



**ORANGE COUNTY  
DISTRICT ATTORNEY'S OFFICE**

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**INFORMANT POLICY MANUAL**

**January, 2017**

# ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE INFORMANT POLICY MANUAL

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## FOREWORD

The use of Informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril....

By definition, criminal Informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom . . . . By its actions, the government can either contribute to or eliminate the problem. Accordingly, **we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery.**

*(United States v. Bernal-Obeso, (9th Cir. 1993) 989 F.2d 331, 333-34 (internal citations and quotations omitted; emphasis added).*

For as long as there have been police officers, informants have been used to help combat crime. Without informants, many of the more serious and violent crimes would go unsolved and criminals threatening the public safety would not be brought to justice. The Supreme Court has acknowledged, "The informer is a vital part of society's defensive arsenal." *McCray v. Illinois* (1967) 386 U.S. 300, 307. Likewise, Judge Learned Hand wrote, "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely on them or upon accomplices because the criminals will almost certainly proceed covertly." *United States v. Dennis* (2d Cir. 1950) 183 F.2d 201, 224.

Often, the criminal justice system requires balancing of competing interests, including in the area of informants. Recognizing that the use of informants is a

legitimate law enforcement practice, California law provides protection to those who provide information to law enforcement. Evidence Code Section 1041 codifies a long-standing legal privilege protecting the identity of informants. As held by the California Supreme Court, by means of the informant identity privilege, “The informer is thus assured of some protection against reprisals.” *People v. McShann* (1958) 50 Cal.2d 802, 806. On the other hand, criminal defendants have their own constitutional rights; these rights include due process of law and the right to a fair trial. Sometimes, an accused’s right to a fair trial will require that an informant’s identity be disclosed.

Prosecutors and police officers have a duty to ensure that all criminal defendants’ rights are protected. Public trust in the criminal justice system will erode if law enforcement’s use of informants does not conform to legal standards. Therefore, it is imperative that police and prosecutors in Orange County use informants only in a lawful manner. The policies set forth in this manual are designed for that purpose: to “safeguard the system against treachery.” (*United States v. Bernal-Obeso, supra*, 989 F.2d at 934.) The entire law enforcement community must commit itself to this rule of law.

*Tony Rackauckas*  
Orange County District Attorney

## **QUICK REFERENCE GUIDE FOR PROSECUTORS: INFORMANTS**

The following is a brief outline of steps to take when a case a prosecutor is handling involves an Informant<sup>1</sup>. For a full and complete description of what is expected from a prosecutor handling a case involving an Informant, please refer to the OCDA Informant Policy.

**In all cases mentioned below, a prosecutor must comply with their *Brady* obligation.**

- 1. Information provided by Informant was used solely for establishing probable cause**
  - a. Notify your supervisor and contact OCII Coordinator for proper documentation.
- 2. Informant was a participant in the crime or a percipient witness to the crime**
  - a. Notify your supervisor and contact OCII Coordinator for proper documentation.
  - b. Provide OCII Coordinator with all applicable documentation (proffer agreement, Tahl, etc.).
- 3. Jailhouse Informant (Informant obtained a statement from a suspect while both were in a custodial setting)**
  - a. Notify your supervisor and contact OCII Coordinator for proper documentation.
  - b. **Must** obtain CIRC approval **prior** to using the Jailhouse Informant.
- 4. Informant testifies as defined in Chapter 6, Section 6-13 of the OCDA Informant Policy**
  - a. Notify your supervisor.
  - b. Complete the "Post-Testimony Cooperating Informant Summary" form, found in the G:/ drive under the file name "CI Forms." Submit to OCII Coordinator and, if it was a Jailhouse Informant that testified, submit the form to a member of the CIRC.
- 5. Informant is "involved" in the case as defined in Chapter 6, Section 6-14, subd. (A) of the OCDA Informant Policy**
  - a. Notify your supervisor and contact OCII Coordinator for proper documentation.
  - b. Complete and submit the "ICI Database Information" form which can be found in the G:/ drive under the file name "CI Forms."
- 6. Prosecutor receives information bearing negatively on the credibility of the Informant, as described in Chapter 6, Section 6-14, subd. (B) of the OCDA Informant Policy**
  - a. Notify your supervisor and send a notification email to the Senior Assistant District Attorney in charge of Vertical/Violent Crimes, who will initiate a meeting of the CIRC.
  - b. Attend the CIRC meeting.
  - c. If the CIRC finds the Informant "**not credible**" as described in Chapter 6, Section 6-14 of the OCDA Informant Policy, complete and submit the "NCCI Database Information" form which can be found in the G:/drive under the file name "CI Forms."

**If a prosecutor, or supervisor, has a question after reading this guide and the OCDA Informant Policy, any member of the CIRC may be contacted for assistance.**

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<sup>1</sup> An "Informant" is any person who knowingly provides information to law enforcement related to another's criminal activity, whose motivations for doing so are other than that of an uninvolved witness, victim, or private citizen primarily acting through a sense of civic responsibility and who, as a general rule, but not necessarily, expects some form of benefit or advantage for himself, herself, or another person in return. Informants can be citizen informants, paid informants, defendant informants, accomplice informants and/or jailhouse informants. Specific definitions regarding types of Informants can be found in Chapter 1, Section 1-6 of the OCDA Informant Policy.

**SECTION 1-1**

**DISTRICT ATTORNEY** includes the Chief Assistant District Attorney and all Senior Assistant, Assistant and Deputy District Attorneys (DDAs) in the Orange County District Attorney's Office (OCDA).

**SECTION 1-2**

**RESPONSIBLE DEPUTY DISTRICT ATTORNEY** includes the DDA handling the Informant's case (the case or cases that were generated or helped by the Informant).

**SECTION 1-3**

**OCII COORDINATOR** is the DDA designated by the elected District Attorney to maintain the documents in the Orange County Informant Index (OCII), and coordinate communications between the law enforcement agencies and the Responsible DDA's.

**SECTION 1-4**

**LAW ENFORCEMENT AGENCY** includes any law enforcement agency utilizing an Informant.

**SECTION 1-5**

**INVESTIGATING OFFICER** is the law enforcement officer(s) and/or deputy(ies) who are directly working with an Informant.

## **SECTION 1-6**

**AN INFORMANT** is any person who knowingly provides information to law enforcement related to another's criminal activity, whose motivations for doing so are other than that of an uninvolved witness, victim, or private citizen primarily acting through a sense of civic responsibility and who, as a general rule, but not necessarily, expects some form of benefit or advantage for himself, herself, or another person in return.

For purposes of this policy, Informants include only the following:

### **(A) CITIZEN INFORMANT**

**CITIZEN INFORMANTS** are Informants who regularly or frequently provide information outside the scope of their employment without any form of compensation. This does NOT include volunteers (such as Police Explorers and Senior Volunteers), or other sources who provide information to law enforcement agents on an infrequent or irregular basis, who are usually motivated by civic responsibility. Infrequent is defined as: seldom happening or rare. It is not necessary for law enforcement to get prior approval from the OCII Coordinator to use this type of Informant.

### **(B) PAID INFORMANT**

A **PAID INFORMANT**, often referred to as a "mercenary", is an individual who receives compensation from law enforcement in return for information regarding criminal activity. It is not necessary for law enforcement to get prior approval from the OCII Coordinator to use this type of Informant. Prior approval should be sought from the OCDA CIRC Committee where paid Informants are used in *Perkins* or custodial operations.

### **(C) DEFENDANT INFORMANT**

A **DEFENDANT INFORMANT** is an Informant who has a pending criminal

matter, including probation and/or parole violations. A Defendant Informant also includes an individual who has been prosecuted, convicted and is awaiting sentencing, or on probation. A Defendant Informant provides information in return for a benefit or consideration in their pending criminal matter.

**(D) ACCOMPLICE INFORMANT**

An **ACCOMPLICE INFORMANT** is an Informant who has a pending criminal matter and provides information about one or more co-Defendants in return for a benefit or consideration in the pending criminal matter.

**(E) JAILHOUSE INFORMANT**

A **JAILHOUSE INFORMANT** is a person other than a co-defendant, percipient witness, accomplice or co-conspirator whose testimony is based upon statements made by the defendant while both the defendant and the jailhouse informant are in a custodial setting. Penal Code Sections 1127a, 1191.25 and 4001.1 govern their use. (Appendix A contains the full text of these statutes, and is current as of January, 2017. Before relying on the information contained in this Appendix, confirm that no revisions have been made.)

*Perkins* Operation Informants (see Section 1-7, below, for the definition of a *Perkins* Operation) are also considered Jailhouse Informants for purposes of this policy. The only exception to this rule is when a Law Enforcement Agency uses undercover officers/deputies in the course of a *Perkins* Operation. In that instance, the officers/deputies are not considered Jailhouse Informants.

**SECTION 1-7 PERKINS OPERATION**

A **PERKINS OPERATION** is defined as an undercover investigation of an in-custody suspect's participation in a specific crime, by means of insertion of an officer/deputy, civilian or Jailhouse Informant into a custodial setting with the suspect

for the purpose of eliciting incriminating statements. A **PERKINS OPERATION** is conducted before the suspect has invoked his or her *Miranda* rights and before charges have been filed against the suspect for the specific crime under investigation. [The name is derived from the case of *Illinois v. Perkins* (1990) 496 U.S. 292, which involved an undercover officer posing as an inmate to obtain statements from a murder suspect who was serving time for an unrelated offense.]

## **SECTION 1-8      **BENEFIT****

A **BENEFIT** includes any consideration or advantage an Informant was offered, promised, or received in exchange for information or testimony provided. It includes a benefit for the Informant or another person at the Informant's request. Common forms of benefits include, but are not limited to, the following:

- **Financial** – monetary payments of any kind including, but not limited to, room and board, payment of debts, use of an automobile, cash, meals and expenses, which includes reimbursement for costs or expenses incurred by the Informant
- **Release from Custody** – leniency in arrest or booking, including an O.R. release, request for consideration on bail, declining to contest the source of bail (PC 1275)
- **Charging leniency** – leniency shown in the filing of charges and enhancements, including non-filing of charges
- **Delay** – continuances in arraignments, pre-trials, sentencing
- **Disposition** – dismissal or reduction in charges, custody time, probation terms and length, **favorable input by a DDA or investigating officer made directly to the sentencing court.**
- **Immunity**
- **Favorable Intervention** – favorable action with other governmental agencies, such as DMV, ICE, IRS, DSS, or employers

## **SECTION 1-9      **BRADY MATERIAL****

**BRADY MATERIAL** is defined as evidence that is material to the case and favorable to the Defendant. 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. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. (*United States v. Bagley* (1985) 473 U.S. 667, 682.)

