CROSS EXAMINING POLICE OFFICERS AND AGENTS: WHO'S IN CONTROL NOW ?

September 25, 2008

1. THE POLICE: WHAT MAKES THEM DIFFICULT TO CROSS EXAM:

- THEIR EXPERIENCE AND COMFORT LEVEL AS WITNESSES
- THEY UNDERSTAND THE COURTROOM PROCESS
- THEY HAVE MOTIVE, AND ABILITY, TO HURT YOU AND YOUR CLIENT.
- THEY TAKE PRIDE IN TESTIFYING

2. OUR ADVANTAGES:

- WE HAVE SOURCE DOCUMENTS - POLICE REPORTS
- THEY MAY NOT BE WELL PREPARED. THEY REVIEW THEIR REPORTS SHORTLY BEFORE TESTIFYING. IT MAY HAVE BEEN SEVERAL MONTHS OR YEARS SINCE THE INCIDENT
- YOU SHOULD KNOW THE FACTS BETTER THAN THE OFFICER
- THEY KNOW THE RULES OF THE COURTROOM - USE THAT TO YOUR ADVANTAGE

3. PREPARATION: GATHER DOCUMENTS AND INFORMATION:

- DISCOVERY
    - POLICE REPORTS
    - MEMO BOOKS (DISCOVERABLE UNDER STATE V. GROH, 69 WIS. 2d. 481 (1975))
    - LOCAL POLICE DEPARTMENTS REQUIRE OFFICERS TO MAINTAIN MEMO BOOKS TO RECORD INVESTIGATIVE INFORMATION
- AGENT AFFIDAVITS FOR CRIMINAL COMPLAINTS AND WARRANTS
- ESPECIALLY IN FEDERAL DRUG AND INTERNAL REVENUE SERVICE

CASES, TRY TO GET AGENT'S PRIOR AFFIDAVITS, THEY ARE A VALUABLE IMPEACHMENT/CONTROL TOOL

- TELL WAR STORY

- AFFIDAVITS ARE TYPICALLY VERY DETAILED. OFTEN EACH AGENT HAS HIS OWN SIGNATURE AFFIDAVIT.

- TRANSCRIPTS
    - PRELIMINARY HEARING
    - MOTION HEARINGS

- VISIT SCENE OF OFFENSE

- SIZE UP THE COP BEFORE HE TESTIFIES. TALK TO THEM.

4. BEFORE YOU BEGIN CROSS ALWAYS ASK "DO I NEED TO CROSS EXAMINE THIS WITNESS?"

- "DID THIS WITNESS HURT MY CASE?" "CAN THIS WITNESS HELP MY CASE?" IF NO TO BOTH, PASS ON CROSS

- THE LAY-LOW APPROACH

- YOU MUST CROSS EXAMINE IF THE WITNESS' STORY, IF BELIEVED, DAMAGES, OR LOSES YOUR CASE

5. SET REALISTIC GOALS - CROSS EXAMINE WITH A PURPOSE:

- DON'T EXPECT TO DRAMATICALLY REVERSE THE WITNESS' TESTIMONY

- TRY TO ESTABLISH SOME ELEMENT OF THE OFFENSE MISSING

- SAVE THE ULTIMATE QUESTION FOR FINAL ARGUMENT. IF YOU ASK THE ULTIMATE QUESTION THE WITNESS WILL FIND A WAY TO DEFLECT THE ANSWER YOU ARE TRYING TO GET.

- **TELL WAR STORY**

6. IF POSSIBLE IMPEACH AT THE VERY START OF THE CROSS EXAMINATION:

- USE CLEANEST, ADMISSIBLE, IMPEACHMENT FIRST

- TELL WAR STORY

- IF USING A REPORT TO IMPEACH: YOU READ THE INCONSISTENT STATEMENT FROM THE REPORT AND MAKE OFFICER AGREE THAT YOU CORRECTLY READ WHAT HE WROTE IN HIS REPORT. YOU WANT TO PUT YOUR OWN TONE AND EMPHASIS ON THE WORDS IN THE REPORT.

- CHART AND DIAGRAMS - DON'T ACCEPT THEIR WORD

- IMPEACH BY HIGHLIGHTING LOGICAL INCONSISTENCIES IN TESTIMONY

- TELL WAR STORY

7. IMPEACHMENT OF COPS BY PRIOR INCONSISTENT STATEMENTS:

- MOVE FROM THE GENERAL TO THE SPECIFIC. DO NOT IMMEDIATELY ASK THE WITNESS ABOUT PRIOR INCONSISTENT STATEMENTS. THEY WILL WIGGLE OUT

- BOX THE WITNESS IN AND CLOSE THE ESCAPE HATCHES. FORCE THE WITNESS TO COMMIT TO EACH COMPONENT OF THE TO BE IMPEACHED STATEMENT BEFORE YOU IMPEACH.

