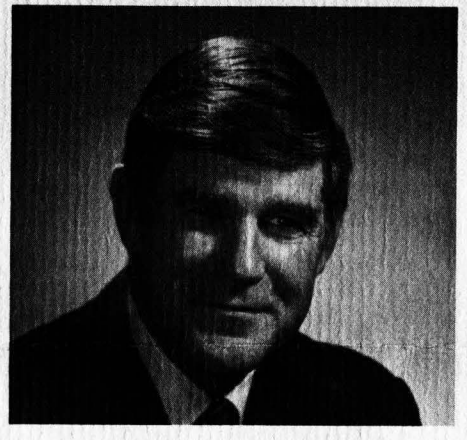
MARCH 1971

ALERT

CRIMINAL DIVISION

FROM THE OFFICE OF
THE ATTORNEY GENERAL
OF THE STATE OF MAINE



MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

Your attention is directed to the following matter before the State Legislature:

The Legislature is presently considering legislation, passage of which would have a far reaching effect on law enforcement in Maine. One of the bills, legislative document No. 701, would replace the present part time County Attorney system with a system under which Assistant Attorneys General would be appointed to designated counties to perform all prosecution functions.

This bill, if passed, would provide capable, professional full-time prosecutors to each county in Maine on an equal basis. No longer would local prosecution depend upon underpaid, overworked, part-time county attorneys. Each citizen would receive the same quality law enforcement protection no matter where he lived.

Furthermore, passage of this bill would result in a more coordinated, uniform approach to law enforcement in Maine. All prosecuting attorneys would be available for movement around the State when different areas experienced high criminal activity or particularly difficult cases. Also, the Attorney General's Office would be a center for research and exchange of information and a clearinghouse for files, records, statistics, and other data. The new system would also facilitate establishment of a centralized, coordinated system of communication between prosecutors and police.

James S. Erwin

JAMES S. ERWIN
Attorney General

THE LAW ENFORCEMENT OFFICER IN COURT

Testifying in court is one of the most important and often overlooked phases in the training of law enforcement officers. The officer who has investigated a case is often the most important witness in the trial of that case. He may be the only person with a comprehensive enough view of a crime to give a complete, coordinated view of what happened. He is therefore the main communications system through which evidence of a crime is transmitted to the finder of fact at trial.

The importance of a good presentation by law enforcement officers on the witness stand cannot be overemphasized. Hours and hours of the most competent investigation and preparation of criminal cases by investigating officers may be wasted if the results are improperly presented in court. The trier of fact (usually the jury) comes into court having no prior knowledge of what happened or any idea of the right or wrong of the matter. The picture the jury gets depends largely on the ability of the investigating officer to testify truthfully and accurately and to do so in a manner that impresses everyone present that he is intelligent, honest, competent, and fair. The defense attorney will do everything legally permitted to twist the evidence in his client's favor. If the officer becomes confused, hazy, or unsure of important facts, the jury will be similarly confused and hazy. However, if he presents a clear-cut report containing all elements of proof in a calm, unprejudiced manner, the jury will see the case in the same light.

Furthermore, a verdict of guilty accomplishes little if an officer has testified so sloppily and poorly that he affords an accused good grounds for a new trial or for a reversal on appeal. Neither does a guilty verdict accomplish the good it should unless the trial has been conducted in such a manner that everyone in the courtroom has been impressed with the dignity and justice of the proceedings. Public confidence in our system of justice is essential to its proper function.

Unfortunately, the performance of law enforcement officers testifying in court has not generally been of the highest quality. The reasons for this are poor preparation and training, stage fright, and inexperience. These must be overcome if an officer is to justify an arrest or an investigation made by him. This article is an attempt to set forth guidelines and suggestions to help improve the quality of court testimony by law enforcement officers.

PREPARATION BEFORE TRIAL

Effective testimony in court depends to a large extent on preparation by the law enforcement officer before he enters the courtroom. As was emphasized in the February 1971 issue of ALERT, this preparation should begin with the first notification that a possible crime has been committed. All facts, observations, and actions having to do with the case should be carefully recorded in notes, reports, and photographs, keeping in mind that the information may eventually be introduced in court. This cannot be stressed strongly enough, because there are often long delays between the investigation of a case and the trial, and unless information is recorded, much of it is sure to be forgotten in the interim.

