Court Appearances

~ CHAPTER 35 ~

Topics and concepts included in this chapter:

1. Important information required to be recorded during a preliminary investigation.
2. Chain of custody and how it relates to criminal trials.
3. Proper procedures for court appearances.
4. The rules of evidence.
5. Pre-trial hearings.
6. The principles of effective trial preparation and testimony.
7. Penal Law offenses relating to perjury and tampering with physical evidence.
8. Elements of proper traffic court testimony.

Mandatory Patrol Guide Procedures

Court and Agency Appearances

P.G. 211-01	Duties and Conduct in Court
P.G. 211-04	Computerized Court Appearance Control System (CACS)
P.G. 211-07	Prevention of Court Appearance on Scheduled Day Off

Mandatory Legal Bureau Bulletin

Vol. 46, No. 1, "The Rosario Rule - Duty to Preserve and Disclose Police Officer's Notes".

Vol. 47, No. 1, "Cross-Examination of Police Witnesses".

This chapter is designed to help you become an effective witness in judicial proceedings. Effective police witnesses are those who are able to articulate clearly, fully, and truthfully both the facts and circumstances of the matters that have brought them to court and their roles in these matters. Effective witnesses come to court prepared; they make certain that they have properly documented events and that they have properly processed any evidence for which they are responsible. Effective witnesses are aware of the strategies that may be used by opposing counsel to discredit them or trap them into phrasing their answers in ways that may mislead jurors.

Effective and honest police testimony is particularly important in our system of justice. In some countries, criminal justice systems are ***inquisitorial***, which means that they are designed only to determine whether individuals committed the crimes of which they have been accused, and that they pay little or no attention to the manner in which the police collect evidence. In such places, there is no Bill of Rights: no right to be free from unreasonable search and seizure, no right to counsel at interrogation, and no right to decline to answer interrogators' questions. In such places, jurors or judges (in some countries there is no right to trial by jury) are free to infer that accused persons who do not take the witness stand in their own defense do so because they are guilty. In most such places, all that matters is whether the police can produce evidence of guilt. Indeed, in some such places, the burden of proof may not even be on the prosecutor – instead, accused persons may have the near impossible burden of proving that they did not commit the crimes with which they have been charged.

This is not the way our system works. Our system is ***adversarial***, and places the burden of proof squarely on the prosecutor. Unlike inquisitorial systems, ***our system draws a great distinction between factual guilt and legal guilt***. In our system, the only two outcomes of criminal trials generally are those in which prosecutors succeed in proving guilt beyond a reasonable doubt and those in which prosecutors fail to prove guilt beyond a reasonable doubt. Nobody is ever found ***innocent*** in our system because defendants do not have to prove their innocence: instead, they are either found guilty or not guilty. To prove guilt in our system, police and prosecutors must overcome a series of obstacles designed by our Founding Fathers to protect the freedoms they fought the Revolutionary War to gain.

In our system, prosecutors who fail to show that the evidence they introduce was obtained in compliance with the Bill of Rights cannot use the evidence, even though it may clearly show that defendants committed the crimes with which they have been charged. When this happens, people who are factually guilty cannot be proven legally guilty beyond a reasonable doubt, and are, therefore, released to prey on our citizens again. Thus, in our system, it is critically important that officers testify credibly, honestly, knowledgeably, and convincingly in criminal cases. Police testimony is evidence, and when evidence is presented improperly, it results in lost cases and injustice.

Although most police testimony occurs in criminal, juvenile, or traffic proceedings as a result of an officer's law enforcement actions, officers also testify in civil proceedings in which they, the Department, or others are the accused parties. In these cases as well, it is critical that officers know how to be effective, honest, and credible witnesses.

THE ROLE OF THE POLICE OFFICER IN THE CRIMINAL JUSTICE SYSTEM

Effective police witnesses begin preparing their testimony from the instant they suspect that criminal activity may be occurring. They know that, from the moment they first take action, they may have to testify about everything they have seen and done. They know also that answers like "I don't recall" can be used to raise questions about their honesty, so they make it a point to imprint images of their actions deep into their memories and to document them carefully, as well. They take great pride in doing this in a way that reflects favorably on them and the Department, and that includes thorough mental and written recording of the facts.

Good preparation for court testimony encompasses the entire investigative process: the facts of the offense; location of the witnesses; discovering, preserving, and marking evidence; recording events that led to the apprehension of the defendant, and other incidents pertaining to the arrest.

One of the most important aspects of an investigation is the gathering of materials that may become evidence at a later trial. This includes the names and addresses of ***all*** potential witnesses, even if they appear to duplicate witnesses you already have. Taking note of details that you may be asked to recall later is a skill a good investigator must develop. The experienced officer learns to concentrate on seemingly minor items that may take on great importance from the witness stand.

You need to start doing this at the moment you become involved in any case, no matter how strong the case may seem. Keep in mind that nobody wants to go to jail and that, especially in serious cases, offenders are likely to try very hard to stay out of jail. This means that, ***the stronger the evidence in a case, the more likely it is that defense attorneys will try to attack your credibility by suggesting to jurors that you have left out information that might weaken the prosecution's case.***

Here's an example: Let's say that you and your partner come upon a fatal shooting that has taken place at 2200 hours on a public street, in front of 50 or more witnesses at a street fair. There you learn that several of these bystanders – mostly friends of the decedent – immediately jumped the shooter, disarmed him, and held him until you arrived. Let's say also that one of the bystanders, a friend of the dead man, gives you what he identifies as the shooter's gun. Then, you and your partner start interviewing these witnesses. After speaking to ten or so (all of whom knew the victim), you find that they all say essentially the same thing: that the victim was unarmed, and that the suspect shot him dead, in cold blood, during what apparently had been a heated

argument. They also indicate that another man was with the shooter, but that he had fled the scene (the next day, you learn that the other man was the shooter's brother).

The worst thing you can do at this point is to conclude that you have gathered enough eyewitness evidence, and release the remaining 40 bystanders without at least learning who they were, what they saw, and how to get in touch with them. Good attorneys know that if they want to avoid surprises and to win their cases, they should never ask questions of witnesses unless they know in advance what the answers will be. If you were to send the remaining 40 witnesses on their way in this case, opposing counsel would almost certainly design a set of questions for you, knowing that the answers you would be compelled to give would make it appear as though you were both incompetent and dishonest. This would be likely to turn this apparently clear-cut case into one that involved reasonable doubt about the defendant's guilt. Consider the answers you would have to give to the following questions in our hypothetical case; consider also how your answers would affect the jury's view of the evidence and of you:

Q. Now, Officer, you testified that when you arrived, you found the defendant being held by five or six people, and that there were about 50 people in the immediate area, is that correct?

Q. And some of these people told you that my client had shot the dead man, is that correct?

Q. But you didn't see the shooting yourself, is that correct?

Q. So the only things you know about the shooting are what these people told you?

Q. How many of these people did you talk to?

Q. And these ten people all told you the same thing?

Q. What about the other 40 people? Did you talk to them?

Q. So you want the jurors to believe that you let these 40 people go without talking to them or identifying them, and that the ten you did talk to all said the same thing?

Q. Now these ten all were friends of the dead man, is that correct?

Q. So you can tell us that, but you can't tell us anything about the other 40?

Q. You can't tell us whether these 40 people were also friends of the dead man, can you?

Q. Is that the way you were trained, Officer? To interview only friends of victims and to let everybody else go without finding out who they were and what they had seen?

Q. I have the NYPD's ***Police Student's Guide*** here, Officer. I'd like to show it to you and to ask you whether you can find in it anything that says that you should interview only friends of dead people and let everybody else go. Can you do that for me?

Q. Can you give me the names of any Police Academy instructors who taught you that it was proper to let 40 witnesses leave a homicide scene without finding out who they were and what they had to say?

Q. And you obviously can't tell us whether these 40 people you conveniently let go would have told you the same story as the ten friends of the dead man whom you kept around, isn't that right?

Q. You're aware that my client's brother has testified that the dead man and several of the people you interviewed attacked him and my client with knives, and that my client had shot the dead man in self-defense?

Q. Did you find any knives on the scene?

Q. No, you didn't find any knives. Did you even look for any knives?

Q. You never searched any of these ten eyewitness friends of the dead man to see if they had knives?

Q It was ten o'clock at night when this shooting took place?

Q. Was it dark?

Q. Do you know whether it was too dark for anybody to have seen whether the dead man had a knife in his hand when he was shot?

Q. Do you know whether the streetlights were on?

Q. Can you describe them? Were they all working? Do you know where they were?

Q. And you never questioned the other 40 people you let go to see whether they would tell you that these friends of the dead man had attacked my client and his brother with knives?

Q. And you don't know who or where they are so that we could ask them now?

Q. Did you ever see my client with the gun in this case?

Q. You found the gun in somebody else's hands, is that correct?

Q. Do you know whether my client's fingerprints were found on the gun?

Note: Because the gun had been forcibly taken from the shooter and then held by somebody else, it is extremely unlikely that the suspect's fingerprints would be found on this gun.

