

NEW MILFORD POLICE DEPARTMENT



Courtroom Testimony and Demeanor Lesson Plan

Prepared by Officer Steven M. Palmer #462

June 2021 - Version I

Table of Contents

I. Instructional Goals.....2

II. Performance Objectives3

III. Disclaimer4

IV. References5

V. Overview6

 A. What Is Testimony?6

 B. Settings.....6

 C. Course Focus.....6

 D. Primary Goal for An Officer During Testimony6

 E. Confidentiality7

VI. Civil and Criminal Trials8

 A. Definitions.....8

 B. Relevant Parties8

VII. Officer Pre-Trial Concerns and Responsibilities9

 A. Potential Concerns9

 B. Responsibilities9

VIII. Trial11

 A. Officer Attire and Appearance11

 B. Types of Witnesses11

 C. Evidentiary Procedures11

 D. Nature of Questioning11

 E. Officer Demeanor14

IX. Officer Post-Testimony Procedures16

X. Conclusion17

 A. Review17

 B. Questions?.....17

XI. Mock Trial/Practical Exercise18

I. Instructional Goals

This course will cover pretrial responsibilities, personal appearance, courtroom demeanor, and testimony.¹

¹ Connecticut Police Officer Standards and Training Council (POSTC), *Curriculum Goals & Objectives for Lesson Plans, 212 Courtroom Testimony and Demeanor, 22* (August 8, 2020), <https://portal.ct.gov/-/media/POST/CERTIFICATION/Curriculum-Goals-and-Objectives-AUGUST-8-2020.pdf>.; The presentation of this course material will be scaled based on the composition and pre-existing knowledge of the students (i.e. recruit, in-service, etc.).

II. Performance Objectives

The performance objectives for this lesson plan include, in part, the following:²

- Identify the ethical issues which may affect the law enforcement officer as he prepares for or testifies in civil or criminal trials.
- Identify the need to maintain harmonious prosecutor / police relations.
- Identify the need to confer with the prosecutor regarding the case prior to testimony.
- Identify need to check that witnesses are ready for court testimony.
- Identify the need to maintain confidentiality.
- Identify proper procedure for appearance in courtroom including attire.
- Identify proper procedure to present evidence in legal proceedings.
- Identify proper techniques in providing testimony.
- Identify the need to discuss problems regarding a past case that should be corrected in future cases with the prosecutor.
- Identify the relationship between successful prosecution and police reports.
- Identify situations and procedures when an officer may testify in court.
- Identify the pre-trial responsibilities and procedures of an officer.
- Identify non-verbal attributes that affect the officer's testimony.
- Identify proper reaction or response to common tactics used by defense counsel.
- Identify procedures to follow when the officer has completed his testimony
- Demonstrate or critique the use of notes when testifying.
- Identify those areas of special concern when an officer is preparing to testify, or is testifying as a plaintiff in a civil action.

² *Id.*; The information contained within this lesson plan will be continuously updated based on changes in law, policy, training, best practices, and other applicable standards.

III. Disclaimer

The information contained within this lesson plan is for training purposes only. Do not construe or rely upon it as legal advice. Government entities, law enforcement agencies, officers, and others should consult with their legal representative(s) and/or supervisory authority for specific guidance related to any and all of the topics contained herein.

IV. References

The source materials used to prepare this lesson plan were derived, in part, from various government entities, rules of evidence, law enforcement policies and training, and experts in the field of law enforcement courtroom testimony and demeanor and related topics. Each of these references are cited in the footnotes section of this document. These source materials should be consulted directly and fully for more complete information related to each respective topic. The references listed herein, however, are not exhaustive and represent only some of many useful resources pertaining to this subject matter.

V. Overview

A. What Is Testimony?

Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition.³

B. Settings

An officer's testimony may take place in a variety of settings including, in part, the following venues:⁴

- Criminal Trial
- Civil Trial
- Deposition
- Administrative Per Se Hearing

C. Course Focus

This course will focus primarily on an officer's testimony during the course of a civil or criminal trial.⁵

D. Primary Goal for An Officer During Testimony

The primary goal for an officer during testimony should not be to obtain a particular outcome, nor simply to just be competent and tell the truth, but instead for the jury to find him/her credible.⁶

³ Bryan A. Garner, *Black's Law Dictionary*, 5th Ed., Thomas Reuters, 777 (2016).

