Training Key® #597

Assessing Witness Credibility

During the course of an investigation, assessing witness credibility becomes an essential function in determining how reliable and trustworthy a witness will be. It is the investigator's responsibility to properly analyze a witness's credibility in order to complete a thorough investigation.

There is an adage in conducting investigations that physical evidence does not lie, but people do. This adage is accepted as true because items of physical evidence lack the human characteristics of pride, greed, envy, anger, and lust that motivate people to be deceptive in their actions and words. This ability of human beings to provide false witness necessitates the investigator to take steps to assess the credibility of all witnesses. And although intentional deceptive conduct is troublesome, these intentional acts are not the only assault on witness credibility. Witnesses also get the facts wrong due to their perceptions, beliefs, and cognitive abilities that mislead them into believing what did not occur. These mistaken beliefs may be much more difficult to discern as witnesses may be entirely convinced of their self-deception, even in the face of overwhelming evidence to the contrary.

Investigators should not be automatically inclined to believe the story of witnesses who are interviewed during the course of an investigation. In fact, investigators should recognize that all witnesses are susceptible to error and that they may have reason to be deceitful. Investigators and adjudicators can and should make determinations on a witness's credibility. It is the credibility of witnesses that affects the believability and trustworthiness of their statements and that provides the investigator with a basis to rely on witnesses' statements as factual or to choose between conflicting stories, in order to determine the truth of the matter under investigation.

Credibility then becomes a significant factor in all investigations, and statements are only deemed to be factual propositions if the person making the statement is judged to be credible. It is for this reason that the investigator must understand and properly apply the appropriate criteria for making credibility assessments. Ultimately a credible witness is one who is competent to give evidence and someone who is worthy of belief. In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to see or hear the things that he or she is testifying about, the witness's memory, any motives or bias that the witness may have for testifying in a certain manner, whether the witness said something different at an earlier time, the reasonableness of the statements that have been given and the consistency with other evidence that has been obtained in the case. Simply stated, the investigator should ask, does the witness's testimony make sense in light of all of the facts and circumstances associated with the case?

Because the determination of credibility is so crucial to the outcome of the case, making a credibility assessment requires more than merely asserting the investigator's unreasoned opinion. The grounds for rejecting or disbelieving evidence must be clearly stated with specific and clear reference to evidence items that support the investigator's conclusions. This generally includes an obligation to provide examples of the reasons for not accepting the testimony offered by the witness, and by explaining how and why these reasons impacted the witness's credibility.

To aid the investigator in establishing whether a particular witness's testimony is credible, a number of factors, many of which are subjective, must be assessed. These factors include the following:

- the witness's demeanor;
- the extent of the witness's capacity to perceive, recollect, or communicate;
- the extent of the witness's opportunity to perceive;
- the witness's character and reputation for honesty;

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• the existence or nonexistence of a bias, interest, or other motive;

• a statement previously made by the witness that is consistent or inconsistent with his or her statements;

• the existence or nonexistence of any fact testified to by the witness;

• the witness's attitude toward the action in which he or she testifies or toward the giving of testimony;

• the witness's admission of untruthfulness;

• prior bad acts committed by the witness that are probative of untruthfulness;

• prior inconsistent statements;

• certain criminal convictions;

• the inherent plausibility of the witness's account;

• consistency between the witness's written and oral statements;

• consistency of statements with the physical evidence and other witness's statements;

• the extent to which the witness's statements are corroborated or contradicted;

• consistency with common experience;

• internal consistency;

• the witness's recollection is consistent with established facts;

• the witness's background, training, education or experience affected the believability of the witness's testimony; and

• the witness's detail of the account.

It is only after making these assessments that an investigator may make a credibility determination to believe all of the witness's statements, part of his or her statements, or none of his or her statements.

