

SPECIAL TOPICS SERIES



**APRI**

American  
Prosecutors  
Research Institute

*Basic  
Trial Techniques  
for Prosecutors*

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# *Basic Trial Techniques for Prosecutors*

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# DEDICATION

Our efforts are dedicated to the hundreds of thousands of impaired driving victims and their families and the thousands of professionals and advocates working to alleviate the impaired driving problem.

This monograph is dedicated to the following individuals for their tireless efforts to promote traffic safety:

## ***Mr. John Bobo***

Mr. Bobo is the United States Department of Transportation's director of Drug and Alcohol Policy and Compliance. Mr. Bobo previously served as director of the National Traffic Law Center (NTLC). As NTLC director, Mr. Bobo was nationally recognized for developing partnerships between prosecutors and other traffic safety partners and expanding NTLC's scope. He also provided training and assistance to hundreds of prosecutors and law enforcement officers around the country, initiated the monograph series, published numerous articles and revised national training courses.

## ***Dr. Jack Richman***

Dr. Richman is a tenured full professor at the New England College of Optometry. He is an internationally recognized expert in optometry who has lectured around the world and published over 50 research and clinical articles and papers in professional journals and textbooks. Dr. Richman is a Standardized Field Sobriety Training (SFST) instructor and an associate Drug Recognition Expert (DRE) instructor who consults and works with the Massachusetts State Police, Massachusetts Criminal Justice Training Council, the New Hampshire State Police Training Academy and Institute of Police Technology and Management (IPTM). He also serves as the medical consultant to the International Association of Chiefs of Police (IACP) National Highway Safety Committee's DRE Technical Advisory Panel and as a police surgeon with the Marblehead and Yarmouth Police Departments.

***Sergeant Luis Taborda***

Sergeant Taborda is a 13-year veteran of the Miami Police Department (MPD). Sergeant Taborda specializes in DUI and crash investigations. He is a certified Intoxilyzer 5000R breath test operator and agency inspector and DRE. He is certified to teach officers about the Standardized Field Sobriety Tests (SFSTs), radar, traffic laser, driving and firearms. Sergeant Taborda is a recognized expert in DRE/DUI and traffic crash investigations. Sergeant Taborda is, and always has been, dedicated to DUI enforcement. Miami-Dade Mothers Against Drunk Driving (MADD) bestowed its highest award, the “William Craig Memorial Award,” to Sergeant Taborda in 1999, MPD gave him an “Administrative Award of Excellence” in 2000 and Citizens Against Drug Impaired Driving (C.A.N.D.I.D.) recognized him in 2002.

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# INTRODUCTION

“Congratulations! Let me be the first to welcome you to the Prosecutor’s Office. Here are your files. Lucky for you, crime is down. You only have 200 cases. Your courtroom is across the street. Good luck!” In many resource-strapped offices, this suffices for prosecutor training.

Many offices assign Driving Under the Influence (DUI)<sup>1</sup> cases to their most inexperienced prosecutors. Yet DUIs can be as difficult to win as homicide cases. DUI cases involve all types of evidence, including eye-witness testimony, documentary and other physical evidence, lay opinion testimony, scientific evidence, expert testimony and an almost infinite number of complex issues. DUI prosecutors must be familiar with these various types of evidence and the rules governing their admission at trial. They also must learn to captivate their audience (the jury) and present their cases convincingly, in a manner the jury can relate to and understand.

Every attorney and every case is unique; there are very few hard and fast courtroom techniques and strategies. You must develop your own style and adapt your strategy to each individual case. However, there are maxims or guidelines you should consider in developing your own style and strategies. This monograph is designed to assist you to make appropriate, informed decisions, by providing differing perspectives, examples and tips. As you read it, be mindful that your jurisdiction may have rules, statutes or case law that prohibit you from employing some of these techniques.<sup>2</sup>

<sup>1</sup> Some states refer to DUI as Driving While Intoxicated or Driving While Impaired (DWI).

<sup>2</sup> American Prosecutors Research Institute’s (APRI) National Traffic Law Center (NTLC) attorneys are available to assist you if you have questions or want further assistance. You may contact the NTLC at (703) 549-4235.

# PRE-TRIAL PREPARATION

A successful trial starts long before the venire<sup>3</sup> is brought in. Simply stated, preparation is the key to victory. You must thoroughly familiarize yourself with the evidence, case strengths and weaknesses, and the law *before* selecting a jury.

## Theme

One of the most important strategy decisions you make is selecting a proper theme. The theme is the general storyline of your case. Choose a theme that resonates with the average person. Whenever possible, choose a theme that motivates your jury to convict.

Create a catch phrase that captures your theme that you can use throughout the trial. Advertisements, quotation dictionaries, slogans and proverbs can be helpful. You should be able to present your theme in a few short words or phrases. An easy way to start developing a theme is to say “This is a case about.....” and finish that phrase.

### **Practice Tips: DUI Themes and Catch Phrases**

Typical DUI themes revolve around responsibility and consequences. Examples include:

- “On \_\_\_\_\_, the defendant made some choices. Now he must bear the consequences.”
- “You drink. You drive. You lose.”<sup>4</sup>
- “The car came fully loaded. So did the defendant.”<sup>5</sup>
- “The defendant didn’t control his drinking, so he couldn’t control his driving.”

<sup>3</sup> In many jurisdictions, the courts refer to prospective jury panels as “venires” and prospective jurors as “venire persons.” This terminology is not universal.

<sup>4</sup> National Highway Traffic Safety Administration (NHTSA) anti-DUI campaign slogan(2003–2005).

<sup>5</sup> Mothers Against Drunk Driving slogan (2000).



**Structure**

Your presentation should tell your story in a clear, concise fashion. It may be easiest to present the witnesses and evidence in chronological order. An alternative, more dramatic method is to start and end the case in chief with your strongest witnesses, saving your best piece of evidence for last.

**Evidence**

Pre-plan your strategy for proving your case. Do not introduce evidence simply because you have it. For example, consider not calling witnesses who do not advance your theme or argument. The more witnesses you call, the greater the likelihood of introducing unnecessary conflicts in the evidence. Sometimes, less really is more.

