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TESTIFYING IN COURT

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GENERAL CONSIDERATIONS & GUIDELINES

The presentation of evidence in a court of competent jurisdiction is the final step taken by the police in a criminal case. The effectiveness of this presentation is, to a large degree, dependent upon the competence of the officer on the witness stand. All of the police efforts that precede the court appearance can be nullified by an inadequate, incomplete or unsatisfactory presentation of the facts by the testifying officer.

The court will consider not only the quality and quantity of the evidence itself, but also the manner in which it is presented. The officer's personal appearance, demeanor, attitude and ability to express him/herself in a convincing manner can greatly affect the weight given to the testimony and have a significant influence on the outcome of the case.

It is only human for an officer to take a personal interest in a criminal case in which s/he has been deeply involved and to firmly believe that the offender is guilty and should be convicted. However, the defendant is innocent until proven guilty and the conviction is based upon a finding of guilt beyond a reasonable doubt. Therefore, in his/her testimony, the officer must make every effort to present the facts fairly and impartially without understating or exaggerating any of the circumstances.

The legal technicalities involved in bringing a criminal investigation and subsequent prosecution to a successful conclusion requires a team approach. By working together, the prosecutor relies on the investigative skills of the police and the police rely on the skills of the prosecutor in handling the legal aspects.

Every court appearance should be a learning experience for a police officer. S/he should evaluate his/her testimony objectively and constantly make every effort to improve his/her skills as a testifying officer. After a court proceeding has concluded, particularly if the case has been lost, the officer should review his/her testimony with the prosecutor to determine where improvements can be made to strengthen similar cases in the future.

PROCEDURES

I. RULES OF EVIDENCE

To become skilled and effective in the task of testifying in court, a police officer should be familiar with the basic rules of evidence. See ***Appendix A*** for an overview of the rules of evidence in Massachusetts.

II. PRIOR TO TRIAL

A. If there is a sequestration order applicable to the police and other witnesses, officers shall remain outside the courtroom until called to testify. Also, they shall not discuss their testimony or the testimony of any other witness until the completion of the trial or other proceeding. A sequestration order generally requires that each witness testify separately and without having discussed his or her testimony with other witnesses and without having overheard the testimony of any other witness. Violation of a sequestration order could result in the judge declaring a mistrial or even dismissing the case.

B. The officer shall not discuss the case with the defendant in the absence of his/her attorney, if s/he has one, or make any agreement with the defendant's attorney for recommendations as to the disposition of the case without the knowledge of and in the presence of the prosecutor and/or the department prosecuting officer.

C. In pretrial conferences with the prosecutor it is the responsibility of the police officer to provide all available information even though it may be beneficial to the defendant. No detail concerning the particular case should be considered too trivial to discuss. This will decrease the likelihood of any surprise developments during the trial.

D. It is understandable that occasionally mistakes in testimony may be made. An officer should voluntarily correct any error as soon as possible. In addition, an officer may realize after s/he has left the witness stand that s/he has overlooked some particular point. In such cases, s/he should inform the prosecutor as soon as possible in a manner that is not distracting to the court. Writing a note and passing it to the prosecutor is an acceptable method to accomplish this purpose.

III. CONDUCT AS A WITNESS

A. To ensure that his/her testimony will be given the full weight and credit to which it is entitled, every police officer testifying in court or at an administrative hearing should:

1. Be punctual in reporting at the time and place set for the hearing. Also, his/her physical appearance, personal conduct and professional manner should be aimed at making the best possible impression.

2. Review and prepare in advance all aspects of the case, have all necessary witnesses present, and have all physical evidence arranged for presentation.

3. Testify to what s/he knows from personal knowledge to be the truth and avoid any reference to evidence which is inadmissible hearsay.

4. Speak naturally and calmly in a distinct and clearly audible tone of voice, describing in a straightforward manner the events of the case in the order in which they took place. Use plain, clearly understandable conversational language avoiding slang, police jargon, and unnecessary technical terms.

5. Maintain a courteous attitude, self-control and personal composure at all times avoiding any impression of being contentious, biased or prejudiced, even if defense counsel attempts to berate, belittle or embarrass the officer or his/her efforts.

