



# “Will You Please Take the Stand?”

## *Courtroom Testimony for Law Enforcement Officers – Part II*

By David Berger

### **Preparing for Testimony**

**Police Reports:** The earliest phase of preparation for trial is in the writing of the report. The officer must consciously, as he is writing, be aware of the fact that he will potentially be required to testify from that report. Make certain, therefore, that the report is accurate, thorough, and extremely detailed. The testimony may not occur for a considerable period of time, during which the officer will have been involved in many other cases and have written numerous reports of similar events.

The report from which he will testify, therefore, must be sufficiently detailed to refresh the officer's memory regarding that particular case and his involvement therein. Absolutely nothing must be left to conjecture. If an officer is forced to assume he performed some function, that assumption will be addressed by the defense counsel and subjected to criticism that certainly will stand out in the jury's memory. Methods of handling that situation will be discussed later.

Upon learning that testimony will be required, the officer should first obtain a copy of the police report. Department or agency policy may differ; however, this author recommends that the officer review only that portion of the report which was written by him or her, or their partner who wrote the report on behalf of both of them. If the particular phase of the event required the participation of other units, then those reports also should be reviewed. It is not necessary to review

the entire file, including, follow-up investigation, witness interviews, forensic procedures, etc. The reason being is that the officer may learn information that developed at a later time under more intense circumstances, which may lead the officer to interpret some of the actions he observed in a different light. Also, if the officer has no knowledge of subsequent investigative procedures or actions that occurred outside his presence, he cannot testify to those procedures or comment upon them.

It not only relieves the officer of that responsibility, but it also denies the defense other areas of inquiry at that time in the trial; areas in which the testifying officer is not sufficiently knowledgeable to answer without committing some error which would benefit the defense. It is not incumbent upon an officer to follow-up on a case unless he is specifically assigned to do so. The only subjects where the officer can, or should, testify to are those events with which he or she was directly involved and are contained in that portion of the entire police report file that the officer created.

**Discuss With Partner:** The officer's partner will also be called to testify and, for that reason, the report which was jointly composed, should be reviewed together. Under normal circumstances, both officers will compose a single report under joint signatures. If the responding officers were in separate one-officer units, however, they may be required to prepare individual reports or



department/agency policy might simply require each officer to prepare a separate report. Under any and all circumstances, the officers should discuss the report(s), and if there appears to be any significant discrepancy, the matter must be discussed first with their supervisor and, finally, with the prosecutor.

Obviously, it is always more appropriate if all the officers, engaged in any one phase of the case, are consistent in their observations of what occurred. Inconsistencies, always being sought by the defense counsel as an area that he knows very well, will reflect badly on the People's case.

**Notes:** If the officer makes and retains any handwritten notes at the scene of the incident—notes which were used in the preparation of the report—those, too, should be reviewed for any additional memories of the event they may trigger. Whether or not to keep those notes has always been a topic of concern. On one hand, as indicated above, those notes may trigger important memories; on the other hand, they may also contain some data that was not considered appropriate or relevant to the issue, thus not transferred to the final report.

The problem, under the latter situation, is that those notes are also subject to inquiry and possible presentation at trial, and could prove embarrassing only because it will enable the defense counsel to place the officer on the defensive regarding his entries on those notes. Ultimately, the decision should rest with the officers' superior or agency policy. The district attorney's office might also be consulted for their input, which may differ from one jurisdiction to another.

**Meet with Prosecutor:** As was indicated earlier in this article, the prosecutor has a great many problems to deal with in preparation for trial, along with in many cases, a large case-load to contend with. He or she many times passes-off the officer as one who has testified on numerous prior occasions, knows his job, and really doesn't require a great deal of preparation. Maybe even the officer feels that way. Both of them are, of course, incorrect.

The officer's testimony is extremely important to the case and, if it is not in the areas of experience or professionalism, which are of concern relative to the presentation, there are other

considerations. The prosecutor knows all of the considerations; he is simply remiss by virtue of the existent trial pressure — a common occurrence.