Q. So the only fingerprints you did find on the gun were those of the other man, is that right?

Q. So you did not see the shooting, and you never saw the gun in my client's hands, and you found no fingerprints to indicate that the gun had ever been in my client's hands, is that right?

Q. But then you locked up my client because the guy you did find holding the gun – and his friends – said that my client did the shooting?

Q. How do you know they are telling the truth? I can think of some reasons that they might lie about this. Can you?

As you can see, a line of questioning like this takes advantage of any investigative failure, and tries to use it to raise reasonable doubt about defendants' guilt. And, to avoid a conviction, the only thing that defense attorneys must do is to create such doubt in the mind of just one juror. The moral is simple: ***when you go to court to testify, make sure that you are thoroughly knowledgeable about your case; that you have anticipated likely questions, and that you are prepared to testify honestly, confidently, and fully about any aspect of the case that might be raised in court.***

The process of discrediting witnesses in the eyes of the jury is known as ***impeachment***. Be aware that, the stronger the case in which you are testifying, the more likely opposing counsel is to try to impeach you by making it appear to the jury that you are both incompetent and dishonest. Do not take this personally: the defense attorney is playing their part in the ***adversarial*** American justice system. Your part in this process is to keep opposing counsel from impeaching you by coming to court at least as ready as they are.

To do your job properly, you need to ensure that you have all the details of the case thoroughly recorded. This includes:

The Precise Time of Important Events:

1. When the crime was committed;
2. Officer first received the call;
    a. Officer responded to the scene;
3. Officer arrived on the scene;
4. Officer first saw defendant;
5. Defendant taken into custody;
6. Any post-arrest identification by a witness; time & place;
7. Any post-arrest statements; time and place.

The Time Elapsed Between Important Events

1. In a chase situation, the time between the first sighting of the defendant and the time of their apprehension;
2. The time between statements made by defendants.

Layouts of Indoor Locations

1. Number of rooms;
2. Arrangement of furniture;
3. Condition of rooms (e.g., messy, neat, etc.);
4. Evidence of occupation (clothes in closets, food in refrigerator, pictures or diplomas on the wall, etc.);
5. Number of beds.

Configuration of Streets at Outdoor Locations

1. Intersections;
2. Direction of street (north/south/east/west);
3. Type of street (e.g., two-way, dead-end, etc.).

Exact Street Addresses

1. Apartment number, floor;
2. Cross streets;
3. Location on block (middle, corner).

Lighting at Crime Scenes

1. Location of street lamps; are they in working order (assuming it's at night)?
2. Amount of natural light.

The Weather

1. Sunny/rainy;
2. Clear/overcast;
3. Warm/cold;
4. Rain/sleet.

Physical Characteristics and Clothing of Suspects

1. Age;
2. Approximate height;
3. Approximate weight;
4. Description of face;
5. Description of hair;
6. Description of multiple articles of clothing;
7. Unusual features (tattoos, scars, etc.).

Statements Made by Defendants

1. Need not be a signed confession;
2. ***Anything*** the defendant says may be important. Get the full details of the statement, including:
    a. Beginning time and ending time of statement;
    b. Location;
    c. Other witnesses (including officers);
    d. Exact wording;
    e. Circumstances of warnings given.

Exact Location of Seized Contraband

1. If recovered from the defendant's person, record the precise location (e.g., right front pants pocket).
2. If near defendant, distance between defendant and contraband (e.g., "located within six inches of defendant's foot"). The word *approximately* should be used.
3. If indoors, whether in plain view or hidden, and exactly where it was (e.g., on top of coffee table in living room, in top drawer of dresser), and whether other objects, tending to connect contraband with owner, were near (e.g., drawer contained women's clothing and passport for Irma Smith).

Names of Other Officers Assigned to Case

Include their location, and what actions each officer performed (e.g., recovered property, interrogated the suspect). The officer assigned to secure a crime scene *must make an Activity Log entry of* the rank, name, and command of every person that enters the crime scene area.

Chain of Custody

The presentation of physical evidence for use at trial is another crucial part of the investigation. ***Chain of custody*** is critical here: ***chain of custody*** means that from the time evidence has been seized to the time it is presented in court, there has been an unbroken record of the location of the evidence, thorough documentation of who has been responsible for it, and solid assurance that it has not been tampered with or otherwise tainted in any way. Because admissibility at trial depends upon an unbroken chain of custody from arresting officer to courtroom, the processing of evidence (vouchering) must be done meticulously. As few people as possible should handle physical property, especially contraband. The officer who seizes it, either from the defendant or the location, should therefore, voucher it at once. Under no circumstances should evidence from different defendants be combined on one voucher. ***Chain of custody is one of the most fertile areas of trial for the defense attorney to cast doubt on the prosecution's case; only meticulous attention to detail will insure the admissibility of the physical evidence that will help convict the defendant.***

When in doubt as to the relevance of physical evidence, INVOICE IT! Property can always be returned, but an item not vouchered at the proper time can leave a hole in the prosecution's case.

Recording the Facts

Note taking should begin at once. Your Activity Log should begin to contain entries recording your observations as soon as practicable. Many police officers believe that their Activity Logs contain confidential or highly secret information. They feel that since they made the record it is their personal record and no one else has the right to see it. In fact, nothing could be further from the truth. You are a public servant and as such the records you make are public records. You should keep this in mind when you make your initial memo entries. While writing them, be aware that there is a good possibility that these records will be produced in a court of law and may even be read to the judge or jury. On occasion, officers have even been surprised to find that their requests for Departmental recognition have been obtained by defense attorneys, and when they embellish the facts, the requests have been used to impeach officers' accounts of arrests. It is a better practice to wait until the case is over, before submitting a request for Departmental recognition.

Thorough Activity Log entries should read like testimony. There should be a minimum number of conclusions and a maximum number of details. Remember that it is the details, even ones considered insignificant, that will convince the court or jury that you are telling the truth and that the defendants are guilty of the crime for which you have arrested them. At the very minimum, your Activity Log entry should contain the defendant's full name, alias, address, age, occupation, physical description of the clothes the defendant was wearing at the time of the arrest, and the acts committed. The full names of any complainant(s) or witness(es) should be included, and, to the extent possible, you should record their exact words.

It is also helpful to describe the crime scene. Often the experienced police officer will sketch a diagram of the crime scene, indicating the location of certain items, e.g., body, gun, etc., and the approximate distances from doors, windows, etc.

Officers should also note weather conditions, lighting conditions, the exact time they responded to the crime scene, and a detailed description, including serial or identification numbers, of any property stolen.

Your Activity Log, and for that matter, any police report you prepare, should be prepared accurately, thoroughly, and as quickly as possible, while your memory is fresh. Sometimes you may need to use it to refresh you recollection while you are on the witness stand.

Never include anything that you are not sure of. At the same time, items you are certain are true should not be excluded for any reason. Failure to record an important fact can be used by the defense lawyer at trial to cast doubt upon your credibility.

In addition to routine paperwork (Complaint Reports, Arrest Reports, Unusual Occurrence Reports), you may have occasion to conduct procedures that involve the defendant's constitutional rights. These include taking statements, conducting a show-up, and arranging for a line-up. In all such instances, notes should be made concerning the manner in which the procedure was conducted. ***ALL*** statements, however seemingly harmless, made by a defendant should be recalled, recorded, and repeated to the Assistant District Attorney. One never knows what twist and turns a criminal case may take, and what appears to be a harmless statement by a defendant may turn out to be significant as the court case develops and the defense develops their strategy. Miranda Warnings must, of course, be given and a record kept of that fact.

MAKING THE CASE: THE ROLE OF THE DISTRICT ATTORNEY

Although the District Attorney ("D.A.") has a great deal of discretion in deciding how a case should proceed, they are ultimately working with the product brought to their office by the police. Therefore, it is your responsibility to bring the D.A. a case that is as thoroughly prepared as possible. You must keep in mind that, unlike defense attorneys and lawyers in general, the D.A. is not obligated to zealously advocate the position of his client (the "People of the State of New York"). Therefore, the D.A. will **not** prosecute someone where the evidence does not support a conviction.

The first prosecutor you meet will probably be the **Assistant District Attorney (A.D.A.)** at the **Early Case Assessment Bureau (E.C.A.B.)**. You will recite facts to this A.D.A, and they will decide on the basis of those facts what charges to file against the defendant. Since the facts as conveyed by you to the A.D.A. can be used to discredit you at trial, you should articulate the facts of the case to the A.D.A. as precisely as possible. Furthermore, the A.D.A's initial assessment of the case, whether to treat the case as a felony or misdemeanor will, in some instances, be based on the actual interview of the arresting officer. Remember to <u>always</u> include all statements made by the defendant, no matter how insignificant you may believe them to be.