- **The Brady Rule:** The Responsible Deputy District Attorney has a duty to disclose to the Defendant all material evidence that is favorable and that is possessed by the prosecution team. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) The prosecution team includes both investigative and prosecutorial personnel (the OCDA’s office, the Law Enforcement Agency and assisting agencies.)
- **The Brady Rule Applies to All Stages of a Criminal Proceeding:** Immediately upon learning about, or acquiring *Brady* information, the Investigating Officer must notify the Responsible Deputy District Attorney so that the information can be provided to the defense. It is unacceptable to delay such communication to the Responsible Deputy District Attorney or time the release of *Brady* materials for a subsequent phase of the criminal proceedings. The *Brady* disclosure obligation extends to preliminary hearings, motions to suppress evidence involving issues such as search and seizure, *Miranda*, *Massiah*, and *Perkins* operations.
- **No Request for Brady Material Required:** *Brady* material must be disclosed to the defense whether it is requested or not. There is a duty on the part of the prosecution, even in the absence of a request, to disclose all material evidence favorable to an accused, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness. (*People v. Rutherford* (1975) 14 Cal. 3d, 399, 406.)

- **Brady and Informants**: The Responsible Deputy District Attorney is obligated to provide information about any prior or current relationship between a witness (Informant) and law enforcement. The fact that a witness was an Informant in the past has been held to be *Brady* information. This duty extends to evidence reflecting on the credibility of a material witness including any inducements (benefits) made to prosecution witnesses for favorable testimony. It also includes evidence of all historical events bearing on the Informant's propensity to be truthful or untruthful and any misconduct on the current or past cases.
- **The Responsible Deputy District Attorney's Duty**: The individual prosecutor has a duty to ascertain as well as divulge any favorable evidence known to the others acting on the government's behalf, including the police. Courts have strictly imposed this obligation holding the Deputy District Attorney responsible for information in the possession of the "prosecution team," **whether or not the Responsible Deputy District Attorney was actually aware of it**. Prosecutors are admonished to resolve questions in favor of disclosure.
- **The Investigating Officer's Duty**: The Law Enforcement Agency/ Investigating Officer must ensure that the Responsible Deputy District Attorney is made aware of the existence of the Informant and the nature of his involvement in case in which the Informant is a potential witness. As noted above, the Responsible Deputy District Attorney is responsible for information in the possession of the "prosecution team," **whether or not the Responsible Deputy District Attorney was actually aware of it**. As such, this information must be communicated before the filing of the case in which the Informant is a potential witness.

- **Brady Questions**: It is important and prudent for the Investigating Officer to contact the Orange County District Attorney's office on any questions or issues related to Informants or *Brady* obligations.

## **SECTION 1-10 COOPERATING INFORMANT REVIEW COMMITTEE (CIRC)**

The **COOPERATING INFORMANT REVIEW COMMITTEE (CIRC)** is a committee comprised of the elected District Attorney, the Chief Assistant District Attorney, the Senior Assistant District Attorney in charge of Vertical/Violent Crimes, Assistant District Attorneys of the Homicide, Gang, and Narcotics Enforcement Team (NET) Units, the OCII Coordinator, an appointee from outside the OCDA and a discretionary, temporary appointed Deputy District Attorney.

CIRC approval is mandatory in order to prosecute a case involving a Jailhouse Informant and/or where a *Perkins* Operation has been conducted.

CIRC members are also available for consultation to any District Attorney, or any member of a Law Enforcement Agency, to provide an effective and efficient process for reviewing other cooperating informant-related issues. The CIRC will serve as a resource for prosecutors and Law Enforcement Agencies to ensure that proper legal standards are maintained and followed throughout the criminal justice process.

## CHAPTER

# 2

## RESPONSIBILITIES OF THE LAW ENFORCEMENT AGENCY AND INVESTIGATING OFFICER

### SECTION 2-1 NOTIFICATION TO DISTRICT ATTORNEY WHEN AN INFORMANT IS INVOLVED, OR A *PERKINS* OPERATION HAS BEEN CONDUCTED, IN A CASE TO BE FILED

It is essential that the law enforcement agency inform the filing DDA when: (1) a case involves an Informant in any capacity; and/or (2) a *Perkins* Operation has been conducted. This is vital in order to ensure the proper evaluation of discovery and *Brady* issues at the earliest possible time, and to determine the most effective filing strategy. For example, if this information is known by the filing DDA, a case may be filed differently to better protect and ensure the confidentiality of an Informant. The DDA should also be informed of any operation that does not yield helpful evidence because *Brady* may require the discovery of that information to the defense.

### SECTION 2-2 INFORMANT RECORDS TO BE KEPT BY AGENCY

Each Law Enforcement Agency utilizing Informants has a duty to maintain records of all information pertinent to the use of an Informant. This duty extends to any Jailhouse Informant they have transported, assisted with housing or interviewed. These records should include the following:

- 1) **Identifying information** (i.e. fingerprints, tattoos, etc);
- 2) **A criminal history;**
- 3) **Any notes, memoranda and computer generated documents;**
- 4) **A log** of the supervision and direction of the Informant's activities;
- 5) **The names of the investigating officers** responsible for the Informant;
- 6) **A record of any payments or benefits** provided to the Informant; and

- 7) **A work performance record containing** both positive and negative information and results, including the Informant's degree of participation and cooperation (including testimony), the number of persons arrested by name, charges and case numbers and the amount of evidence seized.

### **SECTION 2-3 USE OF MINORS AS INFORMANTS**

No minor shall be utilized as an Informant except in compliance with Penal Code Section 701.5. (See Appendix B for the full text of the statute.) **In addition it is the policy of this office that no minor shall be used as an Informant, as herein defined, without the prior *written* approval of the Law Enforcement Agency's Chief and the elected District Attorney.**

### **SECTION 2-4 INFORMANT DEBRIEFING**

The Investigating Officer shall, at the earliest opportunity, debrief a potential Informant to evaluate and examine the Informant's ability to assist law enforcement. The Investigating Officer should examine the motivations and truthfulness of the Informant, weigh the value of the target against the potential risks to the Informant, and evaluate whether the Informant's role should be as an active participant or merely as a source of intelligence.

### **SECTION 2-5 REPRESENTATIONS / PROMISES TO INFORMANTS**

The Law Enforcement Agency and Investigating Officers shall not make any promises or representations, express or implied, to any Defendant Informant regarding his pending criminal proceedings, or those of any other person(s), without the concurrence of the OCII Coordinator. In the event of a vertical prosecution, prior approval from the Assistant DA of that vertical unit is also required.

The Law Enforcement Agency and Investigating Officers should also advise

Informants that requests for benefits and consideration are dependent on “truthful information leading to viable prosecutions” (i.e., cases that can be filed) and not convictions.

## **SECTION 2-6      PROMISES OF BENEFITS TO OTHERS**

**Generally, an Informant should not be allowed to provide information or assistance to law enforcement to obtain a benefit on another person’s pending criminal matter.** In such cases, prior approval must be obtained from the OCII Coordinator and the Assistant DA of the unit responsible for the prosecution of the third party.

## **SECTION 2-7      TESTIMONY OF INFORMANTS**

An Informant shall not be advised that he or she will not have to testify in court. If an Informant makes that a condition of his cooperation, his utilization shall first be approved by the OCII Coordinator and the Assistant DA whose unit is prosecuting the case.

## **SECTION 2-8      USE OF JAILHOUSE INFORMANTS / *PERKINS* OPERATIONS**

There are significant legal and practical challenges associated with the use of Jailhouse Informants and *Perkins* Operations. Chapter 3 of this manual discusses these topics and Law Enforcement Agencies and Investigating Officers are encouraged to familiarize themselves with that material.

## **SECTION 2-9      USE OF CITIZEN INFORMANTS**

### **(A)            NOTIFICATION TO OCII COORDINATOR WHEN CITIZEN INFORMANT BECOMES A POTENTIAL WITNESS OR DEFENDANT IN A PENDING CRIMINAL CASE**

It shall be the responsibility of the utilizing Law Enforcement Agency to inform the OCII Coordinator whenever any non-defendant, Citizen Informant has either been charged with a crime or has become a potential witness in any pending criminal case. **This includes when the Informant is an affiant or provides information used by an affiant in an affidavit used to support a search warrant.** This latter requirement is vital to ensure that if other agencies use the Informant in the future, they have information available that he is either reliable or not. In addition, if the Informant later becomes a witness that testifies in a criminal proceeding, the fact he has previously provided information to law enforcement shall be considered *Brady* material.

The utilizing Law Enforcement Agency shall prepare and submit an OCII packet to the OCII Coordinator. **It is vital that all utilizing Law Enforcement Agencies comply with this requirement in order to ensure the ability of the prosecutor to meet *Brady* requirements. (See Section 1-9.) Failure to follow this procedure may jeopardize a pending criminal prosecution, endanger the safety of other law enforcement personnel or compromise the integrity of future investigations.**

## **SECTION 2-10      USE OF DEFENDANT INFORMANTS**

### **(A)            COMMUNICATION WITH A REPRESENTED DEFENDANT INFORMANT**

There should be no communication with a represented Defendant Informant concerning the subject of his representation (such as the crime for which the

Defendant has been charged) without the knowledge and explicit permission of his attorney. It is the duty of the Law Enforcement Agency to notify a Defendant Informant's attorney of his pending cooperation. Such contact, and any permission given to communicate with the Defendant Informant, should be obtained on a voice recording or in writing and documented in the agency's Informant file. If a Defendant Informant expresses a desire to discuss cooperation without the knowledge of his/her attorney, you must first consult with the OCII Coordinator and/or the Responsible DDA in order to ensure that any subsequent interviews are in compliance with existing law.

#### **(B) EXAMINATION OF DEFENDANT INFORMANT'S BACKGROUND**

The utilizing Law Enforcement Agency shall, at the earliest opportunity, make an examination of a Defendant Informant's background to determine whether he/she is an appropriate candidate to work. This evaluation shall include a criminal history check for active warrants, parole and probation status, a record of violence, including weapons and domestic violence charges, strikes, substance abuse, dishonesty, criminal sophistication, immigration status, unexplained failures to appear, control issues (e.g., gang membership, flight risk), and prior Informant activity.

#### **(C) EVALUATION OF DEFENDANT INFORMANTS**

The Investigating Officer shall determine whether a Defendant Informant is able to provide information which will result in prosecutions of a **significantly greater magnitude** than that with which the Defendant Informant is charged.

#### **(D) NOTIFICATION OF OTHER INTERESTED PARTIES**

When a Law Enforcement Agency wishes to use a Defendant Informant who is: (a) under arrest by another agency or agencies; (b) under investigation by another agency or agencies, or c) being prosecuted by another agency or agencies,

that Law Enforcement Agency will contact such other agencies prior to the use of the Informant, in order to determine whether any conflicts exist regarding the use of the Informant.

**(E) NOTIFICATION TO THE DISTRICT ATTORNEY (OCII)**

The utilizing Law Enforcement Agency shall submit to the OCDA's Office, through the OCII Coordinator, a **complete OCII packet prior to utilization of a Defendant Informant, which includes an Informant on formal/ informal probation in Orange County.** (See Section 2-10(G)). If prior notification is not feasible, the packet shall be submitted within three working days. The OCII Coordinator will review the packet and immediately advise the Investigating Officer if there are any issues that would preclude the use or limit the benefit available to a Defendant Informant.

The OCII packet shall contain:

- A completed OCII card
- A photo (if available)
- CII, DMV histories
- A brief statement (including DR#) of any pending cases
- A brief summary of the Informant's work to date
- A list of all benefits given (e.g., OR, citation, etc.)

