THE POLICE WITNESS

Effectiveness in the Courtroom

Michael W. Whitaker, J.D.

With a Foreword by

W. J. Michael Cody

This is not a manual of courtroom protocol. Instead, it is a guide to the elements of police officers' testimony that draw attention and bolster credibility. The author stresses the real-life problems posed in the courtroom, and he shows officers how to handle them confidently and effectively.

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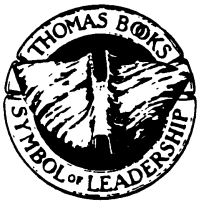
Attorney General of Tennessee
Former U. S. Attorney, Western District of Tennessee



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DEDICATION

To Thomas J. (Jack) Blackwell, Tennessee Bureau of Investigation, whose career has raised the standards of courtroom presentation for all who follow.

FOREWORD

MICHAEL WHITAKER has made an effort in this book to set out in practical and understandable language the basics that the police officer must master if he or she is to be an effective and persuasive witness in the courtroom. He has certainly succeeded!

This is the first book that I know of that uniquely addresses the police officer's role as a witness in court.

From my experience as a private defense lawyer as well as a prosecutor, I realize that only someone such as Michael Whitaker, who has extensively worked in criminal trials, can write with the necessary authority and clarity to be of practical help to those who will be a law enforcement witness.

While he is writing about the police officer as a witness, he underscores the fact that it is out of a meaningful working partnership between the officer and the prosecutor that allows the government's case to be presented to a jury within the rules of evidence and the confines of the courtroom. He hammers home that it is forceful courtroom testimony by the officer that most effectively presents the government's case.

The author clearly explains to the police officer, as a potential witness, the boundaries of the trial setting and the roles of the participants.

The chapter on cross-examination will be particularly helpful to the often nervous police witness. Never to my knowledge has an instructional book, before this, actually dissected cross-examination techniques for officers in order to prepare them for this experience in the courtroom.

The book presents a wealth of information about the criminal justice system which the officer must know. While giving practical tips to the witness responsible for presenting the government's evidence, the book never loses sight of the fact that it is the officer's first obligation to clearly speak the truth and not to merely attempt to secure an indictment or conviction.

The book ranges from the very simple proposition that the witness should listen to the question before answering it — to detailed instruction in the mechanics of compiling the search warrant so that it withstands attack at the suppression hearing. It underscores the necessity for the officer to master the basic components of the rules of evidence.

In the final analysis, this book is a welcome dose of common sense and practical advice in an area of police work not heretofore dealt with. All law enforcement officers will be helped by Whitaker's careful review of the testimonial problems to be faced during the course of a criminal trial. I predict that this book will become a standard police training manual on courtroom presentation.

W.J. Michael Cody
Attorney General of Tennessee
Former U.S. Attorney,
Western District of Tennessee

PREFACE

IN THE criminal trial, whether the officer can take the witness chair and speak the truth clearly and powerfully enough to see justice done depends on three elements: his willingness to labor in preparing himself and his case, his ability to speak accurately and honestly, and his confidence in himself.

Other than an assistant district attorney, who may be six months out of law school, the officer, on occasion will suspect that he has not one friend in the courtroom, and he must rely on these elements to present himself and his case with maximum impact. If he lacks any one of the three, which spring one from the other, he will fail to present the whole truth he has sworn to tell and justice will fail.

Not intended as a manual on courtroom protocol, this book focuses on practical means to master those elements by showing the officer how to speak with clarity and power in all cases, how to bolster credibility with juries, judges, and prosecutors, how to face cross-examination with confidence, how to face those situations in which the officer finds his own character and motives on trial, and how to testify about the police use of force, and, in general, how to achieve greater effectiveness in the courtroom.

M.W.W.
Covington, Tennessee 38019

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I

THE BOUNDARIES

AN OFFICER one morning walked into his chief's office before reporting in for the day shift. "I don't know really how to say this, since you've been so good to me, but I'm giving you my notice — I've got a chance to be assistant personnel manager over at the parts factory."

"What?" The chief was stunned, for he considered the young officer one of his best recruits of the past decade. He had signed him straight out of college with a bachelor's degree in criminal justice, and all he had heard from the shift supervisors had been high praise for his hard work. "Is it the pay?"

"I appreciate that, chief, but it's not the money. . . ."

"Is there something going on in the department I ought to know about?"

"No, nothing like that," said the officer, "It's just something personal. Thank you for the chance, chief, but you can advertise the position."

