

## Sample Cross-Examination Questions That the Prosecutor May Ask

If you have prepared properly and understand the areas of your testimony that the prosecution will most likely attempt to impeach you with then the following types of questions will not come as a surprise. Going over these questions may help you avoid becoming confused or being tricked by the government during your testimony, however, they are only offered as examples of common types of impeachment questions. The questions should not be used as a script, as every case and every witness differs. However, a general understanding of the government lawyer's trick questions will prevent disaster on the witness stand by teaching you to present a well thought out and truthful response.

### A. Coached Testimony

Q. You discussed your testimony with your attorney [or the defense attorney] prior to coming here today, didn't you?

Bad response: No [or simply] yes.

Good response: Of course, I've never testified before. I had a lot of questions about what was going to happen during the trial, and about what types of questions the prosecutor might ask me. Mr. Lawyer helped explain the trial process to me so I could better understand what to expect.

Q. You also discussed your version of the facts with the other defense witnesses didn't you? [or] You met wit the other defense witnesses to agree on what was important, didn't you?

Bad response: Yes [or] no.

Good response: We all agreed that it was important to discuss the event to remember as many facts as possible for the trial. We didn't all remember the same things, but the discussion helped refresh our memories so that we wouldn't forget to leave anything out when we got the chance to talk to the jury/court. I think the jury/court should know everything.

Q. Isn't it true that your lawyer told you what your answers to my questions should be? [or] Your lawyer told you what to say?

Bad Response: Yes.

Good response: Yes, he told me to answer all your questions truthfully, but to listen carefully to your questions because they might be

confusing. He also told me not to let you put words in my mouth. I was told not to guess if I was not sure, but to tell the truth and say I was not sure.

Reasoning: These types of questions imply that your testimony has been rehearsed. You should expose the prosecutor's tricks by providing truthful and acceptable reasons for your pretrial interviews with the defense attorney and the other witnesses. Don't let the prosecutor make it look as though you've done something wrong. Just be honest. Of course the jury/court knows you met with your attorney and the other witnesses. Make sure you let the jury/court know that no one got together to try and nail down the "perfect story." Your answer should let the jury/court know that you want the "whole truth" out. Tell them that the instructions you received were to tell the truth.

#### B. Bias or Motive to Lie

Q. Mr. Defendant, you don't want to be convicted for driving while intoxicated do you? [or] Mr. Witness, you don't want to see your (friend, co-worker, etc.) convicted for driving while intoxicated do you?

Bad response: No.

Defendant's Good response: I was not driving while intoxicated. I'm innocent. No innocent person would want to be convicted for something he didn't do. [or]

Witness' Good response: I wouldn't want to see any innocent person be convicted.

Q. You'd do anything to keep from being convicted wouldn't you? [or] You'd do just about anything to help your (friend, co-worker, etc.) from being convicted, wouldn't you?

Bad response: Yes, of course.

Good response: I would not lie. I swore to tell the truth. If I were guilty I would accept responsibility. [or]

Good response: I swore to tell the truth. [or]

Good response: I would not lie. My integrity is too important to me to give up my honesty. I gave an oath.

#### C. Questions about Intoxication

Q. Mr. Witness, how do you define intoxication?

Bad response: Drunk; can't walk; falling down; seriously impaired.

Good response: Loss of normal use of mental or physical faculties. [or]

Good response: Impairment, either mental or physical, to the extent that one's normal abilities are appreciably impaired.

Reasoning: Be sure you let the jury/court know that your opinions are based on an accurate understanding of the legal definitions they are using.

Q. Is that the definition you've always used for intoxication?

Bad response: Yes (unless it's true).

Good response: No, that's the legal definition of intoxication as my attorney explained it to me. He said I needed to understand it for the trial.

Q. How would you generally describe an intoxicated person?

Bad response: Slurred speech, bloodshot eyes, physical or mental impairment, loss of balance.

Good response: I think it's probably different for each person. It's difficult to speak in general because some people are just clumsy or uncoordinated and some people have physical conditions like a natural slur or a speech impediment.

Q. Would you agree with me that an intoxicated person might sway when standing? (or might forget the alphabet, slur his speech, lose his balance, etc.) [or] Would you agree with me that an intoxicated person might not be able to walk a straight line? (or might not be able to touch his nose, balance on one leg, estimate 30 seconds, etc.)

Bad response: Yes.

Good response: I think it would depend on what is normal for the person being evaluated. Alcohol affects people differently. [or]

Good response: Sure, it's possible, but it would depend on the person, how much he or she drank, and other things such as injuries, fatigue, health, etc.

Q. Who do you believe is the better judge of whether someone is intoxicated, the person drinking or someone who has not been drinking?

