PEACE OFFICER AS PROSECUTOR

ONLINE

PRESENTED BY:

DPS – Law Enforcement Academy
Santa Fe, New Mexico

Date: ______________________

GOALS

- Understanding a trial from opening statement to closing argument.
- Learn how to prosecute a criminal trial.

OBJECTIVES

Upon completion of this course, students will be able to:

- Explain the advantages of peace officers prosecuting their own cases.
- Know the rules of discovery.
- Be able to evaluate the sufficiency of a criminal case.
- Understand the advantages and disadvantages of plea bargaining.
- Know how to do an opening statement.
- Learn how to be more effective on direct examination.
- Explain how to get an exhibit admitted into evidence.
- Discuss evidence objections including relevancy and hearsay.
- Learn how to be more effective on cross examination.
- Know how to do a closing argument.
- Participate in trial scenarios.

SOURCES

- New Mexico Criminal and Traffic Manual
- State and federal case law.

ESTIMATED TIME Eight to sixteen hours.

PREPARED BY:

Legal Instructor
Department of Public Safety
Law Enforcement Academy
Santa Fe, New Mexico

DATE APPROVED ______________ **ACCREDITATION NUMBER** ____________

INTRODUCTION

The goal of this class is to give peace officers an understanding of trials and how to prosecute a case. Prosecutors who are attorneys also take this class and we can learn much by looking at a trial from their perspective. Initially, however, we will discuss issues relating to peace officers only.

PEACE OFFICERS ONLY

We will note the statutory authority for officers to prosecute cases, the advantages of officers prosecuting cases, and some ideas on how officers can become effective at prosecuting cases.

THE GOAL OF THIS CLASS: MORE CONFIDENCE IN PROSECUTING CASES

Many officers are reluctant to go to trial

- Officers know the importance of the courtroom but it can be intimidating.
- For a number of reasons, many officers are reluctant to go to trial.

Yet with training many officers look forward to going to trial

- But it doesn't have to be this way. With confidence, we can change our outlook.
- And how to instill this confidence? One way is through training.
- Our goal is that by the end of the class, after training, you'll not only be comfortable about going to trial but will look forward to going to trial.

BACKGROUND - AUTHORITY OF PEACE OFFICERS TO PROSECUTE CASES

Peace officers in New Mexico are allowed to prosecute misdemeanor cases. An officer, however, must present his own case; one officer cannot present another officer's case. The rule that permits this follows:

MAGISTRATE RULE 6-108. NON-ATTORNEY PROSECUTIONS

A. Peace officers. Peace officers may file criminal complaints against persons in the magistrate court . . .

C Peace officers . . . shall be authorized to testify and present evidence to the court. In the court's discretion, such parties may also ask questions of witnesses, either directly

or through the court, and may make statements bringing pertinent facts and legal authorities to the court's attention.

ADVANTAGES OF PEACE OFFICERS PROSECUTING THEIR OWN CASES

- Rather than being on the sidelines, the officer is in charge of the case.
- Officers learn more about the elements of crimes and become better witnesses.
- Defense attorneys treat officers with more respect since they're dealing directly with the officer.

THE EXPERIENCE IN BERNALILLO COUNTY (ALBUQUERQUE)

Some years ago it was decided that officers would prosecute the majority of misdemeanor cases. Most cases involved quality of life issues: drinking in public, graffiti, disorderly conduct. Officers were apprehensive. Fortunately, the District Attorney's office did extensive training sessions with the officers.

What happened?

- Officers gained confidence and prosecuted their cases as they would a simple traffic ticket.
- Most cases continue to plead out. The difference is that defense attorneys now negotiate directly with the peace officer. It's the officer who decides whether to plead or go to trial, what charges to drop, what recommendations to make for sentencing. The effect is that the officer is in charge, not the district attorney.
- The majority of officers, once they gain confidence, prefer to prosecute their own cases.

FACTORS THAT MADE PEACE OFFICER PROSECUTION A SUCCESS

- ADA's prosecute cases that go to jury trial.
- An ADA is present in the courtroom or nearby for legal advice.
- Extensive training by the District Attorney's Office.

A NOTE ON OUR PERCEPTI0N OF DEFENSE ATTORNEYS

- We hear much about defense attorneys, some of it derogatory, but as professionals we need to remember that they may be our adversaries, even our opponents, but they're not the enemy.
- Defense attorneys have a very valuable role: to represent their clients and to protect their constitutional rights. Defense attorneys act as a "check and balance" to law enforcement.

HOW AN OFFICER CAN BECOME A BETTER PROSECUTOR OR WITNESS

One of the most effective ways for an officer to become a good prosecutor or witness is to watch others. And here's the good news: in the middle of the rules of evidence there is a rule that permits the lead investigator or officer to sit alongside the prosecutor in a trial. This rule follows:

Evidence Rule 11-615. 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.

- What is the purpose of this rule? (prevent one witness gaining advance knowledge of what the opposing attorney is going to ask him or her).

  But it is the next part of the rule that is very helpful to the officer who wants to become a good prosecutor or a great witness.

  C. **This rule does not authorize exclusion of:**

  a person whose presence is shown by a party to be essential to the presentation of the party's cause.

The following case is good to know:

Case law supporting the right of officers to sit next to a prosecutor at trial

- Defendant argued that the trial court erred by permitting the officer to testify last after remaining in the courtroom throughout the trial. Defendant felt that the trial court should have ordered the officer to testify first to avoid giving the State an unfair advantage.
- Court of Appeals held that the officer's presence in the courtroom and the order in which the officer was called to testify did not prejudice the Defendant. State v. Shirley (2007).

TAKE ADVANTAGE OF THIS RULE!!

- Most officers never get to observe a trial from start to finish; they're excluded from the courtroom. However, if you're essential to the state's case, you'll get to sit next to the prosecutor during the trial. Not only is it a great learning experience but you'll get a front row seat!
- Bernalillo County started having officers sit next to prosecutors in the early 1990's. It's now done for nearly every felony trial and is very popular with officers. Few things are as effective in preparing an officer to be a good prosecutor or witness. Officers are strongly encouraged to take advantage of this rule at every opportunity.

POLICE OFFICERS AND PROSECUTORS

INTRODUCTION

The remainder of the outline is for both police officers and prosecutors. One of the most effective ways for an officer to learn how to be a prosecutor is to see it from the perspective of a prosecuting attorney. We are not seeking to be attorney-prosecutors (three years of law school!) but as officers we can learn much from what they do.

ANOTHER REASON FOR USING THIS FORMAT

- Practices vary by jurisdiction. In some jurisdictions, an officer will prosecute cases other than DWI or domestic violence. In other jurisdictions, officers do all misdemeanors. And in some jurisdictions peace officers even do jury trials. Approaching this class as a prosecuting attorney will prepare us to handle virtually all trials.

WHAT WE HOPE TO ACCOMPLISH BY THE END OF THIS CLASS

- Whether you're a cadet or recruit or peace officer, our goal is to prepare you for court. And, with training, to be a better prosecutor, a better witness, and a better peace officer. By the end of the class we hope that not only will you feel comfortable about going to court but will look forward to going to court.

PREPARING FOR TRIAL

WHAT HAPPENS BEFORE TRIAL

This review is done from the viewpoint of a prosecuting attorney. The review will include such things as criminal procedure, from arraignment to witness interviews to discovery..

MAGISTRATE RULE 6-501: ARRAIGNMENT

This is where the Judge advises the defendant of the charges and sets conditions of release. There are two types of arraignment:

a) Custody arraignments - person didn't make bond and is in custody.

At custody arraignments, prosecutors (whether attorneys or peace officers) may wish to go to the arraignment to address conditions of release. It is also an opportunity to provide new information to the Court.

b) Bond arraignments - person made bond and is not in custody.

MOTION HEARING

- Motions by defense attorneys include: motion to dismiss because of insufficient complaint, to compel discovery (attorney wants a copy of the police report or to look at evidence), motion to suppress evidence because of unlawful search, etc.

What does the court rule say about amending a defective complaint?

MAGISTRATE RULE 6-303. AMENDMENT OF COMPLAINTS AND CITATIONS

Defects, errors and omissions. A complaint or citation shall not be deemed invalid . . . because of any defect, error, omission, imperfection . . . which does not prejudice the substantial rights of the defendant. . . the court may at any time prior to a verdict cause the compliant or citation to be amended with respect to any such defect, error, omission . . . if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.

- This means that a prosecutor can move to amend a complaint if there is an error. Example: a wrong name or the wrong date for the date of the offense.

MAGISTRATE RULE 6-504. DISCOVERY

- Prosecutors have a duty to seek justice. That means an obligation to disclose to defense attorneys information that may assist their case. Following is the rule on discovery and witness lists for Magistrate Court.

B. **Disclosure by state.** . . . the prosecution shall disclose and make available for . . . copying and photographing any records, papers, documents and recorded statements made by witnesses or other tangible evidence in its possession, custody and control which are material to the preparation of the defense or are intended for use by the prosecution at the trial or were obtained from or belong to the defendant.

C. **Witness disclosure.** . . . the prosecution and defendant shall exchange a list of the names and addresses of the witnesses each intends to call at trial. Upon request of a party, any witness named on the witness list shall be made available for interview prior to trial.

  - The rule will indicate time limits for providing discovery.

METROPOLITAN COURT RULE 7-504 Discovery in Metro Court

A. Disclosure by prosecution. Unless a different period of time is ordered by the trial court, within thirty (30) days after arraignment . . . the prosecution shall disclose and make available . . . This rule was approved by the Supreme Court in 2007.

NOTE:

Although the format of this class is for the prosecuting attorney, these rules also apply to an officer prosecuting a case.