Frustration caused this good officer to leave when, in fact, he probably would have made an outstanding member of the force if he had been able to accept the limitations in his own role in the criminal justice system. This was something he had not found a way to express to his lieutenant nor to the chief. Every time the district attorney's

office had plea-bargained one of his cases, usually for a lesser sentence than he thought the offense required, the officer had felt a growing tension, though he had never outwardly complained.

The same thing happened when judges suspended sentences he thought should have been served, and he had not slept the night he learned an appellate court had reversed a jury verdict in a case he had worked. These hit him with greater shock than other officers with similar experiences because he had not learned the boundaries of his profession in relation to others in the law enforcement system.

How effectively the officer can work in the criminal court system depends in large measure on how accurately he perceives his own role and those of all the others with whom he must work. The simplest way for the officer to discover the boundaries of his own function is to comprehend generally the others. He must coordinate all his courtroom effort with the prosecutor, the magistrate or judge with authority to bind-over cases to the next entity, the grand jury, the trial judge, the jury, and then the appellate courts, each of whom possesses major powers by constitution or statute.

The most crucial to the officer is his prosecutor — the district attorney, county attorney, municipal attorney, attorney general, or some combination of these titles. Regardless of designation, the prosecutor does far more and is far more important to the officer than to merely be the one to ask the questions on direct examination. Within variations among the states, the prosecutor has the sole power to decide who's to be prosecuted and who's to be tried, thus being the ultimate arbiter of law enforcement priorities within the jursidiction he serves.

Whether elected by popular vote or appointed, as in the federal system, the prosecutor ultimately will answer for his decisions, either to the voters or to the authority that appointed him. These powers will say whether or not the prosecutor has borne well the trust placed in him or her. This is not for the officer to weigh. Nor should the prosecutor attempt at all times to curry favor with the police departments he serves, for this would prevent the former from exercising independent judgment in prosecutorial decisions.

Besides being the independent shield of the citizen against unwarranted prosecution, the prosecutor functions much like a movie director. He doesn't write the script, nor does he select the players.

He does, however, set the beginning, the end, the range, and the pace of the performance, and, within ethical limits, determines whether the script will be played at all.

The police officer wanting to present cases to courts and juries must never forget the power of the prosecutor and must commit himself to aiding that office in accurately charging offenses and forcefully presenting the whole truth to the trier of fact. Thus, the officer must learn the prosecutor's requirements for case processing, and then master that technique regardless of the apparent wisdom of the system, or the lack thereof.

Whatever the requirements, however, they represent but the minimum, and the officer who routinely delivers a truly accurate case file to the district attorney is generating credibility and enhancing his effectiveness in working with the prosecutor. The officer, moreover, owes the prosecutor the entire and accurate truth of the crime and the defendant.

Thus, the officer should advise the prosecutor of weaknesses that do not appear in the case report itself, and some observations properly do not belong in the written and permanent records of the department, nor should they be made available to anyone outside the prosecutor's office. Here, such matters as one of the key witnesses being a garbage-eating wino, or such as the victim of the burglary being a disagreeable, pompous jackass, who will destroy the case if he's ever put on the witness stand, should be kept for private communication to the prosecutor assessing the strength of the case.

Nothing, absolutely nothing, can diminish an officer's credibility with his prosecutor's office more than letting the district attorney be made to appear a fool in the courtroom when one of these surprises appears without prior warning from the officer handling the case. In other words, the officer should never overstate his case to the prosecutor's office, and for maximum credibility should, perhaps, make a practice of understating the strengths of his file.

In the same vein, only one who has never worked with a law enforcement unit would suggest that police procedural errors do not occur. Sometimes lineups do get suggestive; sometimes officers do exceed their perogatives and promise leniency for confessions; these types of mistakes do, in fact, occur. Here, again, the prosecutor should be warned that these issues may be raised.

If the officer will candidly tell his prosecutor — again this should be done privately — exactly what happened and why, then the latter can deal with it tactically and according to the requirements of the law that certain exculpatory evidence be revealed to the attorney for the defendant. This may be handled somewhat like this: "I just wanted to let you know, Mr. Prosecutor, that the lineup wasn't as good as we would have liked. The defendant is 6'8" and the tallest other man we could put up there was 6'2½"."

In other words, the officer should never allow the prosecutors of his cases to be embarrassed by or surprised with any critical aspect of the case if it is within the former's knowledge before the trial commences. This approach, no doubt, will lead to the officer seeing cases into which he has put much hard work be rejected for prosecution, but this "whole truth" approach enhances his impact with the prosecutor's office.

