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A Dangerous Highway Of Discovery

How to avoid jarring potholes on the two-way street of reciprocal discovery in criminal cases

By ALEX RICCIARDULLI

Until just over a decade ago, the road of criminal discovery in California ran only one way: The prosecution was statutorily and constitutionally obligated to furnish evidence to the defense, and the defense had no duty to reciprocate. (See *In re Misener*, 38 Cal.3d 543 (1985).) As approved by California's voters on June 5, 1990, Proposition 115, the "Crime Victims Justice Reform Act," changed all that by requiring that the prosecution and defense disclose to one another the evidence that they are going to present at trial. The Supreme Court explained in upholding the constitutionality of the act that "Proposition 115 effectively reopened the two-way street of reciprocal discovery in criminal cases in California." (*Izazaga v. Superior Court*, 54 Cal.3d 356, 363 (1991).)

There are many potholes for lawyers on this highway, and some can be severely jarring. Violations of the discovery rules are punishable by sanctions ranging from preclusion of evidence to contempt of court, and the State Bar of California may discipline lawyers for violations.

Defense attorneys in criminal cases face especially daunting obstacles. As exemplified by the charges once leveled against the lawyers representing the defendant in the *Symbionese Liberation Army* case, publicizing or disclosing to the public the address or telephone numbers of witnesses turned over by the prosecution is a misdemeanor which carries up to six months in jail. (See Pen. Code §1054.2.)

Given the complexity and potentially dire consequences of modern criminal discovery procedures, both prosecutors and defense lawyers should familiarize themselves with the law in this field. A good road map through this hazardous legal terrain is essential for practitioners.

On the treacherous turnpike

The journey to two-way discovery started when Proposition 115 was enacted, creating a scheme whereby both the prosecution and defense must disclose to the other side before trial the names, addresses and statements of witnesses which the party "intends to call" at the trial. (Pen. Code, §§1054.1, 1054.3.) The statute specifically exempted disclosure to the prosecution of the defendant's own statements, so as to not violate a defendant's Fifth Amendment privilege against self-incrimination and the attorney-client privilege. (Pen. Code, §1054.3, subd. (a).)

The California Supreme Court in *Izazaga v. Superior Court*, *supra*, 54 Cal.3d 356 held that the scheme did not violate either the federal or state Constitutions. It also held that a party “intends to call” a witness when “it reasonably anticipates it is likely to call” the witness to testify at trial. (*Id.*, at p. 376, fn. 11.) This is an objective standard aimed at avoiding shenanigans like an attorney falsely claiming that he or she did not “really” think of calling the witness until the last possible moment.

A lawyer’s ethical duty to be truthful with the court should prevent such misrepresentations. (See Rule 5-200 of the California Rules of Professional Conduct [“In presenting a matter to a tribunal, a member . . . (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law”].) Nonetheless, use of an objective standard greatly simplifies matters because it is enough that a reasonable lawyer under the same circumstances would have elected to call the witness.

Disclosure or consequences

Once a party has decided that it intends to call a witness at trial, the duty of disclosure to the opposing side is triggered. (Pen. Code, §§1054.1, 1054.3.) If a party breaches this duty by making a late disclosure, the aggrieved party may ask the judge to impose sanctions, including preclusion of the witness’ testimony from the trial, and the judge may initiate contempt of court proceedings.

If a lawyer is found to have violated the discovery rules, a judge can, and in some instances, must report the matter to the State Bar for potential discipline. Business and Professions Code §6086.7 provides that “a court shall notify the State Bar of any of the following: (a) A final order of contempt imposed against an attorney that may involve grounds warranting discipline under this chapter.” If the judge believes that the discovery violation is severe enough to warrant discipline, the judge must report it to the State Bar.

Penal Code §1054.5, subdivision (b), states that upon a failure to comply with the duty to disclose, “a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.” The law also states that “the court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted.” (Pen. Code, §1054.5, subd. (c).)

A contempt citation carries dire consequences for the offending lawyer. The judge can impose a fine of up to \$1,000 and add a jail sentence of up to five days. (Code of Civ. Proc. §1218, subd. (a).) The State Bar can discipline the lawyer by disbarment or a suspension of the right to practice law. (Bus. & Prof. Code §6100.)

Barring witnesses from testifying

An unscrupulous attorney out to prevail at all costs may well feel it is worth risking being held in contempt in order to win a case. However, the sanction of barring the lawyer’s witnesses from testifying should make him think twice.

