



Difficult Witnesses:
Impeachment and What to Do
When a Witness Just Won't Cooperate

SDDA Christine Bannon
SDDA Lindsey Carinci

LADA Training - May 2019

OVERVIEW

Impeachment

- Prior Convictions/Misconduct
- Prior Inconsistent Statements/Using Former Testimony
- Impeaching the Defendant

Securing Witnesses

- Exercising Due Diligence
- Material Witness Issues

When a Witness Claims the 5th

- Procedure
- Compelling Testimony & Granting Immunity
- Refusal to Testify & Contempt

Outline and Attachments

- See course outline for details, case cites and summaries, relevant statutes
- See attachments to the course outline for the following:
 - Moral Turpitude Conduct List
 - PC §1332 pleadings
 - General DV tips for uncooperative witnesses you can't incarcerate
 - What to Do When Witness Takes 5th Flow Charts
 - PC §1324 Pleadings
 - Orders Adjudging Contempt
 - Sample Informal Immunity Letter
 - Immunity P&A (Long & Short form)

**PRIOR CONVICTIONS
OR
MISCONDUCT**

Prior Convictions

■ Felonies (EC §788)

- May impeach with underlying conduct (*People v. Dalton*, May 16, 2019, S046848)
- Pardoned conviction not applicable (EC §788(a)-(b))
- Expunged priors (EC §788(c)-(d)) are allowed against defendants only
- Out of state convictions allowable if it meets *Castro* test
- “Prior” felony convictions are admissible
- Prop 47: remains a felony until petition is granted

Prior Convictions

■ Misdemeanors

- No equivalent to EC §788
- Underlying conduct involving moral turpitude is admissible (*People v. Wheeler* (1992) 4 Cal.4th 284, 297)
- Certified prior misdemeanor conviction can be used to prove conduct IF witness denies conduct (EC §452.5(b))

Misconduct

- **RULE**: An act of moral turpitude does not have to result in a conviction for us to use it for impeachment purposes.
 - *People v. Leopolo* (1997) 55 Cal.App.4th 85
 - EC §352

Juvenile Adjudications

- **RULE**: It is permissible only to impeach witness with evidence of prior conduct amounting to moral turpitude that was subject of prior juvenile adjudication (*People v. Lee* (1994) 28 Cal.App.4th 1724.)
 - It is **error** to admit juvenile adjudication itself
 - However, if witness/defendant denies conduct, can introduce evidence of admission to prior petition

Juvenile Records and Pre-Prelim *Brady* Obligations

DDAs must make every effort possible to seek out exculpatory and impeachment evidence from members of the prosecution team, before preliminary hearing, where that evidence would likely be material to the outcome of the prelim.

Juvenile Adjudications

Suggested protocol on unsealed juve records:

- Review DA file
- Make copies of pertinent information you want/need released (redactions may be necessary)
- Paginate
- File a W.I.C. § 827 petition and include all necessary paperwork and serve all parties
- Make your appearance
- Put it out for discovery in a timely manner

Juvenile Adjudications

Regarding sealed juvenile records...

- State sealing statutes do NOT relieve us of our due process/*Brady* obligations if a witness's juvenile records in our possession contain exculpatory information.
- Depending on what statute (WIC 781, 786, 790) the records are sealed under will determine how you go about inspecting the records and discovering them.
- Consult with your juvenile division to comply with your office's policy on how to review/get these records in a proper and timely manner.

Using Priors/Misconduct

Motion in Limine

- Factors outlined in *People v. Beagle* (1972) 6 Cal.3d 441.
 - Is it moral turpitude? Does it reflect adversely on defendant's honesty and veracity?
 - Prior near or remote in time
 - Prior substantially similar to charged crime
 - Influence defendant's decision to testify
- For witnesses, court mainly considers first two factors (*People v. Clair* (1992) 2 Cal.4th 629)
- EC § 352 analysis

Using Priors/Misconduct

- Sanitizing Priors
- Line of Questioning – conviction only
 - Limited to name, nature of crime, date and place of conviction
 - Determine when and how
 - Listen as to whether defendant/witness is trying to mislead or minimize (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1267)

**IMPEACHING WITH
PRIOR INCONSISTENT
STATEMENTS**

&

**USING FORMER
TESTIMONY**

CALCRIM 318

- Jury can use PIS two ways:
 1. Evaluate believability of testimony given in court
- OR
2. As evidence that the information in those earlier statements is true

Prior Inconsistent Statements

EC § 1235

- Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is:
 - Inconsistent with his testimony at the hearing; and
 - Is offered in compliance with Section 770.

