

DWI Cross Examination: A New Approach

by

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Getting Organized with the “Chapter Method”

The first task in preparing for DWI cross examination is to get organized. It can be daunting. Every state witness presents a unique challenge. Virtually every state witness (whether you are dealing with an arresting officer, an intoxilyzer operator or an intoxilyzer supervisor) will have at least some expertise in a specific area. Many of the state’s witnesses will have more courtroom experience than you. That is particularly true if you are dealing with a “task force” case in which officers specialize in DWI arrests.

It is important for you to be well-prepared, organized and ready to present your theory of the case in a logical and interesting way. You should view every state witness as an opportunity to prove your theory of the case.

The best way to organize cross examination material is topically. Think of every topic as a separate “chapter” in a story that you are telling to the jury. For example, if your theory of the case is that the police confused or misinterpreted your client’s innocent behavior with symptoms of intoxication, your goal should be show how each behavioral symptom was consistent with something other than being intoxicated. At the end of this paper you will find several examples of how to promote common DWI defenses through cross examination.

You should begin by selecting three to seven chapters for each witness. Avoid “waiving” cross examination and asking no questions of a state witness unless it is absolutely clear the witness hasn’t helped the state’s case. Minor witnesses (such as police station video operators) should be cross examined lightly, unless you have reason to believe the witness is an “easy mark” or might contradict the testimony of an important state witness. You should cross examine the state’s “star” witnesses

most aggressively. In many instances you can destroy the state's case by toppling the arresting officer.

Each cross examination chapter should be listed on a separate page with your questions underneath the heading. It is OK if you can't fit all of your questions on a single page. Simply make sure that the last question for any given chapter is the last question on the page. Keeping your chapters separate from one another will keep you organized and allow you to easily add new material during the prosecutor's direct examination. The last thing you want is to have to draw "insert arrows" or make notes in your margins when you are 30 seconds away from beginning your cross examination.

You should start each witness with a strong chapter. Do not begin by addressing things that the prosecutor just covered during direct examination. Your first chapter should be planned, scripted and a sure-fire "winner" that will capture the jury's attention.

Finish each cross examination with a strong chapter as well. As with your first chapter, the final chapter should be planned, scripted and a topic that you know will go over well with the jury. If your theory is that the police never gave your client a fair chance to prove he was innocent, end with how they never told him he had a right to a blood test. If your theory is that the field sobriety tests were "designed for failure," end with a hypothetical about how a suspect can do the tests almost perfectly but still "fail" under the peculiar scoring system of the National Highway and Traffic Safety Administration (NHTSA). You will find an example of this method at the end of the paper.

Whenever you have three or more cross examination chapters for a witness, select a chapter that you consider strong but do not plan to start or finish with. Label this chapter "**the cork.**" You should write "the cork" at the top of your page so that you will not forget what or where it is. The cork, quite simply, is your "go to" chapter. It is the chapter you will use in the event you get into trouble during cross examination and want to quickly re-establish command over the witness. If you

do not get into trouble and do not need to use the cork, you should use it as the second-to-last chapter in your sequence. Keep in mind that jurors usually remember what they hear first and last. The cork, followed by a strong and scripted final chapter, can make for a very powerful finish.

Deciding which chapters should go first, last and somewhere in the middle will depend upon your theory of the case and how comfortable you are with the material. Some defense lawyers are comfortable with the NHTSA material and prefer to start or finish with it. Others like to use it as their cork. Some prefer to bury NHTSA material, if they use it all, in the middle of their cross examination sequence because they view it as risky or not particularly important for a given witness. In any event you should pick a logical sequence that flows from one chapter to the next but avoids being chronological. Prosecutors usually direct their witnesses with a chronological recitation of the stop and arrest. Do not go chronologically in your cross examination as it tends to reinforce the state's version of the case.

Be Polite, Patient and Persistent

Try to maintain your composure during cross examination. Even when the prosecutor is nagging you with groundless objections and the judge appears to be on the state's side, you should remain polite and professional. The jury will lose your message if you appear to be rattled or, worse, become rude with a state witness.

