

The California District Attorneys Association

Prosecuting Domestic Violence Misdemeanors Seminar

September 24, 2018



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

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CDAA's Mission

To promote justice by enhancing prosecutorial excellence

This project is supported by a grant awarded by the Office on Violence Against Women, U.S. Department of Justice, and through a grant from the California Governor's Office of Emergency Services (Cal OES). Points of view, opinions, findings and conclusions in this publication and at this seminar are those of the author and/or instructor and do not necessarily represent the official position or policies of the U.S. Department of Justice, Cal OES or CDAA. CDAA and Cal OES reserve a royalty-free nonexclusive, and irrevocable license to reproduce, publish, and use these materials and to authorize others to do so.

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CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

PROSECUTING DOMESTIC VIOLENCE MISDEMEANORS SEMINAR

September 24, 2018

Embassy Suites, Sacramento

•AGENDA •

8:00 – 8:30	REGISTRATION
8:30 - 10:00	VOIR DIRE Andrea Haney, Senior Deputy District Attorney, Ventura County
10:00 - 10:15	BREAK
10:15 – 11:15	RESTRAINING ORDERS CJ Mody, Supervising Deputy District Attorney, San Diego County
11:15 – 1:00	LUNCH (on own)
1:00 – 2:00	DOMESTIC VIOLENCE AND ETHICS Michael Romney, Deputy District Attorney, Riverside County
2:00-2:15	BREAK
2:15 – 3:15	WORKING WITH DIFFICULT WITNESSES Gerald Fineman, Chief Deputy District Attorney, Riverside County
3:15 – 3:30	BREAK
3:30 – 5:00	INVESTIGATION AND TRIAL PREPARATION Jennifer Kibbe Day, Deputy District Attorney, San Joaquin County

Voir Dire

Andrea Haney
Senior Deputy District Attorney
Ventura County

VOIR DIRE IN DOMESTIC VIOLENCE CASES

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ROAD MAP

- Law and procedure
- The best domestic violence jury
- Issues to address
- Intangibles

LAW AND PROCEDURE

Voir Dire in California is governed by:

1. California Rules of Court
2. California Code of Civil Procedure
3. Case law

CALIFORNIA RULE OF COURT 4.201

- Initial questioning by the court
- Supplemental questioning by counsel

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Judge shall conduct initial questioning
 - Attorneys may submit questions for consideration (CCP § 223(a))
- Attorneys shall have right to conduct oral questioning
 - Within reasonable limits
 - *“Shall permit liberal and probing examination calculated to discover bias or prejudice”*

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Follow-up permitted to Judge’s questions. (CCP § 223(b)(1))
- Not required to submit questions in advance. (CCP § 223(b)(1))
- No specific/unreasonable/arbitrary time limits or inflexible time policy.
 - Judge shall permit supplemental time based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. (CCP § 223(b)(2))

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Questioning in presence of other jurors (practicable). (CCP § 223(d))
- Judge shall consider use of questionnaires. (CCP § 223(e))
- List of random order to attorneys. (CCP § 223(f))

CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Judge's discretion viewed in light of:
 - Amount of time requested
 - Unique/complex law or facts
 - Length of trial
 - Number of parties
 - Number of witnesses (CCP § 223(c)(1-5))

PURPOSE OF VOIR DIRE

- Only in aid of the exercise of challenges for cause. (CCP § 223(d))
- Improper question:
 - A question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury. (CCP § 223(d))

GETTING STARTED

- Introduce yourself to court staff
- How does the judge select juries
- How much time you have
- Off-Limits
- Alternates
- Peremptories
- Challenges for Cause

FIRST IMPRESSIONS

- Counsel Table
- Confidence
- Listen to the defense
- Outline of Questions

TYPES OF QUESTIONS

- Road map
- Domestic violence questions
- General questions
- Issues in the case
- Pertinent to specific jurors
- Mix it up

GENERAL CHARACTERISTICS

- People that work in groups
- People with families
- People with stable jobs
- Leaders/Foreperson
- Followers

PEOPLE TO BE WARY OF

- Legal background
- Law enforcement
- Messy divorces / custody

PERSONAL QUESTIONS – LAY GROUNDWORK

- Acknowledge personal nature of questions
- Promise to be respectful
- Private if allowed

DOMESTIC VIOLENCE – STARTING THE DISCUSSION

- What do you think of when you hear the words “domestic violence?”
 - Gender(s)
 - Relationship
 - Type of abuse
 - Results

CONTINUING THE DISCUSSION

1. Repeat their exact words. *“There was violence in my house, it was horrible.”*
2. Open-ended questions. *“What kind of violence occurred? What do you think it stemmed from? What would happen?”*
 - How recent
 - Relationship
 - Reported
 - How they reacted
 - Resumed Relationship
 - Impact / Effect on life
 - Law Enforcement Involvement
 - Judicial Involvement

CONTINUING THE DISCUSSION

3. Acknowledge validity and compare. *“Thank you for your honesty and sharing your personal experience. It is understandable that you feel the way you do. Has anyone else had violence in their home?”*
4. Compare and contrast: *“Mr. Smith, how was your experience similar or dissimilar to that of Mr. Jones?” I know that*

SHIFTING GEARS – TOUGH(ER) SUBJECT

Has anyone here been accused of domestic violence or know someone else who has?

- “Mr. Smith, you said that your ex-wife accused you once.”
 - What happened
 - How recent
 - Relationship
 - Reported
 - Resumed Relationship
 - Law Enforcement Involvement
 - Judicial Involvement
 - Were you treated fairly

CASES INVOLVING SEX CRIMES – TOUGH(EST)

- *Sometimes crimes of Domestic Violence may include a sexual component such as rape or sexual assault.*
- *Is there anyone here who as been the victim of, accused of, or know someone who has experienced or been accused of sexual assault?*
- *Same questions, maybe in private.*

DOMESTIC VIOLENCE – STARTING THE DISCUSSION

- Does anyone think that domestic violence is a personal family issue that the government should stay out of?
- Uncomfortable Nature of Topic – Getting Involved

USING THE INFORMATION

- Challenges for Cause
- Developing themes
- Similarities to your case
- MIXED BAG
- Keep with EXTREME CAUTION

INTANGIBLES

- Characteristics of Defendant
- Sympathetic defendant
- Uncooperative victim
- Unlikeable victim
- Cooperative / biased / motivated victim
- Different lifestyles
- Prior domestic violence

DEFENDANTS

- Expectations
 - *In this case the defendant is _____.*
- *Were you surprised when you heard the charges read?*
- *Why do you think that surprised you?*
- *What did you immediately think of?*

UNCOOPERATIVE VICTIM

- *Not all crime victims are happy about coming to court. In fact, some want nothing to do with it.*
- *Do you think domestic violence cases should be prosecuted even if the victim does not want it prosecuted?*
- *Can you think of reasons why a victim might not want the case prosecuted?*

UNCOOPERATIVE VICTIM

- *Do you think that a person could get on the stand and lie?*
- *How do you determine if someone is lying?*
- *The court will give you instructions as to how to evaluate testimony, will you use those as you reflect back on the testimony of witnesses?*
- *Listen to all of the evidence*

UNLIKEABLE VICTIM

- *Jury instruction*
- *Some witnesses in cases are not very likeable for a whole host of reasons.*
- *Can you set that aside as you look at the evidence in the case?*

COOPERATIVE / BIASED / MOTIVATED VICTIM

- Preview the issue
- You may hear that there is an ongoing custody issue in this case.
- Would it influence you in a manner such that you would give less weight to the testimony based on that alone?

DIFFERENT LIFESTYLES - IDENTIFY

- Socioeconomic
- Same sex relationship
- Drug use
- Bad choices

DIFFERENT LIFESTYLES – ADDRESS THE ISSUE

- Jury instruction
- Preview of what to expect
- What do you think?
- How would it affect you?
- Can you set aside?

PRIOR DV- EVIDENCE CODE 1109

- By Defendant (and/or Victim)
- Pre-trial ruling
- *You may receive evidence that you can consider in your deliberation, but only for specific or limited purposes. You will get instructions from the judge on how to do that.*
- *Will you agree to consider all of the evidence you are allowed to?*
- *Will you follow the judge's instructions?*

OTHER INTANGIBLES

- Presence / lack of injury
- Inconsistent statements
- Involvement of children
- CSI

CHILDREN AS WITNESSES / VICTIMS

- A child may be called as a witness in this case.
- Do you think it is fair to ask a child to testify?
- What if it is about something that involves their parents?
- Would you hold it against the party who called the child?

GENERAL QUESTIONS

- Reasonable doubt
- One witness rule
 - Domestic violence (witness)
- Sexual assault

COMMITMENT - WAIT TO DECIDE

- Inconsistent statements
- Corroboration
- Whole picture

JUROR-SPECIFIC QUESTIONS

- Follow-up
 - Body language
- Prior questions by defense
- Any unanswered questions

SECOND WAVE OF JURORS

- Do not simply ask if anyone has different answers!
- Don't shortchange yourself on time!
- Still ask direct questions and general questions

THINGS TO AVOID

- Don't argue with a juror
- Be aware of discomfort- private topics
- Don't use legalese
- Ask open-ended questions
- Keep questions clear

HOW TO FINISH

- Anyone who has anything they want to add or discuss?
- Thank them

FINAL ADVICE

- The jury should talk most of the time
- Have an outline with your questions
- Listen to the defense
- Watch the jurors and their reactions
- Trust your instincts

**VOIR DIRE IN DOMESTIC
VIOLENCE CASES**

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Restraining Orders

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Supervising Deputy District Attorney
San Diego County

Prosecuting Restraining Order Violations

CJ Mody
Deputy District Attorney
San Diego County
September 24, 2018

What Is A Restraining Order?



What Is A Restraining Order?

- ◆ Just a piece of paper?
 - No. Look at it as a tool!

- | | |
|---------------|------------------|
| ◆ PC 136.2 | ◆ PC 13700 |
| ◆ PC 1203.097 | ◆ FC 6200 et seq |
| ◆ PC 273.5(j) | ■ FC 6211 |
| ◆ PC 368(l) | ■ FC 6320 |
| ◆ PC 646.9(k) | |

Why Get Restraining Orders?

- Protect the victim
- Control the suspect's behavior
- Increase future penalties
 - Additional/increased charges
 - Step up to a felony
 - Stalking

Types of Restraining Orders

- Emergency Protective Order – EPO
- Temporary Restraining Order – TRO
- Criminal Protective Order – CPO
- Civil Harassment (CCP 527.6)
- Postsecondary School Violence (CCP 527.85)
- Workplace Violence (CCP 527.8)
- Gun Violence (CCP 18100 et seq.)
- Elder Abuse (WIC 15610.07 et seq.)
- Gang Violence (CCP 3479)
- Juvenile Court (WIC 213.5, 304, 362.4)
- Teen Protective Order (CCP 372(b)(1) & (2))

Emergency Protective Orders

- Who issues an EPO? (FC 6241)
 - FC §§ 6240-6275
 - Can only be requested by LE
 - Issued by a judge
 - Must be available 24/7
 - Issued orally, telephonically or otherwise

When Are EPO's Sought?

- Reasonable grounds to believe immediate and present danger of: (FC 6250)
 - Domestic Violence
 - Child Abuse / Child Abduction
 - Elder Abuse
 - Stalking
- EPO necessary to prevent the abuse
- Victim's consent not required

EPO's - LE Duties

- Duty to Inform/Request EPO (FC 6275)
 - **Shall** inform and request *if* belief that immediate and present danger
 - Victim's consent not required
- Must reduce EPO to writing and sign it
 - Serve it on restraining person, if possible
 - Provide copy to protected party
 - File copy with court ASAP
 - Enter the order into CLETS

EPO's

- Valid for 5 court days or 7 business days (FC 6256)
- Can be issued even if protected party is no longer at the residence (FC 6254)
- Can include child custody orders (FC 6252)
- Can prevent restrained party from getting address/location of protected party (FC 6252.5)

Violations of the EPO?

