

**OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF VENTURA**

MCLE AGENDA

LEGAL ETHICS, DISCOVERY, AND OFFICE POLICIES

August 18, 2017

Room 308

Instructor: Michael D. Schwartz, Special Assistant District Attorney

MCLE Credit: 3.25, including 2.25 hours legal ethics

8:30 – 9:30 Legal Ethics

9:30 – 10:45 Criminal Discovery, including statutory requirements and *Brady v. Maryland*

10:45 – 11:00 Break

11:00 – 12:00 Office Policies

ACTIVITY EVALUATION FORM FOR CALIFORNIA MCLE

Please complete and return to Provider (Please Print)

Provider Name: Ventura County District Attorney's Office Provider Number: 1130

Title of Activity: Legal Ethics, Discovery, and Office Policies

Date(s) of Activity: August 18, 2017

Time of Activity: 8:30 a.m. - 12:00 p.m.

Location of Activity: Room 308

Please indicate your evaluation of this course by completing the table below

Question	Yes	No	Comments
Did this program meet your educational objectives?	<input type="checkbox"/>	<input type="checkbox"/>	
Were you provided with substantive written materials?	<input type="checkbox"/>	<input type="checkbox"/>	
Did the course update or keep you informed of your legal responsibilities?	<input type="checkbox"/>	<input type="checkbox"/>	
Did the activity contain significant professional content?	<input type="checkbox"/>	<input type="checkbox"/>	
Was the environment suitable for learning (e.g., temperature, noise, lighting, etc.)?	<input type="checkbox"/>	<input type="checkbox"/>	

Please rate the instructor(s) of the course below

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Michael Schwartz: Legal Ethics, Discovery, Policy	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

http://vclweb/da/

MCLE REQUIREMENTS

Minimum Continuing Legal Education

Three year cycle based on last name

Group 1 - A-G - compliance period 2/1/16 through 1/31/19

Group 2 - H-M - compliance period 2/1/15 through 1/31/18

Group 3 - N-Z - compliance period 2/1/17 through 1/31/20

Total hours required every three years: 25 hours

Maximum "self-study" hours: 12.5 hours; written materials must be available if class 1 hour or more

At least 12.5 hours must be "participatory" (e.g., attending a live class)

Special Requirements within the total hours required (may be participatory or self-study):

Legal Ethics: 4 hours

Competence issues (substance abuse or other mental or physical issues that impair a member's ability to perform legal services with competence): 1 hour

Elimination of Bias in the Legal Profession and/or Society: 1 hour

Proportional requirement for new admittees: see

<http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx>

Potential sources of MCLE credit include:

Ventura DA classes

MCLE CD library (see Carrie Broggie or other Management Assistants)

Alameda County DA video links (self-study)

Los Angeles County District Attorney Saturday Seminars

California District Attorneys Association classes and webinars

Ventura County Law Library CEB CD library

Ventura County Bar Association classes

Teaching an MCLE class: 4 hours credit for each hour of class taught



**Ethics
Discovery
and
Policy**

ETHICS

- State Bar Act (Bus. & Prof. Code 6000 et seq.)
- Rules of Professional Conduct
- Case law

State Bar Act: Bus & Prof 6068

- Support federal & state constitution
- Maintain only legal & just actions
- Seek truth – never mislead the court
- Cooperate with Bar investigations

State Bar Act: Bus & Prof 6068

- **Maintain respect due to courts and judicial officers**
- **Advance no fact prejudicial to honor or reputation of party or witness, unless required by the justice of the cause**

**Courteous
professional**

*

**Effective
advocate**

**Obnoxious
jerk**

*

**Effective
advocate**

**Courteous
professional**

*

**Incompetent
advocate**

**Obnoxious
jerk**

*

**Incompetent
advocate**

Bus & Prof 6068

- **Self-report to State Bar of imposition of sanctions by court, filing of felony, certain convictions, reversal based on misconduct**

Bus & Prof. 6106

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

Rules of Prof. Conduct

- 2-100: Communication with represented party
- 3-600: Organization as a client
- 5-110: Member in gov't service requires probable cause
- 5-120: Trial publicity likely to prejudice proceedings

Rules of Prof. Conduct, con't

- 5-200: Mislead judge or jury, cite invalid authority
- 5-210: Member as witness before jury
- 5-220: Suppression of evidence
- 5-300: Ex parte communications (see Code of Jud. Ethics, Canon 3(B)(7))
- 5-320: Communications with jurors

