

CHAPTER 14

TRIAL PRACTICE

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14.1 TRIAL PREPARATION

A. Take Time To Prepare - The importance of adequately preparing and organizing a case cannot be over-emphasized. Get in the habit of taking time to prepare. You must know in advance who your witnesses are, the order of their testimony, what exhibits you have, and through which witness you will introduce those exhibits. Research and be familiar with applicable laws and foundations necessary to introduce exhibits.

Know What Is In The Case File - The first step is to review and familiarize yourself with all of the materials in your case file. You should have a number of items, including:

- the alcohol influence report
- police crash report (if applicable)
- supplemental police reports
- officer's notes
- advisement of Miranda forms
- implied consent forms
- administrative per se form
- alcohol concentration test result forms
- chemical test instrument maintenance forms
- chemical test operator certification

- drug influence evaluation report (if DRE evaluation conducted)
- toxicological results, including certification
- medical records
- witness statements
- defendant's statement
- vehicle registration
- defendant's driving record and criminal history
- photographs
- audio and video tapes of defendant during stop, performance of FST's, etc.

Review the case file with the law enforcement officer responsible for its contents to confirm that you have everything. Prosecutors have a duty to provide to the defense a copy of everything that the officer has regarding the case. Kyles v. Whitley, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S.Ct. 1555 (1995).

What To Do After Reading Case File - When you read through the case file, you should:

- Verify that there is evidence that will prove each element of the crime beyond a reasonable doubt.
- Verify that the officer had legal justification for the stop of the vehicle (if not a crash), and had probable cause to believe that each element of the offense was present.
- Verify that the times for the various stages of the DUI investigation are consistent.
- Identify evidence (for example, photographs) that is mentioned in the reports, but is not in your case file.
- Identify witnesses whose testimony will be required to prove the elements of DUI.

After reviewing the case file, you should:

- Gather any evidence that you need, but do not have.

- Decide what your theory of the case is.
- Identify possible defenses and plan strategies for countering them.
- Interview and subpoena witnesses for trial. If the case involves a crash, seek out specific addresses and points of reference in the case, and visit the site. Perhaps the crash was observed by someone living on the street or near the intersection. Contact any ambulance attendants, paramedics, or emergency medical technicians who assisted the crash victims. Such people are excellent witnesses because of their training in the detection of alcohol and/or drug use and may corroborate the officer's opinion.

Sometimes it will be useful to make contact with a bartender who served the defendant on the night in question. At times, party hosts or cocktail waitresses can prove helpful with respect to certain aspects of the case. Bear in mind that such witnesses may be the defendant's friends and their testimony may favor the defense. But it is often useful to find out.

- Prepare jury instructions to propose to the court.
- Plan the various stages of trial: voir dire, opening statement, direct and cross examination of witnesses, responses to motions to dismiss or suppress, and closing argument. (There are sections in this manual that discuss each of these steps in more detail) .
- Organize the items in your case file in a logical consistent manner so that you can find and refer to the evidence as needed.

B. Theory Of The Case

You must develop a theory of the case. The theory of the case is simply your unified approach to all of the evidence that explains what happened. You have to integrate the undisputed facts with your version of the disputed facts to create a cohesive, logical position. Your theory must remain consistent during each phase of trial. The jury must accept your

theory of the case as the truth. Thus, you need a persuasive theory of the case to intelligently select a jury or prepare your opening statement, witness examinations, and closing argument.

How do you develop a theory of the case? First, review the elements of your crime. Second, decide how you intend to prove each of the elements through your witnesses and exhibits. Third, imagine what evidence the defendant will present. Fourth, research all evidentiary issues to maximize the admissibility of your evidence and minimize the defendant's evidence. Finally, try to determine the strengths and weaknesses of both the defendant's and the state's case.

After you do this, you should have a good idea of what evidence will be contested. You should gather as much additional evidence as you can, both direct and circumstantial, to bolster your weaknesses and attack the defendant's theory of the case. After you have reviewed all the evidence you can formulate your theory of the case. Once you have your theory of the case, you should try to determine what the defendant's probable theory of the case will be. This will help you prepare to cross examine defense witnesses.

C. Preparing Witnesses For Trial

Interviewing Witnesses

- Make and Keep Appointments - Once you know the case is going to trial, you should try to interview all witnesses. For most people, this case will be their first exposure to the criminal justice system. You should make every effort to be accommodating when scheduling pretrial interviews with witnesses.

You should attempt to schedule interviews that do not conflict with the witness' work or personal plans. You should keep all appointments.

The importance of interviewing lay witnesses cannot be overstressed. Lay witnesses are the least experienced witnesses. Whereas expert witnesses appear often and police officers may

have had special training in courtroom procedures, lay witnesses called during the case are often testifying for the first time in their lives.

- Reluctant Witnesses - Meet to Avoid Surprises - Occasionally, a witness will be reluctant to be interviewed or testify. Point out that the witness' testimony is necessary to the case and that the only concern is that the witness testify truthfully. Explain that it is good to review questions that will be put to the witness at the trial so that there will not be any courtroom surprises. It is also helpful to talk to the witness about charts, pictures, and other exhibits that may be used at trial. If such an explanation over the telephone fails to secure an appointment, at least request a telephone interview at a time when the witnesses can respond to your questions.
- Acceptable To Discuss Case Before Trial - Tell the witness that it is acceptable to discuss the case with the prosecutor before trial. Some people carry the impression that it is somehow prejudicial to the case to discuss it with anyone prior to trial. The witness must be advised, therefore, that if asked in court whether the case has been discussed with the prosecutor, the witness is to tell the truth.
- Explain The Witness' Importance - After rapport has been developed and the witness' story is told, explain the importance of the witness' testimony to the state's case. Tell the witness where the testimony fits into the case to avoid giving the impression that the witness is only a small cog in some massive machine.
- Discuss Talking With The Defense Attorney - Advise the witness that the defense counsel may want to discuss the case prior to trial, and that the witness may decide whether or not to talk to the counsel. Tell the witness that only the witness can decide whether or not to meet with the defense attorney and under what circumstances that meeting will occur. Explain that should the witness refuse to speak with the defense attorney, this may be used to attack the witness' credibility. Suggest to the witness that you and your investigator would like to be

present to ensure that the interview is reported accurately.

- Consider Having A Witness To The Interview - Finally, if it is anticipated that a witness will be uncooperative or will say one thing in the office and another from the witness stand, have a court officer, investigator or police officer present when meeting with the witness. That person can then testify to a prior inconsistent statement, if necessary.

Preparing Witnesses - What To Do Before Court

- Review Case Report - Review with the witness all events surrounding the case. Analyze possible defenses. Read through all statements or reports in the case file with the witness and check them for accuracy. Add any notes that can be useful to your case and build questions to ask the witness at trial. Clear up any contradictions, inconsistencies, and questions you may have after a thorough reading of the reports or statements.
- Discuss Trial Procedures - Familiarize the witness with trial procedures to help reduce any uncertainty or potential for courtroom surprises. Provide instructions on how to find the courthouse, and familiarize the witness with the physical layout of the courtroom including the location of the witness stand, the jury box, and the podium.

Explain trial chronology and identify the examinations that will be encountered, i.e., direct examination, cross examination, redirect, and recross. It is often helpful to point out how each is progressively limited in scope by the preceding one.

- Let The Witness Read Prior Statements - Allow the witness to read prior statements and become familiar with each statement as a means of preparing for trial. Let the witness see any physical exhibits that the prosecutor intends to use at the trial. It is important to go through the foundation questions, if any, that will be asked about the exhibit and ensure that the witness is able to identify each important aspect of such exhibits — spatial relationships, directions, lighting, visibility, and

placement of critical items within the diagram.

- Discuss Diagrams - If the witness will be testifying with a diagram, be sure that the witness knows exactly how the diagram and the events fit together. It is essential for the witness to understand the concepts and computational techniques of the diagram. For this reason, it is essential that the witness should see the diagram before testifying.
- Review Opinion Of Impairment - Review with the witness any opinions regarding the defendant's state of alcohol or other drug impairment, and be certain that the witness can articulate a sound basis for any opinions expressed.
- Review Estimates - If the witness' testimony is important as to estimates of time, distance, speed, or unusual circumstances, be sure to thoroughly discuss in advance the details so that they are firmly planted in the witness' mind. Advise the witness to return to the scene of the crime to refresh the witness' memory of the environment. If it is possible, go with the witness — seeing the scene may raise an issue that you should discuss with each other.
- Practice Testimony - After key elements of the testimony are reviewed, it is often productive, particularly with essential witnesses, to go through a short role-playing situation during the pretrial meeting, simulating what the witness will actually experience on the witness stand during direct and cross examination. It may be helpful to question the witness in a manner similar to that used during trial.
- Discuss Estimates - If the witness' testimony will involve an estimation of time, distance, or speed of travel, try to pin down the details. If the witness will be pointing to an object in the courtroom to show or demonstrate a distance, test the witness' ability to do this accurately. Test the witness' ability to accurately describe things by asking how tall or how old the witness thinks someone is. It is also important to find out about the witness' eyesight, hearing, and senses prior to trial.

- Prepare For Cross Examination - Prepare the witness for cross examination. Prepare the witness for any special techniques that the defense attorney has used before. Tell the witness that, on cross examination, the defense attorney may attempt to show:
 - Bias or prejudice of the witness for or against the defendant
 - Motive(s) of the witness to lie
 - Inability of the witness to recollect at the present time
 - Inability of the witness to observe or hear at the time in question
 - Unfavorable background or character of the witness
 - Inconsistencies in the testimony given
 - Inconsistencies or variances found in the witness' prior statements, either oral or written
 - Inability to explain an answer (by limiting the witness to a yes or no answer)

Discuss with the witness ways to respond to these attacks.

- Dress Appropriately - Advise witnesses to dress appropriately for their role and responsibility. Depending on the jurisdiction, police officers may wear either their uniforms or regular clothes. If firearms are not permitted in the courtroom, make sure that the police officer witness is informed to secure any firearms outside the courtroom.

Lay witnesses should wear clothing appropriate for court. If that is not clear, explain that the witness should wear clothing suitable for church or a funeral. If you are concerned about what the witness might choose, ask the witness to bring the clothing to your office before the trial so you can review it.

- Learn The Witness' Weaknesses - Discuss any areas of vulnerability and discourage the witness from holding back any information at this time. You might also learn about any bias, special interest, or past criminal record, and make notes of any such facts that could be used against the witness by defense counsel.

Preparing Witnesses - Manner Of Testimony

- Tell The Truth - In addition to what is said by the witness at trial, the manner in which testimony is given during direct and cross examination will contribute greatly to the witness' credibility. First and foremost, advise the witness to tell the truth. The jury will see through lies, exaggerations, and hedging.
- Answer The Question Asked - Caution the witness to listen to the entire question. If the witness does not hear or understand it, he or she should ask that it be repeated or rephrased. The witness should answer the question completely, then stop. Normally, the witness should not volunteer any information, but can say "May I explain?" Advise the witnesses to be concise and expressive.
- Correct Mistakes - It is a good idea to remind the witness that everyone makes mistakes and, if during testimony the witness makes a mistake, it should be immediately corrected. The witness should admit when he or she either doesn't know or remember something. The witness may feel comfortable offering an estimate or a range if a distance, time, or other measurement is requested.
- How To Handle Objections - Explain to the witness what to do if one of the attorneys objects to the testimony. The witness should immediately stop talking, and should answer the question only if the judge or the examining attorney tells the witness to answer it.
- Do Not Argue With Attorneys - Urge the witnesses to never compete with the defense attorney on cross examination. Some will try, though most will lose in the attempt. The witness should not try to figure out why the attorney is asking something, but should just answer the question. Generally, witnesses should treat both attorneys the same way — with courtesy and honesty.
- Personal Knowledge - Caution the witnesses to always testify

to facts and events personally observed. (This does not apply to the expert witnesses.) The facts include what was actually seen, heard, smelled, touched, or tasted by the witness.

- Speak Loudly - Ask the witness to be sure to speak loudly enough for everyone, particularly the jurors, to hear. Ask the witness to remember that a person's voice often drops when she is looking at exhibits or standing at a blackboard, so she needs to make a special effort to speak loudly.
- Discuss Refreshing Recollection - If applicable, explain methods for refreshing the witness' recollection, in case part of the testimony is omitted or forgotten. If there are prior statements made by the witness, clarify any inconsistencies without putting words in the witness' mouth.
- Do Not Memorize - Advise witnesses to avoid memorizing what they intend to say at trial or sounding like what they think a witness should sound like.
- Use Plain Language - Encourage witnesses to talk in plain language, using their own words. They should not try to impress, make speeches, or do anything other than respond to questions posed in as direct and unaffected manner as possible. The statement that "I walked over to the defendant's car" is preferable to saying "I then proceeded to the defendant's vehicle." Advise the witness to avoid profanity.

Expert Witnesses

- Learn the Expert Witness Rules - Ordinarily, witnesses can testify only as to what they have personally observed relating to a particular case. However, an expert witness, an individual who has superior knowledge of a subject, is given the opportunity to share that special knowledge with the court. You should be familiar with the evidence rules on expert witnesses that apply in your jurisdiction.

Expert opinion is usually admissible only on matters requiring some special skill, experience or education. If the trier of fact

can reasonably be expected to arrive at a conclusion from facts admitted at the trial, then expert testimony is not admissible. One characteristic that distinguishes experts from other witnesses is that an expert is not required to testify from personal observation.

- **Jury Is Not Bound By The Expert's Opinion** - Although an expert witness may be allowed to give an opinion as to the ultimate facts in a trial (for example, whether or not the defendant was impaired), the jury is not bound to accept the testimony or opinion of an expert. The court should not tell the jury what weight it should give to any expert testimony. Determining the credibility of the witness and what weight to give to the testimony are matters exclusively in the jury's domain.
- **Get The Expert's Resume** - A person who testifies often in court as an expert will usually have a resume, sometimes called a curriculum vitae or CV, that outlines the expert's training, experience, and publications. You should ask your expert to give you a copy of the resume before court and become familiar with it.
- **Interview Expert Before Trial** - It is important to interview the expert witness before the trial. You should have copies of all relevant case reports available for the expert well before trial. Often the expert may be able to point out any special problems or recommend preferred presentation methods that may not have occurred to you. You should take full advantage of such input during the case preparation and presentation of evidence in court.
- **Review Evidence With The Expert** - It is imperative that you review physical evidence with your expert prior to trial, and get the expert's opinion as to its adequacy or completeness. The expert should never be put in a position of having to make spot judgments as to the identity, form, or substance of the evidence while in the courtroom. The expert may well claim never to have seen such materials before, and therefore, to be unable to offer an opinion.

- Discuss Possible Cross Examination - If your expert wrote a report, you should briefly discuss possible cross examination about the report. (Remember, your arresting officer may be an expert on certain issues.) One common defense question is whether the case report is complete and accurate. You might remind the expert that although the report should be accurate, chances are it is not complete. There will always be details or events that are not in the report. For example, the officer probably did not say in his report that he had not been drinking.
- DUI Experts - Expert witnesses in a DUI case are usually those individuals who have knowledge about alcohol and other drugs and their effects on the body. Such witnesses can include toxicologists, chemists, chemical engineers, biochemists, medical technicians, technologists, and Drug Recognition Experts. Their special knowledge can be the result of training or experience.
- Opinions Of DUI Experts - The use of expert witnesses is allowed in many states in the area of alcohol or other drug impairment to establish both the principles and methodology of tests used and the ultimate facts of alcohol or other drug impairment. Thus, an expert may testify as to the reliability of the method of breath, blood, or urine analysis. The expert may also testify as to the effect of the alcohol or drug on the body; that is, whether the defendant was under the influence of the alcohol or drug and whether, as a result, driving ability was impaired.
- Use Drug Experts - A word of caution regarding toxicological evidence of the presence of drugs. Unlike alcohol, whose levels can be quantified and from which impairment may be inferred, there are no straight-forward correlations between drug levels and impairment. The presence of the particular drug in the system of the defendant does, however, corroborate the opinion of the drug recognition expert (an officer who has received specialized training in detecting drug impairment). The toxicologist and the drug recognition expert are usually the best experts to clarify this relationship.

14.2 TRIAL

The actual presentation of the DUI trial has been broken down, for the purpose of discussion, into the major elements of any jury trial: Jury Selection, Opening Statement, Direct Examination, Cross Examination, and Closing Argument.

14.2.1 JURY SELECTION

A. ESTABLISHING A RELATIONSHIP BETWEEN THE PROSECUTOR AND THE JURY PANEL

General Homework

Memorize Last Names Quickly

Speak In Plain English, Not Complicated Legal Terminology

Talk With The Jurors

Listen To The Answers

Do Away With The Podium

Avoid Repeating Questions

Watch The Jurors

Proper Decorum

Educate The Jurors About The Case And The Law

Expose Possible Bias/Prejudice

Challenge For Cause

Peremptory Challenges

B. GENERAL TOPICS OF QUESTIONING TO BE CONSIDERED FOR DUI CASES

General Background Of The Individual Prospective Jurors

Criminal Record Or Traffic Record Of The Prospective Jurors And/Or

Close Family Members

Knowledge And Use Of Alcohol

Conclusion

A. Establishing A Relationship Between The Prosecutor And The Jury Panel

Jury voir dire is the first opportunity for you, as the prosecutor, to become familiar with the prospective jurors. However, it is much more important that the jurors are at the same time becoming familiar with the prosecutor, the defendant and his/her counsel. You want to get the jurors on the side of the prosecution as soon as possible.

General Homework

An effective prosecutor always keeps a handle on the people within the community. Prior to trial, if all possible, a prosecutor should become familiar with the jury panel. The size of your practice area and prohibitions set by your state, county or city may limit your investigation into the jury panel. This investigation may include:

- Communication within the office to determine if others are acquainted with the jurors and if they participated in prior cases.
- Jury tracking systems of prior verdicts in which jurors participated.

Use your imagination to develop ways of seeking out information. Always be discreet and acknowledge the individual's right to privacy.

