Driving Under the Influence Prosecution

Creg G. Datig
Traffic Safety Resource Prosecutor Program Director

Michael A. Ramos
President

W. Scott Thorpe
Chief Executive Officer
TSRP Program
Creg G. Datig, Director
Daniel Fox, TSRP, Southern California and Inland Empire
G. Stewart Hicks, TSRP, Central Valley Region
David Radford, TSRP, Northern Region
Rosalind Russell-Clark, TSRP, Greater Los Angeles and Ventura
Stephen F. Wagner, TSRP, Coastal Region

Paige D’Angelo, Public Information Officer

CDAA Publications Staff
Kathy Sheehan, Editor
Laura Bell, Publications Production Coordinator

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California District Attorneys Association
921 11th Street, Suite 300
Sacramento, CA  95814-2882
(916) 443-2017  •  (916) 443-0540 Fax
www.cdaa.org

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Introduction

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DUI IS A HOMICIDE WAITING TO HAPPEN. If you are reading this manual, chances are that you are a prosecutor who has been assigned to a misdemeanor trial unit, and you know that handling DUI cases will be a significant part of your job. Or perhaps you are a more experienced prosecutor handling felony matters, and a vehicular homicide case involving impaired driving has landed on your desk. Either way, at some point someone, perhaps even a colleague, may say to you, “don’t worry … it’s just a ‘deuce.’” It may seem as though impaired driving cases, even those involving death or injury, just aren’t as important or challenging for us as prosecutors as certain other types of crimes. Don’t believe it.

The societal cost of driving under the influence is enormous. According to the National Highway Traffic Safety Administration (NHTSA), traffic collisions are the number-one killer of people between the ages of 4 and 34 years. Vehicle crashes kill more young people than any physical ailments, diseases, accidental deaths, or violent crimes. In 2008, almost 11,800 people were killed in the United States in collisions involving drivers whose blood-alcohol content was above .08 percent, amounting to 32 percent of the total traffic fatalities for the entire year. That means that about every 45 minutes on average every day here in the U.S., someone dies because of impaired driving.

In California during 2008, 1,029 people were killed in crashes involving impaired drivers, the second-highest number of DUI fatalities in the nation. Makes you want to think twice before you get behind the wheel or see a loved one do so, doesn’t it? The good news is that as the result of greater public awareness of the terrible toll inflicted by DUI, as well as more stringent laws and a commitment to improving prosecutor and law enforcement training through programs such as the CDAA Traffic Safety Resource Prosecutor Program (TSRP), NHTSA reports that DUI-related fatalities during 2008 were reduced by more than 9 percent from 2007. While this is certainly encouraging, even one death as the result of impaired driving is too many.

Being a public prosecutor is the most rewarding job you can have as a lawyer. You might not make quite as much money as some of your law school classmates who accepted employment with large firms and are now worrying about grinding out billable hours. But you will be regularly paid for doing justice, and your clients are each and every one of the People of the State of California. You get to do the right thing every day, and in a DUI or vehicular homicide case, what you do in court may save lives later on our streets and highways. That is most definitely important work.

Creg G. Datig
Director
Traffic Safety Resource Prosecutor Program
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Chapter I

DUI—The Nature of the Offense

by David Stotland, Deputy City Attorney
San Diego City Attorney's Office

and

Steve Hansen, Deputy City Attorney
San Diego City Attorney's Office

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(Updated 2010 by David Radford, TSRP Northern Region)

I. Introduction

Driving under the influence (DUI) cases are of great community importance in every jurisdiction in the state. No crash or collision involving an impaired driver is an “accident.” Although the defendant did not intend the crash, his or her decision to drive while impaired is markedly more culpable than the actions of a defendant in a civil tort case.

No one can seriously dispute the magnitude of the impaired driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. “Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.” 4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.8(d), 71 (2d ed. 1987)....

(Michigan Dept. of State Police v. Sitz (1990) 496 U.S. 444, 451.)

Due to legislative changes, improved training for law enforcement and public prosecutors, and increased public awareness, the highway carnage noted above has been reduced. In California in 2006, DUI drivers killed 1,596 victims, about half as many as those lost in the 1970s and 1980s. Unfortunately, however, the fatality statistics have been on the rise since 1999. The numbers for 2006 represent the fifth rise in five years and a thirteen percent increase over 2002.

Most DUI cases are complex challenging trials, requiring the prosecutor to handle direct and cross-examinations of expert witnesses, to present information outside the knowledge and experience of many jurors, and to address complex legal issues governing admissibility of evidence and DUI sentencing schemes. While these cases are commonly misdemeanors, defense lawyers often have many years of experience. Some attorneys devote their entire practice to DUI defense and thoroughly
know the issues presented. The complexity of these cases and the relative experience of the DUI defense bar can make a DUI trial a challenging effort and guarantees a valuable learning experience for the new prosecutor. This manual is designed to help ensure that these important cases are prosecuted effectively.

Vehicle Code section 23152(a) prohibits driving while under the influence of alcohol, a drug, or a combination of the two, and section 23152(b) prohibits driving with 0.08 percent or greater blood-alcohol content. Subsections (a) and (b) of Vehicle Code section 23153 apply when a defendant, while under the influence or with an excessive blood alcohol level, drives illegally or negligently and causes injury. This chapter covers the elements of these crimes and the sentencing considerations in DUI cases.

In the years since the last edition of this manual, many DUI-related statutes have been renumbered by the Legislature. Accordingly, many earlier court decisions refer to statutes by their former numbers. Every year, there seems to be some change in the laws governing DUI cases. **Prosecutors handling DUI cases should take particular care to check whether relevant laws have been amended.**

II. Charging Statutes (Effective January 1, 2010)

A. Vehicle Code Section 23152

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

For purposes of this article and section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(c) It is unlawful for any person who is addicted to the use of any drug to drive a vehicle. This subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with § 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code.

(d) It is unlawful for any person who has 0.04 percent or more, by weight, of alcohol in his or her blood to drive a commercial motor vehicle, as defined in section 15210.
In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

**B. Vehicle Code Section 23153**

(a) It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

(b) It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of performance of a chemical test within three hours after driving.

(c) In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of this code was violated.

(d) It is unlawful for any person, while having a 0.04 percent or more, by weight, of alcohol in his or her blood to drive a commercial motor vehicle, as defined in section 15210, and concurrently to do any act forbidden by law or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of performance of a chemical test within three hours after driving.

**III. Elements of the Crimes**

**A. Driving a Vehicle**

1. **Volitional Movement**

   “In everyday usage the phrase, ‘to drive a vehicle,’ is understood as requiring evidence of volitional movement of a vehicle.” *(Mercer v. Dept. of Motor Vehicles (1991) 53 Cal.3d 753,*
763.) “To warrant conviction, only slight movement is necessary.” (People v. Jordan (1977) 75 Cal.App.3d Supp. 1, 8.) In Henslee v. Department of Motor Vehicles (1985) 168 Cal.App.3d 445, 451–452, the court held that the defendant was driving when she moved her car several inches. “[I]t has been consistently held that a person steering or controlling a vehicle may be prosecuted for impaired driving when the vehicle is in motion but the engine is off.” (Jordan, supra, at 9.)

2. Actual Physical Control

“A ‘driver’ is a person who drives or is in actual physical control of a vehicle.” (Vehicle Code § 305; CALCRIM 2241, formerly CALJIC 1.28). While most DUI cases involve a civilian or police officer witnessing the defendant driving his or her car in the normal sense of the word, courts have affirmed convictions for DUI under the expanded definition of driving set out in section 305. In In re Queen T. (1993) 14 Cal.App.4th 1143, 1144, the court upheld the conviction of a passenger who was handling the steering wheel while the driver handled the gas and brake pedals. In People v. Hernandez (1990) 219 Cal.App.3d 1177, 1184–1185, the court affirmed the conviction of a man who steered a coasting car into another lane.

3. Corpus Delicti

The corpus delicti rule requires the prosecution to present slight evidence of each element of the charged crime by evidence other than a defendant’s extrajudicial statements. (CALCRIM 359, formerly CALJIC 2.72.) There is no need to establish the identity of the criminal—just the elements of the crime. (See People v. Cobb (1955) 45 Cal.2d 158, 161.) But since it must be shown that somebody who was under the influence was driving, establishing who was driving may be necessary. (See People v. McNorton (2001) 91 Cal.App.4th Supp. 1 [finding corpus met when only two people at scene and both intoxicated]; compare People v. Nelson (1983) 140 Cal.App.3d Supp. 1 [no corpus where two people at scene and only one was intoxicated].) A court may rely on the facts presented and reasonable inferences from them. The inference that the defendant is the driver does not need to be the only possible inference from the evidence or even the most compelling inference. (People v. Scott (1999) 76 Cal.App.4th 411, 416–417.) Formerly, prosecutors were required to present this slight evidence before a defendant’s statements could be presented to the jury, but now, a defendant’s statements can be presented at any time. The prosecution still has to establish corpus delicti during the case in chief. (People v. Alvarez (2002) 27 Cal.4th 1161.) Evaluating a case for corpus delicti is fact-specific. The following fact summaries of appellate cases are illustrative:

- People v. McNorton (2001) 91 Cal.App.4th Supp. 1: DUI corpus existed when an officer saw a car legally parked. The defendant, the registered owner, was in the passenger seat. Another person was changing the tire on the car. Both the defendant and the tire-changer were intoxicated. There were no empty containers at the scene to indicate that the driver drank after parking.

- People v. Wilson (1985) 176 Cal.App.3d Supp. 1: Corpus for DUI existed where the intoxicated defendant was behind the wheel of a car stopped partly in one lane of traffic and partly on the shoulder. The defendant was the sole occupant and was behind the
wheel. The car was in park and the brakes were on, but the engine and the air conditioner were running.

- *People v. Scott* (1999) 76 Cal.App.4th 411: Corpus existed when officers came upon a car parked on the wrong side of the road, up on a hand-jack, in a desolate area two miles from the nearest business. The area was marshy, and there were mud smears on the left front panel. The defendant, who showed symptoms of alcohol consumption, was in the back of a police car. He was wet and muddy. A deputy had seen him standing in the middle of the road one-quarter of a mile away from the truck. The defendant had the keys to the car and lug nuts for a tire in his pocket, and the registered owner of the car shared the defendant’s address.

- *People v. Komatsu* (1989) 212 Cal.App.3d Supp. 1: Corpus for DUI existed when officers found a car blocking a roadway. The intoxicated defendant was sleeping in the front passenger seat. He was the only one around, and he had the car keys in his pocket. The registered owner shared his last name and address.

- *People v. Hanggi* (1968) 265 Cal.App.2d Supp. 969: Corpus for DUI existed where the defendant was found unconscious and intoxicated, sitting in the driver’s seat of his car, clutching the steering wheel. The car was parked at an angle across two lanes. The engine and headlights were on, and the defendant was the only person around.

- *People v. Garcia* (1983) 149 Cal.App.3d Supp. 50: Corpus for DUI existed where the police arrived at the scene of a crash and found the defendant, the sole occupant of the car, leaning against the passenger door. There were three or four other people around, all of whom said they were not the driver. The defendant was the only other person in the general area, and he was intoxicated.

- *People v. Quarles* (1954) 123 Cal.App.2d 1: Corpus for DUI existed where the impaired defendant was lying beside a car that was involved in a three-car collision, and nobody else was around, except the occupants of the other cars.

- *People v. Gapelu* (1989) 216 Cal.App.3d 1006: Corpus for DUI existed when a witness saw a crash, found the intoxicated defendant standing by the rear of a car, saw nobody running from the scene, saw all other people at the scene around the victim’s car, and saw that the defendant’s injuries were consistent with the broken windshield on his car.

**Corpus Not Found**

- *People v. Moreno* (1987)188 Cal.App.3d 1179: No corpus existed where police found the defendant’s truck near the collision. There were a number of bystanders at the scene. Two said they were passengers in the car, and their sobriety level was not noted. Police found the defendant in a nearby market. This case has been criticized by *Scott* and *McNorton* discussed above.
People v. Nelson (1983) 140 Cal.App.3d Supp. 1: No corpus existed where two people were thrown from a car during a crash, no witness could say who was driving, and there was evidence that only one of the two was intoxicated.

To evaluate a case for corpus delicti, the following are some of the factors that should be considered:

1. Is the registered owner the defendant or someone with a similar surname or address?
2. Was the defendant in possession of the car keys?
3. Where was the defendant found in relation to the car?
4. Were there other people around?
5. Were the other bystanders intoxicated?
6. Were there any indicia that the defendant drank after he or she drove, such as empty alcohol containers in the car?
7. Was the position of the driver’s seat of the car consistent with someone of the defendant’s height?
8. In a collision case, did the defendant have any injury consistent with the crash?
9. Is there a taped 911 call made by the defendant or some other witness to the collision? If so, is the driver identified by the caller?
10. Are there any other witnesses who can testify or whose statements can be admitted under a hearsay exception placing the defendant as the driver?

4. Officer Does Not See Driving (Vehicle Code § 40300.5)

For most misdemeanors, a police officer may not arrest a person without a warrant unless the crime was committed in his or her presence. (Penal Code § 836(a)(1).) This rule hampered many DUI cases where police found a car parked on the side (or in the middle) of a road or where a police officer responded to a collision. To remedy this problem, the Legislature created an exception to this rule in Vehicle Code section 40300.5. This section allows an officer to arrest a person without a warrant for a DUI if:

1. The person is involved in an “accident”;
2. The person is in or around a car that is blocking a roadway;
3. The person will not be apprehended unless immediately arrested;
4. The person might cause injury to himself or herself or property damage unless arrested;
5. The person may destroy or conceal evidence.

The Vehicle Code further provides that these provisions are to be interpreted liberally. (Vehicle Code § 40300.6.)

For instance, assume a traffic crash and a hit-and-run. The driver is subsequently located. If there is sufficient probable cause to believe that the suspect was DUI at the time of the crash, the officer may arrest the suspect, even though the misdemeanor DUI was not committed in the officer’s presence. The rationale for this exception to Penal Code section 836(a)(1) is that the suspect’s body is metabolizing the alcohol, thus reducing the accuracy of the chemical test. The courts have held that this potential, albeit involuntary, destruction of evidence warrants the suspect’s arrest pursuant to Vehicle Code section 40300.5. (People v. Schofield (2001) 90 Cal.App.4th 968.)
The courts have further held that even if an arrest fails to come within the purview of either Penal Code section 836 or Vehicle Code section 40300.5, evidence coming from the arrest should not be suppressed unless the arrest violates the United States Constitution. In *People v. Donaldson* (1995) 36 Cal.App.4th 532, 539 and *People v. Trapane* (1991) 1 Cal.App.4th Supp. 10, 13–14, the courts held that Proposition 8 (codified in Article I, section 28 of the California Constitution) prohibits courts from excluding evidence, unless it was obtained in violation of the United States Constitution. These cases both rejected arguments that a case should be dismissed because of a violation of Penal Code section 836. (See also *People v. McKay* (2002) 27 Cal.4th 601 [finding failure to comply with state procedures governing arrest do not merit suppression absent violation of federal Constitution].)

5. **Driving on Private Property**

*People v. Malvitz* (1992) 11 Cal.App.4th Supp. 9, 11 held that a person can be convicted of driving under the influence even if the defendant only drove on private property.

6. **Vehicle and Commercial Motor Vehicle**

“A ‘vehicle’ is a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.” (Vehicle Code § 670.) A transportation device equipped with a motor is a vehicle even if the motor was not running. (*People v. Jordan* (1977) 75 Cal.App.3d Supp. 1, 7 [holding a moped to be a “vehicle” subject to Vehicle Code section 23152’s predecessor statute].)

A bicycle, which is exclusively human-powered, is not a vehicle under section 670. But Vehicle Code section 21200.5 makes it illegal to ride a bike under the influence of drugs or alcohol. That section is punishable by a maximum $250 fine (plus penalty assessments) and a one-year license suspension under Vehicle Code section 13202.5, if the defendant is under 21 years old.

A “commercial motor vehicle” for purposes of Vehicle Code sections 23152(d) and 23153(d) includes any vehicle requiring a Class A or B license or some vehicles requiring a Class C driver’s license. There are numerous exceptions to this rule set forth in section 15210(b) as well. Before charging this section, a prosecutor should review the definition carefully and should contemplate involving an expert witness from the Department of Motor Vehicles (DMV), California Highway Patrol, or a local police department to establish whether a given vehicle is commercial.

**B. Under the Influence and 0.08 Percent or Greater**

CALCRIM 2110, formerly CALJIC 16.831, defines “under the influence” as follows:

A person is under the influence if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.
Commonly, prosecutors demonstrate that a defendant was under the influence based on: (a) his or her erratic driving, (b) observed physical symptoms, (c) poor performance on field sobriety tests, and (d) chemical test results. Generally, forensic experts opine everyone is under the influence of alcohol at a 0.08 blood-alcohol concentration (BAC).

1. Presumptions

   a. Vehicle Code Section 23152(a) Cases—Driving Under the Influence

      Vehicle Code section 23610 sets forth presumptions applicable in evaluating “(a)-count” cases. The presumption attaches when a breath or blood test is used. The inferences may also be tied to a Preliminary Alcohol Screening (PAS) test result. (*People v. Bury* (1996) 41 Cal.App.4th 1194, 1206.)

      (1) Less Than 0.05 Percent

      If a defendant’s blood-alcohol level is less than 0.05 percent based on analysis of his or her blood, breath, or urine, then it is presumed that the defendant is not under the influence of alcohol. (Vehicle Code § 23610(a)(1).) This presumption, however, can be overcome by evidence. In *People v. Gallardo* (1994) 22 Cal.App.4th 489, the court affirmed a conviction pursuant to section 23153(a) where the defendant’s blood-alcohol level tested at 0.03 percent. The court found that the presumption that the defendant was not under the influence was rebutted by the following facts: the defendant burned rubber out of a parking lot, ran two stop lights, ignored his passenger’s plea to slow down, and crashed into a car. The defendant said he drank two beers and felt their effects. He drank a third beer a few minutes before the collision. He had watery eyes, an unsteady gait, and the odor of alcohol on him.

      A jury should not be instructed about this presumption when the prosecution’s theory is that the defendant is under the influence of both alcohol and a drug. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250.)

      (2) 0.05 Percent to 0.07 Percent

      Where the blood-alcohol level is between 0.05 and 0.07 percent, there is no presumption as to whether the defendant is under the influence. (Vehicle Code § 23610(a)(2).) Under these circumstances, a court should not give the jury any instruction about the presumptions that attach when the blood-alcohol level is 0.08 percent or higher. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [evaluating case under older statute setting under-the-influence presumption in California at 0.10 percent].)

      (3) 0.08 Percent or Greater

      When a defendant’s blood or breath test shows a 0.08 percent or higher blood-alcohol level, there is a rebuttable presumption that the defendant was under the influence of alcohol:
If the evidence establishes beyond a reasonable doubt that at the time of the chemical analysis of the defendant’s blood or breath, there was 0.08 percent or more by weight of alcohol in the defendant’s blood, you may, but are not required to, infer that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.

(CALCRIM 2110, formerly CALJIC 12.61.)

b. Vehicle Code Section 23152(b) Cases—0.08 Percent or Greater

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of the chemical test within three hours after the driving.

(Vehicle Code § 23152(b).)

Note: The language that permits a rebuttable presumption when the chemical test occurred within three hours of the driving applies only to the Vehicle Code section 23152(b) count and not to a Vehicle Code section 23152(a) charge.

2. Effect of Noncompliance with Title 17

Title 17, sections 1215 through 1222.1, of the California Code of Regulations govern breath and blood testing for alcohol. These sections include requirements for how tests are administered, how records should be maintained, how laboratories need to be licensed, and so forth. Frequently, cases contain facts that reflect some noncompliance with a provision of Title 17. Accordingly, the inference instructions, CALCRIM 2100 and 2110, formerly CALJIC 12.61 (under-the-influence inference) and 12.61.1 (0.08 percent-or-greater inference), include the following paragraph:

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]


Prosecutors should familiarize themselves with what Title 17 does and does not require. (Title 17 is included in the appendix to this manual.) Defense attorneys will on occasion incorrectly claim that Title 17 requires certain procedures that the regulations do not require.
3. Alcoholic Beverage

“Alcoholic beverage” includes any liquid or solid material intended to be ingested by a person which contains ethanol, also known as ethyl alcohol, drinking alcohol, or alcohol, including, but not limited to, intoxicating liquor, malt beverage, beer, wine, spirits, liqueur, whiskey, rum, vodka, cordials, gin, and brandy, and any mixture containing one or more alcoholic beverages. Alcoholic beverage includes a mixture of one or more alcoholic beverages whether found or ingested separately or as a mixture.

(Vehicle Code § 109.)

4. Drug

The term “drug” means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions.

(Vehicle Code § 312; People v. Olive (2001) 92 Cal.App.4th Supp. 21 [kava tea can be a “drug”].)

Whether a substance is a drug for purposes of this section is a question of law for the court to determine rather than a factual question for the jury. (People v. Keith (1960) 184 Cal.App.2d Supp. 884, 887 [holding as a matter of law that insulin is a drug].) Unlike violations of Health and Safety Code section 11550, there is no need to specify the drug affecting the defendant in the complaint. (Byrd v. Municipal Court (1981) 125 Cal.App.3d 1054, 1058.)

Involuntary intoxication is a defense to a drug DUI charge. To establish this defense, however, there must be evidence that the defendant taking the substance did not know that it would have an intoxicating effect. (People v. Chaffey (1994) 25 Cal.App.4th 852 [upholding a conviction where a defendant knew the drug would have an intoxicating effect on her but who did not intend to drive under the drug’s influence].)

5. Use of a Lawfully Prescribed Drug Is No Defense

The fact that any person charged with driving under the influence of any drug or the combined influence of alcoholic beverages and any drug in violation of Section 23152 or 23153 is, or has been entitled to use, the drug under the laws of this state shall not constitute a defense against any violation of the sections. (Vehicle Code § 23630.)
C. Vehicle Code Section 23153 Cases—Act or Neglect Causing Injury

1. Act or Neglect

To prove a violation of section 23153, we must establish that, while driving, the defendant either performed an act forbidden by law or neglected a legal duty and that the violation or negligence caused injury to someone other than the defendant. Driving under the influence, by itself, is insufficient; there needs to be an additional violation or negligent act or omission. (People v. Oyaas (1985) 173 Cal.App.3d 663, 667.) Neglect of duty can be established by showing simple negligence; gross negligence is not required. (Id. at 669–670.) There is a split in authority as to whether a jury needs to unanimously agree on the predicate act or neglect. (People v. Mitchell (1986) 188 Cal.App.3d 216, 220 [no unanimity instruction required]; compare People v. Gary (1987) 189 Cal.App.3d 1212, 1218, overruled by People v. Flood (1998) 18 Cal.4th 470, 481 [unanimity instruction—CALCRIM 3500, formerly CALJIC 17.01—required]; People v. Durkin (1988) 205 Cal.App.3d 1212 [unanimity instruction ordinarily required unless a series of Vehicle Code violations or negligent acts forms a “continuing course of conduct”].)

The act or neglect must be concurrent with the defendant’s driving. But continuous violations that began before a defendant started driving may be considered as concurrent with the driving. (People v. Weems (1997) 54 Cal.App.4th 854, 859, fn. 6 [though seatbelt violation began before defendant was driving, law imposed a continuous duty that was active while defendant was driving].)


The negligence theory was held applicable in Oyaas [swerving car from side to side before it overturned where there was no evidence of a mechanical or road defect]. Also, violations of Vehicle Code sections can be presented under a negligence theory. (People v. Thompson (2000) 79 Cal.App.4th 40, 51.)
2. Causation

To establish the causation element of Vehicle Code section 23153, we need to show a causal link between the defendant’s act or neglect and the injury. The prosecution does not need to show that the defendant’s negligence caused the crash. (Weems, supra, 54 Cal.App.4th 854 [upholding conviction where defendant’s failure to ensure that his passengers were wearing seatbelts when car was involved in collision resulted in increased injury to his passengers].) All that is needed is proof that the defendant’s act or neglect caused “any injuries or aggravation to existing injuries.” (People v. Capetillo (1990) 220 Cal.App.3d 211, 220.)

But where the Vehicle Code violations do not cause the injury, a defendant cannot be convicted of violating section 23153. (Id. [auto theft and felony hit-and-run do not support a conviction because neither caused nor aggravated the collision victim’s injury].)

3. Injury

“Common sense requires more for conviction than a ‘shaking up’ of a person in a car which is in an accident, or fright, or a minor headache; it means very obviously a hurt to the body.” (Lares, supra, at 662.) In People v. Dakin (1988) 200 Cal.App.3d 1026, 1036, the court held that the combination of two minor cuts, severe headaches, and a stiff neck constitute “bodily injury” under section 23153.

4. Multiple Victims in a Single Crash

Regardless of how many people are hurt in one crash, a defendant can only be charged with one count of Vehicle Code section 23153. (Wilkoff v. Superior Court (1985) 38 Cal.3d 345.) But Vehicle Code section 23558 allows a one-year enhancement for each additional victim, albeit capping out at four total victims.

D. Attempts and Lesser Offenses

1. Attempted DUI

Attempted driving under the influence is a crime in California. In People v. Garcia (1989) 214 Cal.App.3d Supp. 1, a conviction for attempted DUI was affirmed. Prosecutors should be very careful about charging attempted DUI or requesting instructions on the lesser-included crime of “attempt” in a jury DUI prosecution.

The court in Garcia noted that there was sufficient evidence to affirm if the prosecutor had charged a DUI instead of just an attempt. Additionally, Garcia noted that attempted driving under the influence is a specific intent crime. For such crimes, voluntary intoxication is a defense. This leads to a requirement that the prosecutor prove the defendant is too impaired to drive, but not too intoxicated to know what he or she was doing, making the case uniquely difficult to prove. Further, it is questionable whether enhancements such as refusal to take a chemical test or child endangerment are applicable to attempted DUI. Finally, and most importantly, it is questionable whether a conviction for attempted DUI triggers the mandatory increased sentences that are associated with DUI anti-recidivism statutes discussed below.
2. Lesser-Included and Lesser-Related Offenses

At one point, California decisional law required a court to instruct the jury on lesser-related offenses to those that were charged. In *People v. Weathington* (1991) 231 Cal.App.3d 69, the court held that the defendant was entitled to instructions on Penal Code section 647(f) (drunk in public) as a lesser-related offense to DUI.

But the doctrine of lesser-related offenses has been overturned. In *People v. Birks* (1998) 19 Cal.4th 108, the California Supreme Court held that there is no longer a right to have such lesser-related offense instructions read to the jury.

There is still a right to have a jury instructed on lesser-included offenses under Penal Code section 1159, and Vehicle Code section 23152 is a lesser-included offense of section 23153. (*Capetillo*, supra, at 220.) Being under the influence of a controlled substance (Health & Safety Code § 11550) is not a lesser-included offense of a DUI. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 696; *People v. Davalos* (1987) 192 Cal.App.3d Supp. 10.) Reckless driving is also not a lesser-included offense of DUI. (*People v. Clenny* (1958) 165 Cal.App.2d 241, 249; *People v. McGrath* (1928) 94 Cal.App. 520.) Driving with a blood-alcohol level over the legal limit (Vehicle Code § 23152(b)) is not a lesser-included offense of driving under the influence (Vehicle Code § 23152(a)). (*People v. Subramani* (1985) 173 Cal.App.3d 1106, 1111.)

IV. Regarding Alcohol and Drivers Under 21 Years of Age

A. Zero-Tolerance Law—Vehicle Code Section 23136

The Legislature has concluded, as a matter of state law, that drivers under 21 years of age shall not operate motor vehicles with any measurable level of alcohol within their systems. Vehicle Code section 23136 requires a one-year suspension of the driving privilege for each incident in which an underage driver records a BAC of 0.01 percent or greater on any chemical test or PAS device. A refusal of the PAS test or other chemical tests also calls for a one-year suspension (Vehicle Code § 13353.2(a)(2).) A subsequent offense within 10 years will result in a two-year revocation. (Vehicle Code § 13353.1(a)(2).)

Section 23136 is not a criminal charging section that may be filed against the offender. The purpose of this section is to give the DMV authority to suspend the driving privilege of any underage driver who violates the zero-tolerance provisions. (Vehicle Code § 13353.3(b)(3).) The offender may, after an adequate showing of a critical need to drive, receive from the Department a restricted driving privilege rather than a suspension.

Based on the officer’s stop, DMV will impose a one-year zero-tolerance administrative per se suspension of the driving privilege. The offender’s privilege will not be restored until: (1) the term of administrative per se suspension has ended, and (2) the offender provides the Department with proof of financial responsibility (insurance).
B. 0.05 Percent BAC and Underage Drivers—Vehicle Code Section 23140

Separate from the provisions of Vehicle Code section 23152, it is unlawful for any person under the age of 21 to drive a motor vehicle while being affected by an alcoholic beverage or with a BAC of 0.05 or greater. Section 23140 is an infraction. Upon conviction, a defendant will have to pay a fine, suffer a driver’s license suspension for one year, and will have to complete a DUI education program.

V. Punishment

Mandatory minimum and maximum sentences for DUI cases largely depend on the number and timing of a defendant’s prior convictions and the enhancements that are pled and proved. In many jurisdictions, sentences for pretrial guilty pleas on DUI cases are standardized.

A. Prior Convictions

Penalties are enhanced where a defendant has prior DUI convictions within a given time period. Initially, in discussing priors, be aware there is a difference between a violation date (the date of the offense) and a conviction date (the date the defendant pled or was found guilty). There are two types of priors: 10-year priors and permanent priors.

1. Ten-Year Priors

If the defendant committed a DUI violation that resulted in a conviction and the violation date of the prior is within 10 years of the current violation, he or she faces increased penalties. Per Vehicle Code sections 23620 and 23622, the following offenses are priorable:

- Vehicle Code section 23152(a) or (b);
- Vehicle Code section 23153(a) or (b);
- Vehicle Code section 23103 per section 23103.5 (wet reckless);
- Penal Code sections 191.5, 192.5(a); and
- Harbors and Navigation Code section 655(b), (c), (d), (e), and (f).

On a DMV teletype, wet-reckless convictions can sometimes be distinguished from “dry” reckless-driving convictions. The wet-reckless convictions may have an “R” in the “DISP” column next to the case information. Out-of-state prior convictions can also count as priors per Vehicle Code section 23626. However, out of state “wet” convictions cannot be charged as a prior (Vehicle Code § 23626 and People v. Crane (2006) 142 Cal.App.4th 425.) Out-of-state convictions may appear on a DMV teletype in the “convictions” section with codes numbered 17 (DUI), 18 (DUI with injury), 37 or 38 (drug DUI), 46 (vehicular manslaughter), or 47 (gross vehicular manslaughter).

In addition, it is useful to look past the teletype. For example, it is useful to see if a defendant has convictions for violating Vehicle Code section 14601.2 or 14601.5, which show license suspensions for impaired-driving-related reasons. Also, local records and rap sheets might show priors that for some reason are not reflected in the DMV printout.
A DUI is a felony-misdemeanor wobbler under Vehicle Code section 23550.5 if the current case’s offense date is within 10 years of any of the following offenses:

- DUI punished as a felony because the defendant had three or more 10-year priors;
- DUI with injury punished as a felony; or
- felony violation of Penal Code section 191.5(a), 191.5(b), 192(c)(1), or 192.5(a).

Note, however, if the prior DUI felony conviction was subsequently deemed a misdemeanor by a judge pursuant to Penal Code section 17(b)(1), then the new DUI does not qualify as a felony under Vehicle Code section 23550.5. This is so because a felony conviction that is a wobbler and subsequently made a misdemeanor by the judge becomes a misdemeanor for all purposes, and thus ceases to be a **felony** for the purposes of Vehicle Code section 23550.5.  
*(People v. Camarillo (2000) 84 Cal.App.4th 1386.)*

The term “prior” can be misleading, however. Under Vehicle Code section 23217 and *People v. Snook* (1997) 16 Cal.4th 1210, a DUI driver is subject to enhanced penalties for multiple violations within a 10-year-period. This is true regardless of whether the convictions occur in the same chronological sequence as the violations. Thus, for instance, a defendant who has committed three separate DUIs in a 10-year-period but has only suffered convictions for the second and third DUI violations can be charged with a DUI with two prior convictions for the pending earliest DUI violation. Therefore, if an extended period has passed since the violation date, it may be useful to run a new DMV teletype to see if the defendant has been convicted of another DUI in the interim.

In the felony DUI context, it is necessary to prove up the three prior convictions at the preliminary hearing. Thus, in a case in which the defendant has two prior convictions for DUI and a third case pending at the time the fourth DUI is filed, the defendant will not be held to answer at preliminary hearing unless all three priors have achieved conviction status. *(People v. Casillas (2001) 92 Cal.App.4th 171.)*

If you are confronted with a *Casillas* factual pattern in which the pending third and fourth DUIs are misdemeanors, you obviously can amend the fourth case to a felony once the defendant pleads to the pending third case. If the defendant pleads to the fourth case before dealing with the third case, then amend the still-pending third case to a felony, alleging cases one, two, and four as the separate violations that resulted in convictions within the 10 years citing *Snook.*

Regardless of whether the prior convictions occurred before or after the offense date on your current case, all prior convictions must have been obtained within 10 years of each other. *(People v. Munoz (2002) 102 Cal.App.4th 12.)*

### 2. Permanent Priors

Pursuant to Vehicle Code section 23550.5(b), a new DUI case is deemed a wobbler and may be charged as a felony if the defendant has ever suffered a prior conviction for a vehicular manslaughter under Penal Code section 191.5(a), 191.5(b), or 192(c)(3).
3. **Proving Priors**

Prior DUI convictions can be proven by more means than are available in other anti-recidivism laws. Vehicle Code section 23622(b) authorizes a court to consider a DMV teletype to prove the existence of a prior conviction. Other law enforcement records may be used as well. In *People v. McClary* (1988) 200 Cal.App.3d Supp. 11, the court permitted the admission of a California Law Enforcement Teletype (CLETs) to show the existence of a prior DUI conviction.

In addition to establishing the existence of the prior conviction, it may be necessary to establish that it was indeed your defendant who suffered the prior conviction. Assuming that the defendant is not willing to admit the prior, there ought to be at least three reasonably available indicia of identity regarding the prior conviction.

a. **Handwriting Exemplars**

The person who was convicted in the prior case would most likely have signed court papers at the time of the plea. It is common for a defendant to complete and sign *Boykin-Tahl* waivers before a plea is taken. Additionally, a defendant who is sentenced commonly signs a copy of the probation conditions imposed. These documents should be available in the prior’s court file.

Armed with these handwriting exemplars, you can ask the court to order the defendant to provide a sample (which should probably include at least 10 signatures by the defendant in order to ensure their integrity). If it is clear that the defendant’s handwriting appears in both cases, the finder of fact is permitted to decide the issue. (See *People v. Chapman* (1957) 156 Cal.App.2d 151, 159.) If there is some question, you may want to provide expert handwriting evidence to prove identity.

b. **Fingerprints**

The person who suffered the prior conviction probably was required to provide fingerprints at two different times. When first arrested, the defendant would have been fingerprinted at booking. Second, at the time of the sentencing, the defendant would have again been required to provide fingerprints. A comparison of these prints and the print exemplar from your defendant by a fingerprint expert should quickly resolve the identity issue.

c. **Booking Photo**

In many jurisdictions, an arrestee is photographed by the arresting agency when booked. With the help of the arresting agency, a copy of the booking photo may be introduced in order to resolve the identity issue.
B. Enhancements

1. Refusal to Take a Chemical Test

Vehicle Code section 23612, or the “implied consent” law, states that by driving in the State of California, a person agrees that, if lawfully arrested for driving under the influence, he or she will provide a blood or breath sample for alcohol or drug testing. Willful refusal of a chemical test results in enhanced punishment under Vehicle Code section 23577, with punishments varying based on how many prior DUI convictions the defendant acquired in the previous 10 years. More details about the refusal enhancement can be found in Chapter III, “Legal Considerations When Prosecuting Refusals.”

2. Speeding and Reckless Driving Enhancement

Vehicle Code section 23582 provides an enhanced penalty of 60 days in county jail for anyone who, while DUI on a freeway, drives both recklessly and exceeds by 30 miles per hour the prima facie, maximum, or posted speed limit. If the DUI defendant drives recklessly on any other street or highway, the enhancement applies if the defendant exceeded the prima facie, maximum, or posted speed limit by 20 miles per hour and drives recklessly.

*Note:* the defendant’s driving must be “reckless” as that term is defined by Vehicle Code section 23103.

3. Child Endangerment

If a defendant is convicted of a DUI and has a passenger under 14 years old, penalties can be enhanced under Vehicle Code section 23572. The enhancement is a minimum of 48 hours in county jail if it is the defendant’s first DUI conviction. The enhanced penalty escalates for each additional prior to a maximum of 90 days if it is the defendant’s fourth DUI. (See the sentencing chart beginning on page I-19.)

*Note:* If the defendant in your case is convicted of Child Endangering (Penal Code § 273(a)) in addition to the enhancement, Vehicle Code section 23572(c) precludes punishment for the enhancement because it would constitute double punishment in violation of Penal Code section 654.

4. Multiple Victims

Pursuant to Vehicle Code section 23558, if a defendant is convicted of a felony DUI that caused either death and/or injury, and it is proven that the defendant caused the death or injury of additional victims, the sentence shall be enhanced by an additional one year of incarceration for each additional victim, with a maximum of three additional years allowed. The court may only strike these enhancements if there are mitigating circumstances and the court states its reasons for doing so on the record. The charging document must identify each victim to whom the enhancement applies, and the prosecution must prove each injury alleged. *(People v. Gibson (1991) 229 Cal.App.3d 284.)*
Penal Code section 12022.7’s sentence enhancements for great bodily injury can apply in DUI cases. It is proper to impose both a great-bodily-injury enhancement and an enhancement under Vehicle Code section 23558. (People v. Arndt (1999) 76 Cal.App.4th 387.)

C. Sentencing

1. Fines and Penalty Assessments

Vehicle Code section 23152 offenses carry a mandatory minimum fine of $390 and a maximum fine of $1,000. These results do not include penalty assessments as required by Penal Code section 1464 and 1465.7 and Government Code section 76000. With these penalty assessments added, the mandatory minimum fine is $1,131, and the maximum fine runs from $2,900 to $3,500, depending on the county in which the court is located. Section 23153 carries the same mandatory minimum but with a maximum fine of $5,000 or, with penalty assessments, $14,500. This does not include restitution fines, booking fees, alcohol-assessment program fees, and other similar fees.

2. Restitution Fine

Generally, a conviction for a felony or misdemeanor requires imposing a restitution fine per Penal Code section 1202.4(b). For a felony, the fine may range from $200 to $10,000. For a misdemeanor, the fine may range from $100 to $1,000. (Penal Code § 1202.4(b)(1).) An acceptable scheme for setting the restitution fine for felonies is to multiply $200 times the number of years a defendant is sent to prison times the number of felony counts for which he or she is convicted. (Penal Code § 1202.4(b)(2).) To raise the fine above $200 in a felony or $100 in a misdemeanor, the court should consider the defendant’s ability to pay, the severity of the offense, economic gain to the defendant, and the amount of damage the defendant caused to a victim. (Penal Code § 1202.4(d).)

A court can only decline to impose the restitution fine if there are “compelling and extraordinary reasons” that the court notes on the record. A defendant’s inability to pay is not a compelling and extraordinary circumstance. (Penal Code § 1202.4(c).) A restitution fine is entirely separate from a requirement that the defendant pay restitution (see below).

3. Restitution

Victims of crime have a state constitutional right to restitution. (Cal. Const. art. I, § 28.) The statute governing restitution is Penal Code section 1202.4: “[I]n every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order ....” (Penal Code § 1202.4(f).) Victims in DUI cases commonly need restitution for personal injury, auto repair, time spent helping the prosecution, rental cars used while their cars are being repaired, etc. A victim is also entitled to 10 percent annual interest from either the date of loss or the date that the defendant was sentenced. (Penal Code § 1202.4(f)(3)(G).)
A court can order restitution as a condition of a defendant’s probation even if the crime for which the defendant was convicted did not require proof of personal injury or property damage. (People v. Carbajal (1995) 10 Cal.4th 1114 [though hit-and-run does not require proof of fault for the collision, it was appropriate to order restitution].) It is not necessary to show that the defendant was the sole cause of a collision to justify restitution; all that must be shown is that “the manner in which [the defendant] drove, affected by her intoxication, was a cause of the accident and ensuing injuries.” (People v. Phillips (1985) 168 Cal.App.3d 642, 650 [holding that a defendant’s acquittal of section 23153 charges and conviction on lesser-included section 23152 charges did not bar an order of restitution for personal injuries suffered by the victim] [emphasis in the original].)

4. Emergency Response Costs

If a person is under the influence of alcohol or a drug and his or her “negligent operation of a motor vehicle” causes “any incident resulting in an appropriate emergency response,” the person is liable for the costs of the emergency response. (Govt. Code § 53150.) This is important in DUI cases where there is a collision involved. The defendant must pay these costs; they may not be covered by his or her insurance. (Govt. Code § 53154.) Damages are capped at $12,000. (Govt. Code § 53155.) “The court shall also consider whether the defendant as a condition of probation shall make restitution to a public agency for the costs of an emergency response pursuant to [Govt. Code §§ 53150 et seq.].” (Penal Code § 1203.1(e).)

Recovery of the costs of an emergency response is often handled directly by the arresting agency. Since this varies from jurisdiction to jurisdiction, the prosecutor should always contact the arresting agency to see if the defendant has been billed for those costs and whether the defendant has paid. Copies of the billing and any other paperwork done by the agency should be obtained and included in the file.

5. Custody

The following chart shows minimum and maximum jail or prison time for violations of sections 23152 and 23153 and applicable enhancements.

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<thead>
<tr>
<th>OFFENSE</th>
<th>AUTHORITY</th>
<th>CUSTODY REQUIREMENTS</th>
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<tbody>
<tr>
<td>Vehicle Code § 23152(a) or (b)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>First Offense</td>
<td>23536 and 23538</td>
<td>Without probation: 96 hours to six months, 48 hours of which must be continuous. With probation: Minimum of 48 hours to six months jail.</td>
</tr>
<tr>
<td>Second Offense</td>
<td>23540 and 23542</td>
<td>Without probation: 90–365 days. With probation: Minimum 96 hours jail or 10 days.</td>
</tr>
<tr>
<td>OFFENSE</td>
<td>AUTHORITY</td>
<td>CUSTODY REQUIREMENTS</td>
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<tr>
<td><strong>Vehicle Code § 23152(a) or (b)</strong></td>
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</tbody>
</table>
| Third Offense | 23546 and 23548 | **Without probation:** 120-365 days jail.  
**With probation:** 120 days custody or 30 days and a 30-month rehabilitation program. |
| Fourth Offense | 23550 and 23552 | **Without probation:** 180–365 days jail or three years state prison.  
**With probation:** 180 days custody or 30 days jail and 30-month rehabilitation program. |
| Within 10-years and permanent prior | 23550.5 | Maximum 365 days jail or three years state prison. |
| **Vehicle Code § 23153(a) or (b)** | | |
| First Offense | 23554 | **Without probation:** 90–365 days jail or up to three years state prison.  
**With probation:** Minimum five days jail. |
| Second Offense | 23560 | **Without probation:** 120 days–one year jail or up to three years prison.  
**With probation:** 120 days jail minimum or 30 days jail and 18-month or 30-month rehabilitation program. |
| **Refusal Enhancement** | 23577 | All terms consecutive except first-time § 23152 cases. |
| First DUI | | Minimum 48 hours custody. |
| Second DUI | | 96 hours continuous custody. |
| Third DUI | | 10 days jail. |
| Fourth DUI | | 18 days jail. |
| **BAC of .15 or above** | 23578 | May be considered by court as a special factor warranting additional penalty (i.e., defendant required to do a six-month alcohol program. (Veh. Code § 23538(a)(3)(B).) |
If a defendant has been ordered to serve time in a residential rehabilitation facility as a condition of pretrial release, he or she may receive custody credit for time spent in the program. (*People v. Sylvestry* (1980) 112 Cal.App.3d Supp. 1, 3.) But the court cannot suspend proceedings to allow a defendant to spend time in a rehabilitation program. (Vehicle Code § 23640.) Also, a convicted defendant may not substitute a rehabilitation program for a mandatory jail sentence. (*People v. Municipal Court (Hinton)* (1983) 149 Cal.App.3d 951.)

