BASIC TRIAL TECHNIQUES

for PROSECUTORS *in* IMPAIRED DRIVING CASES

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BASIC TRIAL TECHNIQUES

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Updated By RICHARD ALPERT, JD

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INTRODUCTION

First, let me welcome you to the profession! A career as a prosecutor can be a rewarding experience and unlike your civil practice brethren, you are actually going to have the opportunity to try cases in front of a judge and a jury on a regular basis. Furthermore, while their cases focus on dollars and cents, your cases will focus on blood, sweat and tears.

In a perfect world, once you have been hired by a prosecutor's office, you would be eased into this experience so that over time you could gain confidence and develop a talent for trial work. Your reality, if it is anything like mine, is that your training consists of being handed an office directory, the necessary codebooks, and an overwhelming stack of case files.

I was in my first jury trial the same week I started work. I had a partner that had all of six months experience and though I got to sit second chair for the first trial, that still involved me preparing a witness, making an opening statement, cross examining a witness, and delivering a closing argument. The next week I was lead, and I picked my first jury and went through the whole process again. I made many mistakes in those first two trials and felt totally unprepared and yet we got a guilty verdict on both cases.

That experience taught me two important lessons: First, trial advocacy may be an "art" but you don't have to be a great "artist" to be rewarded with success. That lesson eased my stress about feeling like I did not have time to prepare, and that was good because over the next thirty years I rarely tried a case without some sense that there was more I needed to do. The second lesson was that success isn't about not making mistakes but rather about learning to adjust and overcome those mistakes.

As I continued to try cases, win cases, lose cases, I learned the importance of deconstructing each case at the end of a trial to find ways to avoid the pitfalls encountered in future trials. I later became the supervisor of the misdemeanor section of my office, a position I held for twenty years. In that time, I always communicated the following advice to new attorneys. You will make mistakes and you will lose trials. That is expected and while you won't enjoy losing cases that doesn't mean that you are not suited for trial work. It means that the road to becoming a trial attorney is not straight or smooth and takes time.

You will be facing defense attorneys that have more experience and there is nothing you can do about that. Over time you will learn that more experience does not always mean better prepared and that the passion you have for your job, for your cases, is something your more experienced opponent lost many years ago. Passion, and a sincere, deep-seated belief that you are advocating for justice, can compensate for the skills you are still developing.

In the pages that follow I will share the lessons I have learned as a trial attorney and as a trial "observer" that, over time, gave me an edge over my opponents. This monograph is designed to expose you to different strategies with examples and tips that I have used in my jurisdiction in cases that involve impaired driving. By "impaired driving" I mean cases where the driver's mental or physical faculties are impaired due to the introduction of alcohol, drugs, a controlled substance or any combination of those substances. For the purpose of this monograph "intoxication" and "impaired" describe the same criminal conduct. Be mindful that your jurisdiction may have rules, statutes or case law that prohibit you from employing some of these techniques.

PRE-TRIAL PREPARATION

A successful trial starts long before the venire is brought into the courtroom. Prosecutors define success as seeking justice in every case. If a prosecutor determines a trial is necessary to seek justice, the prosecutor has determined that justice will be served by a conviction in the case. Most cases are resolved without a trial. In the event there is a trial, preparation is the key to victory. The prosecutor must thoroughly familiarize himself[1] with the evidence, case strengths and weaknesses, and the law before selecting a jury.

Theme

One of the most important strategy decisions the prosecutor makes is selecting a proper theme. The theme is the general storyline of the case. A prosecutor should choose a theme that resonates with the average person. Whenever possible, choose a theme that motivates the jury to convict.

A prosecutor should try to create a catch phrase that captures the theme and try to weave that theme throughout the trial. Advertisements, quotation dictionaries, slogans and proverbs can be helpful. The prosecutor should be able to present his theme in a few short words or phrases. An easy way to start developing a theme is to say, "This is a case about…" and finish that phrase with as few words as possible.

Practice Tip

Typical impaired driving themes revolve around responsibility and consequences like the following examples:

- *"On (date) the defendant made some choices. Now he must be held accountable for those choices."*
- *"You drink. You drive. You lose."*
- *"The defendant didn't control his drinking, so he couldn't control his driving."*

Structure

The presentation should tell the story in a clear, concise fashion. It may be easiest to present the witnesses and evidence in chronological order. A prosecutor should not be wed to that chronology and should instead be prepared for the possibility that conflicts in witness scheduling may make that impossible. If the chronology of the story is not going to be smooth, the prosecutor should prepare the jury for that eventuality in the opening statement. Remember, it does not matter to the jury what order the pieces are added to the puzzle so long as they have a clear understanding of the final picture.

If some witnesses are not as strong as others, a prosecutor may want to consider organizing the witnesses in such a way that the weak witness is sandwiched between two stronger witnesses. Whenever possible, the prosecutor wants to ensure that he begins and ends strong.

Evidence

A prosecutor should pre-plan the strategy for

[1] The use of the term "he," "him," or "his," is used throughout this document for economy and includes all genders.

proving the case and not introduce evidence simply because it exists. For example, a prosecutor should consider not calling witnesses who do not advance the theme or argument or whose testimony would duplicate that of other witnesses. The more witnesses a prosecutor calls, the greater the likelihood of introducing unnecessary conflicts in the evidence. Sometimes, less really is more. A good test for whether a witness should be called focuses not so much on "what" he said, but on "why" the prosecutor needed him to say it. If the testimony he gives can or will be given by another witness or does not speak to an element the prosecutor has to prove, the prosecutor should not call him.

The prosecutor should determine how to introduce the evidence he wants to present. He should review applicable statutes, available predicate manuals, and seek guidance from more senior prosecutors. As he gathers his evidence, he should be mindful of the fact that he is obligated to provide the defense with notice of any exculpatory evidence he uncovers in advance of trial.[2]

Practice Tip

A prosecutor should create and update an exhibit chart to keep at the counsel table. On that chart, he should list the exhibits to be admitted at trial, the sponsoring witness used to admit the exhibit, and the legal authority on which he relies in support of its admissibility. At the end of the chart, he should have a place to check that it was offered and admitted. If there is case authority supporting the admission of the exhibit or testimony, the prosecutor should print out a copy for himself, the defense counsel, and the judge and have it with him when he offers the evidence.

Exhibit / Evidence	Witness	Rules / Case Law	Offered	Admitted
Breath Test Result	Technical Supervisor	Administrative Rule 3.5, Business Records Exception, *Harrell v. State*, 725 SW2d 208 (Tex.Crim.App. 1986)	X	X

The prosecutor should carefully review and organize all case documents in a folder or a loose-leaf trial notebook. He should make time to have a pretrial meeting with all witnesses. At those meetings,

[2] A prosecutor must always keep in mind his ethical and legal obligations of discovery. The ABA Model Rules of Professional Conduct, Rule 3.8 Special Responsibilities Of A Prosecutor, paragraph (d) provides that the prosecutor in a criminal case shall: "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal…." Also, the suppression by the prosecution of evidence favorable to and requested by an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). A prosecutor should be familiar with the applicable rules, statutes, and case law in his jurisdiction that cover his obligations.

the prosecutor should go over the questions he intends to ask them, go through any questions he thinks they may be asked on cross-examination, and advise them of any matters that they are not allowed to mention pursuant to case law and/or pre-trial motions in limine. Examples of inadmissible evidence include prior bad acts, character and propensity evidence, and statements taken in contravention of *Miranda*[3] or that constitute hearsay when there is no exception.The prosecutor should identify possible inadmissible evidence he believes the other side might offer or try to elicit from his witnesses and raise it with the court pre-trial via a motion in limine.

As the prosecutor runs through his pre-trial preparation, he should identify potential conflicts in the evidence and either resolve them or determine ways to explain them.

Defenses

A prosecutor should anticipate and prepare for all possible defenses and arguments. This really is a much simpler task than it sounds. There are only a few common defenses in any criminal case:

I. Identity or ID (frequently referred to as SODDI, or "Some Other Dude Did It.")
II. "The evidence proves I'm innocent." (includes defenses of insanity, necessity, self-defense)
III. The State cannot prove its case because:
  A. There is a "lack of evidence."
    1. There is only one witness.
    2. There is no (or very little) corroborating physical or scientific evidence.
    3. The evidence is not credible or trustworthy.
      a. The witnesses are lying.
      b. The police are corrupt, prejudiced or inept.
      c. The analyst, technician, doctor or scientist is not qualified or made a mistake (the evidence is not reliable).
  B. There are conflicts in the evidence.
  C. The State's case does not prove guilt beyond a reasonable doubt.

If the prosecutor does not see any issues or shortcomings in his evidence, he should not panic. Sometimes a case is taken to trial simply because a defendant wants a trial. Be aware that in some cases one is relying on opinion testimony (*e.g.*, an impaired driving case with no scientific evidence) and, in those cases, the defendant's trial theme may simply be "The officer's opinion that the defendant was intoxicated is wrong."

Defense Witnesses

The prosecutor should review the offense report for names of individuals who were present at the scene. If the defendant is in custody, the jail log should be checked to see who has visited him, and the prosecutor should request notice of expert witnesses provided his jurisdiction entitles him to said notice. Most importantly, when a defense attorney is speaking to the prosecutor about plea-bargaining, the prosecutor should let him talk! Listen carefully to the issues he has spotted with the evidence in his case and think about whom he may call to present those weaknesses to the jury.

For information regarding common defenses in impaired cases, see the following publications by the National Traffic Law Center (NTLC) at

[3] Before custodial interrogation, defendant must be warned that he has the right to remain silent and anything he says can be used against him, and he must be told he has the right to a lawyer; he may knowingly and intelligently waive these rights. *Miranda v. Arizona*, 384 U.S. 436 (1966).

www.ndaa.org: *Overcoming Impaired Driving Defenses and Challenges* and *Defenses II: Claims and Responses to Common Challenges and Defenses in Driving While Impaired Cases*.

The Judge

The prosecutor should familiarize himself with the judge and adjust his strategy and style accordingly. Some matters he may want to know about his judge before trial are the following:

Does the judge:

- allow speaking objections?
- expect him to cite the applicable rule of evidence when making an objection?
- expect him to present case law before ruling on legal issues?
- impose time limits or other constraints on voir dire, opening or closing?
- require that one ask permission to approach a witness?
- expect all witnesses to be present and sworn in prior to trial?
- have an area where witnesses should sit while waiting to testify?
- require all trial motions to be in writing or are oral motions permitted?
- expect one to have one's exhibits marked pre-trial?
- require one to stand when questioning witnesses?
- require opening and closing arguments be made from a podium or can one walk around?
- keep time, and will he give warnings when one's time is almost up?
- allow for a minute to conclude when an attorney's time is completed or expect the attorney to stop speaking mid-sentence?

A prosecutor should always treat the judge with respect. Jurors tend to dislike attorneys who are sarcastic with or overly critical of the court. As a rule, refrain from rolling one's eyes or otherwise reacting to adverse rulings. When the other side has made an objection, wait or ask for permission before responding.

Defense Counsel

Similarly, consider defense counsel's style. If the prosecutor does not know the defense attorney, he should ask his colleagues questions about them such as:

- What is the defense lawyer's cross-examination style?
- Does the defense attorney like to ask inappropriate questions in voir dire, or introduce inadmissible evidence or make inappropriate arguments? If so, the prosecutor should consider filing an expansive motion in limine asking the judge for restrictions.
- Does the defense attorney typically call expert witnesses? In impaired driving trials certain defense attorneys often have "go to" defense experts they call in almost every case.

If a prosecutor has the opportunity to watch the defense attorney in trial in another case before his case goes to trial — he should do so!

Ask for Help

Perhaps most importantly, a prosecutor does not have to start from scratch or reinvent the wheel. He can consult with experienced prosecutors and ask them for assistance and guidance. Watch them in trial and adopt (steal) ideas, techniques or arguments whenever possible. Contact the National Traffic Law Center for predicate questions, case law, and sample briefs.

