

WHAT IS YOUR
THEORY OF THE WITNESS

IS THE WITNESS...

- PROVIDING ACCURATE INFORMATION
- MISTAKEN
- MISINFORMED
- INCOMPLETELY INFORMED
- LYING

IF THE WITNESS IS LYING

- IS HE CONIVING AND MALICIOUS

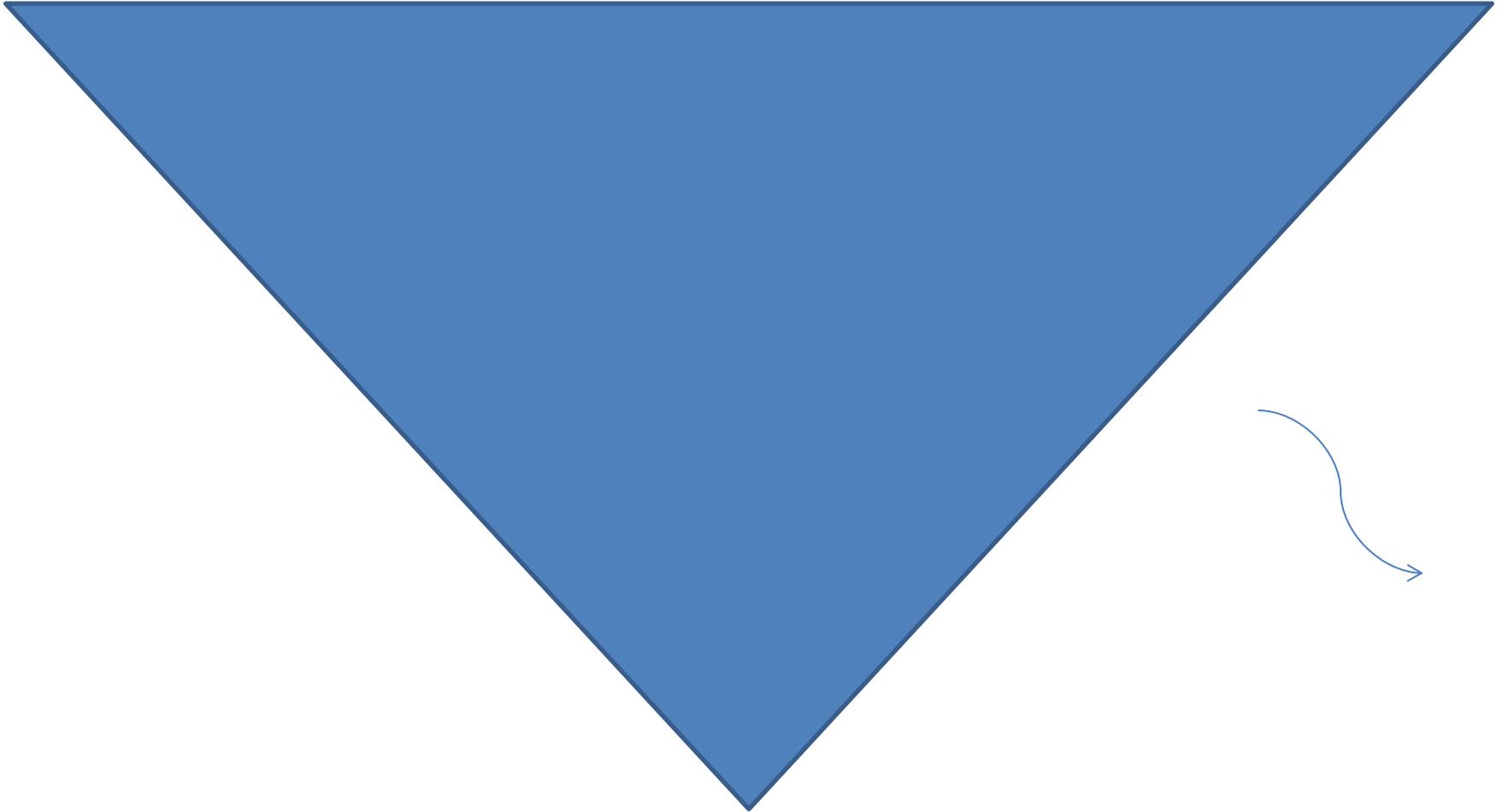
OR BECAUSE HE'S AFRAID OF SOMEONE.