With all of the data the prosecutor is expected to contend with, in its totality, small details of the officer's testimony may be overlooked; therefore, it is important to review that testimony. It is also important for the prosecutor to have some input as to the officer's presentation personality, so that questions may be asked in a manner which will provide the officer the best forum possible for his answer. Then, depending on the tactics the prosecutor is planning to employ, tactics which are determined by knowledge of the defense attorney and his tactical approach toward interrogating witnesses, along with the nature of the offense and suspect being tried, the officer's manner of testifying must be carefully orchestrated.

Should he direct his answers toward the jury or would it be preferable to merely have the jury present during a technical discussion between two professionals, the attorney and the officer? Does the prosecutor wish the officer to play it close to the belt and answer only "yes" and "no" to direct questions, or would it be appropriate because of the officer's personality and expertise to embellish his answer? Should that method be employed during direct examination or employed ONLY during "direct" and revert to the "yes" & "no" technique for cross-examination? The possibilities are endless and, hopefully, some time will be taken for their consideration. In any event, there should be communication between the prosecutor and police officer witnesses prior to the trial, and the officer should not hesitate to initiate a meeting, with his superiors' approval of course. Cases have been lost due to poor preparation over and above those where the accused was, in fact, innocent.

### The Trial

The judge gives instructions to jurors regarding witnesses, immediately prior to the beginning of deliberations: "The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements, and the strength or weakness of his recollections."



### Appearance and Attitude On the Stand

Next to the content of the officer's testimony, his or her appearance is the most important factor of the presentation. The jury will see the officer prior to hearing him and, it is only human nature to begin, at that point, to derive an opinion relative to his testimony. If the officer is sloppy, unkempt, slouches, walks uncertainly; if his speech is poor or weak and he stammers while on the stand, those qualities will affect the content of his testimony.

If the officer is abrupt, arrogant, or flaunts his authority, he will be viewed in a negative manner... which will seriously affect the content of his testimony. Initially, unless there is a strict department or agency policy as to the manner of dress, the prosecutor should be consulted as to how he would prefer you to appear in court, in civilian clothes or full uniform.

At all times while in the courthouse, be aware that any person within your view may be a member of the jury. Never smoke in the hallway outside the courtroom, whether before trial, during breaks, or after the scheduled appearance. Too many people today are sufficiently anti-smoking advocates, and unfortunately, they immediately derive an extremely poor impression of the person they observe with a cigarette. The author, who has been an expert witness for well over twenty-five years, does not even enter a restroom on the same floor as the courtroom, for fear of bumping into a juror under those circumstances. For some reason, it tends to take the officer off his pedestal and the respect level diminishes.

Regardless of whether the officer is in uniform or plainclothes, make certain the clothing is clean and freshly pressed, shoes are shined. Men should be clean-shaven or, if mustache and beard is worn, they too should be neatly trimmed. Hair should be trimmed and neatly combed. Women should not wear heavy makeup, but that which is in "good taste." Civilian clothes for men should be a business suit, white shirt and tie or conservative sport jacket, shirt and tie. Do not display any religious or political emblems; they certainly will offend somebody. If trial is held during the summer months, when some areas of the country are extremely hot and humid, jackets may be eliminated, but the tie remains and long sleeves are preferred. The courtroom will be air-conditioned and sleeves can be rolled up upon leaving the court.

Speech should also be considered under "appearance." Make certain you keep your voice volume "up," so that the jury can hear your responses to questioning. Wait a second or two after the question has been posed, especially during cross examination. This will enable the prosecutor to object to the question, then wait for a ruling by the court prior to answering—if you, in fact, are able to answer and the objection has not been sustained. Waiting a couple of seconds also allows the officer to prepare his answer so that he doesn't always begin with an "uhh," or in some other manner stammers.

This always gives the impression that the officer may not be certain of his answer, or to some pseudo-students of "body language," may suggest the officer's attempt to devise a false or misleading answer. Taking a moment to consolidate one's thoughts is totally appropriate and makes for an even, flowing context of intelligence that is convincing, leaving the listener with the knowledge that the speaker is firm, accurate, and certain of his or her facts.

