Cross-Examination
For Prosecutors

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INTRODUCTION

Cross-examination is an art form only occasionally practiced by prosecutors, who instead necessarily focus much of their efforts on direct examination. This is brought on by the prosecution bearing the burden of proof and the simple realities of many criminal trials where the defense may choose to present few or no witnesses. DUI cases, however, are often complex and more scientific or technical in nature than many other types of criminal cases. Accordingly, the prosecutor's opportunity to conduct a cross-examination, particularly of an expert witness, is greater.

This monograph was developed to assist prosecutors in understanding the basic goals, methods, and forms of cross-examination when dealing with all witnesses. In addition, the monograph provides guidance specific to expert witnesses.

The National Traffic Law Center previously published *Basic Trial Advocacy for Prosecutors,* thanks to a contribution from a charitable foundation, discussing such trial advocacy topics as pre-trial preparation, *voir dire,* opening, direct examination, cross-examination and closing argument. In addition, the National Traffic Law Center created a *DWI Prosecutor's Handbook,* in collaboration with the National Highway Traffic Safety Administration and various vehicular crime prosecutors and experts from across the country. This monograph covers such topics as case evaluation and review, trial preparation, and common defenses and challenges. Both monographs may be obtained by contacting the National Traffic Law Center of the National District Attorneys Association at trafficmail@ndaa.org or 703-549-9222.

For the purposes of this publication the terms DUI (driving under the influence), DWI (driving while intoxicated or impaired) and OUI (operating under the influence) are considered interchangeable for the purposes of this publication.

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PREFACE

Effective cross-examination is a critical part of any criminal trial. Never is this more true than when technical or scientific evidence is a central issue for the jury. With this being said, prosecutors often feel uncomfortable during cross-examination of defense witnesses. This is not due to lack of ability. Rather, it is caused by insufficient practice, focus, and preparation for this part of the trial. As prosecutors, we generally expend most of our effort on "proving our case" in chief and experience a feeling of relief when the prosecution "rests." In reality, the State's case is far from over at the end of the State's presentation of evidence. The simple message is that case preparation includes preparing to overcome any defense theory because it is often when the State's case ends that the most difficult work, cross-examination of the defense witnesses, begins.

In order to succeed at cross-examination, a prosecutor must understand the goals of each party in a criminal trial. This allows a prosecutor not only to block the defense tactics, but also to use skillful questioning of defense witnesses to illicit responses favorable to the State. The goal of the defense during trial is to cast doubt in the minds of the jury on behalf of their client. This goal can be accomplished in several ways: (1) minimize the State's case through pretrial motions to suppress evidence; (2) minimize the State's case through the cross-examination of State's witnesses; (3) minimize the State's case by calling their own witnesses to present evidence for the jury and (4) bombard the jury with enough technical or scientific testimony to cause confusion. Any of these methods, if unchallenged, can result in the creation of reasonable doubt.

Effective prosecution, at its core, the means presenting sufficient evidence to convict a defendant of the crimes charged through direct evidence. Keeping this goal foremost in mind allows a prosecutor to focus more on the case-in chief. Often a prosecutor will not even know if the defense will present evidence until after the State rests. At that point, skilled and effective cross-examination of the defense witnesses becomes critical for a prosecutor. He or she will work through cross-examination of any defense witnesses with two core goals. The primary goal is preserving the integrity of the State's case and the secondary goal is to obtain any favorable facts, concessions or inconsistencies possible. While a prosecutor should not plan on winning the case through cross-examination of defense witnesses, a poorly planned or executed cross-examination could impact the success of the case and the prosecutor's credibility with the jury. A well-prepared prosecutor can both obtain helpful factual admissions supporting the State's case from the defense witnesses and minimize the defense case through impeachment of the defense witnesses.

This monograph is intended to assist prosecutors in successful cross-examination. Careful consideration and adherence to the thoughtful strategies contained within will increase the chances of the desired outcome, a verdict of guilt. With time and practice, any prosecutor can become a master of the *art of cross-examination.* No matter how natural a seasoned prosecutor's cross-examination skills may appear, it took years of training and experience to become truly proficient.

OBJECTIVES FOR CROSS-EXAMINATION

When a prosecutor takes a case to trial, the primary goal is always a conviction. To achieve this end, prosecutors will have specific objectives and goals for each portion of the trial. Before beginning any work on cross-examination, a prosecutor needs to carefully consider his or her objectives for each witness that will be presented. How can this witness hurt the case? How can the witness help the case? How important is the witness and how much time should be spent on cross-examination? Does this witness require any cross-examination at all? It is important to determine whether or not to examine each and every witness put on by the defense. If the witness did not hurt the State's case, cannot help the State's case and can offer no additional positive evidence for the State through cross-examination, cross is not necessary. It is difficult to pass up an opportunity for a devastating cross-exam, but attorneys must resist the temptation to showcase their skills.

Cross-examination by the defense asks the jury to question what was done procedurally during the stop and arrest, to challenge the validity of scientific tests or to doubt the law enforcement officer's competency or even integrity. The prosecutor's cross-examination can be an effective tool to repair any damage that occurred in defense cross or direct testimony by bolstering the jury's faith in the fairness of the prosecutor and officer and their search for truth.

Many would argue that the practical purpose of cross-examination is simply to undermine or destroy direct testimony. However, the legal purpose of cross-examination is a good faith quest for ascertaining truth and the prosecutor should use it justly and legitimately. Cross-examination of fact witnesses will differ from that of expert witnesses but a prosecutor's goals remain the same. Choosing the type and form of cross-examination, therefore, should be done in light of the State's theory of the case and organized in such a manner as to reduce confusion and seek the truth.

There are four basic goals for a prosecutor to consider in the cross-examination of each defense witness:

- Obtain factual admissions helpful to the State's case;
- Corroborate the testimony of the State's witnesses;
- Minimize the defense case by impeachment of the witness on the stand; and
- Minimize the defense case by impeachment of other defense witnesses through the witness on the stand.

Prosecutors should prepare a cross-examination for each witness in light of each of these goals. This is critical because the defendant's witnesses may provide the last testimony heard by the jury prior to closing argument. However, the prosecutor can make use of cross-examination to ensure that some of that evidence either bolsters the State's case or undermines that offered by the defense, or, better yet, both. Cross-examination and its execution can be varied. Personal choices as to style and techniques will dictate how specific facts and specific witnesses are approached.

PREPARATION

> "If I had 8 hours to chop down a tree, I would spend 6 hours sharpening my axe."
>
> - Abraham Lincoln

While it sounds overly simple, proper preparation for the direct case is the best way to prepare for cross-examination of the defense witnesses. Knowing the strengths and weaknesses of the State's case will assist in anticipating the type of defense and the possible defense witnesses the defendant will rely upon. Proper preparation of the State's case should include the following:

Reviewing the case file

The first step in preparing for a cross-examination is to review the entire file. This will give the prosecutor an overview of the case and a framework from which to work. One of the most important elements of a thorough case review is to go over all witness statements. These statements come in many forms and could be found in police reports, witness statement forms, 911 or other emergency recordings, text messages, depositions from concurrent civil litigation, published articles, recorded police interviews, or any prior sworn testimony from the case at hand or prior cases. Thinking "outside the box" may enable a prosecutor to locate very useful cross-examination material.

The prosecutor can also use the review of the file to assess the file for completeness. Is anything missing? Did the police interview all the witnesses mentioned in the file? Was all the evidence seized and tested properly? Are there any holes in the investigation the defendant will attempt to exploit? What expert or other witnesses will the defense attempt to call that can damage the State's case? Sometimes, this process will identify problems that need to be addressed before trial. If the prosecutor is aware of a defendant's admission but unable to locate it in the original report, it may be necessary to have the investigating officer prepare and submit a supplemental report. If the expert's written report seems incomplete, it may be necessary to have the expert provide some supporting documentation.

Every prior statement of a witness may be fodder for incisive questioning. Failure to identify and thoroughly review these statements might mean a lost opportunity to expose testimonial inconsistencies or bias. As a prosecutor becomes familiar with the prior statements it should become more clear which facts and/or opinions this witness will likely offer during a trial or hearing. Understanding the potential content of a witness's direct testimony is critical to determining the extent to which this witness may damage the State's case. A witness who does little or nothing to the State's case will not require as extensive cross-examination as a witness who can undermine or contradict a fact necessary to establish guilt. No prosecutor can predict with 100% certainty what any witness will say, but preparation is the best way to avoid being caught off-guard. Forewarned is forearmed.