GENERAL TRIAL TIPS

Most jurors want to reach a fair and just decision. The prosecutor's job is to convince them that to achieve that goal, they must find the defendant guilty. The prosecutor should remember he is not just selling his case, he is also selling himself. At all times he should demonstrate to the panel that he is sincere, that he has an unwavering belief in the strength of his case, and that they can trust him. If a prosecutor does not understand the case, cannot explain why the issues raised by the defense are not important, and if he fails to convince the jury that their verdict matters, he will lose.

Jurors expect a prosecutor to be fair and honest. If he fails to meet that expectation, he will not only lose but may also face appropriate discipline from the state bar association. He should try to refrain from objecting to evidence that does not hurt his case significantly. If a prosecutor objects too much, it will look as if he is hiding something (especially if the judge overrules the objections). If defense counsel is particularly abrasive, the prosecutor may want to make the defense attorney's lack of professionalism more obvious by being especially cordial in front of the jury.

Remember that whatever happens in the courtroom, the jurors are *always* watching. How one looks, how one sits, how one interacts with everyone in the courtroom, and how counsel table appears, all make an impression with the jury.

Because people have different skills and learn differently, a prosecutor should try to involve as many senses as possible during trial. Whenever possible, do not just tell the jury about the evidence. Let the jury see, touch and smell the evidence, if possible, through every stage of the trial.

Jurors are inundated by crime-dramas in the popular media that create unrealistic expectations of police officers, prosecutors and judges. Many truly believe that crime scene investigators solve crimes in 60 minutes or less using high tech scientific techniques. Obviously, this is not the case. Still, a prosecutor should strive to meet the jurors' expectations whenever possible.

Finally, a prosecutor needs to be cognizant of the record. A victory will be meaningless if the case is lost on appeal. He should make sure that all relevant conversations take place on the record and that the court reporter can hear everything.

If a witness is shown an exhibit, a prosecutor should ensure the exhibit number is noted for the record. If the witness points to something on the exhibit that is important, he should ensure the record reflects what the witness did (*i.e.*, "Your honor, may the record reflect the witness has pointed to the intersection of 2nd street and Main on State's exhibit number two." Or "Your honor, may the record reflect the witness has identified the defendant as the person who fired the gun.").

In presenting cases, a prosecutor should remember this empowering fact: truth is on the prosecutor's side. Jurors may have some difficulty understanding all the evidence, but jurors are very good at recognizing sincerity. A prosecutor needs to be, therefore, himself. He should speak to jurors as colleagues, not students. A prosecutor should believe in his case and that will give the jurors reason to believe in him.

VOIR DIRE (JURY SELECTION)

For many new prosecutors, the voir dire process can be the most intimidating part of the trial. A prosecutor can greatly diminish his stress level if he enters the voir dire process with a clear understanding of the goals he wants to accomplish. Those goals should include getting acquainted with the panel; exposing those jurors who should be challenged or rehabilitated; educating the jurors about the law that is applicable to the case; and introducing the jurors to the state's theory of the case.

Time Management

Which topics and to what extent they are covered will depend on how much time a prosecutor has. Because impaired driving is typically a misdemeanor charge, a prosecutor could have as much as two hours or as little as 25 minutes. How much he covers and on which categories he is focused should depend on the strengths and weaknesses of the case. No matter what the focus, *how* he does it is as important as *what* he does. As the old saying goes, "No one gets a second chance to make a first impression." The prosecutor should keep this in mind as he organizes his topics and prepares to prioritize the matters he "must" talk about over those he "wants" to talk about.

Case Evaluation

Before voir dire, the prosecutor should make a list of the strengths and weaknesses of his case. When he puts pen to paper and thinks about this, it will help him decide which topics are most important to cover during jury selection. He should decide which of these strengths and weaknesses need to be addressed in voir dire and hit the weaknesses head on. He should talk to the jury panel about them and find the people who can deal with the issues.

A prosecutor should also evaluate the types of witnesses to be called in the case. Is there only one witness? Do witnesses have prior criminal convictions? Will there be any expert witnesses? A prosecutor should decide which of these areas must be covered and find a way to discuss them that will help the jurors understand them and distinguish what does and does not matter.

Reading vs. Speaking

Whether a prosecutor is picking a jury, giving an opening statement, or delivering a closing argument, he will always be more persuasive without notes. A prosecutor, however, does not have to abandon the use of notes completely. For instance, he needs to have the names of the members of his jury panel available, so he can get their names into the record as he speaks to them directly. To accomplish this, he may want to use a seating chart.

The prosecutor should make some short notes or marks next to the panel members' names as a guide. At the very least, he should consider using a highlighter to mark those he believes he will want to keep and those he does not. This provides him with a handy reference point, so he can tell in an instant whether the juror who has just made a ridiculous comment should be saved or allowed to fall into the chasm of unacceptability.

A prosecutor should never read his voir dire questions to the panel. All he really needs is an outline of words or very short phrases to remind him of what to cover. If he uses an outline, it should be clear and concise and legible so that he need only glance at it to be reminded of the points he wants to cover.

Challenges

The prosecutor has an unlimited number of cause challenges. The purpose of cause challenges is to eliminate jurors who cannot be fair and impartial. A judge will grant a cause strike if he has a reasonable doubt about the venire person's ability to be fair. Still, the prosecutor should use his cause challenges wisely and fairly to avoid sacrificing his credibility with the court. Before he makes a cause challenge, he should think about the fact that if he loses that challenge, he may have to burn a peremptory challenge to remove the juror he has called unacceptable.

By contrast, the prosecutor has a limited number of peremptory challenges. The number varies according to jurisdiction and crime. He should know how many peremptory challenges he gets so that he may use them appropriately. He may exercise his peremptory challenges on whomever he wishes, provided he does not use them in a discriminatory manner. Whenever he challenges a venire person who is a member of a suspect or protected class, he should be prepared to provide the court with a logical reason to strike the venire person. The basis for his strike need not rise to the level of cause (or even come close), but it must be articulable and legitimate.

Getting Acquainted with the Panel

Written Questionnaire

The process of getting acquainted with the jury panel should begin before asking the first question. To this end, a written questionnaire filled out in advance is essential. The more that is known about the prospective juror at the beginning, the less time a prosecutor needs to spend asking background questions and the more focused the individual questions can be.

Many judges will be skeptical of the use of questionnaires in a misdemeanor case. A prosecutor should work with the defense attorney and the judge to develop a mutually beneficial questionnaire that will make efficient use of time in voir dire.

Besides saving time, another advantage of written questions is that people are more open and candid in their responses than if speaking publicly in front of a group of strangers. The written questions must be carefully drafted, or they may do little more than raise other questions. For instance, asking if a juror has ever been convicted of a crime without further asking them what, when, and where is not productive use of a written questionnaire.

On the topic of criminal convictions, it is always a good idea for the prosecutor to complete a criminal history for each potential juror, if possible. A prosecutor learns over time that jurors are not always honest about their run ins with the law. If the case involves operating a motor vehicle in a reckless or impaired manner, a prosecutor should also try to check their driver license history.

Visual Observations

Judging a book—or a juror—by its cover is a risky venture, but there are some obvious and relevant factors for which a prosecutor should look. The way a person is dressed and what book he brought with him into the courtroom can tell him something about the juror. Racial or ethnic background is something a prosecutor can easily observe. While it is illegal to base peremptory challenges on a juror's race, it is still important to note a juror's race. What *Batson*[4] has done is require the State to be prepared to explain its reason for excusing all minority group members on a jury panel. That holding extends to gender as well.

[4] A prosecutor's use of peremptory challenges in a criminal case may not be used to exclude jurors based solely on their race. *Batson v. Kentucky*, 476 U.S. 79 (1986).

The prosecutor might also want to note who on the jury panel is speaking with whom as they are waiting for voir dire to begin or during breaks. Also, it may be helpful to note individuals who appear to have health problems, if those problems could affect their ability to observe evidence, follow the proceedings, and be available for the entire trial.

Beginning Voir Dire

How the prosecutor begins his voir dire will vary, but he should take care to not put venire panelists to sleep with his opening comments. Though many prosecutors begin by introducing themselves, there may be no need to do this if the judge has already introduced all trial participants to the panel. The prosecutor should consider introducing other participants (clerk, court reporter, your investigator, the bailiffs) who are in the courtroom if the judge has not done so. This helps reinforce the idea that this is his courtroom the jurors are visiting and helps him take on the role of host.

If a prosecutor can make the jurors smile in his opening comments, that will ease their tension and make them more likely to open up to him during voir dire. No matter what words he uses to begin his voir dire presentation, he should do so from a position of confidence and strength.

The prosecutor should never read his opening comments from notes. He should make eye contact with the potential jurors and try to put them at ease. The prosecutor should explain to them how he will structure his portion of the voir dire. He should advise the jurors if the court requires that they need to stand when they speak. At all times he should be sure that the jurors name and/or number are in the record and be sensitive to the fact that the court reporter must be able to hear and record what jurors say.

In the early part of his voir dire examination, he should review his witness list with jurors to see if they recognize anyone. If the judge has not done so, he should ask them if they know the defendant, his attorney, or anyone else in the courtroom.

It is also important to ask the potential jurors if they know other members of their jury panel. Jurors commonly know other panel members from work, church, or other community functions. If a prosecutor finds that panel members know each other, he should explore that relationship briefly, by asking something like, "Mr. Jones, would the fact that you and Mr. Smith work at the same factory make it difficult for you to reach an independent verdict if you were to both end up on this jury?"

Many people like to describe to the jury how the voir dire process works, pointing out that they are on the jury at the end not because they were selected but because they were not struck. Though this is the truth, it is hard to understand the logic of telling the panel this. What benefit does an attorney gain from telling a panel member that their making the jury is an indication that they did not strongly impress either side?

Which, if any, of the topics the prosecutor goes into at the start of voir dire examination will depend on the amount of time he is given. Whatever he discusses in the first five to 10 minutes, the topic should put him in a confident and positive professional light. The kind of impression he makes on the jury with his appearance, comfort level, confidence, and the rapport he establishes with the panelists will control how they view and accept other matters he presents during voir dire and throughout the trial of his case.

Responding to Questions

It is important that the prosecutor does all he can to make his jurors feel comfortable raising their hands in response to his questions or to ask questions they may have. While it is good to organize his voir dire presentation, he should not let that organization control how he addresses questions. Telling a juror

who has raised his hand that he will get to his question later sends the message he does not really care about his questions. If he is asked about something that he intends to cover later, it is better to answer it when it is asked.

Challenging or Rehabilitating Jurors

The prosecutor has dual goals in voir dire. From the time he begins voir dire to the time the panel is passed to the defense, he must firm up those jurors he wants and challenge or expose those who must be eliminated. Both goals demand that the prosecutor put the panel at ease so that jurors feel comfortable admitting their biases. As he asks questions, both he and his partner should scan the panel for non-verbal reactions.

Exposing for Challenge

Some jurors may be reluctant to raise their hands to voice dissent with an issue a prosecutor has raised, but they may not be able to mask their displeasure in their facial expression or body language. If a juror is brave enough to say openly something that would make them a bad State's juror, it is important for the prosecutor to mask his disapproval.

For instance, if a potential juror says, "I could not convict upon the opinion testimony of a police officer because I believe most officers are corrupt and will lie on the stand," the prosecutor should let the potential juror know very quickly that he is entitled to his opinion and that it is all right to feel that way. The prosecutor should continue by indicating that what is not all right is to hide those feelings. If he based his negative feelings on a bad experience, the prosecutor should not explore that in front of the rest of the panel but rather at the bench. The prosecutor should attempt to get the juror to agree that his feelings constitute a bias against the State. Before he moves on from that juror's statement, the prosecutor should survey the rest of the panel to see if anyone agrees with the juror.