In addition to maintaining professional decorum, you should be patient and persistent in your cross examination. If a witness is evasive you will probably get what you want if you follow a few simple tips. First, if the witness refuses to answer your question right away do not go to the judge for help. Try asking the question a second time:

Lawyer: Cigarette smoke can cause bloodshot eyes, correct?

Cop: That's not why your client had bloodshot eyes.

Lawyer (repeating with emphasis): Cigarette smoke can cause bloodshot eyes, *correct?*

Cop: I suppose.

A witness that fights you on obvious points will soon lose credibility with the jury. If a witness has the audacity to duck your question after you've repeated it with emphasis, go ahead and suggest the answer. Nod or shake your head as appropriate. This will make the witness squirm and almost always results in a direct response:

Lawyer: Cigarette smoke can cause bloodshot eyes, correct?

Cop: That's not why your client had bloodshot eyes.

Lawyer (repeating with emphasis): Cigarette smoke can cause bloodshot eyes, *correct?*

Cop: A lot of things can cause bloodshot eyes. Intoxication can cause bloodshot eyes.

Lawyer (repeating with emphasis and nodding head): *So your answer is yes.* Cigarette smoke can cause bloodshot eyes?

Cop: Yes.

Very few witnesses will continue to refuse to answer your question. If a witness repeatedly refuses to answer obvious questions, the court will usually intervene and instruct the witness to answer. Even the most state-oriented judge doesn't want to sit through a three-week DWI trial.

In some instances a witness may evade your question without trying to do so. Listen carefully to each response. Don't settle for vague answers such as "uh-huh" or a non-verbal response such as a head nod. Court reporters sometimes sit with their backs to the witnesses and don't take down non-verbal responses. Even when you get a verbal response, listen carefully to see if you need to follow up. A witness might give you an implausible answer that needs to be explored with a "mirrored" follow-up:

Lawyer: Standing on a broken ankle could be painful, wouldn't you agree?

Cop: I guess.

Lawyer (mirroring the witness' answer): You *guess*?

Cop: Well, yes. I suppose that could be painful.

If you are patient and persistent you will usually get the answers you need. Once you have “trained” a witness to give you yes and no answers, you will find it easier and easier to cross examine the witness. In fact you might encounter witnesses who give up early on because they correctly conclude that it is futile to resist you.

“Preview” Each Topic

Always let the jury know when you are changing topics and beginning a new chapter in your cross examination. There are several ways to do this. One common method is to simply tell the witness and jury where you are headed next:

Lawyer: Officer, I'm going to ask you some questions about {name of client}'s driving. Do you understand?

Cop: Yes.

Another method to preview a new topic is to announce it to the witness and follow up with a question. You might say, “OK, let's move on to something else. You offered {name of client} a breath test, correct?” Previewing topics will keep your jury awake and (hopefully) interested even during the most methodical portions of your cross examination.

Ask Short Questions (i.e., Make Statements)

Jurors absorb information better in small bits. You should ask short questions whenever possible. The shorter your questions, the shorter the witness' responses will be.

In reality most of your questions will resemble declarative statements rather than questions. You don't have to end every, single declarative statement with “correct” or “isn't that true” in order

to ask a leading question. Sprinkle in a few “corrects?” and then slip into a pattern of making declarative statements to which a witness must either agree or disagree. For example:

Lawyer: You claim you smelled alcohol on {name of client}'s breath, correct?

Cop: Yes.

Lawyer: The smell of alcohol doesn't tell you what type of alcohol was consumed?

Cop: No, sir.

Lawyer: The smell of alcohol doesn't tell you when it was consumed?

Cop: No, sir.

Lawyer: Doesn't tell you where it was consumed?

Cop: No, sir.

Lawyer: Whether it was mixed with food?

Cop: No, sir.

Lawyer: How much food?

Cop: No, sir.

Lawyer: What kind of food?

Cop: No, sir.

Lawyer: It certainly doesn't tell you what a person's tolerance is for alcohol?

