

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY VICTORY,

Plaintiff,

v.

C. BARBER, et al.,

Defendants.

CASE NO. 1:05-CV-01578-LJO-DLB PC

INFORMATIONAL ORDER REGARDING
TRIAL SCHEDULING ORDER (DOC. 99)

ORDER DIRECTING CLERK OF THE
COURT TO SEND PLAINTIFF COPY OF
LOCAL RULE 281

Plaintiff Michael Anthony Victory ("Plaintiff") is a California state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff's first amended complaint against Defendants Barber, Smith, Kushner, Bresler, Salazar, Sacks, Neubarth, and Ortiz for violation of the Eighth Amendment. Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, the Court set a trial scheduling order on June 2, 2010. *See* Doc. 99. The Court now provides the following informational order.

The parties are required to file pre-trial statements in accordance with the schedule set forth on June 2, 2010. In addition to the matters already required to be addressed in the pre-trial statement in accordance with Local Rule 281, Plaintiff will be required to make a particularized showing in order to obtain the attendance of witnesses. The procedures and requirements for making such a showing are outlined in detail below. Plaintiff is advised that failure to comply with the procedures set forth below may result in the preclusion of any and all witnesses named in his pre-trial statement.

At the trial of this case, Plaintiff must be prepared to introduce evidence to prove each of

1 the alleged facts that support the claims raised in the lawsuit. In general, there are two kinds of
2 trial evidence: (1) exhibits and (2) the testimony of witnesses. It is Plaintiff's responsibility to
3 produce all of the evidence to prove his case, whether that evidence is in the form of exhibits or
4 witness testimony. If Plaintiff wants to call witnesses to testify, he must follow certain
5 procedures to ensure that the witnesses will be at the trial and available to testify.

6 1. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to
7 Testify Voluntarily - An incarcerated witness who agrees voluntarily to attend trial to give
8 testimony cannot come to court unless the Court orders the warden or other custodian to permit
9 the witness to be transported to court. The Court will not issue such an order unless it is satisfied
10 that: (a) the prospective witness is willing to attend; and (b) the prospective witness has actual
11 knowledge of relevant facts.

12 A party intending to introduce the testimony of incarcerated witnesses who have agreed
13 voluntarily to attend the trial must serve and file concurrent with the pre-trial statement a written
14 motion for a court order requiring that such witnesses be brought to court at the time of trial. The
15 motion must: (1) state the name, address, and prison identification number of each such witness;
16 and (2) be accompanied by declarations showing that each witness is willing to testify and that
17 each witness has actual knowledge of relevant facts. The motion should be entitled "Motion for
18 Attendance of Incarcerated Witnesses."

19 The willingness of the prospective witness can be shown in one of two ways: (1) the party
20 himself can swear by declaration under penalty of perjury that the prospective witness has
21 informed the party that he or she is willing to testify voluntarily without being subpoenaed, in
22 which declaration the party must state when and where the prospective witness informed the
23 party of this willingness; or (2) the party can serve and file a declaration, signed under penalty of
24 perjury by the prospective witness, in which the witness states that he or she is willing to testify
25 without being subpoenaed.

26 The prospective witness's actual knowledge of relevant facts can be shown in one of two
27 ways: (1) if the party has actual firsthand knowledge that the prospective witness was an
28 eyewitness or an ear-witness to the relevant facts (i.e., if an incident occurred in Plaintiff's cell

1 and, at the time, Plaintiff saw that a cellmate was present and observed the incident, Plaintiff may
2 swear to the cellmate's ability to testify), the party himself can swear by declaration under
3 penalty of perjury that the prospective witness has actual knowledge; or (2) the party can serve
4 and file a declaration signed under penalty of perjury by the prospective witness in which the
5 witness describes the relevant facts to which the prospective witness was an eye- or ear-witness.
6 Whether the declaration is made by the party or by the prospective witness, it must be specific
7 about the incident, when and where it occurred, who was present, and how the prospective
8 witness happened to be in a position to see or to hear what occurred at the time it occurred.

9 The Court will review and rule on the motion for attendance of incarcerated witnesses,
10 specifying which prospective witnesses must be brought to court. Subsequently, the Court will
11 issue the order necessary to cause the witness's custodian to bring the witness to court.

12 2. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse to
13 Testify Voluntarily - If a party seeks to obtain the attendance of incarcerated witnesses who
14 refuse to testify voluntarily, the party should submit with his pre-trial statement a motion for the
15 attendance of such witnesses. Such motion should be in the form described above. In addition,
16 the party must indicate in the motion that the incarcerated witnesses are not willing to testify
17 voluntarily.

18 3. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree to
19 Testify Voluntarily - It is the responsibility of the party who has secured an unincarcerated
20 witness's voluntary attendance to notify the witness of the time and date of trial. No action need
21 be sought or obtained from the Court.

22 4. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to
23 Testify Voluntarily - If a prospective witness is not incarcerated, and he or she refuses to testify
24 voluntarily, the witness must be served with a subpoena. Fed. R. Civ. P. 45. In addition, the
25 party seeking the witness's presence must tender an appropriate sum of money for the witness.
26 *Id.* In the case of an unincarcerated witness, the appropriate sum of money is the daily witness
27 fee of \$40.00 plus the witness's travel expenses. 28 U.S.C. § 1821.

28 If Plaintiff wishes to obtain the attendance of one or more unincarcerated witnesses who

1 refuse to testify voluntarily, Plaintiff must first notify the Court in writing of the name and
2 location of each unincarcerated witness. The Court will calculate the travel expense for each
3 unincarcerated witness and notify Plaintiff of the amount(s). Plaintiff must then, for each
4 witness, submit a money order made payable to the witness for the full amount of the witness's
5 travel expenses plus the daily witness fee of \$40.00. The subpoena will not be served upon the
6 unincarcerated witness by the United States Marshal unless the money order is tendered to the
7 Court. Because no statute authorizes the use of public funds for these expenses in civil cases, the
8 tendering of witness fees and travel expenses is required even if the party was granted leave to
9 proceed in forma pauperis.

10 **If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who**
11 **refuse to testify voluntarily, Plaintiff must submit the money orders to the Court no later**
12 **than April 1, 2011.** Plaintiff should notify the Court of the names and locations of his
13 witnesses, in compliance with step one, as soon as possible.

14 The parties are advised that failure to file pre-trial statements as required by this order
15 may result in the imposition of appropriate sanctions, which may include dismissal of the action
16 or entry of default. The telephonic trial conference and trial date will not be changed.

17 Accordingly, the Court HEREBY ORDERS as follows:

- 18 1. The parties are to comply with the deadlines set forth in the June 2, 2010 trial
19 scheduling order and the requirements stated herein;
- 20 2. In addition to electronically filing their pretrial statement, Defendants shall e-mail
21 the pretrial statement to: ljoorders@caed.uscourts.gov; and
- 22 3. The Clerk of the Court shall send Plaintiff a copy of Local Rule 281.

23 IT IS SO ORDERED.

24 **Dated: February 4, 2011**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE