TESTIFYING IN COURT

TAKING THE OATH

Comments: This is the formalized procedure of promising to tell the truth. It is routine, but very solemn, hence is viewed with respect. The witness should face the clerk administering the oath, with the right hand upraised about head height.

When the clerk of the court completes administering the oath, the witness should state, "I DO," in an audibly and decisive manner. The oath must be taken in a serious and respectful manner. The witness should stand still and erect and **listen** to the oath, and he should not move or take a "traveling oath," on the way to the witness stand.

After taking the oath, the witness is invited to "take the stand." If the witness chair is on the opposite side of the courtroom from where the oath is administered, the witness should proceed directly there, but should not walk between the attorneys and the judge.

TAKING THE WITNESS STAND

Comments: This is the moment when all attention is directed toward the witness, which has a tendency to create a "stress" situation. Nervousness is to be expected, but some of the tension may be relieved by remembering that a witness is to relate only what he remembers or knows, and that the judge will protect him from undue harassment.

Witnesses are merely presenting facts for consideration and evaluation by the judge (or jury), hence any distracting anxieties, prejudices, or favoritism should be repressed.

The witness should seat himself comfortably erect, without slouching, and with any appropriate notes or reports in his hand.

When asked, he should state his name and position (or address) in a clear manner. "I am Deputy John Williams of the King County Sheriff's Department."

ADDRESSING THE QUESTIONER

The judge is "Your Honor."
The attorneys are "sir" and/or "Yes, Sir"/"No, Sir."
The accused is "Defendant" or "Defendant Jones."
A partner is "Deputy Sheriff Smith" or "Detective Smith."

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ATTITUDE ON THE STAND

Comments: A professional impartial attitude should accompany the officer to the stand.

A witness has a right to expect courtesy and respectfulness. In turn, it would seem that the same attitudes should be manifested by the witness.

Any display of animosity or hostility is easily detected and may influence the decision. Counsel for the defense is charged with the duty to protect the constitutional rights of his client. Although his tactics may assume a Jekyll-Hyde appearance, the defense attorney should not be regarded as the personal enemy of the witness.

Avoid showing prejudice against a defendant in court, even if it is justified. The pervert who committed an act of perversion upon a small child is still entitled to be judged by the jury and not prejudged by the officer.

The purpose of a trial is to rebuild the facts of a criminal act so that the accused can be judged.

TECHNICAL LANGUAGE AND SLANG

Comments: Technical terms and slang are not always understood, hence witnesses should use good English. A clear, firm "Yes, Sir" or "No, Sir" answer is generally desirable and convincing.

When asked "Was he drunk" an answer, "He was drunk" is more effective than he was "stinking drunk."

If a technical term or slang was mentioned, the witness should explain what he meant by the term. Avoid slang, terms of exaggeration, flip answers, sarcasm, or wisecracks.

RULES OF EVIDENCE

Comments: It is too late for an officer on the stand to learn the simple rules of evidence. He must know these rules before he takes the stand, or he may be subjected to embarrassment.

The officer should know that he must not give hearsay evidence, but testify to only things he has observed directly with his own senses. He must know that the law permits him to give hearsay evidence under certain exceptions to the hearsay rule, and these exceptions must be learned in a training school. He must not give opinions, or draw conclusions on the stand, because he is not permitted to usurp the function of the jury.

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Testimony that this man was "reckless driving" is a violation of the rule of evidence against opinions or conclusion, or "I could see the burglar inside the filling station," will immediately classify an officer as not knowing his business. An officer must know that under an exception to the rules against opinions, he can give opinions on speed, sanity, drunkenness, and reputation. Of course, an expert qualified to the satisfaction of the court can give opinions.

CHANGING FROM EXAMINATION TO CROSS-EXAMINATION

Comments: When the witness stays on the stand for cross-examination, it indicates he knows his business. If he seems anxious to leave, the defense attorney will say (in a loud voice), "Just a minute _____, we have a right to cross-examine you!" This is calculated to infer to the jury that the witness is trying to get away and not tell all of the story--that he may have something to hide which may be favorable to the defense.

Generally, a well-trained or experienced witness gets much better treatment on cross-examination than one who has neither training nor experience. A good defense attorney often states "No questions," and does not cross-examine the witness who is very sure of himself. The attorney knows that further questioning of a skilled police officer witness may do even more damage to his client. This has been particularly true when the witness has been qualified as an expert witness on a particular subject.

The direct examination is usually very peaceful and routine. Immediately after the direct examination, the defense attorney cross-examines the witness. The purpose of the cross-examination is to weaken and disprove the case of the prosecution; therefore, the witness can expect a searching cross-examination and testing of his knowledge of the case.

When the questioning shifts from direct examination to cross-examination, the witness should not visibly brace himself for the anticipated onslaught.

Without realizing it themselves, some veteran officers are eager and positive in their testimony when questioned by the prosecuting attorney and without knowing it will assume a hostile and belligerent attitude toward "the enemy" in the form of the defense attorney. Needless to say, this change of attitude implies prejudice to a court and jury.

CREATING EMOTIONAL STRESS

Comments: Persons who are angry or emotionally upset may not think as clearly as when they are calm. It is upon this premise that some attorneys proceed to needle, coerce, intimidate, accuse, harass, and belabor a witness to produce emotional stress. The objective is to disprove

previous testimony, confuse the witness, and to discredit him in the eyes of the judge and jury.

Calmness, composure, and courtesy toward an offensive attorney are the things he wants least of all, and it is a sure way to turn the tables on him. Meeting the badgering type of cross-examination with dignity and courteous answers often begets a dislike by the judge and jury for the discourteous, offensive attorney.

This also requires the witness to know his case and be wary not to become tricked into making unsure statements. Some of these "trick" questions will follow.

AN OBJECTION IS MADE

Comments: Stop talking. Witnesses are responsible only for answers to questions asked. When an objection is made to a question, it then becomes the judge's prerogative to rule on the propriety of the question. The witness must wait for the ruling of the court on all objections before answering.

If the witness completes his answer and the judge then rules that the question is improper, both the question and the answer are stricken from the record. The stigma which would attach to the question would then seem to apply to the answer.

Following is a list of objections to the witness's testimony, which if accurate, will be sustained by the judge:

1. Hearsay
2. Leading and suggestive
3. Asked and answered
   (Sometimes "Cumulative," sometimes not)
4. Cumulative
5. No proper foundation
6. Argumentative
7. Irrelevant
8. Incompetent
9. Immaterial
10. Assuming fact not in evidence
11. Calling for a conclusion
12. Not the best evidence
13. Privileged communication
14. Beyond the scope
15. Self-incrimination
16. Opinion by non-expert
17. No corpus delicti
18. Unintelligible
19. Compound

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TESTIFYING AS TO TIME, WEIGHTS, DISTANCES

Use approximations unless you have actually measured them.

AMBIGUOUS QUESTIONS

Comments: It is proper to ask for clarification. If the question is not clear, the witness should state, in a courteous manner, that the question is not clear to him, or that he does not understand what is meant. This sometimes gives the defense attorney an opportunity to state, "Now officer, this is a simple question _____ ." He is not only belittling the witness, but he may also be downgrading the jury, some of whose members may also be wondering what was meant by the original question. Hence, it would seem better procedure to ask for clarification than to guess at what was meant. If the question was subject to two interpretations, the witness may have answered in accordance with his own concept, and the defense attorney then could argue that the answer was in response to the attorney's meaning of the question.

DOUBLE AND TRIPLE QUESTIONS

Comments: Answer each question separately.

ARGUMENTATIVE QUESTIONS

Comments: Answer calmly and courteously.

Question: "You haven't been an officer very long, have you?"

Comments: No explanation or apologies are necessary. Neither is it appropriate to make flip or caustic answers, such as, "I guess I know a drunk when I see one."

Answer: "I have been a deputy sheriff for _____."

Question: Why are you here today?"

Comments: That is an attempt to elicit an answer such as, "To convict the defendant," which should show that the witness is a "volunteer" witness and anxious to convict.