⁴ See State of Connecticut Judicial Branch, *About Connecticut Courts: Organization of the Courts, Superior Court*, <https://jud.ct.gov/ystday/orgcourt.html> (last visited June 8, 2021) (providing an overview of several of these settings in Connecticut).

⁵ POSTC, *supra* note 1.

⁶ Val Van Brocklin, *Winning Courtroom Confrontations: If you think that WHAT you say on the stand determines whether jurors believe you – think again*, Officer.com (December 26, 2007), <https://www.officer.com/home/article/10249217/winning-courtroom-confrontations> (discussing these issues in the context of law enforcement officers not just surviving testimony/cross-examination, but “winning” courtroom confrontations, and defining credibility as the degree to which the jury believes a witness).; See Michelle M. Heldmyer, *The Art of Law Enforcement Testimony: Fine Tuning Your Skills as a Witness*, Federal Law Enforcement Training Centers (FLETC), 3-4 (April 20, 2018), [the_art_of_testimony_4.20.18.pdf](https://www.fletc.gov/the_art_of_testimony_4.20.18.pdf) (fletc.gov) (detailing the fundamental importance of credibility related to a law enforcement witness's testimony and observing, in part, that at the heart of credibility is truth).

E. Confidentiality

Officers and other witnesses should maintain confidentiality throughout all stages of the trial process by avoiding discussions/communications about the case with unauthorized persons (i.e. other witnesses, jurors, etc.) and/or in locations where unauthorized person may overhear.⁷

If an officer has any questions/concerns about this issue, he/she should consult with their supervisor and/or the prosecutor (or other attorney calling the officer as a witness) for further clarification and guidance.

⁷ See United States Department of Justice (DOJ), *Tips for Testifying*, The United States Attorney's Office, District of Alaska (February 5, 2020), <https://www.justice.gov/usao-ak/tips-testifying> (discussing this issue in the context of witness testimony generally).

VI. Civil and Criminal Trials

A. Definitions

- Civil Trial

A matter in which one party sues another to protect civil, personal, or property rights (e.g. landlord-tenant disputes, automobile or personal accidents, product or professional liability suits, and contract disputes).⁸

- Criminal Trial

A case in which a person (defendant) is accused of breaking the law.⁹

B. Relevant Parties

Some of the relevant parties that take part in civil and/or criminal trials include, in part, the following persons:¹⁰

- Judge
- State's Attorney/Prosecutor (Criminal Trial)
- Defendant
- Defense Attorney
- Plaintiff (Civil Trial)
- Plaintiff's Attorney (Civil Trial)
- Witnesses
- Jury
- Judicial Marshalls
- Others (family members, media, court reporter, public, etc.)

⁸ CT Judicial Branch, *supra* note 4.

⁹ *Id.*

¹⁰ *See id.* (mentioning several of these individuals in the context of various legal proceedings).

VII. Officer Pre-Trial Concerns and Responsibilities

A. Potential Concerns

Several potential concerns for an officer leading up to his/her courtroom testimony may include, in part, the following issues:¹¹

- Public speaking generally.
- Officer may feel like his/her job performance, competence, and/or work product is being unfairly judged or attacked.
- Outcome of the case (e.g. a potentially dangerous person may be set free because of deficiencies/issues/problems with the officer's testimony).
- Unfamiliar environment of the courtroom.
- Embarrassment/poor performance in front of peers and others.
- Potential effects on career.
- Lack of control.

B. Responsibilities

- Set yourself up for success early on in the case by:¹²
 - Conducting a competent investigation.
 - Drafting a thorough and accurate report.
- Be prepared¹³
 1. Thoroughly review the facts of the case by:¹⁴
 - Reviewing case file/reports, materials, and evidence.
 - Visiting the scene (if possible and appropriate).
 2. Contact and/or meet with the attorney calling you as a witness.¹⁵
 - Notes on Prosecutor and Officer Pre-trial Meeting:

¹¹ See Eric Starnes, *Overcoming the Terror of Testifying*, Lexipol (January 4, 2019), <https://www.lexipol.com/resources/blog/overcoming-terror-of-law-enforcement-courtroom-testimony/> (noting several of these issues when discussing courtroom anxiety pertaining to law enforcement testimony).

¹² See *id.* (observing that these preliminary efforts can contribute to the success of an officer's testimony).

