TESTIFYING IN COURT

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I. GENERAL CONSIDERATIONS AND GUIDELINES

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

Officers are also often called upon to testify in civil cases related to a matter in which the officer was involved in his/her official capacity. The officer is called upon to offer unbiased testimony that may aid a judge or jury in determining their findings.

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

It is only human for an officer to take a personal interest in a criminal case in which [s]he has been deeply involved and to firmly believe that

the offender is guilty and should be convicted. In his/her testimony, however, [s]he must make every effort to present the facts fairly and impartially without understating or exaggerating any of the circumstances.

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

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

II. POLICY

A. It is the policy of this department that:

1. When testifying in court, officers shall follow the procedures set forth in this policy; and

2. Officers shall testify truthfully and impartially in all judicial proceedings.

III. PROCEDURES

A. Prior to Trial

1. Review all aspects of the case, including reports, notes, witness statements and review or obtain all physical evidence needed.

2. Refrain from discussing the case with the defendant in the absence of his/her attorney, if [s]he has one, or making any agreement with the defendant's attorney for recommendations as to the disposition of the case without the knowledge of and in the presence of the prosecutor and/or the department prosecuting officer.

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

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

B. At the Courthouse

1. Officers shall be punctual in reporting at the time and place set for the hearing, trial or other proceeding. Officers physical appearance, personal conduct and professional manner should be aimed at making the best possible impression.

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

3. While waiting to be called to the stand, or after having provided testimony, officers shall refrain from any unnecessary discussion with other officers in the courtroom.

C. Courtroom Attire

1. JUDGE TRIALS: In trial before a judge without a jury, patrol officers may wear their uniform or comply with the procedure below applicable to attire in jury trials. Therefore any appearances in Clinton District Court only, officers can wear patrol uniform.

2. JURY TRIALS: In jury trials, which apply to all appearances in Fitchburg or Worcester Courts, the following attire requirements apply:

    a. Male officers shall dress neatly in a suit or sports coat and tie.

    b. Female officers shall dress in a conservative dress or suit.

    c. Exposed firearms shall not be worn.

3. Exceptions may be made, but only with the approval of the assistant district attorney and/or police prosecutor

D. **Conduct as a Witness**

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

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

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

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

2. While on the stand, the officer shall:

    a. Testify to what [s]he knows or believes to be the truth.

    b. Speak naturally and calmly in a distinct and clearly audible tone of voice, describing in a forthright manner the events of the case in the order in which they took place.

c. Use plain, clearly understandable conversational language avoiding slang and unnecessary technical terms.

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

e. Listen carefully to each question and respond accordingly.

i. If asked to state facts, state the facts known or believed to be true.

ii. If asked to state an opinion or conclusion, do so if the officer has formed an opinion or conclusion which [s]he can articulate and support. Do not give a personal opinion unless asked to do so.

iii. If an answer is unknown, state that it is unknown.

e. Answer only the questions which are asked.

f. Make every effort to avoid errors in his/her testimony or inconsistent statements which could undermine the confidence of the judge or jury in his/her credibility.

3. When a question is asked, the testifying officer:

a. Should look directly at the person asking the question and then give a deliberate, courteous, well-considered answer. If [s]he does not hear or clearly understand the question, [s]he should request that the question be clarified or repeated.

b. Should pause briefly and consider every question before responding in order to:

i. Assure that the question is complete and to prevent misinterpreting or misunderstanding the question;

ii. Give the officer an opportunity to analyze the question and to form a complete and accurate answer; and

iii. Give the other attorney the opportunity to make an appropriate objection to the question, if necessary.

c. However, an officer should not be too deliberate in responding to questions as any conspicuous wavering or hesitancy on his/her part may be interpreted as indecision or uncertainty.

d. Be as specific as possible in his/her responses, but in testifying as to times or distances [s]he should state that they are approximations unless [s]he has the exact information readily available.

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

5. REFER TO NOTES: At the request of the prosecutor or defense attorney, and with the permission of the judge, an officer may refer to his/her notes or a police report to refresh his/her memory on a given point. This is called present recollection refreshed. If the officer has no current recollection on a given point but did make a report or record at an earlier time, the prosecutor or defense attorney may request that report or record be admitted into evidence. This is called past recollection recorded. Continual reliance on notes can detract from the officer's testimony and raise doubts as to the officer's knowledge of the facts.

E. Inaccurate or Omitted Testimony

1. If during or at the conclusion of his/her direct testimony and before cross-examination, an officer realizes that an important point has not been brought out or fully developed by the prosecutor's questions, the officer, while still on the witness stand, may utilize a discreet signal to gain the prosecutor's attention. This will allow the prosecutor to ask the judge for permission to confer with the officer. If that method is unavailable or unsuccessful, the officer may

address the judge directly and request permission for a very brief conference with the prosecutor.