Memorize Last Names Quickly

Try to bring the jurors into the conversation by making them feel a part of the proceeding. Out of respect to the dignity of the courtroom, good lawyers address the personnel and litigators in the courtroom with a title of respect, examples being Judge, Prosecutor Smith, Ms. Johnson and the court reporter. If you cannot remember all the names, pick three or four jurors that you can remember. It encourages the jurors to like you personally and professionally by letting them know you care enough about them to learn their names.

Speak In Plain English, Not Complicated Legal Terminology

Remember that the prospective jurors are out of their element. Probably not one of them has “exited” his/her “vehicle” or “provided a sample for the breath-test instrument.” Normal people get out of their cars and take a breath test. Jurors will feel much more comfortable understanding what is going on during the proceeding when you speak plainly.

Talk With The Jurors

The way a prosecutor introduces him/herself and asks questions can influence a juror’s perspective of the case. Therefore, when preparing questions for voir dire, the form of the questions is important. This is especially true when the questions are going to be asked by the judge.

The use of group questioning is often more applicable at the beginning of voir dire. Group questions reduces jurors anxiety and helps them to focus. Examples of group questions are:

- Do any of you know Judge Reed?
- Do all of you believe that it is wrong for a person to drink and then drive a car?

Individual questions help pinpoint an issue or develop an opinion for all the jurors. Examples of individual questions are:

- Ms. Foley, it is my understanding that you are a bartender at the Blennerhassett Hotel.
- Have you ever had a customer who you thought could not drive a car because he or she had been drinking?
- Could you tell us what the customer did that made you think this?

Open-ended questions lead the jurors to believe you truly want to know what they are feeling. Examples of open-ended questions are:

- What do you think about _____ ?
- What do you feel about _____ ?
- Please share your feelings about _____ ?

These questions can help prosecutors open the door to personal view points without looking pushy or intrusive in the privacy of jurors. Furthermore, it can lead the rest of the jurors to a discussion of their true feelings and voir dire becomes a collective discussion rather than a question and answer period.

Closed questions can help diffuse the impact of defense voir dire. For example, a juror may say that 25 years ago a drunk driver killed his brother. This is definitely a juror you want on the panel. To solidify the results you want, you might ask:

- I am sorry that your brother was killed in a crash where the driver of the other vehicle was drinking alcohol.
- Can you listen to all of the evidence in this trial?
- Can you listen and follow the judges instructions?
- Once you have heard all the evidence, do you think it is within your power to make a fair and impartial decision based only upon the evidence presented in this courtroom on this day?

Try to keep this type of question for the end of your voir dire. Sometimes this type of questioning may lead the jurors to simply answer the question with a “yes” or “no” and not give detailed information.

Listen To The Answers

By listening, you can use jurors answers to lead into other areas of questioning. It also makes the flow of questioning more like a conversation than an interrogation.

Do Away With The Podium

If possible, do not use the podium as it represents a barrier between you and the jurors. If permitted by the court, walk freely around the courtroom or sit at your table. Do what makes you the most comfortable. If you are comfortable talking with the jurors, it is more likely the feeling will be mutual.

Avoid Repeating Questions

Another mistake made by prosecutors, is the repetition of questions either previously asked by you or by opposing counsel. If you feel the need to revisit an area of questioning already addressed, do it with different words. An exception to this rule is the *intentional* repetition of questions to emphasize the point. Write out your questions and prepare before trial. Know what you want to ask and do not repeat the same questions. If you feel the need to revisit an area of questioning already addressed, do it with different wording.

Watch The Jurors

Sometimes the answers to the questions asked differs from what the jurors' body language or gestures indicate. Learn to read between the lines of the actual answers.

Proper Decorum

If you have achieved the goal of establishing a good rapport with the jurors you must not break this bond. At the end of voir dire, you have established that you are credible, trustworthy, competent, and likable. If you present one image in the courtroom and while on a break, the jurors see an entirely different image, the bond that you worked so hard to establish can disappear.

In addition, if you expect the jurors to have respect for the system that we work in every day, you must show the same respect throughout their courtroom experience. Be courteous and polite. Address the court appropriately.

Be prepared and organized. Use the courtroom to your advantage. Let the jurors know you are in charge by being the only one that presents the true facts. Above all, never ever embarrass or argue with a juror.

Educate The Jurors About The Case And The Law

Jury voir dire gives you, the prosecutor, the opportunity to educate the jurors, pique their interest, and prepare the jurors for opening statements.

In DUI cases, lay persons may have little or no knowledge about many issues. For example, most people know the police have an instrument that you can blow into that tells how much alcohol is in your system. However, jurors may be unaware that chemical test results are not required to prove DUI. If you do not have a chemical test result, be prepared to explain that in voir dire.

Other areas of education for voir dire include, but are not limited to:

- Reasonable doubt
- Specific elements of DUI
- How individuals act while impaired
- Toxicology evidence
- Police officer training
- Role of expert witnesses

In addition, it is always wise to anticipate what the defense will be. Search for areas that defendants may use to develop sympathy or alliance from the jurors. Some examples are:

- Physically or mentally challenged
- Victim of the crime is a relative of the defendant
- Age; extremely young or old
- Loss of family member or recently divorced
- Social or economic status
- Alcoholism
- Injured in the crash
- Single parent with children

Just as a prosecutor uses voir dire to educate the jury, so will a good defense attorney. Be alert and be prepared. Make sure you prepare the jurors for opening statements. During voir dire questioning, you should have laid the groundwork with facts, law, beliefs and opinions. In the opening you can bring all these areas together and give the jurors a clear view of the case.

In a simple DUI case where the defendant is a respected member of the community, you must try to discourage the jury panel from being sympathetic to the defendant. For example, a juror may empathize with an individual who just left a Christmas party and was picked up for DUI.

Questions should be asked to dispel jury identification with the defendant.

Expose Possible Bias/Prejudice

During the course of your education of the jury, you should also educate yourself as to the possible bias/prejudice of the individual jurors so that you can use your strikes effectively. This education, along with the pretrial preparation, should enable you to efficiently use your challenges to impanel a jury. A juror may be challenged for cause or removed from the panel through the use of peremptory strikes.

- Challenge For Cause

A party can challenge any juror for cause when legal grounds exist to disqualify, including any prospective juror who is unable to render an impartial verdict based on the evidence presented. The proper time to challenge for cause is before swearing in the jury to try the issue. Therefore, to discover a recognized statutory or common law basis for disqualification, you must do a thorough voir dire to prevent possible bias/prejudice from deciding your case. Be sure you know your state's specific challenges for cause.

General areas to be explored for bias/prejudice include:

- Relationships:
 - Employer/employee
 - Related to parties, to witnesses, or to victim by either blood or marriage
 - Connection with law enforcement
 - Membership in associations
 - Related to defense counsel
 - Has been represented by defense counsel
- Interest in outcome of the proceedings
- Juror has been a victim of DUI
- Pretrial publicity
- Arbitrator in the civil matter
- An action pending between the juror and one of the parties
- Felony/convictions

Trial courts usually have the final say on challenges for cause. In most jurisdictions, the court must exercise reasonable discretion and unless abused, the trial court's decision is final. Make sure your reason "for striking" are sound. If possible, make your challenges outside the hearing of the jury. A juror unsuccessfully challenged for cause may harbor resentment.

- Peremptory Challenges

These challenges occur at the end of voir dire and can be based upon almost anything except gender, religion, ethnicity, sexual preference, race or minority discrimination.

The United States Supreme Court first addressed this issue in the case of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In *Batson* the Court held that the equal protection clause of the 14th Amendment forbids a prosecutor from using peremptory challenges to exclude African Americans from a jury based solely on race. The Court articulated a three-step process for proving discrimination in the jury selection process. First, a pattern of peremptory challenges of black jurors may establish a prima facie case of discriminatory purpose. Second, the prosecutor may rebut that prima facie case by tendering a race-neutral explanation for the strikes. Third, the courts must decide whether the explanation is pretextual. Mere denial of a discriminatory motive or an incredible explanation is insufficient to rebut the prima facie showing of a discriminatory purpose. At a minimum, the prosecutor "must articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 98 n.2.

Nevertheless, the second step of the process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 770, 115 S.Ct. 1769, 1773, 131 L.Ed.2d 834, 839 (1995).

Subsequently, in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the Court held that racial identity between the defendant and the excluded jurors is not a precondition to raising a Batson challenge. The state's discriminatory use of peremptory challenges harms the excluded jurors by depriving them of a significant opportunity to participate in civil life. Although an individual juror does not have the right to sit on a particular jury, s/he does possess the right not to be excluded from one on the account of race.

In *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), the Court expanded Batson to prohibit the defense from using peremptory challenges to dismiss jurors based solely on race. The Court determined that discriminatory challenges harm the individual juror regardless of whether it is the State or defense who invokes them. The Court rejected the argument that a prohibition against discriminatory challenges violates a defendant's constitutional rights.

Batson was extended to include discrimination based on gender in *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Gender-based peremptory challenges cannot survive the heightened equal protection scrutiny that the Court affords distinctions based on gender. However, as long as gender does not serve as a proxy for bias, unacceptable jurors may still be removed, including those who are members of a group or class that is normally subject to a "rational basis" review.

In *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), the Minnesota Supreme Court declined to extend Batson to peremptory challenges based on religion. In a plurality decision, the U.S. Supreme Court denied certiorari. *Davis v. Minnesota*, 511 U.S. 1115, 114 S.Ct. 2120, 128 L.Ed.2d 679 (1994). In a concurring opinion Justice Ginsburg made two observations: (1) that religious affiliation is not as self-evident as race or gender; and (2) ordinarily, questions as to religious affiliation are irrelevant, prejudicial and improper.

However, in a dissenting opinion to the denial of certiorari, Justice Thomas joined by Justice Scalia, contended that by refusing to consider discriminatory challenges based on religion, the Court was

ignoring the holding in *J.E.B.* Justice Thomas stated that “no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause.” *Davis*, 511 U.S. at 1116, 114 S.Ct. At 2121, 128 L.Ed.2d at 680.

In *United States v. Somerstein*, 959 F. Supp. 592 (E.D. NY 1997), the court acknowledged Justice Ginsburg’s concerns but rejected the plurality opinion in *Davis* and held that *Batson* logically should be extended to discriminatory use of peremptory challenges based on religion. However, since the excluded jurors in *Sommerstein* were Jewish, the court concluded that a *Batson* challenge could also have been raised on the basis of race.

A state has the right under its constitution to be more restrictive or grant greater rights to its citizens than those granted under the federal constitution. Individual states may have extended *Batson* to include religion, sexual preference or any other category for which heightened scrutiny is required under the equal protection clause. Always check state law for guidance on exercising peremptory challenges. In addition, make sure you reserve enough peremptory strikes to cover those jurors who you challenged for cause but who were not excused.

B. General Topics Of Questioning To Be Considered For DUI Cases

General Background Of The Individual Prospective Jurors

- Age
- Children
- Marital Status
- Driver’s License: do they presently drive and what type of skills do they consider to be necessary to be a good driver.
- Address/area of residence (some jurisdictions do not allow this to be asked during voir dire)
- Education level
- Prior juror experience
- Other experience in a courtroom, such as a witness or party to an

action; if so can he/she separate their prior experience from this action.

- Knowledge of the attorneys involved
- Job: Someone may be a waitress, bartender or be connected with the sale of alcoholic beverages; you can use his or her knowledge throughout the voir dire

Criminal Record Or Traffic Record Of The Prospective Jurors And/Or Close Family Members

- Convictions
- Citations
- Arrests
- Any family member arrested for DUI
- Ever been stopped at a sobriety checkpoint — what was their experience
- Ever taken a breath test

Knowledge And Use Of Alcohol

- Use of alcohol
- Social drinker
- Beer after work

Conclusion

The way to win a jury's confidence and trust is to be yourself and be prepared. Know the facts, the law and as much as you can about the jury panel. If you can make the jurors feel a part of your world by easing the tension, by educating them on the issues that will be presented, and by adding to their desire to hear the rest of the case, you have successfully accomplished jury voir dire.

14.2.2 OPENING STATEMENT

A. SEIZE AND ELEVATE THE JUROR'S INTEREST

Develop A Theme

Tell A Story

Prepare

Know The Facts

Know The Legal Issues

Organize

Communicate Effectively

Use Simple Language

Use Voice Inflection (The Orator's Most Powerful Tool)

Be Aware Of Your Gestures

Be Careful With Quotations

Do Not Use Notes (Whenever Possible)

Use Exhibits

B. CONTINUE THE EDUCATION AND THE RAPPORT WITH THE JURORS ESTABLISHED DURING VOIR DIRE

Establish The Seriousness Of The Offense

Content Of The Opening

Elements

Strengths vs. Weaknesses

Leave The Detail Of The Case To The Witnesses To Reveal

Instructions

Commit To The Jurors

Concluding Your Opening Statement

C. CONCLUSION

A. Seize And Elevate The Juror's Interest

Develop A Theme

In order to embrace the attention of the jurors and inform them about the case, develop a theme that can continue from opening through closing. Prosecutors can develop many themes to help organize and communicate the state's side of the story. To develop a theme, a prosecutor should condense the entire case down into a short statement. Use this statement as the introduction to your opening. A theme helps jurors relate to your side of the case throughout the entire proceeding. Example:

"Just say no." On January 1, 1999, Dan Drunkard, the defendant started out the New Year by "Just saying no." The defendant said NO to his girlfriend who asked him not to order any more drinks. The defendant said NO to his friends who offered him a ride home from the party. The defendant said NO to Officer Winters who requested he take the breath test. Lastly, the defendant said NO to little Amy Johnson being able to celebrate her next birthday.

Other themes:

- Party time
- One drink at a time
- Rolling party
- Choice and consequences
- Afternoon party delight

Tell A Story

Use a narrative approach to tell the jury the facts of the case. This narrative can be from the viewpoint of an outsider who watched what occurred and is reporting back to his friends, the jurors. The narrative can be from the viewpoint of the victim or the police officer. Evaluate your case and decide what would be the most effective format for you to employ in each individual case. Remember to only include that which you can prove through the introduction of witness testimony or real or physical evidence.

Eliminate the use of phrases such as:

- The evidence will show. . .
- Mr. Jones shall testify. . .
- Whatever I say is not evidence, but the witness will tell you . . .

By eliminating the use of these phrases and telling a narrative story, the opening statement becomes more persuasive.

Prepare

- Know The Facts

Review the facts and know who can testify to prove the elements necessary. If the prosecutor fails to prepare and misrepresents the facts to the jury, the bond established during voir dire can break and trust will disappear.

- Know The Legal Issues

If at all possible, resolve all legal issues concerning the admission of chemical test results, statements, standardized field sobriety tests results, prior convictions, and any other issue that may affect your case prior to trial. Remember, never promise the jury evidence that you cannot produce. For example, to blurt out the chemical test result was a .20 without being positive of the admissibility of such result may lead to objections from the defense, and the possibility of a mistrial.

- Organize

Decide how you are going to present an organized and understandable case. Remember, during opening statement, your emphasis should be on your theme. This may be achieved through several methods of organization. Organize your opening in chronological order, topic by topic, or a combination of the two. A prosecutor who does not organize his thought process, may lose his train of thought and in turn lose the jurors' attention. It is also important for the jurors to be able to follow the flow of the case. Without organization, this cannot occur. More importantly, you can

lose your credibility with the jury by being unorganized.

Communicate Effectively

- Use Simple Language

Do not use legalese. For example, say the police officer got out of his car instead of exited his vehicle.

- Use Voice Inflection (The Orator's Most Powerful Tool)

Raise and lower your voice to emphasize the important parts of your opening. Draw the attention of the jurors to your words by using voice inflection. Do not use a monotone voice. You will lose the jurors' interest.

- Be Aware Of Your Gestures

Find a way to use body language to your advantage. Videotape yourself and review the result of your work. It is amazing how fiddling with the change in your pocket or snapping the lid of your pen calms you but irritates everyone else. Be careful not to be too melodramatic. Do not make it appear to the jury you are acting. Be sincere.

- Be Careful With Quotations

Almost never quote your own witness in opening statements. Do not be afraid to quote the defendant's statements documented within police reports or notes. Sometimes defendant's statements can lead you to your best themes. For example, "Man, I didn't think I was that drunk!" or "I only drove because I was less drunk than she was!"

- Do Not Use Notes (Whenever Possible)

Never read from or memorize the notes. If you need notes, use them as little as possible. Try not to carry notes with you. Leave notes at the podium or counsel table and refer back to them only as needed. Remember to keep to the theme.

Use Exhibits

Jurors love to view exhibits that clarify the facts while you are speaking. Pictures of the crash, diagrams of the intersection, or evidence seized, such as beer cans, will reinforce your opening statement. In addition, viewing the exhibits helps the jurors retain the important issues presented.

Preparation of the exhibits helps the prosecutor become more familiar with his own case. Evidence that can be fairly admitted into trial may be used during opening statements. When in doubt obtain prior judicial approval before using evidence which may not be admissible.

B. Continue The Education And The Rapport With The Jurors Established During Voir Dire

Establish The Seriousness Of The Offense

Although we all know that jurors love to sit on the panel of the latest murder or the sexual assault case that has made the headlines, never apologize for presenting a DUI case. You can find an avenue to express the seriousness of these cases within the facts of the simplest DUI.

For example, if the police just pull over a car because of erratic driving, you may point out that the police officer saw the car cross the double line into the other lane of traffic twice. Any juror who is a driver and has seen this happen, knows the feel-ing of helplessness and fear that overcomes a possible victim. By drawing on their own experiences, jurors will see and feel for themselves the seriousness of the case.

In addition, you must be careful about the tone you set during opening statement. Usually the DUI defendant will not be a hardened criminal. Make the offense the issue as opposed to the personality or the defendant's status in the community.

Content Of The Opening

- Elements

Be sure to incorporate all the elements of the offense in addition to the jurisdiction and date. Through the story, give the perspective of the witnesses. Remember, try not to say, "Officer Winters shall testify to. . ." Instead say, "The defendant drove down the road crossing the center line twice."