Knowledge of the Case

As the time of trial draws near, the investigating officer should make a complete review of the case and refresh his memory of the facts by carefully reading through all notes and reports. He should also examine physical evidence which has been collected in the event that it has to be identified or referred to in court. Then he should put his thoughts together so he can visualize the whole thing in the sequence in which it happened. Testimony presented to a jury as a chain of events in the order that they occurred is both interesting and convincing.

An officer is allowed to refresh his memory on the witness stand by referring to his notes or reports. However, if he does so, the defense counsel has a right to examine these notes and question the officer about them. Therefore, the officer

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should discuss with the prosecuting attorney the advisibility of taking the notes onto the witness stand with him.

Also, the prosecuting attorney may want to confer with the investigating officer about the facts of the case at a pre-trial session. At this session, the prosecuting attorney may try to re-awaken the officer's senses to recall parts of the investigation which he deems essential to the case and to go over the officer's testimony. This is entirely proper, and at this time, the officer should make sure that the prosecuting attorney knows all the facts of the case whether favorable or unfavorable to the defendant. The prosecuting attorney may not, however, tell the officer what to say or influence the officer to deviate from the truth in any way.

Knowledge of the Rules of Evidence

Besides knowledge of the case being tried, the law enforcement officer testifying in court should have a basic knowledge of the rules of evidence. This knowledge will help him to better understand the proceedings and will enable him to testify more intelligently, resulting in less delay and confusion in the courtroom. Unfortunately, a detailed coverage of the rules of evidence is beyond the scope of this article and will be provided in a future issue of ALERT.

Appearance and Attitude

When a law enforcement officer appears in court, he must observe the highest standards of conduct. The minute he walks to the witness stand, he becomes the focal point of interest and observation by the public. His appearance and behavior will reflect not only upon himself but upon his fellow law enforcement officers and the entire system of criminal justice.

The key thing for a law enforcement officer to impress upon his mind when testifying in court is that he is engaged in a very solemn and serious matter. He should look and act accordingly. While waiting to testify, the law enforcement officer should not linger outside the door of the courtroom, smoking, gossiping, joking, laughing, or engaging in other similar conduct. This distracts attention from the proceedings and shows little regard for the serious nature of the occasion. Rather, the officer should be seated quietly in the courtroom while awaiting his turn to take the stand, unless witnesses are excluded to the witness room.

An officer's appearance while testifying should be neat and well-groomed. He should wear a clean suit and tie or a clean and neatly pressed uniform and shined shoes. He should avoid wearing a gun if possible. Neither should he wear dark glasses, smoke, chew gum, or generally fidget around while on the witness stand. A favorable impression is created if the officer sits erect but at ease in the witness chair and appears confident, alert, and interested in the proceedings.

It is important to remember that the public is highly interested in its police and what they do and how they act. Their opinion of the police is often based on limited observation and experience - usually involving traffic and other motor vehicle violations. Yet, the public expects a high standard of performance all the time and especially in the courtroom. An effective and properly presented testimony can help fulfill these expectations and improve the public image of all law enforcement personnel.

TESTIMONY DURING TRIAL

Our system of securing information from a witness at a criminal trial is by the question and answer method. On direct examination, each party to the proceeding (State and defendant), calls witnesses to the stand whom that party believes will testify in its favor. The questioning by attorneys on direct examination serves merely to guide the witness in his testimony and indicate to him the information that is required. After direct examination, the witness may be subject to cross-examination by the opposing counsel. The questions on cross-examination will have the opposite purpose of those asked on direct examination. They may be devious, deceptive, or innocent in appearance, masking the opposing counsel's real objective, which is to discredit or minimize to as great an extent as possible the effect of the witness's testimony. The law enforcement officer is almost always a witness for the State and therefore he will be directly examined by the prosecuting attorney and cross-examined by counsel for the defense.

There are no definite rules for testifying effectively in court because each case has its own peculiarities. However, there are general guidelines for answering questions which should be followed in most cases and some specific suggestions designed to aid the witness on cross-examination.

