

*A newsletter by Taheri & Todoro, P.C., devoted to Driving While Intoxicated law in New York State*  
Taheri & Todoro, PC, 388 Evans Street, Williamsville, NY 14221, Telephone: (716) 633-0374

## Cross-Examination Suggestions

Cross-examination can be like crossing a minefield – one mis-step and the client's case can “explode.”

Set forth below is a series of suggestions regarding how to conduct cross-examination in a DWI case. These suggestions do not focus on the substance of cross-examination, but instead on technique.

### ***Determine if cross-examination is necessary***

Before beginning any cross-examination, reflect and ask, “Has this witness's testimony hurt my client's case?” If no questions are posed, counsel cannot inadvertently damage the client's case. Additionally, if there is no cross-examination, the prosecutor cannot conduct a re-direct examination of witness. As a result, if the prosecutor forgot to cover a topic—such as the identification of the defendant—during direct examination, and if the defense informs the judge that he or she has “no questions” for the witness, the prosecutor should not be permitted to conduct any re-direct examination.

### ***Stick with the client's theory of defense***

Cross-examination is not the time to experiment with developing an alternate theory of defense, and counsel should not feel compelled to ask questions on cross-examination because “it's my turn.” Instead, the goal should be to cross-examine a witness only to the extent necessary for

presentation of the client's theory of defense.

Every question asked during cross-examination should have a clear purpose. If asked, counsel should be able to articulate a reason for every question posed and be able to tie it into the client's theory of defense.

### ***Elicit favorable testimony before conducting impeachment***

When counsel anticipates conducting a destructive cross-examination, but also must elicit favorable testimony such as the client's attitude and demeanor, it is wise to elicit that testimony early in the cross-examination. Once the impeachment process begins, the witness — especially a breath test operator or other member of law enforcement — generally becomes less likely to provide testimony that is favorable to the client.

### ***Use simple words and clear phrases when posing questions***

Because the trier of fact is listening to the questions and the witness's answers, as opposed to reading them, counsel should strive to use short questions which contain simple words. The goal of cross-examination is to communicate to the trier of fact, not to demonstrate counsel's verbal skills.

### ***Use close-ended questions to control the witness' testimony***

The law permits the use of leading questions on cross-examination. Counsel

should seize upon this rule and use it to his or her advantage. During cross-examination, the goal is to maintain control over the witness by using close-ended or leading questions. Strenuously avoid the use of open-ended questions, such as “who,” “what,” “when,” “where,” “how,” and “why,” during cross-examination. These questions allow the witness to give a lengthy and potentially devastating response. When questions asking “who,” “what,” “when,” “where,” “how,” and “why” are posed, there is a risk of losing control of the witness. If such open-ended questions are posed during cross-examination, counsel is not permitted to interrupt the witness during his or her answer.

### ***Try to begin and end cross-examination of the witness on a high note***

Studies in behavioral science have demonstrated that people tend to best remember what they heard first and what they heard last. Counsel should attempt to organize the examination by topic and pay close attention to which topics will be used to begin and end the cross-examination.

This newsletter does not offer specific legal advice. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. If you have any questions or would like a specific topic covered in the newsletter, please contact Michael S. Taheri, Esq., or Peter J. Todoro, Esq., at Taheri & Todoro, PC, 388 Evans Street, Williamsville, NY 14221, telephone no. (716) 633-0374, e-mail: taheri@localnet.com.

Edited by James F. Orr

Newsletter available by e-mail if you contact us with your address.