A defendant may serve jail time under electronic monitoring (house arrest) if the program has been properly approved by the county board of supervisors and the probation department deems the defendant to be a suitable candidate for it. (*People v. Superior Court (Hubbard)* (1991) 230 Cal.App.3d 287.) But any second or subsequent offense must be punished with at least 48 hours of the required jail time spent in custody or as 10 days of community service. (Vehicle Code § 23580(a).) Work release is also authorized, subject to the aforementioned mandatory minimum of 10 days service, even if the custody ordered for the defendant is less than 10 days. (Vehicle Code § 23580(a).)

6. **Standard Alcohol Conditions**

In all DUI cases, there are certain requirements when a defendant is placed on probation, per Vehicle Code section 23600. These include:

- a minimum of three years of probation;
- a condition that the defendant not drive with any measurable amount of alcohol in his or her blood;
- that the defendant obey all laws; and
- that the defendant submit to a chemical test if arrested for DUI.
7. Alcohol Assessment and Education Programs

a. Alcohol Assessment Program

All people convicted of violating section 23152 or 23153 should be referred to their county alcohol-assessment program. (Vehicle Code § 23646.) The program monitors their addiction and their need for rehabilitation. They may, if they can afford to, be ordered to pay a $50 alcohol-assessment fee per section 23645.

b. First Conviction Program

Under Vehicle Code section 23538, first-time DUI defendants must complete the first-conviction program. This program ranges from three to 12 months and typically includes both education and chemical-dependency group meetings. The six-month program is the mandatory minimum for those convicted of a DUI with 0.20 percent or greater blood-alcohol level. (Vehicle Code § 23538(b)(2).)

c. DUI Recidivist Program (SB 38)

An additional program is a required term of probation for recidivist DUI drivers unless they do a 30-month program. (See, e.g., Vehicle Code § 23562(b)(4)(A).) The program, commonly referred to as SB 38 for the Senate bill that enacted it, is an 18-month program that includes alcohol or drug-dependency and education components as well as some supervision of the defendant.

d. 30-Month Program

Some DUI punishment schemes allow defendants to enroll in a 30-month program and, by doing so, avoid significant custody minimums. The program is only available in those counties where such a program exists. For details of this rarely used scheme, see Vehicle Code section 23552(b).

e. Youthful Drunk Driver Visitation Program

Vehicle Code sections 23509 et seq. describe the Youthful Drunk Driver Visitation Program. The Legislature highly recommends this program as a term of probation for young DUI convicts:

It has been demonstrated that close observation of the effects on others of alcohol and other drugs, both chronic and acute, by a young driver convicted of driving under the influence has a marked effect on recidivism and should therefore be encouraged by the courts, pre-hospital emergency medical care personnel, and other officials charged with cleaning up the carnage and wreckage caused by impaired drivers.

(Vehicle Code § 23510(d).)

This program, for which priority is given to defendants 25 years old or younger, takes DUI defendants to see emergency rooms and morgues to observe the results of impaired driving. It can only be imposed if the defendant consents.
8. License Suspensions

There are many laws governing DUI-related suspensions of the driving privilege. These include admin per se suspensions, DMV-ordered suspensions, and court-ordered suspensions. The laws governing suspensions are very complex, and most of these suspensions impact prosecutors only when defendants drive after the privilege is suspended. Most DUI-related suspensions are imposed by the DMV through administrative procedures rather than through the courts. These include the admin per se suspensions ordered by police officers when a person is arrested for DUI or refused to take a chemical test. The following DUI suspensions are the most important ones for prosecutors to know about.

**Controlled-Substance-Offense Suspensions:** If a defendant is convicted of an offense involving controlled substances, and a vehicle is involved in or is incidental to the offense (i.e., driving while in possession of marijuana [Vehicle Code § 23222]), the court may suspend the defendant’s ability to drive for up to three years under Vehicle Code section 13202.

**Minors Committing DUIs:** Vehicle Code section 13202.5 requires a court to suspend the driving privilege or delay a defendant’s ability to get a license for one year if the defendant is between 13 and 21 years old and is convicted of a DUI or wet reckless. Upon a showing of a critical need, the court may grant the minor a restricted license instead of suspending it. If a restricted license is granted, the court can make the restriction conditional on the defendant getting an ignition interlock device installed per Vehicle Code section 13202.8.

**First-Time DUIs:** First-time section 23152 violations are punished by a mandatory minimum 48 hours custody and a DMV-ordered license suspension. If the defendant has a license and proof of financial responsibility, however, Vehicle Code section 23538(a)(2) allows him or her to avoid custody and to get a license restriction rather than one of the various DUI-related suspensions imposed by the DMV. The restriction allows the person to drive to and from work and to and from DUI programs. The license restriction does not eliminate all DMV suspensions, and the court should make this clear to defendants at sentencing. First-time section 23153 violators have their licenses suspended by the DMV.

**Subsequent DUIs:** Longer suspensions of the driving privilege are issued by the DMV for additional convictions. For instance, a three-year suspension is imposed by the DMV after a third DUI conviction. (Cf. Vehicle Code § 13352.)

**Commercial DUIs:** A person convicted of section 23152(d) may not drive a commercial vehicle for one year. If he or she was transporting hazardous materials, the prohibition is for three years. (Vehicle Code § 15300.) A lifetime prohibition is imposed if a person suffers a second conviction for either Vehicle Code section 23152(d), hit-and-run, or Vehicle Code section 2800.1, fleeing from a peace officer, and committed those crimes in a commercial vehicle. (Vehicle Code § 15302.)

9. Impounds

One sanction available in DUI sentencing is for a court to require that a defendant’s car be impounded at his or her own expense. Section 23594 discusses DUI impounds. Under
that section, if the defendant owns an interest in the car that he or she was driving while under the influence, the car can be ordered impounded at the defendant’s expense for one to 30 days. If a defendant has a prior DUI conviction within five years of the new one, the court must, except in an unusual case, require the car used in the offense be impounded for one to 30 days at his or her own expense if the defendant is the car’s registered owner. If a defendant has two prior convictions for DUI within five years of his or her current conviction and was the registered owner of the car driven in the offense, the court must, except in an unusual case, order the car impounded for one to 90 days. “Unusual” cases under section 23594 include those where impoundment can result in a defendant’s loss of employment, an inability to get family members to school or medical care, etc. Most DUI defendants’ cars are impounded when they are arrested for driving under the influence, so they are not abandoned on the street.

10. Vehicle Forfeiture

If a defendant has two priors and is the registered owner of the car in which he or she was arrested, the car may be forfeited under Vehicle Code section 23596. That section requires notice to be given to a defendant if forfeiture is sought and requires a hearing. If the defendant is shown to have used a car registered to him or her in a DUI and the defendant has the appropriate prior convictions, the court may declare the car to be a nuisance and order it to be sold. (See Chapter XVII, DUI Vehicle Forfeiture.)

11. Ignition Interlock Devices

An ignition interlock device (IID) is an instrument attached to a car that requires a driver to first blow into a breath testing device before the car can drive. Section 23575 governs the imposition of IID conditions on a defendant in a DUI case.

Imposing IID conditions on a first-time DUI offender is discretionary. The court may impose the condition for any period of time up to three years. Courts are particularly encouraged to impose the IID on a first-time offender if he or she had 0.20 percent or greater blood-alcohol level, two or more moving violations on his or her DMV record, or refused a chemical test.

For second and subsequent DUI convictions, the court has to forward an abstract of judgment to the DMV, which will require the defendant to install an IID device if he or she is allowed to drive. The court can make exceptions in the interests of justice. To create uniform standards for when the interests of justice apply, California Rules of Court, Rule 4.325 sets the following guidelines:

Exceptions should be granted when

- the defendant is from outside of the state and maintenance of the IID would cause hardship to him or her and the defendant’s family,
- the defendant’s residence is 50 or more miles away from the nearest IID-installation facility and would cause hardship,
- the defendant’s prior conviction was from six years and nine months ago and the defendant is enrolled in a rehabilitation program,
- the hardship on the defendant will far outweigh the risk that the defendant will drink and
drive while on probation, or the defendant’s car is inoperable and he or she cannot legally transfer title.

There is also an exception that allows the defendant to only put an IID on one car if the defendant is a sole proprietor of a business that requires him or her to have two cars registered to the defendant.

D. Prohibition Against Double Punishment

Penal Code section 654 prohibits multiple punishments for the “same act or omission.” Below are some of the most important cases interpreting section 654 as it applies to DUI cases:

1. A defendant may not be punished for both a violation of Vehicle Code section 23152(a) and Vehicle Code section 23152(b). (*People v. Subramani* (1985) 173 Cal.App.3d 1106.)

2. But a defendant can be punished for DUI and driving on a suspended license even though the act of “driving” is common to both charges. (*In re Hayes* (1969) 70 Cal.2d 604.)


5. A defendant can only be punished for manslaughter and section 23153 arising from the same collision if there were multiple injured victims. (*People v. McFarland* (1989) 47 Cal.3d 798.)

6. A defendant convicted of both a DUI-related murder (Penal Code § 187) and a gross vehicular manslaughter while intoxicated (Penal Code § 191.5(a)) may not be punished for both. (*People v. Sanchez* (2001) 24 Cal.4th 983.)

E. Issues of Diversion and Proposition 36

If a defendant is convicted of driving under the influence of a drug or being under the influence of a drug (per Health and Safety Code section 11550) and there is evidence that he or she was driving at the time of the offense, he or she is not eligible for diversion. (*People v. Duncan* (1990) 216 Cal.App.3d 1621.) A defendant is still ineligible for diversion if he or she was driving while committing his or her drug crime even if a DUI is not charged. (*People v. Covarrubias* (1993) 18 Cal.App.4th 639.) Other diversion programs are also unavailable to DUI defendants. In *People v. Weatherill* (1989) 215 Cal.App.3d 1569, the court held that a DUI defendant could not take advantage of diversion for mentally ill defendants under Penal Code section 1000.21.

In 2000, California voters passed Proposition 36, which generally requires probation and drug treatment rather than incarceration for convictions in simple drug-possession cases. Penal Code section 1210.1(b) excludes from Prop. 36 coverage someone who is convicted, in the same proceeding, of an additional misdemeanor charge “not related to the use of drugs.” Numerous
appellate cases have recently dealt with the issue of whether a defendant convicted of either a drug-related DUI or convicted in one proceeding of both DUI and simple possession of drugs is eligible for Prop. 36. As of this writing, most appellate rulings on this issue have concluded that the defendant should be excluded from Prop. 36 coverage. The courts have commonly ruled that the distinctive, additional element of “driving” while impaired creates an added danger to the public that takes DUI out of the category of a “nonviolent drug related offense.” With the exception of People v. Goldberg (2003) 105 Cal.App.4th 1202, virtually all of these cases are not published or have been granted hearing by the California Supreme Court.

F. Dismissals, Plea Bargaining, and Wet Reckless

When a judge dismisses a section 23152 charge or strikes a prior, the court must state its reasons for dismissing the charge or the prior conviction on the record. (Vehicle Code § 23635.) A court may not strike any DUI priors to avoid imposing fines, custody, or to avoid the license suspensions associated with recidivist drunk driving. When a prosecutor seeks to dismiss a section 23152 case, reduce the charge to a lesser offense, or strike a prior conviction allegation, he or she also must state the reasons on the record. (Vehicle Code § 23635.)

In felony DUI cases, Penal Code section 1192.7(a)(2) governs plea bargaining:

Plea bargaining in any case in which the indictment or information charges … any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the People’s case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.

A common plea bargain where a DUI case faces proof problems is a wet reckless. This is a crime under Vehicle Code section 23103.5. It cannot be charged as an offense; it can only serve as an agreed-upon plea-bargained reduction. Wet-reckless convictions are only available if the prosecutor agrees; they cannot be imposed by the court unless “the prosecutor agrees to a plea.” (Vehicle Code § 23103.5(a).)

A wet reckless can serve as a 10-year-prior conviction to increase penalties if a defendant reoffends. (Vehicle Code § 23103.5(c).) Generally, a defendant convicted of a wet reckless will have to enroll in a first-conviction program, and he or she must, at minimum, complete the educational component of the program. If there are “compelling” reasons not to require such a program, the court must note those reasons on the record if it chooses not to require the program. (Vehicle Code § 23103.5(e).) If the wet reckless is a reduction from a DUI where one or more 10 year priors have been alleged, the defendant might want to have this requirement satisfied by the multiple-conviction program because completing that program may be required for the defendant to get his or her driver’s-license suspensions cleared through the DMV. Otherwise, a wet reckless is punishable in the same way as a “dry” reckless under section 23103. So a wet reckless is punishable by up to 90 days in jail and up to a $1,000 fine (plus penalty assessments, for a total of $2,700). The defendant faces a minimum penalty of either $145 plus penalty assessments (for a total of $391) or five days of custody and a restitution fine of $100 to $1,000.
David Stotland has been a deputy city attorney in the San Diego City Attorney’s Office Criminal
Division since 2000. Prior to joining the San Diego City Attorney’s Office, Stotland clerked at the
Santa Barbara County District Attorney’s Office, the Governor’s Office of Legal Affairs Office, the
Federal Defender’s Office for the Eastern District of California, and the Sacramento City Attorney’s
Office. Stotland received a Bachelor of Arts degree from the University of California, Santa Cruz. He
earned a Juris Doctor degree from the McGeorge School of Law.

Steven Hansen is a deputy city attorney with the San Diego City Attorney’s Office Criminal Division.
He started working there in 1988. Since 1996, Hansen has been the head of the division’s Appellate
Unit. He was named Prosecutor of the Year for the City Attorney’s Office in 2000. Hansen received a
Bachelor of Arts degree from Drake University, and a Juris Doctor degree from the University of Iowa,
College of Law.

Chapter updated in 2010 by David Radford, TSRP: Dave Radford began his law enforcement career
in police service. Serving as a City of Pleasanton police officer for 24 years, he achieved the rank of
captain and worked various assignments including patrol, traffic, SWAT, and narcotics. From 1993–2003,
he served as a Drug Recognition Expert (DRE) and DRE Instructor for the California Highway Patrol,
holding the title of DRE Emeritus. In his police career he made or assisted in 1,500 arrests/DRE exams.
Earning his JD from John F. Kennedy School of Law, Mr. Radford retired from police service in 2003
and became a deputy district attorney in Tuoloume County, and later in Stanislaus County. As CalTSRP
for the 27-county Northern Region, he is based in Solano County.
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Chapter II

Prosecuting the Drug Impaired Driver

Dan F. Jeffries, Assistant Supervising Attorney
Los Angeles City Attorney’s Office

and

Sgt. Thomas E. Page, Officer-in-Charge (retired)
Drug Recognition Expert Unit, Los Angeles Police Department

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I. Introduction

Vehicle Code section 23152(a) prohibits the driving of a vehicle by “any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug.” The term “drug” is defined by Vehicle Code section 312 and CALCRIM 2110 as:

any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his [or her] ability to drive a vehicle in the manner that an ordinarily cautious [person], in full possession of his [or her] faculties, using reasonable care, would drive a similar vehicle under like conditions.

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Thus, the prosecution must prove that the driving was impaired to an appreciable degree and that the driver was in fact impaired by a drug. (People v. Enriquez (1996) 42 Cal.App.4th 661.) The specific identity of the drug does not need to be proved. (Byrd v. Municipal Court (1981) 125 Cal.App.3d 1054.) Similarly, the phrase “any drug” includes legally prescribed drugs as well as illegal drugs or narcotics. (Vehicle Code § 23630.)

The level of impairment that must be proven for a conviction under Vehicle Code section 23152(a) is higher than that required for a conviction under Health and Safety Code section 11550(a). To be “under the influence” within the meaning of the Vehicle Code, the liquor and/or drug(s) must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to drive a vehicle as an ordinarily cautious person in full possession of his or her faculties. (People v. Haeussler (1953) 41 Cal.2d 252, 261, overruled on other grounds by People v. Caban (1955) 44 Cal.2d 434.)
In contrast, “being under the influence” within the meaning of Health and Safety Code section 11550(a) merely requires that the person be under the influence in any detectable manner. (Byrd, supra, 125 Cal.App.3d 1054.)

Unlike Vehicle Code section 23152(a), Health and Safety Code section 11550(a) does not include all drugs. Generally, the drugs covered by Health and Safety Code section 11550(a) are cocaine, amphetamines, methamphetamine, heroin, PCP, mescaline, peyote, and methaqualone.

A defendant may be prosecuted and convicted for both driving under the influence of a drug (Vehicle Code § 23152(a)) and being under the influence of a drug (Health & Safety Code § 11550). (People v. McGuire (1993) 14 Cal.App.4th 687.) Prosecution under Vehicle Code section 23152(a) requires proof that the defendant was impaired to an appreciable degree by the drug, but does not require proof of the particular drug involved. Prosecution under Health and Safety Code section 11550 requires proof of the particular drug but only requires proof that the drug had “appreciably affected the person’s nervous system, brain, or muscles or has created in the person a detectable abnormal mental or physical condition.” (CALCRIM 2400 [emphasis added].)

At the outset, it should be noted that because these cases commonly involve legally prescribed drugs as illegal substances, it is crucial that all prosecutors preparing for a DUI-drug case have access to a copy of the Physician’s Desk Reference. Hopefully your office has a copy of this “drug bible.” Its contents include coverage of more than 3,000 drugs, their brand and generic names, and color photos. The discussion of each drug includes recommended dosages, side effects, prescribing limitations, and clinical pharmacology.

II. The Drug Recognition Expert

Unlike driving-under-the-influence alcohol-impairment cases, there are no standards that define when a defendant is impaired due to drugs. Often, the People’s toxicologist will testify only that the defendant’s urine or blood sample revealed the presence of a particular drug, that it was above therapeutic levels, and that the physical signs and symptoms the defendant exhibited on the date of the arrest were consistent with one who possibly was impaired by drugs. Obviously, this evidence might fall short of a juror’s notion of beyond a reasonable doubt. The reason this gap exists in the People's case is partly due to the enormous number of drugs being used. The metabolism of this myriad of drugs may be specific to the particular substance and specific to the person ingesting. Similarly, the elimination rate of each of the drugs is not easily determined. Consequently, toxicologists have virtually no scientific guidelines that permit them to draw conclusions about drug impairment from the presence or amounts of drugs found in the defendant’s system.

In an effort to provide expert testimony on the issue of whether the defendant was drug impaired while driving, many law enforcement agencies have instituted special programs to train qualified police and highway patrol officers to become drug recognition experts (DREs). The Drug Recognition Expert Program, first developed by the Los Angeles Police Department is now sponsored by the National Highway Traffic Safety Administration (NHTSA) and the International Association of Chiefs of Police (IACP). As of December 2007, California had more than 3,000 certified DREs representing some 110 police departments, 30 sheriffs’ departments, 15 federal, and 12 state law enforcement agencies. Since 1992, the California Highway Patrol has evaluated and arrested more than 50,000 suspects utilizing the DRE protocol.
A study of the LAPD Drug Recognition Program conducted for the NHTSA by the Southern California Research Institute involved the evaluation by police officers trained as DREs of 173 actual arrests where most of the arrestees had taken two or more substances. In 94 percent of the cases in which the DRE concluded that an individual was impaired by a drug, a drug was in fact found by analysis of a blood sample obtained from that individual.

Although DREs may initiate their own arrests for DUI-drugs, the usual case is for a different officer, the arresting officer, to request the expertise and assistance of the DRE after making a DUI arrest. The DRE should be requested to conduct an evaluation for drug influence when the arrestee’s signs and symptoms are not consistent with the arrestee’s blood-alcohol concentration, or BAC. Simply, the arrestee may appear more intoxicated than the alcohol level alone would suggest. Some law enforcement agencies seek a drug-influence evaluation by a DRE whenever an individual is arrested for DUI and produces a BAC below 0.08 percent. In addition, an evaluation is mandated whenever the arrestee’s degree and/or type of intoxication is not consistent with the arrestee’s BAC.

A DRE is trained to resolve whether:

- the arrestee’s impairment is not consistent with the BAC;
- the arrestee is suffering from a medical condition that requires immediate attention or is under the influence of drugs; and
- the individual is under the influence of a specific category (or categories) of drugs.

A. The 12-Step DRE Procedure

In order to reach the three determinations, DREs utilize a 12-step, standardized, and systematic process. It is standardized in that all DREs, regardless of agency, utilize the same procedure, in the same order, on all suspects. It is systematic in that it logically proceeds from a BAC, through an assessment of both clinical and psycho-physical signs of impairment, to toxicological analysis for the presence of drugs.

The 12 steps are:

- Step 1: The Blood- (or Breath-) Alcohol Concentration (BAC)
- Step 2: Interview of the Arresting Officer
- Step 3: Preliminary Examination (includes the first of three takings of the pulse)
- Step 4: Eye Examinations
- Step 5: Divided-Attention Tests
- Step 6: Vital-Signs Examinations (includes the second taking of the pulse)
- Step 7: Darkroom Examinations of Pupil Size (includes an examination of the mouth and nasal cavities)
- Step 8: Muscle Tone
- Step 8: Examination of Injection Sites, If Any (and third taking of the pulse)
- Step 10: Statements, Interrogation
- Step 11: Opinion
- Step 12: Blood or Urine Toxicological Examination
1. **BAC**

   This step precedes the involvement of the DRE. If the arresting officer has determined that the BAC is consistent with both the type and degree of impairment, no DRE is called. On the other hand, if the BAC is not consistent with the degree and/or type of impairment, a DRE should be requested.

2. **Interview of the Arresting Officer**

   Based on the results in Step 1, the arresting officer requests the assistance of a DRE. The DRE will discuss the circumstances of the arrest and will inquire as to the arrestee’s condition at the time of the arrest, whether the arrestee had been involved in a traffic collision, any statements the arrestee had made, whether or not the arrestee had drugs in his or her possession, and any other relevant matters. This step is analogous to the interview an emergency-room physician conducts when an unconscious individual is brought by ambulance to the hospital. The physician will of course inquire of the ambulance crew how long the person has been in that state, if the person has come in and out of consciousness, and so forth.

3. **Preliminary Examination**

   This step is commonly referred to as “a fork in the road.” The purpose of this step is to determine if there is sufficient reason to suspect drug influence. There are often serious medical conditions that may mimic drug influence. Therefore, an extremely important part of this step is the determination that it is in fact drugs, rather than a medical condition, that are inducing the observed impairment. In order to make this critical determination, the DRE will make general observations of the arrestee’s condition, inquire of the arrestee as to any health problems, and conduct a pupil-size and eye-tracking examination. Pupils of different size and/or differences in the tracking movements of the eyes often provide evidence of serious, potentially life-threatening medical conditions. In addition, the DRE takes the first of three pulses in this step. Based on what the DRE detects in this phase, a number of outcomes are possible. The DRE may see evidence of a medical condition and may obtain a medical assessment. The DRE may find no signs of drug influence and may return the arrestee to the arresting officer for routine processing. Or the DRE may proceed with a full DRE evaluation. Even though the DRE may have decided to proceed with the drug evaluation, if the DRE at any time finds evidence of a serious medical condition, the DRE will cease the evaluation and obtain the medical assessment.

4. **Eye Examination**

   During this step, the DRE conducts three separate eye-movement examinations: horizontal gaze nystagmus, vertical nystagmus, and an eye-convergence examination.

   Standardized field-sobriety-testing research found that horizontal gaze nystagmus (HGN) was the best predictor of an individual’s alcohol level. Simply, HGN refers to an involuntary but visible jerking of the eye balls while gazing at an object. The DRE holds a pencil or pen in front of the arrestee’s eyes and moves the object horizontally while the individual moves his or her eyes, attempting to follow the object. Alcohol and certain other drugs of abuse induce
this visible jerking. Although there are many different types of nystagmus, some of which are caused by pathology, the HGN examined for by DREs is rarely confused with nystagmus caused by something other than alcohol or drugs.

During the vertical nystagmus examination, the arrestee is directed to follow an object that is moved up and down. Importantly, any drug that induces HGN may also cause vertical nystagmus. There are no drugs, however, that may cause vertical nystagmus without first causing HGN. Certain medical conditions, such as brain-stem damage, may cause vertical nystagmus but not HGN.

During the convergence examination, the DRE, again using a pencil or pen, directs the arrestee to look at the object while the DRE places it at the bridge of the arrestee's nose. The arrestee will attempt to cross his or her eyes while looking at the object. Certain drugs impair the ability of the individual to converge (or cross) the eyes.

5. Divided Attention Testing

To a degree, this step repeats some of the tests that were given to the suspect at the time of the arrest. The setting now, however, is a controlled environment—a police station rather than the side of a roadway. The DRE administers the following tests in the following order: Romberg Balance Test, a Walk-and-Turn Test, the One-Leg Stand Test, and a Finger-to-Nose Test. These tests are divided-attention tests in that they require the individual to not only balance and coordinate body movements, but to remember instructions and perform more than one task at once. Frequently, the individual's performance on these tests during the DRE evaluation will be markedly different from the arrestee's performance in the field. There are many explanations for this variance: The drug(s) may have worn off during the intermittent time period; the individual may have used multiple drugs, and a different drug may now be dominant; and so forth. The officer will document the performance of the arrestee and then continue to Step 6.

6. Vital Signs Examination

The DRE takes three vital signs: blood pressure (using a sphygmomanometer and stethoscope), body temperature (utilizing an oral thermometer), and pulse. This is the second of three pulses, the first having been taken in the preliminary examination. Of course, if the arrestee's vital signs are dangerously high or low, the DRE will immediately obtain a medical assessment. DREs are trained to accurately take these vital signs and to compare the results with medically accepted normal ranges. Certain drugs elevate specific vital signs, other drugs depress the vitals, and other drugs may not affect certain vital signs.

7. Dark Room Examination

The eyes have been called the “window to the soul.” They are certainly a window to the inner body. The pupils enlarge in response to darkness, certain drugs, and fear and excitement. They also constrict in response to bright light as well as in response to certain drugs. The DRE uses a pupillometer to estimate the arrestee's pupil sizes in three different light levels: room light, near-total darkness, and direct light. The DRE also examines the individual's mouth and nasal
cavities for evidence of drug use. As with the prior steps, the DRE documents the results of this examination but does not reach a final opinion until the entire evaluation is completed.

8. **Muscle Tone**

Certain drugs cause the skeletal muscles to become rigid; whereas, other types of drugs, such as alcohol, cause muscle flaccidity. The arrestee’s muscle tone is evaluated throughout the examination through observations of the arrestee’s movements. During this step, however, the DRE gently moves the arrestee’s arms to determine muscle tone. This examination has its roots, as does most of the DRE evaluation, in standard medical procedures.

9. **Injection Sites Examination**

Many drug users inject drugs intravenously. Rarely, however, do medical procedures involve injecting drugs into an artery or vein. For example, insulin-dependent diabetics do not inject into blood vessels. During this step, the DRE examines the arrestee’s arms, possibly ankles, and possibly other body areas for injection sites. Importantly, the presence of injection sites, even recent ones, is an indicator of use rather than drug influence. Their presence, however, may provide evidence of frequency of use and the type of drug used. A third pulse is also taken.

10. **Statements, Interrogation**

The DRE now conducts a structured interview of the arrestee. Within the constitutional and procedural rights of the arrestee, the DRE will question the person about the use of drugs. Frequently, the arrestee will make self-serving denials of drug use but may admit or even confess to the DRE. Arrestees often state that they were using a prescribed drug. The DRE may ask the arrestee about any warnings given to the arrestee by the prescribing physician or pharmacist regarding operating a motor vehicle while taking the drug.

11. **Opinion**

Based on the totality of everything the DRE has observed up to this point, including the statements provided by the arresting officer, the DRE forms an opinion as to drug influence and then as to the type of drug causing the impairment. This opinion is not a guess or a hunch. The DRE’s opinion is not beyond error though, and the DRE’s background, training, and experience enables him or her to provide a generally accurate contemporaneous examination and conclusion about the suspect’s drug impairment. A positive finding by a DRE would commonly be expressed as, “In my opinion, the arrestee is under the influence of a central-nervous-system stimulant and cannot safely operate a motor vehicle.” This educated opinion is provided after a process that attempts to mirror a physician’s process of history taking and physical examination before a provisional diagnosis is made.

12. **Toxicological Examination**

The fact that this step is the 12th, or last, should not be construed to mean that it is the least important part of the evaluation. In fact, toxicological corroboration of drug use is often
necessary for successful prosecution. During this step, the DRE obtains a urine or blood specimen from the arrestee, which is then analyzed for the presence of certain drugs by a toxicological laboratory.

It is important, however, to again reiterate the laboratory’s role in a non-alcohol drug case. In a drug-influence case, the laboratory’s role is usually not to determine if the individual was impaired, but to determine use of a specific substance. For example, the DRE has determined the arrestee is under the influence of a central-nervous-system stimulant. The laboratory analyzes for specific drugs such as cocaine, amphetamines, and others. The laboratory report, assuming it corroborates the opinion of the DRE, will identify a specific stimulant the person used. In court, the consistency between the DRE’s opinion and the laboratory analysis is critical in demonstrating the accuracy of the DRE.

The DRE collects and records information using the 12-step protocol and then compares the observations to a symptomatology matrix. The DRE then forms his or her opinion by relying on the information contained in the matrix and from the DRE’s own personal knowledge and experiences.

An abbreviated sample drug-symptomatology matrix similar to the one used in most DRE programs follows:

<table>
<thead>
<tr>
<th></th>
<th>CNS DEPRESSANTS</th>
<th>CNS STIMULANTS</th>
<th>HALLUCINOGENS</th>
<th>PCP</th>
<th>NARCOTIC ANALGESICS</th>
<th>INHALANTS</th>
<th>CANNABIS</th>
</tr>
</thead>
<tbody>
<tr>
<td>HORIZONTAL GAZE NYSTAGMUS</td>
<td>PRESENT</td>
<td>NOT PRESENT</td>
<td>NOT PRESENT</td>
<td>PRESENT</td>
<td>NOT PRESENT</td>
<td>PRESENT</td>
<td>NOT PRESENT</td>
</tr>
<tr>
<td>VERTICAL NYSTAGMUS</td>
<td>POSSIBLY PRESENT</td>
<td>NOT PRESENT</td>
<td>NOT PRESENT</td>
<td>USUALLY PRESENT</td>
<td>NOT PRESENT</td>
<td>POSSIBLY PRESENT</td>
<td>NOT PRESENT</td>
</tr>
<tr>
<td>LACK OF CONVERGENCE</td>
<td>PRESENT</td>
<td>NOT PRESENT</td>
<td>NOT PRESENT</td>
<td>PRESENT</td>
<td>NOT PRESENT</td>
<td>PRESENT</td>
<td>PRESENT</td>
</tr>
<tr>
<td>PUPIL SIZE</td>
<td>WITHIN THE NORMAL RANGE</td>
<td>DILATED</td>
<td>DILATED</td>
<td>WITHIN THE NORMAL RANGE</td>
<td>CONstricted</td>
<td>NORMAL RANGE OR DILATED</td>
<td>DILATED BUT MAY BE NORMAL</td>
</tr>
<tr>
<td>REACTION TO LIGHT</td>
<td>SLOWED</td>
<td>SLOWED</td>
<td>NORMAL</td>
<td>NORMAL</td>
<td>LITTLE OR NO VISIBLE REACTION</td>
<td>SLOWED</td>
<td>NORMAL</td>
</tr>
<tr>
<td>PULSE RATE</td>
<td>BELOW NORMAL</td>
<td>ABOVE NORMAL</td>
<td>ABOVE NORMAL</td>
<td>ABOVE NORMAL</td>
<td>BELOW NORMAL</td>
<td>ABOVE NORMAL</td>
<td>ABOVE NORMAL</td>
</tr>
<tr>
<td>BLOOD PRESSURE</td>
<td>BELOW NORMAL</td>
<td>ABOVE NORMAL</td>
<td>ABOVE NORMAL</td>
<td>ABOVE NORMAL</td>
<td>BELOW NORMAL</td>
<td>DEPENDS ON SUBSTANCE</td>
<td>ABOVE NORMAL</td>
</tr>
<tr>
<td>BODY TEMPERATURE</td>
<td>WITHIN THE NORMAL RANGE</td>
<td>ABOVE NORMAL</td>
<td>ABOVE NORMAL</td>
<td>ABOVE NORMAL</td>
<td>BELOW NORMAL</td>
<td>ABOVE, BELOW OR NORMAL</td>
<td>WITHIN THE NORMAL RANGE</td>
</tr>
</tbody>
</table>

### III. Common Drugs in DUI Cases

Drug recognition experts classify the drugs of abuse into seven categories. This categorization system is based on the premise that each drug within a category produces a pattern of effects known as signs and symptoms. This DRE categorization system is analogous to a handwritten signature rather than a fingerprint. Each time a signature is written, it will be slightly different. The signature will still be recognizable as identifying a specific individual. Fingerprints, on the other hand, do not change.
Practically, this means that although there are numerous drugs within each of the seven categories, the overall pattern of effects within the category at hand is the same.

The effects can and do vary from drug to drug, primarily in terms of intensity and duration of action. The effects of a drug depend not only upon the substance itself, but the subject (or suspect) as well as the setting. The three “Ss” of substance, suspect, and setting interact to produce the observable effects. Generally, the effects of a drug are dose-dependent. More of the substance, such as alcohol, will generally produce more pronounced effects. The effects also depend on how the drug was administered, its purity, and the presence of other drugs. The suspect’s tolerance to the substance, the user’s expectations, coexisting illness, and fatigue all affect the outcome. Also, for many reasons, individuals vary in their response to the same drug. For example, people differ in metabolic rates. The effects of a drug also vary in the same individual. Indeed, rarely will a single individual experience or display all the effects associated with a drug. The setting or the environment interacts with the substance and the suspect to produce the constellation of effects. “White coat hypertension” is an example of the interaction of environment and physiology. The fact that one is having his or her blood pressure taken in a doctor’s office may temporarily raise the person's blood pressure.

Drug abusers use drugs for effects on the central nervous system (CNS), primarily the brain. If a drug does not affect the brain, then it will not be abused (although, of course, it may be misused). The seven DRE drug categories are: CNS Depressants (including alcohol), Inhalants, Dissociative Anesthetics, Cannabis, CNS Stimulants, Hallucinogens, and Narcotic Analgesics.

A. The Drugs of Abuse: An Overview

1. Central Nervous System Depressants

This category includes the most widely abused drug—alcohol. In addition, the category consists of barbiturates, non-barbiturates that have barbiturate-like effects, anti-anxiety tranquilizers, antipsychotic tranquilizers, certain antidepressants, and certain pharmaceutical combinations that contain more than one type of CNS depressant. The benzodiazepines,¹ chloral hydrate, GHB,² methaqualone, lithium, phenobarbital, and many other substances are included in this category. Commonly referred to as “downers” or sedative-hypnotics, the effects of these drugs at intoxicating doses mirror the effects of alcohol. However, they are not detected by an alcohol breath test and do not produce an alcohol odor. Unlike the case with alcohol, there are generally no consistent correlations between the levels of these drugs ingested and the degree of intoxication. These drugs produce relaxation, drowsiness, impaired balance and coordination, slurred speech, a lowering of inhibitions, and increased risk taking. They also produce nystagmus, do not generally affect pupil size, and typically depress the vital signs. The non-alcohol CNS depressants are extremely dangerous when taken with alcohol. Pharmaceutical preparations of these drugs usually contain warnings advising the user not to drink alcohol at the same time and to be cognizant that they may impair driving.

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¹ Benzodiazepines are anti-anxiety tranquilizers that share a similar chemical structure. Examples include: valium (diazepam), librium, xanax, halcion, flunitrazepam (“roofies” or rohypnol), and many others.
² Gamma hydroxy butyrate.
2. Inhalants

The drugs in this category are usually inhaled. Three subcategories comprise the inhalants: volatile solvents, aerosols, and anesthetic gases. The typical user of these drugs is poor, young, and, as a result, does not have ready access to more preferred drugs. Included are solvents such as paint thinner, gasoline, toluene, turpentine, and paint. Nitrous oxide (laughing gas), freon, ether, and many other substances are also included. Common indicators of the use of these drugs are the presence of chemical odors on the user, and residue of the substance on the user’s face, clothing, and hands. Intoxicated individuals may look and act similar to people under the influence of alcohol. They may display impaired gait, slurred speech, bloodshot eyes, and a blank stare. Because these substances displace oxygen, the heart generally will accelerate, resulting in an increased pulse rate. Depending on the specific substance, blood pressure can be elevated or depressed. As with the CNS depressants, these drugs generally produce nystagmus but do not usually affect pupil size.

3. Dissociative Anesthetics

This drug category was formerly named PCP, which represents the longer chemical name of phenyl cyclohexyl piperidine. Although frequently classified as a hallucinogen, and sometimes as a depressant, a stimulant, or an analgesic, PCP is appropriately termed a dissociative anesthetic. The drug ketamine, which has uses in veterinary medicine, pediatric surgery, and other areas, is included in this category.

The typical effects of dissociative anesthetics are elevated vital signs accompanied by both horizontal and vertical nystagmus. In addition, rigid skeletal muscles, a blank stare, an absence of pain, hallucinations, and many other effects may be evident. Dissociative anesthetics users may become suddenly violent and pose an extreme danger to police officers. Many nonlethal control devices, such as taser dart guns, have been developed in order to subdue dissociative anesthetics users.

PCP was originally used in the mid-1950s as an anesthetic. Because PCP increases blood pressure, heart rate, and respiration, it was thought it could be used on older patients who were endangered by the use of anesthetics that cause depressed heart rates and blood pressure. The drug was withdrawn from human use in 1965 because of unpleasant side effects. Some patients suffered temporary loss of memory, confusion, mood changes, muscle tension, nausea, anxiety, aggressiveness, paranoia, and other unpredictable effects.

Today, PCP is an increasingly popular drug because it is easily and cheaply produced. Due to its common availability and high profits, PCP is expected to remain popular among drug abusers.

There are many different names for PCP. The more common ones are angel dust, cadillac, cyclone, surfer, super kool, super weed, and tic tac. PCP comes in the form of tablets, capsules,

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3. The anesthetic gases cause blood vessels to enlarge or dilate. This may cause a drop in blood pressure.
4. Ketamine is used legitimately only in an injectable form. The Physicians’ Desk Reference includes ketamine. Its effects are basically identical to those resulting from PCP.
crystals, powders, and liquids. PCP can be smoked, snorted, ingested, and injected. The most common way to take PCP is by smoking a PCP-soaked marijuana cigarette.

A user will feel PCP’s effect within minutes after smoking it, and the high will peak in 15 to 30 minutes. The effect of PCP will last for several hours, and the user will return to a normal state in 24 to 48 hours. When snorted, PCP takes a few more minutes (30 to 45) to affect the user. When swallowed, PCP does not produce effects for 30 to 60 minutes.

The single sign that usually pinpoints dissociative anesthetics intoxication is the presence of both vertical and horizontal nystagmus. While alcohol causes horizontal nystagmus, very few things cause vertical nystagmus. Among the few things that can cause vertical nystagmus are brain tumors, multiple sclerosis, strokes, brain hemorrhaging, Wernicke’s disease, and barbiturates taken in sufficient quantity to make the person comatose. Dissociative anesthetics do not constrict or dilate the user’s pupils.

4. **Cannabis**

This category, which includes marijuana, hash, hash oil, and the synthetic drug dronabinol, is the most widely abused illicit drug. Although it has a popular reputation as a relatively benign drug, the impairment caused is significant, affecting judgment, depth perception, ability to maintain attention as well as affecting the cardiovascular system. Cannabis causes bloodshot eyes, dilated pupils, accelerated heart rate (tachycardia), muscle tremors, forgetfulness, and many other effects. Unlike the first three categories (CNS depressants, inhalants, and dissociative anesthetics), this category does not produce nystagmus. Users of cannabis frequently also use alcohol as well as other drugs concomitantly.

5. **Central Nervous System Stimulants**

This category includes the ubiquitous cocaine in all its various forms, amphetamine, methamphetamine, ephedrine, Ritalin, certain diet pills, and other related substances. Commonly known as “uppers,” the effects of these drugs mimic the body’s fight or flight response (the autonomic nervous system's response to perceived danger). Their effects include dilated pupils, elevated vital signs, hyper-alertness, rapid and agitated body movements, extreme weight loss accompanied by deteriorating health and hygiene, and a deterioration of the individual's ability to filter environmental stimuli such as noises and movement. CNS stimulants do not produce nystagmus. The user may overreact to seemingly minor events and may view minor inconveniences as elaborate plots. As the effects wear off, the user may physiologically crash and may appear nearly the opposite of when he or she was under the influence of the drug. The user may sleep for long periods, may wake voraciously hungry, and may be extremely dysphoric, unhappy, or depressed.

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5. Dronabinol’s brand name is Marinol. Listed in *The Physicians' Desk Reference*, it is a Schedule II drug. Its uses include combating nausea induced by cancer chemotherapy. Dronabinol is synthetic tetrahydrocannabinol, the psychoactive component of marijuana.

6. These drugs are sometimes called sympathomimetics. This means that they mimic the naturally occurring and appropriate response of the body to danger.
Three of the most common amphetamines are benzedrine, dexedrine, and methamphetamine. They come in capsules, tablets, powders, and solutions. Amphetamines are commonly taken orally as a tablet or capsule, or sometimes through intravenous injection.

Medically, amphetamines were first used in the 1930s as nasal constrictors to treat colds and hayfever. Today, the major uses of amphetamines are for treatment of obesity and for relief of mild depression.

6. Hallucinogens

Hallucinogens are used to induce distorted sensory perceptions known as hallucinations. In many respects, they are closely related to the CNS stimulants as is evidenced by the fact that they also cause dilated pupils and elevated vital signs. The user may experience a mixing of the senses, called synesthesia, in which the user may “hear” visual stimuli, such as colors, and may “see” sounds, such as music. LSD, psilocybin, mescaline, peyote, bufotenine, morning-glory seeds, jimson weed, and the psychedelic amphetamines are some of the drugs in this category. The psychedelic amphetamines include methylenedioxymethamphetamine, or MDMA, which is known in the vernacular as “Ecstasy,” and many other related preparations. Very popular in the 1960s, these drugs experienced a resurgence of use in the 1990s.

7. Narcotic Analgesics

This final category includes opiates such as morphine, codeine, heroin, meperidine, percodan, methadone, fentanyl, and numerous others. These drugs relieve pain but also produce sedation. The specific effects include constricted pupils, depressed vital signs, slow and deliberate movements, and forgetfulness. These drugs do not produce nystagmus. Although these drugs are frequently injected, more users, because of the concern over the spread of infectious disease through the sharing of hypodermic needles, are inhaling drugs such as heroin. These drugs are known for their physically addictive qualities, as well as for the extremely unpleasant, though not life-threatening, withdrawal syndrome.

B. Poly-Drug Use

Poly-drug use is the norm for today’s drug user. Poly-drug use, also termed poly-pharmacy and multi-habituation, simply means that the drug user is using more than one category of drug simultaneously or serially. Often, the drugs have nearly opposite effects. For example, an extremely common drug combination in many parts of the United States is the “speed ball.” This slang term refers to combining a narcotic analgesic, typically heroin, with a CNS stimulant, usually cocaine. In many respects, these drugs have opposite effects. For example, cocaine dilates the pupils and elevates the vital signs, whereas heroin constricts the pupils and depresses the vitals. Contrary to what defense attorneys attempt to coax the DRE to say, neither drug cures the effects of the other. What typically occurs is that the user displays a mixture of signs and symptoms, such as dilated pupils with depressed vitals, which can best be explained by poly-drug use.

7. The term “opioid” is often applied to this category. This means that the effects are similar to opium; although, the substance may not contain any actual opium.
DREs apply four concepts to interpret poly-drug signs and symptoms: additive, antagonistic, overlapping, and null.

“Additive” means that each of the drugs used produce the same effect. Each of the drugs reinforces a specific effect of the other. For example, CNS stimulants and cannabis independently elevate pulse rate. Taken together, the user’s pulse will be elevated, probably to a greater degree than either drug would produce separately. Each drug is reinforcing an effect of the other.

“Antagonistic” means that each of the drugs produces an opposite effect. Cocaine dilates the pupils, while heroin constricts them. When taken together, the user’s pupils may be dilated, may be constricted, or may be within the normal range (3.0 mm to 6.5 mm diameter). The effects displayed are dependent on the dose of each of the drugs, the user’s tolerance to each of the drugs, and, importantly, the point in time that the user is evaluated by the DRE. Cocaine, a short-acting drug, may wear off quickly, and the effects of the heroin may then dominate.

