

# **Mock Trial: Good Testimony vs. Bad Testimony**

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Dissemination is an essential step in the analytic process. As law enforcement analysts, you may be called upon to disseminate your methodology and findings before a grand jury, judge and/or trial jury. Effective communication from the witness stand is an important aspect of your role in criminal investigations and prosecutions.

## **Fundamental Guidelines for Effective Testimony**

### **Preparation**

- Keep detailed records during the investigation regarding your methodology and decision making processes. This will prove to be an invaluable trial preparation tool to refresh your memory as to what you did, and how and why you did it. It can take years for a case to come to trial, do not rely on your memory alone.
- Check and recheck your work, and the work of anyone else upon which you have relied. You do not want to be identifying errors (of any magnitude) behind the scenes during the trial – or worse yet, having the defense identify them for you when you are on the witness stand. Even the slightest error or change can be twisted by the defense to call into question the validity and reliability of your data or conclusions (“how can we trust the rest...?”), your competence (“so, you admit you were wrong when...”), or even your impartiality (“so, your numbers basically changed and grew over time...”).
- Be aware of contradictory evidence and materials that tend to favor a putative defendant. Divulge all exculpatory evidence to investigators and prosecutors. This information must be provided to the defense during discovery.
- Develop useful charts or exhibits to help explain your testimony. Meet with the prosecutor to suggest charts or particular documents which will help the jury understand your methods and results.
- Try to avoid using potentially prejudicial terminology or slang terms during the course of the investigation. It is significantly more difficult to replace a term in your head than it is to replace a term on an exhibit. As you sit on the witness stand explaining your methodology and answering unrehearsed questions, you are far more likely to use terms you have become comfortable using than those you’ve recently been instructed to use to replace them. (For example, you may be instructed to use the benign term “personal joint bank account” in place of the prejudicial term “slush fund”). Do what you can ahead of time to avoid having to alter your vocabulary, or the unnecessary interruption of objections to your wording.
- Be careful to use benign / non-prejudicial terminology on all of your analytical products, and in all your spreadsheets and reports. Be prepared to make last minute adjustments to your exhibits when additional wording and terminology is deemed unacceptable. Most often you will not have convenient access to a computer, a large scale color printer and the host of supplies required to re-do your exhibits during the trial. (Overlaying the permitted words on top of the disallowed terminology by way of Velcro “dots” or Glue Stic may be the quickest and easiest solution).

- Review all aspects of your testimony with counsel: your methodology, decision making processes, errors, omissions and conclusions. Don't hide anything from the prosecutor. This process is rewarding for both parties – while informing the prosecutor it forces you to begin formulating clear and concise explanations.
- Know the government's theories and strategies for the case. Make sure you understand the points the prosecution wants to make through your testimony.
- Make a concerted effort to inform the prosecutors and the investigators as to the types of information you have analyzed. In addition to your testimony, let them know what other types of questions you can answer so that if something relevant comes up they know to come to you.
- Attempt to identify potential weaknesses in your testimony for the prosecution, in order to anticipate the possible tone and direction of defense counsel's cross-examination.
- Thoroughly review your prior grand jury testimony before taking the stand.
- Be prepared. Know the facts. Be careful not to memorize your testimony. Do think about how you will answer questions you expect to be asked.
- Do not exaggerate or downplay your qualifications. It is important to create and maintain a current curriculum vitae (CV). The final product will be more professional and more accurate if you are not forced to create one in a mad rush.
- Don't bring books or magazines with you into the courtroom or up to the stand.
- Be punctual. Better yet, be early! You do not want to appear rushed as you enter the courtroom. Sometimes court schedules need to be altered and you may be called to testify earlier than expected.
- Walk confidently and directly to the stand. Try to visit the courtroom prior to your testimony so that you will be aware of the setup before entering to testify. If possible, watch another proceeding. Observe the interaction of the participants and listen to someone else testify.
- Be ready to be flexible. After you have organized your thoughts and decided upon the best way to explain something to the jury, you may be informed that there are things the judge has prohibited you from mentioning. Additionally, while you are on the witness stand, defense objections may force the prosecutor to lay a more detailed foundation for your opinion than originally anticipated. Be forewarned that externally imposed restrictions may require you to reformulate your answers and explanations on the fly.

### **Appearance and Demeanor**

- Dress neatly, professionally and conservatively. Wearing the appropriate attire will convey the proper respect for the court proceedings. The first impression is important. Don't wear anything too new or too tailored which you will appear uncomfortable in. Do not wear extreme colors or prints. Do not wear fraternal pins, emblems or flashy jewelry. You don't want what you are wearing to become more important than what you are saying.

- Leave your bulky key chain, cigarettes etc at home. Don't chew gum or suck on hard candy or mints.
- Be confident. Do not be cocky.
- Maintain good posture. Appear natural but dignified. Don't slouch, lean back or rock on the stand. Avoid constantly switching positions.
- Be quiet and serious whenever in view of the court or jury. Don't engage in loud conversations or noisy greetings.
- Don't fidget. Be aware of "nervous habits" (hair twisting, nail biting, pen or finger tapping). It is best to keep your hands comfortably folded in your lap or resting in front of you on the witness stand.
- Resist the urge to apologize for your nervousness. Do your best to remain calm.
- Appear objective. Do not express extreme reactions / emotions (sighs, eye rolling, head shaking, laughing).
- Stay calm. Answer respectfully. Be polite. Do not get angry, defensive or argue with the defense.

