

Witness Preparation MCLE Outline

12/18/17 – Brent Nibecker

1. Ethics of Witness Preparation
2. The General Mechanics of Witness Preparation
 - a. Review reports, recordings, and exhibits
 - b. Outline direct examination
 - c. Ask follow-up questions
 - d. Provide the witness general rules for testifying
 - e. Consider mock questioning
3. Handling Different Types of Witnesses
 - a. Children
 - b. Recanting
 - c. Overly Cooperative
 - d. Expert Witnesses
 - e. Police Officers
 - f. Doctors

Witness Preparation



Supervising Deputy District Attorney Brent Nibecker
Misdemeanor Unit

Why Prep Your Witnesses?

Today's Topics

- The Ethics of Witness Prep
- The General Mechanics of Witness Prep
- General Witness Rules for Testifying
- Handling Different Types of Witnesses

The Ethics of Witness Prep

- See generally *CDAA Professionalism Manual, Chapter III, Section IX (Duty with Respect to Witnesses)*
- There is an unwritten, traditional duty of a prosecutor to interview his/her witness beforehand.
(CDAA Professionalism Manual; *People v. Bentley* (1955) 131 Cal.App.2d 687.)

The Ethics of Witness Prep

- Attorneys may not advise a person to hide or leave the jurisdiction to avoid service.
(Cal. Rules of Prof. Conduct 5-310(A).)
- Attorneys may not pay an individual for their testimony.
(Cal. Rules of Prof. Conduct 5-310(B)
 - EXCEPT
 - Reasonable expenses incurred by the witness in testifying or attending.
 - Reasonable compensation for loss of time from work.
 - Payment of expert fees.

The Ethics of Witness Prep

- We must refrain from advising witnesses NOT to talk to defense counsel.
(Cal. Rule of Prof. Conduct 5-310(A); *Walker v. Superior Court* (1957) 155 Cal.App.2d 134, 140.)

The Ethics of Witness Prep

- We have a duty to prepare our witnesses to avoid giving testimony containing false or inadmissible evidence.
(People v. Cabrellis (1987), 251 Cal.App.2d 681, 688.)
- We have a duty to warn witnesses not to mention subject matter that the court has excluded.
(People v. Glass (1975), 44 Cal.App.3d 772, 781-82.)

The Ethics of Witness Prep

- We have a duty to disclose statements of witnesses if they are written, recorded, orally conveyed or, in any event, if they are exculpatory.
 - Penal Code § 1054.1(f) [regarding written and recorded statements]
 - *Poland v. Superior Court* (2004) 124 Cal.App.4th 154, 166-69 [regarding disclosure by defense of non-recorded statements made by a witness to a defense attorney or investigator to the prosecution]
 - *People v. Lozano* (1991) 54 Cal.3d 356 [regarding disclosure of any statement that is exculpatory]

BOTTOM LINE – We must disclose any new statement made by a witness in witness prep regardless of how we record or do not record that statement.

The Ethics of Witness Prep

Disclosure of Witness Statements

- Includes raw notes taken by an attorney or investigator other than those containing "impressions or opinions of the interviewer, regardless of whether the notes are used to produce a formal written witness statement report."
 - *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480, 488 [actually relating to defense need to discover notes of witness interview to prosecution].
 - *People v. Verdugo* (2010) 50 Cal.4th 263, 284 [discovery of prosecutor's "raw notes" discoverable].

The Ethics of Witness Prep

Disclosure of Witness Statements

- Includes a statement merely orally conveyed to an attorney or investigator, even if those statements are not formalized in a report or recorded.
- *Roland v. Superior Court* (2004) 124 Cal App.4th 154, 167.

In fact, excluding such statements from the disclosure requirement of section 1054.3—and concomitantly section 1054.1—would undermine the voters' intent because it would permit defense attorneys and prosecutors to avoid disclosing relevant information...by not writing down or recording any of those witnesses' statements. As noted previously, "such gamesmanship is inconsistent with the quest for truth, which is the objective of modern discovery." (Citation omitted.)

From California Criminal Discovery by Hoffstadt

TIP: Prosecutors and investigators should conduct witness interviews using two notepads—one for the witness's statements, another for thoughts and reactions. This will make it easier for the prosecution to disclose the former, and retain the work product privilege over the latter. See generally below § 12.03.

The Ethics of Witness Prep

- ALWAYS remember Evidence Code section 771:

"...If a witness either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of the adverse party...[who may] inspect the writing, cross-examine the witness concerning it, and introduce into evidence such portion of it as may be pertinent..."