The police officer is allowed to talk to the A.D.A to prepare their testimony. As the hypothetical case at the beginning of this chapter suggested, the defense attorney may attempt to discredit the police officer by implying perjury, misconduct, or incompetence. Case preparation should therefore be thorough and thought out.

The adversarial system is the foundation of the Anglo-American judicial process. The parties must remain within the bounds of the law. Each side will exert effort to present their case in the strongest light and, in theory, this partisan confrontation will yield the truth, and justice will be served. The defense and A.D.A. will present their cases and

argue the applicable law. The judge serves to rule on issues presented by each side. The judge assumes a neutral and relatively detached role as decision-maker.

Case strategy depends on the A.D.A. assigned. Some A.D.A.s will keep testimony simple and straightforward because *the facts speak for themselves*, and the evidence is strong. Other A.D.A.s will rely almost entirely on witness testimony. Relying heavily on witness testimony requires extensive pre-trial preparation. Failure to prepare creates a situation whereby the defense can discredit the A.D.A.'s case. Proper case preparation can help ensure that the case will not be overturned on appeal. Case strategy also hinges on the veracity of the evidence and witnesses. It's impossible to predict who a jury will believe and to what extent they'll consider *expert testimony,* which often involves scientific analysis of physical evidence.

In some cases, the A.D.A. has the power to charge either a felony or a misdemeanor. They, for example, may offer a plea bargain, because the case appears weak or because the defendant has agreed to cooperate on other matters.

Sometimes it may seem to you that the "deals" made by prosecutors and defense lawyers are not only contrary to justice, but undermine the good police work done on the case. Your police reports may seem to vanish into a black hole, having no impact whatsoever on the criminal justice system. This, however, is simply not the truth.

The A.D.A.'s decisions regarding the case are made with careful consultation of all available police reports, including the E.C.A.B. write-up. Before offering to engage in plea negotiations, the A.D.A. will review the file, taking into account such factors (recorded on police reports) as the extent of injuries sustained by the victim, the presence of a weapon, and the existence of incriminating statements by the defendant. The plea offered will usually reflect the police view of the seriousness of the case - as reflected in your reports.

The defense lawyer also relies upon police reports to do their job of advising the defendant. They must counsel the accused concerning the chances of prevailing at trial versus the certainty of the plea bargain. Their advice will be influenced by the contents of the police reports they obtain through the discovery process. Thus, even if you never have the opportunity to take the stand, your police work, as contained in the reports you have prepared, is a crucial factor in each and every criminal case. The more accurate and complete those reports are, the stronger your presence in the courtroom will be – whether or not you actually take the witness stand.

PARTICIPATION IN COURT PROCEEDINGS

Preparation for Hearings and Trials

There is no such thing as an over prepared case. Every lawyer, whether on the side of the prosecution or the defense, knows this simple truth. With good preparation by the A.D.A., a police officer's testimony becomes sharpened and focused, emerging as the cornerstone of the People's case. With full preparation, the police officer understands their role in the case, and may even be able to anticipate hostile defense questions. A properly prepared police witness comes across to the jury as a competent, objective professional whose testimony can be relied upon.

There is no substitute for knowing the case and being well prepared. By succinctly and accurately communicating facts to the court, the officer's testimony should demonstrate that they are knowledgeable.

Truthful testimony is a must, even if it is favorable to the defendant. Traditionally, police have had an edge on lay witnesses when testifying in court. The uniform or shield symbolized credibility and, both the training you are now receiving and the experience of working in the street, under pressure, will help to make you an articulate and powerful witness. Juries tend to believe the police officer. Today a police officer must strive to offer clear, concise and logical testimony.

By contrast, a poorly prepared witness may fumble or back track, rifling through papers in a frantic attempt to locate a vital fact. Worse, their feelings of inadequacy may erupt in a hostile outburst at the defense lawyer. As a result, the jury loses respect for the witness and may choose to believe the defense version of events.

Adequate preparation for trial is the right of every police witness. The A.D.A. who promises to talk to you in the hall on the way to court is not doing their job properly and may cause you to do less than your best on the witness stand. You have the right and duty to insist on a thorough preparation before placing your credibility and the Department's image on the line.

Good preparation serves several functions: It helps you, the witness, to understand courtroom procedures; it acquaints you with the prosecutor's theory of the case; it allows you to convey vital information to the A.D.A., and it aids in refreshing your recollection.

LAW
Court Appearances

Procedures for Court Appearances (Patrol Guide 211-01)

When a uniformed member of the service is required to appear in court, before a Grand Jury or other government agency, such officer must conform to the procedures found in the Patrol Guide. These procedures require the officer to:

A. Appear in uniform, if assigned to duty in uniform, **except** if:
   - Off-duty;
   - On sick report or restricted duty;
   - Required to arraign deferred or holdover prisoner;
   - Authorized by commanding officer.

Note: Patrol Guide procedure 204-04, "Optional Uniform Items" states: "Uniformed members of the service in the rank of sergeants, police officers and detectives performing duty in uniform and civilian uniformed and auxiliary counterparts MAY wear the regulation turtleneck shirt underneath the regulation long sleeve uniform shirt. The top button only of the long sleeve shirt is to be left unbuttoned. No tie is to be worn. This combination may be worn with or without the uniform duty jacket. i.e., it may be worn as an outer garment. It may be worn to court and to detail assignments. This uniform option may NOT be worn by members assigned to perform administrative positions."

B. Report to the Police Sign-In Room and submit I.D. card and **Court Attendance Record (PD468-141)** to supervisor / designee.

C. Inform supervisor / designee if scheduled to appear in more than one part of court, before another government agency, or if on a court alert.
   - Notify supervisor/designee if appearing on off-duty time.

D. Wear appropriate business attire, if appearing in civilian clothes. Wear shield on outermost garment at all times when in courtroom or within court building.

E. Take meal period when court is in recess and enter meal location in Activity Log.

F. Report to the Police Room if you are required to leave the court building for reasons other than meal, and upon return.

G. Have Activity Log and evidence available at each appearance.

H. Request adjournment to a day when performing duty on a 2nd platoon or, if a detective, when performing day duty. Inform the judge if the adjourned date is on a scheduled day off.

I. Report to the Police Room upon completion of court appearance and obtain a completed **Court Attendance Record**.

J. Return evidence, if any, to Property Clerk. Notify the desk officer by phone upon dismissal from Police Sign-in Room and comply with instructions.

Preparing to Testify

A. On or before meeting with the A.D.A., the officer should take the following steps in order to provide accurate and professional testimony:

B. Review your notes, reports, and previous testimony. (The defense attorney will have all of these as a result of the discovery process.)

C. Review the case with other officers that were present.

D. Review the case with the prosecutor.

E. Review your testimony with the prosecutor. If you are on the stand and are asked by the defense attorney if you discussed the case with the prosecutor, tell them that you did, in fact, discuss the case. This question is a trick: many people, unfamiliar with the courts, may believe that it is somehow improper to talk with the attorney who represents the side for which they are testifying. It is not, as no competent lawyer would put anybody on the stand unless they had a very good idea of what the witness is likely to say.

F. Make sure that you and the prosecutor have all of the exhibits and evidence that will be utilized at the trial. Make sure you can identify them and that they are marked with your mark in addition to having evidence tags.

   Examples of evidence:

   - Records;
   - Weapons;
   - Your certifications;
   - Pictures;
   - Reports.

G. Assist the prosecutor in making sure that all witnesses show up.

H. Show the witnesses their statements and let them review them.

I. Put the witnesses at ease - explain the court system to them.

Trial or Hearing Date

A. Show up early to meet with A.D.A. and review notes and exhibits.

B. If assigned to appear on a scheduled day off, inform the judge of such condition and request an adjournment to a day when performing duty with the 2nd Platoon.

C. Make an Activity Log entry if re-scheduling is impossible. Such entry **must** include:

- Name of the Judge and A.D.A.;
- Date of appearance;
- Adjournment date;
- Court and part.

D. Inform the Borough Court Section supervisor assigned to the Police Room of such scheduling on day off.

Note: A uniformed member of the service who is assigned to appear in court on a scheduled day off will be assigned to a tour starting at 0900 hours, unless the court scheduling necessitates a different start time. UMOS returning from court may be excused upon request, if the exigencies of the service will permit.

E. Dress appropriately - uniform or business suit;

- Neat/pressed;
- Clean;
- Leather polished;
- Minimal jewelry;
- Hairstyle.

UNDERSTANDING LEGAL PROCEDURE

The courtroom is similar to a foreign country to many people. Customs are different, and a strange language is spoken. The A.D.A. should be your tour guide, explaining such basics as how the courtroom is laid out, the proper way to address the judge, and the differences between direct and cross-examination. They should practice with you how to handle your documents and/or physical evidence so that in-court admission of these items goes smoothly. The hearsay rule, which prevents you from testifying to the contents of conversations with third parties, should be thoroughly discussed so that you will not be rattled by defense objections at trial. After a suppression hearing, certain facts may no longer be admissible; the A.D.A. should help you structure your testimony so as to leave out any reference to the suppressed items.

