§ 37:14. Sobriety checkpoints and field sobriety tests

(a) Introduction

Driving while intoxicated (DWI) and driving under the influence (DUI) are impaired driving offenses common in most jurisdictions, whether the source of impairment is alcohol, controlled dangerous substances, or other drugs. Many arrests for these offenses take place at sobriety checkpoints set up by the police. The Supreme Court has upheld the use of sobriety checkpoints, balancing drivers' Fourth Amendment rights against the effect of DWI and DUI on traffic safety, and their use has expanded on a national level.

While most criminal law practitioners are familiar with the general intoxicated driver offenses, the use of a checkpoint as the pretext for contact and detention introduces new variables into the trial equation. As this equation changes, so do the weights of the various factors that will determine either guilt or innocence.

(b) Field Sobriety Tests—Generally

Although many field “sobriety test” procedures are modifications of those performed by neurologists in diagnosing illness and by pharmacologists in assessing the psychomotor effects of drugs, this does not guarantee their accuracy as specific indicators of drug effects or observable intoxication or as predictors of driving impairment.

Field sobriety tests, or FSTs, are exercises that test a subject's balance, coordination, recollection, and ability to follow instructions. Observation of FST performance provides insight into a driver's condition and into a driver's ability to safely operate a motor vehicle. FSTs are qualitative, gauging the effect of drug or alcohol ingestion, rather than quantitative. They do not indicate what intoxicant was ingested, when it was ingested, or how much of its was ingested. FSTs only present an opportunity to observe the effect that the intoxicant has upon the subject. To be effective, FSTs must be properly explained and demonstrated, so that they are clearly understood, before the subject attempts to perform them. Where this is not done, poor or incomplete performance may be attributable to misunderstanding, rather than inebriation.
Very few experiments that rigorously test the validity of the claim that such procedures accurately indicate intoxication or that rule out the influence of other factors have actually been conducted. There have been only two studies—both unsuccessful—that attempted to demonstrate the relationship between any of the commonly used procedures and actual or simulated driving impairment. Several experiments, which are summarized below, have shown that the relationship between these coordination procedures and blood alcohol concentration is loose, tenuous, and subject to considerable bias. As a result, the weakness of these relationships permits the defense attorney to make use of several avenues of attack.

Very few attorneys or judges realize that the National Highway Traffic Safety Administration (NHTSA), which sponsored the most scientific examination of these procedures and developed the three best procedures for forensic use, recommends that these procedures be used solely during the roadside stop to establish probable cause for further investigation. Even after their refinement, the procedures recommended by the NHTSA were never meant to be introduced as evidence in the prosecution's case—even when they were performed and scored properly—because there was no proof of their specificity and relevance.

The information gathered by these procedures suffers from several of the same problems that mar observations of intoxication. These problems include the lack of a self-comparison (to sober performance), the subjectivity of assessment procedures, the influence of environmental conditions, and the failure to preserve the evidence. Some of the solutions are also similar—training and periodic recertification of officers who perform the procedures, the use of videotape, spot-checking the proficiency of the officers to insure objectivity, a thorough search for alternative explanations, conservative interpretation of observations, recognition of all of the problems with the assumptions used to form any conclusions, and further research and validation. If all these were conscientiously implemented, then the information that was gathered could have probative value. Since this is almost invariably not the case, the defense attorney should do everything in his or her power to contest the admissibility of both the observations and the conclusions, or minimize the probative weight accorded by the fact-finder to such evidence if admitted, since it will undoubtedly bias the case against the defendant.

(c) NHTSA “Approved” Tests

The NHTSA has approved and standardized five tests for use in ascertaining a driver's sobriety: (1) the Romberg Balance test, (2) the Walk and Turn test, (3) the One Leg Stand test, (4) the Finger to Nose test, and (5) the Gaze Nystagmus tests. The first four test balance and divided attention, or the ability to perform multiple tasks simultaneously. While balance is not necessarily a factor in driving, the lack of balance is an indicator that there may be other problems. Poor divided attention skills relate directly to a driver's exercise of judgment and ability to respond to the numerous stimuli presented during driving. The tests involving coordination (Walk and Turn, One Leg Stand, and Finger to
Nose) are probative of the ability to drive, as they examine control over a subject's own movements. Nystagmus testing has both qualitative and quantitative qualities.

