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Policy Directive
San Francisco District Attorney's Office
Discovery Compliance & Open File Policy

I. INTRODUCTION

To promote transparency and fairness in the criminal justice process, the San Francisco District Attorney's Office implements this policy to ensure that all discovery is efficiently provided to defense attorneys in adult and juvenile criminal prosecutions. As a general principle in all cases, the District Attorney's Office expects prosecutors to comply with an "open file" policy; all non-work product evidence—including, but not limited to, statements, relevant criminal histories, videos, photographs, reports, and scientific evidence—will be discovered to defense counsel as soon as possible after receipt and prior to appointment of counsel at arraignment, when feasible. The District Attorney's Office will provide all discovery in an unredacted form—with limited exceptions. In the event that the prosecuting attorney believes disclosure is prevented because of a constitutional or statutory privilege, the prosecutor will seek an order from the court regarding the propriety of the disclosure; it is not appropriate to engage in "self-help" by unilaterally withholding materials and information subject to disclosure.¹

II. APPLICABLE LAW

Penal Code Section 1054 et seq., which enumerates California's discovery obligations, aims to "promote the ascertainment of truth, save court time, and avoid undue delay" in trials by requiring timely pretrial discovery while also protecting "victims and witnesses from danger, harassment, and undue delay of the proceedings." (Penal Code Section 1054). It establishes that a prosecutor must provide discovery to defense counsel, including the names and addresses of all persons the prosecutor intends to call as witnesses at trial; statements of all defendants; all relevant real evidence in connection with the case; the existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial; any exculpatory evidence; and relevant written or recorded statements of witnesses or reports of the statements of witnesses the prosecutor intends to call at trial. (Penal Code Section 1054.1.) Although phone numbers were not specifically listed as discovery items in Penal Code Section 1054.1(a), Penal Code Section

¹ *People v. Riggs* (2008) 44 Cal. 4th 248, 310 n.29.

1054.2(a)(1) references telephone numbers, which suggests that telephone numbers are also permissible discovery.²

Penal Code Section 1054.2(a)(1) prohibits attorneys from disclosing or permitting disclosure to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause. Penal Code Section 1054.7 affords additional protections by denying, restricting, or deferring these disclosures for "good cause" by court order. "Good cause" is limited to "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement."³

Marsy's Law, defined by California Constitution, Article 1, Section 28(b)(4) gives a victim the right to prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family ... or which are otherwise privileged or confidential by law. This "confidential personal information," as defined by Penal Code Section 964(b) includes but is not limited to, an address, telephone number, driver's license or California Identification Card number, social security number, date of birth, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number. However, subsection (c)(1) provides that the provisions of Penal Code Section 964 *may not* be construed to impair or affect the discovery requirements of Chapter 10 commencing with Penal Code Section 1054.⁴

The Constitution requires defense counsel to provide competent and effective representation of a defendant, including reasonable investigation of the case.⁵ Early provision of all relevant discovery equips the defense with the necessary information to effectively represent a defendant and to conduct a reasonable investigation of the case. This policy aims to effectuate this Constitutional standard and thus preserve the integrity of future convictions, as well as to avoid unnecessary delay.

² Phone numbers will rarely compromise safety more than the discovery of the victim or witness address. When addresses are disclosed but telephone numbers are withheld, defense attorneys and investigators will likely visit victims and witnesses rather than call, which can be far more intrusive than a telephone call. Note that attorneys and investigators contacting a victim or witness provided in discovery must clearly identify themselves, the full name of the agency by whom they are employed, and whom they represent or have been retained by, the prosecution or the defendant. Pen. Code § 1054.8.

³ Pen. Code § 1054.7.

⁴ Confidential personal information in reports submitted to the court shall continue to be redacted or filed under seal consistent with the procedures approved by the court.

⁵ *Strickland v. Washington* (1984) 466 U.S. 668, 690-691.

III. DISCOVERY POLICY

All discovery as enumerated in Penal Code Section 1054.1 shall be provided to defense counsel as soon as possible after receipt unless there is a legitimate, “good cause” basis to withhold or defer it pursuant to the limitations of Penal Code Section 1054.7 (which may be determined by a judge). “Use of the phrase ‘at least’ in Section 1054.7 connotes a bare minimum of 30 days”⁶ before trial, and disclosure should occur as soon as good cause to withhold or defer no longer exists, to avoid unnecessary delays or continuances.

Constitutional provisions or other express statutes may require disclosure of certain information prior to a preliminary hearing or suppression motion when appropriate. Because the failure to disclose exculpatory information can be grounds for a common-law motion to dismiss, the prosecuting attorney should not wait until after the preliminary hearing to disclose any relevant or material information.⁷

Prosecutors shall permit defense counsel who wish to review the prosecution’s file to do so, except for any “core” work-product information. In criminal cases, the prosecution and the defense may only assert the core work product privilege; they may not assert a broader work product privilege.⁸ This “core” work product privilege bars discovery of “an attorney’s impressions, conclusions, opinions or legal research or theories.”⁹ Non-core work product typically refers to “material of a derivative” or “interpretive” “character, such as diagrams prepared for trial, audit reports, appraisals, and other expert opinions, developed on the initiative of counsel in preparing for trial.”¹⁰ Prosecutors shall review all notes in the case file including entries on the “Blue Sheets”¹¹ for discoverable information and may consult with a manager to determine whether the “core” work-product privilege applies.

⁶ See *Sandefffer v. Superior Court* (1993)18 Cal. App. 4th 672, 677.

⁷ *People v. Gutierrez* (2013) 214 Cal. App. 4th 343; *Bridgeforth v. Superior Court* (2013) 214 Cal. App. 4th 1074.

⁸ Pen. Code § 1054.6; *People v. Bennett* (2009) 45 Cal. 4th 577, 595; *Izazaga v. Superior Court* (1991) 54 Cal. 3d 356, 382 n.19.

⁹ Civ. Proc. Code § 2018.030(a); Pen. Code § 1054.6 (making section 2018.030(a) applicable in criminal cases).

¹⁰ *Dowden v. Superior Court* (1999) 73 Cal. App. 4th 126, 135.

¹¹ The “BLUE” Work Product Sheet(s) added to every SFDA file-folder continues to be the appropriate repository for “core” work-product records; however, when complying with discovery obligations and open-file requests, please review the “BLUE” for Pen. Code § 1054.1 materials that may not exist elsewhere in the file and discover the same as appropriate.

All discovery provided to defense counsel must be unredacted, with limited exceptions for confidential personal information that is not generally necessary for defense preparation (i.e., social security numbers, bank account numbers, and similarly confidential information). This confidential personal information, other privileged information, and any statutorily protected information may be provided with court-approved protective orders on a case-by-case basis if necessary.

Victim and witness names, addresses, telephone numbers, email addresses, and other means to contact the persons shall be provided in discovery in all cases unless discovery would threaten the safety of the victim or witness and good cause exists as defined in Penal Code Section 1054.7.

If a prosecutor believes good cause exists to deny, restrict, or defer discovery because disclosure would jeopardize the safety of a witness or victim, result in the loss or destruction of evidence, or compromise other investigations by law enforcement pursuant to Penal Code Section 1054.7, he or she shall file a motion and seek to establish good cause at a hearing before a judge, which may be *in-camera*.