

**NACDL/NCDD LAS VEGAS 2016  
DIRECT AND CROSS-EXAMINATION  
OF EXPERTS**



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# Bio Virginia L. Landry



Virginia Landry is well known in Orange County for effectively representing persons accused of DUI cases relating to alcohol and drugs, as well as the DMV's Administrative Per Se actions for license suspensions. Located in Laguna Hills, California, the firm has successfully represented thousands of DUI clients during her twenty eight years of private practice. Virginia Landry is Board Certified in DUI Defense by the ABA and the National College for DUI Defense, is a Regent, Sustaining Member and Chairperson for the Diversity and Listserve Committees. Virginia serves on the National Association of Criminal Defense Lawyers Association DUI Committee. She currently serves on the Board of Directors for the California DUI Lawyers Association as its Secretary. Virginia Landry is a current member of the Orange County Bar Association, previously serving on the Board of Directors and on two committees. Virginia Landry is qualified as an Instructor for Standardized Field Sobriety Testing, and owns two portable breath testing machines. Speaking engagements include the National College for DUI Defense, Mastering Scientific Evidence, California State Bar Association's annual meeting, the California DUI Lawyers Association, California Attorneys for Criminal Justice, the California Public Defenders Association, the West, Newport Harbor and South Harbor Orange County Bar Associations and the Bridging the Gap program for new attorneys. Ms. Landry has been a guest lecturer at Chapman University of Law, Western State University and Trinity College of Law. Virginia Landry has been featured in the Orange County Register, the OC Bulletin, the Irvine World News and appeared on news channels 4 and 13 and radio talk show "Ridin' Dirty".

# Professional Affiliations

## Virginia L. Landry



National College for DUI Defense

National Association of Criminal Defense Lawyers

California Attorneys for Criminal Justice

California DUI Lawyers Association

California Public Defenders Association

American Bar Association

Orange County Bar Association

Newport Harbor Bar Association

West Orange County Bar Association

South Orange County Bar Association

Northern Arizona University Alumni Association

Western State College of Law Alumni Association

# KISS RULE

- What's the single most important thing in cross examination?

# CONNECT WITH THE LAWYER



EMOTIONAL CONNECTION  
TO  
SECURE THE KISS  
AND  
SEAL THE DEAL

Teachable Moment: Suzanne Perry and Physical Demonstrations

# DIRECT OR CROSS EXAMINATION

- PREPARATION
- SHOULD YOU EVEN DO IT
- WHAT FACTS DO YOU NEED FROM EACH WITNESS
- DISCREDIT A PREVIOUS WITNESS
- MINIMIZE DAMAGE FROM DIRECT
- EXPOSE BIAS

# CROSS

- THE OPPORTUNITY FOR THE ATTORNEY TO TESTIFY
- THE ABILITY TO TELL THE STORY/CONTINUE WITH THE THEORY OF THE CASE
- YOUR THEME MUST FIT



# HOW TO USE CROSS TO WIN YOUR TRIAL

- ALWAYS ATTACK THE MACHINE
  - Prosecution has to defend
  - Jurors love their officers
  - Puts them on the defensive

“ONE WHO CAN BE VICTORIOUS ATTACKS;  
ONE WHO CANNOT BE VICTORIOUS ASSUMES A  
DEFENSIVE POSTURE.” Sun Tzu

# HOW TO USE CROSS TO WIN YOUR TRIAL

- CHANGE THE JURORS FOCUS FROM COP TO MACHINE
  - IS IT ACCURATE?
  - IS IT RELIABLE?