Demeanor

Demeanor evidence is comprised of nonverbal cues from a witness's gestures or tone of voice. These nonverbal cues can be construed as expressive, meaningful movements that may be interpreted by the investigator to determine the truth of the statements made by the witness. Responses from a witness that are frank and spontaneous are much more likely to be believed than a response that is hesitant or reticent. Similarly, gestures like avoiding eye contact, stuttering, stammering, or actions that are inconsistent with the witness's statements may be used to impeach the witness's statements. For example, if a witness is interviewed immediately after a highly emotional event like witnessing a drive-by shooting, but gives his or her statement in a calm, deliberate and detached way, the investigator may tend to believe that the witness is being dishonest.

Although investigators, judges, and juries appropriately use demeanor evidence; the investigator must be cautious because his or her evaluation of the meaning of a witness's demeanor may be very misleading. Unfortunately for the investigator, an intentionally deceptive witness could effectively use nonverbal cues to deceive the investigator and a truthful witness may be so nervous that they act in a manner that would cause the investigator to believe the witness is being untruthful. Like many of the factors included as part of a credibility assessment, the demeanor of a witness may raise the suspicions of an investigator and may be the basis of further inquiry, but it is a unique case where demeanor evidence alone was sufficient to undermine the credibility of a witness statement in its entirety.

Capacity

Witness capacity refers to the witness's cognitive ability to observe, understand, remember, and relate the events that he or she has sensed either by seeing, hearing, smelling, or touching and his or her physical ability to employ the sense in question. A cognitive or physical deficiency that would have an effect on the witness's ability to accurately relate his or her observations would impact the level of credibility that may be granted to the witness. The key in determining witness capacity is to conduct an inquiry to determine a witness's ability to observe, remember, and recall.

Capacity can be affected by a wide variety of circumstances including physical limitations, mental health issues, or a lessened state of awareness caused by the ingestion of a substance such as a drug or alcohol. Physical limitations that may impact the ability of a witness include a person's vision, or a limitation on any of his or her senses that were employed to perceive the event. For example, if a person requires corrective lenses to maintain a competent level of vision, the investigator must determine if the witness was wearing the lenses at the time of the event. Although the investigator should make a determination of possible physical impairment, physical impairment alone is not a ground to make the witness statements incompetent, rather the extent of impairment is a factor relating to the credibility of the statements made by the witness.

Similarly, the mental health of a witness may affect his or her ability to observe, understand, recall, or communicate his or her perception of the event. Such a cognitive deficiency must be examined to determine the extent of the witness's abilities to establish his or her overall credibility. Other limitations on capacity may be temporary in nature and may have impacted the witness's ability during the event. For example, if the witness was intoxicated to any level by an alcoholic beverage or drug(s), or if the witness had taken any medication that may have affected his or her cognitive ability to observe or comprehend the event, a capacity issue may be raised.

Opportunity to Perceive

The ability of the witness to have seen or perceived what he or she is testifying about is a crucial element to support the credibility of the witness. The opportunity to perceive an event involves much more than the consideration of view obstructions and distance. The degree of attention paid by the witness is also a significant factor. Police officers seek this type of information routinely during their investigations of criminal matters. For example, when someone witnesses a vehicle collision and claims that one of the drivers ran a red light, officers seek to determine when the witness looked at the signal, where the witness was located when they looked at the signal, and the witness's physical and cognitive ability to perceive. In traffic collisions, the sound or sight of the collision is often what brings the witness's attention to the event and in many cases it is only after the collision does the witness look at the signal.

Understanding that it is the event itself that frequently causes the witness to focus his or her attention, a well thought out series of questions will enable the investigator to learn when the witness turned his or her attention to the events and whether the witness had a vantage point to see the events as he or she has described. Questions such as, "Were you surprised, frightened, sleepy, or intoxicated when the event occurred?"

or "Did the event occur rapidly and unexpectedly?" will help the investigator to determine the witness's state of mind just prior to the event to learn if the circumstances were conducive to accurate perception.

