

CROSSING THE COP IN A DUI CASE

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CROSSING THE COP IN A DUI CASE

Try cases. Test yourself and the State's evidence. Don't be intimidated.

Don't think you need to be someone you're not. There is no "best" way to be a trial attorney. Don't try to be someone else. Be prepared and be yourself and you will be great.

Quote from Tony Bennett on his teacher Mimi Spear who told him:

"Don't imitate another singer, because you'll just be one of the chorus if you do. To learn how to phrase, study musicians—a piano player, a saxophone player—and see how they're phrasing." I took her advice. It sounds so simple, but if you just be yourself, you're different than anyone else."

I. PRETRIAL PREPARATION

A. Get and review the discovery from this case.

1. At a minimum you will need:

- a. law enforcement reports – should have one from every officer;
- b. the videos – should be one from every car
- c. certification records for the Intoxilyzer if one was used
- d. certification records for the officer
- e. BAC records if a blood test was done. B.

B. Does your client look good on the video?

1. If (s)he looks potty hugging drunk You're done – unless there's another reason (medical, wreck).
2. What does the officer look like – juries don't like bullies.

3. Is there a disconnect between the BAC and how your client looks on the video.
- C. Is there an error that you can exploit in pretrial motions?
1. Was there reasonable suspicion to stop?
 2. Were proper advisories given?
 - a. Must tell that have the right to independent test.

II. PREPARING THE SCRIPT

- A. No matter how smart you are, I don't believe you can "wing" cross-examination – or anything else about trial. You need to have an outline of every part of trial – a script if you will.
- B. Even if you aren't Perry Mason, you can become a skilled at cross-examination. There are a couple of really good sources that most of us rely on:
1. *Cross-Examination: Science and Techniques* by Larry Pozner and Roger Dodd
 2. *McCarthy on Cross-Examination* by Terrence McCarthy.

Most of what I, or others talking about cross-examination say comes from one or both of these sources. That's because it works.

- C. Some basics:
1. Know where you're going – if you don't you won't get there.
 2. Your credibility is everything. If you lose it you lose. Everything you say and do in and out of the courtroom matters.

3. Less is more – the less that is said, the more control you have over what people hear.
 4. Your client has a name – use it. Your client isn't “the defendant,” “the subject,” or “the accused” – He is Joe.
 5. Don't take on too much - all DUI arrests, all breath tests, all blood tests aren't flawed. You are only trying *this* case where mistakes were made.
 6. The officer made the arrest based on probable cause. That is a much lower standard than proof beyond a reasonable doubt.
 7. “Beyond a reasonable doubt” = “Beyond any doubt for which there is a reason.”
 8. Give yourself permission to win – In most cases there is enough evidence to win and there is enough evidence to lose.
- D. You must have a theory of the case and it must be consistent from voir dire to closing.

Be able to state your theme in three words – for example: “lost, nervous, tired.”

1. You need to know where you're going. If not, you'll never get there.
2. You must focus. Just because a cross-examination is long doesn't mean it's good – or effective. If a question doesn't further your defense don't ask it.
3. In most cases you will need to present the defense case through cross-examination of the State's witnesses. Your cross-examination is your case in chief.

- E. Officers are trained witnesses – if you give them an opening they will take it. So, you need to craft your cross-examination to keep them reigned in.
 - 1. On cross you get to, and must, use leading questions – those that require “yes” or “no” answers.
 - a. Short, declarative sentences.
 - b. Only one new fact per question. This controls that scope of the question and the permissible scope of the witness’s answer.
 - 2. Formulate the questions so that either answer works for you. Either the officer tells the truth or you expose him or her as a liar. You will never need to get upset or defensive.
 - 3. Formulate your questions based on your theory of the case and the reports. You must know the reports – If you get a bad answer you need to use the exact language of the report to impeach the officer.
 - 4. Everything you ask should be backed up by the report or the videos. Remember – never ask a question you don’t know the answer to or don’t have something to impeach the officer with.
 - a. Don’t fudge – use exact quotes.
 - 5. You may not attack the officer. If you do, the jury won’t like you. If the jury doesn’t like you, you lose.
 - a. Let the jury make its own determination that the officer is dishonest – or a jerk – or a liar.
- E. Organization – The jury must understand where you are going and what points you have made. Thus, you must cross examine in a logical progression to a specific goal.