Berger v. U.S. (1935) 295 U.S. 78

- Prosecutor's interest is not to win, but to see justice done
- Guilt shall not escape nor shall innocence suffer
- Should prosecute with earnest and vigor and may strike hard blows
- Duty to refrain from improper methods



Conviction Integrity Deputy

Created October 2012

Discriminatory prosecution

Murgia v. Municipal Court
(1975) 15 Cal.3d 286

- Equal protection violated if prosecutions deliberately based upon unjustifiable standards
- race, religion, other arbitrary classification

Vindictive / retaliatory prosecution

- Raise the ante after exercise of constitutional rights
- OK to withdraw pretrial offer

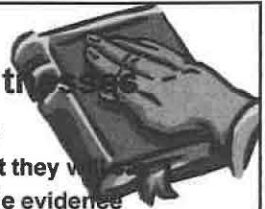
Duty During Voir Dire

- Not use voir dire to present inadmissible facts
- Use peremptory challenges only for proper purpose (*Wheeler/Batson*)



Duty with Witnesses

- Interview and prepare
 - You should know what they will say
 - Instruct re inadmissible evidence
- Do not suggest answers or influence content of testimony
- Plan questions carefully
 - Not elicit inadmissible evidence
 - Good faith belief



Duty with Witnesses (continued)

- Do not advise not to talk with defense
(*Walker v. Superior Court* (1957) 155 Cal. App. 2d 134, 140; *People v. Hannon* (1977) 19 Cal.3d 588, 601)
- Do not threaten defense witnesses with arrest
(*In re Martin* (1987) 44 Cal.3d 1)

Duty During Opening

- Do not overstate case
- Do not speculate
- Do not ask to observe def's demeanor
- Pretrial rulings on evidence, charts
- No arguing



Duty During Closing

- Argue based on admitted evidence and jury instructions
- No comment on def's failure to testify (*Griffin* error)
- No comment on invocation of *Miranda* rights (*Doyle v. Ohio*)
- No disparaging counsel

- No personal vouching for witnesses
- No facts outside the record
- No misleading jury
 - Facts or law
- No improper appeal to passion or prejudice
- No personal beliefs about guilt



Civil Liability

- **Violations of Civil Rights (42 USC 1983) or tort claims**



Absolute Immunity

"Intimately associated" with judicial proceedings

Filing and trying cases

May not apply when case is over

Qualified Immunity

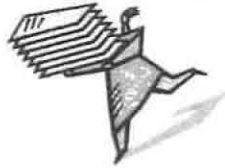
Authorized Acts

- **Immunity unless violating clearly established right, reasonable official would have understood that violating right**
- **Advice to police**
- **Statements to news media**
- **Authorizing search warrant**

DISCOVERY

Discovery

- *Brady v. Maryland* (1963) 373 US 83
- *Pitchess v. Superior Court* (1974) 11 Cal.3d 531
- Penal Code section 1054 et seq.



“There is an epidemic of *Brady* violations abroad in the land.”

United States v. Olsen (9th Cir. 2013) 704 F.3d 1172, reh'g. en banc denied, 737 F.3d 625 (dis. opn. of Kozinski, C.J.)

Brady

- **Constitutional due process duty to disclose evidence that is**
 - **Favorable to the accused**
 - and
 - **Material to guilt or punishment**

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

Material

Reasonable probability disclosure would have produced a different result in the proceeding

Reasonable Probability

A probability sufficient to undermine confidence in the outcome

Penal Code § 1054.1 (e)

**Must disclose any exculpatory evidence,
needn't be material**

***Barnett v. Superior Court* (2010) 50 Cal.4th 890**

What to Disclose

- Evidence directly opposing guilt, e.g., new witness
- Third party culpability
- Inconsistent statement of witness
- Evidence that reduces degree of culpability

**The *Brady* obligation includes
“substantial material evidence
bearing on the credibility of a
key prosecution witness.”**



***People v. Ballard* (1991) 1 Cal.
App. 4th 752, 758; *Giglio v. United
States* (1972) 405 U.S. 150**

What to Disclose

- Promises, inducements (informant)
- Prior felony convictions
- Prior incidents of untruthfulness or moral turpitude
- Pending charges
- Probation status