To learn the witness's opportunity to hear, see, or perceive the event, the following areas of inquiry should be made:

- the witness's degree of attention;
- the location of the witness compared with the location of the event;
- whether the witness's view was partially or completely obstructed;
- environmental factors like rain, wind, fog, and lighting conditions;
- the level of certainty demonstrated by the witness;
- the length of time between the event and the witness's statements;
- whether the witness's identification was made spontaneously and remained consistent thereafter or whether it was the product of suggestion; and
- the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly.

Character

Another factor used to determine the credibility of a witness is to show that the witness has a character of truthfulness. Courts allow testimony on a witness's character for veracity because the truthfulness of the witness's statements is put into issue when he or she takes the witness stand. In federal court, there are three ways to prove a character of untruthfulness. First, testimony may be offered of specific instances of untruthfulness. Second, testimony may be offered by another witness who has personal knowledge of the target witness. This second witness may testify as to his or her opinion of the target witness. And finally, testimony may be presented by a witness who has knowledge of the target witness's reputation in the community for truthfulness.

A witness's testimony may also be discredited based on certain prior criminal convictions on the presumption that a person convicted of these types of crimes does not possess the values necessary to prevent them from perjuring his or her testimony. Generally the courts will allow this information if the prior conviction involves crimes that include dishonesty or false statements, felonies, or other crimes if the court determines that the probative value of the prior conviction outweighs the prejudicial effect that would be inherent in bringing evidence forward that the witness has a prior felony conviction. Most courts will not allow evidence of prior convictions more than 10 years old to be admitted to impeach a witness's testimony, including evidence of a conviction when the witness was a juvenile.

Character evidence may establish a presumption of dishonesty, but that presumption may be overcome with evidence that rebuts the testimony, or with evidence that tends to corroborate the witness's statements. The introduction of character evidence is therefore not an automatic bar to the witness's statements, but this evidence should be considered as part of the overall credibility assessment. Character evidence, like other credibility assessment factors, may give cause to deem all, some, or none of the witness's statements as trustworthy.

Bias

Bias as a term used to describe a relationship between a party and a witness which might lead the witness to slant his or her testimony either in favor of, or against, a party involved in the matter under investigation. This includes family relationships, compensation of witnesses, pending criminal charges, or anything which would provide the witness with a motivation to lie. The slant in the witness's testimony may be a conscious or unconscious decision that is induced by a witness's like, dislike, or fear of a party; or by the witness's self-interest. Evidence of a bias tends to discredit the witness's testimony and the investigator may properly diminish the value of the witness's statements based on the level of bias that has been discovered.

Evidence of a bias may come directly from the witness's statements as when a witness acknowledges that he or she has some type of relationship with the party involved in the investigation, or when he or she declares any set of circumstances that may create a reasonable motivation to be dishonest. Evidence of bias may also be developed indirectly through other witnesses, documents, or records that reveal a relationship or opportunity exists for some bad purpose by the witness.

In most cases, investigators can effectively deal with witness bias by adjusting the weight that they grant to the statements. Statements from an individual who has a strong bias may be granted little weight or discounted completely. However, statements may be granted significant weight if there is evidence that tends to corroborate the statements, even if the witness displays a bias. Although the finder of fact ultimately has the power to grant or remove weight of a witness's testimony based on evidence of bias, the investigator must document evidence of bias in his or her report to allow the reviewing authority, whether it be the district attorney in a criminal case or the chief of police in an administrative case, to assign weight to the credibility of witnesses as they prepare to try or adjudicate the matter.

Prior Inconsistent Statements

The existence of contradictions or discrepancies in the evidence of a witness's statements is a well-accepted basis for finding a lack of credibility. Statements made by a witness to others before he or she speaks to the investigator may be used to either support or discredit the witness's credibility. If the statements made to the investigator are consistent with the witness's prior statements the consistency would tend to show that the witness is acting in good faith. Alternatively, if a witness makes statements that are inconsistent with his or her prior statements, these changes will likely discredit the witness.