Answer: The witness should state, "I am here by order of the court."

The Answer "Yes" or "No" Problem

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Comments: This is not a legal requirement.

Analyze the question first. It is usually best to answer "Yes, sir," or "No, sir," or in as few words as possible. There are many questions that cannot be properly answered "Yes" or "No" such as, "When did you stop beating your wife?" Answering yes or no admits that he witness is a wife beater.

However, elaboration is possible if a shorter explanation will not answer the question.

It is quite proper for the witness to address himself to the judge by stating: "I cannot answer that question yes or no. May I have the court's permission to explain?" Do not make such a request to opposing counsel since this may appear to be argumentative or evasive.

Answer "yes" or "no." The defense attorney may ask you a question and then say, "Answer yes or no." This is a favorite trick of the cross-examiner to try to force you to give a "Yes" or "No" answer. Many times such questions cannot be answered correctly that way. If an attempt to do so is made, the succeeding questions will proceed to show how the "yes" or "no" answer could not be true, and thus the witness becomes impeached.

This predicament can be avoided if the officer will say, "I cannot answer the question correctly by either 'yes' or 'no' but I am willing to state the facts as I know them." The cross-examiner is then in the embarrassing position of apparently withholding the facts if he does not let the officer answer in narrative form. However, if the question can be answered properly by "yes" or "no," a demand for such an answer may be reasonable. If the question is such that it cannot be answered fully by yes or no, the witness may ask the court if he must answer the question that way, explaining that neither would be the correct answer without further qualification. The court will probably say that the witness does not have to answer the question by "yes" or "no" because <u>there is no rule of law requiring a "yes" or "no" answer</u>. If he does require you to answer in that form, answer the question as best you can and let the prosecuting attorney bring out the full information later by questions or re-direct examination.

Question: "Do you mean to say that ...?"

Comments: An attempt is being made to put a different interpretation on what you have just stated.

Question: "You're not sure are you?" or "You're not POSITIVE are you?"

Answer: "To the best of my recollection, that's the way it happened -- or that's what I observed, sir."

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Question: "As a matter of fact, officer, wasn't it this way...?"

Comments: This will be followed by a statement just the opposite of your testimony. Sometimes the seemingly friendly attorney will attempt some quasi-ingratiating prefix to a false statement, such as, "May I suggest to you that it happened this way...?" Another attempt to mislead the jury would be, "I submit to you that the real facts were...."

Question: "Did you enjoy watching (such and such events)?"

Comments: In sex and perversion cases, the defense attorney may attempt to make the witness appear as a passive participant to the incident.

Answer: "No, I found it repulsive."

Question: "Why didn't you stop it?" (Referring to witnessing some lewd or perverted act.)

Comments: The police function in the judicial process is to secure sufficient evidence for presentation in court.

Answer: "The complaints I had were not for this act." "I was watching for a felony to be committed." "I stopped it as soon as I could."

Question: "Have you discussed the facts of this case with anyone?"

Answer: "Yes, sir with witnesses, my partner, the prosecuting attorney, my supervisors."

Comments: The defense attorney may shout at the witness, "Whom have you talked to about his case, and who told you to testify the way you have?" The question catches witnesses everyday. It is asked in an accusing manner. An answer may be: "I have talked with my supervisor, with other officers, and with witnesses concerning this case, but no one has told me how to testify. I am here to tell the truth." It is really two questions in one: "To whom have you talked about his case?" and "Who told you to testify the way you have?" Sometimes the question is put in another form: "To whom have you talked about this case? Shouting at the witness in an accusing manner as if it were wrong to speak of it. The witness may get the idea from the accusing way in which the question is asked that "I've talked to a number of people, and all the time I should not have done so." This is an effort by the defense attorney to trick the witness into saying "no" as if it were wrong to discuss the case with someone else.