The prosecutor should review the terminology he will be using during the voir dire examination. "Bias" and "prejudice" are two very harsh words that provide the necessary basis for a successful challenge for cause. He can make it much easier for a panel member to admit they are biased or prejudiced if he makes this type of admission more acceptable. One way to approach it is as follows:

> *"Each of us has certain life experiences that have shaped our views and beliefs. Sometimes those experiences have had such an effect on us that we can no longer view certain matters objectively. For instance, if you were the victim of a burglary last night, you might have trouble sitting on a jury in a burglary case this morning. That doesn't mean that you couldn't be a good juror in another type of case."*

The prosecutor should advise potential jurors that he does not intend to embarrass anyone with his questioning. He should let them know that if a question calls for information that is too personal for them to discuss in front of the panel, he can discuss it with them outside the presence of the rest of the panel. He should find out before voir dire begins what his judge's preference is for the timing of these situations. Some judges like to deal with these matters as they come up while others would prefer to reserve them until a break or until the end of the voir dire process.

A prosecutor should avoid the questions "Can you be fair?" or "Can you follow the law?" with potential jurors. No one wants to admit outright in front of a crowd of people that he cannot be fair. Moreover, the most unfair people think they are very fair and therefore would never admit to being unable to follow the

law. A prosecutor should lead these jurors down a path to get them to admit their biases. Jurors must believe it is acceptable to hold certain views before they will admit to them. Sometimes a prosecutor can accomplish this either by (1) admitting his own weaknesses or biases, or (2) flushing out at least one juror who will admit a weakness and then asking the other panelists if they agree or disagree with that juror.

Rehabilitating

Jurors who will probably favor the State are usually easier to spot than those who are defense-oriented. Many times, State's-oriented jurors have relatives in law enforcement, and people are more willing to admit to having those relatives than family members who have criminal histories.

The prosecutor cannot ignore these good State's jurors and assume they will survive the defense attorney's scrutiny. Rather, he needs to prepare them for the defense voir dire. One way to do this is to communicate to them what answers will enable them to stay on the panel. In other words, the prosecutor should let them know it is possible to be pro-law enforcement and still be fair. It is possible to believe in stricter impaired driving laws, for example, and still be able to afford the accused his right to a fair trial. The prosecutor can address this head on by asking a member of the jury panel, "Mr. Jones, what kind of jury panel would we have if all jurors who supported law enforcement were disqualified from jury duty?"

A prosecutor should not be afraid to explore and challenge jurors who verbalize they might not be able to be fair.

Defense counsel will try to strike for cause as many crime victims and pro-State venire persons as they can by getting them to say that they cannot be "fair" because of their life experiences. The prosecutor can minimize the defense attorney's chances of success by ensuring that the jurors understand what they are saying when they say that they cannot be "fair".

For example:

Mr. Jones, a few minutes ago you told the judge that you could not be fair in this case because you were robbed. I'd like to clarify that.

You have no reason to believe that this defendant committed that crime, do you?

Are you going to find this defendant guilty simply because you're angry at the person who robbed you?

Will you follow the law and require us to prove the defendant's guilt beyond a reasonable doubt?

If yes, that's all we're asking when we ask, "Can you be fair." Knowing that, can you fairly determine the defendant's guilt or innocence in this case?

By rehabilitating these venire persons, the prosecutor can force the defense attorney to use one of his peremptory challenges.

Police Officer Witnesses

Many people have a definite bias for or against police officers. Most of the impaired driving cases tried will rely primarily on the "opinion" testimony of a police officer. This is especially true if there is no videotape at the scene or the station house. Either on the questionnaire or verbally, a prosecutor should ask jurors about any bad experiences they may have had with police officers. He should firm up the pro-law enforcement jurors by pre-empting the defense's claims that they would automatically give an officer's testimony more weight. In other words, a prosecutor should try to get them to commit that they will judge an officer's credibility like any other witness.

A prosecutor should not let jurors confuse giving

an officer credit for his experience with giving him more credibility because he wears a uniform and a badge. If a juror says he would tend to believe what an officer says just because that person is a police officer, he is demonstrating a bias in favor of law enforcement. This is distinguishable from giving the officer's opinion more weight than a civilian because of the officer's training and experience.

> **Practice Tip**
>
> One way to demonstrate the concept that a person's training can make him a better observer is to ask how many people on the panel have bought a house. Did they hire an inspector to look over the house before they bought it? Did the inspector notice problems that the potential buyers had missed? How was the inspector able to do that? The point the prosecutor is making is that a person's training can make him aware of certain things that are not obvious to the untrained eye.

Educating Jurors About the Law

Jurors will enter the voir dire arena with their own definitions and beliefs about the law. Part of the prosecutor's job is to educate them about what the law is. Too many times prosecutors put the proverbial cart before the horse and ask a potential juror what they think about the law before discussing that law with them. A prosecutor should let the potential jurors know early on that the law is often confusing, and it is natural to have questions about it. He should use charts so that they have a chance to read the law for themselves. If the prosecutor just recites the law to them verbally, they might miss something that could later cause them concern. As the law is discussed, the prosecutor should not neglect a chance to cover why the law is important. That understanding will reinforce in the jurors mind the need to follow the law. The easiest way to accomplish this is for the prosecutor to simply ask a juror why he thinks the law exists, why he thinks it is important.

Visual Aids

As a prosecutor reviews the law applicable to his case, visual aids can be helpful. Most people understand and retain what they read better than what they hear. If the prosecutor uses a chart, he should ensure it is large, legible, and that all words are properly spelled. When he recites a portion of the law, he should do so correctly. If he has any doubts about his ability to do this, he should read it right out of the Penal Code. (This is one exception to the general rule that does not favor reading during voir dire). PowerPoint can be a great tool in jury selection. Slides are more visible, and a prosecutor can even use photos or other pictures to help make his points. If a prosecutor plans to use PowerPoint, he should be sure his equipment, projector, laptop, and mouse are all working and that all slides are displayed in a way that makes them visible to the entire panel.

Legal Issues

"Beyond a Reasonable Doubt"

Some jurisdictions have a legal definition of "beyond a reasonable doubt" and some do not. Regardless, when the prosecutor discusses his burden, he should emphasize that "beyond a reasonable doubt" does not mean "beyond all doubt." He should stress that the State has this burden only as to the elements of the offense. He should point out that the law does not require the evidence to convince jurors immediately but anticipates that jurors may arrive at verdicts after they have heard the views of other jurors.

Elements

The prosecutor should go over each of the elements that he must prove. Even though most impaired driving cases come down to a dispute about one element—whether a suspect was intoxicated at the time he was operating his motor vehicle—it is still worth explaining to the jury that he must prove that the offense occurred in a county and state and on a public street, so they can understand why he asks certain very basic, seemingly obvious questions of his witnesses. Sometimes the legal definition of a term or an element the prosecutor must prove may need to be explained. It is always best to find a commonsense example from everyday life to explain the meaning and application of a legal term. See the practice tip on page 20 for an example of how a prosecutor might explain to the jury panel the reason there are two definitions of "intoxication."

Utilizing Beneficial Jurors

When possible, a prosecutor should look for opportunities to use jurors on their panel to educate the rest of the panel. Venire persons understand that the lawyers and witnesses have an interest in how a case is decided. They generally view themselves, however, and other venire persons as non-partial. Thus, a prosecutor should use beneficial venire persons to educate the others. This can be done by introducing legal concepts through them. The prosecutor can also use reasonable jurors to contradict other venire persons who take unreasonably pro-defense positions, thereby having the good venire persons fight his battles for him and saving him the necessity of contradicting a venire person. For example, if a juror had a particularly good experience with the police, the prosecutor can ask him to describe it. If a juror is familiar with the breath-testing instrument's accuracy and reliability, the prosecutor can ask him to tell him about it.

One way a prosecutor can use beneficial answers is to engage in a practice called "looping." If a juror said that he was not happy about getting a ticket but he "understands that the officer had a job to do and that he was just trying to protect him and others on the road." The prosecutor can loop that answer by addressing another juror and asking him to give his opinion. For example, "Juror number 4, Mr. Jones, how do you feel about what Mr. Smith said about his experience with police officers?" When a prosecutor has a particularly good answer or one that is concerning, he can try to "loop" that answer to others on the panel to see if they share the beliefs expressed by their fellow juror.

TV Myths

Television has done many things to make a prosecutor's job harder; justice sometimes suffers at the hands of the media and the entertainment industry. A prosecutor should explain to the panel that real-life trials are not like television. If a nurse or doctor is on the panel, ask him or her if everything on the show "Grey's Anatomy" is realistic and accurate. Of course, they will say no. The prosecutor can then make the same comparison to legal dramas. Such shows are unrealistic and generally inaccurate; he can explain that trials are much longer and generally more boring than television. He can also explain that television witnesses are not the same as witnesses in real life. In the real world, there are no commercial breaks, no makeup artists, no wardrobe people, etc.

What a Prosecutor Does Not Have to Prove

Remind the panel members that the State must prove only the elements of the offense. Point out to them there are things they might want to know, but for which the State has no burden of proof. For example, the State need not prove that the defendant intended to get intoxicated, that the defendant knew

Practice Tip

One way a prosecutor can help the panel understand why two different definitions of intoxication are needed is to talk about two hypothetical people from which the law wants to protect the public: Brian and Billy. Brian is a big guy (200 pounds), has been drinking since he started shaving (at age 16), and can put away two to three pitchers of beer without slurring his speech or stumbling. Ask whether anyone on the panel has Brian's tolerance for alcohol? Does anyone on the panel know a Brian? Despite Brian's seeming tolerance for alcohol, however, his BAC would still be over the legal limit.

Consider Billy, on the other hand. Billy weighs 99 pounds and has never had a drop of alcohol in his life until his wedding day. Billy has a couple of glasses of champagne, an amount clearly insufficient to put him over the legal limit, but his balance is affected, his speech is slightly slurred, and he is making inappropriate comments to his in-laws. His mental and physical faculties are clearly not normal. Does anyone on the panel have Billy's tolerance for alcohol? Does anyone on the panel know someone like Billy? Despite an under-0.08 BAC, however, Billy does not have the normal use of his faculties.

The law says neither Brian nor Billy should be operating a motor vehicle.

The prosecutor might also want to follow this up with a question to test the jurors' knowledge and ability to follow the law:

Sample Question

If we prove to you that a defendant's alcohol concentration was .08 or greater at the time he was driving, but you believe he had the normal use of his mental or physical faculties, would you be able to find from the evidence that the defendant was legally intoxicated?

Or

Can a person who has a BAC of under .08 still be legally intoxicated under the law?

A "no" answer qualifies them for a challenge for cause as they have a bias against the law regarding intoxication. Jurors must understand that the definitions are independent and distinct. The jurors do not have to agree on which mode of intoxication was proven. Two jurors can believe a loss of mental faculties; two can believe a loss of physical faculties; and two can believe the defendant's BAC was .08 or more, and the verdict must be guilty. The prosecutor wants to address issues he anticipates the defense might raise and, as mentioned before, it is best to do so in a way that jurors can relate to their everyday life.

One common attack from the defense in an impaired driving case is that the officer cannot tell if a client's faculties were normal because the officer had never met his client before that night and does not know his client's normal behavior and appearance.

The prosecutor can also point out that the members of the jury panel form opinions about whether a person is intoxicated all the time. He can demonstrate this by asking them if they have ever seen a stranger in public whom they believed was intoxicated. Those who say they have should be asked what they saw, heard, and smelled that led them to form that opinion.

he was intoxicated, what brand or how much alcohol the defendant was drinking, or that the defendant was driving badly.

It may not be enough to simply tell the panel that the prosecutor does not have to prove one of the above. The prosecutor needs the panel to understand why those issues are not part of his burden. For instance, on the issue of not having to prove the defendant intended to drive while intoxicated or even knew that he was intoxicated, he might ask the following question:

Sample Question

Could a person who is legally intoxicated not be aware that they have lost the normal use of their mental faculties? What he hopes the panel will see is that if a person's mental faculties are not normal, their ability to perceive the effect of the intoxication on those faculties might likewise be impaired.

Range of Punishment

There are a few states that allow the jury to assess the punishment in the case. In such states, a defendant can elect before trial to have the jury assess his punishment. If the prosecutor's state allows it, and the defendant has made such an election, the prosecutor needs to be prepared to discuss it with the panel.