Determine how to introduce the evidence you want to present. Review applicable statutes and available predicate manuals, and seek guidance from more senior prosecutors. Remember also that you are obligated to provide the defense with exculpatory evidence.<sup>6</sup>

**Practice Tip: Introducing Evidence**

List all of the evidence you want to admit. Write down the rules of law and the name(s) of the witness(es) that will allow you to introduce the evidence. Leave space to check off the predicates and the evidence as you proceed through the relevant examination(s). For example:

Evidence	Witness(es)	Applicable Rules	Completed	Admitted
Breath Card	Operator Maintenance Officer	Administrative rules Breath test checklist Business records exception Public records exception		

This will help you stay focused during trial and ensure that you succeed in admitting the evidence.

<sup>6</sup> *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

Carefully review all case documents and prepare (or pre-try) each witness. Identify clearly inadmissible evidence and instruct your witnesses to refrain from mentioning it. Examples of inadmissible evidence include prior bad acts, character and propensity evidence, and statements taken in contravention of *Miranda*. Identify possibly inadmissible evidence and raise it with the court pre-trial via a motion *in limine*.

Identify potential conflicts in the evidence and either resolve them or determine ways to explain them.

### **Defenses**

Anticipate and prepare for all possible defenses and arguments. This really is a much simpler task than it sounds. There are only a few common defenses in any criminal case:

- A. Identity or ID (frequently referred to as SODDI, or “Some Other Dude Did It”)
- B. “The evidence proves I’m innocent” (including defenses of insanity, necessity and self-defense)
- C. The State cannot prove its case because:
  - 1. There is a “lack of evidence”
    - i. There is only one witness
    - ii. There is no (or very little) corroborating physical or scientific evidence
    - iii. The evidence is not credible or trustworthy:
      - a. The witnesses are lying
      - b. The police are corrupt, prejudiced or inept
      - c. The analyst, technician, doctor or scientist is not qualified or made a mistake (the evidence is not reliable)
  - 2. There are conflicts in the evidence.

For information regarding common defenses in DUI cases, see *Overcoming Impaired Driving Defenses*, [http://www.ndaa-apri.org/pdf/overcoming\\_impaired\\_driving\\_defenses.pdf](http://www.ndaa-apri.org/pdf/overcoming_impaired_driving_defenses.pdf) (APRI's National Traffic Law Center 2004).

**Practice Tips: DUI Crash Cases**

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In crash cases, be ready for defense claims that the defendant consumed alcohol *after* the crash occurred.

**The Judge**

Familiarize yourself with the judge and adjust your strategy and style accordingly. Does the judge allow speaking objections, need case law before ruling on legal issues, or impose time limits or other constraints on *voir dire*, opening or closing?

Always treat the judge with respect. Jurors tend to dislike attorneys who are sarcastic or overly critical of the court. As a general rule, refrain from rolling your eyes or otherwise reacting to adverse rulings.

**Defense Counsel**

Similarly, you should consider defense counsel's style. If you do not know the defense attorney, ask your colleagues for their impressions. If you know that defense counsel likes to ask inappropriate questions in *voir dire*, introduce inadmissible evidence or make inappropriate arguments, file an expansive *motion in limine* asking the judge for restrictions.

**Ask for Help!**

Perhaps most importantly, do not try to reinvent the wheel until you become comfortable in court. Consult with experienced prosecutors and ask them for assistance and guidance. Contact the NTLC for predicate questions, case law and sample briefs.

# GENERAL TRIAL TIPS

## **Generally**

Most jurors want to reach a fair and just decision. Your job is to help them achieve that goal by finding the defendant guilty.<sup>7</sup> You must sell yourself and your case. If you do not understand the case, or cannot explain it, you cannot sell it.

Jurors expect prosecutors to be fair and honest. If you fail to meet this expectation, you will assuredly lose and face appropriate discipline from the state bar association. Try to refrain from objecting to evidence that does not hurt your case significantly. If you object too much it will look as if you are hiding something (especially if the judge overrules your objections). If defense counsel is particularly abrasive, you may want to make his lack of professionalism more obvious by being especially cordial in front of the jury.

Remember that whatever happens in the courtroom, the jurors are always watching. How you look, how you sit, how you interact with everyone in the courtroom, and how your desk appears, all make an impression with the jury.

Because people have different skills and learn differently, try to involve as many senses as possible during trial. Whenever possible, do not just tell the jury about the evidence. Let the jury *see, touch and smell* the evidence, if you can, through every stage of the trial.

Jurors are inundated by crime-dramas in the popular media that create unrealistic expectations of police officers, prosecutors and judges. Many truly believe that crime scene investigators solve crimes in 60 minutes or less using high tech scientific techniques. Obviously, this is not the case. Still, you should strive to meet the jurors' expectations whenever possible.

<sup>7</sup> As a prosecutor, your job is to seek justice, not to convict everyone the police arrest. You must never try a defendant for a crime unless you are convinced the defendant committed it.

## BASIC TRIAL TECHNIQUES FOR PROSECUTORS

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Finally, be cognizant of the record. Your victory will be meaningless if you lose on appeal. Make sure that all relevant conversations take place on the record and that the court reporter can hear everything.

In presenting your cases, remember this empowering fact: truth is on your side. Jurors may have some difficulty understanding all of the evidence, particularly if the defense introduces expert testimony. However, jurors are very good at recognizing sincerity. Therefore, you must be yourself. Speak to them as colleagues, not students. Believe in your case and give the jurors reason to believe in you.

## VOIR DIRE (JURY SELECTION)

■ In some jurisdictions, prosecutors are permitted to voir dire or question prospective jurors or venire persons. If you practice in a jurisdiction that permits you to ask questions, it is important to develop an effective voir dire. This requires thorough preparation. Carefully identify and anticipate all potential issues and defenses. To accomplish this, you must understand the jury selection rules and the law of your case.

You have an unlimited number of cause challenges. The purpose of cause challenges is to eliminate jurors who cannot be fair and impartial. A judge will grant a cause strike if the judge has a reasonable doubt about the venire person's ability to be fair. Still, you should use your cause challenges wisely and fairly to avoid sacrificing your credibility with the court.