1. Chapters – Think of the trial as a book. Each chapter is an area or section to be covered on cross-examination with a specific goal.
 - a. DUI trials are generally fairly short and are the chapters are generally pretty clear.
 - b. Nonetheless, having your chapters spelled out ahead of time ensures that you won't forget something.
 - c. These can be moved around to best present the case or to respond to something that has happened in court.

III. A SAMPLE CROSS OF THE COP

A. Driving – Purpose: To establish that your client's ability to operate a motor vehicle was not diminished.

1. When you saw Ali's vehicle, you were stopped at the stop light at 6th and Last Chance Gulch?
2. It was about 12:19 a.m.?
3. What direction were you facing. (Show pic.)
4. Ali's vehicle was traveling west. (Show pic)
5. Your report doesn't mention any other vehicles?
6. Her vehicle was directly across from Riley's Irish Pub?
7. She was in the correct lane of traffic?
8. There were people on the sidewalk outside of Riley's?

9. There is a crosswalk that goes across 6th Avenue right at that spot?
10. Fair to say that the driver of a vehicle is supposed to stop for pedestrians at crosswalks?
11. Fair to say that a driver doesn't always know whether a person at a crosswalk is going to step into the street?
12. Your report states that you were stopped at the light for 5-7 seconds?
13. And then you pulled up behind Ali's vehicle?
14. And it started moving?
15. You weren't delayed?
16. Again, there was no other traffic?
17. And there were people on the sidewalk?
18. Your video camera was not on at this point?
19. Your video only turned on after her vehicle and your vehicle were past the intersection?
20. You followed her for several blocks?
21. You did not report any traffic violations during that time?
22. But you still pulled her over?
23. When you turned on your top lights, she pulled over promptly?
24. She pulled over appropriately?

25. Used her turn indicator and pulled into bank parking lot?
 26. That was a safe place?
 27. It was out of traffic?
 28. By all appearances she was in complete control of her vehicle?
- B. Marrying the Cop to his or her report** – this chapter can be used any time an officer attempts to guild the lily during his or her testimony.
1. You wrote that report in order to create a record of what occurred isn't that right?
 2. You wrote the report the evening you arrested Ali?
 3. You testified on direct examination that you went the Law Enforcement Academy?
 4. There was a class on report writing?
 5. It's fair to say that your purpose in writing that report was to memorialize those things that you felt were significant?
 6. Your report is basically your explanation of why you decided to arrest Ali isn't it?
 7. Have you ever heard the phrase “if it’s not in the report it didn’t happen?”
 8. You wrote it so that you could use it to refresh your memory?
 9. When you wrote it you knew that you would not be the only person who would rely on it?

10. You knew that the prosecutor would rely on it?
11. You knew that it would be produced in discovery?
12. So, you knew that I would rely on it?
13. You reviewed that report before you came to court this morning didn't you?
14. You did that to refresh your recollection regarding the events surrounding this arrest?
15. This arrest occurred on June 4 of this year?
16. Over four months ago?
17. You have been working since then?
18. You deal with a lot of people in your job?
19. How many people have you encountered on your job between then and now?
20. How many arrests have you made since that time?
21. It's fair to say that you can't recall all of the details of each of those encounter's isn't it?

C. INITIAL CONTACT WITH DRIVER.

ODOR OF AN ALCOHOLIC BEVERAGE

1. You testified that as you spoke with Ali you detected an odor of alcoholic beverage isn't that correct?

2. It is not against the law to drink an alcoholic beverage and drive a car is it?
3. It is only against the law to drive after drinking an alcoholic beverage if your ability to safely drive has been diminished right?
4. You can't determine whether someone is intoxicated simply because of the odor of an alcoholic beverage on their breath can you?
5. You can't tell what they drank?
6. You can't tell how much they drank?

OTHER OBSERVATIONS

1. You stated that Ali's actions were slow and deliberate when she was getting her proof of insurance and registration, is that correct?
2. She was able to produce those items?
3. She didn't fumble or drop anything or anything of that nature?
4. The only observation that you made about his speech was that it was slow?
5. You did not report that it was slurred?
6. You were with Ali for a period of time?
7. You had no trouble communicating with her or understanding her?
8. You had never met Ali prior to June 4?
9. So you don't know how she normally moves or speaks do you?