### **Courtroom Etiquette**

- Tell the truth. Do not color the facts to influence the jury.
- Don't attempt anything in the courtroom that you haven't already tested thoroughly before testifying (utilize equipment you are not familiar with, offer to perform calculations).
- Don't acknowledge anyone in the courtroom immediately before or after your testimony. This may give the jury the impression of bias, or associate you with another's testimony.
- Speak clearly, and loud enough to be heard throughout the courtroom. Don't mumble, nod or shake your head as an answer. Keep your hands away from your mouth.
- Do not bring any notes to the stand which you would not want to be directed to deliver to defense counsel.
- Address the jury when explaining anything at length. Maintain eye contact. Don't turn toward the jury when answering short or "Yes" or "No" questions.
- Look at the questioning attorney. Don't look towards the prosecution when you are asked something by the defense. You don't want to give the impression that you are looking for support, reassurance or permission from the government before you answer.
- Show respect for all court participants. Do not appear to dislike or be annoyed by opposing counsel.
- Remain objective and dignified. Don't be sarcastic, make "wise cracks", or attempt to be humorous. Resist any urge to do so, particularly on cross-examination.

- Give “Yes” or “No” answers whenever possible. Do not volunteer information, elaborate or make gratuitous remarks. If additional information is required or appropriate, the prosecutor will ask for it.
- Don’t answer beyond the scope of the question. Don’t volunteer answers to the questions that *you* think should be asked or that you want to be asked. Trust the prosecutor to ask it, if it is appropriate, at the appropriate time.
- Listen intently. Ask for clarification when necessary. Do not assume that you know the question or just what counsel are looking for.
- Pay attention to court rulings (sustained or overruled objections). Do not talk over interruptions.
- Use simple language and concise explanations whenever possible. Answer as naturally as you can, using your own words. Don’t use slang, technical or profane language.
- Immediately correct wrong or unclear answers.
- Avoid needless qualifiers like “In my opinion”, “I believe” and “I think.”
- Admit if you do not know or can not recall (they are different). Do not guess. If you must approximate, state that up front.
- Be aware that attorneys sometimes ask multi-part or confusing questions. Ask that the question be broken down or rephrased.
- Think before you speak. Do not answer too quickly or blurt out answers. If you don’t understand the question, say so. Ask the question to be repeated or rephrased.
- Turn off your cell phone and pager (do not set phone on vibrate). Never answer your phone or pager in the courtroom.
- Admit and explain mistakes. Don’t try to cover up errors you have made. If you must change your conclusions as a result of error or, more likely, new information, be up front. Explain what you did and why you did it. Do not allow yourself to be put on the defensive.
- Wait until the entire question is asked before you answer the question. Don’t interrupt the examiner. Give the prosecutor time to object and the court time to rule.
- Don’t talk over the questioning attorney. This can be confusing for the court reporter and the jury.
- Ask the judge to allow you to finish an answer if you feel that your interrupted answer was incomplete or left the wrong impression. Address the judge as “Your Honor”, and wait until you are given permission to ask a question.
- Never talk to jurors or defense counsel outside of the courtroom while the case is being tried. Make a concerted effort to avoid them in the cafeteria, elevators and hallways.
- Do not discuss the case or your testimony in the elevator or hallways. Jurors, defense family members and court personnel may be in the area.

## Defense Tactics

- Be prepared to handle cross-examination tactics. The defense is likely to employ various tactics in an effort to convey to the jury that you, and your damaging testimony, cannot be trusted.
- *Undermining your qualifications:* You will most likely be required to provide your curriculum vitae to the defense during discovery, and you will be asked to detail your qualifications on the stand prior to your testimony. The defense may attempt to discredit you and diminish your qualifications or level of expertise in the eyes of the jury.
- *Diminishing your importance as a witness:* The defense may attempt to do this by consistently mispronouncing your name, or speaking to you in a sarcastic tone. Don't get defensive about condescending comments or attitudes. Remain even-tempered. Be courteous even if an attorney is not. If the questions are phrased improperly, ask that they be rephrased.
- *Questioning the veracity of your testimony by implying a bias:* The motivation of summary or expert witnesses can be brought into question by the implication that they are merely puppets of the United States Government, being paid to provide testimony which would benefit their "greedy" and powerful institutional employers.
- *Questioning the accuracy of your data / testimony:* By highlighting any differences between the exhibits presented in discovery and those presented at trial, the defense can argue that these discrepancies "prove" that the evidence was inaccurate and unreliable. The defense can also use these discrepancies to question your impartiality, since the prosecution "told" you to update your analytical products.
- Freely admit that you have discussed the case with the government attorneys prior to the trial. Remember that attorneys are expected to meet with witnesses before trial.
- Do not appear to quarrel with opposing counsel. Be prepared to concede facts or conclusions where appropriate. An objective witness is a credible witness.
- Don't be bullied into answering "Yes" or "No" if the question cannot be answered that simply.
- Don't get lulled into a false sense of security. Always stay alert.
- Don't be provoked into filling the silence with more information than was requested. Complete your answer, and then wait for the next question.
- Be wary of leading questions. Concentrate. Don't allow the defense to confuse you.
- Be wary of compound questions. (For example: "Did you review all of the subpoenaed records and what table did you use to determine the premium rates?") Ask the attorney to restate or breakdown the question.

**Remember that your role is that of a witness. You are not responsible for conducting the trial or for the outcome.**

**Remember that the defense attorney has a role as well. No matter which tactics the defense team employs, stay calm. Do not get rattled, do not be argumentative or sarcastic (no matter how tempted you may become), be honest, be direct, be professional, know your strengths and your weaknesses, and never exaggerate your qualifications or your knowledge.**