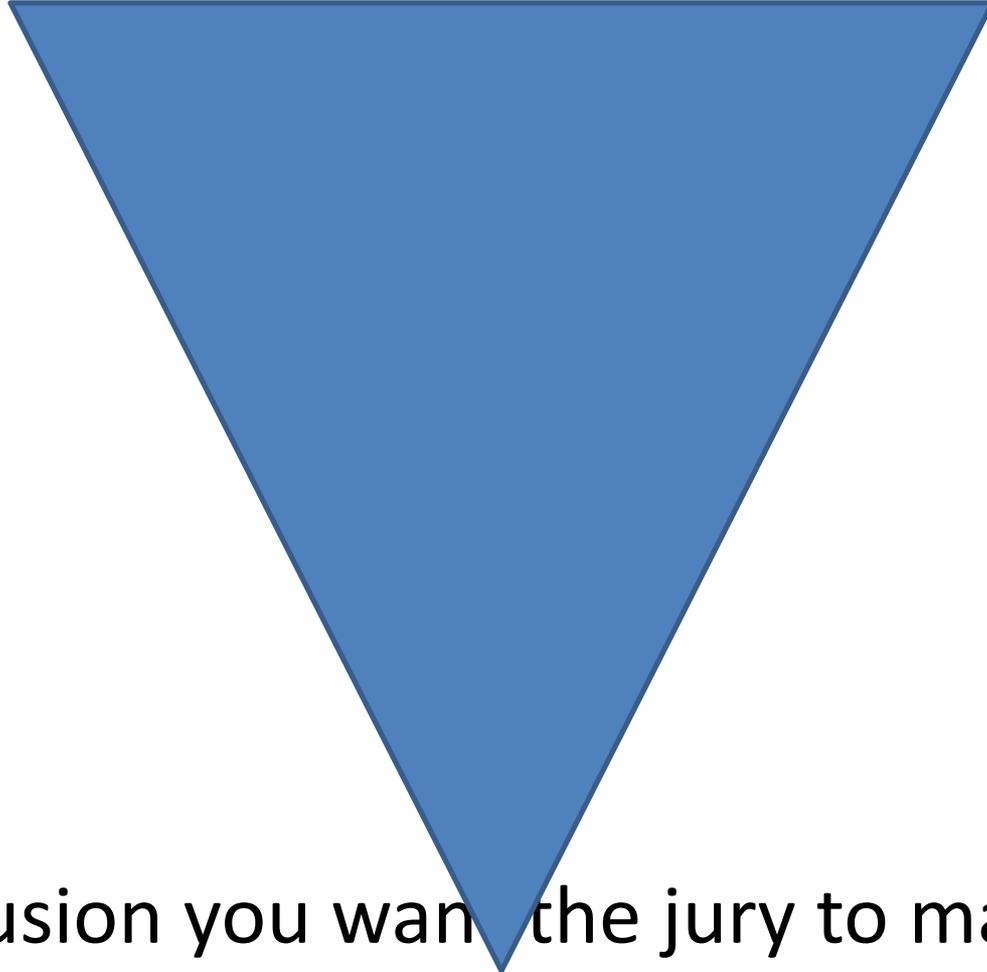
The 4 Rules for Controlling the Witness

- 1 Only Leading Questions
- 2 Only 1 new fact per question
- 3 Only short questions
- 4 Only leading to a specific conclusion

