

COURTROOM TESTIMONY TECHNIQUES

“SUCCESS INSTEAD OF SURVIVAL”

“IT IS OK TO HAVE BUTTERFLIES WHEN YOU TESTIFY. THE KEY TO BEING A GOOD WITNESS IS TO TEACH THE BUTTERFLIES TO FLY IN FORMATION.”

By

Ron Smith

INTRODUCTION

Most law enforcement officers, investigators and forensic specialists receive very little formal training on proper methods of providing testimony in front of a judge or jury. That presents a significant problem because jury members assume that not only are you properly trained in providing testimony, but that you also testify on a regular basis as part of your job. For

most criminal justice witnesses, testifying in court is not part of their weekly or even monthly schedule. This lack of experience leads to a natural feeling of anxiety when they are called upon to testify. This two-day seminar is specifically designed to aid you in understanding and accepting that natural fear, taking that concern, and channeling it in a positive direction to make you a better witness. You will learn that “Fear is Good” because when you are afraid you are also very alert to what is happening around you. Once you learn to utilize and channel this feeling through aggressive listening techniques and numerous preparation and presentation methods, you will make great strides toward becoming the witness that you want to be and the kind of witness that the jury expects.

For more than fifteen years, Ron Smith has been conducting research on courtroom testimony techniques and interviewing witnesses, judges, prosecutors, defense attorneys and the most important people of all, “JURORS,” to determine what they believe, what they like and what they specifically don’t like from criminal justice witnesses. The results of this research will surprise you and provide insight on courtroom dynamics that will assist you in becoming a better witness. The seminar is exciting, fun and fast paced, with a great deal of interaction between the instructor and the students. This combination makes for a totally enjoyable learning experience – one that you will remember throughout your career. The instructor will work very hard to make the information available to you. For you to succeed, it is imperative that you relax your guard, soak up the information, don’t worry about making mistakes, and enjoy the class while you grow as a person and as a witness. Welcome!

ABOUT YOUR INSTRUCTOR

Ron Smith has been employed in the forensic identification and investigation field since 1972, first with the Federal Bureau of Investigation in Washington, D.C., then with the Alabama Bureau of Investigation in Montgomery, Alabama, and since 1978, with the Mississippi Crime Laboratory. As Associate Director, he supervises the operation of the Meridian Branch of the Mississippi Crime Laboratory System, serving a thirty-county area of east central Mississippi.

Mr. Smith has served in numerous leadership positions of various forensic identification associations. He currently serves on the Board of Directors of the International Association for Identification. He is certified by the International Association for Identification as a Certified Latent Print Examiner and Certified Senior Crime Scene Analyst. In addition to his expertise in latent print examination and crime scene examination, he is recognized as a specialist in the area of courtroom testimony training.

Since 1980, he has served as the principal instructor for the Expert Witness Training Program (EWTP) of the Mississippi Crime Laboratory. The EWTP, a program Mr. Smith was instrumental in developing and maintaining, is recognized as one of the best in the United States for training forensic scientist and crime scene investigators. He is the primary expert witness trainer for the Mississippi Law Enforcement Training Academy and has shared his knowledge and experience related to courtroom testimony, latent print examinations and crime scene examinations by lecturing in more than forty states, Canada, Europe and the Caribbean Islands.

He has testified in over five hundred criminal trials in various states. Therefore, he understands what it is like to sweat bullets, make mistakes, lose sleep and be embarrassed by what happened or may happen on the witness stand. Most importantly, he understands how it feels to be successful and how to achieve success on the witness stand.

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CLASS RULES AND GUIDELINES

Class Attire:	Casual
Breaks:	As permitted by instructor (Usually one short break per hour. Bribery is permitted)
Lunch:	One hour
Starting Time:	8:30 A.M.
Ending Time:	4:30 P.M.
Participation of Students:	Requested, appreciated and rewarded
Testing:	Oral testing throughout the seminar
Certificates of Completion:	Presented at end of seminar

INSTRUCTOR EXPECTATIONS

Instruction will be on a wide variety of topics related to courtroom testimony and will be conducted in such a manner that the student will retain the information provided during what should prove to be an enjoyable learning experience. It is expected that during this two-day seminar, students will significantly improve their individual testimony skills while developing a personal plan of improvement that can be implemented, using this information, upon return to their agency.

STUDENT EXPECTATIONS

The student should expect to gain both knowledge and confidence in their own abilities to testify as a witness in a criminal case. If the student actively participates in the personal growth exercises, they can expect to become a better witness. They should expect the instructor to be

totally committed toward this common objective.

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I. IS THERE A NEED FOR THIS TYPE OF TRAINING? IF SO, WHY?

Most officers or crime laboratory forensic specialists are aware that there is a real need for this type of training, but they may not fully understand the reasons why. Criminal justice agencies commit significant portions of their available funding toward training new officers or forensic analysts in their daily duties. This certainly is necessary if employees are to succeed in their new position and be the type of officer or analyst that the agency needs and desires. But, why does the training seem to stop or significantly slow down once the initial training has been completed? What are our criminal justice agencies doing for the officer or analyst on the job as they grow in their positions and responsibilities?

There are many areas of continuing education that need to be addressed and this seminar will only attempt to address one of them; courtroom testimony. This is an area in which most new entrants into the criminal justice profession get very little training. Usually, what training they have received was so early in their basic training that by the time they need to use the information, the memory of it is fragmented, at best. They may remember just enough to get them into trouble on the witness stand. Special classes on “Officer Survival” are planned throughout a new officer’s basic training and these are indeed critical for the safety of the officer and the citizens they are sworn to protect. However, most officers and investigators feel that while on the witness stand, they need to know survival techniques as well. They get the feeling that surviving the witness stand is enough and that success is measured in degrees of survival. The problem with that philosophy is that jurors don’t agree.

The most significant reason that courtroom testimony training has become a necessity is based upon responses from the jury members themselves. Over the last several years I have been conducting research by interviewing a large number of jurors after they had completed their service as a jury member. One of the questions that I have asked them is this: “Prior to you hearing the actual testimony of the officer or investigator in your case, how much training do you believe the average law enforcement officer receives on how to testify in court?” The answer may surprise you but the average response from jury members was eighty (80) hours! The average juror views your testimony to be a very important or vital part of your job. Therefore, jurors honestly believe that the criminal justice system provides a sizable amount of technical training to employees in your field of endeavor.

We must agree with the jury’s view, but does your agency give you the benefit of this amount of training in how to become a good witness in court? Probably not if you work for the average agency in this country. Interestingly enough when the same jurors were asked, “After you heard the actual testimony of the officer or investigator in your case, how much training do you believe they had received in testimony techniques?” The answers ranged from zero to a lot, depending on the witness. Moreover, the average answer could be categorized as simply “not near enough.”

This same survey revealed another very surprising aspect of jury expectations of the criminal justice witness. Consistently, jurors respond that they believe testifying in court is a regular and normal part of every law enforcement officer's job. Therefore, officers and investigators should be good at testifying since they get so much experience in doing it. Do you think they are right in this belief? How many times have you testified in your career? How often do you testify? This belief may not be fair, but it is indeed real! Most importantly, their expectations of you are based on those same beliefs. The grade they give you as a witness on the stand will be based in part on those beliefs. You must recognize and accept this fact of life and plan your training accordingly to meet those expectations.

The best part of recognizing this need is that, once you do, you have started the educational process necessary to becoming the witness that the jury expects. How could you be expected to do a great job on the witness stand when you have never been taught how? It would be wonderful if when you walk into the courtroom, you could stop and say "Good Morning! This is my first time to testify and I hope everyone will not expect too much from me." You know that you can't do that. If you make a valid attempt to learn how to testify, you won't feel that you need an excuse when you walk into the courtroom for the first time. Learning to become a good witness is an acquirable skill, just like learning to fire your service weapon, just like learning to conduct interviews and interrogations, just like learning how to document a DUI traffic stop, just like learning to photograph and sketch a crime scene or conduct a laboratory analysis. There are steps to success that can be identified and followed and this seminar has now become part of that process for you.

II. TESTIMONY ENVIRONMENT

Where will you be called upon to testify and to whom?

A. Preliminary Hearing: The purpose of the preliminary hearing is to provide a judicial determination of the existence of probable cause and to protect the defendant from a totally baseless prosecution. The judge must determine whether there is probable cause to believe that an offense was committed and that the defendant committed it. The preliminary hearing consists mainly of the presentation of evidence against the defendant by the prosecuting attorney. The defense attorney may cross-examine witnesses against the defendant as well as introduce evidence in the defendant's behalf. As a witness, you should never take these hearings lightly, because they can become explosive when the defendant has a well-prepared attorney. Prepare well for this hearing. Expect the worst and if it comes, you'll be ready; but if not, your day will be a little easier. Can you think of cases in which preliminary hearings could get to be a larger than usual proceeding? How about a DUI second or third offense on a defendant who is a doctor, lawyer or well recognized business person in the community? Better yet, get ready for the case of some influential person's kid getting picked up with sale proportions of crystal methamphetamine in their car. Remember, in a preliminary hearing, no jury is present. You are testifying to a judge. This may allow you to use more technical terms than you might use in a jury situation.

If probable cause is established that the defendant committed the offense, the defendant will be held to answer to the grand jury in the county in which the crime was committed and the process continues.

B. Grand Jury: The Grand Jury usually consists of from 12 to 23 jurors, selected from their communities. The duty of the grand jury is to receive complaints in criminal cases, hear the evidence put forth by the state and find an indictment when and if they are satisfied that there is probable cause that the defendant has committed an offense. The grand jury hears testimony from witnesses, usually at the direction of the prosecutor. It is normally a more informal setting than trial court and can be quite interesting. Any member of the grand jury can ask questions of the witness and the type of questions can be as varied as the people serving on the grand jury. Although it is not an adversarial setting, you must be prepared to answer their questions from either memory or your case notes, which you should have with you. There is no defense counsel present for cross examination, but it is not uncommon for grand jurors to ask questions consistent with what may be asked by a defense counsel during the trial phase. Also remember that it is very common for a witness to be asked to testify on multiple cases at one time while in front of the grand jury and special preparations should be made to have your thoughts and notes organized by individual case. The indictment is the document that charges the defendant with an offense and upon which the defendant is brought to trial. If the grand jury returns an indictment, the process continues.

**Note:* Not all states use a grand jury system. Some states use what is called the “Information” system. The main difference between the indictment and the information is that the indictment is issued by a grand jury and signed by the foreman of the grand jury. The information is signed and sworn to by the prosecuting attorney without the approval or intervention of the grand jury.

In those states which use the information method, I have found that cases have the potential for coming to trial much sooner than in grand jury states. This can effect the witness in that their trial preparation time may be limited.

C. Motions: The defendant may file numerous and varied motions with the court regarding the case but the two that most often involve the officer or investigator are 1) the motion to suppress evidence, and 2) the motion to suppress a confession. These two motions and the hearings associated with them are conducted in front of the judge and may require significant testimony on the part of the officer or investigator. If the crime laboratory personnel were called upon to assist in the crime scene investigation, they may be called as witnesses during these hearings. Obviously, if the defense counsel can show that his client has been damaged by an unlawful search and seizure, or an unlawfully obtained admission or confession, then they can have this evidence excluded from the trial and the jury never knows about it regardless of how important it might be. Some of the most strenuous cross examinations have been witnessed during these motion hearings because the defense counsel knows quite well

that if they can have the evidence suppressed, in many cases it will cause the state to either reduce the charges or drop the case entirely. Remember it is your responsibility to have your information ready at this time.

D. Trial: Normal Sequence of Events

1. Selection of Jury
2. Opening Statement by Prosecutor
3. Opening Statement by Defense Counsel
4. Prosecutor Presents Evidence Through Witnesses
 - a. Direct Evidence: Evidence consisting of oral statements of witnesses on the stand testifying to their own personal knowledge of the facts in issue. Eye witness statements are considered direct evidence.
 - b. Circumstantial Evidence: (Sometimes called indirect evidence) refers to evidence which does not directly prove a fact in issue, but raises a strong inference or suggestion as to the truth of that fact. Possession of stolen goods from a burglary with bits of broken glass or insulation on your clothing would be considered circumstantial evidence. It is quite possible to obtain a conviction with only circumstantial evidence.
 - c. Real Evidence: (Sometimes called physical evidence) is made up of things---tangible objects of one kind or another that are associated with the offense. Fingerprints, photographs, blood, hair, documents and weapons are all types of real evidence. Of course, quite often physical evidence is also circumstantial evidence.
5. Cross Examination of Prosecution Witness by Defense Counsel
6. Re-Direct Examination by Prosecutor

7. Re-Cross Examination by Defense Counsel
8. Motion for Acquittal by Defense
9. Defense Presents Evidence Through Witnesses
10. Cross Examination of Defense Witness by Prosecutor
11. Re-Direct Examination by Defense Counsel
12. Re-Cross Examination by Prosecutor
13. Prosecutor Calls Rebuttal Witnesses
14. Cross Examination by Defense Counsel
15. Closing Arguments by Prosecutor
16. Closing Arguments by Defense Counsel
17. Rebuttal by Prosecutor
18. Case Goes to Jury for Deliberation

E. **Sentencing Hearing:** Depending on the type of crime committed and the applicable state statutes, a sentencing hearing may require the testimony of the officer, investigator or forensic specialist. In the cases of capital offenses where the state has a bifurcated sentencing statute, this may require an additional testimony in front of the jury. Testimony may also be required in “Pen-Pack” situations in which the prior record of the convicted defendant must be proven to meet the requirements of habitual offender statutes.

***Note:** Even though the actual people who will be hearing and making decisions based on your testimony will be the judge and jury, there is another group of people who may be called on to evaluate your testimony without having the benefit of seeing you on the witness stand. Of course, the appellate court is a very important part of the criminal justice system and your testimony, as recorded and transcribed by the court reporter, is the only source of information they have regarding your testimony. This, in itself, presents additional challenges that will be discussed in detail during later discussions on presentation methods.

III. WHY IS GIVING TESTIMONY CONSIDERED A DIFFICULT THING TO DO?

For most individuals being called upon to testify in a criminal trial does not rank at the top of the list of things that they would like to do at work each day. There are a number of reasons for this and they are all very legitimate. It is not natural for a person to wish to be placed in a situation where they may not be in total control of their environment. They will be restricted in both speech and movement and must ask for permission to do anything other than to sit there and answer questions that may not be asked in the most pleasant of tones. Who in their right mind would want to be subjected to that?

Of course the serious nature of the case, the fear of failure in front of others, and the eagerness to succeed all add to the immense weight that seems to be on your shoulders as you are called to the witness stand. This is a very natural feeling and it just comes with the territory. There is no way to ignore it nor should you. As you learn more about the proper techniques of giving testimony, you will find that these same feelings that cause you to dread being called as a witness will be there to help you become a better witness as your knowledge and experience grows.

IV. ALL YOU HAVE TO DO IS TELL THE TRUTH! BULL!

When I entered the criminal justice workforce over twenty-five years ago, I was told by a number of supervisors and supposedly learned people that to be a good witness all you had to do was to remember to tell the truth. For several years I believed that philosophy until I got the opportunity to work with less experienced forensic examiners that were placed under my tutelage for forensic testimony training. I soon came to realize that there was much more to it than just telling the truth and I started to study the subject with an intense fervor.

These studies have led me to the conclusion that the only people who profess that position are those who have either been testifying so long that they have learned from years of experience and can't remember how it was when they got started in their testimony career, or they are so far out on a mental limb that the slightest breeze will send them crashing to the ground. Harry S. Truman once said, "Always tell the truth; that way you never have to remember what you said." How true he was but even that bit of wisdom is not enough in a courtroom environment. It is certainly possible for you to tell the complete truth about your knowledge of the case but to have done it in such a fashion as to make it unbelievable to anyone that hears it. The irony in this is that you may not realize that your presentation methods have made it unbelievable to the jury.

The best example I can personally recall of this phenomenon was during an armed robbery trial when an eyewitness to the crime was asked under cross-examination, "It was very dark. How is it possible that you can be so sure that the armed man you saw was my client? The witness dropped her eyes and head and said, "Because I got a good look at him." Even though what she said may have been very true and would have appeared favorably on the written court

record, it certainly was not convincing to the jury at all. Just the fact that the witness looked down and away from anyone when she replied, gave the impression that she was not sure. The truth must be presented in a convincing manner for it to be unequivocally believed. This is the responsibility of the witness.