- Strengths vs. Weaknesses

No one can agree whether it is better to point out your weaknesses or to let the defendant bring them up and then attack.

In order to keep the bond of trustworthiness and credibility with the jurors, it is often much better to bury those weaknesses between your strong points. The prosecution has the benefit of going first. This gives the state the opportunity of choosing how to break the news in a manner most beneficial to the prosecution. Begin and end with your strongest points.

- Leave The Detail Of The Case To The Witnesses To Reveal

In an opening statement, the jurors need to know that a trained officer administered a breath test and the result was .23. Pique their interest and make the jury want to hear the trained officer's testimony. He can tell them his training, experience and how he administered the test.

- Instructions

Although it is improper to argue the instructions in opening include, to the extent possible, all the elements of your instructions.

Commit To The Jurors

Remember that your opening statement is a commitment to the jurors that you can produce evidence to prove the case. Make sure you fulfill that commitment.

Concluding Your Opening Statement

In concluding your opening statement be direct, forceful, and concise. Prepare the conclusion and practice. You want to end forcefully, assuring the jury that you are in control. Tell the jury you will be asking for a guilty verdict at the end of all evidence.

C. Conclusion

Opening statements are the most important part of the trial. Studies have shown that 80% of jurors reach the same verdict at the end of the trial as they would have reached at the end of opening. Opening statements done correctly and in conjunction with a well done voir dire, heighten the jurors' interest and desire to hear the witness' testimony.

14.2.3 DIRECT EXAMINATION

- A. Introduction: Goals Of Direct Examination
- B. Preparation
 - Witness Interview
 - Exhibits
 - Examine All Exhibits Closely
 - Show All Exhibits To The Defense
 - Mark Exhibits For Identification
- C. Conducting Your Direct Examination
 - Order The Sequence Of The Witnesses
 - Ask Simple, Direct Questions
 - Highlight Important Facts
 - Use Demonstrative Evidence
- D. Sample Direct Examination Questions
 - The Arresting Officer
 - Vehicle in Motion -- Initial Stop
 - Personal Contact
 - Pre-arrest Screening
 - Sickness, Injury, Weight
 - Chemical Test Admonition
 - Breath Test
 - Blood Or Urine Test
 - Blood Sample
 - Urine Test
- E. Statements By The Defendant During Post-Arrest Interrogation
- F. Redirect Examination Of The Arresting Officer
- G. The Chemist Or Criminalist
- H. Breath Test
- I. Blood Or Urine

J. Redirect Examination Of The Chemist

A. Introduction: Goals Of Direct Examination

Direct examination provides the foundation for the rest of the trial. The other segments of the trial are constructed from the building blocks of direct examination. For example, the strength of the opening statement depends upon the prosecutor's confidence in anticipating an effective presentation of the State's case. Similarly, a successful closing argument is predicated on a thorough and logical presentation of the evidence. This chapter will discuss what the prosecutor should seek to accomplish during this very essential part of the trial and will give some practical tips and sample questions to help the prosecutor effectively conduct the direct examination of the arresting officer and the chemist or criminologist in a DUI trial. The prosecutor's goals during direct examination are twofold: The prosecutor must elicit testimony and present sufficient evidence to factually and legally satisfy each element of each charge alleged against the defendant. Further, the prosecutor's more challenging goal in direct examination is to present the evidence in as clear and simple a manner as possible, thereby maximizing the persuasive weight of the evidence to the jury.

B. Preparation

Witness Interview

In a typical driving under the influence trial, the main witness will be the arresting officer. If at all possible, try to meet with the witness prior to the start of the trial, regardless of the experience level of the witness. Review the arrest report prior to the interview. In addition, instruct the witness to also review his or her report first, providing a copy to the officer if he or she does not bring a copy to the interview.

In the interview, go over the details of the arrest with the officer from the time the officer first observed the defendant to the conclusion of the officer's contact with the defendant. Let the officer describe the events in narrative form, then go back over the various segments of the case in greater detail, fleshing out the facts with follow-up questions. Clarify all times and distances mentioned by the officer, as these are frequently fruitful areas for defense cross examination. The prosecutor should request that the officer check his or her daily activity log for the date of the

defendant's arrest in order to refresh the officer's memory of the event of that date. The officer's background, training and experience in law enforcement, and, more specifically, his or her experience in the area of DUI enforcement should be thoroughly covered in the witness interview. Ask the officer about his or her education and employment history prior to joining law enforcement — it may be pertinent to the case.

If the prosecutor intends to have the officer demonstrate any standardized field sobriety tests for the jury, he or she should inform the officer during the interview and allow the officer to demonstrate the tests for the prosecutor, prior to giving testimony. Even if the prosecutor does not request the officer to perform the physical tests during direct examination, the officer should be prepared for such a request from the defense attorney.

Assuming that the case includes an observed pattern of driving, the officer should prepare a diagram of the streets where the driving occurred, preferably including the point where the defendant was first observed and the location where the car was stopped. Check the accuracy of the diagram with a street map and view the scene of events, if time permits. The prosecutor should also take photographs, if possible. The direct examination will benefit from the prosecutor having an excellent grasp of the facts. Have the officer explain the defendant's driving pattern, using the diagram; however, the actual drawing of the paths of the cars should be saved for the witness' testimony in front of the jury.

Be sure that the officer brings to court any evidence relating to the case, such as a breath test printout, urine or blood sample, videotape, or weapon. Determine whether the officer can establish the chain of custody for items that are susceptible to alteration, or where it is necessary to trace the origin of the evidence to its source. Additional witnesses may be needed to fully establish the necessary chain of custody.

Ask the officer if anything else occurred during the contact with the defendant that is not in the report and has not already been discussed, such as additional statements made by the defendant, previous contacts between the defendant and the officer, or the presence of additional witnesses. Ask if there is anything else pertaining to the case that has not been turned over to the prosecution. Advise the officer if he or she should appear for testimony dressed in business attire or a police uniform.

Finally, the prosecutor should prepare the officer for cross examination. If

there are mistakes in the report, the officer should be asked to explain the mistake, omission or discrepancy. As with all witnesses, remind the officer that if he or she is asked a question and does not know the answer, or cannot recall, he or she should not hesitate to say so. Tell the officer that the arrest report may be used to refresh his or her recollection, if necessary.

Exhibits

In a standard DUI case, the prosecutor will probably have several items, real or demonstrative, that he or she will seek to have introduced into evidence. Appropriate use of these exhibits will enhance the quality and, therefore, the persuasive level of the presentation.

Such exhibits may include: diagrams, maps, photographs, video or audiotapes, written statements, records relating to the maintenance of the breath-testing instrument, liquor bottles, driver's license information and medical records.

- Examine All Exhibits Closely

Before beginning the presentation of the State's case, it is essential that the prosecutor adequately prepares his or her exhibits for trial. Go over all exhibits carefully, reviewing them with a critical eye. Make sure that the exhibits do not contain information that may harm the prosecution's case. Possible conflicts or discrepancies may exist between the exhibits and the anticipated testimony of the witnesses, e.g., barely legible details contained in medical records. Examine the exhibits for such discrepancies and anticipate how the defense might attack and possibly use the exhibits to its advantage.

It is preferable to use exhibits that are visually interesting, attractive and clear. Consider enlargements, overhead projectors, and the use of color. On the other hand, avoid using exhibits that are boring, repetitive or hard to read.

- Show All Exhibits To The Defense

The prosecutor should show all exhibits to the defense outside the presence of the jury, prior to the start of the trial.

- Mark Exhibits For Identification

Arrange the exhibits in the order in which they will be presented. The prosecutor can either mark them, or ask the court clerk to mark them, depending upon the practice in the particular court. If the exhibits are marked in advance, the prosecutor will not have to interrupt testimony to have them marked and will appear more prepared in front of the jury.

C. Conducting Your Direct Examination

Order The Sequence Of The Witnesses

Plan to call witnesses so that the order of their appearance helps tell the story. Generally, in a typical DUI case without a crash, the prosecutor will want to present the witnesses' observations of the defendant chronologically. For example, call the person who observed the driving pattern as the first witness.

If another officer or officers completed other portions of the investigation, call them in sequence.

Keep in mind, however, the general rule that people remember best is what they hear first and last. If the case has several officer and/or civilian witnesses, start with a strong witness or dramatic event and end with a strong witness whenever possible.

Ask Simple, Direct Questions

The prosecutor's job is to educate the jury. Questions should be kept short and understandable. A complex, lengthy question may yield a confusing or misleading answer. During direct examination, the focus should be on the witness, not the questioner. Ask the witness to tell his or her story in a smooth chronology, guided by the prosecutor's questions. **Remember, the question asked is as important as the witness' answer.**

For his or her first few trials, the new prosecutor may feel compelled to write out all questions ahead of time. However, hopefully the attorney will ultimately choose to outline the important areas that need to be covered. The danger in relying on prepared questions is that the attorney's focus will tend to be on his or her notepad, instead of on the witness. It is important to listen to the witnesses' answers and adjust questions accordingly.

Highlight Important Facts

The prosecutor can present the case in a more persuasive manner by highlighting critical testimony for the jury. This can be done through repetition. For example, incorporate the witness' answer into the next question. If the jury did not hear the information the first time, they will hear it in the next question.

For example, the witness testifies:

“AFTER THE CAR STOPPED, THE DRIVER OPENED THE DOOR AND FELL OUT OF THE CAR.”

The prosecutor can then ask:

“AFTER THE DRIVER FELL OUT OF THE CAR, WHAT HAPPENED NEXT?”

Use follow-up questions to elicit additional details about important facets of the case, e.g., the officer's observations of the defendant's objective signs of impairment.

Be sure that the witness paints a clear picture for the jury, rather than glossing over an important piece of evidence. If a witness says that the defendant appeared “drunk”, the prosecutor should be sure to draw out a more detailed description to substantiate the conclusory word “drunk.”

For example:

Q: PLEASE DESCRIBE THE DEFENDANT'S APPEARANCE.

A: HE LOOKED DRUNK TO ME.

Q: WHAT MADE YOU THINK THAT HE LOOKED DRUNK?

A: HIS EYES WERE RED AND WATERY, HIS CLOTHES WERE DISHEVELED AND HE WAS HAVING TROUBLE WALKING.

Q: IN WHAT WAY WERE THE CLOTHES DISHEVELED?

A: HIS SHIRT WAS UNBUTTONED AND HIS SHIRTTAIL WAS HANGING OUT OF HIS PANTS. HIS TIE WAS CROOKED. HIS PANTS WERE UNZIPPED AND HE WASN'T WEARING ANY SHOES.

Q: WHAT DID YOU MEAN WHEN YOU SAID HE WAS HAVING TROUBLE WALKING?

A: HE WAS WALKING VERY SLOWLY AND SWAYING FROM SIDE

TO SIDE. HE DIDN'T WALK IN A STRAIGHT PATH, BUT KIND OF ZIGZAGGED FROM THE CAR TO THE SIDEWALK.

Although the focus should be on the witness during direct examination, the prosecutor can focus the jurors on particular parts of testimony with his or her voice and body language. Changes in volume, movement from the podium, or a well-placed pause will attract the jurors' attention.

Use Demonstrative Evidence

Anticipate the exhibits that you will seek to introduce into evidence and become familiar with the necessary foundation that must be established for admissibility. Relevance is a prerequisite to admissibility, therefore, before an exhibit is introduced, the prosecutor must demonstrate a link between that exhibit and a material issue in the case.

As a general rule, the proponent of the evidence must establish (1) that the witness recognizes the exhibit; (2) that the witness knows what the exhibit looked like on the relevant date; and (3) that the exhibit is in the same condition or substantially the same condition now as when the witness saw it on the relevant date.

For example, to introduce a photograph of the scene where the standardized field sobriety tests were administered, the prosecutor might ask the police officer witness the following questions:

Q: I AM SHOWING YOU A PHOTOGRAPH MARKED AS STATE'S EXHIBIT 3 FOR IDENTIFICATION. DO YOU RECOGNIZE THE AREA DEPICTED IN THE PHOTOGRAPH?

A: YES.

Q: PLEASE DESCRIBE THE AREA PICTURED.

A: THE PHOTOGRAPH SHOWS THE NORTHWEST CORNER OF BROADWAY AND 1ST AVENUE.

Q: DOES STATE'S EXHIBIT 3 ACCURATELY REFLECT THE WAY THAT CORNER APPEARED AT 11 P.M. ON DECEMBER 1, 1995, THE TIME AND DATE OF THE DEFENDANT'S ARREST?

A: YES, IT DOES.

The prosecutor should make sure that the witness is familiar with the exhibit and that the necessary foundation was fully discussed during the

witness interview.

For documentary evidence, the prosecutor should become familiar with the necessary foundational requirements of the Business Records and the Official Records or Public Records exceptions to the Hearsay Rule. These exceptions are frequently relied upon in DUI cases to introduce records relating to the alcohol testing instruments, medical records, police records and other documentary evidence.

D. Sample Direct Examination Questions

The Arresting Officer

In a typical DUI case, i.e., a case not involving a crash, the prosecutor generally has two main witnesses: the arresting officer and the chemist or criminologist. The arresting officer will testify about driving observations, objective signs of impairment, the administration of standardized field sobriety tests (SFSTs), and the breath test, if applicable. The prosecutor should keep in mind that appropriate direct examination questions generally begin with “who,” “what,” “when,” “where,” “how” or “why.” Below are a series of sample direct examination questions. These questions are not intended to be exhaustive. Additional questions will be required based upon the facts of each case. These questions are for guidance only and may not be applicable in your state. Be sure to talk with the witness before trial to determine what questions the chemist/criminologist wants to include. The chemist/criminologist may have a list of questions for use.

Suggested topics for additional questions are noted throughout these sample questions:

- What is your occupation and assignment?
- How long have you been a (police officer with the city of _____ / highway patrol officer for the state of _____)?
- Did you attend a law enforcement academy? Did you receive any training regarding the investigation of driving under the influence offenses? Please describe that training.
- Have you received any training in this area since you graduated from the academy? Please describe that training.

- (If the officer is a traffic officer) How long have you been employed in traffic enforcement?
- Please describe any other experience you have had that relates to driving under the influence investigation?
- Approximately how many times have you participated in arrests for driving under the influence?
- Approximately how many times have you stopped a driver suspected of being under the influence, and then released the driver because your investigation determined that he or she was not under the influence?
- Were you on duty on _____ (Date of offense) at about _____ (Time of first observation)?
- What was your assignment at that time? What shift were you working?
- Were you in a marked patrol car (or motorcycle)?
- Were you in uniform?
- Were you alone or with a partner? (If with a partner: who was your partner? Who was driving the patrol car?)

Vehicle in Motion -- Initial Stop

- On _____ (date of offense) at about _____ (time of first observation), did a car attract your attention?
- Where was that car at that time? Please describe the area. Is that within the county (or city) of _____?
- Where were you when you first saw that car?
- Describe the car that attracted your attention?
- Why did that car attract your attention?
- Have you prepared a diagram of the area around _____

___ (Location of driving and arrest)?

- (Have diagram marked for identification, if not done in advance.)
Officer, I am showing you State's 1 for identification, did you prepare this diagram?
- Who asked you to prepare it? When did you prepare it?
- Does the diagram fairly represent the location as it appeared on _____
_ (The date of the offense)?
- Is the diagram drawn to scale? (Hand-drawn diagrams are generally not drawn to scale, but are still permissible if they fairly represent the scene.)
- Please describe the notations on the diagram.
At this point in the testimony, the prosecutor should develop the entire driving and stopping pattern, using the diagram. The prosecutor should be sure to cover all of the following areas that are applicable to the case:
 - locations of officer and defendant's car when first observed;
 - distance between officer and car;
 - speed of defendant's car;
 - road, traffic, weather and lighting conditions;
 - description of defendant's driving pattern;
 - driver's response to red lights, siren, horn, loudspeaker;
 - manner in which defendant stopped; and
 - distance from curb that defendant's car was stopped.

The officer should note on the diagram every location where something significant occurred, with the prosecutor instructing the officer to use specific notations, e.g., "D-1" for location where officer first observed the car; "P-1" for location of officer when first observations were made. The prosecutor should move the diagram into evidence at this time to avoid the opportunity for defense counsel to mark on the diagram.

In many cases involving traffic crashes, the officer does not actually observe movement, operation, or even control of the vehicle. A common scenario is that the officer comes upon the scene of a one-car collision (or a collision with a parked car). The defendant is outside the car. There are no other witnesses at the scene.

Based on circumstantial evidence, the officer concludes that the defendant was the driver. In such a case, the prosecutor needs to elicit facts that establish that the defendant was the person who was driving or operating the vehicle.

For example, the prosecutor should ask questions of the officer that address the following areas, as applicable to the facts of the case:

- distance between the defendant and the vehicle;
- absence of any other people in the area of the collision;
- driver's door unlocked; other doors still locked;
- character of the area (residential, commercial, rural);
- time of crash/frequency of police patrol in that area;
- adjustment of seat and mirrors match defendant's size;
- location of keys;
- injuries to defendant consistent with collision/defendant's hair embedded in broken windshield;
- defendant is registered owner of vehicle.

Keep in mind that the *corpus delicti* rule requires some independent, albeit minimal, evidence that an individual drove (or operated) the vehicle while impaired by alcohol before the defendant's admission of driving will be admitted into evidence.

Personal Contact

- After the car stopped, what did you do?
- Did you observe the driver at that time?
- Do you see the driver in court today? Please identify the driver for the jury by describing what that person is wearing today. (Or please point out the driver for the jury.) For the record, the witness has identified ____ (name of defendant).
- Was anyone else in the car with the defendant?
- Please describe the defendant's appearance at that time.

The prosecutor should follow up with questions covering the period from just after the stop to just before the SFSTs. These questions

should be designed to elicit information about the following areas: odor of alcohol on defendant's breath and from car; a description of the defendant's face, eyes, clothing, speech, walk; the manner in which the defendant located and displayed his license and registration; any observable injuries; and statements of the defendant which should be admissible as investigative, as opposed to custodial.