Only a handful of published California cases have addressed the propriety of a preclusion sanction for a discovery violation. Even though all the cases have dealt with judges who barred criminal defendants’ witnesses from testifying, the California Supreme Court has stated that the defense and prosecution standards are identical in this regard. (*People v. Tillis*, 18 Cal.4th 284, 290, fn. 3 (1998).)

Further, although the standards in these cases have been derived from federal opinions that involved a defendant's constitutional right to present evidence, under the California Constitution prosecutors have the right to due process of law (Cal. Const., art. I, §29), so the prosecution's constitutional rights must also be respected when considering a preclusion sanction.

One of the cases held that "absent a showing of significant prejudice and willful conduct, exclusion of evidence is not appropriate as punishment" for a discovery violation. (*People v. Gonzales*, 22 Cal.App.4th 1744, 1758 (1994).) The Court of Appeal reasoned that "to conclude otherwise might well place upon the truth-finding process an imprimatur of unreliability inconsistent with confidence in a finding of guilt." (*Ibid.*)

People v. Edwards, 17 Cal.App.4th 1248, 1263 (1993) found that a preclusion sanction should be used "only for the most egregious discovery abuse." *Edwards* held that to justify preventing a party from calling a witness, the violation must be deliberate and motivated by a desire to obtain a tactical advantage at trial. In both of these cases, the appellate courts concluded that the defense's actions did not merit a preclusion sanction.

In *People v. Jackson*, 15 Cal.App. 4th 1197 (1993), however, the Court of Appeal did find that preclusion was a valid penalty. When the prosecution rested its drug possession case, the defense disclosed that it wanted to use as evidence a written statement that showed that the drugs were owned by another person. (The document fell within Evid. Code §1230's declaration against penal interest hearsay exception.)

Finding that due to the tardiness of the disclosure the person who wrote the document could not be found, the judge excluded the defense evidence.

Jackson affirmed, holding that the defense had deliberately chosen to surprise the prosecution with the evidence mid-trial, and that no other sanction would have been effective because, since the person who made the written statement was unavailable, the prosecution would have been unable to effectively rebut the document.

The scant case law in this area is in agreement: Preclusion sanctions may be imposed only for the most egregious discovery violations. The mere existence of a preclusion sanction, however, is a strong deterrence reinforcing attorneys' ethical duty to be forthright with the court and opposing parties.

Criminal charges as a sanction?

A separate type of discovery violation can be enforced not just by contempt and preclusion sanctions, but by criminal penalties. Penal Code §1054.2, subdivision (a)(1) was added by the legislature a few years after Proposition 115's discovery provisions, and provides that "no attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of §1054.1." (Pen. Code §1054.1, subd. (a) is the statute that requires the prosecution to disclose to the defense information concerning witnesses it "intends to call" at trial.)

Section 1054.2, subdivision (a)(3) states that "willful violation of this subdivision by the attorney, or persons appointed by the court, is a misdemeanor." Punishment for the misdemeanor can include a fine of \$1,000 and up to six months in jail. (Pen. Code §19.)

Several exceptions are set forth: It is permissible to disclose the information if permitted by a court after a hearing and a showing of good cause. (Section 1054.2, subd. (a)(1).) It is also OK to disclose the information to persons employed by the attorney, like investigators, when necessary for the preparation of the case. (Section 1054.2, subd. (a)(2).)

Finally, if the defendant is representing himself, disclosure of the name and address of the victim or witness must be given only to the defendant's private investigator. (Section 1054.2, subd. (b).)

In the Symbionese Liberation Army fugitive case, misdemeanor charges were filed against the defendant's two attorneys for allegedly allowing a motion that contained prosecution witnesses' addresses and telephone numbers to be placed on a public website.

The website, which is pro-defense and based in Minnesota, routinely places all defense motions online (as well as hawking the defendant's cookbook, *Serving Time, America's Most Wanted Recipes*).

The motion was filed by the defense attorneys in court, and it appears that the website merely picked it up and put it online just as it had done with all the other motions. (The charges were later dismissed.)

The case raises interesting issues concerning the mental state needed for the misdemeanor in §1054.2. For example, is mere negligence sufficient to violate the law? Section 1054.2, subdivision (a)(3) makes only a "willful violation" a crime, meaning that the defendant must exhibit "a purpose or willingness to commit the act." (Pen. Code §7, subd. (1).)

However, a "defendant may be found to have acted with 'criminal negligence' without proof that he or she intended to commit the act." (*People v. Lara*, 44 Cal.App.4th 102, 108 (1996).)

