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# THE GAME OF TRIAL; Running the Bases

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# FIRST BASE: THE BEST GEAR

- ⦿ Texas Rules of Evidence
- ⦿ Leading Case Law
- ⦿ Learned Treatises
- ⦿ Personnel Files
- ⦿ Materials / Toys

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# Texas Rules of Evidence

- **105 Limited Admissibility**  
voice exemplar; medical records; breath test
- **106 Remainder of Related Writings**  
DIC-24 and ALR Judgment
- **107 Optional Completeness**  
What else is in there? BT records of invalid tests.
- **201 Judicial Notice**  
weather, Super Bowl, Bronze Star
- **401 Relevance**
- **403 Exclusion of Relevant Evidence**  
unfair prejudice, confusion of the issues, or misleads the jury
- **613 Prior Witness Statements**  
Impeach using ALR Transcript
- **615 Production of Witness Statements**  
(e) testimony shall be stricken  
radar log; MDT; other reports
- **803(8) Public Records**  
no offense report; *Fischer*
- **803(18) Learned Treatises**  
published treatises established as reliable authority may be read  
NHTSA; Dubowski; experts
- **902(10) Business Records**  
affidavit on file 14 days prior to trial;  
medical records; auto repair; post dated

# Leading Case Law

## ○ Weaving

*Fowler*, 266 SW3d 498; *Hernandez*, 983 S.W.2d 867; *Huddleston*, 164 S.W.3d 711; *Eichler*, 117 S.W.3d 897; *Bass*, 64 S.W.3d 646; *Corbin*, 33 S.W.3d 90; *Cerny*, 28 S.W.3d 796; *Arriaga*, 5 S.W.3d 804; *Tarvin*, 972 S.W.2d 910; *Curtis*, 209 S.W.3d 688.

## ○ Drugs / Medication

*Layton*, 2009 LEXIS 149 PD-408-07; *DeLarue*, 102 S.W.3d 388

## ○ Traffic

*Guzman*, 240 S.W.3d 362 (Spinning tires); *Coleman*, 704 S.W.2d 511 (wheeling); *Ford*, 158 S.W.3d 488 (conclusory statements); *Trahan*, 16 S.W.3d 146 (turn signals)

## ○ Breath Test

*Mata*, 143 S.W.3d 331; *Mata*, 46 S.W.3d 902; *Erdman*, 861 S.W.2d 890; *Franco*, 180 S.W.3d 219

## ○ Causation

*Badgett*, 42 S.W.3d 136

## ○ Radar Predicate

*Rivera*, 91 S.W.3d 365 (Doppler); *Gano*, 466 S.W.2d 730 (Doppler); *Hall*, 264 S.W.3d 346 (LIDAR)

## ○ Statute

38.22; 38.23;

# Learned Treatises

- NHTSA Student and Instructor Manuals
- DRE Manual
- Breath Alcohol Testing Program Manual
- Dubowski

Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects;  
Alcohol Determination in the Clinical Laboratory

- Widmark

Principles and Applications of Medicolegal Alcohol Determination

- Others

Ohlsson (hyperventilation); Fox and Hayward (body temperature); Gullberg (truncation)

# Personnel Files

- Open Records Request
- TCLEOSE
- MDT logs
- Dispatch tapes

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# Materials / Toys

- **Demonstrative Aids**

Burdens of Proof Chart; Drinking Patterns; 3 Rules; BRD Comes From

- **Photographs**

5 x 7s of scene; helicopter; Google Earth

- **Laser Level**

- **Alcohol**

- **Paper**

Colored sheets of paper; post it notes

- **Thermometer**

- **Intoxilyzer 5000**

- **Mouth Piece**

- **Cars and Action Figures**

# SECOND BASE: KNOW THE PLAYERS

- The Client
- The Judge
- The Prosecutor
- The Officers
- The Expert
- Yourself

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# The Client

- ① Dress For Success

Cover tattoos; dull down plastic enhancements; dress like going to church

- ① Character Strengths

Career; family; religion; military; education

- ① Preparing for the Witness Stand

Not coaching; prosecution questions; truth; “I don’t remember”

