

Outside Counsel

# Police, District Attorneys Unveil Statewide Identification Procedures

Kristine Hamann

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In a unique collaboration, law enforcement agencies at all levels of government across New York State have agreed upon new statewide guidelines for identification procedures. The voluntary adoption of the New York State Identification Procedure Guidelines for the showing of photo arrays and lineups to witnesses of crimes was announced on May 19, 2010, by New York State's District Attorneys and all of the state's police agencies. These guidelines will result in reliable and fair identifications that will enhance law enforcement's ability to solve crime and protect the rights of the accused.

The guidelines are the first major project of the District Attorneys Association's Best Practices Committee. The committee was formed to bring together innovative ideas from disparate parts of the state for the first time. It had its initial meeting in September 2009.<sup>1</sup> The Best Practices Committee is made up of district attorneys and experienced assistant district attorneys from 25 counties, including rural, metropolitan and suburban offices.<sup>2</sup> As an example of the difference between the counties on the committee, compare Franklin County with a population of 50,000 residents in 1,700 square miles, to Brooklyn with 2.5 million residents in 97 square miles.

The goal of the Best Practices Committee is to develop best practices for law enforcement, to review innovative initiatives, and to analyze the causes of wrongful convictions and the various recommendations surrounding that issue. The committee has set an ambitious agenda which will include an examination of topics including video recording interrogations, community initiatives, forensic evidence, *Brady* issues and discovery. It is anticipated that in each area, discussions will lead to concrete suggestions for improvement.

The identification procedure guidelines evolved as the Best Practices Committee reviewed the identification procedures currently in place in the over 550 police departments around the state. These departments range in size from the New York City Police Department with 35,000 officers to the Malone Police Department with 10 full-time officers. Practices and resources vary widely across the state. For example, New York City and its closest suburbs use a so-called live lineup, in which the suspect is viewed with four or five similar looking fillers. For the rest of the state, this practice is rarely used. Instead, a photograph of the suspect is put together with five other photographs into a photo array and then shown to the witness.

The committee's review revealed that there was no uniformity in the procedures used, some protocols were not in writing, and training was sporadic. Given the disparity in practice and the fact that identification issues have played a role in some wrongful convictions in New York State,<sup>3</sup> it became clear that identification was a topic worthy of revisiting.

The committee worked to create identification procedures with multiple objectives in mind: accurate identifications of guilty persons, respect for the rights of the accused, protection of witnesses and consideration for the practical realities imposed by location and funding. The guidelines had to be equally relevant and useful in New York City as in Lake Placid, Rochester or Glens Falls.

Many good ideas were found by looking at identification procedures in other states.<sup>4</sup> Studies on eyewitness identification were also part of the analysis. Research has demonstrated that eyewitness identification can be fragile, so that any procedure to elicit a witness' identification must be fair, reliable and free of influence—intentional or unintentional. Social scientists in the field, whose work has been peer-reviewed and published, were consulted.<sup>5</sup> Eyewitness identification is an evolving field of study; nevertheless, the social scientists provided valuable insights and suggestions based on the research to date.

One significant observation we heard from the social scientists, as well as from practitioners around the country, is that voluntary, self-generated protocols, such as the new statewide guidelines, are far more likely to be successfully and uniformly implemented than procedures that are imposed by legislation or executive fiat. Clearly, when law enforcement initiates the reform and is committed to it, the outcome is likely to be positive.

A significant benefit to voluntary guidelines is that the procedures can easily evolve and improve. This is particularly important since there is still much to be learned about eyewitness identification. Inevitably, there will be new ideas about how best to elicit an accurate identification from a witness. Legislated or mandated procedures do not allow for experimentation, improvement or comparative study. In contrast, the new statewide guidelines are already in their second version based on practical input received after they were first released.

With the help of Kate Hogan, District Attorney of Warren County and the 2009 president of the District Attorneys Association, the draft was circulated among the various police agencies in the state. From upstate, the New York State Police, the New York State Sheriffs' Association, and the New York State Association of Chiefs of Police actively participated in providing

suggestions, comments and practical advice. At the same time the NYPD reviewed the procedures and gave constructive suggestions for improving the protocols. As the guidelines progressed, they were presented for input and approval to the Municipal Police Training Counsel, a statewide body that sets standards for police training.

One of the goals of the New York State Guidelines is to protect a witness' memory of the perpetrator from inappropriate influences. Even the best procedures cannot prevent illegal conduct, such as false accusations by a witness, or intentional misconduct by a rogue police officer. However, neutral and fair protocols can minimize any unintentional influence or cuing of a witness.

It is worth noting that from years of experience in dealing with eyewitnesses, Best Practice Committee members have seen that witnesses are motivated by wanting to identify the criminal, not a desire to please the police. Indeed, often witnesses are reluctant to cooperate with police, either from fear or apathy. Nevertheless, no matter what type of witness is called to an identification procedure, it is important to create fair and neutral procedures that are practical, capable of being implemented and that properly capture and preserve the witness' memory of the perpetrator.

#### Summary of the Guidelines

The statewide identification procedure guidelines enhance current lawful practices. They lead an officer from the point where the witness is called by law enforcement to participate in the identification procedure to the completion of the process. As a fundamental principle, the officer must remain neutral in his or her dealings with a witness. The witness is instructed on the procedure before it begins and signs a form acknowledging the receipt of the instructions. When the procedure is over, the witness is admonished not to discuss with any other witness what he or she observed or said during the identification procedure.

