

Gaining Concessions from the Defendant in Refusal Cases

By Elliott Wilcox

The most common type of D.U.I. that you'll be trying is a refusal case. If your defendant decides to take the stand and testify, will you be prepared to impeach him? Do you know what concessions you'll want to obtain? Have you crafted a storyline approach to your cross-examination, so the jury will be listening to you, rather than the defendant? What follows is a generic example of how you can gain concessions from the defendant and tell a persuasive story during cross-examination:

LIVING WITHOUT A CAR AIN'T EASY

- How long have you lived here in _____ county?
- Since you've lived here, have you had to take your car to a mechanic?
- Have you ever had to leave your car in the shop for a day?
- When you took your car to the mechanic, did he tell you how long it would take?
- Did it take longer than expected?
- Annoying, isn't it?
- Was it difficult to get around without your car?
- Did it ruin any of your plans?
- Did you have to ask someone else to drive you around?
- Who did you depend on for a ride?
- Was it convenient for them?
- Was it convenient for you?
- Having your car in the shop for a day really limits where you can go, doesn't it?

[If you have any objections to this line of questioning, argue that they're relevant because they go to his state of mind when he decided to refuse. It shows the informed nature of his decision. If he's ever had his car in the shop for a day, then he knew how difficult it was going to be to live without his license for an entire year.]

DRINKING

- Let's switch gears and go back to the evening you were arrested, ok?
- Earlier that evening, you were drinking alcohol. [Be prepared for a wiggle answer here. Pin him down – "Yes, I was drinking some alcohol" or "No, I didn't drink anything." If he says he wasn't drinking any alcohol at all, you might want to jump straight to the REFUSAL section. Why would he put his car in the shop for a year if he was guaranteed to blow triple zeros?]

DRIVING

- Sometime after drinking alcohol, you get into your car.
- Now you're sitting in the driver's seat.
- You put your key in the ignition.
- Put your foot on the brake.
- Turn the ignition.
- Start the car.

- Place the car in gear.
- You drive your car.
- After drinking alcohol, now you're driving your car.
- *Are you nervous?*

STOPPED BY THE POLICE

- Sometime after that, you see blue and red lights in your rearview mirror.
- Police lights.
- You stop your car.
- After drinking alcohol and driving your car, now you're being stopped by the police.
- *Are you nervous?*

POLICE OFFICER APPROACHES YOUR CAR AND TALKS TO YOU

- The police officer walks up to your door.
- He shines his flashlight inside your car.
- He shines his flashlight on your face.
- He looks you in the eyes.
- He's close to you.
- Arm's length away.
- Close enough to smell your breath?
- He asks you to step out of the car.
- After drinking alcohol, driving your car, and being stopped by the police, now you're being asked to step out of the car.
- *Are you nervous?*

FIELD SOBRIETY EXERCISES AND ARREST

- He asks you to perform some field sobriety exercises.
- He asks you to walk a straight line.
- He asks you to stand on one leg.
- He asks you to touch your nose.
- He asks you to repeat the alphabet.
- The police officer watches you do these things.
- After watching you he tells you to place your hands behind your back.
- He handcuffs you.
- He places you in the backseat of his police car.
- After drinking alcohol, driving your car, speaking with the police officer, and performing field sobriety exercises, now he's placing you under arrest.
- *Are you nervous?*

REFUSAL

- He drives you to the police station.
- He takes you inside.
- You're still handcuffed.
- He walks you into the breath testing room.

- You see the intoxilyzer.
- Have you ever seen one before? [Careful – don't ask this question if he's got prior DUI arrests]
- The police officer asks you if you'll take a breath test.
- *Are you nervous?*
- You tell him that you won't take the test.
- He explains to you that if you don't, your license will be suspended for at least a year.
- 12 months.
- 52 weeks.
- 365 days.
- **Based on what the police officer is telling you**, it's either take the breath test or he's going to suspend your license, right?
- At this point in the evening, do you remember how much you've had to drink?
- You know *exactly* how much you've had to drink, don't you?
- Now you're looking at the intoxilyzer.
- You've got an important decision to make: Take this breath test, or lose your license. **That's what he's telling you, right?**
- How quickly do you make up your mind?

Obviously, you won't want to simply read these questions aloud during your cross-examination. They're designed as a starting point for developing your cross-examination. To improve your chances of a "Guilty" verdict after trial, tailor the questions to fit your unique style and the facts of your case. Look at these questions with a critical eye and analyze which ones will work for you and which ones should be omitted. Also, analyze how the questions were asked. Do you want to use the repetitive question ("Are you nervous?"), craft a different question, or not use a repetitive theme at all? As you craft your own questions, try following these guidelines:

- Each question should ask for a "yes" or a "no" response.
- Each question should ask for only **one** fact.
- Limit your use of "quibble" words (modifiers, such as adverbs or adjectives) that the witness will argue with.

In refusal cases, the cross-examination of the defendant can make (or break) your case. To improve your chances of success, don't focus solely on impeaching the defendant. Plan your cross-examination in advance to gain concessions from the defendant. Although the individual concessions may not seem very valuable, when you tie them all together during closing argument, your results will be persuasive.

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