If the jury will be assessing punishment, the prosecutor should discuss the punishment range with them and qualify panelists on their ability to consider the full range. The law requires that a person be able to do this before he has heard any of the facts in the case. Many times, a juror will hear defense counsel remind the jurors in closing argument that they all promised to consider probation. This is misleading because the jury's obligation to consider the full range of punishment does not extend to the time *after* they have heard the facts of the case. The process of qualifying them on the range of punishment has two parts. First, expose the weak jurors. Ask if there is anyone who could not consider jail time for someone charged with impaired driving. Ask them if they could fairly consider the maximum incarceration period. Second, firm up the status of the strong panel members. The prosecutor may want to further explain what "fairly consider" means. It does not mean that they must commit to give or not give any punishment. The law merely asks that jurors keep an open mind until they have heard all the facts.

One way a prosecutor can expose an undesirable juror is to ask a question like:

Sample Question

Have you ever been in the presence of someone who has just read something about a case on trial, and that person says that if he were ever on a jury, he would always give the maximum? Any person who feels that way and cannot wait until the trial evidence has been fully presented—who cannot base their punishment verdict on the facts of that case—should not be serving on a jury. Do any of you feel the same way as the person I just described? Can each of you give fair consideration to the full range of punishment and wait until you hear the facts before you determine what that means?

Sympathy

A prosecutor should use part of the voir dire to explore any potential sympathy for the defendant. He should ferret out jurors who would be unable to judge the defendant fairly, and remind them, if appropriate, that the defendant is not a "bad person"—he is a person who made a very "bad choice." Be aware that some jurors may feel that their religion would not allow them to judge others. It is better to ask if anyone feels that way during voir dire than to find out after one has a hung jury.

Practice Tip

A prosecutor may want to consider covering the following impaired driving-specific issues in voir dire:

Attitudes about Drinking

- *What is the maximum number of drinks you would consume before driving a motor vehicle?*
- *Do you drink? If no, have you never had a drink, or did you drink in the past and at some point, stopped drinking? If so what was the reason you decided to stop drinking?*
- *Do you think the person drinking is the best judge of whether they have had too much to drink?*
- *Have you, a close friend, or family member ever been treated for a drinking problem?*
- *Have you, a close friend, or family member ever been arrested for impaired driving?*

Driving

- *Is there anyone here who does not drive? Why not?*
- *Is driving complicated? How many things does a person have to do simultaneously when driving a motor vehicle?*
- *Find someone on your panel who is currently or has recently taught a teenager how to drive and pose the above two questions to them.*

Breath Test Refusal

- *The law says that a jury can consider a person's refusal to give a breath or blood sample as evidence against them at his trial.*
- *Does anyone disagree with that law?*
- *Does anyone feel like it violates the 5th Amendment?*
- *If a juror responds affirmatively to that question, the prosecutor should explain why it is not a violation and may wish to consider talking about the fact that it is also not a 5th Amendment violation to compel someone to provide his fingerprints or to stand in a lineup.*

Attitudes about Drinking and Driving

- *The law does not prevent people from drinking and driving. The law prevents people from driving under the influence of alcohol or drugs or with an unlawful blood or breath alcohol level.*

- *Is there anyone who thinks that people should not be allowed to drink and drive?*
- *For those who answer "Yes" ask:*

  Despite that belief, would you still hold me to my burden to the offense beyond a reasonable doubt?

Feelings about Impaired Driving Laws

- *What would you think about changing the law to say a person can only be arrested for impaired driving after he has had a wreck?*
- *Do you think the impaired driving laws are too tough/lenient?*
- *Do you think the efforts to enforce those laws are too tough– too lenient – or just right?*
- *Does anyone here think the police spend too much time or money enforcing the impaired driving laws?*
- *Does anyone here think the police do not spend enough time or money enforcing the impaired driving laws?*

Thoughts about the Law Concerning Impairment by Prescription Drugs[5]

- *Has anyone on the panel had occasion to take prescription drugs?*
- *Did the doctor review and/or warn you about the side effects of the drugs?*
- *When the pharmacist gave you the prescription, did he also warn you about the side effects of the drugs?*
- *Have you ever gotten a prescription that did not have a warning label?*
- *Have you seen such a label that warned against driving or operating machinery while taking the drug?*
- *Do you understand that having a prescription for the drug is not a defense to driving while impaired?*

[5] This distinguishes between prescription drugs and illicit drugs because prescription drugs, even if legally obtained and used, can still impair a driver. A prosecutor may also want to use questions like these in instances where the driver is impaired by over-the-counter drugs, synthetic drugs, or other impairing substances.

THE OPENING STATEMENT

The opening statement is a critical element of any jury trial. The opening statement is the prosecutor's first opportunity to tell the jury what happened, and it is one of the only chances he will get to tell a complete, uninterrupted story. If he is sharing the case with a trial partner, it may be his first opportunity to address the jury. A proper opening statement addresses case facts, rather than argument. During opening statement, he should capture the jurors' attention, build a rapport with as many of them as possible, present his theme, advise them what the issues are and tell them what he expects the evidence to show. A prosecutor should not, under any circumstances, refer to inadmissible evidence. If there is any doubt about the admissibility of a piece of evidence, it is better to not mention it in opening statement.

There are two schools of thought on how long a prosecutor's opening statement should be. Many prosecutors believe that the opening statement should be short and to the point. They believe that a prosecutor should avoid providing too much detail because the evidence never comes out exactly as expected. Other prosecutors prefer longer, more detailed openings because they believe that most jurors make up their minds after hearing the opening statements. Regardless of the length of the opening statement, it often is preferable for the prosecutor to tell the story in chronological order as this facilitates the jury's ability to process the information. It may be a mistake to talk extensively about the law of the case in opening statement. A prosecutor should have already covered that in voir dire as legal discussions have a way of sucking the momentum out of the prosecutor's narrative.

Most impaired driving cases are not particularly dramatic. They are, by criminal justice and societal standards, mundane. Some prosecutors commence by thanking the jury, re-introducing themselves, or telling the jury that an opening statement is like a roadmap or a table of contents in a book. The prosecutor should be wary of opening in this way and should remember that every time he addresses the jurors, he is looking to make a good impression and persuade. Beginning with introducing himself again to the jury, or by thanking them when they had done nothing but shown up for the trial, is dull and may come across as artificial. Instead a prosecutor should try to start with a memorable catch phrase or impact statement. Studies show that people most easily remember the first and the last thing a speaker says. When deliberating in the jury room, a prosecutor does not want the most memorable thing he has said about his case to be his own name.

Rather than a dry recitation of the facts, a prosecutor should attempt to find a way to make the opening more interesting, perhaps by presenting the facts from the perspective of the victim or a witness in the case. The prosecutor can also use this opportunity to paint a good picture of a witness who may not present as well as he hoped he would. For example, when faced with a highly qualified police officer who is not a particularly good speaker, the prosecutor could start by discussing that officer's qualifications.

Example:

> *"On March 5, 2018, at a few minutes past midnight, Officer Jones was patrolling in the South*

District of Fort Worth. Officer Jones is a 15-year veteran of the Fort Worth Police Department. For the last 10 years, he has been assigned to the impaired driving task force. He will tell you about the extra training and certifications he received that qualified him to be a part of that task force. You will learn that he has not only attended dozens of specialized trainings in the field of impaired driving detection, but he is also an instructor in the field of impaired driving detection. He was looking forward to the end of his shift as he drove down Baker Street, when he noticed a blue Toyota in front of his vehicle. What caught his attention was the fact that it was weaving back and forth in its lane, at one-point crossing over the adjoining lane without signaling. He had seen such driving behavior many times before and knew it was a driving behavior commonly observed in the case of intoxicated drivers. He decided it was important for the safety of the driver of the Toyota and others on the road to make a traffic stop so he could determine if they driver was capable of safely operating his motor vehicle…"

By starting this way, the prosecutor has built up the credibility of his officer before the jury meets him and allowed them a glimpse into the officer's point of view about the defendant's driving behavior.

A prosecutor should try to not overuse phrases like "I believe the evidence will show…" before each recitation. Think of the opening statement as the coming attraction trailer for a movie. While a prosecutor cannot argue his case in opening statement, he is trying to persuade, and it is hard to persuade if he is constantly qualifying every statement with words like "I believe," or "I anticipate," or by talking about puzzles and road maps.

When the prosecutor speaks to the jury, he should try to avoid legal or police terminology. Instead of saying, "the officer approached the suspect's vehicle," the prosecutor should try language more like that used by the average person, and say, "The officer walked up to Mr. Smith's car." One way to ensure the prosecutor is not speaking "legalese" is for him to practice his opening in front of a non-lawyer. He can ask them to raise his hand whenever he uses a word or phrase the non-lawyer does not understand.

A prosecutor should never read his opening statement to the jury; it is impossible to speak with passion and commitment while looking down at a legal pad. If the prosecutor finds he cannot recall all the details he wishes to cover in his opening statement, perhaps he is using too many details? If he must write something down, he should consider limiting it to a list of words or two-word phrases down the middle of his legal pad. This way, he has an outline at which he can glance, but is less likely to look like he is reading his statement. The best opening statements provide a compelling overview of the case. A prosecutor should not worry about leaving something out of the opening statement as the jury is still going to hear about it when the evidence is presented. When making an important point, a prosecutor should remember to pause; nothing gives emphasis to a word or phrase like a moment of silence. If allowed to walk while giving the opening, a prosecutor should consider moving with purpose; pacing back and forth can be distracting. A prosecutor may want to consider moving when transitioning from one portion of the narrative to another. A prosecutor should also try to make eye contact with all his jurors as he speaks.

PREPARING AND PRESENTING THE CASE

During a prosecutor's case-in-chief, he will present the jurors with the evidence they need to determine the defendant's guilt. He should develop the evidence in a simple, easy to understand and interesting (if not exciting) manner that supports his theme. He should pre-mark his evidence to avoid unnecessary delays during witness examination.

As he prepares his witnesses for direct exam, he should try to anticipate and pre-empt his opponent's cross-examination. He must remain cognizant of the fact that the jury can disregard some or all his evidence. To guard against this, he must establish the reliability of his evidence by showing that his witnesses know what they are talking about and that they are trustworthy. Was the witness in a position to see or hear what he claimed? Was the witness qualified (or certified) to administer the standardized field sobriety tests? Similarly, he must establish that his evidence is reliable. The jury will not find his defendant guilty if the jurors do not believe his evidence, and they will not believe his evidence if his witnesses are not properly prepared.

The witnesses should be the stars of direct examination. The prosecutor should focus the jurors' attention on his witnesses as soon as each enters the courtroom. When a witness testifies, if he can stand during witness examinations, the prosecutor should stand next to the rear portion of the jury box when a witness testifies. This will focus the jurors' attention on the witness and force the witness to speak louder. The prosecutor should ask open-ended questions that allow his witness(es) to tell a story in a clear, concise, logical and persuasive manner.

Question Preparation

To ensure he presents the witness testimony in a clear organized manner, it is important that the prosecutor prepare the questions he wants to ask in advance of trial. Many new prosecutors "write out" all the questions they are going to ask in advance. The down side to writing out questions is that the prosecutor cannot help but spend most of a direct examination looking down and reading the questions. The direct examination is the conversation the prosecutor has with his witness once called to the stand and will be more compelling and more realistic if the prosecutor is looking at the witness while he is questioning them.

Instead of "writing out" the questions, the prosecutor should write out a list of short, sometimes one or two-word answers to the questions. It might look something like this:

March 16, 2018 — 8:00pm
Weather Clear
Corner of Main & Smith
Engine Revving
Blue Toyota
Radar — 60/40

This is really all that is needed and should serve as prompts for the questions necessary to elicit those answers from the witness. For instance, the words listed above should be adequate to remind the prosecutor to ask:

Officer Jones, can you tell the jury what you were doing on March 16, 2018 at 8:00 pm?

Can you tell us what the weather conditions were like that night?

Where were you when you first heard or saw something that caught your attention?

The other advantage of this method is the prosecutor can simply check off the answers as he obtains the information. At the end of the direct examination, this leaves him with a summary of the testimony provided by the witness. If a witness happens to give an answer that is not worded the way the prosecutor expected, he can simply pause and correct it in his notes.

