IT’S ALL ABOUT YOUR OPINION

Why do prosecutors need expert witnesses? As a DRE officer, are you a “fact witness” or an “expert witness”? What makes you an expert legally? This session will answer these questions and so much more. Come find out why prosecutors need expert witnesses and what you can do as a DRE to be the expert witness the judge and jurors want and deserve.

5 Questions to Ask to define your expertise

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Introduction

Why do prosecutors need expert witnesses? In short, it is all about your opinion! A longer explanation is prosecutors need witnesses to tell the story of their case. Before the Drug Recognition Expert (DRE) becomes an expert witness, they are first a police officer. The jury expects an officer to be a “professional witness,” one that testifies all the time. While this impression is based on illusions created in television and movies, it is nonetheless very real in jurors’ minds. Every citizen of this country is afraid of angry police officers. An officer who loses his or her cool loses the jury. Goading the officer to lose their temper is a real and profitable tactic for defense counsel. Being professional at all times is the first step to testifying expertly.

It is also worth noting that a police officer witness takes the same oath as every witness . . . “I swear to tell the truth, the whole truth, and nothing but the truth.” That is the officer’s one job . . . that is it . . . tell the truth. A DRE that spins their testimony, shows a bias for the prosecutor or against the defense, treats one side more politely, plays games, or responds sarcastically in kind, does not increase their credibility, they destroy it. “Hey the defense lawyer started it,” never justifies less than professional conduct of the officer witness. Juries expect more of officers than they do of defense counsel, and they should.

The DRE is unique in often being both a fact witness and an expert witness. Like any fact witness, a DRE must convey what he or she saw, heard, smelled, and touched in a manner that is both professional and fair. They are also experts, but the expectations of jurors are the same — the rules don’t change.

A prosecutor needs an expert witness to be a teacher. Prosecutors need experts to explain how and why things happened the way they did, or why they didn’t happen the way they were supposed to. In the drug impaired driving case, expert witnesses are needed because these cases are legally very technical (i.e. must prove the substance is intoxicating), and a great deal of science converges (i.e. horizontal gaze nystagmus, divided attention principles, toxicology reports, etc) that are beyond the every day experiences of jurors. Finally, an expert crowned by the judge is allowed to testify about the ultimate issue at trial, something a lay witness is generally not allowed to do.

An expert is simply a witness who explains things to a jury. The expert’s job is to take something that appears complicated and boring and make it simple and interesting. In preparing for trial, I often ask myself, “What will these jurors tell their family or friends tonight around the dinner table?” Will they say: “This was a case where a dangerous drugged driver was stopped before they killed someone.” Or, will they say, “You should have heard this case…It had the sloppiest police work you ever saw!”
You have an opportunity to tell a powerful story as a Drug Recognition Expert (DRE). Becoming a DRE is more than passing the certification exam and investigating drug-impaired people. It requires understanding your role in becoming an expert witness who communicates the truthful story in a simple and interesting way. This presentation addresses the first of two hurdles a prosecutor and DRE officer must clear together for the DRE officer to become the expert witness the judge and jurors want and deserve.

What are the two hurdles? First, to become an expert witness the **judge** must be satisfied you have complied with the **laws of evidence**. You are not an expert until the judge says you are an expert. Second, to become an expert witness you must satisfy the **jury** by complying with the **laws of persuasion**. Jurors decide what the final story will be. What will jurors tell their friends and family after the trial?

This presentation will assist your clearance of the first hurdle with the goal of putting you in a position where you are ready to expertly clear the second hurdle. Expert testimony must pass certain evidentiary tests before it is admissible. This presentation will focus on 5 questions to ask and answer right now to be able to define your expertise later in front of a judge who will determine if you are qualified to testify in the specific drugged-driving case. Once the judge determines you have established your expertise, the issue then is one of credibility, which is for the jury to decide. This credibility begins with how you approach the first hurdle. Let's get started . . .

1 **Knowledge**

Facts, information, and skills acquired by a person through experience or education; the theoretical or practical understanding of a subject. Where did you get your knowledge? What is your relevant knowledge to this case?
2 Skill

The ability to do something well; expertise. What skills do you have beyond the normal officer as it relates to this case? Where do you obtain these skills? How often do you use these skills? How reliable are your skills?

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3 Experience

The knowledge or skill acquired by practical contact with and observation of facts or events over a period of time, especially that gained in a particular profession. How long have you used skills relevant to this case?

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4 Training

Be taught a particular skill or type of behavior through practice and instruction over a period of time. When did this training take place? What was taught? Is it relevant to this case? Is your testimony the product of reliable principles and methods?

5 Education

The process of receiving or giving systematic instruction, especially at a school or university. What is your educational background? Are there any classes or subjects that relate specifically to your testimony in this case?
Just because you are an expert you will not always have an answer to every silly question the defense can ask on cross. Remember, your one job is to tell the truth. Officer witnesses, and DREs in particular, hate to give honest answers that sometimes make them feel dumb. Yeah, I said it makes them FEEL dumb. Face it . . . the questions are actually what are dumb. A DRE should never ever be afraid to answer, “I don’t know”. Fact witnesses should answer every hypothetical with this answer. The DRE can be asked for their opinion, even on cross. But if the truthful answer to any question is “I don’t know” then this is the answer that must be given.

A DRE must also be willing to answer “I don’t remember.” If that is the honest answer then it is the only appropriate answer. Never guess, bad things always happen when you guess. If it was something you should have remembered prosecutors can always refresh your recollection.

Finally, defense lawyers ask multi-part, triple negative horrid messes of questions. Sometimes they do this because they are stupid, sometimes because they are very smart. Your oath is to tell the whole truth. How can you follow that oath if you answer questions you do not understand? You can’t. Answer these questions truthfully by saying “I don’t understand the question.” You have no right to know WHY a question was asked, but you can not possibly follow your oath by answering questions you don’t understand. These three answers would have saved most officers I have seen destroyed on the stand.

Final thought, it is never the DREs job to win the case. It is their job to tell the truth and tell it effectively.

Conclusion

If today’s training went well, then we have cleared the first hurdle together. The judge has qualified you as an expert under the Rules of Evidence. Now what??

Step into the jury box for a moment. An expert has been called as a witness, has made her or his way to the witness chair, and has just been sworn. What are the jurors thinking about this expert? What are their expectations? What are their concerns?

My friend and expert John Kwasnoski says, “Technical proficiency may make one an expert, but it does not make one an expert witness.”

Think about this for a moment and hopefully our paths will cross at a future training where we will learn how to testify expertly in your next case — Brush your teeth, use clean language, wear your best clothes . . . Ok, Mom taught you (or should have) some of the basic skills in testifying expertly. The next training session is not about that . . . Nor is it about the knowledge you have learned and retained as a Drug Recognition Expert. The next hurdle is all about taking small portions of your DRE investigation and expertly presenting it to the jurors so they are persuaded by the truth.