# TEACHING SCIENCE TO JURORS IS FUN WITH THE RIGHT EXPERT



# TOXICOLOGY EXPERT CHECKLISTS

- QUALIFICATIONS
- FIELD SOBRIETY TESTING
- MAINTENANCE RECORDS
- INSTRUMENT ACCURACY
- NON-SPECIFICITY FOR BREATH
- RISING BLOOD ALCOHOL
- BREATH PRESSURE AND TEMPERATURE

# TOXICOLOGY EXPERT CHECKLISTS

- MOUTH ALCOHOL
- PRETEST OBSERVATION/DEPRIVATION PERIOD
- RADIO FREQUENCY INTERFERENCE
- PERIODIC ACCURACY CHECKS
- HUMAN ERROR
- BUTTON PUSHING

— TEACHABLE MOMENT: BATHROOM SCALE

# TOXICOLOGY EXPERT CHECKLISTS

- RETROGRADE EXTRAPOLATION
- PARTITION RATIO
- STRESS
- NONSPECIFIC ANALYSIS
- ABSORPTIVE STATE
  - TEACHABLE MOMENT: SERIOUS SCIENCE: Advanced Course in Blood Drug Analysis and Trial Advocacy, December 9-14 in Arlington, TX

# WHAT DO YOU AGREE WITH?

- Date of arrest
- Time of the stop
- Description of the car
- Odor of alcohol
- Red watery eyes
- Types of SFTS given

# WHAT DO YOU DISAGREE ABOUT?

- INCONSISTENCIES
- INACCURATE STATEMENTS
- EXAGGERATED TESTIMONY
- BAD SCIENCE



# STRATEGIES

- OUTLINE YOUR CROSS
- TIE IT TOGETHER FOR CLOSING
- COME BACK TO THE OPENING
- GET VOIR DIRE DIRECTING THE JURORS TO LEAN IN FOR YOUR KISS

WHAT DO YOU THINK ABOUT THIS  
CASE?

LET YOUR TONGUE SPEAK  
WHAT YOUR  
HEART THINKS

# GET READY FOR THE KISS

- ANTICIPATION IS THE KEY

List all the good facts

- DRIVING
- SYMPTOMS
- TOXICOLOGY

# EXPERTS ON DRIVING

- Weaving
- Weaving across lane lines
- Straddling a lane line
- Swerving
- Turning with a wide radius
- Drifting
- Almost striking a vehicle
- Stopping problems
- Accelerating/decelerating
- Varying speed
- Slow driving (10+under)
- Driving in opposing lanes/  
wrong way
- Slow response to traffic  
signals
- Slow/failure to respond to  
officer's signals
- Stopping in lane no reason
- Driving without headlights

# EXPERTS ON DRIVING

- Failure/wrong signal/inconsistent with action
- Following too closely
- Improper/unsafe lane change
- Illegal/improper turn
- Driving on other than designated highway
- Stopping inappropriately in response to officer
- Inappropriate or unusual behavior (throwing objects/arguing)
- Appearing to be impaired

Taken from Student Manual

# ADD-ONS WHEN THEY DO IT RIGHT

- Fog line
- Red light
- Limit line
- Failed to go on green
- Fishtail
- Others?

# NO WORRIES – I'M FINE



# EXPERTS ON SYMPTOMS

- Odor
- Eyes
- Speech
- Face
- Documents
- Exit
- Walk to side/curb
- Admissions
- Attitude
- Voice
- Smell
- Clothing
- Visual
- Responsiveness
- Interrupting
- Unusual



# EXPERTS ON SYMPTOMS

- HGN
- VGN
- WAT
- OLS
- ROMBERG
- FINGER TO NOSE
- ABCs
- TIME

# JIM NESCI'S THE CURE FOR BAD BREATH

- SEVEN POINTS OF ERROR
  - MACHINE
  - BREATHING PATTERN
  - TEMPERATURE ERROR
  - HEMATOCRIT ERROR
  - PARTITION RATIO ERROR
  - MOUTH ALCOHOL ERROR
  - EXTRAPOLATION ERROR

# VARIABILITY LEADING TO ERROR

• MACHINE ERROR	+/-	10.0%
• BREATHING PATTERN ERROR	+/-	15.0%
• TEMPERATURE ERROR	+/-	8.6%
• HEMATOCRIT ERROR	+/-	<u>14.0%</u>
– TOTAL MARGIN OF ERROR	+/-	47.6%