“Overlapping” effect refers to the case in which one of the drugs produces the effect, but the other drug is neither additive nor antagonistic to it. For example, alcohol produces nystagmus. If alcohol is taken with cocaine, a drug that does not cause nystagmus, the user will display nystagmus due to the alcohol. There is no drug that is antagonistic to nystagmus.

“Null” effect refers to a combination of drugs in which neither of the drugs used produces the effect. For example, cocaine does not produce nystagmus, neither does heroin. Taken together, the user will not have nystagmus because neither of the drugs produces nystagmus.

IV. Legal Use of a Drug

Many of the previously described drugs can be obtained legally by prescription. Legal use of a drug is not a defense to driving under the influence of a drug. Vehicle Code section 23630 states:

The fact that any person charged with driving under the influence of any drug or the combined influence of alcoholic beverages and any drug in violation of Section 23152 or 23153 is, or has been entitled to use, the drug under the laws of this state shall not constitute a defense against any violation of the sections.

See People v. Chaffey (1994) 25 Cal.App. 4th 852, where the defendant, who had been prescribed one or two Xanax tablets (benzodiazepine), attempted suicide by swallowing 120 of them. Chaffey then drove a car and was arrested and convicted for driving under the influence of an intoxicating drug. See also People v. Keith (1960) 184 Cal.App.2d Supp. 884, where the drug involved was an accidental overdose of insulin (combined with drinking two drinks containing vodka).

V. Refusal to Submit to a Blood or Urine Test

Vehicle Code section 23612(a)(2)(B) provides that if a “person is lawfully arrested for driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug, the person has the choice of whether the test shall be of his or her blood, breath, or urine, and the officer shall advise the person that he or she has that choice.”
In addition:

A person who chooses to submit to a breath test may also be requested to submit to a blood or urine test if the officer has reasonable cause to believe that the person was driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug and if the officer has a clear indication that a blood or urine test will reveal evidence of the person being under the influence.

(Vehicle Code § 23612(a)(2)(C).)

The jury should be instructed pursuant to CALCRIM 2130 that the refusal shows consciousness of guilt.

VI. Jury Considerations in DUI-Drug Cases

A common problem in many driving-under-the-influence-of-alcohol cases is jury sympathy for the defendant. A jury member may identify with someone who has a few too many glasses of wine with dinner and may develop a feeling of, “There but for the grace of God go I.” In driving-under-the-influence-of-drugs cases, jurors’ reactions can vary widely.

A defendant charged with driving under the influence of a drug that is never used legally, such as PCP, does not normally receive sympathy from a judge or jury. But a defendant with serious medical problems who is taking prescription drugs, or a defendant who combines prescription drugs with alcohol, not realizing the effect, can arouse juror sympathy. In such cases, the prosecutor must stress the serious consequences that can result from even these seemingly innocent acts.

Another jury consideration involves the expectations of jury members. For example, most jurors have heard stories of persons under the influence of PCP with extremely bizarre and disoriented behavior. Because of these expectations, jurors frequently have difficulty conceiving of a person actually being able to operate a motor vehicle under the influence of PCP, and expect substantially more bizarre behavior than the average PCP suspect demonstrates. In such cases, the prosecutor must convey, through the testimony of the DRE, that reactions to drugs vary widely from individual to individual. Similarly, the prosecutor must convince the jury that the lack of extremely aberrant behavior does not negate the evidence that the suspect is under the influence of a drug.

A. Voir Dire

A jury trial involving a charge of being under the influence of a drug requires an additional set of voir dire questions. The following questions are suggested depending on the actual charges and the facts of the case.

1. HAVE YOU, OR ANY MEMBERS OF YOUR FAMILY, OR CLOSE FRIENDS EVER HAD ANY TYPE OF NARCOTIC OR OTHER DRUG PROBLEM?
A “yes” answer to this question might signal either juror sympathy, prior personal drug experience (if the juror identifies close friends as drug users), or possibly a real anti-drug stance, depending on how the known drug user’s experience impacted the juror. Certainly, additional follow-up questions would be appropriate.
2. HAVE ANY OF YOU HAD ANY MEDICAL TRAINING OR EXPERIENCE?
If there are any “yes” answers, ask for elaboration, e.g., where, when, duties, experience.

3. HAVE YOU DONE ANY EXTENSIVE READING ABOUT DRUGS OR DRUG ADDICTION?

4. If appropriate: DO YOU UNDERSTAND THAT IT IS ILLEGAL IN THIS STATE TO BE UNDER THE INFLUENCE OF [NAME OF DRUG] AND THAT NO PARTICULAR BEHAVIOR IS REQUIRED?

5. DO YOU THINK THAT'S FAIR?

6. DO YOU THINK THE GOVERNMENT HAS THE RIGHT TO CONTROL THE USE OF CERTAIN DRUGS?

7. HAS ANYONE ON THE PANEL SEEN A PERSON WHO WAS UNDER THE INFLUENCE OF [NAME OF DRUG]?
If “yes,” ask for elaboration, e.g., when, where, under what circumstances, why did the panelist think it was that particular drug, etc.

8. DO YOU BELIEVE THAT ONLY MEDICAL DOCTORS ARE ABLE TO DETERMINE WHETHER SOMEONE IS UNDER THE INFLUENCE OF A DRUG?

9. WOULD YOU AGREE THAT SPECIALLY TRAINED PERSONS WHO ARE NOT DOCTORS COULD ALSO DETERMINE WHETHER SOMEONE WAS UNDER THE INFLUENCE OF A DRUG?

10. WILL YOU GIVE AN EXPERT WITNESS'S OPINION THE WEIGHT TO WHICH YOU FEEL IT IS ENTITLED?

11. DO YOU HAVE ANY DISAGREEMENT WITH THE NOTION THAT A PERSON UNDER THE INFLUENCE OF A DRUG MIGHT NOT SHOW ANY PARTICULAR SYMPTOMS?

12. WOULD YOU AGREE WITH THE NOTION THAT A PERSON WHO IS UNDER THE INFLUENCE OF A DRUG MIGHT HAVE DIFFICULTY REMEMBERING WHAT OCCURRED AT THAT TIME?

13. DOES ANYONE BELIEVE THE DRUG LAWS SHOULD BE CHANGED?

14. DOES ANYONE BELIEVE THAT A PERSON SHOULD HAVE THE RIGHT TO TAKE DRUGS WITHOUT GOVERNMENTAL INTERFERENCE?
If anyone answers “yes,” you may want to follow up to determine whether this juror is a reasonable choice by you for this case, or possibly the juror’s attitudes would support a “challenge for cause.”

15. IS THERE ANYONE HERE WHOSE FEELINGS ABOUT DRUG LAWS WOULD PREVENT HIM OR HER FROM BEING FAIR AND IMPARTIAL IN THIS CASE?
16. HAVE YOU, YOUR RELATIVES, OR CLOSE FRIENDS EVER WORKED FOR A DRUG-REHABILITATION PROGRAM? Follow up affirmative answers with additional questions that will help you determine whether you want this juror.

17. IS THERE ANYONE WHO DISAGREES WITH THE NOTION THAT A PERSON TAKING A LAWFULLY PRESCRIBED DRUG COULD BECOME IMPAIRED?

18. DOES ANYONE DISAGREE WITH THE LAW THAT SAYS IT’S WRONG TO DRIVE IMPAIRED, EVEN IF THE DRUG WAS LAWFULLY PRESCRIBED?

19. IN THIS CASE, IT IS MY BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS UNDER THE INFLUENCE OF A DRUG. DOES ANYONE HAVE ANY DISAGREEMENT WITH THAT?

20. IT IS NOT NECESSARY FOR ME TO IDENTIFY WHAT PARTICULAR DRUG WAS USED. DOES ANYONE HAVE ANY DISAGREEMENT WITH THAT?

Questions when there is a refusal to take drug test:

1. IF THERE WERE NO CHEMICAL TEST IN THIS CASE, WOULD THAT RAISE AN AUTOMATIC “REASONABLE DOUBT” FOR YOU?

2. WOULD YOU ALL BE ABLE TO BASE YOUR CONCLUSIONS IN THIS CASE ON ALL THE EVIDENCE?

3. IF YOU HEARD TESTIMONY FROM A SPECIALLY TRAINED WITNESS ON A PARTICULAR ISSUE, WOULD YOU CONSIDER THAT WITNESS’S TESTIMONY IN REACHING YOUR FINAL CONCLUSION?

4. HAVE YOU ALL HAD THE EXPERIENCE IN WHICH YOU RECEIVED A TRUSTWORTHY AND ACCURATE OPINION FROM A SPECIALLY TRAINED PERSON LIKE A MECHANIC OR A NURSE?

VII. DRE Expertise and Kelly-Frye Issues

In order for a DRE to provide opinions in your case, it will be necessary that the court conclude the DRE is an expert witness. To qualify the DRE as an expert witness, the prosecution must establish a foundation that the DRE has special knowledge, skill, experience, training, or education on the subject to which his or her testimony relates.

Once the DRE’s background, training, and experience have been established, the DRE will be deemed an expert by the court pursuant to Evidence Code sections 720 and 801. At this point, your witness is legally permitted to utter opinions relevant to your case. As of January 2008, there were no published California decisions limiting the admissibility of DRE testimony. This is likely because the specialized background, training, and experience of a DRE brings the offered evidence squarely within section 801.

On occasion, a defense attorney will challenge the proposed DRE evidence contending that the DRE protocol does not satisfy the Kelly-Frye test. The Kelly-Frye rule is used to determine the
admissibility of innovative scientific evidence. (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (1923) 293 F. 1013.) In *Frye*, the court held that before a new scientific principle or discovery could be admitted into evidence, it “must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” This federal rule was subsequently replaced by federal statute. But California still uses *Kelly-Frye* as a foundational standard necessary before permitting evidence regarding new scientific methodology. (*People v. Leaby* (1994) 8 Cal.4th 587.)

There are two arguments available to the prosecutor confronted with a defense *Kelly-Frye* objection. First, the DRE’s testimony is admissible as expert testimony pursuant to Evidence Code sections 720 and 801, predicated on professional training. Case law has long recognized that experienced officers are capable of recognizing “the manifestations” of drug use because of their background, training, and experience. (*People v. Dunkel* (1977) 71 Cal.App.3d 928; *People v. Knutson* (1976) 60 Cal.App.3d 856.)

Further, California case law draws a distinction between expert evidence on the one hand and scientific evidence on the other. In explaining the difference, the California Supreme Court noted:

> It is important to distinguish in this regard between expert testimony and scientific evidence. When a witness gives his personal opinion on the stand—even if he qualifies as an expert—the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine: like many laypersons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently “scientific” mechanism, instrument, or procedure. Yet the aura of infallibility that often surrounds such evidence may well conceal the fact that it remains experimental and tentative. [Citations.] For this reason, courts have invoked the *Kelly-Frye* rule primarily in cases involving novel devices or processes.… We have never applied the *Kelly-Frye* rule to expert … testimony ….


The second response to the defense argument is that the protocol that a DRE officer follows is not a new or novel scientific innovation. Although there are no California cases dealing directly with the issue of whether the DRE protocol is subject to *Kelly-Frye* (the absence of cases on this point, by itself, stands for the proposition that it is a nonissue. For if the DRE protocol was truly subject to *Kelly-Frye*, the appellate courts would have dealt with the question), there are rulings from other state courts.

In New York, it was held that “nothing contained in the [DRE] protocol is a new invention. It is rather a compilation of tried and true procedures utilized by medical science and the law enforcement community in similar contexts for many years.” (*People v. Quinn* (1991) 580 N.Y.S.2d 818.)

The Minnesota Supreme Court, after noting that few of the 12 steps a DRE follows “call for any particular medical or scientific training or skill on the part of the officer,” ruled that:
[T]he protocol ... is not itself a scientific technique but rather a list of the things a prudent, trained and experienced officer should consider before formulating or expressing an opinion whether the subject is under the influence of some controlled substance.

(State v. Klawitter (1994) 518 N.W.2d 577, 584.)

In another case, the Oregon Court of Appeals upheld the DRE protocols in State v. Sampson (2000) 167 Or.App. 489. The court ruled that, provided the state makes “a foundational showing that the officer who administered the test was properly qualified, the test was administered properly, and the test results were recorded accurately,” then “the procedure and results of the DRE protocol are admissible in a DUI-CS proceeding to show that a defendant was under the influence of a controlled substance.” (Id. at 512.)

Therefore, the prosecutor should emphasize that the DRE protocol is not novel or new, but rather a list of procedures that have been utilized by medical science and the law enforcement community over a number of years. The procedures are not scientific in nature, but rather procedures that a prudent, trained, and experienced officer can rely on before formulating an opinion as to whether someone is under the influence of drugs.

VIII. Direct Examination of the Drug Recognition Expert

The DRE is usually not the arresting officer. He or she will be asked to observe the defendant after the arrest for an opinion as to drug intoxication. These officers vary greatly in general knowledge and courtroom presence. Therefore, it is necessary to interview the DRE before trial.

Generally, if there is not a chemical test, the DRE may be your only expert in a driving-under-the-influence-of-drugs trial. All evidence of the physical and psychological effects of the drug on the human body will come from the DRE as well as evidence of the defendant’s observable signs and symptoms on the arrest date.

The following series of questions is intended to provide a sample direct examination of a DRE witness. The bracketed answers are designed to give you some examples of the answers you likely will receive from your witness. Obviously, your case may require alteration and amendment of this string of questions.

A. Establish Training and Experience

1. PLEASE STATE YOUR NAME AND OCCUPATION FOR THE COURT REPORTER.

2. HOW LONG HAVE YOU BEEN EMPLOYED AS A POLICE OFFICER?

3. WHAT IS YOUR CURRENT ASSIGNMENT?

4. HOW LONG HAVE YOU BEEN IN THAT ASSIGNMENT?

5. PLEASE DESCRIBE YOUR DUTIES AND RESPONSIBILITIES IN YOUR CURRENT ASSIGNMENT.

6. DO YOU HAVE ANY OTHER LAW ENFORCEMENT EXPERIENCE?
7. PLEASE TELL US ABOUT YOUR BACKGROUND, TRAINING, AND EXPERIENCE RELATING TO DRUG LAW ENFORCEMENT AND DRUG-USE RECOGNITION
   [A: I have received training as a drug recognition expert (DRE).]

8. WHAT IS A DRUG RECOGNITION EXPERT?

9. PRIOR TO BECOMING A DRUG RECOGNITION EXPERT, HAD YOU HAD THE OPPORTUNITY TO ENGAGE IN DRUG ENFORCEMENT?

10. APPROXIMATELY HOW MANY TIMES A [DAY] [WEEK] [MONTH] WOULD YOU COME IN CONTACT WITH A PERSON USING DRUGS?

11. OVER THE YEARS, HOW MANY DRUG ARRESTS HAVE YOU BEEN INVOLVED IN?

12. WAS IT YOUR PRIOR LAW ENFORCEMENT EXPERIENCE, IN PART, THAT QUALIFIED YOU FOR THE DRUG RECOGNITION PROGRAM?

13. WAS THERE SOME SPECIALIZED TRAINING YOU RECEIVED IN ORDER TO QUALIFY AS A DRUG RECOGNITION EXPERT?

14. BRIEFLY DESCRIBE WHAT A DRUG RECOGNITION EVALUATION INVOLVES.
   [A: A drug-influence examination is a standardized method of determining whether observable physical impairment and behavior is the result of the use of drugs. If drug use is suspected, the method provides procedures for determining whether the observable impairment is the result of alcohol alone or whether it’s a result of other drugs. The method also provides procedures for determining the category of drugs causing the impairment.]

15. WHAT TOPICS WERE CONSIDERED IN YOUR TRAINING AS A DRUG RECOGNITION EXPERT?
   [A: I was trained to distinguish between seven broad categories of drugs based on shared symptomatology. I was also trained to use a standard evaluation sequence, and to record and document the results of my examination on a standardized form, which also serves as a checklist for the procedure. I was trained to interpret the results obtained from the examination.]

   [I was initially trained in the proper administration of the Standardized Field Sobriety Test. This training lasted approximately 24 hours over a three-day period. This was followed by a two-day, 16-hour DRE preliminary training. I then completed a seven-day, 56-hour DRE school.]

   [Upon successfully completing all of the classroom training, I completed the certification stage of DRE training. During this phase, which lasted approximately six months, I conducted 15 evaluations of individuals who were believed to be under the influence of non-alcohol drugs. These evaluations were supervised by a certified DRE instructor. I had to correctly evaluate suspects who were under the influence of at least four categories of drugs. My opinions were then corroborated by toxicological analysis.]
16. WERE YOU REQUIRED TO TAKE A FORMAL EXAMINATION AFTER THE CLASSROOM PHASE?
[A: Yes. I was given a written examination during the classroom phase of the training and an additional comprehensive written exam during certification training. Finally, I was recommended for certification by two DRE instructors who had observed me conduct drug-influence evaluations.]

17. WAS THERE ANY CONFIRMATION ON YOUR EVALUATION AND WHETHER THE PERSON WAS UNDER THE INFLUENCE?

18. HOW LONG DOES IT TAKE TO COMPLETE ALL STAGES OF THE CERTIFICATION PROCESS?

19. AT THE END OF THE CERTIFICATION TRAINING, WERE YOU CERTIFIED?
[A: Yes.]

20. WHEN WERE YOU CERTIFIED?

21. ARE THERE ANY REQUIREMENTS TO MAINTAIN YOUR CERTIFICATION?

22. WHAT ARE THE REQUIREMENTS?

23. OFFICER, ARE YOU CURRENTLY CERTIFIED?

24. ARE THERE DRUG RECOGNITION OFFICERS THROUGHOUT THE UNITED STATES?

25. WHEN WAS THE DRE PROGRAM DEVELOPED?

26. DOES EVERY DRUG RECOGNITION OFFICER IN THE UNITED STATES RECEIVE THE SAME STANDARDIZED TRAINING?

27. DOES THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (NHTSA) RECOGNIZE THE DRE PROGRAM?

28. DOES THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE (IACP) RECOGNIZE THE DRE PROGRAM?

29. AND HAVE THEY APPROVED OF THE CERTIFICATION PROCESS UTILIZED IN THE TRAINING PROGRAM?

30. IN ADDITION TO DRE TRAINING, DO YOU HAVE ANY OTHER TRAINING IN THIS AREA?

31. HAVE YOU ATTENDED ANY TRAINING WITHIN THE PAST YEAR?

32. HOW MANY ARRESTS HAVE YOU MADE FOR DRIVING UNDER THE INFLUENCE?

33. HAVE ALL OF THOSE ARRESTS BEEN FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL?
[A: No.]
34. WHAT WERE THE OTHER ARRESTS FOR?  
   [A: Those arrests were for driving under the influence of drugs or driving under the combined influence of alcohol and drugs.]

35. HOW MANY DRE EVALUATIONS HAVE YOU CONDUCTED (INCLUDING THOSE ADMINISTERED IN YOUR CERTIFICATION PROCESS)?

36. DO YOU DOCUMENT YOUR DRUG EVALUATIONS?

37. WHAT INFORMATION DO YOU SPECIFICALLY DOCUMENT?

38. OF THOSE [NUMBER] EVALUATIONS, HOW MANY TIMES DID YOU DETERMINE THAT A SUSPECT WAS UNDER THE INFLUENCE OF DRUGS?

39. WHAT WAS THE OUTCOME OF THE OTHER EVALUATIONS?

40. IN THOSE EVALUATIONS IN WHICH YOU DETECT THE SUBJECT IS UNDER THE INFLUENCE, IS THE SUBJECT REQUESTED TO PROVIDE A BLOOD OR URINE SAMPLE?

41. THE SUBJECT, OF COURSE, HAS THE RIGHT TO REFUSE SUCH A TEST, ISN’T THAT CORRECT?

42. IN HOW MANY OF THE [NUMBER] EVALUATIONS IN WHICH YOU DETECTED EVIDENCE OF DRUG IMPAIRMENT DID THE SUBJECT PROVIDE A BLOOD OR URINE SAMPLE?

43. IN WHAT PERCENTAGE OF THOSE INSTANCES IN WHICH YOU DETECTED DRUG IMPAIRMENT DID THE CHEMICAL TEST CORROBORATE THE CONCLUSION THAT THE SUBJECT HAD INGESTED DRUGS?

44. HAVE YOU PREVIOUSLY TESTIFIED ABOUT THE EFFECTS OF DRUGS AND THE RECOGNITION OF DRUG IMPAIRMENT?

45. HAVE YOU PREVIOUSLY QUALIFIED IN COURTS OF THIS STATE AS AN EXPERT ON THE SUBJECT OF PERSONS DRIVING UNDER THE INFLUENCE OF DRUGS?

46. HOW MANY TIMES?

   YOUR HONOR, THE PEOPLE WOULD ASK THE COURT TO DEEM OFFICER [NAME OF WITNESS] AN EXPERT WITNESS IN THE AREA OF DRUG RECOGNITION AND DRUG IMPAIRMENT.

47. OFFICER, I NOW DIRECT YOUR ATTENTION TO [DATE OF ARREST]. WERE YOU WORKING ON THAT DATE?

48. WHAT WAS YOUR ASSIGNMENT AT THAT TIME?

49. WERE YOU ASKED TO CONDUCT A DRUG EVALUATION AT [TIME] A.M./P.M.?
50. WHO WAS THE SUBJECT OF THAT EVALUATION, IF YOU KNOW?  
[A: (Defendant’s name and ID.)]

51. DO YOU SEE THE PERSON YOU EXAMINED AT THAT TIME IN COURT TODAY?

52. PLEASE DESCRIBE WHAT THAT PERSON IS CURRENTLY WEARING.  
MAY THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT [NAME OF DEFENDANT].

53. DID YOU PERFORM A DRUG-INFLUENCE EXAMINATION OF THE DEFENDANT?  
[A: Yes, I did.]

54. HOW MANY PARTS WERE THERE IN THE DRUG-INFLUENCE EVALUATION YOU CONDUCTED?  
[A: There were 12 basic components of the examination.]

55. AND THE EVALUATION YOU CONDUCTED HAS THE SAME COMPONENTS AS USED BY ALL TRAINED DRUG RECOGNITION EXPERTS IN THE UNITED STATES?

B. Drug-Influence Examination

[Note: For easier reading, these questions assume a case in which the defendant is male.]

Step One: Breath-Alcohol Test

1. OFFICER, WHAT WAS THE FIRST PART OF THE EVALUATION THAT YOU PERFORMED?

2. WHY IS THAT THE FIRST COMPONENT OF THE DRUG EVALUATION?  
[A: The breath-alcohol test is used to determine whether alcohol is the cause or a contributing factor for the physical impairment of the defendant.]

3. DID YOU COME TO KNOW THE RESULTS OF [NAME OF DEFENDANT]'S BREATH-ALCOHOL TEST?  
[A: Yes, I did.]

4. OFFICER, HAVE YOU BEEN TRAINED IN RECOGNIZING ALCOHOL-INDUCED IMPAIRMENT AT KNOWN BREATH-ALCOHOL LEVELS?  
[A: I have on many occasions evaluated suspects for driving while under the influence of alcohol and have compared the subject’s degree of impairment and subsequent breath-alcohol levels.]
5. WHAT DID THE BREATH-ALCOHOL TEST INDICATE TO YOU AS TO WHETHER ALCOHOL WAS THE CAUSE OR CONTRIBUTING FACTOR TO THE PHYSICAL IMPAIRMENT OF THE DEFENDANT?
[A: The test indicated that alcohol was [was not] a cause or contributing factor to the physical impairment of the defendant and that the BAC was not consistent with the degree and/or type of impairment.]

Step Two: Interview of Arresting Officer

1. OFFICER, PLEASE TELL US ABOUT THE SECOND COMPONENT OF YOUR EVALUATION.
[A: The second component is an interview of the arresting officer regarding his [or her] observations of the defendant at the time of stop of the defendant.]

2. DID YOU OBTAIN THE ARRESTING OFFICER’S OBSERVATIONS?
[A: Yes. (The purpose here is not to repeat the arresting officer’s observations but to prove that the officer’s observations were obtained as part of the procedures. Generally, the arresting officer will have already testified as to his or her observations.]]

Step Three: Preliminary Examination

1. OFFICER, TELL US ABOUT THE THIRD COMPONENT OF YOUR DRUG-INFLUENCE EVALUATION OF THE DEFENDANT.
[A: The third component consists of a preliminary examination of the arrestee. This step is commonly referred to as “a fork in the road.” The purpose of this step is to determine if there is sufficient reason to suspect drug influence. An extremely important part of this step is the determination that it is drug influence, rather than a medical condition, that is inducing the observed impairment. I made general observations of the arrestee’s condition, inquired as to any health problems, and conducted a pupil-size and eye-tracking examination. Pupils of different size and/or differences in the tracking movements of the eyes often provide evidence of serious, life-threatening medical conditions. In addition, I took the first of three pulses in this step.]

2. WHAT WERE YOU EXAMINING IN THIS STEP?
[A: Based on what a DRE detects in this phase, a number of outcomes are possible. There may be no signs of drug influence, and the arrestee may be returned to the arresting officer for routine processing. The DRE may see evidence of a medical condition and may obtain a medical assessment. Or the DRE may proceed with a full DRE evaluation. Even though the DRE may have decided to proceed with the drug evaluation, if the DRE at any time finds evidence of a serious medical condition, the DRE will cease the evaluation and obtain the medical assessment. General observations are made while the defendant is asked a series of questions, and the defendant is observed closely as he or she answers these questions.]

3. WHAT QUESTIONS DID YOU ASK HIM?
[A: I don’t recall them verbatim as I sit here. I followed our drug-evaluation form which contains the questions.]

4. WOULD IT REFRESH YOUR RECOLLECTION OF THE QUESTIONS TO REFER TO THE DRUG-EVALUATION FORM?
[A: Yes, it would.]
YOUR HONOR, I REQUEST THAT THE WITNESS BE ALLOWED TO REFRESH HIS [HER] RECOLLECTION BY REFERRING TO THE DRUG-EVALUATION FORM.

5. I'M SHOWING YOU PEOPLE'S EXHIBIT [NUMBER] FOR IDENTIFICATION. IS THIS THE DRUG-EVALUATION FORM YOU ARE REFERRING TO? [A: Yes.]

6. OFFICER, PLEASE REFER TO PEOPLE'S EXHIBIT [NUMBER] FOR IDENTIFICATION. TELL US THE QUESTIONS YOU ASKED THE DEFENDANT, AND THE DEFENDANT'S ANSWERS.
   [A: (1) What have you eaten today? When? (Defendant’s answer); (2) What have you been drinking? How much? (Defendant’s answer); (3) Time of last drink? (Defendant’s answer); (4) What time is it now? (Defendant’s answer); (5) What was the correct time? (Officer’s time of examination); (6) When did you last sleep? (Defendant’s answer); (7) How long? (Defendant’s answer); (8) Are you sick or injured? (Defendant’s answer); (9) Are you diabetic or epileptic? (Defendant’s answer); (10) Do you take insulin? (Defendant’s answer); (11) Do you have any physical impairments? (Defendant’s answer); (12) Are you under the care of a doctor or dentist? (Defendant’s answer); (13) Are you taking any medication or drugs? (Defendant’s answer).]

7. WHAT OBSERVATIONS DID YOU MAKE OF THE DEFENDANT WHILE HE WAS SPEAKING? (1) ATTITUDE? (2) COORDINATION? (3) SPEECH? (4) BREATH? (5) FACE?

Step Four: Eye Examinations

Equal Tracking

1. PLEASE DESCRIBE FOR THE COURT THE FOURTH COMPONENT OF YOUR EXAMINATION, WHICH YOU TERMED “EYE EXAMINATION.”
   [A: I first noted if the defendant was wearing glasses or contacts (if contacts, whether they were hard or soft). I then noted if the defendant’s eyes were bloodshot or watery and whether the defendant had any indication of blindness in either eye. I then determined if the defendant’s eyes tracked equally.]

2. HOW WAS THIS PERFORMED?
   [A: I had the defendant follow the tip of my pen with his eyes as I moved it to each side of his face to determine if his eyes followed in the same way.]

3. WHAT DID YOU OBSERVE?
   [A: I observed that the defendant was [was not] wearing any glasses or contacts, that his eyes were [were not] bloodshot and/or watery, that there was no indication of blindness, and that the defendant’s eyes tracked equally [unequally].]

4. WHAT WAS THE SIGNIFICANCE OF THIS FINDING?

Horizontal Gaze Nystagmus

1. WHAT WAS THE SECOND EYE TEST YOU GAVE?
   [A: I administered the Horizontal Gaze Nystagmus test.]
2. PLEASE EXPLAIN HORIZONTAL GAZE NYSTAGMUS FOR US AND WHY IT'S IMPORTANT IN A DRUG-IMPAIRMENT EVALUATION

3. DID YOU RECEIVE ANY SPECIFIC TRAINING IN ADMINISTERING THIS TEST?
   [A: Yes.]

4. PLEASE DESCRIBE THIS TRAINING TO THE JURY.

5. AT THE CONCLUSION OF THE TRAINING, WERE YOU GIVEN A PRACTICAL-SKILLS EXAMINATION?
   [A: Yes.]

6. DESCRIBE THIS EXAMINATION.

7. DID YOU SATISFACTORILY PASS THE PRACTICAL EXAM?

   **Smooth Pursuit:**

   (1) HOW IS THE HORIZONTAL GAZE NYSTAGMUS TEST PERFORMED?
      [A: There are three parts to this test. The first part is simply moving an object, usually a pen, from a point near the person's nose outwards towards the side of his face so that the eyeball follows it from one side to the other. (Have witness demonstrate various motions with pen throughout testimony.)]

   (2) DID THE DEFENDANT ATTEMPT THIS PART OF THE EVALUATION?
      [A: Yes, he did.]

   (3) WHICH EYE DID YOU EXAMINE FIRST?
      [A: I did the left eye.]

   (4) WHAT OBSERVATIONS DID YOU MAKE OF THE LEFT EYE IN THE PERFORMANCE OF THIS TEST?
      [A: As I moved the pen from one side of his left eye to the other, his eye moved in a jerky [smooth] motion.]

   (5) DID YOU PERFORM THIS PART OF THE TEST ON THE DEFENDANT’S RIGHT EYE?
      [A: Yes, I did.]

   (6) WHAT OBSERVATIONS DID YOU MAKE OF THE RIGHT EYE?
      [A: As I moved the pen from one side of his right eye to the other, his eye moved in a jerky [smooth] motion.]

   (7) WERE THESE OBSERVATIONS CONSISTENT WITH DRUG IMPAIRMENT?
Maximum Deviation:

(1) WHAT WAS THE SECOND PART OF THE HORIZONTAL GAZE NYSTAGMUS TEST YOU ASKED THE DEFENDANT TO PERFORM?
   [A: The second part of this test involves having the defendant follow the pen so that his left eyeball moves to the outer corner of his eye. I hold the pen steady and see if the left eye jerks while it is at that position.]

(2) HOW LONG DID YOU HAVE THE DEFENDANT HOLD HIS EYE AT THE OUTER CORNER?
   [A: About four seconds.]

(3) WHAT DID YOU OBSERVE?

(4) DID YOU PERFORM THIS PART OF THE TEST ON THE DEFENDANT’S RIGHT EYE?
   [A: Yes, I did.]

(5) WHAT DID YOU OBSERVE?

(6) WERE THESE OBSERVATIONS CONSISTENT WITH DRUG IMPAIRMENT?

Onset at less than 45 degrees:

(1) WHAT WAS THE THIRD PART OF THIS TEST THE DEFENDANT PERFORMED?
   [A: The third part is checking to see if the eye starts to jerk at less than a 45 degree angle with the nose.]

(2) WHAT IS THE SIGNIFICANCE OF THIS TEST?

(3) HOW IS THIS PORTION OF THE TEST CONDUCTED?
   [A: This is done by placing the pen about 12 to 15 inches from the defendant’s nose and slowly moving the pen toward the outer corner of his eye. I start with the left eye and watch it closely for the first sign of jerking. If I see any jerking, I stop moving the pen and hold it steady. I make sure that the eye is actually jerking. If it is not, the procedure is to continue moving the pen further towards the outer portion of the eye and watch for jerking. If there is jerking, I locate the point at which the jerking begins and determine if the jerking started before the eye reached a 45 degree angle with the defendant’s nose.]

(4) DID YOU PERFORM THIS PORTION OF THE TEST IN REGARD TO THE DEFENDANT’S LEFT EYE?
   [A: Yes, I did.]

(5) WHAT DID YOU OBSERVE?

(6) DID YOU PERFORM THIS PORTION OF THE TEST IN REGARD TO THE DEFENDANT’S RIGHT EYE?
   [A: Yes, I did.]

(7) WHAT DID YOU OBSERVE?
(8) WERE THESE OBSERVATIONS CONSISTENT WITH DRUG IMPAIRMENT?

**Vertical Nystagmus**

1. WHAT WAS THE THIRD EYE TEST YOU GAVE TO THE DEFENDANT?
   [A: This test involved having the defendant move his eyes up while holding his head still. Instead of holding the pen up and down in front of his eyes, I held the pen sideways and asked him to look at the middle ring that divides the top of the pen from the bottom of the pen. I then moved the pen straight up to see whether his eyes jerked when they were gazing upward.]

2. WHAT IS THE SIGNIFICANCE OF THIS TEST?

3. WHAT DID YOU OBSERVE?

4. WERE THESE OBSERVATIONS CONSISTENT WITH DRUG IMPAIRMENT?

**Eye Convergence**

1. WHAT IS THE FOURTH EYE TEST YOU GAVE TO THE DEFENDANT?
   [A: The fourth eye test was done by holding the pen about 12 to 15 inches in front of the defendant’s face with the tip of it pointing at his nose. The defendant was asked to hold his head still and follow the pen with his eyes. Keeping the pen about 12 to 15 inches from the defendant’s nose, I moved the pen in a slow circle. Once I determined that the defendant eyes were following the pen as I moved it, I brought it slowly and steadily in towards the bridge of his nose. I did this to see whether or not both eyes would move together and converge at the bridge of his nose.]

2. WHAT IS THE SIGNIFICANCE OF THIS TEST?

3. WHAT WERE THE RESULTS OF THIS TEST?

4. WERE THESE OBSERVATIONS CONSISTENT WITH DRUG IMPAIRMENT?

**Pupil Size**

1. WHAT WAS THE NEXT EYE TEST YOU GAVE THE DEFENDANT?
   [A: I observed whether the defendant’s pupils were of equal size.]

2. WHAT IS THE SIGNIFICANCE OF THIS TEST?

3. HOW DID YOU DETERMINE THIS?
   [A: I estimated the defendant’s pupil size using a pupillometer that has different sized circles.]

4. HOW DOES THE PUPILLOMETER WORK?
   [A: It has a series of dark circles with diameters ranging from 1.0 mm to 9.0 mm in half millimeter increments. The pupillometer is held up alongside the defendant’s eye, and the card is moved up or down until I locate the circle closest in size to the defendant’s pupil.]

5. WHAT WAS THE RESULT OF THIS TEST?
   [A: The defendant had equal (unequal) pupils.]
6. WAS THAT OBSERVATION CONSISTENT WITH DRUG IMPAIRMENT?

7. DID YOU MAKE ANY OBSERVATIONS OF THE DEFENDANT’S EYELIDS DURING THIS PHASE OF YOUR EXAMINATION?
   [A: Yes. They were droopy (normal).]

8. WHAT WAS THE SIGNIFICANCE OF THAT OBSERVATION?

9. WHAT DID YOU DO NEXT?
   [A: I took the defendant’s pulse.]

10. AT WHAT TIME WAS THAT?
    [A: (Time of first pulse)]

11. IN A DRUG EVALUATION, WHAT MIGHT A PULSE RATE INDICATE?

12. WHAT WAS THE DEFENDANT’S PULSE?
    [A: (Pulse at first testing)]

**Step Five: Divided-Attention Tasks**

**Information Regarding Divided Attention**

1. OFFICER, PLEASE DESCRIBE THE NEXT COMPONENT OF YOUR DRUG-INFLUENCE EVALUATION.
   [A: The next component involved the divided-attention or psycho-physical tests, repeating some of the tests that were given to the defendant at the time of arrest by the arresting officer.]

2. WHAT IS MEANT BY DIVIDED ATTENTION, AND OF WHAT IMPORTANCE ARE THEY IN EVALUATING WHETHER A PERSON IS DRUG IMPAIRED?

3. HOW MANY COMPONENTS ARE THERE TO THIS PART OF THE EXAMINATION?
   [A: There are four psycho-physical tasks.]

4. ARE THESE PSYCHO-PHYSICAL TASKS USED EXCLUSIVELY FOR DRUG RECOGNITION EVALUATIONS?
   [A: No.]

5. HOW ELSE ARE THEY COMMONLY USED IN LAW ENFORCEMENT?
   [A: They are standardized field sobriety tests that are used in cases involving alcohol as well as drugs.]

**Romberg Balance Task**

1. WHAT WAS THE FIRST PSYCHO-PHYSICAL TASK REQUESTED OF THE DEFENDANT?
   [A: The first was the Romberg Balance task.]
2. WHAT IS THE PURPOSE OF THIS TEST?
   [A: The purpose is to observe the defendant’s balance and his perception of time. Drug impairment commonly impacts one’s balance and ability to accurately estimate time.]

3. WHAT FACTORS DO YOU LOOK FOR WHEN A SUBJECT IS PERFORMING THIS TASK?
   [A: I look to see if the defendant is standing still with his feet together. I look for body tremors. I look to see if there are eyelid tremors. I look for swaying and whether the swaying is from front to back, side to side, and how many inches from the center he is swaying. I look for muscle tension—whether his muscles are rigid or relaxed. I also look for any statements or sounds that the defendant makes while he is performing this test. Finally, I record the number of seconds that the defendant stands with his head tilted back and his eyes closed, and compare that with the 30 seconds that he was told to stand there.]

4. PRIOR TO ASKING THE DEFENDANT TO PERFORM THIS TASK, DID YOU EXPLAIN AND DEMONSTRATE IT?
   [A: Yes.]

5. PLEASE EXPLAIN THIS TASK FOR THE COURT AND JURY IN THE SAME MANNER THAT YOU EXPLAINED IT FOR THE DEFENDANT ON THE DATE OF ARREST.
   [A: I asked the defendant to stand straight with his feet together and his arms down at his sides. I told him to stay in this position while he was being given the instructions. Part of the test is to see if he would follow that instruction and not try to start the test until told to begin. I then asked if he understood the instructions. I instructed him that when told to begin, he was to tilt his head back slightly and close his eyes. Once he had done this, he was told that he must keep his head tilted back with his eyes closed until he thought 30 seconds had gone by.]

6. DID THE DEFENDANT APPEAR TO UNDERSTAND THE INSTRUCTIONS?

7. DID THE DEFENDANT ATTEMPT THIS TASK?

8. WHAT DID YOU OBSERVE?

9. WERE THOSE OBSERVATIONS CONSISTENT WITH DRUG IMPAIRMENT?

**Walk-and-Turn Task**

1. WHAT WAS THE NEXT PSYCHO-PHYSICAL TASK?
   [A: The next psycho-physical task was the walk-and-turn.]

2. WHAT IS ITS PURPOSE?

3. PRIOR TO ASKING THE DEFENDANT TO PERFORM THIS TASK, DID YOU EXPLAIN AND DEMONSTRATE IT FOR THE DEFENDANT?
   [A: Yes.]
4. PLEASE EXPLAIN THE EXERCISE IN THE SAME MANNER THAT YOU DID FOR THE DEFENDANT ON THE DATE OF ARREST.

[A: I told him to place his right foot on the line ahead of his left foot with the heel of the right foot against the toe of the left foot. I told him to put his arms down against his sides and keep them there throughout the test. The defendant was told to hold this position until he was given the instructions for the performance of the test. I emphasized to the defendant that he should not start walking until told to begin. I asked the defendant if he understood my instructions. The defendant said that he did.]

5. IS IT YOUR EXPERIENCE THAT PEOPLE WHO ARE IMPAIRED DUE TO DRUG INGESTION HAVE DIFFICULTY FOLLOWING INSTRUCTIONS?

6. DID THE DEFENDANT APPEAR TO UNDERSTAND THE INSTRUCTIONS?

7. WHAT HAPPENED NEXT?
   a. WALK— I told the defendant that when I told him to begin, he was to take nine heel-to-toe steps on the line. I explained that every time he took a step, he was to place his heel against the toe of the other foot.
   b. TURN— I told the defendant that when the ninth step had been taken, he was to leave his front foot on the line and turn around, taking a series of small steps with the other foot.
   c. WALK — I reminded the defendant that after turning, he was to take another nine heel-to-toe steps back up the line.
   d. COUNT — Finally, I told the defendant to watch his feet as he walked and to count off the steps out loud: one to nine.

The final instruction was that once the defendant started walking, he was to keep walking until the test had been completed. Again, before I told the defendant to begin, I asked if he understood these instructions, and the defendant said that he did.

8. DO PEOPLE WHO ARE DRUG IMPAIRED HAVE DIFFICULTY DOING DIVIDED-ATTENTION ACTIVITIES?

9. DID THE DEFENDANT ATTEMPT THIS EXERCISE?

   [A: Yes, he did.]

10. HOW DID THE DEFENDANT PERFORM THIS TASK?

11. WAS THE DEFENDANT'S PERFORMANCE CONSISTENT WITH DRUG IMPAIRMENT?

One-Leg-Stand Exercise

1. WHAT WAS THE THIRD PSYCHO-PHYSICAL EXERCISE THAT YOU HAD THE DEFENDANT PERFORM?

   [A: The third test was the one-leg stand.]

2. PRIOR TO ASKING THE DEFENDANT TO PERFORM THIS EXERCISE, DID YOU EXPLAIN AND DEMONSTRATE IT?

   [A: Yes.]
3. PLEASE EXPLAIN THIS TASK FOR THE COURT AND JURY IN THE SAME MANNER THAT YOU EXPLAINED AND DEMONSTRATED FOR THE DEFENDANT ON THE DATE OF ARREST.

   [A: I asked the defendant to stand straight with his feet together and his arms down at his sides. I told the defendant to maintain this position while he was given the instructions, and I emphasized that he was not to start the test until told to begin. I asked if he understood. Then, I told the defendant that when he was told to begin, he was to raise his right foot in a stiff-leg manner and hold the foot about six inches off the ground with the toes pointed out. I told the defendant he must keep his arms at his sides and keep looking directly at his elevated foot while counting out 30 seconds as follows: “One-thousand-and-one, one-thousand-and-two,” etc. I again asked if he understood him to begin. After the defendant completed the test, I told him to perform it again while standing on his right foot.]

**One-Leg-Stand Clues:**

1. **IF ONE IS DRUG IMPAIRED, WHAT SORT OF THINGS DO YOU COMMONLY SEE IN THIS EXERCISE?**
   
   [A: (1) defendants raise their arms; (2) sway; (3) hop on one foot; (4) put down the foot that was raised; (5) be unable to stand still and straight during the instructions; (6) have body tremors; and (7) their muscles will be more rigid or more relaxed. I also note any statements or sounds that defendants make while performing the test.]

2. **DID THE DEFENDANT APPEAR TO UNDERSTAND THE INSTRUCTIONS?**

3. **DID THE DEFENDANT ATTEMPT THIS TASK?**

4. **HOW DID THE DEFENDANT PERFORM?**

5. **WAS THE DEFENDANT'S PERFORMANCE CONSISTENT WITH SOMEONE DRUG IMPAIRED?**

**Finger-to-Nose Exercise**

1. **WHAT WAS THE FOURTH PSYCHO-PHYSICAL TASK THAT WAS PERFORMED?**
   
   [A: The fourth psycho-physical task performed was the finger-to-nose exercise.]

2. **PRIOR TO ASKING THE DEFENDANT TO PERFORM THIS EXERCISE, DID YOU EXPLAIN AND DEMONSTRATE IT?**
   
   [A: Yes.]