¹³ See Heldmyer, *supra* note 6, at 1-3 (discussing, in part, the critical importance of an officer knowing the facts of the case and meeting with the prosecutor in the context of preparing for testimony).

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 1-3 (examining this issue primarily as it relates to an officer meeting with the prosecutor).

- The prosecutor's role in this meeting includes, in part, the following:¹⁶
 - Listening to the facts.
 - Choosing the material facts to include in the officer's testimony.
 - Giving guidance as to the best way to present those facts (he/she will not tell the officer what to say, but may provide advice on how best to say it).
 - Reviewing evidence/exhibits that may be introduced during officer's testimony.
 - Discussing how weaknesses in the officer's testimony may be attacked by the defense, and considering strategies to counter such efforts.
 - Answering any questions that the officer may have about the proceedings.

 - This meeting is also the officer's opportunity to ask questions about his/her testimony and the trial process generally.¹⁷
 - It may be useful for the officer to make a list of questions and/or concerns prior to this meeting.

 - If the officer finds some error before testimony, such as in a report, he/she should tell the prosecutor.¹⁸
3. An officer should know any and all relevant laws, training, and policies and procedures applicable to his/her testimony.¹⁹

 4. Continuously prepare for upcoming testimony through, in part, the following:²⁰
 - Learning from previous testimony.
 - Interactive public speaking engagements.
 - Mock trials.
 - Briefings.
 - Other similar forms of practice and training.

¹⁶ See *id.* at 1-2 (discussing most of these issues).

¹⁷ See *id.* at 2-3 (consult this source directly for the complete list of questions outlined by the author pertaining to this issue).

¹⁸ *Id.* at 16-17.

¹⁹ Starnes, *supra* note 11.

²⁰ See *id.* (mentioning several of these preparation strategies).

VIII. Trial

A. Officer Attire and Appearance

- Requirements pertaining to a testifying officer's attire may be based on department policies and/or court rules.
- If not, seek guidance from supervisor and/or prosecutor.
- A police uniform or business suit is often appropriate.
- Officer should have a well-groomed and professional appearance.

B. Types of Witnesses

- Lay Witnesses

Generally, subject to some limited exceptions, a lay witness must testify from personal knowledge and may not offer opinions.²¹

- Expert Witnesses

An expert witness is someone who, through knowledge, skill, experience, training, or education, may testify in the form of an opinion if they have scientific, technical, or other specialized knowledge that will help the trier to understand the evidence or to determine a fact in issue.²²

C. Evidentiary Procedures

Certain evidentiary procedures will often be dependent on the nature of the trial and the jurisdiction in which it is taking place, among other factors. In addition to those mentioned throughout this lesson plan, the prosecutor or attorney calling the officer as a witness may be able to provide him/her with specific guidance on particular evidentiary procedures that may arise during the course of the officer's testimony.

D. Nature of Questioning

²¹ See Fed. R. Evid. 602 & 701 (taken in combination, these rules describe the need for a witness to have personal knowledge, while also outlining some circumstances in which a lay witness may offer an opinion); See also Steven Lubet and J.C. Lore, *Modern Trial Advocacy: Analysis & Practice*, 5th Ed., National Institute for Trial Advocacy, 193 (2015) (discussing several differences between ordinary, fact witnesses and expert witnesses).

²² See Fed. R. Evid. 702 (consult this rule directly, as well as other Federal Rules of Evidence (FRE) and/or state specific rules, for additional requirements related to this issue); See also Lubet et al., *supra* note 21, at 193-230 (discussing expert testimony).

Regardless of the nature of questioning - i.e. direct examination, cross examination, redirect, recross - an officer (and/or other witnesses) should be aware, in part, of the following guidance pertaining to his/her testimony:²³

- Always tell the truth.
- Do not lose your temper.
- Respond orally to each question (i.e. do not simply nod or gesture).
- Speak clearly.
- If questioned about units of measurement (time, distance, etc.), be sure to specify whether your answer is exact or an approximation, and beware of suggestions by attorneys that may conflict with your recollection.
- Do not exaggerate.
- Be careful responding to “Wouldn’t you agree that...?”-type questions that are not reflective of your own explanations/words.
- Correct your mistakes.
- Don’t volunteer information, only answer the question being asked.
- Be careful of using certainties, such as “all”, “always”, “never”, etc., unless such terms are accurate.
- Stop speaking immediately when a judge interrupts you or when an attorney objects to a question, and wait until the judge tells you to continue before answering.
- Give positive, definite answers when possible (i.e. avoid “I think”, “I believe”, etc. if you can honestly answer with certainty).
- If you don’t know something, then just say so.
- Don’t look to the prosecutor or others for help in answering questions.
- Think before you speak.
 - Listen carefully to the questions being asked.
 - If you don’t understand the question, have it repeated.
 - Do not rush answers, but also be cognizant of unnaturally long delays when answering.
- Explain your answer if necessary.
 - This includes those that cannot be truthfully answered “yes” or “no”.
 - Give the answer in your own words.
- Refer to the Judge as “Your Honor”, and use “Ma’am” or “Sir” to address the attorneys.²⁴