What to Disclose

- **False Reports**
- **Racial, religious or personal bias**
 - Evid. Code § 780 (f); *In re Anthony P.* (1985) 167 C.A.3d 502, 507-510

Credibility Information

**Duty to run rap sheet on material
civilian witness and disclose any
information bearing on credibility**

The prosecution's duty includes evidence in possession of

- The prosecuting attorney
and
- The "prosecution team"
(investigating law
enforcement agencies)



**No duty to disclose preliminary,
challenged or speculative
information**

**(*United States v. Agurs* (1976)
427 U.S. 97, 109, fn. 16)**

Brady

- No defense request required
- Ethical duty even after conviction
(*Imbler v. Pachtman* (1976) 424 U.S. 409, 427 fn. 25; *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179)

Disclosure of impeachment evidence not required if guilty plea

(*U.S. v. Ruiz* (2002) 536 U.S. 622)

**Evidence of actual
innocence must be
disclosed**

Need not disclose "minor inaccuracies"

(*People v. Padilla* (1995) 11 Cal.4th 891, 929, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Resolve doubtful questions in favor of disclosure

(*United States v. Agurs*
(1976) 427 U.S. 97, 108)

**Avoid "tacking too
close to the wind"**

(*Kyles v. Whitley* (1995)
514 U.S. 419, 439)



Disqualification & State Bar

Court may **disqualify** prosecutor, and must report to **State Bar**, if it finds prosecutor deliberately, intentionally, and in bad faith withheld relevant or materially exculpatory evidence, and that it contributed to a guilty verdict, guilty or nolo plea, or seriously limited the ability to present a defense. (Gov. Code § 6086.7(a)(5); Penal Code § 1424.5, effective 1/1/2016)

Felony withholding

Felony for prosecutor to intentionally and in bad faith withhold any physical matter, digital image, video recording or relevant exculpatory material or information, knowing it is relevant and material to outcome of case, with specific intent that it be concealed or destroyed. (Penal Code § 141(b), effective 1/1/17 (AB 1909).)

Unresolved Issues

Conflicting authority re:

- whether to be material under *Brady*, evidence must be admissible.
- whether *Brady* applies to evidence relevant to a suppression motion.
- whether disclosure required if public record or available through reasonable diligence

In re Benjamin T. Field (State Bar Court, Review Dept.)

- **Brady:** fail to disclose exculpatory statements of witnesses before trial
- **Moral turp./dishonesty: (& mislead court):** unable to locate witness “at that address”
- **“Ben, just don’t do it.”**
Ignore court’s directives re search warrant and dental exam

Peace Officer Records

- Information from peace officer personnel records may only be disclosed pursuant to a *Pitchess* motion.
(Evidence Code §§ 1043-1047;
Penal Code § 832.7)



Pitchess vs. Brady

- | | |
|--|---|
| • Written motion and "good cause" showing required | • Prosecution must disclose with or without request |
| • 5-year limitation | • No specific time limit |
| • Dates and witness information only | • Must disclose material evidence |

Issue: How to balance



Internal Brady Policy

- Advise supervisor of potential *Brady* information re officers
- Check *Brady* list for witnesses
- Consult with Special Asst. DA on how to proceed

External Brady Policy

- Law enforcement agencies advise DA's office that officer has *Brady* material in personnel file
- DDA checks *Brady* list for witnesses
- DDA makes *Pitchess* motion

***City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1**

- *Pitchess* and *Brady* operate in parallel
- On its face, *Pitchess* does not violate due process

***Alford v. Superior Court* (2003) 29 Cal.4th 1033**

- *Pitchess* protective order limits use of information to that case.
- DA has limited role at *Pitchess* hearing
- DA does not get materials disclosed as result of defense *Pitchess* motion
- DA can make its own *Pitchess* motion

***People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696**

- The prosecution does not have unfettered access to personnel files of peace officer witnesses to identify *Brady* information
- DA or defense can make *Pitchess* motion – equal access
- Police "laudably established" policy to provide DA with names of officers whose files contain potential *Brady* information
- DA must pass on that information to defense



The Pretend Supreme Court

**98 Ops.Cal.Atty.Gen. 54
(2015)**

**External Brady policy is
"legally valid"**

ALADS v. Superior Court

(B280676, July 11, 2017)

Petition for review will be filed

- **Sheriff may not provide DA
with names from Brady list
because it violates Pitchess**

