

CHAPTER 14

BRADY COMPLIANCE

14.01 BRADY MATERIAL KNOWN WITHIN THE DISTRICT ATTORNEY'S OFFICE

In order to ensure uniformity and consistency in meeting constitutionally required discovery obligations under *Brady v. Maryland* (1963) 373 U.S. 83, the Brady Compliance Section of the Appellate Division will coordinate and make available to deputy district attorneys known *Brady* material on peace officers and governmentally employed expert witnesses who are part of the "prosecution team." The Brady Compliance Section will be the central repository of known *Brady* material and is charged with answering any *Brady* questions that might arise. Subject to any future changes in the law, this chapter sets forth office policy for handling these discovery obligations. This policy was carefully drafted to protect the statutory and privacy rights of police officers while fulfilling prosecutorial obligations.

14.01.01 What Is Required Under Brady

Prosecutors are required to disclose to the defense evidence favorable to a defendant that is either exculpatory or impeaching and is material to either guilt or punishment. Evidence is "favorable" to the defendant if it either helps the defendant or hurts the prosecution. (*In re Sassounian* (1995) 9 Cal.4th 535, 543-544) In *Strickler v. Greene* (1999) 527 U.S. 263, 280-281, the United States Supreme Court stated:

In *Brady* this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S., at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U. S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*, at 682; see also *Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995).

In order to ensure compliance with these rules, the United States Supreme Court on more than one occasion has urged the "careful prosecutor" to err on the side of disclosure. (*Kyles v. Whitley*, *supra*, 514 U.S. 419, 440; *United States v. Agurs*, *supra*, 427 U.S. 97, 110)

14.01.02 Material Evidence

The definition of "material evidence" is generally provided in the context of an appeal from a conviction. Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. A reasonable probability of a different outcome is shown where suppression undermines confidence in the outcome. Such evidence must have a specific, plausible connection to the case, and must demonstrate more than minor inaccuracies. (*Kyles v. Whitley, supra*; *United States v. Bagley, supra*; *People v. Padilla* (1995) 11 Cal.4th 891, 929-32 (overruled on other grounds, see *People v. Hill* (1998) 17 Cal.4th 800, 823); *People v. Clark* (1992) 3 Cal.4th 41, 133-34).

However, as prosecutors we must determine what *Brady* evidence there may be before trial. In making this assessment, the deputy shall utilize the above guidelines.

14.01.03 Exculpatory Evidence

Exculpatory evidence is evidence favorable to the defendant and material to the issue of guilt or punishment.

14.01.04 Impeachment Evidence

Evidence Code § 780 states in part that:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

* * *

- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest or other motive.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

California Jury Instructions, Criminal (CALJIC) No. 2.20 incorporates the above listed factors and adds a felony conviction and past criminal conduct of a witness amounting to a misdemeanor as well as several other considerations. If impeachment evidence is based upon the prior commission of a crime, the crime must involve moral turpitude to be admissible. (*People v. Castro* (1985) 38 Cal.3d 301, 314 [felonies]; *People v. Wheeler* (1992) 4 Cal.4th 284, 295-297 [misdemeanor conduct])

Further examples of possible impeachment evidence of a material witness include:

- False reports by a prosecution witness (*People v. Hayes* (1992) 3 Cal. App. 4th 1238, 1244);
- Pending criminal charges against a prosecution witness (*People v. Coyer* (1983)

- 142 Cal.App.3d 839, 842);
- Parole or probation status of the witness (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486);
- Evidence contradicting a prosecution witness' statements or reports (*People v. Boyd* (1990) 222 Cal.App.3d 541, 568-569);
- Evidence undermining a prosecution witness' expertise (e.g., inaccurate statements) (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179);
- A finding of misconduct by a Board of Rights or Civil Service Commission, that reflects on the witness' truthfulness, bias or moral turpitude (cf. *People v. Wheeler, supra*, 4 Cal.4th at p. 293) (Note that the burden of proof in an administrative hearing is preponderance of the evidence);
- Evidence that a witness has a reputation for untruthfulness (3 Witkin Cal. Evid., 4th Ed., §§ 288-290);
- Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510); and
- Promises, offers or inducements to the witnesses, including a grant of immunity (*United States v. Bagley, supra*, 473 U.S. at 676-677; *Giglio v. United States* (1972) 405 U.S. 150, 153-155).

