

# **MONTEREY COUNTY DISTRICT ATTORNEY'S**

## **BRADY POLICY 2022**



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## **I. Peace Officer Witnesses**

### **A. Exculpatory Evidence Derived from Personnel Files of Peace Officers**

Peace officer personnel records are confidential and are subject to discovery pursuant to the *Pitchess* procedures set forth in Evidence Code §§1043 – 1045.<sup>1</sup> Further, prosecutors do not have the right under Penal Code section 832.7(a) to inspect police personnel records when a law enforcement officer is a witness in a case.<sup>2</sup> Nor may a prosecutor disclose the contents of a peace officer’s personnel file without judicial approval.<sup>3</sup> However, in *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal. 5th 28, the California Supreme Court held that law enforcement agencies have a right to provide *Brady* alerts to the prosecution: “Law enforcement personnel are required to share *Brady* material with the prosecution . . . The Association's contrary view that ‘*Brady* relates only to the prosecutor’ and that ‘*Brady* . . . does not impose obligations on law enforcement’ is distressing and wrong . . . Prosecutors are deemed constructively aware of *Brady* material known to anyone on the prosecution team and must share that information with the defense . . . Because confidential records may contain *Brady* material, construing the *Pitchess* statutes to permit *Brady* alerts best ‘harmonize[s]’ *Brady* and *Pitchess*.” Therefore:

1. All law enforcement agencies in Monterey County will notify either the District Attorney or the Chief Assistant District Attorney of the names of officers who have

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<sup>1</sup> *Alford v. Superior Court* (2003) 29 Cal.4<sup>th</sup> 1033, 1038.

<sup>2</sup> *People v. Gutierrez* (2003) 112 Cal.App.4<sup>th</sup> 1463, 1475. However, prosecutors may obtain records with a California Public Records Act request within the limited parameters set forth in Penal Code section 832.7(b)

<sup>3</sup> *Fagan v. Superior Court* (2003) 111 Cal.App.4<sup>th</sup> 607.

information in their personnel files that may require disclosure under *Brady*. *Brady* material in personnel files of law enforcement agency employees is defined to include:

a) Any sustained finding<sup>4</sup> of misconduct that reflects upon truthfulness, bias or moral turpitude, including excessive force.<sup>5</sup> Categories of conduct which may implicate *Brady* referenced in *Association for Los Angeles Deputy Sheriffs v. Superior Court* include:

- 1) Immoral conduct
- 2) Bribes, rewards, loans, gifts, favors
- 3) Misappropriation of property
- 4) Tampering with evidence
- 5) False statements
- 6) Failure to make statements and/or making false statements during departmental internal investigations
- 7) Obstructing an investigation/influencing a witness
- 8) False information in records
- 9) Discriminatory harassment
- 10) Unreasonable force
- 11) Family violence

b) Any felony conviction;

c) Any misdemeanor conviction involving moral turpitude;

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<sup>4</sup> Penal Code section 832.8 (b) now defines “Sustained” as meaning “a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy.” (Pen. Code, § 832.8(b).)

<sup>5</sup> The government has no *Brady* obligation to “communicate preliminary, challenged, or speculative information.” (*United States v. Agurs* (1976) 427 U.S. 97, 109 fn. 16.) However, “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” (*Id.* at p. 108.) See also *Kyles v. Whitley* (1995) 514 U.S. 419, 439, which warns prosecutors against “tacking too close to the wind” in withholding evidence.

