1 Hour and 30 Minutes

SESSION XXVIII

CASE PREPARATION AND TESTIMONY

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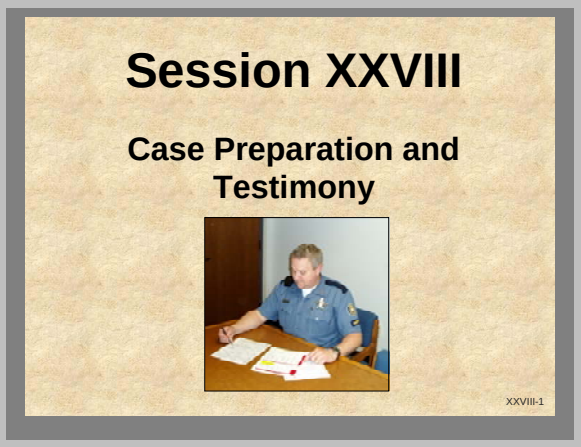
Upon successfully completing this session the student will be able to:

- 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 examine in Drug Evaluation and Classification cases.

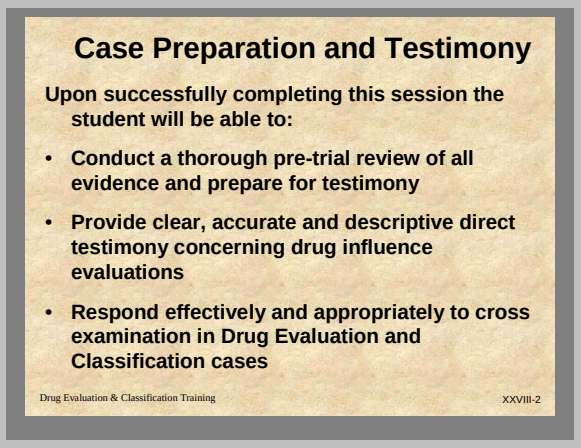
CONTENT SEGMENTS	LEARNING ACTIVITIES
A. Guidelines for Case Preparation	▪ Instructor Led Presentations
B. Guidelines for Direct Testimony	▪ Instructor Led Demonstrations
C. Typical Defense Tactics	▪ Reading Assignments

I. CASE PREPARATION AND TESTIMONY

Session 28-1: Case Preparation and Testimony



Session 28-3: Preparation



Give an overview of session objectives, content segments, and learning activities.

A. Guidelines for Case Preparation

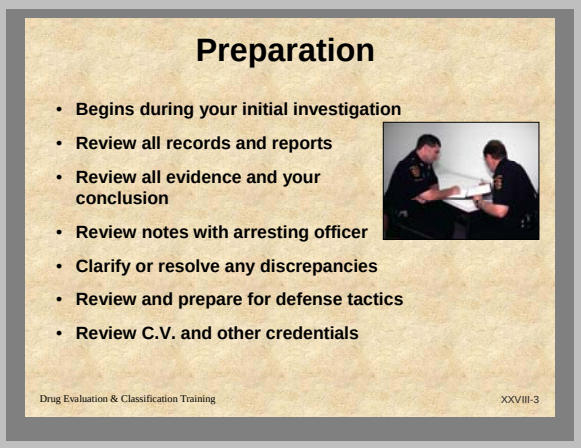
Preparation

Preparation to present your case in court begins during your initial investigation.

The quality of your investigation and documentation will ultimately determine your ability to accurately present information during trial.

- Point out that it is especially important to take complete and accurate notes of your investigation and observations. Complete documentation of this information is essential.

Session 28-3: Preparation



When you receive the trial notice you should:

- Schedule a pre-trial conference with the prosecutor.
- Review all records and reports associated with the case.
- Review all evidence and your conclusion.
- Review notes with arresting officer.
- Review any weak areas.
- Clarify or resolve any discrepancies.
- Review questions the prosecutors will be asking.
- Review tactics the prosecutors expect the defense to use.
- Review your curriculum vitae and credentials.