A determination of the OCII Coordinator regarding the use of a Defendant Informant with which the Law Enforcement Agency disagrees may be referred for resolution first to the Assistant District Attorney in charge of the Narcotics Enforcement Team (NET), and secondly, in unusual or special circumstances, to the Senior Assistant District Attorney that oversees the Narcotics Enforcement Team (NET).

## **(F) BEFORE UTILIZING INFORMANT TO OBTAIN SEARCH WARRANT**

When a Law Enforcement Agency wishes to use a Defendant Informant who is under arrest or approaches a Law Enforcement Agency and offers their services as an Informant, they should contact the OCII Coordinator to make sure there is nothing negative in the potential Informant's background that would potentially need to be disclosed in a search warrant affidavit so the magistrate will not be misled in the belief there are no prior credibility issues with the Informant.

It is also vital that the Investigating Officer submit an OCII packet to the OCII Coordinator [see Section 2-10(E)] to ensure that in the future other law enforcement personnel who may utilize the Informant have the same information available to them. In addition *Brady* requirements may be implicated. (See Sections 1-9, 2-10(A), 2-12 and 2-13.)

## **(G) NOTIFICATION OF PAROLE OR PROBATION DEPARTMENTS**

The use as an Informant of an individual subject to supervised probation or parole terms may lead to a violation of these terms. Accordingly before using an Informant on supervised probation or parole, in a manner that *may* violate their terms and conditions (i.e. controlled buys, association with other criminals, etc.), the Investigating Officer should first contact the Informant's Parole or Probation Officer to obtain their consent to this utilization. In cases where the cooperating Informant is formally supervised by the Orange County Probation Department, **special permission must be obtained from the Supervising Probation Officer of the Special Enforcement Unit (SEU) in charge of Informant issues.**

If the Investigating Officer has secured the permission of the probation officer at the time the OCII package is submitted, and the OCII Coordinator approves the use of the Informant, nothing further beyond entering the Informant's name into the

OCII index need be done. If the Investigating Officer has not yet obtained the probation officer's consent, or it has been refused, and the OCII Coordinator agrees that the use of the supervised probationer or parolee is warranted, the OCII Coordinator is to contact the Supervising Probation Officer of the Special Enforcement Unit (SEU) directly and attempt to gain consent. If consent is still declined, the OCII Coordinator is to turn the matter over to the Assistant District Attorney in charge of the unit prosecuting the case.

If the Assistant District Attorney agrees that the use of the supervised probationer or parolee as an Informant is warranted, he/she may pursue consent up the chain of command of the Probation Department and the OCDA. In the event consent is still not obtained, the Assistant District Attorney may then refer the matter to the responsible judge of the Superior Court.

If the Informant is on parole or supervised by the probation department of **another county**, and consent of the parole or probation officer cannot be obtained, the Informant should only be utilized in a manner that will not violate the terms of parole or probation, or the instructions of the parole or probation officer.

#### **(H) USE OF VIOLENT OFFENDERS AS DEFENDANT INFORMANTS**

No violent offender [a person charged with a violent felony (see Appendix C) or other crime of violence, or who has a violent criminal background, or constitutes a danger to a victim or others] shall be utilized as a Defendant Informant unless the following procedures are employed:

- 1) The Investigating Officer must first seek and receive the approval of his/her command level supervisor;
- 2) In addition to the OCII Coordinator, the Assistant DA in charge of the Narcotics Enforcement Team (NET) is notified and his/her approval

obtained.

- 3) The Assistant District Attorney in charge of the unit prosecuting the Informant is notified and his/her approval obtained.
- 4) In the event the Informant is to be utilized as a witness in a case against another criminal Defendant, the Assistant District Attorney in charge of the unit prosecuting that case shall be notified and his/her approval obtained.
- 5) In the event of disagreement, the Senior Assistant District Attorney in charge of the Division in which the case utilizing the Informant as a witness is being prosecuted shall make the final decision.
- 6) After first securing the approval of his/her command level supervisor, the Investigating Officer may request the OCII Coordinator to coordinate the notification and approval of the required DA personnel.

**(I) USE OF “THIRD STRIKERS” AS DEFENDANT INFORMANTS**

No 3<sup>rd</sup> “striker” [a person charged with a new serious or violent felony and 2 or more allegations pursuant to Penal Code Section 667.5(c) and/or Penal Code Section 1192.7(c) (i.e. strikes)] shall be utilized as a Defendant Informant unless the procedure outlined in Section 2-10(H), above, is followed. It should be noted that certain juvenile prior adjudications qualify as strike offenses pursuant to Welfare and Institutions Code Section 707(b). (See Appendices C, D and E for a list of serious and violent felony offenses and juvenile adjudications that constitute strikes. The text of these statutes is current as of January, 2017. Before relying on the information contained in these Appendices, confirm that no revisions have been made.)

**(J) USE OF DEFENDANTS WITH PENDING DUI CASES**

Although not classified as violent criminals, individuals with driving under the influence cases are not normally utilized because of the overriding potential risk to the public safety. Accordingly, a Defendant facing a pending DUI case shall neither be utilized as an Informant, nor shall he/she be given, offered or promised any

benefit or consideration on that pending driving under the influence case unless the procedures outlined in Section 2-10(H) are employed.

**(K) SUBMISSION OF PENDING DEFENDANT INFORMANT CASES TO DISTRICT ATTORNEY**

A Defendant Informant's case shall be submitted to the District Attorney for filing in a timely manner, and shall not be held back pending the Informant's performance, without prior approval of the OCII Coordinator.

**(L) STATUS REPORTS – REQUESTS FOR CONTINUANCES**

The Investigating Officer shall keep the OCII Coordinator advised of the current status of the Informant's activities in advance of the Informant's scheduled court dates so the OCII Coordinator can approve and arrange for continuances. All requests for continuances shall be directed to the OCII Coordinator.

**SECTION 2-11 USE OF ACCOMPLICE INFORMANTS**

Accomplice testimony must be corroborated by other evidence, in compliance with Penal Code Sections 1111 and 1111.5.

**SECTION 2-12 NOTIFICATION TO OCII COORDINATOR OF TERMINATION OF RELATIONSHIP WITH INFORMANT**

When the relationship between an Informant and the Law Enforcement Agency or Investigating Officer is terminated for unsatisfactory performance, or for any reason ends or lapses and the Investigating Officer has been unable to reestablish contact after reasonable efforts, the Investigating Officer, if he has not yet done so, shall prepare an OCII packet and submit it to the OCII Coordinator. In addition to containing the usual required information [see Section 2-10(E)], the

packet shall also document the date of, and reasons for the termination or end of utilization, any attempts to re-establish contact, and/or the method of notifying the Informant and/or his attorney. The OCII Coordinator shall enter this information into the Informant's record in the OCII database.

**This procedure must be followed upon the ending or termination of an Informant relationship.** Following this procedure will provide the appropriate data base that a subsequent Law Enforcement Agency may refer to in the event the Informant attempts to develop a relationship with that agency. The safety of law enforcement personnel in that agency, or their cases, may be jeopardized if they remain unaware of an Informant's previous history with another agency.

This procedure is equally vital if the Informant ends up becoming a witness. **The fact that a witness has previously been an Informant shall be considered *Brady* material in a subsequent case in which the Informant is a witness.** (See Section 1-9). The Deputy District Attorney prosecuting that case will be charged with that knowledge whether or not he is actually aware of it. His failure to disclose that fact can constitute a *Brady* violation. **Consequently, in addition to potentially endangering other law enforcement personnel, a failure to follow the procedures outlined above may jeopardize a pending criminal prosecution.**

### **SECTION 2-13      NOTIFICATION TO OCII UPON AGENCY DESTRUCTION OR PURGING OF INFORMANT FILES**

Before a Law Enforcement Agency deletes, destroys or purges records or information concerning an Informant which the agency has utilized, if it has not yet done so, the Agency must submit an OCII packet in accordance with Section 2-10(E). As noted above this procedure needs to be followed in order to ensure compliance with *Brady* requirements in the event the Informant becomes a witness. In addition this information should be available to other Law Enforcement Agencies in the event they work with the Informant in the future.

## **SECTION 2-14    LETTERS FOR CONSIDERATION**

All requests for consideration must be in writing, directed to the OCII Coordinator, and approved by a command level police supervisor (e.g., lieutenant or above). The letter should detail the Informant's level of involvement and cooperation, and the results of his efforts, including DR#'s, number of people arrested and amount of contraband or evidence seized. At no time should these letters be filed with the Court, in the DA file, or given to the Informant or his attorney. They will be maintained in a secure location overseen by the OCII Coordinator.

## **SECTION 2-15    PRIVILEGES**

In certain circumstances, Law Enforcement Officers may invoke a privilege during their testimony to protect the confidentiality of official information and/or to protect the identity of cooperating Informants. These privileges are set forth in Evidence Code Sections 1040, 1041 and 1042. Members of Law Enforcement Agencies should be familiar with these code sections and know how to procedurally invoke any applicable privileges. Evidence Code Sections 1040, 1041 and 1042 are more thoroughly discussed in Chapter 5 of this manual.

A Jailhouse Informant is a person other than a codefendant, percipient witness, accomplice or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution. (Penal Code section 1127a.)

*Perkins* Operation Informants (*Illinois v. Perkins* (1990) 496 U.S. 292, 294) are also considered Jailhouse Informants for purposes of OCDA policy. The only exception to this rule is when a Law Enforcement Agency uses undercover officers/deputies in the course of a *Perkins* Operation. In that instance, the officers/deputies will not be considered Jailhouse Informants.

These policies and guidelines apply to all Jailhouse Informants, whether or not they seek leniency or any other benefit from the OCDA or other law enforcement officials in exchange for their testimony.

There are significant legal and practical challenges associated with Jailhouse Informant cases. Fully understanding *Brady* requirements, discovery obligations, and *Massiah* issues is only the beginning of the rigorous process when using a Jailhouse Informant. Proper documentation, recording and establishing confidentiality through legal means are essential. Do not underestimate the amount of scrutiny and work that is necessary when a Jailhouse Informant is involved. For these reasons, the Responsible DDA shall immediately notify his/her supervisor when the Responsible DDA becomes aware that a potential Jailhouse Informant has come forward to offer cooperation to the OCDA or any Law Enforcement Agency.

There is also a general skepticism about the credibility of Jailhouse Informants and their use in the criminal justice system. The law codifies this skepticism in Penal Code Section 1127a. When an in-custody informant testifies as a witness, Penal Code Section 1127a requires the court to instruct the jury as follows:

“The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefit from the party calling that witness...”

Given the general skepticism relating to the credibility of Informants, strong corroborating evidence is required to demonstrate that a Jailhouse Informant is offering truthful testimony.

Prosecutors and Law Enforcement Officers are urged to read and familiarize themselves with these policies and guidelines. A new procedure and resource of the OCDA, established in 2015, is the Cooperating Informant Review Committee (CIRC), which is further described in Chapter 4 of this manual. All Jailhouse Informant and *Perkins* Operation cases, issues and questions **must** be directed to the CIRC. The OCDA has also prepared a Checklist for Cooperating Informants that shall be used by District Attorneys and Law Enforcement Officers to ensure that all areas of cooperating informant use have been anticipated and evaluated. That checklist can be found in subdivision (M) of this Chapter, below.