Learning how to do this properly is a very important part of becoming a good witness.

V. WHAT IS HONESTY?

We all believe that we know what honesty is, but do we really? Are there different levels of honesty? What are the juror's expectations of us as criminal justice witnesses when it comes to honesty? Do you think that the average juror believes that you are telling the truth just because you are a law enforcement officer or crime laboratory analyst? Remember, it is not always the real truth that counts but what the members of the jury perceive the truth to be that is important.

The jurors perception of the facts and their perception of the witness as a presenter of the facts is critical to the outcome of their decision. As witnesses we must make every attempt to understand their position and what they are feeling as they sit there and see the parade of witnesses and evidence flow before them. I am sure that at times it can be very overwhelming for them individually and collectively. They wish to be honest with themselves and fair in their opinions and the more we know about being a juror the better we can meet their needs as a trier of the facts in the case.

Early on in my research, I had the pleasure of interviewing a juror who had just finished serving on a five day robbery/assault case and he taught me a great deal about what I needed to be as a criminal justice witness. He was a middle aged businessman and he had graciously agreed to meet me at his office for the interview. When I asked him what he expected from a criminal justice witness he replied, "I expect to sleep well at night." I chuckled for a moment realizing that he must have been hard of hearing and didn't quite understand my question. I asked him again and his response was, "I told you. I expect to sleep well at night." Totally confused, I laid down my survey notebook and asked him to help me understand. What he told me that afternoon has had more influence on my testimony and certainly on my teaching of the subject than any book I have ever read.

He explained to me something that I should have already known but didn't yet fully realize. He said "I expect enough information from a criminal justice witness, that is understandable and believable, so that when I go into that jury room and vote guilt or innocence on another person's life or liberty, I will sleep well with that decision." There it is in a nutshell, and it took a layperson to show it to me. Honesty must not only be present; it must also be perceived to be effective.

VI. JURY PERCEPTIONS. WHAT ARE THEY THINKING?

What are they thinking as you enter the courtroom? Do you believe they are biased toward the prosecution or the defense? Do you think they will believe you just because you are law enforcement officer or crime laboratory analyst? Do you think they will automatically distrust you for the same reason? Do you believe that they want you to do well on the witness stand or not? Or do they really care? These are very interesting questions for discussion. First let's take several minutes to take the handout test on this subject that is found on the next few pages of your training manual. We will discuss it after you have finished.

JURY BELIEFS AND YOUR OPINIONS

1. What do you believe that an average jury thinks about you and your criminal justice associates, in general? _____

2. Prior to hearing your actual testimony, do you think that they will believe you will tell the truth just because you are an officer of the law or a crime laboratory analyst? YES [] NO [] Why? / Why Not? _____

3. Do you think that the average juror wants to believe you? YES [] NO [] Why? / Why Not? (This is very important) _____

4. If you were a juror with your existing criminal justice background, would you believe a lay witness prior to hearing them testify just because they are a citizen? YES [] NO []
Why? / Why Not? _____

5. Name at least three things that you can do to convince the jury to believe you?

1) _____

2) _____

3) _____

6. Name at least three things that you can do that might cause a jury not to believe you.

1) _____

2) _____

3) _____

7. Are most cases decided on the testimony of one witness or several witnesses? _____

8. Are most jury trials decided on an accumulation of points or on a single three point shot at a critical time in the game? _____

9. How many times has the average jury member served as a juror before? _____

10. How many times has the average jury member been to a trial before? _____

BONUS QUESTION:

11. Who makes up a jury? (This may be the most important question of all. Give it some thought before you answer) _____

VII. FEAR IS GOOD!

What is fear? Is it the same for everyone? How does it relate to courtroom testimony training? So many questions and so few answers? Can we really talk about it? We're supposed to be trained to handle and control fear, but how do we do that?

The first thing we need to do is accept the fact that fear is a very natural feeling we all have throughout our life. Every person has fears, but not everyone would readily admit them. Even fewer people are secure enough in themselves to admit their fears in a classroom seminar environment. Since we all are aware of our personal fears, we need to discuss how we have learned to deal with them and harness that power for use in a different environment. In other words, we need to bring the existing power in each of us to the surface, dust it off, shine it up and get ready to use it when we need it. Each of you brought this power with you, and I am going to show you how to bring it to the surface for use when you need it.

Let's first make an attempt at identifying your natural fears.

LIST TEN NATURAL EVERYDAY PHYSICAL FEARS

- | | |
|----------|-----------|
| 1. _____ | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |
| 4. _____ | 9. _____ |
| 5. _____ | 10. _____ |

LIST TEN NATURAL EMOTIONAL FEARS

- | | |
|----------|----------|
| 1. _____ | 6. _____ |
| 2. _____ | 7. _____ |
| 3. _____ | 8. _____ |

4. _____

9. _____

5. _____

10. _____

LIST FIVE SPECIAL SITUATION FEARS

1. _____

4. _____

2. _____

5. _____

3. _____

How many blanks did you fill in? How many of these were fears that you have personally felt sometime during your life? How many of them have you seen in others? What were the symptoms of these fears? How did these fears manifest themselves in you or others? Could others see your fear? Could you see theirs? These are all very personal and thought-provoking questions that need to be discussed and evaluated. By studying your natural fears and how you react when you are afraid, you can learn to overcome many of your fears and control your visible reaction to much of the rest. There are some very valuable lessons to be learned from the study of your own fears. Fear itself lends itself to being useful to the witness in a courtroom environment.

Since we now understand that fear is a natural feeling, how can we harness the power to deal with it and apply it in a beneficial way to make us a better witness. Actually it is a very simple concept. One of the symptoms of natural fear is the increased awareness of our body to the environment around us. This increased awareness can be manifested in several of our body's senses. Our eyes are sharper and notice the slightest movement. Our ears are striving to hear the faintest sound that could affect us. Our smell, taste and feel senses are on the alert for any change in the status quo. Overall, we are at our highest peak of attention when we are afraid. This can be a extremely positive natural condition once you have learned how to utilize it to your benefit. The witness that does not take advantage of this increased awareness fails to seize a wonderful opportunity that is there for the taking. It costs nothing, and, as you will learn later in the seminar, can be used to reap great benefits.

How did you learn to deal with your fears? Are you afraid when you must respond to a domestic violence call without a backup? Are you afraid when you make a DUI stop by yourself? Are you nervous when you are at the crime scene and you have found what you believe to be a critical piece of evidence. You have only one chance to collect the evidence correctly, and it will not be easy? Are you afraid when you are making a undercover buy and a group of unexpected visitors drives up while you are making the deal? Are you afraid or nervous when your lab examination has reached a critical stage and it is all up to you?

What is it that makes you perform well in these and similar situations? Training! Training! Training! If you are trained to handle these situations, even though you are nervous or even afraid, you are still under control and can be successful under pressure. Providing or giving courtroom testimony is no different. Once you understand this concept, you are on your way to becoming a better witness.

VIII. JURY EXPECTATIONS OF A CRIMINAL JUSTICE WITNESS

Jurors are like any other people. They are not void of feelings, beliefs, biases or expectations just because they are now on a jury and are trying to be impartial and fair. Their internal expectations of criminal justice witnesses have been developed over the years from a variety of sources, most of them from television and movies. Unless they have had exposure to a previous trial personally, they have preconceived ideas based on television trials such as the O.J. Simpson trial or other cases seen on Court T.V.

During the numerous interviews that I have conducted over the years, I have compiled a list of items that I have named “Jury Expectations.” They include:

1. ***They expect you to tell the truth.*** For the great majority of jurors that I have interviewed they will perceive you to be telling the truth until you give them some reason to think differently. Although there are some jurors that believe criminal justice witnesses lie under oath; they are a very small percentage.
2. ***They expect clear and concise information.*** They consistently believe that you are trained to be organized in your thoughts and in your documentation; therefore, your testimony should be organized as well. Whereas they may be much more forgiving of a lay witness who is testifying, such as a victim or an eyewitness, their expectations of you are much higher. After all, they think you do this quite often.
3. ***They expect you to be impartial.*** Although they know that you may have been the officer who arrested the defendant, they need to believe that you are fair to all, including the defendant. They don’t want to feel that “their police force” is biased or discriminatory.
4. ***They expect you to have concern for them collectively and as individuals.*** Many jurors have expressed to me that they felt uncomfortable being “Juror # 6.” When they entered court as a juror, they had a name and they will be leaving with the same name. Although they understand why they are assigned a number, they consistently express their desire to be testified to as a person, not a number. Jurors also feel that they can better understand a witness who talks to them like a person and who seems to be truly concerned for them and their understanding of the testimony. They are also consistent in their opinion that a witness who attempts to have eye contact with each member of the jury during their testimony

has shown a concern for the jury collectively. This impresses jurors significantly and will score points for the criminal justice witness.

- 5.. ***They expect you to be prepared.*** The criminal justice witness who comes into the courtroom with a file disorganized with multiple dog-eared loose pages in no particular order has told the jury a lot about how they worked the case. They also expect you to have it together mentally and they expect you to have gone over your testimony with the prosecutor prior to being called to the stand. **VERY IMPORTANT!** When something goes wrong during your testimony, it is the perception of the jury that it was your fault, not the fault of the prosecutor. This may not be fair; however, it is real. (This is a problem that will be discussed later in the seminar)
6. ***They expect you to be clean and neat and to look professional.*** Entire books have been written on the subject of what to wear, what type of clothes are appropriate, which colors are best, what hair styles look best, what jewelry to wear, etc. I am sure that much of this is true and has its benefits. However, based on hundreds of juror interviews, there are a few things that stand out above all the rest and probably are sufficient by themselves to adequately cover this issue. First, your clothes or uniform should be clean and pressed. If they can take the time to select and wear nice, pressed clothes to court, then they expect you to do the same.

If you normally wear a uniform in your job, jurors expect you to wear one when you testify. Wear your best uniform and leave off as much of the extra hardware as possible, such as whistles, pagers, shoulder microphones, Sam Brown belts if you have so much stuff on it that you can't comfortably get into the witness chair, and anything else that might be distracting to the jury. Tie tacks in the shape of handcuffs, smoking guns, and hangman's nooses are not appreciated by jurors. For male witnesses, a sport coat or suit is acceptable. Ensure that your dress is a little on the conservative side. (Not boring but conservative) If you have a clip-on identification designed for your coat breast pocket, it is acceptable to wear it in court. For female witnesses in street clothes, the same guidelines apply. A conservative, professional looking business suit is appreciated by the average juror. My interviews have indicated that most jurors still expect a female criminal justice witness, who is dressed in street clothes, to wear a dress or business suit when testifying.

Regarding jewelry, the most important thing for both males and females to avoid is anything that would cause the jury to be distracted or cause them to spend their time thinking about something other than your testimony. This happens quite often when a witness is wearing a pin which represents some organization they belong to and one or more of the jurors can't help but study that pin in an effort to figure out what it represents. This can be very negative in that it may be an

organization that the juror dislikes or may distrust for some reason. There is no reason to take chances as a witness. Leave this jewelry at home on your dresser. Earrings for females are certainly expected as long as they are not distracting and seem to fit well with the outfit and overall look of the witness. Earrings for male criminal justice witnesses has not gained the acceptance in the average jury panels that it may have met in society as a whole. Many of the middle to older aged jurors do not like earrings on men, period. This is especially true when the officer is in uniform. When they see them, they get a negative feeling and are forced to try to figure out what it means, based on which ear it is in. Gentlemen, leave them home!

Regarding hair, it depends on what your job is in the criminal justice community. If you are a male narcotics officer, jurors are not surprised by long head hair and facial hair. As a matter of fact they even expect it. They also expect that if you have long head hair, it must be clean and neat. If it is very long, they appreciate the male officer who ties it back before they testify. Facial hair should be clean and trimmed as well. If you are working as a male uniform officer, investigator or crime lab analyst, the average juror does not expect to see long hair.

Facial hair for men is acceptable as long as it is neat and trimmed. For female witnesses, the key to hair is clean and appropriate for their job or overall appearance. There appears to be no significant difference in juror expectations regarding female hair length as it relates to the type of criminal justice job they have.

7. ***They expect you to be accurate.*** This is a very important expectation and is critical. They feel that since this is your job and you have been trained to do it, you should not make serious errors in your work. This is particularly true for crime lab analysts who are testifying as expert witnesses. They are a little more forgiving of officers or investigators on the street who have to make split-second decisions, but not of investigators or forensic specialists who have time to study their next move before they make it.

IX. THINGS THAT JURORS DO NOT LIKE

What a subject! When I first started conducting interviews of jurors, I concentrated on the positive things that they thought a criminal justice witness should do to be accepted better by a jury. As this process continued through the first few interviews it became very apparent that these jurors wanted to tell me more. They also wanted to tell me the things that turned them off about witnesses. I found this to be very intriguing and sought to understand it better as the interviews continued. After finally learning to ask the right questions, I discovered the reason and it really was very simple. It boils down to what jurors expect of criminal justice witnesses in our society. Remember, they want you to do well and represent them well at all times

because you are their shield against the criminal plagues of our society.

When a criminal justice witness performs poorly on the witness stand and is either incompetent or found to be less than accurate in their testimony, the juror is compelled by a sense of fairness to lean more towards the defense counsel's position of reasonable doubt. This is a difficult move for the average juror to make and it causes them to be particularly observant of the errors made by the witness that caused them to lean toward the defense. Those serious errors become the justification for their decision. They remember them well and are quite willing to talk about them. The following list of topics are not exhaustive but can provide insight into the thought processes of the average juror. (Not listed in any particular order.)

1. ***Refusing to look at them.*** It may be just nerves or a defense counsel's trick, but they are bothered when you do not look at them and acknowledge their position as the people who will be voting on the guilt or innocence of the defendant.
2. ***Talking down to them, as if they are not smart enough to understand.*** There is a fine line to be drawn here, particularly when it comes to technical expert witness testimony provided by crime laboratory analysts. Jurors appreciate the witness that takes technical testimony, and after using the technical terms, uses simple analogies to help explain the concepts. On the other hand they are offended if the forensic witness uses only simple terms to explain the concept. They expect a scientist to use some scientific terms. They truly appreciate it when expert witnesses pause during their testimony to spell the technical terms for the court reporter. This gives the juror a sense that the witness is in control of his/her testimony and they respect that. Investigators who talk down to the jury about how they did their job are walking on thin ice. With all the police shows on television these days, the average juror believes that they know a great deal about how an investigation should have been conducted. Whether they actually do or not does not matter. It is their perception that is important.
3. ***Disrespect for the judge.*** This is very important. If they see that the witness has a true and sincere respect for the judge and addresses them in a courteous manner, it scores points for the witness. On the other hand, if the witness refers to the bench as "judge" or shows less than the expected level of respect for the court, they have lost that same respect from the jury. Juror interviews have also revealed another significant fact that can be very important for the witness. Most jurors have a great deal of respect for the judge. If the judge seems to approve of you as a witness, many times this approval is demonstrated in the mannerisms and comments of the judge. The average juror notices this and awards you a higher level respect as well. If the witness has to continually be instructed by the judge to do something different in their testimony, the witness is losing credibility rapidly. Keep the judge happy at all times!
4. ***Improper speech.*** Several topics are related to speech of the witness. Speaking too fast is offensive to the jury. Mumbling drives them nuts. Witnesses who seem to avoid the use of the microphone for some reason are distracting to the jury. Monotonous

testimony, particularly to a jury right after lunch, is a slow death for witnesses and their credibility. Extra noises, particularly into the microphone, such as clearing your throat or blowing your nose, are not appreciated by the jury. Being asked to speak up by the judge or an attorney does not help you in the eyes of a jury. Remember, they think that you do this all the time. Of course, the use of foul or vulgar language, unless directed to read or repeat a passage that is in evidence, is not recommended.

