COUNCIL FOR CRIMINAL JUSTICE INTEGRITY

An Overview of Penal Code Section 141(c) and Suggested Office Protocols for Ensuring That Discovery Duties Are Maintained and Properly Documented by Prosecutors
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An Overview of Penal Code Section 141(c) and Suggested Office Protocols for Ensuring That Discovery Duties Are Maintained and Properly Documented by Prosecutors was approved by the Board of Directors of the CDAA Foundation. These suggested practices were created to provide guidance to prosecutors. Information contained herein is the opinion of the authors and is not intended to dictate how district attorney offices write their policies. Rather, it offers suggestions on addressing the many issues that may arise. Additionally, given the diverse nature of prosecutor office size, funding, current patterns and practices of information exchange and delivery with allied agencies, county and city computer infrastructure, current agreements with defense counsel regarding the exchange of information, existing and available technologies, and other aspects of the daily functioning of a prosecutor’s office, some or all of these suggested practices may not be desired, practical, or possible.
Suggested Discovery Practices to Protect Prosecuting Attorneys from Accusations of Intentionally and in Bad Faith Committing *Brady* Error

AB 1909 was signed into law on September 30, 2016 by Governor Brown. The law went into effect on January 1, 2017.

**Overview**

This new legislation expands the existing provisions of the law and makes it a felony punishable by imprisonment for a term of 16, 2, 3 for a prosecuting attorney to intentionally and in bad faith alter, modify, or withhold any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding or inquiry.

**New Language of Penal Code Section 141**

This law amends Penal Code section 141 to read:

(a) Except as provided in subdivisions (b) and (c), a person who knowingly, willfully, intentionally, and wrongfully alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, digital image, or video recording, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter will be wrongfully produced as genuine or true upon a trial, proceeding, or inquiry, is guilty of a misdemeanor.

(b) A peace officer who knowingly, willfully, intentionally, and wrongfully alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, digital image, or video recording, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter, digital image, or video recording will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by two, three, or five years in the state prison.
(c) A prosecuting attorney who intentionally and in bad faith alters, modifies, or
withholds any physical matter, digital image, video recording, or relevant
exculpatory material or information, knowing that it is relevant and material to
the outcome of the case, with the specific intent that the physical matter,
digital image, video recording, or relevant exculpatory material or information
will be concealed or destroyed, or fraudulently represented as the original
evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable
by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or
two or three years.

(d) This section does not preclude prosecution under both this section and any other
law.

Stated Justification for the New Law

According to the sponsors of this legislation, California Attorneys for Criminal Justice
(CACJ), the public lacks confidence in our criminal justice system. In their appeal for the
recent amendments, CAJC argued that 45 percent of the exonerations nationwide were
as a result of official misconduct, which was defined as police, prosecutors, or other
governmental officials significantly abusing their authority or the judicial process in a
manner that contributed to the exonoree’s conviction. As the basis for the argument that
more serious consequences for “bad-acting prosecutors” are necessary, CACJ cited the
Santa Clara University School of Law Veritas Initiative, which reported that California
courts have repeatedly failed to take meaningful action when the court found that the
prosecutorial misconduct was harmful.

SUGGESTED PRACTICES FOR PROSECUTORS

The procedural mechanism that will be implemented in the event of an allegation
pursuant to Penal Code section 141(c) is unknown at this time. There are several
suggested practices, however, that can guide prosecutors in their discovery practices
and protect individual prosecutors from meritless claims of misconduct pursuant to
Penal Code section 141(c).

1. **Develop a Uniform System of Documenting Discovery Requests**
   It is imperative for prosecuting agencies develop a mechanism to document and
   memorialize all discovery requests and responses between both defense counsel
   and the prosecutor and the prosecutor and the investigating agency. Verbal
requests should be avoided. A standard letter or discovery form/log should be retained as part of the case file. This document should include the following information: name of the requestor, date of request, prosecutor responding to the request, the materials being requested; and the response thereto.