#### **(A) IMPORTANT FOUNDATIONAL LEGAL PRINCIPLES**

The rules of *Brady*, *Massiah* and *Miranda* will be honored and scrupulously applied when dealing with Jailhouse Informants, *Perkins* Operations and targets. (A *Perkins* Operation should not be conducted after the suspect has invoked his/her *Miranda* rights.) When dealing with Jailhouse Informants and/or conducting *Perkins* Operations, Law Enforcement Officers are required to ensure the target's statements

are voluntary under the 5<sup>th</sup> and 14<sup>th</sup> Amendments. (The Jailhouse Informant or undercover officer should not make any express or implied threats, promises of benefits, or other statements, gestures, or conduct which threaten the target or his loved ones or the target's legal, financial, social or reputational interests in any way.)

## **(B) ORANGE COUNTY INFORMANT INDEX AND POLICY MANUAL**

The Jailhouse Informant must be in the OCDA's Informant Index (OCII). Entry into OCII is not dependent upon the Jailhouse Informant's testimony. OCII entry is required whenever a Jailhouse Informant is involved in an investigation, including cases that aren't filed and prosecutions where the Informant is not used.

Some of the more important policies are briefly noted here:

- Section 1-9: *Brady* Material
- Section 2-1: It is essential that the Law Enforcement Agency inform the filing DDA when a case involves an Informant in any capacity.
- Section 2-2: The importance of Informant record keeping by the Law Enforcement Agency.
- Section 2-5: The Law Enforcement Agency and Investigating Officers/Deputies shall not make any promises or representations, express or implied, to any Defendant Informant regarding his pending criminal proceedings, or those of any other persons, without the approval of the OCDA.
- Section 2-10(E): The utilizing Law Enforcement Agency shall submit to the OCDA, through the OCII Coordinator, a complete OCII packet prior to utilization of a Defendant Informant or an Informant on formal or informal probation in Orange County.
- Sections 2-10(H), (I) and (J): Procedures for Informants with a violent history, "strikes" or DUI's.

### **(C) COOPERATING INFORMANT REVIEW COMMITTEE (CIRC)**

If a member of a Law Enforcement Agency has a question about the use of a Jailhouse Informant, contact should be made with a member of the CIRC. CIRC committee members are senior prosecutors experienced in dealing with informant-related issues.

Law Enforcement Agencies shall contact the CIRC when (1) there are questions about a CI-related issue involving a homicide, gang or sexual assault case; (2) the use of a Jailhouse Informant and/or a *Perkins* Operation is being contemplated; (3) when a Jailhouse Informant is used and/or a *Perkins* Operation is conducted, irrespective of success or failure; and/or (4) an Informant is involved in a high profile case.

The Responsible DDA shall contact the CIRC if: (1) the testimony of a Jailhouse Informant is involved in a case and/or his/her use is contemplated in a criminal prosecution; and/or (2) a *Perkins* Operation is contemplated or has been conducted. No case will be prosecuted if a Jailhouse Informant is involved, and no Jailhouse Informant will be utilized in the prosecution of a case, without the prior approval of the CIRC. Similarly, no case involving a *Perkins* Operation will be prosecuted without the prior approval of the CIRC.

Committee members are also available for general questions about the use of Informants. Chapter 4 of this manual contains the names of the committee members and their contact information, and also outlines the OCDA's internal CIRC protocol.

### **(D) JAILHOUSE INFORMANT BACKGROUND AND TRAINING**

A comprehensive review must be conducted of the Jailhouse Informant's criminal record at every level. Be prepared to provide a list of past cases worked on,

cases testified on, past, present and future benefits, impeachment material (criminal history and evidence of dishonesty).

Training should be implemented by the Law Enforcement Agency for the Jailhouse Informant to discuss ground rules for engagement with the target. Law Enforcement Agencies must provide a report and record what was told to the Jailhouse Informant by the Law Enforcement Agency prior to the contact between the Jailhouse Informant and the target. The report must include information on benefits, incentives and instructions provided to the Jailhouse Informant.

#### **(E) JAILHOUSE INFORMANT BENEFITS**

- Law Enforcement Agencies should not promise a Jailhouse Informant any benefit, which includes the exercise of prosecutorial discretion, without first obtaining the written approval of the Cooperating Informant Review Committee (CIRC).
- The OCDA will not accept any oral request by Law Enforcement Agencies for benefits involving a Jailhouse Informant on a pending criminal case. All agency requests for benefits must be in writing and personally approved in writing by that agency's command level supervisor (lieutenant or above).
- No DDA or other members of the OCDA shall assist in offering or facilitating any Jailhouse Informant benefit which has not been previously approved by the Cooperating Informant Review Committee (CIRC).

#### **(F) DISCOVERY OF REPORTS AND RECORDINGS**

There must be detailed chronological reports of the Jailhouse Informant's activities during the operation, which disclose all relevant circumstances of the operation. Each Law Enforcement Agency must have an organized method of record-keeping involving Jailhouse Informants.

Steps must be taken to ensure excellent video and audio recordings between the Jailhouse Informant and the target. The entire encounter must be recorded. Document the personnel involved in the recording and those present who witness the encounter and recording. Review the quality of the recording and document any deficiencies in a supplemental report. If the entire contact is not recorded, the report should explain why the entire contact was not recorded, date and time of the unrecorded contact, whether it was done before the target was charged, and what was said between the Jailhouse Informant and the target.

### **(G) CONFIDENTIALITY OF THE JAILHOUSE INFORMANT**

No criminal case should be filed in which the disclosure or testimony of a Jailhouse Informant is mandated by law or essential for successful prosecution, when the Jailhouse Informant or Law Enforcement Agency submitting the case insists on the Jailhouse Informant remaining confidential. It should be understood that in cases involving Jailhouse Informants, it often will not be possible to keep the Jailhouse Informant's identity confidential.

### **(H) PRIVILEGES**

Know and apply official government privileges set forth in Evidence Code Sections 1040, 1041 and 1042, as well as Penal Code Section 1054.7. (The Evidence Code sections are more thoroughly discussed in Chapter 5.)

### **(I) SAFETY OF THE JAILHOUSE INFORMANT**

Evaluate the logistics of ensuring the safety of the Jailhouse Informant and his next of kin.

### **(J) PERKINS OPERATIONS**

To the extent possible, exhaust all investigative leads before conducting a

*Perkins* Operation. If possible, use an undercover officer instead of a Jailhouse Informant.

Except where a defendant's right to counsel has not attached, no Law Enforcement Agency and no Jailhouse Informant may take any action that is designed to elicit incriminating statements from a defendant beyond merely listening to a defendant's statements. (Penal Code section 4001.1(b); *People v. Clair* (1992) 2 Cal.4<sup>th</sup> 629, 657; *Illinois v. Perkins* (1990) 496 U.S. 292, 294.)

Law Enforcement Agencies must understand the potential scope of discovery issues in *Perkins* Operations. Each operation will present significant discovery obligations. Subdivision (M), below, contains a checklist for Cooperating Informant cases, which include Jailhouse Informants, and reflects the areas and information that the OCDA will need to prepare the case for filing and prosecution.

#### **(K) MARSY'S LAW**

Pursuant to Penal Code Section 1191.25, before the Jailhouse Informant is called to testify, the Responsible DDA shall give notice to all prior victims of the Jailhouse Informant of the intent to provide the Jailhouse Informant with any benefits.

#### **(L) COMPLIANCE WITH STATUTES GOVERNING CONTACT WITH JAILHOUSE INFORMANTS**

All Responsible DDAs who call a Jailhouse Informant to testify must comply with Penal Code Sections 1127a, 1191.25 and 4001.1. (Appendix A contains the full text of these statutes, and is current as of January, 2017. Before relying on the information contained in this Appendix, confirm that no revisions have been made.)

At trial, the Responsible DDA shall file with the court a written accounting of any considerations or benefits promised or given to the Jailhouse Informant,

pursuant to Penal Code section 1127a(c). The Responsible DDA shall also request that the court give a cautionary instruction to the jury regarding Jailhouse Informant testimony, pursuant to Penal Code section 1127a(b).

**(M) ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE  
CHECKLIST FOR COOPERATING INFORMANT CASES**

1.  Has the Cooperating Informant been entered into OCII?
2.  How and when did the Cooperating Informant begin supplying information?
3.  What was his motive for becoming a Cooperating Informant?
4.  Was he trying to mitigate his responsibility for another crime?
5.  Was anyone close to him released or given some form of favorable treatment in anticipation of, or as a result of his cooperation?
6.  Were there other motives such as fear of associates, revenge, diverting suspicion from himself, money, or repentance?
7.  What benefits have law enforcement officers offered?
8.  Is there documentation of the benefits offered?
9.  What can the Cooperating Informant reasonably expect?
10.  What has the Cooperating Informant already received?
11.  No further promises should be made to the Cooperating Informant unless the assigned trial deputy has been contacted beforehand.
12.  Acquire and review the Cooperating Informant's criminal record.
13.  Is the Cooperating Informant a suspect in any criminal investigation(s)?

14.  Find all cases pending against the Cooperating Informant, state or federal, from traffic infractions to felony appeals.
15.  Has contact been made with the attorney representing the Cooperating Informant on his/her charged case?
16.  If the Cooperating Informant has cases pending which were not known to officers, the officers should be asked again whether they made any general promises of leniency or favorable treatment such as an officer's promise to take care of all the Cooperating Informant's cases.
17.  Get details of the Cooperating Informant's activity in other cases which established his reliability. Determine the kind of cases, type of information provided, whether law enforcement investigated the information to determine its accuracy, and whether arrests or convictions resulted from the information.
18.  Were there any court rulings in which the Cooperating Informant was found credible or not credible? Were there any occasions known to the officers when the Cooperating Informant knowingly provided false or misleading information? Has any agency "blackballed" the Cooperating Informant?
19.  Ask how frequent the contacts with and supervision of the Cooperating Informant by law enforcement has been. Will the agency be able to control and track the Cooperating Informant in the future?
20.  Finally, to what extent will the law enforcement agency be able to corroborate the Cooperating Informant's testimony?

The CIRC Committee was created to provide an effective and efficient process for reviewing informant-related issues within the OCDA and to serve as a resource for prosecutors and Law Enforcement Agencies so that proper legal standards are maintained and followed throughout the criminal justice process.

The Responsible DDA shall contact the CIRC if: (1) the testimony of a Jailhouse Informant is involved in a case and/or his/her use is contemplated in a criminal prosecution; and/or: (2) a *Perkins* Operation is contemplated or has been conducted. No case will be prosecuted if a Jailhouse Informant is involved, and no Jailhouse Informant will be utilized in the prosecution of a case, without the prior approval of the CIRC. Similarly, no case involving a *Perkins* Operation will be prosecuted without the prior approval of the CIRC.

Law Enforcement Agencies shall contact CIRC when (1) there are questions about a CI-related issue involving a homicide, gang or sexual assault case; (2) the use of a Jailhouse Informant and/or a *Perkins* Operation is being contemplated; (3) when a Jailhouse Informant is used and/or a *Perkins* Operation is conducted, irrespective of success or failure; and/or (4) an Informant is involved in a high profile case.