Cop: No.

If the prosecutor objects, tell the court that you are asking questions by setting forth propositions to which the witness may agree or disagree. If the court sustains the objection, add a few more “correct” and “isn't that true” appendages to your questions and then gradually slip back into the pattern of making declarative statements. The best cross examinations are essentially arguments to the jury. The witness' job is to get on board, get out of the way or get run over.

Ask Leading Questions!

The most common mistakes that trial lawyers make include asking too many leading questions during direct examination and too few leading questions during cross examination. There is no excuse for asking open-ended questions to an adverse witness. Even when you *do* know the answer to a question, asking it in a non-leading form is likely to generate a lengthy explanation that could hurt your case or derail your momentum.

Get in the habit of asking leading questions on cross examination so that it becomes second nature to you. As the late Johnnie Cochran might have said, “if you don’t lead, you won’t succeed.”

Following are some specific examples of DWI cross examination using the concepts discussed above. Feel free to use these in trial and let me hear from you when those acquittals begin tumbling in! If you have a war story or a new “chapter” that relies on the concepts discussed above, please let me know at grant@scheinerlaw.com

DWI Cross Examination **Examples**

1. One Leg Stand {Visual cross examination using easel pad or chalkboard to illustrate key points.}

Lawyer: I'm going to ask you some questions about the one leg stand test. Do you understand?

Cop: Certainly.

Lawyer: You have a suspect stand on one leg, for 30 seconds, correct?

Cop: That's correct.

Lawyer: And you look for clues of intoxication?

Cop: Yes.

Lawyer: A total of four possible clues?

Cop: Correct.

Lawyer (enumerating with fingers): Swaying?

Cop: Yes.

Lawyer: Using arms for balance?

Cop: Yes.

Lawyer: Hopping?

Cop: Yes.

Lawyer: Dropping foot?

Cop: Yes.

Lawyer: When you see one of these things happen, you count that as a clue?

Cop: That's correct.

Lawyer {very nicely}: And if you notice two or more of these so-called clues, it's your belief the

person is probably intoxicated?

Cop: To me that would indicate he had lost his faculties.

Lawyer: That he had failed the test?

Cop: Yes, sir.

Lawyer: So, if a person drops his foot once during a 30-second test, that's a clue?

Cop: Yes, that's correct.

Lawyer: And if a person raises his arms just once during a 30-second test, that's a clue?

Cop: Yes, sir.

Lawyer: In fact he doesn't even need to raise his arms all the way. Just six inches away from his body, correct?

Cop: Yes, sir.

Lawyer: That's a clue?

Cop: Yes, sir.

Lawyer (using easel pad): So let me see if I understand this correctly ...

	<u>Perform</u>	<u>Seconds</u>
<i>Sway</i>	<i>30</i>	<i>30</i>
<i>Drop Foot</i>	<i>29</i>	<i>30</i>
<i>Use Arms for Balance</i>	<i>29</i>	<i>30</i>
<i>Hop</i>	<u><i>30</i></u>	<u><i>30</i></u>
Total:	118	120

Equals an “F” !!

Lawyer: According to *your* scoring, that person would get an “F.”

Cop: To me that indicates a loss of faculties.

Lawyer: Officer, where did you go to high school?

Cop: Pasadena High School in Pasadena.

Lawyer: In high school, did you take any tests in which 118 out of 120 was considered a failure?

Cop: Well, no ...

Lawyer: But that’s the scoring system you use in your DWI arrests, correct?

Cop: That’s the way I was trained to score it.

Lawyer (suggesting an answer, after witness is non-responsive): Yes?

Cop: Yes.

Lawyer: And that’s the scoring system that you used the night {Name of client} was arrested?

Cop: Yes.

2. Good Driving {Emphasize client's good driving in cases where only traffic infraction is speeding, expired inspection sticker or some other "non-drunk" driving.}

Lawyer: I'm going to ask you some questions about {name of client}'s driving. Do you understand?

Cop: Yes.

