

# Ten Commandments Of Testifying

## Legal Question of the Week

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Welcome to the “Legal Question of the Week” bulletin. Each week, I choose the best legal question I’ve been asked and share my advice on it. This week’s questions have been mostly inappropriate (“Hey Brian, is it true you’re so ugly that when your mama dropped you off at school, she got a ticket for littering?!”) so I’ve decided to create the Ten Commandments of Testifying and discuss them with myself.

Speaking of ugly, I once got a grand jury to indict John Doe for the felony of Assault With A Deadly Weapon, to wit: the ugly stick, Inflicting Serious Injury. I attached a copy of the alleged victim’s photograph. The grand jury took one look and declared that it was a capital offense.

Okay, so that’s not true at all, but I’ve had probable cause for the charge dozens of times. The rest of this bulletin, on the other hand, is very, very true.

### **The Ten Commandments of Testifying**

Those of you who dealt with me during my days as a prosecutor several weeks ago probably did so when called to testify as a witness. Over my eleven years as an Assistant District Attorney, I have tried countless cases in both District Court and Superior Court. I have seen police officers make horrible, embarrassing witnesses, and I have seen police officers win cases single-handedly by simply telling the truth in a clear, engaging, and professional matter. Most of the time, I may not know what I’m talking about – this is not one of those times.

#### **COMMANDMENT #1: Tell The Truth, The Whole Truth, and ONLY The Truth**

The first time you are caught in a lie, a fabrication, or a large exaggeration is the last time you will be successful in a courtroom. We have all been told to tell the truth from the witness stand and there are very, very few officers who would willingly tell a lie when testifying, but it is difficult sometimes to avoid exaggerating what happened or filling in information that you really don’t know. After all, this is your case, right?

First of all, when in a courtroom, try to get away from the feeling that this case is the most important thing in the world to you and you must win it and convict this sorry SOB. This will only cause you to take everything surrounding the case personally and lead to all kinds of bad testimony practices (more on this in #10 below.) When you are objective about your case, you will feel less tempted to testify to something you think you know and only testify to what actually happened.

As an example, I have seen officers quickly build a reputation for untruthfulness because every DWI arrest they ever made sounds exactly the same. Without fail, they testify to a strong odor of alcohol, red, glassy eyes, had trouble getting out of the car, leaned against the car, etc. You will be testifying many times in front of the same judge, or same defense attorneys, or same prosecutors – and they all talk to each other. The officer in this example is not lying, per se – he’s filling in details that he doesn’t actually remember because he didn’t take very good notes. But his credibility is gone anyway.

Don’t exaggerate. Tell the truth, the whole truth, and only the truth.

### **COMMANDMENT #2: Always Be Prepared**

Before taking the witness stand on a case, the officer at the absolute bare minimum should read over his or her report. There is nothing that screams out “Don’t believe me!” like an officer who has to flip through his report to answer even simple questions. Remember that in felony cases, the attorney has been carefully studying not only your report, but also the reports of other officers. Shouldn’t you know more about the case than the defense attorney?

In the more serious cases, being prepared might mean reading through your entire case file, looking at and checking the evidence that you turned into the property room, and possibly visiting the scene to refresh your memory. Jurors aren’t going to listen to you if you act like you don’t remember what happened. Worse, the defense attorney is going to make you look even “stupider” than you feel.

### **COMMANDMENT #3: Watch Your Demeanor**

All the obvious ones apply here: dress appropriately, don’t chew gum, don’t scratch in inappropriate areas. But remember that your demeanor is not only important when you are on the witness stand but when you are in the vicinity of the courthouse. If on the way to the courthouse you ogled the same hot chick or hunk who turns out to become Juror #6 and they didn’t appreciate it...that might affect the case. On the other hand, if you held the elevator for that same person...that might have a better effect.

#### **COMMANDMENT #4: Speak English**

Perhaps at your 10-20, you were 10-19 a 10-50 PI and right after you called for a 10-51, your 10-55 who was 10-73 started a 10-43 which ended in a 10-40. No one – not even officers from other jurisdictions – know what this means. Don't speak in ten codes, even though they sound really cool.

Ordinary people don't "respond" to a location, "activate" lights, "exit their units," or "telephonically contact" someone. A "physical altercation" is a fight and "maintaining visual surveillance" means you watched someone. Speaking a different language impedes communication, and the jury or judge has to understand what you are saying in order to know what happened.

#### **COMMANDMENT #5: Be Respectful**

If the attorney is able to get you so emotionally engaged that you start arguing with him in front of the jury, your credibility will be damaged. If it appears you have a personal stake in "winning" the jury is less likely to believe you. Maintain an even pace, an even tone of voice, and a patient response when the attorney tries to annoy you. Don't interrupt, try to talk over the lawyer or allow anyone to put words in your mouth. Most of all, don't try to get in a battle of wits with the lawyer. Even if you are able to hit the lawyer with a "zinger," you've probably alienated some jurors in the process by being a smart aleck.

There are two extremes to avoid while you're on the witness stand. You don't want to be arrogant and act as if you resent having to testify. However, you also don't want to be timid, giving the impression that you're unsure of yourself and the case. Officers who can find this balance make great witnesses.