EC § 770

- Evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded *unless*:
 - The witness was given an **opportunity** to explain or deny the statement; or
 - The witness has **not been excused** from giving further testimony in the action.
- Witness need not be shown prior statement before questioning (EC § 769)

Which E.C. § 770 Option...

- Give the witness an opportunity to explain or deny the prior inconsistent statement?

OR

- Leave the witness subject to recall and put on the evidence of the prior inconsistent statement?

How to Properly Impeach A Witness with PIS

- Prepare for Testimony

- Gather all statements made that you want to use
- Transcribe recorded interviews of key witnesses in serious cases

- Question the Witness

- Organize and outline your questions
- When impeaching, ask questions the RIGHT way.

How to Properly Impeach A Witness with PIS

Did you tell Officer Jones that you saw Darnell with a gun?

OR

Did Officer Jones ask you the following question and did you give the following answer?

Question: Who did you see with a gun?

Answer: Darnell.

→ Make them admit or deny the statement

“I don’t recall...”

- “I don’t recall” Responses
 - Real memory lapse is NOT inconsistent statement (EC§1237)
 - Feigned memory lapse *is* inconsistent statement (*People v. Green* (1971) 3 Cal.3d 981).
 - If witness is faking it, make record by asking easy innocuous detail questions
 - Must be a sufficient record for court to find witness’s feigned memory lapse is attempt to evade answering
 - No need to get formal ruling

Refusal \neq PIS

- Refusal to Testify
 - Cannot impeach with prior inconsistent statement
 - Court will hold them in contempt and strike any testimony already given.
 - Negative inference argument should be made
 - Properly preserved former testimony is admissible (EC §§240(a)(6), 1291)

**DON'T FORGET TO ADMIT THE
PRIOR INCONSISTENT
STATEMENT**

The PIS is not in evidence by
operation of the question alone.

IMPEACHMENT
OF
THE DEFENDANT

4th Amendment Violations

RULE: Evidence is not admissible in our case-in-chief, but can be used to impeach contrary testimony of defendant. (*People v. Moore* (1988) 201 Cal.App.3d 877.)

- Good case examples:

- *People v. Moore, supra*
- *U.S. v. Havens* (1980) 446 U.S. 620

- Any suppressed evidence may NOT be used to impeach defense witnesses. (*James v. Illinois* (1990) 493 U.S. 307.)

5th Amendment Violations

RULE: Evidence is not admissible in our case-in-chief, but can be used to impeach contrary testimony of defendant (*Harris v. New York* (1971) 401 U.S. 222.)

EXCEPTION: Defendant's statements found to be involuntary or coerced cannot be used for ANY purpose (*Brown v. Mississippi* (1936) 297 U.S. 278.)

6th Amendment Violations

There is a split of authority as to whether defendant's otherwise voluntary statement requires suppression of the statements for all purposes, including impeachment:

- **Majority View**: It can be used for impeachment.
(*People v. Brown* (1996) 42 Cal.App.4th 461, 471-473.)
- **Minority View**: Must be excluded for all purposes.
(*People v. Cribas* (1991) 231 Cal.App.3d 496, 606.)

Using Defendant's Prior Testimony

RULE: If defendant testifies at prior hearing, that testimony is only allowed to impeach defendant's inconsistent statements (EC §§780 and 1235)

1. **Parole Hearing Transcript**: “so clearly inconsistent”
(*People v. Coleman* (1975) 13 Cal.3d. 867, 889)
2. **PC § 1538.5 Hearing** (*People v. Douglas* (1977) 66 Cal.App.3d 998, 1003.)
3. **PC § 1368 Hearing**: Statements made by defendant during competency exam CANNOT be used to impeach him at any other proceeding other than the competency trial. (*People v. Pokovich* (2006) 39 Cal.4th 1240, 1253.)
 - **EXCEPTION**: (*People v. Taylor* (2010) 48 Cal.4th 574)

Impeachment of Non-Testifying Defendant

RULE: A defendant's prior felony conviction is admissible pursuant to EC § § 788 & 1202 to attack his/her credibility when a defendant does not testify at trial but where out of court exculpatory statements made by the defendant are admitted into evidence at the defendant's request (*People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1446.)

Various Materials That Can Be Used to Impeach the Defendant

- Prior police reports
- Prior probation reports
- Prior convictions
- Medical records
- WIC §827 petitions
- Statements made to probation officer in preparation for presentence report for instant offense when guilty plea was withdrawn after (*People v. Pacchiolo* (1992) 9 Cal.App.4th 1331.)
- Juvenile defendant's statement to probation officer prepared for fitness hearing pursuant to WIC §707 (*People v. Macias* (1997) 16 Cal.4th 739.)