- These improvements, the three techniques in combination do only a fairly good job at picking out those subjects with blood alcohol concentrations above 0.10%. Specially trained police officers used these techniques in the laboratory, where they were blind to the alcohol dosage that was actually given to the subjects. The walk-and-turn procedures produced 60% correct classifications, the one-leg stand was 65% accurate, and the horizontal gaze nystagmus was right in 77% of the cases. In the field studies, where the sample of stopped cars was selected on the basis of (presumably) erratic driving, the percentages were slightly better—80%, 78%, and 82%, respectively—but almost every error would have led to an erroneous arrest. To increase their accuracy, NHTSA developed a method of combining the scores on the walk-and-turn and the horizontal gaze nystagmus procedures, using a complicated charge called a Decision Table. This raised the percentages only slightly, to 80% and 83% correct. It does, however, provide evidence that NHTSA had little faith in the forensic accuracy of these tests.

- There are a number of nonstandardized sobriety tests used by field officers in the course of their normal DWI and DUI investigations. Use of a particular nonstandardized test may be limited to certain officers or departments in a jurisdiction. These include alphabet tests, number tests, and finger counting dexterity tests. Their use is probative to the extent that they obtain conduct that can be evaluated. The difficulty arises where the test requires a level of education or linguistic ability that the driver lacks. For counsel to evaluate reported performance on a nonstandardized FST with which they are not familiar, it is imperative that a demonstration be observed before trial.

(d) Definition of Terms

- The term “observable intoxication” is preferable to either the word “intoxication” by itself or the ambiguous phrase “under the influence of intoxicating liquor,” in any of its guises. Courts have ruled with distressing inconsistency that the latter was more inclusive or, alternatively, held that it was synonymous with “intoxication.” “Observable intoxication,” which focuses on the observable symptoms of intoxication, has the advantage of a more precise scientific meaning without a confusing legal history. Although it is similar to the terms “obvious intoxication” and “apparent intoxication,” which are frequently used in dramshop statutes, it avoids implying that a marked degree of intoxication is necessary. It also eliminates the possibility that overly broad definitions of intoxication, such as “the presence of a single molecule of a foreign compound in the body,” will be accepted. To reflect this usage, this article will generally refer to “observable alcohol-induced intoxication” closely following the traffic incident in discussing the driver's objective symptoms of intoxication.
Observable intoxication usually refers to a population-referenced comparison, that is, relative to the normal behavior of a typical individual in the population. From a strictly scientific viewpoint, however, self-referenced observation is what is necessary to demonstrate an alcohol effect on a particular individual. The typical pragmatic problem encountered here is that self-compared observable intoxication requires either prior knowledge of the drunker's symptoms and abilities or a subsequent examination of his or her behavior while sober, during which some of the symptoms may possibly be faked to minimize the difference.

As the term is used in law enforcement, “field sobriety test” is a misnomer that creates false confidence that these procedures for assessing coordination are actually scientifically based, specific “tests” of “sobriety.” Even the term “field” is sometimes inaccurate, since these procedures are performed in some stationhouses as well as by the side of the road. Defense attorneys should be very careful not to fall into the trap of misusing this term, since these words can subconsciously bias the jury into believing that these procedures are scientific tests. Not only should they be careful to use terms like “coordination procedures” or “dexterity demonstration,” but they should also seriously consider objecting to any use of the words “sobriety test,” “passing,” and “failing” in the trial, unless the prosecutor can lay the foundation to show that these terms are appropriate.

Existing research demonstrates that despite the aura of scientific approval that comes from the title, these “sobriety tests” are typically less accurate than a lie detector test, and they should have no more place in a court of law. The problems with using individual symptoms as indicators of observable intoxication are at least equally hazardous. Establishing the relevance and the consequent admissibility of the officer's scoring of each of these coordination procedures, and his or her consequent conclusions about the defendant's condition, should require that the prosecution prove one or both underlying assumptions—that “failing” these “sobriety tests” proves that the defendant's driving ability was impaired or that his or her blood alcohol was above 0.10%—depending upon the charges involved. Similarly, each symptom (or combination of symptoms) that may be mentioned by a prosecution witness should require proving a related underlying assumption to provide the foundation to establish its relevance. Thus, the defense attorney should be prepared to challenge these assumptions.