3. **PLEASE EXPLAIN THIS EXERCISE IN THE SAME MANNER THAT YOU EXPLAINED IT FOR THE DEFENDANT ON THE DATE OF ARREST.**
   
   [A: In this test, I told the defendant to place his feet together and stand straight. I told him to extend his arms straight towards me and make a fist with each hand. I told him to extend the index finger from each hand, then to put his arms down at his sides with the index fingers extended. I explained to the defendant that when he was told to begin, he was to tilt his head back slightly and close his eyes. I then told the defendant that when he was instructed to begin, he was to bring the tip of the index finger up to the tip of the nose. I further told the defendant that as soon as he touched the tip of his nose, he was to return the arm to the side.
I explained that when he was told “RIGHT,” he was to move the right-hand index finger to the tip of the nose. When the defendant was told “LEFT,” he was to move the left-hand index finger to the tip of the nose. At this point, I asked if he understood the instructions. He said he did. I then told the defendant to tilt his head back and close his eyes and keep them closed until told to open them. I then told the defendant the following sequence: “LEFT … RIGHT … LEFT … RIGHT … RIGHT … LEFT.”

**Finger-to-Nose Criteria:**

1. **WHAT DOES A TRAINED DRE LOOK FOR WHEN SUBJECTS ATTEMPT THIS EXERCISE?**
   [A: Whether defendants’ fingertips touch their nose or other parts of the face; whether their bodies sway; whether there are any body tremors; whether there are eyelid tremors or muscle tension. Any statements or sounds made by the defendant while performing the test are noted as well.]

2. **DID YOU MAKE A RECORD OF THE DEFENDANT’S PERFORMANCE OF THIS TASK?**
   [A: Yes. I noted on the evaluation form exactly where each fingertip touched the defendant’s face. I also indicated on the form which finger was actually used by the defendant each time.]

3. **WHAT WERE YOUR OBSERVATIONS OF THE DEFENDANT’S PERFORMANCE?**

   4. **WAS THIS PERFORMANCE CONSISTENT WITH ONE WHO IS DRUG IMPAIRED?**

**Step Six: Vital-Signs Examination**

1. **PLEASE DESCRIBE WHAT YOU DID IN REGARD TO THE COMPONENT YOU TERMED “VITAL SIGNS.”**
   [A: I checked the defendant’s vital signs.]

2. **WHAT WERE THE VITAL SIGNS THAT YOU CHECKED?**
   [A: I checked the defendant’s pulse rate for a second time and checked his blood pressure and temperature.]

**Pulse**

1. **HOW DID YOU CHECK THE PULSE RATE?**
   [A: I checked the pulse by placing my fingers on the defendant’s skin next to an artery, pressing down, and feeling the artery expand as the blood surged through. Each surge was a pulse, and I counted the pulses that occurred in one minute. That gave me the pulse rate.]

2. **AT WHAT TIME DID YOU PERFORM THIS SECOND CHECK OF THE DEFENDANT’S PULSE RATE?**
   [A: (Time of second pulse check)]

3. **WHAT WAS THE DEFENDANT’S PULSE RATE AT THAT TIME?**
   [A: (Pulse rate at second check)]
4. IS THAT PULSE RATE CONSISTENT WITH ONE WHO IS DRUG IMPAIRED?

**Blood Pressure**

1. WHAT WAS THE NEXT VITAL SIGN YOU CHECKED?
   [A: Blood pressure.]

2. WHAT IS BLOOD PRESSURE?
   [A: Blood pressure is the force that the circulating blood exerts on the walls of the arteries.]

3. WHAT DID YOU USE TO MEASURE BLOOD PRESSURE?
   [A: I used an instrument called a sphygmomanometer.]

4. WHAT TRAINING HAVE YOU HAD IN THE USE OF THIS INSTRUMENT?
   [A: (Detail training.)]

5. HOW DID YOU USE THIS DEVICE TO DETERMINE THE DEFENDANT’S BLOOD PRESSURE?
   [A: This device has a special cuff that was wrapped around the defendant’s arm and inflated with air. As the air was pumped in, the cuff squeezed tightly on the arm. When the pressure got high enough, it squeezed the artery completely shut so that no blood flowed through it. The next thing I did was to slowly release the air in the cuff so that the pressure on the arm and on the artery started to drop. The pressure continued to drop until blood once again started to flow through the artery. Blood starts to flow once the pressure inside the artery overcomes the pressure outside the artery. At this point, blood will spurt through the artery each time the heart contracts. This is called the systolic level, and the pressure at which this occurs is called systolic pressure. I continued to relax the air pressure in the cuff until it dropped down to the point where the blood started to flow continuously through the artery. This level is called the diastolic level, and the pressure reading at this point is called diastolic pressure.]

6. HOW DID YOU KNOW WHEN THE BLOOD STARTED TO SPURT AS OPPOSED TO WHEN IT WAS FLOWING?
   [A: I listened to the spurting blood using a stethoscope. When there is no blood flowing, you hear nothing through the stethoscope. When you release the air from the cuff slowly, you will hear a spurting sound when the blood starts to spurt through the artery. As you continue to allow the air pressure to drop, the surges of blood become steadily longer. When you reach the diastolic pressure, the blood flows steadily and all sounds cease.]

7. WHAT DID YOU DETERMINE THE DEFENDANT’S BLOOD PRESSURE TO BE WHEN YOU PERFORMED THIS TEST?
   [A: Defendant’s blood pressure was [BLOOD PRESSURE READING.]]

8. GIVEN YOUR BACKGROUND, TRAINING, AND EXPERIENCE, IS THAT BLOOD PRESSURE CONSISTENT WITH ONE WHO IS DRUG IMPAIRED?

**Temperature**

1. WHAT WAS THE NEXT VITAL SIGN YOU CHECKED?
   [A: I took the defendant’s temperature using an electronic thermometer. Each time we test someone, we use a fresh disposable mouthpiece.]
2. WHAT DID YOU DETERMINE THE DEFENDANT’S TEMPERATURE TO BE?

3. IS THAT TEMPERATURE CONSISTENT WITH ONE WHO IS DRUG IMPAIRED?

Step Seven: Dark Room Examination

1. YOU PREVIOUSLY INDICATED THAT THE SEVENTH STEP IN YOUR EVALUATION WAS A DARK ROOM EXAMINATION. WHAT OBSERVATIONS ARE MADE DURING THIS STEP?
   [A: I observed the size of the defendant’s pupils at various levels of light.]

2. HOW DO THESE OBSERVATIONS HELP A DRUG RECOGNITION EXPERT IN MAKING AN EVALUATION OF A SUBJECT?

3. WHAT WERE THE DIFFERENT LEVELS OF LIGHT THAT YOU USED?
   [A: I estimated the pupil size at room light, near-total dark, and direct light.]

Room Light

1. HOW WAS THE ROOM-LIGHT PORTION OF THIS TEST PERFORMED?
   [A: The test was performed by determining the size of the defendant’s pupils in room light.]

2. WHAT WERE THE RESULTS OF THE ROOM-LIGHT PORTION OF THE EVALUATION?
   [A: (Detail results.)]

Darkness

1. HOW WAS THE NEAR-TOTAL-DARKNESS PORTION OF THE EVALUATION CONDUCTED?
   [A: The defendant was taken into a room that was almost completely dark. There was a waiting period of 90 seconds to allow both the defendant’s and my eyes to adapt to the dark. Then, the defendant’s eyes were examined with a penlight. I covered the tip of the penlight with my finger and thumb so that only a reddish glow and no white light emerged. Holding the glowing tip of the penlight, I moved the light up towards the defendant’s left eye until I could see the pupil, separate and apart from the colored portion of the eye (or the iris). I held the tip of the penlight, brought the pupillometer up alongside the defendant’s left eye, and located the circle that was closest in size to the pupil as it appeared in the dark room. I then repeated this procedure on the defendant’s right eye.]

2. WHAT WERE THE RESULTS OF THIS PORTION OF THE EXAMINATION?
   [A: (Detail results of evaluation.)]

3. WAS THAT RESULT CONSISTENT WITH ONE WHO IS UNDER THE INFLUENCE OF A DRUG?
Direct Light

1. HOW WAS THE DIRECT-LIGHT PORTION OF THE EVALUATION CONDUCTED?
   [A: For the direct-light portion of the examination, I left the tip of the penlight uncovered and brought it from the side of the defendant’s face and shone it directly into the defendant’s left eye. I held the penlight in that position and brought the pupillometer up alongside the left eye and found the circle closest in size to the pupil. I then repeated that procedure for the defendant’s right eye. The results of all four examinations were recorded.]

2. WHAT WERE THE RESULTS OF THIS PORTION OF THE EVALUATION?
   [A: (Detail results of evaluation. )]

3. WERE THOSE RESULTS CONSISTENT WITH ONE UNDER THE INFLUENCE OF A DRUG?

Step Eight: Muscle Tone

1. WHAT WAS THE NEXT STEP IN YOUR EXAMINATION PROCESS?
   [A: The eighth step in the evaluation process is an assessment of the defendant’s muscle tone. I evaluate the arrestee’s muscle tone throughout the examination through observations of his movements. During this step, however, I gently moved his arms to determine muscle tone.]

2. HOW DOES THIS PART OF THE EXAMINATION HELP A DRUG RECOGNITION EXPERT EVALUATE A SUBJECT?

3. WHAT DID YOU NOTE ABOUT THE DEFENDANT’S MUSCLE TONE?
   [A: I noted the defendant’s muscle tone to be flaccid (normal) (rigid) and cold (cool) (warm) to the touch.]

4. WERE THESE FINDINGS CONSISTENT WITH ONE WHO WOULD BE IMPAIRED BY DRUG INGESTION?

Step Nine: Injection-Site Examinations

Nasal and Oral Examination

1. OFFICER, DID YOU MAKE ANY OBSERVATIONS OF THE DEFENDANT’S NOSE AND MOUTH?
   [A: Yes.]

2. WHAT DID YOU LOOK FOR?
   [A: I looked for signs that the defendant had been using drugs.]

3. WHAT KINDS OF THINGS DID YOU LOOK FOR?
   [A: Different categories of drugs will have different effects. For example, certain kinds of drugs will irritate the inside of the nose and/or leave residue around and in the mouth and nose. Some drugs will cause the nose to run, and some substances will leave a distinctive odor on the defendant’s breath and around the nasal area. On the other hand, the absence of any such signs can also be helpful in doing an evaluation.]
4. WHAT OBSERVATIONS DID YOU MAKE OF THE DEFENDANT'S MOUTH AND NOSE?

5. IS THIS CONSISTENT WITH DRUG IMPAIRMENT?

Arm and Neck Examination

1. OFFICER, DID YOU MAKE ANY OBSERVATIONS OF THE DEFENDANT'S ARMS AND NECK?
   [A: Yes, I made a check of the defendant's arms and neck to see if he had needle marks and to determine whether his muscles were rigid, normal, or relaxed.]

2. WHY IS THIS DONE?

3. WHAT DID YOU DO?
   [A: I ran my hands over the defendant's arms and neck, feeling for bumps that would indicate needle marks. I have an instrument that is basically a lighted magnifying glass that I use to examine any bumps that I find. The instrument helps me to determine whether or not the bump is a needle mark.]

4. HOW DO YOU TELL WHETHER A BUMP IS THE RESULT OF THE USE OF A NEEDLE OR THE RESULT OF SOME OTHER CAUSE?
   [A: (Detail training in this regard.)]

5. WHAT WERE THE RESULTS OF THIS PART OF THE EXAMINATION?

6. DID YOU CONDUCT A THIRD PULSE-RATE CHECK AT THIS TIME?
   [A: Yes.]

7. WHAT WAS THE DEFENDANT'S PULSE DURING THIS THIRD CHECK?
   [A: (Pulse at third check)]

8. AT WHAT TIME WAS THIS?
   [A: (Time of third pulse check)]

9. WHAT CONCLUSIONS DID YOU DRAW FROM THE DEFENDANT'S THREE SEPARATE PULSE CHECKS?

Step Ten: Statements, Interrogation

1. DURING THE COURSE OF THIS EVALUATION, DID YOU HAVE ANY CONVERSATION WITH THE DEFENDANT?
   [A: Yes, I did.]

2. PLEASE DETAIL FOR US THE CONTENTS OF THAT CONVERSATION.
   [A: (Admissions made by the defendant. The Miranda warning is usually read by the arresting officer, and evidence in that regard would normally be established prior to the DRE's testimony.)]
Step Eleven: Opinion

1. OFFICER, AFTER YOU COMPLETED ALL OF THE PARTS OF YOUR EVALUATION OF THE DEFENDANT, DID YOU FORM AN OPINION AS TO WHETHER HE WAS BEING INFLUENCED BY DRUGS WHEN YOU OBSERVED HIM?
   [A: Yes.]

2. WHAT IS THAT OPINION?
   [A: My opinion is that the defendant was being influenced by drugs when I observed him.]

3. WERE YOU ABLE TO FORM AN OPINION AS TO WHAT TYPE OF DRUG MIGHT BE INFLUENCING THE DEFENDANT?
   [A: Yes. On the basis of my training and experience, and after completing the drug-influence examination, it is my opinion that the defendant was under the influence of (NAME OF DRUG) and (NAME OF DRUG).]

Step Twelve: Toxicological Examination

1. WHAT IS THE NEXT STEP IN A DRUG RECOGNITION EXPERT'S EXAMINATION OF A SUBJECT?

2. WAS THE DEFENDANT ASKED TO PROVIDE A CHEMICAL TEST IN THIS CASE?

3. DID THE DEFENDANT PROVIDE A URINE OR BLOOD SAMPLE?
   [A: I obtained a urine (blood) sample from the defendant for submission to a laboratory.]

4. HOW WAS THIS DONE?
   [A: The defendant was taken into the bathroom, and a urine sample was obtained by having the defendant urinate into a container used for this purpose. (Blood was drawn in a medically approved manner).]

5. DID YOU WITNESS THE TAKING OF THE SAMPLE?
   [A: Yes, I did.]

6. WHAT DID YOU DO WITH THE SAMPLE AFTER YOU OBTAINED IT?
   [A: The plastic containers of urine were sealed with tape, and my initials and the case number were placed on it. The containers were placed in an envelope and taken to headquarters where they were placed in a refrigerator.]

7. DID THIS COMPLETE YOUR EVALUATION OF THE DEFENDANT?
   [A: Yes, it did.]

C. Drug Symptomatology

1. OFFICER, ARE YOU FAMILIAR WITH [THE RELEVANT DRUG TO YOUR CASE]?
   [A: Yes.]

2. WHAT IS [NAME OF DRUG]?
3. HOW IS [NAME OF DRUG] COMMONLY INGESTED?

4. DOES [NAME OF DRUG] PRODUCE ANY OBSERVABLE PHYSICAL SIGNS OR SYMPTOMS?
   [A: Yes.]

5. WHAT ARE THEY?
   [A: (This is a general question wherein the DRE should list many signs, even those defendant
did not display.)]

6. DO ALL PERSONS UNDER THE INFLUENCE OF [NAME OF DRUG] GENERALLY DISPLAY THE SAME PHYSICAL SIGNS AND SYMPTOMS?

7. ARE THERE ANY SIGNS PECULIAR TO [NAME OF DRUG] INTOXICATION?
   [A: Yes.]

8. WHAT ARE THEY?

   **Onset of Drug**

   (1) HOW LONG DOES IT TAKE FOR THAT DRUG TO HAVE AN EFFECT ON AN INDIVIDUAL ONCE HE OR SHE HAS TAKEN IT INTO HIS OR HER BODY?
   [A: The effects of that drug will take approximately __ minutes after administration.]

   **Duration of Drug Effects**

   (1) HOW LONG WILL THE EFFECTS OF THE DRUG LAST?
   [A: The effects of the drug will last approximately __ hours.]

D. Conclusions

1. BASED ON YOUR OBSERVATIONS AND EXAMINATION OF THE DEFENDANT, DID YOU FORM AN OPINION AS TO HIS STATE OF INTOXICATION?
   [A: Yes.]

2. WHAT IS THAT OPINION?

3. HOW DOES [NAME OF DRUG] AFFECT A PERSON'S ABILITY TO DRIVE A MOTOR VEHICLE?
   [A: (Give details, e.g., depth perception, lack of concentration, impairment of motor coordination, impairment of judgment; general disorientation, etc.)]

4. IN YOUR OPINION, WOULD A PERSON WHO IS DRIVING WHILE UNDER THE INFLUENCE OF [NAME OF DRUG] BE ABLE TO SAFELY OPERATE HIS OR HER CAR?
   [A: No.]
5. CONSIDERING THE INFORMATION YOU RECEIVED ABOUT THE DEFENDANT’S DRIVING AND YOUR OWN OBSERVATIONS OF THE DEFENDANT’S PHYSICAL STATE, WAS THE DEFENDANT ABLE TO SAFELY OPERATE A MOTOR VEHICLE ON [DATE], THE DATE OF HIS ARREST?

IX. Cross-Examination of the Drug Recognition Expert

A. Defense Cross-Examination Questions of the DRE

Thorough preparation, by both the prosecutor and the DRE, is the key to providing effective testimony. Preparing for trial includes anticipating the questions that the defense attorney will ask during cross-examination.

Following the direct examination by the prosecuting attorney, defense counsel will typically challenge the DRE’s opinion and its basis by posing the following types of questions to the DRE. These questions are in addition to challenges to the officer’s motivation, bias, completeness of reports, and so on.

The defendant in this scenario is identified as Ms. Crystal Coral.

1. Missing Signs or Symptoms

This line of questioning attempts to elicit the fact that the defendant did not have all of the expected signs or symptoms of the drug(s) in question.

“Officer, you were taught that bruxism, or grinding of the teeth, is a sign of CNS-stimulant influence, isn't it? Ms. Coral didn't have that sign, did she?”

*Note:* It is rare indeed for an individual to display all of the classic effects of a drug. The DRE’s opinion is based on the totality of the observed signs and symptoms as elicited by the DRE evaluation.

2. Point Out What’s Normal

The defense may also focus on those signs or symptoms that were normal and were therefore not consistent with influence by the drug in question.

“Officer, you learned the normal range of temperature in DRE training, didn’t you? And that range is 98.6 Fahrenheit plus or minus one degree, isn't it? You recorded Ms. Coral’s temperature as 98 degrees, didn’t you? Ninety-eight is within normal range, isn't it? Ms. Coral’s temperature was therefore normal, wasn’t it? Stimulants cause elevated temperature, don't they? Ms. Coral’s was not elevated, was it?”

*Note:* Again, the defense focuses on the specifics rather than the totality. The DRE opinion is based on the totality of the presenting signs and symptoms.
3. Alternative Explanations

The defense elicits alternative explanations for the signs and symptoms of the drug(s) in question. These alternative explanations usually deal with medical conditions, stress, a traffic collision, etc.

“Officer, an elevated pulse rate can be caused by things other than drugs, can't it? Excitement may cause it? Stress may cause it? Being involved in a traffic accident is stressful, isn’t it? And being involved in a traffic accident may cause an elevated pulse rate, right? Being interviewed in the early morning by three police officers is stressful? And that may also cause the pulse to be elevated, can’t it?”

*Note:* Certainly, any single sign or symptom can be caused by something other than drugs. The DRE, much like a medical doctor, focuses on the totality of the signs and symptoms.

4. Defendant’s Normals

The defense attempts to emphasize the fact that not everyone is so-called normal, that normal is subjective.

“Officer, you were taught the normal range for pulse rates in DRE training, weren't you? And you agree that not all people fall in that normal range, don't you? That there are people with pulse rates above normal who aren't on drugs, right? And there are people with a pulse rate below normal who aren't on any drugs, right? A person’s pulse changes over time, doesn't it? You don't know what Ms. Coral's normal pulse is, do you? It could be in the normal range, right? But her normal pulse, normal for her, could be above or could be below the so-called normal range, isn't that true?”

*Note:* A vital sign that is out of the normal range doesn't mean that the person is under the influence of drugs. A high or low vital sign must be considered in the overall context of the circumstances.

5. Doctor Cop

This line of questioning challenges the credibility of the officer’s teachers—that they are police officers rather than medical professionals.

“Officer, the teachers in this DRE school weren't doctors, were they? They weren't nurses either? Toxicologists? Pharmacologists? Paramedics? They were police officers, right?”

*Note:* At a minimum, the instructors in a DRE course are certified DREs (by the International Association of Chiefs of Police) who have completed an additional course of instruction to become certified instructors. Many of the instructors in DRE courses are doctors and other medical professionals, toxicologists, etc.
6. Just a Cop

This line of questioning challenges the DRE’s credentials—that he or she is “just a cop.” This infers that the DRE evaluation is an ersatz medical evaluation that should be undertaken only by a medical professional.

“Officer, you’re not a doctor, are you? A toxicologist? A pharmacologist? A nurse? A physiologist? You don’t have a degree in chemistry, do you? You’re a police officer, right?”

*Note:* No one is everything! One does not have to be an automotive engineer to be able to mechanically determine that a car’s battery is dead. Nor does one need to be a doctor to determine someone is “loaded.” People at parties make this determination every weekend. Even if the officer were also a medical doctor, the defense would probably point out that DRE belongs to the specialty of neurology! The DRE has what few other professionals have—experience in encountering the drug-impaired person.

7. The Unknown

By causing the officer to state that he or she doesn’t know how a sign or symptom is caused, the defense attacks the officer’s credibility. This line of questioning challenges the officer’s expertise by implying that a real expert would know these things.

“Officer, you don’t know how stimulants dilate the pupil, do you? You don’t know how alcohol supposedly causes nystagmus, do you? You don’t know how stimulants supposedly elevate the heart rate, do you?”

*Note:* This line of questioning also implies that somebody knows how the drugs produce all of their effects. In fact, many drugs in the *Physician’s Desk Reference* contain the statement, “The exact mechanism of action of this drug remains unknown.”

8. Guessing Game

This tactic attacks the DRE’s opinion as a subjective guess—a belief rather than an objective finding, and guesses can be wrong.

“Officer, your opinion in a DRE case is subjective, isn’t it? It’s really a belief on your part? You’ve stated these beliefs in DRE cases in the past, haven’t you? And sometimes toxicology didn’t find the drug you predicted, isn’t that so? And, in fact, sometimes toxicology didn’t find any drug, isn’t that so? So, sometimes your opinion is not correct, right? Sometimes, you guess wrong.”

*Note:* Opinions, by nature, are subjective. A psychiatric diagnosis, which is an opinion, for example, is based almost totally upon subjective criteria as there is no urine test for schizophrenia. A DRE’s opinion, which is based upon both subjective and objective criteria, such as pulse rate, blood pressure, and the eye signs, is an opinion “with a reasonable degree of certainty.” This is not a guess. **Never agree with the suggestion that a DRE opinion is a guess.**
9. Guilt by Association

This tactic is an attempt to taint the DRE program by associating it with law enforcement.

“Officer, the DRE program was started by the Los Angeles Police Department, wasn't it? That’s the same agency that gave us Rampart Division, Mark Furman, and Rodney King, isn't it?

Note: Of course; the LAPD also accomplished numerous innovative programs, including DARE.

X. Chemical Analysis

In most prosecutions for driving under the influence of drugs, it is necessary and desirable to present evidence as to the results of blood or urine tests. Law enforcement officers should be careful to comply with any rules and regulations related to the administration of blood or urine tests, and should be careful to preserve the chain of custody on the sample. It is a good practice to have the officer witness the withdrawal of blood or the collection of a urine specimen from the defendant.

The primary role of the laboratory is to determine the presence of drugs and/or metabolites in biological specimens. Thereby, the lab can support or corroborate the DRE's evaluation by confirming the presence of a particular drug that is consistent with the DRE’s opinion.

Unlike alcohol levels, useful and straightforward correlations between drug levels and impairment do not exist. There are no per se levels above which people can be considered impaired and below which they can be considered unimpaired. Similarly, the metabolism of drugs (other than alcohol) is complex. The elimination rate of drugs from blood is not constant and is often proportional to the amount in the blood stream, i.e., the greater the drug concentration, the faster its elimination.

Therefore, the laboratory cannot routinely determine impairment by quantifying drug levels in blood or urine. Thus, the primary value of toxicology in DUI-drug cases is to corroborate the presence of drugs but unfortunately not to scientifically establish impairment.

There will be cases in which the DRE’s opinion regarding which class of drugs was affecting the defendant is not consistent with the findings of the toxicology report. This is not fatal to your case. While DREs are trained to not only determine drug impairment, but to define which drug is on board, the law requires no such specificity. The defense will obviously attempt to gain points by showing the inconsistency in the findings. But your jury will understand that a drug-impaired driver is a danger regardless of which substance was causing the impairment.

Written crime laboratory reports are generally hearsay and are not admissible in evidence absent a statute or other exception to the hearsay rule that provides for the admissibility of such records. Absent a stipulation from the defense attorney as to the results of the analysis of the sample, the prosecutor should be prepared to call the laboratory technician who performed the analysis as a witness.
A. Stipulations

A clear stipulation to the chain of custody and test results can save judicial resources and obviate the need for testimony from the criminalist. Unless the stipulation is clear and thorough, however, it can create doubts in the minds of the jurors. Never stipulate to just the chain of custody; your witnesses need to testify to the results anyway, and you can impress the jurors with all the safeguards used to protect the chain of custody.

B. Chain of Custody

1. Urine

   The officer who was present when the sample was given must testify. This officer may be the arresting officer, the DRE, or any officer who watched the defendant void into the jar. This officer must testify he or she:

   a. was present when the defendant voided into the jar;
   b. sealed the jar;
   c. placed the jar in an evidence envelope and sealed it;
   d. recorded his or her name, serial number, date, and the defendant’s name on the envelope and on the seals; and
   e. booked the evidence envelope at a property section or other appropriate evidence storage facility.

2. Blood

   If the arresting officer is present when the nurse or technician draws blood from the defendant, the officer can testify to the chain of custody. Otherwise, the nurse or technician must testify that a sample was taken from the defendant and given directly to the officer. (The nurse should also testify to the sterilization fluid used unless you have a stipulation or a certified medical record.) After you have established the chain of custody, the officer must testify he or she:

   a. placed the sample in an evidence envelope and sealed it;
   b. recorded his or her name, serial number, date, and the defendant’s name on the envelope and on the seals; and
   c. booked the evidence envelope at a property section or other appropriate evidence storage facility.

   After the blood or urine sample is booked into the evidence storage facility, the sample is usually delivered to the laboratory for testing.

C. Special Considerations

Many judges and courts forbid bringing a blood or urine sample into the courtroom if it contains PCP. A workable solution is to take pictures of the sample jar and the front and back of the envelope. If the pictures fail to clearly show the seals on the envelope, you may wish to photocopy
the front and back of the envelope too. After photographing the jar, be sure you reseal the envelope in case the defendant is ever retried.

If it is necessary to follow this procedure, you should have the jury instructed before the analysts testify. The following two instructions have been used successfully:

1. You are instructed that in the interest of public health and safety, no object or substance that has been found by a chemist to contain PCP is permitted in the courtroom.

2. Ladies and gentlemen of the jury, the rules of court (or other local rule) prohibit any objects or substances that contain PCP from being brought into any courtroom. For this reason, you will not have before you as evidence any urine sample allegedly obtained from the defendant that may contain PCP.

It is for this reason that photographs have been admitted for your consideration. You must decide this case based on the state of evidence, which includes the testimony of witnesses, as well as any writings or material objects that relate to any aspects of this case.

By its action, the court is in no way offering any opinion whatsoever as to the state of the evidence. You should not infer that, because of the court’s action, I believe that the urine sample either does or does not belong to the defendant, or that the sample either does or does not contain PCP.

As with all the evidence in this case, you are the exclusive judges of the facts.

**XI. Examination of the People’s Criminalist**

**A. Types of Questions That May Be Asked of the Person Who Analyzed the Drugs**

1. **WHAT IS YOUR PRESENT OCCUPATION AND ASSIGNMENT?**

2. **HOW LONG HAVE YOU BEEN EMPLOYED BY [NAME OF LABORATORY]?

3. **WHAT IS YOUR BACKGROUND, TRAINING, AND EXPERIENCE THAT QUALIFIES YOU FOR YOUR PRESENT POSITION?**

5. **IS ONE OF YOUR CURRENT FUNCTIONS TO CONDUCT CHEMICAL ANALYSES TO DETERMINE THE PRESENCE OF DRUGS IN BLOOD [URINE] SAMPLES?**

6. **BRIEFLY, HOW DO YOU ANALYZE A BLOOD [URINE] SAMPLE TO DETERMINE THE PRESENCE OF [NAME OF DRUG]?**

7. **I’M SHOWING YOU WHAT HAS PREVIOUSLY BEEN MARKED PEOPLE’S EXHIBIT [NUMBER] FOR IDENTIFICATION. DO YOU RECOGNIZE THIS EXHIBIT?**
   [Show defendant’s sample and envelope.]

8. **HOW DO YOU RECOGNIZE IT?**

9. **WHAT IS IT?**
10. WHERE DID YOU FIRST SEE THIS EXHIBIT?

11. WAS THE ENVELOPE COMPLETELY SEALED WHEN YOU FIRST SAW IT?

12. WHAT SEALS WERE ON IT WHEN YOU FIRST SAW IT?

13. DID YOU OPEN THE ENVELOPE? HOW?

14. WAS THERE A CONTAINER INSIDE THE ENVELOPE? WAS IT SEALED? HOW?

15. WHAT WERE THE CONTENTS OF THE CONTAINER?

16. DID YOU PERFORM A CHEMICAL ANALYSIS OF THE CONTENTS TO DETERMINE WHETHER DRUGS WERE PRESENT? HOW?

17. DID YOU EMPLOY ANY QUALITY CONTROLS TO ASSURE THE INSTRUMENT WAS WORKING PROPERLY?

18. WHAT WAS THE RESULT OF YOUR ANALYSIS?

19. WAS YOUR ANALYSIS QUANTITATIVE OR QUALITATIVE?

20. WHAT DID YOU DO WITH THE CONTAINER AFTER YOU COMPLETED YOUR ANALYSIS?

21. DID YOU SEAL THE CONTAINER?

22. DID YOU SEAL THE ENVELOPE?

23. WHAT DID YOU THEN DO WITH THE ENVELOPE?

XII. The People's Toxicologist

This section presumes that the witness who testifies about the chemical test results is not a toxicologist, and a second expert witness from the lab is necessary to give the jury some idea as to what the test results mean regarding drug impairment.

Your preparation for this case ought to include a study of the relevant sections of the *Physicians' Desk Reference*. You will be better able to examine your toxicologist and teach the jury if you know about the drug involved in your case. For instance, it is vital that you know as much as possible about the drug. For what physiological purpose is it normally prescribed? What is a normal therapeutic dose of the drug? What warnings does the *Physicians' Desk Reference* list when this drug is distributed? How is the drug illegally used? How is the drug ingested? What physical signs and symptoms are apparent when the drug is abused?

As has been previously noted, neither the presence of drugs in the defendant’s sample nor the added information regarding the quantity of the drug present will likely enable the People’s toxicologist to definitively conclude that the defendant was under the influence and too impaired to safely operate a motor vehicle. But if prior to trial you discuss all of the evidence with your toxicologist (the driving, the symptoms observed, the FSTs, the DRE’s findings, and the chemical test), it is likely that each evidentiary strand is consistent with both someone under the influence of a drug and who is unable
to safely operate a motor vehicle. By weaving these strands together during direct examination of the toxicologist, you will be able to present an evidentiary tapestry that will enable the jury to see that the defendant is guilty of the charge.

A. The Direct Examination of the Toxicologist

1. WHAT IS YOUR OCCUPATION?

2. HOW LONG HAVE YOU BEEN SO EMPLOYED?

3. PLEASE TELL US ABOUT YOUR BACKGROUND, TRAINING, AND EXPERIENCE THAT QUALIFIES YOU FOR YOUR PRESENT POSITION.

4. WHAT DO YOU DO AS A TOXICOLOGIST IN THE AGENCY YOU WORK FOR?

5. HAVE YOU PREVIOUSLY TESTIFIED IN COURT AS A TOXICOLOGIST?

6. HAVE YOU PREVIOUSLY BEEN DEEMED AN EXPERT WITNESS IN COURT ON ISSUES OF TOXICOLOGY AND DRUG USE?

7. APPROXIMATELY HOW MANY TIMES?

8. HAVE YOU HAD THE OPPORTUNITY TO OBSERVE PEOPLE WHO WERE UNDER THE INFLUENCE OF VARIOUS DRUGS?

9. ARE YOU FAMILIAR WITH THE DRUG [NAME OF DRUG]?

10. [NAME OF DRUG] IS A MEMBER OF WHICH CLASS OF DRUGS?

11. ARE YOU FAMILIAR WITH THE DRUG'S EFFECTS ON PEOPLE?

12. DOES THAT DRUG HAVE A LAWFUL USE?

13. FOR WHAT MALADIES OR CONDITIONS IS [NAME OF DRUG] PRESCRIBED?

14. HOW IS THAT DRUG INGESTED?

15. ARE THERE PARTICULAR WARNINGS ISSUED BY THE PHARMACEUTICAL AND MEDICAL PROFESSIONS REGARDING THIS DRUG?

16. WHAT ARE THEY?

17. WHAT IS THE SIGNIFICANCE OF WARNINGS BEING NOTED FOR A PARTICULAR DRUG?
   
   Note: If the drug in your case has warnings related to drowsiness or avoiding the operation of heavy machinery, be sure to emphasize this point to your jury.

18. HOW LONG AFTER INGESTION DOES IT TAKE FOR THE DRUG TO BEGIN TO AFFECT THE BRAIN?

19. ARE THERE DIFFERENT WAYS TO GET THE DRUG INTO THE BODY?
20. DOES THE WAY THE DRUG IS TAKEN INTO THE BODY AFFECT HOW LONG IT TAKES TO IMPACT THE BRAIN?

21. A DRUG CAN IMPAIR THE ABILITY TO SAFELY OPERATE A VEHICLE, ISN’T THAT RIGHT?

22. IS THAT EQUALLY TRUE FOR A LAWFULLY PRESCRIBED DRUG AND AN ILLEGAL DRUG?

23. COULD THAT OCCUR EVEN WHEN A PERSONFollows THE PRESCRIBED DOSAGE OF THE DRUG?

24. SO, A PERSON WHO NEITHER USES AN ILLEGAL DRUG NOR EXCEEDS THE PRESCRIBED DOSAGE OF A DRUG COULD STILL BECOME IMPAIRED AND BE UNABLE TO SAFELY OPERATE A MOTOR VEHICLE?

25. AND THAT’S WHY THERE ARE APPROPRIATE WARNINGS ATTACHED TO DRUGS?

26. OF COURSE, WHEN ONE USES AN ILLEGAL OR NONPRESCRIBED DRUG, THERE ARE NO PRESCRIBED DOSAGES INCLUDED, ARE THERE?

27. ARE YOU FAMILIAR WITH THE TERM “THERAPEUTIC DOSAGE”?

28. WHAT DOES THAT TERM MEAN?

29. WHAT IS THE THERAPEUTIC DOSAGE FOR THE DRUG [NAME OF DRUG]?


31. ARE YOU ABLE TO DETERMINE WHETHER THE DEFENDANT WAS IMPAIRED AND UNABLE TO SAFELY OPERATE A CAR BASED SOLELY ON THE TEST RESULTS IN THIS CASE?

32. WOULD ANY TOXICOLOGIST BE ABLE TO MAKE SUCH A DETERMINATION BASED SOLELY ON THE AMOUNT OF DRUGS REFLECTED IN THE CHEMICAL TEST?

33. FORENSIC SCIENTISTS CAN DRAW CONCLUSIONS ABOUT A PERSON’S ABILITY TO DRIVE SAFELY BASED ON THE ALCOHOL LEVEL IN THE CHEMICAL SAMPLE, CAN’T THEY?

34. THEN WHY IS SCIENCE UNABLE TO DRAW A CONCLUSION BASED SOLELY AND EXCLUSIVELY ON A PERSON’S DRUG LEVEL?

35. WOULD A SCIENTIST LIKE YOURSELF REQUIRE MORE INFORMATION BEFORE YOU COULD ACCURATELY CONCLUDE A PERSON WAS DRUG IMPAIRED FOR THE PURPOSES OF DRIVING?
36. IF A PERSON WERE TO TAKE MORE THAN A THERAPEUTIC DOSE OF A DRUG, IS IT COMMON THAT PARTICULAR PHYSIOLOGICAL SIGNS AND SYMPTOMS COULD BECOME APPARENT?

37. WOULD ALL PEOPLE WHO EXCEED THE THERAPEUTIC LEVELS OF DRUGS NECESSARILY EXHIBIT THE SAME PHYSIOLOGICAL SYMPTOMS? WHY IS THAT?

38. IS THE PREDICTABILITY OF DRUG-USE SYMPTOMS COMPLICATED IF A PERSON CHOOSES TO TAKE MORE THAN ONE DRUG AT A TIME? WHY IS THAT?

39. WOULD TWO PEOPLE EXCEEDING THE THERAPEUTIC LEVEL OF THE SAME DRUG NECESSARILY EXHIBIT THE SAME PHYSIOLOGICAL SYMPTOMS?

40. IT IS STILL POSSIBLE FOR SCIENCE, WITH APPROPRIATE DATA, TO PROVIDE INSIGHT INTO DETERMINING WHETHER A PERSON WHO TOOK DRUGS WAS IMPAIRED FOR THE PURPOSES OF DRIVING, ISN’T THAT CORRECT?

41. IN THIS CASE, THE DEFENDANT WAS OBSERVED TO [DESCRIBE DEFENDANT’S DRIVING]. THAT DRIVING PATTERN IS CONSISTENT WITH ONE WHO WAS DRUG IMPAIRED AND UNABLE TO SAFELY OPERATE A MOTOR VEHICLE, RIGHT?

42. WHEN THE OFFICER APPROACHED THE DEFENDANT, THE OFFICER OBSERVED [LIST EACH OF THE DEFENDANT’S OBSERVED SYMPTOMS, AND AFTER EACH, ASK]: THAT SYMPTOM IS CONSISTENT WITH SOMEONE UNDER THE INFLUENCE OF DRUGS, ISN’T IT? Reiterate for the jury each symptom observed, and have the expert affirm that each symptom is consistent with someone under the influence of drugs.

43. NOW, FOLKS WHO ARE UNDER THE INFLUENCE OF DRUGS MAY HAVE DIFFICULTY FOLLOWING INSTRUCTIONS AND PERFORMING SIMPLE PHYSICAL TASKS, ISN’T THAT RIGHT?

44. IN THIS CASE, THE OFFICER PROVIDED THE DEFENDANT WITH A FIELD SOBRIETY TEST. ARE YOU FAMILIAR WITH THEM?

45. THEY ARE COMMONLY USED BY LAW ENFORCEMENT TO ASSIST IN DETERMINING WHETHER SOMEONE IS UNABLE TO SAFELY OPERATE A CAR, AREN’T THEY?

47. AFTER THE ENTIRE FIELD SOBRIETY TEST WAS CONCLUDED, THE OFFICER ARRESTED THE DEFENDANT. SHORTLY AFTERWARD, A TRAINED DRUG RECOGNITION EXPERT HAD THE OPPORTUNITY TO EXAMINE THE DEFENDANT.

Repeat the process of explaining the symptoms and FST results observed by the DRE, and continue to establish that each observation is consistent with someone under the influence of drugs.

48. SUBSEQUENTLY, THE DEFENDANT PROVIDED A BLOOD [URINE] TEST, AND THE RESULTS OF THAT TEST REFLECTED FINDINGS OF [AMOUNT AND TYPE OF DRUG]. ARE THOSE FINDINGS CONSISTENT WITH ONE WHO IS IMPAIRED DUE TO DRUGS?

49. IF YOU TAKE ALL OF THE FACTORS WE HAVE TALKED ABOUT, ARE THEY ALL CONSISTENT WITH THE CONCLUSION THAT THE DEFENDANT WAS DRIVING WHILE IMPAIRED DUE TO DRUGS?

50. IS THERE ANY FACTOR WE TALKED ABOUT THAT IS INCONSISTENT WITH A PERSON WHO IS IMPAIRED DUE TO A DRUG?

Note: Some toxicologists are disinclined to ever conclude that a factual pattern necessarily leads to a conclusion that the defendant was driving under the influence of drugs. If your expert is of that ilk, stop here. If your interview with your expert indicates that a conclusive answer will be given to a summarizing hypothetical, then conclude with a question that summarizes all of the evidence in your case.

XIII. Handling a Defense Expert Witness

Frequently, the defense will have an expert testify on behalf of the defendant. These experts attempt to discredit the People's evidence and the findings of the DRE, and contend that the observed signs and symptoms could be caused by other factors. While the defense expert may have experience ranging from a laboratory technician to a medical doctor, do not take his or her qualifications and experience with street drugs for granted. Generally, there are three areas to attack these witnesses: motive, bias, and training.

A. Motive

The defense expert’s motive quite simply put is money. Usually, the first question a prosecutor should ask is how much the expert is getting paid. “Isn’t it a fact that last year you were paid $223,115 (or whatever amount the expert was paid for the previous year) by the County of Los Angeles for your work?”

The prosecution may ask about the expert’s total compensation received for his or her work, not just for the particular case on which he or she is testifying. (Allen v. Superior Court (1984) 151 Cal.App.3d 447; Evidence Code § 722.)

By asking the first question about the expert’s total compensation, the prosecution allows the jurors, from the beginning, to view the expert’s opinion with jaundiced eyes.
B. Bias

Through cross-examination of the defense expert, a prosecutor should attempt to establish that the expert is not an objective and impartial witness seeking the truth. Rather, he or she is testifying for the defense to get the defendant off. In closing argument, the prosecutor will focus on this bias of the defense witness.

C. Training

A prosecutor should always remember when cross-examining the defense expert to keep it simple so that the jurors can understand what the prosecutor is trying to do. Complicated medical terminology that jurors might have difficulty understanding should not be used. In any event, the expert will probably be able to hold his or her own in this area.

The prosecutor should try, as hard as it may be, to be nice and polite but firm with the expert. The prosecutor should always control the expert and should not allow him or her to ramble on about a variety of issues that have not been asked. The prosecutor should listen carefully to the expert’s testimony. For example, the expert may testify that a variety of drugs cause nystagmus. But there are only certain drugs that cause horizontal, vertical, or horizontal and vertical nystagmus.

In attacking the expert’s training, background, and experience, the prosecutor should pin him or her down as to whether he or she has specific training and experience with whatever drug is involved in the case. Frequently, the expert’s knowledge will be limited to controlled settings not involving illegal drugs or high dosages of otherwise legal drugs.

The prosecutor may ask questions regarding whether or not the defense expert has considered contrary opinions regarding the subject matter even though he or she does not rely on the contrary opinion in forming his or her own opinion. (People v. Kozel (1982) 133 Cal.App.3d 507, 535; Evidence Code §§ 721–722.) This may allow the prosecutor to explore opinions contrary to the defense expert’s opinion and can serve to bolster and reinforce the opinion testimony offered by the DRE.

The following is a list of sample questions a prosecutor can ask an expert witness regarding PCP. The questions can be used for a variety of other drugs and defense doctors depending on the facts of the particular case involved.

1. WHICH BOOKS HAVE YOU WRITTEN ABOUT [NAME OF DRUG]?

2. WHICH MEDICAL ARTICLES HAVE YOU WRITTEN ABOUT [NAME OF DRUG]?

3. WHAT WERE THE NAMES, DATES, AND KINDS OF SEMINARS YOU HAVE PROVIDED?

4. THE DEFENSE EXPERT CLAIMS TO BE A LAW PROFESSOR. IN ACTUALITY, HE [SHE] IS A GUEST EXPERT IN MOOT COURT CLASS.

5. YOU TESTIFIED THAT YOU SEE HUNDREDS OF PEOPLE ON [NAME OF DRUG] IN YOUR OFFICE, IS THAT CORRECT?
6. ARE THEY ACTUALLY UNDER THE INFLUENCE OF [NAME OF DRUG] AT THE TIME THEY COME TO SEE YOU?

7. WHERE IS YOUR OFFICE LOCATED?

8. WHY WOULD A PERSON WHO IS UNDER THE INFLUENCE COME TO YOUR OFFICE?

9. YOU TESTIFIED THAT WHEN A PERSON IS UNDER THE INFLUENCE OF [NAME OF DRUG], HE OR SHE WILL HAVE EXTREME MENTAL CONFUSION. IF SOMEONE IS UNDER THE INFLUENCE OF [NAME OF DRUG], HOW DOES HE [SHE] GET TO YOUR OFFICE?