Lawyer: You have been trained to look for certain types of driving that might indicate a person is intoxicated, correct?

Cop: Yes, that's correct.

Lawyer: These are called driving *cues*?

Cop: Correct

Lawyer: They're covered in Chapter 5 of your NHTSA Student Manual, entitled, *Vehicle in Motion*?

Cop: I believe so.

Lawyer: Among other things, you look to see if a vehicle is swerving, drifting or weaving, correct?

Cop: Correct.

Lawyer: Because those are some of the typical cues that a driver might be intoxicated, correct?

Cop: Correct.

Lawyer: {Name of client} wasn't swerving, was he?

Cop: Not that I noticed.

Lawyer: He wasn't drifting?

Cop: Not that I noticed.

Lawyer: Wasn't weaving?

Cop: No, sir.

Lawyer: Wasn't straddling the center or any lane marker?

Cop: {Shakes head}.

Lawyer (following up, after witness gives a non-verbal response): No?

Cop: No.

Lawyer: {Name of client} didn't strike or almost strike another vehicle, did he?

Cop: No.

Lawyer: He didn't follow any other vehicle too closely?

Cop: Not that I noticed.

Lawyer: He didn't brake erratically, as intoxicated drivers sometimes do?

Cop: No.

Lawyer: Didn't drive into opposing traffic?

Cop: No.

Lawyer: Didn't drive with his headlights off?

Cop: No.

Lawyer: Because, driving with your headlights off can be considered a *cue* of intoxication?

Cop: Sometimes.

Lawyer: That's one of the things you're trained to look for?

Cop: Yes.

Lawyer: But {name of client}'s headlights were on and his equipment seemed OK?

Cop: As I recall, yes.

Lawyer: And when you put on your overhead flashers, he pulled over as he was supposed to?

Cop: I suppose.

Lawyer: He didn't try and run from you?

Cop: No, sir.

Lawyer: Never attempted to flee?

Cop: No, sir.

3. Symptom Elimination {Explain client's alleged symptoms of intoxication.}

Lawyer: I'm going to ask you some questions about the things that caused you to believe {name of client} was intoxicated. Do you understand?

Cop: Yes, certainly.

Lawyer: You claim you smelled alcohol on {name of client}'s breath?

Cop: A strong odor.

Lawyer ("looping" the witness' non-responsive answer into next question): Well, the smell of alcohol – regardless of whether you believe it was strong or moderate – doesn't tell you what type of alcohol was consumed?

Cop: What specific type? No, sir.

Lawyer: The smell of alcohol doesn't tell you when it was consumed?

Cop: No, sir.

Lawyer: Doesn't tell you where it was consumed?

Cop: No, sir.

Lawyer: Whether it was mixed with food?

Cop: No, sir.

Lawyer: How much food?

Cop: No, sir.

Lawyer: What kind of food?

Cop: No, sir.

Lawyer: It doesn't tell you what a person's tolerance is for alcohol?

Cop: No.

Lawyer: It doesn't even tell you whether a person is intoxicated?

Cop: By itself, no.

Lawyer: All it tells is the person had something to drink.

Cop: That's correct.

Lawyer: Now, you also claim that {name of client} had bloodshot eyes?

Cop: Yes.

Lawyer: Bloodshot eyes could be caused by things other than intoxication?

Cop: Absolutely.

Lawyer: A person could be tired?

Cop: Yes.

Lawyer: Being tired can cause a person to have bloodshot eyes?

Cop: Yes.

Lawyer: And I think you mentioned that you pulled {name of client} over at 2:20 a.m., correct?

Cop: Yes.

Lawyer: You would expect some people to be tired at 2:20 a.m., wouldn't you?

Cop: I suppose.

Lawyer: A person could also have bloodshot eyes because of cigarette smoke, correct?

Cop: Correct.

Lawyer: Bars, clubs and restaurants often have cigarette smoke, don't they?

Cop: Of course.

Lawyer: And if I am not mistaken, {name of client} told you that he had just left {name of place}, correct?

Cop: Yes.