8. WHEN CROSS EXAMINING TO SHOW THAT A FUNCTION WAS NOT PERFORMED, ESTABLISH:

- WHAT SHOULD BE DONE

- OFFICER KNOWS HOW TO DO THE JOB PROPERLY

- ELICIT WHAT WAS DONE AND

- ESTABLISH THAT THE OFFICER DID NOT DO THE JOB PROPERLY

- YOU DO NOT HAVE TO GET ALL OF THIS INFORMATION FROM ONE POLICE WITNESS

9. DEMONSTRATE, TO THE OFFICER, YOUR COMMAND OF THE FACTS:

EXAMPLE:

DESCRIBE THE ENTRY WAY INTO A HOUSE WITH SPECIFIC LEADING QUESTIONS. MAKE IT CLEAR THAT YOU'VE BEEN TO THE SCENE OR KNOW THE SUBJECT MATTER.

THE MORE THE OFFICER THINKS YOU KNOW THE GREATER YOUR CONTROL

10. NARROW THE WITNESS' UNIVERSE OF INFORMATION:

- WHAT REPORTS HAVE THEY WROTE OR REVIEWED
- LIMIT WHAT THEY DID - SAW - HEARD
- ANCHOR THE COPS TO A POINT YOU CAN ALWAYS BRING THEM BACK TO

11. CONTROL THE EXAMINATION - LEAD EVERYWHERE:

- IF THE WITNESS PERSISTS IN ANSWERING LEADING QUESTIONS WITH NARRATIVE ANSWERS, (DON'T HESITATE TO CUT THEM OFF) RESPOND WITH:
    - "I'M SORRY OFFICER , THAT WAS NOT MY QUESTION" THEN REPEAT THE QUESTION
    - CUT THEM OFF WITH "THANK YOU, BUT I ASKED YOU... " OR "EXCUSE ME, THAT WAS NOT MY QUESTION, I ASKED YOU..." THEN REPEAT THE QUESTION
    - END QUESTIONS WITH "OFFICER, YOU CAN ANSWER THAT QUESTION YES OR NO" (I DON'T LIKE TO USE THIS ONE VERY OFTEN)
    - "OFFICER, I DIDN'T ASK YOU THAT. YOU KNOW HOW THIS WORKS", THEN REPEAT THE QUESTION

12. TAKE THE MYSTERY FROM POLICE TESTIMONY, ELIMINATE THEIR "JARGON":

- MANY JURORS SEE POLICE OFFICERS, AND FEDERAL AGENTS, AS LARGER THAN LIFE FIGURES ENGAGED IN HEROIC WORK.
- DO NOT LET COPS USE JARGON TO ROMANTICIZE THEIR WORK TO

ENHANCE THEIR CREDIBILITY.

- WHEN THEY USE PHRASES LIKE "**DECENTRALIZE**" COME BACK WITH REGULAR LANGUAGE SUCH AS "IN OTHER WORDS YOU WRESTLED HIM TO THE GROUND, RIGHT?".

- DO THAT ENOUGH AND THEIR JARGON STARTS TO SOUND SILLY

13. AND MAKE SURE YOU AVOID JARGON:

- WHEN USING REPORTS TO IMPEACH AVOID QUESTIONS LIKE

    - "AND OFFICER YOU ARE REQUIRED TO WRITE REPORTS THAT ARE TRUE, ACCURATE, AND COMPLETE?"

    - IN MY EXPERIENCE, THAT SOUNDS LIKE JARGON TO JURORS

    - RELATE THE TESTIMONY TO COMMON UNDERSTANDINGS

    - ASK ABOUT POLICE TRAINING

    - GET THEM TO AGREE THAT REPORT WRITING IS A HEAVILY EMPHASIZED SUBJECT IN ACADEMY TRAINING.

    - AND ON THE JOB YOU PERIODICALLY GET EVALUATED BY YOUR SUPERVISORS. THEY REVIEW YOUR REPORTS? THEY CHECK TO SEE IF YOUR REPORTS INCLUDE IMPORTANT INFORMATION?

    - YOU KNOW THAT THE DISTRICT ATTORNEYS, AND SOMETIMES EVEN JUDGES, USE INFORMATION IN POLICE REPORTS TO MAKE DECISIONS?

    - YOU ALSO KNOW THAT HOW WELL OFFICERS WRITE REPORTS IS A FACTOR IN PROMOTIONS?

