



TONY RACKAUCKAS
ORANGE COUNTY DISTRICT ATTORNEY

ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE
401 CIVIC CENTER DRIVE WEST • SANTA ANA, CA 92701 (714) 834-3636

August 14, 2017

THE HON. CHARLES MARGINES, Presiding Judge
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

Re: Response to 2016-17 Orange County Grand Jury Report, "*The Myth of the Orange County Jailhouse Informant Program.*"

Dear Judge Margines:

Please find enclosed a copy of the Orange County District Attorney's response to Findings F1-F11, and Recommendations R1-R7 of the 2016-2017 Orange County Grand Jury Report, "*The Myth of the Orange County Jailhouse Informant Program.*" Thank you.

Sincerely,

Tony Rackauckas
District Attorney-Public Administrator

TR:vlb
Enclosure

THE MYTH OF THE ORANGE COUNTY JAILHOUSE INFORMANT PROGRAM

SUMMARY RESPONSE STATEMENT

On June 13, 2017, the Orange County Grand Jury (OCGJ) released the report, "The Myth of the Orange County Jailhouse Informant Program." The report directed a response from the Orange County District Attorney's Office (OCDA) on certain findings and recommendations which are included below.

The OCDA wishes to express its appreciation to this OCGJ for its efforts in thoroughly reviewing and independently assessing the facts and issues on this subject. The efforts were nothing short of extraordinary. Devoting 3,500 hours, interviewing 150 people and pouring over 40,000 pages of materials, dozens of hours of tapes, and attending numerous court proceedings reflect their commitment to this task.

In addition to the arduous time expenditure, this Grand Jury should be commended for demonstrating its independence and courage. Rather than accept the perpetuated myths and half-truths, this OCGJ doggedly went after the facts and the truth. With the assistance and guidance of attorneys, Fred Woocher, former Special Counsel to California Attorney General John Van De Kamp, and Andrea Ordin, former United States Attorney for the Central District of California, the OCGJ's work was thorough and objective.

In general, the OCDA agrees with most of the Findings of the OCGJ and has implemented or is in the process of implementing the Recommendations. Throughout the entire framework of the OCDA response herein, it should be clear that the OCDA is committed to the rule of law and the pursuit of justice in every case.

FINDINGS AND RESPONSES

Finding F1

"The myriad definitions and nuances of what constitutes an "informant" have caused confusion and may have contributed to the current controversy and unnecessary erosion of trust."

Response to Finding F1: Agree with the finding.

There is little doubt that the current landscape of legal and public parlance contains multiple legal and colloquial definitions of what constitutes an "informant." However, not all informers (people who provide information to law enforcement) are "informants" in either the legal or colloquial sense, and even within the formal heading of "informant" there are different sub-categories. Moreover, differing types of informers and informants have differing legal rules attending their use, depending on the circumstances. As alluded to by the OCGJ, there have been numerous recent instances, both inside and outside the courtroom, in which the single label "informant" has been globally applied in such a manner as to misleadingly assert that the rules attendant to the use of one type of informer also apply to all other types of informers. This widespread misuse of the term "informant" and misunderstanding of the nuances of the law relating to informers has contributed to

the current controversy and unnecessarily caused an erosion of trust in the legal system. The media did not make these important distinctions and their failure to do so has exacerbated the situation and perpetuated the myth.

Legally appropriate informant usage that meets constitutional muster requires an understanding of the various types of informers, including those definitions of “in-custody informants” derived from the California Penal Code,¹ the court-defined terms “citizen informant,” “confidential informant,” “confidential, reliable informant,” and “*Perkins* informant;”² a comprehensive understanding of *Brady*³ and *Massiah*⁴ case precedent; an understanding of co-defendant, accomplice and informant-related corroboration requirements under the Penal Code⁵ and subsequent case law interpretations; an extensive understanding of the privileges and procedures created by Evidence Code sections 1040, 1041, 1042, and Penal Code section 1054.7, as well as experience in their assertion and usage; and an understanding of legal terms and concepts related to “coercion” and “agency” under cases such as *Fulminante*⁶ and *In re Neely*.⁷ In short, the use of informants is both a complex and nuanced area of the law, a fact that has often been missed during public discourse on this subject.