Lawyer: A lot of things can cause bloodshot eyes, isn't that true?

Cop: Yes, that's true.

Lawyer: A person living in {name of city} could suffer from allergies, correct?

Cop: Correct.

Lawyer: Allergies can cause a person's eyes to be bloodshot and even watery, correct?

Cop: Correct.

Lawyer: And I think you mentioned that {name of client}'s eyes were bloodshot as well as glassy, correct?

Cop: That's correct.

Lawyer (enumerating with fingers): Allergies, cigarette smoke and some of these things we are talking about can all make a person's eyes bloodshot and watery?

Cop: Correct.

4. Evidence of sobriety (assuming you can prove via police report, video tape, ALR audio tape or ALR transcript).

Lawyer: Officer, I'm going to ask you some questions about {name of client}'s appearance and behavior. Do you understand?

Cop: Sure.

Lawyer: When you pulled {name of client} over, he stopped on the shoulder of the road, correct?

Cop: Correct.

Lawyer: You got out of your patrol car?

Cop: Yes.

Lawyer: You walked over to {name of client}'s truck?

Cop: Yes.

Lawyer: He kept his hands on the steering wheel?

Cop: Yes.

Lawyer: Didn't make any sudden movements?

Cop: No, sir.

Lawyer: And you asked him to roll down his window?

Cop: Yes, sir.

Lawyer: He complied?

Cop: Yes, sir.

Lawyer: He rolled down his window for you?

Cop: Yes, sir.

Lawyer: You asked him for driver's license and proof of insurance?

Cop: That's what I usually do.

Lawyer (repeating question when the answer is non-responsive): You asked him for his driver's license and proof of insurance?

Cop: Yes, sir.

Lawyer: Sometimes an intoxicated driver will have difficulty finding a driver's license or proof of insurance?

Cop: Sometimes.

Lawyer: Sometimes they'll fumble with it or drop it?

Cop: That can happen, yes.

Lawyer: But {name of client} was able to give you those things without any fumbling or difficulty, correct?

Cop: That's correct.

Lawyer: You asked {name of client} to step out of his truck?

Cop: Yes.

Lawyer: Sometimes an intoxicated driver will stumble getting out his vehicle?

Cop: Sometimes.

Lawyer: But {name of client} didn't stumble?

Cop: No, sir.

Lawyer: He got out of his truck with absolutely no difficulty?

Cop: I think so.

Lawyer ("mirroring" witness' non-committal answer): You think so?

Cop: I didn't notice any difficulty.

Lawyer: Then you asked him to walk to the back of his truck?

Cop: Yes, sir.

Lawyer: And he did it?

Cop: Yes.

Lawyer: Without difficulty?

Cop: I didn't notice any problem.

Lawyer: He didn't hold onto the side of the truck for balance?

Cop: No, sir.

Lawyer: Intoxicated drivers sometimes hold onto their trucks or cars for balance?

Cop: Sometimes.

Lawyer: But {name of client} didn't do that?

Cop: No, sir.

Lawyer: He just walked to the back of his truck in a normal way?

Cop: Yes.

5. Roadside versus Station Video. (Distinguish between a bad roadside video and a good station video).

Lawyer: I'm going to ask you some questions about the *conditions* where you gave {name of client} his field sobriety tests. Do you understand?

Cop: Yes.

Lawyer: As a general rule, you want your tests to happen under the best, possible conditions?

Cop: Whenever possible.

Lawyer: Good conditions are more fair to the person who has to do the tests?

Cop: I would think so.

Lawyer: And good conditions probably give you the best chance of getting an accurate result?

Cop: I would think so.

Lawyer: In this case there were two sets of field sobriety tests given to {name of client}, correct?

Cop: Correct.

Lawyer: One set of tests was given on the roadside?

Cop: Correct.

Lawyer: And another set was given at the police station?

Cop: Correct.

Lawyer: Now, if we were looking for a level surface to do these tests, you would be more likely to find it at the police station than on the side of the road, correct?

Cop: In general, yes.