Prior statements by witnesses may be made orally, in writing, or may be statements of others that are adopted by the witness. Adopted statements occur when another person makes a statement and the witness either agrees or disagrees with the statement, or when the witness engages in some nonverbal conduct that indicates that the witness supports or denies the other person's statement, or when the witness remains silent when a reasonable person would have spoken to dispute the statement. Prior statements may also include omissions of material facts from a prior statement by the witness which under the circumstances should have been included in the prior statement.

Inconsistencies, misrepresentations, or concealment of evidence should not lead to a finding of a lack of credibility where the inconsistency, misrepresentation, or concealment is not material to the matter under investigation. It is entirely reasonable that some trivial facts will be omitted, or that a witness will not mention a piece of evidence that he or she believes to be unimportant. The key to making such a determination is whether a reasonable person would believe that the information is both important and material to the investigation.

Inherent Plausibility

A witness's credibility can be destroyed if the witness testifies about a series of events that are beyond the realm of possibility. Consider a complainant in a police misconduct case who insists that the officer implanted a tracking device in the complainant's brain. This factually implausible claim is grounds to discount the complainant's allegations in their entirety. Similarly, consider an eyewitness who misidentifies an individual as a robbery suspect when the identified individual was imprisoned at the time of the crime. The inherent impossibility of a suspect escaping from prison, committing a crime, and then returning to his or her cell, all without being noticed would render the witness's identification useless. Certainly, a later identification of another suspect by the same witness would be called into question, but the witness may still be considered credible to testify to events that occurred at the robbery, particularly when his or her statements are corroborated by other evidence.

When considering a credibility assessment of inherent plausibility, it is generally not sufficient to simply indicate that the witness's story is implausible. The investigator must be able to articulate why the testimony is being rejected and why it is clearly outside the boundaries of reasonableness. Claims that are irrational, farfetched, or highly imaginative require sound analysis that marries the claim with the evidence to reveal inconsistencies. Similarly, extraordinary claims require extraordinary evidence and absent this exceptional evidence the claims may be disregarded.

Corroboration

Corroborating evidence is evidence that is independent and confirms, supports, or strengthens other evidence that renders the existing evidence more probable. Corroborating evidence may consist of two witnesses who testify independently of one another to the truth of the same proposition, or by other direct or circumstantial evidence. Certainly a noteworthy example of the use of corroborating evidence to support a claim was the situation involving former President Bill Clinton and Monica Lewinsky. Lewinsky publicly claimed that she had sexual relations with the president placing the credibility of a young White House intern against the credibility of the president of the United States who vigorously denied the allegations. Ultimately, it was the corroborating evidence of a stained dress that resolved the credibility question in favor of the intern.

Corroborating evidence is perhaps the investigator's strongest tool in his or her search for witness credibility. Evidence that refutes possible discrediting circumstances or that supports the assertions of the witness serve to bolster the witness's testimony, where as evidence that contradicts the witness's version of events aids to undermine the witness's credibility.

Recollection

In deciding whether or not to believe a witness one needs to recognize that people sometimes hear or see things differently and often they do not recall every detail of the event. Even when a witness had an excellent opportunity to observe an event, other factors may impair the witness's ability to recall the facts of the incident accurately. These factors may include the apparent insignificance of the event at the time that it occurred. Later the event may be deemed to be very important, although it may have appeared to have little consequence at the time. Further, the event may be something that is repetitive in the witness's experience and this repetitiveness may have caused the witness not to observe the event as closely as he or she may have otherwise, and the lack of significance may cause the witness to not recall all of the details of the event.

To make a determination whether a contradiction is an innocent misrecollection, lapse of memory, or an intentional false statement, one should consider whether the witness's ability to recall portions of the incident is based on factors like time, ability to perceive, or trivial versus important matters that cannot be recalled. Other factors that may be helpful in making a determination include whether the witness recorded the event in some manner close in time to its occurrence, whether the witness had an opportunity to review his or her notes to refresh his or her memory, or if the witness cannot distinguish this event from other similar events that he or she may have witnessed.