The OCDA continues to work both internally and externally to educate and train its own personnel as well as the larger law enforcement community on the rights and obligations that flow from the use of informants.⁸ In order to properly inform the public, the OCDA will conduct an Internet seminar regarding this subject.

Finding F2

“There is no structured jailhouse informant program operating in the Orange County Jails. The existence of informants in the Orange County jails does not constitute a program. The use of an in-custody informant is generally organic in nature, and narrowly focused.”

Response to Finding F2: Agree with the finding.

The OCDA agrees that “there is no structured jailhouse informant program operating in the Orange County Jails.” Moreover, while the definition of “jailhouse informant program” has proven to be a very elastic term in public parlance, even under the broadest reasonable definition of the term, the OCDA has never been a part of any such program.

¹ See, e.g., Penal Code sections 1111.5(b) and 1127a.

² Derived from the seminal case of *Illinois v. Perkins* (1990) 496 U.S. 292.

³ *Brady v. Maryland* (1963) 373 U.S. 83.

⁴ *Massiah v. United States* (1964) 377 U.S. 201.

⁵ See, e.g., Penal Code sections 1111 and 1111.5(a).

⁶ *Arizona v. Fulminante* (1991) 499 US 279.

⁷ *In re Neely* (1993) 6 Cal.4th 901.

⁸ Further details on the training activities of OCDA can be found later in this Response in the section concerning Grand Jury Recommendation #4.

Finding F3

“Violations in discovery and/or Brady disclosure in the Dekraai case are limited to the actions of a few members of the OCDA and a few OCSD personnel. This does not represent a conspiracy between the OCSD and OCDA.”

Response to Finding F3: Partially agree with the finding.

There were no intentional discovery and/or *Brady* violations committed by any OCDA personnel in the *Dekraai* case; to the extent that Finding F3 could be read to imply the contrary, OCDA disagrees with the finding. The OCDA agrees that there is no conspiracy between the OCSD and the OCDA.

Finding F4

“The OCII is an incomplete repository of informant information and history due to the voluntary discretion of LLE Agencies to contribute to it.”

Response to Finding F4: Agree with the finding.

There is no legal requirement for LLE Agencies to contribute information to the OCII database at the request of the OCDA. However, ongoing efforts have been made, through training (Attachment A) and networking with our prosecution team members to educate the LLE on the benefits of the system and encourage compliance. These efforts appear to be succeeding and will be continued.

Finding F5

“LLE Agencies are, and continue to be, a weak link on the prosecution team. While OCDA has no authority over these agencies, they can certainly use the bully pulpit to raise awareness of the problem and encourage participation and commitment to proper legal standards.”

Response to Finding F5: Partially agree with the finding.

The conduct of state and federal law enforcement agencies is controlled by their respective governing officials. The Orange County Sheriff’s Department, for example, is managed by an independent elected official while city police agencies are under the authority of their elected council members.

The OCDA is continuously raising awareness regarding the legal obligations relating to discovery, and the handling of jailhouse informants, to all the LLE Agencies. The OCDA has addressed these issues with several command staff at LLE Agencies and for the last two years have provided training to all Orange County Sheriff’s Academy graduates on discovery and *Brady* requirements. On an ongoing basis, the OCDA provides training to officers and investigators. (Attachment B) To the extent that this finding implies that all the LLE Agencies in the County are a “weak link” in the prosecution team, the OCDA does not agree with such an overbroad statement.

Finding F6

“The elevation of personnel in the OCDA to supervisory positions is not the result of standardized, objective hiring standards and does not include any required training in management or supervisory skills training.”

Response to Finding F6: Disagree with the finding.