The CIRC process can be initiated by calling any one of the following Committee members:

Permanent Members shall include:

- The elected District Attorney
- The Chief Assistant District Attorney
- Senior Assistant District Attorney - Vertical/Violent Crimes
- Assistant District Attorney - Homicide

- Assistant District Attorneys - Gangs/TARGET
- Assistant District Attorney - Narcotics Enforcement Team (NET)
- OCII Deputy District Attorney
- Elected District Attorney appointee from outside the OCDA

The elected District Attorney will serve as chair of the CIRC and may designate the Chief Assistant District Attorney or a Senior Assistant District Attorney to act as chair in the elected District Attorney's absence. At the discretion of the elected District Attorney, a Deputy District Attorney or Assistant District Attorney with significant trial experience may be appointed on a temporary basis.

Pursuant to the OCDA Informant guidelines, it is not necessary to contact the CIRC when the Informant who has or will provide information is a charged co-defendant or accomplice of the suspect (about whom the information is or will be provided). However, if such Informant, while in custody, intends to, or is contemplated for, eliciting information from the in-custody suspect, the CIRC must be contacted.

**(A) CIRC MEMBERS CONTACT INFORMATION (For Law Enforcement Only)**

1. **For gang-related CI cases or questions:** Contact should be made either with the DDA assigned to the agency jurisdiction or to the supervising attorneys of the Gang/Target Unit. If a DDA is contacted, that person should immediately contact their supervising attorney.

- **Gang/Target Unit Supervisor:** Alison Gyves  
[Alison.Gyves@da.ocgov.com](mailto:Alison.Gyves@da.ocgov.com)  
714-347-8518
- **Gang/Target Unit Supervisor:** James Laird  
[James.Laird@da.ocgov.com](mailto:James.Laird@da.ocgov.com)  
714-347-8498

**2. For homicide cases or questions (not related to gangs):** Contact should be made either to the deputy DDA assigned to the agency jurisdiction or to the supervising attorney of the Homicide Unit. If a deputy DDA is contacted, that person should immediately contact their supervising attorney.

- **Homicide Unit Supervisor:** Dan Wagner  
[Dan.Wagner@da.ocgov.com](mailto:Dan.Wagner@da.ocgov.com)  
714-347-8462

**3. All other CI inquiries** should be directed to the DDA assigned to the Orange County Informant Index (OCII) or the supervisor of the Narcotics Enforcement Team (NET) Unit.

- **OCII Coordinador:** Ben Masangkay  
[Ben.Masangkay@da.ocgov.com](mailto:Ben.Masangkay@da.ocgov.com)  
714-347-8533
- **Narcotics Enforcement Team (NET) Unit Supervisor:** Ted Burnett  
[Ted.Burnett@da.ocgov.com](mailto:Ted.Burnett@da.ocgov.com)  
714-347-8550

## **(B) PROCEDURES/PROTOCOL AFTER CIRC IS CONTACTED**

1. CIRC member completes the CIRC form which details who contacted the CIRC, the issues involved and the necessary follow up to be completed.

2. CIRC member sends the CIRC form to other committee members for review.

3. As needed, the CIRC will meet to review and discuss matters referred to them.

4. In all cases where a Jailhouse Informant is to be used, approval must be obtained from a Senior Assistant District Attorney, the Chief Assistant District Attorney and the elected District Attorney.

## **(C) RESPONSIBLE DDA'S ATTENDANCE AT THE CIRC COMMITTEE MEETING**

In all cases involving Jailhouse Informants, and in other cases by invitation of the CIRC Committee, the Responsible DDA will present his/her case to the CIRC. The following forms should be submitted to the CIRC Committee members in advance of the meeting:

Factual Summary

Review By Responsible DDA

Review by CIRC Committee

These forms can be found in the G/: drive under the file name "CI Forms."

The Responsible DDA should be prepared to address the following issues with the CIRC Committee members:

1. The present status of the case in which the Informant's testimony will be offered, including the crimes charged;
2. How contact was initiated between the Informant and law enforcement;
3. The facts and circumstances regarding how the Informant obtained the defendant's admission/confession;
4. What evidence/testimony is being offered by the Informant;
5. An analysis of the case both with and without the Informant's testimony;
6. What evidence corroborates the Informant's proposed testimony;
7. The Informant's criminal background, including arrests, pending cases, convictions, law enforcement contacts and gang affiliations. Past crime partners and past co-defendants of the Informant, if known, should also be brought to the attention of the Committee. This information should also include whether the Informant has any connection to the defendant in the current case.
8. Any benefits promised or given to the Informant by any member of the prosecution team on the pending case or any other case. Specifically, the CIRC Committee will need to know whether there has been compliance with Penal Code section 4001.1(a), which prohibits monetary payments to Informants in excess of \$50

(with certain exceptions);

9. Whether the Informant made any prior offers to provide information to law enforcement, and whether any promises were made or benefits provided. If the Informant has testified in other matters, a description of the quality of the testimony; and

10. How the requirements of Penal Code section 1191.25 will be met. (This section requires the prosecution to make a good faith effort to notify the victims of any crime committed, or alleged to have been committed, by the Informant before the informant is called to testify).

The CIRC Committee will notify the Responsible DDA of its decision in writing.

#### **(D) RESPONSIBILITIES AFTER AN INFORMANT TESTIFIES**

An OCII packet must be submitted on an Informant by the Law Enforcement Agency using that Informant. The Responsible DDA should confirm, prior to reviewing a case for prosecution, that an OCII packet has been submitted to the OCII Coordinator by the Law Enforcement Agency or Investigating Officer.

For purposes of this section, an Informant is considered to have testified if his/her statements were introduced during a Prop. 115 hearing and/or if the Informant took the stand at a preliminary hearing, grand jury hearing, trial (jury or bench) and/or sentencing hearing.

After an Informant testifies, the Responsible DDA shall submit the following information:

1. The name of the Informant;
2. The name of the case, case numbers (court, DA and law enforcement agency DR number) and the date of the testimony;
3. A synopsis of the Informant's testimony and an evaluation of his/her

credibility; and

4. A description of any benefits or consideration provided in exchange for the testimony, including case numbers of any affected cases.

This information shall be reported on a form entitled "Post-Testimony Cooperating Informant Summary" which can be found in the G:/ drive under the file name "CI Forms." This form shall be submitted to the OCII Coordinator and a member of CIRC.

(A) EVIDENCE CODE SECTION 1040: CLAIMING AND DETERMINING  
VALIDITY OF THE OFFICIAL INFORMATION PRIVILEGE

“*Official information*” means information acquired by an employee of a public entity that meets the following requirements:

- 1) the public employee must acquire the information in confidence;
- 2) in the course of his or her duties; and
- 3) the information must not have been open to the public (or officially disclosed) before the claim of privilege is made.

Most official information is protected by a *conditional privilege* (Evidence Code Section 1040(b)(2)). A *conditional privilege* is not absolute, which means a judge can order that the information be disclosed under certain circumstances.

The judge is required to go through a weighing and balancing process to decide whether the privilege applies. If the official information privilege is claimed, ***official information should not be disclosed unless the Court conducts a hearing and makes a ruling:***

- 1) that the public interest in preserving the confidentiality of the information
- 2) is outweighed by the need for disclosure in the interest of justice.

When a Law Enforcement Agency asserts the *official information* privilege, it is incumbent for the Investigating Officer and Responsible DDA to apprise the Court why the public interest in preserving confidentiality of the information outweighs the need for disclosure in the interest of justice.

The most common situations involving the *official information* privilege are:

- a. Keeping the location of surveillance sites secret; and
- b. Preventing disclosure of police files or evidence gathered by law enforcement in pending criminal investigations.

**There are four stages of a motion to disclose *official information*. This outline will use the example of what happens in court after an Investigating Officer has refused to disclose a surveillance point location pursuant to the *official information* privilege.**

**First stage:** If an Investigating Officer is testifying in court and he/she is asked a question which calls for an answer containing *official information*, the Investigating Officer should claim the privilege by answering with words indicating that the Investigating Officer is invoking the *official information privilege*. For instance, the Investigating Officer could say: “That question calls for official information, and I am invoking the privilege for that information pursuant to Evidence Code Section 1040.”

**Second stage:** In open court, the defense must object to the Investigating Officer’s assertion of the *official information* privilege or make a motion for disclosure. Either way, the defense must make a showing there is a reasonable possibility the official information sought is material to guilt; however, if the information the defense wants disclosed is not material to guilt, then the court should not order disclosure.

Once the defense objects and also makes a preliminary showing of materiality, the Responsible DDA must prove the privilege applies. The Responsible DDA may proceed in open court to prove to the Court the surveillance location should remain secret, or may seek an *in camera* hearing if the Responsible DDA cannot provide such proof in open court because it would tend to reveal the official information (in this example, the exact location of the surveillance site).

Either in open court or *in camera*, the Responsible DDA has the burden to show the Court that the location of the surveillance site should remain secret, and that its location is in no way material to the issue of the Defendant's guilt.

**Third stage: An *in camera* hearing is conducted to allow the court to determine whether the conditional privilege should be upheld. The *in camera* hearing involves the following persons and procedures:**

- 1) only the Responsible DDA, Investigating Officer, court reporter and judge are present, usually in chambers (defense counsel cannot be present);
- 2) the hearing must be reported and the transcript kept under seal; and
- 3) the defense may submit questions to be asked at the hearing.

**The Responsible DDA must prove both of the following:**

- 1) **It is in the public interest to keep the official information confidential.**

(i.e. a surveillance site should remain secret because disclosure would:

- a. threaten the occupants or owners of the site with retribution and reprisals because of their cooperation with police; or
- b. threaten the safety of officers who may use the site in the future; or
- c. prevent future use of the site by law enforcement.)

- 2) **The official information (the exact location of the surveillance site) is not material to the defendant's case.**

**Fourth stage: The court rules on the motion to disclose the official information (i.e. the surveillance site).**

- 1) Before ruling on the motion, the court conducts a hearing in open court in which it probes the official information's relevance to the defense, exploring with counsel

the availability of other alternatives and, if necessary, receives defense testimony as an offer of proof.

- 2) The motion should be denied if the public interest in preserving the confidentiality of the information outweighs the defendant's need for the information.
- 3) The motion should be granted if there is a reasonable possibility that disclosure of the official information might result in the defendant's exoneration.
- 4) If the motion is granted, officers must decide whether to disclose the official information or to deal with the consequences of non-disclosure, which usually results in a court-imposed remedy for the defense (normally, excluding testimony concerning observations made from the secret surveillance location).

#### **(B) EVIDENCE CODE SECTIONS 1041-1042: CLAIMING AND DETERMINING VALIDITY OF THE INFORMANT PRIVILEGE**

The *confidential Informant privilege* provides law enforcement officers with the legal right – a “privilege” – to refuse to disclose an Informant's identity and any information that would tend to reveal his/her identity, but a judge has to decide whether the privilege applies and should be upheld after the privilege is invoked by an Investigating Officer. Reason for Informant privilege:

- 1) confidential Informants play vital role in the investigation of many crimes; and
- 2) confidential Informants might be killed if their identities were revealed.

