

I N S I D E T H E M I N D S

Witness Preparation and Examination for DUI Proceedings

*Leading Lawyers on Preparing Clients for Trial,
Cross-Examining the Prosecution's Experts, and
Analyzing the Changing Role of Witnesses in DUI Cases*

2011 EDITION



ASPATORE

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Getting DUI Clients Ready for the Witness Stand

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Introduction

In the following pages, I hope to share some of my experiences and successes in the courtroom. There is no better place for a litigator to thrive than in the courtroom defending a client before a jury.

Debating the Client's Role as a Witness

Whether a client should testify is the classic law school and bar examination debate question. It depends on whether your case is a case of reasonable doubt or a case where your client was wrongfully arrested for a crime he or she did not commit. If your closing argument will be focusing on the deficiencies in the government's case against your client and the lack of evidence against your client, most practitioners advise their clients not to testify since a client's testimony may help the government's case. On the other hand, if your case is all about how your client's ability to operate a motor vehicle was not impaired by alcohol or drugs, how your client passed the roadside tests and was able to properly operate a motor vehicle, or how there is some other motive by law enforcement to exaggerate your client's alcohol consumption, your client should be testifying and considerable preparation and planning will be required before that testimony is given.

The client must always make the ultimate decision about whether to testify, and the practitioner should always counsel his or her client that it is their sole decision. Do not make that decision for your client. You can advise and counsel, but the final decision and the consequences for that decision must be left to the client. Considerable preparation must take place before a practitioner advises a client to testify in a criminal proceeding, and you should analyze carefully the chance for any impeachment by the government. Your goal is to have the client come across as sincere and accurate to the jury with their testimony.

Advantages Derived from Questioning

Many times the client is the only factual witness who can give evidence as to the cause of an accident. Many DUI cases take place after an accident has occurred and law enforcement officers are left attempting to piece together the events that led to the accident. In most cases, law enforcement's version

of the events leading up to the accident is not favorable to your client's legal ability to operate a motor vehicle. In these types of cases, such as single-vehicle accidents, striking wild game on the highway, and breakdowns alongside the roadway, your client is the only eyewitness to his or her ability to operate a motor vehicle immediately preceding law enforcement contact or testing. Your client's testimony is crucial.

In my opinion, all DUI cases benefit from a well-prepared client's testimony. The jury is left with a personal connection between the client and the charges leveled against the client by the government. It is much more difficult to convict a real and likeable person than a stranger on a jury instruction. Generally, the only cases in which I do not advise my clients to testify are those in which the entire trial theme is unadulterated "reasonable doubt" or the lack of the government to properly prepare its case against my client. I advise my clients not to testify when my entire trial theme will be the flaw in the government's substance testing procedures, the government has lost key evidence necessary to convict, or the government has failed to collect key evidence necessary to convict. I advise my clients not to testify when their prior criminal history would be devastating when impeached by the government (e.g., four prior DUI convictions), or when their personal demeanor and attitude would cause a jury to revolt against them as a person and disregard the defense themes for acquittal.

Preparing the Client for the Witness Stand

I believe clients should testify at their trials. Everyone serving on a jury tells himself or herself that if they were on trial in a similar situation, they would testify and set the record straight. When preparing my clients to testify, I start with taking my clients to the actual courtroom where their trial will be conducted. Many times, they have already been in the courtroom due to prior appearances or motion hearings. With some prior planning, it can be as simple as standing in the back of a courtroom after an appearance and pointing out to a client how the trial will unfold, where the client will be seated, where the witnesses will testify, and where the prosecutor will be seated. In cases in which the client demands (or can afford) more preparation, I will attend a DUI trial in progress with my clients. These are easy to attend because most jurisdictions have DUI trials on a routine basis.

I have found it very helpful for a client new to the criminal justice system to attend a few hours of someone else's DUI case to gain some general understanding as to how the process unfolds. Relieving the stress of the uncertainty of the mechanics of a trial will make a client a far better witness and participant in front of the jury or fact finder.