This approach has two other benefits for the officer: First, it gives him or her the moral confidence to rest easily in the witness chair no matter how savage the cross-examination; second, the courtroom prosecutor will rise to his feet quicker and will more enthusiastically enter objections to protect the officer whom he respects than for one he doesn't.

More than personal considerations, however, come to play between the officer and the prosecutor's office, and nothing strains the relationship between the two more than the process of plea-bargaining, the process of the prosecutor's giving reduced sentence recommendations upon pleas of guilty or *nolo contendere* to lesser offenses than those charged. This practice will at some time or another cause the officer much irritation and frustration. However, on those occasions, the officer must remind himself of this canon: The police arrest; the prosecutors prosecute; their functions may co-exist, but not coincide.

The officer can, however, through proper means, cause the two functions to overlap, for plea-bargaining to the prosecutor depends on getting sufficient facts to make an accurate case evaluation. This includes getting a true picture of the character and a history of the defendant, his prior criminal record ("rap-sheet" or "charge-card"), military history — particularly if discharged under less than honorable terms — his criminal associates, and his social habits if they in-

clude alcohol and drug abuse. Many a prosecutor has erred in recommending a case disposition because he had not been accurately informed of all the relevant circumstances surrounding the defendant.

To prevent prosecutorial error, the case report must establish the elements of the offense charged. For example, if the officer wants a burglary first degree case prosecuted vigorously, he should first look to the language of the statute, which normally will read something close to this: "Burglary in the first degree is the breaking and entering of the dwelling house of another by night with the intent to commit a felony therein."

On each case, the officer should turn back to the code book for the definition of the offense and break the charge down into digestible pieces, taking the statute above as an example: Burglary in the first degree is . . . (1) the breaking and . . . (2) entering of . . . (3) the dwelling house . . . (4) of another . . . (5) by night . . . (6) with the intent to commit a felon therein. If any one of these six elements is missing, no burglary first degree charge can be proven.

By doing this, breaking the criminal statute into component parts, with every case he presents to the prosecutor's office, the officer is accomplishing two goals. First, he is organizing his thoughts, and this makes their presentation persuasive; second, he has a handy checklist for reviewing his file while investigating the case. Admissibility and relevancy will be discussed in Chapter IV, but for the present, the officer should dedicate his efforts to addressing the "basics," as it were, and building the prosecutor a solid file out of them.

If the officer is not writing or presenting the prosecutor a truly accurate and comprehensive case file bottomed on the statutory elements of the offense, he is not doing his job. Nor is the officer being fair with himself and the others who participated in the investigation, for many a good case has been disposed of for less than what it was worth for the simple reason that it was not reported accurately and well. Thus, if the officer builds the solid case but fails to communicate it to the prosecutor, the former should not be heard to complain of its disposition.

On the other hand, suppose the officer does build the solid case and accurately reports it, including the personal history and character of the defendant as mentioned earlier, and the prosecutor "gives it

away" nonetheless. This does happen, and it would be unrealistic to suggest otherwise, but the officer should remind himself that it is not his role to decide what is done with the case once the investigation is complete; the prosecutor ultimately will have to answer for that decision to the voters or to the appointing authority.

The officer, moreover, must appreciate the competing demands for the court's trial time available and the limited resources of the prosecutor's office. Quite often there are cases on which the district attorney would like to maintain a vigorous position but can't because cases with less merit are pressing in on his time. In other words, the prosecutor does not always have truly unfettered discretion in which cases will be put before a jury and which will be disposed of by a plea. In short, the officer should not let occasional frustration and irritation with his prosecutor's office prevent him from working effectively with it.

Once the prosecutor has accepted the file and the charging process has begun, the next power for the officer will encounter is usually the magistrate, city court judge, justice of the peace, or other judge who will hold a preliminary hearing to bind the defendant over to the next grand jury and to set the amount of bail, if the offense is bailable. This judge is not interested in, nor is he required to hear, the state's or government's entire case, unless the charge is based upon interlocking circumstantial evidence (see Chapter X). This official must determine merely whether an offense has been commited and whether there is probable cause to believe the defendant committed it.

Some states permit these hearings to be transacted in whole or in part upon hearsay evidence, which simplifies matters greatly for the officer, who may relate statements of other witnesses. However, in other states, strict rules of evidence apply, and these preliminary hearings become discovery devices for defense counsel.