You have a limited number of peremptory challenges. The number varies according to jurisdiction and crime. Know how many peremptory challenges you get so that you may use them appropriately. You may exercise your peremptory challenges on whomever you wish, provided you do not use them in a discriminatory manner. Whenever you challenge a venire person who is a member of a suspect or protected class, be prepared to provide the court with a logical reason to strike the venire person. The basis for your strike need not rise to the level of cause (or even come close), but it must be articulable and legitimate.

If you have time, obtain each venire person's criminal record. In Miami-Dade County, prosecutors found that at least one potential juror on almost every panel misrepresented his or her criminal past.

Jury selection really is a de-selection process in which both parties eliminate the worst jurors for their cases. Your goals are to inform the venire persons of the charges, establish your theme, build a rapport with the individual venire persons, and to identify venire persons who are (1) biased or prejudiced against the police, you or your office, the case or the victim; and/or (2) sympathetic or empathic toward the defendant.

## BASIC TRIAL TECHNIQUES FOR PROSECUTORS

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To achieve these goals, try to encourage and obtain active juror participation. It may be helpful to underscore the people's right to a fair jury and compare jury selection to a hiring process. Consider the following list of questions and statements:

Ms. Jones, you indicated earlier that you are a supervisor with X Corporation?

Do you participate in the hiring process?

(If no, move on to another juror. If yes, ask the following questions)

Can you describe the procedure for the jury? How long does the entire process take?

Wow. That's quite a process. It's similar to what we're trying to do here. We're trying to hire or select a jury that can appropriately decide this case. Only we don't get weeks like your company does.

You understand that this case is just as important to the people of the State of Z as your hiring decisions are to you?

Can you appreciate how difficult our job is?

That's why we need your help. That's why it's so important for each and every one of you to actively participate in this process. Can you all do this?

Warn the jurors that you may have to ask them some personal questions and advise them that they can ask for a sidebar if they do not feel comfortable answering any of the questions in front of the larger group. Tell them that you do not mean to intrude on their privacy, but you want to ensure a fair and just result in your case.

Still, you may find it best to start with general questions about work or other common topics before going to more personal matters. This will

allow you to establish a rapport with the jurors before you ask the more difficult questions. Try to speak to them in a conversational tone, as if you were having a chat with them in your living room.

Nobody wants to acknowledge being prejudiced or unfair. Accordingly, probe the jurors' thoughts and feelings by asking hypothetical questions on issues that directly and substantially impact on a venire person's ability to view the evidence fairly or make a proper decision.

Try to learn the venire persons' names. Try to speak to each of them. LISTEN to their answers. This will convey the message that you value them and their opinions.

The most skilled trial attorneys tailor their questions to the facts of the case at bar. Still, there are certain areas you should cover in virtually every trial if you have enough time. Consider the following issues and ways to question people about them:<sup>8</sup>

### ***Right to a Fair Trial***

**Issue:**

Most people understand that defendants have a right to a fair trial. Unfortunately, people often forget that the people also have a right to a fair trial.

**Example:**

Everyone knows that the defendant has a right to a fair trial. Do you understand that the people of the state of \_\_\_\_\_ also have the right to a fair trial?

### ***Ability to Follow the Law***

**Issue:**

Some people will not abide by the law if they do not believe in it. These people should be removed for cause.

<sup>8</sup>The law varies from jurisdiction to jurisdiction. Do not use any of the below listed examples until you verify that you can do so in your jurisdiction.



**Example:**

We all know that it's against the law to exceed the speed limit on our highways. Many otherwise law-abiding people break that law daily.

What we choose to do on the streets is different from what we must do in the courtroom. You, as jurors, will have a special responsibility to follow our laws.

Mr. \_\_\_\_\_, let's suppose you sat on a speeding case in which the driver was charged with traveling five miles over the speed limit. A police officer testified and convinced you of the driver's guilt beyond a reasonable doubt. What would your verdict be?

Why?

***Legal Definitions***

**Issue:**

Many venire persons believe that they know the law based on their own experiences, conversations with friends and lawyers, and television. They may misunderstand legal terms that we, as lawyers, take for granted. For example, many jurors will be shocked to learn that a person can be guilty of certain impaired driving offenses even if he or she was under the legal limit.

**Example:**

As many of you know, the law sometimes defines things differently from the rest of us. Let me give you an example.

Mr. \_\_\_\_\_, can you name some deadly weapons for me?

(Venire persons typically name guns, knives, etc.)

Would it surprise you to know that the court may consider this (hold up a pen) a deadly weapon, depending on how it is used?

Can you promise to keep an open mind and use the legal definitions that the judge gives you?

**Reasonable Doubt: Quality versus Quantity**

**Issue:**

Deluged by recent newspaper articles about exonerations and not guilty verdicts, many venire persons are reluctant to find someone guilty in the absence of overwhelming evidence. Thus, juries that believe defendants are guilty often acquit them “because there just wasn’t enough evidence.” This outcome is particularly likely in cases involving a single witness or little or no physical evidence. It is imperative that you explain to the potential jurors that your burden revolves around the *quality* of the evidence, not the quantity.

**Example:**

It’s my burden to prove the defendant guilty beyond a reasonable doubt, a burden I willingly accept.

Mrs. \_\_\_\_\_, let’s suppose I bring you two boxes of evidence and three witnesses. You look at all of the evidence; you listen carefully to the witnesses. You don’t believe any of it. What’s your verdict?

Now let’s suppose I bring you 100 boxes of evidence and parade in a thousand witnesses. Relax, I promise that’s not going to happen. We’ll get out of here during our lifetimes. But let’s suppose we had all the time in the world and I spent one year presenting you with truckloads of materials. Let’s say you didn’t believe any of it. What would your verdict be?

Let’s change things a bit. Let’s suppose I bring in only one witness. You listen carefully to that witness. You know that the witness is telling the truth. You believe the witness beyond a reasonable doubt. What would your verdict be?

### ***Lack of Evidence***

**Issue:**

The judge will instruct the jury that reasonable doubt can come from a lack of evidence. Savvy defense attorneys rely on this instruction to convince some jurors that the police must conduct every possible test and that you must introduce every possible piece of evidence.