Answering Questions on the Witness Stand

1. When taking the oath, the law enforcement officer should be serious and stand upright, facing the officer administering the oath. He should say "I do" clearly and positively and then be seated to await further questioning.

2. The officer should listen carefully to the questions asked and make sure he understands each question before answering. If he does not understand, he should say so, and ask to have the question repeated. He should then pause after the question long enough to form an intelligent answer and to allow the attorneys and judge time to make objections.

3. Answers to questions should be given in a confident, straightforward, and sincere manner. The officer should speak clearly, loudly, and slowly enough so that all in the courtroom can hear and he should avoid mumbling or covering his mouth with his hand while talking. He should look at the attorney asking the question but direct his answers toward the jury. Simple conversational English should be used and all slang and unnecessary technical terms avoided. Most important, the officer should be respectful and courteous at all times despite his feelings toward the people involved in the case. He should address the judge as "Your Honor," the attorneys as "Sir," and the defendant as "The Defendant."

4. The essential rule to be observed above and beyond all others is to always tell the truth, even if it is favorable to the defendant. Facts should not be distorted or exaggerated to try and aid a conviction, nor should details be added to cover up personal mistakes. Once it has been shown that an officer has not truthfully testified as to one portion of his investigation, no matter how small and inconsequential, the jury may reject the truthfulness of all other testimony which he may offer. On the other hand, an officer's testimony will appear strong if it is a truthful recital of what he did and observed, even though it reveals human error on his part and favors the defendant in some parts.

5. Answers to questions should go no further than what the questions ask for. The officer should not volunteer any information not asked for. If a question requests a "Yes" or "No" answer and the officer feels it cannot properly be answered in this manner, he should ask to have the question explained or reworded or request the right to explain his answer. He may state that he cannot answer the question by "Yes" or "No." This should alert the prosecuting attorney to come to his assistance.

6. Answers to questions should be given as specifically as possible. However, figures for time, distance, etc., should be approximated only, unless they were exactly measured by the officer.

7. When an officer is referring to a map or plan in his testimony, he should identify the point on the map as clearly as possible so it becomes part of the trial record. For example, he should say "the northwest corner

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of the room" rather than just point to the spot and say "here" or "there." If the officer does not understand the map or plan which is to be used at trial, he should tell the prosecuting attorney before trial and go over it with the person who prepared it.

8. If a wrong or ambiguous answer is given, it should be clarified immediately. It is far better for an officer to correct his own mistakes than to have them pointed out to the jury by the defense attorney or a subsequent witness.

9. If a judge interrupts or an attorney objects to an officer's testimony, the officer should stop talking instantly. However, he should not anticipate an objection when a difficult question is asked but should only pause long enough to form an intelligent answer.

10. Under no circumstances should a law enforcement officer memorize his testimony. It will only sound rehearsed and false and will not inspire the confidence of the jury. Instead, the officer should have a thorough knowledge of the facts of the case and organize them in his mind so he can recite them as a narrative. If a particular fact or circumstance becomes hazy or is forgotten, the officer may refresh his memory from his notes, as long as this does not become a habit. It is worth noting that if an officer does refer to his notes, they may be examined by the opposing counsel.

11. If for any reason, the judge criticizes an officer's conduct in court, the officer should not allow it to disturb his composure. The best policy is to ask the court's pardon for the error committed and proceed as though nothing had occurred.

Cross Examination

In a criminal trial, it is the duty of counsel for the defendant, as an officer of the court and as an attorney, to use every legal means to secure the acquittal of his client or the best possible verdict for him under the circumstances. Since the arresting or investigating officer is often the chief witness for the State, the defense attorney, in order to win, must normally discredit or nullify the officer's testimony or at least minimize its importance in the eyes of the jury. To do this, he may use every device legally available to him. He may attempt to show that the officer did not have the proper opportunity to observe the facts, or that he was inattentive or mistaken in his observations. He may try to make it seem like the officer is lying or leaving out facts which are favorable to the defendant. In trials of crimes that happened some time ago, the defense counsel may try to show that the officer's recollection of the entire event is bad and that he knows nothing without his notes. He may even try to show that the officer has it in for the defendant. One of the ways of doing this is to goad the officer into losing his temper to give the appearance of being personally antagonistic to the defendant. Under the proper circumstances, all these approaches are legal and available for the use of defense counsel.