- **(e) Quantitative Sobriety Tests**
  - Quantitative sobriety tests provide indications as to the source of intoxication or influence. They are also useful in gauging the level of impairment.
    - **(1) Nystagmus**
      - Nystagmus is an involuntary movement of the eye that occurs when there is a breakdown in the systems that control eye movement. This involuntary movement can be seen as the eyes appear to jerk or bounce as they track from side to side (horizontal nystagmus) or from top to
bottom (vertical nystagmus). The presence of nystagmus can be an indication of drug or alcohol impairment.

- In spite of the retreat from the “general acceptance in the scientific community” standard for scientific evidence, the admissibility of gaze nystagmus testimony remains in controversy. Although testimony concerning implementation of and observations made during the test may be introduced through a properly trained lay witness, interpretation of these observations, and correlation of the results to evidence of intoxication or influence, requires expert testimony. Absent this corresponding foundation, lay testimony on the implementation of the exam may be useful only in supporting probable cause for the arrest, on the basis that the response observed is similar to that seen by the examiner in other subjects known to have ingested alcohol or a drug.

- As part of a roadside sobriety checkpoint study by NHTSA (which is described in 4 POF3d 229) in which the horizontal gaze nystagmus procedure was administered, the results showed that at each blood alcohol concentration used, a much higher percentage of subjects “failed” this procedure than show any indication of impaired driving. Contrary to claims that sober people will almost always “pass” this test, 15% of the sober drivers and 64% of those with blood alcohol concentrations from 0.05% to 0.09% “failed.” This study demonstrated that using the horizontal gaze nystagmus procedure as an indicator of blood alcohol concentration or driving impairment will generally net more innocent victims than it will impaired intoxicated drivers, considering the larger number of drivers with blood alcohol concentrations below 0.10% on the road.

- (2) Drug recognition examinations

  A drug recognition examination involves a battery of psychophysical and chemical tests, and an interview with the subject. The purpose of such an examination is to determine whether intoxication can be attributed to the ingestion of drugs, based upon observable symptoms of one or a combination of the seven categories of drugs known to be indicators of impairment. Drug recognition examinations were developed in Los Angeles in the 1970s and underwent both controlled laboratory evaluation and field study in the mid-1980s. Following the high percentage of success, NHTSA developed a standardized program to train and certify examiners, known as drug recognition experts (DREs). The result was a procedure, called a drug evaluation and classification process (DEC), followed in the same way by every DRE upon every subject. Due to the time and controlled conditions required, the examination is not considered a field sobriety test, but a post-arrest investigation. DRE testimony has become more common as courts have grown more familiar with the qualification of the examiners and the process of evaluation. Twenty-four states and the District of Columbia have become participants in the DEC as of 1993.

- (3) Preliminary breath testing devices
A preliminary **breath test** (PBT) is a tool to assist police officers in determining whether there is probable cause to believe that a subject is intoxicated by or under the influence of alcohol. Testing is accomplished by use of a portable instrument that collects and analyzes a **breath** sample. Generally, PBT results are not admissible. Absent calibration records, there will be no foundation for the proposition that the device used was functioning properly or that its results are accurate. These arguments notwithstanding, some courts will allow PBT testimony for the sole purpose of establishing the presence of alcohol in a tested subject's system.

(f) Chemical Analysis of Bodily Fluids to Determine Impairment—Generally

- Normally, the grant of a license to drive carries with it the driver's implicit consent to chemical testing upon a police officer's valid request. Because there is no compulsion to submit a sample, as a driver is not required to take a **test**, such a request does not violate the Fifth Amendment.

- There are three principal methods of testing for alcohol consumption: blood testing, which is the most accurate; **breath** testing, which is the most expedient; and urine testing, which is the most problematic. The procedures for implementation of a given chemical **test**, and for certification of testing equipment (including any solutions used in the process of analysis) are governed by statute in most jurisdictions.

