

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
300 Capitol Mall, 17th Floor
Sacramento, CA 95814

TEXT OF REGULATION

EYEWITNESS IDENTIFICATION PROCEDURES

March 13, 2020

REG-2019-00014

Title 10. Investment
Chapter 5. Insurance Commissioner
Subchapter 9. Insurance Fraud
Article 1. Eyewitness Identification Procedures

Adopt 2698.22. Purpose and Scope.

These regulations set forth rules to be observed when Department employees conduct eyewitness identification procedures. These regulations do not apply to field show-ups.

NOTE: Authority cited: Section 859.7, Penal Code. Reference: Section 859.7, Penal Code.

Adopt 2698.23. Definitions.

As used in this article, the following definitions shall apply to the following terms:

- (a) “Administrator” means the employee administering an identification procedure.
- (b) “Blind administration” means that the administrator of an identification procedure does not know the identity of the suspect.
- (c) “Blinded administration” means that the administrator of an identification procedure may know who the suspect is, but because one of the procedures described below is being used, does not know where the suspect, or the suspect’s photograph, as applicable, has been placed or positioned in the identification procedure:

(1) An automated computer program that prevents the administrator from seeing which photographs the eyewitness is viewing until after the identification procedure is completed.

(2) The folder shuffle method, which refers to a system for conducting a photographic lineup by placing a filler photograph in the first folder and numbering that folder, placing the remaining photographs in folders, shuffling those folders, numbering the shuffled folders, and then presenting the folders sequentially so that the administrator cannot see or track which photograph is being presented to the eyewitness until after the procedure is completed.

(3) Any other procedure, including a six-pack lineup, which achieves neutral administration and prevents the lineup administrator from knowing where the suspect or photograph of the suspect, as applicable, has been placed or positioned in the identification procedure.

(d) "Cal-Photo" means the centralized electronic index of driver license and booking photographs maintained by the California Department of Justice and California Department of Motor Vehicles.

(e) "Department" means the California Department of Insurance.

(f) "Employee" means any employee of the Department.

(g) "Eyewitness" means a person whose identification of another person may be relevant in a criminal investigation.

(h) "Field show up" means a procedure in which a suspect is detained shortly after the commission of a crime and who, based on his or her appearance, his or her distance from the crime scene, or other circumstantial evidence, is suspected of having just committed a crime. In these situations, the victim or an eyewitness is brought to the scene of the detention and is asked if the detainee was the perpetrator.

(i) "Filler" means either a person who is not a suspect, or a photograph of a person who is not a suspect, and is included in an identification procedure.

(j) "Identification procedure" means either a photographic lineup or a live lineup.

(k) "Live lineup" means an identification procedure in which a group of persons, including the suspect and other persons who are not suspects, are displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.

(l) "Perpetrator" means a person who committed the crime being investigated.

(m) "Photographic lineup" means an identification procedure in which an array of photographs, including a photograph of the suspect and additional photographs of other persons who are not suspects, are displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.

(n) "Six-pack lineup" means a type of photographic lineup wherein six photographs, including a photograph of the suspect and five filler photographs, are randomly arranged, printed on a single sheet of paper, and displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.

(o) "Suspect" means a person who is suspected as a perpetrator of the offence.

NOTE: Authority cited: Section 859.7, Penal Code. Reference: Section 859.7, Penal Code.

Adopt Section 2698.24. General Identification Procedure Requirements.

(a) An identification procedure shall occur as close in time to the commission of the crime as possible.

(b) A live lineup shall only be conducted before criminal proceedings have been initiated against the suspect. If there is any question as to whether any criminal proceedings have been initiated, the investigating employee shall contact the appropriate prosecuting attorney before proceeding.

(c) In cases involving multiple suspects, a separate identification procedure shall be conducted for each suspect. No more than one suspect, or photograph of a suspect, shall be present during an identification procedure. If an eyewitness is presented with identification procedures for multiple suspects, the lineup order, and the position of the suspect, or photograph of the suspect, shall be different for each identification procedure presented to that eyewitness.