Interviewing all witnesses

Meeting with the prosecution witnesses before the trial is important because it gives the prosecutor the opportunity to assess how they will react to the stress of the courtroom and being subjected to cross-examination. This is the best time to emphasize the importance of truthful testimony based on knowledge, not guesswork. It also gives the prosecutor the opportunity to ask the questions police officers may have omitted in their initial interview and fill in any holes in the testimony. Last, it gives the opportunity to explain the courtroom procedures and prepare each witness for their cross-examination. Witnesses who have not testified before will benefit from preparation including becoming familiar with the layout of the court, the personnel who will be present and the form and content of the expected examination process.

In cases where a particularly damaging fact or opinion witness is anticipated, the State's witnesses may be excellent resources. A fact witness may be able to give a detailed account that allows a prosecutor to expose critical weaknesses or inconsistencies in a defense witness's testimony. A State crime lab toxicologist or law enforcement crash reconstruction expert will be able to help the prosecutor understand the opinions offered by a defense expert. More importantly, those State experts, if given enough opportunity prior to trial, may be able to assist the prosecutor in trial strategy. State experts may offer direct testimony or rebuttal testimony that undermines the defense theory. Also, State experts may be able to suggest areas were the defense theory is weak and enable the prosecutor to ask particularly effective questions. Prosecutors should keep in mind that the State's fact or expert witnesses may be personally or professionally familiar with the defense witnesses. The simple question of "what can you tell me about this defense witness" should never be overlooked.

Access to defense witnesses is often limited prior to trial. A prosecutor should not hesitate, however, to attempt contact with a non-defendant defense witness. Defense attorneys will certainly try to make contact with the State's witnesses prior to any cross-examination. If a defense witness is willing to talk to the State prior to giving testimony, it is best to get as much information as possible by asking open-ended questions such as "Can you explain more about your theory in this case?" Ideally, a witness would agree to being recorded or to discussing his theories in the presence of the investigating officer. If this is not possible, the prosecutor should take concurrent, detailed notes of the conversation.

Visiting the crime scene

One of the most important things prosecutors can do is familiarize themselves with the entire scene or scenes of the crime. This is particularly true in motor vehicle crash cases. Some offices allow their prosecutors to respond to the scene immediately after the crash and before any vehicles have been moved. In these situations, the prosecutor's role is one of observer. Immediate response to a crash site is an excellent opportunity for the prosecutor to observe the scene. Trial preparation should begin from the moment the prosecutor is notified of the potential crime.

Traffic crimes in particular, even those not involving crashes, often involve factual disputes regarding the scene of the driving or arrest. In cases involving field sobriety tests, for instance a prosecutor can expect the well prepared defense attorney to arrive at trial with photographs of the roadside scene of the arrest that depict poor lighting, a steep grade or other similar points to undermine the idea that it was intoxication that caused poor performance. Likewise, a defense

expert may arrive with scene photos of neon lights or radio towers near the scene at which the breath test occurred to support his argument that it was interference and not alcohol causing the high blood alcohol concentration (BAC) results. By visiting the scene of the arrest, crash, or bar, the prosecutor can more effectively defend against surprise attack and ask effective questions on cross. The best way to prepare is to visit the scene with the investigating officer. At the scene, review landmarks, relevant distances and other pertinent details. Knowing these details helps the prosecutor prepare for questioning the witnesses on both direct examination and cross-examination. It will also help the prosecutor to craft specific questions whose answers can better describe the scene for the jury.

Anticipating the defense

After a thorough review of the case, the potential defenses and the types of witnesses should now be apparent. Sometimes, the defense opts to dispute directly the fact or opinion testimony. In these cases, witness preparation is particularly important because a juror may base his decision on the perceived credibility of the witness. Rather than risk offending the jury by a hostile examination of an uninvolved witness or public servant, the defense will undermine the State's case more subtly. This form of attack may involve implying that a witness simply made a mistake or has a well-meaning bias. Basically, the defense explains what it can and mitigates what it cannot.

Just as the State has a theory of its case, so will the defense. Generally, defenses theories focus on two areas: (1) *identification* or (2) *confess and avoid.* Identification cases involve situations where the identity of the defendant is the main issue in the case. In these cases, the defense will argue that the State has accused the wrong defendant. This is commonly referred to as the SODDI or "some other dude did it" defense. In impaired driving cases, this often occurs after a crash when the occupants have gotten out of the car or been thrown around within the car before the officer can respond. The defendant may blame another person at the scene or a "ghost" driver who allegedly fled immediately before the police arrived. In these cases, the defense theory will focus on negating or weakening any identification testimony offered by the State's witnesses. Expect the defense to offer witnesses consistent with this case theory.

Identification witnesses offered by the defense are often the friends and/or family members of the defendant. Alibi or identification defense witnesses may be lying or may be actually mistaken. It's never a good idea to attack a sympathetic witness who has made an honest or good faith error. Careful examination can reveal hidden weakness, biases or intentional wrong doing. Cross-examination of defense identification witnesses should focus on several areas, including:

- the relationship between the witness and defendant;
- how the witness first learned of the case or obtained his or her knowledge of the case;
- his or her actual ability to perceive the facts of the case; and
- the identity of any others who were present.

Identification witnesses testifying to alibi may be willing to agree wholly with the facts of the case, since they are only concerned with placing the defendant away from the scene, or at least, not in the driver's seat. Similarly, if the witness saw that the defendant did NOT commit the crime then they may have seen who did. It is important to note whether or not a witness contacted authorities to name the correct defendant and how promptly the witness took any action to correct the alleged injustice.

When multiple witnesses offer this type of testimony it is critical to establish inconsistencies between their testimonies during cross-examination. If the stories are all exactly the same, this unlikely occurrence may be grounds for argument in closing. The prosecutor should bring out on cross how much conversation the defendant, the defense attorney or other defense witnesses have had with this witness prior to his testimony. Often, the defendant will make post-arrest admissions to defenses witness that may be helpful to the State's case. While "fishing" for admissions should be avoided during trial, a prosecutor can make great discoveries during a pre-trial interview or by listening very carefully during trial to all witness responses and asking specific follow-up questions where appropriate.

During a trial, a prosecutor can develop a type of auditory "tunnel vision" during direct or cross-examination. The prosecutor becomes so focused on the prepared list of questions that he or she forgets to pay close attention to the witness's responses. This could allow a damaging fact to go unaddressed during direct or permit a very favorable fact to slip away during cross. If a prosecutor should plan a thorough cross for identification witnesses then listen to the entire response and ask pertinent follow-up questions. He may be able to expose a hidden relationship, bias, or weakness in that witness's testimony. This can be devastating to the defense. During summation, the prosecutor can argue effectively that the credibility of the witness is tainted and any testimony should be viewed with suspicion.

Confess and avoid cases involve situations where the defendant cannot challenge the identification. In these cases, the defense must somehow disprove the facts of the case offered by the State. This defense theory focuses on eliminating one or more of the factual elements of the crime. In an impaired driving case, for instance, a fact witness may testify to an alternate explanation for the smell of alcohol or offer a different view point of the defendant's pre-arrest driving behavior. Usually, this witness will agree with many of the facts offered by the State's witnesses. Cross-examination of these witnesses should attempt to elicit responses that offer proof of as many facts supporting the State's cases as possible. This is an opportunity to have key facts reiterated and to corroborate facts that were brought out in the State's case in chief.

METHODS OF CROSS-EXAMINATION

> "The commander must decide how he will fight the battle before it begins. He must then decide how he will use the military effort at his disposal to force the battle to swing the way he wishes it to go; he must make the enemy dance to his tune from the beginning and not vice versa."
>
> - Viscount Montgomery of Alamein

In any court proceeding, a prosecutor is limited by governing evidentiary rules and rules of practice for the court presiding over the case. The Federal Rules of Evidence (FRE) offer limited guidance on the style or substance of cross-examination and pertain more directly to the scope of the permissible questions. FRE 611 dictates that "cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness" but allows the judge to permit attorneys to inquire "into additional matters as if on direct examination." Some States allow for "wide-open" cross-examination on any relevant matter if the attorney has a good-faith basis for asking the question. A prosecutor should have a working knowledge of the State-specific rules of evidence that apply to his jurisdiction and craft his cross-examinations accordingly.

