THE POLICE OFFICER IN THE COURTROOM

About the Author

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Upon his graduation from Duquesne Law School in Pittsburgh in 1970, he became employed as an Assistant District Attorney for Allegheny County, Pennsylvania. In 1974, he accepted a similar position in Crawford County, Pennsylvania, where six years later he became the elected District Attorney. After a distinguished career in the state courts, Mr. Lewis accepted a position as Managing Assistant United States Attorney for the Western District of Pennsylvania. After two years there, he applied for, and was accepted into a position of Assistant United States Attorney in Tampa, Florida, where he remained as a trial lawyer for four years. In 1988, he returned home to Pennsylvania and began traveling all over the United States presenting seminars on the topics he has written about in this book.

He is the recipient of numerous awards and much recognition from both state and federal law enforcement organizations for his accomplishments as a trial lawyer in Pennsylvania and Florida.

Mr. Lewis currently lives with his wife in Meadville, Pennsylvania, where he is in private practice.

His pride in this work stems from the satisfaction of having, through this book, given something back to the profession around which he has built his life.

THE POLICE OFFICER IN THE COURTROOM

How to Avoid the Pitfalls of Cross-Examination Through the Proper Preparation and Presentation of Investigative Reports, In-Court Testimony, and Evidence

By

DON LEWIS

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For my father
and
To all the police officers who, over all the years
of my practice as a prosecuting attorney, have
by their professionalism and dedication to duty,
helped me become a better trial lawyer.
I hope this work can in a small way repay all
of you for what you do to keep America safe.

PREFACE

Effective law enforcement has always been the product of diligent investigation conducted by efficiently trained police officers. From the beginning of their training, law enforcement officers are taught the skills necessary to protect themselves and others, they learn to investigate and detect criminal conduct, and to some degree, they receive instruction on the laws pertaining to arrest, the collection of evidence, and the suspect's rights.

While during my thirty years of practice in criminal courtrooms I have gained a great deal of respect for the efficient manner in which police officers conduct their investigations and for the tenacity and courage they show in the pursuit of criminals, I have also come to realize that, in most instances, they receive almost no training in those matters concerning their responsibilities as witnesses in court. The tendency is to rely solely on the prosecutor to win the case in court. The perceived attitude of the officer is that once the case reaches the courtroom, his job is completed, and the responsibility of obtaining a conviction falls squarely on the shoulders of the prosecutor. This seems natural because of the obvious correlation between lawyer and courtroom. The courtroom is seen as the lawyer's arena, and the officer's understandable assumption is that they are playing on someone else's field and that their only obligation to the courtroom presentation is to remember the facts and testify truthfully. *Nothing could be further from the truth!*

A courtroom is a theater, a stage on which, in every case large or small, a drama is played out for the audience. The only difference between the courtroom and Broadway is that the audience sits in the jury box, and decides how the play is going to end. One important way they do that is by evaluating the performance of the players. Usually, the prime player in each presentation is the police officer. He is observed closely by the audience, and his performance often determines the outcome of the case. The fundamental role of the prosecutor is to orchestrate the presentation of the evidence. Indeed, he has the responsibility of using his closing argument to persuade the jury of the prosecution's position, but even an outstanding closing won't normally save a poor presentation by the witnesses. This is the reason why criminal cases are very often won or lost on the testimony of the police officer. In the performance of his assignment, the prosecutor will try to paint the officer-witness as the hero, riding into court on a white stallion, guns blazing,

in pursuit of justice. In order for that image to take with the jury, it is necessary that the officer knows how to ride the horse and how to shoot the guns without misfiring. You may rest assured that any weaknesses detected in the officer's presentation of testimony and evidence will be exhaustively exploited by the defense lawyer. Often, the only defense available to the accused is to attack the credibility of the officer by showing his "guns" are loaded with blanks. When successful, the defense will often create a reasonable doubt in the minds of the jury. If the resulting acquittal is unjust, the officer's efforts have been for naught.

The purpose of this text is to authenticate the importance of the information contained within its covers by guiding and instructing the reader in those areas crucial to the presentation of the evidence in a criminal courtroom case and to emphasize the importance of the part played by the proper preparation of reports and evidence prior to getting into the courtroom. For, once the officer is in the courtroom, it's too late to fix mistakes.

