

# ***Courtroom Testimony for Law Enforcement Officers***

## **Part I**

**By David L. Berger**

**[Editor's Prologue** – Many seasoned veterans of law enforcement will echo one of the sentiments of frustration to being a cop when they give an explanation of the court system as, “We risk our lives to catch ‘em and lock ‘em up, then the courts let them go on a technicality.” That is exactly why law enforcement organizations must change one of the ways they go about training their officers.

It's important that cops are taught how to protect themselves while performing the duties involved in patrol, but it's every bit as important that today's cop is also trained how to survive the courtroom. It's well established that cops face as much stress as anyone in the private or public sector. But when you think about the fact that most cops are more likely to deal with stress as the result of an experience in court, rather than a critical incident like a shooting, it becomes clear that law enforcement organizations are not doing nearly enough to prepare cops for the emotional consequences of the courtroom experience.

How much time did you spend at the academy learning how to deal with courtroom demeanor—especially when it comes to coping with a few obnoxious defense lawyers and occasionally antagonistic judges? Police officers must be trained to look at going to court as an opportunity, not an inconvenience. Cops must see their testimony in the same way they see their weapon and handcuffs, as tools with which to fight crime. Too many of us think our job is done after the arrest is made. But if we want to see the successful conviction of the criminals we lock up, we have to start thinking differently about the other end of the system.

*This is the first of a two-part series written to address an oft-times overlooked necessity of new officer academy training. The author, 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. His 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 a staff research assistant for the Training Wheel and teaches a course in “courtroom procedures” for In-Service Training.]*

### ***“Will You Please Take The Stand”***

Recently, while preparing for a class in courtroom testimony at the Metropolitan Police Department's In-Service Training Section in Las Vegas, Nevada, I took some extra time to make inquiries of officers as to their apprehensions regarding their appearing in court. Those apprehensions, ranging from lack of trust in the system to outright fear, were not at all surprising. Considering that the feedback was fairly consistent with knowledge I already had been exposed to in an informal manner, it was apparent that officers throughout the country universally experience those apprehensions.

The reasons are varied. Some of the responses I received were:

“Why bother? The D.A.'s gonna strike a deal and plea bargain the suspect out, regardless of how much I prepare and no matter what I say.”

“Oh, yeah ... and let some sarcastic defense lawyer make a fool out of me? And the worst part is that those naive jurors will swallow all that nonsense.”

“I'm just scared to death of talking in front of all those people.”

“I can’t believe what a waste of time it is, especially all the waiting—sometime for hours before they call you.”

“Most judges tend to favor the suspect. They forget what they did and worry about their civil rights being violated.”

“The press and TV misquote everybody and the whole thing is actually tried in the papers and on television. They’re only looking to exaggerate everything and sell papers.”

The most amazing thing I DID NOT HEAR was a nice word of any kind regarding the process. There are a lot of shoulders being shrugged, wry smiles, and grunts; most just sort of passed-off the question and were blatantly non-committal. In any event, I made the decision to change my program from its original schedule and begin with a re-explanation of what the courtroom phase of our justice system is all about; what the people who are involved with the process really do; and what everybody’s job actually is (or at least, what it’s supposed to be).

All of this will be from the perspective of the “witness” ... us. I am certain some judges and district attorneys may take exception to my perspective, but after over 40 years of testifying both in criminal and civil court, the past 27 years as a “forensic expert witness,” I believe my approach is realistic, practical, and above all, designed to take the fear and apprehension out of the process. Hopefully, this will enable the law enforcement officers to relax more, testify in a manner required by the prosecution, deal more effectively with the defense counsel and , above all, make a more palatable, believable, and informative presentation to the jury.

Following that phase of this program, we will then delve into the techniques of actual testimony; the preparation process and some philosophy to help the officer cope with the defense counsel. This is not intended to insult the journeyman peace officer who has years of court time under his or her belt, but simply to attempt to remove the accumulation of debris that makes the process so difficult and tedious. Instead, it is all toward the goal of increasing convictions based on the presentation of evidence by professionals and not falling into the traps and pitfalls exhibited in the O. J. Simpson trial. We will, of course, only obtain those convictions – when the suspect is, in fact, guilty ... right?

### **The Prosecutor**

The prosecutor, normally a deputy district attorney or city attorney, is seated at the council table directly in front of the bench. He may have a second attorney present. For whatever reason, it has been decided to present a case for conviction of the suspect in “front” of a judge or jury. Normally, the reason is that the district attorney believes the suspect is, in fact, guilty of the crime for which he or she is accused, based on the evidence compiled by the local authorities and supported by further investigation by the D.A.’s office. The prosecutor is, therefore, an advocate. He believes in the guilt of the accused. His job is to represent the “people” and attempt to obtain a conviction, thereby removing the suspect from being a further threat to the people he represents (i.e., the public).