(d) The administrator shall complete the Eyewitness Identification Form described in Section 2698.26 of this article for each identification procedure, and shall record the following information on the form at the following times:

(1) Prior to the start of the identification procedure:

(A) The items of information described in Sections 2698.26(a)(1) through (a)(3);

(B) Obtain a signature from the eyewitness indicating that the eyewitness understands the identification procedures and instructions.

(2) After completion of the identification procedure, request the eyewitness to initial the results of the eyewitness identification.

(e) If the eyewitness has not yet provided a description of the perpetrator, the administrator shall obtain the eyewitness's description of the perpetrator prior to the start of any identification procedure.

(f) All identification procedures shall be conducted using blind administration or blinded administration. Where applicable, the administrator shall document in writing the reason that the identification procedure was not conducted using blind administration.

(g) All identification procedures shall be composed so that the fillers generally match the suspect in appearance. In the case of a photographic lineup, the photograph of the suspect shall, to the greatest extent practicable, resemble the suspect's appearance at the time of the offense and not differ from the filler photographs in a way that would make the photograph of the suspect appear distinctive.

(h) Prior to the start of any identification procedure, the administrator shall read the eyewitness the instructions set forth in Section 2698.26(b) and confirm that the eyewitness understands the instructions.

(i) No writings or information regarding any of the people or photographs present during an identification procedure, including writings or information regarding the suspect or photographs of the suspect, shall be visible to the eyewitness during the identification procedure. This subdivision shall not prohibit sequential numeric identifiers from being assigned to each person or photograph present in an identification procedure.

(j) Employees, or other persons present during an identification procedure, shall not, in any way, influence an eyewitness as to whether or not any person or photograph presented during an identification procedure is in any way connected to a case. Specifically, an employee shall not indicate or communicate to any eyewitness:

(1) That a person present in a lineup, or whose photograph appears in a lineup, was apprehended near the crime scene;

(2) That evidence suggests that a person present in a lineup, or whose photograph appears in a lineup, is the perpetrator of the crime;

(3) That the administrator, or other employees or law enforcement professionals, believe that a person present in a lineup, or whose photograph appears in a lineup, committed the crime;

(4) That the suspect is, or is not, present in a lineup;

(5) That other eyewitnesses have identified, or failed to identify, a person present in a lineup, or whose photograph appears in a lineup, as the perpetrator of the crime; or

(6) Any verbal or nonverbal information regarding the identity of the suspect.

(k) The administrator shall document in writing all persons present at any time during an identification procedure.

(l) If an eyewitness identifies a person the eyewitness believes to be the perpetrator, or indicates that a photograph is of a person the eyewitness believes to be the perpetrator, the administrator shall:

(1) Immediately inquire as to the eyewitness's confidence level in the accuracy of the identification and record in writing, verbatim, what the eyewitness says.

(2) Not disclose any information concerning the identified person prior to obtaining the eyewitness's statement of confidence level and documenting the exact words of the eyewitness. This requirement also applies to any employees or persons in addition to the administrator who might be present during the identification procedure.

(3) Not validate or invalidate the eyewitness' identification, or otherwise discuss the person or photograph identified by the eyewitness. This requirement also applies to any employees or persons in addition to the administrator who might be present during the identification procedure.

(m) A separate identification procedure shall be conducted for each eyewitness and no more than one eyewitness shall be present during an identification procedure. The order of the suspect and the fillers shall be randomized anew before being presented to each successive eyewitness. Notwithstanding the immediately preceding sentence, a six-pack lineup may be presented to multiple eyewitnesses with the photographs in the same order.

(n) An electronic recording shall be made that includes both audio and visual representations of each identification procedure in its entirety. Notwithstanding the preceding sentence, when the administrator determines that it is not feasible to make a recording with both audio and visual representations, audio recording may be used. When audio recording without video recording is used, the administrator shall state in writing the reason that video recording was not feasible.

NOTE: Authority cited: Section 859.7, Penal Code. Reference: Section 859.7, Penal Code.

Adopt Section 2698.25. Requirements Specific to Photographic Lineups.

(a) In addition to the requirements of Section 2698.24 above, the requirements of this section shall apply to all identification procedures involving a photographic lineup.

(b) The employee composing the photographic lineup and the administrator of the photographic lineup shall not be directly involved in the investigation of the case.