A thorough review of all other types of information must be made before a determination is reached that evidence concerning the credibility of a material prosecution witness is impeachment evidence.

14.01.05 What Is Not Brady Evidence

Allegations that cannot be substantiated, are not credible, or have been determined to be unfounded are not considered impeachment evidence and therefore will not be included in the Brady Alert System. The prosecution has no obligation to communicate preliminary, challenged or speculative information. (*United States v. Agurs, supra*, 427 U.S. at 109, fn. 16) Pending criminal or administrative investigations are considered preliminary in nature.

If a deputy has any questions whether material falls within *Brady*, the Brady Compliance Section is available for consultation.

14.02 NOTIFYING BRADY COMPLIANCE SECTION OF POTENTIAL BRADY MATERIAL

If a deputy is aware or becomes aware of potential *Brady* material, the deputy shall inform his/her Head Deputy or Deputy-in-Charge. If the Head Deputy or Deputy-in-Charge agrees that it is potential *Brady* material, the Head Deputy or Deputy-in-Charge shall cause a memorandum to be written summarizing the discovered material and setting forth the reasons why it is potential *Brady* material.

If it is believed that the conduct amounts to a crime, the memorandum and copies of all

supporting evidence and relevant documentation (e.g., transcripts, disposition reports, police reports or expert reports) shall be forwarded to both the Brady Compliance Section and JSID. JSID will either conduct an independent investigation or refer the matter to the employee's agency for investigation. JSID shall be responsible for monitoring the status of such investigation and encouraging a timely response from the agency.

If the discovered information is other than a potential crime, the memorandum and copies of all supporting evidence and relevant documentation shall be sent directly to the Brady Compliance Section. The Brady Compliance Section will refer the matter to the employee's agency for investigation.

14.03 BRADY ALERT SYSTEM

The Brady Compliance Section will maintain a computer-based "Brady Alert System." The system includes both known historical and current *Brady* material. This system will not create secondary personnel files on police officers or governmentally employed experts. The only material from an employee's personnel file to be included in the system is that which is received pursuant to a Pitchess motion when a court has released material without a protective order prohibiting its dissemination, or pursuant to an investigation resulting in a criminal charge filed against the employee.

14.03.01 Access to the Brady Alert System

Every deputy can access the Brady Alert System to determine whether *Brady* material on a particular witness exists. The alert system will confirm if *Brady* material exists and provide a brief summary of the material. Deputies will need to contact the Brady Compliance Section for further details if necessary.

At arraignment on an information, deputies shall access the system to determine whether impeachment material exists for any witness. Calendar or trial deputies shall also check the system at least 30 days before trial. Any *Brady* material learned from accessing the Brady Alert System shall be noted in the case file. The deputy appearing in court on a case shall have the responsibility of notifying the defense of any *Brady* material learned from the system. A notation shall be made in the case file indicating the date, what material was provided and in what manner notification to the defense was made (i.e., in writing, on the record, etc.). Any *Brady* material learned from the system shall be conveyed to the defense only on the particular case. Misuse of this system will subject an employee to disciplinary action up to, and including, discharge.

14.03.02 Security Log

A security log has been built into the system and is maintained by our Systems Division. This log will track every Brady Alert System inquiry made by a member of this office.

14.04 STANDARD OF REVIEW BY BRADY COMPLIANCE SECTION

14.04.01 Post Investigation

The Brady Compliance Section will decide whether to include material concerning a peace officer or governmentally employed expert witness in the Brady Alert System. Such decision will be made after an investigation of the allegations by the employee's agency, another law enforcement agency or JSID.