Supervisory promotions have always followed the County’s recruitment process. The minimum qualifications criteria are established followed by a review by senior management. Before an Assistant District Attorney (ADA - first level supervisor) is appointed, the candidate must have satisfactorily completed probation through many levels of the office, I-III, IV, and Senior Deputy District Attorney. The candidate for an ADA must also have experience as an Assistant Head of Court (AHC). Aside from the objective standards noted above, the selection to ADA requires an evaluation by the Senior Assistant District Attorneys (SADA – second level supervisor) of criteria that will include: trial experience and courtroom skills, legal knowledge, interpersonal skills, quality of judgment, attitude, maturity, professionalism, leadership, and the ability to see issues from an overall Office perspective. The promotion to SADA will come from those who are ADA’s and have achieved a higher level of growth in the qualities articulated earlier.

For attorney promotions, the attorney skills and development are assessed across several supervisors so that the best evaluation can be made with multiple viewpoints. Prosecutorial agencies throughout this country follow this form of evaluation.

The County’s recruitment process is also followed in filing all OCDA sworn and administrative positions.

In early 2017, the OCDA began a formalized attorney-manager training program. The instructional program, designed to consist of multiple modules, began with an all manager two-day course of instruction administered by the National Association of Attorneys General Training and Research Institute (NAGTRI).

NAGTRI serves as the research and training arm of the National Association of Attorneys General (NAAG). NAGTRI’s faculty provide nation-wide training to state and territorial attorneys general offices, local prosecutors and other attorneys practicing in public law firms. NAGTRI has also created and administers a Center for Leadership Development, devoted to providing training programs and resources to assist managers in a public law firm setting with a concentration on developing leadership behaviors through practical application.

The program, which consisted of lecture, group discussion, self-assessment and learning activities, focused on core concepts of management and leadership including transitioning to management, communication, delegation, managerial challenges, multi-generational workforces, performance management, ethics and strategic planning.

The next phase of the attorney-manager training program is planned for late 2017 and is designed to include continued instruction from NAGTRI faculty on various subjects such as alternative leadership styles; organizational planning and implementing change; motivation; emotional competence; and leading effective management teams.

Since the first phase of the attorney-manager program, the OCDA has also administered a series of elective courses in human resources for supervisory staff. The subjects of these courses have included recruitment, employee performance management, leaves of absence and employee relations.

Well before the institution of internal management, the OCDA has also regularly sponsored supervisory staff to attend managerial training outside of the OCDA. These efforts have included programs administered by the California District Attorneys' Association (CDAA), such as "Supervising Prosecutorial Development," and the "Executive Leadership Conference," as well as supervisory training programs administered by other agencies and entities.

Finding F7

"The OCDA needs to continue and expand the existing training programs to include objective standards in place to evaluate the actual effectiveness of OCDA training. Doubts continue as to whether training, in its current format, will make any substantial difference without metrics to measure impact."

Response to Finding F7: Disagree with the finding.

The central premise of this finding is that the OCDA does not utilize any standards of measurement to assess the effectiveness of its attorney training programs. In that respect, this finding is wrong. The Appellate & Training Unit (ATU) of the OCDA employs a broad series of learning assessments, as outlined in response to Recommendation 2 below, to measure the effectiveness of its educational efforts.

Finding F8

"Interoffice communication within the OCDA is often lacking and contributes to the absence of a unifying vision or sense of leadership. This allows for individual prosecutors to drift and create individualized record-keeping systems that could pose a liability for the County. It is an untenable position to argue that poor communication within the OCDA is the culprit to explain away constitutional discovery and Brady obligations."

Response to Finding F8: Disagree partially with the finding.

The OCDA currently engages in constant internal communications throughout the day. The OCDA acknowledges that it must continue to improve communication and training so that individual practices of its prosecutors conform to Office expectations and to the requirements under the law.

Finding F9

“Hiring an independent monitor to oversee work recommended by IPPEC and already completed by the OCDA is a waste of County money.”

Response to Finding F9: Partially agree with this finding.

The OCDA agrees with the OCGJ that hiring the independent monitor to oversee work recommended by IPPEC and already completed by the OCDA is no longer necessary. The OCGJ correctly found that the OCDA had implemented many of the IPPEC recommendations even before the IPPEC review had begun. The OCDA sees a value for an independent monitor to review the OCDA’s sustained successes.

