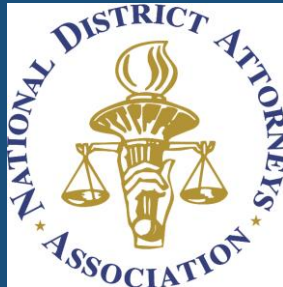


# SURVIVING THE MINEFIELD CALLED CROSS EXAMINATION

Toward Zero Deaths  
Mankato, Minnesota 2018



National District Attorneys  
Association

*The Voice of America's Prosecutors*

## MISSION

To be the voice of America's  
prosecutors and  
to support their efforts to  
protect the rights  
and safety of the people



## OVERVIEW

- Largest and oldest prosecutor membership organization in the nation
- Established in 1950
- 5,100+ members in all fifty states, plus Canada
- Members range from elected officials to law students





- Established in 1992 initially with a cooperative agreement from NHTSA.
- Expanded with a grant from FMCSA.
- Expanded with agreements from private sources (Responsibility.org, AAA etc)

## **THE NATIONAL Traffic Law Center**

Publications

Technical Assistance

Compilations of Law

CDL Training:

Website:

<https://ndda.org>

## LET'S TALK

- TESTIFIED TO A JURY IN A DUI CASE
- TESTIFIED TO A JURY IN ANOTHER TYPE CASE
  - NEVER BEFORE A JURY
  - TESTIFIED IN A NON JURY TRIAL
  - TESTIFIED IN A PRELIMINARY HEARING
- TESTIFIED BEFORE AN ADMINISTRATIVE JUDGE

## LET'S TALK

- TAUGHT AT LAW ENFORCEMENT ACADEMY
  - TAUGHT AN SFST CLASS
  - TAUGHT AN ARIDE CLASS
    - TAUGHT A DRE CLASS
    - TUAGHT A ROOKIE
  - TAUGHT A PROSECUTOR
- TAUGHT A HIGH SCHOOL OR COLLEGE AWARENESS COURSE

## DISCUSSION

- HOW IS TEACHING DIFFERENT FROM TESTIFYING?



# PATIENCE, HONOR, COURAGE

A presentation by Tom Kimball,  
Senior Advisor, National Traffic Law Center

Legal purpose of cross examination: Test the “truth” given on direct exam.

- The **practical** purpose:
- UNDERMINE
- DESTROY
- HELP DEFENSE THEORY

## THE LEARNING CODE

**10/35/55**

## HOW JURORS LEARN

10% is linguistics  
35% is para-linguistics  
55% is kinesics

# LINGUISTICS

the words we use

# PARALINGUISTICS

- HOW WE SAY THE WORDS WE SAY



## KINESICS

- **Kinesics** is the interpretation of body motion communication such as facial expressions and gestures, nonverbal behavior related to movement of any part of the body or the body as a whole.

- Three Things make up Trial Components:
- **FACTS**
- **FEELINGS**
- **DRIVEL**

## YOU TESTIFY ABOUT

- Who you are
- What did you see, do or hear
- When
- Where
- What did you think or feel about it (if relevant)
- What is your opinion (if allowed to give one)

## THE ARMCHAIR QUARTERBACK

- What you **COULD HAVE DONE**
- What you **SHOULD HAVE DONE**
- What **YOU DID**



## CROSS-EXAMINATION

- Get jury to question
  - What was done
  - Validity of tests
  - Competency and integrity
- Attempt to create doubt

### **Types of Cross-Examination**

**Getting agreement**

**Impeaching or contradicting**

**Focusing on behavior**

## CONCESSIONS

- Things that are helpful to defendant
  - Fact Concessions
  - Perception and Recall Concessions

## FACT CONCESSIONS

- New Facts
  - Facts favorable to defendant
    - Point away from guilt
    - Focus on what defendant did right, rather than what did wrong

25

## FACT CONCESSIONS

- Alternatives
  - Seek to change focus of jury
    - Offer some different reason for behavior or observations
    - Minimize defendant's behavior & ignore guilt

26

## FACT CONCESSIONS

- Deleting Facts
  - Show rush to judgment
    - Avoiding totality of circumstances
    - Eliminate facts from jury's consideration

## FACT CONCESSIONS

- Mistakes
  - Mistakes happen
  - Seeking to undermine jury's faith
    - Credibility of witness
    - Case itself
  - Give jury reason to believe something other than what evidence shows