5. **Poor posture.** Being too casual on the witness stand loses points with the jury. Crossing of leg over the knee is not acceptable. Slouching in the chair does not appear professional. Remember, their perception of you equates to their perception of the work that you did on the case. You have only one chance to make a good first impression.
6. **Wasting their time.** This is a major concern of jurors in general. They are very much offended by the witness, and certainly the attorney, that wastes their time. If the attorney asks a direct question, they expect the witness to give a direct answer whenever possible. The witness who makes the attorney drag out the information from them like it was some game of cat and mouse is steadily losing points with the jury. Being evasive does the witness great harm and should be avoided. I have seen many witnesses ask the defense counsel to repeat a question just for the fun of it because they don't think the attorney can do it again. This may sound like fun, but if the jury understood the question the first time, why didn't you? You are now wasting their time. This is particularly true late in the afternoon when the jury may be contemplating that the trial can be finished that day and they can go home. Don't play this game!
7. **Being cocky.** Confidence is a wonderful thing and humility is too! The jury is offended by witnesses who seem so sure of themselves that they think it ridiculous for an attorney to question their methods or conclusions. You may be right in your opinions but they may not give them credence because of your attitude. Nobody likes a smart___!
8. **Bias toward prosecution.** Even though you probably were called to testify by the prosecutor, the jury expects you to treat both attorneys with respect and fairness. They understand that it may be difficult to do depending on the attitude of the defense attorney. However, when you show contempt for the defense counsel, it does not help you in any way. Just the opposite happens when you treat the defense professionally and kindly while under intense cross examination. The jury gives you extra credit for poise under fire. This subject will be discussed extensively later in the seminar when defense strategies are examined.
9. **Not being fully prepared.** The witness who continually does not know the answer to questions without referring to their notes for simple answers is not well thought of by the jury. This is particularly true when the witness can't find the answer even after looking through their notes. The jury does not consider this as acceptable and are disturbed by it. If you did not consider the case important enough to prepare for, then maybe you didn't do such a good job after all. If a juror does not know more after you finished than when you began, then why were you there?

10. ***Being defensive for no reason.*** Jurors understand that it may not be comfortable for you to be asked difficult questions by the defense counsel, but they don't understand why you would change your demeanor just because it was a different person asking the question. If the defense counsel has not been belligerent or aggressive toward you, you have no reason to be rude to them either.
11. ***Using visual displays that cannot be seen clearly or understood.*** This is a big thing to jurors. So often criminal justice witnesses will be asked to prepare visual aids to assist the jury in understanding a particular fact or conclusion, but they don't consider well enough the placement of the jurors when preparing their displays. This is particularly true when enlarged photographs are used. The size of the object in the photograph needs to be large enough for the juror at the back corner of the jury box to see clearly. A major problem in photographs is glare. Jurors would expect you to consider them when you prepare photographs for them to see and also avoid glare during your display of the photograph. It is easy for a criminal justice witness to prepare displays that may be too intricate and detailed for the jury to fully comprehend. Remember, the subject is familiar to you because of your thorough knowledge of it, but it is totally new to the jury. A well prepared display is very much appreciated by the jury and can provide a tremendous boost to the testimony of a witness, but only if it is carefully prepared. A poorly prepared courtroom display can alienate the jury quickly and is worse than no display at all.

X. PRE-TRIAL PREPARATIONS

It would take a full two week seminar to cover all of the material related to this subject. Although that is not possible, we will look at several general concepts that need to be understood by the criminal justice witness. The majority of pre-trial preparations fall into three general categories. They are the Investigation/Examination Stage, Self-Preparation Stage and the Case-Preparation/Review Stage.

The **Investigation/Examination Stage** is certainly the most critical phase. Of course, if the original investigation or technical examination is not conducted properly, a violator will not be identified and the case will never make it to court. So many problems can develop during this phase that it is amazing sometimes that a case can be solved at all; but because of the dedication of law enforcement professionals, many do make it to the jury trial stage. When the case is investigated properly, evidence collected and examined correctly, and the entire process documented completely, the case has at least a chance of resulting in a proper conclusion. It is critical for the officer, investigator or analyst to have split vision during each phase of the case.

Split vision means having one eye totally focused on the case as you are involved in it and the other eye focused on the witness stand and how you are going to present the evidence and defend your actions, if needed. It may not be fair that an attorney may have several months to pick apart a decision that you had only a few seconds to make, but that is the nature of the system and you might as well accept it. What the criminal justice witness has to do is to be

methodical in their actions and take advantage of the first opportunity to stop and fully document each step that they took and why. The witness that relies on their memory is doomed to failure and considerable embarrassment during their career. Split vision and superior documentation can be your salvation under fire.

The **Self-Preparation Stage** is not often spoken of in other presentations on the subject of courtroom testimony techniques. I feel it is critical to the success of any witness. There are many things that a criminal justice witness can do to prepare themselves for their subsequent testimony that are not specifically related to the case itself. So often witnesses forget that it takes a considerable amount of self-preparation to become the quality of witness that the jury expects and appreciates.

To become a successful witness you should make a conscientious effort to improve your public speaking skills and presentation skills. There are a number of ways to accomplish this. For the average person, as was discussed earlier, public speaking in itself is one of the greatest fears known. As we learned also, it is much easier to speak on a topic about which you feel very knowledgeable. The more you know about a subject, the more information that is available to you for recall while speaking.

Every criminal justice witness has the opportunity to do public speaking on a regular basis. With all the civic groups, youth groups, senior citizen groups, religious groups and others that are constantly looking for speakers, it is really no problem to find multiple opportunities to practice your public speaking. These are wonderful venues to try new ideas in an environment that is not judgmental or adversarial. They are simply glad to see you take the time to speak to their group and sincerely appreciate your efforts. I personally recommend the civic groups that meet during the lunch hour. They only want a ten to fifteen minute speaker and they feed you for your efforts!

It is also important for you to learn about your own voice and how it projects at different levels. If you have never really listened to your own voice extensively, I recommend that you obtain a tape recorder and get started. You may not feel comfortable listening to your own voice but it is the only one you have. You might as well get used to it. It probably is not nearly as bad as you think. Practice reading from a book with a tape recorder placed near you for several minutes. Then play it back and carefully listen to the words and how you pronounce them. It is quite common for you to mispronounce certain words or syllables without even noticing it. Listening to yourself with a more critical ear can aid you in identifying those words and replacing them. Also listen for a drop of projection as you near the end of a sentence. This is a very common problem that many witnesses have but don't realize.

After you have completed this exercise, move the tape recorder across the room to a distance of about twenty-five feet, which is the normal distance of the back row of jurors, and

project to the tape recorder by reading for several minutes. Also practice asking and answering questions about some subject where you have to construct the answers at that moment and not from prepared reading material. When you play the tape back, you may notice a significant difference between the projection quality of the material you read versus the answers that you gave extemporaneously. Also listen for the level of clarity in your speech as you increase the projection. Be careful not to lose clarity as you increase projection. Make a conscious attempt to end each of your sentences with a period in your voice. This will keep your sentences from dropping off at the end. These are all quite common problems. Through practice, you will be able to reach the same level of projection and clarity for your impromptu speaking as you have when reading prepared material.

As the trial nears, it is important to prepare yourself physically as well. You should, if at all possible, attempt to get a good night's rest the night before the trial. The subpoena may require you to be at court by 9:00 A.M. but you probably won't be called until late in the afternoon. You will be tired already, but not getting enough rest the night prior to trial will only compound the problem.

The **Case-Preparation/Review Stage** is the stage that most witnesses think of when you mention pre-trial preparation. It is composed of several facets that can be individualized and examined. Once the trial court date has been set and the subpoenas have been issued, the wheels start moving steadily forward. It is the responsibility of the witness to conduct the initial review of the case documentation and to advise the prosecutor of any potential problems that need to be addressed prior to the trial. It is also a good time to review the file and compare it with the list of witnesses that were subpoenaed to make sure that all of the pertinent and necessary witnesses were on the subpoena list. Quite often, a necessary witness will be inadvertently left off of the witness list.

This is particularly true in physical evidence cases in which known standards from a suspect or victim have been collected by another officer and used in the laboratory for comparison purposes. Unless the "other" officer's name appeared in an official report submitted to the prosecutor's office the name of the "other" officer would not have been known to them and they would not have received a subpoena. A common example of this is in the situation of the officer who took the known inked prints of the suspect that were used to compare the latent prints from the crime scene. The officer who took the known inked prints must testify that they are the known prints of the defendant because the latent print expert can't do that during their testimony. You may think that this is the responsibility of the prosecutor, and technically it is, but nevertheless, it needs to be addressed or the trial can come to a halt.

There are several ways to review a case. One of the best proven methods of case review is to read the case in its entirety straight through. Then read and study it in its parts. If you can learn the case in its parts, you can defeat the defense strategy of mixing up the sequence of events during cross examination. Make sure that you learn the parts of the case and not just

memorize them. Memorization by a witness can be deadly on the witness stand during cross examination because any change in the anticipated wording of a question may throw the witness completely off of their pre-planned path of answers.

It is also important for the investigator to be familiar with what other participants in the investigation did and how it related to their part of the case. Of course, they will not be expected to testify for the others, but they may be able to spot potential problems that can be alleviated prior to or during the trial. After you have become completely familiar with your part of the case, set down with the other criminal justice witnesses and discuss the case and anticipate potential challenges to the components of the case. Practice asking questions to each other and discussing the answers and how they sound to each other. It is during this phase of the review process that the testimony for that particular case can be refined. If you can feel comfortable answering questions in front of your peers, you will feel more comfortable doing it in front of a trial jury.

Then there is the prosecutor, the solicitor, the district attorney or whatever their title is in your area. They have a very difficult job to do and, as the rest of us, they don't have enough time and resources to do it the way they would prefer. As criminal justice witnesses we need to coordinate our efforts with the prosecutor's office and staff and work with them as closely as possible. When dealing with a prosecutor, it would be wise for you to remember something about attorneys that have chosen to be prosecutors. They have the same fears and anxieties that you have. Most law enforcement investigators automatically assume that lawyers are taught public speaking and how to perform in a courtroom while in law school. My interviews with prosecutors over the years have revealed exactly the opposite. They receive little or no actual courtroom training during their time in law school. Where do they learn? In court, with you! The next time you are subpoenaed to testify on a case with a new prosecutor and they seem a little nervous, it is because they are. Give them a little slack and they will learn with you.

Once you have the case totally reviewed and ready for a pre-trial meeting with the prosecutor, you may face another common problem in the criminal justice system. The prosecutor does not seem to have the time to discuss the case with you at that time and since the trial is still three or four weeks away, they suggest that you get together a little closer to trial date. You may know that there are some things in the case that could be potential problems in the courtroom and you really need to have that meeting with the prosecutor. What can you do? You call them back the next week and are told that they are still very busy and suggest that you meet together the next week, which will still be two weeks before the trial date. You are getting a little worried now and don't know what to do. I have found one sure-fire way to get a meeting with the prosecutor on cases that really justified a meeting prior to trial. I simply say to the prosecutor, "We need to get together to discuss this case. There are a couple of problems that could come up in open court that might embarrass you if we don't take a little time to discuss them. Would tomorrow at 1:00 P.M. or 4:00 P.M. be better for your schedule?" I know that

may sound tricky and I guess it is. Of course, the prosecutor is an elected official in most jurisdictions and they cannot afford to be embarrassed in open court. You'll get your meeting. Make the most of it.

XI. THE COURTROOM ENVIRONMENT

It is very important for the witness to be familiar with the courthouse, the courtrooms and the witness rooms in any city where they will be called upon to testify. A good working knowledge of the facilities can lend itself well to witnesses, especially when they are relatively new to giving testimony. Testifying can be stressful enough without having to worry about where you are supposed to be and what door you are supposed to enter when called. We will address this environment from two specific directions: the witness room and the courtroom.

The Witness Room:

The area designated for witnesses to wait until called to testify can be designed in multiple ways depending on the age of the courthouse and the availability of space as well as the volume of cases tried in the courthouse. It can range from a very comfortable private room with chairs, tables, coat racks and restroom facilities to a bench in the hallway outside the courtroom door. Regardless of the facility, there are several witness room policies that the new witness should be aware of at all times. Depending on the judge and the court involved, strict adherence to these policies may or may not be enforced on a regular basis. It is best for witnesses to be on the safe side regarding their conduct while in the witness room.

In those jurisdictions where all of the witnesses are sworn in together at the beginning of the trial, the trial judge will often instruct the witnesses not to discuss the case while in the witness room waiting to testify. It is much more common for each witness to be sworn in at the time they are called to the stand; therefore, they are in the witness room without having been placed under oath by the court. Don't think that this relieves you of your responsibility to refrain from discussing the case while waiting to testify. I know that this happens all the time but it is not recommended and can be dangerous. If the prosecutor enters the witness room and starts asking you questions in preparation for your testimony, by all means answer them immediately, but do not carry on discussions about the case outside of their presence. If you have done your

pre-trial preparation properly, you won't need to discuss it with any other witnesses while in the witness room. Be mindful that often, some of the witnesses in the witness room with you are not in the criminal justice profession. Victims, eyewitnesses, and other types of lay witnesses may be present in the room with you and discussion of the case may influence them or make them more nervous than they already are. Be respectful of them at all times.

So what can you do in a witness room? One thing that I recommend is for you to have inquired of the prosecutor as to the order of witnesses to be called. This will allow you the proper time to get physically and emotionally ready before being called to testify without keeping you on pins and needles the whole day. I suggest that you use that time to relax and mentally review your case. It is also a good time to make sure that your case notes are in order and easily accessible if needed. Once that is accomplished try to relax by reading a book or playing cards or dominoes with the other witnesses, anything to keep the room and the witnesses in it relaxed. As you get closer to your time to testify, increase the amount of oxygen that you are taking into your system. Breathe deeply because increased oxygen is the one of the best and most natural reducers of anxiety. Your knowledge of the case, your self-preparation and your confidence are all that are needed at this point. You are ready.

The Courtroom:

“I never met a courtroom that I didn't like!” Sounds kind of silly doesn't it? That was a quote from one of my mentors over the years and I learned to appreciate what he meant after a few years of testifying myself. He taught me that I had to become familiar with the courtroom before being asked to perform in it, and once I became familiar with it, I would learn to feel comfortable in it and could indeed do a better job as a witness. Being very familiar with the actual courtroom can give you a sense of belonging and remove a great deal of the fear of the unknown. It can help to get your testimony off to a much smoother start and get you relating directly to the jury more rapidly. This is very important to your success. Most criminal justice witnesses think that there are only a few things to learn about courtrooms and they are all pretty much the same. Nothing could be further from the truth. I can honestly say that in over twenty-five years and over 500 testimonies, I have never testified in a courtroom that I had not previously walked through and checked out before I was called to testify, including sitting in the actual witness chair. This may not sound critical, but it has become very important to me as a witness and I believe that it will help you as well. Just the simple fact that you have been there before makes you feel more comfortable and gets you off to a better start. The following is a list of twenty questions that you should ask yourself as you inspect the courtroom prior to your testimony:

1. Which door do I enter?
2. What is my direction of travel once I am inside the door? (Swinging door? Which way?)

3. Where do I stand while being sworn in?
4. Who will be swearing me in?
5. Will I be swearing on a Bible? If so, where is the nearest waist high table to place my case file?
6. What is the chair like? Does it swivel? Does it rock backwards? Does it squeak?
7. What kind of microphone does the witness stand have? (Clip-on, free standing or hand held) Does the microphone squeal when it is moved?
8. What will be my line of vision to the judge?
9. Where will the court reporter be seated?
10. Where will the prosecutor and assistants be seated?
11. Where will the defendant and his/her counsel be seated?
(Note: Make sure that you can still recognize the defendant)
12. What will be your line of sight to the jurors in both rows?
13. What will be your line of sight to the alternate jurors?
14. What will be my best method of eye contact with the jury based on the construction of the jury box itself? (flat or tiered)
15. What are my options for placement of my case file while on the witness stand? (Desk, lap or floor)
16. What are my options for placement of physical evidence while on the witness stand?
17. Where is the gallery located and will they be a distraction to the jury or to me?
18. If you are going to use visual displays, what are the audio visual components and how do they operate?
19. Will easels be available if I need them and where are they located?
20. Will laser pointers be allowed in the courtroom if needed for a visual display?

If you ask and answer these twenty questions, and add others as you deem necessary, you

will develop a sense of understanding of the courtroom and it will not feel like such a strange and forbidden place once you are called to the stand. The witness stand can become, and should become, a place where you can feel confident in yourself and your abilities.