The prosecutor should be sure to have the officer explain in detail terms such as "slurred speech," "staggered," and "unsteady on his feet," thus painting a complete picture for the jury. It may be helpful to ask the officer to mention the things that the defendant did correctly. Many defense attorneys elicit this information on cross examination in an effort to raise doubts not only about the defendant's degree of impairment, but also to raise questions about the one-sided presentation by the prosecution. Including this information in direct examination may foreclose this sometimes effective defense tactic.

Some law enforcement agencies are now videotaping portions of their DUI investigations. If the case includes a videotape, the prosecutor must make it available to the defense and he or she will probably want to play it for the jury. Even if it is not especially helpful in showing the defendant's impairment, the prosecutor may still want to introduce it.

Otherwise the prosecutor runs the risk of having it displayed by the defense with the inference that the prosecution was holding back critical evidence from the jury because it was favorable to the defense. In some jurisdictions, preliminary breath testing devices (PBTs), also called preliminary alcohol screening (PAS) devices, are used by law enforcement as investigative tools in DUI cases. Generally, PBT results are not admissible in trial. However, since this is an area of law impacted by technological advances in the instruments, check the applicable state law. If PBT results are admissible in the applicable jurisdiction, the prosecutor should be prepared to lay the appropriate foundation to establish the maintenance of the instrument and the accuracy of the result.

- At this time, based on your observations of the defendant and his or her driving, did you form a suspicion ("opinion" may be too strong at this early stage of the investigation). as to the state of the defendant's sobriety?

- What was that suspicion?

Pre-arrest Screening

- Based on that suspicion, did you ask the defendant to perform some standardized field sobriety tests (SFSTs)?
- What are standardized field sobriety tests?
- Where did you ask the defendant to perform the SFSTs?
- What was the condition of the surface at that location? (Level or sloped surface? Smooth or rocky? Wet or dry?)
- What were the lighting conditions?
- Which test did you ask the defendant to perform first?
- What instructions did you give to the defendant?
- Did you also demonstrate the test for the defendant?
- Did it appear that the defendant understood your instructions?
- Did the defendant attempt to perform the _____ (Name of the test)?
- Describe the defendant's performance.
(The prosecutor may want to use an exhibit enlarging the officer's notations of the defendant's performance on the SFSTs. If so, it should be displayed at this point. The officer should explain the exhibit, then the prosecutor should introduce it into evidence. The officer's explanation should include what he or she was looking for in the defendant's performance.)
- Did you ask the defendant to perform another SFST? Which one? Repeat questions for each of the remaining SFSTs.
- In your opinion, did the defendant satisfactorily complete this series of standardized field sobriety tests? (Avoid using the terms "pass" and "fail.")

- After the administration of the standardized field sobriety tests, did you form an opinion as to whether the defendant was under the influence?
- What was that opinion?
- What factors did you consider in forming your opinion? (Officer should include the TOTALITY of all observations: driving, objective signs, and SFSTs.)
- What did you do next? (Placed defendant under arrest.)
At this point, the prosecutor should ask questions to cover the events that occurred after the arrest. The following areas should be included, if applicable: statements made by the defendant in response to routine questions regarding sickness or injury; the giving of the alcohol test admonition; the defendant's selection of, or refusal to submit to a chemical test, the giving of Miranda warnings and any statements made by the defendant if admissible.

The following are sample questions designed to cover these areas:

Sickness, Injury, Weight

- Did the defendant complain of any physical defects or injuries before or during the SFSTs? Did you observe any physical problems? (If yes, did you take that information into account in evaluating the defendant's performance on the tests?)

Chemical Test Admonition

- Did you explain to the defendant that she/he was required to submit to an alcohol test? (Check individual jurisdiction for requirements of the implied consent law.)
- (If applicable) Did you read a statement from a document? Please read the statement to the jury in the same manner that you read it to the defendant. (If the admonition was paraphrased, the officer should explain the requirement to take a test in the same manner as it was explained to the defendant.)
- Did the defendant agree to take a chemical test?

- What did the defendant say? (Indicating the test chosen or the exact words of the defendant's refusal statement.)

Breath Test

- Where did you take the defendant to administer the breath test?
- What instrument did you use to administer the test?
- Have you received any training in the operation of this instrument?
- Where and when did you receive this training?
- Did your training include instruction on how to operate the instrument?
- Did you receive any practical experience in operating the _____
_(Instrument used) during your training?
- Did your training include the use of a checklist that includes the steps taken when administering a breath test?
- Did you pass a test as part of your training?
- How many times had you administered a breath test on the _____
_(Instrument used) before you administered the test to the defendant?
- Did you use a checklist when you gave the breath test to the defendant?
- To the court: your honor, I am holding a piece of paper entitled _____
_(Caption on checklist) which has been shown to defense counsel and marked as State's Exhibit # _____ for identification. May I approach the witness?
- Officer, I am showing you State's Exhibit # _____ for identification. Do you recognize it?
- What is it?
- Whose writing is on the checklist?

- Did you follow the steps in the order as listed on the checklist?
- Did you make all of the entries on the checklist at the time you administered the breath test to the defendant?
- Did you observe the defendant for a period of time before administering the breath test?
- For how long?
- Why were you watching the defendant?
- Where was the defendant during this waiting period?
- Was the defendant handcuffed?
- Did the defendant eat, drink, smoke, vomit or regurgitate during this waiting period?
- What time was the breath test run?
- How many samples were obtained from the defendant?
- Did the instrument produce a printout indicating the results of the test?
- Did you attach the printout to the checklist immediately after the test was given?
- Please look at the printout attached to State's _____ (The checklist.) Is that the printout that was produced by the instrument after the defendant's test?
- Are the results noted on the printout on State's _____ the results you obtained when you administered the breath test to the defendant on _____(date of arrest)?
- Were the results recorded by the instrument consistent with your observations of the defendant?

Many courts will not allow the officer to testify to the results of the defendant's breath test until the chemist or criminalist testifies that

the instrument was in proper working order. Moreover, it is generally more effective to build up to the test result, saving it for near the end of the prosecution's case.

Blood Or Urine Test

Although the breath test is the most commonly administered chemical test, the prosecution may be confronted with a DUI case in which the defendant provided a blood or urine sample for alcohol testing. Since a blood or urine sample is susceptible to tampering, and since the sample must be traced back to the defendant, the prosecutor must prove chain of custody of the sample. The chain of custody must be shown from the time the sample was obtained from the defendant to the time the sample was tested by the police laboratory. Generally, most police agencies gather the samples in vials or containers that are then sealed and booked into evidence. The prosecutor should ask the officer to detail the manner in which the sample was obtained and go step by step into how the container was sealed and marked.

The prosecutor should be aware that in many jurisdictions it is customary to enter the actual sample into evidence once the necessary foundation has been laid. However, some jurisdictions will not allow body fluids to be brought into the courtroom. In those courts, the prosecutor may have to proceed by way of stipulation or by using photographs of the sample and the evidence envelope.

Blood Sample

- Did you request a blood sample?
- Did you observe the defendant's blood drawn?
- Where was it drawn?
- Was the blood drawn in your presence?
- From what area of the defendant's body was the blood drawn?
- Who drew the blood?
- At what time was the sample taken?

- Did the nurse/phlebotomist/doctor/technician clean that area of the defendant's body? Check individual jurisdiction for categories of persons authorized to draw blood and whether prosecutor is required to call that person as a witness at trial.
- Do you know what kind of cleansing solution was used? (Usually Betadine, peroxide or aqueous zephiran.) Does that solution contain alcohol?
- Before the blood was drawn, did you observe the vial?
- Was it empty?
- What was in it? (Powder preservative.)
- After the blood was drawn, what did you do with the vial?
- Were any seals placed on the vial?
- Did you make any notations on the vial?
- If applicable: Did you place the vial inside an evidence envelope?
- Did you place any seals on that envelope?
- Did you mark the envelope in any way? How?
- What did you do with the vial/envelope after it was sealed and marked? (Booked it as evidence.)
- Did you bring that vial/envelope to court with you today?
- To the court: your honor, I am holding (Describe the vial or the envelope and how it is labeled or marked.) May this be marked as State's Exhibit #__ for identification? May I approach the witness?
- Officer, I am showing you State's Exhibit #_____ for identification. Do you recognize it?
- What is it?
- How do you recognize it?

- When was the last time that you saw this vial/envelope?
- When was the next time?
- Did you bring it to court today?
- Where did you obtain the vial/envelope before coming to court today?
- Is it the same condition as it was when you last saw it on _____ (date defendant's blood was drawn)? (No. The original seal is broken and an additional seal has been added by the crime lab following its analysis of the blood sample.)

Urine Test

The person who obtained the defendant's urine should be the same sex as the defendant. The prosecutor will need to call the person who actually observed the defendant urinate in order to establish the necessary chain of custody for introduction of the urine test result.

- Did the defendant give a urine sample?
- As part of the procedure, did you instruct the defendant to void his or her bladder prior to obtaining the urine sample?
- What instructions did you give to the defendant regarding this first void?
- Where did the void occur?
- When was the first void?
- How much time passed between the initial void and the time you obtained the sample from the defendant?
- Where did the defendant urinate the second time?
- When did the defendant provide the urine sample?
- Did you give the defendant a container for the sample?
- Where did you get this container?

- Was the container sealed when you got it?
- Did you break the seal?
- Did you notice anything inside the container? What?
- Did you watch the defendant urinate into the container?
- Why? (To make sure that there was no dilution and that it really was the defendant's urine.)
- After the defendant provided the urine sample, did you seal the container?
- Did you mark the container in some manner? How?
- What did you do with the container? (Booked it into evidence.)
- When is the next time that you saw that container?
- Did you bring it to court today?
- To the court: I have in my hand_____ (Describe the container or the evidence envelope). May this be marked as State's Exhibit #_____ for identification? May I approach the witness, your honor?
- Officer, I am showing you State's Exhibit #_____ for identification. Do you recognize it?
- What is it?
- How do you recognize it?
- Is it in the same condition as it was on the day that you obtained the urine sample from the defendant? (No. The seal placed on the container or envelope by the officer is broken.)

There should also be a new seal placed on the exhibit by the crime lab after it analyzed the sample. The criminologist should be able to complete the chain of custody by explaining the broken seal and the new seal.

E. Statements By The Defendant During Post-Arrest Interrogation

IMPORTANT: Omit this section if the defendant did not waive his or her Miranda rights. It is a violation of the defendant's Constitutional rights to comment on his or her invocation of the Miranda rights. Also, omit this section if the judge excludes the defendant's statements from evidence.

- Did you question the defendant?
- Did you explain the defendant's constitutional rights?
- When did you do so?
- Did you read the rights from a document?
- What document? (Arrest report, field notebook, card, etc.)
- Read the rights to the jury in the same manner that you read them to the defendant.

The prosecutor should be sure to advise the officer during the witness interview to read slowly — the tendency is to read the rights too quickly in front of the jury.

- Did you ask the defendant if he/she understood each of those rights? What did the defendant say?
- After you explained the defendant's constitutional, or Miranda rights, did the defendant agree to talk to you?
- After waiving his/her Miranda rights, did the defendant make any statements to you?
- Did you ask the defendant a series of questions?
- What was the first question that you asked the defendant?
- What was his or her response?
- What was the next question that you asked? What was the defendant's response?

The prosecutor should proceed question by question, including all pertinent questions and answers. The prosecutor should have a copy of the officer's report handy in case the officer needs to refresh his or her recollection.

F. Redirect Examination Of The Arresting Officer

The purpose of redirect examination is to clarify or further explain matters that were questioned during cross examination by the defense. The scope of the redirect examination will generally be limited to the areas touched upon by the cross examiner. Although some judges give wide latitude to the scope of redirect, the prosecutor should not attempt to merely have the witness rehash his or her direct testimony.

During cross examination of the arresting officer, the defense attorney may choose to ask the officer about all of the tasks that the defendant performed properly, or as instructed by the officer.

For example, the defense may highlight the following facts during cross: the defendant immediately responded to the patrol car's red light; he appropriately pulled over to the curb and parked, he had no trouble locating and retrieving his driver's license, he did not have to lean on the car for support; he was able to follow the officer's directions and walk nine steps in each direction during the SFSTS; and he appeared to understand both the chemical admonition and the Miranda warnings. On redirect, the prosecutor's task is to refocus the jury on the totality of the circumstances that led the officer to conclude that the defendant was under the influence. The prosecutor *might* ask the officer on redirect:

- Did you consider all of your observations of the defendant on the night of his/her arrest before forming your opinion?
- Despite the fact that the defendant was able to follow some of your instructions and was not "falling down drunk," why did you conclude that he/she was under the influence of alcohol? ("...because of all of the other overwhelmingly numerous indicia of impairment including the driving pattern, objective signs of impairment and overall performance on the SFSTs.")

G. The Chemist Or Criminalist

The chemist's, or criminalist's testimony may include his or her expertise, a discussion of the alcohol testing method of a blood, breath or urine

sample, the maintenance and accuracy of the instrument used to test the defendant's sample, the result of the defendant's test, the effects of alcohol on the human body and a person's ability to drive, and the significance of the defendant's particular alcohol reading. The chemist may also give an expert opinion in response to a hypothetical question as to whether a person exhibiting all of the signs of intoxication displayed by the defendant would be under the influence of alcohol. The extent of the chemist's testimony is, of course, limited by the nature of his or her background, training and experience. In some jurisdictions, the chemist may only be qualified to testify that the instrument was maintained properly and that the test result is accurate.

- What is your present occupation and assignment?
- How long have you been employed by _____ laboratory?
- Please relate your formal education and experience that qualifies you for your present position.
- Is the laboratory where you work licensed by the State of _____ to engage in forensic alcohol analysis? (This information may also be introduced by stipulation, judicial notice, or as public record.)
- Are you on a list of personnel authorized to engage in forensic alcohol analysis under your laboratory's license?

Omit questions 6-18 if the witness does not qualify to discuss correlation studies and the scientific literature, or there appears to be no real issue as to the defendant's impairment, e.g. if the sole issue appears to be driving.

- Have you previously qualified in the courts of this state as an expert in forensic alcohol analysis and the effects of alcohol on the human body?
- How many times?
- Have you conducted any research regarding the effects of alcohol on the human body, especially the effects of alcohol on the ability of a person to drive a motor vehicle?
- Please describe the research that you have conducted. (This should include literature reviews, observations of breath testing, attendance

at schools, seminars, conferences, study groups etc., informal drinking studies, police ride-alongs, and correlation studies.)

- Based on the correlation studies which you have conducted, participated in or observed, have you formed an opinion as to whether there is a correlation between a person's alcohol level and whether that person's ability to drive would be impaired?
- Have you prepared a chart to assist in your explanation of this opinion? Have chart marked for identification, if not done in advance of trial.
- Using State's Exhibit # _____ for identification (the chart), please explain your opinion. The chart might be as follows:

.00 - .04	May be under the influence
.05 - .07	Probably under the influence
.08 and above	Definitely under the influence

(Chart should conform to applicable state

practices.)

- Based on your research, what is the effect of a .08 alcohol level on a person's observable behavior?
- Does tolerance for alcohol vary from person to person? Why? How?
- What is it about a .08 level of alcohol that causes you to conclude that all persons are under the influence at that level?

At this point, the witness should discuss the impact of a .08 level on a person's mental abilities including judgment, risk-taking, divided attention skills.

- If a person shows the objective physical signs of alcohol impairment, is that person also mentally impaired? Why?
- If a person is mentally impaired due to alcohol, will that person always show the objective physical signs of alcohol impairment? Why not?
- Please describe the methods used by your laboratory to determine a person's alcohol level.

H. Breath Test

- Are you familiar with an instrument known as _____.
- Have you had training and experience with the _____.
- Please describe that training and experience.
- Is the _____ approved for use in your state?
- Please explain how the _____ works.

If the prosecutor has printed diagrams or enlarged photographs of the instrument, they should be marked for reference only so that the witness can use them in his or her explanation.

- Do police officers who operate _____ instruments receive training in their operation?
- Have you trained police officers in the operation of the _____?
- How does a trained officer make sure that the _____ is being operated properly? (E.g., with the use of a checklist.)
- I am showing you what has been marked for identification as State's Exhibit # _____. Is this the checklist that you just mentioned?
- Does State's _____, the checklist, contain all of the steps, in the proper sequence, which the operator of the instrument must perform in order to obtain a valid reading of the subject's alcohol level?
- Is the 20 minute waiting period sufficient for throat and mouth alcohol to dissipate?
- Is the _____ designed to allow for an analysis of a sample of deep lung air?
- How is that accomplished?

- Is your laboratory responsible for the maintenance of _____ instrument number _____, the instrument used in this case?
- Does the maintenance include conducting regular accuracy tests of the instrument?
- How often is that done?
- How is the accuracy test performed?
- How are the results of these accuracy tests recorded?
- Have you brought with you any reports pertaining to the accuracy of _____ instrument number _____?
- Could you describe these records?
- Your honor, this accuracy report summary has been shown to defense counsel. May it be marked as state's for identification?
- What is the date of the accuracy test performed just prior to _____. The date of the defendant's test? Who performed that test? Is that person on the list of personnel authorized to engage in forensic alcohol analysis under your laboratory's license?
- Who is responsible for preparing these reports?
- How were these reports prepared?

In some jurisdictions, the accuracy tests are performed automatically by computer. If applicable, the witness should explain how this is done.

- Are you one of the persons having custody and control of this information?
- Are these reports prepared in the regular course of your laboratory's activities?
- Do these documents accurately reflect the accuracy of this instrument for the dates surrounding _____, the date of the defendant's test?

- What is the result of the accuracy test of _____ (the first date)?
- What is the result of the accuracy test of _____ (the second date)?
- What is your opinion as to the operating condition of _____ instrument number _____ on _____, the date of the instrument's test?
- Referring to State's _____, the checklist completed for this defendant, what is the alcohol level indicated on the printout?