Shaping the Client's Testimony

After educating a client as to the courthouse logistics of DUI litigation, the next step in client preparation is to help shape their testimony so it is as persuasive and non-distracting as possible. Your client should know the facts of their case better than the prosecutor, arresting officer, or their defense lawyer. I make my clients fully study all of the evidence, reports, testing results, and discovery relative to their case. I make sure my clients fully understand how a breathalyzer works, why the waiting period is necessary for an accurate test, why substances in the mouth can and will affect test results, and why proper and routine calibration is required. I make sure my clients understand all of the steps for field sobriety tests, what the purpose of the physical test is, and what the law enforcement officer is looking for during the test. I generally make sure my client is the most educated DUI expert in the courtroom. This provides excellent support for a client during their testimony on direct examination and under cross-examination, and it greatly relieves a client's anxiousness.

When preparing for direct examination, the key is for the jury to regard the client as a human being instead of a defendant. The client must understand that the jury needs to see him or her as a real person and that it is okay to be nervous and scared to testify. The jury will relate to those emotions and attach emotionally to the client. I generally have the client practice taking deep breaths before they start their examination, and I make sure to observe and mitigate any distracting mannerisms the client may have. Many clients, due to nervousness, will rock in their chairs, fidget in their seats, look at the ceiling, and look down or act strange when under the pressure of testifying. It is important for the practitioner to observe these nervous tics before the actual testimony and help the client get rid of these distracting mannerisms.

Preparation for Questioning

The next step is going over the actual questions they will be asked. I never give a client a copy of my questions, but we rehearse and practice his or her answers many times. I never want a client to unknowingly give an answer that hurts their case or leads to a round of questions on cross-examination that hurts them. I also tell my clients that I will ask questions somewhat differently during their testimony and that I want their answers to feel fresh and not rehearsed to the jury. I ensure that my questions are short and easy to answer with simple answers. Sometimes complicated questions will lead to a horrible answer by a nervous client. You must prepare the client's questions very carefully, and decide whether to start the testimony right at the "good part" or with general and personal background and follow a chronological series of questions leading up to the gist of the case.

I prefer to start the client with an extremely limited personal introduction to the jury and then ask the client the million-dollar question. For example, I would jump right to the question the jury wants to hear. "Were you driving your car drunk on January 1 of last year?" "Did you obstruct the officer in any way from performing his duties on the night of January 1?" I then use a looping technique to backtrack to the beginning of the case and explain the client's side of the case to the jury. I have found this technique to be the most effective when communicating a client's testimony to a jury. Looping allows the practitioner to hit the most important facts early and up front and yet still build credibility with the jury later on follow-up questions. We also know that juries generally remember the beginning and end of a witness's testimony, and little of the middle. Looping gets the most important testimony to the jury right up front so they remember it. I usually end the client's testimony with the same questions I began with. "Are you confident that you were not driving drunk on the night of January 1?"

Attire and Language During Trial

It is important to discuss with a client prior to their day in court what exactly they are going to wear to court. I always make my client come to my office in the attire they plan to wear to their trial. Many times, a client's idea of what is appropriate for court is far different from what is actually

appropriate. Cultural differences between the jury and the client can be exasperated by a client's poor choice in clothing. Do not be shy or indirect with a client when it comes to their clothing. If the clothing is too sexual or revealing, or if the clothing is too dramatic and distracting for the courtroom, a strong response is appropriate from the practitioner.

I also prepare my client's speech and testimony by making sure they do not use street slang or ethnic slang during their testimony. It is important to counsel your client not to be distracting to the jury with what they wear or how they speak. The goal of direct examination is to provide credible testimony to the jury that can be easily understood and believed. Many clients use street slang and abbreviations that distract from a jury's processing of information and may alienate a jury. During the pre-trial meetings, a practitioner should be sensitive to the mannerism and speech of a client and should not shy away from discussing any potential problems.