The General Mechanics of Witness Prep

1. Set a time and place
2. Have the witness review reports/recordings

Reviewing Reports/Recordings

- Time permitting, favor recordings over reports
- Limit their access to the segments that discuss their statements
- Explain regarding reports:
 - “This is a report an officer wrote shortly after he/she spoke with you”
 - “I’m only showing this to you to the extent that it helps refresh your recollection about what happened”
 - “I am not giving this to you with the expectation that you will testify in the same manner as what’s written”
 - “Please take note of anything you remember differently or believe to be incorrect”

The General Mechanics of Witness Prep

1. Set a time and place
2. Have the witness review reports/recordings
3. Ask clarifying or follow-up questions (record)
4. Advise regarding pre-trial rulings (if known)
5. Outline your direct examination
6. Outline prospective areas of cross examination
7. Advise regarding court factors (judge, defense attorney, etc.)
8. Review with the general witness rules for testifying

General Rules for Testifying

1. Tell the truth
2. Make sure you fully understand the question before answering
3. Only answer the question being asked
4. Wait until the question is fully asked before you answer
5. Do not guess what an attorney is asking

General Rules for Testifying (Part 2)

6. If you do not remember, say so
7. Difference between an open-ended question and a leading question
8. If there is an "objection" treat it like a time-out
9. Discuss appropriate attire
10. If you forget all of this...remember rule #1 – TELL THE TRUTH

To Record or Not Record Witness Prep?

Handling Different Types of Witnesses

Police Officers

Expert Witnesses

Tan Cotton Pants (1 of 2)

Cutting/Slain	Single Source Or Mixture	Comparison to Rasha Patroo' DNA	Comparison to Defendant's DNA
	Single Source	IDENTICAL MATCH	N/A
	Single Source	IDENTICAL MATCH	N/A
	Single Source	IDENTICAL MATCH	N/A
	Single Source	IDENTICAL MATCH	N/A

Expert Witnesses

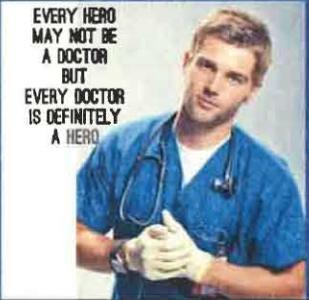
Two Part Prep

1. Meet and Greet
2. Witness Prep with a Court Visit

Recanting/Hostile Witnesses

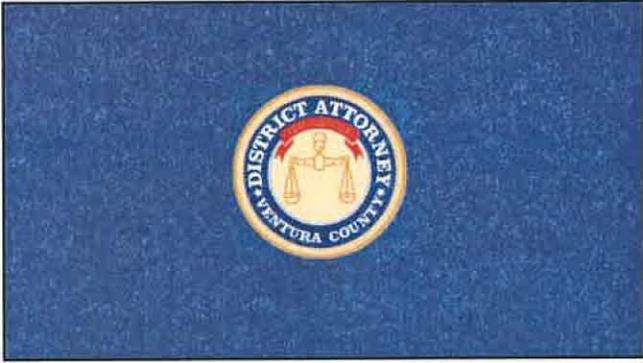
FIS@ the DA	Absolutely Hostile	Speak to them only to the extent necessary to get on the stand and say something
In a Tough Spot	Doesn't want anything to do with you	Give them a truncated version of the rules for witnesses and be done
	Might talk with you candidly about what's going on	Have a (secretly) recorded conversation about all the reasons they don't want to testify
	Probably won't talk to you about what's going on	Give them a truncated version of the rules for witnesses and be done

Doctors



EVERY HERO
MAY NOT BE
A DOCTOR
BUT
EVERY DOCTOR
IS DEFINITELY
A HERO

Overly "Helpful" Witnesses



Klante, Cynthia

From: Schwartz, Michael
Sent: Monday, November 27, 2017 3:25 PM
To: DA Attorneys
Cc: Klante, Cynthia
Subject: MCLE: Witness Preparation

Topic: **WITNESS PREPARATION**
Date: Monday, December 18, 2017
Time: 3:30 – 4:30 PM
Place: Michael D. Bradbury Conference Room
Speakers: Misdemeanor Supervisor Senior Deputy District Attorney Brent Nibecker
MCLE: 1 hour general credit

This class is targeted at newer prosecutors but all attorneys are welcome. It is a repeat of the class Brent taught last year.

The Ventura County District Attorney's Office is a State Bar of California approved MCLE provider. The above-listed class will qualify for 1 hour general credit by the State Bar.

Michael D. Schwartz
Special Assistant District Attorney
Ventura County District Attorney's Office
800 So. Victoria Avenue
Ventura, CA 93009
(805) 654-2719
michael.schwartz@ventura.org