10. When you are on the job, you are dressed like you are today?
11. You have a badge and are armed?
12. You drive a marked patrol car with top lights and sirens?
13. Responsible people pull over when you signal to them?
14. You have the authority to make decisions about people's lives?
15. Whether to make an arrest?
16. Write them a ticket?
17. Place them in custody?
18. Those are significant decisions?
19. Under those circumstances is reasonable to try to get things right?
20. One way to make sure you get things right is to do them slowly and deliberately?
21. There are a number of other physical observations that are commonly made in a dui arrest?
22. You're report also states that his eyes were red and watery?
23. That could be caused by a lot of things, couldn't it?
24. Tired, upset, allergies, cold?

D. HORIZONTAL GAZE NYSTAGMUS

1. Fair to say it was dark when did HGN?

2. You were at least a couple of feet away from Ali?
3. At what angle did you see the nystagmus start?
4. And the jury can't see the results of the test?
5. You didn't do again at station?
6. Fair to say that conditions better there?

E. DIVIDED ATTENTION TESTS – Everyone is judged the same regardless of age, gender, weight, or physical condition. If your client doesn't look good they are coordination tests and not everyone is coordinated.

1. You had Ali perform some tests known as the walk and turn and the one leg stand?
2. They are known as field sobriety tests right?
3. They are also described as “divided attention tests”?
4. They were designed by the National Highway Traffic Safety Association
5. They are done in almost every DUI case?
6. Because they are supposed to detect impairment?
7. Now a divided attention test is designed to require a person to concentrate on more than one thing at a time right?
8. Sort of like patting your head and rubbing your stomach at the sametime right?

9. Are you familiar with recent studies showing that it is dangerous to drive while talking on a cell phone?
10. That is because they are doing two things at once?
11. But the fact that they are less safe drivers when talking on a cell phone does not mean they are intoxicated does it?
12. The point being that normal, sober, people have difficulty dividing their attention?
13. That has nothing to do with being under the influence of alcohol?
14. People in those circumstances aren't under a lot of stress are they?
15. So, it's fair to say that normal, sober people have difficulty with dividing their attention?
16. You had her do those at the side of the road?
17. And there was some traffic going by wasn't there?
18. The alphabet and counting backwards aren't part of the standardized field sobriety tests are they?
19. They are just something you throw in yourself?

WALK AND TURN

1. One of the divided attention tests you gave Ali is known as the walk and turn right?
2. Your training regarding that test is that it "requires a dry, level, non slipping surface with sufficient room for the suspect to complete nine heel-to-toe steps."

3. You told Ali where to do the test right?
4. You didn't have her do it up on the shoulder?
5. But rather you had her do it where the shoulder goes down into the gravel.
6. So, she was walking where the pavement dropped off?
7. And on gravel?
8. This test is essentially like walking a tight rope or a balance beam, except that there is ground on each side of the line right?
9. Not everyone can walk a tight rope or a balance beam can they?
10. She had on clog shoes didn't she?
11. That would make it more difficult wouldn't it?
12. You give her some instructions about how she was to perform the test?
13. Let's go over those:
14. The things that he would be scored a point on are:
 - a. (1) Losing balance in the "starting position"? This includes
merely stepping into a normal stance doesn't it?
 - b. (1) Starts before the instructions are finished.
 - c. (18) Stops while walking – this could happen at any time during the test couldn't it?
 - d. (18) Does not touch heel to toe?
 - e. (18) Steps off the line?

- f. (18) Uses arms to balance?
 - g. (1) Improper turn
 - h. (2) Incorrect number of steps.
15. Have them memorized the first time that you heard them?
 16. You didn't demonstrate with the number of steps you asked her to take?
 17. And according to you scoring, there are eight potential points on this test?
 18. So, for example where there are nine steps if she did any one of those steps incorrectly she would get a point?
 19. Even though there are eighteen places where she could get that point?
 20. No credit is given for anything that is done correctly.
 21. So really there are at least 76 potential places where a person can get a point on this test?
 22. And you gave Ali five points?
 23. You gave her a point for "not maintaining balance during the instruction phase"?
 24. That is simply because while you were talking she stepped into a normal position not because she really lost her balance?
 25. Know anyone who stands like that in real life?
 26. Really you doubled up for starting too soon and not maintaining balance?

27. You gave her a point for not doing the turn correctly?
28. She turned at the appropriate point didn't she?
29. You gave her a point for raising her arms on step five?
30. And you gave her a point for stopping?
31. Because she asked you if she had done the turn correctly?
32. All the while she was doing this test there were cars going by?
33. A person doesn't get any point's for how many times they do it right?
34. So, you can flunk this test even though you do a lot of things right?
35. Even though you do most of it right?
36. It's fair to say isn't it that doing this test on the shoulder of a busy highway would be more difficult than doing it in a quiet well lit room?
37. You took her to the detention center?
38. At the detention center there is something known as the DUI hallway?
39. It is quiet?
40. It is well-lit?
41. It is a flat, even surface?
42. There is a line for the walk and turn?
43. There are cameras to record what's happening?