    - IF AN OFFICER SAYS HE DOES NOT KNOW IF REPORT WRITING IS A FACTOR IN PROMOTIONS RESPOND WITH A SKEPTICAL LOOK AND "YOU DON'T KNOW THAT" AND THEN MOVE ON.

14. CONSTRUCTIVE CROSS EXAMINATIONS - SOMETIMES THE POLICE CAN BE YOUR FRIEND:

- FOR INSTANCE, PROSECUTION CALLS AN OFFICER FOR A LIMITED PURPOSE. SOMETIMES YOU CAN USE THAT OFFICER AS YOUR EXPERT (**BUT YOU MUST HAVE A SOURCE DOCUMENT**).

    - SOMETIMES YOU CAN START BY GIVING THAT OFFICER A SIGNAL THAT YOU DO NOT HOLD HIM RESPONSIBLE FOR THIS CASE

        - **DEFINE THEIR LIMITED ROLE**: FOR INSTANCE "YOUR ROLE IN THIS WAS TO ANALYZE THE PHONE RECORDS?"

        - "ASIDE FROM THAT YOU HAD NO OTHER ROLE IN THIS INVESTIGATION, IS THAT CORRECT?"

        - TAKE WHAT YOU CAN GET

        - THE WITNESS MAY BE WILLING TO HELP YOU

            - ESTABLISH A FACT THAT SUPPORTS YOUR THEORY OF THE CASE,

            - UNDERCUT SOME ASPECT OF THE INVESTIGATION

            - IMPEACH ANOTHER PROSECUTION WITNESS

        - OR HELP YOU EDUCATE THE JURY ON A PROBLEM WITH THE PROSECUTOR'S THEORY OF THE CASE

        - OR EVEN TO ENHANCE USE YOUR CREDIBILITY

        - **TELL WAR STORY**

15. NO CHEAP SHOTS:

- DO NOT ASK QUESTIONS THAT LEAVE OUT IMPORTANT FACTS. WHEN THE MISSING FACTS COME OUT ON REDIRECT, YOU WILL LOOK SNEAKY.

- DO NOT ASK QUESTIONS THAT LACK A GOOD FAITH FACTUAL BASIS. A SUSTAINED OBJECTION THAT YOUR QUESTION IS NOT ASKED IN GOOD FAITH IS DEADLY.

- DO NOT ASK (TOO MANY) QUESTIONS THAT ARE OBVIOUSLY OBJECTIONABLE. IF YOUR CROSS EXAMINATION TURNS INTO AN

OBJECTION BATTLE, YOU LOSE.

16. OTHER POINTS:

- LISTEN TO THE DIRECT. DON'T JUST WRITE, YOU WILL MISS SOMETHING USEFUL

- IF THE WITNESS ERRORS ON DIRECT EXAMINATION AND THE PROSECUTOR FAILS TO CLEAN IT UP DON'T DO IT FOR THEM. LEAVE IT ALONE ON CROSS. POINT IT OUT IN CLOSING ARGUMENT

17. OTHER ATTORNEYS STUFF:

- TREAT THEM LIKE THEY TREAT OUR CLIENTS

- GENTLY LEAD THEM ALONG THE PATH OF GETTING THEM TO SAY THINGS THAT ARE USEFUL.

- SHORTEST QUESTIONS POSSIBLE

- SHORT CROSS DIRECT QUESTIONS - NO WIGGLE - SLAP 'EM DOWN

- MAINTAIN CALM DEMEANOR

- LET COPS GET HOSTILE ON TRIVIAL MATTERS

- IF YOU MAKE A MISTAKE - CONCEDE ERROR - APOLOGIZE (MY MISTAKE) AND MOVE ON

- SEQUESTER, SEQUESTER - IF THEY PULL THE COURT OFFICER ROUTINE, ASK THAT THE COURT OFFICER TESTIFY FIRST.

- OTHER ACTS EVIDENCE - POLICE - STATE V. MISSOURI 291 Wis. 2d 466 (2006)

18. SAVE SOME POINT THAT IS CLEAR, FAVORABLE AND UNOBJECTIONABLE TO CLOSE YOUR CROSS:

19. STOP AFTER YOU GET WHAT YOU WANT. DO NOT RUIN AN OTHERWISE EFFECTIVE CROSS BY ASKING TO MANY QUESTIONS:

20. ALWAYS KEEP IN MIND:

- YOUR GOAL IS TO DEFEAT OR NEUTRALIZE EVIDENCE. CHECK YOUR EGO. IF YOU JUST FOCUS ON MAKING THE WITNESS LOOK BAD, THE JURY MAY NOT LIKE THE WITNESS, BUT WILL STILL ACCEPT HIS TESTIMONY.

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