

SWGDOG SC 6 – PRESENTATION OF EVIDENCE IN COURT

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Statement of Purpose: These guidelines are not meant to be comprehensive procedures on how evidence is presented in a court of law. Rather, these guidelines provide an overview of issues to consider and a resource of relevant case law to assist the lawyer and the expert witness (i.e., handler, scientist) in the presentation of evidence in court.

INTRODUCTION

The introduction of dogs into policing in the United States in the latter part of the 19th century began largely to combat crime. Dogs were used by patrol officers to track fugitives, and for crowd control. Changing social attitudes towards drugs and their control led to the use of dogs to detect drugs. Many agencies also began to train dogs to detect bombs and other chemicals in arson investigations. Today, dogs are utilized by local, state and federal agencies throughout the country for a variety of purposes in criminal investigations, from tracking, trailing, and human scent discrimination, to substance detection. Such evidence is admissible in a majority of jurisdictions to not only establish probable cause (i.e., in the case of drug detection), but also to identify the perpetrator of a crime (i.e., in the case of human scent discrimination). This evidence, however, may be challenged in court. It is important therefore to establish to the court the reliability of the detector/scent dog team. When such evidence is also relied upon in part to prove the identity of the perpetrator, there must be other evidence to support the accuracy of the identification. The corroborating evidence need not be evidence which independently links the person to the crime. The evidence should be sufficient if it supports the accuracy of the scent discrimination. As a general rule, each dog's ability and reliability is required to be shown on a case-by-case basis. This ability is a fact which, like other facts, may be proven by expert testimony. This testimony should come from the dog handler or trainer, or other qualified expert, who is sufficiently acquainted with the dog, the dog's training, ability and other indicia of reliability. If such person is able to demonstrate specialized expertise in the area of training, tracking or detection, and/or the operational performance of his/her dog, he/she is qualified as an expert to state an opinion as to the ability of the particular dog in question to perform the targeted task.

ESTABLISHING RELIABILITY

Establishing the reliability of a detector/scent dog team is a foundational requirement in cases where dog scent evidence is sought to be introduced as evidence in court. The task of the handler is to provide all necessary information to the attorney handling the matter concerning a specific dog taking part in a given activity (i.e. tracking, drug detection). The preliminary steps in the legal process and the relevant documentation are shown schematically below:

1. Preliminary steps in the process (documentation required)
 - 1.1. Preparation of detector/scent dog team (maintenance and certification records)
 - 1.2. Deployment of detector/scent dog team (incident/search report dependent upon results and/or policy)
 - 1.3. Collection of evidence where applicable (chain of custody records)

1.4. Presenting detector/scent dog team's results (affidavit or testimony protocols)

In determining the weight to be given to such evidence, the court will consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the given activity (i.e. tracking, drug detection). The reliability of a detector/scent dog team can be demonstrated by initial competency, maintenance records and certification as outlined below:

2. Factors used by courts to evaluate the reliability of the detector/scent dog team:

2.1. Regular maintenance training records, which should reflect:

2.2.1. Discipline-related training

2.2.2. The use of masking odors and/or distracting stimuli

2.2.3. The use of varying quantities of target materials

2.2.4. The use of varying training scenarios

2.2.5. Periodic proficiency assessments, including but not limited to, negative control/blank testing

2.2. Operational experience

2.3. Detector/scent dog team's annual certification

Although not required by all courts, the fact that the detector/scent dog team is certified annually will bolster the reliability of the team. The successful completion of an annual certification is one factor, among many, that may be considered by the court in establishing reliability when a dog is being used as an investigative tool to develop reasonable suspicion, establish probable cause, or identify the perpetrator of a crime.

The purpose and practicality of a well defined maintenance program is to ensure the continued operational proficiency of the detector/scent dog team in the field. Regular training is meant to improve and enhance the performance of the team. The written documentation of the dog's ongoing training is an important element in establishing the dog's reliability. Regular maintenance training records document the type and amount of training that the detector/scent dog team has undergone before and after the team's participation in the investigation (i.e., drug seizure, scent identification). Deployment/Utilization logs have limited utility in establishing reliability, other than demonstrating the operational experience of the detector/scent dog team in the field, including confirmed case results. Logs of outcomes from currency sniffs may be used to demonstrate the reliability of the substance detector dog in currency forfeiture cases.

Maintenance training issues that may arise in court include whether the dog is exposed to varying quantities of training substances, masking odors and other distracting stimuli, negative controls/blank testing, and various scenarios in its regular training regimen.

The greatest measure of the team's reliability can be found in documents reflecting the team's regular maintenance training, and results from proficiency assessments and certification.

PREPARING FOR COURT

It is recommended that the handler make available to the attorney handling the matter relevant documentation regarding the detector/scent dog team in a timely fashion. The documentation should include updated copies of the team's resume, maintenance training records, results from proficiency assessments, certification, deployment/utilization logs, including confirmed case results, seizure logs, and any reports that may have been prepared concerning the team's participation in the investigation. If a person other than the handler is testifying as an expert in the case, the expert should provide his/her resume to the attorney handling the matter and review all relevant materials prior to his or her testimony.