Finding F10

“Mistakes were made by personnel in the OCSD and OCDA. In response to internal investigations, the OCSD has taken disciplinary action to the extent it is able to do so at this time. There appears to have been minimal consequences for personnel in the OCDA.”

Response: to Finding F10: Partially agree with the finding.

The OCDA response only pertains to matters within the OCDA. Federal and State law, as well as County policy, prohibits comment on specific personnel investigations and discipline. The OCDA took appropriate measures after reviewing the facts of each case. The OCDA has previously acknowledged that personnel changes were made after this review.

Finding F11

“Both the OCSD and OCDA need updated technology and record keeping systems.”

Response to Finding F11: Agree with the finding.

About a year ago, the OCDA contracted with a leading IT consulting group to review and assess the status of OCDA’s existing technology applications and infrastructure to meet the Office’s goals and objectives. The assessment identified some gaps between the business vision for OCDA IT and the current state of the IT Department. The recently completed study found that the OCDA’s IT Department will require many more resources to keep pace with the growing demands of the Office and changes in technology, as well as new mandates such as body-worn cameras. In addition, the assessment found that the OCDA’s applications and technology are in need of an upgrade. Based on the assessment study and our own internal review of the OCDA’s IT needs, the Office is moving forward to increase IT staffing and modernizing IT application technologies.

RECOMMENDATIONS AND RESPONSES

Recommendation R1

“The OCDA should prioritize updating the current case management system to better track all constitutional and statutory requirements and better interface with LLE Agencies and the OCII.”

Response to Recommendation R1: Implemented.

As previously discussed in Finding 11, the OCDA is prioritizing the improvement and upgrading of the entire IT area. This is a critical need and will be the OCDA focus going into this fiscal year and the years to come. Operating with budgetary constraints is the greatest challenge, but the OCDA is committed to achieving its funding requirements in order to meet the business needs of the Office. The County will be asked to recognize this priority as the OCDA strives to meet the ever growing discovery requirements and the evolving IT interfacing with the LLE Agencies.

Recommendation R2

“The OCDA should continue working to improve and prioritize its training program by designing and implementing follow-up measurements to determine the effectiveness and impact of current training content and methods.”

Response to Recommendation R2: Implemented.

The Appellate & Training Unit (ATU) utilizes a variety of diagnostic, formative and summative assessments to determine curricula, shape instructional design and evaluate learning comprehension. These systems of measurement have been implemented since the inception of the ATU in April 2015 and have continuously served as the foundation for a sustainable and evolving professional training and development program.

Diagnostic Assessment

Evaluating “the effectiveness and impact of...training content and methods” does not begin with “follow-up measurements” but with diagnostic assessment instead. Since its inception, the ATU has conducted training needs assessments to promote and subsequently determine its educational effectiveness. These endeavors have been designed to develop information on training needs at every level of attorney experience and assignment and to identify the most effective manner in which to model OCDA’s training efforts. To this end, the ATU has studied the structure, function and approach to training utilized by multiple District Attorney Offices throughout the state as well as the United States Department of Justice; has interviewed, queried and regularly conferenced with the attorney managers of the OCDA to discover training needs, priorities and impediments, if any, to the effective delivery of training; has interviewed a cross-section of judges in a variety of criminal court assignments to develop an external perspective on attorney performance and training needs; has regularly examined records of criminal court proceedings to detect recurring issues suitable for training; and has administered a variety of self-assessments to staff to identify training needs and preferences among modalities of instruction. The aggregate results of these efforts have served not only to formulate curricula and instructional design but also to offer a reference point for later comparison to determine the impact and effectiveness of subsequent training.

Formative Assessment

Formative assessment involves measuring student understanding and performance during the learning process to both evaluate student attainment and modify training during the

course of instruction. The ATU utilizes a series of formative assessments to monitor, in real-time, the effectiveness of its training efforts. For example, the entire instructional design of the Orange County Prosecutors' Academy (OCPA) is premised on combining lecture with practical exercise. Each instructional block includes learning activities or performance exercises that students are required to complete as part of their instruction. Student performance during these practical exercises provides the ATU with an immediate, objective measurement of the effectiveness of its training efforts. This information is used to modify training content and design to accommodate students' needs during the course of instruction and beyond.