The decision to include such material in the alert system will be made using a standard of clear and convincing evidence which is higher than a preponderance of evidence but less than beyond a reasonable doubt. In other words, without clear and convincing evidence that the potential impeachment evidence is reliable and credible, it will not be included in the alert system.

Using the above standard, if the Brady Compliance Section determines that *Brady* material exists, it shall notify the Head Deputy or Deputy-in-Charge and place the material into the alert system. The Brady Compliance Section will advise Head Deputies and Deputies-in-Charge regarding the manner in which notification is made to the defense. The Brady Compliance Section will also notify the employee's agency in writing of this decision and action.

Only Brady Compliance Section deputies will input or delete material from the Brady Alert System.

14.04.02 Pending Investigations

If, while a matter is under investigation, the Brady Compliance Section determines that there is sufficient evidence that the potential *Brady* material is reliable and credible and it is necessary to present such evidence to a court (e.g., where a trial has commenced), it will advise the Head Deputy or Deputy-in-Charge to notify the employee that the trial deputy will be requesting an ex parte, in camera hearing to present all relevant, material evidence to the court and ask the judge to make a decision whether the evidence should be revealed to the defense. If the judge rules that there is *Brady* material, a protective order shall be requested before the material is turned over to the defense. The trial deputy shall send a memorandum to the Brady Compliance Section setting forth the judge's reasoning.

14.04.03 Insufficient Time for an Investigation

In those unusual instances when alleged *Brady* material is discovered shortly before or during trial and there is insufficient time for an investigation, the trial deputy shall consult with his/her supervisor and the Brady Compliance Section. Upon a determination by the Brady Compliance Section that there appears to be sufficient credible information that the potential evidence is reliable and credible, the Head Deputy or Deputy-in-Charge shall notify the employee that the trial deputy will be requesting an ex parte, in camera

hearing to present all relevant, material evidence to the court and ask the judge to make a decision whether the evidence should be revealed to the defense. If the judge rules that there is *Brady* material, a protective order shall be requested before the material is turned over to the defense. The trial deputy shall send a memorandum to the Brady Compliance Section setting forth the judge's reasoning.

In either situation described above, if a court issues a protective order the alleged *Brady* material will not be included in the Brady Alert System. If no protective order is issued, the Brady Compliance Section will wait for a full investigation of the alleged *Brady* material before making a decision to include it in the Brady Alert System.

14.04.04 Individual Responsibility

Complying with *Brady* is the individual responsibility of each deputy. The decision whether to use a witness whose name appears on the alert system will be left to the discretion of the individual trial deputy after appropriate consultation with his/her Head Deputy or Deputy-in-Charge and the Brady Compliance Section. If the situation should ever arise in which a witness' name does not appear on the alert system and an individual trial deputy learns of material that he/she believes triggers his/her *Brady* obligation, the trial deputy shall review this material with his/her Head Deputy or Deputy-in-Charge and the Brady Compliance Section. If the deputy's Head Deputy, Deputy-in-Charge and the Brady Compliance Section do not agree, upon request by the deputy, the Brady Compliance Section will refer the matter to the employee's agency for investigation.

14.05 REPORTING POSSIBLE BRADY MATERIAL

14.05.01 Justice System Integrity Division

Because the Brady Alert System will include both known historical and current *Brady* material, JSID will share information with the Brady Compliance Section on current as well as past filed cases involving peace officers and governmentally employed experts.

A copy of every JSID declination involving a member of the prosecution team will be sent to the Brady Compliance Section. The latter will review the declination and make a preliminary determination if potential *Brady* material exists. If there has not been an investigation concerning the potential *Brady* material, it will be the responsibility of the Brady Compliance Section to ensure such an investigation is completed before making any determination. Following this investigation, if the information is determined to be *Brady* material, it will be included in the alert system and the notification process will be initiated.

14.05.02 Officewide Declinations

In all other divisions, if a case is rejected but a deputy believes that potential impeachment evidence concerning a peace officer or governmentally employed expert witness is included, it shall be brought to the attention of the Head Deputy or Deputy-in-

Charge. If the Head Deputy or Deputy-in-Charge agrees that *Brady* material exists, then the Head Deputy or Deputy-in-Charge shall send a memorandum summarizing and analyzing the *Brady* material to the Brady Compliance Section. The same procedures discussed above shall be followed.

