

Witness Preparation *Techniques* for Prosecutors

What makes an officer an effective witness in court? That is a continuing question posed to several judges, prosecutors, defense attorneys, and officers and this paper covers the highlights from the responses. Those answers, which are the subject of this paper, are particularly interesting because they are very similar. There seems to be total agreement on what helps—and what hurts—an officer's effectiveness in court.

It is also interesting (but not surprising) that everyone interviewed stressed one particular characteristic, which gives weight to an officer's testimony: professionalism. Specifically, an officer's effectiveness in court depends in large part on whether he or she demonstrates those qualities that judges and jurors expect in a professional law enforcement officer.

As you will see, those qualities can be developed. While a particular officer's personality may make him or her more likable, the overall impact of an officer's testimony seems to hinge on habits and traits that can be cultivated. All officers should understand being an effective witness is an ever-evolving ability. One must strive to improve, demonstrated by continuous work on developing courtroom skills. Being an effective witness is essential to being an effective police officer. Much like knowing their patrol area, the witness can anticipate what actions and reactions they might face. When preparing to testify, you must strive to prepare the officer to anticipate the good points, and bad points in your case, and be prepared to deal with them at trial.

*The presenter wishes to acknowledge the Alameda County, Ca., District Attorney's Office for its contribution to the presentation materials.

PREPARED

Everyone interviewed emphasized the importance of preparedness. One officer said: “I think many of the problems with officers’ testimony are caused by the officers themselves—they’re just not prepared.”

The amount of preparation that is necessary will, of course, depend on the complexity and seriousness of the case and the nature of the officer’s testimony. For example, a veteran homicide detective said he takes his case files home at least one week before trial and reviews everything. A robbery detective said he likes to study the file and “try to plan how to respond to questions I think will be asked. It’s like chess: What move is the defense attorney going to make?”

In many cases, however, such extensive preparation is unnecessary and impractical. But there are certain things every officer should do, or consider doing, before taking the stand, regardless of the importance or complexity of the case.

Read your police report

Officers must *always* read their police reports before the trial or hearing. An officer can’t be an effective witness unless he has a command of the facts in his report.

This does not mean that officers should try to memorize their reports. Instead, they should just reacquaint themselves with the facts. When you’re reading your police report you don’t want to memorize things like license plate numbers and quotes from the victim or the defendant. That sounds rehearsed, phony. If somebody asks you to quote something the defendant said, ask to look at your report so the jury knows they’re getting exactly what he said, not your best recollection.

When reviewing a police report, just try to get a feel for the case. Know how things progressed. Memorize some details, like dates and times, what day of the week it was, things like that. Nothing more is necessary.

Most defense attorneys will find ineffective witnesses when he cross-examines a police officer that took the stand without even scanning the police report. “He came in late, so the Prosecutor didn’t have time to talk to him. He kept confusing the facts in my case with the facts in similar cases he’d handled. It was not pretty.” Don’t have these comments attributed to you.

Read transcripts

If an officer has given testimony in the case previously (usually at a preliminary hearing or motion to suppress), it is a good idea to obtain a copy of the transcript from the Prosecutor and read it over carefully. This will also help bring the facts into focus.

In addition, the officer may notice that something he said at the hearing was incorrect. If so, the officer should be sure to tell the Prosecutor so the jury will hear about the mistake from the prosecution—not the defense.

Talk to the Prosecutor

In every case, it is essential that the officer confer with the Prosecutor before the trial or hearing. Sometimes a very brief meeting is all that is necessary. But occasionally it may take several hours, depending on the complexity of the case, the officer’s role in the investigation, and the nature of his testimony.

The purpose of the meeting is to review the facts of the case, discuss what subjects will be covered on direct and cross-examination, and try to anticipate any problems that might arise.

Visit the crime scene

It is certainly not necessary to visit the scene of the crime or arrest in every case. In some cases, however, it may be a good idea, especially if the officer will be asked to draw a diagram in court or if the officer expects to be questioned concerning the physical layout or characteristics of the area.