The better your understanding of the courtroom, the more comfortable you will be on the witness stand. Feel free to ask the A.D.A. any and all questions that come to mind. A few A.D.A.'s have the mistaken idea that all police witnesses are automatically experienced in court and need no explanation of procedure. Especially in your first few court appearances, you may have to insist that the A.D.A., as *tour guide*, gives you a thorough grounding in courtroom basics. When you press this hard enough, the A.D.A. will see that it is in their interest to help you through this process: you are on the same team.

RULES OF EVIDENCE

Your responsibility as a police officer is to legally gather and preserve as much evidence as you can. You should not make decisions as to the usefulness or admissibility of particular items. What will be presented as evidence in a criminal case is up to the prosecutor. The prosecutor is trained to recognize what the judge is likely to admit in order to prove the guilt or innocence of a defendant and they bear the responsibility for the proper presentation of the People's case. The remainder of this chapter will consist of a look at the rules of evidence and how they apply to your duties and responsibilities.

Evidence Defined

Evidence is anything that is used to prove or disprove a disputed issue in a court of law. It may consist of testimony, documents, or objects. The rules of evidence in New York State are not contained in any one statute such as the Penal Law or Criminal Procedure Law. Instead, they are a set of rules which have developed over the years through decisions in individual cases. These rules do not tell us what *is* admissible as evidence in a trial. Instead, the rules tell us what is ***NOT*** admissible. As previously stated, you need not concern yourself with whether a particular item of information will be admissible or not, because that is the function of the prosecutor.

It is possible that evidence that would ordinarily be admissible may be suppressed, which means the evidence will be excluded. This happens when it is obtained through a violation of someone's constitutional rights. The police officer must be aware of the rights of individuals so as not to damage a strong case through carelessness.

Exclusion of Evidence

Evidence that has been illegally obtained by the police is not permitted to be used at the criminal trial. Guns, narcotics, contraband, confessions, or eyewitness identifications may be suppressed if they were obtained in violation of the United States Constitution or in violation of the New York State Constitution. If the prosecutor (District Attorney) offers into evidence one of these items (guns, narcotics, or a confession), the defense attorney will usually object. The objection may occur prior to the trial or during the trial itself. The defense attorney will make what is known as a motion to suppress. If the court grants the motion, it will exclude the evidence from use at the trial. The following are examples of circumstances that most often result in motions to suppress:

- The property was obtained by means of an unlawful search or seizure.
- The statements, admissions, or confessions were not made voluntarily to the police officer.
- There was improper eyewitness identification.
- There is an eavesdropping/wiretap recording of the defendant obtained under circumstances that preclude its admissibility in court.
- Certain evidence exists which would be admissible, but for the fact that the police became aware of it through an unlawful means. This is referred to as the "fruit of the poisonous tree" doctrine.

The judge may grant or deny a motion to suppress evidence or may order a hearing just to determine if the evidence should be suppressed. If a hearing is conducted, you, as the arresting officer, may be called to testify.

The Rosario Rule

People v. Rosario, is the landmark New York Court of Appeals case that created an obligation on police officers to preserve for trial, and prosecutors to ultimately make available to the defense, all statements about a crime that relate to a witness's testimony. These preservation and disclosure obligations are now codified in Criminal Procedure Law section 240.45. Police officers must preserve and disclose all handwritten notes as well as electronically stored information including all emails, text messages, voicemails, photos, videos, and other information generated by any other application on Department issued smartphones and tablets.

Rosario and Criminal Procedure Law section 240.45 require the prosecutor in a criminal case to disclose to the defendant, any written or recorded statement made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony. Therefore, officers must always secure all items which may contain a witness's statement and inform the prosecutor, as soon as possible, that such material is available. Failure to do so may result in the reversal of a criminal conviction.

Rosario material is not only limited to handwritten notes in notebooks or on scraps of paper. Any electronic records or correspondence is considered *Rosario* material and must be preserved and disclosed as such. New York courts have identified the following as *Rosario* material:

- Activity Logs;
- Personal notes and preliminary worksheets prepared by an investigating officer;
- All notes made by a police officer who witnesses a crime, if they are made in connection with the defendant's arrest;
- Arrest reports, interview reports, complaint reports, and incident reports; and
- Electronically recorded communications.

It does not matter how the aforementioned categories of materials are recorded. Regardless of whether they are handwritten and kept in a paper file or typed and electronically stored, if they contain a witness statement, they **must** be turned over to the prosecutor. The prosecutor will then determine when the material will be turned over to the defendant's attorney and what will be included.

There is an exemption on certain materials that the court would consider sensitive or confidential, such that it should be withheld from the defendant's attorney. However, such exemptions are rarely utilized by the courts. Any material which a police officer considers to be confidential should be discussed with the district attorney at the start of the case, so that it may be withheld with the court's approval. If an officer is unsure of whether material is *Rosario* material or confidential, he or she should discuss the matter with the prosecutor so that the prosecutor can make a proper determination.

Regardless of confidentiality concerns, all emails, text messages, voicemails, photo, videos, and other information generated by any other application on Department smartphones and tablets must be retained on the device. In the event that usage approaches or exceeds the memory of a Department smartphone or tablet, **photos** and **videos** must be transmitted to the applicable command email address listed in Operations Order 20 of 2015. Those photos and videos may then be removed from the device once it is confirmed that the data has been properly moved and stored. All emails, text messages, voicemails, and other information generated by any other application on Department smartphones and tablets, however, must not be deleted from the device. Though non-Department issued devices **should not** be used for official

business, any information contained on personal electronic devices should also be preserved and disclosed in the event such smartphones and tables are used.

Members of the service must be mindful of their obligation to preserve and disclose their written notes as well as all emails, text messages, voicemails, photos, videos, and other information generated by any other application on Department smartphones and tablets. Refer to Operations Order 20 of 2015 for official Department procedure for using Department smartphones and tablets.

The penalty for violating the Rosario Rule is catastrophic to a criminal prosecution. ***Any*** failure to produce Rosario material, regardless of the good faith effort by police in attempting to locate it, can result in the reversal of a conviction.

Brady Material

Another important area of law that a police officer should be familiar with is exculpatory evidence, commonly referred to as Brady material. Exculpatory evidence is evidence that tends to clear someone's guilt. Brady material does not necessarily have to be written or recorded; it can also include anything oral. The prosecution is mandated by law to disclose any evidence that is favorable to the defense upon request by the defense. Unsolicited exculpatory evidence must also be disclosed when it creates a reasonable doubt that would not otherwise exist. A police officer must bring any such evidence to the attention of the District Attorney. Failure to do so may jeopardize the prosecution and bring about judicial sanctions. Remember, a police officer should gather and preserve as much evidence as possible at a scene of a crime. The District Attorneys will determine what evidence, if any, is exculpatory.

TESTIMONIAL EVIDENCE

Testimony by Children (C.P.L. Section 60.20)

As a general rule, a witness who is a child less than nine may not testify under oath in court, unless the judge (referred to as "the court") determines that the child understands what taking an oath means. A child less than nine may, however, testify without taking an oath. If a child does testify without taking an oath, a defendant may not be convicted solely on the child's testimony.

When you have a case where a child is less than nine you should attempt to obtain additional evidence. Additional evidence is also important in cases where a complainant or witness may have mental disease or defect, since the judge may not allow such a person to testify in court.

Accomplice Testimony (C.P.L. Section 60.22)

A defendant may not be convicted of any offense solely upon the uncorroborated testimony of an accomplice, unsupported by other evidence tending to connect the defendant with the commission of the offense.

An "accomplice" means a witness in a criminal action who may reasonably be considered to have participated in:

- The offense charged; ***or***
- An offense based upon the same or some of the same facts or conduct that constitutes the offense charged.

The fact that a witness in a criminal action is also an accomplice, and that they have a defense such as infancy, or some type of immunity, does not affect his status as a witness.

> **Example:** Bill and Henry commit a robbery. If Bill is arrested and names Henry as his partner in the crime, Henry cannot be convicted solely on Bill's testimony. However, in combination with any other evidence that ties Henry to the crime, Bill's testimony may be sufficient corroboration to convict him.

The Hearsay Rule

Hearsay is evidence not from personal knowledge of the witness, but where the witness merely repeats what the witness heard others say. It is testimony about something said outside the court by other than the witness, which the witness testifies as being true. **Hearsay evidence is usually not admissible**.

Briefly stated, the hearsay rule precludes testifying to anything that was said out of court. Here's an example: You and your partner are sitting in your patrol car when a woman comes up and tells you her bag has been snatched. If you were telling this story to someone outside of a courtroom, you would undoubtedly say, "The lady told me someone took her pocketbook." In court, this is called hearsay.