WITNESS INTERVIEWS

- No "trial by ambush." Defense attorney may talk to your witness and you may talk to their witnesses. There is one exception to this: the prosecution does not have a right to talk to the defendant.
- If a witness previously gave a statement, it is advisable to have the witness review the statement prior to a witness interview.
- Harassment or intimidation is not permitted in a witness interview. If this conduct persists the interview should be terminated and the Court can decide what to do next. Fortunately, this kind of behavior rarely occurs.

Reminder:

The courts take time limits for witness interviews and discovery very seriously. If for any reason a witness interview can't be done, or discovery is not complete, the court should be notified as soon as possible.

EVALUATING OUR CASE - DO WE HAVE A CASE?

REVIEWING A CASE BEFORE TRIAL

Pretrial preparation is important for success. As we evaluate a case, it comes down to one question: do we have a good case or not?

EVALUATING - REVIEWING THE POLICE REPORT AND STATEMENTS

- Review reports and statements for inconsistencies.
- Has any testimony changed? Sometimes a witness will remember something after giving their initial statement.
- If so, an officer may need to do a supplemental report to correct any errors or omissions on the original report and a copy needs to be given to the defense attorney.

MAKING SURE WE HAVE THE ELEMENTS OF THE CRIME

What are elements of a crime? Looking at one crime – battery – will help us understand what this means.

NMSA 1978, Section 30-3-4. Battery

Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.

Whoever commits battery is guilty of a petty misdemeanor.

Now to diagram the definition of battery into different elements:

Battery:

1) Unlawful
2) Intentional
3) Touching or application of force
4) To the person of another
5) When done in a rude, insolent or angry manner.

These are the elements of battery and we must prove each one of the elements. This is true for all crimes. If we prove four of the elements but not the fifth, then we have failed to prove that this defendant committed a battery.

OTHER THINGS TO KNOW BEFORE TRIAL

- Identification of defendant – can our witnesses do this?
- Date of offense – make sure this is accurate.
- Jurisdiction – need to make sure we have the right jurisdiction and venue.
- Elements, identification, date, jurisdiction – these must be proven at trial.

DECISION: DISMISSAL, PLEA OR TRIAL

PRETRIAL DISMISSAL

There are several reasons for a pretrial dismissal:

- Insufficient evidence.
- A witness is unavailable or missing.
- Offender has complied with a request of the officer, i.e., officer said if offender brought proof of insurance to court the case would be dismissed.

Note:

If we don't have enough evidence, we have an ethical obligation to dismiss.

PLEA BARGAINING - A FACT OF LIFE

Plea bargaining is a reality in the courtroom. Some advantages are:

- A plea is a guaranteed conviction.
- Case is resolved quickly.
- Witnesses don't have to come to court.
- Sometimes a plea is done with one offender who testifies against another.
- An unexpected benefit for officers doing their own plea negotiations is that it directly involves the officer in the court system.

Note:

The number of plea bargains for police officers and prosecuting attorneys is about the same.

DECISION: TO GO TO TRIAL

WHAT KIND OF PERSON CHOOSES TO GO TO TRIAL?

There seem to be two types of people (there may be more) who want to go to trial:

- A person who is sincere and believes he or she is right. There may be an honest difference of opinion.
- And for some cases it's a close call: a borderline DWI or a self-defense argument.
- But there is a second kind of person who wants to go to trial. This person sees the trial as a game. This person wants to beat the system and is willing to deviate from the truth to do so.
- No matter what the reason, and regardless of their attitude, we need to remain professional and courteous.

PRETRIAL: WITNESSES AND EXHIBITS

PLANNING HOW TO PRESENT WITNESSES

- List witnesses in the most appropriate order to present your case. Chronological order usually makes sense but is not always practical because one witness may testify about numerous elements in a case. As each witness testifies, have that witness testify about everything he or she knows about the case.

A BRIEF WORD ON EVIDENCE

- Prior to trial we want to look at physical exhibits and determine how to get them admitted into evidence. We will have an extensive discussion on evidence when we get to the section on direct examination.

THE NEED TO ANTICIPATE DEFENSES

In going to trial, we need to anticipate possible arguments by opposing counsel.

Example: Defense in a Battery case

Defendant on the stand:

"The victim was yelling and acting aggressive to me. I stabbed the victim in self-defense."

Possible prosecutor's response:

Defendant's response was disproportionate. Why didn't defendant walk away? Why was a verbal assault met with physical violence that including stabbing the victim with a knife?

Example: Defense in a DWI case

Prosecution will argue: Defendant had bloodshot, watery eyes.

Defendant on the stand: "I was driving all night from Tucson, Arizona." Or,
"I have allergies."

Prosecution will argue: Defendant had trouble with field tests.

Defendant on the stand: "I have an old football injury."

Prosecution will argue: Defendant had slurred speech.

Defendant on the stand: "I just came from the dentist."

- We need to meet the anticipated defense: Do we need more exhibits, more witnesses?

THE NEED TO ANTICIPATE "SHADOW DEFENSES

- What is a "shadow defense?" This is where someone tries to change the subject. You've seen it in arguments with children: a parent berates a child for doing something wrong and the child changes the subject and puts the parent on the defensive.
- An example: An officer has arrested someone for DWI. Officers are supposed to be respectful but this officer wasn't. The defense attorney will argue that because the officer was disrespectful, his client should be found not guilty of DWI. Prosecutor will need to keep focus on defendant's intoxication.

LAST ITEM OF BUSINESS: SUBPOENAS

- Will need to subpoena witnesses. It's very helpful – and appreciated – if you subpoena a witness as far in advance of a trial or motion hearing as possible.
- A subpoena that has been served means a doubtful witness is more likely to appear. Also, a subpoena is needed for some employees to justify taking off from work.

ANATOMY OF A TRIAL

Every trial, whether it's a DWI or a murder, has a similar format.

In each of the following components, the State goes first, the defense goes next.

1) Jury Selection (Note: we will not be discussing jury selection)
2) Opening Argument
3) Direct testimony
4) Cross-examination
5) Closing Argument – State
6) Closing Argument - Defense
7) Rebuttal - State

OPENING STATEMENT

NOTE TO PEACE OFFICERS PROSECUTING THEIR OWN CASES

- Offices seldom will give opening statements.
- If it's a bench trial, and the case isn't t complicated, some prosecutors waive the Opening Statement. But an Opening Statement to a jury should never be waived. In fact, many people make up their minds after hearing Opening Statement.

THE IMPORTANCE OF A GOOD OPENING STATEMENT

- Some cases are so confusing, and there is so much evidence, that one would be lost without an opening statement. It's a road map of what the evidence will show.
  - The prosecutor will tell a story and summarize what the main witnesses will say.
- Opportunity to mention elements of the crime(s) charged.

- One of the most important parts of a trial. At no time is the Jury more attentive or receptive. This is where the Jury gets their first impression of the prosecutor and the case.
- A strong opening statement creates a lasting impression.

LEGAL GUIDELINES FOR AN OPENING STATEMENT

Opening Statement is the time when a prosecutor is allowed to tell the jury the facts of the case and give them an overview of the evidence. But there are limitations that a prosecutor needs to be aware of.

- It is improper to argue our case in Opening Statement. The purpose of an opening statement is to present facts to the jury, to clarify testimony to come. It is a summary of the evidence to be presented. This is in contrast to Closing Argument where one is permitted to argue about the evidence which has been presented.
- It is improper to instruct on the law in Opening Statement. Example: we cannot say that "the result of the breath alcohol test of .30 is three times the legal limit."
- The reason that this is improper is that the Judge, through the jury instructions, will so advise the jury. When the Judge reads the instructions, we can comment on the instructions.
- It is improper for a prosecutor to testify in Opening Statement. The prosecutor is not a witness nor has he or she been sworn in. Statements beginning with, "I believe. . .", "I think . . . ", are improper.
- It is improper to refer to facts that cannot be proven or are inadmissible. As prosecutors, we must be professional. If we think something may be inadmissible, we should not refer to it in Opening Statement. If we're not certain if the evidence is admissible, we should request a motion hearing before trial.
- It is improper to comment on the defendant invoking the right to remain silent at the time of arrest. Example: "The defendant was advised of his right to remain silent and didn't say anything." Such a comment is improper and reversible error.

- It is improper to comment on the defendant's bad character. Example: "The defendant is a convicted felon." We cannot say the defendant is a convicted felon or has done bad things in the past.

- It is improper to comment on anticipated defenses. Example: "The defense will present witnesses who will testify that the defendant had not been drinking and was not intoxicated at the time of his arrest." This can be viewed as shifting the burden of proof to the defendant and also seen as a comment on the defendant's right to remain silent. The defense, for example, may choose not to put any witness on the stand.

<u>HOW TO MAKE OPENING STATEMENT MORE EFFECTIVE</u> - <u>TECHNIQUE</u>

- What draws us to a good movie? How does a television network prevent channel surfing? We may have many witnesses. It helps to tell a story and a summary of what the witnesses will say. But it's only a summary; we don't want to overstay our welcome during Opening Statement with too many details.
- Speak with conviction and sincerity. If the Jury views you as competent and honest, you will become the State's most important "witness."
- State the facts clearly and concisely as facts, not as probable occurrences. Tell the Jury, "This is what happened . . .," not "This is what might have happened . . ." Tell the Jury how it was, not what might have been.
- It's not helpful to use phrases such as "The evidence will show . . ." Better to go right into a narrative and tell a story of what happened.

  Use conversational language. Example: Use "get out of the car," not "exited the vehicle." Use "watched the house," not "surveilled the residential building." Use "the defendant said," not "the defendant next related to the Officer . . ."
- Prepare a conclusion. Close your Opening Statement in a short, simple, direct fashion. Tell the Jury what you want them to do. Example: "At the end of this trial, I will have the opportunity to talk to you once again. At that time, I will ask you to find this defendant guilty of first degree murder. Thank you."