Once a prosecutor understands the legal parameters, he can focus on the methodology he will use to construct an effective cross-examination. Even with the multitude of possible witnesses and defense tactics, a prosecutor must determine the method or methods he will employ in his cross-examination for each witness. There are various methods of cross-examination, but the two most useful to a prosecutor involve either a concession-based line of inquiry or an impeachment-oriented exam. Which method is appropriate may depend on the nature of the witness or the tone of his direct testimony. A prosecutor can successfully use either or both of these methods to attain the pre-planned goals and objectives for each witness.

Gaining Concessions

Concession-based cross-examination uses the defense witness to aid or bolster the State's case. In other words, the prosecutor seeks those facts or circumstances with which the defense witness must agree that help the State's case. The facts have been well established by other testimony or evidence so denying them will make the witness appear foolish or even dishonest.

Concession-based questioning has a three-fold effect. It allows the prosecutor to do the following:

- regain focus of the trial;
- elicit advantageous testimony from the defense witness; and
- uncover additional facts beneficial to the State.

By eliminating areas of dispute, such as whether the defendant was driving, the focus of the trial then narrows. There will still be a key element that is always contested, but focusing the issues makes the prosecutor's job and the job of the jury much easier. Witnesses expect to be confronted or attacked on cross-examination. A concession-based strategy allows the witness to relax and agree with facts that support the State's case. Finally, the witness may open the door to potential areas that were unavailable previously. A defense witness may opine that the defendant was not impaired. This allows the prosecutor to question how the defendant appears when he is impaired. It may also corroborate the observations of the police officer or other witnesses.

Concession-based cross-examination is easily prepared in advance if the prosecutor has even rudimentary knowledge of what a witness might say. It is as simple as asking "What must the witness admit to?" Rarely do defendants confess to a crime or their witnesses throw them under the bus during testimony. Remember that the point of cross-examination is to prevail over the case, not the witness. Certain things about every case simply cannot be denied and the same potentially holds true for each witness. Seize upon this and make use of the defendant's own witnesses to corroborate as many facts as possible of the State's case.

For example, the defendant's companion may testify on direct examination that the defendant had only "two beers" to drink while they were at the bar and could not have been impaired. A concession-based cross-examination might explore avenues that relate to the following facts:

- The witness had been at the bar;
- The defendant had been at the bar;
- The witness had been drinking;
- The defendant had been drinking; and
- The defendant drove the car.

That is not to say that everything must be or can be prepared in advance. The witness's own direct testimony may often yield information upon which the prosecutor may take advantage. Listening is important at every stage of testimony, but especially so during a concession-based cross-examination. One concession may lead to another, which leads to another and so on until the prosecutor has exhausted the information to be gleaned from the witness.

A plausible defense requires some truth. Concession-based cross-examination can help elicit those truths through facts that can cover a number of areas, including the following:

Gaining Concessions: *Reiterating and Emphasizing Facts*

Facts are what drive the prosecution's theory of a case and provide the necessary proof of the elements of the offense. Repetition of important facts sets them firmly in the jurors' minds for recall during later deliberations. Be careful not to restate the defense version of the case in cross-exam questioning. Only facts helpful to the State should be repeated. This can be accomplished by proper formation of the questions.

- The night the defendant was arrested was your birthday, correct?
- You went out that night to celebrate?
- When you went out to celebrate you decided to go to the local bar?
- While you were celebrating at the bar, you drank beer?
- In fact, while you were celebrating at the bar you drank several beers?
- It was while you were at the bar celebrating and after you had finished multiple alcoholic beverages that you saw the defendant?

Gaining Concessions: *New Facts*

A defense witness may be able to provide new beneficial facts during cross-examination. This requires carefully listening to both the witness's direct and cross-examination testimony. For example, during questioning of the defendant's consumption of alcohol, the witness testifies the defendant was not drinking. The witness bolsters this testimony with the statement that the defendant was taking prescription medications. Cross-examination can expand on this new fact to determine the type, purpose and effect of the prescription medication.

- The defendant admitted to you that he had taken medication that night;
- It was a prescription medication;
- He took the medication before he arrived at the bar; and
- He told you it was medication for pain.

Gaining Concessions: *Alternative Facts*

Many witnesses testify as to facts based upon assumptions or what someone else has told them. Often, defense attorneys may offer an alternative explanation as to the defendant's behavior or actions, seeking to minimize the impact of that fact. Are there facts that, if changed, change the witness's testimony? What if the basis of the witness's testimony is different from the State's evidence? Either the alternative facts could change the opinion of the witness or show that their version is incredible. Many times the State's theory could be just as plausible or is better than the offered alternative.

Cross-examination of lay witness regarding intoxication:

- You base your opinion of how much the defendant drank the night he was arrested on what you actually saw him consume, correct?[1]
- You were only with the defendant for 30 minutes before he left?
- You would agree that you were not with the defendant before he arrived at the party?
- You would need to reconsider your opinion if you knew that the defendant went to two sports bars before he arrived at the party that night, wouldn't you?

[1] This line of questioning would be appropriate only in States where a lay witness may offer opinion testimony regarding intoxication.

Cross-examination of expert computation of BAC:

- Your computation of the defendant's blood alcohol content yielded a result of .07 at of the time of the crash?
- In order to arrive at that blood alcohol content, you had to assume the defendant drank only two beers?
- You assumed the defendant drank only two beers based solely on what the defendant told you?
- If the evidence showed the defendant actually drank six beers, wouldn't your conclusion have to change?
- If the evidence showed, in fact, the defendant actually drank six beers, your answer would be wrong?

Gaining Concessions: *Deleted Facts*

Impaired-driving cases are about the totality of the circumstances. Look for what has been omitted from the defense witness's testimony and put it back in if necessary through concession-based cross-examination. What facts has the witness left out? This is a good opportunity to point out those facts that the witness left out but which are helpful to proving the State's theory of the case. It may assist in raising in the jury's mind that the witness is hiding something for the benefit of the defendant.

- You previously testified to your opinion about how much the defendant had to drink the night he got arrested, correct?
- When he first attempted to get in the car, you asked him to let you drive?
- In fact, you offered to pay for a cab to take him home, correct?

Gaining Concessions: *Mistakes*

Mistakes happen. However, getting people to admit to their mistakes is often difficult. Very hostile or unsympathetic witnesses may be questioned as if they are intentionally withholding or altering facts. This is not always an appropriate strategy, however. If a witness is sympathetic, such as the defendant's mother, the prosecutor may choose to phrase questions as if a witness has made an honest error. Care must be taken to avoid alienating the jury by being overly aggressive when pointing out a mistake.

- You testified that you remember how long your son was gone because he left during the first scene of *Titanic* and returned as the end credits were playing, right?
- Then the reason you are certain about the time frame is the length of the movie, correct?
- It's possible you made a mistake about how long the movie runs, isn't it?
- Would it surprise you to learn that *Titanic* is actually a 3-hour movie?

Impeaching a Witness

Impeachment is the means of challenging any witness's credibility. This type of cross-examination can indicate to the jury that the information provided by the witness is not correct or that they should not believe this witness on one or more issues. It is not necessary to show that everything the witness has said is not correct, only that their testimony is questionable, unreasonable, or untrue in some areas. If the jury believes that the testimony cannot be trusted in those areas, it is unlikely they will believe or trust the rest of it. The credibility of the defense witness can be attacked by addressing their truthfulness and inquiring into biases and prejudices. Is there a reason why the jury would not like or should not believe this particular witness? Do they appear to be slanted in their view and thus their testimony? If the witness may be untruthful, what is the untruth and how can it be shown to be unreasonable?

Impeachment can take many forms:

Impeachment: *Bias*

Bias may be as simple as being related to or being friends with the defendant to carrying a grudge against the State. Lay witnesses may be cross-examined about the closeness of a friendship or romantic relationship with a defendant. In cases where the witness is a parent or spouse, the bias will be obvious and require less focused examination. With experts, the bias could be the result of money paid for services, the witness's ego, or the witness's belief in or propensity towards a particular cause. Bias may be so obvious that lengthy cross-examination on the issue may be counter-productive. On the other hand, if there is a reason for the witness to be untruthful, it needs to be shown. Establishing the bias allows the jury to fairly judge the credibility of the testimony.

For example:

- Every time you have testified as an expert, it has been on behalf of the defense?
- You charge fees based on an hourly rate?
- In fact, you were paid to produce a written report?
- And, based on that report, you are testifying today?
- You are charging based on how many hours you spend in court?

