ARIZONA PEACE OFFICER STANDARDS AND TRAINING BOARD
585 - HOUR BASIC CURRICULUM
MODEL LESSON PLAN

LESSON TITLE: COURTROOM DEMEANOR 2.9 **NOVEMBER 2011**

SUBJECT:	Courtroom Demeanor
AZ POST DESIGNATION:	2.9
HOURS:	4
COURSE CONTENT:	An examination of the proper techniques for giving effective police testimony as a witness in court. Preparation, appearance, manner, attitude and use of reference materials are addressed.
PERFORMANCE OBJECTIVES:	Upon completion of this course of instruction, students using notes, handouts and other support materials as references, within the allotted time, will:

2.9.1 Identify the following as steps to be taken in preparing to give court-room testimony.

A. Refresh memory.

B. Ensure professional appearance.

C. When appropriate, contact witness(es).

D. Ensure evidence and relevant reports are accessible.

2.9.2 Identify the following as principles of effective presentation of testimony.

A. Honesty.

B. Brevity.

C. Clarity.

D. Objectivity.

E. Emotional control.

LEARNING ACTIVITIES

2.9.3 The trainee will observe and participate in instructor-led critiques of role-playing exercises designed to ***demonstrate*** effective and ineffective courtroom testimony as a peace officer in response to the following approaches to questioning.

A. Friendly.

B. Badgering.

C. Condescending.

2.9.4 At a minimum, each such critique will address the adequacy of the officer's testimony in terms of the following.

A. Responsiveness to questions.

B. Clarity of expression.

C. Errors of omission.

D. Errors of commission.

E. Overall demeanor.

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REVIEWED – ***REVISED***:	Sgt. James Dear	DATE: October 2000
REVIEWED – ***REVISED***:	SME Committee	DATE: February 2001
REVIEWED – REVISED:	SME Committee	DATE: May 2002
REVIEWED – ***REVISED:***	SME Committee	DATE: October 2006
REVIEWED – REVISED:	Lt. Dave Kelly, Phoenix PD	DATE: August 2009
REVIEWED – REVISED:	SME Committee	DATE: November 2011
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REVIEWED – REVISED:		DATE:
REVIEWED – REVISED:		DATE:
AZ POST – APPROVAL:	Richard Watling	DATE: November 2011
INSTRUCTOR REFERENCES:		
CLASS LEVEL:	Recruit	
TRAINING AIDS:	http://www.azleg.gov/ArizonaRevisedStatutes.asp	
INSTRUCTIONAL STRATEGY:	Interactive lecture/class discussion, role play and demonstration.	
SUCCESS CRITERIA:	70% or higher on a written, multiple-choice examination.	
COMPUTER FILE NAME:	2.9 Courtroom Demeanor	

I. INTRODUCTION

A. Instructor – (self) introduction.

B. Preview of performance objectives.

C. Attention "grabber."

II. GENERAL THOUGHTS

A. Testifying before fact-finders (hearing officers, judges or juries) is a critical part of a peace officer's job.

1. Without testimony, no criminal trial can result in a conviction.

2. The presentation of any criminal case will be strongly affected by the testimony of the police officers involved in the investigation of the incident and the arrest of the defendant.

3. There are things that an officer can do during the investigation to be a better witness when testifying ie. thorough documentation**. ****

****** Remind students of a common philosophy: "If it is not in your report and helps the officer, it did not happen. If it is not in the report and hurts the officer, it happened."

B. The goal of the course is to discuss and demonstrate what an officer may encounter in a courtroom in order to assist officers in being effective witnesses.

C. Officers should understand that only the "close" criminal cases go to trial.

1. Cases in which the evidence is very strong result in plea bargains by defendants.

2. Cases in which the evidence is weak result in either plea bargains or dismissals.

3. It is only the close case, one in which most of the evidence is circumstantial or is itself questionable (e.g., a borderline blood alcohol reading in a DUI) that goes to trial.

4. In such a case, the demeanor and substance of an officer's testimony may make the difference between a guilty verdict and a not guilty verdict.

5. Especially in close cases, a good investigation can be made meaningless by an officer whose testimony is delivered poorly.