Bad response: The person who has not been drinking would be a better judge.

Good response: I think someone who knows the person drinking would be the best judge. It would be difficult to judge a stranger without knowing what is normal for the person. It would be a guessing game. If, however, you are really referring to the officer and I, I was not intoxicated and I know myself. I don't have to guess about my normal- I know what it is.

Q. Mr. Witness, are you telling this jury that you felt no effect whatsoever from the alcohol that you had consumed?

Bad response: I may have felt a little buzzed.

Good response: I may have felt some sensation, but it did not affect my mental or physical abilities.

#### D. Memory and Ability to Observe

Q. Mr. Witness, you were drinking at about the same rate as the defendant that night, weren't you?

Bad response: Yes. [or] No, I was probably drinking more than he was.

Good response: About the same rate (or less if it's true), but I wasn't actually counting how many drinks the defendant was having, or how quickly or slowly he drank them.

Q. Then your mental (or physical) faculties would have been affected to about the same degree that the defendant's were?

Bad response: Yes, we probably felt the same.

Good response: I'm sure it didn't affect us the same because we are not the same people. However, I do know that I was not intoxicated, so if you're saying we were the same then the defendant could not have been intoxicated because I was not intoxicated.

Q. Do you think your memory is better than the officer's is?

Bad response: Yes. [or] No.

Good response: I don't know what the officer remembers. I'm not like the Officer where I see lots of different cases where I have to write down stuff to keep one case from running into another. What I do know is that being arrested made an impression on me that I

will never forget. I don't think anyone remembers that night better than I do.

Q. Mr. Witness are you saying that the officer is lying?

Bad response: Yes, he's a liar.

Good response: I don't think he's lying, but he might be. I'd rather give him the benefit of the doubt that he is mistaken. I think he misinterpreted what he saw because he didn't know me.

Q. Mr. Witness, if what you've said about the Defendant is true, then the officers had no reason to arrest him, right?

Bad response: Yes, that is correct.

Good response: I believe that once an officer smells alcohol on a driver's breath, it's usually downhill from there. With all the political issues involved around DWI, I think the police are afraid to let people go after they stop them and smell alcohol.

Q. Mr. Witness, isn't it possible that you don't remember many details about that night because you were so intoxicated?

Bad Response: I guess it's possible. [or simply, no]

Good Response: I was not intoxicated. I think that once the officers smelled alcohol on my breath they viewed every little thing about me that they thought was unusual as being caused by alcohol.

E. Field Sobriety Tests

Q. At the police station (or on the roadside with the officer), you had the opportunity to perform sobriety tests to demonstrate your mental and physical faculties but you chose not to, didn't you? Isn't it true that you didn't take those tests because you knew you were too intoxicated to pass them?

Bad Response: I knew it wouldn't be in my best interest to take the tests because I didn't know how I would do on them. [or] I couldn't pass those tests sober.

Good response: I have always heard that when a person is being investigated by the police or is under arrest he should talk to a lawyer before he says or does anything. [or]

Good response: I chose not to do the tests because I felt that the officer had already made up his mind to arrest me. I didn't believe taking the tests was going to change that. Plus, he didn't have a video camera to record my performance for the jury/court to look at, and I didn't think it was fair.

Q. So you admit you had the opportunity to show the jury/court, (either on tape or through the officer's observations) that you were not intoxicated, and you didn't take it?

Bad response: Yes.

Good response: I didn't want to do anything until I could ask a lawyer what my rights were and whether I should just go along with everything.

Good response: I knew I didn't have to prove my innocence, isn't that the law?

Q. So what you're saying is that you intentionally or knowingly withheld evidence from the members of this jury/court that could have been helpful to them in making a decision in this case?

Bad response: Yes [or] I was afraid it might look bad on tape.

Good response: What I'm saying is that I didn't want to participate in the investigation against me without first speaking with a lawyer about what my rights were and to find out whether I should just go along with everything.

Q. In your video (or according to the officer) during the sobriety tests you failed to count in thousands as the officer instructed (or didn't keep your arms at your sides; or didn't turn properly on the walk-the-line test; or didn't point your toe during the balance test), didn't you understand the officer's instructions, or were you too impaired?

Bad response: I don't know why I did that, I guess I didn't understand.

Good response: I know those tests are easy for the officer, he's probably practiced them thousands of times, but I had never been asked to do this stuff before (if it's true) and I was extremely nervous. [or]

Good response: What you see is normal. I normally use my arms for balance, just like everyone else. The tests were unfair because what the officer was asking me to do is unnatural. I don't know anyone who could do these on their first try when they were as nervous as I was and perform all those tests exactly like the officer wanted me to.