- PC 273.6(a)
 - vs. 166
- PC 166
 - EPO is pursuant to PC 646.91 (PC 646.91(q))
- LE may arrest for violations not committed in their presence (PC 836(c)(1))

Criminal Protective Orders

- CR-160 vs CR-161
- CR-160: Domestic Violence cases
 - PC 13700
 - FC 6211
 - PC 261, 261.5, 262, or 290(c)
- CR-161: Other than Domestic Violence

[illegible]

CR-160

[illegible]

WARNINGS AND NOTICES

CR-100

1. **VIOLATION OF THE ORDER IS SUBJECT TO CRIMINAL PROSECUTION.** Violation of this protective order may be punished as a misdemeanor, a felony, or a contempt of court. Taking or concealing a child in violation of this order may be a felony and punishable by confinement in state prison, a fine, or both. Traveling across state or tribal boundaries with the intent to violate the order may be punishable as a federal offense under the Violence Against Women Act, 18 U.S.C. § 2261(a)(1) (1994).

2. **NOTICE REGARDING FIREARMS.** Any person subject to a protective order is prohibited from owning, possessing, purchasing or attempting to purchase, receiving or attempting to receive, or otherwise obtaining a firearm. Such conduct is subject to a \$5,000 fine and imprisonment. The person subject to these orders must relinquish any firearms (by surrendering the firearms to local law enforcement, or by selling or giving it with a licensed gun dealer) and not own or possess any firearms during the period of the protective order. (Pen. Code, § 136.2(b)) Under federal law, the issuance of a protective order after hearing will generally prohibit the restrained person from owning, accepting, transporting, or possessing firearms or ammunition. A violation of this prohibition is a separate federal crime.

Specified defendants may request an exemption from the firearm relinquishment requirements stated in item 2 on page 1 of this order. The court must afford the law enforcement the right to inspect the defendant's residence. If the defendant can show that the firearm is necessary as a condition of continued employment, the court may grant an exemption for a particular firearm to be in the defendant's possession only during work hours and while traveling to or from work. If a peace officer or law enforcement personnel taking report on the safety of a family a court may grant an exemption that allows the officer to carry a firearm on or off duty, but only if the court finds, after a mandatory psychological examination of the peace officer, that the officer does not pose a threat of harm. (Code Civ. Proc. § 527.802)

3. **ENFORCING THIS ORDER IN CALIFORNIA.**
This order must be enforced in California by any law enforcement agency that has received the order or is shown a copy of the order or has verified its existence on the California Law Enforcement Telecommunications System (CLETS).
Law enforcement must determine whether the restrained person has notice of the order. If notice cannot be verified, law enforcement must advise the restrained person of the terms of the order and, if the restrained person fails to comply, must arrest the person. (Pen. Code, § 26303)

4. **CONFLICTING ORDERS PRIORITIES FOR ENFORCEMENT**

Where there are restraining orders that have been issued, the orders must be enforced according to the following priorities:

a. Emergency Protective Order (Form EPO-001) and is more restrictive than other restraining or protective orders, it has precedence in enforcement over all other orders. (Pen. Code, § 136.2(b)(1)(A))

b. No-Contact Order: If there is no EPO, a no-contact order that is included in a restraining or protective order has precedence in enforcement over any other restraining or protective order.

c. Criminal Order: If none of the orders include a no-contact order, a domestic violence protective order issued in a criminal case takes precedence in enforcement over any conflicting civil order. (Pen. Code, § 136.2(b)(2)) Any nonenforcing terms of the civil restraining order remain in effect and enforceable.

d. Family, Juvenile, or Civil Order: If more than one family, juvenile, or other civil restraining or protective order has been issued, the one that is most restrictive must be enforced.

5. **CERTIFICATE OF COMPLIANCE WITH VIOLENCE AGAINST WOMEN ACT (OWA).** This protective order meets all Full Faith and Credit requirements of the Violence Against Women Act, 18 U.S.C. § 2261 (1994). This court has jurisdiction over the parties and the subject matter, and the restrained person has been afforded notice and a timely opportunity to be heard as provided by the law of this jurisdiction. This order is valid and enforceable in every jurisdiction throughout the United States, the District of Columbia, all U.S. territories, and all U.S. possessions, and shall be enforced as if it were an order of that jurisdiction.

6. **EFFECTIVE DATE AND EXPIRATION DATE OF ORDERS.**

a. These orders are effective as of the date they were issued by a judicial officer.

b. These orders expire on the date in item 2 on page 1 of this order or as explained below.

c. Orders under Penal Code section 136.2(a) are valid as long as the court has jurisdiction over the case. They are not valid after expiration of a county jail or state prison commitment. (Civ. Practice & Gov. (2004) 125 Cal App 4th 1053.)

d. Orders issued under Penal Code sections 136.2(a)(1), 271.5(a), 38850, and 845.50 are valid for up to 10 years and may be issued by the court whether the defendant is sentenced to state prison, county jail, or is subject to mandatory supervision or imposition of sentence is suspended and the defendant is placed on probation.

e. Orders under Penal Code sections 120.027(a)(2) are probationary orders, and the court has jurisdiction as long as the defendant is on probation.

f. To maintain this protective order, courts should use form CR-105, Notice of Termination of Protective Order in Criminal Proceedings (2/07).

7. **CHILD CUSTODY AND VISITATION**

a. Child custody and visitation orders may be established or modified in Family, Juvenile, or Probate court.

b. Unless box a or b in item 10 on page 1 is checked, contact between the restrained and protected persons permitted by a Family, Juvenile, or Probate court order will be subject to violation of this order or will be subject to mandatory supervision or imposition of sentence is suspended and the defendant is placed on probation.

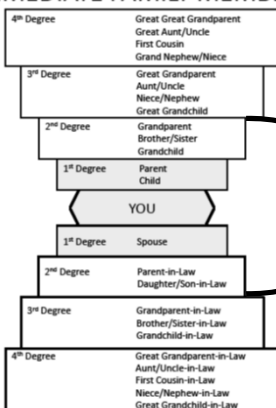
c. If box a or b in item 10 on page 1 is checked, the restrained and protected persons should always carry a certified copy of the court record that controls an existing order issued by the Family, Juvenile, or Probate court.

Family Code 6211

- (a) A spouse or former spouse.
- (b) A cohabitant or former cohabitant, as defined in Section 6209.
- (c) A person with whom the respondent is having or has had a dating or engagement relationship.
- (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).
- (e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.
- (f) Any other person related by consanguinity or affinity within the second degree

IMMEDIATE FAMILY MEMBERS

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Note: Step relationships (step-brother, step-father, etc.) are considered to be the same as blood relationships.

CPO's Pending Trial - CR-160

CRIMINAL PROTECTIVE ORDER—DOMESTIC VIOLENCE
(CLETS - CPO) (Pen. Code, §§ 136.2, 1203.097(a)(2),
136.2(i)(1), 273.5(j), 368(f), and 646.9(k))

☐ ORDER UNDER PENAL CODE, § 136.2 ☐ MODIFICATION
☐ PROBATION CONDITION ORDER (Pen. Code, § 1203.097)
 ORDER UNDER: ☐ PENAL CODE, § 136.2(i)(1) ☐ PENAL CODE, § 273.5(j)
 ☐ PENAL CODE, § 368(f) ☐ PENAL CODE, § 646.9(k)

- PC 136.2 – Order Pending Trial
 - Issued at arraignment, valid until sentencing
- ‘Modification’

CR-161

[illegible]

CPO's Pending Trial - CR-161

**CRIMINAL PROTECTIVE ORDER—OTHER THAN DOMESTIC VIOLENCE
(CLETS - CPO) (Pen. Code, §§ 136.2, 136.2(i)(1), and 646.9(k))**

☐ ORDER UNDER PENAL CODE, § 136.2
☐ MODIFICATION
ORDER UNDER:
☐ PENAL CODE, § 136.2(i)(1) ☐ PENAL CODE, § 646.9(k)

CPO's Pending Trial

- PC 136.2
 - Not DV specific
 - Applies to a variety of cases and situations
 - Good cause to believe that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur
 - Read it!

CPO's Pending Trial - PC 136.2

- Court SHALL consider issuing a CPO on it's own motion (PC 136.2(e)(1))
- If charged crime is DV
 - MAY consider charges as good cause to issue the order (PC 136.2(h)(1))
- If charged crime is Sex Crime related
 - MAY consider nature of the offense, relationship to victim, D's criminal history, likelihood of continuing harm, prior CPO/weapons offenses (PC 136.2(h)(2))

CPO's Pending Trial - PC 136.2

- LE protection for a victim, witness, or immediate family (PC 136.2(a)(1)(f)(i))
- A minor who is not a victim but was present at the time of the DV is a witness and is deemed to have suffered harm (PC 136.2(a)(2))
 - PC 273a(b)?

Post Conviction CPO's

CRIMINAL PROTECTIVE ORDER—DOMESTIC VIOLENCE
(CLETS - CPO) (Pen. Code, §§ 136.2, 1203.097(a)(2),
136.2(i)(1), 273.5(j), 368(f), and 646.9(k))

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☐ PENAL CODE, § 368(f) ☐ PENAL CODE, § 646.9(k)

- PC 1203.097 – Probation Condition Order
 - ONLY if D is placed on DV probation
- 'Modification'

Post Conviction CPO's

- Penal Code section 1203.097
 - If granted DV probation, terms SHALL include a CPO, and residence exclusion or stay away orders (PC 1203.097(a)(2))
 - Usually for 3 years
 - Matches the length of probation
 - Child Abuse – PC 273a
 - Mandatory probation period is 4 years

Sex: <input type="checkbox"/> M <input type="checkbox"/> F	HT: _____	WT: _____	Hair color: _____	Eye color: _____	Race: _____	Age: _____	Date of birth: _____
1. This proceeding was heard on (date): _____ at (time): _____ in Dept.: _____ Room: _____ by judicial officer (name): _____							
2. This order expires on (date): _____, If no date is listed, this order expires three years from date of issuance.							
3. <input type="checkbox"/> Defendant was personally served with a copy of this order at the court hearing, and no additional proof of service of this order is required.							
4. FULL NAME, AGE, AND GENDER OF EACH PROTECTED PERSON:							
5. <input type="checkbox"/> For good cause shown, the court grants the protected persons named above the exclusive care, possession, and control of the following animals: _____							
6. <input type="checkbox"/> The court has information that the defendant owns or has a firearm or ammunition, or both.							
GOOD CAUSE APPEARING, THE COURT ORDERS THAT THE ABOVE-NAMED DEFENDANT							
7. must not harass, strike, threaten, assault (sexually or otherwise), follow, stalk, molest, destroy or damage personal or real property, disturb the peace, keep under surveillance, or block movements of the protected persons named above.							
8. must not own, possess, buy or try to buy, receive or try to receive, or otherwise obtain a firearm or ammunition. The defendant must surrender to local law enforcement, or sell to or store with a licensed gun dealer any firearm owned by the defendant or subject to his or her immediate possession or control within 24 hours after service of this order and must file a receipt with the court showing compliance with this order within 48 hours of receiving this order.							
<input type="checkbox"/> The court finds good cause to believe that the defendant has a firearm within his or her immediate possession or control and sets a review hearing for (date): _____ to ascertain whether the defendant has complied with the firearm relinquishment requirements of Code Civ. Proc., § 527.9. (Cal. Rules of Court, rule 4.700.)							
<input type="checkbox"/> The court has made the necessary findings and applies the firearm relinquishment exemption under Code Civ. Proc., § 527.9(f). The defendant is not required to relinquish this firearm (specify make, model, and serial number of firearm): _____							
9. must not attempt to or actually prevent or dissuade any victim or witness from attending a hearing or testifying or making a report to any law enforcement agency or person.							
10. must take no action to obtain the addresses or locations of protected persons or their family members, caretakers, or guardian unless good cause exists otherwise. <input type="checkbox"/> The court finds good cause not to make the order in item 10.							
11. <input type="checkbox"/> must be placed on electronic monitoring for (specify length of time): _____ (Not to exceed 1 year from the date of this order. Pen. Code, § 136.2(a)(1)(G)(iv) and Pen. Code, § 136.2(b)(2).)							
12. <input type="checkbox"/> must have no personal, electronic, telephonic, or written contact with the restricted persons named above.							
16. <input type="checkbox"/> may have peaceful contact with the protected persons named above, as an exception to the "no-contact" or "stay-away" provision in item 12, 13, or 14 of this order, only for the safe exchange of children and court-ordered visitation as stated in:							
a. <input type="checkbox"/> the Family, Juvenile, or Probate court order in case number: _____ issued on (date): _____							
b. <input type="checkbox"/> any Family, Juvenile, or Probate court order issued after the date this order is signed.							
17. <input type="checkbox"/> The protected persons may record any prohibited communications made by the restrained person.							
18. <input type="checkbox"/> Other orders including stay-away orders from specific locations:							
17. <input type="checkbox"/> The protected persons may record any prohibited communications made by the restrained person.							
18. <input type="checkbox"/> Other orders including stay-away orders from specific locations:							
Executed on: _____ (DATE) _____ (SIGNATURE OF JUDICIAL OFFICER) _____ (Department/Division) _____							
Page 1 of 2							

Post Conviction 10 Year CPO's

CRIMINAL PROTECTIVE ORDER—DOMESTIC VIOLENCE
(CLETS - CPO) (Pen. Code, §§ 136.2, 1203.097(a)(2),
136.2(i)(1), 273.5(j), 368(f), and 646.9(k))

☐ ORDER UNDER PENAL CODE, § 136.2

☐ MODIFICATION

☐ PROBATION CONDITION ORDER (Pen. Code, § 1203.097)

ORDER UNDER: ☐ PENAL CODE, § 136.2(i)(1) ☐ PENAL CODE, § 273.5(j)

☐ PENAL CODE, § 368(f) ☐ PENAL CODE, § 646.9(k)

- UP TO 10 years
- PC 136.2(i)(1) - 'catch-all'
- PC 273.5(j) - DV under PC 273.5(a)
- PC 368(f) - Elder Abuse
- PC 646.9(k) - Stalking
 - PC3053.2 - Parole stalking order

Post Conviction 10 Year CPO's

- Length is based upon seriousness of facts before the court, probability of future violations and safety of victim and victim's family
- Applies to state prison, county jail, mandatory supervision, or probation

Notice?