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

b. If an omission is realized after the officer has left the witness stand, [s]he shall inform the prosecutor as soon as possible in a manner that is not distracting to the court. Writing a note and passing it to the prosecutor is an acceptable method to accomplish this purpose.

2. If a mistake in testimony has been made, the officer shall voluntarily correct any error as soon as possible.

F. Defense Attorney Tactics

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

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

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

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

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

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

e. Asking repetitious questions or rephrasing previous questions in order to obtain inconsistent answers or answers which conflict with previous testimony by the witness;

f. Asking questions which suggest a particular answer in order to lead the witness into responding;

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

h. Demanding a "yes" or "no" answer to questions that obviously require more explanation;

i. Suggesting or indicating that conflicting answers were given in earlier testimony; and

j. Belligerent questioning to anger and disconcert the witness.

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

G. Testifying in Civil Suits or as a Defense Witness

1. Officers shall refer to the department’s rules and regulations regarding testifying in civil suits or appearing as a defense witness in a criminal case.

APPENDIX A: OVERVIEW OF MASSACHUSETTS RULES OF EVIDENCE

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

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

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

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

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

Some of the more common classifications of evidence are as follows:

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

Direct evidence is often broken down into four forms:

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

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

3. ***Documentary Evidence***. Any instruments containing written or otherwise recorded entries (e.g. a book, ledger, receipt, report, letter, deed, contract, diary).

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

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

Best Evidence Rule. Whenever possible, the original of a written document must be produced at court. If the original is not offered, a copy or other secondary evidence of the contents of that document will be accepted only if the absence of the original is adequately explained to the satisfaction of the court. The best evidence rule applies only to written documents and not to photographs, tape recordings, visual displays, etc.[1]

Corroborative Evidence. Evidence which confirms or strengthens other evidence.

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

Prima Facie Evidence. Evidence which is sufficient on its own to establish a given point or conclusion and is legally binding unless it is effectively rebutted or discredited. For example, a properly executed certificate of a chemist of the Department of Public Health is **prima facie** evidence of (a) the composition, (b) the quality, and (c) the weight of the drug or other chemical analyzed. Once such a certificate is admitted into evidence, the judge or jury must accept what the certificate states pertaining to composition, quality and net weight.[2]

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

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

Expert Evidence. Evidence presented by a person who is accepted by the court as having special knowledge of a subject not usually possessed by the average person and derived from his/her training, education and experience in that field. The testimony of an expert, as to facts or opinions, is not binding on the judge or jury; they may give expert testimony whatever weight or credibility they decide that it deserves.

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

1. The apparent age of a person;

2. The apparent physical condition of a person;

3. The obvious emotional state of a person;

4. Identity and likeness of appearance, voice or handwriting;

5. Whether a person appeared to be under the influence of alcohol or drugs;

6. Sense recognition, such as whether an object was heavy, red or bulky;

7. The direction from which a sound emanated;

8. The estimated speed of a vehicle or other moving object;

9. The value of an item (if the witness was the owner or has had sufficient dealings with such objects to be able to render a credible opinion as to its value).

Hearsay. Hearsay evidence consists of:

1. Oral or written statements
2. Made by one other than the witness
3. Out of court
4. Not under oath
5. Not subject to cross-examination
6. If offered to prove the truth of the matter asserted therein.

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

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

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

2. **Confessions** - Admissions and declarations against penal interest (all defined below) are admissible if legally and voluntarily made.

3. **Spontaneous Exclamations** (also called excited utterances) - If a person makes a statement during or very shortly after the occurrence of a startling event and while under the

excitement or stress of that startling event another person may testify to those statements.

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

5. **Business records** - These include any entry, record or memorandum if it was made in good faith, in the regular course of business, before the beginning of the litigation in question and if it was a regular business practice to make such entries, records or memoranda. Although this is commonly referred to as the "business records" exception to the hearsay rule, it also applies to records of non-profit organizations and to records maintained by government agencies, including police departments.

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

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

Confession. A statement made by a competent person voluntarily acknowledging that [s]he committed a given offense. A confession, by itself, is sufficient for a conviction, provided there is some evidence that the crime was committed.[3]

Admission. A statement or declaration in which the accused acknowledges the truthfulness of a fact which may or may not, along with other evidence, prove his/her guilt.

Declaration Against Penal Interest. A statement which would tend to expose the maker of the statement to criminal penalty.