6. Listen carefully to each question and respond accordingly without hesitation or evasion. Answer only the questions which are asked.

   a. If asked to state the facts, state the facts known or believed to be true;
   b. If asked to state an opinion or conclusion, do so if the officer has formed an opinion or conclusion which s/he can articulate and support; and
   c. If an answer is unknown, state that it is unknown.

7. Make every effort to avoid errors or inconsistent statements which could undermine the confidence of the judge or jury in his/her credibility. If a mistake in testimony is made, the officer should voluntarily correct the error as soon as possible.

8. Confine his/her testimony to the particular case and do not volunteer information or go beyond the scope of the question under discussion.

9. Know his/her facts so thoroughly that s/he will not have to change his/her testimony even under rigorous cross-examination.

A. As soon as s/he is called, the testifying officer should go directly to the witness stand in a dignified and alert manner, as it is at this point that the jury gains its first impression of the officer.

1. During the reading of the oath, the officer should maintain an attitude that reflects the seriousness of the proceedings.

2. On the witness stand the officer should take a comfortable position that gives him/her a full view of the jury and the attorneys and should always maintain good posture and an alert appearance.

3. S/he should avoid any movements or sounds that could be distracting to the judge or jury and which may divert their attention from his/her testimony.

A. When a question is asked, the testifying officer should look directly at the person asking the question. If you do not hear or do not understand the question, request that it be repeated. Do not respond to any question that you do not clearly understand.

B. An officer should pause briefly and consider every question before responding. This procedure has the following advantages:

1. It will assure the question is complete, preventing misinterpretation of the question;

2. It gives an officer a chance to analyze and frame a complete and accurate answer;

3. It gives the prosecutor the opportunity to make an appropriate objection to the question, if necessary.

Note The pause should not be too long as hesitation may be interpreted as indecision or uncertainty.

A. When an objection has been made, an officer should immediately cease testifying, look at the judge and await his/her decision.

B. In responding to questions, an officer should be as specific as possible. However, figures for time and distance are usually given as approximations unless an officer has the exact information readily available.

C. At the request of the prosecutor or defense attorney, and with the permission of the judge, an officer may refer to his/her notes or a police report to refresh his/her memory on a given point. However, continual reliance on notes will detract from what is being said and may also raise doubts as to the officer's knowledge. Adequate preparation will help to minimize the necessity of this type of aid.

D. In responding to questions, an officer should not guess or give an ambiguous answer. If an officer does not remember or does not know a particular fact, s/he should say so as this will be less damaging to the case than an inaccurate reply or one that is confusing or misleading.

E. Unless s/he is asked to do so, an officer on the witness stand should not volunteer his/her personal opinion on any matter, and s/he should avoid any statements such as "I think," I believe," "In my judgement," "probably," "perhaps," or any other words indicating an opinion or conclusion.

F. If an officer has discussed the case previously with the prosecutor, s/he will so state if asked. Such pretrial discussion is entirely proper and legitimate.

G. A testifying officer should rely on the prosecutor to ask the questions that s/he wants answered and at the time and in the sequence that s/he wants answered.

H. If during or at the conclusion of his/her direct testimony and before cross--examination, an officer realizes that an important point has not been brought out or fully developed by the prosecutor's questions, the officer, while still on the witness stand, may utilize a discreet signal to gain the prosecutor's attention. The prosecutor may then ask the judge for permission to confer with the officer. If that method is unavailable or unsuccessful, the officer may address the judge directly and request permission for a very brief conference with the prosecutor. A police witness should not wait until s/he has been excused from the witness stand to inform the prosecutor

of important matters not brought out in his/her testimony. At that point, it may be difficult for the prosecutor to get the officer back on the stand, or even if s/he does so, to ask questions about matters not raised on direct examination. Naturally, these problems should be avoided by close cooperation in the preparation of a case between the police witness and the prosecutor.