If a pre-trial conference is not possible, identify the main points of the case and discuss them with the prosecutor during the few minutes before the trial.

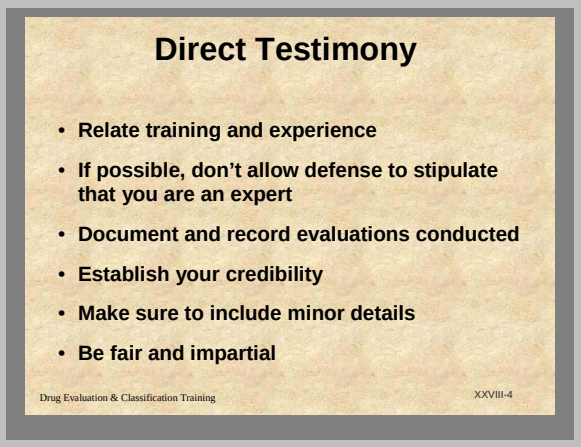
- It is very important to meet with prosecutors that have never been exposed to the DEC Program before trial to explain that it can not be treated like a

typical DUI trial. You must explain that there are different protocols for DUI vs. DRE cases.

- Excellent resources for prosecutors can be obtained through the National Traffic Law Center.

B. Guidelines for Direct Testimony

Session 28-4: Direct Testimony



Direct Testimony

Although knowledge only greater than what the public has is required to qualify as an "expert," your testimony will carry much more weight if you have good credentials.

Qualifications will be established during Voir Dire:

- 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.

When testifying, relate training and experience to the type of arrest being tried (e.g., DWI, Methamphetamine, Cocaine, etc.)

Being qualified as an expert in the past does not automatically qualify you as an expert in a particular court case.

- Highlight fact that you were selected to attend specialized DRE training, not just assigned randomly.

- Point out that officers should document all previous cases where they were qualified as an expert.

If possible, do not allow the defense to stipulate that you are an expert.

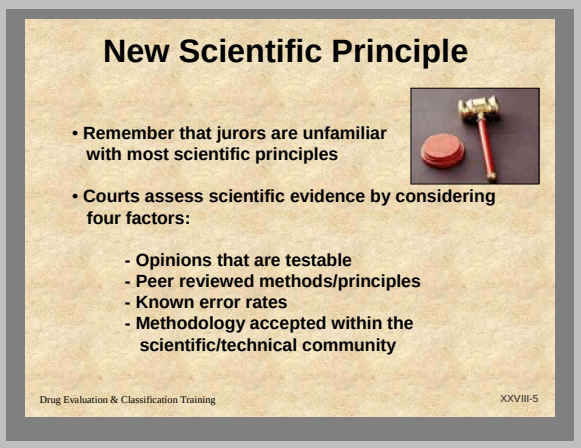
Document and record all evaluations conducted. Establish ratio of evaluations that resulted in a finding that the subject was not under the influence.

Highlight the number of times you have seen a person under the influence of the drug(s) in question and have observed the symptomatology, etc.

Ability to answer specific questions with confidence, skill and exactness will bolster a professional image in the eyes of the judge and/or jury.

New Scientific Principle

Session 28-5: New Scientific Principle



- Point out that they aren't really new just not within the common realm of knowledge of the average person.

The scientific principles are unfamiliar to the jury or judge.

Your task is to establish that your hard work through training will be acceptable in the court.

American courts employ either the Frye or the Daubert standards for determining the admissibility of scientific evidence.

- Discuss the appropriate rule of evidence for your jurisdiction.

The landmark case "Frye vs. U.S."

- "Frye vs. U.S." 293F 1013 (D.C. Cir. 1923).

Frye requires that the scientific principle or theory used to support "evidence" be in conformity with a generally accepted explanatory theory, if the "evidence" is to be admissible.