Self-assessment provides a vital measurement of educational success as well. In the course of each instructional block, the ATU also employs a formative self-assessment exercise for students to critically consider and comment upon the understanding they have gained and areas where they require further instruction or explanation. This instructional design provides the ATU with qualitative information regarding the effectiveness of its efforts at a critical time – during the learning process – when it may be immediately addressed through training modification or supplementation.

Summative Assessment

Summative assessment involves measuring student understanding and/or skill acquisition at a point in time after an instructional period has concluded. The ATU, and the OCDA as a whole, utilize a host of summative assessments which measure the effectiveness of its training efforts.

One of the principal means of evaluating the quality of attorney training is through the objective observation of subsequent job performance. Attorney supervisors throughout the OCDA perform this role regularly, both formally and informally, and their findings continuously shape training curricula and instructional design. Additionally, beginning in December 2015, the OCDA instituted a policy of formally assessing professional development through training participation as a measurement of attorney performance during annual, probationary and promotional evaluations.

Evaluating attorney learning through observation of performance is only one summative perspective on the effectiveness of training. The ATU also employs a series of student assessments of training. Every training session administered by the ATU is followed near in time by a student assessment of the quality of the training. These assessments provide the ATU with both qualitative and quantitative data through the use of survey instruments. In 2016, the ATU also began conducting longitudinal studies of the effectiveness of its instructional programs by interviewing graduates from each phase of the OCPA approximately six months after their completion of training and after they have had an opportunity to place their training into the context of their daily responsibilities. These interviews have served as another mechanism for evaluating both the success of the ATU's training efforts and areas warranting improvement.

The policy of the OCDA has also recently been modified to require attorneys to successfully complete a performance examination administered by the ATU in order to be eligible for promotion to the Felony Panel. The examination, which will focus on specific areas of criminal investigation and prosecution, will serve as another objective assessment of attorney learning and performance.

Promoting External Validity

The ATU also engages in a series of practices to ensure the external validity of its training content and methods. These endeavors serve as another method of measuring the effectiveness of the OCDA's training programs by comparative analysis to and inclusion of training methods, content and programs from outside of the OCDA.

In educational science, the central model of adult learning is based upon the principles and practices of andragogy, a study of the unique learning characteristics and requirements of adult learners. In 2007, the Commission on Peace Officer Standards & Training (POST) approved the creation of the Instructor Development Institute (IDI) which, among other things, educates law enforcement instructors on the theory and practices of andragogy. The IDI curriculum consists of four Academy Instructor Certification Courses (AICC): Basic Certification Course (Level 1) through Master Instructor Certification (Level 4). The curriculum is designed to enhance the effectiveness of law enforcement educators and to develop professionalism in the delivery of law enforcement instruction. According to POST,

[t]he curriculum is grounded in contemporary adult learning methodologies, paralanguage, critical thinking, and taxonomies of learning, presentation delivery, and platform skills. Progressive learning and proficiency in additional dimensions of subject matter expertise, instructional technology, design, mentoring, coaching, and leadership, eventually lead to instructional mastery.⁹

To improve the knowledge and skill of OCDA staff as educators, the ATU's core training personnel have completed a combined 240 hours of instruction to date and have earned multiple certifications in education from POST's Instructor Development Institute. This experience has allowed ATU to assess the effectiveness of its own training efforts against tested principles of education in order to refine its instructional practices.

The quality of the OCDA's internal training resources is also regularly measured against the quality of prosecutorial training in the broader law enforcement community of the state. The ATU accomplishes this goal by regularly evaluating and disseminating externally produced training publications in concert with its own training memoranda, manuals and videos; by hosting subject-matter experts from outside the OCDA as lecturers and other training contributors; and through OCDA's staff consistently serving as trainers to other agencies throughout the state. This continual comparison of internal and external training efforts and resources serves as yet another gauge of the quality of the training program.