– TEACHABLE MOMENT: METROLOGY 3.0 Science as Your Best Defense, November 4-5 in San Diego, CA

# MACHINE

- MALFUNCTION
- ERROR
- INHERENT ERROR

# MALFUNCTION

- OUT OF SERVICE
- NO APPROPRIATE LOGS
- PRECISION AND ACCURACY
- LOCAL REGULATIONS

– TEACHABLE MOMENT: TYLENOL EXAMPLE

# ERRORS

- NO OBSERVATION/DEPRIVATION PERIOD
- NO DETERMINATION OF ACCURACY
  - (Every 10 days or 150 subjects, whichever happens first)
  - NO PRINT OUTS

# INHERENT ERROR

- TWO WAYS TO OBTAIN A NUMBER FROM A MACHINE?
- BLOOD?
- BREATH?
- BLOOD IS MORE ACCURATE?
- BREATH IS AN INDIRECT MEASUREMENT?
- WAS BLOOD AVAILABLE?

# INHERENT ERROR

- BLOOD WOULD HAVE BEEN MORE ACCURATE?
- BLOOD WAS NOT DONE HERE?

– TEACHABLE MOMENT: GET TO DOUBT

This lets the jurors know that they have permission to disregard the prosecution analyst, i.e., they can move away from the kiss



# PROSECUTION

- Get their analyst to say machine is accurate and reliable
- YOU MUST:
  - GET THEM TO ACKNOWLEDGE THAT IT IS CAPABLE OF MALFUNCTIONS
  - EVEN A MACHINE WITH 99% ACCURACY SCREWS SOMEONE

# INHERENT ERROR

- We have a reading?
- Reading is .11%?
- You believe the machine is accurate?
- You believe the machine is reliable?
- The machine does make mistakes?
- It's not accurate 100% of the time?
- 95% accurate? (Whatever they use)

# INHERENT ERROR

- Recognized error is .01%?
- On this reading range of inherent error is from .10% to .12%?
- That's a spread of about 20%?
- With no known errors?
- With no known mistakes?
- With no known malfunctions?
  - TEACHABLE MOMENT: SIN CITY EXAMPLE

# BAD BREATH

- ACETONE DETECTORS
- ACETALDEHYDE DETECTORS
- MOUTH ALCOHOL SLOPE DETECTORS
- RFI DETECTORS
- AMBIENT AIR DETECTORS

# NOBODY WANTS BAD BREATH



# EXPERTS ON TOXICOLOGY

- ABSORBING
- PEAK
- ELIMINATING

# EXPERTS ON TOXICOLOGY

## BREATH

- Diagnostics
- Operators
- Temperature
- Variability
- Observation period
- Interferents

## BLOOD

- Diagnostics
- Operators
- Variability
- Collection/blood draw
- Bacteria/contamination
- QC on the calibration curve
- Linearity
- Salting Out

# EXPERTS ON ACCIDENTS

- Skid marks
- Debris
- Resting place
- Traffic investigators
- Speed Distance Calculations
- Car condition
- Road conditions
- Defects
- Pictures
- Video reconstruction
- Accident reconstruction
- Black box
- Injuries
- Windows
- Windshields
- Rollover
- Airbags



# EXPERTS ON MEDICAL DEFENSES

- Physical and mental
- Allergies
- Asthma
- Diabetes
- Medications
- Neurological
- Hearing
- Eye
- Dental
- Throat
- Balance/Vertigo
- Muscular
- Sprains/strains/tears
- Joint Replacement
- Arthritis
- Stomach/digestive
- Irritable bowel syndrome

# EXPERTS ON MEDICAL DEFENSES

- Yeast infections
- GERD/LPRD/heartburn
- Liver
- Urinary/bladder
- COPD
- Gastric bypass
- Lap bands
- Medical Marijuana
- Blood
- Heart

# THANK YOU

- NACDL
- NCDD
- BOARD CERTIFICATION
- SEMINARS
- For an electronic copy of these slides  
text the word EXPERTS to: (949) 531-7060  
and follow the prompts