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
  • TAUGHT 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
FACT CONCESSIONS

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

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
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? Yes?
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

• Putting words in your mouth
  – Don’t hurry to answer
  – Be precise
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

• 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