

Federal Bureau of Investigation



ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 03-06-2012 BY 65179 DMH/SBS

Unclassified//FOUO//REL TO USA

b7E

The Witness

b7E

- What is your motivation?
- What is your ultimate goal?
- How do you achieve that goal?



Unclassified//FOUO//REL TO USA,



b7E

Five Basic Principles

- Look Professional
- Act Professionally
- Prepare Professionally
- Answer the Question
- Be Truthful

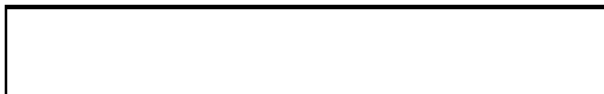
Unclassified//FOUO//REL TO USA,

b7E

Venues

- Court
 - Trial
 - Motions hearing for suppression of evidence
- Grand Jury
 - Probable Cause hearing. FREs do not apply. Determine if enough evidence to charge and go to trial
- Depositions – Very common in civil system where depositions are used as a discovery tool.
 - In criminal proceedings FRCP 15 controls: Depositions only permitted in ‘exceptional circumstances’ to preserve witness testimony for trial. Restricted to use in cases when necessary in order to prevent a failure of justice

Unclassified//FOUO//REL TO USA,



b7E

What Rules Govern Witnessing?

- Competency
 - **Competent to understand the oath** (W. must recognize duty to tell truth – even children as young as 3 permitted to testify)
 - **Perception (Personal Knowledge and Hearsay** – generally cannot testify based on what someone else witnessed. H/S is “an out of court statement offered by the W. in court to prove the truth of the matter asserted.”)
 - **Memory / Recollection**
 - **Communicate in a rational fashion**
- Direct Examination
 - Open-Ended Questions

Unclassified//FOUO//REL TO USA,

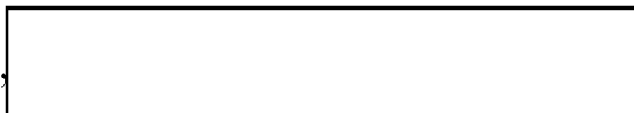


b7E

What Rules Govern Witnessing?

- Cross-examination
 - Impeachment (Lying/Shaping/Mistake)
 - Bias/Prejudice
 - Religious Beliefs
 - Prior Statements Writings
 - FRE 613
 - Defense counsel will have all W's statements in front of him at podium

Unclassified//FOUO//REL TO USA,



b7E

What Rules Govern Witnessing?

- “The Rule”
 - Witness can’t watch trial testimony of other witnesses
- *Jencks* Material (Previous Statements; FRCP 26.2)
 - Jenks Act governs production of statements and reports and requires that prior statements be provided to defense after W. testifies
 - What is a statement?
 - Written statement made by W, signed or adopted by W
 - Recording of interview with W
 - Transcription of W’s GJ testimony
- But not everything is a statement (ex., notes of a police interview of a W)

Unclassified//FOUO//REL TO USA,



b7E

What Rules Govern Witnessing?

- **Brady Material (Favorable to Defense)**
 - *“The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.” Brady v. Maryland, 373 U.S. 83, 87 (1963).*

Unclassified//FOUO//REL TO USA,

b7E

What Rules Govern Witnessing?

- *Giglio/Henthorn* Impeachment Materials
 - Upon defendant's request, Gov't is required to review personnel files of law enforcement officials that Gov't intends to call as witnesses. U.S. v. Henthorn, 931 F.2d 29 (9th Cir. 1991).
 - Impeachment evidence must be disclosed when such evidence is material to guilt. Giglio v. U.S., 405 U.S. 150 (1972).

What Rules Govern Witnessing?

- What information must be turned over to defense from an agent's personnel file (USAM 9-5.001)
 - Specific instances of conduct of a witness for the purpose of attacking the W's credibility
 - Finding of misconduct that reflects on truthfulness; past criminal charge or pending criminal charge; credible, substantiated allegation of misconduct
 - Allegations of misconduct that are unsubstantiated or result in exoneration generally not required to be disclosed
 - Inconsistent statements
 - Information that may be used to suggest the W. is biased

Unclassified//FOUO//REL TO USA



b7E

What Rules Govern Witnessing?

- Each investigative agency employee is obligated to inform the prosecutor with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any civil or criminal case.