I. Blood Or Urine

- What method does your laboratory use to determine the amount of alcohol in a person's blood (urine)?
- Are you familiar with an instrument known as the gas chromatograph?
- Have you had training and experience operating a gas chromatograph?
- Please describe your training and experience.
- Does your laboratory use a gas chromatograph to analyze samples of blood (urine) to determine the amount of alcohol in the samples?
- Please briefly explain how the gas chromatograph used in your laboratory operates.
- Your honor, may I approach the witness? I am showing you State's Exhibit # _____, an evidence envelope (or a vial/container). Do you recognize it?
- How do you recognize it?
- Where did you obtain this envelope (vial/container)?
- Was the envelope (vial/container) sealed when you received it?

- After our analysis was completed, did you place a new seal on the envelope (vial/container)?
- Between the time you opened the envelope (vial/container) and the time you placed the new seal on it, what happened to the blood (urine) sample?
- Please explain what you did to prepare for the analysis of the sample?
- Was the instrument working properly on the date the blood (urine) was analyzed?
- How do you know? (The instrument was calibrated before and after the analysis of the defendant's blood urine.)
- Did you write the results on the envelope?
- Was a computer printout generated indicating the results of the analysis of the blood (urine)?
- Your honor, I am holding a computer printout, may this document be marked as state's exhibit #_____ for identification?
- May I approach the witness? I am showing you State's Exhibit # _____. Do you recognize it?
- What is it?
- How do you recognize it?
- Referring now to this computer printout, State's Exhibit #_____, what was the defendant's alcohol level at the time the blood (urine) sample was taken?
- Within what limits is the alcohol level accurate?
- What did you do with the envelope (vial/container) after you finished the analysis?
- Based solely on the defendant's alcohol level what is your opinion as to the defendant's degree of impairment at the time of the test?

- Given a person's sex and weight, are you able to determine how many ounces of a given proof of alcohol would have to be present in the person's system to produce a particular alcohol level?
- What formula do you use to make these calculations?
- Given that the defendant is a (male/female), weighing approximately _____ pounds at the time of the test, please perform the calculations and tell us how many ounces of alcohol would have to have been present in the defendant's system to produce an alcohol level of _____.
- (Ask only if the defendant told the officer that a certain number of drinks were consumed.) Assuming the same sex and weight, what alcohol level would the defendant had if only _____ drinks of _____ were in the defendant's system at the time of the test?
- Assume that a person with an alcohol level of _____ said that (he/she) drank _____ (number and type of drink defendant admitted to drinking), would you have a professional opinion as to the accuracy of that person's statement? What is your opinion?
- If you know the defendant's alcohol level at the time of the test, are you able to determine what the alcohol level was at the time of arrest, i.e. _____ minutes (or hours) earlier, assuming that all of the alcohol was absorbed into the defendant's system at the time of the arrest and that no alcohol was consumed after the arrest?
- How are you able to make that determination? (Burn-off rate.)
- In your opinion, what would have been the defendant's blood alcohol level at _____, the time that the defendant was stopped?
- Please assume the following facts: (describe defendant's driving, i.e. objective signs of impairment, performance on SFSTs, etc.). Are these facts consistent with a person's being under the influence of alcohol?
- Assume the facts that I just described, combined with an alcohol level of _____. What is your opinion as to that person's ability to

drive/operate a vehicle safely?

J. Redirect Examination Of The Chemist

Redirect examination of the chemist may include questions designed to elicit information about the safeguards that are built into the breath-testing instrument. For example, in the case of the infrared testing device, most defense attacks on the validity of the readings can be rebutted by the fact that the instrument will not produce a reading unless the subject provides a deep lung breath sample which can be analyzed for the presence of ethyl alcohol. The test will abort if the instrument detects mouth alcohol or any other interfering substances, if the instrument detects radio frequency interference, or if the subject provides an inadequate breath sample. Much of the information designed to cast doubt on the accuracy of the readings by the defense may be technical and somewhat confusing. Therefore, if the court allows, it is best for the prosecutor to confer with his or her own expert as to the most useful areas for rehabilitation on redirect.

14.2.4 CROSS EXAMINATION

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Basic Rules Of Cross Examination

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Affirmative Cross Examination

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Bias

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Did Not See The Defendant Personally Or Observe The Defendant

Destructive Cross Examination

E. CONCLUSION

A. General Cross Examination Principles

Preparation

It is important to prepare all phases of your case ahead of time, including cross examination. In preparing your cross, you will want to do the following:

- Anticipate the defense argument. Examine your case from the defense attorney's viewpoint. From preparing your own case, you will know the weaknesses in the prosecution's case. The defense case will be aimed at those weaknesses, so consider what defense(s) the defendant might raise. By anticipating what the defendant and his witnesses will say, you can prepare a cross examination to counter those issues.
- Find out who the defense witnesses are as soon as possible. Some states require the defense to disclose their witnesses ahead of time. If not, you might ask the defense lawyer who his witnesses are.
- If you know who the defense witnesses are, find out what they are going to say. Consider taking a deposition, if that is permitted. Interview the witnesses before the trial. Have another person present when you interview the witnesses, particularly defense or hostile witnesses. Ask if the witness has any pictures, diagrams, statements or other evidence, and get copies if possible.
- Check the court file to see if the defense has given notice of witnesses, just in case your office did not receive it.
- Find out if the defense intends to call any expert witnesses; because they will require special preparation. If there is an expert, find out if the expert prepared a report. Get a copy of it and the expert's resume also known as a curriculum vitae (CV). If necessary, get a ruling from the judge or permission from the defense attorney to ask the expert directly for that information. You should also contact your state prosecuting attorney's council or organization to see if they have transcripts, questions, or other materials on the expert.
- Check with your co-workers or with prosecutors in the defense lawyer's jurisdiction to find out if the defense attorney uses an expert

in DUI cases, and if he uses a particular expert frequently. Defense lawyers will establish relationships with particular experts, particularly if they are successful for them, and use them routinely in their cases.

- Review the rules on reciprocal discovery. If the defense is required to give you notice of their witnesses and has not, file the appropriate motions and get a ruling by the court. In extreme situations, failure of the defense to comply with discovery means that the witness cannot be called. At mini-mum, the judge can force the defense to comply so you are not surprised.
- Be sure that the defense attorney turns over to you all experts' reports or witness statements that exist, as well as any diagrams, photographs, or other exhibits he intends to use at trial. Again, it is advisable to do this as soon as possible, but at least a week or two before trial, so you can adequately prepare your case. If the defense is not complying with discovery, file a motion with the court to enforce it. In some jurisdictions, failure to file a motion to compel discovery may preclude your objection at trial.

Should You Cross Examine?

The first question always is "Should I cross examine?" The answer will usually be "yes." Most juries expect the prosecutor to cross examine the defense witnesses. Most defense witnesses will say something that harms your case, and you will need to cross examine.

Cross examination does not always mean that you try to discredit the witness. In fact, most of your cross examinations will be an "affirmative" cross, where you use the defense witness to help establish your case, rather than a "destructive" cross, where you try to discredit the witness or damage the testimony. There is always something safe you can ask that will give the "appearance" of a cross examination, even if you do not have much you can do with the witness. If you have information that will weaken the testimony of a defense witness or expose bias, then your cross examination will be a destructive cross examination or a bias cross examination.

In the rare event that a defense witness has not hurt your case, and has not significantly helped the defendant's case, you may decide not to cross examine that witness. Be careful with a witness who has obvious difficulties such as age or illness and who has not significantly hurt your

case. You may appear to be bullying the witness if you do an extensive cross examination. You may want to say simply, "Thank you for coming, Mr./Ms. Jones."

Basic Rules Of Cross Examination

The form of your cross examination questions is as important as their content. Most lawyers are familiar with the "rules" of cross examination:

- Always ask leading questions. A leading question is one that can be answered simply "yes" or "no", like "Your name is John Jones?" Avoid "tags" like "correct?" or "right?" at the end of the question. Instead, use a rising voice inflection to convert a statement into a question.
- Keep your questions short. A good rule of thumb is one subject, one verb and one object: "You drove the car?" "You drank 5 beers?" Longer questions confuse the witness or allow the witness to give an explanation.
- Almost never ask questions that begin with "How" or "Why". Never let the witness explain anything. If you do, he will give an answer that explains the problem away, and shows that the defendant is not guilty.
- Pick two or three points that you want to make on cross; then **Stop**. Do not try to cover everything that the witness said; you will drown your two main points with a lot of minor points. The jury will not remember every little detail, but they will remember the two or three main points. Those are enough for them to decide if they believe the witness.
- Do not let the witness repeat a favorable direct examination. Once the witness has testified on direct, you want to avoid a cross examination that gives the witness a chance to tell the story again. If there are portions favorable to your case that you want to emphasize, ask about those areas, but do not go through the entire story from beginning to end.
- Never ask a question that you do not know the likely answer to, unless you are **sure** it will not hurt your case. If you have not had any discovery, you may not know what the defendant or the

defendant's witnesses will say, and you will have to cross examine without knowing the answers. However, you should listen to the voir dire, opening statement, the cross examination of the prosecution's witnesses, and the testimony of the defendant's witnesses for clues about what the defense witnesses will say. Use those as your guide when you cross examine.

- Listen to the answer. Always listen closely to the answer the witness gives you. The witness may hedge the answer or give you something unexpectedly helpful that you need to follow up on. Occasionally, a lawyer will become more concerned about following a script on a page, and will miss an opportunity.
- Control the witness. If the witness hedges, or wants to narrate instead of answering with a yes or no, there are some techniques to use so you stay in control:
 - Use short questions that can be answered "yes" or "no." The witness looks foolish if he can not answer a simple question with a straight answer.
 - After the narration, follow up by saying, "Is that a 'yes' (or 'no')?"
 - Use your initial questions to "train" the witness and get him into the habit of answering "yes" or "no." Start with short questions about facts you know the witness will agree with. If you begin the cross examination by attacking the witness, you will not get the simple "yes" or "no."
 - Say, "I'm sorry, you misunderstood my question. I just need a "yes" or "no" answer (and ask your question again).

Having a complete command of the facts is needed to control a witness, so if the witness forgets or misstates something, you are the one who corrects him. If appropriate, stand close to the witness when cross examining. You can use an exhibit and ask the witness about the exhibit, which will give you a reason to stand near the witness. If your rules allow or require you to stand when examining a witness, stand at a different place for your cross examination than you do for your direct examinations.

- Know when to stop. When you have asked all the questions that make your point, **Stop**. Save the conclusory questions for points you make in your final argument. If you give them to the witness, they will explain it away and leave you with a different conclusion than the one you were looking for.

Parts Of Cross Examination

No matter who the witness is or what he has said, all cross examinations have three essential parts. Those are: affirmative cross, bias/prejudice and destructive cross. For an effective cross examination, it is helpful if you have a basic order or “structure” that you use in cross examining every witness. You can work from this and adjust the parts to each witness. There are as many ideas as there are advocates, but for purposes of this manual, the following structure will be suggested:

- Affirmative Cross Examination - getting the witness’ agreement to as many of the facts of the prosecution’s case as possible.
- Bias/Prejudice - exposing the bias or prejudice of the witness.
- Destructive Cross Examination - impeaching or discrediting the witness, or weakening the witness’ testimony.

This is the structure or order of the questions that will most commonly be used, and is generally most effective. Within this structure, you can expand or limit within an area, as appropriate. For example, if you have a defense witness whose testimony helps you, you may skip the destructive portion of the cross. If you have a witness who is not very credible, you may skip the affirmative portion entirely.

It is important to do the affirmative portion of the cross examination **before** the destructive portion. The witness will not be cooperative with you if you just tried to discredit him. Since most witnesses expect to be attacked, you may cause them to lower their defenses with a non-threatening affirmative cross. This will then set up your destructive cross. However, decide first what you want to do with the witness. If the witness is helpful, you may choose to skip the destructive or bias portion of the cross examination, even if you have some damaging information. You will lose the positive impact the witness has given you if you then discredit him.

Your assessment of the credibility of the witness or defendant determines the emphasis of your cross examination. If you have a strong witness or defendant, you will emphasize the affirmative portion of the cross. If you have a witness or defendant who is vulnerable, you will emphasize the destructive portion of the cross, or the bias and prejudice portion.

In deciding what you want to do with a witness on cross examination, consider the following questions:

- What is the defense?
- How credible is the witness?
- What is your goal on cross-examination?
- What can you get out of the witness?

The answers to these questions, and particularly the credibility question, will help you determine what portion of the cross examination (affirmative, bias/prejudice or destructive) you will emphasize with the witness.

- **Affirmative Cross Examination**

An “affirmative” cross examination is when the cross examiner asks the witness to agree with the prosecution’s facts in the case. Because the defendant is on the other side, the jury is expecting a different version of the events from the defendant’s witnesses. Every fact in your case that the defendant or the defendant’s witnesses agree is true bolsters the credibility of your case with the jury, and reduces areas of dispute.

The affirmative cross is the best way to cross examine if the witness cannot be discredited. Most witnesses believe that the cross examiner is going to attack them, and are not prepared for an affirmative cross. It also can bolster the credibility of your witnesses when the defendant has to agree to the facts in their testimony. You can argue that your witnesses are correct, because even the defendant or the defense witnesses agree with most of what your witnesses said.

In designing an affirmative cross, look at what your witnesses will say, and then identify the points that the defendant or the defendant’s witness will have to agree with. Look at your elements and what you have to prove, and use the defendant’s witnesses to establish as many elements as you can. There will always be the key point that

the case turns on where there will not be agreement, but if you can reduce that to one point of dispute, you have made your job and the jury's job easier.

The defendant's witnesses can be very helpful, and may give you information that they do not realize is damaging. For example, if the witness testifies that he did not think the defendant was impaired, he just opened the door to a line of questioning about what the defendant looks like when he is impaired. Ask how much it takes to get him impaired. Ask how the witness knows when the defendant is impaired. This is a line of questioning where the answers cannot hurt you.

If he says he can tell by looking, so can the police, or the citizens who saw him. If he says that he slurs his speech, or staggers, or has trouble driving, then that may confirm previous testimony by your witnesses. If the witness testifies that the defendant was not impaired because he was not passed out, then you can argue that the witness does not use the same definition for impaired that the law does. Rather than discredit this witness, you get farther by making him an unwitting witness for you.

With the defendant, the affirmative cross may be the only part of cross examination that is available to you. The bias of the defendant is obvious. Defendants virtually never write out statements or testify under oath in circumstances which could be used for impeachment. However, you have a fruitful topic for an affirmative cross examination of the defendant — his drinking. In addition to asking how much he had to drink and where, you can ask why he was drinking, how he knows when he is sober or impaired, how he is affected when he is impaired, and how much it takes to get him impaired. If the defendant says he staggers when he is impaired, and it takes 6 beers for him to feel impaired, you may be able to corroborate the officer's observation of impairment.

Rules of affirmative cross:

- Keep the questions short. A good rule is use one subject and one verb. Examples: "You had just left work?" "You drove to the bar?"

- Ask leading questions that can only be answered with a “yes” or “no.” Keeping the questions short and only asking questions where the witness will agree with you will help.
- Make sure the witness will agree with the question. Ask only questions the witness cannot disagree with — or will want to agree with.
- Be courteous, but firm.
- Pick two or three areas that you want the witness to confirm, then **Stop**. You will lose the effectiveness of your points and the jury may forget them if you try to cover too much information. Pick areas of the witness’ testimony that establish elements of your case or that corroborate an important prosecution witness’ testimony.

- **Bias And Prejudice**

“Bias” or “prejudice” means anything that shows a witness favors a particular side or has a motive for what he is saying.

Jury instructions usually contain an instruction about evaluating the credibility of the witness, and choosing who to believe when there are conflicts in the evidence or testimony. The witness’ bias or motive for testifying are factors that can be considered by the jury. It is always helpful to establish the bias or prejudice of a witness. These are “safe” questions to ask a witness that you cannot otherwise use or attack.

Example of bias and prejudice issues include:

- What is the witness’ relationship to the defendant? Is the witness the spouse, sibling, parent, in-law, friend, co-worker, boss, neighbor, or social friend of the defendant?
- Who contacted the witness about testifying?
- When was the witness contacted? Was it was the day after the arrest, the night before the trial, etc. You can argue to the jury that the witness and the defendant have had a long time to plan what the witness is going to say. If it was the night before trial,

you can say that this is a witness who will say anything for a friend.

- Who the witness has talked with about his testimony? Almost certainly he will have talked to the defendant at some point. Otherwise, how would the defendant know the testimony would be favorable?
- Is the witness being paid or compensated to testify? Usually this occurs only with expert witnesses. Occasionally, you may discover that a lay witness is also being compensated in some fashion for the testimony.

There are cases where you may have a witness who has a particularly strong prejudice against the police because of past experience, and whose testimony will include strong criticism of the police. If you intend to discredit the witness by bringing out the witness' past experience with police, check your local practice rules.

The defense may have a witness who has no motive or bias, just an opinion that the defendant was not impaired or was not driving. Your emphasis will not be on bias or prejudice with that witness, but will be an affirmative cross, or a combination of affirmative and destructive. Or the witness may not have a particular bias or prejudice, but nevertheless may be mistaken. Skip the bias/prejudice portion of the cross if you are sure there is none with this witness. More likely, you will need to ask some questions that would tend to weaken the witness' ability to see, hear or remember.

- Destructive Cross Examination

A destructive cross examination is the kind of cross examination that all prosecutors dream of doing, but seldom happens in reality. Witnesses, and particularly defendants, can be skillful liars, and unlike on *Perry Mason*, they are not going to crumble on the witness stand when confronted. Most people who lie tell as much of the truth as they can, and only lie about the things that are unfavorable to them, or that they do not want to reveal.

In the destructive portion of the cross examination, your goal is to discredit the witness and his testimony. You seldom will be able to completely discredit a witness. It will be sufficient to show the

witness' testimony is questionable or untrue in two or three areas. If the jury finds that the witness' testimony can not be trusted in certain parts, it will be hard for them to trust the rest of it.