IV. DEFENSE ATTORNEY TACTICS

A. A defense attorney may resort to a variety of tactics in an effort to confuse or upset the testifying police officer or to discredit his/her testimony. This is permissible within ethical limits and should be expected. An officer's ability to cope with these tactics improves with experience. Since the judge and jury will be closely observing the officer, s/he should never become argumentative or display anger or animosity towards the defense counsel. S/he should remain calm and courteous at all times despite any badgering tactics by the defense and take sufficient time to permit the prosecutor to make appropriate objections.

B. The following are some of the most common tactics used by a defense attorney in cross-examination:

1. Asking questions in a rapid-fire manner to confuse the witness.

2. Asking questions which suggest a particular answer in order to lead the witness into responding in a certain way.

3. Indicating conflicting answers with earlier testimony.

4. Demanding "yes" or "no" answers to questions that obviously require more explanation.

5. Intentionally mispronouncing the officer's name or calling him/her by the wrong rank or title in order to affect his/her concentration.

6. Being overly friendly to give the witness a false sense of security before attempting to lead him/her into inconsistent or conflicting answers.

7. Being condescending to the point of ridicule to give the impression that the officer lacks experience or expertise.

8. Asking repetitive questions or rephrasing previous questions in order to obtain

inconsistent answers or answers which conflict with previous testimony by the witness.

9. Continuing to stare directly at the witness after s/he has responded in order to provoke the witness into elaborating on his/her answer and providing more information than the question called for.

10. Belligerent questioning to anger and disconcert the witness.

Note All officers must acquire the ability to remain calm, deliberate and objective under such provocation and to understand that it is the purpose of the defense attorney to diminish or discredit that effect of their testimony on the judge or jury.

V. TESTIFYING IN CIVIL SUITS OR AS A DEFENSE WITNESS

A. A police officer shall not testify in any civil case which relates to his/her police duties without being legally summoned or unless permission has been granted by the Chief or designee.

B. A police officer shall not testify for the defendant in any criminal case without being legally summoned. Before testifying in such case s/he shall inform the Chief of the nature of his/her testimony and shall also notify the prosecutor.

APPENDIX A

OVERVIEW OF MASSACHUSETTS RULES OF EVIDENCE

Evidence may be defined as the legal means by which any alleged matter of fact is established or disproved when submitted to a judicial inquiry. It includes the testimony of witnesses or the introduction of records, documents, exhibits or other objects which are relevant and material to the particular case.

The three primary tests for the admissibility of evidence, as determined by the court, are as follows:

1. it must be ***relevant*** in that it is legally, as well as logically, related to the issue in question;

2. it must be ***material*** to the issue before the court in that it establishes the facts in the case and contains sufficient measurable weight to aid the jury in reaching a conclusion; and

3. it must be ***competent*** in that it meets all required legal standards for admissibility in order to ensure that only information of a reliable nature is presented to the jury for consideration.

CLASSIFICATIONS OF EVIDENCE

Direct Evidence As opposed to circumstantial evidence, direct evidence includes testimony from a witness as to what the witness personally observed or personally knows to be a fact; it also includes any physical object or presentation which in itself indicates or proves a given fact or conclusion. For example, if the witness testifies that he saw the defendant operating the motor vehicle in question, that is direct evidence pertaining to that fact. On the other hand, if the witness testifies that he saw the defendant's car being operated, that the defendant had the only set of keys and that the defendant had said he would be using his car that day, that is circumstantial evidence that the defendant was the operator.

Direct evidence is often broken down into four forms:

1. Oral Evidence. Testimony by a competent witness under oath and subject to cross examination.

2. Real Evidence. Objects and items that are physically present at court and admitted into evidence for examination and consideration by the judge and jury.

3. Documentary Evidence. Any instruments containing written or otherwise recorded entries; a book, ledger, receipt, report, letter, deed, contract, diary, etc.

4. Demonstrative Evidence. This includes any display or visual presentation such as a map, photograph or film, sketch or other depiction.

Circumstantial Evidence In contrast to direct evidence, circumstantial evidence includes testimony or physical objects or items from which the existence of a fact can be inferred or a certain conclusion drawn but the testimony or physical objects or items do not in and of themselves directly establish that fact or conclusion. For example, if the defendant is found with very recently stolen property in his possession the circumstances could warrant a judge or jury in concluding that the defendant must have known the property was stolen.