D. Pay as much attention to off-stand conduct (appearance, seriousness or demeanor) as on-stand conduct (testimony). It is as important, if not more important.

E. A juror's opinion of a police officer is probably formed long before the first question posed to you, and more than likely, long before you walk into the courtroom. — John Waltman, Non-Verbal Element in Courtroom Demeanor; FBI L/E Journal, March 1984.

1. Up to 93% of what is communicated is done through non-verbal means.

2. An individual's first impression is difficult to change.

3. Nevertheless, you must always remember that the arresting officer is often the first, most important and, in many cases, only witness.

4. The impression you make on the jury is paramount in the case.

F. Officers testify in a number of different settings:

1. Trials. — DISCUSS the officer's role in each of these hearings.

2. Evidentiary hearings.

2. Probation revocation hearings.

3. Grand juries. — DISCUSS those situations in which no attorney may be present to do the questioning or to represent the officers (administrative hearings, civil traffics, certain interviews and depositions).

5. Preliminary hearings.

6. Administrative hearings (e.g., Motor Vehicle Division).

7. Depositions or interviews. The differences between depositions and interviews include:

a. Deposition:

i. Court ordered.

ii. Under oath.

iii. Time and place chosen by defense attorney and then ordered by the court.

iv. Under Arizona Criminal Rules of Procedure, may be granted if the witness is uncooperative in granting an interview. — A.R.Cr.P., Rule 15.3.

b. Interview:

i. Voluntary (not under court order). Understand that this is voluntary, but it is still admissible in court.

ii. Not under oath (though the obligation to tell the truth, of course, remains).

iii. Time and place are agreed to by the witness and the attorney.

iv. Make the attorney ask the questions and testify only to what you know.

c. Prior to the interview/deposition.

i. Check your individual department's guidelines regarding defense interviews and/or depositions.

ii. For example, interviews may be voluntary under the law, but may be required per departmental general orders.

iii. In most cases, interviews are preferable because they are less expensive and because you generally have some control over when and where the interview occurs.

iv. If contacted by a defense attorney, do not do the interview or answer questions over the phone until you review your report.

G. Being truthful and being prepared are both absolutes.

III. PREPARING TO GIVE COURTROOM TESTIMONY

P.O. 2.9.1

P.O. 2.9.1A

A. Refresh memory.

1. Preparation begins with good field work. Write thorough, professional police reports.

a. Otherwise, you will end up saying, "I don't know."

b. The more details, the better.

c. Let the prosecutor know about unusual things; never let the prosecutor get surprised by your testimony.

d. The prosecutor will charge the case according to what you put in the report; it must be complete and accurate.

e. The defense attorney will have access to the report and will assess the strength of the case, at least in part, based on the report.

2. An officer should never testify without first having reviewed any, and all, reports the officer prepared concerning the incident. Obtain a copy of the reports and review them thoroughly.

Note: Same is true of deposition or interview. Never testify without first reviewing all reports.

3. If there is a chance that the testimony will relate to evidence, photographs or witness statements taken by the officer, those items should be reviewed as well.

Be up to date on your procedures and policies regarding obtaining / returning evidence for trial.

4. Pre-trial preparation is key to being an effective witness.

5. Do not try to memorize the report. Memorizing the report will result in mechanical sounding, artificially appearing testimony.

6. Do not wait until you arrive in the courtroom to begin preparations or to read your report. Doing so distracts the prosecutor and leaves you without the opportunity to do the other things listed above that you may need to do to be prepared.

B. Ensure professional appearance.

P.O. 2.9.1B

1. Be punctual.

a. Show up on time. Plan ahead of time where you are going.

b. If you realize you are going to be late, notify the court and/or prosecutor as soon as possible.

c. The case may be dismissed if you arrive late without having contacted someone to let him/her know.

2. If possible, arrive early enough to give yourself time to speak with the prosecutor before trial, in case he/she has any questions. This will give the

prosecutor time to talk to every witness (if necessary) before the rule for exclusion of witnesses is invoked.