**Example:**

Continuing the above quality versus quantity hypothetical, you might ask:

What if other witnesses were available and I didn't call them?  
Would that change your verdict?

OR

What if the officer could have taken DNA swabs but didn't?  
Would that change your verdict?

(If a venire person answers any of these questions in the affirmative, remind the juror that the issue revolves around quality, not quantity. If a juror persists in this misunderstanding, try another hypothetical. For example, would the juror expect you to call 70,000 witnesses if a crime occurred at a local football or baseball game?)

### ***Conflicts in the Evidence***

**Issue:**

The judge will instruct the jury that reasonable doubt can come from conflicts in the evidence. If you call more than one witness, they will invariably testify differently, creating real or perceived conflicts in the evidence. Most discrepancies are meaningless (unless they are sufficient to cause the jury to question the veracity of the witnesses or they directly pertain to the elements of the case). Still, the defense will highlight the differences, claim they establish a reasonable doubt, and attempt to con-

vince the jurors that you must prove every *fact* in the case, rather than the *elements* of the charge. It is imperative that you explain this distinction to the venire panel.

**Example:**

One of the most effective examples is the “Wedding Hypo”:

Has everyone here been to a wedding?

Mrs. \_\_\_\_\_, you’ve been to a wedding before?

How many?

You know how everyone always sits around and talks about the bride and groom?

Let’s say that you get there a little late. You sit at your table and ask the other guests how it has been. Everyone starts talking about how many times the bride and groom kissed. One person says, “I saw them kiss five times.” Another says, “I saw them kiss three times.” A third person says, “I saw them kiss two times.” Based on their comments alone, could you determine *how many* times they kissed?

Of course not, because they cannot agree.

Does that make them all liars?

Why not?

(You should elicit testimony or explain that people see things differently because they may not pay attention to the same things, may not notice things at the same time, may be looking at things from a different angle, and so on.)

Now let’s say that the issue was not how many times they kissed, but whether they kissed at all. Can you make that determination?

Of course, because everyone agrees they kissed.<sup>9</sup>

It would be silly to conclude that they did not kiss at all simply because people cannot agree on the number of times they kissed.

Can you see how conflicts in the testimony are just a natural consequence of real life?

### ***Physical versus Testimonial Evidence***

**Issue:**

Some people are so distrustful of others that they cannot reach a decision based upon someone's word alone. Jurors who *require* physical evidence in all cases are subject to challenges for cause.

**Example:**

Just as the law does not require a certain amount of evidence, it also does not require a certain type of evidence. Does that make sense to everyone?

For example, the law does not weigh testimonial evidence (what a witness says) and physical evidence (things the police may find) differently. Does anyone have a problem with that?

Mr. \_\_\_\_\_, let's suppose the defendant was charged with a noise ordinance violation. Would you expect any physical evidence?

(Depending on your jury, you may use similar hypotheticals involving sexual harassment, non-forcible rape, theft, and so on. In appropriate cases, you also may want to comment that criminals typically do not commit crimes where they expect to be observed, and that we would expect anyone who commits a crime to destroy evidence to avoid being caught. Encourage the venire persons to use their common sense; they should not expect DNA evidence in a DUI case where identity is not an issue.)

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<sup>9</sup> Some prosecutors use a variation on this hypothetical by asking additional questions about a person who did not see them kiss (but was not paying attention to them).

### ***A Lawyer's Questions***

**Issue:**

Defense attorneys sometimes mislead jurors by creating or suggesting non-existent facts or evidence through their questions. Rather than attack the defense attorney, try to address the issue in a more subtle manner.

**Example:**

The judge is going to tell you that what a lawyer says is not evidence. Understanding that, can you tell me the difference between these two questions:

What color was the car?  
Was the car blue?

(By phrasing the comment and questions that way, you will alert the jury that there is a difference while simultaneously avoiding objection.)

After a juror explains the obvious difference between the questions, ask the juror:

What if I ask a witness, "Isn't it true the car was blue?" and the witness answers, "No, the car was red." What is the evidence in the case?

(The evidence is that the car is red because that is what the witness said.)

How many people think there is a conflict in the evidence?

(The number of people who think there is a conflict may surprise you. At this point, choose a juror who understands that there is no conflict because what the lawyer says or asks is not evidence and ask that juror to explain it to the panel.)

### ***Police Officers***

**Issue:**

Some jurors may be biased against police officers because of their own

bad experiences or because of the extensive media attention given to police errors and misconduct. It is imperative that you identify and eliminate jurors who may be unwilling to fairly assess police testimony.

**Example:**

Has anyone ever had a bad experience with a police officer?

Has anyone ever gotten a traffic ticket?

Do any of you feel that you didn't deserve that ticket or tickets?

Mr. \_\_\_\_\_, can you please tell us about that?

**Practice Tips: DUI Specific Issues to Cover in *Voir Dire***

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- Attitudes about drinking
  - Do you drink?
    - For those of you who do not, why not?
    - Will your practices or beliefs prevent you from determining whether the defendant drove while impaired?
- Driving
  - Is there anyone here who does not drive?
    - Why not?
    - Would that prevent you from fairly determining whether the defendant drove with a blood alcohol level over the legal limit or while impaired in this case?
- Attitudes about drinking and driving
  - The law does not prevent people from drinking and driving. The law prevents people from driving under the influence of alcohol or drugs while impaired or with an unlawful blood or breath alcohol level. Is there anyone who thinks that people shouldn't be allowed to drink and drive?
- The different methods of proof (impairment versus unlawful blood or breath alcohol level)

- Mr. Smith, would it surprise you if I told you that a person could be guilty of DUI even if the person was under the legal limit? (*For cases where the person was near or below the legal limit*)
- The law says that a person can be guilty in one of two ways. A person is guilty of DUI if the person drives with a blood or breath alcohol over the legal limit OR while impaired. Does everyone understand that?
- Feelings about the DUI law
  - Mr. Jones, do you think the law is too tough/lenient?
- Feelings about enforcement
  - Does anyone here think the police spend too much time or money enforcing the DUI laws?
  - Does anyone here think the police do not spend enough time or money enforcing the DUI laws?