Corroborative Evidence Evidence which confirms or strengthens other evidence.

Cumulative Evidence Evidence of the same kind, to the same point or effect which further establishes what has already been indicated or suggested by other evidence.

Prima Facie Evidence Evidence which is sufficient on its own to establish a given point or conclusion and is legally binding unless it is effectively rebutted or discredited. For example, a properly executed certificate of a chemist of the Department of Public Safety is Prima facie evidence of (a) the composition, (b) the quality, and (c) the weight of the drug or other chemical analyzed. Once such a certificate is admitted into evidence the judge or jury must accept what the certificate states pertaining to composition, quality and net weight.

Expert Evidence Evidence presented by a person who is accepted by the court as having special knowledge of a subject not usually possessed by the

average person and derived from his training, education and experience in that field. The testimony of an expert, as to facts or opinions, is not binding on the judge or jury; they may give expert testimony whatever weight or credibility they decide that it deserves.

Opinion Evidence

As a general rule, neither expert witnesses nor lay people (non-experts) may testify as to their opinion on any matter. They must restrict themselves to testifying to facts and observations. However, courts recognize that the opinions of certain experts within the scope of their specialty are admissible and may aid the judge or jury in its deliberations and decision. Lay witnesses (the average person) may testify to an opinion on such common place matters as:

1. the apparent age of a person;
2. the apparent physical condition of a person;
3. the obvious emotional state of a person;
4. whether a person appeared to be under the influence of alcohol or drugs;
5. the direction from which a sound emanated;
6. the estimated speed of a vehicle or other moving object;
7. the value of an item (if the witness was the owner or has had sufficient dealings with such objects to be able to render a creditable opinion as to its value).

Hearsay Evidence

Hearsay evidence consists of:

1. oral or written statements
2. made by one other than the witness
3. out of court
4. not under oath

5. not subject to cross-examination

6. if offered to prove the truth of the matter asserted therein.

Hearsay statements are unreliable for several reasons. They were made out of court by the person originating the statement. They were not made under oath or while the originator of the statement was subject to cross-examination. And, the person repeating those statements in court may not have recalled them completely or accurately. In addition, if witnesses in a criminal trial are allowed to testify to what someone else said was true and that other person is not available, then the defendant would be deprived of his Sixth Amendment right to confront all the witnesses against him.

Although hearsay statements are generally objectionable, there are many exceptions to the general rule. Some are listed below:

1. Dying Declarations - In a prosecution for homicide statements made by a dying person regarding the cause and circumstances relating to his imminent death are admissible if the dying person believed death to be imminent and he did in fact die shortly after the statements were uttered.

2. Admission by Party-Opponent - Confessions, admissions, declarations against penal interest, and statements of a joint venturer (all defined below) are admissible if legally and voluntarily made.

3. Spontaneous Exclamations (also called excited utterances) - If a person makes a statement during or very shortly after the occurrence of a startling event and while under the excitement or stress of that startling event another person may testify to those statements.

4. Public records and reports maintained by legal requirement or duty, if properly authenticated.

5. Business records - These include any entry, record or memorandum if it was made in good faith, in the regular course of business, before the beginning of the litigation in question

and if it was a regular business practice to make such entries, records or memoranda. Although this is commonly referred to as the "business records" exception to the hearsay rule it also applies to records of non-profit organizations and to records maintained by government agencies, including police departments.

6. Unavailable witness - Testimony given previously by a witness who was then under oath and subject to cross examination, if the witness is presently unavailable through no fault or collusion of the party seeking to admit the former testimony.

7. "Fresh Complaint" (in rape and sexual assault cases) if the victim of a rape or other sexual assault reports the incident to another person within a reasonable time after the incident, the person to whom the victim complained of the rape or assault may testify as to what the victim said had occurred.