The best defense against the techniques and devices of the defense attorney is thorough preparation on the part of the testifying officer. If the officer has carefully observed the facts at the time of their occurrence, made complete and sufficient notes, reviewed his notes and reports carefully to fix the events in his memory, and testified truthfully, he need have no fear of cross-examination.

Nevertheless, there are a few important suggestions regarding cross-examination which will help prevent the officer from falling into the traps laid by a clever defense attorney. Some of these suggestions have been mentioned above and others apply exclusively to cross-examination.

1. The officer should not become angry or argumentative with the defense attorney. This is exactly what the defense attorney wants and the officer will only appear to have lost his composure or to be hostile to the defendant. Rather, the officer should stick to calmly answering all questions unless an objection thereto is sustained by the judge. If he does not remember or does not know an answer, he should simply say so.

2. The officer should make very clear by his attitudes and statements that he has no personal feelings against the accused. Often times, if an accused has been nasty, insulting, or even has assaulted an officer, the defense attorney may make much of such occurrences to persuade the jury that the officer has a personal grudge in the matter and is "out to get" the accused. The jury, being only human, is quick to resent any evidence of overbearing conduct or personal animosity on the part of the police. The officer in this situation should make clear that such things are common occurrence in his line of duty and that they have no bearing on the matter as far as the facts are concerned.

3. The officer should not be afraid to admit mistakes made either in his investigation or his prior testimony. Everyone in the courtroom realizes that no-one is perfect and an officer's admitting his errors himself will give defense counsel less fuel for attacking his credibility.

4. If a defense attorney's question is not clear, the officer should tell the court and ask to have it restated. An answer to an ambiguous question may very likely be a set-up for a contradiction later on.

5. The officer should never be afraid to admit that he had discussed his testimony before trial with the prosecuting attorney, his superiors, or other officers. This is entirely proper and accepted procedure. However, defense counsel, in the way he asks the question, may try to make it seem improper, and thereby trick the officer-witness into a lie.

6. If defense counsel seeks to cut off an officer in the middle of his testimony, the officer may turn to the judge and request an opportunity to explain his answer. This request will usually be granted.

CONDUCT AFTER TRIAL

When an officer leaves the witness stand, he should do so quickly and quietly and either return to his seat or leave the courtroom if he is no longer needed. He should not linger to talk to the prosecutor. If he should have additional information or ideas to tell the prosecutor, they should be written down and passed to the prosecutor with a minimum amount of display. When an officer leaves the courtroom, he should not loiter to talk or gossip with others and, most important, he should not talk to jurors if it is a jury trial.

SUMMARY

Convincing and effective testimony by law enforcement officers is essential to successful operation of our criminal justice system and depends on proper preparation, approach, and experience. The suggestions outlined above are designed to familiarize the officer with court procedures and improve his approach to testimony as a witness. The preparation and individual effort required in this endeavor depend on the dedication of each law enforcement officer.

James S. Erwin — **Attorney General**
Richard S. Cohen — **Chief, Criminal Division**
John N. Ferdico — **Editor**

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IMPORTANT RECENT DECISIONS

Note: Cases that are considered especially important to a particular branch of the law enforcement team will be designated by the following code: J - Judge, P - Prosecutor, L - Law Enforcement Officer.

Search and Seizure L

Defendant was a passenger in a car, the driver of which had been arrested for a license violation. The arresting officer then asked defendant for permission to look in the trunk and defendant handed over the keys. The officer found burglar tools in the trunk which the defendant was later convicted of possessing.

On appeal, the search of the trunk was held to be unreasonable for the following reasons:

1. The officer had no probable cause or reason to believe that any felony had been committed or that the trunk contained any contraband or criminal evidence. It was therefore an exploratory search without justification.

2. The search could not be justified as a search for weapons because the trunk was well beyond the reach of defendant. Furthermore, the officer made no search of the persons or the auto interior for weapons and he indicated no fear of defendants.

3. The search could not be justified as a consent search. Defendant had not been warned of his Fourth Amendment rights and there was no evidence he knew he had such rights. Any consent defendant gave by his actions could be consistent with a desire not to offer resistance to the officer. The totality of the circumstances did not show that defendant freely, intelligently and unequivocally waived his constitutional right and consented to the search. *Witherspoon v. State* (Missouri Supreme Court, December 1970).