It is generally desirable for the handler/expert to meet with the attorney handling the matter before he/she testifies in court to discuss the training and experience of the detector/scent dog team/expert, the circumstances of the case, and the team's participation in the case. The handler/expert should be prepared to discuss at length not only the dog's training and experience, but also his/her own training, education and experience, both in the classroom and the field. Adequate time before the hearing should be set aside for this meeting.

It is not unusual to encounter attorneys who have little to no experience in the area of dog related evidence. It is therefore useful for the handler/expert to have a list of routine foundational questions that are commonly asked in court relating to the qualifications of the expert and detector/scent dog team, the team's participation in the investigation, including collection, handling, and storage procedures that may have been utilized in any given case. A sample list of questions may be found in the attached appendix. The handler/expert should be prepared to address what questions or objections may be expected from opposing counsel during the expert's presentation and discuss them with the attorney handling the matter.

QUALIFYING AS AN EXPERT

Most dog handlers will qualify to testify as an expert as long as the handler can demonstrate sufficient training, education and experience in the targeted task (i.e. tracking, drug detection). It is not unusual, however, for other professionals to testify as experts (i.e. scientists) in this area. Such an expert should be thoroughly familiar with the materials submitted by the dog handler.

Experts draw their expertise from a broad mix of education, training, and experience, and attorneys should try to bring out all three. Having acceptable technical qualifications allows the expert to testify in the form of an opinion and the attorney's role in court is to persuade the fact finder to give credence to the opinion. In this context, demonstrating that an expert is a specialist in the narrow issue before the court is more persuasive than just listing broad qualifications, no matter how impressive they may be.

1. General Qualifications for Experts

1.1. General qualifications

1.2. Specialized knowledge or skill (existing degrees, honors, licenses, practical training, years of experience, relevant teaching and writing, publications, professional internships or apprenticeships, duration of professional practice, and experience in the specific area that helps render the witness competent to offer an authoritative opinion on the subject matter at issue)

1.3. Offices and memberships in professional societies

- 1.4. Previous experience as an expert witness
- 1.5. Practical experience
- 1.6. Certification (explain and amplify what such certification means and what it took to obtain it)
- 1.7. Continuing professional training outside the job, and continuing task-related activities
- 1.8. Relevant professional activities

PREPARING FOR EXPERT TESTIMONY IN COURT

1. When called as an expert witness, the handler/expert should be prepared to address the following areas in court:

1.1. The handler/expert is thoroughly familiar with the dog related scent materials in the possession of the attorney handling the matter and is able to recite from memory detailed aspects of such materials.

1.2. The handler/expert conducted a detailed analysis of the materials, together with the dog's participation in the case.

1.3. The handler/expert is prepared to render an opinion concerning the detector/scent dog team's reliability and provide the basis for such opinion.

1.4. The handler/expert should consider preparing visual aids in order to illustrate the nature of the case (i.e. diagram of a track/trail), as well as any other aspect of the subject matter before the court.

2. A scientific expert shall be thoroughly familiar with and be able to reference the latest literary sources and scientific findings (*such as, quantitative data, results of experiments, etc.*) to support the expert's reasoning and opinion.

If the Court excludes witnesses from the courtroom, this means that, until excused as a witness, all witnesses will remain outside the courtroom except when testifying. The witness should wait in the areas directed by the bailiff unless other arrangements have been made with the attorney who has called them. This rule also forbids witnesses from telling anyone but the attorney what they will testify about or what they have testified to. If witnesses do talk to the attorney about their testimony, they should do so outside the presence of other witnesses and jurors.

ENTERING THE COURTROOM

Always dress in a manner showing proper respect for the court. Business attire/duty uniform is appropriate. Employing the proper dress code may accomplish more in conveying your participation in the investigation than pages of even the best written documentation. The impact of the expert's opinion starts from the moment he/she enters the courtroom ('first impression').

1. The handler/expert should be cognizant of the following when testifying in court:

1.1. Method of courtroom presentation - responses should be brief and concise; when receiving a question look at the attorney asking the question; when giving an answer look at the jury or the attorney who posed the question.

1.2. Pace of speech - in general, the pace of speech should be relatively normal; avoid speaking too quickly; your testimony should not seem ‘rehearsed’ or ‘memorized’; you should be relaxed and natural.

1.3. Voice modulation - to emphasize the most important aspects of your testimony it often makes sense to use voice modulation or to pause before the most important statements. This allows the court and jury to focus on the expert and the information being delivered.

1.4. Vocabulary - when possible, avoid specialized canine industry terminology and/or technical terms unless an explanation in layman terms is provided.

1.5. References to literature - it is often necessary and helpful to make reference to literature and scientific studies to support certain statements and/or the expert’s opinion. If referencing such materials, it is critical to be accurate.

1.6. References to own experience/experiments – any experiments should have a sound scientific basis.

1.7. Always be familiar with and have a thorough knowledge of the factual aspects of the case at hand. Your answers are important and should be based on your knowledge of the case.

APPENDIX

1. Suggested direct examination questions of handler/expert
2. Compilation of state and federal human scent cases
3. Compilation of state and federal substance detection cases