<u>MORE THOUGHTS ON OPENING STATEMENT</u> - <u>STRATEGY</u>

- You now know what you are allowed to say and how to say it in Opening Statement. So, when should you say it? This is where you need a strategy. Although there are no hard and fast rules, here are some general suggestions:
- Don't hold back strong evidence. Consider: "A man who sat with the defendant for two hours before defendant's arrest for DWI is going to testify he saw defendant drink a case of beer." Should you leave these facts out of Opening Statement and surprise the Jury

with this strong evidence at trial? No. Do not hold back powerful evidence for later. Make that strong impression with the Jury first, and you'll make an impression that will last throughout the trial.

- Be careful of saying something in the Opening Statement that you cannot prove. If that happens, it can be devastating because you will lose credibility with the Jury.
- Don't disclose all the details. Opening Statement is a time to give an overview of the facts to come.
- Do disclose some weaknesses. If you have a weakness in your case and know it will come out at trial, it is best for the Jury to hear it from you, not the defense attorney. By stating it first, you can reduce the impact and treat it from your perspective.
- Example: If the defendant had an accomplice who is now a state's witness, tell the jurors they will hear testimony from a man who pled guilty in this case. Explain the deal so that the Jury understands exactly what's involved.
- Start strong, finish strong. This is generally true for all phases of the trial.

SHORT VERSION OF AN OPENING STATEMENT: MURDER

"Good morning, Ladies and Gentlemen. This is a case in which the defendant, John Smith, robbed a man and beat him repeatedly on the face, head and body. And then, because the victim might identify him later, he held a .38 caliber revolver to his head and at point blank range pulled the trigger. The victim fell to the ground dead. I ask for your careful attention for the next few minutes because I'd like to explain how this happened. On December 25, 2--- . . . "

SHORT VERSION OF AN OPENING STATEMENT: DV BATTERY

"Good afternoon, Ladies and Gentlemen. The defendant, Mr. Smith, committed Battery upon his wife. His wife, Mrs. Smith, will testify that he came home late one night, heavily intoxicated, and struck her in the face. Ms. Jones, who was also present, will testify she saw Mr. Smith hit his wife for no reason at all.

After all the evidence is presented, after all the witnesses have testified, we will ask that you find the Defendant guilty of committing a Battery on his wife, Mrs. Smith."

ANOTHER SHORT VERSION OF AN OPENING STATEMENT: DV BATTERY

"Ladies and Gentlemen, this is a case of Battery Upon a Household Member. On July 4, 2---, the Defendant unlawfully and intentionally slammed his girlfriend's head against the wall of their bedroom during an argument in a rude, insolent and angry manner (notice that the prosecutor is giving the elements of battery).

Officer Garcia will testify that upon arrival at the scene, the victim had visible injuries to her head and face. These injuries were photographed by Officer Garcia. The victim will testify the injuries are a result of her boyfriend hitting her repeatedly. At the end of the trial, we will ask that you find the defendant guilty of Battery Upon a Household Member."

DIRECT EXAMINATION

NOTICE TO OFFICERS PROSECUTING THEIR OWN CASES

If it's a Jury trial, generally the prosecuting attorney will be presenting the case. For bench trials, if you are the only witness, you will tell the court what happened. It's possible, however, that you may have witnesses.

Note:

- The following section, from the viewpoint of a prosecuting attorney, has been streamlined to make it more useful for officers who prosecute cases. It's also designed to help officers who will be witnesses.

WHAT IS DIRECT EXAMINATION?

- What is direct examination? This is where the State, through its witnesses, presents its case.
- It's called direct examination, but the way in which questions are asked is quite indirect. The questions do not suggest or hint at an answer. To some people the format of questioning is awkward.
- But there is a reason for this type of questioning: evidence must come from the witness, not the prosecutor. If the prosecutor tries to suggest an answer, the defense attorney will say, "Objection, leading the witness!"
- How do questions on direct examination differ from questions on cross examination? A question on direct examination would be: "What color was the car?" It doesn't suggest an answer; it is for the witness to provide an answer.

- An example of a leading question (used on cross examination) would be: "Was the car blue?" It is improper to use a leading question on direct examination because it suggests an answer.
- The State will always do direct examination because it has the burden of proof to present a case; the defense usually (although not required) may also present witnesses to support their version of events.
- Although direct examination may not have the excitement of other parts of a trial, it's very important. It's here that the State tells its story, gives its version of events.
- If the State doesn't present a good case, or prove all of the elements, the defense attorney will be quick to point out weaknesses.
- When the witness is sworn in, his or her testimony will be considered as evidence. Exhibits introduced through the witness will be considered as evidence. What is said by the attorneys in opening argument is not evidence since it is not sworn testimony.
- We will discuss testifying on direct examination and also how to introduce evidence through witnesses.

HOW TO MAKE DIRECT EXAMINATION MORE EFFECTIVE

- It's always helpful to anticipate the defense. Often in a DWI trial, defense attorneys on cross examination will emphasize what the defendant did properly. Prosecution may wish to note these points on direct examination, thereby lessening the impact of the defendant's cross-examination.
- Be wary of language that can be confusing for others. If that happens, the prosecutor should clarify what was said. Question: And about seven in the evening what were you doing? Answer: I was on routine patrol. Question: What is "routine patrol?"
- It's helpful when the prosecutor tries to simplify things. Example: I got out of my unit and pursued the male subject. Question: Unit – is that your car? Answer: Yes. And the person you were chasing, do you know who that was?
- The wording of questions can be important. Which sounds better, "How far was the robber from you?" or "How close was the robber to you?" In using the latter, we reinforce the psychology of the event.
- A prosecutor may wish to use a follow up question to help the memory of the Jury. The following example is an exaggeration but prosecutors often do this: Question: Did you see him again? Answer: Later. He had the gun then. Question: When you

saw the gun, what was he doing? Well, he was coming at me. Question: When you say he was coming at you with a gun, what do you mean by that? Answer: I took it as a clear threat. Question: How close was he to you when he came at you with the gun in that threatening manner?

- Avoid the "windshield wiper direct" method. "What happened next . . . what happened next . . . what happened next . . . what happened next . . .
- One way prosecutors make the testimony easier for jurors to follow is by providing continuity from event to event or from person to person. Example: Now, Ms. Garcia, I would like to direct your attention to the rape crisis center. What time did you get there? Example: Now, Mr. Ortega, let's jump ahead to about 2:00 p.m. that evening. Where were you about that time? Example: "Officer, let me take you to the night of November 11, 2---."
- Be careful of fill-speak or vocal pauses. "Uh . . . I mean . . You know . . .All right . . .Let me ask you this . . .At this point in time . . . Ok . . ., etc."
- Sometimes a witness may give an opinion but there are limitations. For example, an officer may give an opinion that the smell on the defendant's breath was alcohol but for a more scientific opinion (what does an HGN really mean) we need an expert. Another officer might testify that something appeared to be cocaine but in court an expert is needed to give an opinion that the drug in fact was cocaine.
- Use a lot of details to draw a picture. For example, say this is a DWI trial. Does it not add to the case to have a witness mention that the driver was in a school zone or endangered others? In a battery case, is it not helpful to note that the defendant was much larger than the victim?
- Argue your facts to the Judge, not opposing counsel.

HOW A PROSECUTOR CAN HELP A WITNESS

- It is important that witnesses maintain a "psychological edge" and have confidence.
- Remember, the great majority of witnesses have never been to court. The prosecutor – whether an attorney or an officer - can offer suggestions to assist those testifying for the first time.

HELPFUL TIPS PRIOR TO TESTIFYING

- Courtroom is meant to be serious – Judges wear robes and there is a dress code.

- For example, hats are never worn in the courtroom. If you have witnesses, remind them of this ahead of time so they will not be embarrassed in the courtroom.
- Clothes: We want to show the court that we're serious. For males, recommend – although it's not required –wearing a business suit or sports coat. Females should also dress conservatively.
- Some people when not using sunglasses put them on top of their head. It may be cool or even fashionable but not in the courtroom.
- Some witnesses chew gum. Not recommended since this can be distracting to the Jury and disrespectful of the court. Nearly all courtrooms prohibit gum chewing.
- It's human nature to joke with others at the courthouse. Remember that a trial is a serious situation. One reason not to joke around in the hallways is that others – Judges, jurors, etc. – may observe you and gain the wrong impression.
- A witness should review police reports and other documents prior to taking the stand. This will give the witness more confidence when testifying. It also look unprofessional if a witness has to keep referring to their report to answer questions.
- Sometimes a prosecuting attorney will want an officer to demonstrate something. Example: a field test. As a courtesy, the prosecutor should ask the officer ahead of time. One reason is that the officer may have an injury and cannot adequately do a field test for the jury.
- The prosecutor should also, as a courtesy, ask a witness if he or she is comfortable drawing a diagram in front of a Judge or Jury.

ONCE IN THE COURTROOM

- A witness should walk to the witness stand without hesitation.
- When taking the oath, the witness should raise his or her hand and answer "I do" in a confident voice.

HELPFUL HINTS WHILE TESTIFYING ON DIRECT EXAMINATION

BEING PROFESSIONAL

- The most effective witness is one who can tell their story comfortably. A witness should come across as professional and unbiased.

BEING AWARE OF PERSONAL HABITS

- A witness needs to keep his or her hands away from face and mouth. Some witnesses do this as a nervous habit. When testifying, the Judge may have difficulty hearing and interrupt the witness and ask them to speak up.
- A witness should not nod his or her head to indicate "yes" or "no." It's better to say "yes" or "no," especially when it is a court of record.
- Some witnesses feel more comfortable facing the prosecutor as they answer a question. It's more effective, however, to face the Judge or Jury.