The theory is that ***each witness testifies only to what they saw and heard first-hand***. You did not ***SEE*** the purse snatching; therefore you cannot testify that it happened. The reason for hearsay not being admissible is that the person who actually said the words is not under oath and cannot be cross-examined. The woman herself will take the stand and tell that part of the story and be cross-examined.

Your testimony, without hearsay, would consist of: "I was in the car with my partner. A woman came up to me; and told me something. As a result of what she told me, I took

her in the car and we drove around. Eventually we saw the defendant and stopped him. I then had a conversation with the woman, and placed the defendant under arrest."

There are exceptions to the hearsay rule. Perhaps the most important is that you may testify to any admissions or confessions made by the defendant (providing, of course, that they have not been suppressed prior to trial). Other exceptions to the hearsay rule, such as spontaneous utterances or dying declarations should be discussed beforehand with the A.D.A.

Exceptions to the Hearsay Rule

There are many exceptions to the hearsay rule. However, there are three that you will most likely encounter. They are as follows:

- ***Confession or Statement:*** Given by a defendant.

- ***Admission***: A statement made by a defendant that is against his penal interests, but does not amount to an acknowledgment of guilt.

- ***Dying Declaration***: A statement made by the victim of an assault which is made when death is imminent and the declarer has abandoned hope of recovery. Dying declarations may only be used when the victim actually dies.

Pretrial Hearings and Motions to Suppress

The motion to suppress may be handled without a hearing if the District Attorney and the defense attorney agree to the facts in the case. This is not often done, however. If a hearing is conducted, you, as the arresting officer, will be called as a witness. The reason that the motion to suppress is so important is because, if the defense counsel is successful, the evidence sought to be admitted by the People will not be admissible as evidence in the case. This often means that the case is won or lost at the suppression hearing.

> **Example**: A police officer arrests and charges a defendant for criminal possession of a weapon. If the defense counsel is successful in a suppression motion, the court will rule that the gun cannot be introduced in court as evidence. Without the gun being introduced as evidence, it is almost impossible to prove the crime of criminal possession of a weapon. In gun cases, if the defense counsel wins at the suppression hearing, the District Attorney will drop the charge against the defendant. On the other hand, if the People win, the defendant will often edge towards entering a plea of guilty. This is because he knows that once the court rules that the weapon is admissible, the People will have an easier time establishing their case.

Types of Pretrial Hearings

1. **The Mapp Hearing**: A hearing conducted prior to trial, a Mapp Hearing determines whether **physical evidence** to be presented at trial was legally or illegally seized.

2. **The Huntley Hearing:** Also conducted prior to trial, a Huntley Hearing is one in which the defendant asks the court to determine the admissibility of a **confession, admission, or statement** made by the defendant.

3. **The Wade-Gilbert-Stovell Hearing**: This hearing determines the fairness of the **eyewitness identification** of a defendant. This will usually follow a lineup or show-up at which the defendant was identified by a witness or the victim.

Understanding the Theory of the Case

The ability of a witness to testify effectively is enhanced when the witness understands the purpose for which they are called and where their testimony fits into the case as a whole. Your testimony is like a piece in a jigsaw puzzle: taken by itself, it may seem to lack a coherent meaning, but put in context with other pieces, it forms a clear picture. It is up to the A.D.A. to show you exactly where your piece of the puzzle fits.

In addition to having their own theory of the case, an experienced A.D.A will often be able to anticipate the approach the defense will take. They will be able to help you prepare for the exact type of cross-examination you will face in the courtroom. Your testimony may take on a different character depending on the nature of the defense claim.

For example, suppose that you are a witness in two robbery cases. In the first case, the accused raised a defense of mistaken identity, asserting that he was not the person who committed the crime. Your testimony will probably focus on matters of physical description, comparing the description given to you by the complaining witness with the actual appearance of the defendant.

In the second case, the defendant, who is acquainted with the complaining witness, asserts that the complainant fabricated the entire robbery story in order to get revenge for some other act of the defendant. Since the parties are known to each other, identification would not be the issue, and your testimony would differ considerably from that in the first case.

Cross-examination cannot only be anticipated, but simulated; with the A.D.A. playing the role they expect the defense lawyer to play in the courtroom. The A.D.A. may even be able to put you on notice regarding the individual defense attorney's usual style and tactics.

Conveying Information to the Prosecution

The educational function of pretrial preparation is not just a one-way street. You are as much an expert in your profession of law enforcement as the A.D.A. is in the legal arena. You can, therefore, add to the strength of the People's case by the information you provide to the prosecutor during preparation.

One obvious area in which the police officer can instruct the prosecutor is in police procedure. While some A.D.A.s are well versed in the workings of the Police Department, others are not and would benefit from your experience. You can educate the prosecutor on such topics as routine police actions, the requirements of the Patrol Guide, and the many types of reports that may be filed for a given case. For example, the A.D.A. may be well aware that a Complaint Report, a Complaint Report Follow-Up, and an Arrest Report have been filled out, but do they know that an application for a commendation was prepared? The commendation form may contain a more detailed account of the incident and, therefore, might be used by the defense to impeach the routine reports filed in the case.

An experienced police officer who knows “the street" can often help a prosecutor understand the motives and methods of those who commit crimes. Some con games, for example, require a thorough analysis by an expert in order to be fully understood by a layperson. The police officer that understands the con game educates the A.D.A., who then educates the jury.

Where the officer has had an ongoing relationship with the defendant, they can illuminate the defendant's family relationships and prior conduct for the benefit of the A.D.A. The prosecutor will then have to decide which portions of the defendant's criminal past they will use in court.

The police officer conveys vital information to the Assistant District Attorney in another very basic way: by bringing to the prosecutor's office ***ALL*** reports, memoranda, documents, and scratch notes connected with the case. The A.D.A. will use all of this to help you refresh your recollection of events, and will also determine which documents they intend to introduce at trial.

The initial meeting between the police officer and the A.D.A. assigned to the case is critical. It is at this meeting that the facts of the arrest/incident are conveyed to the A.D.A. assigned to the case. The officer must attempt to relate all the facts. If they are unsure about whether a particular detail is important, the A.D.A. should be allowed to decide. ALL paperwork related to the case must be given to the assigned A.D.A. This includes Complaint Reports, Online Booking System Worksheets, Complaint Report Worksheets, Stop Reports, Police Accident Reports (in cases involving vehicle collisions), Aided Reports, narcotics "buy reports", Activity Log entries, and scratch

notes. The officer should make the A.D.A. aware of applicable Patrol Guide procedures, and any particular knowledge or expertise that the officer has.

Legal Bureau Bulletin Volume 2, Number 9, describes an arrest made by a Housing Authority police detective. This detective received information regarding drug dealing by a particular defendant from an unidentified informant. Over a period of two weeks, the detective then made independent observations of the defendant and his actions. It was the detective's observations, and not the information supplied by the unknown informant, that led to the establishment of probable cause. If the detective had not painted such a good word picture, he would not have been allowed to testify as an expert, nor would he have had established probable cause for the arrest. A new officer who has recently graduated from the Police Academy would find it harder to be recognized as an expert than would an experienced narcotics detective.

If, during the course of the trial, a police officer recalls previously forgotten information, this information should be immediately related to the assigned A.D.A. If a police officer either failed or simply forgot to disclose a certain fact or detail, they should admit this at trial. Failure to do so will only serve to taint everything else the officer says. If a police officer should attempt to *fix* a previously undisclosed fact or detail, the defense attorney could use this to win an acquittal for a client. Additionally, the police officer would be guilty of perjury. ***The greater good can never be achieved by perjury, but only by diligent police work, augmented by a careful and reliable judicial inquiry***.

Sometimes an Arrest Report will differ from a Complaint Report in some ways. It is up to you to point out any such discrepancies to the Assistant District Attorney so that they can be explained at trial. A discrepancy may be a simple mistake, or it may have a reasonable explanation. The important thing is that the A.D.A. be forewarned, so that the discrepancy does not come as a surprise, but can be dealt with at trial.

The arresting officer will be designated to retrieve all physical evidence from the Property Clerk and bring it to court. Vouchers should accompany all items. The A.D.A. will review the paperwork with you, and prepare you to testify, with emphasis on establishing the "chain of custody". The officer should be able to account for the property at every stage of these proceedings.

THE COURSE OF TRIAL: AN OVERVIEW

A suppression hearing, whether in Criminal or Supreme Court, precedes many trials. After the hearing, if a trial is still required, a jury will be impaneled. Both the A.D.A. and defense counsel are permitted to question prospective jurors during the ***voir dire*** (selection of jurors) in order to insure impartiality.

Once the jury is selected, the trial begins. The A.D.A. must make an opening statement, telling the jury what they intend to prove. Because the defense is not required to present a case, the defense lawyer's opening statement is optional.

Testimony begins with the A.D.A. calling witnesses. Their questioning of prosecution witnesses is called ***direct examination***. When the A.D.A. is finished, the defense lawyer may question the witness. This is called ***cross-examination***. The A.D.A. may have some questions on ***re-direct***; the defense lawyer is then permitted to ***re-cross***.