### **Sympathy**

#### **Issue:**

Most people understand that it would be inappropriate for them to find a defendant guilty because they feel sorry for the victim. However, some of these same people will not view sympathy for the defendant as a bias against the State.

#### **Example:**

Does everyone understand that it would be improper for a jury to find a defendant guilty because the members feel sorry for the victim?

Or prejudiced against the defendant?

Do you also understand that it would be just as wrong to find a defendant not guilty because you feel sorry for the defendant?

Your job is to determine the defendant's guilt. If you find the defendant guilty, the judge will decide how to sentence him/her. Can you all trust this judge to do his/her job?



(By asking these questions and phrasing it this way, you will make it easier for the jury to disregard sentencing issues.)

***Additional Issues: Rehabilitating Beneficial Venire Persons***

Defense counsel will try to strike for cause as many crime victims and pro-State venire persons as they can by getting them to say that they cannot be fair because of their life experiences. You can minimize the defense attorney's chances of success by ensuring that the jurors understand what they are saying when they say that they cannot be fair. For example:

Mr. Jones, a few minutes ago you told the judge that you could not be fair in this case because you were robbed. I'd like to clarify that.

You have no reason to believe that this defendant committed that crime, do you?

Are you going to find this defendant guilty simply because you're angry at the person who robbed you?

Will you follow the law and require us to prove the defendant's guilt beyond a reasonable doubt?

If yes, that's all we're asking when we ask, "can you be fair." Knowing that, can you fairly determine the defendant's guilt or innocence in this case?

By rehabilitating these venire persons, you can force the defense attorney to use one of his or her peremptory challenges.

***Utilizing Beneficial Jurors***

Venire persons understand that the lawyers and witnesses have an interest in how a case is decided. However, they generally view themselves and other venire persons as non-partial. Thus, you should use beneficial

## VOIR DIRE (JURY SELECTION)

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venire persons to educate the others. You can do this by introducing legal concepts through them. You can also use them to contradict other venire persons who take unreasonably pro-defense positions, thereby having the good venire persons fight your battle for you and saving you the necessity of contradicting a venire person. For example, if a juror had a particularly good experience with the police, ask him or her to describe it. If a juror is familiar with the breath testing instrument's accuracy and reliability, ask him or her to tell you about it.

# OPENING

## *The Opening*

**T**he opening statement is a critical element of any jury trial. Opening statement is your first opportunity to tell the jury what happened. A proper opening statement addresses case facts, rather than argument. During opening statement, you should capture the jurors' attention, build a rapport with as many of them as possible, present your theme, advise them what the issues are and tell them what you expect the evidence to show. Do not, under any circumstances, refer to inadmissible evidence.

There are two schools of thought on how long your opening statement should be. Many prosecutors believe that your opening statement should be short and to the point. They believe that you should avoid providing too much detail because the evidence never comes out exactly as expected. Other prosecutors prefer longer, more detailed openings because they believe that most jurors make up their minds after hearing the opening statements. Regardless of the length of your opening, it often is preferable to tell your story in chronological order; this facilitates the jury's ability to process the information.

Most DUI cases are not particularly dramatic. They are, by criminal justice and societal standards, fairly mundane. Some prosecutors commence by thanking the jury, re-introducing themselves, or telling the jury that an opening statement is like a roadmap or a table of contents in a book. Other prosecutors start with memorable catch phrases because studies show that people most easily remember the first thing and the last thing a speaker says. If you start this way, make sure that you do not imply that the jurors, or anyone they care for, was a potential victim, or at risk. This type of suggestion would be a violation of the Golden Rule<sup>10</sup> and subject you to the court's wrath and a mistrial.

<sup>10</sup> The Golden Rule prohibits an attorney from asking jurors to place themselves in the place of a victim, witness or defendant. For example, you cannot ask a jury to think about how they would feel if they were treated the way the defendant treated the victim.

# CASE IN CHIEF (DIRECT EXAMINATION)

## ***Background***

During your case in chief, you will present the jurors with the evidence they need to determine the defendant's guilt. You should develop the evidence in a simple, easy to understand and interesting (if not exciting) manner that supports your theme. Pre-mark your evidence to avoid unnecessary pauses and arguments during the examination.

Throughout, it is imperative that you anticipate and pre-empt your opponent's cross-examination. Remember that the jury can disregard some or all of your evidence. To guard against this, you must establish your evidence's reliability by showing that your witnesses know what they are talking about and that they are trustworthy. Was your witness in a position to see or hear what he or she claimed? Was your witness qualified (or certified) to administer the field sobriety tests? Similarly, you must establish that your evidence is reliable. The jury will not find your defendant guilty if the jurors do not believe your evidence.

Your witnesses should be the stars of direct examination. Focus the jurors' attention on your witnesses as soon as they enter the courtroom. When a witness testifies, stand next to the rear portion of the jury box. This will focus the jurors' attention on the witness and force the witness to speak louder. Ask open-ended questions that allow your witness (es) to tell a story in a clear, concise, logical and persuasive manner.

Be a good listener! Sometimes your witnesses will stray from the script and answer questions they anticipate. You will look foolish if you ask a witness about something the witness already testified to. Furthermore, if you fail to listen to your witnesses' answers, the jurors may similarly discount their testimony.

Above all else, make sure you introduce evidence proving venue, the elements of your case, and the defendant's identity as the perpetrator.

### ***The Examination***

Begin each examination by introducing the jury to the witness and explaining the witness's relation to the case. Jurors like to know who they're listening to and why. For example:

Officer, please introduce yourself to the jury.

On July 4, 2003, did you arrest \_\_\_\_\_ (defendant) for DUI?

Before we talk about that, can you please tell us what training and experience you have in DUI investigations?

During direct examination, help the witness tell the story in a conversational, easy to understand, methodical and compelling manner. One approach is to introduce different parts of each witness's testimony, using "headers" or "headliners" to alert the jury to what you're going to discuss and, if possible, how it relates to the issues in the case. For example, "Officer, let me take you to the night of July 3, 2003....." or "Let's talk for a few minutes about the horizontal gaze nystagmus test....." This technique is particularly useful when introducing evidence:

Officer, did you speak to the defendant about what he did that night?  
Prior to doing so, did you advise the defendant about his rights?  
Did you do so from memory or did you read from a form?  
Let me show you what was previously marked as .....