<u>TESTIFYING ON THE STAND</u>

- Always be respectful to the Judge – "Your Honor," "Judge."
- Avoid "police lingo" or jargon. Which of the following is better:

"At 2140 hours the perpetrator exited the northeast door of the motor vehicle and started flight with responding officers in pursuit, resulting in apprehension" or

"At twenty to ten, the defendant got out of his car from the passenger side and ran, but was chased and caught by other officers."

- If you're asked to give a time or distance, and cannot be certain as to accuracy, you should indicate that it is an estimate.
- Avoid guessing or speculating. If you do not know an answer, say "I don't know" or "I'm not certain."
- Answer questions fully but do not volunteer information unless asked for.
- A witness generally testifies to facts, not beliefs or opinions. If a witness tries to guess something, the defense attorney may say, "Objection, calls for speculation!"
- Do not state anything that refers to the Defendant's criminal background unless specifically asked to do so. Avoid, for example, saying "I knew him/her because I've arrested him/her before" or "I found out who he was when I pulled his mug shot." This may lead to a mistrial because the jury isn't permitted to know about the defendant's criminal background.
- What happens if you forgot something in the police report? Simply say to the prosecutor, "I need to look at the police report to refresh my memory." The prosecutor, after getting permission from the Judge, will approach and hand you the police report. After reviewing it, the prosecutor will ask if your memory has been refreshed. The prosecutor will take the report back and repeat the question.

- What should you do when the defense attorney objects? It is tempting to try to hurry up and get the answer in. Integrity, however, requires you to stop immediately so that the Court can determine if the question is proper or not.
- Giving positive, truthful answers is always preferable. If you're not certain about a certain answer, be candid and say so.

ONCE TESTIMONY IS DONE

- After a prosecutor is done asking question of a witness, normally he or she will say, "Your honor, I have no further questions of this witness," or "Your honor, I pass the witness." This alerts the court and the defense attorney to go to the next phase of the trial, cross examination.
- If the prosecutor seeks and gets permission to have you "permanently excused," that means you will not be called back again as a witness. It also means you can stay in courtroom and watch the trial. However, check with the prosecutor on this.

SAMPLE DIRECT EXAMINATION

The following will give you examples of the initial phase of direct examination:

QUESTIONS FOR PERSON WHO HAS JUST TAKEN OATH

- Direct examination begins with a ritual – the swearing in of a witness. Can this ritual be used by the prosecutor to link the witness with the jurors? The jurors, after all, are also sworn in and the prosecutor can ask the same initial questions of the witness that he or she asked the jurors. An example of this follows:

Would you state your name and spell your last name for the benefit of the court reporter?

Jane Doe, D-0-E

Ms. Doe, are you employed?

Yes, I work for the Bank of New Mexico

What do you do for them?

I'm the financial manager

As financial manager, what are your major job responsibilities?

- These questions from the very beginning achieve a number of things. The Jury sees the witness sworn in the same ritualistic way that they were. They see the prosecutor ask Ms. Doe what her major job responsibilities are. That is probably the same question the prosecutor asked many jurors when the jury was being selected. The prosecutor is

perceived as helping out the hardworking court reporter. Also, as the witness answers questions about job responsibilities he or she becomes more relaxed.

- What has been accomplished? With a few short questions, the prosecutor has established a polite demeanor, created a bond with the witness and the Jury, and given the witness a change to relax.

INITIAL QUESTONS FOR AN OFFICER IN A DWI JURY TRIAL

- Officer, please state your name for the Jury.
- On January 1, 2---, did you arrest the Defendant for DWI?
- Before we go into the facts of the case, please tell us what training and experience you have in DWI investigations.
- It's a simple question but it puts the witness on familiar grounds, makes the witness comfortable, and just as importantly, gives the Jury a chance to relax and relate to the witness on the stand.

MORE QUESTIONS FOR AN OFFICER IN A DWI TRIAL

Officer, would you state your name and occupation for the record?

How long have you been working with the _________ Police Department?

Were you on duty on _____(give date) at ______time?

Were you in the vicinity (or area) of ______?

What city, county, and state is that?

NOTE: It is important to establish jurisdiction or venue for each case. Failure to do so may result in dismissal. Location of the offense shows whether or not the offense took place within the geographic jurisdiction of the court. Proof of location must be as specific as possible but also needs to include the city or county where the offense took place.

What were you doing at that particular time? (routine patrol)

What do you mean by routine patrol?

What kind of vehicle were you driving? (police vehicle, marked)

What were you wearing at the time? (police uniform with badge of office)

NOTE: This is important since NMSA 1978, Section 66-8-124 requires an officer to be in uniform to make a traffic stop.

At that time (give date and time) did you come in contact with anyone in the courtroom?

Officer, please identify that person for the court.

NOTE: Simply pointing at the defendant is not enough. This is a court of record and on appeal the reviewing or appellate court will not know if the Defendant was properly identified. Recommend describing where the Defendant is sitting and what Defendant is wearing. Prosecutor will then say, "Your Honor, I would like the record to reflect that the Defendant has been properly identified."

What drew your attention to the defendant? (weaving, red light, speeding, etc.)

Where was your vehicle in relation to the Defendant?

What were the traffic conditions like at that time? Light conditions? Weather?

NOTE: By now you see where we're going with this. We're drawing a picture for the Judge and Jury. The more details, the better the picture. The questions are not exciting or dramatic but the important thing is to draw a picture.

What kind of vehicle was Defendant in?

How long did you observe the Defendant's driving?

NOTE: In the next few questions we establish reasonable suspicion for the stop.

What did you observe as Defendant was driving?

Why did you stop the defendant?

DANGER AHEAD!! THE FOLLOWING MAY BE BORING TO SOME PEOPLE!!

Note:

Most officers seldom introduce exhibits into evidence. If you're in this category, you may wish to skip the next section. But if you do read the next section, it may give you a better idea of what prosecuting attorneys have to do in a trial.

GETTING EXHIBITS ADMITTED INTO EVIDENCE

In trial there are two main kinds of evidence: (1) the person testifying and (2) physical exhibits. We have already discussed a person testifying. Now we'll look at getting physical exhibits admitted. Watching prosecutors trying to get exhibits admitted into evidence - especially when there are a lot of exhibits - can sometimes be tedious and even boring.

But the State must ask these questions: the rules of evidence require it. A good prosecutor will know what questions to ask: the admission or exclusion of an exhibit (drugs, breath card, weapon, etc) can be very important. This is where the State can win or lose its case. That's also why you'll see so many objections from defense attorneys.

INTRODUCING EXHIBITS THROUGH A WITNESS ON DIRECT TESTIMONY

- There are two terms to know for now. They're legal terms but easy to understand: (1) to authenticate evidence and (2) chain of custody.

To **authenticate** evidence – is the evidence true and accurate?

- Exhibits and documents need to be "authenticated" before being admitted into evidence. This means someone must testify that the document or exhibit is the thing it's supposed to be and in the same condition as it was when taken into evidence.
- Evidence Rule 11-901 notes the requirement of authentication or identification:

A. General provision. The requirement of authentication or identification as a condition . . . to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

- For example, the prosecutor may want to show a photograph to the Judge or Jury. A witness will need to testify that he or she took a picture and that's what things looked like when the picture was taken.
- An item (guns, television sets, etc.) may have distinguishing marks or serial numbers and one witness may testify that this is the same item seized. However, sometimes more than one person will handle evidence.

Chain of custody

- If an item isn't unique (for example, dope, tools, etc.) or have distinctive markings, it will be necessary to prove that it is the same item which was seized. Each person who had custody of the item must testify from whom they received it, what they did with it while it was in their possession, and to whom they gave it to. This is known as chain of custody.

A SHORT VERSION OF INTRODUCING EVIDENCE

- A prosecutor needs to ask certain questions in order to get an item admitted into evidence.
- First, the prosecutor will ask the clerk for an exhibit tag (alphabet or numerical). The clerk will put a tag on the item of evidence.
- "Your Honor, may I approach the witness?"

- "I'm showing you what has been marked as State Exhibit A. Is this the same item you took from the crime scene that day?" (yes)
- "Has the item been changed or altered in any way?" (no)
- "Your Honor, I would like to move State's Exhibit A into evidence."
- Defense attorney may object and say, "Improper Foundation," which means not enough questions were asked. If necessary, the prosecutor may ask more questions (this is also known as laying a foundation) and then move to have the exhibit admittted into evidence**.**

WHY STATE WANTS EXHIBIT ADMITTED INTO EVIDENCE

- There is a reason why the State wants to have an exhibit admitted into evidence. When the Judge says, "It will be so admitted," the Jury can review the evidence.
- When an item is admitted into evidence, the prosecutor will either hold it in front of the jury or have it handed it to them. Example: it may be a picture.
- The exhibit can also be taken into the jury room during deliberations.
- We will now go through some examples of a prosecuting attorney questioning an officer.

GETTING EXHIBITS ADMITTED INTO EVIDENCE

Exhibit: Knife with blood seized by officer on a search warrant

Identify Officer or witness

Will you please state your name for the record?

What is your occupation?

Where are you assigned?

How long have you been a law enforcement officer?

What type of training have you had as a law enforcement officer?

Any specialty training? Refresher training?

Were you on duty on _________?

Were you involved in the execution of a search warrant on that day?

Where was the search warrant executed?

VENUE: In what city, county, and state was the search warrant executed?

What did you do during the search warrant?

Show how the officer came in contact with the exhibit

Did you take custody of any evidence during the execution of the search warrant?

What evidence did you take custody of?

Pick up item. (a knife with blood on it).

