SESSION XXVIII

CASE PREPARATION AND TESTIMONY

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Upon successfully completing this session the student will be able to:

- Conduct a thorough pre-trial review of all evidence and prepare for testimony.
- Provide clear, accurate and descriptive direct testimony concerning drug influence evaluations.
- Respond effectively and appropriately to cross examination in Drug Evaluation and Classification cases.

A. Guidelines for Case Preparation

Case preparation actually begins with your first contact with the suspect. At that point you begin "collecting" the evidence that you will organize and present at trial.

To begin properly, make sure that you complete each portion of the standard drug influence evaluation report form. Be especially careful to take accurate notes of your observations of the suspect, and to record their statements accurately. Note and document all relevant information you obtain during your interview of the arresting officer.

When you are notified of the trial date, you should conduct a careful review of all records and reports associated with the case. If you made the arrest, or were summoned to the scene, revisit the scene. During discovery, list and properly document all evidence. Compare your notes with the arresting officer, and clarify or resolve any discrepancies, if possible.

If at all possible, try to arrange a pre-trial conference with the prosecutor. Review with the prosecutor all evidence and all basis for your conclusions. If there are weak points in your case, bring them to the prosecutor's attention. Ask the prosecutor to review the questions he or she intends to ask you on the witness stand. Point out when you do not know the answer to a question. Ask the prosecutor to review questions and tactics that they anticipate the defense attorney may use. Make sure your curriculum vitae is current. Review your credentials and qualifications with the prosecutor. Offers to assist and educate prosecutors are usually appreciated.

If you cannot have a pre-trial conference, try to identify the main points about the case, and be sure to discuss these with the prosecutor during the few minutes you will have just before the trial. It is important for you to advise a prosecutor that has no experience in DRE, that the case can not be treated like a, “typical DUI case”.

B. Guidelines for Direct Testimony

1. Testifying about your qualifications as a Drug Recognition Expert.

   Remember that having been qualified as an expert in the past does not automatically guarantee that this court and judge will deem that you are an expert in this case. You may have to testify in some detail as to your relevant training, education and experience. In fact, it often is to the prosecution's advantage to have you provide such detailed testimony.

   Juries and even judges may be favorably impressed by the depth and scope of your experience and other credentials, and may attach added "weight" to your opinions and conclusions if they have had an opportunity to learn how well qualified you are to render them. For this reason, you should encourage the prosecutor, if possible, not to accept the defense's stipulation as to your expertise. Instead, always try to enter testimony as to your credentials into the record.

When testifying about your qualifications, try to relate your training and experience to the specific categories of drugs involved in the case at hand. Highlight the number of times you have seen a person under the influence of those categories. Explicitly highlight the number of times you have examined subjects and concluded they were not under the influence of drugs: this helps to demonstrate the fairness and impartiality of your evaluations.

Voir Dire is a French expression literally meaning "to see, to say". Loosely, this would be rendered in English as "To seek the truth", or "to call it as you see it". In a law or court context, one application of Voir Dire is to question a witness to assess his or her qualifications to be considered an expert in some matter pending before the court.

2. Testifying about the facts of the case.

   Your basic task is to establish that the suspect was under the influence of a drug or combination of drugs. When you testify about the suspect's performance of the Standardized Field Sobriety Tests, do not use the terms "pass" or "fail". Also, do not refer to the suspect's "score" on the test or the number of "points" he or she produced. Instead, describe clearly and explicitly how the suspect performed (e.g., "stepped off the line twice, raised the arms three times, etc."). By presenting your observations clearly and convincingly, you will allow the fact of the suspect's impairment to speak for itself. In the same way, describe exactly what you observed and measured during the eye examinations and vital signs examinations, and relate these observations and measurements to your training and experience. In this way you will establish a solid foundation for introducing your opinions and conclusions.