A CHAPTER OF CROSS

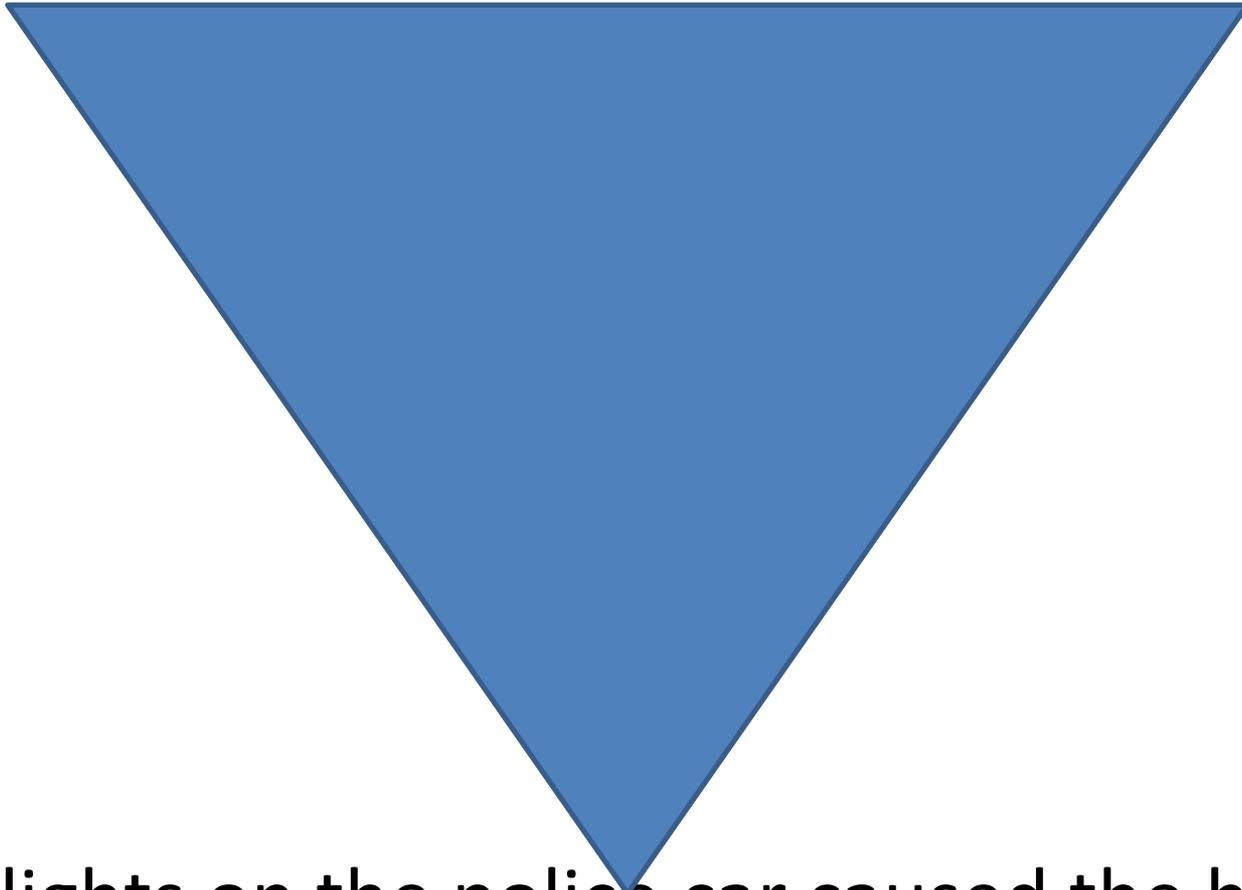


A topic important to your theory



The conclusion you want the jury to make

HGN LIGHTS



The lights on the police car caused the hgn.