Q. Your balance was certainly impaired to some degree that night, wasn't it? After all, you were swaying during the head tilt test, weren't you?

Bad response: No (unless it's true). [or] I guess I was swaying a little bit.

Good response: I think everyone has a natural sway to some extent under those conditions. Anyway, the officer didn't tell me not to sway during that test. All he told me to do was tilt my head back, close my eyes, and estimate thirty seconds. He never said anything about not swaying. It's not fair to grade me on swaying if I was not told to refrain from swaying. If he had told me not to sway during the instructions at least I would have had a fair chance at passing the test.

#### F. Breath Testing

Q. Mr. Defendant, you refused to take the breath test because you knew you were too intoxicated to pass it, right? You knew it would be all over?

Bad response: I didn't want to take any chances, I knew it wasn't in my best interest.

Good response: I didn't take the test because I don't know anything about the machine, or how it is supposed to work. I wanted to at least talk to a lawyer to find out what I should do. Then they told me I couldn't talk to one. I didn't think that was fair. I couldn't make an educated decision without more information. [or]

Good response: I've heard there is a lot of controversy about the machine being unreliable. I wasn't about to take a chance on some machine. I'd rather trust a jury/court of my fellow citizens or an impartial judge. To me that seems like a smarter decision.

Q. Mr. Defendant, you were aware of the consequences of refusing a breath test, yet you thought it would be safer to just lose your license than to blow into the intoxilyzer/breathalyzer machine?

Bad response: Yes [or] I didn't want to risk possibly failing the test.

Good response: I wasn't happy about having to make a decision that would lead to a possible suspension of my license, but I wanted to speak with a lawyer first and I wasn't about to be coerced into giving up my good judgment simply because I might lose my license for a while.

Q. So you chose to lose your license instead of just taking the test?

Bad response: Yes, that's correct [or] I didn't want to risk failing the test.

Good response: I simply chose not to take the test.

#### G. Video Witnesses

Q. By your own testimony you were not with the Defendant on the night of his arrest. How could you possibly know what his condition was at the time he was stopped?

Bad response: I can't. I wasn't there.

Good response: I may not have been with him, but I have seen the video made shortly after his arrest and he looks perfectly normal on it to me. He looks a little nervous (or scared, angry, frustrated, etc.), but his mental and physical faculties are seemed fine.

Good response: I may not have been with him at the time he was stopped, but I've known the defendant (state length of time) and he just isn't the type of person who would get behind the wheel of a car if he was intoxicated. He has a reputation in the community for being a very reasonable person.

#### H. Questions about Drinking Alcohol

Q. Mr. Witness, what do you normally drink when you go out?

Bad response: Beer (or wine, or anything with alcohol)

Good response: I don't usually drink when I go out, although I'll occasionally have a drink or two.

Q. How many drinks did you have on the night in question?

Bad response: I'm not sure, I don't remember.

Good response: I know I initially told the officer I'd had three or four drinks, but at the time I was so nervous that I didn't really stop to think about it. Now that I've had time to carefully go over all the details of the evening, I'm sure that I only drank three drinks. I did order a fourth, but I only took one or two sips from it and never finished the rest. [or]

Good response: Just like I told the officer that night on the roadside, I only had three drinks.

Q. What time did you have your first drink, second, etc?

Bad response: I had my first one at eight, then nine, then nine-thirty.

Good response: I'm not sure about exact times, but I know I ordered my first drink about eight, when I got to the restaurant. I probably had my second drink about forty-five minutes later, during dinner.

Q. How much had you had to eat that night?

Bad response: I didn't eat dinner, so I probably had an empty stomach.

Good response: [List everything you had to eat that day. The amount of food in your stomach affects the rate that alcohol is absorbed in the body.]

Q. Mr. Witness, it's true that we only have your word to rely on for the number of drinks you had?

Bad response: Yes, I suppose that's true.

Good response: The proof can also be seen on the video tape, and also in the testimony of people who know that I was not impaired that night.  
[or]

Good response: If you are insinuating that I would lie about how many drinks I had to mislead the jury/court because no one can contradict me, you are wrong. I want the jury/court to know the truth.

Q. Mr. Witness, have you been intoxicated before? [or]

R. Mr. Witness, have you seen the defendant intoxicated before?

Bad response: Yes.

Good response: Yes, last New Year's Eve we had the defendant and his wife over to our home to celebrate the holiday. We had a nice time, and Mr. and Mrs. Defendant spent the night [or]

Good response: Back when I was younger I used to go out and meet friends occasionally. We always had a designated driver or just took taxis though when we planned on drinking.