10. WHAT DO YOU DO WITH A PATIENT WHO COMES TO YOUR OFFICE UNDER THE INFLUENCE OF [NAME OF DRUG]?

11. ISN’T IT TRUE THAT THE DRUG [NAME OF DRUG] IS STIMULANT DEPENDENT? BY THAT I MEAN THE MORE STIMULANT EXPERIENCED BY THE PERSON, THE MORE AGITATED THE PERSON COULD BECOME; THEREFORE, THE PERSON SHOULD NOT BE EXCITED, TOUCHED, EXPOSED TO LIGHT, ETC. YET, YOU CONDUCT A FULL MEDICAL EXAMINATION OF THAT PERSON IN YOUR OFFICE?

12. SO, IN OTHER WORDS, DOCTOR, YOU RUN A DRUG PROGRAM THAT AIMS AT TRYING TO STOP A PERSON FROM USING DRUGS?

13. YET, MORE THAN 100 PEOPLE PER MONTH [WEEK] COME TO YOUR OFFICE UNDER THE INFLUENCE OF [NAME OF DRUG].

**Odor of PCP**

1. YOU TESTIFIED THAT YOU’VE READ MORE THAN 1,000 POLICE REPORTS INVOLVING PCP. IN ALL OF THOSE POLICE REPORTS, DIDN’T THE OFFICERS WRITE THEY SMELLED A “DISTINCTIVE ODOR INDICATIVE OF [NAME OF DRUG]”?

2. ARE YOU SAYING THAT ALL OF THOSE DIFFERENT POLICE REPORTS WHERE THE OFFICERS WROTE THEY SMELLED A DISTINCTIVE ODOR, THEY WERE ALL CONFUSED ABOUT THAT ODOR?

3. DO YOU KNOW WHAT CHEMICALS ARE USED TO MAKE [NAME OF DRUG]?

4. ISN’T IT A FACT THAT THE CHEMICALS AND PROCESSES USED TO MAKE [NAME OF DRUG] ARE VERY DISTINCT AND ODOROUS?

5. WERE YOU PRESENT AT THE TIME THE DEFENDANT WAS ARRESTED?

6. YOU WEREN’T EVER CALLED IN AFTER THE DEFENDANT’S ARREST TO EVALUATE HIS SYMPTOMS?
7. DID YOU CONDUCT A MEDICAL EXAMINATION OF THE DEFENDANT ON THE DAY OF THE ARREST?

8. DID YOU TAKE THE DEFENDANT'S BLOOD PRESSURE ON THE DAY OF THE ARREST?

9. DO YOU KNOW WHAT THE DEFENDANT'S NORMAL BLOOD PRESSURE IS?

10. DID YOU EVER ASK THE DEFENDANT WHAT HIS NORMAL BLOOD PRESSURE IS?

11. DOCTOR, WHAT EXACTLY DID YOU DO TO FORM YOUR OPINION THAT YOU CANNOT SAY THAT THE DEFENDANT WAS UNDER THE INFLUENCE OF [NAME OF DRUG] ON [DATE]?

12. HOW LONG DID THAT TAKE YOU?

13. SO, IN OTHER WORDS, IT TOOK YOU ___ HOURS TO READ A POLICE REPORT?

14. ARE YOU FAMILIAR WITH THE NOTION OF TOLERANCE IN RELATION TO [NAME OF DRUG] USAGE?

15. PLEASE EXPLAIN THE TERM TOLERANCE IN RELATION TO [NAME OF DRUG] USAGE.

16. ARE YOU FAMILIAR WITH MOOD SWINGS IN RELATION TO [NAME OF DRUG] USAGE?

17. ISN'T IT A FACT THAT WHEN A POLICE OFFICER ATTEMPTS TO TAKE A PERSON'S PULSE, THE PERSON COULD BE IN A CALM STAGE?

18. WOULD YOU AGREE THAT WHEN A PERSON IS CONTACTED BY THE POLICE, HE OR SHE COULD BECOME VERY ANXIOUS, WHICH COULD ACCOUNT FOR AN ELEVATED PULSE?

If Defense Has a Later Sample Tested

1. TO DETERMINE WHETHER A PERSON HAS INGESTED A DRUG, ISN'T CONTEMPORANEOUS TESTING MORE ACCURATE THAN TESTING AFTER A SIGNIFICANT PASSAGE OF TIME? WHY?
   There is the likelihood that a higher concentration of metabolite will remain in the blood/urine, i.e., six hours after use, a sample may contain 450 ng, yet after 40 hours may only have 75 ng.

Hypothesis

1. I'M GOING TO READ YOU A SERIES OF SYMPTOMS. I WOULD LIKE YOU TO INDICATE WHETHER THE SYMPTOM IS CONSISTENT OR INCONSISTENT WITH [NAME OF DRUG] INTOXICATION:
   Read each symptom in your report: blank stare, mental confusion, etc.
2. YOU WERE GIVEN A HYPOTHETICAL BY THE DEFENSE ATTORNEY THAT YOU USED TO FORM YOUR OPINION THAT THE DEFENDANT WAS NOT UNDER THE INFLUENCE. BUT YOU WERE NOT PRESENT AT THE TIME OF THE DEFENDANT'S ARREST WERE YOU?

3. SO, YOU DON'T HAVE ANY PERSONAL KNOWLEDGE OF WHAT SYMPTOMS THE DEFENDANT WAS EXHIBITING ON THE DAY OF THE ARREST, DO YOU?

4. BUT YOU ARE IN AGREEMENT THAT IF THE SYMPTOMS OBSERVED WERE THE ONES I MENTIONED TO YOU, EACH AND EVERY ONE OF THEM WOULD BE CONSISTENT WITH THE CONCLUSION THAT THE SUBJECT WAS IMPAIRED DUE TO DRUGS, CORRECT?

5. AS AN EXPERT IN THIS FIELD, YOU HAVE OBSERVED OR LEARNED THAT PEOPLE CHARGED WITH CRIMINAL OFFENSES MAY HAVE A MOTIVE TO BE LESS THAN TRUTHFUL, HAVEN'T YOU?

6. AND YOU WOULD AGREE, WOULDN'T YOU, THAT SINCE YOU HAVE NO FIRSTHAND KNOWLEDGE OF WHAT SYMPTOMS THE DEFENDANT WAS EXHIBITING, YOUR CONCLUSIONS ARE ONLY AS ACCURATE AS THE INFORMATION YOU HAVE BEEN PROVIDED, CORRECT?

7. SO, IF THE DEFENDANT'S INFORMATION TO YOU IS WRONG, THEN YOUR CONCLUSIONS ARE WRONG, ISN'T THAT RIGHT?

8. IT WOULD BE LIKE THAT PHRASE IN COMPUTER PROGRAMMING, WOULDN'T IT: "GARBAGE IN – GARBAGE OUT"?

Dan Jeffries is the assistant supervising attorney of the Metropolitan Branch of the Los Angeles City Attorney’s Office. The Metropolitan Branch prosecutes approximately 7,500 DUI cases per year in addition to other vehicular offenses in the City of Los Angeles. Jeffries received his Associate in Arts degree from Orange Coast College, and then attended UCLA as an undergraduate, receiving a Bachelor of Arts degree in mathematics, and for law school, earning a Juris Doctor degree in 1983. After working for the Los Angeles Olympic Organizing committee, Jeffries joined the Los Angeles City Attorney’s Office in 1985. Besides conducting in-house training, Jeffries has been a speaker at the Northwestern University Traffic Institute’s Annual Vehicular Homicide and DUI Conferences and the University of Wisconsin’s Annual Traffic and Impaired Driving Law programs. He has been active in DUI legislation and testified on behalf of CDAA before the California Legislature in support of CDAA-sponsored legislation to eliminate urine testing in DUI cases. Jeffries also represented CDAA on the Department of Health Services ad hoc Advisory Committee on Alcohol Determination. He currently serves on the Los Angeles County Crime Lab Advisory Committee.
Thomas E. Page, the former officer-in-charge of the Los Angeles Police Department’s Drug Recognition Expert (DRE) Unit, began his law enforcement career in 1977 with the Detroit Police Department. He currently is a Reserve Officer with the South Pasadena, California, Police Department. Page assisted in the coordination of the 1985 Los Angeles Field Validation Test (173-case study) of the DRE Procedure. This study validated the effectiveness and reliability of a standardized and systematic approach to drug-influence recognition. Page was also a member of the initial DRE curriculum-development cadre that created the first formal DRE course curricula. Page has taught drug-influence recognition and criminal justice topics to a wide range of audiences around the world. He also frequently provides expert testimony in court on the effects of alcohol and drugs (including legal drugs), driving-under-the-influence enforcement, drugs in the workplace, and the standardized field sobriety test, including horizontal gaze nystagmus. He has been accepted as an expert in courts in California, Arizona, New York, Maryland, Colorado, Delaware, Hawaii, Minnesota, Iowa, Oregon, Washington, Nebraska, Missouri, and Florida. He also served as the law enforcement representative on a Department of Transportation-sponsored committee that developed curricula to train prosecutors to effectively prosecute drug-impaired drivers. Page has authored numerous articles on drug-user detection techniques. His credits include Police Chief Magazine, The Siren, and The DRE. He also co-authored The Drug Information Handbook for the Criminal Justice Professional, published by Lexi-Comp. He has served as the general chairperson of the DRE section of the International Association of Chiefs of Police (IACP) and is a former member of IACP’s DRE Technical Advisory Panel. He is an advisory member of the Canadian Society of Forensic Science’s Drugs and Driving Committee, a member of the National Safety Council’s Committee on Alcohol and Other Drugs, and a member of the Texas Impaired Driving Advisory Committee. Page is also a member of the International Council on Alcohol, Drugs and Traffic Safety. He received his Bachelor of Arts degree in industrial psychology and his Master of Arts degree in urban affairs from the University of Detroit (since renamed University of Detroit Mercy). He holds a State of California lifetime community college teaching credential.

Chapter updated in 2010 by David Radford, TSRP: Dave Radford began his law enforcement career in police service. Serving as a City of Pleasanton police officer for 24 years, he achieved the rank of captain and worked various assignments including patrol, traffic, SWAT, and narcotics. From 1993–2003, he served as a Drug Recognition Expert (DRE) and DRE Instructor for the California Highway Patrol, holding the title of DRE Emeritus. In his police career he made or assisted in 1,500 arrests/DRE exams. Earning his JD from John F. Kennedy School of Law, Mr. Radford retired from police service in 2003 and became a deputy district attorney in Tuolomne County, and later in Stanislaus County. As CalTSRP for the 27-county Northern Region, he is based in Solano County.
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Chapter III

Legal Considerations When Prosecuting Refusals

by Thomas M. Reeves, City Prosecutor
Long Beach City Prosecutor’s Office
and
Michelle Gardner, Deputy City Prosecutor
Long Beach City Prosecutor’s Office
and
Justin Houterman, Deputy City Prosecutor
Long Beach City Prosecutor’s Office
and
Felicia Liberman, Deputy City Prosecutor
Long Beach City Prosecutor’s Office

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(Updated 2010 by Rosalind Russell-Clark, TSRP, Greater Los Angeles and Ventura)

I. Preface

In this chapter, we will discuss what constitutes refusal of a chemical test for drugs or alcohol and the consequences. Under California’s “implied consent” law, Vehicle Code section 23612, persons suspected of driving under the influence (DUI) are required to submit to a chemical test of their blood, breath, and, perhaps, urine to determine if they are under the influence of drugs or alcohol. A driver convicted of a violation of Vehicle Code section 23152 or 23153 who refused a chemical test is subject to a sentence enhancement under Vehicle Code section 23577. Such a driver also faces a license suspension under Vehicle Code section 13353. The statements made by a driver when refusing a chemical test are often times very useful in the prosecution’s case-in-chief or for impeachment. The fact that a driver refused a chemical test is admissible in evidence to show consciousness of guilt. This is a fact of which most prosecutors do not take full advantage. We hope that after reading this section, you will argue and highlight the consciousness of guilt instruction in every closing argument you make when prosecuting a DUI refusal case.

II. Implied Consent

California’s “implied consent” law is Vehicle Code section 23612(a)(1)(A):

A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for any offense allegedly committed in violation of
Section 23140 [DUI under age 21 and .05 percent BAC], 23152 [DUI and 0.08 percent BAC], or 23153 [DUI while committing another offense and .08 percent BAC].

Note: People with hemophilia or suspects who are afflicted with a heart condition and are using an anticoagulant under the direction of a licensed physician or surgeon are exempt from taking a blood test. (See Vehicle Code § 23612(b)&(c).)

By now you have concluded that your driver was lawfully arrested or detained. If not, you should refer to Chapter VII and Vehicle Code section 40300.5. As you can see, to be subject to a chemical test, the driver must have been lawfully arrested or detained for a violation of Vehicle Code section 23140, 23152, or 23153. Note that although Vehicle Code section 23612(a)(1)(A) says “lawfully arrested for … violation of Section 23140,” a defendant who is under 21 years of age need only be lawfully detained for the law of implied consent to apply. (See Vehicle Code § 23136(c)(2) [detention is lawful when an officer has reasonable cause to believe that the under-21-year-old driver was driving while having a 0.01 percent blood-alcohol concentration in violation of Vehicle Code § 23136(a)].)

III. Admonishing the Driver

Even after a lawful arrest, the driver must be properly advised or admonished of the test choices and the consequences of refusing to be tested to be deemed to have withdrawn consent. The law in this area is becoming ever more complex and is litigated more in the context of Department of Motor Vehicle (DMV) administrative license suspensions than in criminal prosecutions.

There may be variations among different police agencies, but the admonishment must contain the following elements:

1. The driver has a choice of tests, including blood, breath, or sometimes urine. If blood or breath tests are not available, or the suspect is unable because of a medical reason to take either a blood or breath test, then the urine test should be offered. In addition, if the officer suspects that the person is under the influence of drugs or a combination of alcohol and drugs, then the defendant should be offered a blood or urine test.

2. Failure to take or to complete a chemical test would result in:
   a. a fine;
   b. mandatory imprisonment if convicted of DUI;
   c. suspension of driving privilege for one year, two years, or three years;
   d. revocation of driving privilege for two years if refusal is within 10 years of a separate conviction of:
      (1) DUI under Vehicle Code section 23140, 23152, or 23153, or a reduced charge of DUI-related reckless driving, or vehicular manslaughter, or driving privilege suspended or revoked under Vehicle Code sections 13353, 13353.1, or 13353.2; or
      (2) three-year revocation of privilege if within 10 years of two or more separate convictions of DUI or DUI-related reckless driving, or vehicular manslaughter, or two or more suspensions under Vehicle Code sections 13353, 13353.1, or 13353.2;
3. The driver does not have the right to have a lawyer present before stating whether or not he or she would submit to testing, or before deciding which test to take, or during any test; and

4. The driver was advised that if he or she refused to submit to testing, the refusal may be used against him or her in a court of law.

(See Vehicle Code §§ 23136(c)(3); 23612(c)(3); 23612(a)(1)(D); CALCRIM 2131.)

IV. Refusal—Withdrawing Implied Consent

Vehicle Code section 23612(a)(5) states:

A person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the noncompletion of, the test or tests will result in the suspension or revocation of his or her privilege to operate a motor vehicle. A person who is dead is deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer.

Under Vehicle Code section 23612(a)(1)(D) or 23136(c)(3), a driver who fails to submit to, or fails to complete, a chemical test has refused. A driver who is incapable of willfully refusing to submit to, or to complete, a test will not be subject to an enhanced penalty. A driver’s capability to refuse is viewed in light of the law of implied consent. The courts have characterized a refusal as withdrawing implied consent, which must be a willful act. Clearly an unconscious or dead driver cannot willfully withdraw implied consent. There are physical or mental conditions short of unconsciousness, however, that may render a driver incapable of refusal, i.e., unable to willfully withdraw his or her implied consent.

The following cases represent the way courts have addressed certain conditions offered as defenses. Many of these cases arise in the context of appeals from administrative license suspension or revocation by the DMV. Although not arising within a criminal prosecution, these cases represent a body of law that defines the circumstances under which a driver will be deemed to have withdrawn consent or refused a chemical test. Remember that the scope of review for an appellate court reviewing an administrative action is sometimes limited to determining if the trial court’s decision was supported by substantial evidence. The value of such cases to criminal law practitioners must be weighed in this context. Each of the following sections gives the reader a quick review of the condition or circumstance that was offered as a defense to a refusal in either review from an administrative hearing or in a criminal case.

A. Voluntary Intoxication—No Defense

The trial court in Bush v. Bright (1968) 264 Cal.App.2d 788 concluded that the driver was so intoxicated that he was incapable of refusing a chemical test. This logic was reversed by the appellate court:

The construction placed [on former section 13353] by the lower court and by Bush would lead to absurd consequences—the greater the degree of intoxication
of an automobile driver, the lesser the degree of his accountability under the statute. It would invalidate [the section] as to grossly intoxicated drivers and frustrate the purpose of the Legislature.

(Id. at 792.)

B. Undisclosed and Self-Induced Conditions—No Defense

In *Eilinger v. Department of Motor Vehicles* (1983) 143 Cal.App.3d 748, the driver claimed she had an irrational fear of police that stemmed from her life in Argentina. She never told the arresting officer that she feared police, and there was no evidence that the arresting officer acted in any way to provoke her alleged fear. The court held that her self-induced condition did not obviate the requirements of implied consent.

The *Eilinger* court suggested that in an appropriate case, a person might be incapable of refusal, which would be a defense. “A driver is excluded from the requirement of voluntary submission if he or she is incapable of understanding the requirements and consequences of the test. Implicit in such exclusion is a requirement the driver’s refusal is rational and disclosed under the circumstances of the facts presented.” (Id. at 751 [emphasis in original].)

C. Failure to Hear and/or Comprehend Advice—May Be a Defense

In a license-suspension appeal, *Thompson v. Department of Motor Vehicles* (1980) 107 Cal.App.3d 354, the arrested driver was being advised about chemical tests in the rear seat of the police vehicle. The officer had a tape recorder in the front seat taping the conversation. The tape was played for the DMV hearing, and portions of it were taken down by the court reporter in the trial court writ proceedings. The court of appeal did not have the audiotape and relied solely on the court reporter’s transcript of the tape recording.

The *Thompson* court held that the police radio transmissions interfered with the conversation between the officer and the driver and concluded:

If respondent was not aware that his refusal would result in an automatic suspension, it is not reasonable to expect him to have volunteered an explanation for his decision to refuse the tests. Moreover, the source of respondent’s confusion (the radio broadcasts) was just as obvious to the officer as it was to the driver. Therefore, it was incumbent on the officer to take measures to be sure the statutory warning was effectively communicated.

(Id. at 363.)

Here, the driver had the capacity to hear the officer and did not tell the officer that he could not understand what was being said. Nevertheless, the court stated, “When the driver, through no fault of his own, is unable to understand the warning, he should not suffer the consequence of a license suspension.” (Id.)
D. Distracted by Pain—No Defense

In *Plunkett v. Alexis* (1982) 136 Cal.App.3d 370, a writ cast against the DMV to overturn a license suspension, Plunkett sought to prove that he was in such pain from injuries sustained in a collision that he could not understand the admonishment by the arresting officer. Plunkett argued that the officer should have considered him incapable of refusing and given him a blood test. The court focused on the officer’s giving of the admonishment and not on the driver’s receipt of it. Holding that Plunkett expressly refused to submit to a test, the court pointed out that Plunkett understood what the officer said to him and, therefore, was not “unconscious, or ‘otherwise in a condition rendering him … incapable of refusal.’” (*Id* at 374 (quoting Vehicle Code § 13353)).

E. Request for Lawyer—Self-Incrimination—No Defense

A refusal to take a chemical test without the presence of the driver’s attorney is deemed an absolute refusal. The collection of a sample or a specimen to determine if a driver is under the influence of drugs or alcohol does not violate the Fifth Amendment’s privilege against self-incrimination. (*Goodman v. Orr* (1971) 19 Cal.App.3d 845, 852-853.) This has been codified at Vehicle Code section 23612(a)(4):

> The officer shall also advise the person that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law. (Emphasis added.)

F. “I Want My Doctor”—No Defense

The driver has the statutory right under Vehicle Code section 23158 to have his or her blood drawn only by licensed, qualified individuals. Hesitation about submitting to the test without first seeing proper identification is not deemed to be a refusal to submit to the test. In *Ross v. Department of Motor Vehicles* (1990) 219 Cal.App.3d 398, the driver agreed to take a blood test. The technician arrived “wearing Levi’s, a wrinkled shirt, and a plaid coat. He sported a beard and looked like he had just gotten out of bed.” (*Id* at 400.) The driver demanded to see identification. The officer offered a breath or urine test instead, but the driver still wanted a blood test. The officer treated this as a refusal. The DMV suspended the driver’s license. The driver unsuccessfully sought a writ and then appealed. The court of appeal reviewed the conditional consent cases (*Kesler v. Department of Motor Vehicles* (1969) 1 Cal.3d 74 and *Goodman, supra*, 19 Cal.App.3d 845) and distinguished this case by pointing out that the driver was merely insisting on protecting his statutory rights (Vehicle Code § 23158)—not imposing conditions on testing. Thus, he did not refuse a chemical test.

Notably, the *Ross* court did not address the issue of available alternative tests (breath or urine).
G. Failure to Complete Test—No Defense

The driver chose a urine test and provided the preliminary void. After waiting for the driver to provide the second sample, the officer advised the driver that he could take a blood or breath test. The driver declined to complete either test. On appeal from an administrative hearing, the driver argued that he did not refuse to be tested and that the officer’s explanation confused him. The court held:

Upon appellant’s [driver’s] inability to comply with the requirements of the statute by providing the second urine sample, he was obliged, upon request so to do, to select another with which he could comply. Not having done so, he refused a “request to submit to a chemical test” (citation) and brought upon himself the penalty of the statute.

(See Caball v. Department of Motor Vehicles (1971) 16 Cal.App.3d 491, 496.)

In 1981, as now, Title 17 of the California Administrative Code required an additional (third) breath sample if the initial two completed breath tests had a difference between them of greater than 0.02. The driver gave two breath samples. One was measured as 0.15, and the other was measured as 0.10. The driver was advised of the administrative regulation but refused to provide a third breath specimen. On appeal from an administrative judge’s finding in favor of the driver, the court of appeal held:

The administrative regulation requiring the taking of at least two samples showing blood alcoholic concentrations differing by no more than 200ths percent is to insure reliability in the testing process and ultimately in the evidence of the degree of intoxication resulting therefrom that may be offered in court if necessary. (Citations omitted.)


A chemical test is not complete until evidence of such reliability has been reasonably obtained. Accordingly, petitioner failed to complete the chemical test of his breath for determination of the alcoholic content of his blood. (Id. at 299.)

Suspicion of intoxication due to drugs or the combination of alcohol and drugs requires a driver to take either a blood or urine test, not a breath test alone. In People v. Roach (1980) 108 Cal.App.3d 891, an appeal from a criminal conviction, the driver was stopped for weaving in traffic. The arresting officer noted needle “tracks” on his arm and suspected drugs might be involved. The driver completed a breath test, which showed a 0.08 BAC. The officer then advised the driver that because of suspected drug use, the driver would have to perform either a blood or urine test. The driver refused to perform any other test. At trial, the driver sought to suppress evidence of his refusing the second test, claiming that he was required to perform only one test under the implied consent law. The court held, “He [the driver] refers us to neither the letter nor spirit of any statute precluding the request for a second sample from a person charged as he was, or the admission of evidence of refusal to supply a second sample as tending to show consciousness of guilt.” (Id. at 893.)
In an appeal from a DMV suspension, the driver (a medical doctor) chose to take a blood test but only if the blood was drawn at a particular hospital. The arresting officer obliged and took the driver to that hospital. When presented with a “Consent to Blood Test” form that required the driver to affirm that he was not “a person who is afflicted with hemophilia or a person who is afflicted with a heart condition using an anticoagulant under the direction of a physician,” the driver refused to sign the form. The driver stated that he was taking medication that affected his bleeding. The arresting officer told the driver such medication prevented a blood test and that the driver would have to select either a breath or urine test. The driver refused to select another test and continued to insist on a blood test. The court of appeal held that the consent form was appropriate as a protection for the hospital and for the driver and did not unnecessarily burden the driver’s choice of a test. The driver’s insistence on a blood test without signing the consent form was a refusal. (See Carrey v. Department of Motor Vehicles (1986) 183 Cal.App.3d 1265, 1271.)

Another example of attempting to manipulate the test procedure can be found in Reyes v. Department of Motor Vehicles (1984) 162 Cal.App.3d 66. In that case, the driver overheard the arresting officer indicate that there was only one remaining specimen container for urine tests. The driver was handed this last specimen container for his test. The arresting officer testified that the driver dropped the container into the toilet, thus contaminating the last container. When offered an alternate test, the driver declined, leading to a DMV suspension. The court determined there was substantial evidence to conclude that dropping the container was an intentional act. Thus, declining an alternate test was a refusal.

H. Insistence on Taking All the Tests—No Defense

A driver cannot avoid taking a test by seeking to take all three tests. In Kesler v. Department of Motor Vehicles (1969) 1 Cal.3d 74, the driver insisted that he wanted to take all three tests to get an “average.” The driver claimed that anything less would not be “scientifically reliable.” The court concluded that the statutory scheme permitted a driver to choose one of three tests but not all three. The driver’s insistence on taking all three tests was a refusal. It would seem that this rule could be extended to insisting on two tests as well.

I. Silence—No Defense

In Lampman v. Department of Motor Vehicles (1972) 28 Cal.App.3d 922, the driver was stopped for DUI and read her Miranda rights. When asked if she understood those rights, she remained silent. The officer then gave her the admonishment for drug and alcohol testing and asked her if she understood those rights. She remained silent. In all, the officer gave the testing admonishment to the driver four times, and the driver never responded. A defendant’s silence in response to repeated requests to submit to a chemical test and/or to choose a test constitutes a refusal. (See Eilinger v. Department of Motor Vehicles (1983) 143 Cal.App.3d 748.)

J. Request to Test After Refusal—No Defense

Because the best evidence of an individual’s blood-alcohol level at the time of the offense depends on completing the test in a timely manner, the court in Cole v. Department of Motor Vehicles (1983) 139 Cal.App.3d 870 held that a motorist may not, when asked to test, refuse the
test and then “at his leisure” complete a test “in his own time.” (See *Skinner v. Sillas* (1976) 58 Cal.App.3d 591.)

If the driver is tested following a refusal, the mere fact that a subsequent test was taken will not negate the earlier refusal. (See *Morgan v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 165; *Dunlap v. Department of Motor Vehicles* (1984) 156 Cal.App.3d 279; and *Barrie v. Alexis* (1984) 151 Cal.App.3d 1157.)

In *Zidell v. Bright* (1968) 264 Cal.App.2d 867, the driver was advised that he must submit to a test of his BAC. He telephoned his attorney and then refused all tests. The arresting officer returned to his duties outside the station. Approximately 35–40 minutes later, the driver reconsidered and requested a test. The arresting officer refused to return to the station, and no test was given. At an appeal of the DMV license suspension, the court held that the state’s implied consent statute did not provide to an accused impaired driver the right to refuse an officer’s request to submit to a chemical test and thereafter demand the test.

**K. Declines to Choose a Test—Possible Defense**

In a case that twists the notion of insistence on taking all three tests, *James v. State ex rel. Department of Motor Vehicles* (1968) 267 Cal.App.2d 750 involves a driver who was “willing” to take any test the arresting officer selected. The arresting officer repeatedly told the driver that it was the driver’s choice. On appeal from the administrative suspension of his license, the driver convinced the court that he did not refuse a chemical test. The court of appeal’s scope of review was limited to deciding if the trial court’s findings were supported by substantial evidence. It was required to resolve all evidence conflicts in favor of the driver and indulge all legitimate and reasonable inferences to uphold the verdict, which favored the driver. In its holding, the court of appeal said, “Since the professed willingness of the licensee to take all the tests, if his testimony is believed, could have been tried out by giving him the one most easily administered, we are not prepared to say that the trial court’s finding is unsupported by substantial evidence.” (*Id.* at 754.) But see *Kesler, supra*, at 77 and Vehicle Code § 23612(a)(2)(A): “If the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her blood or breath and the officer shall advise the person that he or she has that choice.” (Emphasis added.)

**L. Temporary Mental Incompetence—Possible Defense**

Being distracted by pain may not be enough, but experiencing mental difficulties from trauma may be. In *Hughey v. Department of Motor Vehicles* (1991) 235 Cal.App.3d 752, the driver was involved in a motorcycle accident while not wearing a helmet. At the scene, the arresting officer noted that Hughey went from being rational to irrational, from cooperative to combative; he had an odor of alcohol, staggered when he walked, and suffered from lateral nystagmus, but the officer observed no head injury. At the DMV hearing and at trial, Hughey introduced medical records and testimony to show he had suffered a skull fracture and experienced “mental incapacity induced by head trauma.”

The *Hughey* case presents a good review of the holdings in *Plunkett; Thompson; Eilinger; Bush; Maxsted v. Department of Motor Vehicles* (1971) 14 Cal.App.3d 982; and *McDonnell v. Department of Motor Vehicles* (1975) 45 Cal.App.3d 653. *Hughey* recognized that the implied consent law
contemplates a driver being allowed to introduce evidence that he or she was genuinely unable to understand what was happening. As Justice Puglia stated in his concurring opinion, “As I read the statute, it plainly contemplates that there may be occasions when ‘no’ does not mean ‘no,’ i.e., when an express refusal to submit to a chemical test is not a withdrawal of the consent to such testing implied in the act of driving a motor vehicle.” (See Hughey, supra, at 768.)

M. Compelled Blood Test After Refusal—No Defense

If a defendant refuses an alcohol test or fails to complete an alcohol test, can a blood specimen be forcibly extracted? Yes. Can the defendant still be charged with refusal? Yes.

In People v. Sugarman (2002) 96 Cal.App.4th 210, 214, the court set out the three conditions that must exist to forcibly extract a blood specimen.

Under the implied consent law, the defendant may select a breath test instead of a blood test. (Citations omitted.) But “regardless whether the terms of the implied consent statute are met, forcible, warrantless chemical testing may occur under the authority of Schmerber [infra] if [three conditions are met]: the circumstances require prompt testing, the arresting officer has reasonable cause to believe the arrestee is intoxicated, and the test is conducted in a medically approved manner incident to a lawful arrest.” [citing Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 753, 760.]

In Sugarman, circumstances created a need to conduct a warrantless seizure of a blood specimen because the defendant’s breath test had no evidentiary value, and alcohol dissipates from the blood. It was Sugarman’s own failure to complete the breath test that created the “the circumstances require[ing] prompt testing.” (Sugarman, supra, at 214.)

If Sugarman had completed a satisfactory breath test, a court might see the need for a warrantless seizure of a blood specimen differently. This was the case in Nelson v. City of Irvine (1998) 143 F.3d 1196, where breath or urine tests were available, and the defendants agreed to take one of these tests, but the police coerced them into taking blood tests. The federal district court concluded that there was no need to seize a blood specimen because the defendants had agreed to take an available alternative test. The risk of losing evidence by the passage of time was no longer present because a breath or urine test was available. The Nelson court concluded that was unreasonable and, therefore, unconstitutional to seize what the defendants were willing to give. (See also People v. Fiscalini (1991) 228 Cal.App.3d 1639.)

V. Admissibility of Refusal

In 1983, the United States Supreme Court ruled in South Dakota v. Neville (1983) 459 U.S. 553, 564, that the admission into evidence of a refusal to take a blood-alcohol test pursuant to a state statute did not violate the driver’s Fifth Amendment right against self-incrimination. The Supreme Court based its decision on its holding in Schmerber v. California (1966) 384 U.S. 757. Because the state could compel the test under Schmerber, the fact that the state provided a choice between testing and license penalties did not render the test or the choice coercive. As long as the driver was afforded a
choice, no matter how difficult or uncomfortable that choice might be, there was no violation of the privilege against self-incrimination.

Before the issue was addressed in *Neville*, the California Supreme Court had already held that refusal to submit (to a test) is a physical act rather than a communication and for this reason is not protected by the privilege against self-incrimination. (See *People v. Sudduth* (1966) 65 Cal.2d 543.)

*Note:* The defense in a DUI refusal case may point out that the officer had the legal authority to compel a blood test (*Schmerber* and *Sudduth*, supra). In this way, the refusal is disputed by pointing out that the officer did not have to accept a refusal “if he really wanted to prove the driver’s blood alcohol level.” This pits the circumstantial evidence of a refusal against the idea that direct evidence was available to the officer but he or she simply did not take the time or effort to get it. The defense implication is that the officer feared that compelling a blood-alcohol test would show the driver’s innocence. Of course, this line of questioning never asks what the risks are to the officer and the driver from the force needed to compel a blood test. Indeed, the more adamant the driver’s refusal, the more this line of questioning will assist the prosecutor. The risks of injury and unfounded claims of police misconduct are good reasons not to compel blood tests unless the seriousness of the case justifies these risks.

In order to prevent the defense from arguing to the jurors that the officer could have forced a blood draw, the People should bring a motion in limine to preclude such testimony. The grounds would be that such testimony is irrelevant and unduly prejudicial. The first argument should be that it is the defendant’s conduct that is at issue, not the officers. Secondly, the defendant is the person who is suspected of driving under the influence and further has the obligation by law to submit to a chemical test.

The People should point out to the court that the *Schmerber* case is very specific about the set of circumstances that must exist before forced blood draw is instituted. More importantly, if the facts of your case do not meet those circumstances, the People’s position should be that the defense should not have the opportunity to argue and rely on *Schmerber* to ask the officer about forced blood draw. The argument in regards to Evidence Code section 352 is that the probative value if any to allow the defense to argue that there should have been forced blood draw is substantially outweighed by the substantial danger of creating undue prejudice to the People’s case. Allowing the jurors to focus on the officer’s actions instead of the charged defendant would cause undue consumption of time if the court permits the parties to litigate forced blood draw.

Inform the court how much time would be spent by the prosecution outlining how their particular facts do not fall under the *Schmerber* case.

In addition, argue to the court that an inordinate amount of time would be spent in the prosecution’s case explaining the potential danger to the officer and the defendant, if a forced blood draw was conducted. Remember, most judges do not want to spend a lot of time on ancillary issues. If you can persuade the court that indulging in the forced-blood-draw arena will cause unnecessary delay in the trial moving forward, you are off to a good start.

Convince the court that to allow such evidence will result in nothing but confusion to the jurors, especially since the law states that even if there is a forced blood draw after a suspect refuses, the defendant can still be charged with the refusal allegation.
A. Failure to Give Admonishment—Goes to Weight

In *People v. Municipal Court (Gonzales)* (1982) 137 Cal.App.3d 114, 117–119, the arresting officer failed to warn that refusal to take a test would be used as evidence in court. The driver moved to suppress evidence of the refusal, and the trial court granted the motion. The appellate court pointed out that evidence of refusal was not testimonial or communicative and that the privilege against self-incrimination does not extend to real or physical evidence “extracted under compulsion.” The appellate court held that evidence of a refusal was circumstantial evidence of an arrestee’s consciousness of guilt. Therefore, the arresting officer’s failure to advise goes to the weight of such circumstantial evidence, not to its admissibility.

B. Evidence of Refusal—Admissible—Consciousness of Guilt

Refusal, in violation of implied consent law, to take a chemical exam to establish blood-alcohol content is admissible in a prosecution for driving under the influence of alcohol to show consciousness of guilt. This is a question to be answered by the jury as a special finding. (See Vehicle Code §§ 23152(a); 23612; *People v. Williams* (2001) 89 Cal.App.4th 85 [affirmed but criticized by *People v. Williams* (2002) 28 Cal.4th 408].) “Most significantly, defendant refused to take a chemical exam in violation of the implied consent law. This refusal was admissible to prove defendant’s consciousness of guilt, and the jury was so instructed.” (*Williams*, supra, 89 Cal.App.4th at 101; see also *People v. Bury* (1996) 41 Cal.App.4th 1194, 1200.)

VI. Evidence Code Section 1101(b)—Prior Knowledge

Assume you are prosecuting a DUI refusal case with a prior DUI conviction alleged. You come to learn that the facts of the prior case reflect that the defendant refused a chemical test in that case as well. You are certain that the defendant at trial will contend his refusal was a product of his confusion, mistake, or lack of knowledge. Or assume a defendant with prior arrest or conviction for driving under the influence of alcohol or drugs took and failed field sobriety tests in connection with that prior event. In trial on his present case, the defendant is now contending that he did not do well on the field sobriety tests because of his unfamiliarity with them.

You are satisfied that if the events of the defendant’s prior DUI episode were known by your jurors, they would understand that the defendant’s actions in your case were not the product of some mistake or confusion, but an intentional act motivated by a knowing interest in avoiding additional evidence of guilt. Is there any legal authority that will permit you to introduce the defendant’s past experience as evidence of his motive and intent to refuse chemical tests or knowledge of the field sobriety tests?

Evidence Code section 1101(b) provides:

Nothing in this section prohibits the admission of evidence that a person [previously] committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident …) other than his or her disposition to commit such an act. [Bracketed word and emphasis added.]
Unless the defendant takes some action to narrow the prosecution's burden of proof (i.e., admitting the allegation of refusal prior to trial), his or her not-guilty plea to all charges places all material facts and elements of the crime in issue. Therefore, evidence of a prior DUI-related event such as a refusal or FST performance or completed chemical test (i.e., participation only, not the actual test results) should be admissible as both material and relevant to demonstrate a defendant's knowledge, motive, intent, plan, or absence of mistake with regard to pertinent facts or events in the open DUI case. In other words, if a defendant's prior actions will prove a disputed element to the jury by explaining why the defendant did what was done in the instant case, then the information should be admitted. Be careful in how you attempt to introduce evidence of the defendant's prior DUI history. Consider that *People v. Weathington* (1991) 231 Cal.App.3d 69 held it was reversible error not to bifurcate the trial on prior DUI convictions.

But the California Supreme Court noted:

> We have long recognized “that if a person acts similarly in similar situations, he probably harbors the same intent in each instance,” and that such prior conduct may be relevant circumstantial evidence of the actor’s most recent intent. The inference to be drawn is not that the actor is disposed to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.


**VII. Department of Motor Vehicle Hearings**

**A. Not Double Jeopardy**

Arrest for DUI starts the DMV process for either a license suspension or an administrative hearing. The driver has 10 days to notify DMV of his or her desire to have an administrative hearing, at which time the driver can contest the arrest and/or refusal. The Vehicle Code makes it clear that these administrative proceedings are not part of the criminal adjudication.

Vehicle Code section 13353.2(e):

> The determination of the facts in subdivision (a) is a civil matter which is independent of the determination of the person’s guilt or innocence, shall have no collateral estoppel effect on a subsequent criminal prosecution, and shall not preclude the litigation of the same or similar facts in the criminal proceeding.

In *Rivera v. Pugh* (9th Cir. 1999) 194 F.3d 1064, defendant Rivera was charged with, among other things, driving while intoxicated and refusing to submit to a chemical breath test. The State of Alaska’s DMV conducted an administrative hearing and, because Rivera had refused to take a chemical breath test, revoked Rivera’s Alaska driver’s license for 90 days. Rivera moved to dismiss the pending criminal charges on the ground that the revocation of his driver’s license by the DMV was punishment and that any further punishment would violate the Constitution’s protection against double jeopardy. The court noted that the Alaska Legislature gave the DMV
administrative review a civil label, and administrative license revocation was remedial in nature; therefore, subsequent criminal prosecution on the same grounds was not barred by double jeopardy.

B. No Collateral Estoppel to Criminal Prosecution

In DUI refusal cases, the arresting officer will submit a sworn statement regarding the detention, arrest, and refusal to the DMV. Upon receipt of the sworn statement, the DMV will conduct an administrative review to determine if the person’s license should continue to be suspended, revoked, or reinstated. The person may be entitled to a DMV administrative hearing to contest the order of suspension or revocation. The DMV review and hearing will determine if the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Vehicle Code section 23140, 23152, or 23153, whether the person was placed under arrest or lawfully detained under section 23136, and whether the person had refused to submit to or did not complete the test or tests after being requested by the officer.

DMV administrative reviews and hearings frequently are conducted prior to the commencement of a criminal prosecution. DMV findings or conclusions that the driver did or did not refuse a chemical test have no effect on the subsequent prosecution. Vehicle Code changes made effective July 1, 1999, clarified previous judicial findings regarding the issue of collateral estoppel. It is now clear that DMV proceedings have no collateral estoppel effect on any subsequent criminal proceeding regarding the refusal. (See Vehicle Code §§ 13353; 13357; 13358.)

C. Criminal Prosecution and DMV Hearings

If the DMV administrative hearing precedes the criminal trial, the criminal trial outcome may affect the DMV hearing. When a criminal case is rejected, dismissed, or the defendant is acquitted, the defendant may be entitled to another administrative hearing with DMV.

Vehicle Code section 13353.2(e):

Notwithstanding subdivision (b) of Section 13558, if criminal charges under Section 23140, 23152, or 23153 are not filed by the district attorney because of a lack of evidence, or if those charges are filed but are subsequently dismissed by the court because of an insufficiency of evidence, the person has a renewed right to request an administrative hearing before the department. The request for a hearing shall be made within one year from the date of arrest.

(See also Gikas v. Zolin (1993) 6 Cal.4th 841.)

Vehicle Code section 13353.2(f):

The department shall furnish a form that requires a detailed explanation specifying which evidence was defective or lacking and detailing why that evidence was defective or lacking. The form shall be made available to the person to provide to the district attorney. The department shall hold an administrative hearing, and the hearing officer shall consider the reasons for the failure to prosecute given
by the district attorney on the form provided by the department. If applicable, the hearing officer shall consider the reasons stated on the record by a judge who dismisses the charges. No fee shall be imposed pursuant to Section 14905 for the return or reissuing of a driver’s license pursuant to this subdivision. The disposition of a suspension action under this section does not affect any action to suspend or revoke the person’s privilege to operate a motor vehicle under any other provision of this code, including, but not limited to, Section 13352 or 13353, or Chapter 3 (commencing with Section 13800).

D. Evidence from DMV Hearings—Use at Trial

The DMV encourages telephonic hearings, which are easy and cost effective. In-person hearings can be scheduled, and the officer and other witnesses can be subpoenaed to testify under oath. The hearing officer is usually not an attorney and acts as prosecutor and judge. The defense attorney is entitled to cross-examine the officer and other witnesses without strict adherence to the Evidence Code. This examination is similar to a deposition covering probable cause, field sobriety tests, observations, objective symptoms, statements, Title 17, and other relevant issues. The defendant may be called as a witness or may testify voluntarily, but will not usually be compelled to testify. These hearings are tape-recorded, and a transcript can be prepared. Testimony at the hearing may be used to impeach that same witness at trial.

*Note:* Always ask your witness officers if they have testified at a DMV hearing. These hearings are often used by defense counsel as an opportunity to examine the arresting officer without a prosecutor present and with few, if any, rules of evidence. Do not be surprised in your trial by the officer’s DMV testimony. You should always be on the alert that a DMV hearing may have been conducted when you are prosecuting a defendant who has retained a private defense attorney. Public defenders do not generally represent defendants at DMV hearings or assist them in any manner with a DMV hearing.

If your officer has testified at a DMV hearing, make sure you ask the officer whether he or she read the arrest report before testifying. Most often the officer has not read the report, thus was at a tremendous disadvantage at the hearing. Also, as mentioned, these hearings are sometimes telephonic, which obviously puts the officer at a disadvantage because his or her credibility cannot be accurately assessed by the DMV hearing officer. If your officer informs you that he or she did not read the report before testifying at the DMV hearing, make sure you point this out in a subsequent trial if necessary. This will allow the jurors to understand that the officer is not necessarily being untruthful about the facts in the case, but maybe just did not remember certain details because he or she did not read the report before testifying.

The prosecutor should also point out to the jurors that the officer did not have the advantage of having a prosecutor present at the hearing to monitor the questions that were being asked by the defense and the DMV hearing officer. The jurors will begin to understand that the DMV hearing was being used by the defense in an attempt to create reasonable doubt in the criminal trial.

It is helpful to the prosecution to inform the court that a DMV hearing took place, because it puts the court on notice that there might be additional testimony elicited by both parties, which could cause the trial to be longer than needed.
You should also bring a motion in limine to limit the questions that the defense will ask your officer at the jury trial. You want to make sure that irrelevant information is not put forth before the jury.