Various Materials That Can Be Used to Impeach the Defendant

- TRO declarations
- Statements made during polygraph examinations (EC § 351-351.1)
- Statements made during private psychological exam given to DA during plea negotiations. (*People v. Crow* (1994) 28 Cal.App.4th 440, 452.)
- Jail calls/mail/visitation logs
- Jail classification/incident reports
- Field interviews

**PRESERVING
AND
USING FORMER
TESTIMONY**

Preserving Former Testimony

RULE: If witness testifies at prelim or conditional exam and does so inconsistently with prior statements given, *in order to preserve your ability to admit those prior inconsistent statements for their truth at trial* should witness become unavailable, you must:

- 1) Impeach W with all known PIS (EC § 1235/770)
- 2) Offer PIS statement into evidence by:
 - ✓ Calling witness who took statement
 - ✓ *Playing* audio tape + admit transcript so it's part of transcript of prior proceeding
 - ✓ Admitting audio or videotape into evidence

EC § 1294

- The following evidence of PIS of W properly admitted at prelim, conditional exam or trial of the same criminal matter pursuant to Section 1235 is admissible if W is unavailable and former testimony is admitted pursuant to Section 1291:
 - a. An video or audio recorded statement introduced at a preliminary hearing or prior proceeding concerning the same criminal matter
 - b. A transcript, containing the statements, of the conditional exam, preliminary hearing or prior proceeding

Preserving PIS in Former Testimony

- What if you don't introduce the PIS at prelim...
 - No EC§1235 admissibility if W later unavailable
 - Limited to EC§1202 impeachment of HS declarant only

BOTTOM LINE - USE IT OR LOSE IT!

Audio/Videotaped Statements

- *People v. Haynes* (1999) 72 Cal.App.4th 337
 - W testified at prelim, *entire audio recording of PIS was played at prelim.*
 - W unavailable at trial (EC § 240).
 - Because D had same motive and an opportunity to cross W about PIS, Confrontation Clause was satisfied. Former testimony (EC §1291) and *entire recorded PIS* properly admitted at prelim (EC § 1294) was admissible for truth at trial (EC §§ 1235 & 770/CALCRIM 318).

Audio/Videotaped Statements

- *People v. Martinez* (2003) 113 Cal.App.4th 400
 - Uncharged accomplice witness testified at prelim but denied telling police in recorded interview that D was shooter.
 - Entire recorded interview was *not* played at PE.
 - W invoked at trial (unavailable, EC § 240(a)(1)).
 - PE testimony admitted (former testimony EC § 1291) and *entire recorded police interview was played for jury.*
 - Court found playing entire recorded interview violated Confrontation Clause b/c W was never subject to cross examination by D as to *entire recorded statement.*

SECURING WITNESSES

Due Diligence
and
Material Witness Issues

Due Diligence

- Required if witness unavailability is the ‘good cause’ cited for continuance.
- Required before witness will be declared unavailable (EC§240(a))(5) thus allowing admission of prior testimony (EC§1291).
- Serving W with subpoena to appear is generally sufficient to establish due diligence; see outline for more.

Witness Facing Deportation

- “[N]o less important is the duty to use reasonable means to prevent a present witness from becoming absent. If the prosecution fails in this...duty, it does not satisfy the requirement of due diligence...[T]he government cannot simply throw up its hands and do nothing when faced with the prospect of one of its witnesses being deported or leaving the country on his own accord.” (*United States v. Tirado–Tirado* (2009) 563 F.3d 117, 124-126.)

People v. Roldan
(2012) 205 Cal. App. 4th 969

“The [trial] court acknowledged the prosecution’s efforts may not ultimately have been successful, but germane to the question of due diligence was the prosecution’s failure to even try.”

**MATERIAL
WITNESS WARRANTS
AND DETAINERS**

PC §1332

When the court is satisfied by *proof on oath* that there is good cause to believe that a material witness, whether *adult or minor*, will not appear and testify unless security is required, the Court may commit the witness to custody in lieu of bail until the witness complies or is legally discharged.

No U.S. Constitutional Violation

“The law has long recognized that the duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained in the absence of bail, as a material witness.” (*Stein v. New York* (1953) 346 U.S. 156, 184.)

No CA Constitutional Violation

- PC §1332 is clear in its grant of authority to detain a material witness and the steps prescribed within that section are straightforward.
- PC §1332 does *not* violate CA Constitution Article I, Section 10, which proscribes the “unreasonable detention” of citizens.