3. Always dress appropriately, even on your days off. The prosecutor should never have to worry about how you look; the jury should never be distracted by how you look. Remember the defendant will be dressed up and will look good. Basic rules:

   a. No alcohol.

   b. No gum.

   c. Clean-shaven or trimmed facial hair.

   d. No tight-fitting or low-cut clothes.

   e. Clean and pressed clothes and uniform.

   f. No sunglasses.

   g. No handcuff tie clips or other inappropriate or distracting jewelry.

The rule for the exclusion of witnesses is discussed in Section III.A(11) of this outline.

C. Contact witness(es) – depending on the case, this may or may not be appropriate. In any event, the officer should never contact the defendant.

P.O. 2.9.1C

D. Ensure that evidence and relevant reports are accessible.

P.O. 2.9.1D

1. Bring subpoenaed evidence to court. Make sure you know what evidence the prosecutor expects you to bring and bring it as well.

2. If you are going to need a diagram for your testimony, arrange to have it prepared (or prepare it yourself) in advance of trial whenever possible.

Explain *Subpoena Duces Tecum* (a subpoena which requires a person to produce certain named items in the person's possession or control).

E. When put under oath, stand erect with your right arm at a right angle and speak clearly.

1. When called to the stand, do not look at the prosecutor until you are ready to testify.

2. Sit erect, leaning slightly forward.

3. Your arms should rest comfortably on the arms of the chair or your legs.

4. Do not cross your arms, your legs, clench the chair or exhibit other nervous reactions (i.e., cracking your knuckles, clenching and unclenching your fists).

IV. THE PRINCIPLES OF AN EFFECTIVE PRESENTATION OF TESTIMONY

P.O. 2.9.2

A. The defense attorney has four (4) main avenues of attack: Memory, perception, narration and honesty.

1. Memory – are you recalling details of the incident consistently with how you recalled them when you wrote the report, gave a deposition and talked with a witness? This objection is overcome with preparation, which we have already discussed.

2. Perception – no one perceives an event with 100% accuracy.

   a. We all focus upon some things and miss others.

   b. Your training and experience will assist you in focusing on details that are relevant for criminal law purposes.

   c. Three (3) important aspects to this are:

      i. How long you had to perceive an event (2 seconds? 2 minutes?)

      ii. Whether you had a good vantage point (Direct line of view? Short distance away?)

      iii. Whether you were focused upon the event (Were you doing something else when this happened? E.g., involved in another conversation?)

3. Narration – this is the ability to testify in a manner which communicates information in as under-standable a method as possible. It includes brevity and clarity.

Note: Remember to testify <u>to the jury</u>, not the judge or prosecutor.

4. Honesty – this is whether the trier of fact believes you.

P.O. 2.9.2A

   a. It not only includes honesty, but objectivity and emotional control as well.

   b. If you are not objective, the trier of fact might believe you would “fudge the facts” or even lie outright to get a conviction.

c. If you lose emotional control, the trier of fact might believe you did so during the event in question and took actions based upon emotion, rather than the facts and the law and that now you are hesitant to say so.

B. Honesty. **P.O. 2.9.2A**

1. Tell the truth, the whole truth and nothing but the truth.

2. Never lie – always tell the truth.

   a. Lying puts you on the same level as many criminals.

   b. Lies are hard to remember; you will get caught.

   c. If you lie, you may impact your ability to testify in the future, you may be disciplined or terminated, you may be prosecuted, and your Arizona P.O.S.T. certification may be suspended or revoked.

3. Consider your reputation and duty to the profession.

4. Remember that there are both criminal penalties (perjury) and employment penalties (discipline/ termination/loss of certification) for lying.

5. Do not hedge unnecessarily ("I believe. . . ," "To the best of my recollection"). On the other hand, *never* guess as to the correct answer.

   a. If you do not know the answer, say so. It is appropriate to say that you "don't know" or "do not remember" if that is in fact the case.

   b. Do not guess even if the defense attorney asks you to guess.

6. If you make a mistake in your testimony, correct it.

   a. Do so as soon as reasonably possible, even if the questioning has moved on to other areas and even if you must interrupt.

   a. Doing so enhances your credibility.

Advise trainees that AZ POST has taken the position that an officer who lies may have his/her certification revoked.