(1) Blood testing

Blood testing allows the direct measurement of the percentage of alcohol in a given volume of blood, reported as the blood alcohol content level, or BAC. The blood sample that is tested for BAC also can be preserved for future alcohol or toxicological testing. The problems with this method are mainly in sample collection and storage before testing. The withdrawal of the sample itself is not problematic, so long as no outside contaminant is introduced into the sample during collection. In general, collection and analysis of blood samples should be performed by medical personnel using approved equipment and methods in an appropriate setting.

(2) Breath testing

In **breath** testing, a result is obtained by measuring the percentage of alcohol present in a volume of **breath**, and converting that, through an average partition ratio, into a BAC value. **Breath** samples ordinarily require a 20-minute observation period, and a simulation **test** to assure operation of the machine within preset standards. Sample collection and analysis should be performed by approved personnel with approved equipment. Because the procedure is brief and the results are readily available, this is the most commonly used form of chemical analysis for alcohol. It is, therefore, the most often and vigorously attacked. Many of the issues involved in earlier challenges to **breath test** results (e.g., measurement of alcohol in the mouth, radio frequency
interference, and operator bias) have been eliminated by use of modern testing instruments. Breath testing equipment does not allow for preservation of breath samples for subsequent testing.

- (3) Urine testing

  Urine testing provides the benefit of sample preservation for future testing, but valid sample collection is more difficult. The procedure requires a full void (or emptying) of the bladder and a subsequent sample collection after a waiting period. Where there is a full void, the possibility arises that the subject will be unable later to provide a sample for collection upon request. Where there is not a full void, the value of the result obtained is undermined. This is due to the nature of urine testing, which can determine what has passed through the body by detecting waste products in the system. A calculation is performed to estimate a BAC value based upon the waste products present in the sample. The tests cannot determine the time of ingestion with any accuracy, however, and a full void is necessary, therefore, to limit the time frame in which the waste products detected were processed through the system. Due to privacy concerns at the time of sample collection, contamination or dilution of the sample is also a concern. Once collected, urine samples must be tested by appropriate personnel through the use of approved and properly calibrated equipment.

- (g) Use of BAC Results to Calculate Consumption

  After a valid blood alcohol content level, or BAC, result has been obtained an extrapolation is often performed to determine the number of drinks consumed. The extrapolation is based upon the research of E.M.P. Widmark in the 1930s. The formula derived from this research established a constant for the ratio of alcohol concentration over the entire body to the alcohol concentration in the blood. This constant was designated “r,” and when combined with Widmark’s research on the rate of alcohol elimination, allowed for estimation of the number of drinks consumed by establishing the amount of ethyl alcohol in the body. (The “r” value differed between the sexes: men ranged from 0.52 to 0.86, averaging 0.68; women ranged from 0.47 to 0.75, averaging 0.61.)

  In the context of DWI and DUI trials, variations upon the Widmark formula are used to introduce testimony on the number of drinks the defendant consumed, and averages or estimates are substituted for unknown values. This is a simplified Widmark formula:

  \[(\text{BAC}) (\text{body weight}) (r) (0.184) = \text{fluid ounces of ethyl alcohol}\]

  The resulting value for fluid ounces of ethyl alcohol is then divided by a numerical value for the type of alcohol consumed. For example:

  1 shot = 0.43 fluid ounces of ethyl alcohol

  1 beer = 0.54 fluid ounces of ethyl alcohol

  1 glass of wine = 0.48 fluid ounces of ethyl alcohol
Finally, an average rate of elimination (0.015% per hour since the first drink) is subtracted. The result is an estimate of the number of drinks consumed. Where the pattern of consumption is known but a valid BAC result was not obtained, a Widmark-equation-based extrapolation also may be employed to estimate BAC.

While the math may be captivating, the estimations used to complete the calculations undermine the reliability of the result. Liquors, wines, and brands of beer vary in potency; and drinks are rarely measured to the ounce during consumption. Additionally, absorption can be influenced by food and other factors, and the rate of elimination is not uniform throughout the population. Unless a controlled experiment is used to determine the “r” and beta values of a particular individual (or comparing that individual to the tested population), there is no basis for branding the average values as accurate. Accordingly, the substitution of an average value for any variable in a Widmark equation undermines its effectiveness. This line of testimony, therefore, should be viewed with caution and skepticism.