XII. ANXIETY CONTROL TECHNIQUES

Well it is almost time to testify. Are you ready? How do you feel? Nervous? That's alright, you're supposed to feel nervous. This is an important step in the case and in your career. When you are sitting in the witness room there are a few things that you can think about that will help you to control your anxiety level. If you concentrate on the things that make you feel confident, you can get off to a great start. For instance, you know your information better than anyone else and certainly better than anyone in the courtroom. You know the courtroom and where you are supposed to go and what you are supposed to say. You know how to breathe to decrease anxiety and reduce the nervous feeling. You know how good it feels to accept a challenge and be successful and this will be one more of those times in your life. Most importantly, the jury has a real need for your information. If you will concentrate on

communicating your message and information to them and think less about yourself, you can be the type of witness that they need and that they expect. Oh yes, one other thing. Before you go in the courtroom make sure your pants or dress are zipped up all the way. Chuckle a little and smile; you know you are ready.

XIII. PRESENTATION TOPICS AND METHODS

Getting to the Stand:

Once your name is called and you enter the courtroom, the next phase of the testimony begins. It is what you do from this point on that the jury will see and hear. Their impressions of you begin as you enter the room and continue until you exit at the end of your testimony. Remember, the average juror wants you to do well and believe that you are going to tell the truth so you are already ahead in points. What you do now will determine if you increase your lead, lose your lead or foul out of the game. It is also very important that you remember that you are one of several witnesses in the case and you play only a part in their final decision. Don't put more pressure on yourself than is needed. The real pressure is on the jury and as you enter the courtroom you need to be feeling a concern and a burden for them.

Since you have taken the time to inspect the courtroom, you know exactly where to go

and where to stand while being sworn in. This is impressive in itself because you may have been the only witness that day that knew those things. The jury starts to take notice right away. As you raise your right hand to be sworn, you look very professional and something about your posture as you swear in looks particularly good to them. It is the fact that your right arm is extended straight out with a ninety degree angle formed by your elbow and your palm fully open. This looks good to the average juror. Think about it. What does a right arm held close to the body with a palm placed close to your chest tell the jury? It sure doesn't scream honesty? It looks like you are taking the oath because they made you, not because you wanted to. What about the witness that stretches their arm straight up in the air as if they are exceptionally eager to testify? How does that make the jurors feel? Probably not too good. This witness may be too eager to tell the jury what the prosecutor wants them to. These two hand postures might not mean anything at all to the witness but once again it is the juror's perception that counts. If you are asked to place your left hand on a Bible while swearing in, you are faced with a dilemma. Where do you put your case file during that time? You certainly do not wish to hold it under your arm while taking the oath. Only bad things can happen if you choose to do that. This is where the pre-testimony inspection becomes handy again. You simply walk over to the waist high table nearest the witness stand and place your file there, step back into position and take the oath. You then retrieve your file and take your seat on the witness stand. Don't forget to breathe during this entire process!

As you enter the witness box it is quite common for the prosecutor to start talking before you get fully comfortable in the chair. They probably did not do it on purpose but were simply looking down at their notes when they began speaking. If this happens, wait until you are completely ready to speak and then answer. This tells everyone watching that you are now in control of that witness stand and everything that will come from it will be at your direction. This will increase your level of professionalism in the eyes of the jury and often you will see them perk up and increase their individual attention level. I have seen prosecutors use this technique on purpose just to gain the attention of the jury, but I don't recommend it.

Listening as an Offensive Weapon:

Most criminal justice witnesses feel that their most offensive weapon they have at their disposal in the courtroom is their knowledge of the case, their confidence, their investigative abilities or in some cases, their clean cut good looks. In reality it seems that the most dependable, consistent and reliable offensive weapon is their ears, if they know how to use them. For those of you that are blessed with good hearing, you certainly feel like you can hear anything that the defense counsel says in a courtroom and should be able to understand and correctly answer any simple question posed to you. If you can hear it, you should be able to answer it. This can be true if you have trained yourself to be an aggressive listener. For example, read this next question out loud to yourself. Give yourself only two seconds to answer the question. Don't cheat! The question is: "How many animals of **each** species did Moses take aboard the ark?" If you answered "2" you had a very good answer but it was not right. Moses did not have a boat,

that was Noah. Gotcha! You see how easy it is to lose touch with aggressive listening when we are put under the constraints of time and pressure to perform. Defense attorneys know that and they can use that knowledge against witnesses to disrupt their thoughts and answers during rigorous cross examination.

So how do you learn to listen aggressively? First you have to stop anticipating words and phrases based on past experiences with the English language. The first part of a question may not necessarily compliment or even be connected to the second part of a question. If you assume that the question will be completed in a commonly expressed manner, you will answer what you thought you heard but not what was actually said. The time to formulate questions as full sentences is after the last word of the question has been asked. That is why you are wise to wait a full second or two before answering a question, even if you immediately know the answer. This natural pause will become part of your method of answering and it will not seem unusual when you pause to answer a question that requires more study and concentration. A good practice mechanism for becoming an aggressive listener is to listen to taped presentations by non-professional speakers and think of other words or phrases that they could have used to make their point more clearly. By doing this, you will become more cognizant of the individual words and phrases that people use in their speech patterns and less influenced by your expectations of what you think they should say. The defense counsel that spots a criminal justice witness with poor listening skills can develop a line of questioning that will wreak havoc on the facts of the case.

So what should a witness do if they truly did not fully hear the question? They should ask that it be repeated. This is certainly acceptable and is much preferred to guessing based on what you thought the question was. Of course, if you are continually using the repeat question as a stall tactic, you will alienate the jury and lose points with them. This will be discussed again during the cross examination tactics segment of the seminar.

Effective Use of Hands, Eyes and Posture While on the Witness Stand:

For some individuals, talking without using their hands is seemingly impossible. It is almost as if for every major word there is an appropriate gesture. I have read from numerous sources that a witness should not use their hands during their testimony but based on what jurors have told me, that may not be the best advice. It is possible to improperly use your hands, but it is also possible to use your hands to aid you in explaining certain segments of your testimony. For instance, if you need to explain to the jury how wide something was and it is approximately two feet, it is certainly acceptable and advisable to show the approximate distance as you testify to the actual width. It would not be proper to testify by saying “about this wide” without saying the actual width for the record. Remember, as a witness you are responsible for testifying for both the jury and the court record. It is also good to remember that some jurors are both distance and directionally challenged. They don’t easily deal with measurements and have difficulty

using or giving directions using north, south, east and west. This is a very common problem and will usually be found in at least one or more members of the average jury panel.

Although it is not uncommon to see witnesses use their finger as a pointer when using charts or other visual displays, it is not recommended. When the witness uses their finger to direct the attention of the jury to a particular item on a display, they fail to realize that their forearm is usually blocking part of the display from the view of the jury. Therefore, it is highly recommended that the witness use a pointer designed for that purpose instead of their finger.

The placement of the hands during regular questioning and answering can tell the jury a great deal about the composure and confidence of the witness. If your hands are tightly gripped on the arms of the witness chair, your posture signals the jury that you are not comfortable with what is happening. The jury may not understand that you are simply trying to cope with your nervousness. Jurors may interpret that you are in an evasive or defensive mode and they will question why. Positive signals cannot be generated from hands in this position. The same signal is evident from arms that are crossed across the chest of the witness. This gives the same defensive message to the jury that it may give to the investigator who is conducting an interview or interrogation. Of course, it is important to not have your hands near your face when speaking.

So what is the witness to do with their hands while testifying? It is recommended that the hands be relaxed on your lap with the fingers touching each other but not tightly interlocked. This appears to be a very comfortable position and allows for the free movement of the hands if needed. With the body turned to the jury and leaning slightly forward and the hands in the lap, the witness gives the jury the impression that he/she is having a conversation and communication can be free flowing. I refer to this posture as the “fire-side chat position” and it is very effective.

The eyes can tell more about the witness than even their words. For most people a great deal of weight is placed on how a person uses their eyes when speaking and it is no different for juries. If you really believe what you are saying as a witness and you wish for them to believe it as well, look directly at them when you are speaking. They want you to. This makes your testimony more personal to them and enhances your stature in their minds. The eyes can become one of the most powerful tools of the witness if they are used properly and often. When a look is

joined with a smile, the witness can build a connection with members of the jury as they testify. Many jurors have explained to me over the years that it was the connection they felt with the witness that made the witness believable and not what they had actually said. That may not seem fair or reasonable, but it does and will continue to happen. When you are looking at the jury, remember to look at them individually and collectively.

Many public speaking instructors teach their students to look in the direction of the audience but not to focus on any one person or persons. This supposedly helps relieve anxiety and pressure on the speaker. That is not recommended when giving testimony to a jury. You should look at the eyes of each juror as you are speaking to them. In face to face

communications we expect speakers to look at us while they are talking. If the speakers do not look at us, we will soon lose our need to look at them and our desire to pay attention to them. It is very important to remember that as a witness you have a certain amount of control over the jury's attention simply by looking at them.

If your testimony lasts at least twenty minutes or longer, you should have enough time to have some direct eye contact with every juror on the panel. Of course, some testimonies are shorter than that. There is a very good tactic that can help you in this situation. When attempting eye contact start with the back row of jurors first. The benefit of this approach is that as you are looking past the front row of jurors to establish eye contact with the back row, the front row of jurors will think that you are looking at them. It is recommended that the witness always start with the back row of jurors and then work to the front as time allows. When a testimony lasts for more than an hour, it will be possible to reach every juror on more than one occasion.

It is important for the witness to look at the attorney as the question is being asked. The attorney may be using some body language to emphasize some part of the question that is of particular importance. You need to be in tune with what is being asked. If the question calls for a short yes or no type answer, then it is not necessary for the witness to turn to the jury when answering, as long as the jury is able to hear your answer. If the answer calls for an extended answer or explanation, the witness needs to turn to the jury before beginning their answer. Remember, the jury feels more comfortable if they can physically see your lips move as you speak. This is a common preference in your own life as well. Think about several of the sermons you have heard at church in the last few months. If you were really in tune with what the minister was saying, you will slide over, if needed, to see the face of the pastor as he is speaking. If you had a rough night the night before, and you are having a hard time staying awake in church, you may slide over the other way so you will be behind the big guy in the pew in front of you. Admit it, you know you do it.

How does the witness know if they are getting through to a jury? It may not be possible in all instances, depending on the jury, but for most juries you can learn to read the feedback through their eyes and their mannerisms. Are they looking directly at you? Are they nodding their head slowly as if to say yes, I understand that? Are they making notes? Communication is a two way street and even in a courtroom it is indeed possible. If you just can't seem to read the jury, don't worry. The judge has instructed the jury to not show emotion while listening to testimony and some jurors are better at complying with those instructions than others.

Have you ever videotaped yourself giving a presentation or practice testimony? If you want to have some fun and learn a great deal during the process; get someone to videotape you in one of these situations and then set down and study it carefully. I certainly would suggest that you have someone else watch it with you and provide you with constructive criticism. It is not the time to be shy. Don't ask people to help you that won't be totally honest with you. You will be wasting their time and yours. This is a time for growth, not a time for a pat on the back and an "attaboy." There will be time for that later when you get good at it.

What will normally surprise you, other than your voice and speech patterns, will be all of the mannerisms and habits that you have while speaking under stress. The things you do with your nose or your glasses, the unusual places you put your hands and what you do with them, the way your body moves and feet shuffle, and the multiple other physical idiosyncrasies that you have developed over the years will surprise you and make you chuckle at yourself. Don't feel badly about it. We all have these and by studying them we can remove or modify those that are distracting to our audience and build upon those that seem to help us in communicating.

How to Use Reports and Notes on the Witness Stand:

There are so many chapters and recommendations on this subject that it is no wonder that many witnesses are confused about what they should or should not carry on the witness stand and how they should use it. Instructors have not helped this situation any by all of their opinions being so different either. Well, here are a few more opinions added to the bonfire of confusion. At the outset, let me say that I will defend my opinions because they are those of the vast majority of jurors I have interviewed. I'll stick with what they suggest since they are the ones who vote!

First, is it "ok" to take your case file to the witness stand with you? Juries say yes. As a matter of fact, they expect it more times than not. They realize that the case has lots of details involved. They don't expect the criminal justice witness to memorize every fact in the case. They do expect the witness to have it organized in a professional manner and be in a professional looking folder or binder when you bring it into the courtroom. This in itself is an interesting topic for discussion. There are many articles and even some books that suggest that the witness should not, under any circumstances, carry their official file on the witness stand. It is even further suggested in some of these same literary works that it is much better for the witness to write down some of the key points and details of the case on notes cards and keep these in their coat pocket for use during testimony. I don't know who these authors are talking to but it sure isn't jurors. When this question was posed to past jurors as to what their feelings would have been if the investigator had pulled out note cards to aid them in their testimony, you should have heard the responses. Comments, such as "Note cards are for book reports in school." and "Why wouldn't they have a copy of their report if they needed information?" Give you an indication as to what jurors think about note cards? Forget using them.

If you choose to take your case notes or file on the witness stand with you, make sure that you do not have it in loose leaf paper rolled up like a newspaper or stuffed in your inside coat or jacket pocket. It is common to roll paper documents when you are nervous and it sure can happen if you are not careful. If you have it in a folder or binder, this can not happen. At the other end of the spectrum is the witness who feels compelled to carry a briefcase on the witness stand. This is totally unnecessary in most cases and can cause serious problems for the witness. Technically speaking, if the witness finds it imperative that they refer to information contained within the briefcase and they ask for permission to access that information, the defense counsel could, if they desired, ask to see the file and the contents of the briefcase as well. It may contain

information of a personal or embarrassing nature. This could serve as a means to discredit the witness. Although I have personally seen this happen only one time, what happened to that witness was enough to teach me to never do it myself.

The other big controversy regarding the taking of your official file on the witness stand involves the access of the defense counsel to the contents of your file if you have to use it to refresh your memory or find out a specific bit of information that you can't recall. Some attorneys say that you should never carry your file on the witness stand, because once the defense counsel gets access to your entire file they can use it to cross examine you. So what! If they are any good at all at what they do, they already have a copy of your file that they received from the prosecutor's office in response to a discovery motion. What have you to hide? If you properly complied with the request for discovery, there should not be anything in your file that they don't already have or at least know about. If you find it necessary to refer to your notes or case file when responding to a question, you should ask for permission from the court to refer to your file for that information. This shows respect for the court and scores points with the jury. Once the permission is granted, you should go directly to that portion of the file and obtain the information. You can take advantage of these few moments to plan your answer in relation to the direction the examination is going. This is also a wonderful opportunity to regulate your breathing if you are feeling an increased anxiety level. If you find it necessary to refer to your notes a second or third time, it is not normally necessary to ask for permission each time.

It is imperative that a witness give accurate testimony. The use of official case notes or reports can aid in accomplishing that objective. If you have prepared properly, it should not be necessary to continually refer to your notes for the answer. If the questions are of such a nature as to be considered basic information, the jury would expect you to be familiar with the information without referring to your notes. There is one rule of thumb that can be applied in each and every situation. If you are not sure of the answer, do not guess! Look in your notes for the answer if you believe it is there or simply say "I don't know."

Maintaining Limits of Knowledge or Expertise:

One of the most common pitfalls for criminal justice witnesses is knowing when to stop talking. They wish to be helpful witnesses and provide the necessary information and in their eagerness to help, they often say too much. It must be remembered that the process of direct and cross examination is designed to be a question and answer session, not a lecture session. This can be particularly difficult for the expert witness who is called upon to testify regarding technical examinations in a science that is new to the jury members. In some cases the witness must be allowed to explain the fundamentals of their science so that the jury can understand and appreciate the conclusions reached by the forensic scientist. Since most criminal justice witnesses are not providing expert witness testimony, but providing chronological testimony, they should be wary of providing too much information in response to specific questions. Allow the attorney to ask the next question to maintain the proper flow of information to the jury. Jurors say that is much easier to comprehend a sequence of events if it is explained through

multiple questions and answers. This is because it gives them more time to absorb and understand the information.

It is also important for the witness to recognize the limits of their knowledge and expertise. When a witness exceeds their credentials or specific case knowledge, they are not only flirting with danger, they are inviting destruction of their credibility as a witness. The witness, particularly the expert witness, who knows it all, and wants the jury to know he does, can alienate a jury with this “How Great I Am” attitude. It has happened, and will happen again, that the prosecutor may ask the expert witness to go beyond their own expertise in their testimony. It may happen that the prosecutor or defense counsel may ask you to answer a hypothetical question that is not possible for you to answer due to the constraints of the science. In these instances, the expert witness is obligated to stand fast and not go beyond accepted scientific conclusions based on the information provided to them.