²³ See DOJ, *supra* note 7 (discussing many of these issues in the context of witness testimony generally).

²⁴ Gordon Graham, *How to testify like a professional*, Video Lecture, Police 1/Lexipol (May 25, 2020), <https://www.police1.com/police-training/videos/how-to-testify-like-a-professional-qzosl2RQJc2vYBct/>.

- Wait for the entire question before answering, and do not talk over the attorney or others.²⁵
- Don't guess.²⁶

In addition to the aforementioned guidance, outlined below is more specific information related to each type of questioning, as well as some special considerations pertaining to law enforcement testimony in each context:

- Direct Examination
 - Testimony elicited through non-leading, open-ended questions.²⁷
 - Be a storyteller, do not just recite facts.²⁸
 - Try to avoid police jargon or technical terminology if possible.²⁹
- Cross Examination
 - The cross-examiner is allowed to ask leading questions (i.e. questions that imply/suggest/contain an answer).³⁰
 - Often more adversarial than direct examination.³¹
 - Officer may be able to shift the dynamics of cross-examination by, in part, being polite, setting his/her own pace when answering questions, and controlling voice volume.³²
 - You may sometimes be able to break-up constant “yes” or “no” answers by giving slightly different responses when appropriate.³³
 - Do not agree to anything that you do not know from your own personal knowledge.³⁴
 - A prosecutor's objection(s) may be a signal to the testifying officer that the defense counsel is attempting to ask him/her a question that is outside the scope of the officer's personal knowledge, among other possible issues.³⁵

²⁵ *Id.*

²⁶ *Id.*

²⁷ Lubet et al., *supra* note 21, at 48-49 (see also 45-78 of this source, discussing the issue of direct examination in further detail).

²⁸ See Heldmyer, *supra* note 6, at 3 (further noting that the officer should make his/her testimony as engaging and entertaining as the facts and circumstances allow).

²⁹ *Id.* at 5.

³⁰ Lubet et al., *supra* note 21, at 80-81 (see also 79-136 of this source, discussing the issue of cross-examination in further detail).

³¹ *Id.* at 79.

³² Heldmyer, *supra* note 6, at 7.

³³ *Id.* at 9-11 (noting that this approach can help disrupt defense counsel's tempo and make the officer's responses appear to be less agreeable with the questions/points being offered).

³⁴ *Id.* at 11-14 (noting, in part, that personal knowledge of a fact in this context means ... *you experienced the event – you personally participated, actively or passively. You heard it, saw it, touched it, tasted it, or smelled it with your own senses*).

³⁵ *Id.* at 14, 18-19.

- While unlikely, be aware of various tricks defense counsel may play, such as pretending to read or reference another officer's report and falsely claiming that it contradicts your report.³⁶
- Re-direct Examination
 - Allows counsel an opportunity to respond to cross examination.³⁷
 - Used for a number of purposes, including rehabilitating the witness.³⁸
 - Generally limited to the scope of cross-examination.³⁹
 - Rules of direct examination generally apply; thus, testimony must usually be elicited through non-leading questions.⁴⁰
 - Sometimes followed by recross, then additional redirect, etc.⁴¹

E. Officer Demeanor

- Communication is comprised primarily of non-verbal cues, such as body language; followed by how we say things, such as tone of voice; and lastly by the actual content of what we say.⁴²
- Officers should be cognizant of their attitude and body language when testifying, and take steps to ensure that they are not acting defensively when being questioned.⁴³
- While the perception of each jury member can differ, jury research/consultation experts have identified some behaviors that may decrease a witness's credibility during testimony including, in part, nervous gestures and fidgeting, lack of eye contact with attorney and jury, poor posture (slouching, hunched shoulders, leaning back in chair, etc.), and blocking parts of the witness's body from view.⁴⁴

³⁶ *Id.* at 17-20.