■ investigation b6
b7C

Unclassified//FOUO//REL TO USA,

b7E

What Rules Govern Witnessing?

- Expert Testimony (FRE 702)
 - Examples: Ballistics, Toolmark Examiners, DNA, Forensic Psychiatrist
 - To be an expert, must have scientific, technical, or other specialized knowledge that will assist judge or jury determined a fact in issue
 - No first-hand knowledge required (gov't psychologist may not actually interview defendant, but instead review defendant statements and psychological tests)
 - Permitted to offer “opinion” testimony, but can't offer opinion on the ultimate issue

Unclassified//FOUO//REL TO USA,



b7E

What Rules Govern Witnessing?

- Testifying as an

b7E

- Do you have to testify?



b7E

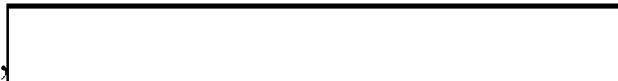
Unclassified//FOUO//REL TO USA

b7E

What Rules Govern Witnessing?

- DOJ policy for requesting a closed courtroom during witness testimony (USAM 9-5.150)
 - Prosecutor may not move for closure without authorization from the DAG
 - Strong presumption against closing proceedings
 - Request to close the courtroom should address how an open proceeding will create a substantial likelihood of danger, and/or how ongoing investigations will be jeopardized (28 CFR 50.9)

Unclassified//FOUO//REL TO USA,



b7E

What Rules Govern Witnessing?

- Cases in which court granted gov't motion for closure:

-
-
-

b7E

Unclassified//FOUO//REL TO USA,

b7E

What Rules Govern Witnessing?

■ Other options to courtroom closure

■

■

b7E

Unclassified//FOUO//REL TO USA

b7E

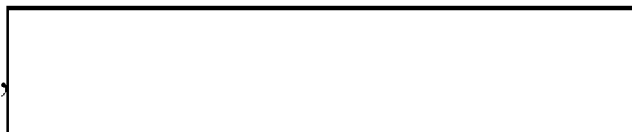
What Rules Govern Witnessing?

- Other options to courtroom closure:

- Limit examination

- Limit media access or coverage

Unclassified//FOUO//REL TO USA,



b7E

What makes a good witness?

Unclassified//FOUO//REL TO USA,



b7E

Recipe for a Great Witness

- Tell the Truth
- Prepare
- Know Your Audience
- Practice
- Execute

Unclassified//FOUO//REL TO USA,



b7E

Recipe for a Great Witness

- Preparation
 - Everything you do in the case
 - Review
 - Confer
 - Rehearse
- First Impressions
- Appearance

Unclassified//FOUO//REL TO USA,



b7E

Recipe for a Great Witness

- Taking the Oath
 - “The truth shall set you free”
 - “No traps for the truth”
- State your Name
- Demeanor

-
-
-

b7E

Unclassified//FOUO//REL TO USA

b7E

Recipe for a Great Witness

■ Listen

- Listen Carefully
- Listen to the Entire Question
- Ask for clarification
- Limit your response