Entering Evidence

Your honor, I'd like to request that this exhibit be marked State's exhibit #_____ for identification. (Court clerk marks a tag and puts it on the exhibit)

Let the record reflect that I'm showing the exhibit which has been marked as State's Exhibit ______ to defense counsel. (defense counsel looks at the exhibit)

Now, Officer _____, let me show you the item marked as State's Exhibit #____. Do you recognize it?

What do you recognize it to be?

How do you know it is the item found at (address)?

Why did you take custody of the (item)?

Where in the house did you find the ______?

Is it now substantially in the same condition as it was when you took custody of it?

(need to resolve any inconsistencies)

Does it appear to have been altered or tampered with?

After you took custody of exhibit ____, what did you do with it?

(The officer may have been tagged the item into evidence or given it to another officer. If so, the prosecutor will need to ask more questions).

Thank you Officer ______,

Exhibit: Crime scene diagram

Questions regarding a crime scene diagram

- Note how much detail the prosecutor goes into to get a crime scene diagram admitted into evidence. The questions are generally the same every time; indeed, some prosecutors follow a script. There's no need to reinvent the wheel.

Pleases state your name.

How are you employed?

How long have you been so employed?

What are your duties as such?

Questions Relating to the Crime Scene Diagram

Were you on duty on _____?

Did you have occasion to participate in the investigation of this case?

Where did you go to assist in the investigation?

Did you prepare a diagram of this location?

<u>Questions Pertaining to the Admissibility of the Crime Scene Diagram</u>

Officer, I show you what has been marked for purposes of identification as State's Exhibit _______

Do you recognize this exhibit?

How are you able to do so?

When was the exhibit prepared by you?

Where was the exhibit prepared by you?

How was it prepared?

Is it drawn to scale?

Does it accurately reflect the relationship of the objects shown to each other?

Are distances and directions shown?

Is this exhibit in substantially the same condition as when you originally prepared it?

Are there any material alterations or deletions?

State will move to have the exhibit admitted into evidence

JUDGE: State's exhibit A will be admitted into evidence.

<u>Questions about the Crime Scene Diagram Itself</u>

With the Court's permission, I would like to have the officer step down and explain the diagram to the jury.

Have the officer point out significant features of the diagram.

Thank you Officer. Please return to the witness stand.

State: Your honor, I'll pass the witness over for cross-examination.

<u>Exhibit:</u> **<u>A photograph taken by an officer</u>**

<u>Questions identifying the witness</u>

Please state your name

How are you employed?

What are some of your duties as a law enforcement officer?

What training, if any, do you have in taking photographs?

<u>Questions relating to the specific photograph in question</u>

Did you have occasion to be working on ____(date)?

Did you participate in the investigation of this case on that date?

Were you at a residence located at ______ on that date?

What did you do?

By whom were you requested to take photographs?

Were photographs relating to this case taken on that date?

What area or areas did you photograph?

What type of camera did you use?

Questions Qualifying the Photographs for Admissibility

I show you what has been marked for purposes of identification as State Exhibit's _____.

Do you recognize this exhibit?

How are you able to do so?

Here the witness can explain that he or she recognizes the scenes in the photographs.

When was the photograph marked State's Exhibit ____ taken by you?

Does this photograph fairly and accurately depict the scene as it appeared on the day it was taken?

Are there any material alterations or deletions on the photograph?

Your Honor, I wish to offer State's Exhibit ____ for admission into evidence.

Judge: It will be admitted.

State: Your Honor, I'll pass the witness over for cross-examination.

Evidence: Officer testifying as an expert on automobile accident reconstruction

- Note how meticulous and detailed the following questions are. Sometimes direct examination can seem tedious but good questioning by the prosecutor can help draw a picture, tell a story. It can also preclude or overcome objections by the defense attorney. A witness who is qualified as an expert can give an opinion once he or she has been qualified as an expert.

Please state your name.

What is your occupation?

How long have you been so employed?

Were you so employed on ______?

Have you attended any special schools connected with your work? (accident reconstruction)

Will you please name some of the specialized schools that you have attended?

When did you attend these schools?

How long were the schools that you attended?

What did the training consist of?

Were you tested in any manner to determine your degree of proficiency in this area?

Did you successfully complete this course of instruction?

Were you issued a certificate, diploma, or other evidence of such completion?

Since the completion of your training, have you had occasion to investigate accidents concerning vehicles?

Approximately how many times?

Have you testified previously in court about automobile accident reconstruction?

Approximately how many times?

STATEMENT: At this time, your Honor, I would move this court to qualify ______as an expert witness in the field of automobile accident reconstruction.

JUDGE: _____ will be allowed to testify as an expert witness in automobile accident reconstruction.

- Once the court "qualifies" an individual as an expert, that person can give an opinion. First, however, we need to go into more detail as the following demonstrates:

Did you have an occasion to investigate an accident that occurred on ___ at _____ location?

NOTE: May wish to have witness do a diagram.

What did you observe when you arrived at the scene?

- Number of vehicles?
- Location of vehicles?
- Angle of vehicles?

Did you observe any physical evidence indicating the direction of the vehicles?

- Physical evidence, such as torn trees, signposts, or fences?

Did you observe any skid marks?

- Measurement of skid marks
- Direction of skid marks

As a result of your investigation, as you have related through your testimony, were you able to form an expert opinion as to the:

- Speed of the vehicles?
- Direction of the vehicles?
- Which vehicle was at fault?

Thank you, no further questions.

State: Your Honor, I'll pass the witness for cross-examination.

Evidence: Officer testifying at DWI Jury Trial

Almost every officer, sometime, will testify in a DWI trial. These trials tend to be as difficult as felony cases. One reason may be that many people have done the same thing as the offender but simply didn't get caught. Despite all the publicity, there is still some sympathy for DWI offenders.

- These questions relate to initial observations of a DWI offender prior to the field tests.
- Note how detailed the questions are. This is because we want to draw a picture for the Jury. Also, we want to cover all bases. A question not asked may become a major point of contention later on in the jury room.

Preliminary questions (jurisdiction, marked vehicle, uniform, on duty)

What is your name and occupation?

How long have you been so employed?

Were you employed on (date of offense) of this year?

Directing your attention to that day (or night) and the (time of offense), where were you?

City? Country? State? (want to establish jurisdiction/venue early in questioning)

Were you on duty on that time?

What were you wearing? (uniform, wearing badge of office)

What kind of vehicle were you in? (police car)

What identification or markings was there to suggest this was a police vehicle?

(**note** that we're establishing officer in uniform, marked vehicle early in the questioning)

Observations of vehicle prior to stop (what drew officer's attention to vehicle)

Did you observe anything out of the ordinary at this time?

Will you describe the vehicle which you observed at this time? (a car)

(**note:** once it has been identified as a car, it's okay to call it a vehicle)

What drew your attention to this vehicle? (weaving)

How many times did the vehicle cross the center lane?

Where did you observe the weaving occurring?

Where was your vehicle in relation to the car you observed?

Was there any other traffic present? If so, please describe traffic.

What was the speed of the car you were observing?

What is the posted speed at that location?

What did you do next? (engage emergency equipment)

Approximately how long did it take to get the vehicle stopped?

Approximately how much distance was covered between the time you first attempted to get the defendant to stop his vehicle until that was finally accomplished?

What was his driving like after you engaged emergency equipment?

Describe the position of the vehicle when it was stopped.

After the defendant was finally stopped, what did you do next? (approached vehicle)

<u>Identification of driver</u>

Do you recognize the driver of the vehicle in this courtroom now?

Please describe and point him out for the jury.

> State: I would like the Court to note that Officer ____ has identified the defendant as the driver of the vehicle.

> (**note:** this is another one of those things that must be done.)

<u>Observations of Defendant after vehicle is stopped</u>

How close to the defendant were you when he was in the driver's seat?

What did you observe as to his facial features? (bloodshot, watery eyes)

Did you notice any unusual odor? (yes)

What was that odor? (alcohol)

Did you have occasion to talk with the defendant at the scene? (yes)

Will you describe his speech for us? (slurred speech)

> **Note:** This is a good time to get into questions and answers and volunteered statements by the defendant.

What did you ask the defendant to do? (asked for a drivers license)

Describe his efforts to get his drivers license. (fumbled around trying to get his license)

Did you ask him to get out of his car?

Please describe for the Jury his exit from the car?

> NOTE: First question was "Did you ask him to <u>get</u> out of his car. Next, Please describe for the Jury his exit from the car. Any preference for one word (get out) over another (exit)?

<u>Observations upon getting out of the vehicle</u>

What was the state of his clothing?

What was his attitude?

Was there anyone at the scene besides you and the defendant?

Did you observe the defendant walk?

From what distance?

Would you describe for the jury the way he walked?

Would you describe the defendant's balance? (hanging onto the car for balance)

As you observed him, did he appear injured in any way?

Did he complain of any injuries?

Did you ask him if he had any injuries?

What did he say?

<u>Continue with field test observations and breath alcohol machine observations</u>

<u>Questions for an officer to refresh his or her memory</u>

Can you recall the license plate number of the vehicle you stopped? (no)

Do you know of anything that will refresh your memory? (looking at the police report)

STATE: Your Honor, I wish to approach the witness. (granted)

I will show you State's Exhibit ____and ask if this is your police report.

Would looking at the police report refresh your recollection?

STATE: Your Honor, I would like to show the police report to the witness to refresh her recollection. (granted)

Please read State's Exhibit ____and tell me whether it refreshes your independent recollection of the license plate number (It does)

What do you recall?

<u>Conclusion on Direct Examination</u>

- Although direct examination does not have the drama or excitement of cross examination, this is where the State makes it case. Slowly, calmly, we want to draw a picture for the jury.
- It gives the State's witness a chance to come across as professional and competent.
- After the witness has testified on direct examination, the defense attorney will have an opportunity for cross examination.

