Baste & Broil: Cross Examination Strategy for Impaired Driving Cases

Massachusetts.—A 22-year-old Brockton man has been charged with drunken driving and vehicular homicide resulting from an April 9, 2002 crash that killed Malcolm Kalp, a retired CIA Officer and decorated veteran of the Vietnam War. Kalp's pickup truck was hit by a vehicle driven by Richard Clinch a short time after Clinch and his friends were turned away from a popular bar by bouncers who felt the group appeared intoxicated. According to a state trooper, Clinch "had no reaction whatsoever" when advised at the scene of Kalp'Thanks to Perry Mason and Matlock re-runs, jurors have unrealistic expectations of what happens during cross-examination of witnesses. While prosecutors would love to see witnesses leap up and scream, "Yes, yes, I did it, I drove drunk and that was wrong," that's never happened in a courtroom outside a Hollywood soundstage. Yet, many prosecutors still feel the pressure of jurors' expectations, so how can prosecutors be effective in cross-examination? How can prosecutors pave the road towards closing arguments with all the points they need to make?

Prepare: Is it reasonable that someone would lie to avoid going to jail? You bet. So, to anticipate defenses, the single best question to ask yourself is: What is the lie going to be? Then, ask yourself: What can I do to make that lie unreasonable? Remember, the burden of proof is beyond a reasonable doubt. Showing defense claims are unreasonable is the single best technique in shooting down their claims.

Control Witnesses. Getting loud or cutting the witness off only makes you look bad and gains sympathy for the witness, so be polite, firm and always appear fair using witness control techniques such as:

- Repeating the question.
- Asking if the witness heard the question.
- Having the witness repeat the question.
- Emphasizing the question the witness is avoiding.
- Letting the witness run until finished.
- Providing the answer yourself.
- Entering into an agreement with the witness that you will ask questions and he will answer them.
- Requesting the judge instruct the witness to answer the question.
- Asking the answer to be stricken as non-responsive.
- Using short, short, simple questions and build.

Techniques of the last resort:

- "I'm sorry. I must have confused you. Let me ask the questions again..."
- "Are you through? Anything else you want to say before you answer my question?"
- Pause. Look at the jury. Ask the question again.
- "You swore an oath to tell us the truth. If the truth is yes, can't you tell us yes?"

Strategy. There are as many approaches to cross examination as there are prosecutors, but for impaired driving cases, try the consensus based cross followed by impeachment.

Consensus based cross is where you build consensus with a witness before you turn to impeachment. In other words, you get the witness to agree with you on every element and fact that you can to bolster the credibility of your case and reduce areas of dispute. The effect is three-fold: (1) it focuses the trial, (2) it takes advantage of witnesses when they are most helpful, and (3) the door is opened occasionally when witnesses give information they didn't realize was damaging.

Make a list of the points you wish to make on cross that support your theory of the case. Arrange them with the questions that the witness will agree with on top. Then draw a line where the questions get nasty, listing all your questions for impeachment below. Thinking of cross as a two-step exercise of "nice and nasty" is helpful. While you should always be courteous in both portions of your cross, this categorizing of questions helps maximize your performance. Remember the first step is the proactive portion of cross-examination, where you speak through the

witnesses. Impeachment is the reactive part of cross where you discredit the witness and his testimony. You baste; then broil.

For our Impeachment Checklist, log onto www.ndaa-apri.org and click on the National Traffic Law Center's home page.

911 Operators To Get Immediate Crash Data from OnStar

Since 1999, GM vehicles have provided prosecutors and law enforcement officers with an increasing wealth of crash data through electronic data recorders (EDRs) and sensing & diagnostic modules in airbags (SDMs). Now, GM and OnStar are going a step further by notifying 911 operators of the SDM data moments after the crash.

Beginning this year, OnStar plans to add Advanced Automatic Crash Notification (AACN) systems to 400,000 OnStar-equipped 2004 models. Currently, OnStar receives about 500 air bag deployment notifications per month. When an airbag is deployed, OnStar contacts 911 with the location of the vehicle. Now with AACN, OnStar will relay notifications if a car is involved in a moderate to severe front, rear or side-impact crash, regardless if whether the airbag deploys or not. In addition, OnStar will relay direction of impact and impact force.

For drivers and passengers, this means prompt relay of location and severity of the wreck to emergency and medical personnel. For law enforcement officers, crash reconstructionists and prosecutors, this means documented evidence of crucial facts. In most investigations, SDM data is usually obtained after a court order and hauling the wreck to a dealership. Now, the information will be relayed by OnStar to 911 dispatchers instantly creating a public record through 911 recordings and flagging for investigators the need to later obtain OnStar business records.

OnStar records should be accessible through subpoena of business records or by search warrants. AACN is already being used by police to help locate stolen cars. For more information, visit OnStar on the web: www.onstar.com.

Models to be equipped with AACN 2004

- Chevrolet Malibu
- Chevrolet Trailblazer
- GMC Envoy
- Envoy XUT
- Oldsmobile Bravada
- Buick Rainier
- 2005
- Cadillac SRX
- Saturn VUE
- Pontiac Grand Am
- Chevrolet Cavalier

Drug Czar Releases Model State Drugged Driving Policy

John Walters, Director of the White House's Office of National Drug Control Policy (ONDCP), has called for per se drugged driving impairment laws in the release of *Drugs and Driving: Model State Policy*. Dr. Jeffrey Runge, Administrator of the National Highway Traffic Safety Administration (NHTSA), joined Walters last November to launch this campaign to stop drugged driving.

"While the consequences of drunk driving have become well known over the past 20 years, drugged driving has received relatively limited attention," Director Walters said.

ONDCP released a *Drugs and Driving: Model State Policy* that identifies several key elements of effective legislation against drugged driving:

- **Per Se Impairment Laws.** Drivers who have a mere presence of controlled substances and other impairing substances such as glue, paint and other inhalants in their blood should be considered per se impaired.

- **Treatment/Early Intervention.** Statutes should allow and encourage courts to provide the same treatment opportunities for drug-impaired drivers as for people convicted of possessing drugs.

- **Admissibility of test refusals.** All test refusals should be admissible as evidence.

- **DRE.** Every state should allow for training and testimony from law enforcement officers trained as Drug Recognition Experts.

For a copy of ONDCP's *Drugs and Driving: Model State Policy*, visit our website at www.ndaa-apri.org and click on Traffic Law Center.