**CRIMINAL
DISCOVERY
STATUTE**

**What to Disclose
(Penal Code § 1054.1)**

- **Witness names, addresses, statements**
- **Defendants' statements**
- **All relevant real evidence**
- **Felony conviction of any material witness**

**What to Disclose
(Penal Code § 1054.1)**

- **Any exculpatory evidence, needn't be material**
(Barnett v. Superior Court (2010) 50 Cal.4th 890)
- **Results of physical or mental examinations, scientific tests, experiments, or comparisons intended for trial use**

**Discovery from Defense
(Penal Code § 1054.3)**

- **Witness names, addresses and statements**
- **Results of physical or mental examinations, scientific tests, experiments, or comparisons intended for trial use**
- **Real evidence defense intends to offer**

**Discovery Procedure
(Penal Code § 1054.5)**

- **Exclusive procedure**
- **Informal request deemed made at arraignment**
- **Discovery order if not comply within 15 days.**
- **Must provide at least 30 days before trial**
- **Sanctions: immediate disclosure, contempt, exclude evidence, continuance**

Resources

**CDA, Professionalism
sourcebook**

**Hoffstadt, Cal. Criminal
Discovery (Lexis/Nexis)**

S/Brady file/Brady outline

S/Brady file/Pitchess outline



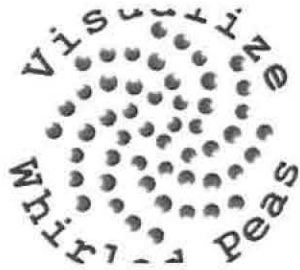
**You may be dealing with
the same attorneys for a
long time**



**Don't sink
to their level**



Ask for what you want



Visualize your plan



Individual style –
To thine own self be true



**Ethics
Discovery
and
Policy**

DA Policies – The Consolidated Version

(For full text of all policies please refer to the DA Policy Manual, on the DA Web)

(DA Web also contains links to Internet and Technology Use Policies, County Personnel Rules, Criminal Justice Attorneys Association of Ventura County MOA, etc.)

For other County policies, including County Administrative Policy Manual, go to
<http://myvcweb/index.php/forms-and-policies>

Content revised September 2010
Minor changes July 2015; June 29, 2016; August 2, 2017

CHECK-IN/CHECK-OUT SHEET

We need to be able to find you.

BADGES, ID CARDS, LETTERHEAD

For use in performance of official business.

EXPENDITURES

Before incurring costs on behalf of the office, complete an ERF (Expenditure Request Form), now completed on-line. See DA Web for instructions.

OUTSIDE EMPLOYMENT, OUTSIDE SPEAKING ENGAGEMENTS, MEMBERSHIP ON COMMITTEES

All require approval.

COMPUTERS

Occasional personal use permitted. Internet use may be monitored. Emails must be courteous, professional and businesslike. See various technology use policies on DA web.

CONFIDENTIAL INFORMATION

Access and disclosure on need-to-know basis. Criminal penalties for disclosure of rap sheets, DMV information.

SEXUAL HARASSMENT

It's unprofessional, it's illegal, and it can be expensive.

D.A. LEGAL OPINIONS

Law enforcement agency must make written request to District Attorney.

REQUESTS FOR INVESTIGATIONS

Fill out "Request for Investigation" form and have supervisor approve. (Be aware that investigator assistance in misdemeanors is the exception, not the rule.)

ROLE OF THE ATTORNEY IN INVESTIGATIONS

1) Pending Cases

You must try to avoid becoming a witness in your own case – this means you should not conduct your own witness interviews, but should request assistance from the police agency or a DA Investigator. If you do become aware of new information you must promptly document the information as well as your role in obtaining it.

2) Original Investigations

Deputy District Attorneys are rarely involved in original investigations, and you may not become involved, in any way, unless specifically assigned to do so. If you believe an investigation is warranted you should contact your supervisor who will then bring it to the attention of the proper person or persons.

3) Surreptitious Tape Recording

Surreptitious tape recording is generally not allowed by DDAs. This is a situation where you will need the assistance of a police officer or DA Investigator.

4) Use of Criminal / Driving Record Information

Access to criminal and driving record information is prohibited except for case-related purposes. Any such information received for case-related purposes is confidential and shall not be disclosed except as allowed by law.

Defendant's rap sheets are discoverable to the defense.

Witness rap sheets are not discoverable, but some information on the raps may be. If your witness has a rap sheet and you are unsure what to do with the information, consult a more experienced DDA for advice.