Impeachment: *Perception and Recall*

What is the witness's perception of the facts? For the fact witness, it might be something as simple as his location or ability to observe what happened. Time may have eroded his ability to remember clearly. Distance, angle, lighting, obstructions, physical limitations, and memory are all examples of factors of the witness's ability to first perceive and later recall.

Sometimes a witness recalls some facts beneficial to the defense but has trouble remembering others. The prosecutor can explore how many times the witness has discussed the case with the defendant or his attorney.

When a witness has provided damaging testimony, the prosecutor should closely examine that witness's ability to accurately perceive and recall facts. Questions may focus on environmental circumstances relating to the witness's ability to perceive or his physical or mental ability to perceive or recall facts accurately.

- You were looking from your window through the leaves of a tree?
- You were over 100 feet away?
- It was dark outside?
- There was not street lighting?
- It has been over six months since this happened?

The prosecutor should be aware that a witness's perception and recall may also be susceptible to suggestion and manipulation. Careful questioning may reveal whether the witness's testimony was influenced by outside sources. Of particular importance may be the witness's age, physical or mental limitations, community pressures and other factors that may affect the witness's ability to independently recall.

With an expert witness, a prosecutor should particularly focus on where the factual basis for an opinion was obtained. An expert's opinion may be based primarily on a lay witness's version of events. In that case, the ability of that lay witness to accurately perceive and recall facts is even more important. If it appears that an expert witness is predisposed to believe a defendant or jumped to a conclusion without the proper investigation or analysis, then the jury will likely discount that expert's opinion. The prosecutor can reveal any weakness by exploring the following lines of questioning:

- Is the expert's perception obscured by who relayed the facts?
- How reliable was the fact witness who provided this information to the expert?
- Was the expert given all of the facts or only those favorable to the defense?
- Could the expert have gotten a more thorough version of the facts elsewhere?
- Did the witness fail or refuse to consider all of the facts?
- Did the witness form a conclusion without knowing or considering all the relevant facts or circumstances?
- Has the witness lost objectivity and developed an opinion so entrenched that nothing will change it?

Impeachment: *Lack of Personal or First-Hand Knowledge*

Federal Rule of Evidence 602[2] prohibits a non-expert witness from testifying unless "evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." This is particularly effective with commentators, those witnesses who would second-guess the investigation, or those witnesses who testify as to general character traits of the defendant. Generally, these witnesses did not see the defendant during the commission of the crime and thus should not be allowed to imply otherwise. This cross-examination strategy is particularly well-suited for experts who almost always base their opinions, at least partially, on second-hand information. In cases involving serious injuries or fatalities, such as vehicular homicide, the State's expert probably responded to the scene immediately. The State's expert may even have interacted with the defendant at that time. The opportunity to gain direct, first-hand knowledge about the case gives the State's witness an edge over any defense expert. A defense expert may base much of his own opinion on the work the investigating officer did at the scene. That opinion is subject to a concession-based cross-examination due to reliance on the State's evidence. In that case, the expert will have to concede that the officer took proper measurements or otherwise collected evidence correctly. It may also be vulnerable due to lack of first-hand knowledge.

FRE 602 Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

A defense expert may testify that a crash should be blamed on the victim or that a defendant's blood alcohol was at a level below the *per se* level of impairment. In a retrograde extrapolation defense, for instance, an expert will opine that, based on the defendant's consumption of alcohol, his blood alcohol level could not be above a particular level. This type of opinion relies heavily on the statement of the defendant. The defendant is highly motivated to avoid punishment. By relying on evidence given by this biased witness, coupled with the lack of personal knowledge, the expert leaves himself vulnerable to cross-examination as follows:

- You did not see the consumption, or keep track of how long the consumption took?
- You did not measure the exact amount of alcohol poured by the bartender?
- The reliability of your opinion is completely reliant on the defendant's statements?
- The defendant's perceptions were made after he had been drinking alcohol?

[2] Federal Rules of Evidence and Rules of Criminal Procedure are cited as examples only. Prosecutors should always consult and adhere to the applicable rules of evidence, rules of criminal procedure and court practice rules in their respective jurisdictions.

Impeachment: *Competency*

FRE 601 General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Federal Rule of Evidence 601, which defines competency of witnesses, is very broad. Witnesses must be able to understand the court's directions and distinguish truth from falsehood. Generally, fact witnesses will be considered competent to testify.

Witnesses offering opinion testimony, however, must prove they are competent to offer that opinion through foundational evidence. This evidence is subject to cross-examination. The competency of a witness is based on knowledge, education, training, or experience. The prosecutor must consider whether the witness is qualified to state the opinion he has made or if he has exaggerated or misstated his qualifications. Additionally, expert witnesses may overstate their credentials or self-importance. Prosecutors should examine credentials and educational background. The extent of actual training is important. Professional training and hands-on experience are very different than attending a course and receiving a certificate. Although the difference between completing a certification process and receiving a certificate for attendance is subtle, it is a crucial distinction.

Defense attorneys sometimes present an all-purpose witness. The witness may have experience or expertise in something, but it is not relevant to the topic about which he is attempting to testify. All-purpose witnesses can be impressive to judges and juries. Cross-examination will help to restrict the testimony to the witness's actual area of expertise. Concession-based cross-examination is the best way to accomplish this with such witness.

If it becomes apparent that the defense witness is not actually qualified, a prosecutor has two methods of attacking competency. First, he should file a motion with the court to exclude the witness's testimony. If the attempt to exclude the witness is unsuccessful, the prosecutor should still expose the witness's inadequacies during cross-examination to the jury.

- Your undergraduate degree is in criminal justice, correct?
- You don't actually hold a degree in chemistry, biology, or any other science?
- The training you received several years ago as a civilian employee was on a different breath test instrument than the one used in this case?
- In fact, you never used this instrument to test suspects in custody?
- You have never received any hands-on instruction for this instrument at all?

Impeachment: *Physical Evidence*

Contradictions between the physical evidence or exhibits and witness testimony may effectively demonstrate a witness either lied or was mistaken. It would be difficult to establish any greater point than this on cross-examination. When confronted with uncontroverted physical evidence, concession-based cross-examination of a witness may cause them to change their testimony or offer an incredible explanation.

It is not always necessary to confront the witness with the physical evidence during cross-examination. Instead, cross-examination can be used get the witness to completely contradict the physical evidence. In that case, the witness has no opportunity to provide an explanation for his error and the prosecutor has great ammunition for closing argument. If the physical proof is so compelling that the witness cannot possibly explain it, then it is fine to use it during cross-examination to expose the defense error to the jury.

- You testified that the defendant had no warning that pedestrians could be in the area?
- Did you review the photographs taken by the investigating officers on the night of the crash?
- Did you also review the aerial photographs taken the following morning?
- Would you agree that this picture shows a yellow crosswalk sign on the right side of the street?
- And the next photo shows a large white painted pedestrian crossing on the street 20 feet north of the crash site?

Impeachment: *Inconsistencies*

Testimonial inconsistencies are extremely common in criminal trials when multiple witnesses are called. People's perceptions, ability to recall, beliefs and experiences are all different. Minor inconsistencies are to be expected, especially when months or years have elapsed between the crime and the trial. Prosecutors should pay attention to inconsistencies that seem significant. For example, a defendant testifies to details that help him but has trouble remembering facts that damage his case. Another example is a witness having trouble remembering anything about the day the defendant was arrested except that he had only one beer. Pointing out this type of inconsistency is useful in cross-examination, particularly if a prosecutor suspects fabricated testimony. The truth doesn't change.

Prosecutors should be careful to listen closely when inconsistencies occur. Cross-examination questions should focus on when the story changed and how the story has changed rather than what the changes or differences indicate. The focus should be on the fact the change in testimony has occurred and not necessarily the particulars of the change. Explaining the reason for the change is best left to the prosecutor during closing argument.

The prosecutor should consider these types of inconsistencies when he prepares for cross-examination:

- If a fact was very important, why is the trial the first time it comes to light?
- What possible reasons might the witness have for changing his testimony?
- How can a fact be true if it contradicts other witness statement or proof?
- Did a witness receive coaching from the defendant or attorney between statements?
- Has the witness's motivation changed between statements?
- Does changing this fact help the defense case?

Prior Inconsistent Statements

The most common inconsistency subject to cross-examination is a prior inconsistent statement. Has the witness said something different from their direct testimony on a prior occasion? The prosecutor should force the witness to choose which version is correct during cross-examination. This allows the prosecutor to argue that the witness has chosen the version that helps the defendant rather than the one that is truthful.