The prosecution should be prepared to request from the defense authentication of any tape recordings and transcripts from the DMV hearing that will be used in the jury trial against the officer.

Obviously impeachment material is not generally discoverable, however if the defense plans to impeach the officer with transcripts, the People need to be confident that the transcripts state what the recording from the DMV says. Be aware that the defense commonly uses someone in their office to transcribe the material instead of a certified court reporter. This should be a concern raised to the court.

Most judges, once put on notice that DMV hearing evidence will be used, will narrow the focus by the defense and will require the defense to provide reliable evidence of impeachment. Most courts will not allow defense attorneys to spring DMV recordings and transcripts on the People right before the officer testifies. Object by way of motion in limine to any findings by the DMV regarding the defendant’s hearing. There are times when the defendant was successful at his DMV hearing. This success has no bearing or relevance on the criminal prosecution for DUI. Do not allow the defense to put this before the jury. This is an example of irrelevant cross examination. This is why it is important to handle these issues by way of a motion in limine.

If the defendant driver attended an administrative hearing and was called to testify, an audiotape of the proceedings could be very useful. It may give you a preview of the defendant’s testimony. Often, the defendant’s testimony may also be used as impeachment evidence at trial.

**VIII. Pleading DUI Refusal**

CDAA’s 2001 Uniform Crime Charging Manual provides preferred language for Vehicle Code section 23577:

**Special Allegation: Refusal of Chemical Test**

It is further alleged that the defendant, in violation of Vehicle Code section 23577, refused a peace officer’s request to submit to, and willfully failed to complete, a chemical test.

**A. Approved “Refusal” Jury Instructions**

1. **CALCRIM 2130: Refusal—Consciousness of Guilt**

   The law requires that any driver who has been lawfully arrested submit to a chemical test at the request of a peace officer who has reasonable cause to believe that the person arrested was driving under the influence.

   If the defendant refused to submit to such a test after a peace officer asked him or her to do so and explained the test’s nature to the defendant, then the defendant’s
conduct may show that he or she was aware of his or her guilt. If you conclude that the defendant refused to submit to such a test, it is up to you to decide the meaning and importance of the refusal. However, evidence that the defendant refused to take such a test cannot prove guilt by itself.

2. CALCRIM 2131: Refusal—Enhancement

Willful Refusal To Take Or Complete Tests Regarding Driving Under the Influence (Vehicle Code §§ 23612 & 23577)

In addition to the crime(s) charged, it is alleged that after defendant’s lawful arrest for driving while under the influence of alcohol or a drug or both, the defendant, in violation of section 23577 of the Vehicle Code, “willfully refused to submit to” or “willfully failed to complete” the chemical test(s) requested by a peace officer pursuant to Vehicle Code section 23612. In order to prove the truth of the allegation, each of the following must be proved:

1. A peace officer asked the defendant to take a blood, breath, or urine test to determine the alcohol or drug content of his or her blood.
2. The peace officer advised the defendant that he or she had a choice of which test to take subject to certain exceptions.
3. The peace officer advised the defendant that his or her failure to take, or failure to complete, the chemical testing would result in a fine, mandatory imprisonment if convicted of driving under the influence, a violation of Vehicle Code section 23152 or 23153, and
   (a) the suspension of defendant’s privilege to operate a motor vehicle for a period of one year;
   (b) the revocation of his or her privilege to operate a motor vehicle for two years if the refusal occurs within 10 years of a separate conviction of:
      (i) driving under the influence pursuant to Vehicle Code section 23140, 23152, or 23153; or
      (ii) reckless driving reduced from driving under the influence (pursuant to Vehicle Code § 23103, as specified in § 23103.5); or
      (iii) vehicular manslaughter while driving under the influence (pursuant to Penal Code §§ 191.5 or 192(c)(3); or
   (iv) if defendant’s privilege to operate a motor vehicle has been suspended or revoked pursuant to an administrative determination (under Vehicle Code sections 13353, 13353.1 or 13353.2) that he or she refused testing or was driving with an excessive concentration of alcohol on a separate occasion; or
   (c) a revocation of his or her driving privilege for three years if the refusal occurs within 10 years of two or more separate convictions of:
      (i) driving under the influence pursuant to Vehicle Code section 23140, 23152, or 23153; or
      (ii) reckless driving reduced from driving under the influence (pursuant to Vehicle Code § 23103, as specified in § 23103.5); or
      (iii) vehicular manslaughter while driving under the influence (pursuant to Penal Code §§ 191.5 or 192(c)(3)); or
(iv) any combination thereof; or
(v) if his or her privilege to operate a motor vehicle has been suspended
or revoked two or more times pursuant to an administrative determination (under
Vehicle Code §§ 13353, 13353.1 or 13353.2) that he or she refused testing or
was driving with an excessive concentration of alcohol on separate occasions; or
if there is any combination of those convictions or administrative suspensions or
revocations.

4. The peace officer advised the defendant that he or she did not have a right
to have a lawyer present before stating whether or not he or she would submit to
testing, or before deciding which test to take, or during any test;

5. The peace officer advised the defendant that if he or she refused to submit
testing, the refusal may be used against him or her in a court of law; and

6. The defendant willfully refused to take or willfully failed to complete the
test or tests as required by law.

If you find that defendant is guilty of driving a vehicle while under the influence
of alcohol or with 0.08 percent alcohol in his or her blood, or while under the
influence of a drug, in violation of Vehicle Code section 23140, 23152, or 23153,
you shall also determine whether or not he or she willfully refused or willfully
failed to complete the test or tests as requested by a peace officer.

If you have a reasonable doubt as to whether the allegation is true, you must find it
to be not true.

Include a special finding on that question in your verdict, using a form that will
be supplied for that purpose. Compliance with the provisions of Vehicle Code
section 23612 requires that the defendant complete, not merely attempt, one
of the possible required tests. You are the sole judge of whether the defendant
completed the test(s).

3. CALCRIM 2131: Choice of Tests

If the defendant is incapable, or states that he or she is incapable of completing
the chosen test, the defendant must choose and submit to one of the remaining
tests, and the peace officer must advise the defendant of that right.

A defendant who chooses to submit to a breath test may also be requested to
submit to a blood or urine test if the officer has reasonable cause to believe that
the defendant was driving under the influence of any drug or the combined
influence of an alcoholic beverage and any drug, and if the officer has a clear
indication that a blood or urine test would reveal evidence of the defendant’s
being under the influence. The officer must state in his or her report the facts upon
which that belief and that clear indication were based. The defendant has a right
to choose whether to submit and complete the blood or urine test; the officer must
advise the defendant that he or she is required to submit to an additional test
and that he or she may choose a test of either blood or urine. If the defendant is
incapable, or states that he or she is incapable of completing either chosen test, the defendant must submit to and complete the other remaining test.

If the defendant, following arrest, was in need of medical treatment, and was first transported to a medical facility where it was not feasible to administer a particular test of, or to obtain a particular sample of, the defendant’s blood, breath, or urine, the defendant has the choice of those tests which are available at the facility to which that person has been transported. In that event, the officer must advise the defendant of those tests that are available at the medical facility and that the defendant’s choice is limited to those tests that are available.

IX. Trial Tactics

A. Jury Voir Dire

Here is your chance to educate the jury. The best place to start is the refusal documentation prepared by the arresting agency. Use a show of hands to highlight the questions in this paperwork. For instance, ask the jurors to raise their hands in response to, “Does anyone on the jury believe that a person being offered a blood-alcohol test has the right to have an attorney present before deciding what test, if any, to take?” Because this is clearly not the law, the prosecutor can educate the jurors to the law while spinning the facts of the case. Be innovative, and create questions for each of the admonitions given by the officer.

Jury selection is a very important phase of every DUI trial, but it is especially important in a DUI refusal case. Why? In a DUI refusal case, the People will not present evidence of a chemical test showing how much alcohol was in the defendant’s system. In light of this fact, your weapon as a prosecutor is the officer’s credibility and experience. Let’s face it, most people are more comfortable drawing the conclusion that a person was under the influence of alcohol if they have a chemical test of the defendant’s blood to support their finding. As prosecutors, we know that it is somewhat of a challenge to prove a DUI refusal case; therefore we must use the best evidence that we do have in order to convince the jurors that the defendant was in fact driving under the influence of alcohol. The best evidence that a prosecutor has in a DUI refusal case is the officer’s credibility and experience.

Your voir dire should primarily be designed to find jurors who do not need a chemical test to convict a person of driving under the influence of alcohol. One of the ways you find such jurors is to ask if any of them have ever seen someone who they believed were intoxicated due to alcohol? Of course, you will get most, if not all, of the prospective jurors to answer in the affirmative. Next, ask what type of symptoms they noticed. It should not be a surprise that the jurors will note most, if not all, the symptoms that your officer will eventually testify to. You are off to a great start. Ask the jurors if they tested the intoxicated person to determine their blood alcohol level. Of course they did not. I think you get the point. You have set the stage that any lay person can tell when a person is intoxicated due to alcohol; certainly a trained officer can recognize when a person is under the influence of alcohol.

Next, you want to make sure you have identified prospective jurors who have had negative experiences with police officers. This is very important because it goes back to using your
credibility weapon. If you have prospective jurors who have had bad experiences with police officers, it is a great likelihood that the officer testifying in your case will not be believed by those jurors if selected. Remember, you do not have an independent chemical test to show how much alcohol was in the defendant’s system; therefore, the jurors must trust your arresting officer. Is it likely that the jurors will trust police officers after having a bad experience with one? The answer is no. Of course, you have the rare prospective juror who could end up being good for your case, but it is not worth the risk if you can accept a juror who does not have a predisposed prejudice against police officers. You also want to select jurors who have a respect for the specialized training that officers go through to detect when someone is under the influence of alcohol. You might ask a question like, “Does everyone here agree that a trained officer in detecting DUI symptoms should be able to determine when someone is under the influence?” This question should help you identify the prospective jurors who still need a chemical test of the defendant’s blood to be confident in the officer’s testimony. On the other hand, this question opens the door for you to find jurors who respect training and experience, and who will rely on such to come to the conclusion that the defendant was under the influence of alcohol.

Do not underestimate the importance of jury selection in a DUI refusal case. You want to ultimately be able to point out in your closing argument that your officer is trained in detecting DUI symptoms, trained in conducting FSTs and interpreting the results, and was professional and credible in the way and manner that the investigation was conducted. This is why an officer’s credibility and experience is your best weapon in a DUI refusal case.

After you have introduced enough evidence to prove the corpus of the offense, it is time to consider the statements of the defendant. Was there an admission by the defendant? What language was used? Was the defendant cursing or disruptive? Remember, the most damaging evidence against the defendant is often the statements from his or her own mouth.

Be sure to repeat every damaging statement uttered by the defendant. Do not hesitate to state exactly what the defendant said to the jurors, even the cursing that may have been used. The defendant’s demeanor is always important in a jury trial. It is always a bonus if the defendant testifies and displays the nasty behavior on the witness stand that was shown in the field with the officer. Most people do not appreciate vulgar language, so you might want to explore areas in voir dire that will give you a sense of the jurors’ feelings on strong language. You can even relate that strong or offensive language to the consciousness of guilt instruction. For example, if the defendant said to the officer, “I won’t take your f***ing test,” this is pretty powerful to show not only the defendant’s nasty demeanor, but also shows consciousness of guilt.

B. Opening Statement

OK, so this is a refusal, and there is not much to prove, right? Wrong. Use the driver admonition to set up the facts. For instance, “I’m going to show you that this defendant had every opportunity to take and complete a blood-alcohol test. Officer Smith will testify that he was the arresting officer and that he used a checklist to make sure that this defendant was given every opportunity.” Refusal is an action that communicates consciousness of guilt. This is very powerful information—use it!
REFUSAL CHECKLIST

WAS THERE:

• Probable cause to believe the defendant was driving under the influence?
• A lawful arrest for an offense under Vehicle Code section 23140, 23152, 23153, or 23136(a)?

IF SO, WAS THE DEFENDANT TOLD:

• That failure to submit to or complete a chemical test will result in:
  • a fine and mandatory imprisonment if convicted, and
  • a one-year license suspension, or
  • a two-year license revocation if, in the preceding 10 years, the defendant was convicted of a separate violation of Vehicle Code section 23103 (see § 23103.5); or of Vehicle Code section 23140, 23152, 23153, or Penal Code section 191.5 or 192(c)(3); or had his or her license suspended or revoked pursuant to Vehicle Code section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion, or
  • a three-year license revocation if, in the preceding 10 years, the defendant was convicted of any combination of (i) two or more separate violations of Vehicle Code section 23103, as specified in Vehicle Code section 23103.5, or of Vehicle Code section 23140, 23152, 23153, or Penal Code section 191.5 or 192(c)(3); or (ii) two or more separate license suspensions or revocations pursuant to Vehicle Code section 13353, 13353.1, or 13353.2; or (iii) any combination of two or more of the convictions or administrative suspensions or revocations described in (i) and (ii)?
• That refusal to submit to the test may be used against him or her in court?
• That he or she is not entitled to consult with an attorney before deciding to take a test, which test to take, or while taking the chosen test?

WHEN DRUGS ARE SUSPECTED, WAS THE DEFENDANT TOLD:

• If suspected of drug use, that he or she will also be required to take a blood or urine test?
• If testing for drug use, does the report state facts that reasonably support a suspicion of drug use—justifying the blood or urine test for drugs?

Remember when prosecuting a DUI refusal case, your first obligation is to prove your DUI charge. If you don not prove your DUI charge, the refusal allegation is really of no consequence.

Thomas Reeves was elected Long Beach City Prosecutor in July 1998. The Long Beach City Prosecutor’s Office has an annual budget of $4.1 million and 41 employees. The City Prosecutor’s Office is responsible for prosecuting all adult misdemeanors and infractions in Long Beach. The office prosecutes approximately 25,000 misdemeanor offenses each year. Prior to his election, Mr. Reeves was a Principal Deputy City Attorney in the Long Beach City Attorney’s Office. There, he supervised a staff of 16 with responsibility for all city litigation. He was personally responsible for all federal civil rights litigation in both state and federal courts. Mr. Reeves is a Lieutenant Colonel in the Air National Guard and presently serves as the Staff Judge Advocate for the 146th Airlift Wing. He began his military career in 1966 and served almost 10 years on active duty. In 1996, Mr. Reeves was activated for a six-month tour in Bosnia-Herzegovina. He served as the Legal Advisor for the International Police Task Force.
in Sarajevo. Mr. Reeves obtained his Bachelor of Arts degree in Political Science at California State University, Long Beach. He earned a Juris Doctor degree from the Southwestern University School of Law.

Michelle Gardner is a Deputy City Prosecutor for the City of Long Beach and has been employed as such since 1999. She prosecutes general misdemeanor crimes, including all driving under the influence cases occurring in the Long Beach city limits. Prior to being assigned to general-crimes prosecution, she worked in the Domestic Violence Unit and prosecuted relationship-abuse, child-abuse, and elder-abuse cases. Ms. Gardner attended the University of Southern California, where she received her Bachelor of Science degree in Public Administration. She subsequently attended Chapman University School of Law, where she received her Juris Doctor degree.

Justin Houterman is a Deputy City Prosecutor for the City of Long Beach. Currently, his job is to prosecute all general misdemeanor crimes occurring within the jurisdiction of Long Beach, including all driving-under-the-influence cases. Before taking on his current responsibilities, he worked as Counsel for Congressman Steve Kuykendall. There, he had the opportunity to serve the residents of Los Angeles’s South Bay—his home. Mr. Houterman is a graduate of the University of Southern California. It was there he received his Bachelor of Arts degree, having completed a double major in American Literature and Political Science. He then worked for a year at the Los Angeles Business Journal as a researcher before attending and graduating from the University of California Hastings College of the Law.

Felicia Liberman is a Deputy City Prosecutor for the City of Long Beach. Currently, she is assigned to prosecuting general crimes occurring within the Long Beach city limits, including misdemeanor driving-under-the-influence cases. Before working for the City of Long Beach, she practiced dependency law representing abused and neglected children in Los Angeles County. Ms. Liberman earned her Bachelor of Arts degree in Political Science, with an emphasis in Environmental Policy, from California State University, San Marcos. Later, she attended Southwestern University School of Law, where she earned her Juris Doctor degree.

Chapter Updated in 2010 by Rosalind Russell-Clark, TSRP: Rosalind Russell-Clark has an AA in Administration of Justice from Southwest College, a BS in Criminal Justice from California State University Los Angeles, and a JD from the University of West Los Angeles School of Law. She has served as an instructor at the University of West Los Angeles School of Law on a variety of subjects, focusing primarily on criminal law. The CalTSRP for Los Angeles and Ventura, she currently works for the Los Angeles City Attorney’s Office. In her 20 years as a prosecutor, she has handled more than 75 DUI jury cases, including ones with notable defendants. Ms. Russell-Clark is also the director of a free legal clinic at her church in Carson.
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Chapter IV

Using and Defending Prior Convictions

by Carey Shimon, Deputy District Attorney
Sonoma County District Attorney's Office

and

Larry Ornell, Deputy District Attorney
Sonoma County District Attorney's Office

(Updated 2010 by Daniel Fox, TSRP, Southern California and Inland Empire)

Unfortunately, all too often, our driving under the influence (DUI) and Vehicle Code section 14601 defendants are “repeat customers.” Meaning: they have DUI and 14601 convictions predating the present offense bringing the defendant to our attention. When the People seek to use these prior convictions either as pled enhancements, predicates, for impeachment, or at the time of sentencing, the repeat defendant may exercise his or her judicially created privilege to challenge the constitutional validity of the prior conviction. When the defendant does, the People need to be ready to defend the prior conviction.

I. Prior Convictions

A. What Is a Prior Conviction?

A prior conviction can be the result of a plea or trial. Prior convictions come in two varieties: in-state priors and out-of-state priors.

1. In-state DUI priors are convictions that the defendant has suffered within California for violations of Vehicle Code sections 23103.5, 23152, 23153; Penal Code sections 191.5, 192(c)(3) prior to 2007; or Harbors and Navigation Code section 655. In-state section 14601 priors are convictions that the defendant has suffered within California for violations of Vehicle Code sections 14601.1, 14601.2, or 14601.5.

2. Out-of-state priors are convictions that the defendant has suffered where the law of the reporting state is substantially the same as California's. (See Driver License Compact, Vehicle Code §§ 15000 et. seq.) This includes “any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Dominion of Canada” (§ 23626).


**B. Prosecution Use of a Prior**

Prior convictions can be pled and proven as enhancements, serve as predicate crimes in current cases, be used for impeachment, and be considered by the court at the time of sentencing (assuming a conviction relevant to the case at hand).2

If the People seek to use the prior conviction only as a sentencing consideration, then no time limit is placed on its use. It gets staler as it gets older, but it never expires. However, if the People seek to plead and prove the prior as an enhancement, then there are strict time frames during which the prior may be so employed.

**C. What Is the Priorable Enhancement Period?**

A prior violation of Penal Code section 191.5 or 192(c)(3) (prior to 2007) resulting in a felony conviction is a permanent prior that never expires.

A DUI conviction for Vehicle Code sections 23103.5, 23152, 23153, or Harbors and Navigation Code section 655 is priorable for a period of 10 years from the date of the violation for the purposes of charging as an enhancement. The priorable 10-year period runs from the date of violation for the prior to the date of violation for the present offense. The chronological sequence of the violations is not significant. *(People v. Snook* (1997) 16 Cal.4th 1210.)*

A prior violation of Vehicle Code sections 23152, 23153, or Penal Code section 192(c)(1) resulting in a felony conviction is also priorable for 10 years. In addition, the prior felony conviction causes the present Vehicle Code section 23152 or 23153 to become a wobbler, chargeable as a felony. (See Vehicle Code § 23550.5.)

A section 14601 conviction is priorable for a period of five years from the date of violation for the purposes of charging as an enhancement.

**II. Challenges to a Prior**

**A. Court Cannot Strike Alleged DUI Priors**

Once alleged by the People, a prior DUI conviction can only be disposed of by: (1) a failure of the People to prove the prior beyond a reasonable doubt; (2) a dismissal of the allegation by the People; or (3) a successful challenge to the validity of the prior by the defendant.

A court cannot on its own motion strike an alleged prior. (Vehicle Code § 23622(a).) In fact, when presented with an allegation of a prior DUI conviction, “[T]he court shall obtain a copy of the driving record of the person charged from the Department of Motor Vehicles and may obtain any records from the Department of Justice or any other source ….” (Vehicle Code § 23622(b)), 2. We will not discuss here the use of “prior DUI conduct” pursuant to section 1101(b) of the Evidence Code.
and “[i]f any separate convictions of violations of Section 23152 or 23153 are reported to have occurred within 10 years of the charged offense, the court shall notify each court where any of the separate convictions occurred for the purpose of enforcing terms and conditions of probation pursuant to Section 23602.” (Vehicle § 23622(c).)

B. Challenging a Prior Conviction

There are two distinct ways by which a defendant can challenge a prior conviction. The first is a direct challenge. The second is a collateral challenge.3

1. Direct Challenge

Direct challenges to convictions occur when a defendant seeks by some process (appeal, writ, motion) to vacate a judgment (or a conviction before judgment is imposed) in that case. By necessity, direct challenges require a pre-existing conviction or a final judgment.

Direct challenges are not pretrial motions. As such, they do not lie when the People seek to use a prior conviction as an enhancement or sentencing consideration. If the defense attempts to bring a direct challenge as a pretrial motion, then the People should ask the court to reject the motion on the basis of improper jurisdiction (if brought in a court other than that in which the conviction was suffered) or it being an improper appeal or writ (i.e., the motion must be made in the conviction case not the pending case).

In a direct challenge, the defendant must bring the motion or writ in the court that heard the matter or, if an appeal, in the appropriate appellate court. The defendant bears the burden from the outset, and both the defendant or appellant and the People or respondent are limited to the record of conviction. However, the legal issues that can be raised in the attack go well beyond those that can be raised in a collateral attack.

If successful, the conviction or judgment is vacated and no longer exists. However, the prosecution may then re-prosecute the defendant for the offense set forth in the overturned conviction.

Note: It would appear that a direct attack is the only method of overturning a conviction or judgment resulting from a trial on the merits of the prior offense.

2. Collateral Challenge

When a defendant challenges the constitutional validity of a prior conviction in a case other than the one in which the conviction occurred, it is deemed to be a collateral challenge. A collateral challenge is a “judicially established rule of criminal procedure” created “in the interest of efficient judicial administration.” (People v. Allen (1999) 21 Cal.4th 424, 429, 430.) As such, it is limited in scope to four enumerated constitutional errors: one Gideon error (denial of Right to Counsel) and three Boykin-Tahl errors (denial of Right to Jury, Right

to Confront Witnesses, or Right Against Self-Incrimination). No other claims of error or prejudice are permitted in a collateral challenge.

In DUI and Vehicle Code section 14601 prosecutions, the procedure for collaterally challenging a prior is set forth by statute.

III. Collateral Challenge Statutes

A. Vehicle Code Section 41403

Section 41403 sets forth the burdens and procedures for collaterally challenging prior DUI and 14601 convictions.

First, the defendant must

state in writing and with specificity wherein the defendant was deprived of the defendant’s constitutional rights … wherein the [motion] shall be filed with the clerk of the court and a copy served on the court that rendered the judgment and on the prosecuting attorney in the present proceedings at least five court days prior to the hearing thereon.

(Vehicle Code § 41403(a).)

Simply filing the motion does not guarantee a hearing on the merits. The motion must be sufficient on its face to warrant a hearing.

Assuming the defendant succeeds in having a hearing on the merits of the motion, the prosecution bears the initial burden of producing evidence “sufficient to justify a finding that the defendant has suffered that separate conviction.” (Vehicle Code § 41403(b)(1).)

Once that prima facie showing has been made by the prosecution, the burden shifts to (and remains with) the defendant. The defendant must prove “by a preponderance of the evidence that the defendant’s constitutional rights were infringed in the separate proceeding at issue.” (Vehicle Code § 41403(b)(2).)

The defendant must “provide the court with evidence of the prior plea, including the court docket, written waivers of constitutional rights executed by the defendant, and transcripts of the relevant court proceedings at the time of the entry of the defendant’s plea.” (Vehicle Code § 41403(b)(2).)

“If the defendant bears this burden successfully, the prosecution shall have the right to produce evidence in rebuttal.” (Vehicle Code § 41403(b)(3), implying that the court should make a preliminary finding as to whether the defendant has been successful.) Then “the court shall make a finding on the basis of the evidence produced and shall strike from the accusatory pleading any separate conviction found to be constitutionally invalid.” (Vehicle Code § 41403(b)(4).)
Section 41403(c) provides that if the defendant fails to comply with the above notice and production requirements, the court “shall hear the motion at the time of sentencing.” The trial in the new case shall be continued only if “good cause is shown” and then only for a “reasonable period.”

B. Vehicle Code Section 23624

Only one challenge shall be permitted to the constitutionality of a separate conviction of a violation of Section 14601, 14601.2, 23152, or 23153, which was entered in a separate proceeding. … [A] determination by the court that the separate conviction is constitutional precludes any subsequent attack on constitutional grounds …. In addition, any determination that a separate conviction is unconstitutional precludes any allegation or use of that separate conviction in any judicial or administrative proceeding, and the [DMV] shall strike that separate conviction from its records.

Thus, the defendant and the People get only one shot at eliminating or preserving the prior no matter where in the state the challenge is brought.

IV. Defeating a Collateral Challenge

When a defendant moves to challenge a prior, he or she becomes the protagonist. The prosecution finds itself cast in the unfamiliar role of defending the status quo. Lucky for us, the best defense is a good offense!

A. Pre-Hearing Defenses to a Collateral Challenge

Since criminal convictions are presumed valid, the defendant does not automatically get a hearing on the merits simply by moving to the prior conviction. The defendant must surmount a number of preliminary hurdles prior to earning a hearing on the merits. Failure to clear these hurdles dooms the defendant’s collateral challenge.

1. Notice

Per Vehicle Code section 41403(a), a defendant must provide notice of the collateral challenge to the court that rendered the prior conviction. The California Supreme Court has held that the rendering court is an indispensable party to an attack on its judgment. (Thomas v. Department (1970) 3 Cal.3d 335.) If the defendant fails to give proper and timely notice to all parties, then the motion should be denied (or at least delayed.)

2. Res Judicata

A defendant is only entitled to collaterally challenge a prior once. A defendant is not entitled to make separate challenges on separate constitutional bases. The defendant’s DMV record should reflect if the prior had been previously challenged. (A code “9” is used.) If it does, then the present court should deny the defendant’s motion immediately.
3. Specificity and Sufficiency

One of the highest hurdles for the defendant is the specificity and sufficiency of the constitutional deprivation claimed in the motion. “A successful collateral attack on a prior conviction requires an allegation and a showing of actual prejudice from any Boykin–Tahl error.” (People v. Harty (1985) 173 Cal.App.3d 493, 502.) “The defendant must file a written motion stating with specificity how he or she was deprived of a constitutional right.” (People v. Superior Court (Almaraz) (2001) 89 Cal.App.4th 1353, 1356.) The defendant must allege that he or she was not advised of and did not intelligently or voluntarily waive a constitutional right, and had the defendant known of this right, a plea of guilty or no contest would not have been entered. (Mills v. Municipal Court (1973) 10 Cal.3d 288, 299–300.) Conclusory or incomplete allegations do not justify a hearing. (People v. Soto (1996) 46 Cal.App.4th 1596, 1606.) A claim of incomplete or defective advisement is not enough. (People v. Hayes (1990) 52 Cal.3d 577.) A defendant who does not remember having been advised “fall[s] leagues short of meeting the appellant’s burden.” (Ganyo v. Municipal Court (1978) 80 Cal.App.3d 522, 532.) Alleging the record is silent or does not show an advisement of rights does not merit a hearing. (People v. Sumstine (1984) 36 Cal.3d 909, 921–924.) A defendant must specifically plead all of the following: (1) There was no waiver of constitutional right(s) before pleading, and (2) he or she was actually unaware of the right(s), and (3) he or she would not have pled guilty had those right(s) been known. (People v. Allen (1999) 21 Cal.4th 424, 436, fn. 3)

4. Invalid Claims

Defendants often attempt collateral challenges based upon claims that are improper for this judicially created rule of convenience. Only claims founded in the four constitutional areas (Right to Counsel, Right to Jury, Right to Confrontation, and Right against Self-Incrimination) are permitted. What follows are examples of some of the most common invalid claims.

a. No Express Waiver

Express waivers are required only when the defendant is waiving the right to counsel. (In re Johnson (1965) 62 Cal.2d 325, 333; see also Iowa v. Tovar (2004) 541 U.S. 77.) The waiver of the three Boykin–Tahl rights need not be expressed. An explicit and express waiver of rights is not required for a constitutionally valid guilty plea under federal law. (People v. Howard (1992) 1 Cal.4th 1132, 1174–1179.) Under federal law, a plea is valid if the record affirmatively shows it was voluntary and intelligent under the totality of the circumstances. (Id. at 1175, 1178; Allen, supra, at 437–438.) The trial court must examine the totality of the circumstances to determine whether the plea was voluntary and intelligent, much as the court would do if it were presiding over a hearing held in response to a habeas corpus petition. (Allen, supra, at 440.) A court may rely on properly executed plea forms to determine the validity of the waivers. A verbal recitation is not necessary. (People v. Castrillon (1991) 227 Cal.App.3d 718, 721–722.) Nor are separate waivers of each of the rights required. (In re James H. (1985) 165 Cal.App.3d 911, 917.)
b. Unrepresented Defendant

The defendant must claim (and testify) that he or she was not advised of his or her right to an attorney and/or was not advised that the court will appoint an attorney if the defendant is unable to afford one, and had the defendant known of this right, a plea of guilty or no contest would not have been entered. (In re Smiley (1967) 66 Cal.2d 606, 615.) Where the error claimed is a failure to inform the defendant an attorney will be appointed if he or she cannot afford one, it is “incumbent upon the person who is seeking to have a judgment of conviction set aside ‘to allege or show that he was without ability to employ counsel since it must be made to appear that the right exists before there can be any claim of deprivation.’” (Still v. Justice Court (1971) 19 Cal.App.3d 815, 818; accord Application of Johnson (1965) 237 Cal.App.2d 463, 467.) Furthermore, the trial court is not required to give an unrepresented defendant the Faretta warnings about the pitfalls and problems of self-representation before accepting the plea. It must acknowledge only that the defendant’s election to proceed without counsel is a knowing and intelligent election. (People v. Mellor (1984) 161 Cal.App.3d 32, 36–37.)

c. Ineffective Assistance of Counsel

This claim cannot be raised in collateral challenges. (Garcia v. Superior Court (1997) 14 Cal.4th 953, 966.) Ineffective assistance of counsel claims conflict with the “judicial efficiency” genesis of collateral challenges.

d. Right to Trial

The trial court does not have to advise the defendant that the jury’s verdict must be unanimous. (People v. Tijerina (1969) 1 Cal.3d 41, 45.) Nor is the court obliged to inform the defendant that he or she could have a court trial. (People v. Vest (1974) 43 Cal.App.3d 728, 737.)

e. Right to Confrontation

Precise wording is not required; “has the right to cross-examine” is adequate. (People v. Hayes (1990) 52 Cal.3d 577, 637.) Also, the court is not required to expressly inform the defendant of the right to subpoena witnesses. (People v. Buller (1979) 101 Cal.App.3d 73, 78.)

f. Right to Testify

There is no requirement that a defendant be advised of or waive this right. (People v. Johnson (1990) 217 Cal.App.3d 978, 982.)

g. Advisement

h. Future Consequences

For a plea of guilty to be valid, the defendant must be advised of the primary and direct consequences of the imminent conviction. (In re Birch (1973) 10 Cal.3d 314.) This advice is limited to consequences directly involved in the ongoing criminal case—it does not include indirect or collateral consequences. (Ganyo v. Municipal Court (1978) 80 Cal.App.3d 522, 527, fn. 1; People v. Searce (1974) 37 Cal.App.3d 204, 211.) Cases have repeatedly held that the potential use of the immediate conviction to enhance a later sentence imposed on some possible future conviction is a collateral consequence. The court taking a guilty plea is not required to advise the defendant of this potential collateral consequence. (People v. Bernal (1994) 22 Cal.App.4th 1455, 1457; People v. Wohl (1990) 226 Cal.App.3d 270, 275; Carter v. Municipal Court (1983) 149 Cal.App.3d 184, 190; Hartman v. Municipal Court (1973) 35 Cal.App.3d 891.) Likewise, a motion to strike is not an appropriate remedy for failure to advise of immigration consequences. (People v. Murillo (1995) 39 Cal.App.4th 1298, 1305–1306.)

i. Direct Consequences

The failure to advise of direct consequences of a guilty plea is not a valid ground for striking the prior either. (People v. Barella (1999) 20 Cal.4th 261, 266.) The California Supreme Court ruled that failure to advise of the consequences of the plea (i.e., payment of a restitution fine) was waived if the error was not raised at or before sentencing on the allegedly flawed conviction. (People v. Walker (1991) 54 Cal.3d 1013, 1022–1023.)

j. Factual Basis

The constitution does not require that the court take a factual basis for a guilty plea. (People v. Hoffard (1995) 10 Cal.4th 1170, 1183–1185.)

k. Out-of-State Priors

To challenge an out-of-state prior, the defendant must show “beyond doubt” that the rendering state was required to follow Tahl-like procedures when the plea was entered. (People v. Green (2000) 81 Cal.App.4th 463, 470–471.)

l. Plea Before Waiver

A plea that precedes a waiver is a valid plea. (Salazar, supra, at 10.)

m. Interpreters

While failure to provide a competent interpreter may be grounds for striking a prior conviction (People v. Superior Court (Almaraz) (2001) 89 Cal.App.4th 1353, 1360, fn. 3), a defendant who claims absence of an interpreter at plea must prove inability to understand English (California State Constitution, article 1, section 14) and that the court unconstitutionally denied access. (People v. Duarte (1984) 161 Cal.App.3d 438.) Failure to provide a certified interpreter is not a violation of a constitutional right giving
rise to a motion to strike. (Almaraz, supra, at 1359–1360.) There is no constitutional right to a “certified” interpreter, only a “competent” one.

n. “I Was a Juvenile.”

A defendant who pled as an adult cannot come back and claim to have been a minor at the time of the plea. (People v. Level (2002) 97 Cal.App.4th 1208.)

5. Failure to Provide Record

Vehicle Code section 41403(b)(2) requires the defense to produce the entire record of the challenged conviction. Failure to provide the records to the court in a timely manner can result in the denial of the motion or postponement of the hearing until the sentencing proceedings. (People v. Vallejo (1991) 1 Cal.App.4th 760.) A defendant’s failure to obtain and present a transcript of the change-of-plea hearing, where one is available, is fatal to a motion claiming Boykin-Tahl errors. (People v. Johnson (1990) 217 Cal.App.3d 978, 983; People v. Zavala (1983) 147 Cal.App.3d 429, 439.)

The fact that the records of conviction are incomplete, no longer exist, or were never prepared does not mean that the defendant is entitled to a hearing. “The defendant should be required to make a prima facie showing (by appropriate declarations, documents, or formal offers of proof) that Boykin-Tahl procedures were violated, and that there was, in fact, no knowing and voluntary waivers of rights.” (Allen, supra, at 447–451 inc. fn. 2 & 3, conc. opn.)

B. Defeating a Challenge on the Merits

Assuming the defendant gets past the pre-hearing hurdles and earns a hearing on the merits of the motion, the People should be prepared to continue challenging the defendant’s attack on the prior conviction. But first, we must meet our initial burden of showing that the defendant has suffered the conviction in question.

1. The People’s Burden at Hearing

The People must make a prima facie showing that the defendant suffered the conviction. This can be done by offering certified copies of the prior or by way of an abstract of judgment. (Johnson, supra, at 983.) Also, the court should already have a copy of the defendant’s driving record as Vehicle Code section 23622(b) requires the court to obtain one sua sponte. Evidence Code section 452 (judicial notice) would allow for the court’s copy to be used to meet the People’s burden. Other admissible sources of proof include state or locally certified “rap sheets” (People v. Martinez (2000) 22 Cal.4th 106, 142–143; People v. Dunlap (1993) 18 Cal.App.4th 1468; but see People v. Steele (2000) 83 Cal.App.4th 212, 223) and a law enforcement teletype record from the DMV showing defendant’s previous convictions. (People v. McClary (1988) 200 Cal.App.3d Supp. 11.) If all else fails, the People can ask the defense to stipulate to the conviction or use the records supplied by the defense.

Note: The People should have their own complete set of the record of conviction just in case the defendant inadvertently fails to produce the entire record.
2. The Defendant’s Burden at Hearing

After the People have made their prima facie showing, the burden shifts to the defendant. The defendant must prove by a preponderance of the evidence that there was no voluntary waiver of his or her constitutional right(s) before pleading guilty and that defendant was actually unaware of the right(s) and would not have pled guilty had those right(s) been known. (Allen, supra, at 436.) The defendant must prove all three of these things in order to be successful in his or her motion. Awareness and prejudice (“would not have pled”) are often provable only through the direct testimony of the defendant. So be ready to cross-examine the defendant.

3. Cross-Examine the Defendant

The defense may present evidence by way of defendant’s declaration under penalty of perjury, but the People retain the right to cross-examine defendant. (People v. Williams (1973) 30 Cal.App.3d 502.) The cross-examination is limited to the scope of the direct examination (here, the declaration under penalty of perjury). (Evidence Code § 761.) Cross-examination should focus on two categories: (1) The defendant had knowledge of the right(s), and (2) the defendant would have pled anyway (no prejudice was suffered).

a. Defendant’s Knowledge

The defendant must claim and show that he or she was unaware of the four enumerated constitutional rights. This means proving the non-existence of something—in this case knowledge. He or she must prove a negative, the absence of a fact. This is not an easy task, especially since the presumption is that the fact exists—that the defendant had or has the knowledge and awareness. The People should cross-examine to demonstrate the dubiousness of that lack of knowledge.

(1) Record Evidences Advisement and Waiver

If the record of conviction evidences that the defendant was advised of and waived the right(s) in question, then either the record or the defendant’s claim is defective. Justice Baxter suggests that proof of a facially valid waiver should result in a summary denial of the defendant’s motion. (Allen, supra, at 447, fn. 1, conc. opn.)

(2) Record of Other Prior Convictions

Evidence of convictions predating the challenged conviction may be used to show a defendant’s actual knowledge of Boykin-Tahl rights. (In re Ronald E. (1977) 19 Cal.3d 315, 325.) If the defendant knew it before, then he or she knew it at the time of the challenged plea.

(3) Conversations with Counsel

If the defendant was represented, especially by retained counsel, ask what the defense lawyer told him or her about the charges, the court appearance, and the process
regarding the defendant’s decision to plead. Ask basic questions, going step by step through the rights one at a time. Work toward the point that the defendant clearly remembers what was not said and has little idea of what was actually said. (“You have a clear memory that you were not told “X,” but you have little to no memory as to what you were told, is that right?”)

(4) The Defendant’s Education and Employment

Make inquiry into the defendant’s level of education and as to the nature of his or her employment. The higher the educational or employment status, the more likely it is that he or she would have a better understanding of, and been more actively involved in, the proceedings now being challenged.

(5) The Defendant’s Common Law Knowledge

Society is filled with legal entertainment. Cop shows (from Adam-12 to CSI), court shows (Law & Order, Judge Judy), and TruTV populate our televisions. Celebrity prosecutions grab headlines (two letters: O-J). Many movies revolve around criminal cases (My Cousin Vinny, 12 Angry Men, Legally Blonde, etc.). Inquire of the defendant whether he or she is familiar with these shows, events, and movies. Many people are aware of their rights because of something they saw on TV.

(6) Friends and Relatives

Does the defendant have any friends, relatives, or associates who have been convicted of this type or other types of crimes? Are any of them involved in the law enforcement and justice area? Did the defendant discuss the case with anyone besides his or her attorney? Did this have an affect on his or her level of awareness?

b. No Prejudice

The objective of this cross-examination area is to show that even if the defendant had been aware of his or her rights, he or she would still have pled. In a nutshell: The denial of right(s) is of no consequences in this case because the outcome would have been the same.

(1) The Defendant Benefited by Pleading

The reason the defendant pled was because other counts were dismissed, and he or she would serve only X days in custody.

(2) The Factual Strength of the Case

If the case was a strong one, the defendant saw conviction as almost inevitable. Therefore, why not plead and save time, money, and reach a quicker more equitable resolution?
(3) Inquire as to Actual Guilt

Whether the defendant actually committed the offense is a fact bearing strongly on whether the defendant would have pled guilty. Thus, it is fair to ask if the defendant was driving under the influence. If the defendant says, “yes,” then you can follow up by asking if he or she would have come into court and lied by denying he or she was DUI, or by asking if he or she would have tried to evade responsibility for the act. If the defendant says, “no,” then you can follow up by asking why he or she pled guilty, and why the lack of advisement would have changed his or her reason for pleading guilty. (Be careful with this one—it can boomerang back on you. “I didn't know that I had all these protections against being railroaded ….”)

4. People’s Rebuttal

If the defendant makes the requisite showing by a preponderance of the evidence, then the People have a right to present evidence in rebuttal. (Vehicle Code § 41403(b)(3).) Again, be prepared.

a. Call the Defendant’s Previous Counsel

Subpoena the prior defense attorney. In order to bring a motion to strike, the defendant must testify that the defense attorney in his or her case did not inform the defendant of the constitutionally required right(s) and that his or her right(s) were not voluntarily waived. The defendant’s disclosure of attorney-client communication is a waiver of the privilege. (Evidence Code § 912.) The failure to advise is the basis for a claim of ineffective assistance of counsel. The attorney-client privilege does not apply to breaches of duty. (Evidence Code § 958.) Most defense attorneys will have no independent recollection of this particular change of plea, so develop custom and habit evidence. (Evidence Code § 1105.)

b. Call the Judge, the Clerk, Court Staff, or the Prosecutor

For Boykin–Tahl challenges, evidence of the trial judge’s habit and custom in taking proper waivers, or witnesses to the events in question are relevant and probative. (People v. Pride (1992) 3 Cal.4th 195, 255–256, Curl v. Superior Court (1990) 51 Cal.3d 1292, 1297, fn. 1; Evidence Code § 1105.) A deputy district attorney can testify that it was the habit and custom of the particular judge in question to carefully explain rights to defendants before taking pleas. (People v. Anderson (1991) 1 Cal.App.4th 318, 322.) The clerk’s affidavit is relevant and admissible concerning custom and practice of a deceased judge. (In re Tucker (1966) 64 Cal.2d 15, 18.) A judge’s affidavit of his universal practice was relevant, admissible, and referred to as persuasive evidence. (In re Luce (1966) 64 Cal.2d 11, 13.)

c. Introduce Additional Records

A combination of handwritten remarks, contemporaneously made rubber-stamped entries, and the judge’s signature, coupled with the presumption in Evidence Code section 664 that the official duty was regularly performed in preparing a court docket.
is sufficient proof of the necessary advisements and waivers. (*Worsley v. Municipal Court* (1981) 122 Cal.App.3d 409, 415.) A clerk's handwritten entries to questions addressed to a defendant at arraignment are enough to show proper waivers. (*Ganyo v. Municipal Court* (1978) 80 Cal.App.3d 522, 529–530.) “[T]here [remains] a presumption that in preparing the docket entry the official duty [judge's and clerk's] was regularly performed (Evidence Code § 664) ….” Therefore, “such an entry must ordinarily be deemed to speak the truth.” (*Worsley,* *supra,* at 415.)

C. Review Standard

“The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.” (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) At the hearing, the court must employ the totality-of-the-circumstances approach outlined in *Howard.* Neither side is limited to the face of the record, as they were in *Howard,* in a direct appeal case. (*Allen,* *supra,* at 439.)

V. Conclusion

Remember: When a defendant brings a motion to collaterally challenge a prior, he or she is challenging the status quo. Convictions are presumed valid. It is the defendant’s burden to overcome that presumption. To do so requires the defendant to carefully and completely navigate a judicially created rule of criminal procedure that exists only for the purpose of judicial economy and convenience.

The People’s duty in a collateral challenge is to defend the status quo. The best defense is a good offense. As a prosecutor, you are accustomed to playing offense. So have at it.