For field investigators, the problem is a little more complex. Why should the prosecutor have each and every officer testify about what they did in the case when the lead investigator knows what they did and how they did it? It sounds like it would be easy for the lead investigator to include all of these items in their testimony. If it were not for cross examination that might be acceptable in some cases. If the defense counsel gets past the surface of the testimony, it will be very easy for them to call into question the procedures that were used and the persons involved, since they are not in court to defend their own actions. Remember, the defense does not have to prove innocence, just cast a shadow of doubt on guilt. Don’t get caught up in the trap of testifying about something your partner did that you did not personally observe. If the prosecutor indicates that he will be using you to cover a number of topics that were done under your supervision but not personally observed by you, remind him/her that you can not do it and have them issue subpoenas to the other officers or analysts.

Word/Phrase Selection and Delivery:

As was discussed earlier, learning about your own voice is very important. Once you have gotten accustomed to how you sound and how to match your volume with the correct projection level, it is important to carefully select your words that you know will be used in your testimony. This is of special importance when your testimony will require using long “50 cent” words. Crime laboratory analysts are not the only ones called upon to use technical jargon. Narcotics investigators need to practice the proper pronunciation of the scientific name of the drug they seized from the violator. Some of these names can be very difficult to pronounce and even more difficult to spell. Make sure you can spell it because you will have to do this for the court reporter. It would be very embarrassing for you to arrest the defendant for sale or

possession of a drug that you can't even spell correctly.

Delivery is an important aspect of good testimony. Once you have gotten familiar with the best words to use and which ones to avoid, it is possible to concentrate more on how to deliver them so that they are convincing. It is quite common for witnesses to increase volume for emphasis, but that is not required. It is possible to emphasize your point by dropping your voice just a little while slowing down the delivery. This method is often combined with a limited hand movement to increase the emphasis. If you plan to reduce the volume of your voice for emphasis make sure that the sentence was started at a high enough level that the reduced volume will still be loud enough for all of the jurors to hear. While this combination can be very effective for the witness, the opposite combination does not seem to work well at all. Louder and slower is not pleasing to the ear and should normally be avoided. It makes the speaker sound dumb and makes the jurors feel ill at ease with the witness.

The witness does not have to sound like a professional actor while on the stand but it is important for the testimony to be enjoyable to listen to. The witness who has a dull monotone voice may have very valuable and critical information for the jury to hear but may lose them completely before they grasp the importance of the information. If you are called upon to testify after the lunch break, it will be greatly appreciated by the jury if your testimony is upbeat and interesting to hear. You don't have to sound like a play-by-play announcer doing a college ball game, but it will help if you seem to be enjoying the time you are sharing with them.

Handling of Physical Evidence and Use of Visual Displays:

Most new criminal justice witnesses don't really consider how physical evidence gets into the courtroom but the how, when and by whom can be very important. The planning of evidence Introduction needs to be coordinated between the officer who collected it and the prosecutor. This should be done during the pre-trial meeting. Waiting until the day of trial can be dangerous especially when the chain of custody is going to be challenged by the defense counsel. Depending on the amount and type of evidence that is to be admitted, this process can be quite lengthy and require a significant amount of testimony. There are several procedural concerns that apply to physical evidence with which the witness needs to be familiar.

Physical evidence has two basic status levels. It can be marked for "Identification Only" or as "Evidence." The basic differences between these two categories are the limitations associated with the use of them. If an item of evidence has been marked for "Identification Only" it can be displayed to the jury during testimony but can not be physically examined by the jury during deliberation, since it has not reached full "Evidence" status. Normally the officer or investigator which collects the item of physical evidence would testify first regarding where it was found, how it was collected and what was done with it after it was collected. During this testimony the item will be marked for "Identification Only". It will receive a court designated

“ID Only” exhibit number on a colored adhesive label. This is normally placed on the item or its container by the court reporter. It will retain that designation until such time as additional testimony is received from any other individuals that had custody of the item from the time it was received from the officer who collected it to the time it was brought to court.

Once all of these steps in the “Chain of Custody” have been proven, the item can be admitted as “Evidence” and receive a “State’s Exhibit Number.” Another different colored adhesive label bearing the state’s exhibit number will be placed on the item of evidence or its container by the court reporter. From that point on, it should be referred to by the state’s exhibit number and not any other number which might be on the evidence. This can be confusing to the criminal justice witness if they don’t understand this process. When the field investigator collected the evidence, it was assigned an exhibit number and agency case number. Once it was submitted to the crime laboratory, it received a different case number and exhibit number. By the time all of the testimony has been received in open court, the evidence can actually have a total of four or more case numbers somewhere on the evidence or container.

The important thing to remember is for the witness to refer to the court’s exhibit number and not their own agency or crime laboratory case and exhibit number when testifying. All of the court records will define the exhibit by the court assigned numbers only. The use of other numbers while testifying can irritate the judge greatly. The proper use of the court’s exhibit numbers is impressive to the members of the jury. Normally when court reporters place the evidence labels on the evidence, they will not cover your numbers so they will still be there for you to locate when you are asked to identify the evidence on the witness stand.

Many times the evidence container and the evidence itself will not look exactly as it did when you originally collected it. That is expected since the crime laboratory had to change the appearance of the container and sometimes the evidence itself during the examination process. Additional markings or notations on the evidence should be expected and are no reason for alarm when confronted with them on the witness stand. When asked if the evidence is in the same general condition as it was when you collected it, you can respond, “It appears to be, with the exception of additional markings that have been placed on it” or some answer to that effect. If you noted other differences, it is appropriate for you to explain them. Items such as tire or shoe casts, submitted to the laboratory with the excess dirt still intact on the cast, obviously now appear in court with the dirt removed. Blood tubes will be empty, drug packages will not have as many pills in them as when submitted. One particular thing to be aware of when testifying to trace evidence that you collected is the fact that when you are handed the small box that you used to collect the hair or fiber or paint sample, if you open it up there won’t normally be anything left in it. Don’t be alarmed. The evidence had to be removed and placed on other mediums during the examination process and these are not normally returned to the original container. This does vary from crime lab to crime lab.

When handed an item of evidence in a container and asked if you can identify it, make

sure you fully understand the scope of the question. Do they mean the container, the contents of the container or both? It is acceptable to ask the attorney for clarification prior to answering the question. This also shows the defense attorney that you are aggressively listening to the question that is being asked. If they say “just the container” then take the time to look at the container on all sides, find your identifying data and initials on it, and then respond in the affirmative. Do not go on to explain what the container is and what it contains. That was not the question. Learn to be responsive and let them ask the next question. It makes it easier for the jury. Once your identification of the container has been established, they will ask you if you can identify the contents. If the container has not already been opened, don’t pull out a “Bowie” knife from your pocket and attempt to open it. Ask for a knife or scissors as deemed necessary. Normally the court reporter will have what you need right there on their table. They will hand it to you or the prosecutor will bring it to you. Take your time and open the container carefully insuring that nothing falls out during the process. Then take the time to examine the item(s) contained in the container individually and carefully. Even though you may have been the one who brought these items to court today, the jury may not know. They will be impressed with your methodical examination of the evidence prior to answering the question. They appreciate criminal justice witnesses that look before they leap. Don’t take all day but be thorough. As you look at the items once again, find your data and initials on the evidence and notice any additional markings which may have been placed on the items since you last saw them. Then you are prepared to answer the question.

If the envelope or box contains an item of clothing or something similar that has dried blood or other body fluid stains on it, be very careful when handling it. Ask for gloves prior to removing it from the container. If you know that you are going to be asked on the witness stand to do this, it is wise for you to carry a couple of pairs of gloves with you in your coat pocket. Don’t trust the prosecutor to have them for you. They have enough on their mind as it is. Even though you know that there is no real danger of catching anything from a dried body fluid stain, the jury expects you to wear gloves, so do it. If the item has dried blood that is flaking off of the item when you move it, be prepared to have some white pieces of paper available to put under the item when it is removed from the container. Everyone will appreciate it, especially the court reporter.

Guns of all types are often admitted into evidence and the manner of handling is a very special part of proper testimony that justifies special discussion. Of course, all weapons should be handled as if they are loaded even if the attorney tells you it is unloaded. When an attorney approaches you on the witness stand and hands you a weapon the first thing that you should do is to safely clear the weapon. Even if attorneys are asking you a question as they are handing you the weapon, do not answer under any circumstance until you have cleared the weapon. The jury will not listen to a thing you have to say until you have checked the weapon for safety. It is human nature to feel that way and they will appreciate you a great deal for being concerned with the safety of all present, including them, before you answer any questions. Some prosecutors have used this tactic on purpose to improve the status of the witness in the eyes of the jury. Of course, if the witness does not do what they are supposed to do, then both the prosecutor and the witness loses points. If the firearm is a handgun, either open and rotate the cylinder or pull

the slide back and remove and inspect the clip. Of course, the barrel of the gun needs to be pointed down and away from the jury and everyone else in the courtroom. If the firearm is a long gun, such as a shotgun or rifle, the same procedures should be followed. Since the length of the barrel may prohibit you from pointing the barrel downward as you clear the weapon, it is certainly acceptable to have the barrel pointed upward at the ceiling while checking it for safety.

You will undoubtedly be asked if you can identify the weapon and if so, how? You should inspect the serial number on the firearm and compare that with either your memory or your notes prior to responding. Of course you should have your initials either on the gun or on an evidence tag attached to the gun. There is something about weapons and criminal justice witnesses. Many criminal justice witnesses just can't seem to put the gun down once it is handed to them. It is almost like they feel safer with it in their hands and before long; they do everything but fondle it.

If you have answered all the questions about the gun, put it down or ask the attorney to come and take it from you. If the defense sees you playing with evidence while you are on the stand during direct examination, you might as well get ready. You're going to see it again in cross examination. The old courtroom rule of thumb is "If you can feel it, you will look at it." This means that you need to get the evidence out of your hands as soon as possible so you won't be fumbling with it, constantly looking down at it and distracting the jury. So where do you put it? If the witness chair has a desk top built into it that is several inches below the top of the witness stand outer rail, then it is permissible to put the item of evidence on the desk top in front of you. If the attorney brings you another piece of evidence to discuss, you can hand the first piece of evidence back to them at the same time. This way the witness stand doesn't get cluttered up and become a distraction in itself. Under no circumstances are you to place an item of evidence on the rail of the witness stand. You will learn much more about this during the cross examination phase of the seminar.

When it becomes necessary to prepare a visual display and show it to the jury, there is one very important rule that the witness must follow. Prior to leaving the witness stand and approaching the jury, the witness must ask for permission from the judge. Some judges are very peculiar about this formality and will immediately call the witness down for a violation of this process. It can be very embarrassing for the witness. If permission is asked properly and in a timely manner, once again the witness has scored points with the jury.

The old saying goes "A picture is worth a thousand words" can certainly apply in the courtroom if the witness prepares the visual display properly and with the needs of each jury member in mind. Many prosecutors encourage and sometimes even demand that criminal justice witnesses prepare and present visual displays during their testimony. Of course this can be very expensive as well as time consuming; therefore, visual displays are not used as often as they could be. Coupled with the fact that so many defendants plead guilty right before the trial starts, many criminal justice witnesses don't feel like it is worth the time and effort to prepare visual aids on every case. Nevertheless, when they must be prepared, there are several things that need

to be considered during the planning and preparation stages.

First, make it large enough to see. Juror interviews continually reveal that jurors are bothered by visual displays that they can't physically see because of size. They figure that this would be the easiest problem to solve, and they are probably right. If you are using enlarged photographs, consider the glare in the courtroom when selecting the type of finish for the final print. Its size may be large enough to see, but still can't be seen due to the glare of the lighting in that particular courtroom. It is acceptable to use colors on charts and drawings but don't overdue it with too many colors. Red and black seem to be the favorite of most jurors, seconded by dark blue and green. Pastel colors may be pretty, but are more difficult to distinguish at a distance and certainly present major problems for color blind jurors, which are much more common than you might think.

If you use dark colors for your charts or graphs, select colors that would appear as different shades of gray when viewed together by a color blind person. When you explain the display or chart, remember to refer to not only the color, but the position of the information and its content so that you don't lose anyone. No one else will know it but them. This is because persons affected with this problem will not usually tell anyone about their color sight problem. They will recognize what you have done and appreciate you for it. The great thing about this is that you can meet their special needs without sacrificing anything from the remainder of the jurors. Also be aware that there are many individuals with some degree of form blindness. Don't construct your displays too intricately with too many intersecting lines. Just make sure that your testimony is such that they can understand your points even without the visual display because for some of our neighbors, a picture is not worth a thousand words.

When you plan to use 35mm slides or a computer projector system, double check to make sure that you have all the necessary equipment and that it is in working order. Do not trust this to anyone else if you are the one who is going to be using it. Have extra bulbs available and make sure that you have an extension cord if it is necessary. If possible, use a rear projection screen so you will not be required to put the projector in the middle of the jury box (causing a sound and heat problem) or directly in front of the jury box (makes the screen too far away for the jury to see.) If you plan to use slides in your testimony, make sure that you have given the attorneys and the judge time to position themselves to see the screen before you start. If at all possible, you should control or operate the projector or computer. You know your equipment better than anyone else and can troubleshoot problems faster if they occur. If you have slides that have not been pre-approved by the court for showing to the jury, such as gruesome crime scene slides, then remove them from the carousel completely or from your computer slide presentation. Accidents do occur with computers and projectors; mistrials can happen.

When using an easel for flip charts or sketches, make sure that the sketches are large and dark enough to be seen from 15 to 20 feet. Place the easel in a position that will allow you free movement without blocking the view of any juror including alternates. It is a courteous

gesture to ask if everyone can see the display before beginning. Actually, it is technically improper to ask this since you are there to answer questions, but what can the defense counsel do; object to you being kind to the jury?

Don't use your finger as a pointer for sketches, photographs or charts. It causes too much of your forearm to be in the way of the object of their attention. Practice using a retractable pointer if you are close to the chart or a laser pointer if you are several feet away.

If you are nervous about using a laser pointer because you are afraid that the red dot will be shaking on the screen, simply hold the pointer against your abdomen and shoot from the hip. It is much easier to control the red dot that way. When using a laser pointer, move it slowly. Moving it rapidly is dizzying for the jury and they will quickly get frustrated and lose interest. Remember, many of the jurors have never owned a laser pointer and are not used to seeing the red dot. When not specifically using the laser pointer for pointing out something under discussion, shut it off. A flying red dot is very distracting and discourteous.

Regarding any visual display there is a simple rule to follow. "A display is designed to aid the jury. Make sure that it does."

Correcting Mistakes in Your Testimony:

Hey, everybody is human. Everybody makes mistakes, right? It is possible, and actually likely, that on different occasions in your career, you may make mistakes in your testimony. It is not the end of the world. How you deal with them can be more important than the fact that you made them at all. What is a mistake anyway? Are there different categories of mistakes? Which ones are more serious? These are some tough questions with very few concrete answers. Jurors accept that you can make mistakes and they do not hold it against you unless they are frequent and not corrected voluntarily. They will not accept a planned cover-up of a mistake and if it happens, all credibility is lost.

If you make a mistake, by saying something that is in error, and wish to correct it, the way you can correct it depends on what is happening at the moment you discover your mistake. For instance, if you have been asked a question and have given an incorrect answer, and immediately realize it, you can correct your answer before the next question is asked. If the next question has already been asked before you realize your mistake, you should answer the question at hand and then advise the attorney that you made a mistake in your previous answer and would like to correct it. Sometimes this will be allowed and sometimes it will not. If it is not allowed, then it can be cleared up in re-direct or re-cross examination. If several questions have passed by before you realize your mistake, you can try to ask permission to clear up the answer; however, usually you will not be allowed to go back without a specific question to lead you there and it will be necessary to clarify it in re-direct or re-cross examination. If you do not realize your

mistake until you have been finally excused, the best you can do is advise the prosecutor or defense counsel about the error at their earliest convenience. It might be possible to recall you as a witness, depending on the case or situation.

You can't worry about making mistakes. Take them as they come and apologize for making them. That is all that you can do.