44. Yet you didn't give her the opportunity to do the test again?

ONE LEG STAND

1. Next test was the one leg stand?
2. Basically, what that test requires a person to stand on one foot for 30 seconds?
3. You didn't tell her that though, did you?
4. You told her to "elevate her foot about six inches and count out loud."
5. So, the only number you told her was 6.
6. Each time she did it she put her foot down at six?
7. She did that deliberately didn't she?
8. She didn't lose her balance?
9. It was pretty clear that she thought she was supposed to hold the position for a count of six?
10. You didn't correct that belief once it became clear that is what the trouble was?
11. Perfect at the station?

ALPHABET

1. You asked her to recite the alphabet?
2. Now, you don't know what her education is?

3. Or the last time she was asked to recite the alphabet?
4. When you learned the alphabet did you learn it with the song?
5. That's how almost everybody learned it isn't it?
6. But you asked her to speak it without singing it?
7. That is so she wasn't able to use the rhythm or the melody of the song?
8. In the field she did just fine until she got to "v".
9. That happened to her three times right?
10. Every time she got to V and wasn't able to go past that?
11. So it wasn't that she was too intoxicated to recite the alphabet was it?
12. She just wasn't able to remember what came after v.
13. But everything up to that point was perfect.
14. By the time she got to the jail she had a chance to collect herself and think about it she did just fine, didn't she?

IMPLIED CONSENT ADVISORY– Refusal

1. Do you remember giving your implied consent to chemical testing when you got your driver's license?
2. To your knowledge is there anything in the application process specifically addressing that?

3. After Ali did the alphabet, you arrested her and put her in the back of your patrol car?
4. And you read her what is known as the Implied Consent Advisory?
5. And you told her that she didn't have the right to talk to a lawyer or anyone else before deciding to take the test.
6. You have a sheet that you actually read that from?
7. You had read it before that evening?
8. At least several times?
9. Fair to say that the form is pretty long?
10. And a little confusing?
11. And you had a little trouble with the form?
12. At the beginning you said "You are under arrest for driving or being in actual physical control of a motor vehicle while under the influence of alcohol. Under Montana law, a person in your situation has been deemed to have given his implied consent to testing for alcohol and possibly testing for drugs. As the requesting officer I have the right to select the type of test you will be asked to take. I'm going to ask you to take a breath test or a blood test. Later I may ask you to take a blood test. Right now, I'm asking you to take a blood test."
13. "If a driver is unlicensed or holds a base driver's license. If you refuse this test, your driver license (if any) will be seized and your driver license, driving privilege and/or privilege to apply for and be issued a driver license will be suspended for six months."

14. “If you have refused similar testing within the past five years and you refuse again today, your driver license will be seized and your privilege to drive and/or apply for and be issued a driver license will be suspended for one year.”
15. Fair to say the form might not make sense to someone who had never heard it before?
16. Fair to say that your errors at the beginning made it even more confusing?
17. Fair to say that not everyone trusts the test.

IMPLIED CONSENT ADVISORY – Client agrees to test.

1. Fair to say that Ali readily agreed to take a blood test?
2. She expressed no concerns that she would be over the legal limit?
3. You are aware aren't you that the so called “legal limit” in Montana was .1 for many years.
4. What did you do at the hospital?
5. Learned that there was a problem with how she was cuffed?
6. Her hands were blue?
7. She hadn't complained about it?
8. Was your training officer there?
9. Weren't there for the blood draw?
10. Didn't observe it?

11. Didn't insure that preservative and anticoagulant properly mixed into blood?
12. What did you do with the blood?
13. There is no record of what you did with it in your report?
14. Why no record?
15. Shouldn't there be?
16. Ever see it again?
17. When you got back from the hospital asked Ali questions?
18. She was very willing to talk to you?
19. She told you that she had had 3 beers earlier
20. Between 6:45 and 8:30?
21. She told you that she was not under the influence?
22. Did not charge this case as a Per Se case did you?
23. Charged Ali with DUI?
24. At the Detention Center you had her take a breath test on a machine known as the Intoxilyzer 8000?
25. You don't know what her temperature was do you?
26. You don't really know how the machine works do you?