In those jurisdictions requiring this more formal process, the officer will find he spends more time in the witness chair in these preliminary hearings than he does in jury trials. Thus, the presentation of the case at this level deserves attention. Moreover, strong cases for the prosecution can be quickly destroyed in these hearings if the officers involved approach them too casually because normally a court reporter or recorder is recording every statement made, even those

made in error. Reporters and recorders are unforgiving, and defense counsel can use these later to impeach the officer's testimony (see Chapter VI).

In terms of testifying, the next step in the charging process is easier for the officer, but carries its own significant responsibilities. This is the grand jury, a body of citizens, usually thirteen to nineteen in number, who meet in secret to consider indictments. Once more, all this body is concerned with is whether an offense has been committed and whether there is probable cause to believe the person accused committed it.

In other states, the prosecutor may bring a defendant to trial upon an information, a charging document requiring only the district attorney's signature, while the grand jury is used as an investigative body. But in either function the grand jury will hear the officer's testimony without the defendant or his counsel being present to cross-examine; nor do the strict rules of evidence apply during these hearings.

Let the officer, however, not be deluded and think that because his version of the events will meet with little resistance that he not dedicate preparation and effort to appearing before the grand jury. First, there is a tendency of some grand jurors, regardless of the number of times they are reminded of their limited function, to insist on completely trying the case on the ultimate issues of guilt and innocence. Though it is more of the prosecutor's role, perhaps, than the officer's to make this determination, a good operating procedure would be not to try to indict those cases for which the proof was not presently available to support a conviction.

Second, because the officer presents his case without the defendant or his counsel present to refute the allegations made in the testimony, a greater burden falls on the officer, requiring him to use particular caution not to indict the innocent. Even if the defendant is later totally and absolutely exonerated in the trial of the case, the citizen indicted has been harmed greatly, in many cases being ruined socially and financially. A reckless indictment can destroy a life, so instead of it being a light duty, the officer's appearance before the grand jury demands honesty and accuracy of the highest order.

After the indictment is returned a *true bill,* the next power with which the officer must contend is, of course, the trial judge, who

presides over the proceedings and applies the law. With the exception of certain suppression hearings (see Chapter III), rulings on motions for directed verdicts or dismissals, and motions for new trial, in which the court reviews the sufficiency of the evidence, this official will not weigh the evidence for its credibility.

The trial judge, however, does make critical rulings on admissibility under standards of "due proces of law" and the rules of evidence (see Chapter V). In screening the evidence to guarantee a fair, constitutionally sound trial, the judge exercises a broad range of powers under the application of discretion, for nowhere in the lawbooks are there formulas of rules precisely fitting every conceivable factual situation. Here the officer's credibility comes into play once more. The officer who candidly admits the shortcomings of his cases, who testifies with organized preparation and clear voice, and who earns the respect of the trial court will find more and more of the "close" calls going in his favor, and neither higher education nor a high I.Q. are necessary to build these skills.

In a motion to suppress an in-court identification of the defendant by a witness based upon alleged unduly suggestive police procedures during the lineup or showup, for example, the trial judge is going to consider, inter alia, whether the complained of viewing occurred inadvertently or was staged by the police to bolster its case. The officer who has impressed the judge as one who habitually tells the "whole truth" will get the benefit of the judge's discretionary calls in cases such as these more often than not. On the other hand, the sloppy, the disorganized, and the poorly prepared officer will suffer more of the discretionary calls going against him.

Appellate courts, however, work in a colder environment, simply reviewing the transcript of the trial along with the exhibits to determine whether sufficient evidence was introduced to technically support the verdict. They do not reweigh the evidence nor do they have the opportunity to judge the demeanor of the witness on the stand. So the officer must also be concened with how what he says is going to look in printed form, and if he presents his case with disjointed sentence fragments and partial thoughts haphazardly strung together augmented by hand gestures, he may well appear in the printed record as a complete idiot. Court reporters omit dramatic pauses, voice inflections, gestures and the other clues of verbal com-

munication, and what may be perfectly understood by a listener with the benefit of those signals can come totally garbled in the printed form.

Lest the officer become intimidated by the printed record of his words, however, he should consider how his testimony will appear in the transcript the least important of all his problems, for if he abides by the other suggestions of how to maximize his impact on the other powers in the trial court system, his impact at the appellate level will take care of itself. That is to say, if he prepares his case thoroughly and honestly and presents it with clarity and organization, the printed record will follow suit.