The guidelines spell out how to compose a fair photo array or lineup so that the suspect does not stand out in some way that could encourage an incorrect identification. Documentation of the procedure is stressed. The photo array must be preserved, and the lineup must be photographed. Standardized forms require the officer to list the names of the officers involved, the instructions given to the witness, and the responses of the witness.

The procedures can be conducted "double blind" or "blinded." A double blind procedure is one where the officer administering the identification procedure does not know the identity of the suspect. Such an officer cannot provide any inadvertent cues to the witness. Unfortunately, double blind procedures are resource-intensive and can be difficult to achieve in departments or units where all the officers often know the identity of the suspect. Nevertheless, it is expected that pilot projects will emerge around the state to identify how double blind procedures can be practically accomplished.

With the understanding that double blind procedures are not always possible, the guidelines have developed "blinded" procedures that allow the case detective to conduct the procedure in a manner that avoids inadvertent cues. Similar to mechanisms used by social scientists,<sup>6</sup> this is

done in three ways. First the witness is given a series of admonitions, including: "The perpetrator may or may not be present," "Do not assume that I know who the perpetrator is," and "Do not look to me or anyone else in the room for guidance."

Second, the officer must stand to the side of the witness during the procedure to avoid any inadvertent cues. When a photo array is used, the officer must also hand the array to the witness in a folder to prevent any unintentional influence. Third, the guidelines require that the officer not reinforce the identification before, during or after the procedure is concluded.

To preserve the identification, the guidelines require the officer to memorialize the words and gestures of the witness at the time of the identification. The officer is required to record the witness' full responses to three questions: "Do you recognize someone?" "What is the number of the person that you recognize?" "From where do you recognize the person?" It is no longer sufficient for the officer to simply say, for example, "Positive hit."

If the witness provides an answer that is vague or unclear, such as, "I think it is number 3" or "It looks like number 3" then the officer must follow up by asking, "What do you mean by that?"<sup>7</sup> This open-ended, non-leading question is designed to elicit an answer from the witness, uninfluenced by the nature of the question asked. The officer may not confirm the identification, if there is one, and may only discuss next steps in the process after the identification procedure is documented.

### Training and Monitoring

Daylong training on these guidelines is underway throughout New York State. By the end of December, officers will be trained in Rockland, Nassau, Rochester, Albany, Watertown, Buffalo, Binghamton and Syracuse. The training is conducted collaboratively by the Division of Criminal Justice Services and the Best Practices Committee. In New York City, the NYPD is also training its officers and implementing the guidelines.<sup>8</sup>

In many instances this is the first intensive training on identification procedures that some officers have had since the academy. The training includes discussion of the impact of inaccurate identifications on wrongful convictions as well as the importance of avoiding inadvertent influences. The guidelines have triggered a productive, statewide conversation in law enforcement about the importance of fair and neutral procedures.

The Best Practices Committee will monitor implementation of the procedures and will continue to gather suggestions for new methods of conducting identification procedures gleaned from experience and further research.

**Kristine Hamann** is executive assistant district attorney in the Office of the Special Narcotics Prosecutor for the City of New York and chair of the District Attorneys Association's Best Practices Committee. **Patricia Bailey**, Bureau Chief of the Special Litigation Unit, New York County District Attorney's Office, and **Lois Raff**, counsel, Queens District Attorney's Office, assisted in the preparation of this article.

## **Endnotes:**

1. The Best Practices Committee is a sub-committee of the Fair and Ethical Administration of Justice Committee, which is chaired by District Attorney William Fitzpatrick of Onondaga County. This committee has two other subcommittees: the Ethics Committee and the Mutual Assistance Committee.
2. The represented counties are: Albany, Allegany, Bronx, Brooklyn, Broome, Erie (Buffalo), Franklin, Jefferson, Livingston, Monroe (Rochester), Nassau, New York, Oneida, Onondaga (Syracuse), Ontario, Putnam, Queens, Rockland, Saratoga, Schenectady, Sullivan, Staten Island, Suffolk, Warren, Westchester and the Office of Special Narcotics.
3. See Report of the New York State Bar Association's Task Force on Wrongful Convictions (2009).
4. Procedures from Wisconsin, Illinois, Minnesota, Washington D.C., and Massachusetts, among others, were studied.
5. Roy Malpass, Ph.D., Professor, Department of Psychology, University of Texas at El Paso, Brian Cutler, Ph.D., Professor of Criminology, Justice and Policy Studies at the University of Ontario Institute of Technology, Heather D. Flowe, Ph.D., Lecturer of Forensic Psychology, University of Leicester, England; Steven Clark, Ph.D., Professor, Department of Psychology, University of California, Riverside, California.
6. See "Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion," Nancy K. Steblay, Augsburg College; Jennifer E. Dysart, John Jay College of Criminal Justice; Gary L. Wells, Iowa State University, Article in press: Psychology, Public Policy, and Law (2010), p. 26.
7. This procedure used by law enforcement in Washington D.C.
8. As of October 2010, the state identification procedure guidelines have been implemented in eight New York City precincts.