Joint Venture - Joint Acts and Declarations, If two or more persons join efforts to perpetrate or accomplish a crime, generally, the acts and declarations of each can be used against all in court. Also, an individual is criminally responsible for the actions of his/her joint venturer if [s]he

harbored the same criminal intent and was present at the scene of the crime. There need not be an overt agreement to prove a joint venture. It is enough if two or more persons act together or assist one another in the crime. To prove conspiracy, however, there must be evidence of an overt agreement to commit the crime.[4]

Bruton Rule. The U.S. Supreme Court ruled that it is a violation of a defendant's Sixth Amendment right to confront adverse witnesses to try a defendant jointly with a co-defendant where the co-defendant has made admissions or confessions that implicate the defendant but the co-defendant chooses not to testify (and, therefore, is not subject to cross-examination by the defendant). Thus, where there are two or more persons charged with the same offense, severance (separate trials) sometimes occurs.[5] This rule was reinforced by the Massachusetts Supreme Judicial Court[6] which held that the admission in a joint trial of a co-defendant's statement implicating the defendant was reversible error, even though the Commonwealth alleged that the co-defendant's statement was offered only to show consciousness of guilt and argued during trial that the statement should be disbelieved.

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

1. Lawyer - client
2. Psychotherapist - patient[7]
3. Husband - wife[8]
4. Clergy - penitent[9]
5. Government privilege to withhold identity of informer[10]
6. Social worker - client[11]
7. Sexual assault counselor - rape victim[12]
8. Parent - child[13]

Note: There is no physician - patient privilege presently recognized under Massachusetts law.

Exclusionary Rule. Generally, if it is shown that evidence was obtained by police in a manner which contravened the rights of the defendant,

that evidence will, upon motion of the defendant, be excluded at court. The most common areas involving motions to suppress allegedly unlawfully obtained evidence are interrogation and searches and seizures. See departmental policies on ***Search and Seizure***, ***Interrogating Suspects and Arrestees*** and ***Arrest***. However, the police should be aware of several exceptions to the exclusionary rule and should discuss utilizing any of these exceptions with the prosecutor in appropriate cases.

1. **Attenuation** - If the unlawful police action was so far removed or so remotely connected to the incriminatory evidence obtained, the court may rule that any taint due to the initial illegality was "attenuated" and the exclusionary rule should not apply.[14]

2. **Independent source** - If the police can establish that they obtained the evidence in question from a source or in a manner completely independent of the unlawful procedure, the exclusionary rule may not apply.[15]

3. **Inevitable discovery -** If police can establish that they would have obtained the evidence in question anyway and in a lawful manner, the exclusionary rule may not apply.[16]

   NOTE: The Supreme Judicial Court has held that this exception cannot be applied to cure an illegal warrantless search on the basis that it was inevitable that a warrant would be obtained.[17] In another Massachusetts case the Court indicated that the inevitable discovery rule may apply to cure or to apply in a situation not requiring a warrant (e.g., protective custody).[18] In implementing the rule, the Court focused on two issues:

   a. the issue of inevitability; and

   b. the character of the police misconduct.

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

5. **"Good Faith" exception** - For example, where police reasonably rely on what appears to be a valid search

warrant, the exclusionary rule may not be applied even though a court subsequently determines that the search warrant was defective.

NOTE: Massachusetts has yet to decide whether it will follow the good faith exception.[19]

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[1] M.G.L. c.233, s.79K

[2] M.G.L. c.111, s.13

[3] *Com. v. Forde*, 392 Mass. 453, 466 N.E.2d 510 (1984)

[4] *Com. v. Clarke*, 418 Mass. 207, 635 N.E.2d 1197 (1994); *Com. v. Bianco*, 388 Mass. 358, 446 N.E.2d 1041 (1983)

[5] *U.S. v. Bruton*, 391 U.S. 123, 88 S. Ct. 1620 (1968)

[6] *Com. v. Hawkesworth*, 405 Mass. 664, 543 N.E.2d 691 (1989)

[7] M.G.L. c. 233, s. 20B

[8] M.G.L. c. 233, s. 20

[9] M.G.L. c. 233, s. 20A

[10] *Com. v. Abdelnour*, 11 Mass. App. Ct. 531, 417 N.E.2d 463

[11] M.G.L. c. 112, s. 135, 135A and 135B

[12] M.G.L. c. 233, s. 20J

[13] M.G.L. c. 233, s. 20

[14] *Com. v. Crowe*, 21 Mass. App. 456, 488 N.E.2d 780 (1986), *rev. den'd* 397 Mass. 1101, 409 N.E.2d 806 (1986)

[15] *Murray v. U.S.*, 487 U.S. 533 (1988)

[16] *Nix v. Williams*, 467 U.S. 431 (1984)

[17] *Com. v. Benoit*, 382 Mass. 210, 415 N.E.2d 818 (1981)

[18] *Com. v. O'Connor*, 406 Mass. 112, 546 N.E.2d 336 (1989)

[19] *Com. v. Pellegrini*, 405 Mass. 86, 539 N.E.2d 514 (1989), *cert. den'd* in 110 S.Ct. 497.