FRE 613 Prior Statements of Witnesses

(a) Examining witness concerning prior statement.

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Prosecutors should also make sure the inconsistencies are significant and are not just an attempt to nitpick insignificant errors. Continually pointing to minor prior inconsistencies too often can give the perception that the prosecutor is badgering the witness. The prosecutor should remember that extrinsic evidence may or may not be admissible to prove any prior inconsistent statement. FRE 613 controls both the foundational requirements for the impeachment and the admissibility of extrinsic evidence to prove prior inconsistent statements. Prosecutors should be familiar with local jurisdiction rules on this matter.

- You testified today that you had two beers to drink the night you were arrested?
- Didn't you speak with the arresting officer when you were pulled over?
- Isn't it true you told the arresting officer you had six beers that night?

Prior Consistent Statements

Pointing out prior testimony that appears to be scripted or boilerplate is an excellent method of attacking the witness's credibility. Opinion (expert) witnesses may be prone to this type of repetitive testimony. For example, a witness called in multiple cases may use the exact same language to describe different defendants. The prosecutor should be prepared to question the witness to determine if he actually examined this particular situation or if he is instead relying on boilerplate language. The more the stock phrase is used, the less impact of truthfulness it has, particularly if the witness offers the same conclusion, despite different cases and factual circumstances.

- Does this witness use the same language in every report?
- Does the witness always use the same excuse to explain a defendant's apparent intoxication?
- If presented excerpts from other testimony or reports, could the witness even distinguish them?

Behavioral Inconsistencies

Often the conduct or demeanor of a witness changes between direct examination and cross-examination. A witness may appear willing or even eager to answer all questions asked by the defense attorney. However, they may exhibit a marked unwillingness to answer cross-examination questions. This unwillingness may be shown through behavior changes including eye contact, tone of voice, body language and a general unresponsiveness to questioning. With a particularly hostile on uncooperative witness, the prosecutor should point out those changes in attitude and the witness's lack of willingness to respond to questions.

- You seemed to be able to hear the defense attorney's questions, are you having trouble hearing mine?
- You understand that you need to answer my questions and not just the defense attorney's?
- You are as willing to answer my questions as you were to answer the defense attorney's questions, aren't you?

Impeachment: *Lack of Corroboration*

Sometimes what a witness fails to offer may be more important than his actual testimony. A prosecutor may craft cross-examination questions to focus on that lack of corroboration proof. This may be useful in missing or unknown witness cases or those situations in which a witness testifies to his version of things but offers nothing to corroborate that statement. *The burden of proof never shifts to the defendant,* but reasonable inquiry into a defense witness's inability to produce evidence in his control is useful. The idea is to point out evidence the witness could have produced to corroborate his testimony.

- You testified earlier you were drinking with the defendant the night he was arrested?
- And that the beers you saw him drink were paid for on your bar tab?
- You knew within an hour of the crash that the defendant was arrested?
- You failed to bring the bar receipt for the drinks you purchased with you today?
- You didn't even bring your monthly credit card statement?

Impeachment: *Prior Bad Acts*

Prior bad acts directly relevant to a witness's testimony may be grounds for impeachment. These prior acts, under the rules of evidence, might include lack of truthfulness, acts of moral turpitude, felony convictions or a variety of other matters. Prosecutors should be mindful of their State's particular rules in this area.

Character and Credibility

A witness may be subject to impeachment based on his character for truthfulness. This includes not only opinion concerning the witness's reputation for truthfulness but specific instances of conduct as well.

- You previously conducted a study concerning the link between childhood vaccination and autism?
- You published this study?
- Two years later you admitted you had falsified certain data in this study?
- You have since lost your medical license due to your admitted falsification of data?

Criminal Convictions

Most States allow impeachment of a defendant with conviction for felonies or crimes of dishonesty. When dealing with prior criminal convictions as considered by FRE 609, the prosecutor should be familiar with the State evidentiary rules and the court's rules of practice prior to attempting this type of impeachment. The prosecutor should make certain that the conviction in question has not been overturned or vacated. A pre-trial motion declaring the State's intent to use the conviction for impeachment purposes is usually the safest course of action. By addressing prior convictions outside the presence of the jury prior to making use of them in court, the prosecutor can avoid a mistrial. If a court determines that the prior convictions may be used for impeachment, make sure to limit questions to those approved by the judge. The State rules concerning impeachment with prior convictions vary greatly. Properly done, cross-examination using prior convictions can be quite effective. Consideration must be given to how best to use the conviction and to whether, as per evidentiary rules, it is more probative than prejudicial.

- How long ago was the crime committed?
- Is the prior crime so similar to this offense that its prejudicial value outweighs its probative worth?
- How directly does the defendant's prior conviction relate to truthfulness?
- Has the defendant declared himself to be a particularly honest or trustworthy person?

CONTROLLING CROSS-EXAMINATION

Cross-examination should never be an opportunity for the witness to restate direct testimony. It should be well-prepared and structured, always focusing on the prosecution's theory of the case. Remember, defense witnesses are called with the intent to discredit the State's case and help the defendant.

Remember that body language is important during these exchanges. Prosecutors can exercise control of witnesses during cross-examination through effective use of body language, eye contact, physical stature and position in the courtroom. This control can be taken or relinquished, at least in part, based upon the way the prosecutor stands, speaks and addresses the witness. Remember to be the party in control of the encounter. That means standing solidly on both feet. Don't lean. Square your shoulders and directly face the witness. Do not lean away. Look him in the eye and avoid reading your questions. Speak clearly and forcefully but don't be offensive or abusive. Do assert authority.

Equally important in controlling witnesses during cross-examination IS the proper formation and order of questioning.

Form of Questions

Structure of cross-examination questions takes preparation and careful thinking. This is the opportunity to probe and challenge the direct testimony. The surgical use of leading questions is the most effective method to accomplish this. Make use of short, one-fact questions. Short questions and plain words, with only one fact at issue, require short answers. Avoid long, involved, or rambling questions; the longer the question, the longer the answer most likely will be. Short, pointed questions keep the witness and the jury focused.

Controlling a witness requires a prosecutor to be flexible when approaching cross-examination. Be prepared to make use of more than one method of cross-examination with the same witness. Concession-based and impeachment cross-examination are not mutually exclusive. Preliminary predicate questions, often in the form of concessions, are necessary to lay the foundation for the impeachment. Even those witnesses who the prosecutor may ultimately wish to impeach may be useful in establishing particular facts or narrow the focus of the case to the benefit of the prosecution theory.

Order of Questioning

Start strong and end strong. Primacy and recency are the rule. Jurors tend to remember the first and last evidence they hear. Control of a witness once lost, is difficult to regain. Because of this, prosecutors must start strong and end strong during cross-examination. One approach is to pick something important to the prosecution theory to start the questioning and end with something even more important. Although the order of questioning should be planned in advance, cross-examination is an organic process. A prosecutor must listen and respond to the witness's answers, adapting the cross-examination as it unfolds. Finishing with a bang is always preferable to going out with a whimper.

At times the demeanor of a witness may determine the best method of control through cross-examination. With potentially uncooperative or hostile witnesses, the prosecutor shouldn't jump directly into impeachment of the witness. If there are concessions that help the case and they are important, get those out first, before the witness is uncooperative or becomes hostile.

CROSS-EXAMINATION OF THE EXPERT WITNESS

Effective cross-examination requires extensive preparation. It is almost impossible to "out expert" an expert. Rather, the prosecutor must be as ready as possible to obtain any possible fact helpful to the State. Preparation for experts is even more important because they possess specialized knowledge the prosecutor, judge and jury lack. These witnesses may have communication skills that are better developed than most other witnesses. In addition, experts have often gained experience through numerous previous cross-examinations. In order to prepare to cross-examine, the prosecutor must become familiar with the subject area and, if possible, how this expert has testified in the past. It is always a good idea to involve the State's own expert in the preparation process if possible. A friendly expert can help a prosecutor understand defense expert reports, publications and prior testimony. Before this discussion, the prosecutor must honestly evaluate his knowledge or lack thereof. Admitting these limitations allows the expert to effectively communicate the information needed. Under FRE 615, the prosecution may be allowed to designate an expert who can sit at the State's table and assist with understanding the defense testimony. Not all States have adopted this rule. Individual State and court rules will determine whether this is possible.