Unclassified//FOUO//REL TO USA,



b7E

Recipe for a Great Witness

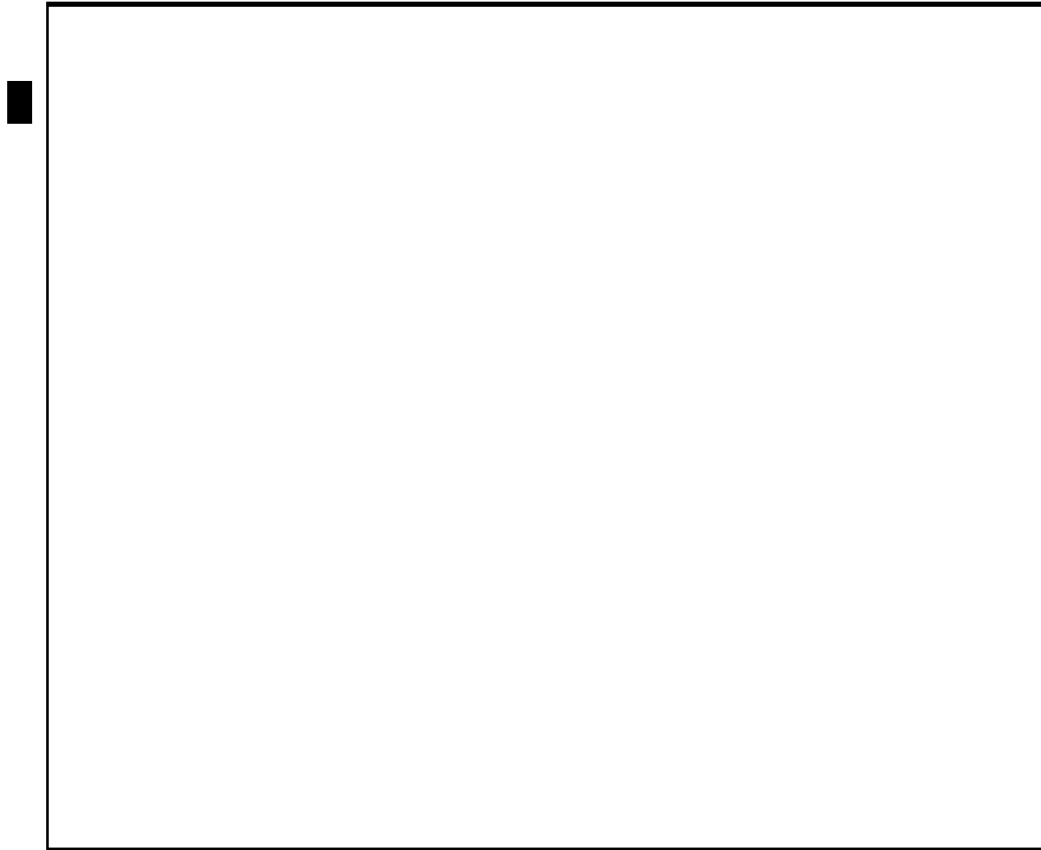
- Speak
 - Loudly
 - Clearly
 - Slowly
 - Avoid “Copspeak”
 - Eye contact
 - Report Mistakes to AUSA (recorder malfunctioned)
 - AUSA will protect you on cross, but must know all issues

Unclassified//FOUO//REL TO USA



b7E

Recipe for a Great Witness



b7E

Unclassified//FOUO//REL TO USA,



b7E

Testifying on Direct Examination

- No leading questions
- Open-ended questions
- Tell a story

Unclassified//FOUO//REL TO USA,

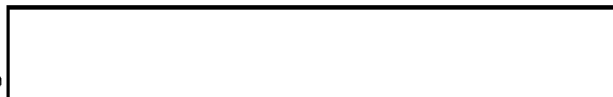


b7E

Testifying on Cross-Examination

- NO TRAPS FOR THE TRUTH
- Listen to the question
 - Ensure you understand the question
- Pause for objections
- Limit your answers to the question
 - Don't volunteer
- If you don't know, don't guess

Unclassified//FOUO//REL TO USA,



b7E

Testifying on Cross-Examination

- Answer Yes or No
 - Unless explanation required to:
 - Avoid confusion, or
 - Misleading the jury
- Remain professional and courteous
 - This is not “One-on-One”
 - Don’t have 2 different demeanors, 1 on direct and 1 on cross
 - Don’t argue – AUSA’s job is to win case, not yours. AUSA only wants to talk about the evidence in summation, not your behavior or demeanor
- Admit mistakes
- Tell the truth- It is what it is

Unclassified//FOUO//REL TO USA,



b7E

Testifying on Cross-Examination

- “Nothing could be worse than to let the witness re-tell his story in his own words.”

■ Irving Younger

Unclassified//FOUO//REL TO USA,



b7E

Summary

- Look Professional
- Act Professionally
- Prepare Professionally
- Answer the question
- Be Truthful

Unclassified//FOUO//REL TO USA,



b7E

Summary

- “Do everything you do with the knowledge that you may have to testify to it in court and when you get to court, look good and tell the truth.”

Unclassified//FOUO//REL TO USA,



b7E

Questions?

AGC

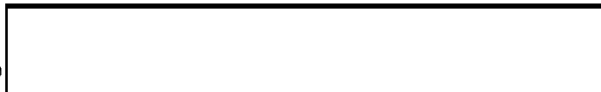


b6
b7C

National Security Law Branch, OGC



Unclassified//FOUO//REL TO USA,



b7E