Carey Shimon and Larry Ornell are both deputy district attorneys for the Sonoma County District Attorney’s Office. Carey Shimon attended law school at the University of Illinois. Larry Ornell attended Empire College School of Law. Together they have more than 10 years of experience as prosecutors. Both are undefeated in DUI trials with more than 35 convictions. Many of the cases involved 0.08 blood-alcohol content and one triple homicide with a 0.07 BAC.

Chapter updated in 2010 by Daniel Fox, TSRP: Daniel Fox, originally from the Washington D.C. area, brought a BA in Economics and a BA in Government and Politics from the University of Maryland, a JD with Honors from George Washington University, and an MBA from the University of California, Los Angeles to Riverside County where he served for eight years as a deputy district attorney. Leaving the District Attorney’s office, he spent seven years in private practice and consulting back in the Washington D.C. metropolitan area before joining the CalTSRP in June 2007. Handling the Inland and Southern Region, Mr. Fox’s dedication was recognized by the MADD organization with its presentation as Prosecutor of the Year in 2009.
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Attachment A
Checklist

1. **Written** motion
   a. Served on the People five days before hearing?
   b. Served on the court that rendered the conviction?

2. Does it **specifically** state defendant:
   a. Did not voluntarily waive at least one of the following rights: the right to counsel, confrontation, jury trial, or against self incrimination and
   b. Was not aware of the right and would not have pled had defendant known of the right?

3. Hearing
   a. Prosecution's burden is initially to show prima facie evidence of conviction.
   b. Defendant’s burden is to prove both parts of (2) above by a preponderance of the evidence. (Defendant must be subject to cross-examination.)
   c. Rebuttal—Evidence of custom and habit, other convictions, etc.

Have the clerk of the court send a copy of the ruling to the county in which the conviction occurred.
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Attachment B

Other Sources Often Cited

• *People v. Sumstine* (1984) 36 Cal.3d 909 — A criminal defendant, charged with having suffered a prior felony conviction, may move in the trial court to strike the alleged prior conviction on the ground the trial court in the prior proceeding failed to comply with the defendant’s *Boykin-Tahl* rights.

• *Boykin v. Alabama* (1969) 395 U.S. 238 — The defendant was charged in Alabama with five counts of robbery. Represented by court-appointed counsel, the defendant pled guilty and was sentenced to suffer the death penalty. The trial record was silent on the question of whether the defendant was aware of the constitutional rights he waived by pleading guilty. Although the state supreme court affirmed the conviction, the United States Supreme Court reversed. The Court explained that to ensure the plea was made intelligently and voluntarily, the record must show the defendant was made aware of three constitutional rights he was waiving by pleading guilty: the right to a jury trial, the right to confront the witnesses against him, and the right to be free from compelled self-incrimination. The High Court held that an intelligent and voluntary waiver would not be presumed from a silent record.

• *In re Tahl* (1969) 1 Cal.3d 122, disavowed by *Mills v. Municipal Court* (1973) 10 Cal.3d 288 — A plea of guilty cannot stand unless the record in some manner indicates a free and intelligent waiver of defendant’s right against compulsory self-incrimination, the right to trial by jury, and the right to confront one’s accusers and indicates an understanding of the nature and consequences of the plea. The judge must actively participate in canvassing the matter with the accused.

• *Custis v. United States* (1994) 511 U.S. 485 — With the exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions.

• Vehicle Code Section 41403
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Chapter V

Preparing for Trial

by Ellen A. Sarmiento, Assistant City Attorney
Los Angeles City Attorney’s Office

with contributions from David Stotland, Deputy City Attorney
San Diego City Attorney’s Office

The California District Attorney’s Offices wishes to extend special thanks to Stephen Brown and Jackie Duffy of the San Luis Obispo County District Attorney’s Office and Greg Jones of the Marin County District Attorney’s Office for their assistance in the peer review and editing of this chapter.

(Updated 2010 by G. Stewart Hicks, TSRP, Central Valley Region)

I. Introduction

One of the most critical aspects of trial work takes place before the trial even begins. The effectiveness of trial presentation is directly related to the prosecutor’s level of preparation. Eloquence helps, but it is no substitute for thorough preparation. A well-prepared, organized prosecutor exudes confidence and establishes instant credibility with the jury and the court. A well-prepared prosecutor is better equipped to minimize surprises at trial, and, even when surprises occur, can more readily adjust his or her presentation without appearing flustered. An unprepared prosecutor will cause the evidence to appear disjointed, weak, and unconvincing.

As new prosecutors are quick to learn, in misdemeanor prosecutions, preparation time is often very limited. Accordingly, it becomes essential to maximize the precious few hours available for trial preparation. Every prosecutorial agency does things a little differently. In some agencies you may see your case file several days or weeks prior to trial. In others, you may be fortunate to read it over once before voir dire begins!

Irrespective of the norm in your office, developing and following a preparation checklist can be very helpful. By regularly following the same case-preparation routine, you will effectively utilize your time while determining the important aspects of your case. You will also develop a procedure for trial preparation that will serve you well throughout your prosecutorial career. The areas noted below should be considered in developing your driving-under-the-influence (DUI) checklist. This list is by no means intended to be exhaustive, and many items may appear to be common sense. Nevertheless, having a list that touches upon the essential issues in the typical DUI trial is invaluable.
II. Preparation Checklist

A. Read Complaint

Most courts will read the complaint aloud to your jury prior to commencement of testimony. Therefore, always read over the charges filed in your complaint. Specifically, be sure that the proper charges have been filed, including any applicable allegations or enhancements that must be pled and proven, such as separate convictions, refusals, child in car, etc. Carefully review any charged license offenses to be sure, for example, that the applicable subdivision of Vehicle Code section 14601 has been alleged. Take note of any motions to amend the complaint that may be appropriate. For example, in a case where there is no evidence of drug involvement, be prepared to make a motion to delete the inapplicable language from the complaint that alleges the defendant was under the influence of alcohol and a drug and a combination of the two. In addition, verify that the date of the offense is accurate. Simple clerical errors are generally easier to correct prior to trial and before the judge reads the complaint to the jury.

B. Review Jury Instructions

Review the jury instructions relating to DUI. It is imperative that you become conversant with the legal requirements necessary for a conviction for both Vehicle Code section 23152, subdivisions (a) and (b). Note that driving under the influence is defined in terms of impairment. (See CALCRIM 2110.) Impairment is a concept that the prosecutor must incorporate into each element of the trial, from voir dire through closing argument. In preparing to take your case to trial, remember that it is vital that you remind the jury that the People are not required to prove that the defendant was drunk but rather that the defendant was impaired. The concept of impairment will then be reinforced when the judge instructs the jury at the close of the trial.

You should note that CALCRIM 2110 also states that it is no defense if a substance in addition to alcohol or a drug contributes to the defendant’s impairment. That portion of the instruction is particularly helpful in cases where the defendant blames poor driving on fatigue, illness, or unfamiliarity with the road.

Familiarize yourself with the permissible inferences contained in CALCRIM:

- If the result is 0.08 percent or above, jurors “may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.” (CALCRIM 2110.)
- If the chemical test was administered within three hours of the driving, and the test result is 0.08 or above, the jurors “may, but are not required to, conclude that the defendant’s blood alcohol level was 0.08 percent or more at the time of the alleged offense.” (CALCRIM 2111.)

These two instructions are extremely helpful and should be considered during your case preparation and referred to in closing argument.

Do not limit yourself only to the DUI-related instructions. Make and keep a complete set of all the standard instructions used in the typical DUI trial. The more familiar you become with the jury instructions, the better you will be able to conduct voir dire, present your evidence, and argue...
your case to both the judge and the jury.¹ The jury is much more likely to trust you and your case when they have heard the language of the jury instructions coming from you throughout the trial, from jury selection to your rebuttal.

Review the jury instructions for any additional charges, such as license violations, a hit-and-run charge, or weapons offenses. Although you may view a license charge as less important than your DUI charges, a conviction on the license charge may expose the defendant to additional custody time.

C. Study Your Case File

Whenever possible, you should read over your case file at least a few times before interviewing your witnesses. The first thing, of course, is to verify that the offense occurred in your jurisdiction. You should read it at least once with an eye toward the elements of the offense, the logical presentation of evidence, and argument. This is a good time to list your witnesses and to make notations as to what evidence you will present through each witness. Verify that all of your witnesses have been subpoenaed for the date of your trial. Identify key items of evidence obtained at the time of the incident such as statements, chemical test results (including preliminary alcohol screening [PAS] results), drug paraphernalia, open containers, weapons, photographs (including booking photographs), videotapes, or anything else that might be relevant.

You should then read your case file at least once with a critical eye. In this reading, you should be looking at your file as a defense attorney would look at it. Ask yourself, what issues and arguments will the defense use? You should be looking for problems, inconsistencies, and omissions. It is recommended that you go well beyond the observations, the stop, the field sobriety tests (FSTs), etc. For example, different dates, times, spellings of names, locations, and much more are frequent occurrences. Anticipate possible defense attacks, including challenges to the admissibility, of each item of evidence you intend to present, and prepare to provide the necessary response.

If your court is one in which the same defense attorneys frequently appear, try to obtain transcripts from Penal Code section 1538.5 hearings previously conducted by your opponent. Even if transcripts are unavailable, you should speak to other attorneys in your office who have had suppression motions and trials with opposing counsel. Insight into your opponent’s typical strategies is priceless.

After reading your file and discussing your case with other prosecutors, you will be thoroughly prepared to interview your witnesses.

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¹ The following is a partial list of additional CALCRIM instructions with which you should become familiar: 104 (Evidence); 105 (Witnesses); 220 (Reasonable Doubt); 222 (Evidence); 223 (Direct and Circumstantial Evidence); 224 (Circumstantial Evidence); 226 (Witnesses); 300 (All Available Evidence); 301 (Single Witness); 302 (Evaluating Conflicting Evidence); 315 (Eyewitness Identification); 318 (Prior Statements); 322 (Expert Witness Testimony); 333 (Opinion Testimony of Lay Witness); 358 (Evidence of Defendant’s Statements); 361 (Failure to Explain Adverse Testimony); and 362 (Consciousness of Guilt).
D. Check Criminal History

Run a new rap sheet and a new DMV history. (Obviously, it is vital that you learn to read and interpret rap sheets and DMV histories. See Chapter XIX.) Your case may not be tried until several months after the date of the offense. Be sure you are aware of any recent arrests or convictions. Additionally, examine the defendant’s criminal history for possible probation violations, including non-DUI convictions. Most courts include a probationary condition to obey all laws. If the conviction occurred within your jurisdiction, request that the court revoke the defendant’s probation and set a probation violation hearing contemporaneous with your trial.

If your complaint alleges prior DUI convictions, try to obtain the underlying reports as well as certified copies of the court dockets and plea forms. The reports may provide fruitful information for cross-examination and impeachment. For example, if the defendant refuses to take a chemical test in your case and is now claiming a lack of understanding of the requirement to submit to a chemical test, you may be able to use the fact that the defendant completed a chemical test in a previous case to impeach the defendant in your trial.

E. Review the Court File

If the defendant is represented by court-appointed counsel, determine if the court file reflects an order appointing a defense expert. If you know that the defense is going to call an expert witness, and you know who that person is, research the witness’s qualifications. Additionally, more often than not, the simple fact of knowing who the defense intends to call as their expert, you will know what the defense will be in your case. If possible, locate and read transcripts of the expert’s testimony from other trials. Most prosecution offices keep sample transcripts of the more popular defense experts.

Medical records subpoenaed by either party are usually sent directly to the court and should be attached to the court’s file. They should be opened on the record with both attorneys present. Review medical records carefully. They often contain evidence supporting your case. For example, you may discover that the physician who examined the defendant’s minor injuries following a collision noted the defendant’s level of intoxication on the chart. Incriminating statements made by the defendant may also be noted in the medical records.

F. Interview Witnesses

1. Police Officers

Most DUI cases involve at least one police-officer witness. The prosecutor should be sure that the officer reviews his or her report before discussing the case. If the officer shows up for the interview having not recently read the report, find a quiet location where the officer may review the report in private. Typically, officers do not like to have you watching over their shoulders while they review their reports.

Your first area of inquiry should be to ask if your officer noted any inconsistencies, omissions, additions, or other problems with the report about which you should be made aware. It is important to remember that the officers’ reports are designed to assist them in recalling
the incident. Reports rarely contain all the relevant information, including incriminating statements. Anything not included in the report should be disclosed to defense counsel as soon as practicable in order to avoid discovery issues.

Now you can go over your direct examination with the officer(s). Be sure to elicit sufficient information about the officers’ background, training, and experience in the area of DUI investigation, including any pertinent experience prior to their current assignments, such as related military experience, employment with a different law enforcement agency, or emergency-medical-technician training. Verify that your officers can identify the defendant in court.

a. **Verify Times and Locations**

This may seem redundant, but that is the point. Because this is frequently a fertile ground for defense cross-examination, verify all times and locations noted in the reports, including the time of the driving observation period, the time of the initial stop, the time of the field sobriety tests, the 15-minute waiting period, any transporting time, time of the chemical test, and the booking time. In cases involving the rising blood alcohol defense, pay attention to what time the defendant stopped drinking. By paying close attention to this now, you should be able to recreate an accurate time line for purpose of trial.

b. **Visit the Scene**

This is another area where the defense often attacks the credibility of the officer, and it is one of the most overlooked areas of concern by DUI prosecutors. Determine the extent of the officer’s familiarity with the area of the driving and the area where the field sobriety tests were administered. Strongly suggest that the officer revisit the scene prior to trial, and suggest that the visit occur at or about the same time of day or night as the arrest. If possible, go to the scene with the officer so that you have a more clear understanding of the events in question. Take a camera. The defense often provides photos of the scene of the stop, FSTs, and arrest. While such photos may be reasonably accurate representations of the scene, they are often taken from distorted angles, thus conveying a false impression to the jury. If your officer has been to the scene recently, and, if you have accurate photos of the scene, you will be able to rebut defense distortions and to avoid any jury confusion.

c. **Prepare a Street Diagram**

Have the officer prepare a street diagram of the area where the driving occurred. The officer can then use the diagram during direct examination to draw the defendant’s driving pattern. Whenever possible, have the officer make two sets of diagrams. Defense attorneys seem to take great pleasure in having these diagrams marked up by witnesses. You can have a relatively clean diagram admitted into evidence by you, and the defense can have the messy diagram admitted.
d. The Defendant’s Conduct and Appearance

Explore any potential issues arising from a language barrier or a physical or mental disability. Anticipate jury sympathy for handicapped or elderly defendants, or defendants who derive their livelihood from driving.

Ask the officer to tell you as much as possible about the defendant’s conduct and appearance at the time of the arrest. Prepare the officer to be able to contrast the defendant’s appearance and demeanor at the time of the arrest with the defendant’s courtroom appearance and demeanor. Whenever possible, use the booking photo or booking video in trial. This will help the jury to envision the polite, well-dressed defendant as the disheveled, alcohol-impaired arrestee.

e. Field Sobriety Tests

The officer should be prepared to explain and demonstrate the field sobriety tests in the same manner that was used to explain and demonstrate the tests to the defendant on the date of the arrest. Even if you do not ask the officer to demonstrate the tests (as they were demonstrated at the scene of the investigation) for the jury, the defense attorney may request a demonstration during cross-examination.

*Note:* You should strenuously object to a defense request to have the officer demonstrate the tests in the same manner as the defendant performed the test. The officer’s ability to mimic the defendant’s degree of physical impairment is irrelevant, cumulative, and demeaning, not to mention impossible. Your objection should be sustained pursuant to Evidence Code section 352. In addition, if the defendant refused to perform the field sobriety tests, you may argue that this refusal is evidence of the defendant’s consciousness of guilt, even though there is no jury instruction that specifically addresses the refusal to perform field sobriety tests.

f. Department of Motor Vehicle (DMV) Hearings

DMV hearings have the potential of becoming a great source for the defense. Police officers frequently testify at these hearings without adequately reviewing their reports, and there is no attorney present to represent the officer. Consequently, an officer’s testimony may be sketchy as to the events of the arrest. The defense attorney will likely use the officer’s hearing testimony to impeach the more complete recitation of the circumstances at trial. Moreover, defense attorneys will often reveal their theory of the defense of the case at these hearings through cross-examination of the officers and through any testimony they introduce to defeat the suspension order.

It must be noted that DMV recordings of these hearings are not kept indefinitely. In light of that fact, defense attorneys will often conduct the hearing, obtain the transcripts, and continue your trial until the recordings have been destroyed. They will use these transcripts at trial to impeach your officer. You will get the transcripts at the time of cross-examination of your officer, but it will be too late to avoid the damage done by the defense.
Accordingly, if you discover that the defendant requested and obtained a hearing with the DMV to contest the admin per se driver’s license suspension, you must make every effort to obtain a tape recording and/or transcript of the hearing. You do not want to be in a position where the defense attorney has more information than you do.

2. Civilian Witnesses

DUI cases stemming from traffic collisions usually have civilian witnesses. Interview them, and verify the information recorded in the police report. If there are discrepancies between the witnesses’ recollections of the events and the police reports, discover them early, and be prepared to explain away any mistakes. Ask the witnesses if they will be able to identify the defendant as the driver. If they are unsure about identifying the defendant in court, verify that they were able to identify the driver at the time of the collision and that the person arrested by the police was, indeed, the driver. Ask if they remember what the driver was wearing at the time of the collision. Sometimes, the arrest report’s description of the arrestee’s clothing may effectively corroborate the witness’s description and identification. Occasionally, you may be able to use the booking photo of the defendant as your identification of the defendant in court, as this may be the way the witness best remembers the defendant.

Be sure to inquire whether the civilian witnesses saw any objective signs of alcohol impairment. Ask if they noticed the odor of an alcoholic beverage or if the defendant’s speech was slow or slurred. Civilian witnesses will usually have to give an account of how the collision occurred. Go over the events leading up to the collision. Make sure the witnesses are clear on streets and directions. Show them the street diagram that you intend to use in court. Witnesses may have photos, repair bills or estimates, medical records, or bills that would corroborate the facts of your case. Have the witnesses bring them to court. Always ask if the witnesses are aware of any other witnesses not named in the police report.

For most of your civilian witnesses, this will be their first time appearing in court. Tell them what to expect. Explain that they need to answer your questions as completely as possible. They need to know that they will be subject to cross-examination by the defense attorney. If time permits, give them a sampling of cross-examination. Caution them to be truthful at all times and to remain calm and polite, even if the defense attorney becomes argumentative or belligerent. Advise your witnesses that it is preferable to respond that they “cannot remember,” “don’t know,” or “don’t understand the question,” rather than to guess at what the attorneys want them to say. Finally, remind them to answer the question asked and to avoid giving long non-responsive answers.

3. Forensic Alcohol Analyst

The forensic alcohol analysts who testify in DUI trials are usually experienced expert witnesses and should be prepared to answer the questions you are likely to ask in your direct examination. Nonetheless, you should make every effort to interview the expert who will be testifying in your case, especially if you are not particularly comfortable with the science involved in a DUI case. Whenever possible, go over your direct examination before trial. Your expert should be able to explain the manner in which alcohol affects the human body, particularly the ability of a person to drive a motor vehicle; offer an opinion as to the level at
which all people are impaired by alcohol for purposes of driving; and state the defendant’s alcohol level and explain its significance. This testimony will include a discussion about how the defendant’s breath or blood sample was tested and how the testing instrument is maintained to ensure the accuracy of its results.

If the defendant made a statement at the time of the arrest regarding his or her drinking pattern (“I only had two beers.”), ask your expert what would have been the highest alcohol level that the defendant could have reached if the defendant’s statement were true. Also, ask your expert how many ounces, bottles, or glasses of their choice of alcoholic beverage would the defendant have had to drink to reach the alcohol result in your case. If the defendant said “two beers,” for example, but the test result is 0.10, you know the defendant was not truthful with the officer at the time of the arrest. This type of evidence can be very convincing at trial, because it often forces the defendant to testify in an attempt to explain the discrepancies. If the defendant testifies, during closing argument you can point to the lack of candor at the time of the arrest, and it permits you to argue that the defendant’s testimony at trial is untruthful. (See CALCRIM 362—Consciousness of Guilt.)

G. Breath- or Blood-Test Results

Obtain the necessary testing equipment maintenance records that will establish the reliability and accuracy of your breath test results. Commonly, maintenance logs are kept by the law enforcement agency or by the agency that actually maintains the device (such as the Department of Justice). If you have any questions as to whether or not the instrument was in proper working order at the time of the defendant’s test, be sure to ask your expert. The expert will be able to interpret the records and tell you whether any abnormal accuracy test result would affect an opinion as to the accuracy of your defendant’s test result.

If the defendant submitted to a blood test, you will need to provide evidence regarding the manner in which the blood sample was obtained. If there is no objection by the defense, you may proceed by way of an affidavit prepared pursuant to Evidence Code section 712, which must be served on the defense at least 10 days prior to trial. Alternatively, you must elicit testimony from the person who drew the blood sample from the defendant. Obviously, make sure the person is available to testify.

In order to introduce the results of a blood test, you need to establish the chain of custody of the blood sample from the time it was obtained from the defendant to the time it was tested by the criminalist to the time it is brought to court. Be sure that you have the witnesses needed to establish the integrity of the sample. (Note: If the chain of custody of the sample is not at issue, the defense may stipulate to the manner in which the blood was drawn.)

(For more detailed information regarding breath and blood tests, see Chapter XI, “Field Breath Testing: The PAS Test” and Chapter XII, “The Admissibility of Blood-Alcohol Evidence”.)

H. Refusal Cases

If your complaint alleges that the defendant refused or failed to complete a chemical test, you must prove that the defendant was properly advised of the consequences of the refusal pursuant
to Vehicle Code section 23612. (See also Vehicle Code §§ 13353 et seq. and 13388.) At trial, the police officer witness should be prepared to read the chemical admonition to the jury in the same manner in which it was read to the defendant at the time of the arrest. If the admonition was informally given and was incomplete, the sentence enhancement provided for in Vehicle Code section 23577 will not be applicable.

Ask the investigating officer if the defendant spoke English and appeared to understand the admonition. If the defendant has requested the use of an interpreter, be prepared for a claim that the defendant did not understand the requirement to submit to a test. If the officer gave the admonition in another language, verify the officer’s fluency in that language and make sure that the officer will be available to testify at trial.

Be mindful that defendants will sometimes justify or blame their refusals on hostile or inappropriate conduct by the arresting officers. Claims of officer-provoked altercations, racial profiling, or sexual advances do arise. Be alert to signs of any such claims, and discuss them with your police witnesses.

(For a more detailed explanation regarding how to prepare for refusal cases, see Chapter III, “Legal Considerations When Prosecuting Refusals”.)

I. Discovery

You must comply with the discovery provisions of Penal Code sections 1054 et seq. This requires disclosure of all applicable reports, all written or recorded statements of witnesses, including 911 tapes, all statements by the defendant, all exhibits, any lab results, and any other items that you intend to introduce at trial. (See Penal Code § 1054.1.) Similarly, you are entitled to discovery from the defense. The defense is required to disclose the identity, and any written or recorded statements, of witnesses the defense reasonably anticipates it is likely to call. This includes the identity of expert witnesses and any related reports relevant to the issues at trial. (See Penal Code § 1054.3.) If the defense has not informally complied, it may become necessary to seek a court order compelling compliance. Potential sanctions for failure to comply with these discovery provisions, by either the prosecution or the defense, include immediate disclosure, contempt proceedings, a continuance, and prohibiting a witness from testifying. (See Penal Code § 1054.5.)

J. Know Your Theory of the Case

After you have examined the files, interviewed the witnesses, visited the scene, and discussed the case with the defense, you should have a clear idea of how you believe the events surrounding the offense occurred. Accordingly, you should now have an understanding about how to present your case to the jury.

K. Determine Witness Order and Organize Exhibits

Decide which witnesses you will call in your case-in-chief and in what order you will call them. You may be limited by their availability. Prepare a list of the items that you intend to move into evidence. Determine ahead of time if the court prefers you to mark them before trial. Enlarge and mount photos, if possible, so they can be easily displayed to the jury.
L. Anticipate Defenses

In any DUI trial it is usually possible to anticipate the defense before trial and to prepare to rebut the defense. The potential defenses will fall under the categories of no driving or not under the influence (or 0.08 or above). The no-driving defense will take the form of a defense claim that the vehicle did not move, or a denial that the defendant was the driver of the vehicle. In either case, it is important to elicit as much circumstantial evidence as possible to prove that the defendant drove the vehicle.

If the element of driving is irrefutably clear, the defense will be that the defendant was not under the influence. Again, this defense also is commonly presented in two ways:

- Either the defendant did not consume enough alcohol to reach a level of impairment (or a 0.08), or
- the defendant’s alcohol level was “on the rise” and had not yet reached a level causing impairment (or 0.08) at the time of the driving.

The first form of this defense necessarily challenges the chemical test result. A challenge to the 15-minute waiting period requirement should be expected. It is virtually impossible for a police officer to rule out regurgitation merely by observing the person. Be prepared to argue that the existence of two consistent readings (each within 0.02 of one another) effectively rebuts a claim of mouth alcohol. In addition, modern breath testing instruments can detect mouth alcohol. Your expert will help you to respond to these defenses.

A defense claim that the defendant’s alcohol level was “on the rise” at the time of the driving can be effectively cut off in your case-in-chief if you are prepared to address it. Look at the length of time between the driving and the administration of the chemical test, and ask your forensic alcohol expert if a substantial change in the defendant’s alcohol level during that period of time is reasonable. If the defendant made statements regarding a drinking pattern, those statements should be factored into your question. More importantly, be sure to ask your investigating officer if he or she noted any significant or observable change in the defendant’s objective signs of impairment over the course of the investigation. If the officer observed no change or noted that the defendant appeared less impaired over time, elicit this information in your direct examination of the officer. It should help diffuse the on-the-rise defense.

The issue of multiple clocks is one you should have covered in discussions with your officer. The issue arises in circumstances in which the officers use their wrist watches for stop and/or arrest times in their reports, the breath test printout or the blood tech has a different time, and dispatch logs have yet another time. In addition to the obvious inconsistencies, this can result in apparent violations of the 15-minute observation period. When these apparent inconsistencies occur, it is vital that you address them during direct examination of the officers. This is easier and more effective than trying to explain inconsistencies after they have been used to impeach your officers.

Most likely, you will become aware of the defense theory of the case as a result of your review of the reports. It is not uncommon to learn the defense theory from the defense attorney. Many defense attorneys, in an attempt to settle the case, will tell you how they intend to attack your case at trial. Do not be afraid to ask the defense attorney, "How do you expect to win
Occasionally, you will discover the defense theory simply by a close examination of the defendant’s statements. Another means of discovering the defense theory may be by way of discovery turned over by the defense, including such circumstances as the location where the defendant was drinking, how much alcohol the defendant claims to have consumed, where the defendant was coming from, and the destination at the time of the driving. You must make every attempt to determine the truthfulness of these claims. Your trial preparation may include such tasks as issuing a subpoena duces tecum for bar receipts, restaurant tabs, work time sheets, and cell phone records. You know that the defendant consumed more alcohol than he or she is willing to admit.

(For a more detailed discussion of what to expect from the defense in DUI trials, see Chapter XIV, “Common Defenses to Driving-Under-the-Influence Cases”.)

M. Motions in Limine

Many DUI cases are won or lost during motions in limine. In limine motions are typically made just prior to jury selection. Such motions may be brought by either party for the purpose of excluding or admitting evidence. The California Supreme Court has described them as follows:

Motions in limine are a commonly used tool of trial advocacy and management in both criminal and civil cases. Such motions are generally brought at the beginning of trial, although they may also be brought during trial when evidentiary issues are anticipated by the parties. In either event, they are argued by the parties, either orally or in writing or both, and ruled upon by the trial judge. The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. “The advantage of such motions is to avoid the obviously futile attempt to ‘unring the bell’ in the event a motion to strike is granted in the proceedings before the jury.” [Citation.]

Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence. Finally, by resolving potentially critical issues at the outset, they enhance the efficiency of trials and promote settlements.


In short, motions in limine are useful vehicles to get the trial judge to pay attention to a key issue in your case, allow you to better prepare for trial by knowing what evidence you can and cannot get in front of the jury, and often help lead to a pretrial plea.

Many defense lawyers, particularly those who limit their practice almost exclusively to DUI cases, come to court with a battery of in limine motions. If you have any time in advance and know
who the defense lawyer is, ask your co-workers for copies of in limine motions that the defense lawyer has filed in previous DUI cases. This will give you some advance notice about the legal issues you will likely address when your case is assigned to a trial judge.

Common defense motions in limine include motions to exclude evidence from the Preliminary Alcohol Screening (PAS) test, motions to exclude horizontal gaze nystagmus testimony, and motions to exclude evidence of the defendant’s past crimes. Watch out for defense motions to exclude evidence based on alleged search and seizure violations. While motions in limine can be made at any time, motions to suppress must be made in advance. Unless your local court rules say otherwise, Penal Code section 1538.5 motions on felonies must be filed 10 court days before trial (Penal Code § 1538.5(f)(2)), and motions on misdemeanor cases must be filed 10 calendar days before trial. (Cal. Rules of Court, Rule 4.111.) The only exceptions to the rule banning last-minute search and seizure motions are when the defense lawyer can show that “opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion.” (Penal Code § 1538.5(h).) As a practical matter, in some jurisdictions, these exceptions are applied liberally.

Historically, prosecutors do not run very many motions in limine. There is no logical reason for this. Such motions may be very useful if you have key pieces of evidence that you want to admit or exclude, particularly if there are unusual legal issues.

It is often useful to prepare a trial brief, including a summary of your case, a witness list, an exhibit list, motions in limine, and proposed questions for jury voir dire. Even if you do not present it to the judge, preparing the trial brief will help you focus on the strengths, weaknesses, and issues presented by your case. As you get to know your local judges better, you will learn their preferences. Some like resolving as many issues as possible before trial, while others prefer to deal with contested evidence as it comes up in trial.

Motions in limine are usually argued in chambers or in open court before the jury-selection process begins. Contemporaneous with motions in limine, your trial judge will often try to help settle the case. You should also use the pretrial conference to find out whether the judge has any special courtroom rules or preferences and to work out scheduling for your witnesses.

When the judge rules on in limine motions, make sure that the orders are clear and on the record. If the court’s rulings are clear and on the record, it will be more difficult for defense attorneys to violate the rulings and claim they did not know about them. If the judge orders you not to present certain evidence, instruct your witnesses before they take the stand not to discuss the excluded evidence.

Here are a few code sections to consider in situations in which motions in limine may be applicable.

1. **Evidence Code Sections 350, 351, 352**

   Section 350 states that only relevant evidence is admissible. Section 351 states, “Except as otherwise provided by statute, relevant evidence is admissible.” Section 352 states, “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the
probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

For many prosecutors, their only experience with section 352 is by way of a defense objection that the proffered evidence is too prejudicial to their client. However, section 352 should be one of the best friends of prosecutors, because good defense attorneys will make every effort to confuse the issues, mislead the jury, and consume time.

Accordingly, when you discover what the defense issues are in your case, when you discover what witnesses the defense intends to call, especially experts, consider offering motions in limine. With surgical precision, you may attack the defense on multiple fronts prior to a single word being presented to the jury. Occasionally, you may be able to limit the nature of the defense, the number of witnesses, and the extent of the testimony of those witnesses. Moreover, you should use these motions to clear up any admissibility issues regarding your evidence prior to presenting it to the jury. This will make your trial go more smoothly and prevent objections by defense counsel during trial.

2. Evidence Code Sections 400–406

Most prosecutors become aware of section 402 motions early in their careers, but most prosecutors have not actually read the sections that control such hearings. An entire chapter could be devoted to the issue of motions pursuant to these Evidence Code sections. However, this section will be limited in scope. Take the time to read these sections of the Evidence Code prior to proceeding with the remainder of this section.

Section 402 is the statute that describes how preliminary fact issues are to be resolved. Sections 403 and 405 are the operating sections.

In section 403 hearings, the judge determines whether the preliminary fact has been established. If the judge determines that the preliminary fact is insufficient, the evidence does not come in, and the jury never hears it. If the judge is satisfied that the preliminary fact exists, the evidence you seek will be admitted. In these situations, however, the jury is permitted to re-decide the issue. In other words, the jury is not bound by the judge’s decision. If they determine that the preliminary fact has not been shown, they may disregard both it and the evidence.

The most common example of section 403 evidence in a DUI trial is the chain of custody of a blood sample. The judge may determine that there is sufficient evidence to believe the blood is that of the defendant, and thus you may present the BAC result to the jury. However, the jury is permitted to determine the issue irrespective of the judge’s prior ruling. If the jury determines that the chain of custody is not sufficient to believe that the blood is the defendant’s blood, they are permitted to reject both the chain of custody evidence and the BAC evidence.

In a section 405 hearing, the judge determines the existence of the preliminary fact, the evidence comes in, and the jury cannot reject the preliminary fact. The jury may only determine the weight to be given to the evidence.
A few of the most common examples of section 405 issues in DUI trials are expert qualifications, BAC results, and issues revolving around Title 17 compliance. For example, the judge may rule that a particular witness is an expert and will be permitted to testify as such. The jury will hear the evidence offered by the expert. The jury determines what weight, if any, they will give to that testimony. However, the jury will not determine whether the witness is an expert.

Evidentiary determinations pursuant to sections 403 and 405 should be most often performed out of the presence of the jury, and the judge should state on the record whether the ruling is pursuant to section 403 or section 405.

N. Develop a Theme

Try to distill your case into a single idea that can be woven into the presentation of your case, from voir dire through closing argument. Generally, a theme is a concept that the jurors will remember, particularly when you reinforce it in closing argument. Themes are often derived from an admissible statement made by the defendant, such as: “I guess I had one too many;” “I can’t do these tests when I’m sober;” or “I wasn’t driving that bad!” A theme may also reflect a recurring concept in your case, such as impaired judgment, bad choices, or one foot over the line. You need to be comfortable with the theme and should avoid a theme that seems too contrived or cute. Try to match the tone of your theme to the seriousness of your case. Whatever theme you choose, it must be one with which you are comfortable.

III. Conclusion

Trial preparation is the process of learning as much as possible about your case and the defendant, and then organizing that information in the most effective and persuasive manner for your presentation to the jury. The more effort you place in trial preparation, the less likely it is that you will be surprised during trial. If you are well-prepared, during trial you will be able to focus your attention on developing your trial strategy and honing your skills rather than trying to educate yourself about the facts of the case as it unfolds. Pretrial preparation will increase confidence in your case, improve trial performance, and, consequently, enhance your credibility and persuasiveness with the jury.

Ellen Sarmiento is a Supervising City Attorney in the Los Angeles City Attorney’s Office. She has been employed with the Los Angeles City Attorney’s Office since 1981. Ms. Sarmiento started as a Trial Deputy, was the Assistant Supervisor of the Hill Street Branch for several years, and has been the Supervisor of the Metropolitan Branch since 1988. She currently supervises the prosecution of all vehicular misdemeanors, including DUI cases, that occur in the Central Los Angeles City area and oversees the filing and disposition of approximately 20,000 misdemeanor cases per year.

Ms. Sarmiento earned a Juris Doctor degree from the University of California at Davis, where she was a member of the Law Review. She received a Bachelor of Arts degree in English Literature from the State University of New York at Binghamton.

Ms. Sarmiento is a frequent instructor for several different programs. She has taught “Prosecuting the Drugged Driver,” an advocacy course for the National Traffic Law Center/National District Attorneys Association, a couple of times and has been a Trial Advocacy Instructor for CDAA since 1994. Ms. Sarmiento has also been providing training to new deputy city attorneys through the City Attorney Training Program since 1985. In addition to writing a chapter for this manual, Ms. Sarmiento was also a contributor to the *DWI Trial Manual*, published by the National Highway Traffic Safety Administration, Transportation Safety Institute in 1998.

Chapter Updated in 2010 by G. Stewart Hicks, TSRP: Stewart Hicks holds an L.L.M. degree in Prosecutorial Science from Chapman University, a JD degree from Western State University College of Law, and a BS degree from Oregon State University. Prior to joining the CalTSRP in 2007, he served as a district court magistrate in Michigan and as a deputy district attorney in Los Angeles and Orange Counties. He has also served as an appellate attorney and as a judge pro tem in the Orange County Superior Court in the Juvenile and Dependency Courts, bringing more than 25 years of prosecutorial and judicial experience to the TSRP Program. Mr. Hicks is assigned to the Central Valley Region, and is situated in Fresno.
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Chapter VI

Winning at Trial—Thinking Beyond the Corpus

by Frank M. Horowitz, Former Director of CDAA's Driving Under the Influence Project

Special thanks are owed to Riverside County Deputy District Attorney Michael Quesnel, whose willingness to participate in our ongoing dialogues provided vital insights and nurturance for this chapter. CDAA owes particular appreciation to Los Angeles Deputy City Attorney Steven Totten and San Diego Deputy District Attorney Julie Willis for providing peer-review and editing assistance.

(Updated 2010 by Stephen F. Wagner, TSRP, Coastal Region)

I. Introduction

READY FOR THE PEOPLE, YOUR HONOR. By uttering these magical words, the pursuit of justice in your case begins. Central to your preparation for this effort has been your focus on the corpus and your burden of proving each element beyond a reasonable doubt. In order to accomplish this, you have reviewed the relevant law, read all the reports, talked to the witnesses, and verified the accuracy of the chemical test results. You are satisfied that after the jury hears your evidence, it will agree that each element of the corpus has been proven and return the appropriate verdict of guilty. If the jury should happen to come back with an unexpected verdict of not guilty, well … as some of the senior prosecutors say, “Stupid juries do stupid things.”

But the reality is that most juries' verdicts accurately reflect the issues, evidence, and arguments that were presented at trial. Therefore, if the jury does not agree with you, it is likely it either saw holes in your case that you did not spot, or gave greater weight to the defense's evidence than you believed was warranted.

The point of this chapter is that the analysis of your evidence, and of your opponent, through the dual lenses of common sense and life experience will improve your ability to develop a case that your jury will both understand and embrace.

II. What Do Those 12 Strangers Want from Me? Reasonableness and Fairness

Most likely, the jurors you have chosen have no legal education. Therefore, they do not see the world the way you do, and they do not think like you. For instance, they felt greater anxiety entering the unfamiliar environment of the courtroom than you did. They likely were more embarrassed by the intrusive questions of voir dire than you were. It is unlikely that your perspective of this trial matches theirs. They are anticipating the unfolding of the case to be exciting and entertaining—like good theater. And, for sure, your jurors have no clue what a corpus is.
The jurors have been told they are the judges of the facts, whatever that means. They understand they have been invited to render a verdict, to solve a case, to choose between the prosecution and defense renditions of what happened. Not being lawyers, they are not clear how they should take on this task or what tools or skills they might use. Even the judge’s pre-testimony instructions created more confusion than illumination. So, what to do? Like most normal folks, your jurors will attempt to measure and evaluate all that occurs in this unfamiliar environment with the most familiar tools they own—their life experience and their common sense. It is the unspoken belief of all jurors that the use of these tools will lead them to what they believe the judge wants: a REASONABLE conclusion. (After all, the judge did say something about the verdict being based on a belief that is beyond a reasonable doubt.) Therefore, your case must not only satisfy the elements of the corpus, but must reasonably satisfy your jurors’ notions of common sense and fit within their own life experiences.

In closing argument, consider highlighting not only the factors that support guilt (i.e., the impairment factors), but also the absence of factors that point to innocence.

During your trial preparation, you likely listed how the facts of your case related to each element of the crime’s corpus. For instance, the fact that the officer saw the defendant’s vehicle continually weave between two lanes is evidence that supports the conclusion that the defendant was driving in an impaired manner. This fact is useful in proving a violation of both Vehicle Code sections 23152(a) and 23152(b). One of the reasons the jurors will relate to this information is that each has had the experience of seeing a weaving driver on the highway. In each instance they probably thought: (1) “I think that driver is ‘loaded,’” and (2) “I’d better be careful lest that driver crash into me.” Thus, when the jurors ultimately nod in agreement that the defendant was both an impaired driver and a threat to everyone on the road at that time, it is because that conclusion reasonably matches their own life experiences much more than their appreciation of corpus.

Jurors find comfort in knowing that the arresting officer was fair—that is, fair to the defendant. The fairness factor first comes to light in a driving under the influence prosecution when the prosecutor is addressing the issue of the field sobriety tests that were administered to the defendant. During direct examination, efforts should be made to slow down and highlight the facts that show the precautions taken by the arresting officer to ensure that the defendant received adequate instructions during the administration of the field sobriety tests.

III. Knowledge of All Available Case Facts Is the Key to the Kingdom

It is vital that prosecutors develop a real compulsion to learn as much about the case at hand as possible. The more you know about your facts and how they fit into the puzzle, the better your position to satisfy the jury beyond a reasonable doubt. This will require that you go beyond the four corners of your reports to learn more about the scene of the incident or about the important people in your case or about the processes the officers followed in their investigation. Each extra fact you learn is like having an additional arrow to hit the target. And just as the one with the most arrows in the bull’s eye wins, the trial lawyer with the most extensive knowledge of what happened is in the better position to satisfy the jury.

For instance, assume the facts show that the defendant repeatedly put his or her leg down during the leg-lift portion of the field sobriety test. The contention that such a performance is consistent with impairment will probably be accepted by the jurors because it squares with their life experience.
But a juror might rethink this conclusion if the defense presents evidence contending the fallibility of FSTs. Assume the defense expert testifies that such tests are not good predictors of impairment because they assume a certain level of coordination; don’t allow for the nervousness naturally felt by a person stopped by the police; and don’t consider the unbalanced grade of a sidewalk. Such defense testimony provides an alternative explanation for the leg-lift results, and, thus, may raise a reasonable doubt for the jury.

But if during the pretrial interview with the officer the prosecutor had asked, “Is there anything else I ought to know about this case,” a crucial piece to the puzzle might have been revealed. For instance, in the case above, if the officer’s response was that during the FSTs, the defendant mentioned having been a college gymnast, you can see how this additional fact would permit the prosecution to regain momentum. This revelation to the jury would satisfy it that the leg-lift results, given the defendant’s athletic prowess and coordination, must have been due to alcohol impairment. So as you can see, the more you learn about your available facts and how they may be used, the greater your opportunity to establish the believability of your case.

This marks an opportunity to expand and truly highlight the significance of these factors. Of course there are limits to how much you can pile on, but the point is to note the value of the opportunity and to clearly communicate the message to the jury. In the example above, to ignore this new information would be a missed opportunity. This example also illustrates the importance of the pretrial interview.

IV. Like a Coin, Every Story Has a Flip Side: Your Adversary’s “Unreasonable” Need to See the Facts Differently

One of the most interesting and sometimes frustrating things about prosecuting is that the defense will surely present evidence intended to either neutralize or negate the facts that support your case. What this means is that every fact gleaned from the officer’s reports, witness interviews, or lab results is susceptible to an alternative read, and, consequently, the case you prepared may possibly veer off on an unexpected angle. Many of the senior people in your office can share experiences about a case they tried and how it bore only a slight resemblance to their case preparation. In fact, you may have had this experience yourself. The feeling is one of ambush. Your adversary appears to be weaving a Pied Piper spell over your jurors, leading them down the wrong path. It can dent your confidence and leave you wondering why you went to law school in the first place. So what is a reasonable prosecutor to do?

Let us be clear. Our primary duty as public prosecutors is to do justice, and, if we are not satisfied about the defendant’s guilt, we must dismiss the case. Indeed, it is one of the joys of our profession that we are a class of lawyers that gets paid to do justice.

The common prosecutorial experience is that the charges against the defendant are good and are supported by the evidence. But it is likely that your case, like any product of human endeavor, possesses flaws, glitches, inconsistencies, and problems. There are no perfect cases. It is how you deal with the imperfections of your case that will determine your ability to be an effective prosecutor. Your challenge is compounded by the reality that there are always two sides to every story.
New prosecutors tend to believe that the mere reading of the reports and an interview with the witness has revealed all of the only possible renditions of what happened. But by assuming the rigid notion that the evidence in your file is all you need to know, you reduce your odds of success at trial. If, instead, you begin your preparation as a questioning truth seeker, critically evaluating the facts of your case, you gain an invaluable perspective. You are like the shopper who has just purchased a great-looking steak from the local market. It appears fresh and yummy in its sealed, plastic-wrapped package. When you get it home and open your purchase, however, you realize it is rotten. It failed the smell test. By the same token, your first task when you evaluate your case is to determine whether it passes the smell test. You achieve this by using those pre-law-school gifts of life experience and common sense in order to determine whether or not your case is reasonable and believable. If your independent evaluation of the alleged facts raises questions, or if the actions of your witnesses seem outside your expectations of how people would act in a similar circumstance, or if obvious corroboration is missing, then you likely have discovered some significant glitch.