How to Make Your Testimony Enjoyable for the Jury and Yourself:

The first thing, and the most important thing, to remember always is that juries are composed of people. If you continue to have a burden on your heart for their understanding of your testimony, you will be able to reach them as individuals and as a group. This attitude, in itself, can make your testimony more enjoyable for you and them. As was mentioned earlier, they have a difficult decision in front of them, regardless of the evidence, because the life or liberty of another human being is at stake. They are frustrated from all the procedures and formalities that they don't understand. Every time it seems to be getting fired up in the courtroom, the judge runs them out to the jury room while he talks to the lawyers. They don't get to choose where they are going to eat or when they can go to the bathroom. They can't use the telephone and they are missing work. Nobody gets to talk to them and if the trial drags on for days, they feel almost like being placed in a leper colony. They can't even talk to each other about the case and they don't know enough about each other's lives to talk much about anything else. With the right attitude and commitment, you have the power to make a part of their day better. If you can find a way to accomplish just a few of the things that have been discussed in the preceding pages, you will feel a sense of pride that will make you realize that this day has been a great day for yourself as well.

Remember, God only created two kinds of days -- good days and great days. One of the real blessings of life is that you get to pick which one you are going to have each day. Just do it!

XIV. PREPARATION FOR CROSS EXAMINATION

So you have survived the direct examination without falling apart. You may even be feeling pretty good about yourself right about now. That is excellent. If you have done all the preparation that you should have, there is no reason why you should do anything less than great.

The direct examination is designed to go smoothly. Even when prosecutors are not totally on top of their game or as well prepared as they should be, you can still find a way to get your points across because you are ready. Congratulations. You have accomplished the most important part of preparing for a stiff cross examination from the defense counsel. It has been said that the best defense is a good offense and that certainly holds true in the adversarial setting of a courtroom. If the prosecution and the witness did an excellent job in presenting the testimony and the evidence, why would the defense counsel wish to keep this witness on the

stand any longer than absolutely necessary. All you will do is hurt their case even more. One of the greatest compliments that a defense counsel can give a criminal justice witness is to rise and say to the court, “We have no questions of this witness, your honor.” In essence, they are admitting that they can’t shake you from the facts or from your testimony.

Now don’t think that happens all of the time because it doesn’t. Many defense counsels are pressed into conducting rigorous cross examinations even when they may not want to. There could be a variety of reasons for this. It may be that the case involves a capital offense and the defense is obligated to pursue every possible line of defense that might have an effect on the outcome. It may be a crime charged under a habitual offender statute which could result in long term prison sentence or life imprisonment. Certainly in these cases the defendant has absolutely nothing to lose by having their counsel attack every witness and piece of evidence. Then, there are the defense attorneys who just simply like the thrill of the trial. They very much enjoy the challenge before them and relish the thought of winning just for the sake of winning. They may not admit it, but they are out there and they possess that same competitive spirit that many prosecutors have.

ABC Sports said it best. “The thrill of victory and the agony of defeat” is a real feeling for many attorneys. They might not want to admit it because they are supposed to be thinking only of their client. Attorneys, both defense and prosecutor, are people too. They have the same needs and desires as the rest of us and the competitive spirit is alive and well in the halls of justice. The major remaining portion of this seminar will deal specifically with defense tactics and strategies and how to confront and neutralize them from the witness stand.

Let’s first look at defense counsels themselves and get a mental picture of them. What is their role in the criminal justice system? Why do we really need them? What purpose do they actually serve? These are all interesting questions. Maybe by studying them and their strategies, we can gain a better insight into how they function and how we can interact with them in the courtroom.

For years I had difficulty dealing with my bias against defense attorneys. I was taught that they were not very nice people and could not be trusted. They were eager to get guilty people off. As I grew up through high school and early years of college, somehow I developed a prejudice against them. It might have been from what I saw on television or movies. During those days there was only one good and decent television defense attorney and his name was “Perry Mason.” Everyone else was portrayed as an ambulance chasing, money laundering, stooge. of the criminal element of the day. Until “Matlock” came along years later, that was the negative image of defense attorneys that most people were familiar with.

Is this a fair assessment or characterization of these legal officers of the court? Well, you decide. If you were asked to come up with one word adjectives to describe the most well known defense attorney in your city or area, what word you would use? I can only imagine what words you might choose and there is a good chance that I wouldn’t want to print them in this handout.

Now think about it from a different perspective. If you got into trouble, which attorney would you immediately think of to hire? What if your young son or daughter got stopped and there was liquor in the car and they were charged with first offense DUI. Which attorney would you run to for help? If the answer to all of these questions is the same attorney; maybe you need to stop and rethink your position and opinion. There are good and bad attorneys, honest and dishonest ones too, just as there are honest and dishonest members of the criminal justice community. It is a fact of life that some people can't be trusted. However, there is no reason to believe that a greater proportion of these individuals are defense attorneys than there are law enforcement officers or crime lab analysts.

Purposes of Cross Examination:

What are defense counsels trying to do? Are they trying to get the guilty guy off? Are they trying to seek out the entire truth? Are they just trying to get a hung jury? Are they trying to make the prosecution prove its case beyond a reasonable doubt? What is really happening? Are they only satisfied with an acquittal? Do they really believe that their client is innocent? Do they even care that their client is guilty? How can they work so hard to represent them if they know that they are guilty? These questions are important to the criminal justice witness just as they are to the defense attorneys themselves. They have to work in an environment that may not be of their own choosing but they are necessary to make the system work. The job you do every day as a criminal justice professional is a very important part of the criminal justice process, but it is only a part. It is not the entire thing. Defense attorneys are another part of the same system and the system cannot function without them either. Those countries that do not have an adversarial legal system of due process can not, and do not, offer to its citizens the level of rights and freedoms that we enjoy so freely. We need good defense attorneys to make the system work.

Methods and Styles of Cross Examination:

Defense attorneys are just like the rest of society. There are as many different styles and methods as there are attorneys. There are some tactics that are more common than others and those that are encountered most often will be discussed in this segment of the seminar.

It is important for the criminal justice witness to fully understand that the burden of proof lies squarely on the shoulders of the prosecution. The defense is not required to prove innocence.

They are not required to prove anything at all. All they have to do is interject a shadow of doubt in the mind of at least one of the jurors. A hung jury is considered a victory for a defense attorney. If a jury can not reach a verdict, the prosecution must start all over again, normally during the next term of court, which may be several months away. You know how it works. If the case gets continued to the next term, the probability that it will be retried again, if at all, decreases with every passing month. If a case is retried and the jury can't reach a verdict the

second time, the case is normally dropped like a hot rock. This fact of the legal system is important to understand because it becomes the premise for cross examination techniques commonly used by good defense counsels. In other words, their methods do not have to result in convincing the jury that their client is innocent. They simply have to distract or confuse a juror long enough for the truth to become difficult to see clearly. The jury is made up of twelve law abiding, honest, caring citizens from the community who are trying to do the right thing. They certainly do not wish to return a verdict of guilty on a person that did not commit the crime, just as they do not want to set a guilty person free. If the attorney, through one or more of the defense tactics we will discuss, can cause a conscientious juror or jurors to lose track of the facts for a short while, then when they get back in the jury room and begin deliberations, that juror may not be able to put the pieces together for a vote of guilty. Understanding this very important concept can give you insight into comprehending the tactics that defense counsels use and how to deal with them in an open court environment.

When you are called to the stand to testify on behalf of the prosecution, it is understandable that you would expect the prosecutor to be there to aid you in the cross examination phase of your testimony. Of course, they are going to object if the defense counsel gets too rough or seems to be getting you into trouble. Yeah, right. As a witness, it is your responsibility to handle your own situations while on the stand and don't get in the habit of being dependent on the prosecutor to bail you out of trouble. There are many prosecutors who are very adept at intervening on your behalf; but frankly, it looks much more impressive to the jury if you handle the cross examination without any help from the prosecutor. For that reason, many prosecutors are reluctant to object when they believe that you can handle it alone. Don't send pleading looks over to the prosecutor's table while under cross examination. If the question should be objected to for some technical reason, the pause that you are supposed to have before your answer will give the prosecutor ample time to object if appropriate.

The "Style" of a defense attorney is what they are known for in court. Most attorneys have one or maybe two, different styles of cross examination. The really exceptional attorney may have a complete repertoire of styles, but it is very rare indeed. Actually, from the interviews that I have conducted with several defense counsels over the years, they feel that their method or style is the best for them and they don't feel any need to change. What can I say! They have large egos. Once you have determined what the style for an attorney usually is, it actually becomes much easier to handle their methods in the courtroom. Be careful yourself though, and don't get cocky and expect an easy time with them. Who knows? They may have attended a seminar themselves and learned some new tricks.

There are three basic general styles of cross examination that are most often encountered by criminal justice witnesses with multiple variations of each. The first is the type that many witnesses fear the most, the brow-beating type of defense counsel. The second is the crafty, slight-of hand type who seems to be playing chess with your knowledge and your emotions. The third is the good-buddy, I'm your friend, type of attorney that smiles and loves everybody, especially you. Each of these have several tactics that fit their style very well and can make

cross

examination a challenge for the criminal justice witness. They all can be studied and prepared for. The well trained, well prepared witness should not have any major problems with them regardless of their style or their tactics.

As was mentioned earlier in the seminar, you know more about what you did on the case than anyone else in the courtroom. You certainly know more about your case, or your science, than the defense attorney. A few months ago I asked Barry Scheck, a member of the O.J. Simpson Dream Team, what were the greatest obstacles facing forensic scientist witnesses in the next century. He said one of the largest obstacles was for the forensic scientist to take advantage of the fact that when they are testifying, they are the only expert who is talking to the jury. Not the attorney for the prosecution or the defense, but them, and only them. He believes that we have not trained our criminal justice witnesses well enough to seize the opportunity to instruct the jury on our facts and our science. Doesn't that sound familiar? Attorneys such as him are successful because we are not getting ourselves ready for them.

Specific Tactics of Cross-Examination:

Tactic: "Road Runner"

This is a tactic that can be employed in those courtrooms where the judge allows free movement of the attorneys during the examination. There are still a large number of courtrooms around the country where this is allowed, although the number is decreasing. This is almost never used in federal court. It is really very simple. If the defense attorney wishes to get to a very important question that they think will benefit their case, but to get there they have to lay a foundation with another question that they would prefer the jury not to hear clearly; then, they may choose to call on the "road runner." The attorney starts moving away from you and the jury as they ask the first question, reaching the furthest allowable point when it is your time to answer. The intention is to have you looking away from the jury and at him when you answer the question. You will still be near enough to the court reporter for it to appear clearly on the record, but it may not have been heard by one or more of the jurors. Once that has been accomplished, they casually stroll back across the courtroom speaking directly to the jury as they ask the very important question and your eyes are drawn back in the direction of the jury as you respond. They have achieved their purpose by getting it correct in the record and getting a particular point emphasized to the jury. A very slick move when it is done correctly.

Solution: Since you know that eye contact is critical in providing testimony to a jury,

you simply turn back to the jury before you answer the first question. If you think that the attorney's question could not be heard clearly by the jury, you can repeat it as part of your answer. This will catch them up to speed on both the question and the answer and

will send the “road runner” down the road quickly.

Tactic: “Up the Ladder / Down the Ladder”

This is an oral version of the “road runner” technique. If the attorney wishes to ask a very important question but must first ask some predicate questions, they will move closer to you as they are asking questions, gradually dropping the volume of their voice as they get nearer. When they get to the lowest point they will ask you the question that they really don’t want the jury to hear, but it will, once again, be loud enough to show up on the court record. If you fall for this trap, your voice will drop as well. The answer you give will be loud enough for the record but not loud enough for all of the jury to hear. Then of course, once this is accomplished, they will step back, raise their voice and while looking directly at the jury, hit you with their important and damaging question. You won’t whisper then.

Solution: The reason that “up the ladder / down the ladder” can be effective has a great deal to do with the way we communicate one on one. If you are seated at a dining room table talking with a friend, you will use whatever volume of voice necessary for the conversation to be heard by the person across the table from you. You will not speak louder than is needed to carry on the conversation. To speak louder would feel uncomfortable and would be rude. Attorneys know that, so as they move closer to you while asking questions, they drop their voice. It seems perfectly natural to drop yours as well. This is very simple to deal with if you stay focused again on the jury. Your answers are to questions that the attorney asked but they are not spoken for the benefit of the attorney. You should speak for the jury and all volume selection and projection levels are based on the jury’s needs.

Tactic: “Just a Yes or No, Please”

Yes or no answers are frequently insisted upon by defense counsels. Such answers are necessary in many instances, but there are times when it is done merely to baffle the witness or to induce you to make some flat affirmation or denial which he may later show to be less than accurate or a half-truth. The intent of the attorney is to show that you are willing to play with the truth; therefore, you are not totally worthy of belief. This tactic is normally used by the brow-beater type of attorney and can be unsettling to the witness who is not prepared for it. It is more

of an attempt to elicit aggressive behavior from the witness than it is a quest for information.

Solution: When you have a defense counsel using this type of technique, it is probably because they have attempted other tactics with no success. It is unlikely for an attorney to start a line of questioning with this move. They will usually build up to it if they get a hint that you have a temper control problem. Of course there are some questions that cannot be answered with just a simple yes or no answer. How do you reply when asked to respond in that manner? I would recommend that you state, “I cannot answer the question with just a yes or no answer but I am willing to tell you the facts about (the subject) as I know them.” What is the attorney to do? If the attorney does not let you speak, then it is obvious that they don’t want you to tell the facts. Shame on them. You have basically turned the tables on them without appearing to be unresponsive or evasive to his inquiry.

Tactic: “Come Along for Information”

How do you know when an attorney is lying? The old joke goes “when their lips are moving.” I don’t know about that but I do know one of the ways to determine when a defense attorney has not prepared their case the way they should have. They quite often will use the “come along” method of seeking information from a talkative witness. They will ask open ended questions such as “What did you do when you arrived at the crime scene?” or “What did you do with the evidence once it was received at the crime laboratory?” The criminal justice witness could go on forever with this question and that is what the attorney wants for you to do. They will increase the chances of you continuing your dissertation by stepping closer to you when you stop speaking and looking directly into your eyes and nodding their head or shoulders as if they were saying “please continue.” Most probably, you will, if you are not aware of what is happening. There are a couple of reasons they would do this. One is the obvious reason; they honestly don’t know what all you did in the case. They need the information so they can formulate additional questions. Secondly, they use this technique to check your statements against what you may have said during direct examination. This technique, since it is non-verbal, will not show up on the record. It will only show that you stopped and started again for some unknown reason.

Solution: Know when to stop talking. If the question is open ended, then you may do either one of two things. You may define the answer by saying “The first thing I did was.....,” and then explain just the first thing you did and then stop. You may ask the attorney a question such as “Do you mean just the first thing I did when.....” and wait for their reply before you answer. Either response is acceptable and will stop the attorney from trying that trick again.

Tactic: “Who Made You an Expert and When”

For those of you in this seminar that will be qualifying and testifying as expert witnesses,

you may expect to see this line of questioning in more and more cases. This is particularly true when the defense has been able to acquire the assistance of private forensic experts to refute or call into question your findings. Since the O.J. Simpson case and other celebrity court trials, this old method of attack has seen a resurgence of use and interest in the legal community. It has always been popular in the litigation of civil cases where expert testimony can come from almost any direction. It appears that more attorneys are willing to challenge the government's experts even if they do not have any contradictory expert witness testimony of their own to present. Once again, interviews of defense attorneys seems to provide the answer for this resurgence. I am told that the reason they are more willing to take a shot at the government's expert and their procedures is because of all the publicity received from situations such as the FBI laboratory

fiasco with the whistle blower scenario and Agent Whitehurst. Also it appears that the media has brought forensics into the living room in a less than appealing way with DNA being used on everything from morning talk shows like "Jerry" and "Sally," to investigations of high (very high) government officials that are printed all throughout the tabloids.

The issue of challenging the government's expert as to their credentials and their amount of experience is certainly within the scope of fair and impartial cross examination. The defense should make the state prove that not only the techniques and procedures that were used in this case are scientifically accepted, but that the persons involved in the analysis were properly educated and trained to conduct the analysis. Questions regarding your formal education, formal training program, documentation of training, qualifications of your trainers, certifications obtained, professional memberships held, continuing education received and a multitude of other topics regarding your expertise should be expected.