Contrary to the police who merely apprehend when they suspect an individual is guilty of a crime based on their observations and investigation, it is the job of the district attorney first to review all the data and make a judgment as to the suspect’s degree of guilt and for what crime; secondly, to determine whether the evidence is sufficient to support their contention of guilt in a court of law; thirdly, to coordinate the elements of their presentation in court; and, finally, to actually participate in the presentation of evidence at the trial. The deputy district attorney, who is the trial attorney, is the “captain of the ship.” His training and experience prompts him or her to organize the people’s case in a manner which will present the case in the most convincing manner to the judge or jury.

The prosecutor must have the technical knowledge of the criminal law sufficient to insure that legal mistakes will not be made which could lead to motions for a new trial, impeachment of his witnesses, or reversal of a conviction by the appellate courts. The prosecutor must also delve into the psychological arena – first in the selection of jurors and, secondly, in the manner he presents his case to them. Legal research, selection of evidence, and the manner by which that evidence will be presented (photos, testimony, demonstrations, etc.), the interviewing and preparation of percipient witnesses – not only for the case at issue, but many times along with an overburdened caseload - all tend to sometimes make the prosecutor slightly remiss when it comes to preparing his police witnesses. “After all, they’re

professionals. They've testified before. They know what to do and what's expected of them," he rationalizes.

It is all of the above stress, the considerations of the many elements of the trial process and, above all, what the district attorney believes are the strengths and weaknesses of the people's case that guide his decisions. His estimation of the potential of obtaining a conviction or the unacceptable alternative of losing the case and returning a criminal to the streets is what many times leads to a plea bargain situation. ANYTHING, just to put the suspect away, if only for a little while; to get him into the corrections system for future identification and limited control through the parole or probation processes.

At trial, the prosecutor will guide the officer through his testimony from the officer's background, training, experience, to the observations that the officer perceived relative to the case. Those questions will be carefully orchestrated, guiding the officer in his presentation so as to impact the jury favorably and help them understand what sometimes is highly technical data.

### **The Defense Attorney**

According to most law enforcement officers, defense lawyers are the "lowest forms of human life" – Shysters; conniving "low-lives," without conscience who'll lie and do anything to get the "scumbag" criminals they're representing acquitted. Sometimes, that true! On the other hand, the defense lawyers believe policemen will lie on the stand either to punish a poor victim who is guilty of nothing more than "contempt of cop," or to protect one another and cover their own "rear-ends."

Realistically, however, the defense counsel's primary functions are to conduct his own private investigation toward the goal of possibly proving his client is actually innocent of the charges brought against him, or that circumstances created an environment whereby an inaccurate conclusion was arrived at by the authorities. When that is not possible, it's to make the prosecution prove its case, leaving no doubt as to the suspect's guilt. This is accomplished by questioning the witnesses to make them re-examine their observations when faced with newly-acquired information or data, and to question the validity of physical evidence through the manner by which it was acquired and processed.

In truth and fact, even though they are tough in their approach and even though there are some lawyers who fit the first paragraph above, most follow the rules and are totally supportive of the system. Most are ethical professionals simply doing a job defending an accused person under the constitutional provisions of our system of government. Their tactics may not always be to our satisfaction, but they believe as much in their client's innocence as the officer is convinced of his guilt. Don't let him get you down when he is cross examining you. He will attempt to unnerve you. He will test your resolve. He will try to convince the jury that you are confused about your observations, that you could have made a mistake. He does not know you and is not attacking you personally. Do not allow his tactics to affect you in any way. Expect it. THAT IS HIS JOB!

### **The Judge**

The man on the bench is "THE MAN." If you, as a police officer, think you have power – you don't know what power really is. That man sitting up there can fine you a portion of your hard-earned income or sentence you to time in jail simply for "contempt of court" by your refusing to answer a question, if he feels it should be answered. He literally has the power of life or death. Most judges (whom I have known), regardless of the type of attorneys they were, suddenly become aware of the responsibility of that power and appear to live up to that exalted position. Others, very much in the minority, do bring some of their prejudices and priorities with them. Occasionally, one of those prejudices may be involving relationships with law enforcement, and that may be manifested in their rulings. It is rare, but it does occur. Officers, however, appear to magnify and intensify that potential every time a judge makes a ruling in favor of the defense or against the prosecution. Try not to fall into that trap, as it will ultimately create a false image of the entire court system.