This technique allows the prosecutor to focus more attention on the witness than on his legal pad and it makes the questions and answers more conversational in nature. A conversational direct exam enhances the questioner's credibility and that of his witness for the simple reason that it looks real and appears unrehearsed.

A prosecutor should be a good listener! Sometimes witnesses will stray from the script and answer questions they anticipate are coming next. The prosecutor will look foolish if he asks a witness about something about which the witness already testified. Furthermore, if the jurors notice that he has failed to listen to a witness's answers, they may discount the weight they give that witness's testimony. Whenever possible, a prosecutor should follow up the witness's answer with clarifying questions. This will reinforce to the jurors that the matter discussed is important to the questioner and, therefore, should be important to them as well.

As he lays out the facts of the case, the prosecutor must be careful to remember to introduce evidence proving venue, the elements of his case, and the defendant's identity as the perpetrator. If the prosecutor has a co-counsel, he should make it a rule that the non-questioning attorney keeps track of the list of elements as they are proven. Every prosecutor should get in the habit of asking the judge for a moment to check with his court partner before passing a witness to ensure that nothing is missed.

How to Begin

A prosecutor should remember that direct exam is a story and, like a passage in a good story, it is important to set the stage for the essential testimony each witness will provide. Before getting to the substance of the testimony of every witness, lay out the who, why, and where.

Who is he?

Have the witness introduce himself to the jury and elicit some personal details so the jurors can better relate to him as an individual. Have him lay out what he does for a living, whether he is married, and whether he has children.

Why is he there?

The witness is testifying about what he saw so ask him about what brought him to that location. In the case of a police officer witness in an impaired driving trial, the answer is likely that he was simply on routine patrol. In the case of a civilian witness, ask him about what he was doing before he saw what he saw and why he was out on the road that night.

Where was he when he observed what he saw?

A witness's credibility in describing what he saw depends on his ability to see it. As the prosecutor leads up to the witness's observations, he must be sure to set the scene. It often helps to use photographs or diagrams to help the jury understand the witness's perspective. If visual aids are used, always ensure that the jury can see any interaction between the witness and the exhibit. Additionally, the prosecutor must en-

sure the record is clear when a witness only points to a visual aid rather than verbally describes something on it.

Police Officer Testimony

The prosecutor should break down the officer's investigation into distinct areas. The first area should, of course, deal with who the officer is and why he is a witness in the case. That can be handled very quickly as follows:

> *Officer, please introduce yourself to the jury.*
>
> *On July 4, 2003, did you arrest (defendant) for impaired driving?*
>
> *Before we discuss the details of that arrest, can you please tell us what training and experience you have in impaired driving investigations?*

The prosecutor should take his time going over the officer's training and experience. As the prosecutor covers the officer's time at the academy, he should let the jury know how long that period lasted, and what courses the officer took. Officers, like attorneys, are obligated to continue to accrue a set number of continuing education hours each year. As the officer's qualifications are discussed, the prosecutor should focus on those areas of training that directly relate to the work the officer did in this case. Also consider discussing his pre-law enforcement employment if it bears some relevance to the work he does or enhances his credibility. Types of prior employment that are typically a good idea to discuss include military service, bartender, teacher, and EMT.

As police terminology is used during his testimony, be sure and ask the police officer witness to define and explain those terms with which the jurors may not be familiar.

During direct examination, let the police officer witness tell the story in a conversational, easy to understand, methodical, and yet compelling manner.

One way to allow the jury to follow the focus of each phase of a police officer's testimony is to introduce the different parts of his testimony, using "headers" or "headliners" to alert the jury to what is going to be discussed. For example, "Officer, let me take you to the night of July 3, 2003…." or "Let's talk for a few minutes about the horizontal gaze nystagmus test…." This technique is particularly useful when introducing evidence like the defendant's statement after his arrest:

> *Officer, did you speak to the defendant about what he did that night? Prior to doing so, did you advise the defendant about his rights?*
>
> *Did you do so from memory or did you read from a form? Let me show you what was previously marked as …*

In an impaired driving case, the prosecutor should break the examination down into distinct parts that lay out the story of what drew the officer's attention to the defendant's vehicle, what he noticed while the defendant's car was still in motion, when and why he decided to stop the defendant, what he observed after he approached the car, when he asked the defendant to exit his vehicle and why, the tests he administered after the suspect was out of the car, and about the totality of the circumstances he relied upon to make the arrest decision. The goal is to place the jurors in the officer's position and make it clear that at the end of each of these phases, the officer made the correct judgment that more investigation was needed and ultimately that an arrest was appropriate.

Use of Notes

One thing that sets the police officer witness apart from all other witnesses in a case is that he documented what he saw right after those events occurred. For that reason, the prosecutor should make sure the jury is aware of this distinction. He should make sure his officer witness brings his complete report up to the witness stand. If he needs to refer to his report to refresh his recollection, the prosecutor should take the time to ask him to explain that what he is referring to is the offense report he created and go ahead and ask him how many pages there are in that report before asking him to locate the answer to the question asked.

Presenting Evidence

When the prosecutor shows evidence to a witness, he should try to stand in a position that allows the jury to see what he is doing. He should have the witness identify the evidence and explain its relevance. If the item is a document, the prosecutor should remember to establish appropriate hearsay exceptions before asking the judge to admit the evidence. When the prosecutor moves an object, document or photograph into evidence, he should also ask the court for permission to publish it to the jury by either holding it in front of the jury panel or by handing it to them. He should refrain from asking additional questions until each juror sees the evidence. Proceeding while jurors are examining the evidence sends the unintended message that the evidence is not valuable. Additionally, some jurors may tune out the questioning while they look at the item.[6]

The Totality of the Circumstances

Defense counsel may try to focus the jury on alternative explanations for each sign and symptom of intoxication during cross-examination. The prosecutor should anticipate this strategy during direct examination by constantly emphasizing the totality of the circumstances. He should make sure the jury understands that the officer did not suspect or arrest the defendant because the defendant had bloodshot eyes, or a flushed face, or the odor of an alcoholic beverage on his breath, or because the defendant failed one or more of the standardized field sobriety tests (SFSTs). Rather, the officer suspected the defendant was impaired and arrested him for impaired driving because of all these factors.

Defense counsel also may emphasize what the defendant did well or safely in cross-examination. The prosecutor should not be concerned with this tactic. An officer's decision to arrest is not made with a scorecard comparing signs of intoxication with signs of sobriety. Every impaired driving suspect is going to be different. The ultimate question is going to be whether the suspect had the normal use of his mental or physical faculties to operate his motor vehicle safely on the public roadways. In a pre-trial meeting, the prosecutor should make it clear to the officer that when asked, he needs not be concerned about admitting that some classic signs of intoxication were missing.

Standardized Field Sobriety Tests (SFSTs)

Jurors will not rely on evidence they do not understand. It is imperative that the prosecutor establish the SFSTs' utility during his case-in-chief. He should have the SFST officer explain what the tests are, how they measure impairment, and why they are necessary. The prosecutor should have already discussed with the jurors during voir dire how tolerance and masking can be factors in a person's ability to observe

[6] Refer to the section on Pre-Trial Preparation for the suggestion that a prosecutor should familiarize himself with the preferences and practices of his assigned judge.

signs of impairment. Like the tools the house inspector uses to closely review property, the officer likewise uses tools that help him observe subtle signs of intoxication. The SFTSs were not made up in the moment; these tests are standardized, systematic, and commonly relied upon by law enforcement agencies.

To begin, the prosecutor should elicit testimony about the officer's training and experience with the tests and cover the fact that he had to prove his proficiency in administering the tests in school before he used them in the field. The prosecutor may also want to consider having the officer demonstrate the tests in front of the jury, covering not only the cues observed but the importance of those cues. During the pre-trial meeting, the prosecutor should make sure the officer knows he is going to ask him to demonstrate the tests during trial. The prosecutor should consider asking the police officer to demonstrate the tests for him during the pre-trial meeting, too. By doing so, the prosecutor can determine if the witness has a problem testifying while standing or has a problem demonstrating the tests before he does so in front of the jury.

The student SFST manuals are available on the internet and the prosecutor should make a point of finding and reading that manual before he meets with the officer and presents his testimony. He should have a copy of the manual available at counsel table, so the officer may refer to it if needed, as well as to prevent defense counsel from misstating its contents during cross-examination.

As with the behavior observed leading up to the SFST, the prosecutor wants to emphasize that these tests are just one part of the totality of factors that point to the suspect's intoxication.

The Breath Test Operator

Highlight the operator's training and experience and emphasize that the operator administered the breath test according to the State's accepted rules and procedures. The prosecutor should be sure to cover the mechanisms built into the instrument designed to prevent errors and address issues to ensure the reliability of the tests. He should also cover the secure manner the instruments are kept and the fact that only qualified breath test operators can interact with and operate the breath testing equipment.

In the pre-trial meeting, the prosecutor should explore the level of expertise of this witness in detail. Some operators are sufficiently trained to discuss the underlying science of the instrument and some are not. The prosecutor should know the limits of the witness's testimony and should not let the defense attorney take him beyond the limits of his expertise during cross-examination.

At the pre-trial meeting, the prosecutor should review the legal predicate questions with the breath test operator to ensure the breath test result can be offered into evidence. In some jurisdictions, the test results are not admitted through the operator but rather through the technical supervisor who oversees the instrument and its maintenance. Many maintenance officers are highly skilled technicians, and some even have Ph.D.'s in Toxicology. The prosecutor should highlight the additional qualifications and training the witness has received above and beyond that of the breath test operator. He should emphasize that the instrument was tested on a regular basis using several different known samples to ensure it can produce an accurate reading of the breath sample in his case and that this witness followed the State's accepted protocols.

A prosecutor may seek additional information about breath testing from the National Traffic Law Center's publication, *Breath Testing for Prosecutors*, available for download at www.ndaa.org.

Refusal Cases

In most jurisdictions, a suspect can refuse to provide a sample for chemical testing, but that refusal has consequences that can affect the suspect's driver's license. Those consequences are typically listed on the Implied Consent Form that is read to the suspect before he is asked to give a sample. In refusal cases, the prosecutor should consider introducing into evidence the Implied Consent Form. He should have the officer read the form to the jury just as he read the form to the defendant. Publish the form to the jury for review. The argument to be made later is that the suspect was so sure he would not pass the test, he was willing to risk the loss of his ability to drive. The refusal can also be considered as evidence of intoxication in many jurisdictions.

Blood Test Cases

In the past, the ability of police to take a blood sample was limited to those cases where serious injury or death was a consequence of the impaired driving. In such cases, a sample of blood may be requested and drawn by a person qualified to do so (*e.g.*, nurse, technician, phlebotomist). There is a growing trend to use search warrants to obtain blood samples to overcome a suspect's refusal. In such cases, a prosecutor will have the need to present additional testimony.

The officer will need to describe the process of drafting and obtaining a signed search warrant. A nurse or technician will need to be called to testify to the manner in which the blood sample was drawn and preserved. A lab technician will be needed to explain the instrumentation used to test the sample and the results of said testing. Finally, a forensic toxicologist will be necessary to discuss the alcohol and/or drugs found in the sample. An opinion about impairment based on the presence of alcohol and/or the level of a drug may be offered by a toxicologist who has the knowledge, training, and expertise necessary to formulate such an opinion; in many cases, the toxicologist cannot. This should be discussed with the toxicologist prior to trial to determine about what he can or cannot opine. In rare cases, a prosecutor may have enough details to offer retrograde extrapolation opinions.

A prosecutor may seek additional information about toxicology from the National Traffic Law Center's publications, *Alcohol Toxicology for Prosecutors* and *Drug Toxicology for Prosecutors*, available at www.ndaa.org.