(h) Inferences Based Upon Refusals to Submit to Chemical Tests

The effect of a refusal to submit to a chemical test varies from state to state. Where a refusal to submit a sample for examination is admissible, the act of refusing may give rise to an inference that it was a conscious recognition of intoxication on the part of the defendant, and the jury may be so instructed. For this reason, whenever the defendant has not taken a chemical test, whether there was a refusal on the part of the defendant to submit to a test is an important issue. It is, therefore, imperative for counsel to address the circumstances surrounding an alleged refusal.

Refusals may come in many forms. A defendant may decline to take a test either by word or deed. A defendant may initially agree to submit to a test, then subsequently decide not to submit a sample. In other cases a defendant may agree to a test, but be unwilling or unable to provide a sufficient sample. Because it is within the discretion of the testing officer to determine when to stop trying to obtain a sample, a “refusal” in many circumstances is simply a conclusion by the arresting officer. The police ordinarily will label as a “refusal” any situation when a sample cannot be obtained for testing. Ultimately, however, the existence of an actual refusal is an issue for determination by the finder of fact.

In general, the requesting officer must advise a driver of the choice of available tests and the consequences of a refusal to submit a sample. The requirements for this admonition ordinarily are set out in the jurisdiction's traffic statutes. A failure to properly admonish should render the test result obtained inadmissible.
Testimony on the defendant's driving pattern and objective symptoms of intoxication may be used to infer that the symptoms of intoxication or influence observed during FST performance were present during the driving.

**Challenges to Impaired Driving Charges—Generally**

1. **Legal challenges**
   - There can be both legal and factual challenges to DWI and DUI charges. Legal challenges include a lack of probable cause for the initial stop and contentions that the vehicle or the location does not fit the statutory definitions. Within the context of checkpoints, lack of probable cause for the initial stop and sufficiency of the proof of influence or intoxication are the paramount defense.
   - Normally, the checkpoint will have been set up on a public road and a defendant will be identified as the driver of a vehicle that was observed in motion. The focus of the challenge to the checkpoint itself is that it was not established under or conducted within the strict confines of controlling case law.
   - Once the validity of a checkpoint is established, the issues for trial are severely limited. Rarely is there any basis to challenge the “operation,” “vehicle,” or “location” elements of impaired driving offenses. The driver of the vehicle that entered the checkpoint will be named as the defendant, and the potential for misidentification is minimal.

2. **Factual challenges**
   - Factual challenges to DWI and DUI charges center around operation of the vehicle, identification of the driver, and sufficiency of the proof of influence or intoxication, or blood alcohol content level. The inquiry then shifts to facts supporting the conclusion of influence or intoxication at the time of driving, namely, FST performance and chemical test results.
   - This limitation of the issues has an interesting effect. In impaired driving cases (other than those in which the offense charged depends solely upon driving with a BAC at or above a statutory level) the driving pattern is usually significant. It can provide direct evidence of the inability of a driver to operate a vehicle in a safe manner. Unlike the speeding, weaving, or general disregard for traffic control devices found in field stops in sobriety checkpoint cases the driving itself will rarely merit attention. Due to the circumstances under which driving is observed, there is rarely any “bad” driving in these cases, and apart from the isolated incident, there will be no accident. Indeed, the defendant's vehicle will commonly approach the checkpoint in a manner that is indistinguishable from other traffic. The defendant will slow and stop in accordance with directions, and when instructed will move the vehicle out of traffic to another area for further investigation. The significance of this vehicle movement, however brief, is often overlooked. Yet, since it ordinarily occurs without showing any sign of
an impaired ability to drive on the part of the defendant, it may provide grounds for arguing that there was in fact no inability to operate a vehicle safely.

(3) Challenges based upon validity of checkpoint stop—generally

- A reasonable and articulate suspicion of a violation is required to justify a traffic stop. Random stops are unconstitutional, and the first focus of the defense in checkpoint cases is a possible challenge to the checkpoint itself. A constitutional method for spot checks may be developed, however, where there is a limited degree of intrusion and there is no unconstrained exercise of discretion; and, with the expanding use of sobriety checkpoints on a national level, law enforcement agencies have developed and employed methods for spot checks that have generally withstood legal challenges.