- Notice is presumed if
 - Victim presents LE with proof of service
 - LE confirms proof of service in CLETS, etc...
 - Suspect was present in court
 - Suspect informed by LE of the contents of the RO
 - Supported with log entry or incident report (FC 6383(e-g))

Punishment for CPO Violations

- PC 166(c)(1) – 1 year max
- PC 166(c)(2) – 48 hour minimum, if injury
- PC 166(c)(4) – State Prison Felony!
 - If the 2nd offense is within 7 years and involved violence or “credible threat” of violence
 - Credible Threat - cause the target of the threat to reasonably fear for her/his family’s safety (PC 139(c))

Civil Restraining Orders -TRO

- Issued by Civil/Family Court
 - Fills out declaration
 - Usually is ex-parte
- Temporary Restraining Order
 - Granted for 2-3 weeks, pending a hearing, but can be extended
- Must be served at least 5 days prior to hearing so respondent can file opposition

Civil Restraining Order - OAH

- Hearing on Restraining Order
 - Only if properly served
- If Petitioner does not appear
 - Court will dismiss TRO
- If Respondent does not appear
 - Court will likely grant OAH for up to 5 years
- If contested, Court will conduct hearing
 - Restrained party has right to present case
 - Grant or deny
 - Terms & length

Terms of OAH -

- FC 6320 et seq.
 - Child Custody, Visitation, & Support
 - Batterer's Treatment
 - Custody of Pets
 - Exclusion from residence/move out order
 - Prohibiting actions related to community/separate property
 - Enjoining any other type of behavior deemed necessary

Enforcement of TRO/OAH

- FC 6383
 - LE shall serve restraining order, if asked, and provide a copy to the court
 - Protected party does not need to have a copy of the order
 - LE shall check CLETS/DVROS
 - Verbal notice and service is sufficient

Punishment for TRO/OAH Violations

- PC 273.6(a): 1 year max.
- PC 273.6(b): 30 day minimum if injury
 - Can be reduced after 48 hour minimum with good cause
- PC 273.6(d): 1170(h) wobbler
 - 2nd offense is within 7 years and involved violence or "credible threat" of violence
- PC 273.6(e): 1170(h) wobbler
 - 2nd offense is within 1 year and results in injury

CPO vs. DV RO

- CPO's are connected to our criminal cases
- DV RO's require 'effort' on the part of the victim
 - Time to go to court
 - Declaration of fear
 - No attorneys, usually
 - Service of order
 - May not be able to?
 - Scared to do so?
 - V/W advocates can help

CPO vs. DV RO

- EPO's trump all others orders
 - As to orders that are the most restrictive (PC 136.2(c))
- CPO's trump all civil and family court orders (PC 136.2(e)(2))
 - Including custody and visitation orders
- Two or more orders and no other statute governs priority, most recent controls (FC 6383(h)(2))

Workplace Violence Orders (CCP 527.8)

- MUST be requested by employer on behalf of employee
 - Employee cannot request
- Employee has suffered violence/credible threat of violence
 - To be/has been carried out at workplace
- TRO: 21 - 25 days; OAH is valid up to 3 years
 - Restrained from going to workplace, calling or harassing victim, coworkers, etc..

Gun Violence Orders

- Because some people just should not own guns...

Like This Guy...



Gun Violence Orders

(PC 18100 et seq.)

- LE or family can request
 - Can be issued ex-parte
 - Must list number, types, locations
- Restricts possession and purchase
 - Requires forfeiture
- NOT a “no-contact” or “stay away” order
- 3 different types
 - Temporary GVRO
 - Ex Parte GVRO
 - GVRO Issued After Notice

Temporary GVRO

- ONLY LE can request
 - Issued if reasonable cause to believe that person is an immediate and present danger to self or others
 - Necessary to prevent injury
 - Less restrictive alternatives have been tried and were found ineffective
- Valid for 21 days

Ex Parte GVRO

- Immediate family or LE can request
 - Issued if reasonable cause to believe that person is an immediate and present danger to self or others
 - Necessary to prevent injury
 - Less restrictive alternatives have been tried and were found ineffective
- Valid for 21 days
- Immediate family – PC 422.4(b)(3)

GVRO Issued After Notice

- Immediate Family or LE can request
 - Same standard for issuance as others
- Valid for 1 year
 - LE or Family can request to renew within 3 months of expiration
- Restrained party can make 1 written request for termination

Gun Violence Orders

- Misdemeanor if you file a GVRO knowing the information to be false or with an intent to harass (PC 18200)
- Misdemeanor to own or possess firearms or ammunition with GVRO (PC 18205)
 - If convicted, 5 year prohibition on owning or possessing firearms or ammunition AFTER expiration of GVRO

Restraining Orders & Firearms

- NO GUNS!
 - 24/48 hours (CCP 527.9)
 - PC 29825
 - No firearms for 10 years
 - PC 29805
 - Except for employment? (PC 527.9(f))
- If a court does not order a CPO in a DV case, court SHALL consider issuing a CPO ordering D to relinquish all weapons (PC 136.2(G)(ii))

Restraining Orders & Firearms

- Search warrant for seizing an un-relinquished firearm after restraining order (PC 1524(a)(11))
- Search warrant for seizing un-relinquished firearms after GVRO (PC 1524(a)(14))

Teen Protective Order

(CCP 372(b)(1) & (2) & 527.6)

- A minor, 12 years or older, can appear without a guardian
 - To request or oppose:
 - An injunction/TRO per CCP 527.6 or CCP 527.8
 - A CPO per FC 6200 or FC 7710/7720
- Court can appoint guardian to assist
- Court shall notify minor's guardians, if minor appears alone
 - Unless contrary to minor's interests

Request to Modify DV CPO

- People must be given 5 days written notice and an opportunity to be heard (PC 1203.3(b)(1))
- Court may limit or terminate protective order, but shall consider change in circumstances or good cause, including factors under PC 1203.3(b)(6)(A-H)

Request to Modify DV CPO

- PC 1203.3(b)(6)(A-H)
 - Acceptance of responsibility
 - Participation in DVRP/AA/Parenting Classes
 - Performance on probation
 - Cohabitation?
 - Victim's wishes and reasons
 - Spoken to a V/W Advocate?
 - Have a safety plan?
 - Impact on children?
 - Interests of justice?

[illegible]

- Are these cases taken seriously?
 - LE?
 - DA's?
 - Jurors?
 - Victims?
 - V/W Advocates?
- Why or why not?

- Can the protected party violate their own restraining order?
- What if the victim 'invites' the suspect over?
 - Actions of the protected party are irrelevant (PC 13710(b))
 - The terms and conditions of the protection order remain enforceable, notwithstanding the acts of the parties, and may be changed only by order of the court (People v. Gams - 52 Cal.App.4th 147)

Issues

- Lack of service/Proof of service issues
- Mutual Protective Orders
- Conflicts between family law and criminal orders - criminal wins! (PC 136.2(e)(2))
- Multiple violations
 - Stalking?
 - Felony?
- "No Negative Contact"
 - Why still file a CR-160/161?

Tips

- Consolidate your cases
 - Show a pattern of violence and violations
- Talk to your victim - Get Corroboration!
 - Texts, emails, letters, notes, flowers, FB posts
 - Other witnesses/violations
- Charge other crimes
 - Trespass, Child Endangerment
- Use the CPO as a weapon in your case

Tips

- Get certified copies
- Get proof of service
- Know the law
 - CALCRIMS
- Jury nullification
 - Voir Dire!
- Foreign Orders
 - Full faith and credit

Using a DV RO in Your Trial

- Get Family Court records ASAP
 - The “real” story, which you might not hear
- Victim’s declarations in DV RO’s
 - Can be filed before or after charged incident
 - Prior consistent and inconsistent statements
 - Usually a lot more detailed than the police reports
 - EC § 1109
 - Other witnesses

Using a DV RO in Your Trial

- Get transcripts!
 - Judges may “Mirandize” defendant if there is a pending criminal case
- Check for filings by Defendant
 - Declarations or responses
 - Insight into their defense

Practical Tips

- Request a CPO in every case
 - Take a plea to a CPO violation?
- Know your code sections
 - Read 1203.097, 136.2, etc...
 - Judges/defense will not know them and are routinely amazed when you cite to them
- Ask the judge to admonish defendant
 - Possible penalties, victim initiates contact
- Protect your victim as much as possible
 - Add additional arrows to your quiver!

Thank You!

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●619.498.5633



Domestic Violence and Ethics

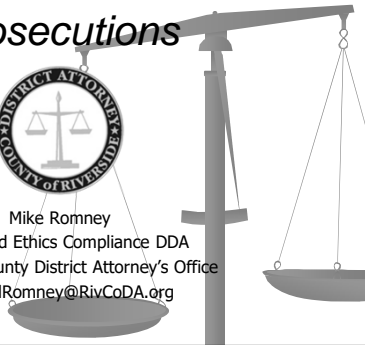
Michael Romney

Deputy District Attorney
Riverside County

Prosecutorial Ethics in Domestic Violence Prosecutions

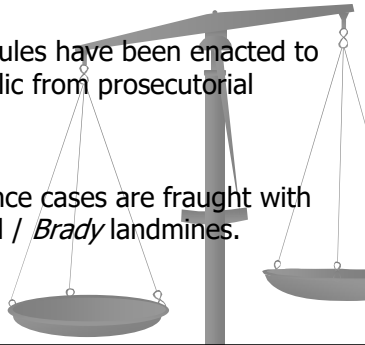


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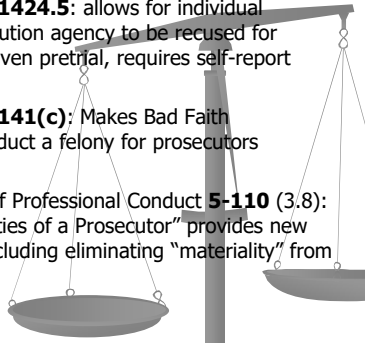
Why an Ethics Class at a DV Training?

- New laws and rules have been enacted to protect the public from prosecutorial misconduct.
- Domestic Violence cases are fraught with potential ethical / *Brady* landmines.