AVOID PARTIALITY

An officer's testimony will have significantly greater weight if the officer demonstrates an impartial and dispassionate attitude. Conversely, an officer's credibility will suffer if it appears he or she has a personal interest in the outcome of the case.

This does not mean an officer should appear uninterested or passive. It simply means an officer should convey the sense that his or her only interest is to present the facts. As judge suggest, "Just state the facts and let the chips fall where they may." Or, "Don't go into the courtroom carrying a torch or a spear. Just tell the truth. If an officer sticks to the truth, a defense attorney can cross-examine him until the building falls down—he won't accomplish anything."

This means an effective police witness will answer each question truthfully, even if he thinks the answer might hurt the prosecution's case. If an officer fudges on something he thinks will hurt the case, it will probably come out from other witnesses. Then the officer's credibility is shot and the case is likely lost.

An officer should testify as if he or she is an expert witness. "Don't worry about the verdict. Your main concern should be your credibility. When testifying as an expert, if the Prosecutor asked: In your opinion does possession of six rocks of cocaine indicate possession for sale? What would your answer be?

A defense attorney will sometimes ask a hypothetical question that could be answered either: A or B. A helps the prosecution; B helps the defense. Some officers will only answer A, even if A and B are both plausible. This will lose credibility, and likely the case.

Treat Prosecutor and defense attorney alike

An officer can also demonstrate impartiality by dealing with the defense attorney in the same manner as the prosecutor. An officer will often appear friendly and relaxed when he or she is being questioned by the DA, but then immediately becomes defensive when cross-examination starts. There may be a change in the tone of voice. He may move around in the chair, sort of squirming. This is body language. Don't do this. Speak to the defense attorney with the same demeanor and attitude as the DA.

Some officers say: Yes, sir, to the Prosecutor but say: That is correct, counselor, to the Defense Attorney. They're stiffer and non-compliant. If the Prosecutor misstates something, the officer kindly corrects him, but if the Defense Attorney misstates something, the officer jumps down his throat. Treat them all alike; let the jury sort it out!

Do not be evasive

An officer's credibility may also be hurt if he or she attempts to avoid answering a question. Judges and jurors usually see this as an indication the officer has an interest in the outcome of the case, and that maybe the answer that helps the defense. If a defense attorney is trying to get an answer out of an officer and he won't give it, he is doing the defense a favor.

When an officer is evasive, he looks defensive. Defense attorneys will keep asking the question until a direct answer is given. It makes a bad impression when an officer won't answer an unambiguous question.

Do not volunteer information

Just as an attempt to avoid answering a question may hurt an officer's credibility, an attempt to volunteer information that was not requested may be interpreted as an attempt by the officer to "help" the prosecution. Some officers try to be the "lawyer for the DA." They volunteer information they think will help the prosecution, but it makes them look like an advocate. Jurors want to believe officers, but if he is acting like an advocate, this makes it difficult.

An effective police witness just answers the questions, then gets out of the witness chair. He doesn't get into long explanations, unless requested and the circumstances call for such. When an officer goes beyond what is asked, it shows bias and demonstrates to the Jury that he is not neutral. If a defense attorney picks up on an officer's willingness to volunteer information, he'll use it to destroy the officer in front of the jury.

Don't overdo it! Answer the question, and then stop. If an officer has three words to say, it is better to say less than more. Get your point across; don't try to shove it down their throat!

Do not get angry

There are two reasons officers should not demonstrate anger toward a defense attorney. First, the officer's image as an unbiased, dispassionate witness will be damaged. Second, the officer's anger may make it difficult to think clearly and to respond effectively to the attorney's questions.

On the other hand, if the officer successfully resists the impulse to demonstrate anger—no matter how obnoxious the defense attorney—the officer's image as a professional will be strengthened. Poise and self-control are qualities that judges and jurors like to see in a law enforcement officer.

Remember that some attorneys *try* to get officers angry on the stand. Don't ever get angry with a defense attorney. They're doing this for a purpose. They're trying to bait you. When an attorney is making you mad, don't give in. He's going to manipulate you by building on your emotions. Your anger will keep you from thinking clearly. If he can get your goat, he's winning.