- Point out it is not enough that qualified experts testify that a particular scientific technique is valid. The technique must be generally accepted by the relevant scientific community.

In Daubert, courts serve as a gatekeeper for all scientific evidence.

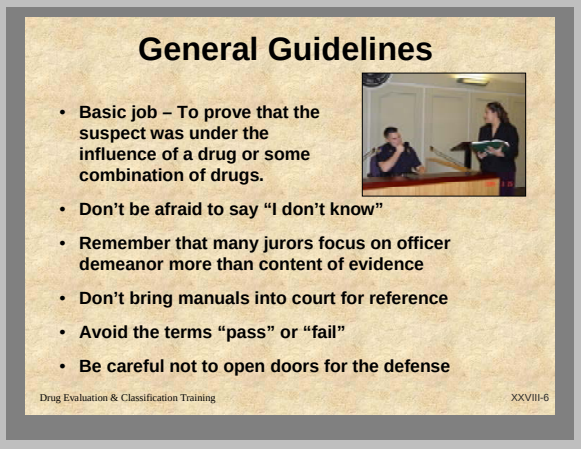
- Daubert vs. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Courts assess evidence by considering four factors:

- Opinions are testable.
- Methods/principles have been subject to peer review.
- Known error rate can be identified.
- Opinions rest on methodology that is generally accepted within the relevant scientific/technical community.

General Guidelines

Session 28-6: General Guidelines



Basic job is to prove that the subject was under the influence of a drug or some combination of drugs.

- Keep this in mind at all times.

Don't be afraid to say "I don't know."

- Point out that the officer is not expected to be an expert on all aspects of all drugs. Testify to only what you know. Remember, an expert witness can rely on hearsay to develop his or her expertise.

Avoid contact with the defense attorney if possible.

Don't be upset if prosecutor and defense attorney appear friendly to each other.

- Remind students that both sides have a specific role to play in the case at hand, but that does not preclude a personal or professional relationship.

Jury focuses on an officer's demeanor more than content of testimony.

- Point out that an officer should be polite and courteous during testimony. Do not become agitated as a result of defense questions. Do not take personal issue with defense statements, stick to the facts.

Do not bring manuals or articles into court for reference.

- Review materials before court to become familiar with contents.

Explain technical terms in layman's language.

- For example, HGN means an involuntary jerking of the eyes occurring as the eyes gaze to the side.

Pay attention to what evidence or testimony can be and is excluded.

- Point out that if the officer testifies on subject matter that was excluded, it could result in a mistrial.

When describing subject's performance on SFST's, explicitly describe exactly what the subject did or neglected to do.

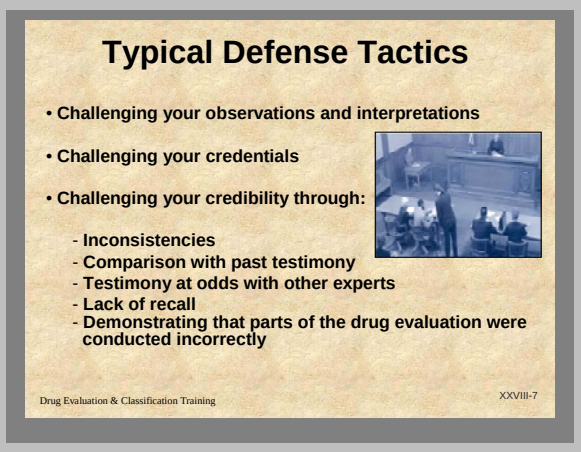
- Point out that the terms "pass" or "fail" should not be used. Describe actual performance. The defense will try to trip you up on this point…there are no passing and failing marks.
- Results of subject's performance are describable evidence.
- Be sure to emphasize that all evidence is taken into account before forming an opinion.

If defense attorney asks a "why" question, take the opportunity to explain in great detail if appropriate.

- Point out that this suggestion does not mean that the officer should embellish his or her testimony…be careful not to open any doors for the defense.
- See attachment for typical defense questions.