# The Judge

- Court or jury
- Motion to Suppress
- Know the law?
- Rural v. Urban
- Punishment

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# The Prosecutor

- ◎ Sex / Race

male v. female; hot or not

- ◎ Personality

- ◎ County Perception

elected; coastal; conservative

- ◎ Trial Style

professional; well spoken; aggressive; dramatic; whiney; underhanded; not good on the law

# The Officers

- Open Records Request

Untruthfulness; Insubordination; Suspensions; Admission of Drugs; Fired; Overtime Pay

- Prior Transcripts

ALR; Transcript Bank; Other Attorneys

- Personal Relationship

- Sex / Race

- Trial Style

Responsiveness; competitive; calm; aggressive; Evasive; Polite; Nervous; Gomer Pyle; Kitten

- Effectiveness on the Stand

Ask around; listen to the jury

# The Expert

## ◎ Prior Transcripts

Absolutely a must to keep each transcript

## ◎ Knowledge of the Materials

Resume; Schools; Others in the Field

## ◎ Trial Style

Polite; Evasive; Boring; Bull Headed; Competitive

## ◎ Effectiveness on the Stand

Ask your colleagues; Listen to the jury

# Yourself

- ◎ Sex / Race

- ◎ Dress For Success

Conservative; flashy; Texan; Rural v. Urban

- ◎ Personal Style

bulldog; authority; McConaughy; Matlock; Joe Pesci

- ◎ Who do you connect with best?

- ◎ Can you relate to the jury?

# THIRD BASE: GETTING HITS

- Voir Dire
- Opening
- Cross Exam
- Direct Exam
- Closing



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# Voir Dire: Where You Win!

- Always refer to each juror by name, not number.
- Show personality and emotions.
- Share something endearing about yourself.
- Citizen's lawyer, not there in defiance of DWI laws.
- Drinking patterns  
Regularly, Occasionally, Rarely, Never, Not Any More
- Ask open ended questions and loop down the row.
- Capitalize on great answers.
- Acknowledge and deal with your difficult facts.
- BT- Thermometer.
- BEYOND A REASONABLE DOUBT.
- Presumption of Innocence.
- 5<sup>th</sup> Amendment.
- Rehabilitate.
- Know how to preserve the record.

# Opening

- ⦿ “The evidence will show”
- ⦿ Start with the theme sentence or trilogy.
- ⦿ All of your clients great qualities.
- ⦿ The rest of the story.
- ⦿ What the government didn't tell you....
- ⦿ **NO WAY BRD!**
- ⦿ Be flexible and able to relate to government's opening, if it helps.

# Cross Exam

- Outline

Background, Driving, Contact, SFSTs, Arrest, Transport, Station, DIC-24, BT, BTO

- Never ask a question you don't know the answer to, unless you feel lucky.
- Always lead.
- Establish authority for learned treatises early.
- Control the witness.
- Listen to the witness.
- Look at the jury when you ask the question.
- Make the courtroom yours by walking around.
- Break down the science for a 5 year old / K.I.S.S.  
body temperature, focal points, SFSTs, breath length
- Demonstrative aids.
- Constantly develop and enhance your theme.

# Direct Exam

- ⦿ Discuss testimony and technique prior to.
- ⦿ Walk them through the story.
- ⦿ Talk to the jury.
- ⦿ Nervousness excuses mistakes.
- ⦿ Keep your expert simple.
- ⦿ “I don’t remember”
- ⦿ Popularity contest.
- ⦿ Only if they need to explain something.

# Closing

- Start with your theme.

- Story time.

Hunting Story, Doc Hollywood, Swedish 3

- 3 Rules

Presumption of Innocence, Burden on the State, BRD

- Reasonable Doubt

Evidence, Mistakes in Evidence, Lack of Evidence

- Jury Charge

- Beyond a Reasonable Doubt

- Best Gear

- IMPACT on client's life.

# HOME BASE: PLAY BALL!!

- ⦿ Step up to the plate.
- ⦿ Get in the batter box.
- ⦿ Keep your eyes open.
- ⦿ Swing for the fence!

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