Lawyer: And if we were looking for the most constant lighting, you would be more likely to find it at the police station than on the side of the road?

Cop: Correct.

Lawyer: The temperature would probably be more constant at the police station?

Cop: I would think.

Lawyer: And you wouldn't expect to have any wind [if applicable] or precipitation at the police station?

Cop: No, sir.

Lawyer: You wouldn't expect there to be any traffic noise at the police station?

Cop: No, sir.

6. “Normal” faculties. (Emphasize that the arresting officer doesn’t know what’s normal for client).

Lawyer: Officer, I’m going to ask you some questions about your belief that {name of client} had lost his *normal mental and physical faculties*. Do you understand?

Cop: Yes.

Lawyer: As we’ve talked about, you asked {name of client} to perform certain tasks, correct?

Cop: Correct.

Lawyer: Some of the tasks were mental?

Cop: Yes.

Lawyer: Some were physical?

Cop: Yes.

Lawyer: Several of the tasks were both mental and physical at the same time?

Cop: Yes.

Lawyer: For example, tilting your head back and estimating 30 seconds is both a mental and physical task?

Cop: That’s correct.

Lawyer: There are plenty of innocent reasons why a person might not perform well on a mental or physical task?

Cop: I don’t understand what you mean by “innocent.”

Lawyer: Reasons other than being intoxicated.

Cop: I suppose.

Lawyer (mirroring the witness’ evasive answer): You suppose?

Cop: It’s possible.

Lawyer: Well, for example, a person could be nervous?

Cop: He didn't seem nervous to me.

Lawyer (pinning witness down after a non-responsive answer): A person could be nervous?

Cop: Yes.

Lawyer: A person could be clumsy or uncoordinated?

Cop: I suppose.

Lawyer: A person could have poor balance?

Cop: I suppose.

Lawyer: A person could have difficulty understanding instructions?

Cop: Yes.

Lawyer: A person could get confused in a stressful situation?

Cop: Yes.

Lawyer: Anxious?

Cop: Yes.

Lawyer: Might not perform well under pressure?

Cop: Yes.

Lawyer: Some people might even have difficulty remembering things when they're under pressure?

Cop: I suppose.

Lawyer (if applicable): You mentioned that {name of client} couldn't remember the name of the restaurant he had been to that evening?

Cop: Yes.

Lawyer: Now, you believed {name of client} had lost his normal faculties, correct?

Cop: Yes.

Lawyer: Because of alcohol?

Cop: Yes, sir.

Lawyer: But the truth is, you had never met {name of client} before the night you arrested him?

Cop: No, I never met him before.

Lawyer: You don't know what he's normally like in a physical task?

Cop: No.

Lawyer: You don't know what he's normally like in a mental task?

Cop: No.

Lawyer: You don't know what he's normally like at 2:30 a.m.?

Cop: No.

Lawyer: And you don't know what {name of client} is normally like when he's stressed out or under pressure?

Cop: No.

Lawyer: Getting pulled over by the police can be a stressful situation for some people, can't it?

Cop: Certainly.

Lawyer (Optional question): And you are aware {name of client} had never been in that type of situation before?

Cop: No, I wasn't aware.

Lawyer (Optional question - possibly objectionable): You are aware that {name of client} has never been arrested before?

Resources

In addition to my own experience, I borrowed heavily from three (3) resources in putting together this paper and presentation. I found these resources enormously helpful and recommend them to anyone who wishes to master the art and science of DWI cross examination:

- MacCarthy, Terry, “Look Good Cross Examination” lecture. CD-ROMs available through mark@bennettandbennett.com
- Pozner, Larry S., “Structure and Sequence in Cross-Examination,” National Association of Criminal Defense Lawyers (NACDL) audio tape lecture as part of the 2000 Fall Seminar, “The Masters: Advanced Trial Techniques” (available at <http://www.nacdl tapes.com/>)
- Taylor, Lawrence, “Drunk Driving Defense [5th Ed.], available at <http://www.duicentral.com/>

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