7. Do not claim to have an infallible memory.

   a. If you do, you will be "detailed" beyond your ability to recall.

b. You cannot remember everything.

c. If you need to during your testimony, you may be able to refresh your recollection by reviewing your report or another document (e.g., a receipt or another officer's report).

d. Tell the attorney asking the question, that you do not recall the answer to his/her question.

e. The attorney may ask whether reviewing your report might assist you in answering the question or may move on to another line of questioning.

Example:

P: What time did you read defendant his Miranda warning?

O: I honestly cannot remember right now.

P: What, if anything, might help you remember?

O: I wrote down the time in my police report.

P. Your Honor, I request that this be marked as State's Exhibit #1 for identification purposes.

J: It will so reflect.

P. I request permission to approach the witness.

J: Granted.

P: Officer _____, I now hand you State's Exhibit #1 for identification. What is it?

O: It is a copy of my police report.

P: How do you recognize it?

O: My name and serial number appear on the report and it is written in my own handwriting.

P: Would reviewing the report help you

refresh your memory?

O: Yes.

P: Please read the exhibit silently (PAUSE). Have you done so?

O: Yes.

P: Please put the report down in front of you. Is your memory refreshed?

O: Yes.

P: What time did you read the defendant his Miranda warnings?

f. If you are given the report (or other document) to review, you may be asked some questions identifying the document. Then, you will be given a chance to review it and will be given a chance to answer the original question.

8. Admit that you reviewed your report, spoke with other witnesses, reviewed the evidence, etc., before your testimony. There is nothing wrong with preparing to testify.

9. During cross-examination, avoid looking at the prosecutor as if you were looking for answers to the questions. The jurors may think you are looking for help from him/her.

10. Do not claim to be an expert on an issue.

a. In a courtroom, the term “expert” has special meaning.

b. Only the judge can determine who is qualified as an expert witness.

11. In most criminal cases, one (1) party or the other (usually the defense) will “invoke the rule.” Arizona Rules of Criminal Procedure, Rule 9.3.

a. This rule, contained in the Arizona Rules of Criminal Procedure, Rule 9.3, excludes all witnesses from the courtroom during testimony and opening statements.

b. It also requires that there be no communication about the case between the witnesses until all have testified.

c. Exceptions to this rule include the defendant, the victim (who is allowed to be present whenever the defendant is allowed to be present) and one (1) specified "investigator" for each party, who may sit at the counsel table.

d. In most criminal cases, the prosecutor will designate the lead investigative officer as the investigator.

e. Prior to the invocation of the rule, witnesses can speak with one another about the case. After that they can talk, but not about the case.

f. All witnesses are advised that the rule has been invoked by the judge and are advised as to the requirements of the rule.

g. If the rule is violated, the trial will be delayed for a hearing and argument on the violation and the court may hold the witness in contempt for violating a court order, may direct a mistrial in the case and, in some circumstances, may dismiss the case.

h. Note: While the investigator is present in the courtroom, he/she cannot talk to other witnesses or be present when the prosecutor discusses with witnesses.

12. Continuing duty to disclose. As an officer, you have a continuing obligation prior to trial to report any new evidence or witnesses to the prosecutor immediately.

Brady v. Maryland, 373 U.S. 83 (1963). Especially applies to exculpatory evidence.

a. If you do not advise the prosecutor, the court may refuse to allow the evidence or witness to be used at trial.

b. Do not simply ignore a new witness or evidence. You have a continuing duty to investigate and then to advise the prosecutor of your findings. The prosecutor has an ongoing duty to disclose new evidence to the defense.

c. Do not, however, contact either the defendant or the defense attorney as a part of that continuing investigation.

i. If you believe that contacting the defendant is necessary, discuss

the matter with the prosecutor first and then contact the defense counsel and ask to speak with the defendant.

ii. Do not contact the defendant directly.

C. Brevity. Define brevity **P.O. 2.9.2B**

1. Answer only the question that is asked. Do not volunteer information.

2. Be direct and brief, but take the time to answer the question completely.

3. Do not answer "yes" or "no" if the answer requires explanation, even if the defense attorney tells you to do so. If the answer requires an explanation, tell the defense attorney that the question cannot be answered with a "yes" or "no" answer.