When the prosecution's entire case is complete, the A.D.A***. rests their case***. At this point, defense counsel moves to dismiss the charges. It is up to the judge to grant the motion if *ALL* elements of the crime have not been established. If they have established all of the elements, called a **prima facie** case, the motion will be denied. The defense attorney has the choice of making a second motion to dismiss, this time on the grounds that the evidence was insufficient to prove the defendant's guilt beyond a reasonable doubt, or proceed to present his defense. Defense witnesses are questioned in the same manner as prosecution witnesses.

The prosecution may call additional witnesses to the stand after the defense has rested its case. This is known as ***rebuttal***, and is permitted only where the defense has raised issues of fact not already covered in the prosecution's case (e.g., evidence tending to disprove a defendant's alibi).

When all testimony has been received, both attorneys deliver summations to the jury. The judge delivers a charge on the law, and the jurors retire to consider their verdict.

GENERAL PRINCIPLES OF COURTROOM TESTIMONY

Appearance

A professional appearance is essential to being an effective police witness. Jurors expect a police officer to be more objective, more competent, and more impressive than a civilian witness.

Department policy requires that an officer assigned to patrol must wear their uniform to court unless they are off-duty, on sick report, or authorized by their commanding officer

to be out of uniform. When a member of the service appears in court in uniform, the uniform should be clean and pressed. Any and all citations should be worn above your shield. You earned them - let the jurors see that you are an experienced officer who has been commended by the Department. Civilian jurors are impressed by citations; the A.D.A. may even ask you to explain them to the jury in order to enhance your position as a seasoned officer.

If you are appearing in court in civilian clothes, your attire should present a professional, essentially conservative image. Think of yourself as dressing for a job interview at a bank. Business suits are appropriate for witnesses of either sex. However, a sports jacket and slacks, providing they are conservative in cut and color, are also permissible for men; a tie is mandatory.

Women have more clothing options than men, but a businesslike appearance is still the key. A dress should not be revealing. A skirt or pants, accompanied by a blouse of conservative cut and color may be worn, preferably with a jacket. Stockings and business shoes should be worn.

The shield should be displayed on the outermost garment. If weapons are carried, they should be out of sight. Good grooming – neatly trimmed hair and beard, polished shoes, and well-kept clothing – is important to the professional image you are striving to project.

The damage to credibility due to appearance should not be underestimated. A sloppy appearance will lead the jury to perceive the witness' police work as equally sloppy. Loud colors, flashy jewelry, or extreme styles may lead to speculation that the officer's performance on the job is guided by a desire for flamboyance. A casual look not befitting the courtroom creates the subtle inference that the witness is casual in the performance of their duties.

Demeanor

The way an officer behaves in court is at least as important as the way they dress in creating an impression on the jury. One vital rule to remember regarding proper courtroom demeanor is that it begins the minute you enter the courthouse. Many criminal cases have been lost in hallways and elevators, where prospective jurors overhear remarks that influence their thinking about guilt or innocence. An officer who is overheard making disparaging remarks about the accused will lose any claim to credibility that they might have had.

Before entering the courtroom, it may be helpful to take deep breaths and consciously relax yourself. When your name is called, step up to the witness stand with confidence, neither hurrying nor displaying reluctance. If you have been thoroughly prepared to

testify, you have nothing to fear. ***Remember: It is the defendant who is on trial - NOT you and your police work.***

In every case where a police officer appears as a witness for the prosecution, studies indicate that the jury gives any witness (but a police officer in particular) a good deal of thought after they testify. This can lead to either a high or low conviction rate depending on what the jury believes of the witness. Mark Fuhrman, the Los Angeles detective who was caught in lies about whether he had ever used the "n-word", illustrates what happens if a jury believes that a witness is untrustworthy. His racism may or may not have had anything to do with whether he was telling the truth about what he had seen and done in the O.J. Simpson murder case – but once a witness falls from grace, there's usually no return. ***There are no such things as stretching the truth, fibs, or white lies on the witness stand: anything that is not the whole truth and nothing but the truth is perjury.***

When taking the oath, do so in a firm, clear voice. The A.D.A. will then ask for your name, rank, shield number and command. Try to answer in a natural tone, but loudly enough so that you can be heard throughout the courtroom.

Your overall attitude should be a combination of confidence about the accuracy of your own testimony, respect for the court, and neutrality toward both attorneys. Showing too much friendliness toward the A.D.A. or displaying hostility toward the defense lawyer will cast doubt upon your objectivity.

As much as possible, you should try to look at the jury when testifying. Keep your voice up. Answer all questions – from both prosecution and defense – with the same calm sincerity, appearing concerned and interested at all times. Do not try to *slant* answers so as to help the A.D.A. or frustrate the defense lawyer.

Listen carefully to all questions and take time to consider your answer. You may ask that a question be repeated or clarified if you did not understand it. Try to answer only the question asked, without volunteering information not requested. On the other hand, DO answer questions as fully as necessary without hedging or evading. If a question *CANNOT* be answered "yes" or "no", you may ask the judge for permission to expand your reply. Even if permission is denied, the A.D.A. will be on notice that you have more to say on the subject. In such circumstances, when the A.D.A. gets an opportunity to re-examine you, they will almost certainly ask you the following question:

> *"Officer, on cross-examination, Mr. Smith asked you about… It didn't seem to me that you had an opportunity to complete your answer to that question. Is there anything else you would like to add to your answer now?"*

There can be a great temptation to enhance the People's case: To *make it better.* This temptation should be resisted. ***The bottom line is that the case is the case***.

You cannot correct mistakes that might have been made or add to the facts that will convict the defendant. You are in court to tell the truth. ***No case – repeat, NOT ANY case – is worth perjury***.

Direct Examination

Direct examination lives up to its name. Straightforward, open-ended questions are asked ("And then what happened?"). The witness answers, telling their story in a direct, chronological fashion.

The key to persuasive direct testimony is good preparation. When the A.D.A. asks, "What, if anything, did you do then?", you must have some idea what particular aspect of your activities they want you to mention. The way to achieve this certainty is through thorough pretrial discussion with the prosecution.

The A.D.A. is not permitted to ask *leading* questions of their own witness. They cannot ask questions that point to a single answer ("The defendant told you he was guilty, didn't he?"), but must instead make open-ended queries ("Did the defendant say anything to you?"). This is another reason why preparation is needed: the A.D.A. will not be able to guide your answers by asking suggestive questions.

Most physical evidence is introduced on direct examination. When you are presented with physical evidence ("Officer, I will show you a weapon. Do you recognize it?"), take care to examine it before you give your answer. You may tell the A.D.A. "I'd like to examine it," before committing yourself.

When looking at the evidence, note any identifying marks you made when vouchering the evidence. This will enable you to establish the first link in the chain of custody that will allow the item to be introduced into evidence. You may need to refresh your recollection from the voucher or the ballistics report; do not hesitate to ask the court's permission to look at relevant documents.

During your testimony, the defense attorney may object to certain questions asked by the A.D.A. When this happens, ***STOP*** testifying. Only after the judge rules on the objection should you resume your answer, following whatever ruling the judge makes. If the judge sustains the objection, you cannot answer. If he overrules the objection, you can answer. Under no circumstances should you react to the court's ruling, favorably or unfavorably.

Since direct testimony is like telling a story exactly as it happened, it would seem that few problems could arise. There are, however, some pitfalls inherent in direct examinations. These can be overcome once they are recognized and anticipated.

Potential Problems during Direct Examination

The first pitfall is the tendency to talk like a police report instead of a person. Some officers do this in the mistaken belief that they sound more professional; others paraphrase the arrest report because they have been inadequately prepared. Whatever the reason, the officer who consistently says things like, "I observed the perpetrator from my R.M.P." instead of telling the jury, "I was in the car when I saw the guy," runs the risk of losing the jury by sounding unnatural and rehearsed.

Other potential problems on direct examination include opinion evidence, speculation, and "background" material. In general, a witness testifies to facts, not opinions. Thus, you must tell the court: "The defendant turned and ran away after I announced myself and told him to stop." You are ***not*** permitted to give your opinion that "he intended to flee." He may well have intended to flee, but how would you know whether this was so? You have no way to get into his head and to determine his intent. Instead, it will be up to the jury to determine whether he *intended* to flee based on the facts you present to them. In this example, the only fact you can present is that *he fled*.

Expert Witnesses are an exception to this rule. Fingerprint technicians, ballistics experts, and any police officer who can demonstrate specialized technical training may be qualified as an expert. For example, police officers who have received courses in con games may be permitted to give an expert opinion as to whether words said by the defendant constituted the opening moves in a well-known fraudulent accosting scheme.