The material will illustrate how closely the officer's credibility is tied to his or her investigative report. In court, the officer's report will serve as his partner. If it is weak, inaccurate, or incomplete when written, it cannot be saved in court. The importance of care taken in its preparation cannot be overstated. Cases can be won or lost solely on the quality of the written report. Weaknesses in the report create opportunities for effective cross-examination, the consequences of which can be devastating to the prosecution's case.

The reader will learn the importance of proper care taken in the handling of evidence, and the consequences in court when it is not. The book examines the various problems which often arise during that time between the arrest and trial, and the steps which can be taken to insure a smooth flowing presentation during the trial.

The text will instruct on the many facets of direct-examination and will take the reader into that world which the officer-witness dreads most, that of cross-examination. Through illustrations offered by way of sample testimony, the officer is instructed in how to recognize and understand the defense strategies employed in each of many different situations, and will learn how to turn attacks by the defense attorney to the officer's own benefit.

It is my sincere wish that this effort will be of service to each of you who hope to benefit by it. Remember, when you, the officer, enter the courtroom, you will generally enjoy the respect of the jurors, and a cloak of credibility. It is up to you to maintain that respect, and that can be done only by offering a well-prepared presentation of your testimony and evidence. Good Luck!

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Last, but certainly not least, my thanks to my wife, Sheryl, for her patience and assistance during the endless hours of work that interfered with many things I'm sure she'd rather have been doing.

I am certain that I am forgetting others who provided assistance along the way. To them, my deepest apologies.

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THE POLICE OFFICER IN THE COURTROOM

Chapter 1

THE TRIAL PROCESS

1.01 Introduction

The trial of a criminal case is the procedure at which the ultimate factual determination of the charges against the defendant is made. Of course, every person convicted of a crime is entitled to exercise his appellate rights, but in this work, we are concerned only with the process that terminates with the trial.

The trial is where we first see the use of the phrase *Beyond a Reasonable Doubt.* The trial of any criminal charge in the United States requires proof beyond a reasonable doubt before the defendant may be convicted. The term reasonable doubt is defined by the court, and though the actual words used in the definition may vary from jurisdiction to jurisdiction, the meaning conveyed is always the same. The typical definition is that a reasonable doubt is such a doubt as would cause a reasonably prudent person to pause or hesitate before making a decision on a matter of importance in his or her own life. That does not mean that the charges must be proven beyond all doubt, for as the court may instruct the jury, nothing in life is beyond all doubt. Nor must the evidence preclude the possibility of innocence.

In order to convict, the evidence must be sufficient to overcome reasonable doubt. A reasonable doubt may arise from the evidence, *or from a lack of evidence.* It is the lack of evidence which is most vehemently argued by the defense attorney, and which usually creates a reasonable doubt in the minds of the jury.

Each juror is responsible for his or her own verdict, and he or she must be prepared to declare to the court that the verdict reached by the entire jury is their verdict as well. If they are not, and if the entire jury is unable to reach a unanimous verdict, the result is a mistrial, or what is commonly known as a "hung jury." In such a situation, the court will declare a mistrial, and, in most cases, the district attorney must make the decision whether or not to re-try the case.

If the jury reaches a unanimous verdict on all of the charges, the defendant is either convicted or acquitted. Obviously, the jury could, and often does, return to the courtroom with a verdict of guilty on some of the charges, and not guilty on the others. If the jury reaches a unanimous verdict on some of the charges and is "hung" on the others, the court may, after reasonable assurance from the jury foreman that the jury is hopelessly deadlocked on a number of the charges, accept the verdict on the charges upon which the jury has reached a unanimous verdict and declare a mistrial on the others, leaving the option of a re-trial on those charges to the prosecuting attorney.

A defendant may never again be tried upon the facts of a charge upon which a jury has reached a unanimous verdict. This rule of law is called "Double Jeopardy" and

works to prevent the defendant from being twice put in jeopardy for the same crime. This rule would also apply in some situations where a defendant is convicted of one charge, but the jury is unable to reach a verdict on another charge. For example, if the second charge is a lesser included offense of the first, and if the second charge is based on the same facts, then the rule against double jeopardy will apply. To illustrate: If a defendant is charged with aggravated assault and simple assault upon the same facts and upon the same person and the jury returns a verdict of guilty on the first count of aggravated assault, but is deadlocked on the second charge of simple assault, the court will accept the guilty verdict on the first charge and discharge the defendant on the second. The same rule would apply if the court accepts a verdict where a defendant is convicted on the second count of simple assault and the jury was deadlocked on the first count; the defendant would be discharged on the count upon which the jury was deadlocked.