When you show evidence to a witness, try to stand in a position that allows the jury to see what you are doing. Have the witness identify the evidence and explain its relevance. If the item is a document, do not forget to establish appropriate hearsay exceptions. Ask the judge to admit the evidence.<sup>11</sup> When you put an object, document or photograph into evidence, publish it to the jury by either holding it in front of each individual juror or by handing it to them. Refrain from asking additional questions until each juror sees the evidence. Proceeding while jurors are examining the evidence sends the unintended message that the evidence

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<sup>11</sup> As noted above, you should identify and learn the necessary predicates *pre-trial*.

is not valuable. Additionally, some jurors may tune out the questioning while they look at the item.

**Practice Tips: Special Rules for DUI Cases<sup>12</sup>**

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***The First Officer on Scene or Stop Officer***

Defense counsel may try to focus the jury on alternative explanations for each sign and symptom of intoxication during cross examination. Anticipate this strategy during direct examination by constantly emphasizing the totality of the circumstances. Make sure the jury understands that the officer did not suspect or arrest the defendant because the defendant had bloodshot eyes or a flushed face or the odor of an alcoholic beverage on his breath, or because the defendant failed one or more of the standardized field sobriety tests (SFSTs). Rather, the officer suspected the defendant was DUI and arrested him for DUI because of *all* of these things.

Defense counsel also may emphasize what the defendant did safely or well in cross examination. Consider presenting these facts during your direct examination to pre-empt this tactic and build your credibility with the jury.

In crash cases, highlight as many facts as possible that establish the defendant's role as a driver.

***The Officer Who Administered the SFSTs***

Jurors will not rely on evidence they do not understand. It is imperative that you establish the SFSTs' utility during your case in chief. Have the SFST officer explain what the tests are and how they measure impairment. Emphasize that the officer did not "make up" the tests; the tests are standardized, systematic and used by police departments around the country.

Elicit testimony about the officer's training and experience with the tests. In cross examination, defense counsel likely will assert that the

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<sup>12</sup> NTLC maintains sample predicates for various State witnesses.

tests are so hard that sober people fail them routinely. Counter this argument by asking how often the officer administers these tests, how many people pass them, and how people who fail them perform on subsequent breath tests.

***The Breath Test Operator***

Highlight the operator's training and experience and emphasize that the operator administered the test according to the state's accepted rules and procedures.

In refusal cases, consider introducing the Implied Consent form. Have the officer read the form to the jury just as he or she read the form to the defendant. Publish the form to the jury for review.

***The Maintenance Officer***

Many maintenance officers are highly skilled technicians. Highlight the officer's qualifications, if appropriate. Emphasize that the officer tested the instrument on a regular basis using several different known samples and that the officer followed the state's accepted protocols.

# CROSS EXAMINATION

## **General Tips**

You do not need to cross-examine every defense witness. Prior to questioning a defense witness, determine if it is necessary or beneficial. If the witness did not hurt your case or if you cannot accomplish anything by questioning him or her, you should forego the examination.

Your goals during cross-examination are to strengthen and corroborate your case, minimize any damage caused by the witness, and set up your closing argument. Your approach should vary according to who the witness is and what the witness says.

Assuming your defendant is guilty, the defense witnesses (including the defendant) are either mistaken or lying. Start by highlighting testimony that strengthens your case (which helps narrow the issues), and then attack the witness's credibility (if you can) and testimony. Then, attack the witness (if necessary<sup>13</sup>) and end strong! Do not, however, undermine a witness you know is testifying truthfully.<sup>14</sup>

During cross-examination, you must control the witness. Avoid descriptive (or subjective) terms that are open to interpretation, and keep your questions as short as possible. By limiting your questions to one or two words, devoid of adjectives and adverbs, you can eliminate any "wobble room." If a witness fails to answer your questions, try to control him or her through your questioning without asking the judge for help. Try repeating your question or following it up using one or more of the following control tactics:

Is that a yes?

Mr. Smith, did you understand my question?

<sup>13</sup> Remember, you sometimes catch "more flies with honey"; impeachment and battering are not always your best strategies.

<sup>14</sup> See American Bar Association Standards for Criminal Justice Prosecution Function and Defense Function, Standard 3-5.7(b) Examination of Witnesses (2004).



Then would you mind answering it?

Mr. Kay, let's focus on . . .

Mr. Barnes, would you like me to repeat my question?

Are you finished?

Then let me ask you again . . .

Mr. Jones, is there a reason you don't want to answer my question?

Mr. Higgins, I'm sure the court would appreciate it if you would answer my question

Use a planned entrance and exit. Refrain, if possible, from asking "why" questions if you do not already know the answer, unless you know the answer will not hurt you.

Most defense attorneys argue that the arresting officer was mistaken, rather than lying. Therefore, you should aspire to bring out as many conflicts between the defense witnesses' testimony and the officer's testimony as possible.

### ***The Defendant***

Defendants rarely testify in criminal cases. When they do, you can treat them like any other witness. Question them about bias or motivation to lie and test their memory. In most jurisdictions, you can question a defendant about having had the opportunity to listen to the other witnesses' testimony and having time to get his or her story straight. Many defendants will claim that the police made a mistake. If that happens, emphasize how fairly the police treated the defendant.

Be wary of asking inappropriate questions that can be interpreted as a comment on the defendant's right to remain silent.

**Practice Tips: Sample Cross-Examination of a Defendant in a DUI Case**

- On June 3, 2002, 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 driver 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 a particularly important question in cases involving a driving pattern.)
- Officer Smith pulled you over.
  - You didn't know Officer Smith.
  - You had never seen him before.
  - He 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 involving driving patterns or claims of officer bias; it supports the contention 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 Smith asked you if you had been drinking.