Officers should also never become sarcastic or irritable. Where officers get into trouble is when they start answering a defense attorney by saying something like "Of *course* I did", or "As I already told you . . .". Or, if the attorney asks the question "Why did your partner go into the store?" and your answer is: "Well, I don't know. You'd better ask him."

Defense attorneys enjoy cross-examination of Officers who think they can outsmart them. If a defense attorney is the least bit effective, he'll win a battle of wits in court with any witness. Most judges will allow an attorney to attack more aggressively when an officer gets smart. But if an officer keeps his dignity, many judges will control the interplay, ensuring the attorney remains civil—or there'll be hell to pay.

"I don't know"

An officer who does not know the answer to a question should say so. There is nothing wrong with answering, "I don't know," or "I can't remember." People generally trust officers who don't know everything, because they are more realistic and more believable. Saying: "I don't know", or "I didn't see it." Is perfectly fine.

There is a difference between "I don't know" and "I can't remember/recall." I don't know means you can't answer the question. I can't remember/recall, means you knew before, but forgot. Absolutes are also just as dangerous. Never, can't, always, are all dangerous as well. Just be clear and say what you mean to say, nothing more, or less.

One interview revealed a case: “[W]here there had been a lot of muggings in a park so this officer was sent in as a decoy, dressed like a bum. He was leaning against a tree when my client grabbed a \$20 bill from his pocket. I didn’t have much of a defense, so at the trial I asked him, “You say you were leaning against a tree. *What kind of tree was it?*” It didn’t make any difference, of course, but instead of just saying, “ I don’t know,’ he became totally unglued and stammered, “It . . . it . . . it was a *wooden* tree!”

“I don’t understand”

Attorneys frequently ask confusing questions. Sometimes they do this on purpose to try to confuse the witness. Some officers will not say they do not understand a question because they think it sounds foolish or implies their stupid. WRONG! Even if the attorney tries to belittle them, the jury will see right through it. Don’t play games with this answer either. It’s better to say, “I don’t understand your question; can you rephrase it?” instead of trying to guess or worse, fall into something that makes a difference, when the attorney did not have a clue. If you don’t understand, you can be sure at least a few jurors probably didn’t understand the question either, so the attorney’s attempt to belittle an officer will usually backfire.

INQUIRE TO AVOIDING TRAPS

There are various ways defense attorneys may try to reduce an officer’s effectiveness as a witness. Here are some common tactics:

Questions about police reports

Sometimes there are inconsistencies between an officer’s testimony in court and what he wrote in his police report. Or the officer may testify about something that was not included in his report. Defense attorneys commonly point out such inconsistencies in an attempt to create doubt about an officer’s credibility.

When this happens it is important that officers not become defensive. If there was an error, simply acknowledge it. One of the hardest things for officers is to admit a mistake. Why? Are they afraid the jurors or the judge won't believe anything they say? Everyone makes mistakes! It's only human. As the California Court of Appeal observed, "What trial judge cannot attest that officers often remember facts on the stand which they neglected to put in their police reports." *People v. Wilson* (1986) 182 Cal.App.3d 742, 752.

A defense attorney put it this way: "All important facts should be in the police report. If not, it may look like the officer is inventing it. If something was omitted which turned out to be important, be humble and admit it. A defense attorney would always rather have the officer try to cover it up, try to patch it up somehow. They can attack the officer with it, if it seems to get to him.

Sometimes an officer will not include certain information in a police report because it did not seem important at the time. If that was why the information was omitted, the officer should just say so. After all, it is not the purpose of the police report to chronicle each and every thing that was said or done. As a defense attorney observed, "Of course officers don't put everything in their police reports. It's not meant to be a report of every jot and tittle that came along." An officer should be defensive about putting everything in.

When officers "lose it" after an attorney starts questioning them about their police reports, they lose more than their cool. The attorney may say, "Now you received training in writing police reports. This is a copy of your report. Can you show me where I can find the information you just testified to? If it's not in the report and it's not vital information, is it. Be careful not to fall in the trap. I suggest trying to explain that the purpose of the report is simply to describe basically what happened to provide enough information to establish PC or to get

the case charged. If you don't get an opportunity, be patient, allow the Prosecutor to do his job on re-direct examination.

