *Brady*, but impeachment material need not be disclosed prior to the entry of a guilty plea.

Neither case nor statutory law setting forth a prosecutor's *Brady* obligation requires a prosecutor to execute a declaration affirming that his or her obligation has been fulfilled. The execution of a declaration does not further the goal of disclosure. Our *Brady* obligation is well-recognized by case law and firmly established rules of professional conduct. As a result, such a suggested requirement is unnecessary.

**10. Possible statewide implementation of the Recommendations of the Los Angeles County Bar Association Task Force in 2003 on the production of *Pitchess* material**

**Focus Question 10** is multi-part query involving the collection and disclosure of *Pitchess* material, standards and procedures for entry of information in a *Brady* database, and the role of law enforcement in the formation of a *Brady* database system.

The recommendations for a *Pitchess* database are contrary to law as recently stated in *Alford v. Superior Court*. The practice of initially disclosing the names and contact information of *Pitchess* complainants is a court-established procedure intentionally designed to balance the right of a defendant to present a defense with the privacy rights of peace officers.

Los Angeles County District Attorney policy requires a deputy district attorney to notify the *Brady* unit when he or she becomes aware that potential *Brady* material may exist. If after a subsequent investigation, there is clear and convincing evidence that the potential *Brady*

**information is reliable and credible, that material is entered into a computerized database.**

**Comments on recommendations for a law enforcement database should be addressed to law enforcement agencies. Development of a database that is compatible and accessible by multiple agencies violates the holding of *In re Brown*, establishing the exclusive and unambiguous duty of the prosecutor to disclose *Brady* material.**

The recommendation that the prosecution maintain a database of all *Pitchess* material is contrary to case and statutory law. *Alford v. Superior Court* (2003) 29 Cal.4th 1033, states that a criminal defendant is not allowed to share the disclosed information with other criminal defendants and that the prosecution lacks a right to discover the information disclosed to a defendant. (*Id.* at p. 1046 [“Nor do we find statutory authority to compel the defense or the trial court to share with the prosecution the fruits of a successful *Pitchess* motion.”].) This precludes the collection of *Pitchess* material in a database maintained by a prosecutorial agency as well as the dissemination of that material to non-party defendants.

The established practice of providing only names and contact information for a *Pitchess* complainant is an intentional decision by the courts to balance the right of a defendant to present a defense and the privacy rights of a peace officer. In *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84, the Court stated: “[a]s a further safeguard, moreover, the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead ... that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question. [Citations.]”

The California Supreme Court recently reaffirmed the validity of *Pitchess* and the way the California courts balance a fair trial for a defendant with the privacy rights of law enforcement personnel. In *People v. Prince* (2007) 40 Cal.4th 1179, 1284, the court stated:

In the present case, the trial court found good cause to examine the evidence concerning possible complaints against the officer. The proceedings conducted by the court were consistent with the standard we have established. As we have stated, the court should “review[ ] the pertinent documents in chambers and disclose[ ] only that information falling within the statutorily defined standards of relevance. [Citations.]” The trial court may not disclose complaints more than five years old, the ‘conclusions of any officer’ who investigates a citizen complaint of police misconduct, or facts ‘so remote as to make [their] disclosure of little or no practical benefit.’

[Citations.] Typically, the trial court discloses only the names, addresses, and telephone numbers of individuals who have witnessed, or have previously filed complaints about, similar misconduct by the officer. [Citation.]” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019, 29 Cal.Rptr.3d 2, 112 P.3d 2.) The trial court followed precisely the procedure we have outlined.”

The Los Angeles County District Attorney’s Office has a written *Brady* policy. It directs each deputy district attorney to notify the *Brady* Compliance unit when he or she becomes aware, from any source, including bench officers or defense counsel, that potential *Brady* material may exist regarding peace officers or governmentally employed expert witnesses. The *Brady* Compliance Unit then requests an investigation of the allegations by the employee’s agency or another appropriate law enforcement agency. If the investigation results in clear and convincing evidence that the potential impeachment evidence is reliable and credible, the material is included in a computerized database.

As stated above, each deputy district attorney has access to the system and is responsible for timely notification to the defense of any *Brady* material learned from the system.

Requests for comments on recommendations for the creation of an automated data system containing personnel and other records by law enforcement agencies are more appropriately addressed to individual law enforcement agencies. The Los Angeles County District Attorney has no authority to recommend policy for law enforcement.

We believe that the recommendation that courts, district attorneys, and public defenders develop a compatible and multi-agency-accessible database violates *In re Brown* (1998) 17 Cal.4<sup>th</sup> 873, which held that “[r]esponsibility for *Brady* compliance lies exclusively with the prosecution including the ‘duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case.’ [Citation.]” (*Id.* at p. 878.) Further, the Supreme Court “has unambiguously assigned the duty to disclose solely and exclusively to the prosecution; those assisting the government’s case are no more than its agents. [Citations.] By necessary implication, the duty is nondelegable at least to the extent the prosecution remains responsible for any lapse in compliance. (*Id.* at p. 881.) The creation of a database accessible to the courts and public defenders would only blur the current established and unambiguous duty of the prosecutor to not only disclose, but to learn of any favorable evidence known by others.

Lastly, the Los Angeles County District Attorney does not advise the courts, the defense bar, or law enforcement agencies in developing information systems. We believe we meet our *Brady* obligations as set forth in our *Brady* policy.