   Always keep in mind that juries typically focus on an officer's demeanor as much or more than on the content of their testimony. Strive to maintain your professionalism and impartiality. Be clear in your testimony: explain technical terms in layman's language; don't use jargon, abbreviations, acronyms, etc. Be polite and courteous. Do not become agitated as a result of questions by the defense. Above all, if you don't know the answer to a question, say so. Don't guess at answers, or compromise your honesty in any way.

Introduction of Evidence Involving "New" Scientific Principles

As a DRE, you will be asked to offer opinions and conclusions based on scientific principles that are quite unfamiliar to the jury or even to the judge. These principles aren't really "new", but they are newly discovered, and they aren't yet within the common realm of knowledge of average people. Your task is to help see to it that the evidence you have obtained through your special knowledge and your hard work will be acceptable to the court.

American courts employ either the Frye or the Daubert standards for determining the admissibility of scientific evidence. Evidence derived from a "new" scientific principle is subjected to the Frye standard of admissibility. This standard derives from the landmark case Frye vs. United States, 293F. 1013 (D.C. Cir. 1923). Frye requires that the scientific principle or theory used to support some offered "evidence" be in conformity with a generally accepted explanatory theory, if the "evidence" is to be admissible. Under Frye, it is not enough that a qualified expert, or even several experts, testify that a particular scientific technique is valid. The technique must be generally accepted by the relevant scientific community.

Courts in many states have ruled that the Drug Evaluation and Classification protocol is not subject to the Frye standard, as the techniques and principles of the protocol are not new or novel. In this situation, the DRE's challenge is to establish a foundation for admissibility of the evidence gained during the evaluation of the defendant. The DRE officer's training and experience is critical to establishing this foundation for admissibility. The DRE's demeanor and credibility will heavily impact the "weight" the judge or jury gives to this evidence.

The Daubert standard derives from Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Some courts refer to the standard as the Daubert/ Kumho standard because the Supreme Court readdressed and reaffirmed the standard in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Pursuant to Daubert, courts serve as a "gatekeeper" for all scientific evidence, regardless of newness or novelty. Scientific evidence is admissible if the court determines that the underlying "reasoning or methodology" is "scientifically valid." Courts assess the evidence by considering four factors: (1) whether the opinions offered are testable; (2) whether the methods or principles used to reach the opinions have been subject to peer review evaluation; (3) whether a known error rate can be identified with respect to the methods or principles underlying the opinion; and (4) whether the opinion rests on methodology that is generally accepted within the relevant scientific or technical community(ies).

C. Typical Defense Tactics

In a DRE case, you will be the key witness for the prosecution. Therefore, the defense will try very hard to cast doubt on your testimony.

The defense may ask some questions to challenge your observations and interpretations. For example, you may be asked whether the signs, symptoms, and behaviors you observed in the suspect could have been caused by an injury or illness, or by alcohol, or by something else other than the drug categories you concluded were present. You may also be asked questions whose purpose is to make it appear that you weren't really certain that you actually saw what you say you saw. Answer these questions honestly, but carefully. If your observations are not consistent with what an illness or injury or alcohol would produce, explain why not. Make it clear that your conclusions about drug influence are not simply one plausible interpretation of the observed facts, but the only logical interpretation.

The defense may also ask some questions to challenge your credentials. These questions may try to disparage or deprecate the formal training you have had as a DRE. There may also be an attempt to ask questions to "trip you up" on technical or scientific issues, to make it appear that you are less knowledgeable than you should be or claim to be. Stick to absolute honesty. Answer all questions about your training fully and accurately, but don't embellish. Don't try to make the training appear to have been more elaborate or extensive than it really was.

Answer scientific and technical questions if you know the answer. Otherwise, admit that you don't know. Don't try to fake or guess the answers.