In most jurisdictions, the court will instruct the jury that if they convict on one count of a charge which includes lesser or greater included offenses, they should not deliberate on the other, explaining to them that the defendant can be convicted on only one of such charges.

There are certain situations which allow a defendant who was tried before a state jury to be re-tried before a federal jury on the same or similar charges, no matter whether he or she was convicted or acquitted at the state level.

1.02 Types of Trial Proceedings

A. Jury Trials

The trial may be held before a judge and a petit jury, which in most jurisdictions, consists of twelve citizens. Some jurisdictions require as few as six jurors in a criminal trial. In either case, the verdict must be unanimous. Under normal circumstances, the jurors will come from the county where the crime is committed, and where the trial is being conducted. There are exceptions to this rule. If, for example, a judge from the jurisdiction where the crime was committed determines that, for one reason or another, the defendant cannot be assured a fair trial before a jury selected from that county, he will change either *venire* or *venue.* The most frequent causes for such action has to do with pre-trial publicity or the identity of the parties.

When the court rules that a change of venire is required, the judge will go with the attorneys to another county to select a jury, then bring that jury back to the trial jurisdiction, and try the case; this is called a *change of venire.*

In the alternative, a less desirable procedure, called *change of venue*, will occur. In such a situation, the case will be sent to another county where the jury selection and trial will both be conducted with jurors selected from among the citizens from the guest jurisdiction.

In a jury trial, the jury is responsible for determining what the facts are and how they apply to the legal definition of the charges and other matters of law as instructed by the court in its charge to the jury.

Throughout the trial, the judge will make decisions on matters of law which may from time to time arise through objections from one side or another to certain testimony or other evidence. The jury is bound by the court's rulings on these matters, and must view the evidence in light of those rulings.

Simply stated, in jury trials, the judge decides issues of law, and the jury decides issues of fact.

After all of the relevant and competent

evidence has been admitted and the testimony is closed, the attorneys argue their case, after which the judge will instruct the jury on the applicable law, and the jury is sent out to a private room to deliberate upon their verdict.

B. Non-Jury Trials

The second alternative is for a case to be tried before a judge without a jury. These are called *non-jury*, or *bench trials*. In a non-jury trial, the judge decides both the issues of law and fact.

Q. *Who decides which kind of trial will be had?*

In all states and in the federal courts, the defendant is absolutely entitled to a jury trial. Some jurisdictions hold that the prosecution is also entitled to a jury trial, so that even if the defendant chooses to be tried before a judge without a jury, the prosecution may choose to have the case tried before a jury. In other jurisdictions, the decision is solely that of the defendant.

Q. *What about a situation where there are multiple defendants and one of them wants a non-jury trial, while the others want a jury trial?*

In such cases where one or more, but not all of the defendants, opt for a non-jury trial, the court has several options. The judge may try all of the defendants together in one trial, while sending to the jury only those defendants who wish a jury trial and deciding himself the verdict on those who chose a non-jury trial. Another option allows the court to sever the defendants for separate trials. Which option to choose falls within the sound discretion of the trial judge, and may depend upon the evidence and the charges.

Q. *Are there other situations which cause defendants involved in the same indictment or information to be severed for trial?*

Yes. A number of other situations may arise or exist which would cause a judge to order the defendants severed for trial. Each defendant severed will receive a trial separate from the others. Some jurisdictions provide that two juries may be seated to hear the same testimony at the same time, but usually a severance means separate trials for each of the severed defendants. In most, but not all, cases, a request for severance is made by the attorney for the defendant. Conversely, the prosecutor most often wants the defendants to be joined for trial.

The defendant may request a severance on the grounds that, for one reason or another, being tried with the other defendants will somehow prejudice the requesting defendant.

If the prosecution and defense cannot agree on whether the cases should be tried together or separately, the judge may allow argument on the matter, then decide which option to choose.

1.03 Jury Selection

Jury selection is the process of selecting from a panel of jurors, the statutory number of jurors required to sit on the *petit*, or *trial*, jury. While in most state jurisdictions, as well as the federal courts, that number is twelve, some require as few as six.

The manner in which the jury is selected varies from state to state and from county to county. Your local prosecutor will be able to acquaint you with the procedure in your jurisdiction. There are, however, two basic systems employed in the selection of juries:

A. The List System

During the employment of the list system, the judge, or the attorneys, or both, ask questions of the jurors in the panel. Again, this