Speculation is also precluded. You may have reason to believe that the defendant's behavior indicated intent to commit a crime, but you may not say so. One exception is that in testifying at a suppression hearing about probable cause to search or arrest, you may tell the judge that you acted upon a reasonable belief that the defendant was committing or about to commit a crime.

Refreshing Your Recollection

Although the Assistant District Attorney will help you reconstruct the events about which you will be testifying, in the final analysis it is ***YOUR*** memory that is being refreshed. Any memory aids that will help you to recapture a vivid and complete recollection should be used. For instance, if it is possible to visit the scene of the crime or arrest, this may help you recall such details as the physical layout and lighting conditions.

Reviewing your own and other officer's paperwork is another way to trigger your recollection. You may wish to discuss the case generally with your partner, or other fellow officers who were present on the scene. ***BE CAREFUL: The idea is to refresh YOUR OWN memory, not to conform your testimony to what someone else saw or heard.*** Too much discussion among police officers may result in testimony that seems *tailored* to a jury. If there are minor discrepancies among the police officers and

yourself, don't worry about it. Nothing in real life is ever perfect, and an experienced A.D.A. can handle it during the course of the trial. If you do consult with others, it is permissible to admit to the court that you conferred with fellow officers.

During your testimony you may also refresh your recollection by briefly reviewing any material you have brought with you to court. Your paperwork should be kept neatly organized in a folder that you can place next to you on the witness stand. You should not hold the folder and fidget with your paperwork while testifying, as this will convey nervousness to the jury. If you cannot remember a specific detail to properly answer a question, you may ask the judge if you can refresh your recollection by referring to your notes, paperwork, Activity Log, or anything else that would help you remember the answer. If given permission by the judge you may view these items briefly, then put them away and give your answer. You may NOT read aloud from any documents in your possession unless the specific item you are reading from has been admitted into evidence.

Explaining Discrepancies

It goes without saying that a police officer should thoroughly review all forms and notes before testifying. These notes include (but are not limited to) Complaint Reports, Complaint Report Worksheets, Online Booking System Worksheets, Activity Log entries, etc. The police officer/witness should also review their testimony with the A.D.A. Police officer/witnesses should refresh their own memories only. Police officer/witnesses should not be afraid to use the term *approximately* when they're unsure about exact figures or measurements. If a police officer forgot about a particular detail they must admit, ***"I don't recall,"*** at the same time, they should anticipate and be prepared to testify about anything they may be asked to recall, so that this phrase is used only rarely.

The jury understands that memory can fail and a police officer who testifies ***"I'm not really sure"*** or ***"I don't recall"*** approximately 10%-15% of the time will, in all probability, appear truthful to the jury. Therefore, they'll be more inclined to believe him. Discrepancies occur in almost every case that has ever been tried. More complicated cases can give rise to numerous, somewhat technical, discrepancies. Discrepancies are normal and even expected. The jury would be surprised if absolutely everything proceeded along in a textbook fashion. Only a police officer's honest and truthful response could impress the jury enough that they could overlook minor (and ultimately unimportant) discrepancies regarding various elements of testimony. The defense attorney will attempt to exploit minor discrepancies, i.e. a difference between two arrest times - one on the Online Booking System Worksheet, and one in the officer's Activity Log. Once again, the best course of action a police officer could take is to simply answer clearly and truthfully as much as their memory allows. ***Going "head to head" with a defense attorney is NOT the answer: when you do this, juries begin to believe that you are more interested in beating the defense attorney than in***

whether justice is accomplished. Don't fight with the defense attorney and, certainly, keep in mind that NO CASE IS WORTH PERJURY.

The main point of working to enhance your memory of events is to transform the dry words of your police reports into a vivid picture that the jurors can ***SEE***. A police officer who testifies like a walking Complaint Report is far less effective than one who can recount the sights, sounds, and smells they actually experience. Trials take place in sheltered courtrooms, under artificial lights. Letting the jurors ***HEAR*** the breaking glass, ***SEE*** the blood flowing from the victim's head, and ***SMELL*** the alcohol in the defendant's car; this brings them out of the calm of the courtroom and into the reality of your experience. ***The more concrete details you can include in your testimony, the more believable your account will be to a jury.***

Some of the same memory aids you use to help a witness recollect events can be used in refreshing your own memory. Ask yourself questions: What type of neighborhood was I patrolling? What types of homes or businesses comprise the neighborhood? What were the demographics? What did I eat for lunch that day? What was the weather? Was I the driver or the recorder on the tour? What was I doing immediately before and after the incident I'm testifying to? Some defense lawyers make a point of testing an officer's memory by asking about unrelated incidents. When the officer can't remember, the lawyer argues before the jury that the officer recalls only the incident on trial only because they have rehearsed.

Background Material

This is another area that is fraught with difficulties. You may know for a fact that a certain location is a "drug prone area", and that the defendant's presence in such an area indicated criminal intent. It is important that you be able to tell the jury ***WHY*** you believe the area is drug prone. For example, arrest statistics or observations of drug sales would be better than mere assertions. In some cases, the A.D.A. will be permitted to establish background (e.g., "Do you know whether the officers in your precinct have previously made drug arrests at this location?" "Have you previously made such arrests at this location?" "How many?"). In other cases, the judge will rule that background information is too prejudicial to be heard by the jury. The best way to handle this type of testimony is to clear it with the A.D.A. before trial.

Everything that is said on direct examination is subject to further questioning by the defense counsel on cross-examination. Volunteering information not asked for by the A.D.A. can give the defense attorney an extra line of questioning they might not have known about. Giving overly precise information when you are not really as certain as you sound ("The defendant was standing exactly 17-1/2 inches away from me at the time.") can give the defense lawyer an edge on cross-examination ("Officer, you didn't measure that distance, did you? Could it have been 15 inches? 20 inches? 17-3/4 inches? You're not really sure ***HOW*** far away the defendant was, are you?").

Remember, it is perfectly alright to use words like "about" and "approximately" when describing times and distances, unless you are certain as to the precise numbers.

In cases where physical force was used to effect an arrest, there may be a natural tendency to play down the amount of force employed. This will definitely boomerang on cross-examination when the defense attorney questions you about injuries sustained by the defendant. If force was required, don't be afraid to state exactly what you did and what the defendant did to necessitate your actions. Trying to "cover up" will only make things worse when the truth comes out on cross-examination.

Cross-Examination

Cross-examination is designed to lay the foundation for the arguments the lawyer intends to advance in summation. Each cross-question is a building block for the structure to be built in summation.

> **Example:** You arrested the defendant for robbery, recovering and vouchering a sum of money. Although a gun was used in the crime, you found no weapon on the defendant, who was arrested some fifteen minutes after the robbery. The complainant identified the defendant in an on-scene show-up.

Defense counsel's questions will be designed to demonstrate to the jury those facts in the defendant's favor: that you did *not* see the robbery; that the gun was *not* found on the defendant; that the money may have come from somewhere other than the victim's cash register; and that the defendant was the only person shown to the complainant at the time of identification.

Most defense lawyers ask the police officer if they have discussed the case with anyone before the trial. As indicated earlier, the police officer can do so without a problem and the defense counsel knows this. Often, counsel will imply, by facial expression or tone of voice, that the witness who admits discussing the case has done something wrong. This is ***NOT*** the case; talking to the Assistant District Attorney or your fellow officers before trial is good sense, not wrongdoing. A defense attorney may seem either friendly or hostile. One who seems angry does so to make the police officer look bad in front of the jury. He wants a hostile response. Police officers must remain cool, detached and professional. Courtroom demeanor will tell the jury a great deal. ***DO NOT ALLOW YOURSELF TO BE PROVOKED TO ANGER.*** When you do this, you give the defense attorney the opportunity to suggest that your bad temper was the real cause of the arrest of their client.

One simple rule to keep in mind during cross-examination: ***The facts are the facts***. If there was no gun recovered, you must say so frankly and forthrightly. If a search of the area was conducted, and still no gun was found, you must admit that fact. If no search

was made, there is no choice but to say so and let the jury draw the inference that the police work was less than perfect.

Unlike direct, cross-examination is rarely chronological. The cross-examiner's purpose is to chip away at the incriminating facts presented on direct; to highlight those elements favorable to the defense; and to underscore any omissions, inconsistencies, and mistakes that tend to cast doubt on the People's case. The last thing in the world the defense lawyer wants you to do is repeat the smoothly flowing, extremely damaging narrative you delivered on direct.

The best way to counter this strategy is to ***listen*** carefully to every question, making certain you understand it fully before answering. ***Think*** before you speak, responding in a calm deliberate voice that refuses to be hurried by the defense lawyer's haste. Letting yourself get caught up in the lawyer's machine gun rhythm can open the door to mistakes and inconsistencies, as answers are given with insufficient reflection.

Another common area of questioning is the kind of inquiry designed to convey to the jury the impression that you, as a police officer, are *interested* in the outcome of the case. The questions may center on a supposed bias you hold toward the defendant or upon the notion that you will earn promotions or commendations through making arrests, especially those that result in convictions. Your best response is to answer such questions truthfully and dispassionately, without displaying outrage or becoming defensive.