FRE 615 Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

Identifying the Expert Opinion and the Basis for It

FRE 702 Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The first step in preparing for the cross-examination of a defense expert is identifying the expert's opinion. FRE 702 allows expert testimony if it will assist the trier of fact to understand the evidence or to determine a fact in issue. This is easier to do in those States that allow pretrial discovery of such opinions. Reciprocal discovery under Rule 16 of the Federal Rules of Criminal Procedure requires the prosecution to provide disclosure of the opinions and reports of its own expert prior to receiving the same from the defense. In those States where such discovery is not available, the prosecutor must look to other sources to determine the opinion that is likely to be rendered. The single most important source is the State's own expert, if available.[3] Based on his own expertise and experience, the State's expert will likely be able to anticipate the defense witness's opinion and rationale. The State's expert may have met the expert, observed him on the stand or be familiar with his opinion from prior cases.

Federal Rules of Criminal Procedure 16 (in part)

(b) Defendant's Disclosure.

(1) *Information Subject to Disclosure.*

(C) *Expert Witnesses.*
The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intents to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if –
(i) the defendant requests disclosure under subdivision (a)(l)(G) and the government complies; or
(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Review with the State's expert all of the reports, personal notes, studies and articles previously authored by the defense expert. They may very well contain opinions or methodology at odds with their opinion in the case in chief. Pay close attention to formulas, treatises,

[3] An expert on behalf of the State may or may not be available for trial. However, experts may be available to the prosecutor for consultation even though they may not appear at trial. For assistance in locating an expert, contact the National Traffic Law Center, www.ndaa.org, or your State's Traffic Safety Resource Prosecutor.

professional articles and other reference material referred to by the defense expert. Many times experts will pick material from these sources that assists them in rendering a particular opinion favorable to the defendant while ignoring other material from those same sources that is detrimental to their cause. Have the State's expert review these reference materials and ask them to assist in preparing the use those materials for impeachment purposes if possible.

In addition, the State's expert may be able to provide other additional documents, texts and websites to assist the prosecutor in increasing his working knowledge understanding and ability to communicate in the area. As the information is reviewed, the prosecutor should not be afraid to ask his expert to repeat or rephrase an explanation until it is understood.

Do not reinvent the wheel. Fellow prosecutors, prosecutor associations and legal search engines are great sources for obtaining the materials referred to above. They can assist in locating transcripts of the expert's testimony in other court and administrative proceedings. For assistance, contact the National Traffic Law Center and your State's Traffic Safety Resource Prosecutor for help in this regard.[4]

Call the Defense Witness

The prosecutor may attempt to contact the defense expert directly when allowed. Just as with effective cross-examination, begin with easy, non-threatening questions. Be sure to ask for any studies or other materials that substantiate his opinion or report generally. If he refuses to engage in a professional conversation, be sure to note the refusal in the case file and be prepared, if permitted, to address it in the cross-examination.

Research the Witness's Background

In addition to gathering information from the State's expert, the prosecutor should make other attempts to locate information about the defense expert. For example:

- What is his employment history?
- Does he have a work history that adds or detracts from his professional competence and credibility?
- Is he truly qualified and competent to testify as an expert regarding the issue at hand?

Make Use of the Internet

Start with a basic Internet search. Most expert witnesses have Web sites which contain at the very least basic *curriculum vitae.* Some contain evidence of obvious bias in statements made concerning their ability in the field. They may even refer to specific cases that can be researched for prior testimony. Reference may also be made to lectures given that can lead to more evidence of bias and professional opinion. Finally, don't forget to search for the witness on social Web sites.

[4] Contact the National Traffic Law Center at www.ndaa.org. Specific State Traffic Safety Resource Prosecutor contact information may also be obtained through the National Traffic Law Center.

Certifications and Memberships

Many times experts boast of certifications and memberships. Pay close attention here and do background research to see if they are valid. Determine what is required to obtain such a status and whether a test is required or if the simple payment of due qualifies one for membership. Witnesses may claim to be certified in a particular field when in actuality all they did was attend a course and receive a certificate. Do not allow trumped up qualifications to go unchallenged either before or during trial.

Publications and Peer Review

Publications written by the witness can be another great source of information. Again, discuss these with the State's expert. Determine if any opinions expressed in these writings might contradict the defense expert's opinions in the case in chief. Be prepared to use the publication to impeach the witness if they do. Have that impeachment prepared ahead of time and make sure the articles in question have been thoroughly reviewed. Also, use the State's expert to determine if any of these publications contain opinions relied upon by the defense expert in the case. Does the defense expert routinely refer to their own publications as authority for those opinions?

"Peer review" is a process where scientific articles are reviewed by other scientists and approved for publication in a scientific journal. If the defense expert routinely refers to their own publications as authority for their opinions, check to see if the articles have been subjected to a peer review process prior to publication or if the articles have simply been published in a defense publication requiring no such peer review. The lack of peer review should be pointed out on cross-examination.

Research the Science

The prosecutor must try to learn as much as possible about the science involved in the expert opinion. He should learn at least enough to understand the basis of the defense expert's opinion. By so doing, the prosecutor can more effectively formulate questions on cross. That knowledge also helps to defend against an expert that is trying to "pull the wool over your eyes." In the process, terms of art need to be recognized, learned and understood. Professor John Kwasnoski,[5] a nationally recognized expert in the field of collision reconstruction, often uses the word "accelerate" as an example of just such a term of art. When used by an expert in crash reconstruction it goes something like this:

> Expert Witness: "The vehicle maintained a speed of 35 mph as it accelerated through the tum."

Such a statement on the stand would lead most prosecutors to prepare to cross the expert about how apparently incorrect the expert's opinion truly is. After all, how can a vehicle maintain a particular speed as it *accelerates?* Kwasnoski points out that the term of art "accelerate" can mean not only speeding up but also slowing down and changing direction. This

[5] Professor Emeritus of Forensic Physics, Western New England College

example makes it easy to understand how the improper use of one term of art can result in the prosecutor being unprepared for or making an error in cross-examination before the jury.

Lack of Support for the Opinion

FRE 705 permits cross-examination on the underlying basis of the expert witness's opinion. The prosecutor, with the help of his expert, must determine what research supports the defense expert's opinion, if any. Is the opinion based on science and sound principles or is it simply a conclusion based upon the witness's personal opinion? Some experts may make assumptions that are nothing more than guesses or theories. Because they are so talented on the witness stand they are able to sound like the opinion results from a scientifically sound basis. Upon review however, it becomes clear that the opinion in many cases is held by no one else in the scientific community and is not supported by research or scientific fact. It is up to the prosecutor to show the jury that the witness's opinion stands alone without sufficient foundation, has not been widely accepted by the scientific community and has not been the subject of peer review.

FRE 705 Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

At times, the defense expert may make certain assumptions in order to arrive at his opinion. The prosecutor should point out that if one assumption made by the expert is untrue or inaccurate then another assumption may be as well. Opinions based upon inaccurate assumptions allow the jury to infer and the prosecutor to argue at closing that the opinion rendered by the expert must be inaccurate as well.

Challenging Expertise

Passive acceptance of a defense witness as an expert is a mistake. An expert's qualifications must be examined thoroughly well in advance of trial to ensure they are in fact learned and/or experienced enough to be declared an expert in the field. If their qualifications and experience do not rise to the level of an expert the prosecutor must challenge their being proffered as such.

Expertise can be challenged by filing a motion *in limine* asking the court to either preclude or limit the expert's testimony by pointing out the witness's lack of qualifications or misapplication of his knowledge to the case. This pre-trial motion allows the court an opportunity to review and critically evaluate the witness's claimed expertise or lack thereof. It also allows the State the chance to discover the witness's opinion and assumptions early enough to adequately prepare for trial.

FRE 703 Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The prosecutor needs to prepare for this motion. A reasonable argument challenging the witness's qualifications to testify should already be established. This is the foundation of the attack. The prosecutor should file copies of any documents that lend credibility to the challenge. These may include printouts of Web site pages, copies of transcripts of the witness's testimony as well as curriculum vitae provided by the witness in other cases. The prosecutor should also review prior civil cases as a resource for this information since defense experts often testify in civil liability cases. These cases can contain a wealth of information due to the more liberal discovery rules that apply. Even if the civil case did not go to trial, the discovery materials may be available. These materials include depositions of the expert, answers to interrogatories including the expert's curriculum vitae, diagrams, reports and opinions.