2. **Define the Scope of the Discovery Requested**

To the best of their ability, prosecutors should identify with specificity the particular evidence they are seeking from the investigating agency. The discovery request should also include standard language calling for the broad production of case materials in the event that there are items that do not fall within the specific materials requested.

Prosecutors should be proactive if they believe there may be outstanding discovery on a particular case. Where appropriate and feasible, prosecutors should consider communicating with the case agent and/or coordinating an evidence review session with the police department or relevant agency in order to ensure that everyone is aware of the evidence that exists on the case prior to making any statements regarding discovery compliance.

3. **Discovery Should Be Numbered (Manual or Bates Stamped) in Every Criminal Case**

It is imperative that discovery be numerically identified at the earliest stage of the proceedings in order to track the materials that have been discovered at any given point. Each office should develop a categorical or sequential method of numbering discovery so that all medium of data (CDs, DVDs, storage drives, photos, and documents) are accounted for in the tracking process.

4. **A Discovery Receipt Should Be Generated in Every Case**

Discovery should be provided to defense counsel/defendants with a receipt mechanism that identifies, as a minimum, the following:

- the items being discovered
- the legible name of the representative/agency to whom the discovery is being provided
- the date of the production of materials
- the identity of the prosecutorial staff person providing the discovery

The discovery receipt should be retained in the case file (physical or digital copy are sufficient).
Prosecutors should ensure that the record reflects the occurrence and result of any pre-trial discovery conference as required by the local rules.

Prosecuting agencies should consider adopting a practice regarding the processing of discovery received after a plea/conviction.

5. **Handling Prosecutor Log/Notation**
   Each office should develop a mechanism to identify the specific prosecutor who handled the case at each particular stage of the proceedings, as well as what discovery, if any, was released by that specific prosecutor. This mechanism could include the prosecutor’s case notations in the actual case file or by an electronic notation in the case management system.

6. **Review File Retention Policies**
   The DA case file is the primary source for identifying what information has been discovered. Where feasible, individual offices should consider digitizing the files for easier and long-term access.

7. **Agency Training**
   Prosecuting agencies should consider developing a training or communication protocol with law enforcement agencies in their jurisdiction. The primary focus of this training would be to develop mutual expectations related to the general scope of discovery, importance of documenting evidence, booking evidence, retaining evidence, and maintaining an audit trail.

8. **Internal *Brady* Protocol**
   Prosecuting agencies should develop a protocol to govern prosecutors who come into possession of *Brady* information regarding any peace officer in order to ensure that such information is documented and discovered in current and future prosecutions, where warranted.

9. **Responding to Accusations of Discovery Violations**
   Prosecuting agencies should create a policy or other mechanism designed to provide an independent review and litigation protocol to address claims for relief wherein an allegation of a discovery violation has been made.
Such policy should include the following:

- Development of a protocol and a training designed to guide prosecutors on how to respond to verbal discovery violation motions or other discovery violation allegations that are made without sufficient notice to the prosecutor.
- Notification of the allegation/pleading to the prosecutor’s supervisor.
- An independent review by a supervisor and/or separately assigned prosecutor of the allegation/pleading.
- An independent review of the case file and relevant procedural history by a supervisor and/or separately assigned prosecutor.
- Assembly of relevant receipts/logs or other records that demonstrate the efforts of the prosecuting agency to request, receive and discover materials as reflected in Suggested Practices 1–5 above.
- Assigning a separate prosecutor to litigate the underlying motion/pleading wherein the allegation is made, if such allegation is directed at a specific prosecutor.
- Determining whether to request a court reporter or audio recording of the litigation proceedings, if those proceedings would not otherwise be recorded.
- Determining what findings to request of the court, if any, if the allegation is found to be without merit.
- Development of a protocol of how to proceed in the event that an allegation is found to be meritorious based on either a judicial determination or an intra-office review.