



# LEGAL DEFENSE TRUST TRAINING BULLETIN

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## IN ANY INVESTIGATION OR TESTIMONY, ALWAYS TAKE TIME TO REVIEW YOUR PRIOR STATEMENTS

A recent case we handled for an officer underscores the need for law enforcement officers to take the time to carefully review any prior statements they have made before testifying about the subject matter of the prior statement, and before giving a subsequent statement about the same events. Sounds simple enough, doesn't it? The idea of refreshing one's recollection from a prior report, statement or recording is so basic, as to hardly require emphasis, right?

Yet, in considering the hundreds of times and myriad of situations I have seen officers and deputies crucified with "prior inconsistent statements" over the past 35 years, I have concluded that the proposition requires review, and most of all, your thoughtful consideration.

So much of what we write about in articles and bulletins, and speak about in seminars, is designed to warn you about dangers, and preserve your professional careers. This is most certainly another one of those. Please take these points seriously. Remembering to do the things we describe in the article which follows can mean the difference from saving, or losing, your career.

Of course, these points, like many of those we have urged upon you before, go to that single, most important peace officer character trait: INTEGRITY. Your *character*, and your *reputation*, for truth, honesty and veracity are as important to your professional career, as is your ballistic vest or body armor to your survival, when someone tries to take you out.

Almost all that we have written before on this subject has been in the form of (1) explaining why dishonesty, however slight or seemingly harmless, is not acceptable; and (2) encouraging you to embrace and practice ethical standards in all that you do. This we have done, by demonstrating that today, more than ever, dishonest words and reports, whether under oath or not, will just *not* be tolerated in any law enforcement organization. An officer or deputy with a poor character or reputation for truth, honesty and veracity is of *no value* to law enforcement.

Over the years, we have heard some colleagues enjoin representatives for officers who are under investigation to "admit nothing, deny everything, demand proof!" This always seems to trigger smiles and chuckles in the audience at seminars. And the reason it does is because it is not serious, or to be taken seriously. But I worry about that when I hear it; *is this the message we want to send?*

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Even if said in jest, doesn't it tend to suggest that it is okay to conceal the truth, at least until that time when you are directly confronted with a question that requires a "yes" or "no" answer? It is risky business, my friends. Most law enforcement officials regard the failure to bring forward pertinent facts reasonably called for in a question, to be as evil as the false affirmative response. "Well, I was never specifically, narrowly,

and directly asked that *particular* question” doesn’t go very far these days to extricate a member from a “false and misleading” charge.

But what about the member who, while not *intending* to deceive, fails through innocent misrecollection, failed recollection, or carelessness to offer an accurate account of an event? While not having the *intent* to lie or deceive, the member nevertheless offers a provably incorrect statement. Is that *lying*? No. Could it be misconduct? Yes. But here is the real question: Might the Chief or Sheriff, or a judge or jury *think* the member is lying? Of course. Truth be told, innocent mistakes in recollection or in testifying can produce disastrous consequences, because someone with the authority to decide, thinks the inconsistencies are *not* “innocent”, but rather willful fabrication.

So, apart from refusing to *lie* about anything in official matters, we need to make sure that our statements, reports and testimonies are as *accurate as possible*. If we can avoid inaccuracy and inconsistency, then our “honest” statements, writings and reports will not be viewed with suspicion and distrust. In other words, don’t permit the opportunity for a decisionmaker to decide whether your incorrect or inconsistent statement is the product of innocent mistake or willful fabrication. Sometimes it is not easy to determine, leading to the possibility that a truly innocent but mistaken member is branded a liar and fired.

Okay, so how to do this? We start with the simple proposition that *human memory is not like fine wine, which gets better with age*. As a trial lawyer and cross-examiner, I am accustomed to both asking and hearing others ask a witness, “So, would you say your memory of the event is better now, three years later, than it was on the date you gave this statement?” When you hear this, you know one of two things has happened; either (1) the witness has *contradicted* his earlier statement and affirmed that his current recollection is accurate, regardless of his prior statements; or (2) the witness has said something inconsistent with his earlier statement, but, as yet, doesn’t realize his testimony is different.

In the first situation, the witness likely will stick with his current testimony, and either explain why his current testimony is more accurate than the statement three years ago, or he will agree with the

examiner that indeed his memory has “improved with age”, which is of course highly improbable because it is inconsistent with human memory and experience.

In the second situation, the witness, once confronted with the prior statement, will probably concede that the earlier statement is more accurate and recant the current testimony – but always, the question could be argued: innocent misrecollection or an attempt to deceive?

Misrecollection and failed recollection are neither uncommon nor alarming. But in a profession that places such a high premium on truth and accuracy, it is important to consider the quest for *accuracy* in statements, testimony and reports, to be second only to honesty. Usually, if members testify, speak or write inconsistently with a prior statement or report, it is because they have not sufficiently prepared for the subsequent statement, testimony or report by carefully reviewing all *previous* statements, reports or recordings. The purpose of this is to refresh the recollection before giving *subsequent inconsistent* testimony or statements.

If we agree that memory doesn’t age well, even over a week, than we must also concede that it is much safer to review and refresh, instead of counting on our unaided memory to recall everything exactly the same at a subsequent time.

A witness who is testifying in a court and who wishes to refresh his memory about an event *before* answering a question will be permitted to do so, so long as the witness can say that the earlier statement or report contains information that will permit the witness to testify more accurately by refreshing the recollection.

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What would you say about a witness who, despite that an earlier statement or report he gave was made when the events were very fresh in his recollection, eschewed the opportunity to review his prior statement or recording, preferring to rely instead on his independent, unaided recollection? Doesn’t a witness, particularly an officer or deputy in official matters, have a duty to make sure his or her testimony is as accurate as possible?

The law recognizes that the quest for truth in official proceedings is enhanced if witnesses refresh their recollections whenever possible. In fact, the Public Safety Officers' Procedural Bill of Rights Act ("POBRA") at *Government Code* § 3303 (g.) specifically provides that if an officer is under investigation and subjected to interrogation, the officer *shall be permitted* to have access to any prior recording or statement (including a summary) he gave, before being interrogated at a second or subsequent time. The purpose of this rule, is to ensure that members are not put to "memory tests" in successive interrogations, creating the potential for inconsistent recollections to be turned into false statements.

Memory is influenced by other variables besides time; for example, exhaustion, stress, emotion, inattention, carelessness, laziness, and many others. Why risk giving inaccurate testimony if there is an opportunity for you to review your prior statements? Would you ever go to court to testify in a criminal case without reviewing thoroughly your arrest report? If not, why do the equivalent in an administrative investigation, or a criminal investigation?

Department managers and association leaders will, I suppose, eternally disagree over whether a "witness" officer or deputy has the right to representation when giving a statement in an investigation. That is not the point of this article. Whether a representative is present or not, if you are providing a written statement, keep a copy or obtain a copy *and* review it carefully before writing, testifying or speaking in an interview at a subsequent time about the event. If you are interviewed in a tape-recorded session, have *your own* tape recorder on, as well, and review the recording carefully before any subsequent interview.

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This is not so that you can perpetuate a false statement. Rather it is to protect you from unjust results of innocent misrecollection or failed recollection. **Look out for yourself – nobody else owns that job.**

**STAY SAFE!**

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**In all cases, before a second or subsequent interview, always demand the opportunity to listen to your previous interview recording before participating in a subsequent interview or interrogation, even if you don't have your own recording.**