## PERCEPTION AND RECALL CONCESSIONS

- Challenge observations based on ability to perceive and remember
  - Locations
  - Distances
  - Angles
  - Lighting
  - Time since observations

IMPEACHMENT

SHORT QUESTIONS

LEADING QUESTIONS

BEHAVIOUR FOCUSED QUESTIONS

Techniques and questions you may face in cross-examination regarding:

Procedures required such as departmental manuals,  
protocols and ethics

Training received (deviations from training, lack of training, etc)

Previously recorded testimony OR DOCUMENTS



Being perceived or presented as a  
**PROFESSIONAL (FAKE) WITNESS**

**THE LANGUAGE SLIDING GAME:**

“ a good officer would always.....”



## Don't Allow the Defense to Control the Focus

- Defense often tries to focus on noise
  - the reason for the impairment
    - Medication is for diseases – who cares
    - Attacks on the program/observations
- Focus on the decision to drive while impaired
- Focus on the impairment

## Reminders

- Defense attorneys will not cross-examine in chronological order
  - To try to keep you & officer off balance
  - Prepare new officers for this
- Do not assume the ploy/question has any merit
- Don't accept their language

## PATIENCE

When is patience most necessary?

## Compound questions:

You were on patrol. It was raining. You stopped my client's 1999 Toyota Camry on Dogleg Road, right?

## Compound question answers?

Answer?

- 1) Yes
- 2) No
- 3) Would you repeat the question
- 4) Yes to part of it and no to other parts or
- 5) Which question would you like me to answer first?

## Compound questions:

What if it is a 1998 Camry?

What if the rained stopped before you stopped him?

What if you turned off Dogleg and actually stopped him on Dog DooDoo Road?

What if it was actually a Honda?

## PATIENCE

Requires listening with skepticism.

Never assume the lawyer is using true facts in the compound question!

# PATIENCE

Requires controlling the speed of the Q & A

Undermining patience

The faster you go, the more likely you error

The technique is to ask numerous questions with a yes answer and sneak in one that requires a no.



### THE FAKE LIST QUESTION

Cannot Keep Balance While Listing to instructions, right?

Starts Too Soon? Yes?

Stops While Walking? Yes?

Does not Touch heel to Toe? Yes?

Does not watch feet while walking? Yes

Steps off Line (by more than ½ inch) Yes?

Improper Turn? Yes?

Incorrect Number of Steps, Yes?

## Helpful Hints

- Don't guess
- Don't hedge
- Be patient
- Describe, don't gesture
- Do your part, not someone else's
- Know and be yourself

## Dealing with Defense Attorneys

- Keep your cool
  - Avoid arguments
  - You control the pace
  - Be the voice of reason



## Dealing with Defense Attorneys

- It Takes Two to Tango
  - You can't be led if you don't want to be
  - Pay attention
  - Be careful of agreeing to quickly

Cops In Court



Session 5 - 49



## Dealing with Defense Attorneys

- Putting words in your mouth
  - Don't hurry to answer
  - Be precise

Cops In Court



Session 5 - 50



## Dealing with Defense Attorneys

- Don't be impressed
  - Claims of expertise or training

## Dealing with Defense Attorneys

- Don't fill the silence
  - Wanting you to volunteer information
  - Wait for question
  - Avoid temptation to fill in

## Dealing with Defense Attorneys

- Don't answer non-questions
  - If it isn't a question, ignore it

## Dealing with Defense Attorneys

- Don't back down
  - Stand up for yourself
  - But don't argue

## Dealing with Defense Attorneys

- Reading too much into question
  - Some questions not intended for answer
    - Seeing how you will react
    - Just answer the question

## Dealing with Defense Attorneys

- Don't apologize
  - Be proud of who you are and what you did
  - If did job correctly, nothing to apologize for

## Conclusion

- You know more about your testimony than anyone else
  - Be prepared and be confident
- Above all, be
  - Fair, honest and impartial

## COURAGE

Taking the stand is scary  
 The lawyer has some weapons  
 They are destructive

Remember, your weapon is bigger, better,  
 used everyday: Truth

- The National Traffic Law Center:

- Tom Kimball, Senior Advisor

send questions to: [NTLC@ndaajustice.org](mailto:NTLC@ndaajustice.org)