It's okay for an officer to explain that the purpose of a police report is to cover the important details, not every conceivable detail. If you really made a mistake, admit it. Everyone can sympathize with a mistake, but not a cover up.

Repeated questions

An attorney may try to cause an officer to give an inconsistent answer by asking the same question several times. Essentially they ask the same thing, but there's a little change in the language. They're trying to get a 'yes' answer to a question which was previously answered 'no.' You've got to pay attention and be careful what you agree to, it may not be what you think.

Summarizing previous testimony

Officers should be especially alert when a defense attorney asks a question in which he or she summarizes the officer's previous testimony, such as, "Earlier you testified that you . . ." The danger here is that the attorney may deliberately or negligently misstate the officer's testimony.

A defense attorney will sometimes paraphrase what the officer said earlier, but it's somewhat incorrect. So listen carefully and if he misstates it, say: "That's not what I said." Don't think, "Well, that's close enough." It is not. However, don't labor on issues of little relevance, this is tricky, but crucial. Avoid an argument over nothing, it detracts from your professionalism.

One example is where an officer is called on a hearing on a motion to suppress in which he testified he stopped the defendant's car because it matched the description of a getaway car in a robbery. The officer testified, "that I stopped the car because it was a Cadillac and it was blue with a red stripe." On cross-

examination the defense attorney said, “You testified you stopped my client because he was riding in a blue car.” You get the picture?

Did you talk to the Prosecutor?

Some defense attorneys routinely ask officers if they talked to the Prosecutor or other officers involved in the case before testifying in court. Usually, the purpose of asking such a question is to suggest the officer was coached by the DA, or met with the other officers “to get their stories straight.”

When an officer is asked such a question, it is important not to get defensive. There is nothing wrong with talking to the Prosecutor other officers before testifying. Prosecutors are supposed to talk with witnesses before going to court, and it is only natural for officers to talk amongst themselves about their cases and their experiences. So if the answer is yes, say so and do not feel as if an explanation or excuse is needed.

According to a defense attorney, “It’s okay to talk to the prosecutor and other officers about the case before testifying. There’s nothing sinister about it. Might as well say so; the ceiling won’t crash in. Sometimes it’s significant. But mostly it’s not.”

Officers should, however, be careful if they are asked whether they talked to the Prosecutor or other officers “about your testimony” or “about how you are going to testify.” Such questions are different because a “yes” answer is more likely to be interpreted as an indication the testimony was rehearsed.

Thus, a prosecutor advised, “Don’t fall for that trap, “Did you talk to the Prosecutor about your testimony?’ One way to answer that question is, “If you’re asking whether we talked about *how* I was going to testify, the answer is no.”

An officer explained, “When I’m asked if I talked to the Prosecutor or other officers about my testimony, I usually say something like, “We didn’t talk about how I was going to testify. We talked about the facts of the case.” Be careful however, any discussion with another may be used as a collateral attack, so this is a double-edged sword.

Times and distances

Attorneys often ask officers to estimate times and distances. This can cause problems if the officer is just guessing. For example, the officer’s guess may be in conflict with estimates given by other witnesses.

A judge offered this advice: “Don’t be forced into guessing. Try to figure out how much time elapsed by going through the things you did.” He gave this example:

BAD

- **Attorney:** How long did it take?
- **Officer:** I don’t know.
- **Attorney:** Was it five minutes?
- **Officer:** I guess so.

GOOD

- **Attorney:** How long did it take?
- **Officer:** I’m not sure, but I think I can figure it out.
- **Attorney:** Okay.
- **Officer:** Well, I got out of my car and walked up to Mr. Felon. That would have taken about 10 seconds. Then I asked to see his driver’s license. He took out his license and I looked at it. That took about 20 to 30 seconds. That’s when he pulled out the gun. So, I would estimate it took 30 to 40 seconds.