CROSS EXAMINATION

The popular myth about cross-examination imagines the prosecutor destroying a witness with an aggressive and blistering attack. Not only does that rarely happen, but it also misses the primary goal of cross-examination. The goal of cross-examination is not to prevail over the witness but rather to prevail in the case. A prosecutor may win the battle of wits and nerve with a witness but, in the end, did it help his case? The famed Scopes Monkey Trial, a trial that was dramatized in the film *Inherit the Wind*, illustrates this point. In that case, most observers felt that Clarence Darrow devastated William Jennings Bryan with his skillful cross-examination. Despite that, Darrow lost his case. The primary objective of a prosecutor should be to argue his theory of the case to the jury through his cross-examination of the defense witnesses.

There are a multitude of resources available describing how to conduct an effective cross-examination. Proper cross-examination is an art that improves over time; even the most experienced prosecutors continue to find room for improvement. Every cross-examiner must possess the skill of critical listening. He must focus on what the witness says, how he says it, and what he does not say. Some of the best points made in cross-examination will be the result of listening critically to what the witness says and turning what started out as a damaging response to a prosecutor's case into a harmless response or even one that helps his case.

Preparing for Cross-Examination

Many new prosecutors struggle with how to prepare for cross-examination. In large part this is because in many, if not most jurisdictions, the defendant is not required to provide a witness list to the prosecutor. Often the only notice to which a prosecutor is entitled is a list of expert witnesses the defendant "might" call.

It can be difficult to prepare to cross-examine a witness when a prosecutor has no notice of the witness. A prosecutor should focus on the facts of the case and generate, in advance of cross-examination, an outline of those facts as presented through the witnesses. While some of the evidence presented in an impaired driving case is subjective and based on opinion, a great deal of it is based on objective facts, some of which may be captured on video. Having a version of those facts at his fingertips will help a prosecutor poke holes in the testimony of the defendant's witnesses.

With a careful review of the records in the case, a prosecutor can usually anticipate who will be called as a witness for the defense. Some examples of such witnesses include: passengers in the car, friends a defendant was with the night prior to his stop and arrest, employees at the bar where the defendant consumed his alcohol, family and friends who can speak to the fact that the defendant did not look impaired, and of course, expert witnesses called to attack the investigation and opinions of the officer, the way evidence was collected and tested, and the flaws with the instrumentation on which the defendant performed his breath test.

Whenever possible, the prosecutor should perform a criminal history check on the names of all witnesses found in the offense report or arrest records. He should also consider searching for those named witnesses (as well as the defendant) on social media. From time to time, such searches will reveal details about the offense or details about a witness's character.

A common mistake a prosecutor may make is to

take too many notes during direct exam of the defense witness. His instinct may tell him to write down everything he hears during direct. The problem is that it leaves him with pages and pages of notes to quickly dig through when that witness is passed for cross-examination. A better practice is for the prosecutor to listen critically to what the witness says and only take notes of that testimony he can effectively explore on cross-examination. How a witness comes across as he testifies is also worth noting. During direct exam testimony, the prosecutor and his trial partner should observe the witness and observe the jurors' reaction to the witness. The prosecutor's demeanor should be one of attentiveness, but he should also look unconcerned by what the witness is saying.

Other Bad Cross-Examination Myths to Ignore

There is a famous adage of cross-examination that one should "never ask a question if one does not know what the answer to that question will be." This may be a good rule for cross-examination in a civil case where the lawyers have the benefit of interrogatories and depositions to help them ensure they know everything that every opposing witness will say; the same does not work for the prosecution. A better rule for the prosecutor is that he should not ask a question before he has carefully considered all plausible responses to that question.

Another common rule is to insist that the witness answer "yes" or "no" to all the prosecutor's questions. Trying to artificially control a witness's answers rarely works and is frequently difficult to enforce. If a prosecutor asks a question that calls for a yes or no response, but the witness does not give a yes or no, the prosecutor can simply ask him, "Mr. Smith, is that a "No?"

Structure and Delivery of Cross-Examination

A prosecutor's questions during cross-examination should be short. One way to prepare for this is to write out the long version of the question and then break it down into as many parts as possible.

For example, say one point the prosecutor wishes to make is that the defendant, who was lost and seemed to have trouble staying in his lane, was familiar with his car and the area.

The first version of that question might read as follows:

> *Mr. Jones on the night of your arrest you were operating a car you have driven before that was in good working order and you were driving in an area you were familiar with, correct?*

It will be more effective and allow the prosecutor to have more control over the answer if he breaks it down like this:

> *Mr. Jones, on the night of you arrest you were operating your car, correct?*
>
> *A car that you have owned for many years?*
>
> *A car you have driven many times before?*
>
> *A car you have maintained and serviced when needed?*
>
> *A car that was in good working order that evening?*
>
> *The road you were on was one that you were familiar with?*
>
> *A major roadway in the city where you work and live?*
>
> *One you have driven on many times before?*
>
> *Your destination was your home?*
>
> *You have lived at that address for many years?*
>
> *You drive to and from that address on a regular basis?*

As the prosecutor asks his questions, he should try

to maintain good eye contact with the witness and demonstrate control. Sometimes a defense witness will answer in a way that is non-responsive or goes off on a tangent unrelated to the question asked. A simple yet effective way to interrupt that testimony, short of an objection, is for the prosecutor to raise his hand palm forward in the universal stop signal. If that does not work, he should not be afraid to object, particularly at the beginning of his cross. The following are examples of responses a prosecutor may use to follow-up a witness's unresponsive answer:

Mr. Jones, is that a yes?

Mr. Jones did you understand my question?

Then would you mind answering it?

Mr. Jones, would you like me to repeat my question?

Mr. Jones, would you mind repeating the question I asked you?

Are you finished? Then let me ask you again ... Mr. Jones, is there a reason you don't want to answer my question?

Cross-Examination Techniques

There are three key cross-examination techniques, each with a different goal.

"Cross to Impeach," where the goal is to destroy or damage the witness's credibility. This is the cross-examination technique popularly dramatized in the media. It is also one of the most difficult techniques to accomplish and should only be used if the next two techniques have failed.

"Cross to Gain Admissions," where the goal is to get the witness to concede points that favor the prosecutor's theory of the case. Almost all witnesses have information that can help the State's case. It is best to gain those admissions at the beginning of the cross.

"Cross to Show No Harm," where the goal is to demonstrate that the witness has actually said nothing that hurts or diminishes the case. Sometimes the best way to demonstrate this is for the prosecutor to stand at the conclusion of the defense attorney's direct examination and in a calm nonchalant manner announce the State has "no questions for this witness."

General Areas of Cross-Examination

When one is looking to build a foundation for cross, think of the acronym, MOB. M= Motive, O= Opportunity, and B= Bias. Most defense witnesses can be crossed on one, if not all of these areas. A defense witness will bring his bias to the witness stand and the prosecutor can diminish his credibility by exposing that bias. A prosecutor should watch for changes in demeanor when the witness switches from answering direct exam questions to cross-examination. Are the answers provided on direct quick and to the point versus evasive and labored when questioned by the prosecutor on cross? The prosecutor should make the witness admit his connection or his relationship to the defendant. The prosecutor should also focus on the assumptions inherent in his opinions. In other words, if the witness was not at the offense scene, he must be basing his answers on a version of events someone else told him. He should consider exploring the matters the witness could not possibly know because he was not present at the scene or what occurred happened outside his hearing or line of sight.

The following are some typical categories of defense witnesses along with some sample lines of questioning the prosecutor may wish to pursue:

Friends of the Defendant

The defendant often calls as witnesses the friends with whom he was at the time of the alleged incident. Their testimony generally takes one of two paths:

1. *"I was with him, and I know he didn't have too much to drink."*
2. *"I looked at the videotape, and he looks normal to me."*

Some examples of the type of testimony a prosecutor may hear from such witnesses are as follows:

"Defendant didn't drink too much."

The prosecutor should explore the friends' statements on this very carefully. The average person out at a bar with a friend is not going to be noting how many drinks a companion is having unless the friend has some reason to be concerned about his companion's consumption of alcohol. Most people only count the number of their friend's drinks if the friend has a drinking problem.

The prosecutor can also point out how unrealistic it would be for a friend to keep an accurate total of the number of drinks the defendant actually consumed. Perhaps there was a gap of time when the friend was not around the defendant. The defendant could have consumed alcohol out of the friend's presence.

"Defendant seemed normal to me."

This testimony presents a good opportunity for the prosecutor to explore the defendant's drinking habits that the friend has observed. If the witness testifies that the defendant seemed normal to him, then either (1) he has seen the defendant intoxicated before and therefore has a basis of comparison, or (2) he has never seen the defendant intoxicated before and therefore has no basis to make a comparison in court.

If they have seen the defendant intoxicated before, the prosecutor should have the witness describe the symptoms of the defendant's typical intoxicated behavior and see whether they match what the officer saw that day. If the defendant's driving was erratic according to the officers, ask the witness whether the defendant is a good driver or not. For instance, does the defendant typically hit a curb when he makes a turn? Does the defendant typically have trouble staying in his lane?

The tendency of these defense witnesses is to minimize everything. This defendant normally is a great driver, normally never drinks, this witness might say. This witness, however, can unintentionally make the State's case better either by overstating his opinions so the jury does not believe him, or by drawing a line between the way the defendant normally behaves and the way the officer saw him on that evening.

The prosecutor should explore with this witness the fact that alcohol affects people differently. With some people, visible signs of intoxication can be observed, but with others, it cannot. If the witness has seen the defendant intoxicated before, how many drinks did he have on the occasion when he was intoxicated? Whatever number the witness gives, the prosecutor can use the number to his advantage. If the witness answers 15 drinks, the prosecutor can hammer the fact that this defendant has, on occasion, consumed 15 drinks. If the answer is three, then the prosecutor can establish the defendant as a lightweight who gets drunk and loses control of his mental and physical faculties easily.

The prosecutor should always ask the civilian witness whether he gave a written statement to anyone (including the defense attorney) or wrote down something about the incident. A prosecutor should be familiar with the criminal rules in his jurisdiction as he may be entitled under the rules to the notes of a witness.

Bartender / Waitress

Sometimes the defense will call a witness who does not know the defendant but was working at the bar

on the night at issue. The bartender or waitress witness typically will testify that he or she did not believe the defendant was intoxicated. The prosecutor should explore the witness's bias in giving this testimony. For example, the bar's ability to keep its license or the employee's ability to keep his job may depend on the witness not serving alcohol to an intoxicated person.

One should also explore how the witness remembers—out of all the people he's served—this particular defendant. Is he a regular? What is the employee's frame of reference for knowing the defendant was not intoxicated? Has the witness ever had to stop serving alcohol to the defendant because he was intoxicated?

What opportunities did the witness have to confirm the defendant was not impaired? Did he do any sobriety tests? Typically, the only abilities of the defendant observed by these witnesses are the ability to walk to where he is sitting, sit in a chair, order a drink, and/or pay for the drink. The prosecutor should have no trouble getting the witness to agree that none of these observations are a good measure of a person's sobriety or his ability to operate a motor vehicle. A prosecutor may consider asking him to describe the behaviors he has observed in the past in others that caused him to cut them off. The described behaviors will typically be of the falling down drunk variety and the witness will have to admit, based on his jurisdiction's Alcoholic Beverage Control or other similar training, that people can be impaired long before they reach that visible level.

Bar Manager

It is not unusual for the defense to call a bartender, waiter, or manager to testify that the bar has strict policies to ensure that no one is over-served alcohol at their establishment. Though these witnesses may believe they do a good job of watching for and cutting off intoxicated individuals, it is not difficult for a well-prepared prosecutor to demonstrate that even the best-intentioned drink-serving policy is not foolproof. Most of the points the prosecutor can make are simply based on common sense. Below are some sample areas of questioning a prosecutor may want to consider.

As a preliminary matter, if the defense has not done so in its direct examination, the prosecutor should have the witness explain the layout of the bar. This can expose problems with the argument that the defendant was where the manager or waiter could see him the entire time. Obviously if the prosecutor knows where the defendant was drinking, he should visit the establishment in advance of trial, so he can see for himself how the bar operates.