New Laws and Rules for Prosecutors

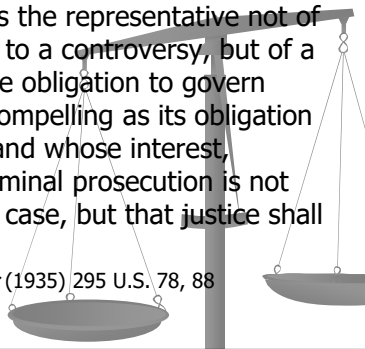
- Jan. 1, 2016: CPC § **1424.5**: allows for individual prosecutor or prosecution agency to be recused for *Brady* misconduct –even pretrial, requires self-report
- Jan. 1, 2017: CPC § **141(c)**: Makes Bad Faith Prosecutorial Misconduct a felony for prosecutors
- Nov. 2, 2017: Rule of Professional Conduct **5-110** (3.8): "Special Responsibilities of a Prosecutor" provides new sanction theories, including eliminating "materiality" from *Brady* obligations



The Role of the Prosecutor

"The Prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

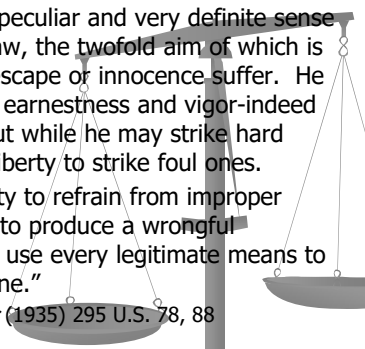
Berger v. United States (1935) 295 U.S. 78, 88



The Role of the Prosecutor

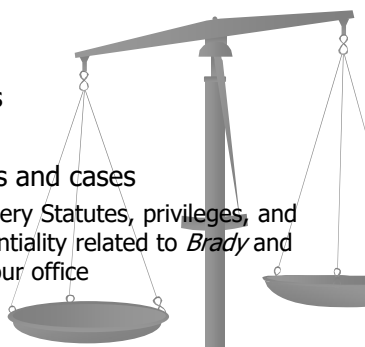
"As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v. United States (1935) 295 U.S. 78, 88



What You Must Know

- The *Brady* Rule
- The ethics rules
- Related statutes and cases
 - Criminal Discovery Statutes, privileges, and laws of confidentiality related to *Brady* and the ethics of your office



Brady v. Maryland

(1963) 373 U.S. 83

- "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."



The *Brady* Rule:

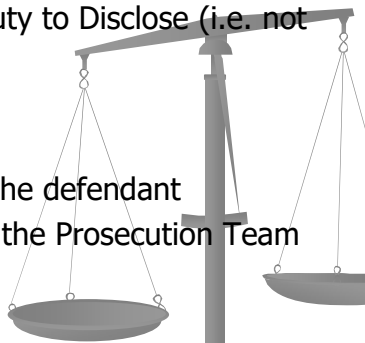
- Don't deflate footballs.



Brady v. Maryland

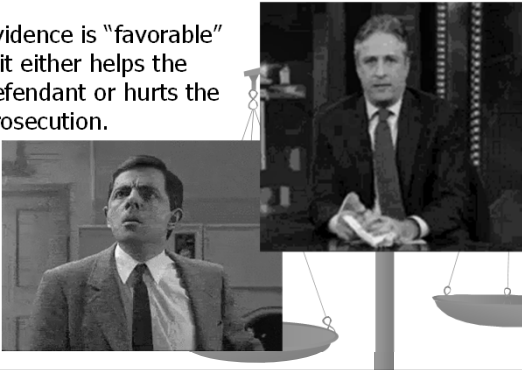
(1963) 373 U.S. 83

- Affirmative Duty to Disclose (i.e. not to suppress)
- Material
- Evidence
- Favorable to the defendant
- Possessed by the Prosecution Team




Favorable

- Evidence is "favorable" if it either helps the defendant or hurts the prosecution.



Favorable

■ Quick quiz:

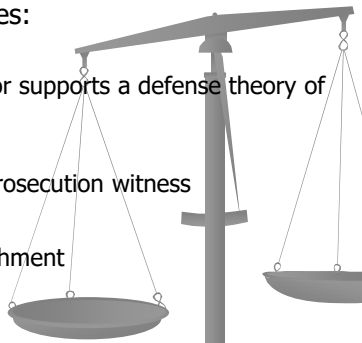
- 
- C) Suppression of evidence that ***mitigated punishment***

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Favorable

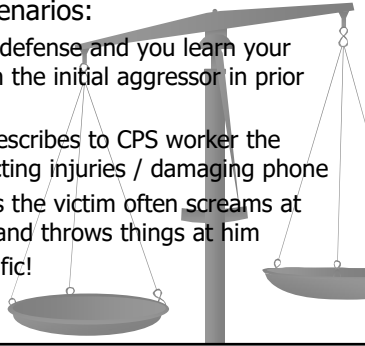
■ Generally 3 types:

- Opposes guilt or supports a defense theory of the case
- Impeaches a prosecution witness
- Mitigates punishment



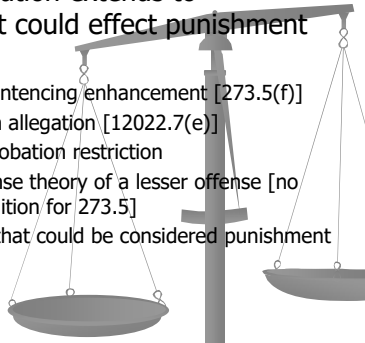
Opposes Guilt or Supports a Defense Theory of the Case

- Common DV scenarios:
 - Defense is self defense and you learn your victim has been the initial aggressor in prior DV incidents
 - Victim's child describes to CPS worker the victim self-inflicting injuries / damaging phone
 - Neighbor states the victim often screams at the defendant and throws things at him
 - Very case specific!



Favorable: Punishment

- Our *Brady* obligation extends to information that could effect punishment
 - EXAMPLES:
 - Undermines sentencing enhancement [273.5(f)]
 - Undermines an allegation [12022.7(e)]
 - Undermines probation restriction
 - Supports defense theory of a lesser offense [no traumatic condition for 273.5]
 - Anything else that could be considered punishment



Impeachment

- What if you learn your victim has made previous demonstrably false allegations against this defendant last year in an *unfiled* case in your county?
- What if the defendant knows about the allegation? Must you still disclose?



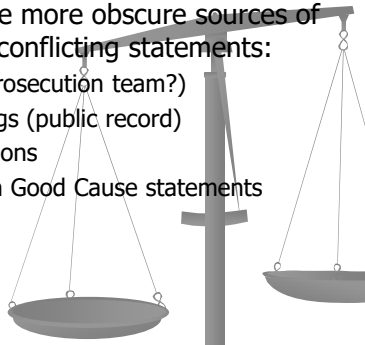
Impeachment

- What if you learn your victim has made previous demonstrably false allegations against another alleged abuser?
 - In your jurisdiction?
 - In another jurisdiction?



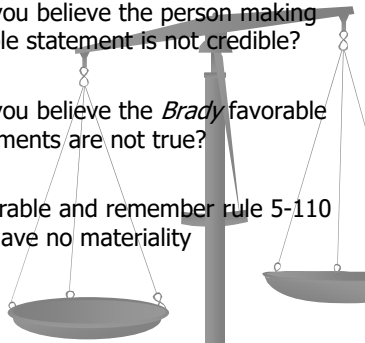
Impeachment

- Be careful of the more obscure sources of inconsistent or conflicting statements:
 - CPS records (prosecution team?)
 - Family law filings (public record)
 - U-Visa applications
 - Child Abduction Good Cause statements



Impeachment

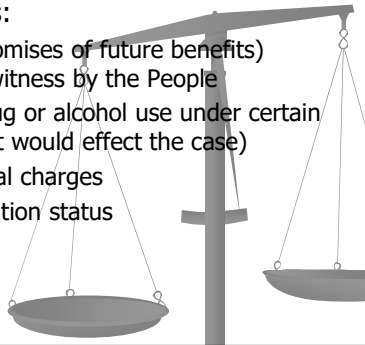
- Does it matter if you believe the person making the *Brady* favorable statement is not credible?
- Does it matter if you believe the *Brady* favorable inconsistent statements are not true?
- Probably still favorable and remember rule 5-110 and CPC 1054.1 have no materiality requirement!



Impeachment

- Other examples:

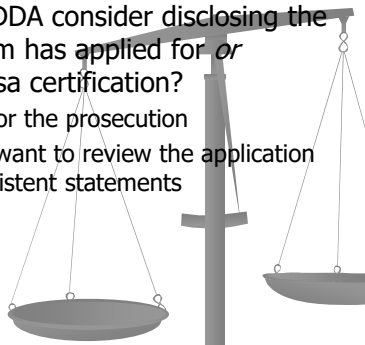
- Benefits (or promises of future benefits) provided to a witness by the People
- Evidence of drug or alcohol use under certain conditions (that would effect the case)
- Pending criminal charges
- Parole or probation status



Impeachment

- Why must the DDA consider disclosing the fact that a victim has applied for *or* received a U-Visa certification?

- Potential bias for the prosecution
- DDA may also want to review the application for prior inconsistent statements



Impeachment



Ethical to Call Recanting Victims?

- B&P 6068: never seek to mislead the judge by an artifice or false statement of fact
 - Counsel may not offer testimony he knows to be untrue. *People v. Davis* (1957) 48 Cal.2d 241
 - But cases interpreting this rule deal with attorneys intentionally seeking or making false statements.

1/2

ABA Model Rule and New CRPC 3.3(a)(3):

- A lawyer shall not knowingly offer evidence the lawyer knows to be false. If a lawyer calls a witness who offers material evidence and the lawyer learns it is false... the lawyer shall take reasonable remedial measures.
- Comments: Remedial measures include that which a reasonable lawyer would consider appropriate under the circumstances
- ABA Comment [5]: A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

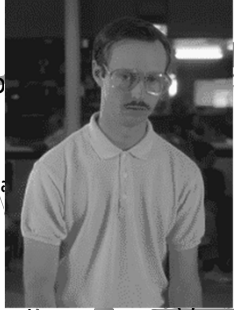
Brady v. Maryland

(1963) 373 U.S. 83

- Affirmative Duty to Disclose (i.e. not to suppress)
- Material
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- Possessed by the Prosecution Team

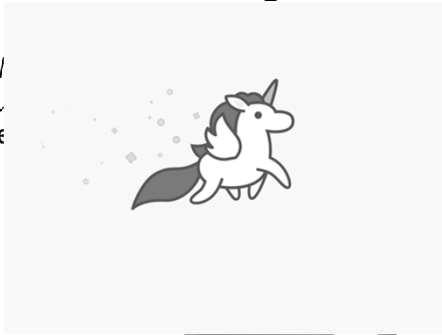
Prosecution Team

- The trial DDA is imputed knowledge of everyone on the team.
 - DA's office
 - Includes bureau of investigation
 - Includes victim advocates
 - Investigating agencies
 - Assisting agencies
 - What if you learn of information possessed by someone not on the prosecution team?



Victim Advocate – Victim Privilege

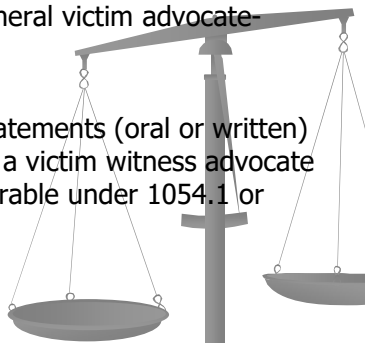
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Victim Advocate – Victim Privilege

- There is NO general victim advocate-victim privilege.
- Any relevant statements (oral or written) by a witness to a victim witness advocate may be discoverable under 1054.1 or *Brady*.



Potential Privileges

- Family Justice Center partners ~~may~~ employ counselors that can have privileged conversations:
 - Domestic Violence Counselor – Victim [CEC 1037.1, *et seq.*]
 - Human Trafficking Counselor – Victim [CEC 1038, *et seq.*]
 - Sexual Assault Victim Counselor – Victim [CEC 1035, *et seq.*]
 - Psychotherapist – Patient [CEC 1014, *et seq.*]

Brady v. Maryland

(1963) 373 U.S. 83

- Affirmative Duty to Disclose (i.e. not to suppress)
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Evidence: Victim Advocates

- It is not uncommon for your advocate to receive potential *Brady* information from your DV victim
- As your agent, and as part of the prosecution team, you must disclose
- Advocates must be careful to not discuss the facts of the case
- Advocates must tell the DDA if they receive:
 - Factual statements from witnesses (1054.1)
 - Information that could otherwise be *Brady* (bias, motive to fabricate, etc. see favorable)

Evidence: Victim Advocates



Evidence



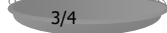
Evidence

■ *Possibly* assistance/services provided

- Relocation expenses
- Food or lodging
- Clothes
- Money provided from emergency fund
- Cell phone

■ Could these be considered benefits we are providing?