Ensuring PC §1332 Detentions are Reasonable

- *In re Francisco M.* finds that Article 1, Section 10, requires “procedural safeguards allowing the interests of the witness to be heard in conjunction with the interests of the state.”
- “Whether and how long to detain a witness cannot be determined according to mechanical rules.” (*In re Francisco M.* (2001) 86 Cal. App. 4th 1061, 1075.)

Procedural Safeguards: Witness Rights

- W must have counsel, retained or appointed.
- W is entitled to controvert the allegations seeking his detention and be heard on all relevant issues.
 - Whether he will agree to return if released.
 - Whether other alternatives to incarceration in lieu of bail are feasible and adequate.
- W is entitled to present evidence on his behalf.

Procedural Safeguards: Court Considerations

- Nature of the charges
- Nature of W proposed testimony
- Length of proposed detention
- Evidence relevant to whether W will or will not appear and testify
- Age/maturity of W
- Harm to W/family flowing from incarceration
- W financial resources
- Circumstances of any continuance of trial prolonging incarceration
- Whether steps short of incarceration are feasible/protect interests

Material Witness Warrants

- The detention provision of PC §1332 should be considered a “warrant of attachment” and *not* a criminal arrest warrant associated with the violation of a penal code provision. (See Attachment “C”)
- The application for warrant must be accompanied by sworn affidavits by DDA and DAI as the section requires the Court’s finding be “upon oath.”

Special Rules for DV/Sex Assault

PC §1332/1334.3

- This section deals with the Court's power to get the witness to *court*.
- **No limitation** as to DV or sexual assault victims regarding detention.

CCP §1219

- This section deals with the Court's power to get the witness to *testify*.
- DV and sexual assault victims are **specifically excluded** from this contempt/custody sanction.

**You MUST carefully
consider all ramifications
before seeking to
incarcerate a
citizen/witness who has not
committed any crime**

WHAT TO DO
WHEN A WITNESS
CLAIMS THE 5th

General Procedure

- BURDEN: is on the witness to establish validity of claim.
 - *If you reasonably anticipate the claim, do it early and outside presence of jury.*
 - Applies to innocent persons as well as guilty
 - Counsel will be appointed
 - EC §404 Hearing
 - Asserted/ruled upon on question by question basis
 - No blanket assertions*

General Procedure

- BURDEN: is on the witness to establish validity of claim.
 - SOL expiration bars privilege claim
 - No claim if risk of probation revocation
 - No claim if risk of pros by foreign gov.
 - Must be a realistically identifiable crime

General Procedure

“The danger to be apprehended [must be] real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency so improbable that no reasonable person would allow it to influence his or her conduct. [A] merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice.”

(*Coleman v. Galvin* (1947) 78 Cal.App.2d 313, 320; *In re Berman* (1930) 105 Cal.App.37, 46; *Brown v. Walker* (1896) 161 U.S. 591, 599-600.)

General Procedure

- STANDARD: must be “perfectly clear” that the answers “cannot possibly” have a tendency to incriminate (*Cohen v. Superior Court* (1959) 173 Cal.App.2d 61.)
 - To find privilege properly asserted, it need only be evident from the *implications of the question*, in the *setting in which it is asked*, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. (*People v. Lucas* (1995) 12 Cal.4th 415, 454.)

Duration and Waiver of Privilege

- Privilege expires when time to file appeal has passed
 - Open question whether survives on appeal
- Waiver is to that proceeding ONLY
 - Example: failure to assert privilege at PE does not bar assertion at trial

General Procedure

- If privilege is properly asserted, there are three options:

- 1) Witness declared unavailable (EC §240(a)(1)) and admit prior testimony (EC §1291);
- 2) Employ PC §1324 to compel testimony over valid claim of privilege; OR
- 3) Enter voluntary immunity agreement w/ witness

Witness REFUSES to Testify

- NO GENERAL RIGHT TO REFUSE TO TESTIFY (EC §911)
- If witness *still* refuses.....
 - Contempt (CCP §§1209; 1219)
 - Testimony stricken
 - Negative inference argument (*People v. Morgain* (2009) 177 Cal.App.4th 454; *People v. Lopez* (1999) 71 Cal.App.4th 1550)
 - Admit prior testimony including PIS evidence for its substantive truth (EC §§240(a)(6); 1291; 1294)

Contempt

- Disobedience of any lawful order or process of the court is contempt. (CCP §1209)
- When contempt is committed in the immediate view/presence of the court it may be punished summarily. (CCP §1211)
 - Punishment: \$1000 fine or up to 5 days in jail (CCP §1218).
 - Compliance: Indefinite incarceration until contempt is cured (CCP §1219(a)).

Custody to Gain Compliance

CCP §1219

- “...[W]hen the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it.”