4. Relate facts, not conclusions.

   a. Such testimony is objectionable because it invades the province of the jury ("He ran two stop signs, drove at 85 miles per hour and made four lane changes without signaling," is good testimony; "He drove in a reckless manner," draws a conclusion.)

   b. Leave it to the prosecutor to draw the conclusions.

5. Avoid long pauses between questions and answers; the jury or judge is likely to believe that you do not know the answer or that you are making something up. On the other hand, if you need time, take it – do not answer without thinking.

6. Do not begin to answer before the attorney is done talking.

7. Do not assume that you know where the attorney is going with his/her line of questioning.

8. Do not be defensive or argue in an interview or a courtroom.

D. Clarity. **P.O. 2.9.2C**

1. Speak loudly and clearly. Speak up; mumbling or speaking too softly may make it appear that you are uncertain about your testimony, or may bolster a defense argument ("My client performed poorly on the field sobriety tests because he did not hear/

could not understand the officer").

2. Remember that you are on the record (either tape or court reporter).

   a. Pointing to a diagram and saying "here" in answer to a question does not leave a good record for appellate courts of your testimony.

   b. The better testimony is "At the corner of 1st and Main, which I will mark as number 6 on this diagram."

   c. Only one person talks at a time. Do not talk over someone else.

3. When referring to people in your testimony, use their names. It is not, "The first officer on the scene who removed the car from the street," but rather "Officer Ramirez removed the car from the street."

4. Do not nod or shake your head as an answer; answer verbally.

5. Give the prosecutor time to object before you answer. If an objection is made, wait until the judge rules before you answer.

6. If you do not understand a question, ask that it be repeated or rephrased.

7. Watch for compound ("and/or") questions.

   a. An answer that is correct for one (1) part of the question could be wrong for another part of the question.

   b. Example:

      "Officer did you yourself take that packet out of the glove compartment, or did you see any other officer, or anyone else present, take that packet out of the glove compartment and dispose of it?"

   c. This is four (4) questions in one (1):

      1) Did you take it out?

      2) Did you see another officer take it out?

3) Did you see anyone else take it out?

4) Did you see any one dispose of it?

8. Correct any misstatements of fact in a question before answering the question.

9. Avoid police jargon. Try to be conversational in your answers (use, "Got out of my car" instead of "Exited my unit").

10. Refer to the suspect as the defendant.

E. Objectivity. **P.O. 2.9.2D**

1. Remember that you are a *witness*, <u>not</u> an advocate.

   a. Answer all questions truthfully, even if the answer will "help" the defendant's case.

   b. Your job is simply to report the facts.

   c. The judge (or jury) will decide guilt.

   d. In fact, this type of impartial truthfulness demonstrates fairness to the jury and can be argued by the prosecutor as evidence of your credibility to the judge or jury.

2. Avoid all contact with the jury.

   a. <u>Never</u> discuss the case with any juror.

   b. Do <u>not</u> engage jurors in small talk during recesses, even if you are not discussing the case.

   c. If you see any witness, defendant or attorney speaking with a juror, notify the prosecutor immediately.

3. Avoid contact with the defense attorney at the time of trial.

   a. This is an adversarial process.

      i. Do not act as if you are friends with the attorney.

      ii. Do not allow the defense attorney to engage you in a friendly conversation in front of the jury.

b. It is a common defense tactic for the attorney to have a "casual" conversation with you, and then base cross-examination on that conversation. This conversation could also occur right after an interview or deposition.

Be especially aware of conversations around elevators, during lunch breaks, breaks during the trial, and even unrelated small talk with friends.

4. Avoid excessive contact with the prosecutor in front of the jury.

a. Never discuss details of the case with the prosecutor within the hearing of any member of the jury.

b. Doing so not only violates the no contact rule, it is also possible that the juror will believe that the attorney is instructing you on what to say when you testify.

5. Avoid careless comments to anyone – court staff, other witness, etc. Comments such as the angry "Why am I subpoenaed" and the smug "I don't mind being here, I get time and a half," may well be interpreted in a manner you did not intend.