Ninety-nine and nine-tenths percent of the time the judge is simply ruling on a point of law in the most unbiased manner possible. My experience is that on rare occasions when a judge will allow a bias to overbalance a ruling that could go either way, that bias is directed toward one of the attorneys, usually due to the judge's perception of ethical conduct. You must remember that a judge is always cognizant of

the possibility of having too many decisions overturned by a court of appeals. That could be a judge's downfall.

The judge's job is to make certain that the evidence being presented to a jury is in a manner which complies with proper legal form, as well as being understandable to a layperson. On occasion, he will take the time to explain a technical aspect of the law or will probe an expert witness on his own if he feels the jury does not understand the implications to the case at bar. The judge must ensure to both the prosecution and defense that the jury will arrive at a just verdict, not only after being presented with the factual data, but also with understanding the significance of the evidence. Another function of the judge is to ensure that all the witnesses are being treated properly by counsel and not badgered or harassed in any way.

### **The Police Officer**

In my class, I ask the question, "As a witness, what is your job?" The answer I receive most often is, "To tell the truth." This is where lawyers will frown, furrow their brows, and begin searching their vocabulary for a quick/legal condemnation of my perspective. In any event, the response I give to that answer – "To tell the truth" – is incorrect. You, the police officer, DO NOT KNOW THE TRUTH. The truth is what the jury (or judge) will ultimately determine after all the evidence has been presented and the deliberation has ended in a verdict. That, lawfully, will be the truth and, many times, it does not coincide with what you believed the truth to be.

The answer to the question of "What is your job?" therefore, is "to accurately inform the court of the perceptions and observations that you made which contributed to the arrest of the accused and his ultimate appearance at this trial." That is all! You may not speculate, offer conjecture, opinions, evaluations, or determinations ... unless that was specifically your assignment relative to this case. An example would be a fingerprint technician comparing a set of latent prints to a freshly rolled set of the defendant's. An opinion could then be rendered as to the match. The same would apply to a DNA tech or any other forensic science discipline. Detectives or investigating officers, too, may be called upon to explain a "speculation" which led to the arrest of the defendant, based on historical comparative evaluations, such as would become apparent in studying MO's in a "serial" crime. The highly developed instincts of a patrol officer, however, must take a back seat to his testimony, which may only contain "observations" which are physically perceived.

### **The Jury**

Finally, we come to the bottom line. Those people in the courtroom whose job it is to render a decision that, theoretically, is just and accurate based on their perception of the evidence that has been presented. That decision is arrived at only after: (1) hearing the testimony of percipient witnesses, (2) observing the physical evidence and having that evidence defined by expert witnesses, (3) listening to the closing arguments by counsel, (4) receiving instructions from the judge, and (5) careful and extensive deliberation after considering all the evidence and dialogue they have (hopefully) absorbed during the course of the trial.

It is that jury (or the judge, if no jury is impaneled) that the police officer witness must be constantly aware of – aware in the sense of directing his testimony toward the goal of making his very technical language understandable to them. They must be able to make the connection to what the officer is saying relative to the innocence or guilt of the accused, and the officer's presentation and appearance must be such that his testimony is believed and remembered days and sometimes weeks later when their deliberations begin.

Jurors are not always the most sophisticated people in the world. Normally, they are not sitting in that box by choice and unless their employer is keeping them on salary, they are certainly losing their income. Jurors are paid only a token amount and not a living wage. They have to take time from their family and friends and all the chores and tasks they have been planning. Contrary to instructions, many of them do bring with them their prejudices, fears and, in more instances than we would all hope, bias against police officers, the courts, and the justice system in general.

There is a process whereby the participating attorneys evaluate the jurors, which are drawn from a panel, in an effort to determine whether each candidate is acceptable. However, this process is not always totally effective as many potential jurors successfully conceal their true feelings and latent prejudices.

On the other hand, many jurors are aware of their civic responsibility and recognize the extreme seriousness of the task they are asked to perform. Many also are retired persons who, rather than seek a reason to disqualify themselves from service, look forward to and are interested in participating in the system. They are former physicians, dentists, businessmen and women, and sometimes even retired police officers.

Jurors are mixed. They represent all races, religions, and cultural backgrounds. They are men and women of all ages who, depending on their life experiences, have developed preconceived beliefs of how life should be. And it is the job of law enforcement witnesses to make themselves understood and believed by all of them.

### **Types of Witnesses**

Although the courts and attorneys may define witnesses differently depending on the jurisdiction where the court is located, for our purposes three major categories will be reviewed.