A similar process may be used when an attorney asks a question about distances:

BAD

- **Attorney:** What was the distance between my client and the gun?
- **Officer:** I'm not sure.
- **Attorney:** Was it about 15 feet?
- **Officer:** Maybe

GOOD

- **Attorney:** What was the distance between my client and the gun?
- **Officer:** I can't say exactly, but it was about the same distance as I am from you.

REGULAR, PLAIN ENGLISH

There is virtually nothing that turns off a judge or jury as much as hearing an officer speak in that stuffy, military-type style that has unfortunately become associated with law enforcement. This style of speaking is characterized by the use of words and phrases that are unnatural and pretentious in place of words and phrases that are simple and direct. Some examples:

- "I exited my patrol vehicle."

Translation: I got out of my car.

- "I proceeded northbound."

Translation: I drove north.

- "I effectuated a right turn."

Translation: I turned right.

- "I activated my emergency equipment."

Translation: I turned on my lights and siren.

- “After the arrest of the suspect was consummated . . . “

Translation: After I arrested Mr. . . .”

- “I entered the residence.”

Translation: I went into the house.

- “That is correct.”

Translation: Yes.

Some other examples were cited in an opinion from the U.S. Court of Appeals:

“The agents involved speak an almost impenetrable jargon. They do not get into their cars; they enter official government vehicles. They do not watch or look; they surveil. They never see anything; they observe it. No one tells them anything; they are advised. A person does not tell them his name; he identifies himself. An agent does not hand money to an informer to make a buy; he advances previously recorded official government funds. The agents preface answers to simple and direct questions with to my knowledge.” *United States v. Marshall* (1973) 488 F.2D 1169, 1171, fn.1.

One of the problems with such language is that it makes the officer appear cold, distant, and overbearing. “This type of language sets up a barrier between the officer and the jurors.” said a judge. “What you really want is to convince the jury you are just like the guy who lives next door.” Another judge said, “It helps if an officer is relaxed on the stand, talking like a real human being.” A veteran police detective put it this way: “Police jargon is fine for TV and movies. But when accuracy is important, when you want to communicate with judges and jurors, it’s terrible.”

OTHER SUGGESTIONS

Here are some other suggestions from interviews:

- “Appear interested in the questions, as opposed to just saying ‘yes’ and ‘no’ in a flat monotone. Make your testimony alive for the jury.”
- “Don’t lounge in the chair. Sit straight or lean slightly forward. It shows you’re interested. And don’t appear cocky.”
- “Talk to the jury. Look at them when you’re answering questions. Make eye contact with them. Remember, the jurors are the most important people in the courtroom.”
- “Don’t worry when you can’t figure out what the defense attorney is trying to accomplish on cross-examination. A lot of attorneys are asking questions, which are really meaningless. They’re doing it for affect or because they don’t know how to cross-examine a witness. Meanwhile, the officer is thinking, ‘What’s going on here? What’s he up to?’”
- “Don’t make statements that are merely conclusions; e.g., ‘I had probable cause,’ or ‘He didn’t see me.’ Instead, give the facts that caused you to reach this conclusion: ‘I believed I had probable cause because . . .’ or ‘I don’t think he saw me because . . .’”
- “When the court clerk asks you to state your name, just state your name. Don’t give your title and don’t spell your name until the clerk asks you to do so. (‘Sergeant John Doe. D-O-E.’) It sounds showy, and makes the officer appear self-important.”
- “It’s okay to be nervous. I’ve been a cop for 20 years and I still get nervous. It gives you a competitive edge, gets the adrenaline going.”

- “There’s nothing wrong with having a sense or humor in court. Let the jury know you’re human. It’s okay to laugh at yourself.”

Final Testifying Tips:

Refresh your memory (don’t bring anything with you).

Tell the truth

Speak clearly

Don’t discuss the case and don’t violate the rule

Remain professional at all times

Don’t volunteer information

Don’t lose your temper

Don’t argue with anyone

Don’t be in a hurry to answer

Don’t look to the Prosecutor for help, and....

Relax, the truth shall set you free.