(there is some law and there are several schools of thought on this)

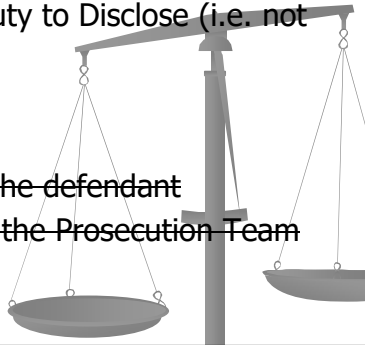


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Brady v. Maryland

(1963) 373 U.S. 83

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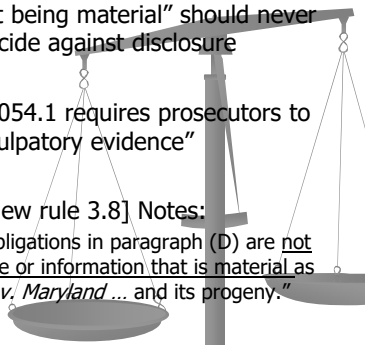


Materiality



Materiality

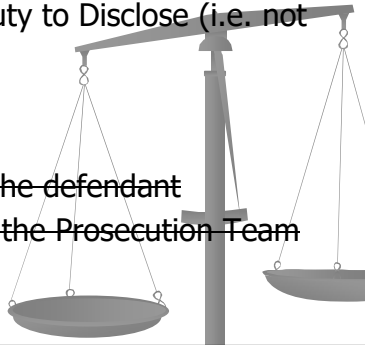
- The evidence "not being material" should never be a reason to decide against disclosure
- Cal. Penal Code 1054.1 requires prosecutors to discover "any exculpatory evidence"
- CRPC 5-110(D) [new rule 3.8] Notes:
 - "The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* ... and its progeny."



Brady v. Maryland

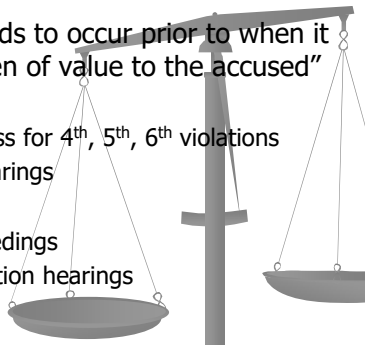
(1963) 373 U.S. 83

- Affirmative Duty to Disclose (i.e. not to suppress)
- Material
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- Favorable to the defendant
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Affirmative Duty to Disclose: Timing

- "Disclosure needs to occur prior to when it would have been of value to the accused"
 - Trial
 - MX's to suppress for 4th, 5th, 6th violations
 - Preliminary hearings
 - Sentencings
 - Juvenile proceedings
 - Probation violation hearings



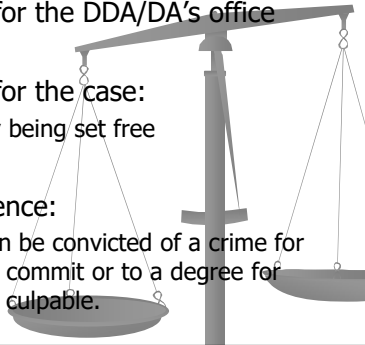
Protecting Discoverable Info

- Redactions
- Protective Orders
- Privileges
- PC 1054.7 motions:
 - *In camera, ex parte*
 - Court can delay, restrict, defer or deny disclosure for good cause
 - "Good cause" = compromise pending investigation, cause destruction of evidence, threat to safety



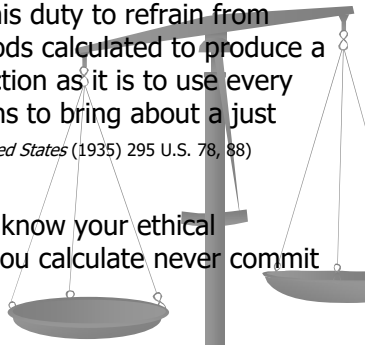
Consequences for Failure:

- Consequences for the DDA/DA's office
- Consequences for the case:
 - Including guilty being set free
- Worst consequence:
 - A defendant can be convicted of a crime for which he didn't commit or to a degree for which he is not culpable.



The Role of the Prosecutor

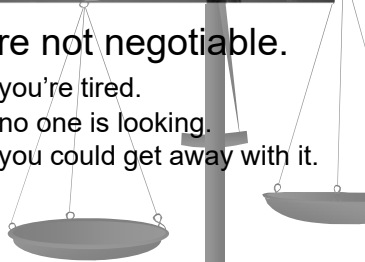
- "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88)
- Study, learn, & know your ethical obligations so you calculate never commit an ethical error





Our ethics are not negotiable.

Even when you're tired.
Even when no one is looking.
Even when you could get away with it.



The End.



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Ethics and Discovery Rules to Live By:

Just turn it over... unless there is another compelling reason to not turn it over, then be careful. If you're concerned about turning it over based on other consequences, can you:

- (a) seek a judicial order relieving you of your responsibility,
- (b) provide the information accompanied by a protective order, or
- (c) redact or otherwise sanitize the information and still fulfill your ethical obligations?¹

If you're accused of prosecutorial misconduct, it may not be advisable to immediately react. Consider asking for a break, contact the appropriate person in your office, and seek help.²

Don't let an allegation of prosecutorial misconduct go unanswered (usually). A "silent record" is not your friend. The appellate court won't know what occurred in chambers.

Do not lie to or mislead the court. Ever.

Ensure you have all discovery well before the proceeding, especially body camera footage.

Use caution if you text with your officers. Factual statements by them could be discoverable.

CDAA's Council for Criminal Justice Integrity's recommendations to avoid committing and being accused of discovery and *Brady* error³:

1. Develop a uniform system of documenting discovery requests.
2. Define the scope of discovery requested from the agency and be proactive.
3. Discovery should be organized, preferably numbered/Bates stamped.
4. Detailed and specific discovery receipts should be generated in every case for discovery provided to defense.
5. A handling prosecutor log and notation system should be implemented and followed.
6. DA file retention policies should be implemented and followed.
7. Prosecutors should ensure they are well trained in discovery, ethics, and *Brady* related issues, rules, and laws.
8. Prosecutors must learn and follow their office's discovery, ethics, and *Brady* policies.
9. Prosecutors should appropriately respond to accusation of discovery violations.

Regardless of how you provide discovery (especially potential *Brady* material), make sure there is a record that can be located and understood 20 years from now.

Strive to be the most ethical prosecutor in the State.

¹ See "The *Brady*-Statutory-Ethical Discovery Outline" 2017 Inquisitive Prosecutor's Guide #31 authored by Santa Clara District Attorney's Office Deputy District Attorney Jeff Rubin.

² See "Defending an Allegation of Misconduct" by Bryn Kirvin and Gary Schons in CDAA's Prosecutor's Brief, Vol. 39, No.2, Winter 2017.

³ "An Overview of Penal Code Section 141(c) and Suggested Office Protocols for Ensuring That Discovery Duties Are Maintained and Properly Documented by Prosecutors" CDAA 2017.

Working with Difficult Witnesses

Jerry Fineman
Chief Deputy District Attorney
Riverside County

Working with Victims

Gerald Fineman
Chief Deputy District Attorney
Riverside County District Attorneys Office

Resource materials

- Working With Difficult Witnesses
- When the Victim Refuses to Testify

DV is Different

*"DV is the place they send you
when they think you are a good
prosecutor to find out if you
really are a good prosecutor."*

Not the same victim that law
enforcement encountered

Misdemeanor DV usually not significant
violent history or injury

- Lack significant 1109 history of violence
 - Still may be evidence of abusive history
- Lack severe (or even visible) injury
- Lack resources
- If any of these things were present, it would probably be a felony

Why DV is different

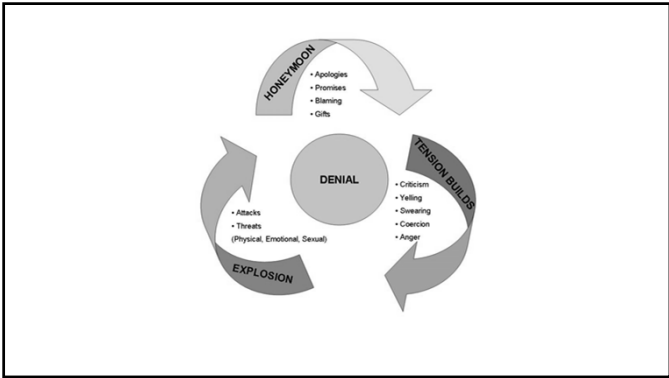
- You know your abuser
- Love
- Family connections
- Financial Connections
- Isolation
- Not the same victim as the one law enforcement sees
- The incident is only a part of the picture
- Other pressures

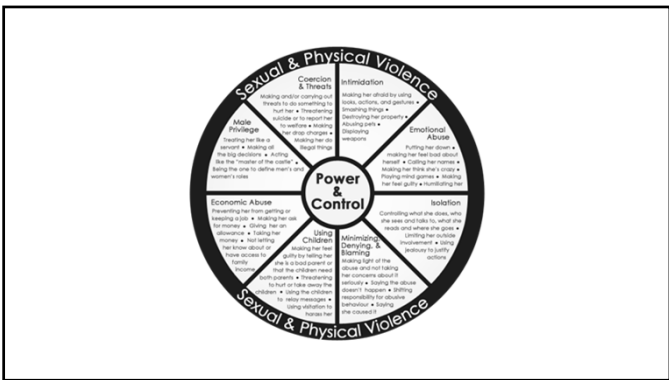
Power and Control



Domestic violence defined

- 13700 Penal Code
 - Force or threat of imminent force
 - Protected party
- Psychologists also consider behavior short of violence or threat to cause violence





Ways to increase our success with these cases

- Frame case based on defendant's actions, not the victim's actions
- Put truth before the testimony of the victim
- Minimize role of victim courtroom testimony

You need to meet your
victim

How to Avoid Difficult Witnesses

- Talk to them
- The benefit of being nice/professional
- Give them what they want
- Subpoena them to court
- Utilize Victim Witness Services
- Use Marsy's Law to help you
- Minimize the role of your victim

How do you avoid becoming a witness

- DA Investigator
- The officer from the case
- Any officer
- Fellow DA
- Other office Employee
- Some other dude (Any other dude)
- Taped
- Written

Taking steps to get them to court

- Subpoena
- On Call Status
- Order Back
- Witness Bond

When your victim recants

Using leading questions

Concession based Examination (leading)

- What things must the witness admit
- Break that down into topics
- Get the witness to admit all those things
- Requires leading questions
- Questions that require a “yes” answer
- Requires “pace” to be effective

Concession based tips

- Establish need to lead witness 767
 - Preliminary matters
 - Refresh recollection
 - Expert witnesses
 - Hostile witnesses
- Consider using to “soften” a witness

Traditional Impeachment

- Refresh recollection EC771
- Witness remembers-proceed
- Witness denies-GREEN
- Witness legitimately can’t recall P.R.R.
- Inconsistent Statements EC1235, EC 770
- People v. Green
 - (1970) 3 Cal.3d 981

Practical tips on Traditional Impeachment

- Your attitude and tone
- “Do you recall...” vs. “Did you...”
- Breaking patterns
 - Can you call them on it
- Don’t excuse the witness EC770
 - Give opportunity to explain
 - Has not yet been excused

Past Recollection Recorded

- Writing made at time fresh
- Made by witness or under his direction
- Offered after witness says it was true
- Offered after authentication
- Read into record
- EC1237

Witnesses who ramble on or have other agendas

- Cut them off
- Let them go
- Call them on the carpet
- Consider story-based examination

Impeaching your victim is
different

Examination patterns

Linear or Exhaustive examination

When you hit a wall

Witness who demand immunity and/or refuse to testify

The Fight for offender
accountability
Gfineman@rivcoda.org

When the Victim Won't Testify
Gerald W. Fineman
Supervising Deputy District Attorney
Riverside County District Attorney's Office

"I ain't saying nothing," touts your victim. You are prosecuting a domestic violence case. You have called the victim to try and discuss her upcoming testimony and you are greeted with a hostile response. The steps you take next may well determine the success of your case. If you can convince the victim to come to court and testify, you have the opportunity to present your case. If you can't convince the victim to come to court, you may lose the ability to prove your case. To complicate matters further, even the victim's attendance in court may not be sufficient to allow you to successfully prosecute your case. This article addresses how to get the victim to court and the steps to take once a victim/witness takes the stand and refuses to testify.