6. Do not mention evidence which has been suppressed or that the judge has ruled is inadmissible.

Note: Upon arrival for trial, you should talk to the prosecutor about this.

a. Doing so will result in a mistrial (the stoppage of the trial) and, in many cases, dismissal of the case against the defendant.

b. If you are asked a question, the answer to which would require you to discuss such evidence, ask for the question to be repeated so perhaps the attorney will rephrase the question.

F. Emotional control.

P.O. 2.9.2E

1. Be calm, courteous and confident.

2. This is especially important during cross-examination.

a. Expect an attack on your investigation,

memory or conclusions.

b. You may also face a personal attack, though such tactics usually backfire on the attorney.

c. The defense will attempt to make you lose emotional control.

3. The defense will attack any conclusions you drew in your investigation.

   a. Remember that it is defense attorney's role to provide the best representation possible for the defendant.

   b. Defense attorneys are limited by both the law and professional ethics as to the nature of their cross-examination; the prosecutor will object if questioning crosses the line.

4. Wait briefly after the defense attorney asks a question. Doing so gives the prosecutor a chance to object and allows you to control the pace of the questioning.

5. We should use the defense attorney to make us better. They make us do better investigations, write better reports, and to testify more effectively. Learn from them and make each case better than the last.

4. Control your reactions to the testimony of others and to rulings by the judge.

   a. This includes non-verbal communication such as rolling your eyes or looking disgusted.

   b. You should always appear interested in the testimony of other witnesses.

   c. Do not stare at a witness or do anything else that might be interpreted as hostile or intimidating.

   d. Judges will remember bad behavior; it can affect the judge's treatment of you and the judge's belief in your credibility in the future.

      Judges speak with other judges and with attorneys. Word about your behavior and actions (good and bad) will spread quickly (reputation).

DISCUSS the role of the defense attorney in the criminal justice system. The state has the burden of proving a person guilty beyond a reasonable doubt; the defense attorney's job is to force the state to do its job. It is important to distinguish between the client and the attorney – representation does not mean approval of the client's conduct.

V. ROLE-PLAYING EXERCISES AND CRITIQUES

LEARNING ACTIVITY

P.O. 2.9.3

A. The trainee will observe and participate in instructor-led critiques of role-playing exercises designed to demonstrate effective and ineffective courtroom testimony as a peace officer in response to the following approaches to questioning:

1. Friendly – here the defense attorney acts as the officer's best friend, trying to get the officer to behave casually and to lose focus on the adversarial nature of the trial or hearing. It is the defense attorney's hope that he/she will be able to catch the officer "off guard" and get the officer to testify in a manner helpful to the defendant's case.

2. Badgering – here the defense attorney is actively hostile toward the officer, asking repetitive questions and seeking to discover even small discrepancies. The defense attorney will seek to portray the officer as intentionally lying or engaged in some illegal and immoral conspiracy just to convict an innocent person.

The instructor should either seek assistance from local prosecutors or prepare himself/herself to perform cross-examination, using each of these techniques.

3. Condescending – here the defense attorney will treat the officer as beneath him/her (and every other decent citizen).

   a. The officer will be portrayed as stupid, or at least "slow" and incompetent.

   b. The attorney will be seeking to demonstrate everything the officer could have done and should have done, if only the officer had the sense to do it.

If available, the instructor may wish to have experienced officers play the part twice in each example, the wrong way and the right way. Or, the instructor may wish to show one (1) of the videotapes available on how to testify.

B. At a minimum, each such critique will address the adequacy of the officer's testimony in terms of the following:

1. Responsiveness to questions.

2. Clarity of expression.

3. Errors of omission.

4. Errors of commission.

5. Overall demeanor.

Once these role-playing exercises are completed, the recruits should be given the opportunity to sit in the witness stand and experience hostile cross-examination. A thorough critique of each such exercise should be done.

If videotape facilities are available, taping a trainee's performance so the trainee can watch himself/herself can be particularly helpful.

VI. CONCLUSION

A. Review of performance objectives.

B. Final questions and answers.

C. Instructor closing comment(s).