He can ask about drink prices and the sizes of the drinks, for example, the size of the glasses for serving beer. Few establishments serve 12-ounce glasses of beer. Many hold as much as 23 or 24 ounces. This may help establish that the three beers the defendant consumed were the equivalent of six 12-ounce beers. Even if the defendant was at a table being waited on by a specific waiter or waitress, there is typically nothing that prevents anyone from walking up to the bar and ordering a drink. It is important to establish that the "tab" is not necessarily the exclusive source of accounting for alcohol the defendant consumed at the establishment.

The next point the prosecutor may want to make is that the ability to know when to cut someone off is a purely subjective exercise. The limited training the waiter or manager received from his jurisdiction's Alcoholic Beverage Control or other agency is far less than the training the officer has received. The prosecutor should get the witness to admit that some people show signs of intoxication after one or two drinks while others who consume alcohol on a daily basis may not show obvious signs of intoxication even after consuming a number of drinks. He can also point out

that the ability to observe poor balance requires one to be in a position to see the person walk, and most people at a bar or restaurant are seated while they are drinking.

Finally, the prosecutor will want to discuss the bar's policy of cutting people off. A manager may say his bar has a strict policy that requires an employee to stop serving alcohol to a patron who has consumed too much. The prosecutor will want to first ask how often the witness is called upon to cut someone off on a typical work night or week. Once he has answered, the prosecutor should ask him, "Would you agree with me that the fact that you ever have to cut someone off is some sign that your efforts to have a strict policy against over-serving are not foolproof?" The witness cannot help but agree. The prosecutor can also point out that if he truly wanted to be sure the establishment did not over-serve anyone, the establishment could have a strict drink-count policy that limited how many drinks an individual could be served each hour. It is unlikely any bar or restaurant has such a policy.

Cross-Examining the Defendant

The State does not always have the opportunity to question the defendant. Once the defendant takes the stand, however, the prosecutor should be prepared to capitalize on the opportunity to use the defendant to advance the State's case. As he listens to the testimony, he should look for gaps in the defendant's description of what he did on the day or evening of the incident as there is usually a good reason he skipped those areas; the prosecutor should not be afraid to test the waters.

The following is a list of areas of questioning a prosecutor may want to explore that will usually be safe to pursue during the cross-examination of the defendant. Unless clarification is necessary on cross-examination, a prosecutor should not ask for the information again if already elicited on direct.

- *Where was the alcohol bought/obtained?*

  If at a commercial establishment, ask the defendant how the alcohol was paid for. If by credit card, ask if the defendant has the receipt.

  Argument point: If the defendant says he paid by credit card but did not bring a credit card receipt, one can question why he did not bring documentation to back up his story.

- *What did you do earlier that day? (if not discussed during direct examination)*

  Remember the extrapolation information needed, such as when the defendant last ate; when drinking began and ended; what type of alcohol was consumed; and if, and when, any over-the-counter or prescription drugs taken.

- *With whom was the defendant on the offense date?*

  If the defendant was with friends, the prosecutor should get their names. He should not ask whether the defendant has seen them lately or if they are going to testify.

  Argument point: If they do not testify, the prosecutor can comment on that in argument.

  The prosecutor should find out what the friends had to drink. Did they show any signs of intoxication?

  In case they do testify, he has already begun to impeach their ability to perceive.

- *The prosecutor should try to work out a time line with the defendant.*

  Argument point: There is no credible way the defendant could have kept track of that, so the prosecutor will either succeed in showing that he has no clear memory of times, or he has an overdeveloped recollection of every minute. First, if the defendant

goes through the stop and arrest in some detail, the prosecutor should focus on the areas not mentioned and consider asking about them to see how many, "I don't recall," answers he gets. Second, if the defendant refused to submit a breath sample, the prosecutor should ask the defendant if he understood the implied consent warning options.

If he says "no," the prosecutor should have him read it in court and ask if he understood the options. If the defendant had slurred speech on the tape, he may want to ask the defendant to read them aloud.

Argument point: If the defendant could not understand at arrest time but can now, one can attribute that to intoxication.

If the defendant insists he only had two or three drinks, the prosecutor might want to ask why he refused to take the one available test that could have confirmed the amount of alcohol in his body.

If he insists he wanted to talk to an attorney before he decided to give a breath sample and lists that as his reason for refusing to give a sample, consider the following arguments: (1) What information could an attorney have given him about his level of intoxication? (2) If the attorney thought he was intoxicated, what breath test advice does the jury think he would have given?

The prosecutor should examine the implied consent document signature if the defendant signed a refusal and compare it to the signature on other court papers. If they look different, these can be shown to the defendant who can then be asked about the difference. The prosecutor should consider offering them into evidence, so the jury can see.

- *The prosecutor should focus on all consistencies and conflicts between the officer's testimony and defendant's testimony.*

He should give emphasis to: (1) pointing out things that officer saw that the defendant would be in no position to contradict (such as weaving within the lane, which would be difficult to detect from inside a car); and (2) whether the defendant agrees or disagrees with most of what the officer says.

Argument point: If the defendant agrees, then he can argue, "How could the officer be right on so many things but wrong on the most important issues?" If the defendant disagrees, he can argue, "Is it logical that the officer would risk his job for the sake of an impaired driving conviction?" Or, "If the officer was going to lie, couldn't he have invented testimony that was much more damaging to the defendant?"

- *Does the defendant think he was intoxicated at the time of arrest?*

- *What does "intoxicated" mean to the defendant?*

If a defendant gets the legal definition verbatim, the prosecutor should ask when he first learned that definition. Before he "learned" what the law said, what did the term mean to him? What difference, if any, is there in his mind between "drunk" and "intoxicated"? Does the defendant think a person can be intoxicated but not drunk?

- *Does the defendant believe his actions at the scene and on tape were normal?*

Especially if the defendant denies the actions occurred (but even if admitted), a prosecutor should go through the objectively not normal things the defendant said or did at the scene and on the tape and see if the defendant will concede they are not normal.

- *Has the defendant ever consumed enough alcohol that he was intoxicated?*

This can sometimes draw an objection as an attempt to elicit an extraneous offense. If so, the prosecutor should reply that he is not asking the

defendant if he has ever broken the law. (Reaching a state of intoxication is not against the law.) He is simply testing the defendant's basis for saying he was not intoxicated on the offense date.

If yes, how many drinks did it take?

If he gives a number of drinks (for instance, six), ask the following:

- *Are you saying that after just five drinks you would not be intoxicated?*
- *Are you saying that after five drinks you would not hesitate to drive a car?*
- *Would you go to your job and work after five drinks?*
- *Would you ever go have four or five drinks at lunch on a workday?*
- *Would you drive your child to school after five drinks?*

If he answers "no" to this question, the prosecutor can ask what the maximum number of drinks he would be comfortable consuming if he knew he had to leave and pick up his child as soon as he finished.

Depending on the response, ask why he would not want to have any or very much alcohol to drink before engaging in some of the above activities.

- *What signs are/were visible when the defendant is/was intoxicated?*

Once again, the prosecutor wants to draw on the officer's testimony as a guide. For instance, if the officer said, "The defendant's balance was unsteady," the prosecutor can ask if the defendant's balance is affected when he is (or the last time he was) intoxicated. Another approach is for the prosecutor to take the signs seen by the officer and ask:

- *You are not normally unsteady when you walk?*
- *You are not normally rude and abusive?*

If the defendant denies ever being intoxicated or knowing what he looks like when intoxicated, the prosecutor should consider asking if he has ever seen other people who he thought were intoxicated. What did they look like?

If the "other person" he described was obviously drunk, the prosecutor can follow up with questions about whether the defendant has seen people whose intoxication signs were not as obvious.

The prosecutor should find out how often the defendant consumes alcohol and how much he normally consumes. No matter what he says, the prosecutor can use it against him.

- *Heavy or regular drinker: Likely was drinking heavily in this case, or more likely, his good appearance on the arrest date can be attributed to masking/tolerance.*
- *Light drinker: Not as familiar with his limits; low tolerance means he would be affected by a small amount of alcohol.*

Does he agree that a person who has consumed enough alcohol that his mental and physical faculties are affected:

- *Might not be aware of his condition?*
- *Might have his ability to perceive himself and his circumstances affected?*
- *Might have had his ability to recall details affected?*

When the defendant was being videotaped, isn't it true:

- *You knew you were being taped?*
- *You knew a judge or jury would see it later?*
- *You knew you had to do well? Or you knew you couldn't afford to let anyone see how bad your condition was?*

If the defendant claims that the officer was overly

abusive or physical with him, he can ask if he filed a complaint with the police department. (Unless, of course, the defendant did file such a complaint in which case that fact should be the basis of a motion in limine).

Did he write down the events of that night for anyone? Did he review what he wrote down before testifying?

If the answer is yes, he can ask for a copy under the Rules of Evidence. If the answer is no, he can contrast that in argument with the officer who did write a report.

If the defendant looks good on the tape, the prosecutor should consider asking questions about whether he was nervous, stressed, or frightened.

Argument point: Most people would view arrest as a "sobering" experience. Using this common belief, a prosecutor can argue that the time delay between the stop and the video, coupled with adrenalin rush brought about by the arrest, account for the defendant's good appearance on the videotape.

Defense Expert Witness

Discovery of Expert

Jurisdictions have different rules about how and when the State is entitled to notice that the other side will call an expert witness. If it requires a motion, the prosecutor should file it and seek a ruling as early as possible.

In an impaired driving case, the good news is that the defense bar seems to draw from the same pool of expert witnesses, even in different regions of the country. For that reason, it is rare that a prosecutor will encounter an expert that has not previously testified. This means there is a prosecutor who has cross-examined that witness and probably has access to a transcript he can share. The National Traffic Law Center also maintains a bank of information on such witnesses that can be accessed by contacting the Center.

A good source of information about any expert is the internet. Using Google, a prosecutor can often discover schools and trials where the expert has testified or spoken. Those may lead to the discovery of papers and transcripts. When a prosecutor finds a source of information about an expert, he will want to explore the content of the expert's prior testimony as well as the expert's demeanor on the witness stand.

Underpinning of Expert Testimony

All expert testimony derives from one of two sources. The first involves what the expert learned by doing. In other words, the work the expert performed in an actual lab or from actual research he conducted. The second involves what the expert learned by reading. What he learned by reading about the work done by others in the form of papers, textbooks, and studies. Most experts fall in the second category. A prosecutor can use this to the State's advantage, especially if the prosecutor has a good collection of studies at his disposal.

Expert Qualification Hearing

Experts are allowed to give opinions and that sets them apart from most other witnesses. As a gatekeeper, the judge is responsible to ensure those opinions are based in proper science and to exclude those that are not. The way one discovers what opinions the witness is prepared to give and the basis for those opinions is with an expert qualification hearing. These are conducted outside the presence of the jury, and one should ask for one every time there is a defense expert.

In that hearing, the prosecutor should explore what the expert did or did not review prior to his testimony. On which of the items reviewed is the witness basing his opinion(s)? On what version of the underlying facts is the expert relying? Compile a list

of every opinion the expert is prepared to offer before the jury.

At the end of the hearing, the prosecutor should be prepared to object to, or try to limit, the admission of any opinion(s) that does not have a proper scientific basis. The prosecutor should seek the permission of the court to enable the State's expert to be present in the courtroom during this hearing so he can assist the prosecutor to recognize weak or bad opinions. If the defense expert refers to studies, the prosecutor should ask him if he has copies of those studies.

Developing Areas of Cross

If a defense expert testifies contrary to the testimony and opinions given by the State's expert, the prosecutor should be prepared to use an outline of his expert's opinions and the basis for those opinions in his cross-examination of the defense expert. Prosecutors can look to the National Traffic Law Center for assistance with additional studies that may contradict opinions these experts may offer. Good textbooks exist that address many of the issues raised by defense experts in impaired driving cases. One of the best is *Garriott's Medicolegal Aspects of Alcohol*,[7] as it is an excellent source of real science presented in a way a non-scientist can easily understand. If the prosecutor has this or other similar treatise, he will find it can be an effective tool for cross-examination, especially after the defense expert acknowledges it as a learned treatise.

It can be intimidating to address a scientist during cross when one lacks a scientific background. The way around this is to focus on the aspects of the witness's testimony that call for speculation or guesses than those parts of his testimony based on science.