Defense lawyers often make a point of asking police officers about police work not done in the course of an investigation. For example, a failure to take fingerprints at a crime scene or to "dust" a gun for prints can be used to infer that, had prints been taken, they would not have been those of the defendant.

However, once again, the facts are the facts. If it is possible to explain the failure to take fingerprints, either because the surface was not printable or Department policy did not call for a crime scene investigation, you should be able to testify to that effect. This is where thorough preparation with the A.D.A. pays off. Together, you will have anticipated this line of questioning and discussed the best way to answer.

Questions about time and distance can cause difficulty on cross-examination. For example: On direct, you testified that you observed the defendant for a period of "two minutes". The cross-examiner breaks down this time, asking when you first noticed the defendant, how long it took him to walk from one place to another, whether your attention was distracted from him at any time. When the questioning is completed, the jury may be asked to infer that you saw the defendant's facial features for only ten seconds out of that original two minutes.

"Answer yes or no" is a phrase that begins a great many questions asked on cross-examination. It can be frustrating at times to compress a complex answer into the simple "yes or no" the cross-examiner prefers. Yet, when you ***can*** reply with a yes or no, you should do so, knowing that the A.D.A. ***will*** have the opportunity on redirect to expand on your answer. In those cases where you honestly believe that a yes or no response would be so incomplete as to mislead the jury, you may courteously ask the court for permission to add an explanation to your reply.

There are some questions you do not have to answer in the form in which they are asked. You may request the judge to separate a compound question; ("Did you arrest the defendant, handcuff him, and place him in the patrol car?" should be asked in three separate inquiries). You may ask to have a question you did not hear repeated, and to have a question you did not understand explained.

Occasionally, a less-than-scrupulous defense lawyer will incorporate a false premise into a question in order to obtain a misleading answer. For example: You have testified all along that the defendant was in a blue car. On cross, you are asked, "When the green car turned the corner, didn't you follow it?" You must first listen carefully to the question, so that the discrepancy is noted. Then you may reply, "The car I saw was blue, not green."

Defense attorneys bring different styles into the courtroom. Some appear folksy, disarming you with their unexpected friendliness, while other attorneys are downright hostile. Each style is a tactic; each requires wariness in your response.

For example, the lawyer who seems friendly, who asks questions designed to build you up as a professional, is doing this for a purpose. They hope to lull you into a sense of false security, to obtain favorable answers to questions. Building you up will be the preparation for knocking you down eventually ("Officer, you finished at the top of your class in the Police Academy. Now you have 23 commendations and years of experience - and yet you failed to completely fill in all the blanks on the Complaint Report?"). Your best response is to be wary: to keep your distance. Admit any mistakes you may have made in a forthright manner.

The opposite of this style is the aggressive cross-examiner whose questions are so hostile that ***you*** begin to feel like the person who is on trial. The goal of this lawyer is to put you on the defensive, to trigger your anger and create a poor impression of you in front of the jury.

It will at times seem very tempting to answer this type of lawyer in kind. A sarcastic reply may easily come to mind – but it should not be stated. The jury expects a certain amount of verbal jousting from the lawyers in the case; that is their job. From a police witness, however, the jury expects cool, detached professionalism. Losing your temper with the lawyer could lead the jury to suspect that you arrested the defendant while in

an emotional state. Becoming sarcastic could indicate arrogance; while a defensive stance leads jurors to conclude that you did something wrong and are attempting to cover up. None of this may be true - but the jurors will speculate about your motives, and your courtroom demeanor will tell them a great deal.

The best method for dealing with a cross-examiner who is out to destroy your credibility with a verbal attack is to give them exactly the opposite of what they want. The more you are able to remain calm, polite, and in control, the more you will be showing the jury that you are a thorough professional who is simply telling the truth about actions you took in the line of duty.

The manner in which a question is phrased is critical. A defense attorney may attempt to introduce new evidence via a question (e.g., "Officer when did you stop lying about what really happened?"). Answers must be carefully considered because they have ramifications on jury deliberation. Only by carefully explaining what occurred can police officers expect to maintain credibility.

Objections

Many police officers have a question in the back of their minds when they endure a blistering cross-examination from defense counsel: "Why doesn't the A.D.A. object?" There are two reasons why the A.D.A. may not intervene. One is that objections must be made on proper legal grounds. Tough, hostile questioning that does not rise to the level of "badgering the witness" is not objectionable. The second reason is that the A.D.A. would much rather have the jurors see ***YOU*** handling the questions by yourself than create the impression that they are protecting you by jumping to your defense when the questions get tough. Painful as it is in the short run to be the object of a stinging cross-examination, in the long run your professional demeanor will do more than any number of A.D.A. objections to convince the jury that you are testifying honestly and objectively.

Defense Attorney Tactics

It must be remembered that the litigants themselves move and shape the contour of any courtroom proceeding. Defense attorneys sometimes follow a particular style that works for them and are sometimes guided by the A.D.A. (e.g., they'll respond to their presentation). If the trial is a bench trial (before a judge, not a jury), or a jury trial, the defense attorney will attempt to argue their case in such a way as to favor their client. In a jury trial the defense attorney will attempt to pick jurors at the selection – ***voir dire*** – stage, for the purpose of assessing their fitness to pass judgment in a particular case.

Obviously the defense attorney will try to select jurors who aren't biased against their client, hopefully rendering a decision that is favorable to the defendant. The voir dire process is essentially a self-disclosure interview. Defense attorneys recognize that

potential jurors are never wholly devoid of bias. The U.S. Supreme Court has decided that a juror's qualifications as to impartiality must fall within minimum standards. Defense attorneys may use voir dire to influence jurors before the start of the trial. Defense attorneys may try to plant the seeds of a certain argument or line of proof in the minds of potential jurors. Defense attorneys may also attempt to create a favorable personal impression or establish a good rapport with the jury in advance.

Defense attorneys may exclude potential jurors via peremptory challenges, i.e., the exclusion of individuals from the jury for whatever reason. Often, defense attorneys will attempt to either discredit a police officer witness or plant in the minds of jurors the idea that the police officer is either lying or unsure of their testimony. Tactics vary from attorney to attorney. One defense attorney may be direct and argumentative while another will be more subtle. Their goal is the same, to discredit the officer in an attempt to create reasonable doubt.

Re-direct and Re-cross

No further questions. With that statement, the defense attorney concludes their cross-examination. You experience a surge of relief, thinking that the worst is over.

Your job as a witness, however, is not finished. The Assistant District Attorney may have more questions for you on redirect examination. Redirect is your opportunity to give the full explanation you were not permitted to present on cross. Now you *CAN* tell the jury why no fingerprints were taken at the scene, or explain the troubling discrepancy between the arrest report and the voucher. You can tell the jury what happened in plain English. You can explain details that you feel need further clarification.

Redirect is not designed to repeat the entire direct, but is limited to matters raised on cross. The A.D.A.'s focus will be to clarify points that are unclear as well as to explain items that might otherwise score points for the defense on summation. The A.D.A. will not belabor items they consider adequately established and may fail to ask questions you are expecting. If this happens, it will be a signal that the A.D.A. feels that your answers on cross-examination were strong enough to need no further explanation to the jury.

The disciplined professionalism you bring to the courtroom should stay with you at all times. You are a working police officer even when you are not actually answering questions. Thus, it is important to conceal from the jury whatever sense of relief you may feel at the close of your testimony. Even if the cross-examination was a grueling ordeal, the jury should see you step from the stand in an unhurried manner. Nor should smiles, winks or victory signals pass between you, the A.D.A., or other officers.

APPEARING IN COURT

The attitude a police witness brings into the courtroom may be as important as their actual testimony. No matter how hard you work at *letting it go*, at telling yourself the facts of the case are the facts, human nature dictates that you will feel differently about an acquittal than a conviction. It is almost impossible not to regard a conviction as a vindication of your police work, and equally difficult not to view an acquittal as some sort of blot on your police record.

These feelings are only natural. The experience of testifying in court is one that generates a great deal of adrenaline. The defense attorney questioned your police work and, maybe, your integrity. The jury may have chosen to reject your testimony in favor of a defense theory you may regard as false.

It is important to put these feelings in perspective. Your police work was not on trial. Your testimony may have had little to do with the eventual outcome of the case. Speaking to the A.D.A. after trial can help you understand the verdict, and would also help you improve as a witness for the next trial.

Some police officers have the impression that an unfavorable courtroom verdict is a black mark against them within the Department. This is not the case. Presenting the facts truthfully and as clearly as possible is all the Department expects of its officers.

Most athletes find that their performances are enhanced when they are able to detach themselves from an overly strong need to win. Personal antagonism toward an opponent seldom improves the athlete's game; trying too hard leads to mistakes. In the same way, your performance as a witness becomes better - and easier - the more you can let it go.