If permitted, ask the trial court to allow the State's expert to sit in court during the motion argument, direct and cross of the defense expert. This is especially important if the prosecutor has had limited discovery or the expert has limited background or published work. The State's expert will be able to provide the prosecutor with suggestions regarding additional areas of attack.

Impeachment of an Expert Witness by Prior Inconsistent Statements

To properly use prior inconsistent written statements, the prosecutor must begin the process by identifying the document to be used to impeach the witness. It obviously should include statements made by the expert witness which have been reduced to writing preferably in transcript form or in the alternative as contained in a report or signed statement. Such transcripts can result from depositions given by the witness under oath as well as transcripts of hearing or trial testimony.

Summaries of Transcripts

To effectively use hearing transcripts, the prosecutor must first thoroughly read and evaluate the document. Caption the summary of the document with the identifying features of the transcript such as the date of the proceeding and the name of the county and State where the deposition took place. Highlight the testimony to be used to impeach the witness. While doing so, pay special attention to the testimony preceding and following the statement of the most interest. Do not take any statement out of context. Doing so provides a good defense attorney or expert witness with an effective tool to make the prosecutor look unfair and therefore not worthy of belief. Use the note pad or computer and reference the statement made as well as the page number and lines where it is contained. When finished, review the sections selected and decide which ones will best be suited to be used as impeachment material. Avoid using statements that only marginally impeach. The jury should hear only strong impeachment evidence.

Once the selected the excerpts have been chosen, identify the order they will be used during cross-examination and how to effectively and efficiently locate them. Remember to avoid giving the witness a chance to recover. That means no paper shuffling and searching. Have command over the material.

In Court

Ask short, simple questions that don't allow the witness a loophole to use to escape. Establishing the opinion or assumption he testified to on direct. Get the witness to re-acknowledge it. Next, have the witness acknowledge the event, hearing, trial, interview, report or other document that will be used to impeach. Remember to ask leading questions. Provide a copy of the relevant parts of the document to opposing counsel as well as a copy of the same to the witness. If it is a transcript, make sure to attach a copy of the cover page identifying the proceeding, its location as well as the date and jurisdiction. If possible, use either a video presenter or power point to show the jury the same portions of the transcript. This method allows the witness to follow along and allows the jury to hear and see the inconsistent statement simultaneously. This has greater impact and makes it much more likely the jury will not forget the important point being made.

Read the portion of the transcript highlighted. Read slowly, clearly and loudly. Make sure the jury does not miss this. To do this effectively, practice reading it out loud before court. Most importantly, read it exactly as it is contained in the document. Do not summarize. When finished, ask the witness if the material was read correctly. Once the witness acknowledges either making the statement or the content of the transcript the prosecutor should. Ask no further questions regarding that point. Save any conclusions for closing argument.

Impeachment using a transcript is as follows:

- "Did you testify at a DUI trial in Green Lake County, Wisconsin, on November 20, 2009?"
- "You were called to testify on behalf of the defendant in that case, is that correct?"
- "You were sworn to tell the truth prior to being questioned correct?"
- "There was a court reporter present?"
- "You were asked questions and gave answers in response to those questions, is that right?"
- "I show you what's been marked as State's Exhibit 8 for purpose of identification and the cover indicates that it is a portion of a transcript of your testimony in the case of *State v. David Perlman* in Green Lake County Circuit Court on November 20, 2009, correct?"
- "On page 11, line 4 you were asked a question and responded as follows: *(Read the applicable question and answer slowly and clearly.)*
- "Did I read that correctly?"

Impeachment Using an Article Written by the Witness

The philosophy and method just described may also be used when impeaching the defense expert with an article or other publication he/she authored. For example:

- "Dr. Fallon, on direct examination today you testified that a drag sled should not be used to determine the drag factor of the road surface at a crash scene."
- "You have written an article titled "Accurately Determining Friction Coefficients in Automobile Crashes," is that right?"
- "That article was published in a publication of the American Trial Lawyer's Association called the *Trial Lawyer*, correct?
- "The date of publication of the article, "Accurately Determining Friction Coefficients in Automobile Crashes," was January 10, 2010?"
- "You were the sole author of that article, is that right?"
- "I show you what has been marked State's Exhibit 12 for purposes of identification. Is that a copy of the article you wrote?"

(Show pertinent part of the article to the jury via video presenter, or foam board so they can see, hear and better remember the pertinent part.)

- "Please refer to the first sentence of the first paragraph on page three of that article. At that place in the article you wrote 'A drag sled is an accurate and reliable tool for determining the drag factor of roadway at the scene of a crash.' Did I read that portion of your information correctly?"

Upon receiving a verbal acknowledgement don't ask any other question concerning this quote and move on. Again, save any conclusions for closing argument.

Countering Escape and Evasion Techniques

Professional expert witnesses are usually very talented and experienced witness. They are masters at cross-examination escape and evasion techniques. Experts often fail to answer questions directly. Many times they fail to answer the actual question asked at all. They run to escape and evade talking about everything but the answer to the cross-examiner's question. When faced with this form of escape and evasion, remember the principle of *slow and steady wins the race.* This is a difficult concept to keep in mind especially when it appears the judge and the jury is tiring of the chase. The prosecutor must pursue the point and make sure the question is answered. Maintain control of the witness.

As a last resort, if the witness continues to refuse to answer the question, the prosecutor can ask the court to direct the witness to do so. Be advised that repeated use of this tactic can diminish the prosecutor's credibility with the court and jury.

- Sir, did you understand my question?
- Would you like me to again repeat my question?
- Are you finished with your thought?
- Now, would you please answer the question I asked you?

For additional discussion of impeaching potential experts in a DWI case, see Expert Witness Addendum.

CONCLUSION

> "In cross-examination, as in fishing, nothing is more ungainly than a fisherman pulled into the water by his catch."
>
> -Louis Nizer

Prosecutors are sworn to achieve justice through the rigorous pursuit of truth. In other words, no witness should be allowed to provide unchallenged exaggerated, misleading or false testimony. Famous trial lawyer Louis Nizer described cross-examination as "the only scalpel that can enter the hidden recesses of a man's mind and root out a fraudulent resolve" as it "elicits the truth in innumerable ways."[6] Cross-examination can pose the greatest challenge and provide the greatest reward to any trial lawyer. Perfecting the art of cross-examination requires time and preparation. Successful prosecutors not only prepare for each trial as it comes but also commit the study of general trial technique, especially cross-examination. A wealth of information is available from experienced prosecutors and other valuable resources. This monograph is intended as the starting point on the path to mastering cross-examination.

[6] Nizer, L.. (1961). *My life in court*. Garden City, New York: Doubleday & Company, Inc., p 366.

EXPERT WITNESS ADDENDUM

Medical Experts

Medical experts may pose a particular problem for prosecutors who fear the science. In reality there are often more resources available to prosecutors in this area than in any other. A prosecutor should prepare and execute cross-examination of a medical expert just as he would any other expert witness.

Qualifications must be examined and work history must be reviewed. The physician's specialty must also be examined. Obtain a copy of the physician's curriculum vitae. Where did they go to school? What is their specialty? What specialties did they do their residencies and internships in and where? It must be determined if they are in fact qualified to testify regarding the issues in question in your case. Look carefully at the physician's memberships and accreditations. Membership in the State Medical Society is generally available to all physicians in otherwise good standing. Board Certification on the other hand is a peer review process that involves both written and oral testing. Having it can be a huge credibility builder. Lack of that certification can be used effectively on cross-examination particularly if your expert is board certified.

Take advantage of local medical resources. A primary care physician may be a good start. They can examine the expert's educational background and professional history and assist in evaluating them. They can also help the prosecutor understand the science. Local hospitals often have a medical library or computers with subscriptions to online medical reference sources. Ask for permission to use these resources for research. Examples of these websites are included in the index. You will be surprised at what is out there and available to the general public.

Finally don't ignore the local high school and community college. Biology teachers can be a great aid in learning the science and in helping do medical research as well as in the creation of exhibits for use during trial.

Collision Reconstructionists

Crash reconstruction is the science of determining the pre- and post-impact motions of a vehicle (the principle direction of force), the speed of a vehicle, and the cause of the crash. There are several options available to reconstructionists to make these determinations involving the use of mathematical calculations or physics formulas. The "methodology" chosen by the reconstructionist is determined by the physical evidence left at the crash scene.