- d) Any pending criminal charge;
  - e) Any current probationary status for a criminal conviction.
2. Usually, A *Brady* alert by law enforcement to the District Attorney should state only that there may be *Brady* material in the employee's personnel file. No actual materials from the file should be provided to the District Attorney's Office, except for materials made public under Penal Code section 832.7(b). The notification should be made as soon as the agency renders a sustained finding unless unusual circumstances require an earlier disclosure.
  3. The District Attorney's Office will provide legal opinions to law enforcement agencies about: 1) Whether specific conduct involves a *Brady* problem for a law enforcement employee; and 2) if there is a *Brady* problem, how that may affect the employee's ability to be an effective witness in a criminal proceeding. Only the District Attorney or the Chief Assistant will issue these opinions. If a deputy district attorney is asked for an opinion by a law enforcement agency, that attorney will refer the question to the Chief Assistant.
  4. When an officer with a *Brady* alert is subpoenaed, the District Attorney's Office case management system will notify the deputy district attorney the officer is on the office *Alert List* and to contact the attorney manager responsible for the office's *Alert List* repository comprised of administrative files. The *Alert List* repository is confidential and inaccessible except by the attorney manager. The prosecutor shall notify the defense that pursuant to the District Attorney *Brady* Policy, "there may be *Brady* material in the officer's personnel file." This notification is the responsibility of the prosecutor assigned to the case and shall be undertaken without a defense request.

**B. Exculpatory Evidence Derived from All Sources Except *Brady* Alerts from Law Enforcement Agencies**

Upon learning of any apparently credible allegation involving a peace officer's misconduct or credibility that may be subject to discovery under *Brady*, deputy district attorneys and district attorney investigators shall timely report this information to their immediate supervisors. For example, evidence of untruthfulness may come to light during a criminal trial, from credible reports of other law enforcement employees based on sources other than personnel records, or from requests for filing of criminal charges on law enforcement employees. Such allegations must be substantial and may not be mere rumor or speculation. Because such an allegation can ruin an officer's reputation and professional career, prosecutors and investigators should be careful in the words used to report an allegation to a supervisor whether orally or in writing. When such information is obtained, the District Attorney's Office will conduct a thorough analysis to determine if disclosure is required pursuant to *Brady*.

1. Following receipt of such a report, the attorney's or investigator's supervisor shall obtain all available information concerning the alleged misconduct, including the transcript of any testimony provided, and shall forward the materials to the Chief Assistant District Attorney.
2. The Chief Assistant District Attorney shall review and analyze the materials in light of applicable law and determine, in consultation with attorney managers, which of the following conclusions is appropriate: (1) the materials do not constitute *Brady* material, in which case the matter shall be closed; (2) the materials may constitute *Brady* material, in which case the matter will be referred for an investigation to the agency

which employs the peace officer; (3) the materials constitute *Brady* and will be placed in an administrative file, in which case the matter will also be referred for an investigation to the agency which employs the peace officer.

3. If the matter is referred to the employing law enforcement agency and if the investigating the agency concludes that the complaint is frivolous, unfounded, exonerated or not sustained, then disclosure may not be warranted. If so, the District Attorney may conclude that the information is not discoverable under *Brady*.

4. If the employing law enforcement agency sustains the complaint, the employing law enforcement agency will comply with the procedure set forth in Section I.A above. The District Attorney's Office shall maintain materials and any documents generated in support of the referral in an *Alert List* administrative file for purposes of complying with the discovery obligation in future cases.

5. Although referral to the employing law enforcement agency is preferred, the District Attorney's Office may elect to conduct the investigation of possible peace officer misconduct in unusual circumstances.

6. When a deputy district attorney subpoenas an officer on the *Alert List* the District Attorney's Office case management system will notify the deputy district attorney to contact the attorney manager responsible for the office's *Alert List* repository.

7. The administrative files in the *Alert List* repository shall be maintained by an attorney manager and shall only be accessed for case-related purposes. The *Alert List* repository is confidential and inaccessible except by the attorney manager. Disclosure of information contained in an administrative file shall be documented in the administrative

file for that officer. The attorney manager will disclose information to the prosecutor handling the current case, who shall disclose that information to the defense.

8. Initiation of this procedure is the responsibility of the individual prosecutor assigned to the case and shall be undertaken without a defense request.

### **C. Security of Alerts**

It is a violation of office policy to disseminate *Alert List* information in any fashion inconsistent with the terms stated in this policy. Violation of this security provisions will be subject to discipline.