Assuming that more than mere negligence is required to violate the statute, if an attorney accidentally allowed disclosure of the prosecution's information, he or she would not be guilty of the crime in §1054.2. Nonetheless, even if a lawyer is acquitted or has the §1054.2 misdemeanor charges dismissed, the State Bar will still be free to discipline the lawyer unfettered by the disposition of the criminal case. (See *Hawkins v. State Bar*, 23 Cal.3d 622 (1979).)

The moral of the story

California's two-way discovery procedures for criminal cases were enacted "[t]o promote the ascertainment of truth in trials." (Pen. Code §1054, subd. (a).) The scheme recognizes that tension often exists in trials between the drive to expose the truth and the urge to win.

Proposition 115 procedures thus empower the judge, as the traffic cop on the discovery highway, to enforce the rules through citations ranging from contempt, monetary sanctions, preclusion of evidence and reporting an offender to the State Bar.

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Test — Legal Ethics

1 Hour MCLE Credit

This test will earn 1 hour of MCLE credit in Legal Ethics.

1. True/False. Prior to the enactment of Proposition 115, the defense in a criminal case did not have to inform the prosecution of the names, addresses and statements of witnesses which it was going to call at trial.
2. True/False. Under Proposition 115, a party must disclose the names and statements of a witness that it intends to call at a trial, but must disclose the address of the witness only if the opposing party cannot locate the witness.
3. True/False. Proposition 115 provides that although the statements of witnesses the defense intends to call at trial must be turned over to the prosecution, the statements of the defendant in the criminal case need not be disclosed by the defense.
4. True/False. The constitutionality of the two-way discovery scheme enacted by Proposition 115 has not yet been assessed by the California Supreme Court.
5. True/False. A lawyer has an ethical duty to not mislead the prosecution or judge regarding what witnesses he or she intends to call at a trial.
6. True/False. It is not until an attorney determines that he or she intends to call a witness at a trial that the duty to disclose is created.
7. True/False. Whether a lawyer “intends to call” a witness at trial is determined by an objective standard, requiring a judge to ascertain whether a reasonable attorney in the same situation would have decided to use the witness’ testimony at the trial.
8. True/False. Even if an attorney violates the discovery rules, the judge is never obligated to report the matter to the California State Bar for potential discipline.
9. True/False. When a party has violated the duty to disclose its witnesses, the judge has the power to continue the case in order to give the opposing party time to investigate the witnesses, rather than impose any other sanction.
10. True/False. Although a judge may impose sanctions for a discovery violation, such as holding a party in contempt of court or barring a witness from testifying, the judge may not inform the jury of the discovery violation.
11. True/False. When a judge sanctions a lawyer for a discovery violation, the State Bar can impose discipline on the lawyer, including suspending his or her right to practice law.

12. True/False. If a discovery violation is sufficiently egregious, the judge may preclude the offending party from calling his or her witness even if lesser sanctions would be equally effective.
13. True/False. Appellate cases discussing the propriety of precluding witnesses from testifying as a discovery sanction are equally applicable to both the defense and prosecution.
14. True/False. Preclusion of evidence might be a valid sanction if the discovery violation causes the opposing party prejudice, even if the violation was not done on purpose.
15. True/False. If a discovery violation is deliberate and motivated by a desire to obtain a tactical advantage at trial, then the judge may sanction the offending party by precluding his or her witnesses from testifying at the trial.
16. True/False. When a party surprises its opponent at trial with evidence that should have been disclosed beforehand, and neither a continuance of the case nor a contempt sanction would have been effective, the judge is authorized to impose the sanction of preclusion of evidence.
17. True/False. If a defense attorney acquires the identity and whereabouts of a witness through her own investigation, it is a misdemeanor if the attorney discloses the name, address and telephone number of the witness to the general public.
18. True/False. When the prosecution discloses to the defense the address and telephone number of the victim of a crime, and the defense wants to inform its investigator of the whereabouts of the victim so that the victim can be interviewed, the defense need not obtain a court order to make the disclosure.
19. True/False. When a defendant is representing himself at a criminal trial, the prosecutor must disclose to the defendant the names, addresses and telephone numbers of witnesses it intends to use at that trial.
20. True/False. If an attorney is charged with a misdemeanor violation for wilfully disclosing the names, addresses and telephone numbers of witnesses turned over by the prosecution, but the a jury finds the attorney not guilty, then the State Bar cannot take any action disciplining the attorney.

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