14.05.03 Newly Discovered Brady Material

If a deputy learns of "new" *Brady* material concerning any member of the prosecution team already identified in the alert system, the procedure described above shall be followed.

14.06 NOTIFICATION OF DEFENSE ATTORNEYS AND PRO PER DEFENDANTS

Because obligations under *Brady* continue even after a case is concluded (*People v. Gonzalez* (1990) 51 Cal. 3rd 1179, 1260-1261), once the Brady Compliance Section determines that *Brady* material exists for a particular witness, the division shall obtain a computer or PIMS run of all cases for that witness. The computer run will include all cases from the date of the alleged misconduct to the present. Head Deputies in the offices where cases are located will be notified to send letters to all defense attorneys of record or pro per defendants, alerting them to the existence of potential *Brady* material. Head Deputies shall not send notification letters in closed cases where the defendant has pled guilty. (*United States v. Ruiz*, (2002) 536 U.S. 622, 153 L. Ed 2nd 586, 597, 122 S.Ct. 2450)

14.07 PRIMARY RESPONSIBILITIES OF THE BRADY COMPLIANCE SECTION

The primary responsibilities of the Brady Compliance Section are to:

- Maintain the Brady Alert System;
- Collect and maintain *Brady* material;
- Assist deputies in determining whether *Brady* material exists in a particular case, or against a particular witness;
- Consult with individual deputies as to when it is appropriate to disclose potential impeachment evidence to the defense;
- Advise deputies on issues relating to the *Brady* Protocol and on relevant case law;
- Consult with deputies as to when it is appropriate to seek ex parte, in camera review by the court of potential *Brady* material; develop and maintain pleadings for this purpose; and
- Coordinate responses to Public Records Act requests for *Brady* material within the office.

Commentary

Compliance with this policy will help fulfill our primary mission of fairly prosecuting those who violate criminal laws in Los Angeles County.

14.08 POSSIBLE BRADY MATERIAL IN THE POSSESSION OF LAW ENFORCEMENT

Full compliance with constitutionally required discovery under *Brady* must include a method of identifying and accessing possible *Brady* material in the possession of law enforcement. Therefore, in conjunction with the Brady Compliance Policy set forth above, which sets forth office policy for handling *Brady* material known within the District Attorney's Office, this policy addresses possible *Brady* material which may be in the possession of law enforcement.

Subject to any future changes in the law, this section sets forth office policy for handling this component of *Brady* discovery obligations.

14.09 BRADY REQUESTS

It is the responsibility of each deputy district attorney to determine whether to request a law enforcement agency to review their personnel files for possible *Brady* material concerning their employees. In order to make any request, the police report and other written documentation provided by the law enforcement agency must establish, on its face, that a law enforcement employee is a material witness and that there may be evidence concerning that material witness which is favorable to the defense and to which the defense may be entitled. Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that may impeach the credibility of a government witness. (*Giglio v. United States, supra*, 405 U.S. at 154) A *Brady* violation occurs where the failure to disclose evidence to the defense deprives the defendant of a fair trial. (*United States v. Bagley, supra*, 473 U.S. at 675) Thus, in the context of *Brady* requirements, a defendant is deprived of a fair trial when it is reasonably probable that the failure to provide evidence to the defense will affect the outcome of the case, (*United States v. Bagley, supra*, 473 U.S. at 682), or stated another way, the failure to disclose the evidence "could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." (*Kyles v. Whitley, supra*, 514 U.S. at 435)

14.09.01 Preliminary Determination of Potential Brady Material

Potential impeachment or exculpatory material in the possession of law enforcement includes: (1) statements made by the defendant or potential defense witnesses which contradict statements made by a material law enforcement employee/witness; (2) statements made by the defendant or potential defense witness that a material law enforcement employee/witness used excessive force; and/or (3) statements made by the defendant or potential defense witness that allege that a law enforcement employee made racial, religious or other statements exhibiting bias.