Q. How many drinks does it take to get you (or the defendant) intoxicated?

Bad response: Six [or any number of drinks].

Good response: It would depend on how much I've eaten, how tired I am, what I'm drinking, how fast I'm drinking, etc. It's impossible to simply choose a number. If, however, your real question is whether or not the \_\_\_\_ (number) of drinks I had that night over \_\_\_\_\_ (hours) on a full stomach made me intoxicated, then, the answer is no, that number did not make me intoxicated.

Q. Would you attend an important business meeting after consuming the same number of drinks you had (or that the Defendant had) on the night in question?

Bad response: No. [or] Yes.

Good response: I'm sure I would be able to, however, I probably would not simply because alcohol is a social thing and it has no place in a professional or work setting.

Q. If you were a commercial airline pilot would you feel comfortable flying a jet full of passengers across the country after consuming the same number of drinks you had (or the Defendant had) on the night in question?

Bad response: No, of course not. It would be too risky.

Good response: If I were a licensed pilot I'm sure the number of drinks I consumed that night would have no effect on my (hypothetical) normal flying abilities, however, if I were a pilot I would never fly after consuming any alcoholic beverages simply because alcohol is a social thing and it has no place in a professional setting such as you have described.

Q. If you were a school bus driver would you feel comfortable driving a bus full of children around the city after consuming the same number of drinks you had (or that the Defendant had) on the night in question?

Bad response: No, of course not, I wouldn't want to take any chance of injuring the children [or] it just wouldn't be worth the risk.

Good response: Again, I'm sure I would be able to without any problems at all, however, I would never do that simply because alcohol is a social thing, it has no place around children or minors, and no place in a professional or work setting either.

Q. Would you feel comfortable driving around your own children, or the children of a friend after consuming the same number of drinks that you had (or the Defendant had) on the night in question?

Bad response: No, I wouldn't want to take any chance of injuring them.

Good response: Again, although I'm sure I would be able to without any problems at all, alcohol simply has no place around children, even in small amounts.

Q. Would you allow a surgeon who had that many drinks to operate on you or a member of your family?

Bad response: No, absolutely not.

Good response: Although he might be able to, if I didn't know anything about him I'd probably ask for another Doctor to avoid any risk. Then again, surgery is a pretty nerve wracking experience. Maybe I'd want him to have a drink to steady his nerves.

H. Questions about Punishment

Q. Mr. Defendant, now that you've been convicted, would you go ahead and admit to the jury/court that you were really guilty?

Bad response: Yes, I guess I really did have too much to drink that night.

Good response: I can accept the jury's/court's verdict, but now it's time to move forward.

Q. Mr. Character Witness, have you heard that the Defendant was previously convicted of DWI (or criminal offense)?

Bad response: No, I didn't know that.

Good response: Yes, I'm aware that he made a mistake in the past.

Q. Does the fact that he's been convicted before change your opinion about his character?

Bad response: Yes. [or simply] No.

Good response: Everybody makes mistakes, we're all human. The fact that the defendant made a mistake in the past does not change my opinion that he is a responsible and productive citizen now. As far as this

offense is concerned, the fact that the jury found he was slightly impaired and shouldn't have been driving does not make him a bad person. If he had been seriously impaired, or if he had been involved in an accident, I would certainly agree that such irresponsible behavior is totally unacceptable. I, however, don't see this as being one of those types of cases. I understand that the jury/court believes he was guilty, but I still believe he was capable of safely operating his vehicle that night. Regardless, I know this whole event has made a lasting impression on him. I am confident this will never happen again.

Q. You would agree that now the defendant has been convicted, he does deserve some type of punishment, wouldn't you?

Bad response: Yes.

Good response: I think it's clear that the defendant has a problem with his drinking, however, I think it's our job as a society to not only punish people who make these mistakes, but more importantly to rehabilitate them and teach them how to be responsible citizens. In Mr. Defendant's case, I believe this would be best achieved by placing him on some type of probation or court supervision so that he will have the opportunity to receive treatment/alcohol education and move forward with his life. Simply placing him in jail won't help him deal with a hidden alcohol problem, if he has one, or make him more aware of alcohol problems.

### Whole Truth

Most prosecution witnesses in a DWI trial have testified numerous times before. Because they have usually been taught how to testify, most have learned how to avoid damaging the State's case with careless and unprepared answers. To level the playing field and insure that the defendant receives a fair trial, it is important that you as a witness take the time to prepare for your testimony by reviewing the types of questions identified in this handout so as to prevent being caught off-guard. Not only will the defendant appreciate your efforts, but you will also feel good knowing that you've helped the jury to see the whole truth.