A person will qualify as an Informant whose identity may be kept secret if all of the following requirements are met. The Informant must have:

- 1) furnished information pertaining to criminal activity;
- 2) known he was giving information to an Investigating Officer, or to someone who would pass it along to an Investigating Officer; and

- 3) furnished the information “in confidence,” meaning there was reason to believe the Informant wanted to remain anonymous. “In confidence” can be implied if the person would be in danger if his identity were revealed.

An Investigating Officer will be deemed to have waived this privilege if he intentionally or inadvertently does the following:

- 1) fails to assert the privilege in court (the Investigating Officer identifies the Informant); or
- 2) discloses the identity of the Informant to the defendant or to any other person who would have cause to resent the Informant’s communication with officers.

There is no privilege to prevent the Informant from disclosing his own identity.

**When a Law Enforcement Agency requests a filing of criminal charges on any case where information from an Informant was used, it is critical that the Informant’s role in the investigation be fully divulged to the District Attorney at the time of the filing decision in order to adequately address the privilege of nondisclosure. At the time of filing, the District Attorney should be made aware of the circumstances of the Informant, including:**

- 1) the type of Informant involved and his or her motivations for assisting the Law Enforcement Agency (i.e. working to reduce criminal charges or sentencing, or for monetary gain, or as a concerned citizen, etc.);
- 2) the reliability of the Informant; and
- 3) the nature and the extent of the Informant’s connection, if any, to the offense being charged.

A discussion about the Informant will provide a framework for keeping the Informant confidential and ensure that the prosecution team (District Attorney and Law Enforcement Agency) meets all *Brady* discovery obligations.

**There are four stages of an Informant motion to determine the validity of a claimed privilege:**

**First stage:** If an Investigating Officer is testifying in court and he/she is asked a question which calls for an answer which would tend to identify the CI, the Investigating Officer should claim the privilege by answering with words indicating that the Investigating Officer is invoking the *Informant identity privilege*. For instance, the Investigating Officer could say: “That question calls for information that would tend to identify the Informant, and I am invoking the privilege for that information pursuant to Evidence Code Sections 1041 and 1042.”

**Second stage:** The defense makes a motion in open court to disclose the identity and location of the Informant. (This should be made out of the jury’s presence if the motion is raised during trial.)

- 1) **At this hearing, the defense must show that the Informant is material to the defense in that there is a *reasonable possibility that the Informant could provide evidence that would exonerate the defendant.***
- 2) If the defense does not show materiality, the motion is denied at this point.
- 3) If the court finds that materiality has been shown, the defense will request that the Informant’s identity and present location be disclosed by the Responsible DDA.
- 4) If materiality has been shown, the Responsible DDA may refuse to disclose the Informant’s identity and request a mandatory *in camera* hearing based on an Investigating Officer invoking the confidential Informant privilege under Evidence Code Sections 1041-1042. The court must conduct this *in camera* hearing upon prosecution request under Evidence Code Section 1042(d).

**Third stage:** The *in camera* hearing. An *in camera* hearing is required only if materiality has been found, and the Responsible DDA has requested such a hearing.

- 1) **The main objective of the *in camera* hearing is to determine whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.**
- 2) The defense is not allowed to be present during this hearing.
- 3) All witnesses must be sworn, and the Responsible DDA may offer evidence that discloses the identity of the Informant, including calling the Informant to give testimony, to aid the court in making a determination of whether there is a reasonable possibility that nondisclosure of the Informant's identity might deprive the defendant of a fair trial.
- 4) A court reporter must be present to transcribe the oral proceedings. Any testimony or physical evidence presented must be ordered sealed by the court, and only the court may have access to the contents of the *in camera* hearing.

**Fourth stage:** A hearing in open court following the *in camera* hearing. All parties are present. The court summarizes its findings based on evidence presented at the *in camera* hearing. The parties are allowed to argue; then the court rules on whether the privilege applies, and if so, whether nondisclosure would deprive the defendant of a fair trial.

- 1) In a criminal action, if the court orders the Responsible DDA to reveal the identity and location of the Informant, and the Responsible DDA refuses, the sanction is for the court to dismiss all counts that depend on the Informant's information.
- 2) If the Responsible DDA discloses the Informant's identity, but does not know the Informant's present location, a hearing is held, if the defense requests, to determine whether the Responsible DDA took reasonable steps to keep track of the Informant. A finding against the Responsible DDA will also lead to the court dismissing all counts that depend on the Informant's information.

### **(C) INFORMANTS INVOLVED IN THE ISSUANCE OF A SEARCH WARRANT**

In a criminal proceeding, when a search is made under a warrant valid on its face, the Responsible DDA is not required to disclose to the defense the identity of an Informant in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it [Evidence Code Section 1042(b)].

The rationale for this rule of nondisclosure is: because the judge will issue a warrant only upon a showing of probable cause, and has the power to question the Informant if he sees fit, there is adequate protection against police abuse.

### **(D) INFORMANTS INVOLVED IN WARRANTLESS SEARCHES / ARRESTS**

In a criminal proceeding involving a warrantless search or arrest, there is a longstanding rule against disclosure of the identity of the Informant in order to attack probable cause, and an officer's invocation of the *confidential Informant privilege* in this circumstance will normally be upheld if the court is satisfied from the evidence that the information received was from a reliable Informant. The defense is, however, entitled to question the Investigating Officer in open court concerning reasonable cause to make the arrest or to conduct the search, to determine if the Informant's information was reliable [Evidence Code Section 1042(c)].

Prosecutors should familiarize themselves with the foundational legal principles and discovery obligations discussed in Chapter 3 as they also apply to Citizen Informants, Paid Informants, Defendant Informants and Accomplice Informants. Specifically, those sections are:

Section 3(A): Important Foundational Legal Principles

Section 3(F): Discovery of Reports and Recordings

Section 3(M): Checklist for Cooperating Informant Cases

**SECTION 6-1      NO CONDITION OF ANONYMITY WHEN INFORMANT IS  
AN ESSENTIAL WITNESS**

No case should be filed in which the testimony of an Informant is essential for successful prosecution when the Informant insists upon remaining confidential as a condition of any cooperation with a Law Enforcement Agency.

**SECTION 6-2      EVIDENCE CODE SECTIONS 1040, 1041, AND 1042**

Deputy District Attorneys are responsible for knowing the law involving confidentiality of official information and identity of Informants, and shall be familiar with Evidence Code Sections 1040, 1041, and 1042. These code sections are more thoroughly discussed in Chapter 5 of this manual.

**SECTION 6-3      ORANGE COUNTY INFORMANT INDEX (OCII) / FILE  
SECURITY**

The Orange County District Attorney's Office maintains a separate system of files, with limited and controlled access, to house the OCII. **Access to the OCII files**

shall be limited to the OCII Coordinator and the Assistant District Attorney in charge of the Narcotics Enforcement Team (NET).

#### **SECTION 6-4      OCII COORDINATOR'S DUTIES**

Upon receipt of an OCII packet from a Law Enforcement Agency, the OCII Coordinator shall review the circumstances of any pending criminal matters, including victim impact, the criminal history of the potential Informant, a check for active warrants, parole and probation status, a record of violence, including weapons and domestic violence charges, strikes, substance abuse, dishonesty, criminal sophistication, immigration status, unexplained failures to appear, control issues (e.g., gang membership, flight risk), and prior Informant activity.

#### **SECTION 6-5      OCII INQUIRIES**

The security and confidentiality of the information contained in the OCII is of paramount importance. Therefore, the OCII Coordinator will **not** respond, in any manner, to telephone requests for **any** information about any Informant. Any Law Enforcement Officer who wishes to inquire about a prospective Informant's status or history as an Informant must first submit by fax a written request for information **approved in writing by a supervisor**. The request must be verifiably sent from his/her police department's fax machine. The OCII Coordinator will then verify the supervisor's approval. Upon verification of the identity of the inquirer as a member of a Law Enforcement Agency, the OCII Coordinator will check whether an individual is in the Index. Specific questions regarding past performance will be referred to the Law Enforcement Officer who entered the information into the Index.

#### **SECTION 6-6      INFORMANTS MUST BE REGISTERED WITH OCII**

All informants must be in the OCDA's Informant Index (OCII). Entry into OCII is not dependent upon the Informant's testimony. OCII entry is required whenever

an Informant is involved in an investigation, including cases that aren't filed and prosecutions where the Informant is not used.

Neither the Investigating Officer nor Responsible DDA shall offer, or agree to any benefit or consideration for an Informant without notifying the OCII Coordinator and submitting an OCII packet in compliance with Section 2-10(E). No benefit shall be conferred until an Informant is registered in the Index.

### **SECTION 6-7      COOPERATING INFORMANT REVIEW COMMITTEE (CIRC)**

While CIRC approval is mandatory for the use of Jailhouse Informants and *Perkins* Operations, the CIRC is also available as a resource to answer questions and address issues that arise in the use of Citizen Informants, Paid Informants, Defendant Informants and Accomplice Informants. Prosecutors are invited to call any of the CIRC members for advice and guidance.

### **SECTION 6-8      USE OF DEFENDANT INFORMANTS**

#### **(A)                    DDA CONTACT WITH REPRESENTED INFORMANT**

No DDA shall communicate directly or indirectly with a represented Defendant Informant about the subject matter of his or her representation without the prior knowledge and consent of his/her attorney, and then, only with an investigator present.

#### **(B)                    DEFENDANT INFORMANTS WITH A PENDING CASE IN ANOTHER PROSECUTION UNIT**

In the event that a Responsible DDA wishes to call a Defendant Informant as a witness or utilize a Defendant Informant for information where consideration will be given and that individual is also being prosecuted by a different unit within the OCDA's office, approval must be first granted by the head of the unit who is

prosecuting the Defendant Informant. This approval should be coordinated through the OCII Coordinator.

**(C) DEFENDANT INFORMANTS WITH A PENDING CASE IN THE SAME PROSECUTION UNIT**

In the event a Defendant Informant is being prosecuted within the same unit in which a Responsible DDA seeks to utilize him or her as a witness or for information in exchange for some form of consideration, the head of that unit must first give approval. This information should then be relayed to the OCII Coordinator for entry into the OCII database.

**(D) DEFENDANT INFORMANTS ON PROBATION OR PAROLE**

Informants on probation to the Superior Court are under the court's orders to obey the terms and conditions of probation imposed by the court as well as the lawful orders and instructions of the supervising probation officer. Engaging in conduct that violates those terms or fails to comply with the instructions of the supervising probation officer can therefore constitute a violation of the court's orders, subjecting the probationer to additional criminal liability.