Destructive cross is effective when you have material to damage the witness, like an inconsistent statement by the witness or an impeachable offense. A witness may be vulnerable, but may be unwilling to admit it. For example, a witness may be color-blind, or need glasses to see. Some witnesses will provide false alibis, or may falsely help the defendant account for time when the defendant was drinking. If you know the truth, confront the witness with it. Be prepared to call a rebuttal witness or introduce the impeaching records if the witness will not admit the truth.

The areas of a destructive cross are:

- Prior inconsistent statements, either sworn or unsworn. This includes tape recordings, videotapes and written statements. If the witness testified at the license revocation hearing, get a copy of the transcript or tape.
- Problems with memory or perception, particularly if the witness was drinking or using other drugs.
- Impeachable offenses. Be sure to take this up with the judge outside the presence of the jury if there is any question about admissibility. It is a guaranteed mistrial if you are wrong.

It may be advisable to stand near the witness during a destructive cross. Exhibits can give you a reason to stand near the witness.

Finally, when listening to a witness' direct testimony, listen also for what he does **not** say. Focus on what was said, but work on developing an ear for what was not said. Most successful liars will tell as much of the truth as they can. When the truth hurts them, they may omit information or hedge about it rather than flat out lie. Omitted information or unnecessary explanations point to sensitive areas for the witness, areas the witness does not want exposed, and are possible areas for cross examination. For example, if the defendant denies being impaired, but skips over a portion of the evening, you may want to ask questions about what was going on during the time period that was omitted.

If you engage in a destructive cross, here are some guidelines:

- Never argue with the witness. It does not accomplish your goals on cross examination. It only makes you look bad, gets the judge upset with you, and creates sympathy for the witness. The jurors' sympathies are going to be with the witness because they see the witness as unsophisticated, scared, and vulnerable, and the prosecutor as a bully.

An example of an argumentative question is, "You heard the witness testify you were drunk, and you (defendant) still claim you were sober?"

- Never ask the witness to explain an inconsistency. Do not ask "why" or "how." You want to establish the inconsistency, then argue, in closing, to the jury that the inconsistency shows the witness is mistaken or lying. If you ask for an explanation, you will get one, and it will not be favorable for you. The witness will have an explanation for the inconsistency.
- Stay in control. Do not badger the witness. Getting loud or cutting the witness off only makes you look like a bully and gains sympathy for the witness.
- Choose only two or three points at most to question the witness about. Two or three, if done properly, will be very effective.
- Know when to stop. If you have made your points, **Stop**.

B. Sample Cross Examination Of Defendant

Affirmative Cross

Have the defendant agree with every fact and element of your case that you can. Have the defendant agree with as much of the officer's testimony and observations as you can. Use voice inflection to turn the statement into a question to which the defendant can only answer yes or no.

- On January 1, you had been drinking?
- You were drinking beer?
- You were drinking Red Dog beer?
- You told the officer you had 3 beers?

- It was New Year's?
- You started drinking at 5 p.m.?
- You ate chips and dip at 5 p.m.?
- That's all you had to eat all night?
- You say you stopped drinking at midnight?
- You left the party at 1:00 a.m.?
- You were driving?
- You were alone?
- No one drove the car except you?
- You were in a crash?
- You hit a parked car?
- A police officer talked to you at the crash scene?
- That was Officer Jones?
- The same officer that testified earlier?
- You did some field sobriety tests?

Don't ask about results — save that for your argument. If the defendant is argumentative about the fairness of the procedures or tests, just establish that tests were done.

- The officer had you stand on one leg?
- You walked in a line?
- You were asked to say your ABCs?
- You were taken to the police station?
- You blew into the instrument?
- The officer also asked you some questions?
- You answered those questions?

(You may want to repeat the questions and answers that help your case.)

Bias

The bias of the defendant is obvious, and you do not have to point that out.

Destructive Cross

- Does alcohol affect your memory?
- Does alcohol affect your eyesight?
- Does alcohol affect your judgment?
- Does alcohol affect your balance?
- Why do you drink alcohol?

Prior Inconsistent Statements -- Unsworn

- You claim you never said “I had too much to drink?” (Approach the defendant and show him the statement -- have statement marked for identification if needed.)
- This is your statement?
- This is your handwriting?
- In this statement, you wrote, “I had too much to drink.” (Point out the sentence.) - I just read it accurately, didn't I?

Prior Inconsistent Statements-- Sworn

- Your testimony today is “I only had three beers”?
- Do you remember another hearing that was connected with this case? (Do not mention the kind of hearing, for instance a license revocation hearing. It could cause a mistrial, or it could generate sympathy from the jury. Some people don't like the idea of taking the license and prosecuting, too.)
- That hearing took place on (date)?
- Mr./Ms. (Defense attorney) was there?
- You were under oath? (Show witness the statement, if required).
- In your testimony on that day, you said, “I don't know exactly how much I had to drink. I think it was four or five beers.” (Never ask for the explanation of why the statements are inconsistent — just show the inconsistency.)

Prior Conviction For An Impeachable Felony

- Mr./Ms. _____, you have previously been convicted of a felony, correct?
- This was the felony of _____ ?

- That is a felony involving dishonesty or false statement? (If multiple felonies, repeat for each felony.)

C. Sample Cross Examination of Defendant's Witness

Affirmative Cross

(Ask only questions you know the witness will agree with. The following are intended as sample questions only and may not be applicable to your case.)

- You were with the defendant that night?
- The defendant drove his car?
- It is a _____(kind/color of car)?
- You were the passenger?
- You were at _____ (place where they were drinking)?
- You got there at _____(time)?
- Defendant was drinking _____(kind of drinks)?
- Defendant was drinking _____(size of drinks)?
- You left at _____(time left)?
- Defendant was driving?
- You were stopped by Officer _____ on _____ Street?
- The officer had the defendant do some tests? (Just have the witness acknowledge that tests were done. The witness will likely disagree with results.)
- The officer found beer in the car?
- You've seen the defendant when he has had too much to drink?
When defendant is impaired, he:
 - Slurs his speech
 - Walks unsteady
 - Has red watery eyes

Bias/Prejudice

- You are the wife/husband/mother/sister-in-law of the defendant?
Boss/co-worker
Friend/neighbor
Business associate
Fellow club member
Sports teammate
- The defendant asked you to be here today?
- You've known the defendant for _____ years?

- You spoke with the defendant about testifying here today?
- You spoke with the defendant's attorney about testifying here today?
- How many times have you talked about your testimony?
- Did you talk about what you were going to say today?
- Who else have you discussed your testimony with?
- Did you ever go to the police and tell them your account?
- Did you ever come to my office to tell me about this?
- Is today the first time anyone besides the defendant/defense attorney has heard your story? (If you have tried to talk to this witness before trial and he/she refused to talk to you, you may want to examine this area.)

Destructive Cross

If the witness had been drinking that night:

- You had been drinking that night, hadn't you?
- You were drinking with the defendant?
- You were drinking at _____ (name of bar or place they were drinking)?
- You had _____ (number of drinks)?
- These are _____ ounce drinks (size of drinks)?
- Who had more to drink — you or the defendant? (Safe question — no matter how the witness answers, it helps you.)
- Does alcohol affect your memory?
- Does alcohol affect your eyesight?
- Does alcohol affect your judgment?
- Does alcohol affect your perception?
- You weren't driving the car?
- The police didn't let you drive home?

Prior Inconsistent Statement

- Your testimony today is "I only had two beers." At the time, did you tell the police officer you had _____? (Never ask for the explanation of why the statements are inconsistent — just show the inconsistency.)

Impeachable Felony

(Check your rules of evidence to see if the witness has been convicted of a felony and whether you can name the felony.)

- Witness, you have previously been convicted of a felony?
- This was the felony of _____ ? (If multiple felonies, repeat for each felony.)

D. Cross Examination Of Experts

General Principles Of Cross Examination

You may have DUI cases where the defense will call an expert witness. Usually, it will be a toxicologist, but can be a pathologist, medical doctor, psychiatrist, psychologist, or other medical person or scientist. This witness may be called by the defense to attack the breath test result, the testing process, or the alleged degree of impairment.

The rule to remember about experts is: they are not going to change their opinions on the witness stand. Just as the defendant is not going to break down on the witness stand and confess, neither will the expert admit that his opinion could be wrong, even if you prove that it is. They are often experienced witnesses, and know many of the attacks on cross examination. They would not be called by the defense if they were not good witnesses and produced successful results.

Rarely will you have a vulnerable expert who can be attacked. If the expert is not vulnerable, the best approach is an affirmative cross examination. Use the defense expert to agree with as many facts, scientific principles and observations from your witnesses as possible. Every fact the defense expert gives you is proven. It serves to confirm the credibility of your witnesses and expert when the defense expert agrees with them.

Consider it a success if you at least gain a tie between the defense expert and your expert. In cases where each side has an expert who appears equally credible and the opinions can not be reconciled, studies and experience show that jurors tend to throw out the expert testimony and base their decision on their own common sense and other evidence they find more reliable, such as eyewitnesses or physical evidence.

Science is not one hundred percent exact. There are some principles that are so well established as to effectively be exact, but a good, cautious scientist will acknowledge that some other explanations are possible, even if the likelihood is extremely remote. The responsible expert will base his opinions on the most reliable science and facts. The less responsible or dishonest expert will either accept only a limited area of the science, or will

accept the science, but interpret the facts differently, and in a way that strains credibility, at least in the scientific world.

Another difficulty in cross examining an expert is **control**. The expert will try to narrate long answers that may not be responsive to your question, or go beyond what you asked. Judges often will allow the expert to narrate and explain; and seldom will instruct the expert to simply answer “yes” or “no.”

There are some techniques to use so you stay in control:

- Use short questions that can be answered “yes” or “no.” The expert looks foolish if he cannot answer a simple question with a straight answer.
- After the narration, follow up by saying, “Is that a “yes” or “no?”
- Use your initial question to “train” the expert and get him into the habit of answering “yes” or “no.” Start with short questions about facts you know the expert will agree with. If you begin the cross examination by attacking the expert, you will not get the simple “yes” or “no.”
- Say, “I’m sorry, you misunderstood my question. I just need a ‘yes’ or ‘no’ answer.”

Preparation

The prosecutor needs special preparation to successfully cross examine an expert. Prepare yourself for the defense expert by learning from your own experts. Every chance you get, learn as much about the area of science that is involved in your case as you can. Ask your toxicologists to give you a tour of their lab, and show you how they do the testing. See how the chain of evidence is handled.

Put yourself in the position of the defense lawyer, and ask every question you can think of that would challenge their results, and have them show you how that problem would not affect the results. As you educate yourself, you will be preparing your expert for the defense cross examination. Your expert will also appreciate working with a well-prepared and knowledgeable prosecutor.

If you know who the defense expert will be before the trial, do some research. Try to obtain information about the expert and his work, including:

- Copies of articles or books written by the expert
- A copy of the expert's curriculum vitae
- Copies of testimony in other cases
- Copies of depositions in other cases
- Any tape recordings, or video tapes of the expert

If you are able to do some formal discovery of the expert, either by deposition or by requests for production, you should ask for the following information:

- The expert's exact degree(s), job title and description, and any specialties or specialized training;
- The expert's training and experience in this field;
- How the expert spends his time (teaching, research, writing, speaking);
- Whether the expert has testified before, and on which side;
- What the expert's sources of income are;
- Other cases in which the expert has testified (to obtain transcripts);
- Whether the expert has talked to the defendant, and what the defendant said;
- The expert's opinion and basis for that opinion;
- All of the materials the expert reviewed or relied on in reaching the opinion and in preparing for the case;
- Whether there are any other materials that the expert would like to have in order to make the opinion more accurate or complete;
- All books, articles, or publications the expert considers authoritative, whether or not used in this case by the expert.
- Any other persons in the field the expert would identify as having more expertise or the same expertise as the expert, for possible rebuttal witnesses and impeachment materials.

See, Art of Advocacy: Cross Examination of Medical Experts by Marshall Houts (Matthew Bender 1982). This is a thorough and complete book.

If the expert is in a field that requires a license, call the licensing agency and find out the status of the expert's license. It is rare, but you may find that the license is on probation or has been suspended previously.

Since the same experts show up over and over, you may want to develop a bank of information in your office or with other jurisdictions for future use. Another resource is your state's prosecuting attorney organization or training coordinator. The American Prosecutors Research Institute's National Traffic Law Center has established a brief bank that includes transcripts, motions and memoranda. The materials on file address issues concerning breath test instruments, drug recognition experts, horizontal gaze nystagmus, field sobriety tests, crash reconstruction, retrograde extrapolation, etc. In addition, the National Traffic Law Center maintains a professional reference directory of individuals who have testified on the above areas. The National Traffic Law Center can be reached at; 99 Canal Center Plaza, Suite 510, Alexandria, Virginia 22314, by phone 703-549-4253, by fax 703-836-3195, or email www.ndaa-apri.org.

Designing The Cross Examination

- Affirmative Cross

When cross-examining the defense expert, never try to take on the expert in his own field. No matter how much preparation you do, you will never know as much as the expert. For a competent, qualified expert, the best approach will be an affirmative cross examination. You can use the defense expert to corroborate or confirm as much of your case and your expert's testimony as possible. You may be able to use the expert to identify the signs and symptoms of impairment, particularly the ones seen in the defendant, to confirm the accuracy of your police or civilian witness' observations. In the affirmative cross examination, your goal is to get as much agreement with your case as you reasonably can, and narrow the testimony to the issue(s) remaining in dispute.

Identify areas that the expert does not know about, or is not going to testify about. Narrow the scope of the expert's testimony as much as possible. For example, if the expert is a toxicologist, have him agree that he is only here to give an opinion about the blood test. He is not going to give opinions about the defendant's driving, the field sobriety tests, statements the defendant made to the police, or what the eyewitnesses saw. This approach makes it clear to the jury that although the expert has opinions about one part of the case, there are other parts the expert is not disputing, and which show the defendant was impaired.

Have a checklist of your expert's testimony. You can develop it in advance from the questions you are going to ask. The main parts of the testimony will be the scientific principles, the facts, and the opinion. When the defense expert testifies, mark on the checklist all the points the expert agrees with. Note any areas of dispute. The checklist will keep you organized on cross examination.

Find out from your expert if he knows the defense expert, and under what circumstances (school or professional colleagues). With the right expert, you may be able to get the expert to agree that the prosecution expert is also an expert in the field. If the prosecution expert identifies certain learned treatises as authoritative, the defense expert may also agree that those same works are authoritative. Both of these enhance your expert's credibility and conclusions with the jury.

- Bias And/Or Prejudice

Bias, as used with the defense expert, means anything that shows the expert is less than an objective scientist. Seldom will you find an expert that has a personal connection with the defendant or a prejudice against the police or prosecution. For thoroughness, you should find out whether the expert knows the defendant or has any personal, professional, or social connections with the defendant. However, that will be rare.

Find out when the expert was retained, when the expert did the work for the case, and if the expert solely testifies for the defense. (If the expert was retained shortly before the trial and did the preparation over the weekend, the jurors may find the opinion suspect.) Most reliable experts will want time to prepare thoroughly. Find out if the expert has ever testified for this defense attorney before (or for that firm), and how often. Find out how much of the expert's fees in the past year came from this law firm.

The curriculum vitae is a good source of information. Many vitae list lectures the expert has given. Look for lectures given to groups that are not the expert's peers. Find out what kind of group it is, and whether the expert was paid. A "defense expert" may be invited to speak at defense lawyer seminars to educate them on the latest and best tactics. If you can, get video or audio tapes of those lectures as

well, both for bias material and/or impeachment material. Lectures given at seminars may be less restrained, and the expert may let the bias show. You may get some quotes you can use to embarrass the expert.

Because of these kinds of questions, many experts now try to include some work for the prosecution or for the plaintiff in civil cases, so they can appear to be objective and fair. Find out what percentage of time is spent between “prosecution” work and “defense” work, and if there is an imbalance, point it out.

- Area Of Expertise/Qualifications

Rule 702 of the Federal Rule of Evidence, now adopted in some form in most states permits expert testimony as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Note: if expert testimony is within common knowledge of jury, it is not permitted.

You may find that the defense expert does not have the best qualifications to give an opinion about impairment, or the effect of medication, or the accuracy of the chemical test. To use this approach to the best advantage, you need to know ahead of time that the expert is vulnerable on the qualifications.

In rare cases, if the defense calls an expert who does not have the qualifications to testify, attack the expert’s qualifications during the defendant’s direct examination. Ask the judge for permission to “voir dire” the witness after the defense has gone through the qualifications and is tendering the witness as an expert. If you know about this ahead of the trial, file a pretrial motion, and ask the judge to hear the issue ahead of time and determine whether the expert will be permitted to testify. Because Federal Rule 702 has such a low threshold for

qualifying as an expert, you are not likely to get the expert disqualified, even if he does not have the best qualifications.

Only take an expert on voir dire if you are sure of success. Otherwise, it will backfire badly, and you will end up reinforcing the expert's credentials. If you can weaken the expert's qualifications, but are unlikely to have the expert disqualified, save it for cross examination.

The expert may lack experience in the area he is testifying about. Every expert has a way of making money, and you may find that the primary source of income is from some other area. For example, a general pathologist may primarily do analyses on biopsied tissues, rather than working with impaired persons or doing blood alcohol analyses. Be sure to go beyond the title or profession to find out what the expert does on a day to day basis. For example, a hospital pathologist is often a general pathologist.

Forensic pathology, however, is a sub-specialty that includes the study of substances on the human body, including alcohol. A witness who is a "pathologist" may sound qualified, but in fact be less qualified than another specialty, such as a forensic pathologist.

If the expert has written any articles or books, or given any lectures that are taped, those can form the basis for an attack on qualifications and experience. For example, if the witness has written articles, but few or none of them are about the subject of impairment, or breath or blood testing, point that out on the voir dire of the witness. You can use those articles to show what the witness' primary work is, and it can be far removed from the subject the expert is in court to testify about.

If you have a credible, qualified expert, an attack on qualifications will likely fail, and you will be better off exploring another area of cross examination.