HGN LIGHTS

28:23 flashing lights can cause HGN

26:7 you had flashing lights on your car

the lights are red and blue

they are bright

27:17 they are designed to be seen from a long way off

28:4 the flashing lights are very effective

they reflect off of everything

26:10 your car is parked behind Mr. W's car

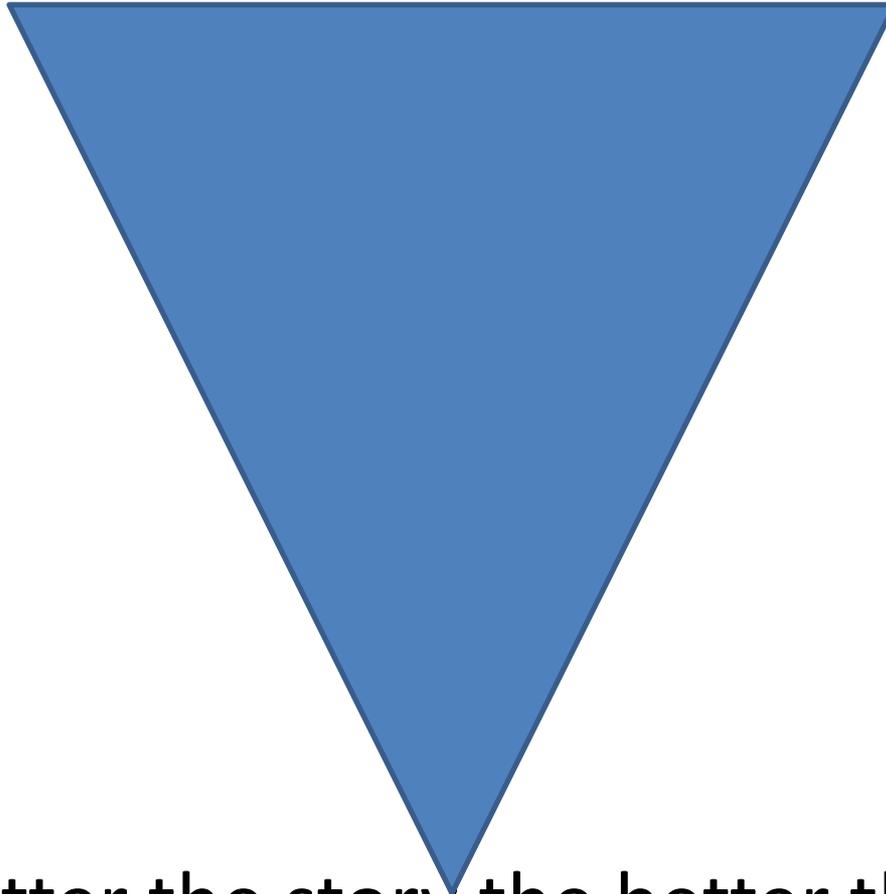
26:10 those flashing lights are pointed at the rear of his car

23:3 you had him facing the rear of his car

your flashing lights were reflecting off the rear of his

car

What he gets for his testimony



The better the story the better the deal.

WORTH AND VALUE

- 1536 after the first time you talked to Det. Dailey on the phone you called again to ask if he had talked to DA
- 1536 He told you “They will not do anything, they won’t approach anybody, won’t do anything until they know what you have”
- 1538 You were worried about telling your story before you knew what it was worth
- 1539 You told him you were skeptical because once you said it they could do whatever they wanted
- 1538 Detective told you it wasn’t going to be worth anything unless you testified
- 1538 Told you that was what your protection was
- 1452 And Det. Dailey told you that the DA was going to have to determine the worth and value of the information
- worth and value means how much you get in exchange
- you are still waiting to find out how much they think your testimony is worth

Use of the principles of Reid Technique interrogation in false confession cases

1. Using what Reid says about the causes of false confessions
 - a. juveniles
 - b. mental or psychological impairment
 - c. “inordinate” length of interrogation
 - d. police use of illegal tactics and techniques
 - e. corroboration
 - f. not revealing details of the offense
2. Understanding the 9 steps of the technique
 - a. Direct, Positive Confrontation
 - b. Theme Development
 - c. Handling Denials
 - d. Overcoming Objections
 - e. Procurement and Retention of the Suspect’s Attention
 - f. Handling the Suspect’s Passive Mood
 - g. Presenting an Alternative Question
 - h. Having the Suspect Relate Details of the Offense
 - i. Converting an Oral Confession into a Written Confession
3. Illustrating the 9 steps in your client’s interrogation
4. Using Miranda as a learned treatise on false confessions

CROSS EXAMINATION ON ROADSIDE SOBRIETY TESTS

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CROSS EXAMINATION ON ROADSIDE SOBRIETY TESTS

- I. Like all good cross it must have a theme--
 - A. Five common themes are:
 1. The client's good performance raises doubt about impairment
 2. The client's good performance raises doubt about the accuracy or reliability of the chemical test result
 3. The tests demonstrate ability to divide attention
 4. The tests are unfair
 5. The officer who gave the tests was unfair

- II. Create as many roadside tests as possible--
 - A. Every observation of the detaining officer is a roadside test; i.e., he's testing to see if the client:
 1. Pulls over immediately;
 2. Pulls over appropriately;
 3. Stops in a safe place;
 4. Rolls down window to talk to cop;
 5. Presents paperwork appropriately;
 6. Is polite and cooperative;
 7. Follows and understands questions and instructions
 8. Answers questions appropriately
 9. Divides attention between questions and documents
 10. Demonstrates manual dexterity

 - B. By doing it this way you can have your client passing 3 or 4 tests before we even get to what the cop calls "roadsides".