The use as an Informant of an individual subject to supervised probation or parole terms may lead to a violation of these terms. Accordingly before using an Informant on supervised probation or parole, in a manner that *may* violate their terms and conditions (i.e. controlled buys, association with other criminals, etc.), the Investigating Officer should first contact the Informant's Parole or Probation Officer to obtain their consent to this utilization. In cases where the cooperating Informant is formally supervised by the Orange County Probation Department, **special permission must be obtained from the Supervising Probation Officer of the Special Enforcement Unit (SEU) in charge of Informant issues.**

If the Investigating Officer has secured the permission of the probation officer at the time the OCII package is submitted, and the OCII Coordinator approves the use of the Informant, nothing further beyond entering the Informant's name into the OCII index need be done. If the Investigating Officer has not yet obtained the probation officer's consent, or it has been refused, and the OCII Coordinator agrees that the use of the supervised probationer or parolee is warranted, the OCII Coordinator is to contact the Supervising Probation Officer of the Special Enforcement Unit (SEU) directly and attempt to gain consent. If consent is still declined, the OCII Coordinator is to turn the matter over to the Assistant District Attorney in charge of the unit prosecuting the case.

If the Assistant District Attorney agrees that the use of the supervised probationer or parolee as an Informant is warranted, he/she may pursue consent up the chain of command of the Probation Department and the OCDA. In the event consent is still not obtained, the Assistant District Attorney may then refer the matter to the responsible judge of the Superior Court.

If the Informant is on parole or supervised by the probation department of **another county**, and consent of the parole or probation officer cannot be obtained, the Informant should only be utilized in a manner that will not violate the terms of parole or probation, or the instructions of the parole or probation officer.

#### **(E) CONTINUANCES/DELAYS IN FILING OF INFORMANT CASES**

The OCII Coordinator shall make a recommendation to the responsible DDA as to the manner in which the Defendant Informant's pending case is to be handled while the Informant is working for law enforcement. This could include a delay in filing charges, the filing of reduced charges, an O.R. release or reduction in bail, or continuances at any stage of the proceedings with the appropriate time waivers.

**(F) SENTENCING OF DEFENDANT INFORMANTS**

The Responsible DDA shall, whenever appropriate, obtain search and seizure and restitution as conditions of probation of a Defendant Informant.

**(G) DOCUMENTATION OF DEFENDANT INFORMANT DA CRIMINAL FILES**

To minimize the possible exposure of a potential or actual Defendant Informant, the DA criminal file shall contain no notes that identify the Defendant as an Informant. All documentation regarding the Informant's status and performance will be maintained in the Index.

**(H) LETTERS FOR CONSIDERATION**

To assure consistency in the disposition of Defendant Informants' cases, the OCII coordinator shall review all written requests from Law Enforcement Agencies for consideration detailing an Informant's level of involvement and cooperation, and the results of his efforts, including truthful information leading to viable prosecutions, number of people arrested and amount of contraband or evidence seized. The Coordinator will make a recommendation to the Responsible DDA reference the amount of consideration or benefit to be offered to the Defendant Informant.

If the Responsible DDA does not agree with the recommendation of the OCII Coordinator, the Coordinator shall be notified, and the Assistant DA in charge of the unit prosecuting the Defendant Informant shall be consulted and shall assist in making the final offer on the Informant's case.

If a case is being vertically prosecuted and the Responsible Deputy District Attorney believes a letter of consideration is warranted, consultation with their supervisor is recommended prior to the sending of such a letter. The OCII

Coordinator is not required to be involved in the decision in this instance.

**SECTION 6-9      USE OF JAILHOUSE INFORMANTS / PERKINS OPERATIONS**

No Jailhouse Informant shall be utilized unless the guidelines outlined in Chapter 3 are followed. Among other things, the guidelines mandate that the Responsible DDA obtain approval from the CIRC prior to filing or prosecuting a case involving a Jailhouse Informant and/or a *Perkins* Operation. The Responsible DDA shall also immediately notify his/her supervisor when the Responsible DDA becomes aware that a Jailhouse Informant has offered cooperation to the OCDA or any Law Enforcement Agency.

**SECTION 6-10      USE OF ACCOMPLICE INFORMANTS**

**(A)                      CONTACT WITH REPRESENTED INFORMANT**

No DDA shall communicate directly or indirectly with a represented Accomplice Informant about the subject matter of his or her representation without the prior knowledge and consent of his/her attorney, and then, only with an investigator present.

**SECTION 6-11      TESTIMONY OF INFORMANTS**

No DDA shall authorize the payment of money in exchange for testimony.

**SECTION 6-12      DISCLOSURE OF BENEFITS RECEIVED BY TESTIFYING INFORMANT**

When an Informant must testify, information concerning benefits received by the Informant in exchange for his or her cooperation shall be communicated to the defense as required by applicable *Brady* law. Even if the Informant does not testify, benefit information should be discovered to the defense.

## **SECTION 6-13     DOCUMENTATION OF TESTIFYING INFORMANTS IN OCII INDEX**

For purposes of this section, an Informant is considered to have testified if his/her statements were introduced during a Prop. 115 hearing and/or if the Informant took the stand at a preliminary hearing, grand jury hearing, trial (jury or bench) and/or sentencing hearing.

After an Informant testifies, the Responsible DDA shall submit the following information to the OCII Coordinator:

1. The name of the Informant;
2. The name of the case, case numbers (court, DA and law enforcement agency DR number) and the date of the testimony;
3. A synopsis of the Informant's testimony and an evaluation of his/her credibility; and
4. A description of any benefits or consideration provided in exchange for the testimony, including case numbers of any affected cases.

This information shall be reported on a form entitled "Post-Testimony Cooperating Informant Summary" which can be found in the G:/ drive under the file name "CI Forms." This form shall be submitted to the OCII Coordinator. If the testifying Informant is a Jailhouse Informant, the form shall also be submitted to a member of the CIRC.

## **SECTION 6-14     DOCUMENTATION REQUIRED IN ICI AND NCCI DATABASES**

Two databases, the Involved Cooperating Informant (ICI) and the Not Credible Cooperating Informant (NCCI), have been established to track information related to the use of Informants. In addition to ensuring the appropriate information is reported to the OCII Coordinator, Responsible DDAs are required to report information to one or both of these databases, as described below.

**(A) THE INVOLVED COOPERATING INFORMANT (ICI)  
DATABASE**

This database will track, on a continuous basis, a listing of all filed criminal cases where at any point in time during the pendency of the case, an Informant was *involved*.

In order for an Informant to be “*involved*” in a case for purposes of this database, one or both of the following must occur:

1. The Informant was relied upon by the Responsible DDA to file the criminal case. This does not include reliance upon an Informant by a Law Enforcement Agency to obtain a search warrant. This element specifically requires reliance by the Responsible DDA to file criminal charges. (Any questions regarding this element should be directed to the Assistant District Attorney in charge of the Special Prosecutions Unit); and/or

2. A decision was made by the Responsible DDA, and, when required, approved by CIRC, to use the Informant as a witness in the case. Once this decision is made, and approved by CIRC in appropriate circumstances, it is irrelevant for purposes of this database that a subsequent decision was made not to use the Informant as a witness, or if the case was resolved without the necessity of Informant testimony.

As soon as the Responsible DDA becomes aware of an *involved* Informant, the following information must be submitted to the Assistant District Attorney in charge of the Special Prosecutions Unit, who will act as the ICI Database Administrator:

1. The name and number of the criminal case;
2. The Informant’s name and date of birth;
3. The type of Informant involved; and
4. Whether the Informant testified in the case.

(For purposes of this database, using an Informant's statements through another witness, such as during a Prop 115 preliminary hearing, will also qualify as testimony.)

This information shall be reported on a form entitled "ICI Database Information" which can be found in the G:/ drive under the file name "CI Forms."

Once this information is submitted to the Assistant District Attorney in charge of Special Prosecutions, the information will be entered into the ICI database. The Assistant District Attorney in charge of Special Prosecutions will then forward a copy of the ICI memo to the OCII Coordinator.

**(B) THE NOT CREDIBLE COOPERATING INFORMANT (NCCI)  
DATABASE**

This database will track, on a continuous basis, a listing of every Informant determined by the CIRC to be ***not credible***.

In order for an Informant to be deemed "***not credible***" by the CIRC, one or more of the following must occur:

1. The Responsible DDA concluded that the Informant either intentionally provided law enforcement with untruthful information, or intentionally testified untruthfully in court or before the grand jury;
2. A Superior Court Judge made a factual finding that the Informant intentionally testified untruthfully, or that the Informant intentionally gave law enforcement untruthful information;
3. A reviewing appellate court opined, either in a published or an unpublished opinion, that the Informant intentionally testified untruthfully, or that the Informant intentionally gave law enforcement untruthful information; and/or
4. Any other information is received that substantially undermines the credibility and truthfulness of the Informant.

If the Responsible DDA concludes that an Informant has been untruthful, or receives information that bears upon the credibility and truthfulness of the Informant, as described above, the Responsible DDA is required to contact, by email, the Senior Assistant District Attorney in charge of Vertical/Violent crimes. The Senior Assistant District Attorney will then convene a meeting of the CIRC to determine whether the Informant will be deemed **not credible**. The Assistant District Attorney in charge of Special Prosecutions will attend the CIRC meeting whenever the subject of the meeting is whether an Informant is **not credible**.

If CIRC designates an Informant as **not credible**, the Responsible DDA must submit the following information to the Assistant District Attorney in charge of the Special Prosecutions Unit, who will act as the NCCI Database Administrator:

1. The Informant's name and date of birth;
2. The date the Informant was officially designated by the CIRC to be **not credible**; and
3. A brief summary of the factor(s) that lead the CIRC to designate the Informant as **not credible**.

This information shall be reported on a form entitled "NCCI Database Information" which can be found in the G:/ drive under the file name "CI Forms."

Once this information is submitted to the Assistant District Attorney in charge of Special Prosecutions, that unit will review all available facts, and conduct any necessary additional investigation, with the objective of determining whether criminal charges should be filed against the Informant in connection with his/her conduct in providing untruthful information to the court, law enforcement or the grand jury. If additional investigation is necessary, the Special Prosecutions Unit will be assisted by Investigators from the OCDA's Bureau of Investigations Public Integrity Unit. At

the conclusion of the review of the Informant's conduct for the purposes of a possible criminal filing, the Assistant District Attorney in charge of the Special Prosecutions Unit will: (1) notify the CIRC of the filing decision; (2) provide a copy of the NCCI database memo to the OCII Coordinator; and (3) enter into the NCCI database a brief summary of any action taken by the OCDA as a result of the Informant's designation as **not credible**. (Possible actions include filing criminal charges against the Informant and/or notifying defendants in previous cases where the Informant was used as a witness if such action is required pursuant to the mandate of *Brady v. Maryland* (1963) 474 U.S. 83 and its progeny.)

# **APPENDIX A**

## **STATUTES GOVERNING CONTACT WITH IN-CUSTODY INFORMANTS**

**The testimony of in-custody Informants is governed by Pen. Code Sections 1127a, 1191.25 and 4001.1, each enacted in 1989. These statutes are reprinted below.**

**(Current as of January, 2017)**

### **Section 1127a. In-custody Informant**

(a) As used in this section, an “in-custody Informant” means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.

(b) In any criminal trial or proceeding in which an in-custody informant testifies as a witness, upon the request of a party, the court shall instruct the jury as follows:

“The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.”

(c) When the prosecution calls an in-custody informant as a witness in any criminal trial, contemporaneous with the calling of that witness, the prosecution shall file with the court a written statement setting out any and all consideration promised to, or received by, the in-custody informant.

