

RESOLUTION 04-07-2015

DIGEST

Criminal Procedure: Discoverability of Police Audio and Video Recordings

Adds Penal Code section 1054.11 to enact procedures regarding the use, retention, disclosure, and discoverability of police audio and video recordings.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code section 1054.11 as follows:

§1054.11

- 1 (a) All law enforcement agencies shall, within one year of the effective date of this
2 section, enact a policy regarding the use, retention, and disclosure to the prosecution of all audio
3 and video recordings depicting interactions between law enforcement officers and civilians,
4 including but not limited to “dash cam” audio and video recorders, on-body audio and video
5 recorders, gun and Taser video, and Mobile Video Audio Recording Systems, that result in the
6 filing of a criminal charge. The policy shall govern audio and video recording equipment owned
7 by or under the control of the law enforcement agency as well as audio and video recording
8 equipment owned by or under the control of law enforcement officers and used in the law
9 enforcement officer’s performance of his or her duties.
- 10 (b) In all cases in which a criminal case is presented to a prosecutor for filing, all audio
11 and video recordings depicting the interaction between law enforcement officers and the
12 arrestee(s) who are the subject of the criminal charges must be disclosed to the prosecution either
13 at the time the case is presented to the prosecutor for filing or, if not immediately available,
14 within five days after the case is presented to the prosecutor for filing.
- 15 (c) The audio and video recordings described in this section constitute real evidence and
16 shall be given by the prosecution to the defense in conformity with Chapter 10 of Title 6 of this
17 code. In the case of a felony, the audio and video recordings described in this section shall be
18 given by the prosecution to the defense not more than 5 court days after arraignment on a felony
19 complaint. In the case of a felony presented to a grand jury, all relevant audio and or video
20 recordings must be shown to the grand jury.
- 21 (d) In any case in which it reasonably appears that audio and/or video recording
22 equipment was present at the scene of the interaction between law enforcement and persons
23 resulting in the filing of a criminal charge, and the law enforcement agency has not given a copy
24 of the audio and or video recording to the prosecution in conformity with this section, both the
25 prosecution and/or defense may serve a subpoena duces tecum upon the law enforcement agency
26 demanding production of the relevant audio and video recordings. The subpoena duces tecum
27 may also demand production of relevant records relating to the specific recording equipment or
28 digital storage space if the law enforcement agency reports that an equipment failure caused the
29 failure to record or loss of the recording.

(Proposed new language underlined; language to be deleted stricken)

PROPOSERS: Ten Members of the California Bar: Mark Harvis, Robin Bernstein-Lev, Thomas Moore, Albert J. Menaster, Albert Camacho, Erika Grant, Greg McCambridge, Dylan Ford, Michael Theberge, Alison Klein.

STATEMENT OF REASONS:

The Problem: Video evidence is often the very best evidence. Police agencies are starting to utilize audio and video equipment such as “dash cams” or on-body cameras that record the interactions between officers and the citizenry. Despite what would seem to be the obvious evidentiary value to both the prosecution and defense of these recordings, law enforcement, including some prosecutors, are sometimes reluctant to disclose these recordings in a timely manner. This failure brings disrespect upon the criminal justice system and suborns the truth and fact finding function. It is essential that in every case in which there is an audio or video recording, that the recording be available to both the prosecution and the defense in a timely manner. It is likely that the production of video recordings will result in fewer trials and preliminary hearings and thus in money savings to the entire criminal justice system.

The Solution: This resolution mandates that law enforcement agencies adopt a policy regarding the use, retention, and disclosure of audio and video recordings in criminal cases. This statute creates a mandatory discovery procedure for audio and video recordings.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESPONSIBLE FLOOR DELEGATE: Mark Harvis

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution adds Penal Code section 1054.11 to enact procedures regarding the use, retention, disclosure, and discoverability of police audio and video recordings. This resolution should be disapproved because the disclosure rules codified in Penal Code section 1054 require disclosure of police audio and video recordings and the prosecutor

has an affirmative duty to disclose both relevant and exculpatory evidence under California law.

The disclosure rules in Penal Code section 1054 presently provide that a defendant may informally request from the prosecution any desired materials and information, including police audio and video recordings. Penal Code section 1054.1 specifically provides that the prosecutor “shall disclose” to the defendant “(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. ... (e) Any exculpatory evidence.” (Pen. Code, §§ 1054.1, subds, (c), and (e).) This resolution is duplicative of the current disclosure requirements and creates a special and unnecessary procedural process for police audio and video recordings that conflicts with the current timing requirements set forth in 1054.1. In the vast majority of cases the prosecution automatically and promptly supplies relevant and materials. If the prosecution does not produce the evidence in fifteen days, the defendant may seek a court order to compel the production. The court may order immediate disclosure of the evidence, commence contempt proceedings, delay or prohibit the testimony of a witness, delay or prohibit the presentation of real evidence, and make any other lawful order.

The due process clause of the United States Constitution also requires the prosecutor to disclose exculpatory evidence, including audio and video recordings in criminal cases, known as Brady discovery, without a request from the defendant. Brady discovery requires the prosecutor to disclose substantial material evidence favorable to the accused. If Brady evidence is withheld, the defendant is entitled to a new trial. Brady evidence includes police audio and video recordings.

A special and unnecessary procedural process for police audio and video recordings would complicate criminal proceedings and burden the courts because this resolution provides shortened timing requirements for the disclosure of video and audio recordings as opposed to all other evidence. There is no reason that video and audio recordings have a different timing requirement.

Finally, this resolution also mandates that the prosecutor must present the video or audio recordings in a grand jury proceeding. There are a couple of problems with this. First, there is no other law requiring the prosecutor present to specific evidence to a grand jury. This would take away the prosecutor’s discretion in how he or she conducts these proceedings. Second, this resolution does not require the prosecutor to present the video or audio recordings at a preliminary hearing. Since the purpose of both proceedings is the same, i.e., to determine whether there is sufficient evidence to hold the defendant over for trial on the charges, it does not make sense to require this evidence to be presented in a grand jury proceeding but not at a preliminary hearing.