- You told him “yes.”
- You told him you had two beers.
  - (the defendant’s answers to these questions prove the second element of DUI, that the defendant was under the influence.)
- Officer Smith asked you to step out of your car.
  - You realized he thought you might be impaired by alcohol.
- Officer Smith asked you to perform some sobriety tests.
  - You knew why he asked you to perform them.
  - You knew he thought you might be impaired by alcohol.
  - You knew he would decide whether or not to arrest you based on your performance.
  - You didn’t want to be arrested.
  - You knew how important your performance would be.
  - You agreed to do the tests.
  - Officer Smith told you how to do the test properly.
  - Because you didn’t want to be arrested.
  - Officer Smith demonstrated the finger to nose test to you.
  - You watched him carefully.
  - Because you didn’t want to be arrested.
  - Officer Smith asked you if you understood his instructions.
  - You told him that you did.
  - You performed the test.
  - You did the best you could.
  - Because you didn’t want to be arrested.
    - (the above line of questioning would be repeated for each of the sobriety tests. Note, however, that officers do not demonstrate the HGN test.)

### ***Lay Witnesses***

Most defense lay witnesses have special relationships with the defendant and are fact witnesses rather than opinion witnesses. In DUI cases, defense witnesses frequently partied or socialized with the defendant just prior to or at the time of arrest. The majority of these witnesses obviously are motivated to help the defendant. You should emphasize their bias.

**Practice Tips: Cross-Examining Defense  
Lay Witnesses in DUI Cases**

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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 defendant's friends about their participation in the defendant's drinking or taking drugs and their own states of sobriety.<sup>15</sup>

**Expert Witnesses**

Preparation is particularly important when dealing with an expert witness. Take advantage of the discovery rules and obtain as much information as possible. Use your investigative skills. Speak to colleagues,<sup>16</sup> conduct public records inquiries, issue subpoenas, search the internet and secure:

- As many of the witness's resumes as possible. Sometimes witnesses re-characterize their experiences or delete hurtful items from their resumes after being hammered in cross-examination.
- As many prior transcripts as possible. Most expert witnesses change (or improve) their testimony over time. Prior transcripts will show you how other prosecutors handled the witness and how the witness adapted.

<sup>15</sup> Anticipate the defense witnesses' testimony by asking the arresting officers about conditions and actions of the defendant's friends at the scene.

<sup>16</sup> NTLC maintains files on defense experts containing resumes and transcripts.

- The witness's writings (including articles, books and outlines).
- Any written correspondence, retainers, contracts, bills, raw data, reports and opinions in your case.

Show the defense expert's reports to your own expert. Obtain your expert's opinion about the defense witness's conclusions and ask your expert how to counter them. Make sure you understand the evidence.

Explore the basis (and sources of information) for the witness's opinion. Defense experts routinely render opinions on what they are told or what they read, and make assumptions that may or may not be reasonable.

### **Practice Tip: Cross-Examining Former Police Officers in DUI Cases**

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

- The number of times the witness relied on the tests to establish probable cause, make an arrest and testify in court to the witness's opinions 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.

During questioning, elicit answers that bolster your case prior to attacking the witness's bias, premises and conclusions. If the witness relied on what the defendant said (which often is the case), hammer the defendant's credibility and motive to beat the crime.

# CLOSING(S)

## **General Tips**

Emphasize important points, evidence and witnesses and especially your theme. Anticipate the jurors' questions and answer them. As one colleague is fond of saying, "arm the strong to defeat the weak." Remind the jurors of the issues you discussed in *voir dire* and the promises they made to follow the law. Integrate the applicable law and facts. Use and read relevant portions of the jury instructions; not only will this educate the jury, but it will bolster your credibility when the judge reads the same passages to them.

Do not make improper jury appeals. For example, do not ask a jury to "send a message to the community" or "think about how the victim's family will feel if you let the defendant go." Do not violate the Golden Rule by asking the jury to put themselves in the victim's (or a potential victim's) position. Do not personalize your closing argument. It is impermissible for you to tell the jury what you believe.

### **Practice Tip: Breath Alcohol Cases**

Do not allow the defense attorney to shift the focus of the trial from the defendant's guilt to the instrument's accuracy by putting the instrument on trial. Always emphasize the totality of the evidence, even when the defendant blows over the legal limit.

The order of closing arguments varies by jurisdiction. In some jurisdictions, the State always argues first, in others the defense. In some of these jurisdictions, the order depends on whether the defense presents evidence. In many jurisdictions, the party that presents first is permitted to give a second or rebuttal closing. Be familiar with your jurisdiction's rules prior to going to trial.

## **Closing Argument**

Closing argument is your last chance to reach the jury. The classic closing comprises several steps:

- The Attention Step
- Discussion of Legal Theory
- Key Issue Statement
- Argument
- Rebuttal
- Exit Line

### **The Attention Step**

The attention step is a statement or series of statements that grab(s) the jurors' attention from the outset of your argument. If your case has some unusual aspect to it, you can plan or rehearse this statement. Most DUI cases are rather routine and may not lend themselves to an obvious attention getter. You may want to look to the defense opening statement or argument (if the defense presents its argument first) for your opening line. If the defense spins or misstates the evidence or the law, your attention step can be to immediately challenge the most inaccurate statement. If the defense attorney contravenes the written word of the jury instructions, you should read the portion of the law exactly as the judge will.

As with the opening statement, many prosecutors believe that the attention step should be devoid of ritualistic statements (I want to thank you . . .," "This is closing argument where . . .," and others). Others believe that jurors appreciate these remarks. If you want to use them, we suggest that you can work them into your argument at some other point. When the attention step is prepared in advance, and is not a response to something the opposition has said, it should be tied into the theme of your case and delivered with sincerity and confidence.

### **Legal Theory**

We often forget that the legal theories we deal with on a day-to-day basis are foreign to most jurors. After we try the same type of case for several months, we forget that the jury instructions were confusing to us

at one time. During closing, you should explain each and every element of the crime(s) charged (and how you proved it) in simple, easy to understand terms. Doing this provides three benefits: (1) it allows you to demonstrate to the jury that you have proven your case; (2) it lets the jury see you as someone who is helping them with some of the difficult concepts they will have to deal with; and (3) it serves as a simple method of organizing your argument.

In most jurisdictions, lawyers are permitted to discuss the law in closing argument. In these jurisdictions, you can present any instruction that the judge will read to the jury. The jury should understand that the lawyers discussed the instructions with the judge in advance. However, you should stress that only the judge can tell them what the law is, and they are not to consider this the law until the judge tells them it is the law.