(1) Notwithstanding the foregoing subdivision (b) of this Section 2698.25, employees composing or administering a photographic lineup may be involved in the investigation of the case, provided that the photographic lineup is conducted in a blind or blinded administration, as required by Section 2698.24(f).

(2) A six-pack lineup shall only be conducted using blind administration. Other than the eyewitness, no person with knowledge of the suspect's identity shall be present during administration of a six-pack lineup.

(c) When composing a photographic lineup prior to an identification procedure, an employee shall:

(1) Use the most recent Department of Motor Vehicles photograph of the suspect and obtain other similar photographs through the Cal-Photo system. Employees shall not mix Department of Motor Vehicles and booking photographs for lineups.

(2) Prior to beginning the identification procedure, record the names, dates of birth and numbers assigned to each photograph in a document that is not made available to any eyewitness.

(d) Photographic lineups shall be subject to the following procedural requirements:

(1) If a photographic lineup is being shown to more than one eyewitness, the lineup shall be reprinted in color for each eyewitness.

(2) If an eyewitness indicates that a photograph is of the perpetrator, the administrator shall ask the eyewitness to circle the photograph, as well as sign and date the photograph. If an eyewitness cannot identify the suspect in any of the photographs shown during the identification procedure, the administrator shall ask the eyewitness to indicate that fact on the Eyewitness Identification Form, as well as write that statement on some part of the photographic lineup, accompanied by the eyewitness's signature and the date.

(3) Lineups shall be presented to the eyewitness sequentially (i.e.: the administrator shall present one photograph to the eyewitness at a time). The eyewitness shall view all photographs in the lineup. Notwithstanding the preceding sentence, the requirements of this subdivision (d)(3) shall not apply to six-pack lineup identification procedures.

(4) After the conclusion of the photographic lineup:

(A) If a photograph was selected, the administrator shall write the eyewitness name, date and time of the identification procedure, and case number on the back of the selected photograph, or six-pack lineup, as applicable.

(B) The administrator shall place all photographs, folders, and audio or visual recordings that comprised the photographic lineup into an evidence envelope, seal the envelope, initial and date the envelope, and book the envelope into evidence.

NOTE: Authority cited: Section 859.7, Penal Code. Reference: Section 859.7, Penal Code.

Adopt Section 2698.26. Eyewitness Identification Form.

An Eyewitness Identification Form shall be completed by the administrator for each identification procedure, and shall contain the following content:

(a) Eyewitness and Procedural Information:

(1) Date, time, and location of the identification procedure.

(2) Name of the eyewitness and time of day that the eyewitness observed the lineup.

(3) The administrator's name and badge number.

(4) Space for the eyewitness to sign indicating that they understand the identification procedure and instructions.

(5) Spaces for the eyewitness to indicate and inscribe the eyewitness's initials to confirm that either:

(A) The eyewitness recognizes a person the eyewitness believes to be the perpetrator, or recognizes a photograph as being of a person the eyewitness believes to be the perpetrator, or;

(B) The eyewitness does not recognize any of the persons or photographs in the lineup.

(b) Written Eyewitness Instructions. The form shall provide instructions to eyewitnesses, to the following effect:

(1) That the eyewitness will be shown a group of persons or photographs.

(2) That the perpetrator may or may not be present among the persons or photographs presented during an identification procedure.

(3) That the eyewitness should not feel compelled to make an identification.

(4) That it is as important to exclude innocent persons as it is to identify the perpetrator.

(5) That the perpetrator may not appear exactly the same as the perpetrator did on the date of the incident.

(6) That the eyewitness shall view all of the persons or photographs prior to making any comment.

(7) That the eyewitness shall indicate on the Eyewitness Identification Form if they recognize any of the people or photographs as being the perpetrator.

(8) That the eyewitness must not ask the administrator whether they correctly identified the suspect.

(9) That the administrator will not tell the eyewitness whether or not they correctly identified the suspect.

(10) That the eyewitness must not discuss details of the incident, the identification procedure, or whether or not the eyewitness has identified a suspect, with any other eyewitnesses.

(11) That the investigation will continue regardless of whether the eyewitness makes an identification.

NOTE: Authority cited: Section 859.7, Penal Code. Reference: Section 859.7, Penal Code.