Solution: You should hope that the defense attorney is pressed into challenging your qualifications as an expert. This will give you the opportunity to shine once again in front of the jury. If you don't have all of the above mentioned topics regarding education, training, etc. completed and fully documented, you should not be testifying as an expert in the first place. Cross examination involving your credentials should be one of your strong points and, if you are well trained, you are then elevated in the eyes of the jury. The biggest problem that I have seen in court with expert witnesses is that even though they have excellent technical credentials to do the job and issue opinions, they could not testify their way out of a wet paper bag. Somewhere in the forensic sciences, we have lost sight of the definition of the word "forensic" - the application of science "to law." We can be great in the lab but we need to be successful on the witness stand as well. It's all about training. You can't be expected to do a good job if you don't know how.

Tactic: "Is It Possible You Missed It?"

Hang on tight! This is one of the hottest things going on in courtrooms across America today and with good reason. This tactic can be used against all members of the criminal justice system regardless if you are a uniform officer making a DUI stop, a narcotics officer doing a surveillance buy, a crime scene specialist who processes the scene, an investigator who was

interviewing witnesses or interrogating suspects or a crime laboratory analyst. It is a common tactic that is used quite successfully against witnesses that don't know how to handle it. Here is an example of how it works? Are you ready?

1. Is it possible that you overlooked something while working the crime scene?

Answer: *I guess it is possible.*

2. Since it is possible that you overlooked something, it must be possible that the thing you overlooked could have been an important piece of evidence in the case, right?

Answer: *Well, I guess it could have been. I really have no way of knowing.*

3. If you had found this important piece of evidence, it would therefore be possible that this new information could have led your investigation in another direction, correct?

Answer: *I suppose it could have.*

4. Since you say that this could have led your investigation in a different direction, then of course, it must be possible the new direction could have led you to a different result or person, isn't that correct?

Answer: **(It really doesn't matter what you say now, the damage is done.)**

Wow! a good case shot down with four easy questions. If you answer honestly, and don't know how to handle the first question, then it goes downhill from there and your credibility and the credibility of the case is severely damaged. There are multiple ways to use this tactic and most of them have the word "possible" somewhere in the first sentence. That is a key word to look for as an aggressive listener. This technique works so well because it is so easy to admit that anything is possible.

Solution: To begin with, except through divine intervention, **anything is not possible!** This in itself is the fallacy of the argument made by the defense counsel in the above questions. I, Ron Smith, will never be Ron Howard, the famous actor and movie director. I can change my name to Ron Howard, but it is not possible that I will become him, unless God makes it happen. For you to admit that anything is possible is to admit that the entire case could be in error and the wrong man is standing trial for the crime. You don't really believe that; nor should you allow the attorney to insinuate that you do.

There is one very simple way to handle this line of questions. Let's try it again from the beginning.

1. Is it possible that you overlooked something while working the crime scene?

Answer: I believe that I did a thorough and professional job in working the crime scene and I have no reason to believe that I overlooked anything. **Do you have something particular in mind?** (smile at the attorney and keep your mouth shut and wait)

If they don't respond immediately, the jury says to themselves "guess not" and the threat is over. Simple as that. If the attorney comes back with some comment, just reiterate what you said in your first response, without the question back to him. Normally this answer will not be anticipated by the attorney and they will be forced to go to another line of questioning. It is imperative that the witness ask the question in a quizzical manner with the facial expressions to match. Otherwise, it could appear as if the witness is being callous or evasive. It is amazing how quickly this line of questioning can be pre-empted just by a few well chosen words.

Tactic: "Compound Questions: Biscuit & Gravy"

This is a very simple technique that is most often used by the crafty or brow-beater type of counsel. There are multiple variations of this technique available and it really depends on the purpose of the question. The most common approach works something like this: "Was the evidence contaminated prior to your examination and did you do all that you could to preserve the integrity of the evidence once you examined it?" The vocal emphasis will be on the second question, with the attorney often continually moving in closer to you as they ask the question. The emphasis on the second question and the added pressure of getting physically closer to you will cause you to focus exclusively on the second question and your normal response will be "yes." Of course, that is the answer hoped for by the attorney. You may not have been agreeing that there was contamination of the evidence before you examined it, but that is what you indicated in your answer. Now the defense can use it in two different ways. One, they can badger you with the answer and get you to admit that you made a mistake in your testimony (usually chosen by brow-beater type) or two, they can just leave it alone and use it in closing arguments. (usually chosen by crafty type)

Solution: Listen aggressively for each word and phrase and then think about them collectively. In the previous example, it would be best to answer each question separately by repeating each part of the question before answering it. If you give multiple answers, the jury will still be lost. Help them out. They will appreciate it. If the attorney persists in asking compound questions in one sentence, it is perfectly acceptable to point it out to them in a kind manner. You can say something like, "I'm sorry, but there appeared to be more than one question in that sentence and I want to be as correct with my answers as I can. Could you please ask your questions again, one at a time? This will usually halt any further attempt at "Biscuit & Gravy." It should also be noted that some very disorganized, unprepared defense counsels will ask compound questions without even knowing it. They are simply winging it and are making questions up as they go. Don't worry about them. They will hang

themselves without any help from you.

Tactic: “Off the Record Hallway Defense”

Occasionally, a defense attorney may approach you in the hallway of the courthouse and request to talk with you about the case. It may be something like, “Ron, I would like to ask you a couple of questions about what you did. It might save some time this afternoon when you are on the stand and it might help me not to look stupid when I am cross examining you.”

What is your response going to be? Some witnesses may tell the attorney that they will just have to wait until they are on the stand to ask any questions. This may be technically correct but it is certainly impolite. It may be a trick on the part of the attorney to catch you in a trap with something you say in the hallway being used against you later on in the courtroom. How should you react?

Solution: Agree to answer any questions they have, but require that they be asked and answered in front of the prosecutor so everyone can hear it the same way and at the same time. By doing this, you have been polite and have protected yourself from unfair attacks later on during your testimony. If it indeed was a trick, the attorney will often excuse themselves without getting together with the prosecutor to ask the questions. Another ploy detected and rejected. If it was a legitimate request, they will be glad to ask their questions in front of the prosecutor.

Tactic: “Gatlin Gun Approach: Rapid Fire Questions”

This is a tactic used almost exclusively by brow-beater attorneys and is not of much good to anyone else. For some unknown reason they think that it can be used to confuse the witness. They may be right, but it alienates the jury so fast that it is damaging to the attorney. Most of the time the process will include numerous short questions that call for short answers. It makes the jury angry at the attorney, but brow-beaters don’t care what the jury thinks of them. They just want to get the witness upset and angry if at all possible.

Solution: This is a no-brainer for the witness. All you have to do is answer the questions slower and add a few more words to the answer even if they are not totally necessary. Instead of just saying “yes sir”, respond by saying “yes sir, that would be a correct statement.” If you do this a couple of times in a row, it will frustrate the attorney enough that he will drop that style of cross examination. Problem solved.

Tactic: “Rolling the Witness”

Remember the lawyer joke we alluded to earlier? It was the one about how you know when a lawyer is lying. Well, there is a better way to tell than by what they are saying. It is called “rolling.” I don’t know what attorneys call it or even if they realize they are doing it, but it

is a very dangerous tool when used properly during cross examination. Here is how it works.

As

the attorney is asking you questions, it is obvious that they are wanting to get to one particular point of major interest to them. They will insinuate in their opening question where they are going and proceed to that point by rapidly covering several, seemingly trivial points, in an effort to get to the major point of their questioning. As they are doing this they will be standing in front

of the witness, looking directly at them, and rolling their hands toward the witness in an attempt to get the witness through those trivial points. They will use leading questions to accomplish this

task and seek your approval as they go, with short answer questions. The whole purpose of this tactic is to get you to focus on the major question that is still to come and not pay attention to the leading questions that you are agreeing to as you get there. I have seen this tactic used successfully to get an experienced investigator to admit to several discrepancies or errors without even knowing it at all. It is an awesome thing to watch in the hands of a skilled attorney.

Solution: Aggressive listening! Sound familiar. When the attorney starts “rolling,” get extra focused on the exact words and phrases that are being used in the leading questions. It certainly is permissible for the defense counsel to use leading questions when cross examining you, but that doesn’t mean that you have to let them “lead” you to the slaughter. When they make a statement in a question that is not correct, you should first correct that statement in the first part of your response and then answer the rest of the question. If they were attempting this ploy, you will be showing them that you are carefully listening and they probably won’t try it again.

As you can tell already from our discussions, many of these tactics will be done without the jury even knowing that they were being tried. Don’t worry, even though the jury doesn’t know how well you have handled the attorney, you will know, and most importantly, the attorney

will know that you are ready to handle whatever comes your way.

Tactic: “Load Em’ Up With Evidence”

Remember when we talked about what a defense attorney had to do to win? What was it?

Did they have to gain an acquittal? No, they just have to get a hung jury. As was mentioned earlier, distraction of the jury members for a short while may be all that is necessary to cause a juror not to be able to vote guilty when in deliberations. If the honest juror cannot recall a

specific testimony due to those distractions, the case may be lost. Defense attorneys can use this to their advantage. One of the easiest ways to distract a jury without it showing up on the court record anywhere is to use a tactic called “Load Em’ Up.” It is also called “Leaning Tower of Pisa” by some of my distinguished colleagues in the forensic science field. It is easy to do when there is a large amount of physical evidence in the case. This will often be used by the defense attorney when they recognize that, during direct examination, the witness did not handle physical evidence properly while testifying for the prosecutor. If the witness handled the evidence too much or kept it in their hands too long or fondled it while they were talking, they are prime candidates for the defense attorney to “Load Up.” The attorney will bring an item of evidence, preferably a box, bag or maybe even a weapon, to the stand and hand it to the witness and ask them if they can identify it. They may ask some simple question about the item of evidence at that time. Once that is accomplished, they will bring another item to the witness stand and hand it to the witness while turning to walk away in the same motion. Now the witness has two items to handle. The witness puts one on the rail before them and holds the second one while anticipating the next question. The question comes and then the attorney brings a very critical piece of evidence to the stand and hands it to the witness. The witness takes the item of evidence while carefully placing the second exhibit on the rail of the witness stand, so they can keep both hands on the new item.

Normally, at that time, the attorney will ask a very important critical question about the third exhibit and what it means to the case. During this time, some of the jurors have been focusing on the balancing act that is taking place before their very eyes on the rail of the witness stand. They can’t help but hope that the evidence does not fall. During that time, they missed either part of the question, or answer, or maybe both of them. Regardless of what the question was or how well it was answered, there is a chance that the tactic worked for the defense counsel. If it didn’t work, so what? It was worth a try.

Solution: Of course, if you handle evidence correctly during direct examination, you are less likely to see this tactic during cross examination, but it can happen. The bottom line is this. One piece of evidence at a time, please. The only exception would be if you were having to show a relationship between multiple pieces of evidence at the same time and you needed to have both exhibits in front of you as you are testifying. If the attorney brings you an exhibit and walks away while asking you a question, it is proper to hold it for a few moments. If they proceed to ask you another question unrelated to the exhibit in your hand, then give it to the court reporter if they are right next to you, or ask the attorney to come back to the witness stand and get it. If after they have asked you a question regarding the first exhibit, they approach you with a second exhibit and make a motion of handing it to you, then with your other hand, offer the first exhibit back to them. If they are turning away from you as they are handing the second exhibit to you, call upon them to take the first exhibit from you and then thank them for doing so. If you follow these suggestions, you will never have evidence stacked in front of you and you will never have a tower of evidence to fall while you are on the witness stand. Once again, you prevailed in the face of adversity.

Tactic: “Number / Name Bait and Switch”

The crafty or friendly defense attorney may choose to confuse a witness by using different variations of the old “number or name bait and switch” technique. It is very easy to do and is usually prefixed by a couple of very easy casual questions that tend to lull the witness into a secure feeling. The attorney will be asking questions in a very conversational tone to increase the warm fuzzy feeling that the witness is having about how their testimony is going. To understand how the attorney leads the witness into this trap, it is also important to know why they do it. For many criminal justice witnesses, it is the detailed facts that are of critical importance. Such details as times, dates, addresses, names, case and exhibit numbers, and various laboratory results are what we use to prove crimes and who committed them. In the criminal justice community, we make our living by being accurate about this type of information. When the attorney can show that we have made errors on this type of detailed information, they can successfully undermine the jury’s confidence in us and our investigation. It could be something as simple as transposing the numbers in an address, or changing the day of the week or month in their question. Once the question is asked and answered, they then will act confused about your answer and go back and point out the error in your testimony to you and to the jury. Somewhere, they will slip in a question to you about how vital it is for you to be accurate and of course, you will eagerly agree. Then they drop the hammer and expose your mistakes to you in front of the jury. This technique can be very easy for them to apply because of their freedom to use leading questions. This was mentioned briefly in a previous tactic, but it is worth explaining in greater detail at this point.

Basically, leading questions are statements made by the attorney that are followed up with the comment, “Isn’t that correct?” or maybe “Isn’t that right?” or some other short question. This type of question is allowed under cross examination while it is not normally allowed under direct examination, except in certain circumstances. An example of how it is used would be, “Let me get this straight. You say that you never struck or threatened my client at all. You just stopped my client, asked him to exit the vehicle, searched his vehicle, recovered the drugs, had him sign a consent to search form, placed him under arrest and then had him transported to the county jail, is that correct?” If you say yes eagerly, you will be asked a follow up question like this. “Nothing else was done to him, other than those things that you said you did in the previous question, is that correct? Once again you will respond with a yes answer. He may even be bold and follow up with one more question to seal the deal for the defense: “Is this the way you make every stop or did you do this one in any different order, or use any different procedures than usual.” You should have picked up on the trick by this time, but if you haven’t, look at the sequence of events that are listed in the first leading question. The consent to search is in the

wrong order and if you didn't catch this when the question was asked, you have just inadvertently admitted to a search and seizure error that may cause the evidence to get thrown out. Do you see where the emphasis on the question was placed to get the witness to miss the trick? It was placed on the comments regarding violence or threats. This was done in an attempt to distract you from the rest of the question. Did it work?

In direct examination, leading questions are not normally allowed. They would be able to ask what you did next, but not tell you what you did, and then ask you if that was correct. It gives the advantage to the cross examination attorney. If the defense attorney calls witnesses on the behalf of the defendant, then the prosecutor will be allowed to ask leading questions to their witnesses.

Solution: Don't assume anything they say is correct, particularly when their lips are moving and their hands are "rolling." Just because the attorney appears to be helping you with your testimony, don't believe that they are. They may be honestly mistaken in their understanding of the sequence of events, but you can't take the chance that they are. If you have to correct them, they won't be upset with you and it will set the record straight. If they were trying to trick you, they will be impressed by your aggressive listening skills and they probably won't go down that path again. The manner that you correct them is important as well. You must make the correction in the statement prior to answering the question. Make sure that you are courteous when you do it. Just because they may have accused you of something that you did not do, it is not time to retaliate.

Tactic: "What You Didn't Do Defense"

If you think that you may get in trouble at work or home for what you did, get ready for the world of cross examination. In this world, you certainly can get chastised for what you did in the case, but more often than not these days, you will get challenged for what you didn't do instead. It seems that defense counsels have seized this approach by the throat and they are trying to swap that grip to the neck of the criminal justice witness. It is very understandable why they have found such a bountiful harvest of ammunition by using this approach. There are more cop shows, forensic science shows and attorney shows on network television than any other single type of program. The public is getting sensory overload from all of the information that they are seeing on television regarding law enforcement work, criminal investigation and forensic science. On top of this, with all that science has to offer the criminal justice system, crimes can normally be solved within a thirty minute or one hour show. Interviews with past jurors have supported this conclusion completely. The average juror believes that law enforcement has unlimited access to technology in most cases. Most believe that the nearby local, state or federal agencies have the manpower, money or equipment necessary to help solve the case and the

reason they don't is because the local agency did not want to ask for help. This may not be fair, but it is real. Defense attorneys know this and have been quick to develop special techniques centered around the general concept of "what you didn't do." If you did the best you could with what you had, shouldn't that be good enough? Sounds reasonable to you maybe, but not to a jury. The three things that most jurors have said are not reasonable excuses for not doing something are those same things -- lack of manpower, money or equipment. We all know that we don't have unlimited resources at our disposal, but you had better find a way to explain that properly to a jury or you will be made to look like you don't care for the victim as much as you should. It will be made to appear as if you are willing to sacrifice quality for speed.