If you answer that you have not talked this case over with the

prosecuting attorney, you thus make it appear that you are lying. The best way to handle this question is to answer it by saying, "Yes, I discussed it with people," and name them. It is not wrong to discuss a case with the proper persons. That is what a police officer has to do to prepare his case and to get evidence. The cross-examiner knows that the prosecuting attorney would probably not use you as a witness unless you had talked the case over with him beforehand so that he would know what you can testify to.If the defense attorney can trap a witness into telling a falsehood about a minor item, it tends to discredit all the testimony.

Question: "Didn't you and the prosecuting attorney (or your partner) get together and frame this whole thing?"

Answer: "Sir, you have asked me two questions. As to the first, we did meet to review this case from my original notes. As to the second question, 'Did we frame this whole thing?' We do not frame people--we merely present facts for the judge and the jury to decide."

Question: "Didn't the prosecution tell you what to say?"

Answer: "He told me to tell exactly what happened."

Question: "Didn't he warn you about anything?"

Answer: Yes sir, he advised me to stick to the facts."

Question: "Have you rehearsed your testimony before coming to court?"

Answer: "No, sir, I have refreshed my memory by reviewing my notes--(or arrest reports, or transcripts)."

Comments: It is a recommended procedure and the mark of a good officer to come to court prepared to relate known facts. This demands an examination of pertinent notes, documents and physical evidence before court presentation in order to refresh your memory.

Question: "You stated you smelled alcohol on his breath. Just what is the odor of alcohol?"

Comments: Pure alcohol has no odor.

Answer: "I smelled odors associated with drinking alcoholic beverages." "He had an odor like drunks I have arrested," or, "He smelled like persons whom I have seen drinking alcoholic beverages."

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Question: "What does opium smell like?"

Answer: "OPIUM" (Nothing else smells like opium.)

Question: "What does marijuana smell like?"
Answer: "MARIJUANA" (Nothing else smells like marijuana.)

Question: "You don't like people who drink, do you?"

Comments: This would include over half the people in the world.

Answer: I don't mind social drinking--as long as it does not endanger or hurt people."

Question: "You want to see this defendant convicted, don't you?"

Comments: The cross-examiner may ask, "Do you want to see this defendant convicted?" By this question he is attempting to make you appear prejudiced in the eyes of the jury. Proof of an impartial, but fair attitude on the part of the witness may be shown when the question asked would call for an answer favorable to the defendant. The witness should not hesitate or be reluctant to mention facts favorable to the defendant.

Answer: "If he is proven guilty, he should be convicted," or, "I am here to testify as to the facts as I know them, and the decision rests with the jury (or court)."

Question: "Have you ever been drunk yourself?"

Comments: It is the duty of the prosecuting attorney to protect his witness from unfair questions, but most prosecutors are reluctant to interfere with the right of the defense to a complete cross-examination. This is why prosecutors are slow to defend their own witness. This question should be objected to on the basis that the officer is not on trial. If an attorney becomes so offensive and unfair that the officer feels he is being abused, and the prosecuting attorney fails to object, then the officer should assert his right to appeal in court.

Answer: "Your honor, do I have to answer such a question?" (The duty then arises in the court to protect the witness from objectionable, offensive, or unfair questions." If the question stands--answer it.

Question: "What is your arrest (or ticket) quota every month?"

Answer: "We do not have a quota. I can only arrest when I have evidence of a

law violation."

Question: "You dislike my client, don't you?"

Answer: "I feel sorry for any man in trouble."

Question: "You say you know this person well. Just tell me where he lives."

Comments: The witness should know.

Question: "Isn't it true you arrested this man because you were mad at him?"

Answer: "No, sir. I arrested him for breaking the law."

Question: "Now officer, you have testified that ...."

Comments: This is often followed by a misquote of your previous testimony. It is quite possible that the witness did not testify exactly as the cross-examiner quotes, that the cross-examiner may be misquoting the testimony, and that the witness by this question is being led into a contradiction. **Don't ever let a cross-examiner misquote you**. **Call it to his attention immediately if he does.** You can do so by saying, "Sir, I am sorry: I have not made myself clear to you. You seem to have misunderstood. The facts in my testimony are theses...." Then repeat the true facts as you said them. By doing so, you bring the unfair tactics to the jury's attention and by repeating the true facts as you said them; you re-register them on the minds of the jurors. If the cross-examiner stops you, the case of the prosecution may be strengthened because the jury may believe that the cross-examiner is afraid to have you again state the facts correctly.

