

SWGDOG SC 6 – PRESENTATION OF EVIDENCE IN COURT

Posted for public comment 7/10/06 – 9/10/06. Approved by membership 10/2/06.

1st Revision - Posted for Public Comment 5/24/10 – 7/22/10. Approved by membership 9/15/10.

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 (e.g., handler, scientist) in the presentation of evidence in court.

1. INTRODUCTION

The introduction of canines into policing in the United States in the latter part of the 19th century began largely to combat crime. Canines 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 canines to detect drugs. Many agencies also began to train canines to detect bombs and other chemicals in arson investigations. Today, canines are utilized by local, state and federal agencies nationwide 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 (e.g., in the case of drug detection), but also to identify the perpetrator of a crime (e.g., 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 canine 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 canine'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 canine handler or trainer, or another qualified expert, who is sufficiently acquainted with the canine, the canine'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, or the operational performance of his or her canine, he or she is qualified as an expert to state an opinion as to the ability of the particular canine in question to perform the targeted task.

2. ESTABLISHING RELIABILITY

2.1. Establishing the reliability of a canine team is a foundational requirement in cases where scent evidence is sought to be introduced as evidence in court. The task of the handler is to provide all necessary information to the investigating agency and the attorney handling the matter concerning a specific canine taking part in a given activity (e.g., tracking, drug detection). The preliminary steps in the legal process of establishing reliability (documentation is required) follows:

- 2.1.1. Establish the preparation of the canine team using maintenance training and certification records.
 - 2.1.2. Present the canine team's relevant deployment results (affidavit or testimony protocols).
 - 2.1.3. Document the collection of evidence where applicable using chain of custody records.
- 2.2. 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 canine, its trainer, and its handler, together with all the circumstances surrounding the given activity (e.g., tracking, drug detection). The reliability of a canine team can be demonstrated by successful completion of initial training, maintenance training records and certification(s) as outlined below:
 - 2.2.1. Initial and maintenance training records, should reflect:
 - 2.2.1.1. Discipline-related training.
 - 2.2.1.2. The use of masking odors or distracting stimuli or both.
 - 2.2.1.3. The use of varying training scenarios.
 - 2.2.1.4. Periodic proficiency assessments, including but not limited to, negative control or blank testing.
 - 2.2.2. Operational experience.
 - 2.2.3. The canine team's certification(s).
- 2.3. Although not required by all courts, a canine team should be certified on a regular basis which will in turn bolster the reliability of the team. Certifications are one factor, among many, that may be considered by the court in establishing reliability when a canine is being used as an investigative tool to develop reasonable suspicion, establish probable cause, or identify the perpetrator of a crime.
- 2.4. The purpose and practicality of a well-defined maintenance program is to ensure the continued operational proficiency of the canine team in the field. Regular training is meant to improve and enhance the performance of the team. The written documentation of the canine's ongoing training is an important element in establishing the canine's reliability. Regular maintenance training records document the type and amount of training that the canine team has undergone before and after the team's participation in the investigation (e.g., drug seizure, scent identification). Deployment or utilization logs have limited utility in establishing reliability, other than demonstrating the operational experience of the canine team in the field. Logs of outcomes from currency sniffs may be used to demonstrate the reliability of the substance detector canine in currency forfeiture cases.
- 2.5. Maintenance training issues that may arise in court include whether the canine 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.

- 2.6. 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.
- 2.7. Records that may be subject to discovery in court proceedings should be preserved by the canine handler or agency, and /or copies provided to the investigating agency. Those records should include training, certification(s), and other applicable records, up through and including the date of the relevant deployment.

3. *PREPARING FOR COURT*

- 3.1. It is recommended that the handler make available to the attorney handling the matter relevant documentation regarding the canine team in a timely fashion. The documentation should include updated copies of the team's resume, training records, results from proficiency assessments, certification(s), deployment/utilization logs, including confirmed case results, seizure logs, up through and including the date of the relevant deployment, 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 or her resume to the attorney handling the matter and review all relevant materials prior to his or her testimony.
- 3.2. It is generally desirable for the handler or expert to meet with the attorney handling the matter before he or she testifies in court to discuss the training and experience of the canine team or expert, the circumstances of the case, the team's participation in the case and the handler or expert's opinion. The handler or expert should be prepared to discuss at length not only the canine's training and experience, but also his or her own training, education and experience, both in the classroom and in the field. Adequate time before the hearing should be set aside for this meeting.
- 3.3. It is not unusual to encounter attorneys who have little to no experience in the area of canine related evidence. It is therefore useful for the handler or expert to have a list of routine foundational questions that are commonly asked in court relating to the qualifications of the expert and canine 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 or expert should be prepared to address questions or objections that may be expected from opposing counsel during the expert's presentation and discuss them with the attorney handling the matter.

4. *QUALIFYING AS AN EXPERT*

- 4.1. Most canine handlers will qualify to testify as an expert as long as the handler can demonstrate sufficient training, education and experience in the targeted task (e.g., tracking, drug detection). It is not unusual, however, for other professionals to testify

as experts (e.g., scientists) in this area. Such an expert should be thoroughly familiar with the materials submitted by the canine handler.

- 4.2. 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.
- 4.3. General qualifications for experts include the following:
 - 4.3.1. 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.
 - 4.3.2. Offices and memberships in professional societies.
 - 4.3.3. Previous experience as an expert witness.
 - 4.3.4. Practical experience.
 - 4.3.5. Certification - explain and amplify what such certification means and what it took to obtain.
 - 4.3.6. Continuing professional training outside the job, and continuing task-related activities.
 - 4.3.7. Relevant professional activities.

5. *PREPARING FOR EXPERT TESTIMONY IN COURT*

- 5.1. When called as an expert witness, the canine handler or other expert should be prepared to address the following areas in court:
 - 5.1.1. The handler or other expert is thoroughly familiar with the canine related scent materials in the possession of the attorney handling the matter and is able to recite from memory detailed aspects of such materials.
 - 5.1.2. The handler or other expert conducted a detailed analysis of the materials, together with the canine's participation in the case.
 - 5.1.3. The handler or other expert is prepared to render an opinion concerning the canine team's reliability and provide the basis for such opinion.
 - 5.1.4. The handler or other expert should consider preparing visual aids in order to illustrate the nature of the case (e.g., diagram of a track or trail), as well as any other aspect of the subject matter before the court.
- 5.2. 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.

6. COURTROOM DECORUM

- 6.1. 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 admonished witnesses from discussing with anyone but the attorney the content of their prior testimony. If witnesses talk to the attorney about their testimony, they should do so outside the presence of other witnesses and jurors.
- 6.2. Always dress in a manner showing proper respect for the court. Business attire or duty uniforms are appropriate. Employing the proper dress code may accomplish more in conveying your professionalism than pages of even the best written documentation. The impact of the expert's opinion starts from the moment he or she enters the courtroom (i.e., his or her 'first impression').
- 6.3. The handler or other expert should be cognizant of the following when testifying in court:
 - 6.3.1. 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.
 - 6.3.2. 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.
 - 6.3.3. 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.
 - 6.3.4. Vocabulary - when possible, avoid specialized canine industry terminology and technical terms unless an explanation in layman terms is provided.
 - 6.3.5. References to literature - it is often necessary and helpful to make reference to literature and scientific studies to support certain statements or the expert's opinion. If referencing such materials, it is critical to be accurate.
 - 6.3.6. References to own experience or experiments – any experiments should have a sound scientific basis.
 - 6.3.7. 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