- A Fourth Amendment seizure occurs whenever a vehicle is stopped and detained; however, a constitutional spot check may exist where there is a limited degree of intrusion and there is no unconstrained exercise of discretion, and brief stops of vehicles on highways for legitimate law enforcement purposes have been upheld. In one Supreme Court case, the court found the brief intrusion upon motorists at a sobriety checkpoint to be slight and far less intrusive than a roving patrol. The court went on to approve the use of these checkpoints after recognizing the states' interests in preventing drunken driving, and the degree to which this method advanced that goal. Subsequently, a number of states have addressed the issue and propounded additional requirements for the conduct of a sobriety checkpoint.

- The elements necessary to validate a sobriety checkpoint are summarized below. Where these elements are established, a sobriety checkpoint will be upheld as constitutional.

1. Regulations restricting discretion of officers. The law enforcement agency conducting a sobriety checkpoint must have clear regulations carefully circumscribing the discretion of field officers, while setting standardized guidelines for site selection and publicity procedures. This may require approval of the checkpoint procedures by high level department officials, or that the procedures be part of a legislatively developed scheme.

2. Systematic stops. Vehicles entering the checkpoint must be stopped on a systematic, nonrandom basis, so that no vehicles are singled out for investigation. All cars are stopped, for example, or some set number (such as every third car) is stopped.

3. Minimal intrusion on individual liberty. This requirement is meant to provide strict regulation of field officers' communications with drivers, and to prevent harassment. In operation it should prohibit vehicle searches, and even permit motorists to refuse contact with the police by allowing them to pass through if they decide not to roll down their windows. It also serves to limit the scope of the inquiry while keeping the intrusion brief, thereby minimizing the inconvenience of the stop.
4. **Opportunity to avoid checkpoint.** The site selected and the established manner of operation must provide drivers with the opportunity to avoid the checkpoint. This requires advance publication of when and where the checkpoint will be set up to prevent surprises and allow motorists to select another route for travel. While in operation, there must be adequate advance warning that a motorist is approaching a checkpoint on that road. Advance warnings take the form of clearly visible road signs indicating that there is a checkpoint ahead, and directions as to when and where drivers can turn off or make a U-turn in order to avoid entry into the checkpoint.

5. **Safety concerns.** The site selected should be sufficiently illuminated to assure the safety of motorist and police officers. Operations should be suspended when traffic becomes too congested, and emergency vehicles traveling in the course of their duties should not be impeded by the checkpoint.

6. **Legitimate show of police authority.** The checkpoint should be sufficiently staffed by uniformed officers. This is meant to reduce motorists' apprehension during the detention by demonstrating the operation is a legitimate use of police authority.

7. **Effectiveness.** This requirement refers to the degree to which the operation advances the public interest. The effectiveness of a checkpoint is demonstrated through statistics concerning the number of cars passing through, and both the number and types of arrests made.

An NHTSA pilot study of Sobriety checkpoints included ratings of several symptoms by officers who were not informed about the blood alcohol concentrations of the seventy-five drivers who approached them. On the average, they found significant increases in symptoms as the blood alcohol concentrations were varied from 0.00% to 0.15%; these included changes in the odor of alcohol, flushed face, slurred speech, dilated eyes, demeanor, dexterity, and disheveled clothes. However, the variability in the percentages detected among the three participating police departments was so large that the author advised that the results be interpreted with caution. Similar increases for alcohol odor, flushed face, and dilated pupils were noted many years before by another researcher, who nonetheless strongly cautioned his readers about the large variability in individual responses to a given blood alcohol concentration. Since all of these symptoms, except possibly poor dexterity, occurred with significant frequency in those whose blood alcohol concentration was below 0.10%, they cannot justifiably be used as indicators of a blood alcohol concentration above that level.

(j) **Suppression of “Test” Results**
The most effective way to neutralize the results of roadside coordination procedures and other observations is to suppress them via a preliminary motion. In almost every case, there are major problems with either the administration of the procedures or their relevance to the case.