- Materials Reviewed In Preparing For The Case

Find out ahead of time what materials the defense reviewed before testify-ing. Prepare a checklist of what materials are available, and note anything that the expert did not review. On cross examination, point out each item the expert did not review. Ask where the expert got the materials that were reviewed — it will probably be from the defense attorney. Ask if the expert would have liked to have reviewed the missing materials to make the opinion more complete (the answer will almost certainly be “yes”). This approach is very effective if the prosecution expert did review all the materials.

As the expert is testifying, keep a checklist of the facts that the expert is assuming for the purposes of giving the opinion. Note any differences between the facts the expert is assuming and facts in the materials that were not reviewed.

Then, go through the missing facts and ask the expert if they would change the expert’s opinion.

Find out if the expert talked to the defendant in preparing for the testimony. This is important for two reasons:

- First, you want to object to the expert relating the defendant’s story, unless the defendant has testified. A defense attorney may try this tactic because it puts the expert’s credibility behind the defendant’s statements the defendant may make a poor impression, or may be vulnerable to cross examination for some other reason.

Pursuant to Federal Rule of Evidence 801(d)(2)(A), a defendant’s statements are not hearsay if introduced by a party-opponent. The defense is not a party-opponent, and the statements are hearsay if the defense tries to introduce them through a witness other than the defendant. Be aware, however, the Federal Rule of Evidence 703 provides that an expert may base his opinion on facts or data perceived by or made known to him at or before trial, if they are of a type reasonably relied on by experts in the particular field in forming opinions, whether or not those facts or data are themselves admissible. In other words, an

expert can rely on hearsay, studies, other experts' data, or the defendant's statements in giving the opinion, even if the underlying information is not admissible.

If you can successfully object and keep the expert from relating the defendant's statements, you may force the defense to call the defendant to the stand. Even though Federal Rule 703 on its face allows the expert to use an interview with the defendant in giving the opinion, to allow the expert to put the defendant's statements in the record, without the defendant testifying, denies the prosecution its right to a fair trial. The defendant is available to testify. Neither the prosecution nor the defense is allowed to introduce hearsay evidence.

- Second, you want to know if the expert talked personally to the defendant because the defendant may have told the expert a different version than he told the police. If you cannot keep the expert from relating the defendant's statements, listen carefully to what is said, and note any discrepancies between the versions.

The expert's opinion is only as good as what the defendant told him. If the defendant is not credible, then the expert's opinion is flawed. You then can go through the discrepancies one by one, and ask the expert whether he would change his opinion if the facts were different. This approach enables you to neutralize the opinion without having to attack the expert personally or professionally. Or, you may choose to leave the inconsistency alone, and argue to the jury that the opinion is not reliable, because the defendant told two different stories.

- Prior Inconsistent Testimony Or Writings By The Expert

This is another of those "dream" cross examinations. If the expert is in demand, testifies a lot, and is not particularly scrupulous about what he says, he may contradict himself from one case to another. If you can obtain depositions, trial

transcripts, or articles or books authored by the expert, comb them for statements that potentially contradict what he is going to say in your case. Your state prosecuting office may be a good source for these materials as well as sample questions for an effective cross of this witness.

Make a checklist of relevant statements with a book/page/line cite for quick reference in the courtroom. Mark your checklist as the expert goes through the testimony. On cross, you will do the standard impeachment for an inconsistent statement. Be sure that these are significant contradictions about crucial points in the case. Minor inconsistencies will not be effective.

- Did Not See The Defendant Personally Or Observe The Defendant

Every expert is vulnerable because he did not personally observe the defendant. The expert is getting his information from the reports provided by the defense, and from the defendant. You can point out that the expert has no personal knowledge of the case and that he was not present when the defendant was arrested. In closing you can argue that it would improve his opinion if he could have seen the defendant or the testing procedures, and that first hand observation is always the best. This is not the kind of cross examination that will discredit the expert, but it serves a valuable purpose to lessen or neutralize the impact of the expert.

- Destructive Cross Examination

A destructive cross examination (*presuming* the expert is vulnerable) will come from one or more of the following areas:

- Area of expertise/qualifications (find out what he does and does not do)
- Materials reviewed in preparing for the case
- Prior testimony or writings by the expert in other cases that are contrary to the expert's testimony in this case.
- Did not personally observe the defendant
- Payment/fees

Consider asking how much the expert is being paid to be in court. If you know in advance that the expert is court-appointed or is charging a modest fee, leave this question out.

If you choose to probe the fee arrangement, ask how much the expert gets per hour of in-court time, how much he is paid for preparation for out-of-court time, and what the total fee is. If the expert hedges, or says that the bill has not been figured, get the hourly figure. Ask the expert how many hours were spent on this case, and do the math. If little time was spent preparing, you can argue that the expert gave “drive-through service.” If the expert gives a high number, then the fee will be correspondingly high. It may be an entirely reasonable fee, but to the jury, the fee may be high compared to what the juror makes.

If you know the expert appears in court frequently and is in the “business” of testifying, you can bring that out. If the expert gets fees from a consulting firm that is hired primarily by defense attorneys, bring that out. Ask what other expenses are being reimbursed. The fee may seem reasonable, but you may find that the expert was given other amenities (lodging, car, meals, plane ticket) that have not been mentioned.

E. Conclusion

The testimony of a defense expert can potentially weaken the scientific evidence in your case. If the expert can be neutralized, the jury will base its decision on the credibility of the officers, witnesses, and the defendant. At minimum, an affirmative cross examination can be conducted. If impeaching material is available, the defense expert may not be a factor in the jury’s decision.

14.2.5 CLOSING ARGUMENT

A. STRUCTURE OF THE ARGUMENT

Introduction

Elements

Use The Jury Instructions

Limit What Must Be Proved

Identify Unchallenged Elements

Relate Facts To Elements

Discuss Facts That Apply To Each Element

Discuss Circumstantial Evidence And Reasonable Inferences

Discuss Significance Of Tests

Explain Stipulations

Deal With Weaknesses

Defenses

Conclusion

Miscellaneous Wrap-Up Topics

Ask For Guilty Verdict

Defendant's Argument

Rebuttal

Start And End Strong

Respond To Damaging Defense Arguments

Deal With Reasonable Doubt

Briefly Restate Evidence Of Guilt

Remind The Jury To Convict

B. STYLE TIPS

Position

Stand In Front Of The Jury

Use Your Posture To Reinforce Your Argument

Watch The Jury

Presentation

Use The Exhibits

Design Charts

Use Gestures That Reinforce Your Arguments

Do Not Distract The Jury

Do Not Read Your Argument

Use Your Vocal Tools

Do Not Get Flustered By Defense Objections

Terminology

Avoid Acronyms And Verbal Shortcuts

Use Appropriate Terminology

Use Quotes From Your Trial

Use Rhetorical Questions

Use Analogies And Stories

Do Not Label The Defendant

Use Forceful And Persuasive Words

Do Not Swear

Persuasion Hints

Avoid Overkill

Do Not Lie Or Hedge

Force The Defense To Argue Weaknesses

Avoid Humor

Collect Exceptional Arguments

Emotions

Use Appropriate Emotions

Maintain An Appropriate Tone

Develop Your Own Style

Avoid A Mistrial

Do Not Comment On The Defendant's Right To Not Testify

Do Not Refer To The Defendant's Invocation Of Miranda

Do Not Shift The Burden Of Proof

Do Not Ask The Jurors To Put Themselves In Another's Place

Do Not Make Jury Feel Responsible

Do Not Assert Personal Beliefs

Avoid The Term "Liar"

C. NATIONAL DISTRICT ATTORNEYS ASSOCIATION NATIONAL PROSECUTION STANDARDS

D. AMERICAN BAR ASSOCIATION STANDARDS

A. Structure Of The Argument

The closing argument can be the most challenging and exciting portion of the trial. In presenting the closing argument, the prosecutor's style of delivery must be original and not imitate others. Be organized, creative, and persuasive. Unless you are able to gather the facts and law together into a logical, common-sense argument, you won't convince the jury that you have met the burden of proof.

In most states, the prosecutor may argue both before and after the defense attorney because the state has the burden of proof. Remember, if the court has limited your time for argument, save sufficient time for your rebuttal.

There are three major goals of an effective closing argument:

- Integrate the jury instructions on the applicable law with the facts brought out in the trial.
- Emphasize important points, evidence, and/or witnesses.
- Argue persuasively the truth of the charge.

To accomplish these goals, structure your argument to include an introduction, a statement of the elements, relate the facts to elements, and conclude with a request for a guilty verdict. **(Throughout each section of your closing, keep in mind the Style Tips that follow this section — these tips have universal utility and importance.)**

Introduction

Your introduction should repeat the theme of the case. The theme, periodically woven into your argument, can be an effective way to capsulize your theory of the case so that the jury will remember it.

Elements

- Use The Jury Instructions

State the elements in a concise manner, using the terminology of the jury instructions. Use the jury instructions in your explanation of the elements. This will help you avoid mis-stating the law. Define or

rephrase any terms that are not part of the average juror's vocabulary.

- Limit What Must Be Proved

When you refer to the instructions, you limit what you have to prove. Defense attorneys try to convince a jury that you have to prove more than the elements. For instance, the defense attorney might argue that the jury has to find that the defendant was falling-down drunk in order to find her guilty. You should point out that the jury doesn't have to decide that question at all, because it is not mentioned in the elements instruction.

- Identify Unchallenged Elements

Another thing you should do when listing the elements is point out any elements that are not at issue. If the defendant testified that he drove a car, let the jury know that the driving element is settled. In this way, you can reduce the number of decisions that the jury must make.

Relate Facts To Elements

- Discuss Facts That Apply To Each Element

For each element that is still at issue, discuss all the evidence that will help the jury decide the element in your favor. You must get the jury to understand the facts, retain the facts, and be persuaded by the facts.

Do not assume the jury understands the significance of the facts. Although you may have had an excellent witness explain how the blood sample was tested, do not assume that the jury connects the significance of the testing procedures to the theory of your case. Explain to the jurors why a particular fact is so important.

Do not try to include every bit of testimony. Hit the high points, remembering to refer to witnesses by name. List the reasons to believe the state's witnesses if their credibility is at issue.

Explain the facts in a manner that helps the jury visualize what happened without getting sidetracked. Refer to any corroborating evidence of key facts on the key issues. Anticipate the questions in the fact-finder's mind and answer them.

- Discuss Circumstantial Evidence And Reasonable Inferences

Reasonable inferences based on the evidence are permissible in closing argument. You may be relying on circumstantial evidence to establish an element, particularly the driving element.

Show the jury how the reasonable inferences you draw from the evidence are the only reasonable possibilities.

- Discuss Significance Of Tests

Scientific tests, particularly breath and blood tests, provide persuasive evidence to the jury. Be sure to point out the significance of the procedures used, and the objective nature of the test. Stress that the accuracy of the instrument was verified before and after testing. Point out how the test is one piece of evidence that helps establish the element of impairment.

- Explain Stipulations

Occasionally, the defense will stipulate to facts. The stipulation should be given to the jury in the form of a jury instruction or an exhibit. Explain that the stipulation means that the jury need not decide anything about that fact, and that they shall assume it is true.

- Deal With Weaknesses

Consider how and whether to mention weaknesses in the state's case. There are two schools of thought to consider in light of your personal style and the merits of the state's case. You may wish to point out and explain any obvious weaknesses in the case before the defense does in order to minimize the damage these facts create. Show how these weaknesses are not important or fatal to your case.

Well-hidden weaknesses, however, create a difficult decision. You may not want to identify any weaknesses to a defense attorney who

might not even be aware of them. On the other hand, if you permit them to be raised first by the defense counsel, you may have to downplay their importance to the real issues of the state's case. That may or may not work in your case.

Defenses

Point to inconsistencies in the defense case. Note any gaps between what the defense promised to show and what was, in fact, presented. Do not talk about any defense unless you are sure it is being offered. Also, avoid summarizing the defendant's evidence because you do not want to give it undue weight.

Conclusion

- Miscellaneous Wrap-Up Topics

Mention that the defense will have an opportunity to address the jury next. You might wish to tell the jury that you have the opportunity to respond to points raised by the defense counsel because you have the burden of proof. Do not say that the defense will make a closing argument, because the attorney can waive argument. Because of that possibility, make sure that you ask that the jury return a guilty verdict at the end of both your first closing argument and at the end of your rebuttal.

Consider discussing the importance of DUI laws and their relation to your case. This works well especially where you have discussed DUI laws with the jurors during voir dire. In most DUI cases, it should not be necessary to walk the jury through the verdict form. This will, however, be necessary in more complicated cases where there are lesser-included offenses or where there are numerous selections available to a jury.

- Ask For Guilty Verdict

Whether or not you discuss the verdict form, though, you must remember to ask for a verdict of guilty. For example, say, "Based upon the evidence in this case, your verdict can be nothing other than that of guilty." Another example is "If you carefully consider all the evidence presented to you, you shall return a verdict of guilty of

the crime of Driving While Under the Influence of Alcohol against the defendant."

Defendant's Argument

During the defense attorney's argument, you should be doing several things. You should learn all of the defenses, plan responses to them, and listen for errors. In addition, you must remain calm — if you show agitation at a defense argument, the jury will believe that it is a good one.

Be alert to improper comments by defense counsel. However, object only if the defense attorney has made a significant error and you are fairly certain you will be sustained. Otherwise, the jury may not appreciate your intrusion.

Do not allow defense counsel to play on the sympathies of the jury by discussing punishment. Punishment is not an appropriate topic before conviction and you should object to any reference to what punishment the defendant may receive.

Rebuttal

- Start And End Strong

In most states, after the defense has made a closing argument, the prosecution has another opportunity to address the jury. There are many ways to structure a rebuttal; there are many different types of arguments you can use. Do not try to use all of these, or your argument will lose its impact. Start strong and end strong. This is your best, most appropriate opportunity to release or demonstrate emotion.

- Respond To Damaging Defense Arguments

Meet head on any and all defense arguments you believe have hurt the state's case. Do not allow yourself to answer every argument made or you will utilize too much of your time in that area and not in the areas that you need to be arguing to the jury. Do not discuss defenses if you either have no evidence to rebut them, or if you cannot make a common-sense argument. If your only argument is weak, do not use it.

Do not repeat and thereby reinforce defense arguments. Be honest with the jury. If defense counsel has argued that the officers could have done a better job and you agree, say so. An example might be to tell the jury that while the officer could have made better notes, he nevertheless recalls the incident and has testified to his recollections. Then point out all the things the officer did in fact remember and testify to. Choosing to deny something that you know to be correct will force the jury to question your credibility.

Consider discussing the biases and prejudices of the defense witnesses. Show how a defense witness might not have actually witnessed any of the things to which the officer testified. Point out obvious and not-so-obvious inconsistencies in the witness' testimony.

- Deal With Reasonable Doubt

One common defense argument is that the state has not proven the crime beyond a reasonable doubt. Many defense attorneys will give examples of what they believe a reasonable doubt is, such as making a major decision like buying a house.

(Caution: Several Federal Circuit Courts of Appeal have ruled that it is improper to equate reasonable doubt with making major personal decisions. (10th Circuit, 9th Circuit, 5th Circuit, D.C. Circuit.) The defense attorney might also try to convince the jury that if it has a reasonable doubt about any particular fact, it must acquit. You should stress that reasonable doubt applies only to elements, not individual facts.

You should also stress that reasonable doubt does not require absolute certainty, and that there are very few, if any, things that can be proven to that degree of certainty. Explain that it is not a scientific standard, but rather, as the name suggests, a common sense and reasonableness standard. For instance, a person might buy a house even though it has a few cosmetic problems — it's still a good house.

- Briefly Restate Evidence Of Guilt

Indicate to the jury that you have done your job in presenting the evidence. Do not simply restate your earlier arguments. Reinforce that the defendant is guilty beyond a reasonable doubt and explain

each of the reasons why. Use the defense's arguments, examples and terminology for your own purposes, whenever possible.

- **Remind The Jury To Convict**

Point out that it is now the jury's duty, based upon the law and evidence, to convict. Remind jury of their oath and obligation. In appropriate cases, caution the jury again to not let sympathy for the defendant influence its verdict. Repeat your theme one last time. You may wish to use a quotation to get the jury in the mood to convict, such as:

Your last words should be in the nature of "Find the defendant guilty."

B. Style Tips

Presenting an effective closing argument requires attention to both your physical and verbal styles. They should both continuously project the belief that the defendant, based on the evidence, is guilty of the crime charged. Above all, though, remember to be yourself. It is more important to tell the jury the story of what happened than to use all of these tips.

Position

- **Stand In Front Of The Jury**

You should stand for your closing argument. The best place is usually directly in front of the jury box, approximately halfway from either end. You should be close enough to maintain eye contact with each juror, yet not too close. If you are a tall or large person, you may make some jurors uncomfortable if you stand too close. Move closer only when necessary to show exhibits to the jury.

Some courtrooms have lecterns, and the judge may require you to make your arguments from the lectern. If you must or want to use a lectern, ask the judge if you can move it to the place you prefer. Try to not use the lectern unless required; it places a barrier between you and the jury.

- **Use Your Posture To Reinforce Your Argument**

Be comfortable as you address the jury, but do not slouch. Stand up straight, with your feet planted firmly, and your shoulders back. You represent truth, justice, and the American way, and you should look proud of it.

Do not pace while you are talking — this distracts your audience. Pause in your argument, move, then resume talking after you have found your new position. Try to move only when you are moving to a new topic in your argument.

- Watch The Jury

You should watch the jury throughout the trial. However, it is particularly important to watch the jury during your argument and opposing counsel's argument. This will help you in determining which defense attorney arguments are impressing the jury and allow you to evaluate which points you should answer.

Maintain eye contact with each juror. Do not single out or ignore any one juror. You can do this by directing each paragraph of thought to a different juror. This will help each juror feel that you are individually talking to him.

Be succinct in your arguments. Do not belabor an issue when you can tell jurors have understood your point.