Finally, please be totally aware that the jury will commence to evaluate the officer as a witness from the moment his name is called, during his or her approach to the stand, the manner by which he takes the oath, and how he sits in the witness box. The expression on the officer's face is important. "Stern" is not acceptable; it imparts authority in an arrogant manner. This is not the place to practice "command presence." Upon the process of sitting in the witness box, it is appropriate to acknowledge the judge with a brief glance, smile and nod. The same would apply to the jury as well as the counsel table. The effect is to present you in a more human perspective and, since you are a "cop" in the jury's eyes, "humane" could easily replace "human." They will receive the officer's testimony better when they feel comfortable with their presence.

**Direct Examination:** The officer will be called to the stand by the prosecution who will attend to some "housekeeping" prior to going into the details of the officer's participation. He will elicit from the officer details regarding his education, training, and experience on the job. This is necessary in order to inform the jury of the officer's professional qualifications to perform his function and to give credence to his testimony regarding his conduct and observations during the events



leading to the accused's arrest. Following those preliminaries, the prosecutor will lead the officer through the details of his activity. He may do this in one of the following ways: ask you questions which require a direct answer, such as "yes," "no" or "one hundred yards," or he will request that the events be presented in a narrative form.

It is important that all answers be consistent with the information contained in the officer's portion of the police report. It is important because the defense counsel will have a copy of that report and will be carefully looking for any inconsistencies with which he may place you on the defensive and possibly impeach your testimony.

The officer's responses should be firm and definite regarding the accuracy of his observations. He should be careful to consider the level of his language with regard to technical phrases or "Police lingo." If a technical term is necessary, it might be appropriate to turn toward the jury and explain that technicality in layman's terms. Usually, the prosecutor having prior knowledge of the answer will request that the officer explain the term to the jury. Otherwise, attempt to retain the language of the testimony in a manner understandable by the jury members.

Also, do not use terms which might be offensive to the jury simply due to their lack of understanding of police lingo. An example would be: "We hooked the suspect up prior to placing him in the unit." A more appropriate statement for the jury would be: "The suspect was put in handcuffs before placing him in the patrol car."

**Cross Examination:** The officer will be prepared for the direct examination procedure because the thrust of the testimony will have been carefully prepared in advance with the aid of the prosecutor. Cross examination, however, is considerably more difficult as the defense counsel will attempt to weaken the impact of your version of events leading to the arrest of his client. He will have all of the information regarding this case at his immediate disposal. He will have read all of the police reports; the witnesses' statements included, along with interviewing all of the other percipient witnesses and, in all probability, having taken the deposition of all of the forensic people. His private investigator, many time a former police officer, will have conducted an independent investigation into the circumstances of the event. He WILL be prepared. His job (once again) is to make the

"People" prove their case against his client, or alternatively, attempt to prove his client's innocence. His approach toward doing his job may be vague to the officer on the stand, primarily because the officer is not aware of all the data and information at the defense's disposal. Under normal circumstances, the officer's knowledge is limited only to that which he obtained when in direct contact with the suspect. What happened prior to that occurrence and what occurred subsequent to his involvement is unknown, other than what he may have been told, read in the paper, or seen on the 10 O'clock news.

The defense attorney will also probe other issues, which although may appear irrelevant or even distasteful to the officer, are areas of inquiry that are proper and normal from the perspective of the defense. Does the officer have any latent prejudices that may have prompted him or her to suspect the attorney's client? Did those biases prompt the officer to "fudge" a little when developing the "probable cause" issues which permitted the stopping, searching, and interrogating of the suspect?

In all probability, those matters are all provoked by statements the suspect made to his attorney who is bound under the attorney-client relationship to consider as potentially accurate. Many suspects, knowing they are guilty, will exaggerate, or even outright LIE to their own counsel believing that the lawyer has to be convinced of his innocence in order to defend him properly. Actually, that is a false premise. Knowing the truth would enable the defense lawyer to consider a plea bargain to a lesser degree crime in exchange for a guilty plea by the defendant. Also, as unfortunate as it may be, and as rare as it is, occurrences of a police officer's prejudice and bias affecting his judgment in the field has occurred.