<u>A BRIEF WORD ABOUT EVIDENCE</u>

- One could get the impression that direct testimony is simply the prosecutor asking a witness questions and the witness telling a story. But we forgot one thing: there are all

kinds of interruptions going on. Someone – the defense attorney - doesn't want the evidence to be admitted.

EVIDENCE OBJECTIONS

Two ways to suppress evidence: Prior to trial and during trial

- Some motions to suppress evidence are made prior to trial. For example, a motion to suppress evidence because of improper search and seizure or an involuntary confession. But many objections are made during trial, while a witness is testifying.
- As a prosecutor, whether an officer or attorney, knowing what kind of objections to expect, understanding what they are, will help us present our cases more effectively.
- We will now go through some of the more common evidence objections. The rules of evidence will be noted but we'll try to understand what these objections mean in plain English. But first a look at some basic guidelines.

How does a lawyer make an objection?

If there is something favorable for the State, the prosecutor will want it admitted as evidence. The defense attorney, for a good reason, will oppose this. Example:

- The breath alcohol test (bat) card is .20. The prosecution wants the card admitted.
- The officer has testified that the defendant had blood shot eyes, slurred speech, and was swaying and wobbling. He had trouble getting out of the car. When he took the field tests, he fell down.
- The breath card is key evidence. The Jury wants it, they expect it. The prosecutor seeks to introduce it. Suddenly the defense attorney screams, "OBJECTION!"
- The Judge will decide what evidence comes in (admissible) and what evidence won't come in (inadmissible). At trial this is one of the most important things a Judge does – deciding what evidence comes in and what doesn't.

Objection overruled – what happens now?

Objection sustained - will the breath card come in?

Trial by Objection

- Some lawyers object every chance they can. There are different reasons for this but sometimes it's to throw a witness off balance, to shake their confidence. How should a witness respond to this?

Physical evidence v. testimonial evidence

- Examples of physical evidence would be bullets, ski masks, photographs, weapons, bank records. Testimonial evidence refers to people testifying. Many rules of evidence apply when someone is testifying.

Note for officers:

The following section on evidence objections is probably more appropriate for prosecuting attorneys. Officers may wish to skip this section.

On the other hand, especially if you go to trial a lot, you may find it interesting. And when you do testify, it will help make you a better witness.

RULES OF EVIDENCE

Introduction

In every trial there are certain rules of evidence and objections that are raised again and again. We will now review some of these rules of evidence.

Evidence Rule 11-102. Purpose of Rules of Evidence

NOTE: Think of the Rules of Evidence as being similar to rules in an athletic game.

As in football or baseball, we need rules or we could never play the game.

The purpose of the Rules of Evidence is to:

- Secure fairness in the administration of justice.
- Elimination of unjustifiable expense and delay.
- We will now discuss a few of the rules and objections you're likely to hear.

ARTICLE 4: RELEVANCY AND ITS LIMITS

- "Objection, Your Honor, that's irrelevant!" This objection is raised quite often.

Evidence Rule 11-401. Definition of "relevant evidence."

- "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- Simply put, will the evidence assist the jury in resolving factual disputes? The road conditions on a particular day may be a relevant fact in a DWI case but completely irrelevant in a narcotics case.
- We mentioned shadow defenses before. In a DWI case, a defense attorney may start asking about the arresting officer's behavior after the traffic stop was made. Is this

relevant? The prosecutor may wish to ask the court what this has to do – is it relevant? - to whether the defendant was driving while intoxicated or not.

Evidence Rule 11-402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

- Since the State has the burden of proof in a criminal case, it is in our interest to bring in as much evidence as possible. Rule 402 is helpful in that it encourages the admission of evidence but it also provides safeguards against the admission of all evidence. This rule works for both the state and defense.
- An officer testifying at a DWI trial. Should the following be admitted:
  Academy grades? Internal Affairs file? A recent divorce?
  Is this relevant? (no)

Evidence Rule 11-403 Exclusion of relevant evidence on grounds of prejudice, or waste of time.

- Although relevant, evidence may be excluded if it is substantially outweighed by the danger of unfair prejudice. A defense attorney may state, "Objection, prejudicial!" The prosecution would respond that the standard is not that the evidence is prejudicial but that it's "unfairly prejudicial."
- Example: A person has been stabbed and the ADA wants to introduce pictures of the victim taken right after the stabbing. Defense attorney objects that this it's prejudicial. Usually, not always, the pictures will be admissible as an accurate reflection of what happened.

Evidence Rule 11-RULE 413: Sex crimes; testimony . . .

- A victim of rape wants to bring charges. Defense attorney argues this is a case of consensual sex and wants to bring up her past, including other affairs. Should the victim's sordid past come in? Let's look at the rule.
- Also known as the rape shield law. Evidence of the victim's past sexual conduct, . . . or reputation for past sexual conduct shall not be admitted unless, and only to the extent the court finds, that evidence of the victim's past sexual conduct is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Conclusion on relevancy

We do not want evidence that is misleading or so prejudicial that the jury cannot make a fair and impartial decision. If evidence is clearly not relevant, we should not attempt to introduce it at trial.

ARTICLE 6: WITNESSES

Evidence Rule 11-603 General rule of competency

- Every person is competent to be a witness except as otherwise provided in these rules.

Evidence Rule 11-602 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 . . .
- This rule indicates why you can't testify as to what others saw and heard. The hearsay rule also addresses this.

Note:

Sometimes a witness gives a statement to officer but is unavailable for trial. Unless there is an exception, we cannot use the statement of the witness at trial.

Evidence Rule 11-603 Oath or Affirmation

.

- Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation, administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.
- A four year old sees a crime. A mentally retarded person is a witness. Can they testify? The answer is to be found in competency and that will be decided by the Court. The person testifying must have the mental capacity to accurately perceive, record, and recollect impressions of fact. The attorneys will argue competency, usually before trial.

We will now look at how to ask questions about the credibility of witnesses. A person may take the stand and tell a bogus story. We want to show the Judge and Jury that the person is not being truthful. In other words – and this is another word for the same thing – we want to impeach the witness. We can do this in a number of ways. For example:

- prior inconsistent statement
- prior convictions
- for guidance for using prior convictions, we need to look at the next rule of evidence.

Evidence Rule 11-609 Impeachment by evidence of conviction of crime

- We can mention prior convictions but we have to be careful. This rule puts some limitations as to when we can use prior convictions.
- First things first. We can never mention a person's prior conviction unless they take the stand. This is why some defendants do not take the stand. A defendant who has numerous felony convictions, which is admissible only if he or she takes the stand, may choose not to testify for that reason.
- If a defendant does not take the stand, we cannot make any reference to a possible criminal record. It follows that an officer cannot refer to a mug shot; it's better for an officer to say that the defendant's identity was learned through investigation.
- Nor can an officer say, "I knew him before he went to prison." Giving the jury the impression defendant has a criminal past can lead to a possible mistrial.

<u>Rule 11-609</u>:

For the purpose of attacking the credibility of a witness:

- For witnesses other than the accused, can use prior felony convictions or any crime involving dishonesty or a false statement.

(1) evidence that an <u>accused</u> has been convicted of such a crime shall be admitted but the court will consider its prejudicial effect on the accused.

ARTICLE 8: HEARSAY

"Objection, Your Honor, hearsay!"

One thing that is distracting is when an officer is testifying and suddenly the defense attorney jumps up and shouts, "Objection, hearsay!" Even more disconcerting is when the Judge sustains the objection, turns to the officer and says, "Now, Officer, just tell us what you observed. Please continue."

This is a good time to learn what hearsay is.

<u>Evidence Rule 11-801 (c) Definition of Hearsay</u>

- "Hearsay" is a statement, other than one made by the person testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.
- If you're testifying, it's not hearsay. But if you mention what someone told you, and you're offering it for the truth of the matter asserted, it's hearsay.
- The reason hearsay is frowned upon is that it is presumed to be unreliable and not trustworthy. Also, a person has a right to confront their accuser. If one person could testify as to what they heard from another, the opposing counsel would not have an opportunity to cross examine the person who made the statement.

- Example: If an officer talks to a civilian witness, and the witness tells the officer that the witness saw defendant buy some dope, a hearsay situation has been created. The officer will not be able to testify as to what the witness told him or her. This is because the officer would then be testifying about what the witness said out of court in an effort to prove that what the witness said was true.
- But there are exceptions where a statement made by someone else can be admitted, although technically it's hearsay (an out of court statement). Going over a few of these exceptions will give you a better understanding of hearsay.

Some exceptions where hearsay is admissible

Evidence Rule 11-801 (D) (2)   Admission by party-opponent

- If a **defendant** made a statement to you, out of court, you can testify as to what the defendant told you. But if the defendant had the opportunity to make a statement and refused to do, one cannot comment on his or her silence

Evidence Rule 11-804(B)(2)   Dying Declaration

- By noting this exception, we can better understand what the hearsay exception is all about. A victim has just been shot, believes he is dying, and tells another who shot him. The victim then dies. The person who heard the statement can testify as to what the victim told him. A dying declaration is considered reliable and trustworthy because it is felt that a person who knows he or she is going to die is going to tell the truth..

CONCLUSION ON HEARSAY

Unless there is an exception, hearsay – what someone tells you – will be inadmissible because the defense attorney is unable to confront the witness.

CROSS-EXAMINATION

- Whether watching a movie or a television courtroom drama, cross examination is often the highlight of a trial. Both prosecution and defense attorneys use cross examination. This is where an attorney will challenge the testimony of a witness who just testified. It's an opportunity to note inconsistencies (falsehoods or mistakes) of witnesses.