If a deputy determines, from police reports or witness interviews, that such statements exist and also determines that the information involves a material law enforcement employee or witness, a request shall be made to the law enforcement agency to review its

personnel files for possible *Brady* material. If the police report and other written documentation are silent as to any conflict between the material law enforcement witness and the defendant or other potential defense witness, then no request shall be made.

If a deputy cannot determine whether to request that the law enforcement agency search for possible *Brady* material, the deputy shall consult with the Head Deputy or Deputy-in-Charge.

If a deputy requests that the agency search its records for possible *Brady* material, he/she shall make a notation in the case file as to the reason for the request. A reference to the relevant part of the police report or other written documentation supporting the request is sufficient. If no request to search personnel files is made, then no such entry is necessary.

14.09.02 Penal Code § 1054.1

Penal Code § 1054.1 requires disclosure of names and addresses of witnesses, statements by the defendant, all relevant real evidence, the existence of felony convictions of material witnesses, exculpatory evidence and relevant written or recorded statements of witnesses the prosecution intends to call or reports by them at least 30 days before trial. In order to comply with the 30 day rule of Penal Code § 1054.7, the request that a law enforcement agency review its personnel files following arraignment on an Information should allow sufficient time for compliance.

14.09.03 The Brady Form

A special form has been prepared to use whenever a deputy requests a search for possible *Brady* documents from law enforcement. This form is the only form to be used by deputies making such requests. The *Brady* form must be completed in its entirety and with sufficient specificity to enable the law enforcement agency to comply with the request. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1230)

Any request for a law enforcement agency to search its personnel files shall be made in writing using the *Brady* form. An oral request shall never be made.

On August 26, 2002, the California Supreme Court in *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 12(fn 2) noted that if Penal Code § 832.7 were used to defeat the right of a prosecutor to obtain access to officer personnel records in order to comply with *Brady*, it may be unconstitutional as applied.

14.09.04 Return of Form

Each agency should designate a sworn officer who will receive each request and respond in a timely fashion. The law enforcement agency designee will be directed to return the *Brady* form to the Head Deputy or Deputy-in-Charge who shall give the original to the deputy assigned to handle the case. A copy of the signed form should be provided to the

defense and so noted in the case file. This manner of processing should avoid misdirection of the form.

14.09.05 Defense Initiated Requests

If a defense attorney, either orally or in writing, provides information to the assigned deputy that a material law enforcement witness' version of events may contain material misstatements or omissions, that defense attorney is to be directed to either file a Pitchess motion or provide to the deputy a signed declaration under penalty of perjury by the individual with personal knowledge of the law enforcement witness' untruthfulness.

Upon receipt of such a declaration, the deputy shall request the employing agency review its personnel files for possible *Brady* material using the *Brady* form.

If the defense files a Pitchess motion in lieu of a declaration, the deputy shall not make a separate request of the employing agency.

14.10 THE BRADY MOTION

If a deputy receives a *Brady* form indicating the existence of possible *Brady* material for a material witness, that deputy shall file a motion and accompanying supporting documents with the court, indicating there is reason to believe there may be material about the credibility of a law enforcement witness to which the defense may be entitled. A copy of the motion shall be served upon the defense as well as the legal representative for the agency. The law enforcement officer involved shall also be notified by the Head Deputy or Deputy-in-Charge. The motion shall request the court hold a hearing pursuant to all notice and statutory requirements under Code of Civil Procedure § 1005(b). The motion shall further request, pursuant to Evidence Code § 1043, the court to review the material provided by the agency's custodian of records in camera, ex parte and determine whether to release any documents to both the defense and to the prosecution. The deputy shall request a protective order limiting the disclosure and use of the material provided to both the prosecution and the defense to the specific case before the court pursuant to Evidence Code § 1045. If the court releases any material without a protective order, the deputy shall immediately notify the Brady Compliance Section as set forth above.