[7] *Garriott's Medicolegal Aspects of Alcohol*, 6th Edition, Yale H. Caplan and Bruce A. Goldberger (2014).

CLOSING ARGUMENT

To constitute proper jury argument, the argument must encompass one (or more) of the following: (1) summation of the evidence presented at trial; (2) a reasonable deduction from the evidence; (3) an answer to opposing counsel's argument; or (4) a plea for law enforcement.

Closing argument is the prosecutor's opportunity to focus the jury on his theory of the case, to make sense of the facts and the law, and ultimately to persuade the jurors to his view of the offense and the appropriate outcome of the case. He should use his imagination. Any trial attorney can simply stand up and regurgitate the elements of the offense and the evidence presented at trial. If that is all a prosecutor plans to do, then a tremendous opportunity to connect with the jury has been wasted. As with all stages of trial work, an effective closing argument begins with thorough preparation.

Closing argument is the part of the trial that can differentiate between those who advocate for a position and those who have a gift for the art of advocacy. Like every other part of the trial, it requires thought and preparation. Prosecutors seem to fall into two camps when it comes to the creation of a closing argument. The first group includes the prosecutor who takes the time to write out his closing argument, practice it, commit it to memory, and deliver it. The second group includes the prosecutor who also works out what he wants to say and how to organize his argument but does not attempt to write it out and memorize it. Each prosecutor must decide for himself which method works best for him. Should a prosecutor subscribe to group one, he is cautioned to remain open to the possibility of adjusting his argument as circumstances warrant.

The Order of Argument

The order of closing arguments varies by jurisdiction. In some jurisdictions, the State always argues first, in others the defense. In some of these jurisdictions, the order depends on whether the defense presents evidence. In many jurisdictions, the party that presents first is permitted to give a second or rebuttal closing. The prosecutor needs to be familiar with his jurisdiction's rules prior to going to trial.

Delivery

A prosecutor should not "read" his closing argument for the same reasons as discussed above about the "Opening Statement." If he needs to have something in writing to remind him of the points to be made or to organize those points, he can write a short outline on his legal pad. He may consider using PowerPoint to assist with structuring his argument. Using PowerPoint allows a prosecutor to make his points on each slide while maintaining eye contact with the jury rather than looking down at notes.

The prosecutor should try to vary his voice level and the pace of his argument as he addresses the jury. There is a time in every argument to raise his voice and there is a time to lower that volume. If he moves, he should do so with purpose. A prosecutor should never forget the power of the well-placed "pause." A "pause" is a great way to highlight one's strongest points.

At all times, a prosecutor should attempt to avoid theatrics and, instead, aim to simply have a conversation with the jury. The goal of argument is walk them through the evidence in such a way that they feel compelled to return the verdict his case needs because it is the only logical destination after their journey through the evidence presented.

Structure

Closing argument is the last chance to reach the jury. The classic closing comprises several steps:

The Attention Step
Discussion of Legal Theory
Key Issue Statement
Argument
Rebuttal Exit Line

Attention Step

The attention step is a statement or series of statements that grab(s) the jurors' attention from the outset of the argument. If the case has some unusual aspect to it, a prosecutor can plan or rehearse this statement. Most impaired driving cases are rather routine and may not lend themselves to an obvious attention getter. A prosecutor can often look to the defense's opening statement or argument (if the defense presents its argument first) for an opening line. If the defense spins or misstates the evidence or the law, the prosecutor's attention step can be to immediately challenge the most inaccurate statement. If the defense attorney contravenes the written word of the jury instructions, the prosecutor should read the portion of the law exactly as the judge will.

As with the opening statement, many prosecutors believe that the attention step should be devoid of ritualistic statements (I want to thank you . . .," "This is closing argument where . . .," and others). Others believe that jurors appreciate these remarks. If a prosecutor wants to use them, the suggestion is to work them into the argument at some other point. When the attention step is prepared in advance and is not a response to something the opposition has said, it should be tied into the theme of the case and delivered with sincerity and confidence.

Legal Theory

It is frequently forgotten that the legal theories with which lawyers deal daily are foreign to most jurors. Laws and their application are often most confusing in the abstract and can best be explained in their application. As the prosecutor discusses the application of the law to the facts in his case, he can use his argument to lay out in a simple, straightforward manner how he has met his burden.

In most jurisdictions, lawyers are permitted to discuss the law in closing argument. In these jurisdictions, a prosecutor may present in argument any instruction the judge will read to the jury. Since the judge has or will read the instructions, a prosecutor should consider ways to paraphrase or reword important legal concepts to make them easier to understand.

During his closing argument, rather than reciting all the witness testimony, the prosecutor should focus instead on covering only the most important parts of it. He should let the jury know where he and the defense agree and disagree as a means of focusing the juror's attention on what is important.

There may be portions of the law that do not support the prosecution's position as much as he would like. The prudent approach is to directly address these areas of the law. He should be careful not to come across as apologetic or defensive. Rather than admit that he thinks there is a weakness in a certain aspect of his case, it is better that he introduces it with words like, *"I anticipate the defense counsel will argue that our evidence of intoxication is lacking. While at first glance some of you may have felt the same way, I want to take time to demonstrate to you why that first impression is not correct."*

Key Issue Statement

The key issue in a case is any element that is hotly contested and requires special discussion. By stating it clearly, the prosecutor can focus the jury on its importance and clarify it in his own terms. In impaired

driving cases, the most common issue revolves around the question of the defendant's intoxication or impairment.

Argument

Once he identifies the key issue, the prosecutor should direct his energies toward persuading the jury of his position. He should use all the tools at his disposal, including inductive reasoning, deductive reasoning, and auditory and visual aids (*e.g.*, physical evidence and demonstrative aids).

Closing argument is not the time to try to go over all the evidence presented. The goal should be to highlight the witnesses and testimony in the case that provide the most compelling grounds for a guilty verdict. It is a time for the prosecutor to remind the jury of his theme and to demonstrate that he kept the promise he made in opening statement.

He should be cognizant that it is unlikely all the jurors will view the evidence the same way. Some will have questions or will focus on perceived weaknesses highlighted by the defense argument. He will want to anticipate and attempt to answer those questions and concerns. He wants to give those jurors who are with him the ammunition they need to convince those that are against him, or those who are undecided, that he proved his case beyond a reasonable doubt.

The prosecutor can remind the jury of the law as needed but should not spend too much time reviewing it in minute detail unless he feels the review is warranted because the law is vague or complicated. It is likely the judge just finished reading the law to the jury and, additionally, the jury may be able to take a copy with them into the jury room for deliberations. That does not mean he cannot read or highlight small portions of the instructions, but such reading should be followed by his dissecting the law to emphasize its meaning.

The prosecutor should not make improper jury appeals. What that means will vary considerably depending on the jurisdiction. In some jurisdictions, for example, a prosecutor is not allowed to ask a jury to "send a message to the community" whereas there is no such prohibition in other jurisdictions. The prosecutor should not personalize his closing argument with words that tell the jury what he believes. A simple tool that allows him to avoid this while also hinting at his position is to replace what he believes with a rhetorical question. For example, he should not argue that he "believes the family of the victim of the car crash has suffered more than anyone should be asked to suffer." Instead he should turn the statement into a question: "What must it be like to have your world turned upside down by a knock at the door?" "What must it feel like to have your world ripped apart by the selfish actions of another?"

The prosecutor should ensure that the jurors understand they do not all need to believe the same

Practice Tip

Impaired Driving Methods of Proof

The defense may be able to explain away some of the field sobriety test results, but not the breath test results, or vice versa. If the prosecutor has subjective and objective scientific proof, he should remind the jurors that they do not have to agree on which type of evidence convinced them of the element of intoxication. It is only necessary that at least one of the types of evidence convince them beyond a reasonable doubt. He should try to structure his argument like a late-night product commercial in which on every point he states that even though this piece of evidence proved his case, "But there's more!"

piece of evidence to find a defendant guilty. The law only requires that all of the jurors believe the defendant is guilty beyond a reasonable doubt based upon some piece of evidence, or combination of pieces of evidence.

A well-crafted argument takes a crucial piece of evidence, discusses why it is credible, and builds upon that evidence by highlighting the circumstances that corroborate its credibility. As the prosecutor reviews the evidence with the jury, he should demonstrate how each witness, and each exhibit builds upon the one that came before it. Using the above example, he would argue that the officer's roadside tests are credible on their own, citing the testimony of the officer and the validity of the procedures used. He would then follow up by noting that the alcohol test results corroborate the officer's testimony. Therefore, it is no coincidence that the defendant failed the roadside tests and had a blood alcohol level higher than that permitted by law.

Rebuttal

The rebuttal is the prosecutor's response to defense arguments. Rebuttal can be one of the most difficult parts of closing argument because a prosecutor cannot plan out his response in advance. Rather, he must develop it as he listens to the defense's comments. The prosecutor should listen closely to the defense's closing argument for objectionable arguments and information that deserves a response. The prosecutor should remain aware that every objectionable argument by the defense does not require an objection. Sometimes he will find that it is better to forgo the objection and simply respond to the content of the improper argument in his rebuttal.

Part of the rebuttal will focus on off-the-cuff responses made by the defense or on unanticipated arguments, some of which may be based upon defense misstatements of the testimony or the law. The prosecutor should pick the most important arguments and respond by quoting or reading back appropriate testimony and/or jury instructions to demonstrate errors. He should refrain from arguing that defense counsel misstated the evidence or law with the intent of misleading the jury. Rather than say the defense attorney has misstated the evidence, he can instead argue that the attorney seems to be confused or suggest that the attorney's attention must have wandered when a critical piece of evidence was admitted. The prosecutor can then remind the jury what that testimony or evidence was.

One of the most overlooked aspects of a rebuttal argument, but frequently the most important, is a discussion of reasonable doubt. As the person with the burden of proof, it is incumbent upon the prosecutor to inform the jury that mere possibilities and "what ifs" are not a valid basis for reasonable doubt. A reasonable doubt is a doubt that a juror can ascribe from the evidence. A naked "assertion" that an officer was untruthful, a test was invalid or "could have been administered incorrectly" is not enough; there needs to be evidential support.

Sometimes a defense attorney will lay out questions in his closing argument and suggest that the prosecutor must answer those questions to prove his client's guilt. Whether the prosecutor responds to those questions, he should be sure to start by making it clear he rejects the premise that those questions must be answered for the jury to return a verdict of guilty.

Finally, the prosecutor should not forget to talk about "why" a verdict is necessary in his case. When dealing with an impaired driving case that does not involve a crash with injury, jurors may need a rhetorical push to see "why" the verdict is so important. Perhaps a reminder that people tend to repeat their conduct until something interrupts the cycle. The officer's stop of the defendant interrupted a misde-

meanor in progress that, if left unchecked, could lead to a greater offense, a felony crime.

The prosecutor must recognize that rendering judgment against another is never easy and remind the jury that doing what is easy is rarely the same thing as doing justice. He should make it clear he has faith in them to be true to their oaths, to be true to their community, to be true to themselves and, in the end, to not do what is "easy" but rather what is "right."

Exit Line

The exit line is a planned and rehearsed phrase the prosecutor forcefully and sincerely delivers at the end of his closing. One of the most effective exit lines is a "call for justice or truth." Many prosecutors find that the most effective exit lines encourage jurors to convict while simultaneously empowering them to "do the right thing."

Conclusion

Trying impaired driving cases is exhilarating and will be one of the most challenging types of cases a prosecutor will face. If a prosecutor can master the ability to prove an impaired driving case, he will be well-equipped to handle more serious felony cases later in his career. The prosecutor must remember that truth and justice are on his side. He must uphold his obligation as the people's attorney and present his case in a fair, dignified, organized and professional manner. He must remember that he cannot persuade others until he has persuaded himself. In the end, he will work through the evidence in his mind, find the words to explain and neutralize the weak points in his case, and marshal his imagination to deliver a compelling argument that convinces a jury to accept his position and render a true verdict. For further information or assistance, contact the National Traffic Law Center through the National District Attorneys Association at www.ndaa.org.

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visit www.NDAA.org.

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