Rehearsal Before Trial

It reflects poorly on a client's credibility if the direct examination testimony comes across rehearsed and polished. You should conduct a dry rehearsal with a client and make sure the client knows what questions are going to be asked, as well as the best way to answer a question. This not only alleviates the fear of the unknown for a client, but it also ensures that the client does not answer a question in a manner that is harmful to their case. I always begin and end every witness preparation session with instructing a client and witness to "always tell the truth." It is a dream answer for every defense lawyer when, under cross-examination, a client answers the opposing counsel's question of "What did your lawyer tell you to say?" with "My lawyer told me to tell the truth."

Preparation for Cross-Examination

I also prepare a client for cross-examination by ensuring that they know that he or she must speak to the prosecutor the same way they spoke to me on direct examination. If they answered my questions with "Yes, Sir" and "No, Sir," they must answer the prosecutor's questions the same way. I strongly advise a client to not show an attitude with the prosecutor and

absolutely remain calm and poised. An attorney who is good at cross-examination will likely use concession-based cross-examination techniques. This style of cross-examination is centered on creating simple, short, and direct questions to which a witness must admit. A good practitioner at cross-examination will start with easy questions that a client will have no trouble agreeing with, and then slowly and carefully lead up to more difficult questions. I make sure to practice this style of cross-examination with my clients to ensure they are not lulled into agreeing to every question asked of them.

I advise my clients to pay very close attention to the questions they are asked, and to never guess about an answer. If they do not know the answer, it is okay if they say, “I do not know.” I make sure my clients understand that they can ask the prosecutor to repeat or rephrase a question if they do not understand it, and if they were asked four different questions in one sentence, it is okay to inquire about which one they should answer. Above all, clients should not look over at their attorney when answering questions under cross-examination. It looks terrible for a witness to look to his or her attorney for help or to a family member in the audience when a tough question is asked on cross-examination.

Juries really want to ensure that someone has been aggressively questioned and confronted before finding them not guilty of an offense. Therefore, it is in the client’s best interest to be attacked and to gracefully survive that attack with strong, truthful answers the jury can believe. Like many of us, juries root for the underdog. Inappropriate and outrageously aggressive cross-examinations lead a jury to feel sympathy for a client on the stand who is at the hands of a merciless and inappropriate prosecutor. I will let my clients know that I will not come to their rescue and I will let the prosecutor beat up on them. In my experience, juries do not like that type of conduct by prosecutors, and it has a tendency to create sympathy from the jury. On the other hand, I tell my clients that if they are “lippy,” sarcastic, or anything but polite and respectful to the prosecutor, the jury will have the opposite reaction. In this situation, the jury will root for the prosecutor to “put the defendant in their place” and will not be sympathetic towards the client.

Complications for Clients

When a client answers a question for which he or she is not prepared, there can be a desire to take back the answer. This happens in every trial. It is important for you to discuss this situation with your client before it happens. A good practitioner will advise his or her client to remain calm, not panic, take a deep breath, and stay focused on the questions and answers. I tell my clients that no matter how bad they think they are doing on the witness stand, it is almost always never that bad in reality. You do not want your client to look like a “deer in the headlights” when they botch an answer or get a question for which you did not prepare. I advise clients to answer the unexpected question in a slow, methodical, and truthful way and act as if they were just questioned about what their middle name was.

The key to mitigating these complications is preparation, preparation, and more preparation. The more time you prepare your client to testify during the pre-trial stage, the more effective your direct examination will be and the better your client will do during cross-examination. Additionally, if the damaging points of a client’s case are handled on direct examination, the effectiveness of cross-examination will be greatly reduced. I am a strong believer in making sure every point of cross-examination is covered with a client on direct examination. If I do not draw an objection or scolding from the judge, I will many times actually turn my direct examination into an aggressive cross-examination on the key points of the government’s case. There is nothing better than having cross-examined your own client and helped him or her deliver good, believable answers before the prosecutor even starts questioning. All that is left for the prosecutor at that point is to ask the same questions that were just asked and successfully answered on direct examination. The jury has already heard the questions and answers before, and their impact is greatly reduced as a result.