More troublesome than a lack of recollection, particularly in an administrative investigation where a police officer is a witness, is evidence of a selected recollection. Few things will cause an investigator to question the credibility of a witness more than a witness who can only recall those portions of the events that are beneficial and display a dim or faulty recollection of portions of the event that may indicate misconduct. This lack of detail and apparent inability to recall all of the facts that the witness had the opportunity to perceive, may be applied in order to diminish the credibility of the witness.

Witness's Background, Training, Education, or Experience

The witness's background, training, education, or experience can play a role in his or her ability to understand technical or unique factors that he or she may have viewed. For example, an individual with prior police or military experience may have a greater ability to recognize the caliber of a fired weapon from its sound alone, or have the ability to recognize a type of weapon after only catching a glimpse from a distance. Witnesses who have specialized abilities may be granted greater credibility as to their assessments of pieces of evidence that are within their range of skills, as opposed to witnesses who lack these skills or who rely on common experience. These types of witnesses may have a decreased level of credibility particularly when they testify to their observations that appear to be beyond a range of common experience.

Detail

The quantity of detail provided by a witness is a factor in considering the witness's credibility. Generally, a truthful ac-

count is sufficiently detailed as to places, time, and events and can be recounted in a chronological manner. The level of detail in the statement will reveal that some of the facts recounted are both very specific and unique to the event, rather than general statements that may apply to many different events. Investigators are appropriately skeptical of witnesses who can only provide a vague description of the event that they had an opportunity to view, or those who provide an exacting detail to events that they had a poor or incomplete opportunity to observe.

Conclusion

The assessment of witness credibility is an essential function during the course of all investigations. It is the witness's credibility that lays the foundation of the witness's ability to relate his or her observations to others in a persuasive and convincing manner. There are many factors that may serve to diminish or bolster the witness's credibility and cause the investigator to believe all of the witness's statements, parts of his or her statements, or none of his or her statements. It is the investigator's obligation to analyze the evidence and make a determination of credibility based on sound reasoning and provide examples of his or her reasoning as part of an investigative report.

Acknowledgment

This *Training Key* was prepared by Jeff Noble. Mr. Noble is a commander with the Irvine Police Department, Irvine, California, and an attorney licensed in the state of California.

questions

The following questions are based on information in this *Training Key*. Select the one best answer for each question.

1. Which of the following statements is *false* when assessing witness credibility?

(a) The grounds for rejecting or disbelieving evidence must be clearly stated with specific and clear reference to evidence items that support the investigator's conclusions.
(b) It is the credibility of witnesses that affects the believability and trustworthiness of their statements.
(c) Investigators should be automatically inclined to believe the witness's story or account of the event.
(d) Statements are only deemed to be factual propositions if the person making the statement is judged to be credible.

2. Which of the following factors aid the investigator in establishing whether a particular witness's testimony is credible?

(a) The witness's demeanor.
(b) Certain criminal convictions.
(c) Internal consistency.
(d) All of the above.

3. Which of the following statements is *true*?

(a) Responses from a witness that are frank and spontaneous are much more likely to be believed than a response that is hesitant or reticent.
(b) If a witness was intoxicated by alcohol or drugs at the time of his or her observation, a capacity issue will most likely not be raised.
(c) In traffic collisions, the sound or sight of the collision does not bring the witness's attention to the event. The witness's attention is often already there before the collision.
(d) In federal court, there are six ways to prove a character of untruthfulness.

answers

1. (c) Investigators should not be automatically inclined to believe the witness's story or account of the event.
2. (d) All of the above.
3. (a) Responses from a witness that are frank and spontaneous are much more likely to be believed than a response that is hesitant or reticent.

have you read...?

Training Key #561, Anonymous Tips, International Association of Chiefs of Police, Alexandria, VA 22314.

This document provides information on how to properly handle anonymous tips in order to interdict criminal conspiracies and solve crimes.