³⁷ Lubet et al., *supra* note 21, at 187-192 (discussing redirect examination and rehabilitation).

³⁸ *Id.* (noting several purposes of redirect)

³⁹ *Id.* at 187-88 (mentioning, though, that some courts are more lenient).

⁴⁰ *Id.* at 188 (although exceptions are sometime allowed).

⁴¹ *Id.* at 187-88.

⁴² See Van Brocklin, *supra* note 6 (citing a study conducted by Dr. Albert Morabian at UCLA several decades ago, and detailing its applicability to law enforcement testimony).; See also Kathleen Balthrop Havener, *Persuasion through Body Language in (and out of) the Courtroom*, American Bar Association (ABA), GPSolo Feature (September/October 2018), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2018/september-october/persuasion-through-body-language-in-out-courtroom/ (discussing the same study in a more recent article pertaining to lawyers understanding and effectively utilizing body language in various settings within their profession).

⁴³ See Van Brocklin, *supra* note 6 (covering these issues and their applicability to law enforcement testimony in greater detail, as well as noting various behaviors that may enhance or weaken witness credibility).

⁴⁴ See Katrina Cook and Merrie Jo Pitera, *How Body Language Can Impact Witness Credibility*, Litigation Insights (January 31, 2018), <https://www.litigationinsights.com/body-language-can-impact-witness-credibility/> (discussing how these and other body language cues can negatively and positively impact the perception of jury members on witness credibility).

- By recognizing these and other similar issues prior to trial, witnesses can take steps to avoid these types of behaviors and possibly increase their credibility in the eyes of the jury by, among other things, making efforts to limit or eliminate nervous gestures and fidgeting (often witness specific), maintaining good posture (sitting up and/or leaning forward slightly during testimony to seem more engaged), and displaying open body language.⁴⁵
- Officers should always appear calm, patient, and mature in the courtroom regardless of the behavior of others (i.e. “be the adult” in every relationship that develops in the courtroom).⁴⁶
- Jurors may be hard to read, but officers can use their training and experience to look for clues that may aid them in evaluating the reaction of jury members and then adjust their testimony accordingly.⁴⁷
- Officers should prepare ahead of time, so that they will not be required to reference reports and/or notes to reflect your recollection of the incident, which may make them look unprepared (unless such references are advisable or necessary).

⁴⁵ *Id.*

⁴⁶ Heldmyer, *supra* note 6, at 4.

⁴⁷ *See id.* at 6 (discussing the issue of reading jury members to look for clues that can then aid the officer in his/her testimony).

IX. Officer Post-Testimony Procedures

- Remain in courtroom?
- Leave courtroom?
- Avoid unnecessary subsequent contact with other parties involved in the case unless otherwise instructed.
- Maintain confidentiality unless otherwise instructed.

X. Conclusion

A. Review

B. Questions?

XI. Mock Trial/Practical Exercise

The practical exercise will include a demonstration of presenting testimony via a Mock Trial,⁴⁸ and may incorporate, in part, some or all of the following stages:⁴⁹

- If time permits, the Mock Trial will be conducted following a scenario-based training exercise simulating some area of law enforcement practical skills (i.e. use of force, search and seizure, etc).
- Officers will then complete a written report regarding the scenario they were involved in.
- Participants in the Mock Trial will review those reports, as well as other available information/resources related to the incident, in preparation for the Mock Trial.
- An attorney will conduct direct examination of the officer related to his/her scenario.
- An attorney will conduct cross-examination of the officer related to his/her scenario.
- Audience members/mock jurors will provide feedback.
- The testifying officers will be debriefed.
- Instructors will provide feedback and guidance to officers/students.
- The Mock Trial may be audio and/or visually recorded so the officers/departments can review.
- Course and mock trial evaluations will be requested from officers/students in order to improve future classes.

⁴⁸ POSTC, *supra* note 1.

⁴⁹ See Robert Magao, *Officer Survival Series: De-Escalation Through Confidence Program*, RLM Training LLC (May 6th - June 24, 2021) (a CT POSTC approved course incorporating, in part, use of force training/scenarios and subsequent officer testimony based on those practical exercises).; See also Van Brocklin, *supra* note 6 (discussing some of these factors in the context of scenario-based training related to this topic).