TESTIFYING

Limitations of CCP §1219

“...[N]o court may imprison or otherwise confine or place in custody the *victim of a sexual assault or domestic violence* crime for contempt when the contempt consists of refusing to testify concerning (the crime).” (CCP §1219(b))

No such limitation on “punishment” for DV or SA contemnor pursuant to CCP §1218.

PC §19.2

- “In no case shall any person sentenced to confinement in a county or city jail...upon commitment for civil contempt...be committed for a period in excess of one year...” (PC §19.2)
- PC §19.2 may seem to suggest a one year limitation on custody for contempt. (But see, *People v. Clemmons* (1962) 208 Cal. App. 2d 696.)

Clemmons & Salkin

- A witness ordered confined until they comply with the court's order pursuant to CCP §1219 is not “sentenced to confinement” such that PC §19.2's 1 year limitation would apply. (*People v. Clemmons* at p. 700.)
- An order for confinement becomes operative or effective only upon petitioner's own choosing; and by the same means, such confinement is terminated. (*People v. Salkin* (1935) 5 Cal. App. 2d 436.)

Continuances for FTA and Contemnor Witnesses

- Good cause to continue exists when:
 - A necessary and material witness FTAs on the subpoena. (*Gaines v. Municipal Court* (1980) 101 Cal. App. 3d 556.)
 - A necessary and material witness is confined for contempt/refusing to testify. (*People v. Clemmons* (1962) 208 Cal. App. 2d 696, 701.)
- These witnesses are material and unavailable despite due diligence.
- May seek continuance when the issue first arises before trial begins in earnest or mid-trial when the issue is most timely.

Examination of Witness **REFUSING** to Testify

- Do **NOT** ask court to declare the witness “hostile”
- Stick to your prepared *direct examination*
- What **NOT** to do
 - *Douglas v. Alabama* (1965) 380 U.S. 415
 - *People v. Shipe* (1975) 49 Cal.App.3d 343

GRANTING IMMUNITY

Types of Immunity

■ Transactional

- Witness cannot be prosecuted for any *conduct* testified about at hearing even if independent evidence comes to light

■ Use/Derivative Use

- Cannot use what W *says* against them, but prosecution is still viable if evidence is obtained solely from sources independent of the immunized testimony

Authority To Grant Immunity

- Prosecutor's Monopoly
 - To request to compel testimony PC §1324
 - To enter into voluntary agreements
- Defendant Has NO Standing
- Court cannot unilaterally grant immunity
- Notice Required for Immunity in Civil Cases
- Applies to State and Federal Prosecutions if PC§1324 is used, but not if agreement outside statutory scheme.

Penal Code §1324

- Only statutorily recognized method for the *court to compel testimony* over a valid claim of privilege
- ***Felony*** proceedings only
- Weigh factors in determining whether to seek court compelled testimony:
 - Witness essential to case
 - Prior testimony
 - Gravity of the instant offense
 - Witness's culpability

Penal Code §1324

- Necessary Pleadings and Hearing:
 - 1) Written request for Order Compelling Privileged Testimony
 - 2) Order Requiring Witness to Answer Questions

Penal Code §1324.1

- Applies in *misdemeanor* proceedings
- Significantly different than PC §1324.
 - If W has valid 5th Am claim, W may agree in writing with the DA to testify voluntarily.
 - Upon written request by DA, the court shall approve agreement unless clearly contrary to the public interest.
 - W cannot be prosecuted for *conduct* testified to/ transactional immunity only authorized form.
 - W can be prosecuted for perjury/false swearing.

Penal Code §1324.1

- If W does not testify after agreeing w/DA, agreement is voided and W can be prosecuted as if agreement never existed.
- Statute does not provide for compelling testimony as with PC §1324, so no contempt remedy pursuant to CCP §1218/1219.

Voluntary Immunity Agreements

Letter Immunity/CI Contract

- Voluntary immunity agreements are between pros. & witness outside Penal Code §1324
- Must be carefully drafted
- Agreement is not enforceable until it has been accepted or relied upon by the witness. (*People v. Superior Court (Perry)* (1989) 213 Cal.App.3d 536.)

Drafting the Grant of Immunity/CI Contract

- Terms of the Agreement:
 - Subject matter of testimony (dates, specific crimes)
 - Proceedings where the testimony will be given
 - Promise to testify truthfully
 - Acknowledgement of consequences of perjury and giving false statements
 - Avoiding claims of witness intimidation - record conversations with witness & defense counsel
 - Include limits to the immunity grant (witness not being a principal)

Hip-Pocket Immunity

Keep your hands out of your pockets!