Thus, without a college degree and without an extraordinary I.Q., the officer can find his influence reaching beyond the technical boundaries of the policeman's role of being merely a gatherer of evidence and can help those above him make the right decisions. Honesty, clarity, and organization — these are the keys to that power.

II

WORDS OF THE WITNESS

ONE MORNING a nervous district attorney was dressing, his mind running over the key elements of a homicide case he was to begin in less than two hours, when his phone rang. The caller was the wife of the chief investigating officer in the case, and, recognizing the voice, the prosecutor instantly dreaded that he was to be told the officer was ill, had had some misfortune, or for some other reason would not be available to testify. Instead, the wife asked the prosecutor to use his very best efforts to prevent a continuance of the trial.

"Sure," said the prosecutor, relieved, "but why would you ask *that?*"

"My husband hasn't slept for two nights. He's so nervous he can't keep his food down."

"Is he sick?"

"No, he gets like this before every jury trial. He's — now don't tell him I said so — afraid of testifying."

After reassuring the wife, the prosecutor tried the case as scheduled and even called the husband slightly out of turn to relieve his tension. While the jury deliberated, he asked the officer to step into his office with him and closed the door. "You seemed more than a little nervous today. Is there something wrong with the case?"

"You noticed?"

"Nothing alarming," the prosecutor said, "but you and I have

tried six cases together — two homicides, three armed robberies, and an aggravated kidnapping. Your case files are tight and you testify more believably than any officer on the force. What's the problem?"

"My wife writes all my reports. She talks and writes better than I do. She's got her degree and I only made investigator because I could break cases. I got my G.E.D. in the army, and I guess I'm scared I'm going to show just how dumb I am in court."

Saying nothing for the time, the prosecutor took from his filing cabinet the transcript of one of the officer's cases that was already under appeal and began running his finger down the lines and turning the pages. "There's nothing wrong with the way you speak. Short, simple sentences. You listen to the questions. You don't venture into areas you aren't sure of — just what do you think you should be doing?"

"I guess what I'm trying to say is that I just can't talk like a cop is supposed to on the witness stand."

Many officers, such as this one, feel courtroom testimony requires them to be fluent in some near-mystical vocabulary. They fear the words and phrases of everyday life are inadequate for the criminal trial and seem to think that because the lawyers and the judge have advanced degrees the entire proceeding must be transacted in ritualized and stilted language.

Nothing could be farther from the truth.

Plain, short words put together in simple English sentences rendered in logical sequence form the most powerful vocabulary known to man. Consider these examples:

> Yea, though I walk through the valley of the shadow of death, I will fear no evil: for Thou art with me; thy rod and thy staff they comfort me.
>
> *Psalms* 23:4

> But their generals misled them. When I warned them that Britain would fight on alone whatever they did, their generals told their Prime Minister and his divided cabinets: "In three weeks

England will have her neck wrung like a chicken!" Some chicken! Some neck!

Sir Winston Churchill,
House of Commons, 1944

Can there be any doubt about what was on the mind of either of these two speakers or what was his position on either issue? While probably never rising to the level of psalmistry or statesmanship, the officer, too, can be effective by using simple English with accuracy and conviction.

This contradicts some training officers have received in some training academies that teach the use of an "official" English stressing the emphatic form of verbs: "I *did* arrive on the scene . . . " or "The subject *did* possess a marijuana cigarette." To this are added two other irritating and useless practices: military time expressions, e.g., "1721" instead of "five-twenty-one in the afternoon," and the police "ten-codes."

Combining the three renders the officer on the witness stand incomprehensible to all but the initiated, while jurors and the trial judge squirm in their seats, wishing they understood the testimony. The witness is excluding himself from the range of believability by using words and sentence patterns alien to the common experiences and training of those whose ears are most important. In short, the officer must deliver the message he bears in terms acceptable to the receiver.

As the teacher in the classroom or the minister in the pulpit, the officer must tailor his message to the level of education and comprehension of his audience. Thus, when the issues are being heard by the trial judge alone, the officer has more latitude in his choice of words. However, for jurors the best words and phrases to use are everyday and common to all.

Some common words, however, have been so overused in police jargon they have become codes in themselves, thrown out by officers from the witness stand in lieu of fuller explanations. "Upon determining probable cause . . . ," "I did apply reasonable and necessary force," or "We executed the capias by taking subject," all have been so overused that they have become crutches supplanting the muscle and tissue of plain speaking.

When these phrases and the dozens like them are used mecani-