Most often, the questions will involve additional steps or procedures that you could have used if you had the time or technology available. For narcotics investigators, it may be why the "buy" was audio recorded and not video recorded. For field investigators, it may be why they did not canvas the neighborhood for other eyewitnesses to the crime. In the laboratory, it might have been why they did not confirm a drug identification with a second or third test, or use an alternate light source on a piece of evidence instead of SuperGlue and powder. DUI enforcement officers may be asked why they did not conduct a field sobriety test and a field breath test on the side of the interstate highway. It is an easy sell for the defense counsel. All he has to do is remind the jury that if they were the victim, they would want the criminal justice system to do all it could for them and their family in their time of need. It almost makes you want to cry, doesn't it?

Solution: You must be confident in your techniques and abilities as you do your job. This needs to be apparent in your testimony and should show through very clearly during the direct testimony, if you have done your job correctly. If it comes up, don't give in. If you feel that you did a good job at the time, then stick with it. If they can't prove that you made errors in your work, then you can't lose credibility with the jury. If you have answered their question regarding what you didn't do and why you didn't need to do it, then the next time they ask it, repeat the same answer, exactly the same way. Let it be obvious to the jury that you have already answered that question the only way you know how. Sometimes the prosecutor will object to the question as being repetitive.

Think about it. What was your purpose in doing the thing in the first place? Was it to collect information or evidence from the scene and the witnesses? Was it to determine if the driver was driving impaired? Was it to determine if there were any latent prints on the evidence or determine if the substance was cocaine? If the techniques you used fully answered the question or solved the problem, what good would additional tests or work have been to the case? Absolutely none. It is perfectly acceptable to explain that to the jury. They will understand it and appreciate the fact that you did not waste time and resources in doing work that did not need to be done. You can make it a positive if you just know how.

Tactic: “Space Invaders” & “Siamese Twins”

It is an accepted fact that we all have an invisible bubble of space that surrounds us that is ours alone. We don't want anyone entering that space (comfort zone) without our permission. This is a natural feeling and although it doesn't rank up there with a paranoia or a life shaking fear, it does have a significant influence on how we interact with other people. Haven't you had someone walk up to you in a crowd and just get a little too close to you for comfort? How did it make you feel? What did you do? Do you ease away from them just a little bit? While they were too close to you, did you pick up on every word they were saying or were you thinking about them being too close? I think I know the answer to that. Defense attorneys do as well. They use this tactic of space invasion to make you feel slightly uncomfortable while they are asking you a question. Their presence might just distract you long enough to slip in a comment or statement that is detrimental to your case without you hearing it and correcting it. Remember, if you don't correct it, then it must be true.

This tactic is also used to aggravate witnesses by sometimes standing directly in front of the witness, thereby blocking their view of the jury. Since eye contact is an important element of good testimony, you are forced to react in some manner.

Solution: It is best to make an attempt to look around the attorney first by leaning slightly to one side and making eye contact with the jury. They will appreciate the effort on your part and realize that the attorney is being rude. At that point you can ask the attorney to step aside so you can see the jury when you answer. Most witnesses believe it is improper to direct an attorney to move but it can be done, if done courteously. Try this: “Pardon me, could you please step over just a little so I can see the jury when I answer your question, Thank You.” It is important to add the “Thank You” in the same sentence and not to wait until after they move. By thanking them in advance, the attorney is required by common decency to comply with your request. They have no other choice.

On occasion defense attorneys will use a variation of the space invader technique called “Siamese Twins.” In this technique, the attorney approaches the witness from the side very casually as they are asking questions. They will set up shop right next to the witness but not in front of them so they both have a clear view of the jury. If the cross examiner is very skilled at asking lengthy, leading, technical questions that call for short simple answers, then before long, it appears as if the attorney is actually the one who is testifying and not the witness. They will try to make you feel uncomfortable and many witnesses will lean away from them to regain their distance.

This is fairly simple to deal with. If the attorney comes up to you and stands immediately beside you, it will normally put their head a couple of feet above yours since you are seated. If you look up at the attorney as they are asking the question, it will be clearly obvious to all that are present that the attorney has put you in a totally unnecessary and physically awkward

position. After you have strained your neck for a couple of questions, you can ask the attorney to step back out front so you can see him better while you are listening to his questions. Make sure that you thank him in the same sentence and he will have to move.

Tactic: “Oh My! Contamination!”

Shades of O.J.! Here we go again. It seems that this case has been like a blood transfusion to defense counsels all over the country who have found their long lost golden egg. We all know that the golden egg was there all the time, they just didn't realize it. That is not to say that we, as a criminal justice community, can't handle cross examinations involving contamination, but from what has been happening, it does appear that we need more training on how to defend our actions and procedures regarding it. Contamination comes in many varieties; many over which we have no control whatsoever. Those sources of contamination that came in contact with the evidence prior to law enforcement gaining control over that evidence can't be defended against; nor should they be. Weather, time, suspects, victims or witnesses may have all altered the evidence in some way and there is simply nothing that can be done about it. The best thing to do when being asked about that type of contamination is to not dispute it, but to be aware that it (the factors far beyond your control) could have affected the quality of any examinations that were conducted on the evidence once it had been collected.

Most often, the cross examination regarding contamination will center on the crime scene investigator or laboratory that collected or examined the evidence. As the “Dream Team” did in that Los Angeles case, the attack will center on the officers or specialists in an attempt to show their incompetence and lack of quality control in their policies and procedures. The goal of this barrage of questions is to render the evidence and the results obtained from it less than trustworthy and not to be believed. It is normally, a very technical type of cross examination and can be utilized by either type of attorney; although it seems to work best in the hands of the crafty style attorney as opposed to the brow-beater. The attorney needs for the witness to fully explain their answers to make the technique work best. Through a series of leading technical questions, the attorney will build up the importance of quality control in evidence collection and examination to the highest possible stature in the eyes of the jury. They will do this by encouraging the technical witness to expound on as many facets of quality control as they can recall, embellishing each one as they go.

Once this has been accomplished, the questions will turn to the second phase of the attack. At that point the attorney will go through each one of the collection or examination steps, asking questions, sometimes hypothetical in nature, about how the test results could be affected if contamination had occurred at any step. Of course, then the cross examination comes full circle,

back to the fact that there is a reasonable possibility that contamination did occur due to the errors made by the crime scene specialists or the laboratory personnel assigned to the case.

Many

times, the attorney will have acquired books or policy manuals that contradict what was done in this case and use those documents to cast doubt on the abilities and methods of the individuals involved in working this case. This would not normally be done on “routine” cases, but should be expected in the large profile cases in your area. Much of this information is available on the Internet these days and it is not difficult to get. This is the wave of the future and we might as well get ready for it.

Solution: First, you must know that there is more than one way to skin a cat. I can’t envision the picture described by that old saying, but you understand what it means. Just because one or more agencies say that evidence should be collected or examined in a manner that is slightly different from yours does not make them right and you wrong. For instance, if your agency evidence collection manual says that you should collect suspected blood stains on a piece of sterile gauze or cloth material, but another agency’s manual states that it should be collected on a sterile swab, does that make either one of you wrong? Of course not, because the main thing is that it is collected on a sterile medium. You are not responsible for knowing the manuals for multiple agencies. However, you are responsible for knowing why you do what you do and why it is acceptable. The contamination defense is a difficult one to handle, but remember the defense must show cause as to how there is contamination for this technique to have any drastic impact. I know that they don’t have to prove it, but they will have to do more than just suggest it. If you have done a good job on direct examination then the jury has already developed a level of confidence in you that will remain if you stand firm.

As for contamination in the field or the laboratory, I certainly hope that your agency has instituted policies and procedures to prevent this from happening. If they have not, then you are ripe for the picking and rightfully so. In today’s criminal justice environment, to have anything less is dangerous and is unacceptable to the jury. They won’t understand how you could let contamination occur. Get ready, this tactic is coming soon to a theater near you.

Tactic: “Phantom Witness Approach”

“That’s not what your partner testified to earlier?” This is a very quick, down and dirty tactic that either unsettles the witness rapidly or does not work at all. Basically, it is a direct insinuation that either you or your partner is mistaken in some facet of your testimony; therefore, someone has made a serious mistake. If it catches you off guard, it might be tempting to blurt out something like “Well, he was wrong,” which in itself makes your partner look bad.

Solution: If you are listening carefully and pause before you answer, you will have time to think before you speak. Your response should be “I can only testify to what I remember. I can’t testify for my partner,” or something similar to it. This will

not work if you are awake and not angry already.

Tactic: “Let’s Argue About It”

How do you win an argument with a defense attorney? Stare them down? Talk louder than they do? Shoot them down with a great answer after they have gotten you mad? Talk about their mama?

Wake up America! There is absolutely no way to win an argument with a defense counsel while you are on the witness stand. If you think you can, then you are just the kind of witness that they like to have on the stand. You are also the kind of witness that will walk out of the courtroom proclaiming that you really “kicked his ____.” You will feel so great until the jury comes back hung and then you will wonder who messed up. Of all the tactics that we have discussed, this one is probably the most deadly for criminal justice witnesses.

Anger is an awesome thing. It will make you speak without thinking. It will make your body send out multiple signals in all directions so that everyone knows of your anger, even when you are not speaking. It will make your voice quiver and tremble. It will change your heart rate and breathing patterns. It will make your stomach churn and rumble uncontrollably. Anger can do all these things, **IF YOU LET IT.**

You’re trained to control anger. You don’t like to be angry. In fact, you don’t like being around angry people, but there is something about that attorney that is really getting you riled up. Maybe it is the sarcastic way he asked me the questions about my training, as if I didn’t have enough. Maybe it was when he said “I am not surprised that you can’t recall, since you failed to take complete notes.” It seems like every time I try to explain what I did, he has something to say to make me look bad. Ever felt like that? We probably all have at some time, if we have testified very much.

It is human nature to have pride. The Bible teaches that we should not be prideful people but we seem to have a need for it in our daily lives. We want to feel good about ourselves and our abilities and when those abilities are called into question, it is a natural reaction to feel a little anger. Everyone knows that. Good defense attorneys have turned it into an art form. They work hard at developing ways to disturb the criminal justice witness because, if they can do that, the jury will get caught up in the thrill of the fight and forget about the case. Interviews with numerous jurors have proven this theory to be totally true.

It is pretty simple when you consider it. From 9:00 A.M. to 11:00 A.M. in the morning, there are a lot of citizens at home watching television. What type of show is a large percentage of them watching? The Discovery Channel? CNN? Home Shopping Network? Oh, no, my

friend, they are watching talk shows. “Jerry,” “Sally,” “Montel” and all the rest. Why do you think they watch these kinds of shows? The educational value? I don’t believe so. They are watching these shows because they want to see some confused live-in, cross dressing, lover on one end of the guest row, jump up and pimp-slap and cuss out the Neo-Nazi skinhead boyfriend who broke up his love affair with the waitress from Denny’s. Real entertainment; I’d say! Why do they watch such trash? Why do you stop, yourself, when you’re channel surfing and run across one of these shows? You may not want to admit it, but you have all watched that show that just has the highlights from the talk shows on it. You watch it just to see the outrageous stuff that people will do on television. It is the need for controversy. Many people thrive on it. Alright, maybe some of you don’t watch these shows, but I bet when you were in school and someone yelled “Fight” you pushed through the crowd to watch. Admit it. Confession is good for you. It will help you grow.

Solution: What in the world does all of this have to do with becoming a better witness? Well, we have been talking about how important it is for you to have a burden on your heart for the jury. That sincere concern we have for them is one of the greatest motivators we have in our arsenal against anger. We certainly understand by now that it does not take much to distract a juror from the facts of the case. That is not an insult to juries, but just a statement about human nature in general. An angry confrontation not only distracts the jury from the case, it builds upon itself in the minds of the average juror. They somewhat enjoy the confrontation and they naturally want to see it get more heated and involved. They may have been seated there for days and this might be the first time that it got really exciting. It is just a natural feeling.

For that reason, you must not let it happen. As the witness, you should have total control over your emotions and see the tactic for what it is. Just a technique to get you angry and nothing else. When an attorney goes down this road and attacks you in this manner, you should take it as a compliment and smile at them. They obviously are without real ammunition and are grasping at emotions. It is a good sign for the witness. If you are able to maintain your composure during the verbal attack, you will score maximum points with the jury because of your ability to control yourself in the face of adversity.

Patrick Swazy said it best in one his famous movies, “Roadhouse”. He said to his barroom bouncers, “Be Nice, Be Nice, Be Nice, Until You Can’t Be Nice, Then Take It Outside.” Well, we shouldn’t wait on a defense attorney outside the courthouse to even the score but the first part of Swazy’s advice is right on the mark. Kill them with kindness. The louder and ruder they get, the nicer you should become. The more they try to draw you away from the jury and to them, the more you should look and smile at the jury. It will become painfully obvious to the attorney and the jury that you are under control and are going to stay that way. It will take the wind out of their sails faster than anything else you could do.

Remember; don't get mad at the attorney. They have got a difficult job to do and they are sworn to defend their client with all their ability. You want them to do that. It is what makes the system work for all of us.

EXTRA TIPS AND TIDBITS FOR THE CRIMINAL JUSTICE WITNESS:

1. Be careful in the use of analogies to help explain a technical point. If you feel that you are ahead in points or at least holding your own, it is acceptable to use an analogy. If you are getting showed around it will not help you catch up.
2. There is one time, specifically, that jurors do not expect you to look at them, but instead look directly at the attorney when you answer the question. If the attorney, in an attempt to make you angry, directly or indirectly, accuses you of being less than truthful, the jury will lose respect for you as a witness if you look away from the attorney when you respond to the accusation. If you can't look your accuser in the eye when they call you a liar, then they must be right.
3. What's in a name? Most books on the subject of courtroom testimony say that if the defense attorney mispronounces your name, just ignore it and let it go. Surveys of juries indicate exactly the opposite. If you won't defend your name, then what will you defend?
If the attorney calls you by the wrong name, the best thing to do is to go ahead and answer the question and then add "and, by the way, my name is Smith, not Jones." This will show that you are listening and have pride in who you are. It may have been an honest mistake by the attorney. If it was, the attorney will gladly apologize to you. It may have been an attempt to see if you were really listening and to see if you can be pushed around on the witness stand. Don't assume anything. Make the correction.
4. Once you finish testifying it is important for you to know if you are finally excused. The court may ask both attorneys if they are finished with you and if so, the judge will turn to you and tell you that you are finally excused. At that point, you are free to leave the courtroom and courthouse. If the judge does not ask the attorneys, you are permitted to ask the judge if you are finally excused by saying, "Your honor, am I finally excused?" This will generate the questions from the judge to the attorneys and you will be advised at that time. If they do not finally excuse you, you may be required to return to the witness room. If you are required to return to the witness room, do not discuss your testimony with anyone in there. This can get you in serious trouble.
5. If you are finally excused, it is best if you do not return to the courtroom to watch the remainder of the testimony. This may give an improper signal to the jury and it is not

worth the chance. You did your job and it is now time to leave and let the jury do theirs.

6. Testimony is not a life or death situation, unless you are the defendant.

Don't worry, be happy!

SO, WHERE DO YOU GO FROM HERE?

If all you do from this point on is study and apply this seminar material, you will get better as a witness, but there is so much more that you and your agency can do. Testimony skills are critical for a witness and it is imperative that both you and your agency recognize this need and make a conscientious effort to develop a training program. What specifically can be done? An effective witness training program should include the following elements:

1. Audio and video taping of oral presentations. (Critiqued by experienced personnel)
2. Required public speaking engagements. (Short to begin with and extending in length as confidence grows)
3. Go to court and observe several testimonies. (Make notes and ask questions later; watch defense tactics)
4. Develop training sessions with judges, prosecutors, and public defender's office.
5. Develop a practice court program. This can only be effective if the other steps are completed before a moot court. If moot court is the only training received then it can do more damage than good. Be careful. It is possible to emotionally destroy students if this training is not conducted properly. Practice court, or moot court, should be a positive experience in which the student gets the opportunity to practice what they have learned. It is not a time for trainers to show how skilled they are at playing defense counsel.

CONCLUSION:

Through this seminar you should have learned that providing professional courtroom testimony is a learnable skill. It provides an opportunity to grow so much as a person and as a witness. By setting your goals high and striving to succeed as a witness you will gain skills that can be used throughout your career inside and outside the courtroom. It has been an honor and pleasure to share this time and information with you. I wish you well in this endeavor as you teach **your** butterflies to fly in formation!

Ron Smith, President
Ron Smith & Associates, Inc.