Conclusion

My best advice for the practitioner is to always remain professional while conducting a direct examination or cross-examination. Save the drama for closing arguments. Treat witnesses with courtesy and respectfulness, and the jury will thank you for it—hopefully with a verdict in your favor. Do

not distract the jury with your mannerisms. Have a colleague or peer watch you conduct a hearing and give you some solid criticism on your mannerisms, speech quirks, or other physical attributes. When conducting a witness examination, it is not beneficial to have the jury distracted by a pen clicking constantly in your hand, the tapping of your shoes while waiting for an answer, slurred or quiet speech when asking questions, or the constant rubbing of your forehead, twirling of your hair, and so on.

Focus on the Important Fact

Select the most important fact the witness can provide on the stand, and then communicate that to the jury three times by asking three different questions that will evoke that fact from the witness. To highlight a great answer for the jury, stop your examination and slowly write the question and answer on a notepad. Let the court and the witness wait while you write down the information, and then read the question and answer back to the witness, emphasizing the important point. A good examination of a witness helps a jury understand and retain the substance of that witness's testimony that best helps your case. Ensuring that the jury retains the key facts or answers is very important, and then hopefully the members will use your favorable facts during their deliberations.

Advice for New Practitioners

Do not be afraid to take cases to trial. The best way to learn to litigate is to try cases. Also, watch as many trials as you can before you try your first case. Go to the courtroom and observe your peers, watch how a judge conducts *voir dire*, and study how a prosecutor against whom you will litigate handles a preliminary hearing or closing argument. Spend as much time in the courthouse as you can. Watching others will help you learn what to do and what not to do, and the strategies and tactics that are effective.

Key Takeaways

- Counsel your client that the decision to testify is his or hers alone.
- Advise your client not to testify when there is a flaw in the government's substance testing procedures, the government has

lost key evidence necessary to convict, or the government has failed to collect key evidence necessary to convict. If the client's prior criminal history will be devastating when impeached by the government, or when their personal demeanor and attitude will cause a jury to revolt against him or her, keep your client off the stand.

- Encourage a client who is new to the criminal justice system to attend a few hours of someone else's DUI case to gain some general understanding as to how the process unfolds.
- Keep your questions short and easy to answer with simple answers. Complicated questions will lead to a horrible answer by a very nervous client. You must decide whether to start the testimony right at the "good part" or start with general and personal background and follow a chronographic series of questions leading up to the core of the case.
- Be aggressive with your questioning. Juries really want to ensure that someone has been confronted before finding them not guilty of an offense. Therefore, it is in the client's best interest to be attacked and to gracefully survive that attack with strong, truthful answers the jury can believe. Like many of us, juries root for the underdog.

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Mr. Feldmann was a former trial and defense counsel in the US Marine Corps and a former prosecutor in Steamboat Springs, Colorado. He is a lecturer and instructor at the US Navy Justice School and with the National College of District Attorneys. He taught prosecutor trial enhancement training at the Navy Justice School and at Colorado Mountain College in the areas of criminal and constitutional law. He has extensive experience in representing federal and state law enforcement officers, police officers, and sheriff's deputies in criminal defense matters and law enforcement employment matters.

Mr. Feldmann received his JD from the University of Denver College of Law and is admitted to the Colorado Bar and the Colorado Federal District Court. He was named a 2007 “Colorado Super Lawyer” for being one of the top attorneys in Colorado. He was also named among the “Top 100 Trial Lawyers” by American Trial Lawyers in 2007. He is a member of the National Association of Criminal Defense Lawyers, the Colorado Trial Lawyers Association, and the American Association of Justice.



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