C. Typical Defense Tactics

Session 28-7: Typical Defense Tactics



Point out that the defense attorney's job is to try and create a "reasonable doubt." Don't take it personally.

The defense relies on several factors to "impeach" or discredit your testimony.

The defense will challenge your observations and interpretations. They will attempt to show that the signs, symptoms and behaviors observed have other explanations.

Defense will challenge your credentials…a bona fide expert has both formal training resulting in a high degree of knowledge and experience in applying knowledge, resulting in a skill.

- Point out that if the defense can discredit your training and /or experience, your testimony will have little "weight" with the jury.

By demonstrating the officer lacks depth of knowledge in the drug field by contrasting his or her knowledge with the defense expert's knowledge.

- The trial tactic is to show that the officer does not have the expertise to accurately diagnose the cause of intoxication / impairment because of

inadequate formal training which lessens the value of his/her field experience and increases likelihood that he/she is mistaken in his/her conclusion.

Some examples of challenging your credibility are:

Inconsistencies:

- Arresting officer's and examining officer's testimony must be complimentary. Any differences must be explained.
- Get your facts straight and stick to them.

Comparison with past testimony:

- Try to get copies of transcripts of pervious trials to review your strong/weak points. If possible, review your testimony with the prosecutor.

Testimony that is at odds with other established experts:

- Do your homework…review the literature. Explain any differences if possible.

Lack of recall:

- Try to be prepared, but don't be afraid to say "I don't know." Be honest.

By demonstrating that the officer incorrectly performed part of the evaluation, resulting in an erroneous conclusion.

- Point out that the evaluation should be performed "by the book" each and every time it is conducted.

Role of Defense Expert

To impeach credibility of the arresting officer and/or the prosecution expert

- My expert vs. your expert. Usually they are 180 degrees apart in their opinions.

To present alternative conditions and states that could have produced the same or similar symptoms

Typical Defense Questions

Pupillary examinations:

- Where the examination took place.
- How dark was the examining room.

- The size or power of the flashlight.
- Where the defendant was placed in relationship to the examiner.
- Where the flashlight was directed during the examination.
- Where the defendant was looking during the examination.
- How many times each pupil was checked.

Describe the difference between a fresh puncture wound and an old puncture wound.

- Point out that a fresh puncture wound is defined as under 12 hours after injection

Are there any physical illnesses or conditions that manifest the same signs as heroin intoxication, and describe a few

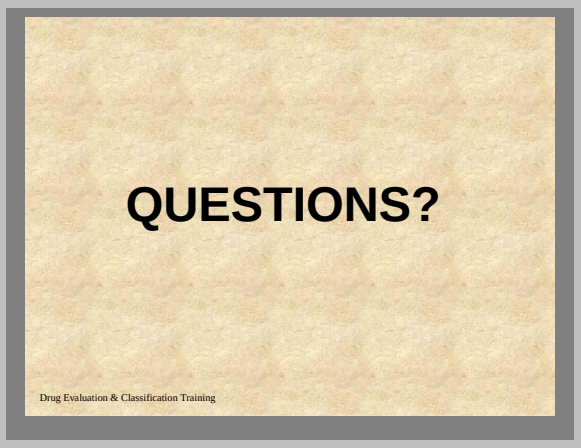
- Point out that the list of possible answers is almost interminable.

How long does an occasional heroin user remain under the influence of the drug after injection?

Suggested role play to discuss the following questions:

- What is a DRE?
- What is involved in the DEC training program?
- How do you properly identify the category or categories?
- How do you explain the opinion?
- What are the components of a drug influence evaluation?

Session 28-8: Questions



Solicit students' comments and questions concerning case preparation and testimony.

DRE DEFENSE CROSS EXAMINATION QUESTIONS

The following are representative of questions the defense may use to challenge the DRE's 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 officer, 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? A 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?