

# TRIAL TACTICS FROM THE TRENCHES

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“IF YOU TRY YOUR  
CASE ON THE FACTS;  
YOU WILL **LOSE** EVERY  
TIME.”

- Gerry Spence

# GETTING READY FOR WAR: The Best Weapons

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

# 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
- **702 & 705(b) Expert Testimony**
- **703 Bases of Expert Testimony**  
can be from inadmissible; *Bullcoming*
- **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*, 263 SW3d 179; *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); *Allocca*, 301 SW3d 364 (a/c on is not operating)

- **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; *Gigliobianco* 210 SW3d 637; *Mechler*, 123 SW3d 449 and 153 SW3d 435; *Kelly*, 824 SW2d 568.

- **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;

- **Blood Test**

*Bullcoming*, 131 S. Ct. 2705, 564 US \_\_\_, 180 L. Ed. 2d 610(2011); *Melendez –Diaz*, 557 U.S. 1256 (2009); *McNeely v. Missouri*

# 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); A.W. Jones

# Personnel Files

- Open Records Request
- TCLEOSE
- MDT logs
- Dispatch tapes
- 911 Tapes
- Witness Statements

# Materials / Toys

- Demonstrative Aids

Burdens of Proof Chart (NCDD); 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

# Psychology

- ⦿ Gentlemen – shined shoes, tie color, hair cut, shave
- ⦿ Ladies – shoes, colors, hair style and color
- ⦿ Keep your jacket open.
- ⦿ Wake up early and eat a clean breakfast
- ⦿ Shit happens; deal with it.
- ⦿ Lucky song, tie, pocket square.....
- ⦿ **KNOW THAT YOU ARE INVINCIBLE**

# KNOWING THE OPPONENT AND THE TERRITORY

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

# The Client

- Dress For Success

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

- Character Strengths

Career; family; religion; military; education

- 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? – what can you get away with?
- ⦿ Rural v. Urban
- ⦿ Punishment

# 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; McConaughey; Matlock; Joe Pesci

- ◎ Who do you connect with best?

- ◎ Can you relate to the jury?

# THE BATTLEFIELD: Tactical Maneuvers

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

# Voir Dire: Where You Win!

- “Show them yours!”
- Lost in a desert? Who would you follow out?
- Always refer to each juror by name, not number.
- 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.
- Never ask a question, you won’t also answer.
- \*\*\*Acknowledge and deal with your difficult facts.\*\*\*
- BT- Thermometer/ Taxalyzer 5000EN
- BEYOND A REASONABLE DOUBT.
- Presumption of Innocence.
- 5<sup>th</sup> Amendment.
- Rehabilitate.
- Last Criminal Jury trial? (35 years ago)
- 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.
- ⦿ Exception: Save your cross for case in chief

# 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 and 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, warranty, Z 80 chip
- Demonstrative aids.
- Constantly develop and enhance your theme.
- Don't ask that last question.
- Let the Jury label him/her a liar.

# 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 – Chart and Definition
- Best Gear
- Impossible not to think about IMPACT on client's life.
- Last CRIM jury trial?
- Leave a part of yourself out there.

# THE BATTLE:

## Leave Your Blood On The Field!!

- ⦿ Don't go to trial if you don't believe your own case.
- ⦿ Fight "them" at every single step, but never annoy the jury.
- ⦿ Make "them" think twice about trying cases against you.
- ⦿ Always be growing, learning, and trying new things.
- ⦿ Never ever give up.

"You don't become a real cowboy by riding ponies." – Trichter

"It's not how many times you get knocked down, but how many times you get back up that matter." – McKinney

"Play for the fumbles." – J. Silverman