BASIC THINGS TO KNOW ABOUT CROSS-EXAMINATION

- We have a strong case and there is no question that the defendant is guilty. So that means one of two things: either the defense witnesses (including the defendant) are

mistaken or not telling the truth. We already have (through direct examination) made our case. Now we need to challenge the credibility of the defense witnesses.

- The initial strategy might be: What is it that the witness must concede which helps my case or, by denying it, makes him look foolish or dishonest?
- Cross examination differs from direct examination. In direct examination the information flows from the victim as a result of open-ended questions. In cross-examination the information is introduced by the prosecutor and is admitted or denied by the witness. The prosecutor can ask leading questions suggesting an answer. A typical question begins with, "Isn't it true . . .?"
- Seldom does a witness or defendant admit they're lying or confess to a crime. Prosecutors, rather than going for a knockout punch, can more effectively use cross-examination to make certain points that favor their position. The significance of these points can later be explained in closing argument.
- Using cross-examination to go for the payoff answer in cross-examination can sometimes backfire. Example: Question: "And you shot him in revenge, didn't you?" Payoff answer: "Yes." Probable answer: "No I shot him in self-defense." Save a payoff answer for closing argument: "You know why he shot him, ladies and gentlemen. He shot him for revenge . . ."

<u>HELPFUL TIPS FOR PROSECUTOR DURING CROSS-EXAMINATION</u>

- The demeanor and tone of the prosecutor is very important. Your goal is to seek the truth but the jury must have confidence that you're being fair and honest in doing so.
- Beware of taking too much control. It may appear to be an interrogation.
- Be wary of asking questions that you don't know the answer to. Usually we have an idea of what the defendant will say. If we don't know, however, we may get a surprise – an explanation, an excuse – that is difficult for us to respond to.
- Do not ask questions beginning with the word "why." This gives the defendant an opportunity to give an explanation or excuse to justify what they did.
- Some lawyers suggest that the prosecutor should lag behind the jury in expressing outrage with a defense witness to preserve that sense of fairness with witnesses. When the Jury has reached the point of exasperation and disbelief with a defense witness, the prosecutor can catch up in outrage.

- But sometimes we get the hostile or evasive witness. You may wish to repeat the question or follow up by using one or more of the following control tactics: “Is that a yes?” “Mr. Smith, did you understand my question?” “Then would you mind answering it?” “Ms. Gomez, let’s focus on . . .” Mr. Marquez, would you like for me to repeat the question?” “Are you finished?” “Then let me ask you again . . .” “Mr. Jones, is there a reason you don’t want to answer my question?” “Ms. Romero, I’m sure the court (or Jury) would appreciate it if you would answer my question.”
- If a witness gives you an answer that you didn’t expect or wanted, and you don’t have a follow up response, do not argue with the witness. Not only does it impact on you adversely, it also can invite the following, “Objection, your Honor, counsel is being argumentative!”
- If the arrest or incident went smoothly, which happens often, emphasize how fairly the officer treated the defendant.
- Prosecutors should ask the defendant about having had the opportunity to listen to other witnesses’ testimony and having time to get his or her story straight.
- What areas to touch on cross-examination? Some prosecutors go for the “shotgun” approach and virtually rehash the entire case on cross-examination. Sometimes it’s more effective to make a few major points than to try to hit on a whole bunch of points.

Prosecutor cross-examination of a Defendant in a DWI case

On March 17th, 2---, at approximately 3:00 a.m. you were driving.

- (the defendant’s answer to this question proves the first element of the crime, that the defendant was driving)

your car.

a car you drive all the time.

a car you are obviously familiar with.

on a road you were familiar with.

- (if the defendant was not familiar with the road he was on, you can use it to your advantage by noting that a prudent person operates his or her car more carefully on unfamiliar roads.)

it was dark.

you were tired.

So, as a careful and responsible driver, you drove carefully.

- (this is an important question in cases involving a driving pattern.)

Officer Estrada pulled you over.

You didn't know Officer Estrada.

You have never seen her before.

She had no reason to know you.

Or your car.

There was nothing wrong with your tag.

The lights operated properly.

- (this line of questioning is designed for cases of bad driving or claims of officer bias; we're making the point that the officer had no reason to pull the defendant over but for the defendant's poor driving.)

You testified that you had a couple of drinks before then, correct?

You knew that your breath smelled of alcohol?

Officer Estrada asked you if you had been drinking.

You told her "yes."

You told her you had two beers.

- (the defendant's answers to these questions shows defendant had been drinking)

Officer Estrada asked you to step out of the car.

You realized she thought you might be impaired by alcohol.

Officer Estrada asked you to perform some field sobriety tests.

You knew she would decide whether or not to arrest you based on your performance on the field sobriety tests.

You didn't want to be arrested.

You knew how important your performance on the field sobriety tests would be.

You agreed to do the tests.

Officer Estrada told you how to do the tests properly.

And you listened carefully because you didn't want to be arrested.

Officer Estrada demonstrated the finger to nose test to you.

You watched her carefully.

Because you didn't want to be arrested.

Officer Estrada asked you if you understood her instructions.

You told her you did.

You performed the test.

You did the best you could.

Because you didn't want to be arrested.

Officer Estrada demonstrated the walk and turn test to you.

You watched her carefully.

Because you didn't want to be arrested.

Officer Estrada asked you if you understood her instructions.

You told her you did.

You performed the test.

You did the best you could.

Because you didn't want to be arrested.

NOTE: This give the prosecution a good chance to establish the elements of the crime and also that Defendant had an incentive to pay close attention and do well on the field sobriety tests. In closing argument the prosecution will note how poorly Defendant did on the tests.

Sample cross-examination of a defense lay witness in a DWI case

If a defense witness testifies that the defendant was not impaired, you should cross-examine the witness about the basis for this testimony. Ask questions about:

- prior opportunities to observe the defendant drinking or taking drugs.
- prior times seeing the defendant impaired.
- what the defendant looks and acts like when the defendant is impaired.
- the defendant's tolerance levels.

Question the defendants' friends about their participation in the defendant's drinking or taking drugs and their own state of sobriety.

Sample cross-examination of former peace officers in a DWI case

Many defense experts in field sobriety exercises and breath testing are former peace officers. When cross-examining one of these experts, consider the following:

- the number of times the witness (former peace officer) relied on the tests to establish probable cause, make an arrest, and testify in court about a defendant's impairment,
- the number of other officers the witness taught to use the tests, and
- the witness's failure to express his or her concerns to former supervisors, the state or the courts about the invalidity of the tests.

Suggestions for an officer or state's witness being cross-examined

Note:

We first looked at cross-examination from the viewpoint of a prosecutor. We will now approach cross-examination from the viewpoint of an officer being cross-examined.

- You have just testified as a witness and you hear the prosecutor say, "Your Honor, I pass the witness. The prosecutor sits down and the defense attorney approaches the podium. The defense attorney is there for a reason: To challenge your credibility.

SUGGESTIONS:

- Knowing some of the things you may face on cross examination will help you understand the courtroom/cross examination environment.
- NOTE: These suggestions apply not just to officers but to all witnesses.
- Badgering the witness. If an attorney is badgering a witness, the prosecutor should object, "Objection, Your Honor, badgering the witness." But sometimes the prosecutor, for different reasons, doesn't object.
- When an attorney seeks to provoke you, always be professional. That means not losing your temper or arguing with the defense attorney. But why is the attorney trying to provoke you? What is their motivation?
- Human nature says we should argue and defend ourselves. But if we do, the defense attorney has accomplished their goal: to make the Judge or Jury believe we're not professional, fair and impartial.
- Being asked the same question over and over again. At this point, the prosecutor should say, "Objection, Your Honor, this question has been asked and answered." An officer might say, "I think I've already answered that but my answer is . . . "
- Why would a defense attorney do this? One possibility is that in time you may give a different answer. Another possibility is that the defense attorney may wear you down and you'll become irritated and argumentative.
- Human nature would suggest we want others to believe that we are honest and capable. That certainly is an image that an officer wants to project to a Judge or Jury. It follows that the defense attorney will be questioning or challenging your integrity and competency.

- One question might be, “Have you discussed this case with the prosecutor?” The implication is that the prosecutor “coached” you as to what to say. Yes, you did talk with the prosecutor. And you also reviewed your statement and the police report as well. But the testimony you give is your own testimony.
- Beware of questions asking if you are willing to swear to your version of events. The implication to the jury is that you’re simply talking and that you’re not serious about this. A proper response might be that you were “sworn in” by the Judge when you raised your right hand to tell the truth and that’s all you’re going to do (tell the truth).
- Usually you’re sitting in the hallway and don’t get the chance to watch other witnesses testify. The defense attorney may note that your answer is different from a previous witness. And then the next question: was the previous witness telling the truth or lying? One witness is not supposed to comment on the credibility of another witness but the prosecutor doesn’t always object.
- What might your answer be? You might indicate that you are telling the truth based upon your observations. You have no way of knowing what another person observed and cannot speak for them.
- Beware of questions asking why you don’t like the defendant. A proper response might be that you feel sorry for any person who gets in trouble but that you also have an obligation to tell the truth, to enforce the law, and a Judge or Jury will have the final say as to defendant’s guilt.
- On cross examination do not keep looking over to the prosecutor’s desk when you’re not sure of an answer.
- Do not get into a “battle of wits” with the defense attorney. It’s important to meet jury expectations, even though they may be based upon television or the movies. Often a jury expects a defense attorney to be dramatic and hard hitting; they <u>always</u> expect an officer to be professional. Being “cute” with the defense attorney, or acting snippy, will only diminish your professionalism.
- A defense attorney may try to rattle you or shake your confidence by asking, “Are you sure about that?” If you are sure, say so. If not or if you have doubts about something, the appropriate thing is to say so.
- One way to challenge your credibility is to go after your competence. For example, suppose someone broke into a car at night on the driver’s side. As a responding officer, you may have taken fingerprints from the driver’s side door. But the defense attorney

may ask, “Isn’t it true that you could have taken fingerprints from the other doors?” “But you didn’t do that, did you?” “Your department has the capability to take DNA samples, doesn’t it?” “But you didn’t do that, did you?” Right now the jury is wondering exactly what kind of officer we have here. How do you respond to this kind of questioning?