How to get the victim to court.

Penal Code Section 1328 covers the service of subpoenas in a criminal case. A witness that refuses to testify is subject to contempt under Penal Code Section 1331. CCP 1219 prevents a witness from being imprisoned or otherwise confined for contempt, "...when the contempt consists of refusing to testify concerning the assault or domestic violence crime." CCP 1219 does not prohibit the confinement or placing in custody of a witness that fails to comply with a subpoena. The distinction between the Penal Code Section 1331 requirement that a subpoenaed witness appear and CCP 1219's restriction contempt punishment have left some with the impression that a body attachment warrant cannot be issued for a domestic violence victim. This is a misunderstanding of the law. Body attachment warrants are covered under Penal Code Section 881.

(b) If a witness fails to appear at the preliminary hearing in response to a subpoena, the court may hear evidence, including testimony or an affidavit from the arresting or interviewing officer, and if the court determines on the basis of the evidence that the witness is a material witness, the court shall issue a bench warrant for the arrest of the witness, and upon the appearance of the witness may commit him or her into custody until the conclusion of the preliminary hearing, or until the defendant enters a plea of nolo contendere, or the witness is otherwise legally discharged. (emphasis added)

Some courts mistakenly believe they lack authority to issue a body attachment warrant since the victim "can't be forced to testify". This is incorrect. First, the failure to appear is contempt of court under 1331 PC. This type of contempt may be punished by incarceration. Second, PC 881 allows for custody for the non-appearing victim. "...upon the appearance of the witness may commit him or her into custody..." PC 881(b). Third, PC881(b) allows for the victim to be held in custody, "...until the conclusion of the preliminary hearing...or the witness [victim] is

otherwise legally discharged.” This implies that the victim may be held until a determination is made that the victim is in contempt under CCP 1219 and can no longer be incarcerated for the contempt of refusing to testify. The refusal to issue a body attachment warrant decays the power of the subpoena process.

Benefits of early victim contact

It is interesting that when I have discussions on this topic with other domestic violence prosecutors we find varying percentages of victim’s refusing to testify. Sometimes, it is based on the practices of the court and sometimes the practices of the local defense bar. One common point of consensus is that the victim is less likely to refuse to testify if the prosecution has strategies in place for early contact with the victim. This may be as elaborate as a family justice center or as simple as a phone call from the prosecutor or other member of the prosecution team. Making early contact with the victim refutes the batterer’s claim that “Nothing will happen, they don’t care about you.” It provides the victim with an active resource for finding a way out of the battering relationship. This is true even if that way out for the present time consists of staying in the relationship. I won’t stay on the soapbox for long here, just try it and notice how victim’s response improves with early, compassionate contact.

Can the victim assert the Fifth?

Prosecutors should seek a hearing to determine whether the victim can assert the privilege against self-incrimination under the Fifth Amendment of the Constitution. The victim must assert this personally, under oath. Written statements and statements of counsel fall short of a Fifth Amendment assertion. If you expect the witness to assert the claim, you should do this outside the presence of a jury.

A successful practice for seeing whether a witness truly intends to assert the Fifth is to begin an examination with the victim by asking non-incriminating questions. A victim only has a right to assert the privilege to questions that would truly tend to incriminate themselves. Questions like, “How are you today?” “Do you feel comfortable this morning?” are great ways to test your victim’s attitude. Neither question tends to incriminate the witness. I suggest asking as many of these neutral questions as possible. Depending on your case, you may also include, “Do you have any children, what are their ages, names, etc. Where do you live/where did you live on (insert date), Are you married, do you see the individual seated next to defense counsel, do you know that person, how. By asking these neutral questions I have seen prosecutors get the victim to begin talking and decide not to assert the Fifth even with their attorney standing by in the courtroom.

The hearing should not stop once the victim asserts the Fifth. The next area of inquiry is whether the assertion relates to an actual or potential Fifth Amendment claim. If the statements are not incriminating, the court should not grant the claim. Does the proffered statement incriminate the victim? For example, where the statute of limitations for the crime has expired, the victim is not incriminating

themselves. Thus, where the proffered testimony is that the victim made a false police report over a year ago, that should not trigger the Fifth Amendment. A similar conclusion could be reached where the victim has already made the incriminating statement under oath at the preliminary hearing. If the area of inquiry has been excluded from testimony under Evidence Code Section 352 the victim should not be allowed to assert the privilege under this circumstance. The assertion of the privilege does not bar further analysis by the court.

Once the court finds the victim has a right to assert the Fifth Amendment to the question asked, determine whether the victim intends to assert that right to all questions asked in the area. Here you are determining the scope of the assertion of the right. If the assertion of the right applies to only a limited area, you may be able to argue to the court that such area of inquiry should be excluded under 352. If the court finds the victim has the right to assert the Fifth to all testimony or intends to assert the right to all testimony, have the court make a finding on the record. This is critical because if immunity is not being granted, the finding by the court is a precursor to your request to have the witness found unavailable. Subject to the confrontation Clause (See Crawford v. Washington), a finding of unavailability may allow for the introduction of the victim's statements under other provisions of the Evidence Code.

Granting immunity

The grant of immunity is extremely powerful. It binds the government in terms of either use immunity or transactional immunity from using the testimony against the victim. When I say government, I mean it in the broadest sense. A grant of immunity by one prosecution agency is binding on other jurisdictions, other states, even the federal government. It would not be binding on a foreign prosecution (another country) but, it is otherwise far-reaching. Since it is so powerful, most prosecution offices have policies regarding the process of granting immunity. Be certain to follow those procedures. The request for immunity can only be made by the prosecution in all but the rarest of circumstances. The actual finding that the victim has been granted immunity is made by the court.

Felony cases

Where the abuser is charged with a felony, immunity is covered under Penal Code Section 1324. The prosecution under this code section may request a grant of use or transactional immunity. The choice is up to the prosecution. Once the witness has been given a grant of immunity by the prosecution they are compelled to accept it under this section. The refusal of the witness to testify after such a grant would constitute contempt (discussed below). The grant should be in writing to avoid any confusion about the nature of the immunity.

Where the abuser is charged with a misdemeanor, immunity is covered under Penal Code Section 1324.1. This grant of immunity is different. First, it can only be transactional immunity. Second, the grant of immunity is by agreement of the

witness only. As such, a witness cannot be compelled to accept such a grant. Nothing in the code indicates the victim must be advised of this aspect of the law and there is no obligation for the prosecution to make this clear. A victim in a misdemeanor case that refuses to accept the prosecution offer of immunity may still assert the Fifth. Again, this should be in writing. Once a witness agrees to accept the immunity under 1324.1, their refusal to testify would be treated as contempt.

Scope of immunity

I have seen recent arguments by defense counsel suggesting that a grant of immunity is ineffective because it may subject the witness to prosecution in another jurisdiction. There is some question whether that is correct. See, *Murphy v. Waterfront Commission of New York*, 1964, 84 S.Ct. 1594. In that case, the court found a local grant of immunity prevented federal prosecution. *Murphy* was overruled in *US v. Balsys*, 1998 524 US 666. It is unclear whether *Balsys* entirely eliminates the principles set forth in *Murphy*.

Refusal to testify

A witness who refuses to testify by refusing to speak or by refusing to answer questions may be subject to contempt. If you believe your victim will refuse to testify, you should still call the witness to the stand (outside the presence of the jury if it is a trial). You should once again, begin by asking neutral questions to see if the witness really will refuse to testify. Once the witness refuses to answer a question, ask the court to order the witness to answer. The victim's refusal to answer would constitute contempt of court under CCP 1218 and 1219. For most courts it will be important to get the court to understand this is not the assertion by the victim of a Fifth Amendment Privilege or some other privilege, merely a contemptuous act by the victim. Ask the court to find the victim in contempt as it will trigger their unavailability under Evidence Code Section 240.

You may be able to have the witness state their refusal to testify in front of the jury. In *People v. Lopez*, (2012) 71 Cal.App.4th 1550, a witness in a gang case refused to testify after being granted immunity. The court allowed the jury to see the witness refuse to testify after being granted immunity and being ordered to testify. This was upheld on appeal as the refusal to testify after being granted immunity is not a Constitutional right (unlike the 5th Amendment).

Many courts claim they cannot find the victim in contempt under CCP 1219. This is an incorrect statement of the law. The victim is still in contempt in that they have refused a lawful court order. CCP 1219 deals only with the punishment of the contempt. It prohibits incarceration as a sanction for contempt. CCP 1219 allows the court to direct the victim to meet with a domestic violence counselor prior to finding the victim in contempt. Such a meeting may lead the victim to make a more neutral and informed decision about whether to be held in contempt. At the very least, it will make certain the victim has had their safety options addressed.

While CCP 1219 prohibits incarceration as a contempt sanction, it leaves other punishment options (such as fines) available to the court. The purpose of finding the victim in contempt is not to suggest any punishment to the court, merely to trigger their unavailability under Evidence Code Section 240.

Another distinction to be made here is that CCP 1219 deals with a victim's refusal to testify. It does not cover the victim's appearance in court for a subpoena. That is covered under Penal Code Section 1328. The refusal of a witness, including the victim, to comply with a lawful subpoena to appear is punished separately from the refusal to testify (*See, People v. Cogswell, 48 Cal.4th 467*).

Marsy's Law Confusion

It should also be noted that this section dealing with contempt is not a part of Marsy's Law. Many attorneys and courts mistakenly cite that the victim has a "Marsy's Law right not to testify." Marsy's Law does not create a right for a victim to refuse to testify. Some judges even go so far as to claim that prosecutors are in violation of Marsy's Law for trying to make the victim testify.

If you find yourself in such a battle, point out to the court that serving subpoenas and calling witnesses to testify is a basic part of our criminal justice process. It can hardly be called harassment to do what the law allows you to do. Compare it to a situation where there is a restraining order against a defendant. That defendant's counsel could still legally subpoena witnesses to court who were the subject of the restraining order without violating that order. Additionally, "Marsy's Law" begins with a discussion of findings that include that criminals be punished so that the public safety is protected. It doesn't allow defendants to commit crimes simply because their victims chose not to testify. Finally, when read as a whole, the tenor of Marsy's Law was to allow victims a voice in the criminal case. That implies their presence and right to be heard (even if it is to say they aren't going to testify) in court.

Conclusion

CCP 1219 creates an illusion that domestic violence victims do not have to come to court on their subpoenas. It clouds the issue as to whether they can be compelled to testify. A victim must comply with a lawful subpoena even if they intend to refuse to testify. Failure to comply with a subpoena is not the subject of CCP 1219. Once a victim is in court, they must actually refuse to testify. This may be based in whole or in part upon the Fifth Amendment. The assertion of a Fifth Amendment privilege should be thoroughly explored. If the court finds the assertion to be valid, the prosecutor should determine whether a grant of immunity would be appropriate. Such a grant may be compelled in felony cases, or agreed upon in misdemeanor cases. A victim who intends to refuse to testify after such a grant or without raising a privilege can still be found in contempt. Prior to such a finding, ask the court to refer the victim to meet with a domestic violence counselor. It may be helpful to establish relationships with the domestic violence counselors in your jurisdiction.

The counselors need to be aware that victims may be referred to them and the counselors need to have some understanding of the process. This should allow the victim to make an informed decision about whether to testify without any undue influence.

If the victim decides to refuse to testify after being so ordered, get the court to make a contempt finding. It triggers the unavailability of the victim and may open the path to other means of introducing the evidence. Remember, the issue of a victim's refusal to testify may be minimized or avoided completely with early contact by the prosecution team. Provide the victim with the opportunity to come in to court and give their statement, whether it is consistent or inconsistent with previous statements made to law enforcement.

Prosecutors should be aware of the impact of CCP 1219 and align their filing practices and case strategies with an anticipation the victim will not be available to testify.