Preparing to cross-examine the defense reconstruction witness should focus on three areas:

- Is the witness qualified?
- Did the witness properly apply the scientific formulas?
- What data or evidence did the witness rely upon (or ignore) to reach their conclusion?

The best way to prepare to cross-examine the defense expert reconstructionist is to review their report with your own crash reconstructionist. Your expert can assist in pointing out the deficiencies in the defense expert report and then direct you to where you should focus your cross-examination.

It is also important to remember that your goals of cross-examining the defense expert are similar to the goals of cross-examining any witness. These goals include gaining helpful admissions from the witness, corroborating your witness's testimony through the defense witness, and if needed, impeachment of the expert witness.

Is the Witness Qualified?

Since crash reconstruction requires the witness to gather the data from the scene and then apply the data to the scientific formulas, the reconstruction witness should have sufficient expertise in both the sciences of crash reconstruction and the background in the crash scene investigation techniques. A physics professor may have extensive expertise in the various scientific formulas but may lack the "hands on" crash investigation abilities. Likewise, the "retired police officer" may have extensive background in crash investigation but lack the ability to understand the scientific formulas required to properly reconstruct the crash.

It is imperative that as much background information as possible be gathered and reviewed to determine if a challenge should be made to the witness's qualification as an expert. As with all experts, review CVs, credentials in the field, published articles, and prior testimony. Many self-described defense experts in the crash reconstruction field have websites describing their training, experience and services available for hire. Be sure to review their self-descriptions carefully for potential cross-examination material such as:

- Does he market himself as defense witnesses?
- Has he ever testified for the State?
- Was he ever a police officer assigned to a crash reconstruction team and if so, how long ago?
- Does he list fees for services?
- Does he list organizations he is affiliated with and received accreditation from?

All of this material will be useful in determining if the witness has the ability to be qualified as an expert.

Did the Witness Properly Apply the Scientific Formulas?

Generally, an expert must testify to a "reasonable degree of scientific certainty" when he gives an opinion under Rule 702 of the rules of evidence. Therefore, it is important to make sure that the defense expert has properly interpreted the data using "scientifically accepted principles" of crash reconstruction and not on unfounded sciences. During a meeting with the State's expert, go through the defense expert's report to make sure the opinion is based on science that has been accepted in the community. At times, "so- called experts" attempt to give opinions not properly

based in science. In these situations, file the appropriate pre-trial motion to challenge the science upon which the defense expert relied. This could preclude the expert from testifying, but at the minimum gives you a preview of the anticipated testimony and a basis to begin preparation for cross-examination.

Keep in mind during cross-examination that the jurors may lose interest or become confused if the questioning is too technical in nature. They are not normally scientists nor do they have extensive scientific backgrounds. Work with your State's expert to formulate attack points that can be made using a minimal amount of scientific or mathematical language.

What Data or Evidence Did the Defense Expert Rely Upon?

Normally, the State's crash reconstructionists are the police officers who respond to the scene and participate in the gathering of evidence and taking of measurements and photographs. It is unusual for a defense expert to have this same opportunity to review the crash scene at the time of the crash. Therefore, the defense witness must either accept the data the investigation officer compiled or attempt to review the crash scene at a much later date. Either way, this gives the prosecutor a great opportunity to cross-examine the witness.

If the defense witness used the same information gathered by the police during the initial investigation, one would expect the results of the reconstruction to be similar. (Assuming the police reconstructionist was accurate in applying the correct sciences and calculations.) If the defense expert's conclusions are significantly different from the State's reconstructionist's results, someone has some explaining to do. In cross-examining the defense expert, go through all the measurements and photographs the State's expert compiled. Point out to the jury even the defense expert relied upon his investigation.

Once you establish that the police did a good job investigating the crash, it is important to elicit from the defense witness the mathematical equations or physics formulas on which the reconstruction of a crash is based. (Assume they too would be the same as the police officer.) Be aware however, that there are numerous formulas and variables in the field. If the defense and State experts use different formulas, be prepared to cross the expert on why the formula he used is incorrect. The prosecutor should be able to show that the defense expert's opinions are not supported by science or research in the field.

Often, defense experts investigate the crash scene at later date. In these situations, make sure to review the defense expert's calculations with the State's expert prior to the trial. The defense expert may have based his analysis and subsequent opinion of facts and data that did not exist at the time of the police investigation. The prosecutor should be prepared to attack the following points on cross-examination:

- Have there been changes in the roadway since the crash?
- Were the markings the State's expert relied upon in their investigation still visible in the roadway?

- Are there changes in the roadway which has impacted the drag factor obtained by the defense expert?
- Is the crash scene in the same condition?
- Are there any changes in visibility at the crash scene?
- Did the expert even visit the scene?

This form of cross-exam challenges the work of the expert and the basis for his opinion. Again note that the cross questions are not overly technical or beyond the understanding of the average juror. They simply indicate that the expert did not see what the police saw immediately after the crash. The fact that his work is not consistent with the work that was done on the night of the crash can be emphasized and discredited again on summation.

In addition to not going to the actual crime scene, the defense expert may also be cross-examined about other potential omissions from his work. Ask if he ever personally interviewed the police officer that reconstructed the scene on the night of the crash. Ask the defense expert about the other witnesses the expert did not interview. "Did you speak with the other driver?" "Did you speak independently to any other witnesses to the crash?" If it appears the defendant gave a statement to the expert, ask the court to have the expert tum over the notes of the conversation. This may have been the only interview the expert conducted in his entire investigation and if so is ripe for cross-examination.

By this manner of cross-examination the prosecutor can show the jury that the expert is not interested in a thorough investigation upon which to base his opinion but one with only partial information. This method of cross-examination shows possible bias of the witness and the lack of a true independent evaluation.

APPENDIX

RESOURCES AND REFERENCES

General Resources

National Highway Traffic Safety Administration
www.nhtsa.gov/impaired
www.stopimpaireddriving.org

National District Attorneys Association
www.ndaa.org

National Traffic Law Center
703-549-9222
trafficemail@ndaa.org
www.ndaa.org

National Association of Prosecutor Coordinators
www.napcsite.org

Medical Expert Resources

American Medical Association
www.ama-assn.org

Journal of the American Medical Association
http://jama.ama-assn.org/

Martindale's Health Science Guide
www.martindalecenter.com/HSGuide.html

Inner Body
www.innerbody.com

Web MD
www.webmd.com

The Centers for Disease Control and Prevention
www.cdc.gov

Mayo Clinic
www.mayoclinic.com

My Electronic MD
http://Myelectronicmd.com

Administrative and Federal Procedure

Federal Emergency Medical Treatment and Labor Act
www.emtala.com

Code of Federal Regulations
www.gpoaccess.gov/cfr/

Food and Drug Administration
www.fda.gov

The Joint Commission on the Accreditation of Health Care Organizations
www.jointcommission.org

Crash Reconstruction Resources

Accreditation Commission on Traffic Accident Reconstruction (ACTAR)
www.actar.org/index.html

Suggested Reading

A Practical Approach to Cross examination, Analytical Trial Advocacy: A Practical Approach for Prosecutors, National College of District of Attorneys, National District Attorneys Association, 1996.

Bugliosi, J. (2000). *The Art of Prosecution: Trial Advocacy Fundamentals From Case Preparation Through Summation.* Flushing, NY: Looseleaf Law Publications, Inc.

Other Publications Available From the
National Traffic Law Center

The following publications were made possible by contributions from corporate foundations:

Basic Trial Techniques for Prosecutors

The Drug Evaluation and Classification Program

Breath Testing for Prosecutors

Drug Toxicology for Prosecutors Alcohol Toxicology for Prosecutors

Prior Convictions in Impaired Driving Prosecutions

Overcoming Impaired Driving Defenses

Admissibility of Horizontal Gaze Nystagmus

Crash Reconstruction Basics for Prosecutors

Hardcore Drunk Driving Prosecutorial Guide

The following publications were made possible in cooperation with NHTSA:

Horizontal Gaze Nystagmus: The Science and the Law

Children and Cars – A Potentially Lethal Combination

Traffic Safety Resource Prosecutor's Manual

The Criminal Justice System: A Guide for Law Enforcement Officers and Expert Witnesses in Impaired Driving Cases

DWI Prosecutor's Handbook

To obtain copies of any of these publications, please contact:
National Traffic Law Center
National District Attorneys Association
Telephone: 703-549-9222
E-mail: trafficemail@ndaa.org
Web: www.ndaa.org

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