- Yes or no! Answer yes or no! But sometimes a “yes or no” answer isn’t enough. A few humorous examples follow: “Officer, do you still rob houses?” “Officer, when did you stop beating your wife?” Whatever answer you give, you lose.
- What can an officer or witness do in a “yes or no” situation? The sequence for questions is direct-cross-redirect. You might answer, “yes, would you like me to explain?” The prosecutor will come to your aid here; on redirect, he or she will ask the same question and you’ll have the opportunity to give a complete answer.
- What do you do when a defense attorney catches you in a mistake? For example, you just testified that you stopped a green car but in the police report you said it was a blue car. Now what do you do? Are you going to get defensive? Are you going to admit that you made a mistake? How would you handle this?
- A suggestion here: Admit you made a mistake. “I made a mistake. I though it was a green car but if my police report says it was a blue car, I’ll go with my report.”
- What if you’re asked a question that is confusing?

  You might want to respond, “Will you please repeat the question?” or “Will you please clarify the question?” If the question is confusing, the Judge or Jury will appreciate your asking for clarification. You don’t want to end up trying to guess what the answer is!
- Be careful of compound questions. This is when one or more questions run together so that an answer to one becomes an answer to all. The trouble is that either by accident or design, the witness may be tricked into saying something that he or she didn’t mean. The prosecutor should advise the Court (Objection, Your Honor, compound question!) that the witness has just been asked more than one question and it is unclear which question the witness is supposed to answer. After the objection, the attorney will rephrase the one question into multiple questions.
- What if an attorney misunderstands or misquotes your testimony?

  Here we may wish to give the attorney the benefit of the doubt. The attorney may be confused. At the next opportunity you may wish to say, “No, what I meant is” or “What I said is. . . “

- Great majority of defense attorneys are decent people who are representing their clients. But we do come across the attorney who is condescending and really believes that he or she is a lawyer, a professional, and you're only a police officer. That person is now questioning you and his or her attitude not only shows but is grating on you. You're on the stand: how do you handle this situation? (stay cool, stay professional)
- You've been on the stand for some time and are feeling uncomfortable. What might you do? You might ask for some water. Judges understand that testifying can be an ordeal and tend to be accommodating.
- One way to improve courtroom testimony is to watch other trials, to watch other officers testify, and learn from them. Also, if you have an opportunity to sit in a trial with a prosecutor, you are strongly encouraged to do so.

REDIRECT

The state will call you first and ask questions on direct examination. Next, the defense attorney will ask questions on cross examination. If there is confusion on cross examination, the state will have another opportunity to ask you questions on what is known as Redirect.

- While the defense attorney is doing cross examination, the prosecutor should be taking notes of those areas where his or her witness may have left a confusing or negative impression. On redirect, the prosecutor can attempt to clarify those areas.

MOTION FOR A DIRECTED VERDICT

After the State has presented its case, and the last of its witnesses had testified, the prosecutor will turn to the court and say, "Your Honor, the State rests." That means all the evidence has been presented.

At this time the defense attorney will make a Motion for a Directed Verdict. The defense attorney will argue that the State's evidence is legally insufficient and that the case should be dismissed. If the Court grants the motion, the trial is over. If the Court denies the motion, we go to the next step: Closing Argument.

CLOSING ARGUMENT

Has the following format:

State - Closing Argument

Defense - Closing Argument

Rebuttal - State has chance to rebut points made in the defense closing argument. This is

not a second closing argument; it's limited to rebut arguments made by the defense attorney.

- Closing argument is different from opening statement. In the opening statement, we provided a roadmap for the Judge or Jury. By the time of closing argument, however, all of the evidence has been presented and we're allowed to comment on the evidence. Closing argument generally are more exciting than the opening argument.
- Avoid lawyer talk. "I submit . . ." "this conjecture . . ." "State's exhibit number one . . ."
- Prosecutor in closing argument shouldn't simply repeat facts. This is the time to give conclusions and inferences from those facts. The Jury already has the facts. The prosecutor can analyze that message as well as motivate the Jury to act in accordance with the State's theory and return a guilty verdict.
- It's important to begin (and finish) strong. Example: "You now see how revenge was acted out on the victim. This murder was the defendant's revenge . . ." Example: "You now know that the defendant sitting across from you is a murderer."
- Rhetorical questions can be useful in closing argument. For example, the defendant may argue self defense. Examples of visual rhetorical questions might be: "Was the defendant in reasonable fear for his life when he hit the victim in the head with the 2x4 the first time?" Was the defendant in reasonable fear for his life when he hit the victim in the head with the 2x4 the second time?" "Was the defendant in reasonable fear for his life when he hit the victim in the head with the 2x4 the third time?" Because no answer is provided, there is a psychological tendency on the part of the jury to provide the answer.
- Use visual aids – charts, diagrams, etc. to assist the Jury.
- An important jury instruction deals with credibility. Prosecutor may wish to use phrases to focus attention on the defendant's testimony. Example: "Did you notice the sudden amnesia which struck the defendant when I began asking questions?
- Use descriptive terms for certain witnesses. Examples: "the witness with the quick answers . . .", "mama had an answer . . .", "witness who didn't want to answer", etc.

<u>FINISH CLOSING ARGUMENT ON A HIGH NOTE</u>

- Some thought should be given to how a prosecutor finishes closing argument. Example: ". . . and Mary Smith told you she still wakes up at 3:00 in the morning – the time the defendant invaded her home and raped her. It is for you to return the verdict that truth

dictates and justice demands. The verdict that will allow her to finally sleep through the night . . ."

- A prosecutor should finish on a high note. It should be clear that the prosecutor has passed that fairness entrusted to him or her over to the jury so that they can do the right thing to the right people for the right reason.
- Example: "Ladies and Gentlemen, counsel for the defendant told you that no one could come into this courtroom and say that the defendant committed this murder. But there is someone who can do that. More than one person can do that. You folks can do that . . ."

THE VERDICT

We need to wear our courtroom mask. When the jury returns a verdict, whether we agree or disagree, we are to show absolutely no emotion.

What we do after a bench trial is even more important. There are two sides to a trial and the Judge has to make a decision. Sometimes they will rule against you. It is tempting to make a facial expression, or mutter something to yourself. That would be a mistake. The Judge has to make a decision and your showing disagreement only makes the Judge's position more difficult. Even if the Judge rules against you, thank the Judge for his or her decision.

For the overwhelming majority of cases, the verdict will be Guilty or Not Guilty. Some people confuse this and think it means Guilty or Innocent. Actually, in legal terms, it means – and this is the actual verdict form in some states – Guilty or Not Proven. Sometimes it is helpful to talk to a Jury (or Judge) after a trial. The Jury may advise you that they believe the Defendant committed the crime but there just wasn't enough evidence. This can be a very good lesson for us; it may teach us in the future to bring in even more evidence to help prove a case.

Note to officers:

We're coming to a close. This course has been the Online version. If you have the opportunity to work with other officers, you may wish to have someone conduct a "moot court" or "mock trial" using the following scenarios.

SCENARIOS OR PRACTICALS

Class can do scenarios in the following areas:

- Shoplifting
- Drinking in Public

- Disorderly Conduct
- Prostitution
- And other areas that the class finds interesting. It is recommended that the class used pending cases (likely to go to trial) for the scenarios.

SCENARIOS CAN BE PRESENTED IN TWO DIFFERENT WAYS

Where the peace officer presents a case

First, do a case where the officer is the only witness. Next, do a more complicated case. Example: a shoplifting case with a loss prevention officer. This can involve an opening statement, direct exam, cross exam, and closing. Recommend using real cases.

Where a prosecuting attorney presents a case

Need someone to be the prosecutor and someone to be the defense attorney. Good opportunity to introduce exhibits (direct exam) and practice cross-examination.

EXAMPLES OF SCENARIOS

Make sure that the scenario is balanced and the verdict can go either way.

DWI SCENARIO

Facts:

Offender is stopped at 1:00 o'clock in the morning for weaving. Officer asks if she has been drinking and how much. She says she had six beers. She is asked to take a field test which she fails. She refuses to take a breath test.

Prosecution:

Six beers! Should be an open and shut case.

Defense:

Offender on the stand will admit she told officer she had six beers. However, the officer didn't ask when she had those beers. Turns out that she had them during Happy Hour and her last beer was over six hours previously.

Why did she fail the field sobriety tests? Turns out the officer didn't ask her about her bad knees. Also, her eyes were bloodshot because of allergies.

Use cases or scenarios where the verdict could go either way.

PROSTITUTION SCENARIO

Facts:

A young lady, dressed almost like a hooker, is standing on a sidewalk in an area well-known for prostitution. She waves a vehicle down. A pickup truck, with a male driver, gives her a ride but soon is stopped by an officer in a marked vehicle who saw the vehicle being flagged down. The office is aware that the female is a known prostitute. The driver says he knows she is a prostitute. The female says she was only getting a ride. Arrested and searched, the officer finds numerous condoms on the female.

Prosecution:

Looks like a strong case.

Defense:

Defendant may argue she left money for bus fare at home and was only getting a ride. She dressed the way she did because it was a hot summer day. And the condoms in her pocket? She was going to see her boyfriend that weekend!

Note:

Scenarios at this point can be not only educational but fun.

CONCLUSION

We have covered the trial experience from the beginning to its conclusion. If you're more comfortable approaching the trial process, then this class has accomplished what it set out to do.