Working With Difficult Witnesses

Gerald W. Fineman

Supervising Deputy District Attorney

Riverside County

- I. Introduction
 - a. This outline covers two aspects of working with what are typically termed “difficult” witnesses. The first part covers some tools for conducting courtroom examination of the witness. The second, and probably more significant part, deals with how to minimize the “difficulty” of your witnesses.
 - b. When we talk about a difficult witness, prosecutors usually are referring to witnesses who don’t want to “cooperate” with the prosecution of the case. They don’t want to appear, don’t want to testify, don’t want to testify in conformity to statements previously given, or some combination of these. These witnesses need to be compelled to attend to the proceedings and may need to be compelled by the court to testify at all.
- II. Examination of the witness
 - a. Traditional Impeachment
 - i. This technique is the traditional technique for dealing with a forgetful, recanting, or inconsistent witness.
 - ii. Refresh Recollection. If the witness claims they can’t recall their testimony you may show them anything which refreshes their testimony. This is usually the police report, but could be many other things. Showing a domestic violence victim a photo of their injury, for example, should refresh their recollection about how they received it. The 9-1-1 call, or a transcript of the call, may prove equally fruitful. The witness is shown the item and asked to review it to see if it refreshes their recollection. If it is a written document, have them read it (to themselves). Once they have reviewed the item ask if it refreshes their recollection. If it does, then move ahead. If not, confront the witness with why that doesn’t refresh their recollection. *Evidence Code Section 771.*
 - iii. A witness that doesn’t recall in court what they previously did recall is not inconsistent. If you have this witness, you may have to move to past recollection recorded. A witness who feigns a failure to recollect is inconsistent with previously recalling the incident. *People v. Green (1970) 3 Cal.3d 981.* Ask the witness some simple details preceding the incident and simple details following the incident to establish the failure to recollect as being feigned.
 - iv. If the witness testifies that the previous statement was false, inaccurate, or in error in some other form, their current testimony is inconsistent with the previous statement. You must give the witness either an opportunity to explain the difference or leave the witness subject to recall. *Evidence Code Sections 1235 and 770.*

- v. Some hints for improved examination under this type of impeachment.
 - 1. This type of examination can be very boring for a jury. The witness is asked a question, says they can't recall, gets recollection refreshed, then agrees, then the pattern repeats.
 - 2. The prosecutor's attitude and tone during the examination is key to the jury understanding whether the witness truly doesn't recall or is trying to conceal information for some reason.
 - 3. Prosecutors should also be aware that asking, "Do you recall..." and having the witness not recall is not the same as asking "Did X happen..." 4.
 - 4. At some point, you might want to simply confront the witness with the fact that they are avoiding telling the truth.
 - 5. If the witness rambles on or is otherwise difficult to control consider:
 - a. Cutting them off
 - b. Letting them ramble
 - c. Calling them out for intentionally answering more than your question. If you take this tact, your attitude is more crucial than ever. If the court disagrees with your assessment of the witness you may be subject to an attack from the court in front of your jury.
- vi. Past Recollection Recorded
 - 1. If the witness truly cannot recall the previous statement you may prove the existence of that statement through this method.
 - 2. The writing or recording was made at a time when it was fresh in the mind of the witness.
 - 3. The witness made the writing or it was made under his direction.
 - 4. The witness admits the writing was true.
 - 5. The writing is authenticated.
 - 6. The writing is read into the record. The writing itself does not become the record.
- b. Concession based Examination
 - i. This technique is useful for controlling witnesses. It is also useful for preliminary questions to "soften" a difficult witness. Under this technique, questions are formulated which require only a "yes" answer. This creates an impression with the jury that the witness is cooperative and gets the witness into a pattern of agreeing with the examiner. It can ease discomfort for a nervous or hesitant witness.
 - ii. First establish the need to lead the witness. *Evidence Code Section 767.*
 - 1. Preliminary matters
 - 2. Refresh Recollection
 - 3. Expert witnesses
 - 4. Hostile witnesses

- iii. Break your examination down into topics. For each topic, ask yourself what things the witness must admit. Examples might be, their relationship, their presence at the location of the crime, their injuries, the fact they had to be subpoenaed to come to court. Get the witness to admit these things.
- iv. Tips for Concession based examination.
 - 1. To be effective, this type of examination requires a fairly rapid and constant pace of questioning. The pattern of question and affirmative answer loses its effectiveness if there are many pauses and delays in the questioning.
 - 2. This can be used to “set up” a hostile witness. If the witness goes through a number of rapid fire questions and agrees with everything the prosecutor says, only to become “hostile” on the key issue, it demonstrates for the jury that the witness is being uncooperative, and probably deceitful in their testimony on the key issue.
- c. Story based impeachment
 - i. This is not a technique for the timid. It requires allowing the difficult witness the opportunity to tell their “in court story” fully and completely. It relies upon corroboration of the original statement as proof that the witness is being untruthful on the stand. That said, it is an excellent technique at shooting down ill-rehearsed, ill-conceived stories.
 - ii. You must first let the witness tell their story. In fact, you are encouraging the witness to tell their story. This gives the impression to the jury that you are not frightened by the witness and are confident in letting the jury see the truth come out.
 - iii. Encourage detail. The more detail from the witness, the greater likelihood of destroying the story with your corroborating evidence. What was going through their mind? Where *exactly* were they? What was the *exact sequence* of events?
 - iv. Once the witness has finished their story, confirm that nothing has been left out. ***This is critical.*** The failure to perfect this step will allow the witness to change the in court story once you start to impeach them. This is somewhat like the typical defense questioning of a peace officer (*Is there anything you’d like to change about your report/*)
 - v. Now that the witness is locked into their courtroom story, get them to deny that the incident description given previously is not accurate. Proceed slowly, in a step by step fashion.
 - vi. Now move back to traditional impeachment and impeach the witness. Since you have already given the witness a full chance to explain, you are much more likely to have the jury understand your cutting off non-responsive answers.

- vii. Do not miss the critical step. You must, must, must, get the witness to confirm that nothing has been left out prior to confronting them with their initial statement.
 - d. Techniques are not Exclusive
 - i. It is important to remember, that these are only techniques and not rigid models. The best prosecutors will blend the techniques above to form an effective examination.
- III. Avoiding Difficult Witnesses
- a. Although I have spent over half my career working with domestic violence victims I seem to have had a much lower number of difficult victims than others within my office. When I discuss this with other highly successful domestic violence prosecutors, we seem to share the same disparity of difficult witnesses. Were we lucky or did we use techniques to minimize the difficult witnesses we had?
 - b. Regardless of your personality you absolutely must talk with all your witnesses. Difficult, or not, you need to talk with them. Often, taking the time out to speak with the witness and clarify what is really going to occur is enough to change their demeanor. Even if they remain difficult, you will at least have an understanding of why they are behaving in a difficult way. This will fuel your courtroom examination and argument.
 - c. Don't forget that many witnesses have the right to have an advocate and support person present during questioning by the prosecutor, law enforcement, or the defense. *Penal Code Section 679.04, 679.05 and now Proposition 9, Marsy's Law.*
 - d. Marsy's Law creates a new set of tools that may be useful in working with difficult witnesses. I use the victim rights contained in Marsy's Law as a way of establishing rapport with victims.
 - e. My typical meeting with a witness will cover the following items:
 - i. How are you?
 - ii. Thank you for coming.
 - iii. The victim's (or witness) rights.
 - iv. The courtroom process, what will really happen?
 - v. What is occurring in court that is causing the need for them to appear in court.
 - vi. Do they have any questions about the court process?
 - vii. Have they heard anything about what is going on in court?
 - viii. A review of what I'm going to be asking them about.
 - ix. Do they have any questions about the topics I plan to cover?
 - x. Anything they think I should know?
 - xi. A run through of the facts.
 - xii. What to expect from the defense.
 - xiii. Any contact by the defense?
 - xiv. Questions from others in the room (law enforcement).
 - xv. The subpoena.
 - xvi. Any questions for me?
 - xvii. Exchange of contact information.

- xviii. Thank you for coming.
- f. Avoid being a witness
 - i. Many prosecutors fear having contact with difficult or potentially difficult witnesses because they are afraid under *Brady v. Maryland* they will become a witness themselves.
 - 1. Get someone else (Investigator, officer, fellow DDA, DDA employee, other) to be present for the conversation. I try never to use an advocate as the “someone else” because it impacts upon their ability to be an advocate.
 - 2. Tape or otherwise document the interaction with the witness. If the witness calls you on the phone or confronts you “solo” then write a statement of what the witness said and get the witness to confirm what is in your written statement in a subsequent interview where “someone else” is present and can verify the statement.
 - ii. While you should avoid being a witness, it is usually more important to get the information. Don’t let fear of becoming a witness prevent you from getting to talk to your witness.
- g. Getting the witness to court
 - i. Subpoenas *Penal Code Sections 1326-1328d*
 - ii. Order back *Penal Code Section 1331.5*
 - 1. Any subpoenaed person may agree in lieu of their appearance to be placed on call and come to court at a place and time agreed upon. Failure may be punished by contempt. Proof by affidavit.
 - iii. Present in court *Code of Civil Procedure Section 1990*
 - 1. A person present or in court may be compelled to testify as if he were under subpoena.
 - iv. Witness Bond *Penal Code Section 1332*
 - 1. Upon showing of good cause that adult or minor will not appear unless security is required.
 - 2. The court can commit the witness.
 - 3. If witness committed to custody requires review after 10 days.
 - v. Witness Deposition *Penal Code Section 882*
 - 1. You *may* be able to take a deposition of a witness who cannot post the bond required under PC 1332
 - 2. Deposition is the same as a conditional examination of a witness
 - 3. Proceeds by question and answer
 - vi. Out of state witness *Penal Code Section 1334 through 1334.6*
- h. When the witness won’t talk
 - i. Normally, a witness must answer questions or risk being held in contempt
 - ii. CCP 1219 prevents the court from incarcerating a domestic violence victim for refusal to testify. The court still has other sanctions available, though they may not be likely to use it.
 - iii. CCP1219 does not absolve victims from coming to court to advise the court (on the record) that they are refusing to testify.

- iv. The court has the ability to refer a victim to meet with a domestic violence counselor prior to finding them in contempt. This provides a way of making certain the refusal to testify is the victim's knowing and voluntary decision.
- v. You should try and convince the court to make inquiry into why the victim is refusing in order to ensure the refusal is "free and voluntary."
- i. When the witness takes the 5th
 - i. Lots of witnesses say they are going to "take the 5th" and most of them don't when they actually reach the stand.
 - ii. If the witness tries to take the 5th you should ask to question the witness briefly to determine if they are truly asserting the 5th to each and every question. Try using Concession based questioning to establish the witness is not asserting the 5th.
 - iii. If the witness is allowed to assert the 5th, they are unavailable under EC 240
 - iv. Your tool at this point is immunity. Every office I know has a policy about this. Follow your office policy.
 - v. There are two types of immunity; use and transactional. There are two immunity statutes, PC 1324 and 1324.1. This is a place where you need to consult your supervisor.
- j. Special issues
 - i. Some witnesses present special issues of their own. It is suggested that you seek some additional guidance if dealing with any of the following:
 - 1. Language/Cultural barriers
 - 2. Child witnesses
 - 3. Sexual assault victims
 - 4. Domestic Violence victims

CONTACT INFORMATION

If you have any questions in dealing with difficult victims feel free to contact me. I will respond to your inquiries as promptly as possible. I usually check email on a daily basis.