The defense attorney should begin by stipulating probable cause (unless circumstances justify a hearing on the issue), to eliminate the argument that this testimony is necessary to establish probable cause.

1. Suppression by discrediting the officer

The typical officer’s training in most jurisdictions falls below an adequate standard. Since the prosecution has the burden to establish his or her expertise, the inadequacy of the officer's training may be the basis of a suppression motion. The NHTSA course lasts three days and has sixteen separate units; anything less is below the federal standard. Even with this syllabus, there are serious shortcomings. The proficiency “tests” are performed immediately after watching a videotape review of the procedures. Each student must demonstrate proficiency on only one fellow student-subject, who does not even have to complete the “test.” NHTSA does not even require that the students demonstrate that they can correctly score any of these “tests” on sober or intoxicated subjects. Performance of other important parts of the procedure is not required to pass the course. Furthermore, the written “test” is an open book test; half the questions are the same as those given in a pre-test at the beginning of the course. Passing this course does not assure any expertise. Very few departments require any refresher courses or recertification in this area.

The expertise of the officer in laying a proper foundation, answering questions about problems with the particular technique utilized, and relating these results to blood alcohol concentrations or driving impairment can be attacked. There are precedents that document both successes and failures with these arguments; outcomes frequently depend upon the expert testimony that was (or was not) introduced. In many of these cases the (presumed) relationship to blood alcohol concentration or driving impairment was not a focal issue.

When circumstances permit, the defense attorney can also base his or her motion on specific problems with the administration of these procedures by the defendant: that they were not properly performed, scored, or recorded; that the evidence was not properly preserved (by videotape); that the “testing” conditions contravened NHTSA regulations or were highly distracting; that the defendant was not an appropriate subject of this procedure (according to NHTSA); or that his or her sober performance was not checked for comparison. Defense counsel may also point to the fact that the defendant was not informed about how the “tests” were to be scored, so that he or she could not make his or her best effort to “pass” them; this can be coupled with the argument that the “standards” used by the officer were highly subjective, if not self-serving.
(2) Constitutional grounds for suppression

The final set of suppression issues is constitutional, beginning with the lack of probable cause for requesting that the procedures be performed at all. Further, a motion based on the lack of *Miranda* warnings, which applies to procedures required at the station house, but not at roadside, may be appropriate. Arguments that videotapes of the defendant performing these procedures without being read his or her rights should be suppressed, based on Fifth Amendment violations, have been successful in suppressing the audio portion of these records, but not the video, and several appellate decisions have not suppressed the nonverbal procedures due to lack of *Miranda* warnings. None of these decisions has focused on NHTSA's requirement that the subject be asked, “Do you understand these instructions?” prior to performing these procedures. A negative response to this question, or a positive response coupled with inadequate performance, can certainly be incriminating. Therefore, *Miranda* warnings should be required before any of these procedures is administered.

- It can also be argued that the suspect was not granted the right to consult with counsel before these procedures. Finally, there is the argument that, since performing these coordination procedures is voluntary, not compulsory, failure to do so satisfactorily cannot be held against the defendant. Very few defendants even realize that performing these procedures is not generally required, since they are typically requested in conjunction with the breath alcohol test.

(k) Use of Opinion Testimony—Generally

- Depending upon the jurisdiction's practice, an opinion of influence or intoxication will come through the testimony of the arresting officer or both the arresting officer and a chemical analyst. An arresting officer traditionally bases his or her opinion on the defendant's driving pattern, objective symptoms of intoxication (e.g., the odor of an alcoholic beverage, red or watery eyes, both, and slurred speech), observation of FST performance, preliminary breath tests and any statements made by the defendant. This is, for the most part, lay opinion, founded upon contact with other persons known to be intoxicated or under the influence. Since analysis of FST performance (especially the significance of observed nystagmus) requires specialized training, a court may require that the officer be qualified as an expert in the field before the testimony will be admissible.

- Chemical expert witnesses rarely have extensive contact with a driver. Their opinion is usually based upon the test result obtained and the effect that BAC level has upon the ability to operate a vehicle safely. Often, these experts are used to support the opinion of the arresting officer through their testimony that reported FST performance was consistent with the test result and the officer's opinion of intoxication.