Question: "Why did you buy the defendant's wrist watch?"

Comments: Calculating criminals sometimes try to sell a real bargain to the arresting officer to weaken the case later. **An officer must not only avoid evil but must avoid the appearance of evil**. Never become involved in "deals" or "bargains" with an arrested person.

Question: "What if I told you your partner said...?"

Comments: This type of question is usually a trap. The attorney does not say that your partner said anything.

Answer: "I didn't hear my partner's testimony. I can only tell you what I know myself" or "I don't recall that he stated that" or "I can only state what I saw (or heard)--not what my partner saw."

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Question: "Did your partner tell the truth, or are you telling the truth?"

Answer: "What I have told you is the truth, and I'm sure Officer _____ told you the truth to the best of his knowledge" or "I can only relate the facts as I saw them. "I'm sure Officer _____ did the same."

Question: "Doesn't your testimony (or statement) conflict with what has been testified to here in court?"

Answer: "To the best of my ability I'm relating what I observed and recall."

Comments: Officers are sometimes concerned that the testimony of each officer will not correspond with that of every other officer. Wide differences between the testimony of different witnesses would perhaps minimize the credit to be given to such testimony; but if testimony which from its nature is open to different explanations is too much the same, the danger is equally great. Each officer should not try to state the facts which he knows is the identical way that every other officer does. Whether the evidence of each officer is alike or different, defense counsel is sure to criticize. If too identical, he can claim proof of error. Therefore, if the officer keeps his mind on what the facts are as he know them, without trying to be consistent with the statement of every other witness, he will avoid confusion.

Question: "You weren't too sure about this case a few days ago, were you?"

Comments: The cross-examiner may ask accusingly, "When you were called as a witness in this case, isn't it true you said to someone, 'I don't remember much about it.' Yet today in the courtroom you tell your story in detail. How do you explain that?" It is possible that you did say something like that, but you can state that you have gone through the process know as "refreshing recollection." Perhaps you revisited the scene of the crime, looked into your notebook to recall dates, or discussed the incident with other witnesses--all of which are perfectly proper. In fact, it is about the only way in which witnesses can recall details and make sure they are telling the truth.

Answer: "That's right, but since then I've reviewed my notes, read the confession, etc."

UNANSWERABLE QUESTIONS

Answer: "I can't answer that." "I don't know."

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MAKING A MISTAKE

Comments: Correct it immediately, or as soon as remembered. An honest correction impresses the court and jury of the truthfulness of the witness.

Answer: "I have made a mistake, and I would like to correct it now. I do not remember whether it was raining at the time the accident was investigated."

Question: "You say you believe so-and-so; we are not interested in what you believe. We want you to relate what you know to be fact."

Comments: Give no opinions or conclusions unless asked for them. These are usually when the witness qualifies as an expert witness or as an exception to the hearsay rule.

Question: "Have you read (or hear on the radio, or seen on TV) any thing about this case?"

Comments: There is no law against learning about a case, nor is it improper. Hence, "Yes sir, I read (head or saw) about it in the newspapers," would be proper.

ON COMPLETION OF TESTIFYING

Comments: After you have finished testifying, leave the courtroom unless you have been retained by the court or by counsel. Staying in the courtroom after the work of testifying is over and visiting with the other officers creates the impression that you are over-zealous and perhaps too much concerned with the outcome of the case.

It is permissible to respectfully ask the court, "Your honor, may I be excused?" If permission is granted, the witness may leave. If permission is not granted, he must remain in or near the courtroom until officially excused.

A witness who has been cross-examined should not try to testify to anything he may have forgotten. However, after leaving the stand, it is possible to jot down on a piece of paper what was omitted and hand it to the prosecuting attorney. It is his job to evaluate evidence, and he will request the judge to recall the witness if he deems it appropriate.