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Investigation and Trial Preparation

Jennifer Kibbe Day

Deputy District Attorney
San Joaquin County

INVESTIGATION AND TRIAL PREPARATION MISDEMEANOR DOMESTIC VIOLENCE

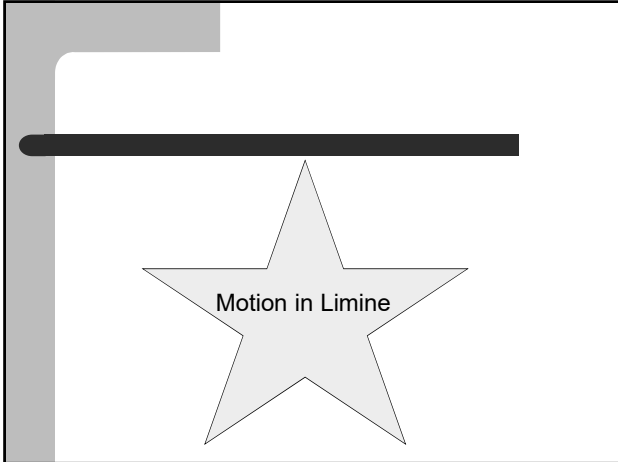


KIBBE DAY
DEPUTY DISTRICT ATTORNEY

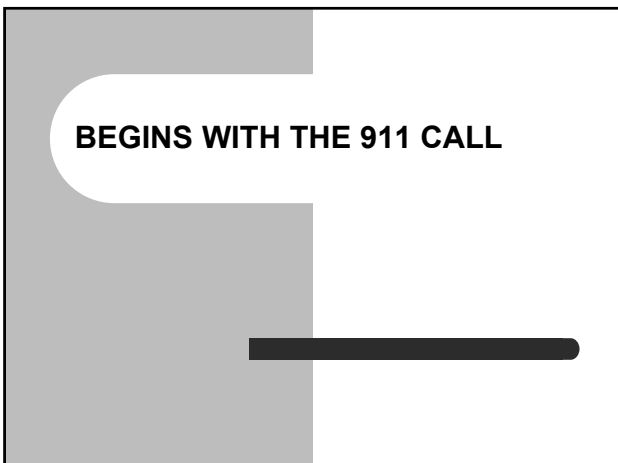
ATTITUDE IS EVERYTHING

CREATING CORROBORATION

- 911 Calls
- Photos
 - Initial
 - Follow up
- Physical Evidence
- Corroborating Witnesses
- Children
- Court documents







TEVANIE'S WORDS

And my husband is drunk on a bicycle and he came to the house intoxicated and grabbed a knife out of the kitchen, put it into the door, and was being like very obnoxious and I'm scared for my life and I ran three blocks. He came after me on a bicycle, but he didn't come after me after me. There was a guy standing out in front of my complex and so I'm very scared

I just took off running because I seen the knife and I got scared and I ran and I could hear him after me



TEVANIE'S WORDS

It's a green mountain mike. No shirt on, just a blue South Pole jacket. I seen him last on Lupton and I started telling him that, that the cops were coming, get away from me, get away from me. And now there's a guy in front of my complex and I'm so scared for my life. I've never ran that fast in my life.



TEVANIE'S WORDS

I can't....if I go in the house right now, I'm gonna...he'll chase me and I'm scared. Just can you please get here? I'm scared just standing here.

I've been through a mental health crisis because of this man.



Who are your witnesses?

- Victim
- 911 Dispatcher
- No victim? No problem
 - Think about *Crawford*
 - Authenticate victim's voice
 - Responding officer
 - **Victim's family member**

911 CALLS SPEAK FOR THEMSELVES

- My husband beat up my dad really bad



Admitting the 911 in court



- Authentication....who should you use?
 - Police, family members, subpoena service, employer....get creative!
 - EC 1410: Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved.
 - EC 1421: evidence refers to matters that are unlikely to be known by anyone but the proponent.
 - Circumstantial evidence, content and location are all valid means of authentication. *People v. Olguin* (1994) 31 Cal.App. 4th 1355, 1372-3- overruled on other grounds.
 - EC 403: authenticity of a writing is a preliminary fact ultimately determined by the *jury*.



Admitting the 911 in court: Hearsay Exceptions

- Recording
 - Business Record EC 1271
 - **Official Record EC 1280- NO WITNESS NEEDED**
- Content of Recording
 - Spontaneous Statement- EC 1240
 - **Contemporaneous Statement- EC 1241**
 - Present Sense Impression- EC 1250
 - Prior Consistent Statement- EC 1236
 - Prior Inconsistent Statement-EC 1235
 - Statement of a Party Opponent- EC 1220
- Transcript: California Rule of Court 2.1040



Find witnesses on 911 dispatch logs

LAW ENFORCEMENT INVESTIGATION

- You can convince good cops to do more.
- You can make good cops good DV cops.....even if they don't like DV

First Responder= First Witness

- Set the scene
- Need to get the big picture;
- Who did they interview
 - Demeanor, demeanor, demeanor
- Injuries

Give the jurors something to visualize

Victim Information

- Victim's location, demeanor
- ☆ • Spontaneous statements
- Injuries
- ☆ • Alcohol/Drug usage...or lack thereof

Suspect Information

- Suspect location, demeanor
- ☆ • Spontaneous statements
- Injuries....or lack thereof
- Alcohol/drug usage

CHILDREN ARE IMPORTANT

- Location where the child was found
- What is the child doing when found?
- How does the child physically look?
- Does child have any injuries?
- Describe any emotional trauma
- What were the child's actions during the incident?
- How did this event make the child feel?

Children make the difference

- CPS
 - *VICTIMS DON'T WANT TO LOSE THEIR KIDS*
- **Forensic Interview**

*SUSPECTS DON'T WANT THEIR KIDS ON
THE STAND*

Witness Information

- Find and interview the reporting party
- Neighbors
- *Who did the victim talk with?*
- Who left the scene?

Evidence.....HA!

- Photos
- Physical evidence
 - Self-created
 - Diagrams
- ☆ – Jail records
 - Visits (get transcript)
 - Mail
 - Phone calls (get transcript)
- ☆ – Court documents
 - Restraining order applications....etc

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[illegible]

Evidence.....HA!

- Photos
 - Crime scene
 - Day of incident AND before/after
 - Injury
 - Day of incident AND before/after
 - Suspect photos
 - Absence of injury
 - Evidence photos
 - Text messages, weapons, torn/bloody clothes

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PROGRESSION OF PHOTOS

Victim photo intentionally removed

Victim photo intentionally removed

PROGRESSION OF PHOTOS

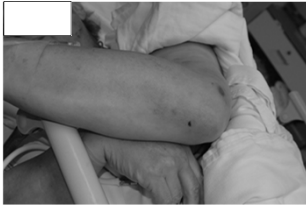
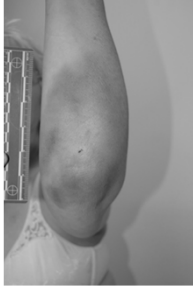
Victim photo intentionally removed

Victim photo intentionally removed

PROGRESSION OF PHOTOS



PROGRESSION OF PHOTOS



Police didn't take photos?

- Find some!
 - Cell phones
 - Facebook/Instagram
 - Take your own
 - Victim
 - Scene

Evidence.....HA!

- ☆ ● Medical Records
 - SDT hospital records
 - SDT paramedic records
- ☆ ● CPS Records

STALKING AND CRIMINAL THREATS

STALKING AND CRIMINAL THREATS CHECKLIST

STALKING CHECKLIST

- Obtain **dates, locations** and descriptions of each incident.
- ☆ • Victim's **previous police reports** against the suspect
- Any witnesses?
- Physical Evidence: phone messages, letters, photos, email, text, journals, property damage, etc
- ☆ • Restraining orders (civil and criminal)

STALKING QUESTIONS

- Threat
 - Verbal, written, electronic, **implied**
 - *What does it mean to the victim?*
 - **Basis for fear**
- What has the victim done to show the effect of being stalked; ie. Moved, changed phone numbers, seen a dr, changed work or school schedule, warned friends or co-workers, stopped visiting places, purchased a gun, pepper spray, called police, etc.
 - *Notified the Defendant he is scaring her*

CRIMINAL THREAT QUESTIONS

- What did the suspect **say**?
- What does this **mean** to you?
- ☆ • What has happened in the **past** when the suspect said those things to you?
- ☆ • Has the suspect threatened to hurt you or hurt you in the past? Friends or family? Pets?
- Does the suspect have weapons?
- Has the suspect ever threatened you with a weapon?
- ☆ • How long ago was the threat made? How do you feel now about the threat?

CRIMINAL THREAT QUESTIONS

- **Who have you talked with** about the threats made before we arrived?
- When was the last time the suspect hurt you?
- How is your life different as a result of these events?
 - Note the victim's demeanor.
 - Is the victim seeking shelter, moving, hiding, having someone stay with them, obtaining an RO, etc?

STRANGULATION

STRANGULATION CHECKLIST

Information provide courtesy of Dr. George McClane and Gael Strack, JD.

STRANGULATION QUESTIONS

- Describe **how** they were strangled. Was it-one or two hands, forearm, object, etc.
- What did the suspect **say** before, during and after they strangled the victim?
- Was the victim **shaken** simultaneously while being strangled?
- Was the victim thrown or held against the wall, floor, or ground? Describe how and the results? Describe the **surface area**.
- **How long** was the victim strangled?
- **How many times** was the victim strangled?

STRANGULATION QUESTIONS

- What was the **victim thinking** when they were being strangled?
- What **caused the suspect to stop**?
- Any **difficulty breathing** during the assault or now?
- Describe any **voice changes**.
- Any complaint of **pain to the throat**?
- Any **coughing or trouble swallowing**?

STRANGULATION QUESTIONS

- How did the victim feel during the assault? (**dizzy, nauseous, loss of consciousness**)
- Did the victim experience any **visual changes** during the strangling?
- Did the victim **vomit, urinate or defecate** as a result of being strangled?
- Was the **suspect wearing** any rings or other jewelry? Look for marks
- Did the victim do anything to try and stop the assault? Will the **suspect have injuries**?

STRANGULATION QUESTIONS

- Look for injuries behind the ears, all around the neck, under the chin and jaw, eyelids, shoulders and chest area.
- Ask the victim to look in the mirror and point out injury sites including petechiae
- Are there prior incidents of strangulation?
- Photograph injuries and the entire area.
- Any object used? Document where it came from. Photograph and book it as evidence.

STRANGULATION SYMPTOMS

- Voice changes
- Complete loss of voice
- Difficulty swallowing
- Difficulty breathing
- Raspy breathing
- Pain or tenderness on touch or movement
- Mental status changes
- Involuntary urination or defecation
- Coughing/vomiting
- Vision changes
- Loss of consciousness

STRANGULATION SIGNS

- Redness of neck
- Scratch marks
- Bruises
- Finger tip bruises
- Tiny red spots
- Blood red eyes
- Swelling of the neck

Difficult victim?
Is the story jumbled or confusing?
Consider this.....

- Evidence of unconsciousness
 - Loss of memory
 - Unexplained bump on the head
 - Bowel/bladder incontinence
 - “Woke up on the floor”
- Evidence of loss of oxygen to the brain
 - Under the influence similarities
 - Restless
 - Hostile
 - Stroke like

Documenting Injuries

- Remove makeup
- Ask victim to look in mirror
- Is hair or clothing blocking it?
- What did victim look like before?
- Get photos from before the incident

Got a legit strangulation?

- Need to know about it ASAP
- Why?
 - Document the changes
 - Encourage medical attention
- ☆ ● Need an expert
 - Doesn't have to be a doctor

STRANGULATION INJURIES



Victim photo intentionally removed

STRANGULATION INJURIES

Victim photo intentionally removed

PREPARE 3 TRIALS

- Cooperative victim
 - Theory of admissibility
 - Anticipate defenses: retaliation, custody, crazy, victim credibility
- Uncooperative victim
 - Theory of admissibility
 - Anticipate defenses: substance abuse, mad at the time, victim credibility
- Unavailable victim
 - Theory of admissibility

UNCOOPERATIVE	COOPERATIVE	UNAVAILABLE
911 <ul style="list-style-type: none"> • Evidence Code: • Witnesses: • Exhibits: • In limine: 	911 <ul style="list-style-type: none"> • Evidence Code: • Witnesses: • Exhibits: • In limine: 	911 <ul style="list-style-type: none"> • Evidence Code: • Witnesses: • Exhibits: • In limine:
PHOTOS	PHOTOS	PHOTOS
VICTIM STATEMENTS <ul style="list-style-type: none"> • Evidence Code: • Witnesses: • Exhibits: • In limine: 	VICTIM STATEMENTS <ul style="list-style-type: none"> • Evidence Code: • Witnesses: • Exhibits: • In limine: 	VICTIM STATEMENTS <ul style="list-style-type: none"> • Evidence Code: • Witnesses: • Exhibits: • In limine:
OTHER WITNESSES	OTHER WITNESSES	OTHER WITNESSES
OTHER EVIDENCE	OTHER EVIDENCE	OTHER EVIDENCE
1109 <ul style="list-style-type: none"> • Witnesses: • Exhibits: • In limine: 	1109 <ul style="list-style-type: none"> • Witnesses: • Exhibits: • In limine: 	1109 <ul style="list-style-type: none"> • Witnesses: • Exhibits: • In limine:

**INCREASE CHANCES OF
SUCCESS WITH ANY VICTIM**

- Meet with them
- Talk to them
- Listen to them
- Care
- Tell them the truth

THEY MAY NOT BE READY TO
COOPERATE.....
BUT THEY ARE STILL VICTIMS

THIS IS HOMICIDE PREVENTION

**2 HOURS AFTER TEVANIE
CALLED 911**



THANK YOU!

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