## **II. Non-sworn Law Enforcement Employees**

Because non-sworn law enforcement employees have a right to privacy in their personnel files, these employees and their employers may assert a privilege not to disclose information from their personnel records. As with peace officers, prosecutors do not have the right to access these personnel records without consent or judicial approval. And because law enforcement agencies routinely conduct internal affairs investigations concerning allegations of misconduct for both sworn and non-sworn employees, the same procedure described above for peace officers will apply with one procedural exception.

1. The prosecutor will disclose to the defense the possible existence of *Brady* evidence in a non-sworn law enforcement personnel file. A motion pursuant to Evidence Code §§ 1043 and 1045 is not available to reach these personnel records. The defense should make a discovery motion for exculpatory evidence under Penal Code section 1054.1(e). The custodian of the records should appear at the hearing with the personnel file to assert any claim of privilege under Evidence Code §1040 and participate in an *in*



*camera* review pursuant to Evidence Code §915 if the court so orders. Unlike the Pitchess procedures, there is no statute compelling the custodian's attendance at the motion.

2. The preferred method is to refer any question about the credibility of a non-sworn law enforcement employee to the employing agency for investigation. The District Attorney's Office will conduct the investigation only in unusual circumstances.

### **III. Expert Witnesses**

This group includes only that set of expert witnesses who are members of the law enforcement team as defined by caselaw. Ordinarily, these are expert witnesses who assisted in the investigation of the case, such as analysts from DOJ.

Prosecutors should be alert to information from any source that an expert employed to assist the People in presenting a case has any shortcomings with respect to integrity or competence. On obtaining such information, a prosecutor should discuss the matter with her or his supervisor and, if warranted, the Chief Assistant District Attorney.

Should an expert witness be found to have a *Brady* problem, the District Attorney's Office will also determine its impact on past or pending cases.

Expert witnesses with credibility or competence issues will be assigned a *Brady* alert in our case management system.

### **IV. In Camera Review of Brady Administrative Files**

The District Attorney has the duty to identify and disclose exculpatory evidence. In some instances, the District Attorney's Office may need to submit potential *Brady* evidence from its administrative files to a judge for *in camera* review to determine if

disclosure to the defense is required.<sup>6</sup> The option of submitting *Brady* material for *in camera* review shall be considered in consultation with an attorney manager. The District Attorney's office shall, in appropriate cases, request that the court issue a protective order limiting or prohibiting the disclosure of the material in other cases.

1. The types of cases which may justify *in camera* review include:
  - a) Any materials contained in or obtained from a peace officer's personnel file pursuant to Penal Code section 832.7;
  - b) Material regarding any incident that is the subject of a pending internal investigation by the employing law enforcement agency;
  - c) Material that is remote in time or has questionable relevance to the present case;
  - d) Any privileged materials;
  - e) When it is unclear whether the law requires the information be disclosed.
2. In consultation with an attorney manager, a deputy district attorney may apply to the court for an *in camera* review of the records pursuant to Evidence Code §§1043 and 1045. If the court orders disclosure of documents or information, the prosecutor shall make further disclosure only to the defendant's attorney of record (or to defendant if not represented by counsel) and to those members of the District Attorney's Office needed to handle the case. Subject to court orders, the prosecutor may use the matters disclosed to present evidence in the court proceeding for which disclosure was made. The prosecutor will abide by any court protective order made pursuant to subdivisions (d) and (e) of §1045 of the Evidence Code.

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<sup>6</sup> *Fagen v. Superior Court, supra.*

3. If information regarding the credibility of a material witness is provided to the defense from a *Brady* administrative file after an *in camera* review, the assigned deputy district attorney shall inform the attorney manager in charge of the *Brady* repository about the material ordered by the judge to be discovered and whether there is a protective order. The attorney manager in charge of the *Brady* repository shall include this information in the administrative file maintained for that law enforcement employee.

**V. Admissibility of Evidence**

Discovery and admissibility of evidence are different, and the assigned prosecutor shall decide whether to challenge the admissibility of impeachment evidence based on whether it is material under *Brady* and Evidence Code section 352.