Search and Seizure L

A police officer received an unverified tip that a vacant house had been entered by two hippie types. The officer knocked on the door of the vacant house, announced himself, and received no reply. He looked in the window and saw some clothes and a stereo which was playing loudly. He then entered the house, carefully searched it, allegedly for would-be-trespassers, and found marijuana.

On appeal, the court found that the warrantless search of the house was not justified:

1. The search was not authorized by the general duty of the police to investigate, detect, and prevent crimes against life and property. Cases establishing this necessity doctrine all involved emergency circumstances of physical injury to a person, which was not the case here.

2. The facts and circumstances perceived by the police officer prior to his entry did not provide the requisite probable cause that there were within the house persons who had entered without authority.

Defendant without Counsel at Trial J

Defendant had no lawyer for the first part of his trial. When he finally did obtain a lawyer, that lawyer, after reviewing the record, made a motion for mistrial on the grounds that much irrelevant material and highly prejudicial evidence had been brought out by the State. The motion was overruled and the defendant convicted.

On appeal, the court said that a trial court cannot stand idly by while a prosecutor brings out inadmissible and prejudicial evidence, taking advantage of a defendant who was incapable of conducting a semblance of a defense. The trial court must vigorously assume responsibility for governing the conduct of counsel and witnesses, seeing that the rules of evidence are obeyed, and bringing to the attention of defendant when important procedural points in the trial have been reached. *Grubbs v. State* (Indiana Supreme Court, December 1970).

Search and Seizure JPL

Defendant was speeding along a highway and pulled over to the side when a police officer chased him with the emergency light in operation. The officer observed defendant's wife bend down in the front seat and come up again to a normal sitting position. Defendant got out of his car and walked toward the police officer. The officer talked briefly with defendant and then walked over to the passenger side, opened the door, and looked in. He found marijuana on the floor of the car.

The court held that the search was unreasonable. The law requires more than a mere "furtive gesture" to constitute probable cause. The movements by defendant's wife could have been for a number of innocent reasons such as picking up a pocketbook, arranging clothes, putting out a cigarette, etc. The officer had no other information whatsoever to suspect criminal activity. In an ordinary traffic violation case, an officer cannot reasonably expect to find contraband or weapons. To allow the police to routinely search the vehicle in all such circumstances would constitute an "intolerable and unreasonable" intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile. *People v. Kiefer* (California Supreme Court, December 1970).

Stop and Frisk L

Police officers had been notified by an unidentified informant that defendant had a gun in his pocket. When police came upon the defendant, they asked him to remove his hand from his pocket. Defendant refused to do so until one of the officers drew a gun. When defendant did remove his hand, a large bulge remained, and one of the officers felt the pocket and thought it contained a gun. The officer put his hand into the pocket and took out numbers slips and cash. Defendant was arrested for possession of numbers slips.

Defendant's pre-trial motion to suppress the products of the frisk was granted. On appeal, the court found that the officers had complied with the requirements of *Terry v. Ohio,* 392 U.S. 1.

1. The officer's action was justified at its inception because of the informant's tip and the subsequent finding of a defendant who fit the description given.

2. The officer's action was reasonably related in scope to the circumstances which justified the interference in the first place. The original pat down of defendant's pocket in which there was a visible bulge was reasonable in light of the circumstances. It was reasonable also to reach into the pocket when the officer thought he had found a gun there. *U.S. v. Dowling* (District of Columbia Court of Appeals, December 1970).

Discovery JP

A juvenile murder and assault defendant was denied a request for discovery of statements made to the police by him and his co-defendants. On a petition for a writ of mandamus, the court allowed defendant discovery of his own statements but not those of his co-defendants.

The trial court has discretion to grant discovery in juvenile cases upon a showing of good cause. In this case, the trial court exceeded its discretion in denying discovery of defendant's own statements because they are necessary to an effective preparation of defense. However, discovery of the statements of the co-defendants was properly denied because these persons would not be tried with defendant and would not be called as witnesses against him. *Joe Z. v. Superior Court* (California Supreme Court, December 1970)

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine.