

## § 70.09 Procedures for Obtaining Discovery

**[1] Informal Discovery****[a] Initial Request for Informal Discovery**

To initiate discovery under the Proposition 115 reciprocal discovery scheme (Penal Code Sections 1054–1054.7), a party to a criminal proceeding is first required to make an informal request of opposing counsel for the desired materials and information.<sup>1</sup> If the opposing counsel fails to provide the materials and information requested within 15 days, the party requesting discovery may seek a court order enforcing discovery provisions.<sup>2</sup> On a showing that the opposing counsel failed to comply with Penal Code Section 1054.1<sup>3</sup> or 1054.3,<sup>4</sup> and that the party requesting discovery has complied with the required informal discovery procedure, a court may make an order compelling discovery and imposing sanctions, among other orders.<sup>5</sup> For further discussion, *see* [c], *below*.

**[b] Informal Discovery in Relation to Preliminary Hearing**

In giving both sides 15 days within which to comply with informal discovery procedures, the Proposition 115 discovery scheme may give the prosecution the opportunity not to disclose any materials or information until after the preliminary hearing, if any is to be held.<sup>6</sup> A preliminary hearing must be scheduled to be held between two and ten court days of the date on which the defendant is arraigned or enters a plea, whichever occurs later, unless the time period is waived by both parties or is continued for good cause.<sup>7</sup>

Penal Code Section 1054.5(b) does not state whether the 15-day period is measured by calendar days or court days, although in other contexts a period of days is usually construed to mean calendar days absent some express indication of court days.<sup>8</sup> In any event, the correct “15-day” period becomes especially critical when the preliminary hearing is set for 10 court days from the time of arraignment; in some cases this would result in the prosecution having to comply

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<sup>1</sup> Penal Code § 1054.5(b). For a form of request, *see* [d], *below*.

<sup>2</sup> For a form of notice of motion, *see* [e], *below*.

<sup>3</sup> *See* § 70.03.

<sup>4</sup> *See* § 70.07[1].

<sup>5</sup> Penal Code § 1054.5(b).

<sup>6</sup> *See* Ch. 41, “Preliminary Hearings.”

<sup>7</sup> Penal Code § 859b.

<sup>8</sup> *See, e.g.,* *Youngblood v. Gates* (1988) 200 Cal. App. 3d 1302, 1310, 246 Cal. Rptr. 775 (Penal Code § 825’s former reference to “two days” for arraignment purposes then referred to two calendar days, and not 48 hours).

with informal discovery before the preliminary hearing, if any, if defense counsel has requested informal discovery at the time of arrest or the filing of a criminal complaint. Neither Penal Code Section 1054.5(b) nor Section 1054.7, nor any other provision within Sections 1054 through 1054.7 specifies when informal discovery may first be requested, nor do any of these provisions prohibit the parties from requesting informal discovery at the time of arrest, or at the time of the filing of a criminal complaint, or at the time an indictment is filed, well before any arraignment or entry of plea has taken place.

If the prosecution does not disclose requested materials and information before the preliminary hearing, if any, the defendant might bring a motion to compel discovery at least of evidence of an affirmative defense, evidence that might negate an element of the crime, and evidence relevant to the impeachment of a prosecution witness. In the motion, the defendant might argue that, since Proposition 115, in Penal Code Section 866(a), codified the defendant's preexisting right to present evidence on these subjects at the preliminary hearing, the defendant continues to have a substantial right to obtain evidence on these subjects through discovery before the preliminary hearing.<sup>9</sup> For further discussion of a defendant's rights at a preliminary hearing, see Chapter 41, "Preliminary Hearing."

The state Attorney General has stated that the discovery statutes do not bar voluntary disclosure that is earlier than described above, and that powerful legal, ethical, and practical considerations militate against prosecutors being stingy or begrudging in disclosing materials and information to the defense.<sup>10</sup>

In addition, superior courts having more than three judges, in cooperation with the district attorney and defense bar, are required to adopt procedures to facilitate dispositions before the preliminary hearing, which may include those for early, voluntary, informal discovery consistent with Penal Code Sections 1054-1054.7.<sup>11</sup> Thus, it is possible that local rules will be established requiring pre-preliminary hearing discovery.

### **[c] Enforcement and Sanctions for Failure to Comply With Informal Discovery**

A party may not seek court-ordered enforcement of discovery or sanctions for

<sup>9</sup> See *Holman v. Superior Court* (1981) 29 Cal. 3d 480, 482-486, 174 Cal. Rptr. 506, 629 P.2d 14; *Stanton v. Superior Court* (1987) 193 Cal. App. 3d 265, 272, 239 Cal. Rptr. 328; *People v. Mackey* (1985) 176 Cal. App. 3d 177, 185, 221 Cal. Rptr. 405; *People v. Justice Court (DeRoco)* (1981) 118 Cal. App. 3d 78, 80, 173 Cal. Rptr. 851 (pre-Proposition 115 right to discovery before preliminary hearing). For a form of notice of motion, see [g], below.

<sup>10</sup> See Cal. Dept. Justice, Proposition 115 Manual 113-115 (1990).

<sup>11</sup> Cal. Rules of Ct. Rule 10.953(a)(1).