**Percipient witness:** “percipient” evolves from the root definition, “to perceive.” Thus, a percipient witness is one who actually is an eyewitness, hears some relevant sounds, smells, tastes, or in some manner has a direct perception of events which are germane to the case at bar.

**Support witness:** Individuals with information that is relevant to the case, but not as to the actual commission of the crime. Examples would be (1) a bartender who could testify as to serving a suspect a given number of drinks at a bar shortly prior to an automobile accident; (2) neighbors who can testify to a suspect’s living habits; or (3) other persons providing background information which may be an important factor in determining “intent” or “character.”

**Expert witness:** This type witness is an individual with special expertise in a highly specialized discipline which is particularly germane to the trial. Theoretically, the “expert” is supposed to explain the significance and relevance of that specialized subject, then possibly advance an opinion on how his research, data, or information reflects on the outcome of the trial, specifically toward determining the guilt or innocence of the accused. In the case of a civil trial, the degree of liability a defendant must bear also comes into play with expert testimony.

Examples of “expert witnesses” are:

**police criminologist:** responsible for collecting evidence and establishing a relationship of that evidence to the accused, thus attempting to prove guilt or innocence.

**psychiatrist:** testifying about the mental capacity of the accused.

**ballistics expert:** showing through photographic demonstration that a recovered bullet was, in fact, fired from a specific firearm.

The expert witness is considered not only a specialist in his discipline, but must also demonstrate to the court that he is a “recognized” authority among his colleagues and peers and/or that he has an adequate academic background along with any post-graduate degrees accepted in his profession. He must then show lengthy practical experience and skill in performing as a professional. Typically, the expert has been “published” in his field with books and papers or articles in professional journals. Once the expert testifies, he may then attach the title “forensic” (or forensic engineer) before his area of expertise or after his name. The exception to the academic requirements set forth above is the “police criminalist,” or “crime scene analyst,” who by virtue of their assignment in law enforcement, are gathering evidential data specifically to be presented in a court of law.

The term “forensic” means “legally arguable” or “publicly debatable.” Webster defines the term as: “*pertaining to, connected with, or used in courts of law or public discussion and debate.*” Thus, we will refine that definition in a law enforcement context to mean, *the gathering of evidence or data through research or empirical evaluation specifically for presentation in a court of law.* It should be noted that

law enforcement officers, upon retiring and having honed their skills on the witness stand, then making the proper transition from law enforcement to the civil court proceedings, have become excellent forensic experts in police and security-related matters.

[A word about that greatly misunderstood title. Due to the popular television series “Quincy,” people believe that “forensic” means a doctor who examines dead bodies. Actually, what Quincy said at the beginning of the program was, “Welcome to the world of forensic medicine.”]

It should also be noted that law enforcement personnel might testify in court under any of the three categories mentioned above (Perceptant, Support, or Expert). In any event, we have attempted to define the entire courtroom environment and process strictly from a peace officer’s perspective along with an “undressing” of the cast of characters. We all, many times, misinterpret the actions of those players and tend to take those actions very personally for one reason or another. We take offense at the tactics that are employed; but, trust me, nothing is directed at the police officer as an individual nor, in most cases, are what we perceive as assaults intended to embarrass or degrade you as a person, UNLESS you have been caught attempting to cover up poor procedure or bending the truth in an effort to protect a fellow officer.

The reader must understand that as rare as the occurrences are, there are police officers who have engaged in cover-ups, and those instances have caused us all to suffer the consequences. Only those instances receive media coverage, not the hundreds of thousands of times officers have testified professionally and properly. It is also those extremely rare instances that have given rise to Miranda, Escobido, etc. etc. etc.

The police officer’s testimony is vital to any criminal case. It, many times, is the most important issue to be presented to the jury. Thus, the defense will go to great lengths to ensure that the testimony is accurate and that no errors have been made; that the officer was properly hired for the job, trained, and that his observations and conduct were according to correct procedure and under circumstances required by state and constitutional law. That is the job of the defense lawyer. Do not take offense at this. Rather, be glad that those issues are in effect because, in the long run, they protect us all.

The courtroom is nothing to fear or be apprehensive of. It is simply a procedure ... a process. It is the culmination of all we have worked for. The observations have been made. Appropriate investigation has been conducted. Arrests were effected. The case has been properly put together and presented to the district attorney who has decided to prosecute. Now, all we have to do is finish the job. Relate accurately to the court exactly the process that was taken to bring us to the witness stand. Take pride in that process. Relax.

In the next issue, I will continue with Part II of this series on “Courtroom Testimony,” and address what the officer has to do to be a professional and effective witness.