Read through each element separately and detail how you proved it. Name the witness (es) that testified to the evidence and remind the jury what they said. In many cases, the defense only contests one or two issues. Let the jury know where you and the defense agree and disagree. This will help focus the jury's attention on what is really important. When you discuss the issue(s) of disagreement, explain to the jury that if they believe your version of the evidence, you have proven your case. Alert them to the fact that you will discuss why they should believe the State's version later in your argument.

While discussing your proof of the elements it may also be necessary to refer to other instructions, or portions of instructions, that help define terms used in the main instruction. Do not hesitate to do this when necessary. It can be beneficial to read portions of a jury instruction several times, especially if the defendant's guilt revolves around a specific provision of the law that jurors may not be generally familiar with, like what constitutes being in actual physical control of a vehicle. *Never quote the law out of context or incompletely.* This affords the defense an opportunity to show the jury that you were not being honest with them.

There may be portions of the law that do not support your position as much as you would like. You cannot avoid these provisions. A competent



defense attorney will be more than happy to point out your failure to discuss them during rebuttal (if he or she has one). Therefore, the prudent approach is to directly address these areas of the law. This will give the jury a sense of your fairness, and also allow you to put the issues in the best light possible.

**Key Issue Statement**

The key issue is any element that is hotly contested and requires special discussion. By stating it clearly you can focus the jury on its importance and clarify it in your own terms.

**Argument**

Once you identify the key issue, direct your energies toward persuading the jury of your position. Use all the tools at your disposal, including inductive reasoning, deductive reasoning, auditory and visual aids (physical evidence and demonstrative aids).

Many jurors do not understand that they can reject a piece of evidence but still find a defendant guilty because another piece of evidence convinces them of the defendant's guilt beyond a reasonable doubt. Your job is to help the jury understand and appreciate the different methods of proof.

**Practice Tip: DUI Methods of Proof**

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The defense may be able to explain away some of the field sobriety test results, but not the breath test results, or vice versa. Point out that:

1. If the jurors believe the police officer's testimony about the roadside tests and the alcohol testing results beyond a reasonable doubt, they should find the defendant guilty;
2. If any juror believes the officer beyond a reasonable doubt, but not the alcohol tests, that juror should find the defendant guilty;
3. If any juror believes the alcohol test results beyond a reasonable doubt, but not the officer's roadside tests, that juror should find the defendant guilty.

Ensure that the jurors understand that they do not all need to believe the same piece of evidence in order to find a defendant guilty. The law only requires that all of the jurors believe the defendant is guilty beyond a reasonable doubt based upon some piece of evidence, or combination of pieces of evidence.

A well crafted argument takes a crucial piece of evidence and discusses why it is credible. The argument should state that the evidence stands on its own for appropriate reasons. Build upon the evidence by highlighting the circumstances that corroborate its credibility. Using the above example, you would argue that the officer's roadside tests are credible on their own, citing the testimony of the officer and the validity of the procedures used. Follow up by noting that the alcohol test results corroborate the officer's testimony. It is no coincidence that the defendant failed the roadside tests *and* had a blood alcohol level higher than that permitted by law.

### **Rebuttal**

The rebuttal is your response to defense arguments. Rebuttal is one of the most difficult parts of closing argument. Listen closely to the defense's closing argument for objectionable arguments and information that deserves your response.

Part of the rebuttal comprises off-the-cuff responses to unanticipated arguments, some of which may be based upon misstatements of the testimony or the law. Pick the most important arguments and respond by quoting or reading back appropriate testimony and/or jury instructions to demonstrate errors. Refrain from arguing that defense counsel misstated the evidence or law for the purpose of misleading the jury. Keep your comments in the context of pointing out mistakes, errors, or inadvertent misinterpretations.

One of the most important aspects of a rebuttal argument, and most often overlooked, is a discussion of reasonable doubt. Some jurisdictions do not permit discussion of reasonable doubt. As the person with the burden of proof, it is incumbent upon you to inform the jury that mere possibilities and what ifs are not valid bases for a reasonable doubt. A reasonable doubt is a doubt that a juror can ascribe from the evidence. A naked assertion that

an officer was untruthful, a test was invalid or “could have been administered incorrectly” is not enough; there needs to be evidential support.

The defense will often argue that the failure to call a particular witness to testify, or the failure to introduce a piece of evidence is a lack of evidence, and, therefore, reasonable doubt. Explain to the jurors that if they believe the witness who was called to testify, or the evidence produced, beyond a reasonable doubt, there is no lack of evidence. If you fail to explain this, the jurors may be misled.

Defense attorneys frequently base their closing arguments on their questions, rather than the witnesses’ answers. Remember and point out to the jury that an attorney’s questions are not evidence, only the witnesses’ answers are evidence. Remind the jury that the defense attorney was not present at the time of the incident.

### **Exit Line**

The exit line is a planned and rehearsed phrase that you forcefully and sincerely deliver at the end of your closing. One of the most effective exit lines is a “call for justice or truth.” You can use the same exit line in every case you try. Although the judge and defense attorney may have heard it many times, the jurors will be hearing it for the first time. Many prosecutors find that the most effective exit lines encourage jurors to convict while simultaneously empowering them to “do the right thing.”<sup>17</sup>

### **Practice Tip: DUI Defendants and Defense Appeals for Sympathy**

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Most DUI defendants do not have criminal histories. Accordingly, defense attorneys frequently appeal to jurors’ sympathy. You can and must respond to these appeals. Emphasize the jury instructions regarding sympathy and remind the jurors that “charity is no substitute for justice withheld.”<sup>18</sup>

<sup>17</sup> Remember, you cannot ask the jury to send a message to the community or protect the community from the defendant’s dangerous acts (past or future).

<sup>18</sup> Saint Augustine (year unknown).

## CONCLUSION

**T**rying DUI cases is exhilarating and challenging. Remember, truth and justice are on your side. Uphold your obligations as the people's attorney and present your case in a fair, dignified, organized and professional manner. For further information or assistance, contact APRI's National Traffic Law Center at 703-549-4253 or visit us at [www.ndaa-apri.org](http://www.ndaa-apri.org).



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