The defense may ask questions to challenge your credibility. You may be asked several very similar questions, in the hope that your answers will be inconsistent. You may be asked questions whose purpose is to show that you had already formed your opinion well before you completed the evaluation of the suspect. And, you may be asked questions that try to suggest that you eliminated portions of the evaluation, or only gave very cursory attention to some portions. Guard against these kinds of defense challenges by always performing a complete, painstaking evaluation, exactly as you have been taught. Standardization will help ensure both consistency and credibility.

ATTACHMENT A

DRE DEFENSE CROSS EXAMINATION QUESTIONS

The following are representative of questions the defense may use to challenge the DRE's testimony in court. (The defendant is identified as Miss Alicia Ann Ace.)

Missing Symptoms/Normals

This line of questions attempts to elicit the fact that the defendant did not have all of the expected signs or symptoms of the drug (s) in question.

Officer, you were taught that bruxism or grinding of the teeth is a sign of CNS Stimulant influence, isn't it? Miss Ace didn't have that sign, did she?

The defense may also focus on those signs or symptoms that were normal, and were therefore, not consistent with the drug in question.

Officer, you learned the normal range of temperature in DRE training, didn't you? And that range is 98.6 plus or minus one degree, isn't it? What was Miss Ace's temperature? (98) 98 is within normal ranges, isn't it? Miss Ace's temperature was normal, wasn't it? CNS Stimulants cause elevated temperature, don't they? Miss Ace's was not elevated, was it?

Alternative Explanations

The defense elicits alternative explanations for the signs and symptoms of the drug (s) in question. These alternative explanations usually deal with medical conditions, stress, a traffic crash, etc.

Officer, an elevated pulse rate can be caused by things other than drugs, can't it? Excitement may cause it? Stress may cause it? Being involved in a traffic crash is stressful, isn't it? And being involved in a traffic crash may cause elevated pulse, right? Being interviewed in the early morning by three police officers is stressful? And that may also cause the pulse to be elevated, can't it?

Defendant's Normals

The defense attempts to emphasize the fact that not everyone is so-called normal, that normal is subjective.

Officer, you were taught the normal range for pulse in DRE training, weren't you? And you agree that not all people fall in that normal range, don't you? That there are people with pulse rates above normal that aren't on drugs, right? A person's pulse changes over time, doesn't it? You don't know what Miss Ace's normal pulse is, do you? It could be in the normal range, right? But it could be above or below the normal range - normally for her, isn't that so?

Doctor Cop

The line of questioning challenges the credibility of the officer's teachers - that they are police officers, rather than medical professionals.

Officer, the teachers in this DRE school weren't doctors, were they? They weren't nurses either? Toxicologists? Pharmacologists? Paramedics? They were police officers, right?

Just a Cop

This line of questioning challenges the DRE's credentials - that they are "just a cop." This infers that the DRE evaluation is actually a medical evaluation that should be undertaken only by a medical professional.

Officer, you're not a doctor, are you? A toxicologist? A pharmacologist? A nurse? A physiologist? You don't have a degree in chemistry, do you? You're a police officer, right?

The Unknown

By causing the officer to state that they don't know how a sign or symptom is caused, the defense attacks the officer's credibility. This line of questioning challenges the officer's expertise, by implying that a real expert would know these things.

Officer, you don't know how CNS Stimulants dilate the pupil, do you? You don't know how alcohol supposedly causes Nystagmus, do you? You don't know how CNS Stimulants supposedly elevate the heart rate, do you?

Guessing Game

This tactic attacks the DRE's opinion as a subjective guess, a belief, rather than objective. Guesses can be wrong.

Officer, your opinion in a DRE case is subjective, isn't it? It's a belief on your part? You've made these beliefs in DRE cases in the past, haven't you? And sometimes toxicology didn't find the drug you predicted, isn't that so? And, in fact, sometimes, toxicology didn't find any drug, isn't that so? And so, sometimes your opinion is not correct, right? Sometimes, you guess wrong?

Document provided by Sgt. Tom Page (Retired), LAPD and DDA Linda Condron, Santa Clara County, CA.