 - C. Break the formal roadsides into as many tests as possible:
 1. Police Manuals on Roadsides do this for you to some extent;
 2. E.g., Walk-and-Turn is at least 9 tests:
 - 1 - balance during instructions
 - 2 - starting too soon
 - 3 - stops walking
 - 4 - heel-to-toe
 - 5 - stepping off the line
 - 6 - use arms for balance
 - 7 - loss of balance on turn
 - 8 - incorrect number of steps
 - 9 - inability to complete maneuver
 - 10- add to these counting out loud which every cop requires
 - 11- Remember that this test requires more than 18 steps and you can turn each step into a test; e.g.,

- you told Ms. Smith not to step off the line
- and on 15 of 18 steps she was on the line
- and on 18 steps she had her heel to her toe
- and on 17 of 18 steps she kept her hands to her sides

3. By the time you are done you will have changed the ratio from your client having failed 5 of 5 tests to passing 20 out of 25 which you can argue in closing is passing under anybody's book; whoever heard of a test where getting 80% right is failing?
4. Break down the One-Leg-Stand
 - 1 - instruction phase -- starting too soon
 - 2 - raising arms
 - 3 - hopping
 - 4 - touching foot down
 - 5 - counting out loud
 - 6 - counting by one thousands
 - 7 - counting all the way to 30 (or until told to stop)
 - 8 - counting at an appropriate speed
 - 9 - looking at end of foot
 - 10 - keeping leg straight
 - 11 - keeping foot six inches off the ground

III. Divided Attention

1. purpose of roadblocks is dividing attention because driving requires it
2. more things client is doing right at same time the better
3. do this with formal and informal roadblocks
4. most importantly do it with the actual driving
 - a. slowing and pulling over
 - b. making turns
 - c. making stops
 - d. parking

IV. Using the Manuals--

A. Are appropriate conditions present

1. Walk-and-Turn, Manual says:
 - a. must use a clearly visible line
 - b. not a valid test for people over 60 years old
 - c. not a valid test for people over 50 lbs. overweight

- d. People in heels over 2" high should be given chance to take off shoes

Older versions give other clues to issues

- e. "may be difficult" for people with injuries to legs or inner ear disorders
- f. maneuver loses its accuracy if repeated
- g. cop must be at least 3 to 4 feet away from subject
- h. cop must remain motionless during test
- i. "Being too close or excessive motion on your part will make it more difficult for the suspect to perform, even if sober."3.

2. One-Leg-Stand, Manual says:

- a. don't give to people over 60 years old
- b. don't give to people over 50 lbs. overweight
- c. don't give in heels over 2" high

3. Older versions of the Manual give clues to other issues:

- a. requires adequate lighting since "One Leg Stand is difficult even for sober people in total darkness."
- b. don't give to people with physical condition that affect their ability to balance
- c. cop must be at least 3 feet away and remain motionless

B. Was it scored properly or is scoring fair

1. Walk-and-Turn

- a. Manual says 2 or more is failing; unfair
- b. Manual says don't give a point for loss of balance during instruction phase if swaying or raising arms, only if steps off line
- c. Manual says don't score raising arms unless its at least 6 inches
- d. Manual says give only one point for each error (e.g., stepping off line) even if it happens more than once
 - i. this can be a way to lower an artificially high score
 - ii. it can also be a way to demonstrate unfairness of the test (e.g., person who on 1 of 18 steps raises arms and 1 of 18 steps misses heel to toe gets identical score to person who take all 18 steps off the line and can't get heel to toe on any of them--both are given a 2, which is failing)

2. One-Leg-Stand

- a. points are only to be assigned for arm raising, hopping, foot down or swaying

- b. points not to be assigned for incorrect counting, foot less than 6 inches high or not looking at end of foot
- C. Many Manuals contain the other common roadsides and proper procedures for each
 - 1. Rhomberg
 - a. find out what the cop thinks a sober person does
 - b. manual says a sober person moves in small circle
 - c. manual says an impaired person may move side to side or front to back or combination (how is combination different than small circle?)
 - 2. Alphabet
 - a. manual says have person do the whole alphabet
 - b. use same principle of showing everything client did right (e.g., if told not to sing, didn't sing)
 - c. manual says nothing about singing -- if singing is failing did cop advise person at start not to sing
 - 3. Finger to nose
- D. Setting up to use the Manuals: get the cop committed at a hearing prior to trial that this manual is how he was trained and is the bible or otherwise a learned treatise on roadsides
- E. Other roadsides not given, some even can be given in custody
 - 1. finger count
 - 2. backwards count
 - 3. finger to nose