INTERPRETERS

If you need an interpreter in court for a witness, make advance arrangements with the interpreter. Languages other than Spanish may take some time.

TRANSCRIPTS

Misdemeanor cases are recorded on courtroom recording devices. The disks can be ordered from the court clerk's records department. If necessary you may have portions of the tapes transcribed by our Word Processing Unit.

Felony cases are reported by court reporters. Complete an Expenditure Request Form, with supervisor's approval, to obtain a transcript.

CHALLENGES TO JUDGES

A deputy may not challenge a judge under CCP 170.6 without supervisor's approval.

JUDGE PRO TEM

Supervisor's approval is required to accept a judge pro tem

NEWS MEDIA

1) DA Spokesperson

Only the District Attorney, Chief Assistant District Attorney, Chief Deputy District Attorney and Chief Investigator are spokespersons for the District Attorney's Office. No other employee may ever represent themselves as spokesperson without express prior authorization. However, you may talk to the news media about cases assigned to you.

2) Furnishing Information to the News Media

Attorneys relations with the news media are governed by Rule 5-120 of the California Bar Rules of Professional Conduct. You should be familiar with that rule before making any comment to the news media.

3) Information that May NOT Be Disclosed to News Media

Character, reputation, or record of the defendant

Possibility of a plea bargain

Existence or contents of any statements of an accused or of the accused's refusal to talk or the performance or results of any tests administered to the accused

Identity or nature of physical evidence

Identity, credibility, or expected testimony of any witness

Opinions as to guilt or innocence, weight of evidence, or merits of the case

Inflammatory statements or representations, which might affect the trial

Any information protected by any gag order or other protective order

Any identifying information of a victim of sexual assault or child abuse

Any information about any juvenile case

CONFLICT OF INTEREST

If you believe you may have a conflict of interest with any case pending in this office, for any reason (witness in case, previous involvement with parties, family member or friend is defendant or victim, etc.), you must immediately inform the Chief Deputy or Chief Asst.

JURY TRIAL REPORTS

After every jury trial, within one week of verdict, you shall complete a jury trial report. The form for this report is available on VCIJIS and includes:

The full name, city of residence, and occupation of each juror

A list of significant excused jurors – ones that others DDA's will need to know about if they ever show up again

Brief factual summary

Under "comments about jurors":

A brief explanation of any significant facts about specific jurors that would be helpful to a DDA in the future when considering whether to select this juror

Comments from the foreperson or other jurors regarding issues or evidence of concern to the panel and what might be done in the future to enhance prosecution efforts

Jury trial reports are generally not discoverable: *People v. Braley*(1969) 1 Cal.3d 277, 293-94; *People v. Quicke* (1969) 71 Cal.2d 502; *People v. Airheart* (1968) 262 Cal.App.2d 673; *People v. Darmiento* (1966) 243 Cal.App.2d 358.

PUBLIC RECORDS ACT REQUESTS AND SUBPOENAS FOR D.A. RECORDS

Requests for D.A. records by way of Public Records Act requests, subpoena duces tecum, or deposition subpoena should be referred to Special Assistant District Attorney.

POLYGRAPHS

No DA employee may offer, administer, or agree to offer, or administer a polygraph, or agree to enter such results in evidence or to base the investigation or disposition of a case in any way upon the outcome of any polygraph without express, written consent of the Chief Deputy District Attorney.

DISCOVERY

Every item that the defense is entitled to inspect under the rules of discovery shall be made available completely and promptly whether or not a formal order exists. For copies, we charge Public Defender and Conflict Defense Attorneys 3 cents/page, other attorneys 15 cents/page. Attorneys who do not want to pay can examine a copy in DA's office or can bring own machine or photocopy service.

INFORMANTS AND IMMUNITY

There are special policies regarding use of informant witnesses and grants of immunity.

CASE DISPOSITION

For misdemeanors, the defendant shall plead guilty to the most serious offense charged, and no less than one-third of all offenses charged. The DDA may not offer less than the arraignment offer without supervisor approval.

For felonies, the defendant shall be required to plead guilty to those provable charges which most accurately describe his criminal conduct. The DDA may not offer less than the Information Review offer without supervisor approval.

FORMATTING

Letters: Very truly yours

Court documents: Calif. Style Manual
Cal. Rules of Court, rule 2.104 et seq.
DA Document Style Manual on DA web