PRIVILEGES

Under certain limited circumstances the law protects important rights and special relationships by granting persons a privilege against being compelled to testify even in criminal prosecutions. The more common are:

1. lawyer-client;
2. psychotherapist-patient;
3. spouses;
4. clergy-penitent;
5. government privilege to withhold identity of informer;
6. social worker-client;
7. sexual assault counselor-rape victim;
8. parent-child.

Note There is no physician-patient privilege presently recognized under

Massachusetts law.

THE EXCLUSIONARY RULE

Generally, if it is shown that evidence was obtained by police in a manner which contravened the rights of the defendant, that evidence will, upon motion of the defendant, be excluded at court. The most common areas involving motions to suppress allegedly unlawfully obtained evidence are interrogation and searches and seizures. See departmental policies and procedures on ***Searches and Seizures***, ***Interrogating Suspects and Arrestees***, and ***Arrests***. However, police should be aware of several exceptions to the exclusionary rule and should discuss utilizing any of these exceptions with the prosecutor in appropriate cases.

1. **Attenuation** - If the unlawful police action was so far removed or so remotely connected to the incriminatory evidence obtained, the court may rule that any taint due to the initial illegality was "attenuated" and the exclusionary rule should not apply).

2. **Independent source** - If the police can establish that they obtained the evidence in question from a source or in a manner completely independent of the unlawful procedure, the exclusionary rule may not apply.

3. **Inevitable discovery** - If police can establish that they would have obtained the evidence in question anyway and in a lawful manner, the exclusionary rule may not apply.

   Note The Supreme Judicial Court has held that this exception cannot be applied to cure an illegal warrantless search on the basis that it was inevitable that a warrant would be obtained. In another Massachusetts case, the Court indicated that the inevitable discovery rule may apply to cure or to apply in a situation not requiring a warrant (e.g., protective custody). In implementing the rule, the Court focused on two issues:

   a. the issue of inevitability; and

   b. the character of the police misconduct.

4. **Procedural uses of otherwise excludable evidence** - If the defendant failed to file it in a timely manner, the prosecutor may be able to defeat a motion-to suppress. Also, otherwise excludable evidence can be used to impeach the defendant if he takes the witness stand and denies any knowledge of or connection to the evidence unlawfully

seized.

5. **"Good Faith" exception** - For example, where police reasonably rely on what appears to be a valid search warrant, the exclusionary rule may not be applied even though a court subsequently determines that the search warrant was defective.

   Note Massachusetts has yet to decide whether it will follow the good faith exception.

THE BEST EVIDENCE RULE

Whenever possible, the original of a written document must be produced at court. If the original is not offered, a copy or other secondary evidence of the contents of that document will be accepted only if the absence of the original is adequately explained to the satisfaction of the court. The best evidence rule applies only to written documents and not to photographs, tape recordings, visual displays, etc.

PRESENT RECOLLECTION REFRESHED VS. PAST RECOLLECTION RECORDED

- **Present Recollection Refreshed**. If a witness has some memory or recall of an event or information but his present recollection is incomplete, vague or unsure, he may, with the permission of the court, "refresh" his recollection by consulting any report, record, document or other reference. However, the report or document used to refresh the witness' recollection may be examined by opposing counsel.

- **Past Recollection Recorded**. If a witness has no memory or recollection whatsoever of an event or information but he did make reliable notes or records of that event or information at some point in the past, those notes or records may be admitted into evidence (unless they contain hearsay or other objectionable material).

THE *BRUTON* RULE

The U.S. Supreme Court ruled that it is a violation of a defendant's Sixth Amendment right to confront adverse witnesses to try a defendant jointly with a co-defendant where the co-defendant has made admissions or confessions that implicate the defendant but the co-defendant chooses not to testify (and, therefore, is not subject to cross-examination by the defendant). Thus, where there are two or more persons charged with the same offense, severance (separate trials) sometimes occurs. This rule was reinforced by the Massachusetts Supreme Judicial Court, which held that the admission in a joint trial of a co-defendant's statement implicating the defendant was reversible error, even though the Commonwealth alleged that the co-defendant's statement was offered only to show

consciousness of guilt and argued during trial that the statement should be disbelieved.