The statement filed with the court shall not expand or limit the defendant’s right to discover information that is otherwise provided by law. The statement shall be provided to the defendant or the defendant’s attorney prior to trial and the information contained in the statement shall be subject to rules of evidence.

(d) For purposes of subdivision (c), “consideration” means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant’s testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness.

### **Section 1191.25. In-custody informant; testimony; victim notification**

The prosecution shall make a good faith attempt to notify any victim of a crime which was committed by, or is alleged to have been committed by, an in-custody informant, as defined in subdivision (a) of Section 1127a, within a reasonable time before the in-custody informant is called to testify. The notice shall include information concerning the prosecution's intention to offer the in-custody informant a modification or reduction in sentence or dismissal of the case or early parole in exchange for the in-custody informant's testimony in another case. The notification or attempt to notify the victim shall be made prior to the commencement of the trial in which the in-custody informant is to testify where the intention to call him or her is known at that time, but in no case shall the notice be made later than the time the in-custody informant is called to the stand.

Nothing contained in this section is intended to affect the right of the people and the defendant to an expeditious disposition of a criminal proceeding, as provided in Section 1050. The victim of any case alleged to have been committed by the in-custody informant may exercise his or her right to appear at the sentencing of the in-custody informant pursuant to Section 1191.1, but the victim shall not have a right to intervene in the trial in which the in-custody informant is called to testify.

### **Section 4001.1. In-custody informant; payment; eliciting incriminating remarks**

- (a) No law enforcement or correctional official shall give, offer, or promise to give any monetary payment in excess of fifty dollars (\$50) in return for an in-custody informant's testimony in any criminal proceeding. Nothing contained herein shall prohibit payments incidental to the informant's testimony such as expenses incurred for witness or immediate family relocation, lodging, housing, meals, phone calls, travel, or witness fees authorized by law, provided those payments are supported by appropriate documentation demonstrating that the money was used for the purposes for which it was given.
- (b) No law enforcement agency and no in-custody informant acting as an agent for the agency, may take some action, beyond merely listening to statements of a defendant, that is deliberately designed to elicit incriminating remarks.
- (c) As used in this section, an "in-custody informant" means a person described in subdivision (a) of Section 1127a.

## **APPENDIX B**

### **USE OF MINOR INFORMANTS**

**The use of Informants under the age of 18 is strictly governed by Pen. Code Section 701.5 enacted in 1998. Note that the statute's definition of "Informant" differs from that employed in these guidelines. (See subsection (e))**

**(Current as of January, 2017)**

#### **PENAL CODE Section 701.5. Use of minor informants; conditions**

- (a) Notwithstanding subdivision (b), no peace officer or agent of a peace officer shall use a person who is 12 years of age or younger as a minor Informant.
- (b) No peace officer or agent of a peace officer shall use a person under the age of 18 years as a minor Informant, except as authorized pursuant to the Stop Tobacco Access to Kids Enforcement Act (Division 8.5 (commencing with Section 22950) of the Business and Professions Code) for the purposes of that act, unless the peace officer or agent of a peace officer has obtained an order from the court authorizing the minor's cooperation.
- (c) Prior to issuing any order pursuant to subdivision (b), the court shall find, after consideration of (1) the age and maturity of the minor, (2) the gravity of the minor's alleged offense, (3) the safety of the public, and (4) the interests of justice, that the agreement to act as a minor informant is voluntary and is being entered into knowingly and intelligently.
- (d) Prior to the court making the finding required in subdivision (c), all of the following conditions shall be satisfied:
  - (1) The court has found probable cause that the minor committed the alleged offense. The finding of probable cause shall only be for the purpose of issuing the order pursuant to subdivision (b), and shall not prejudice the minor in any future proceedings.
  - (2) The court has advised the minor of the mandatory minimum and maximum sentence for the alleged offense.
  - (3) The court has disclosed the benefit the minor may obtain by cooperating with the peace officer or agent of a peace officer.
  - (4) The minor's parent or guardian has consented to the agreement by the minor unless the parent or guardian is a suspect in the criminal investigation.

(e) For purposes of this section, **“minor informant” means a minor who participates, on behalf of a law enforcement agency, in a prearranged transaction or series of prearranged transactions with direct face-to-face contact with any party, when the minor’s participation in the transaction is for the purpose of obtaining or attempting to obtain evidence of illegal activity by a third party and where the minor is participating in the transaction for the purpose of reducing or dismissing a pending juvenile petition against the minor. (Emphasis added.)**

## **APPENDIX C**

### **STRIKES—VIOLENT FELONIES**

**(Strikes include all felonies enumerated in Pen. Code Section 667.5(c) listed below.)**

**(Current as of January, 2017)**

**PC 667.5(c)**: For the purpose of this section, “violent felony” shall mean any of the following:

- (1) Murder or voluntary manslaughter.
- (2) Mayhem.
- (3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
- (4) Sodomy as defined in subdivision (c) or (d) of Section 286.
- (5) Oral copulation as defined in subdivision (c) or (d) of Section 288a.
- (6) Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288.
- (7) Any felony punishable by death or imprisonment in the state prison for life.
- (8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, 12022.8 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5, or 12022.55.
- (9) Any robbery.
- (10) Arson, in violation of subdivision (a) or (b) of Section 451.
- (11) Sexual penetration as defined in subdivision (a) or (j) of Section 289.
- (12) Attempted murder.
- (13) A violation of Section 18745, 18750, or 18755.
- (14) Kidnapping.
- (15) Assault with the intent to commit a specified felony, in violation of Section 220.
- (16) Continuous sexual abuse of a child, in violation of Section 288.5.
- (17) Carjacking, as defined in subdivision (a) of Section 215.
- (18) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1
- (19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22.
- (20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22.
- (21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
- (22) Any violation of Section 12022.53.
- (23) A violation of subdivision (b) or (c) of Section 11418.

# **APPENDIX D**

## **STRIKES—SERIOUS FELONIES**

**(Strikes include all Violent Felonies listed in Appendix C, plus all Serious Felonies enumerated in Pen. Code Section 1192.7(c) listed below.)**

**(Current as of January, 2017)**

**PC 1192.7(c):** As used in this section, “serious felony” means any of the following:

- (1) Murder or voluntary manslaughter;
- (2) Mayhem;
- (3) Rape;
- (4) Sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person;
- (5) Oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person;
- (6) Lewd or lascivious act on a child under 14 years of age;
- (7) Any felony punishable by death or imprisonment in the state prison for life;
- (8) Any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm;
- (9) Attempted murder;
- (10) Assault with intent to commit rape or robbery;
- (11) Assault with a deadly weapon or instrument on a peace officer;
- (12) Assault by a life prisoner on a non-inmate;
- (13) Assault with a deadly weapon by an inmate;
- (14) Arson;
- (15) Exploding a destructive device or any explosive with intent to injure;
- (16) Exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem;
- (17) Exploding a destructive device or any explosive with intent to murder;
- (18) Any burglary of the first degree;
- (19) Robbery or bank robbery;
- (20) Kidnapping,
- (21) Holding of a hostage by a person confined in a state prison;
- (22) Attempt to commit a felony punishable by death or imprisonment in the state prison for life;
- (23) Any felony in which the defendant personally used a dangerous or deadly weapon;
- (24) Selling, furnishing, administering, giving, or offering to sell, furnish, administer; or give to a minor any heroin, cocaine, phencyclidine (PCP) or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code;

- (25) Any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person;
- (26) Grand theft involving a firearm;
- (27) Carjacking;
- (28) Any felony offense, which would also constitute a felony violation of Section 186.22;
- (29) Assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220;
- (30) Throwing acid or flammable substances, in violation of Section 244;
- (31) Assault with a deadly weapon, firearm, machine gun, assault weapon, or semi-automatic firearm or assault on a peace officer or firefighter, in violation of Section 245;
- (32) Assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Section 245.2, 245.3, or 245.5;
- (33) Discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246;
- (34) Commission of rape or sexual penetration in concert with another person, in violation of Section 264.1;
- (35) Continuous sexual abuse of a child, in violation of Section 288.5;
- (36) Shooting from a vehicle, in violation of subdivision (c) or (d) of Section 26100;
- (37) Intimidation of victims or witnesses, in violation of Section 136.1;
- (38) Criminal threats, in violation Section 422;
- (39) Any attempt to commit a crime listed in this subdivision other than an assault;
- (40) Any violation of Section 12022.53;
- (41) A violation of subdivision (b) or (c) of Section 11418; and
- (42) Any conspiracy to commit an offense described in this subdivision.

## **APPENDIX E**

### **STRIKES—JUVENILE PRIORS**

**(Under Welfare and Institutions Code Section 707(b), the following serious and violent felonies also constitute strikes if adjudicated and sustained in Juvenile Court and the minor was 16 or 17 at the time of offense, and was found fit and made a ward of the Juvenile Court)**

**(Current as of January, 2017)**

- (1) Murder.
- (2) Arson, as provided in subdivision (a) or (b) of Section 451 of the Penal Code.
- (3) Robbery.
- (4) Rape with force, violence or threat of great bodily harm.
- (5) Sodomy by force, violence, duress, menace, or threat of great bodily harm.
- (6) A lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code.
- (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.
- (8) Any offense specified in subdivision (a) of Section 289 of the Penal Code.
- (9) Kidnapping for ransom.
- (10) Kidnapping for purposes of robbery.
- (11) Kidnapping with bodily harm.
- (12) Attempted murder.
- (13) Assault with a firearm or destructive device.
- (14) Assault by any means of force likely to produce great bodily injury.
- (15) Discharge of a firearm into an inhabited or occupied building.
- (16) An offense described in Section 1203.09 of the Penal Code.
- (17) An offense described in Section 12022.5 or 12022.53 of the Penal Code.
- (18) A felony offense in which the minor personally used a weapon described in any provision listed in Section 16590 of the Penal Code.
- (19) A felony offense described in Section 136.1 or 137 of the Penal Code.
- (20) Manufacturing, compounding, or selling one-half ounce or more of a salt or solution of a controlled substance specified in subdivision (e) of Section 11055 of the Health and Safety Code.
- (21) A violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code, which would also constitute a felony violation of subdivision (b) of Section 186.22 of the Penal Code.
- (22) Escape, by the use of force or violence, from a county juvenile hall, home, ranch, camp, or forestry camp in violation of subdivision (b) of Section 871 if great bodily injury is intentionally inflicted upon an employee of the juvenile facility during the commission of the escape.
- (23) Torture as described in Sections 206 and 206.1 of the Penal Code.
- (24) Aggravated mayhem, as described in Section 205 of the Penal Code.
- (25) Carjacking, as described in Section 215 of the Penal Code, while armed with a dangerous or deadly weapon.

- (26) Kidnapping for purposes of sexual assault, as punishable in subdivision (b) of Section 209 of the Penal Code.
- (27) Kidnapping as punishable in Section 209.5 of the Penal Code.
- (28) The offense described in subdivision (c) of Section 26100 of the Penal Code.
- (29) The offense described in Section 18745 of the Penal Code.
- (30) Voluntary manslaughter, as described in subdivision (a) of Section 192 of the Penal Code.