#### **COMMANDMENT #6: Don't Volunteer Information**

The nerves that come with testifying and the urge to make sure all the information gets out cause many officers to take a simple question and give a 10 minute narrative response. Especially on cross-examination, you should give the shortest truthful answer that responds to the precise question asked – no less, no more. It is less harmful on direct examination to expand a little, but it is still better to simply answer the question you have been asked.

#### **COMMANDMENT #7: Talk To The Jury**

Having testified myself on occasion, this is probably one of the hardest things to get used to. It seems unnatural or even rude for us to answer a question from someone by turning away from them and talking to another person or group of people. Regardless, learning this simple trick will raise your credibility by a factor of 10.

When testifying in front of a jury, look at the questioner and listen carefully to the question, then look at the jury when you are answering the question. Trust me, it feels more odd than it looks. This way, you are testifying to the jury and they will pay much closer attention to what you are saying. At least most of them are – there's usually one juror who would be asleep even if you went over and poked him with your asp. Don't take it personally.

#### **COMMANDMENT #8: Watch What You Say Outside The Courtroom**

I'll bet the following has happened to most of you, and the ones it hasn't happened to have seen it happen to a "friend."

A defense attorney is talking to you about the case out in the hallway and since he is so friendly, you forget for a moment that he is not your friend. You say something that you think is "off the record" about your case or your star witness. An hour later, you are on the witness stand answering the following, very uncomfortable question: "Isn't it true officer, that you told me out in the hallway this morning that (insert stupid comment here)." The moral of the story: don't say anything to a defense attorney about the case that you wouldn't want to testify to on the witness stand.

#### **COMMANDMENT #9: Be Patient**

Many of you have testified for me in the past. Some of you have had to wait an extremely long time or even come back the next day. This was all part of my master plan to tick off as many people as possible during my short life. That's not it – it really had more to do with the fact that I had a severe handicap when trying a case....I cannot predict the future.

If there was a rule that a defense attorney had to ask only a certain number of questions, it would be easier to tell how long each witness will take. An attorney may ask no questions or he may go on and on for 3 hours with the same witness. But here's the thing – there are very few moments scarier than hearing the defense attorney say "no further questions" and realizing that you are now going to have to explain to a judge and the jury why it is that you don't have anybody to call to the witness stand and now everybody's schedules are thrown off and we're just sitting around looking at each other all because I didn't want an officer to have to wait in court. Trust me – I've been there on more than one occasion and it ain't pretty.

And any DA who has been there will err on the side of caution and have two or three witnesses lined up to call. It is not an attempt to waste your time. Please be patient and understand how things work. It does you no good to whine and complain because you are waiting and it does not reflect well on your professionalism.

On a related note, the prosecutor will try to work with you when you have conflicts in your schedule. However, understand that a good prosecutor has decided what order he wants his witnesses to testify because it is more persuasive, easier to understand, or it lays foundation for evidence to be introduced later. It is difficult many times to work around every class, or daycare issue, or the fact that you worked third shift last night.

## COMMANDMENT #10: Do Not Take It Personally In The Courtroom

Crazy things happen in our justice system. It is the best system yet invented, but it isn't perfect. Criminals go free or they don't get sentenced appropriately. Most of it is outside of your control. Making every case you testify in a life and death struggle between you and the forces of evil actually does more harm than good. Juries want their police officers to be perfectly fair. They are not going to see you as fair if you look like the Tasmanian devil every time you glance at the defense table.

When you are investigating or preparing your case, do everything legally possible to make the best case you can to put away the criminal for as long as possible. Within the bounds of the law, be as aggressive as you can to get the bad guys. When you get to court, there should be no stone unturned and no step untaken.

Once you are in the courtroom, present yourself as professionally and objectively as you can. Just report the facts and leave the rest up to the judge or jury. If the prosecutor or the judge or the jury does something crazy and the criminal gets off, don't take it personally. Make sure that you have done all that you could have done and understand that the rest is out of your hands. If you could have done something better or different, learn from it and move on. Criminals have a way of getting into trouble again. You'll get him next time.

It's not easy. I have on several occasions wanted to strangle jurors who were not convinced by my powerful advocacy skills. It has stuck with me for several days at times. But eventually, you just need to move on and get the next guy.

## WHOOOP, WHOOOP, WHOOOP – WAR STORY ALERT!

One of the best examples I ever saw of an officer getting a defense attorney flustered was back in Durham. I was trying a DWI case against a pretty young lawyer. The defendant was in his thirties, had refused the intoxilyzer, and the attorney was confident that he could get him off. On my direct of the officer, the following exchange occurred:

Me: “And officer, how would you characterize the odor of alcohol coming from the defendant?”

Officer: “Well, it was kind of that ‘old drunk’ smell.”

Now being the shrewd prosecutor that I was, I decided not to ask the officer about that, even though I had no idea what he meant by it. When it was time for cross-examination, the attorney's first question was this:

Attorney: “Now officer, you mentioned that my client had an ‘old drunk’ smell. What did you mean by that?”

Officer: “Well counselor, it wasn't the smell that a college kid has when he's had a few beers. It was an ‘old drunk’ smell. It was a smell that told you that not only was he drunk today, but he was probably drunk yesterday, and would be drunk tomorrow, too.”

After the laughter subsided, the attorney had only a few more questions and the defendant was convicted.

Have a good weekend, everyone!

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