⁹ <https://www.post.ca.gov/idi-levels.aspx>

Recommendation R3

“The OCDA should implement standardized management hiring and training practices for all supervisory personnel and review employee disciplinary practices to ensure they are sufficient responses to employee actions.”

Response to Recommendation R3: Implemented.

The OCDA follows the County’s recruitment process for all of its supervisory promotions. For a more detailed explanation regarding management training, the OCDA incorporates by reference comments made in Finding F6. The OCDA will continue to improve and modify existing management selection processes and employee disciplinary practices.

Recommendation R4

“The OCDA needs to send a clear message to local law enforcement agencies that successful case prosecution relies on the sharing of information, and agencies should be encouraged to share all informant information with the OCDA for input into the OCII.”

Response to Recommendation R4: Implemented.

This recommendation has been implemented and continues to be executed on a regular basis by the OCDA. Since March 2014 alone, the OCDA has conducted over 161 live trainings and issued over 21 training publications devoted to educating prosecutors and LLE regarding discovery obligations and informant use. In addition, the OCDA has held multiple meetings with command staff of LLE with the objective of expressly and forcefully communicating the importance of sharing all the information to the prosecution team. Moving forward, the OCDA will continue to provide training sessions to LLE and to the graduates from the OCSD Academy about our ongoing commitment to comply with discovery requirements under the law.

Recommendation R5

“Prosecutors within the OCDA need to recognize that the OCII is a tool of limited utility and should not rely on the OCII to vet potential witnesses. They should continue to do their due diligence in background checks of all witnesses in their prosecutions.”

Response to Recommendation R5: Implemented.

This recommendation has been implemented and will continue to be executed by the OCDA on a regular basis. As noted above, the OCDA provides prosecutors with regular and specific training on their discovery obligations and on informant use, including training on the OCII, its use as well as its limitations. The OCDA Informant Manual (Attachment C) has been revised adding resources, protocols and checks and balances in relation to the use of informants. This issue will continue to be a focus of staff training and legal education in the future.

Recommendation R6

“The OCDA should standardize its discovery record-keeping system for recording and tracking discovery materials and ensure all prosecutors are aware of and use the new uniform system.”

Response to Recommendation R6: Partially Implemented.

The OCDA has already made significant strides toward the complete implementation of this recommendation. In November 2016, the OCDA formed an office-wide subcommittee devoted to analyzing our discovery practices and modifying procedures and office policies. That subcommittee has developed a series of policy proposals and best practices to institute uniform systems of discovery office-wide.

At the end of 2016, the OCDA’s Office moved forward to implement a Bates stamping system and protocol (consecutive numbering of documents for discovery record-keeping and tracking purposes) applicable to all cases at the Branch Courts. As of the Spring 2017, this system and protocol has been implemented on all felony cases at the Branch Court level (approximately 8,000 cases per year). In the next phase of implementation, once additional resources are secured and deployed, the Bates stamping system and protocol will be applied to all misdemeanor cases in the Branch Courts (approximately 45,000 misdemeanor cases per year).

Before these efforts and continuing today a Bates stamping system and protocol has also been in place in all of the vertical prosecution units in the OCDA. And the OCDA has simultaneously devoted considerable effort to studying and testing third-party software applications for the more efficient receipt, tracking and provision of digital discovery.

It should also be noted that in 2016 the OCDA led a state-wide prosecutorial working group on the development of discovery best practices and, in January 2017, the OCDA was called upon to provide a presentation on those practices to all prosecutors’ offices at a California District Attorney Association conference.

Recommendation R7

“The OCDA should review their management and communication to improve inter-office communications and break down the negative effect of silo-ed operations.”

Response to Recommendation R7: Implemented.

The OCDA is regularly assessing and improving the communication among management and the other OCDA staff. On a daily and routine basis, members of the management team will meet and communicate on a variety of issues and cases. There are periodic meetings between the executive management staff of attorneys and the District Attorney. There are also division meetings, unit meetings and discussions on major cases. Once a month, the Attorney, Bureau, and Admin/Fiscal executive team meet for planning and discussion of issues.