In any event, the above areas of inquiry do occur. They should be expected and, once again, it is only the defense attorney doing his job. It is nothing to become upset over. It is not intended to be offensive to the officer and should not be taken personally. If the officer shows any sign of distress, irritation, impatience, or anger, the defense counsel will press the issue, minimizing the effect of the officer's testimony.

The defense is not permitted to harass the witness in any way, shape, or form, other than being extremely precise and insisting on direct responses to the questions. He may also probe fairly forcibly and go into detailed responses,



but the moment his tactic becomes repetitive or unreasonable in any manner, the prosecutor will certainly object to the line of questioning and that objection will normally be upheld.

It is most important that the witness never argue with the defense counsel. Arguing or displaying emotion will place the officer on the defensive, making an extremely poor impression on the jury. Don't forget that should the officer be placed in an uncomfortable or compromising position because of the nature of the defense's aggressive questioning, the prosecutor should be able to correct any errors or possible misinterpretations to the jury during "re-cross" or "re-direct" examination.

The best tack to employ with an aggressive examination, or any examination for that matter, is to wait a moment before answering; be extremely patient and courteous to the defense, occasionally addressing him by name (i.e., "Yes, Mr. Jones, I am certain it was 10:15pm, I did check my watch at that time."). Remaining calm under the stress of an aggressive defense counsel is extremely impressive to a jury; and the chances are that when counsel realizes he is unable to irritate the witness, he will change his tack so as not to offend the jury members.

When being examined by the defense, always answer only the question, directly, without any embellishment. If the question requires only a "yes" or "no" answer, answer simply "yes" or "no." Counsel will follow up if he desires. The danger of expanding the answer with an explanation is that it will undoubtedly suggest further areas of inquiry and the officer may not be fully prepared to deal with those areas.

"I don't know," is a perfectly correct response to questions when the officer does not know the answer. Some witnesses fear that they will appear unprepared or unprofessional if they don't know the answers to all questions. That fear or assumption is in error. "Sir, I don't know the answer to that question," actually has the effect of portraying the officer in a more credible manner, increasing the effectiveness of his testimony in its totality.

The witness stand is nothing to fear or be apprehensive of as it is the culmination of all the preliminary police work and team efforts of a lot of people attempting to present what they believe to be proof of the accused's guilt. The trial is simply a process, and the police officer's testimony is an integral part of that process encompassing the two elements of preparation and presen-

tation. The only thing expected of the officer is to re-affirm, verbally and audibly, that which he has already reported in writing; to present that testimony in a manner which is articulated honestly and professionally; and to appear confident, but not to assume the image of an advocate. That is the job of the attorneys. ★

*David L. Berger is a Forensic Consultant in law enforcement and private security; serving as an expert witness in those disciplines since 1972 in both criminal and civil courts throughout the United States. He first began court testimony in 1955. He is the author of several books. One of them, "Industrial Security", has become a standard text in colleges and universities for over twenty years. During his 45 year career, he has served as a detective with the Los Angeles County District Attorney's Bureau of Investigation, a reserve federal police officer, a volunteer with the Los Angeles County Sheriff's Department, and a Specialist Reserve Police Officer with the Los Angeles Police Department. He is currently a volunteer with the Las Vegas Metropolitan Police Department assigned as an adjunct instructor teaching this course for Advance Training. His co-instructors are David Nichter, an instructor at UNLV and CCSN, and Dep DA Cheryl Kosewicz.*

## Holiday Carols and Songs

(continued from page 7)

1. White Christmas
2. Chestnuts Roasting on an Open Fire
3. All I Want For Christmas is  
My Two Front Teeth
4. O Holy Night
5. It came Upon a Midnight Clear
6. O Come, All Ye Faithful
7. Away in a Manger
8. Deck the Halls
9. Little Drummer Boy
10. We Three Kings
11. Silent night
12. God Rest Ye Merry Gentlemen
13. Santa Claus is Coming to town
14. Let It Snow
15. Go, Tell It On a Mountain
16. Rudolph, The Red-Nosed Reindeer
17. What Child Is This?
18. Joy to the World
19. Hark! The Herald Angels Sing
20. The Twelve Days of Christmas ★