IV. Horizontal Gaze Nystagmus

- A. Move in Limine to exclude it as unreliable and scientifically not accepted;
- B. Cross cop on all the things she doesn't know about HGN
 - 1. what the neurological mechanism is
 - 2. what the other kinds of nystagmus are and how he couldn't tell them apart
 - 3. things that can cause HGN, strobe lights, rotating lights, over the counter cold medicines
 - 4. things that can cause lack of smooth pursuit, fatigue, moving objects
 - 5. fact that over half the population has HGN at maximum deviation when sober
- C. Was test administered according to proper procedure

1. no hard contacts
2. no glasses on
3. stimulus 12"-15" from face

D. Angle of Onset

1. 45 degree angle of onset much more important than the other 2 indicators to determining alcohol intoxication
2. difficulty of estimating angle in the field (taught with template but not used in field)
3. other factors

E. Location

1. lights
2. reflection
3. cars

F. Using the Manuals

1. high speed pass
2. low speed pass

V. Importance of visiting the scene

- i. Road conditions
- ii. Slope, gravel,
- iii. Proximity and speed of other traffic
- iv. Weather conditions
- v. Reflection of lights
- vi. Wind
- vii. Number of people around
- viii. Lighting

ROADSIDES CROSS CHAPTERS

Balance

Driving Behavior

Driving Scene

Stop

Roadsides Scene

Odor & Absorption

W & T principles

W & T performance

OIS principles

OLS performance

HGN

Rhomberg

Alphabet meaning

Alphabet performance

Counting meaning

Counting performance

Eyes

Statements

Demeanor

Client Physical Condition

Traffic conditions

Client clothing and footwear

Weather conditions

Cross Examining Agents in Drug Cases

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Prepare to cross agents by knowing their job better than they do:

Get their manuals and other training materials.

A Small Sample of Manuals available just at NACDL.org in the Bookstore Section

- DEA Agents Manual

- DEA Chemical Handler's Manual

- US Attorney General's Guidelines on FBI Investigations

- US Attorney General's Guidelines on Lawful, Warrantless Monitoring of Verbal Communications

- US Attorney General's Guidelines Regarding the Use of Confidential Informants

- FBI Handbook for Special Agents

- US Dept. of Justice, Electronic Crime Scene Investigation: A Guide for First Responders

- ATF, Surveillance of Premises, Vehicles and Persons, New Agent Training

Brainstorm things to request in discovery or to subpoena:

- all electronic communications between agents, cellphones, text messages, email, back radio channels

- CAD reports from dispatchers

- not just training manuals but training videos

- materials from special courses that agents have taken, including the results of any exams they took

- all laboratory data, not just results

- all video recordings, dashboard cameras, video surveillance

- logs from all surveillance of listening posts

- all audio recordings, in car, in pocket digital devices

Learn from the Manuals and the best agents and officers you have come across how it ought to be done and make lists of all the things that weren't done right in your case.

Just as you need to develop and articulate a cohesive theory of your defense, you should develop and articulate a cohesive theory of the witness for cross.

Your theory of the witness must fit all of the following:

- Your theory of the case
- The personality of the witness
- The demeanor of the witness
- The facts beyond change

Get a copy of Cross Examination: Science and Techniques, Second Edition (2008) by Pozner and Dodd. Published by Lexis/Nexis.

The basics of establishing and maintaining control of the witness on cross are especially important for professional witnesses like narcotics agents. So:

- Ask only leading questions.
- Add only one new fact per question.
- Ask only short questions.

Prepare your cross in chapters. A chapter is a small subject that is important to your case and leads to a specific factual conclusion that advances your theory or harms your opponent's theory.

Give great thought to the sequence of the chapters but don't be a slave to it. One of the advantages of chapters is the ability to change the sequence. Make sure you choose strong, safe chapters for the beginning and end of your cross.

Use your cross chapters of the key witnesses to organize your opening and closing.