If you see a juror whose attention has wandered or who appears sleepy, one method of focusing that individual's attention back on you is to pause. Pauses can be very effective in that they highlight the statement just made, indicate that it was significant, and snap a juror's attention immediately back to you because you have quit talking. Voice modulation can have the same effect.

Presentation

- Use The Exhibits

A closing argument can usually be made more effective by using the exhibits. Most people understand things they see better than things they hear. Looking at anything that is relevant to your trial will usually help the jurors understand more than just looking at you.

When you use exhibits in your argument, always refer to them by exhibit number. An example would be a photograph of the scene labeled exhibit #3. If you are directing the jury's attention to something in that photograph, tell the jury "In state's exhibit #3, you can see the car in question." This avoids confusion in the record on appeal and also tells the jury which exhibit to request during their deliberations.

Any time you talk about the exhibit, hold it up where the jury can see it. (Remember to ask for permission to approach the jury if your court requires that.) If any witness drew a map of the scene, use the map when describing the defendant's driving. You might want to have an exhibit, such as the breath test document, enlarged so that the whole jury can see it as you discuss it.

- Design Charts

You should also develop charts specifically for use during your closing argument. For example, prepare a chart that lists each of the elements you must prove. Explain to the jury how you took the elements from the jury instruction (and show the instruction). After describing how the evidence establishes each of the elements, check them off or cross them out.

An elements chart is also useful in rebuttal after the defense attorney has pointed out that you didn't prove something that you do not have to prove (for instance, that the defendant failed one of the field sobriety tests). Remind the jury that they need not decide anything that is not on the chart.

A chart is also a helpful way to keep a detailed or complicated chronology of events straight. Another possibility is to develop a list of the signs and symptoms of the defendant's impairment, and compare that with a list of the signs and symptoms of alcohol or drug impairment.

- Use Gestures That Reinforce Your Arguments

You should use gestures in your closing argument, but gestures should be planned along with the rest of your presentation. Gestures

can keep the jury focused on your argument, or they can distract the jury from your point.

You want to keep the jury's attention on your words, so consider using gestures that draw attention to your face, since this is where the words are coming from. Thus, use gestures from your upper body, including facial expressions, head and shoulder movements, and hand gestures that are above waist level.

- Do Not Distract The Jury

Jangling coins in your pocket, clicking a pen top, buttoning and unbuttoning a jacket are common nervous behaviors that some attorneys unconsciously make in the course of arguing their case to the jury. Be aware of your posture, your hand movements and your position in the courtroom. Avoid tapping your feet, slouching, playing with objects in your pockets, or moving your hands while they are down at your sides, since these all distract jurors from concentrating on your speech.

Do not let things distract the jurors from your arguments. When you are finished talking about an exhibit, jury instruction, or chart, set it aside. If you continue holding a document or other item, it will draw the jury's attention away from your argument.

- Do Not Read Your Argument

It is a mistake to read an argument to the jury. The jury may get bored and not listen during the most important points. When reading, you cannot see what effect your arguments have on the jury. In addition, you appear unsure of your arguments, leaving the jury to wonder if your arguments are valid.

However, it is important for you to be organized and prepared when you make your closing argument. Towards that end, you can use notes during your argument. Many attorneys write their outline in pencil in the margins of their charts or diagrams, provided that those do not go to the jury room. That way, you can see your notes, but the jury cannot.

- Use Your Vocal Tools

Vary your oral style to support your arguments and maintain juror interest. Volume, pitch, speech rate and rhythm, pauses, silence, articulation and pronunciation are all tools that you can use to accent and highlight your points. Always make sure that all jurors can hear everything you want them to hear.

- Do Not Get Flustered By Defense Objections

Listen calmly to the objection and to the judge's ruling. It may be that you do not have to abandon a line of argument, even where an objection has been sustained, but rather simply rephrase your argument. Do not lose your train of thought. Notes regarding the points you wish to make to the jury will aid you in keeping your train of thought.

Even if you become angry with the defense attorney's constant objections, act as though you are not. It is important to be able to continue in a concise manner in front of the jury. If objections are so numerous that they have significantly cut into the time allotted for jury argument, remember to ask the court for additional time based upon the time consumed by defense counsel.

Terminology

- Avoid Acronyms And Verbal Shortcuts

Some of the jurors might not understand what you mean, even if it was discussed during the testimony. If you want to use a shortcut, briefly define it for the jury before using it. For instance, "BAC" is a handy way of saying "blood alcohol content", but make sure you connect the acronym to the full phrase at least once or twice.

- Use Appropriate Terminology

Since traffic and DUI offenders for the most part are not classic "criminals," it may be more effective for the prosecutor to talk of "accountability" for the defendant's actions rather than of "guilt" in this "criminal" case.

- Use Quotes From Your Trial

The closing argument should be in your mind from jury selection through the presentation of the evidence. This is not difficult to do since you know what the state's evidence will be.

Remember, however, to listen for quotable quotes from your witnesses. Jot them down as you hear them. Then use them in your argument. An example is where an officer said "his eyes looked like road maps they were so bloodshot". That quotation is much more vivid than just saying the defendant had bloodshot eyes.

- Use Rhetorical Questions

A juror can become very frustrated if she has unanswered questions because, in most jurisdictions, jurors cannot ask any questions. Rhetorical questions can be effective in challenging the defense attorney with difficult or unanswerable questions. An example is:

During opening statement, the defendant's attorney told you that you would hear how someone else was driving the car that night. Where is that person? Why did that person not testify? There is no evidence that this other person even exists.

If the defense doesn't answer the question, the jury will remember.

- Use Analogies And Stories

Analogies and stories can effectively define and crystallize an idea for a juror. Analogies must be short, because your time is limited, and relevant, because a story without a point is not productive.

- Do Not Label The Defendant

Avoid terms like "young boy," "young lady," or "gentleman" since they personalize the defendant. You can label an individual if supported by the evidence. Exercise caution in this area. You do not want to call the defendant a "drunk" if the officer called him moderately impaired.

- Use Forceful And Persuasive Words

Your verbal style should be as persuasive as your arguments. A good approach is to present closing argument in the same manner as you would present your views on an important issue to a gathering of neighbors at a friend's house.

Use plain, colorful, and active language. Replacing "motor vehicle" with "dark blue Ford Mustang" helps the jury visualize what happened. Rather than "the vehicle went from line to line", say "the defendant drove the compact car from line to line."

When you use the active tense, you remind the jury not only that certain things happened, but also that it was the defendant who did these things.

Never talk down to a jury. Do not use "legalese." Use examples that are commonplace and easy to understand. Even though your police officer said "the suspect stumbled when exiting his vehicle", you can remind the jury that "the defendant stumbled as he got out of his large, comfortable sedan."

Jurors expect lawyers to use proper English. Keep your sentences short and your structure simple, since this is much easier to follow and understand. Do not use words of which you are not sure; you probably will use them incorrectly.

- Do Not Swear

It should go without saying, but you should not use profanity at any time during your closing argument (or, for that matter, at any time during the trial). The only exception is when a direct quotation from the defendant contains profanity, and you want to comment upon that profanity.

Persuasion Hints

- Avoid Overkill

Facts, not rhetoric, win cases. Never give the defense attorney fuel by making outrageous claims that you cannot substantiate with evidence.

- Do Not Lie Or Hedge

This should be obvious, but it bears repeating. If the jury cannot rely on your honesty and sincerity, they will not be sure that they can rely on the state's case. State your facts as they were testified to. There is nothing wrong, though, with arguing the significance of those facts. The point is not to mis-state the facts as presented.

One way to appear less than truthful is to over-argue your facts. If, for instance, you claim an offense in which the defendant was weaving for a three-block distance is the "most serious offense that this jury will ever hear," you will lose all credibility with the jury.

- Force The Defense To Argue Weaknesses

Just as you want to concentrate on your strengths, force the defense to argue defense weaknesses. For example, a high breath test result is a defense weakness. You can point out the reliability of the instrument used, and that the procedures are mandated by law or approved by the experts. Then challenge the defense to show some scientific basis for discarding the accepted procedures in attacking the breath test. If there was no testimony to support such an argument, the defense cannot make the argument.

One effective tool is to ask a series of rhetorical questions that challenge the defense to explain his weaknesses. When it is the defense attorney's turn to argue, he may take the bait and attempt to answer the questions, thereby arguing a weakness and creating a negative impression. Be careful, though, do not suggest that the defense has a burden to make a closing argument or present any evidence.

- Avoid Humor

Humor is fine in some situations (for instance, to cover a mistake or slip). While you must be yourself, in general you should not rely on humor during your argument. Humor gives the impression that the case is not serious, and that you think that either the crime or the defendant is ridiculous. If the jury believes that the crime is not serious, it is likely to acquit — why convict someone of a joke?

- Collect Exceptional Arguments

Many trial lawyers collect memorable arguments made by others. Adapt them to suit your style, and use them in later trials. Remember, any analogy, story, theme, or other type of argument that you borrow and use verbatim can sound artificial and contrived unless it fits your style.

Emotions

- Use Appropriate Emotions

You should choose the emotions that you display during closing argument as carefully as you choose the facts that you discuss. During most of your argument, you should appear calm, confident, sincere and positive. Remember, you are on the side of justice, and if you appear nervous or insecure, you may give the impression that the law or your case is not worthy of the jury's attention.

Closing argument, though, is that part of a trial during which a little drama is not only permitted, it is expected. However, while the jury will expect you to get emotional during your argument, use appropriate emotions. For example, anger usually has no place in a DUI closing argument.

Do not exaggerate your emotions. You probably should not show the same amount of horror and disgust in response to a DUI driving pattern as you would to a brutal rape. If you do, the jury may lose confidence in your judgment and your presentation of the case.

If a defendant has a particularly sympathetic situation, show the jury that it is permissible to be sympathetic, and still convict the defendant. DUI defendants are usually just regular people, not hardened criminals.

If all evidence shows the defendant is a "nice guy", recognize that and use it. For example, say to the jury:

There is no question that the defendant is a good family man and has a good reputation in his profession. That does not dismiss or excuse the fact that he broke the law. No one is condemning him as an unfit

individual. All that is being asked of you is to hold him accountable for his actions as every citizen is. All that is being asked of you is that you follow the law and find by your verdict that this individual drove while impaired.

- **Maintain An Appropriate Tone**

While it is important to speak up in any argument before a jury, there is no need to scream or yell in the opening portion of final argument in a DUI trial. As a general rule, with few exceptions, it is a mistake to take anything other than a low-key approach in any phase of DUI jury argument. Do not either minimize or magnify the importance of the crime of driving while impaired by alcohol or other drugs.

- **Develop Your Own Style**

Making an effective closing argument is a skill. There is no such thing as one right way to make a closing argument. Every trial lawyer learns through experience what kind of presentation he is comfortable with, and what is natural for his personality and style.

You must argue in a fashion that is comfortable for you and allows you to be sincere with the jury. Learning from others is important, but always adapt what you learn to fit your own style. Only a delivery style that you feel comfortable with will be effective with a jury.

Avoid A Mistrial

Although prosecutors begin a closing argument with the best of intentions, occasionally they make arguments that may result in a mistrial, or even dismissal, of the case. Some common mistakes follow; for a more complete discussion on these topics, refer to the Professional Responsibility section in this manual and your local laws and rules.

- **Do Not Comment On The Defendant's Right To Not Testify**

While this sounds too fundamental to even print, it is easier than you might think to make an improper comment on the defendant's right to not testify. Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). Exercise extreme caution where the defense has

called no witnesses. See National District Attorneys Association Standard 85.4, page 22.

For example, if the evidence shows that the defendant was at a bar, you can argue that the defense could have called the bartender to tell the jury the number of drinks the defendant had. Avoid saying, "No one told us how many drinks he had that night", because that is too close to saying "The defendant did not tell us how many drinks he had that night."

- Do Not Refer To The Defendant's Invocation Of Miranda

Prosecutors may not mention that the defendant refused to make any statement to the officer after the Miranda rights were read. Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976). If the defendant refused to waive the right to remain silent, do not even refer to the reading of the constitutional rights. Do not ask why the defendant failed to offer any excuse or explanation to the officer at the time of the arrest.

- Do Not Shift The Burden Of Proof

You have to be careful to not shift the burden of proof to the defendant. The defendant has no duty to put on a defense.

- Do Not Ask The Jurors To Put Themselves In Another's Place

The Golden Rule is that you never ask the jury to put themselves in a real or imagined victim's position. Any time you say, "How would you have felt," you are in trouble.

- Do Not Make Jury Feel Responsible

Do not state or infer that the defendant is a menace and will commit additional crimes if set free. Do not try to make the jury feel guilty for acts the defendant might commit. For example, do not say, "Do not let the defendant leave here today only to risk the safety of others tomorrow."

Do not try to appeal to a juror's duty to act as the conscience of the community. It is wrong to say, "Send a message to this community. Tell the community that the defendant's conduct is unacceptable."

- Do Not Assert Personal Beliefs

"I believe," "I am sure," "I promise" are inappropriate statements to make in a trial. Get rid of this habit! The proper approach is to say "the evidence supports," "the evidence shows," or "based on the evidence." To do otherwise is to ask the jury to convict on something other than the evidence.

- Avoid The Term "Liar"

This is a general rule and will have exceptions. There are, however, ways to tell a jury that the defendant, his witnesses, or defense counsel's arguments should not be believed. An example would be to say "It is no surprise that the defendant is unhappy with the state's case", and then to answer the arguments.

If the defendant testified to a fact that you believe is a lie, argue that the defendant has a motive to do something other than to tell the truth. You can also discuss the issues of memory and perception, reminding the jury that the defendant had been drinking and the officers had not. These will imply that the defendant was not telling the truth.

C. **National District Attorneys Association National Prosecution Standards**

Guidelines for closing arguments have been adopted by the National District Attorneys Association, National Prosecution Standards (2nd ed. 1991):

85.1 Characterization - Closing arguments should be characterized by fairness, accuracy, rationality, and a reliance upon the evidence or reasonable inferences drawn therefrom.

85.2 Order of Argument - Prosecution should begin closing argument and should be given the opportunity to rebut closing argument of the defense.

85.3 Comment on Substantive Law - Counsel should have the discretion to comment upon the substantive law relevant to the case.

85.4 Failure to Call Witnesses - The prosecution should have the discretion to comment upon the failure of the defendant to call witnesses under his control and reasonably expected to be favorable to his cause, subject to the prohibition against commenting directly or indirectly upon the defendant's failure to take the stand.

Commentary

The standard calls for the prosecutor to make the first closing argument followed by the defense and then to have rebuttal time for responding to the defense. The government's burden of overcoming the presumption of innocence provides the rationale for this order and statutes adopting this procedure have been held constitutional against challenge on due process and right to counsel grounds. The initial closing argument should contain all essential points so that the defense may respond. In turn, in rebuttal, the prosecutor should only respond to the defense summation; he should not introduce any new line of argument or contradict his original argument.

In keeping with the purpose of the closing argument, it is fitting for the prosecutor to discuss the evidence, drawing individual pieces together to form a cohesive and logical argument. The general rule regarding comment on the evidence is that such comment is proper if it is either provided by direct evidence or is a fair and reasonable inference from the facts and circumstances proved and has bearing on an issue in the case. It is allowable, then, for the prosecutor to draw logical deductions from the facts, to restate the evidence or testimony, and to comment upon results of the crime if apparent from the evidence.

The prosecutor's closing remarks should constitute "fair argument," a term which allows for not only a fair discussion of the evidence but also commentary on the law relevant to the case. Because the purpose of the closing argument is to enlighten the jury, the prosecutor should be permitted to comment on the applicable principles of substantive law during summation, emphasizing the theory of the government's case and the criminal law and perhaps the purposes of the particular statutes involved. The distinction between commenting on the law (proposed in the standard) and instructing the jury on the law is significant; while the former

is universally allowed when free of intentional misstatement or the citing of irrelevant law, the latter is the exclusive right of the trial court.

The defendant's testimony is always subject to comment, cross-examination, and impeachment; thus, the prosecutor may draw reasonable inferences from the testimony, interpret it, and point out any conflicts or inconsistencies. Characterizing the defendant's testimony (e.g., "incredible," "fantastic") is proper if it is based on evidence. Furthermore, once the defendant has taken the stand, the prosecution may call attention to the defendant's failure to testify on material matters within his knowledge. Or, if the defendant's testimony only partially refutes the government's case, silence with regard to other damaging evidence is subject to comment. The defendant's testimony or an attempt to indicate his good character is also an available subject for rebuttal.

As long as prior crimes and misconduct have been accepted into evidence, the prosecution may comment on them only for the purposes for which they were admitted into evidence.

This principle is similarly applicable to the prosecution's comments regarding witnesses. With the exception of statements of personal belief, the prosecutor may comment unfavorably on witnesses, noting inconsistent accounts of the crime, possible sources of bias, prior convictions, participation in the crime, and courtroom conduct. Furthermore, it is proper for the prosecution to note the absence of witnesses favorable to the defense. Specifically, courts have recognized the prosecution's right to point out that the defense "did not use its power to subpoena witnesses or that the defense failed to produce any witnesses or specific witnesses." The latter comment is particularly appropriate and damaging when the absent witness is a material one, the most common example being the alibi witness. Vess, "Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument," 64 *J. Crim. L. & C.* 22, 46 (1973). However, it should also be noted that any comments on an absent witness may be improper where the witness is equally available or accessible to the government; the absent witness must be "peculiarly within the other party's power to produce and [it must be likely that his testimony] would elucidate the transaction." *Id.* at 47

In conclusion, the scope of the prosecution's closing argument, in keeping with his responsibility to seek justice, should be confined to evidence

admitted, to the lack of evidence, to reasonable conclusions of fact that the state may draw therefrom, and to the law applicable to the case.

National District Attorneys Association, National Prosecution Standards (2nd ed. 1991).

D. American Bar Association Standards

The following guidelines for closing arguments have been adopted by the American Bar Association:

The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant.

The prosecutor should not use arguments calculated to inflame the passions or prejudice of the jury.

The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

American Bar Association, Standards Relating to the Prosecution Function, Section 3-5.8, 3-5.9 (1982).

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