One way you can deal with the imperfections in a case is to be an ostrich and bury your head, hoping all the messy, unreasonable aspects you have spotted will go away. But unexamined problems do not go away. They compound. They multiply. They explode! After all, the jury will likely see what you saw, times 12!

Therefore, the better approach is to assume the role of an inquiring, critical “thirteenth juror.” The benefit is you will be the first to uncover the inherent apparent questions or conflicts within the evidence, and the first to determine whether there are reasonable, common-sense answers that the other jurors will ultimately need to know if justice is to be done.

As you evaluate the imperfections in your case, you must be able to categorize these imperfections. Is the imperfection a mere inconsistency that can be explained? Or is it a more glaring imperfection that might truly lead to reasonable doubt or the granting of a pro-defense instruction.

V. One Bad Apple Can Spoil the Bushel

In fingerprint analysis, identification is based on points of similarity. The more points of similarity between the lifted print and the suspect, the greater the likelihood that the identification is correct. But, a single point of dissimilarity totally negates the identification. In much the same way, a significant fact or inferential loose end in your evidence that does not square with the jury’s common sense or life experience may become a point of conflict that completely undermines your case, regardless of the number of facts in evidence that appear consistent with a guilty verdict.

In virtually every case that goes to trial, each side believes its evidence supports its position. But it is not the 10 facts in evidence that each side has presented that will determine the verdict. No, it is the one fact out of the 10 or some other significant point that does not fit or does not make sense that usually sways the jury. Think about it. If each side presents evidence that plausibly supports its position, the jurors are left with the predicament of either throwing up their hands and returning without a verdict or flaw hunting in the belief that the less-flawed presentation must be the truth. Often, a prosecutor learns in talking to jurors after a not-guilty verdict that, in spite of the mounds of evidence that supported the theory of guilt, the verdict was most impacted by those few loose ends in the People’s case that seemed discordant, appeared unreasonable, or did not square with jurors’ life experiences. Usually, a juror will couch this conclusion by saying, “I thought the defendant was guilty,
but I wasn't convinced beyond a reasonable doubt.” For that juror, it did not matter if the final tally of evidence was 26 believable facts supporting guilt and only two unreasonable ones. It was these points of dissimilarity that precluded the jury’s matching of a guilty verdict to the defendant.

The above example and the juror’s feedback may well relate to the previously mentioned point of avoiding missed opportunities. Assume that most jurors need to hear the message more than once.

Because jurors believe they are sworn to evaluate the facts of the case through a filter of reasonableness, they are particularly on guard for anything in your case that impresses them as unreasonable. It could be the facts themselves. It could be what was done or omitted in the police investigation. It could be the demeanor of your witnesses. For instance, if your burly adult male witness breaks down on the stand sobbing while relating how he was threatened in a disturbing-the-peace case, you should not be surprised by a not-guilty verdict. The jury likely concluded that the victim’s behavior on the stand, given his size and appearance, was both unreasonable and so outside the realm of life experience that the victim was not to be believed, even though the facts related supported each element of the corpus.

Similarly, if your interview with a People’s witness includes a story of events that is contrary to the preliminary statement in the police report, you need to determine if there is some reasonable explanation for this apparent inconsistency. For even if the inconsistency is minor, the jury may choose to use this point of dissimilarity to disregard all of that witness’s more important credible testimony, concluding it is unreasonable to trust the testimony of a witness who appears to be talking out of both sides of his or her mouth.

So how do you insulate your case from such attacks?

VI. “Where’s the Beef?”—Thinking Like a Defense Attorney

Some years back, there was a television commercial in which a frail senior citizen, frustrated by her unsuccessful microscopic search for the meat patty between the buns of a hamburger, would wail, “Where’s the beef?” In much the same way, defense counsel’s preparation for trial involves the laborious, painstaking, microscopic inspection of the facts of your evidence. Therefore, in order to insulate your case from a defense onslaught, you must learn to think like Clarence Darrow. Once you are clear about the corpus and your available evidence, your task is to discover what flaws, glitches, and imperfections exist that the defense has found and that you have not yet figured out. What is the defense’s “beef” with your case?

Pretend you are defense counsel. Think creatively. What is the best possible defense read of the facts that might support a notion of innocence? Pretend your facts are the subject matter of a movie. What surprises would you expect in the final scenes that would raise doubts about the accuracy of what came before? Remember, in order to raise a reasonable doubt in a juror’s mind, the defense does not have to negate your entire case—it is usually sufficient to effectively dispute only a point or two.

Indeed, the failure by the prosecution to prove one of several elements of the charged offense should signal that an acquittal is on the way.

As a starting point, CRITICALLY reread all of the police reports. What error, misstatement, or inconsistency lives within the report or surfaces when one report is compared with another? What
flaw is within the calibration of the breath instrument or chemical test? What is it that supports the defense’s belief that there is enough wrong with the People’s case that the jury will reasonably doubt the defendant’s guilt?

During the interviews of your witnesses, pay attention to the facts they relate and the impressions they make as they talk. Are they believable? Were their actions, under the circumstances, reasonable? Be sure to pay attention to whatever questions arise from either the substance of what they have to say, how they acted on the date of the incident, or how they are acting now. Review your case to determine whether there are missing pieces of obvious corroboration. For instance, if your witness in a domestic-violence case claims to have called the police earlier in the evening, check with the law enforcement communications center to verify the call and get a tape of it. You must assume that if you do not tie down your corroboration, the defense will argue it never happened: “For if it did, the prosecutor would have the 911 tape in evidence.” In short, if any questions about your case come to mind, pursue the answers. It is crucial to identify the loose ends and discover the explanations. Your jurors will likely spot the same loose ends. If the available explanations are not provided, the jurors may conclude there is a reasonable doubt.

Experienced and successful prosecutors learn to spot the real and potential problems in their own cases and are prepared to demonstrate to the jury that the defense’s efforts to convert a case flaw into reasonable doubt are either wrong or are unfounded because the perceived flaw is of minor import.

It is possible that the defense is not merely going to attempt to convert the warts of your case into reasonable doubt. The defense may well have its own stable of witnesses who will attempt to spin a tale at variance with your evidence. Often, the discovery of problem areas in your own case will tip you off to potential defense theories of not guilty. The defense’s contention may be, “I wasn't driving,” or, “I didn't drink until after the crash,” or “I was on the rise.” All of these defenses will likely require your opponent to produce witnesses and evidence. Now it is your turn to find the flaw.

VII. What Is Good for the Goose Is Good for the Gander

Let us assume jurors ultimately decide cases by looking for the flawed points of dissimilarity in the evidence presented. Further, let us agree that during the trial, your perfect case will be continually attacked by the defense until some flaws, inconsistencies, or minor gaps surface. But if you are prepared to show your jury the holes and inconsistencies in any defense theory of innocence, the jurors, as truth seekers, will see past the minor imperfections in your case and conclude that guilt is the only reasonable verdict.

Because of the nature of our respective functions, prosecutors are normally more comfortable putting cases together, and defense attorneys necessarily develop the instincts and skills to tear things apart. But there is no inscription on the supreme court building or anywhere else that prevents us from developing the same flaw-spotting skills possessed by our adversaries at the other end of the table. So, how to do this?

Analyze the known defense facts, asking yourself at each point whether the facts are consistent with the defense story. For example: “If the defendant was not driving when the car crashed, how come she had the keys in her jeans when the California Highway Patrol arrived?”
Pretend it really did happen as the defense claims. What would you expect to find? Compare the defense’s facts with yours. Ask yourself, “If the defense’s contentions are true, do all of the proffered facts fit? Are there pieces missing that would be present if this were the truth?” Everything within the defense’s theory that does not make sense is fair game for your counterattack.

The careful scrutiny of plausible defense theories and claims is a fruitful endeavor. However, be careful not to take the bait and chase dead ends.

New prosecutors often focus exclusively on what has been introduced in evidence. Frequently, it is what was not introduced that best counters the defense’s theory of innocence. If the defense rendition raises the notion that someone or something could reasonably corroborate the defendant’s story, but no corroboration is provided, hammer it!

For instance, if the defendant testifies that she and a coworker went out for a drink after work and each consumed no more than one glass of wine, then where is the coworker? If the story were true, wouldn’t the missing witness be essential in establishing the veracity of the defense theory? Or if the defendant is a salesman who took a client out to dinner on the company dime, where are his credit card receipts showing how little alcohol was consumed? Jurors will find defense stories unbelievable if corroboration is implied but none is produced.

Additionally, it is common for defense counsel to attempt to raise red herrings during cross-examination. For instance, assume an officer, in response to defense questioning, concedes that extended wearing of contact lenses might produce red and watery eyes. But the defendant, during testimony, never admits wearing contact lenses. Or assume the People’s expert testifies that burping while blowing into the breath instrument would produce an inaccurate test result, but the defendant never testifies to having burped during the breath test. You can use such gaps and omissions in the defense’s case to demonstrate that it is predicated on merely the possible or hypothetical but not on solid evidence.

You might be able to draw attention to the observed gap during the defendant’s cross-examination. Such an effort obviously makes more sense if you are confident of the defendant’s answers. For instance, in the contact-lens situation, your read of the arrest report and the attached Department of Motor Vehicles licensing information will likely tip you off as to whether the defendant was wearing contacts.

Sometimes, an observed gap in the defense evidence is best left alone on cross-examination and saved for argument, for it is possible that the gap was merely a function of defense counsel’s oversight. If, for instance, in your effort to cement the “no-burp gap” on cross, you alert the defendant who now remembers to claim burping, you have lost that argument to the jury.

While you can generally comment on the absence of defense evidence (i.e., the failure to call logical witnesses) if the defendant did not testify and if the defendant is the only person who logically could have provided the missing testimony, you must not argue, “The defense presented no evidence that …” Such a comment may be deemed an argument erroneously pointing out defendant’s failure to testify, and, if judged a Griffin error,1 will guarantee the granting of the defense’s motion for mistrial.

Of course, in the burping example, you could close up this gap in the defense’s case by calling the officer back to testify that no burping was observed during the defendant’s blowing into the breath instrument. You would then be free to argue, “There is no evidence of burping in this case.” In the above hypothetical scenarios, without supporting affirmative evidence, defense counsel should be precluded from testifying to the jury that the observed redness of the eyes was due to the defendant’s contact lenses or that the chemical test results were a function of burping into the breath instrument.

In preparing your counterattack, take notes and keep track of the quality of the testimony of the respective witnesses. Just as in a movie, it is often how the speaker’s lines are uttered, as well as their substance that helps form audience reaction. Jurors have certain expectations regarding the demeanor of a truthful, impartial witness. Therefore, if a defense witness answers defense counsel’s questions without hesitation and with significant detail but, conversely, is halting, evasive, and frequently answers, “I don’t remember,” during your cross-examination, this is important. For the jury will likely agree with you that the witness’s manner of testifying is discordant with the truth and should be discounted.

Experienced and successful prosecutors are able to see and use the flaws, glitches, and inconsistencies in a defense theory of innocence to show the jury that the only reasonable verdict is guilty.

Often, neither the defense theory nor the substance and quality of defense testimony becomes apparent until after you have rested your case, so it may be helpful to maintain a separate notepad in anticipation of final argument. Consistent-with-guilt evidence and trial happenings can be kept in one section and a separate inconsistent-with-innocence section can also be maintained. By gathering your insights as the evidence unfolds and is fresh in your mind, you will be effectively storing the material for a powerful final argument.

As previously mentioned, your closing argument is enhanced by references to, and examples of, the unreasonable story of innocence.

VIII. A Final Word

This chapter has attempted to share some notions of how effective prosecutors do their jobs. Effective prosecutors understand how the evidence will prove the corpus. With practice, they have learned to seek out and respond to the questions and loose ends imbedded in their evidence. Over time, they have developed the ability to find the flaws in an opponent’s case. They prepare their trials like a seasoned gymnast prepares a floor-exercise routine. They understand the goal of the routine and are able to achieve the whole by moving smoothly through the parts. Unlike their earlier days, they no longer need to fixate on each component. Like athletes, they improved with practice.

Will the points made here guarantee that you will win every case? GET REAL!

We each work within an imperfect, human, criminal justice system. No human can predict or control all that remarkably occurs between, “Ready for the People,” and the jury’s verdict. But this chapter will hopefully facilitate your efforts at achieving justice by defining and discarding the bad cases, and doing your best with the tough but winnable ones.
Frank Horowitz, the director of CDAA's Driving Under the Influence Prosecution Project from 2001–2003, has practiced criminal law for nearly 30 years. His experience includes an initial five years as a Los Angeles County public defender, followed by 19 years as a prosecutor in the Los Angeles City Attorney’s Office. Mr. Horowitz then joined the Butte County District Attorney’s Office, ultimately serving as the deputy-in-charge of the Chico Branch.

Mr. Horowitz’s involvement in prosecutor training began in 1980 with two years as the supervising-attorney-in-charge of the Los Angeles City Attorney’s nationally acclaimed training program. This training format served as an early model for the current CDAA Trial Advocacy Workshop. He has been a CDAA instructor since 1985 and was selected Outstanding Instructor from 1985-1987.

Mr. Horowitz received both his Juris Doctor and Bachelor of Arts degrees from UCLA. He has twice served on the faculty of the National Advocacy Center in Columbia, South Carolina, and has taught law-related courses at numerous colleges. In 2001, he received a Pro Bono Service Award from the State Bar of California for his volunteer work at the Chico office of Legal Services of Northern California.

Chapter Updated in 2010 by Stephen F. Wagner, TSRP: Stephen Wagner served as a deputy district attorney in San Benito County for six years before joining the CalTSRP in November 2007. He has prosecuted a broad range of criminal offenses from simple assaults to various forms of homicide/murder. He has been a consistent editor and author for CDAA publications, including Behind the Wheel and the former Case Digest. Teaching Criminal Law & Procedure at Monterey College of Law, Mr. Wagner is a graduate of NDAA’s Faculty Development Course and has served as an instructor at the National Advocacy Center and at CDAA’s New Prosecutors Seminar. As CalTSRP for the Coastal Region, he is based in Monterey County.
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Chapter VII

Probable Cause to Arrest

by G. Stewart Hicks, TSRP, Central Valley Region

I. Motions to Suppress Evidence in Driving Under the Influence Cases (Penal Code § 1538.5)

A. Introduction

After a DUI complaint has been issued, many defense attorneys file motions to suppress evidence pursuant to Penal Code section 1538.5, alleging that the stop of the defendant’s vehicle and the subsequent detention of the defendant violated the Fourth Amendment. Such a motion should be looked upon as a valuable tool in your continued growth as a prosecutor, as this affords you an opportunity to hone your brief-writing skills, your interview techniques, and your direct and cross examination acumen.

B. Burden of Proof


Subsequent to the decision by the California Supreme Court in People v. Williams (1999) 20 Cal.4th 119, defendants are allowed to file motions that simply allege that the stop and consequent arrest were warrantless. Do not expect defendant’s motions to provide you with a legal analysis of the defense theory as to why a Fourth Amendment violation exists.

The filing of the motion shifts the burden to you, the representative of the People of the State of California, to justify the arrest and search of the defendant and/or his or her property. Of course, the best manner in which to respond to the defense motion is to provide a written response in the form of a brief. As a practical matter in many jurisdictions, however, the People’s response in misdemeanor DUI cases is by way of calling witnesses to the stand and providing evidence of the justification for the stop, detention, arrest, and search. If you have the luxury of being able to file a written response, once the justification for the warrantless search and seizure is provided, the defense (in theory) is supposed to respond by pointing out any factual or legal inadequacies in your proffered justification. In reality, reply briefs by the defense are seldom filed. Nevertheless, you may argue at the hearing that defendant’s failure to file a reply brief—specifying why your proffered justification falls short of meeting Constitutional standards—should prohibit the defense from asserting any new legal theories at the time of the hearing. (Id. at 130.)
C. Interviewing Witnesses

Although the defense motion is not likely to assist you in your attempt to ascertain why the defense believes its motion has merit, keep in mind the fact that most defense attorneys do not file frivolous motions.

Accordingly, do not rely solely on the police reports to determine whether a violation of the Fourth Amendment has occurred. Remember, police reports are only summaries of events. Police reports often provide great detail about the objective symptoms of being under the influence, the field sobriety tests, and the results of the preliminary alcohol screening tests and additional breath test. Although this information is invaluable for trial, none of this evidence will be admissible if the initial stop of the vehicle or detention of defendant is held to be a violation of the Fourth Amendment.

Therefore, questioning your witnesses ahead of time will assist you in filling in the gaps. If practicable, interview your police officers or civilian witnesses prior to the suppression hearing. No question is too minor or insignificant. Try to interview your officers after they have had a chance to review their reports and refresh their memories.

There are many areas of inquiry that require your attention during the interview of your officers. Here is a short list of areas that should be covered, at a minimum.

1. Road and weather conditions prior to and at the time of the stop.

2. Initial observation of vehicle: Where was the officer when the defendant was first observed? Was this a sobriety checkpoint? (See discussion of sobriety checkpoints, infra.)

3. Reason for the stop: This information is for the purpose of justifying the stop of the defendant’s vehicle. If the reason for the stop is that the officer had reasonable suspicion to believe there was a moving violation, be sure you and the officer are clear about which section of the Vehicle Code was violated by the defendant. If the stop is based on erratic driving (or a series of moving violations), obtain as many details as possible regarding lane number, speeds, distance traveled, etc. If an equipment violation was the reason behind the stop, determine which Vehicle Code section was violated and whether there are photographs of the violation (i.e., broken tail light).

4. Initial contact with the defendant: This information is for the purpose of justifying the detention of the defendant. At the time of the stop, did the officer tell the driver the reason for the stop? Did the driver respond? If so, what was the response? What symptoms of impairment was the officer able to make upon first contact? E.g., odor of alcohol, bloodshot and watery eyes, slurred speech, lack of coordination (during retrieval of license, registration, and proof of insurance).

5. Other potential witnesses: Were other persons present in the defendant’s vehicle? Were they in a position to hear the conversation between the defendant and the officer? Were they in a position to observe any activity outside the vehicle, such as the Field Sobriety Tests (FSTs)? Did a passenger make any comments about how much alcohol was consumed by
those persons present in the vehicle? Did anyone make a comment regarding other persons with whom they had been drinking but who is not present in the vehicle? Were those names recorded in some fashion? Were any passengers evaluated and capable of driving the vehicle after the driver was arrested?

6. Length of detention: This information is for the purpose of ascertaining whether there are any issues regarding a prolonged detention. How much time elapsed from the initial observation of the vehicle to the initial contact with the driver, and then to the time the FSTs were begun? Were there any delays during the investigation? What was the cause of the delay?

7. Additional discovery: Are there any supplemental reports or photographs (common in accident cases)? Remember, you must provide this information to the defense at the first opportunity.

8. Were any other officers present at any point of the investigation? This should go without saying; however, those officers who did not write a report for a particular incident are often left out of the written reports—and just as often remain off witness lists.

9. Visit the scene whenever possible, and do so with the officer.

D. Preparation of the Brief

Your local jurisdiction sets policy as to whether a written brief is required prior to the hearing. Although a matter of individual style, the brief should always contain a statement of facts followed by legal argument.

If you have had the opportunity to interview the officers and establish a detailed scenario as to what transpired, it is important to include the information provided by the officer in your statement of facts. The court will rely on the People's recitation of the facts (because the defense normally does not provide any detail), so make sure the facts are accurate.

II. Probable Cause to Arrest

A. In General

The United State Supreme Court stated that “[p]robable cause exists when the facts known to the arresting officer would persuade someone of “reasonable caution” that the person to be arrested has committed a crime.”1 “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts ….” (Illinois v. Gates (1983) 462 U.S. 213, 232.)

Generally, the courts have stated that a peace officer in California cannot arrest a person for a misdemeanor offense without a warrant unless the offense is committed in the presence of

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the officer. (Penal Code § 836.) Frequently, however, an officer arrives at the scene of a traffic collision and believes one or more of the drivers involved may be under the influence of alcohol and/or drugs. Vehicle Code section 40300.5 was originally enacted to allow a peace officer, without a warrant, to arrest a person involved in a traffic collision when the officer has reasonable cause to believe that the person had been driving while under the influence of alcohol and/or drugs. (See Shaffer v. Department of Motor Vehicles (1977) 75 Cal.App.3d 698; People v. Ashley (1971) 17 Cal.App.3d 1122, 1125–1127; People v. Jordan (1977) 75 Cal.App.3d Supp.1, 14.)

B. Suppression of Evidence for Violations of Penal Code Section 836

Subsequent to the passage of Proposition 8, suppression of evidence is not a remedy in the criminal prosecution unless the evidence is obtained in violation of the Fourth Amendment, i.e., an arrest or search was made without probable cause. If an arrest is deemed unlawful, only those items or observations obtained after the arrest must be suppressed. Those observations or statements that occurred during the course of investigation by the officer and prior to the arrest are properly admitted (e.g., observations of driving, field sobriety tests, signs of intoxication prior to arrest).

Accordingly, an arrest in violation of section 836 does not mandate suppression of the evidence where the arrest was nevertheless supported by probable cause. In People v. Trapane (1991) 1 Cal.App.4th Supp. 10, the court stated:

Because Proposition 8 provides only for suppression of evidence obtained in violation of federal constitutional rights, and because a misdemeanor arrest made where the offense was not committed in the presence of the arresting officer is not a violation of constitutional magnitude, it can be concluded that appellant’s Fourth Amendment rights were not violated as her arrest was supported by probable cause. (Id. at 14.)

(See also People v. Donaldson (1995) 36 Cal.App.4th 532, 539.)

C. Vehicle Code Section 40300.5 and Penal Code Section 836

Section 40300.5 provides for warrantless arrests where any one of the following circumstances exists:

(a) The person is involved in a traffic accident.
(b) The person is observed in or about a vehicle that is obstructing a roadway.
(c) The person will not be apprehended unless immediately arrested.
(d) The person may cause injury to himself or herself or damage property unless immediately arrested.
(e) The person may destroy or conceal evidence of the crime unless immediately arrested.

Section 40300.6 provides that the authority of section 40300.5 should be construed liberally. (See generally, People v. Thompson (2006) 38 Cal.4th 811, 821.)
**Note:** Vehicle Code section 40300.5 was amended in 1996 in order to clear up some of the confusion regarding the combined issues of “driving” and “in the officer’s presence” that had arisen from the decision in *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 761–762.

Penal Code section 836(a)(1) provides that an officer may arrest a person without a warrant provided that “[t]he officer has probable cause to believe that the person to be arrested has committed a public offense in the officer’s presence.” *Note:* What happens at the DMV hearing as a result of a Penal Code section 836 violation is not relevant to the criminal prosecution. (Cf. Vehicle Code § 13353.2(e).)

1. “**Accident**”

   A traffic accident refers to a crash involving at least one vehicle. The use of the word “traffic” in the statute is intended to describe the type of collision. In the statute, the word “accident” refers to an unexpected happening, mishap, or unfortunate occurrence. (*Ashley, supra,* at 1127.) Furthermore, it is well settled that a crash involving a single vehicle satisfies the requirement of Vehicle Code section 40300.5. (*Cowman v. Department of Motor Vehicles* (1978) 86 Cal.App.3d 851, 853.) “Accident” must be interpreted in the broadest sense to include both “intentional and unintentional conduct.” (*McNabb v. Department of Motor Vehicles* (1993) 20 Cal.App.4th 832, 838.)

2. “**In the Officer’s Presence**” Requirement of Penal Code Section 836

   When there is no collision or obstruction or driving observed by the officer, but the impaired defendant is behind the wheel of a car stopped on the side of the road, the term “in the officer’s presence” in Penal Code section 836 is to be construed liberally. (*People v. Welsch* (1984) 151 Cal.App.3d 1038, 1042.) The test is whether the alleged offense is apparent to the officer’s senses. Any and all of the senses are included. (*In re Alonzo C.* (1978) 87 Cal.App.3d 707, 712.)

3. **Destruction of Evidence—Dissipation of Alcohol in the Blood (BAC)**

   *People v. Schofield* (2001) 90 Cal.App.4th 968 dealt specifically with the issue of the dissipation of alcohol in a person’s body. The court held that the offense of misdemeanor driving under the influence, which has not been committed in the officer’s presence, is a circumstance justifying immediate arrest, pursuant to Vehicle Code section 40300.5. *Schofield* involved a citizen report of an intoxicated person who had driven away from a liquor store.

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2. In *Mercer*, the court held that in order to administratively apply the implied consent laws, “driving” required some observed volitional movement of the vehicle. The court stressed, however, that there is no such requirement to support a criminal conviction for driving under the influence because such movement may be inferred by circumstantial evidence. Further, note that Vehicle Code section 13353.2(e) provides that nothing determined at the DMV hearing has a collateral estoppel effect on any related fact or issue present in the criminal case.

3. It is highly recommended that prosecutors drop the word “accident” from their vocabulary in DUI cases. Jurors view the term in the same manner as Webster: an unexpected happening, mishap, or unfortunate occurrence. It is not an “accident” when an impaired driver chooses to get behind the wheel of a vehicle and subsequently wreaks havoc on our roadways by being involved in a traffic collision that may take a life.
The officer was provided with a description of the person, the vehicle, and the license plate number. After locating the vehicle parked in defendant’s driveway, the officer knocked on the front door. The defendant opened the door and came outside. The officers arrested the defendant after observing DUI symptoms. The court found the arrest was lawful and the chemical test results admissible even though the officers had not observed the misdemeanor crime. The court reasoned that it is essential in a DUI case to determine the defendant’s BAC as near in time to the driving as possible and, further, that the passage of time would destroy the chemical evidence of the offense. (Id. at 970.) The court in Schofield refused to extend its ruling to entry into a residence to effectuate arrest for driving under the influence. (Id. at 975.)

4. Warrantless Entry into Home

a. Destruction-of-Evidence Exception

In People v. Thompson, the California Supreme Court held that where the defendant’s blood-alcohol level would have diminished while officers sought a warrant, and where the defendant may have masked the blood-alcohol level by ingesting additional alcohol while officers sought a warrant, entry into defendant’s residence to effectuate the arrest was proper. (Thompson, supra, at 825, 827.) In finding that the exigent circumstances in this case validated the entry and arrest, the court noted that it was the totality of the circumstances in this case that validated the arrest. The court pointed out, however, that they did not hold that officers are justified entering without a warrant in all cases. (Id. at 827.)

b. Imminent Threat or Need for Medical Attention

An exigent-circumstances exception based on the officer’s objective belief that the warrantless entry is necessary to save lives after a collision is always justified as long as the officer can cite specific and articulable facts. (People v. Poulson (1998) 69 Cal.App.4th Supp. 1.) The subjective motives of the officer or primary motivation of the officer for entering the house can be considered, but the better rule is only to ask whether the officer’s behavior satisfies an objective inquiry. (See also People v. Dickson (1983) 144 Cal.App.3d 1046, superseded by Proposition 8.)

c. Community-Caretaker Exception

Although not technically a subcategory of the exigent-circumstances exception to the warrant requirement, the community-caretaker exception rests on some of the same foundations. (People v. Ray (1999) 21 Cal.4th 464.) Both exceptions to the warrant requirement contemplate the existence of an emergency that leaves no time to obtain a warrant. Under the community-caretaker exception, the occupant(s) are considered potential victims rather than potential suspects. This is a confusing concept because, in most cases, the belief someone is injured overlaps with the need to investigate a crime.
5. **Circumstantial Evidence of Driving**


The corpus delicti of a crime must be established independently of any statements offered by the defendant. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1169.) The rationale for the rule is to assure that individuals do not confess to crimes that they did not commit. (*People v. Jones* (1998) 17 Cal.4th 279, 301.) The corpus delicti of the offense may be proven by slight or prima facie evidence. (*People v. Scott* (1999) 76 Cal.App.4th 411, 416.) For the purpose of driving under the influence, the corpus delicti consists of proof that the automobile was being driven by a person who was under the influence of alcohol. (*People v. Bowen* (1992) 11 Cal.App.4th 102.)

A line of cases has arisen wherein the issue of circumstantial evidence to prove driving has become the principle issue. The issue may arise under several circumstances, such as traffic collisions when the driver is not in the vehicle, where the vehicle is resting idle with no driver present, where there is a person in the vehicle who is not in the driver’s seat, and many others.

> [W]hen it is established by competent evidence that no one in the reasonable vicinity except the suspect acknowledges having been the driver of the car and the suspect has some demonstrable connection with the vehicle, it then becomes a reasonable inference from circumstantial evidence that the suspect was, in fact, the driver.

(*People v. Moreno* (1987) 188 Cal.App.3d 1179, 1189.)

*Note:* In *Moreno*, the defendant’s conviction for driving under the influence was reversed based on ineffective assistance of counsel because the corpus delicti was not established and defense counsel did not object to the admission of defendant’s extrajudicial statements.

Moreover, independent proof of the corpus delicti “is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible.” (*Alvarez, supra*, at 1171.) Finally, it is not necessary that the inference that the defendant was driving need not be the only inference nor that it even be the most compelling inference. (*Jones, supra*, at 301–302.)

See also:

- *People v. Hanggi* (1968) 265 Cal.App.2d Supp. 969. The defendant was found “seated in his automobile, which was located roughly in the center of a street, across both the east and westbound lanes at an angle. Defendant was seated in the driver’s seat clutching the steering wheel and apparently unconscious. The engine of the vehicle was running and the headlights were on. No other persons were about.” (*Id.* at 971.) The court found “that there was ample evidence from which the jury could have inferred that the defendant had been driving his vehicle ....” (*Id.* at 972.)
• \textit{People v. Komatsu} (1989) 212 Cal.App.3d Supp. 1. “[A]n officer discovered a vehicle obstructing the roadway near the entrance and exit ramps to Highway 101. The parking lights of the vehicle were on. Defendant was the only person in the vicinity of the car. He was found intoxicated, sleeping in the front passenger’s seat of the car. He had the car keys on his person and the car was registered to a person with the same last name and address as defendant.” (\textit{Id.} at 3.) “A reasonable trier of fact could properly find from the evidence, aside from defendant’s statements, that one reasonable, plausible inference was that the defendant, while under the influence of an alcoholic beverage, drove the car to the location where it was found by the traffic officer. Thus, we conclude that there is sufficient evidence to sustain the trial court’s ruling that the corpus delicti had been established.” (\textit{Id.} at 5, 6.)

\section*{D. Citizen’s Arrest}

Citizens may detain or effect a citizen’s arrest for a misdemeanor committed or attempted in their presence. Persons may summon the police to accomplish the physical act of taking a defendant into custody. (Penal Code §§ 837, 839; \textit{People v. Johnson} (1981) 123 Cal.App.3d 495, 499.) To validate the officer’s arrest as a citizen’s arrest, there must be some evidence that the citizen requested the officer to take the person into custody. This may be expressed or implied by the conduct of the citizen in asking the police to respond, reporting the offense, and pointing out the offender. It is not necessary for the citizen personally to detain the defendant or to note an odor of alcohol. In more situations than not, when the police arrive to take the person into custody, they observe objective symptoms of alcohol intoxication. (\textit{Padilla v. Meese} (1986) 184 Cal.App.3d 1022, 1030–1031; \textit{Johnson}, supra, at 499. See also \textit{Johanson v. Department of Motor Vehicles} (1995) 36 Cal.App.4th 1209, 1216–1217 [where a parking attendant could have made an arrest for DUI].)

\section*{E. Unlawful Arrests}

Suppression of evidence is not a remedy in the criminal prosecution unless the evidence is obtained in violation of the Fourth Amendment, i.e., an arrest was made without probable cause. If an arrest is deemed unlawful, only those items or observations obtained after the arrest must be suppressed. Those observations or statements that occurred during the course of investigation by the officer and prior to the arrest are properly admitted (e.g., observations of driving, field sobriety tests, signs of intoxication prior to arrest).

\section*{F. Miscellaneous Cases on Detention and Probable Cause}

“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” (\textit{Whren v. United States} (1996) 517 U.S. 806, 810.)

An officer may stop and detain a motorist on reasonable suspicion that the driver has violated the law. (\textit{People v. Wells} (2006) 38 Cal.4th 1078, 1082–1083.)

An officer’s subjective or pretextual motivations for the stop are irrelevant under Fourth Amendment analysis. (\textit{Whren, supra}, at 813; \textit{People v. Valencia} (1993) 20 Cal.App.4th 906, 915.)
The constitutional reasonableness of the conduct based on probable cause cannot be invalidated by the concurrent existence of ulterior police motives and subjective intentions. *(Whren, supra, at 812.)* See also *People v. Miranda* (1993) 17 Cal.App.4th 917, wherein the court stated the analysis thusly:

> [T]he inquiry focuses on whether the officer was legally authorized to make an arrest and conduct a search. If, in the abstract, the officer does no more that he or she is legally permitted to do, regardless of the subjective intent with which it was done, the arrest and search are objectively reasonable and constitutionally proper.

*(Id. at 924, 925.)*

**III. DUI Sobriety Checkpoints**

**A. Generally**

When dealing with a case of a defendant charged with driving under the influence who has been arrested at a sobriety checkpoint, the prosecutor must keep in mind that the stop has been made without probable cause or any reasonable suspicion that the defendant was driving under the influence or otherwise violating the law. Such stops and initial approaches are allowed based on the state’s exercise of legitimate police powers in the interest of curbing impaired driving on its highways.

**B. Checkpoint Guidelines**

*Ingersoll v. Palmer* (1987) 43 Cal.3d 1321 is the seminal case on checkpoints. The California Supreme Court established eight guidelines that must be used to determine the validity of a checkpoint.

1. All decision making (e.g., location, duration, screening procedures, etc.) must be made at the supervisory level.

2. There must be limits on the discretion of field officers. For example, field officers may not change the formula regarding which vehicles are to be stopped. While the formula may change, depending on traffic flow, the decision must be made by supervisors.

3. There must be strict guidelines regarding the maintenance of safety conditions, such as: proper lighting, warning signs, signals, clearly marked and identifiable police vehicles and police personnel, screening procedures based on traffic conditions, ample off road/shoulder area for screening and FSTs.

4. The checkpoint must be established at a reasonable location. Once again, the decision making must be made at the supervisory level. The location must be one that will be effective in meeting the goal of deterrence. The location must be one that reflects a high incidence of alcohol-related traffic collisions and/or arrests. The location must be permanent in nature. It is not permitted to move from location to location.
5. The time and the duration of the checkpoint must be determined at the supervisory level. However, the time and duration may be at anytime that is effective, so long as it is accomplished with an eye toward effectiveness of the operation, and with the safety of motorists in mind.

6. There must be clear indicia of the nature of the roadblock. There must be advance warning to motorists that the stop is authorized. Such warning is to be accomplished by way of lights, signs, clearly marked police vehicles, and officers in easily recognized uniforms.

7. The length and nature of the detention must be no longer than is necessary to question the driver and to look for signs of impairment, such as odor of alcoholic beverage, bloodshot and watery eyes, and slurred speech. Officers may ask for a driver’s license. If there are no objective signs of impairment, the officer must allow the driver to proceed. If the officer observes objective signs of impairment, the driver may be directed to another area where further examinations may be conducted.

8. There must be advance publicity of the date and time of the checkpoint.

Note: In order for you to respond properly to a motion to suppress based upon a challenge to a sobriety checkpoint, you must be in close contact with the supervisor of the law enforcement agency that conducted the checkpoint. All agencies keep files on their checkpoints for just such a challenge. These files should contain all the information that relates to the eight requirements listed above, including the guidelines that outline the formula by which vehicles are to be stopped. Make sure you request the sobriety-checkpoint diagrams, checklists, etc., that were used by the supervisory personnel when they set up the checkpoint.

C. Additional Case Law Regarding DUI Checkpoints

1. The United States Supreme Court addressed the issue of sobriety checkpoints in *Michigan Department of State Police v. Sitz* (1990) 496 U.S. 444, holding that the initial stop of a motorist passing through the checkpoint, and the preliminary questioning by officers, was reasonable and did not violate the Fourth Amendment. The Court balanced the state’s interest in preventing impaired driving against the amount of intrusion on the motorist. It determined that the state’s interest prevailed because: (1) the scope of the drinking-driver problem and the state’s interest in eradicating it is not in dispute; (2) the “objective” intrusion on the motorist, i.e., the duration of the seizure and scope of investigation, is slight; (3) the “subjective” intrusion, i.e., fear and surprise to the law-abiding motorist was indistinguishable from border checkpoints, which are constitutionally approved; and (4) the state’s interest in preventing driving under the influence is sufficiently advanced by the fact that checkpoints result in the arrest of approximately one percent of all motorists stopped.

2. The California Supreme Court once again addressed the sobriety-checkpoint issue in *People v. Banks* (1993) 6 Cal.4th 926 and decided the issue of whether or not advanced publicity was required. In analyzing *Ingersoll* and *Sitz*, the *Banks* court held that a checkpoint operating without advance publicity, but otherwise in conformance with the guidelines set forth in *Ingersoll*, is constitutionally permissible. Even without the deterrence aspect, which advance publicity provides, the state’s interest still prevails. Thus, advance publicity is no longer a
constitutional prerequisite to a valid sobriety-checkpoint detention. Nevertheless, all law enforcement agencies are well-advised to continue to have a policy that includes advance publicity.

4. In *Roelfsema v. Department of Motor Vehicles* (1995) 41 Cal.App.4th 871, the court noted that in assessing the constitutionality of sobriety checkpoints, it is important to note that the guidelines in *Ingersoll* are just that—guidelines. Absence of any one factor does not necessarily invalidate the checkpoint.

IV. Search Incident to Lawful Arrest

A. In General

Article I, section 28 of the California Constitution abolishes the use of independent state grounds to exclude relevant evidence from criminal proceedings. (*In re Lance W.* (1985) 37 Cal.3d 873.) The result is to limit the application of the exclusionary rule as a remedy for police misconduct to just those situations set forth in decisions of the United States Supreme Court interpreting the federal constitution. (*In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1247.)

B. Vehicle Searches

In *Arizona v. Gant* (2009) ___ U.S. ___, 129 S.Ct. 1710, the United States Supreme Court established a new rule for the search of automobiles incident to arrest. Officers may “search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search . . . [and] when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” (*Id.* at 1710.)

Practically speaking, it is difficult to imagine a situation when an arrestee would not be secured for officer safety reasons. On the other hand, in virtually all DUI cases, it is reasonable to believe evidence relevant to a DUI arrest might be found in the vehicle. Although *Gant* overruled a search procedure imbedded in police policy for 28 years, there remain many viable options for officers to search a vehicle driven by a driver arrested for DUI.

1. Search of Containers Found Within the Vehicle

In *United States v. Ross* (1982) 456 U.S. 798, the United States Supreme Court held that a warrantless search of an automobile could include a search of containers or packages found inside a vehicle when such a search was supported by probable cause. The Court determined that the search of Ross’ car was not unreasonable under the Fourth Amendment. “The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause.” (*Id.* at 823.) Accordingly,

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4. The old rule was embodied in *New York v. Belton* (1981) 453 U.S. 454, wherein the United States Supreme Court stated: “[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” (*Id.* at 460.)
“[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” (Id. at 825.)

In 1991, the Supreme Court further clarified the rule. In California v. Acevedo (1991) 500 U.S. 565, the Court stated that officers may conduct a warrantless search of a vehicle, and the containers found within it, where they have probable cause to believe contraband or evidence is contained. (Id. at 580.)

2. Inventory and Impound

Vehicle Code sections 22650 et seq. provide a lengthy catalog of bases upon which a motor vehicle may be impounded by peace officers and other persons.

Regarding inventory searches, it would be wise to rely upon the United States Supreme Court for guidance. The law enforcement agency’s establishment of a standardized inventory procedure is often at issue. In South Dakota v. Opperman (1976) 428 U.S. 364, the Court stated, “[t]he decisions of this Court point unmistakably to the conclusion… that inventories pursuant to standard police procedures are reasonable.” (Id. at 372.) (See Florida v. Wells (1990) 495 U.S. 1, wherein the Court affirmed the suppression of evidence due to the fact that there was no law enforcement policy in place regarding closed containers.)

[Inventory searches are a now well-defined exception to the warrant requirement of the Fourth Amendment. [Citations omitted.] The policies behind the warrant requirement are not implicated in an inventory search … [A]n inventory search may be “reasonable” under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause.


See also Vehicle Code section 22655.5, which authorizes the removal of a vehicle where there is probable cause to believe it was used “as a means of committing a public offense,” and section 22651(p), which authorizes removal of a vehicle driven by an unlicensed driver or one whose privilege has been suspended.

Failure to comply with the procedural requirements of Vehicle Code section 22651 should not result in suppression of the evidence. Violation of inventory policy does not provide a basis for suppression of evidence. (People v. Trejo (1994) 26 Cal.App.4th 460.)

C. Search of Person

“When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.” (Virginia v. Moore (2008) 553 U.S. 164, 178.)
The officer’s subjective fear of the defendant, or the officer’s suspicion that defendant is armed, is irrelevant to the permissible scope of a search incident to arrest for a traffic offense:

The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.

*(United States v. Robinson (1973) 414 U.S. 218, 234.)*

Accordingly, an officer is entitled to seize evidence found on such a person as “fruits, instrumentalities, or contraband” probative of criminal conduct. *(Id. at 236.)*

In *People v. Gutierrez* (1984) 163 Cal.App.3d 332, the California Court of Appeal upheld the search of a defendant’s person and consequential seizure of a baggie of marijuana and a cardboard pillbox containing stolen jewelry. Gutierrez had been stopped for mechanical violations and weaving, and was placed under arrest for driving under the influence. The court noted that the case was governed by Article I, section 28, subdivision (d) of the California Constitution, requiring the exclusion of relevant evidence only where it is seized in violation of applicable federal standards. *(Id. at 334.)* The court stated:

Under applicable federal law, a lawful custodial arrest creates a situation which justifies the full contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches are considered valid because of the need to remove weapons and to prevent the concealment or destruction of evidence.

*(Id. at 334–335.)*

It is immaterial that the officer intends to release the arrestee without booking. *(In re Demetrius A., supra, at 1247–1248; see also, People v. Castaneda (1995) 35 Cal.App.4th 1222, 1228.)* A search incident to arrest is not permitted when a motorist is simply issued a traffic citation in lieu of being taken into custody. *(Knowles v. Iowa (1998) 525 U.S. 113; but see Atwater v. City of Lago Vista (2001) 532 U.S. 318.)*

**ABOUT THE AUTHOR (2010)**

G. Stewart Hicks is the TSRP for the Central Valley Region. He holds an L.LM. degree in Prosecutorial Science from Chapman University, a JD degree from Western State University College of Law, and a BS degree from Oregon State University. Prior to joining the CalTSRP in 2007, he served as a district court magistrate in Michigan and as a deputy district attorney in Los Angeles and Orange Counties. He has also served as an appellate attorney and as a judge pro tem in the Orange County Superior Court in the Juvenile and Dependency Courts, bringing more than 25 years of prosecutorial and judicial experience to the TSRP Program.

*Driving Under the Influence Prosecution (6th Edition)*
Chapter VIII

Voir Dire

by Frank M. Horowitz, Former Director of CDAA's Driving Under the Influence Project
and Lawrence Morrison, Deputy District Attorney
Los Angeles County District Attorney's Office

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(Updated 2010 by Stephen F. Wagner, TSRP, Coastal Region)

I. General Voir Dire Objectives

Every part of a trial is important. Jury voir dire is the first important part. Like the first act of a play, this is the jury's initial opportunity to meet the primary protagonists—you and your opponent. It is your first chance to show the jurors who you are and begin your courtroom relationship with them, which hopefully will conclude with them believing in you and your case.

A. Select 12 Members of the Community Who You Are Willing to Trust with Your Case

This requires you to use those skills you have developed throughout your life as a people watcher and sidewalk sociologist. You want to weed out those likely to be antagonistic to you or your case, and put together a group where each member has both a commitment to the community and its well being, and is able and willing to work with one another to achieve a common solution without strife or polarization.

Some prosecutors prefer middle-aged jurors on the theory that they have had more extensive life experience, are more practical in making decisions, and are better able to positively engage in the give and take of a jury deliberation.

Try to define the power people in the panel. These are folks who, either by occupation, education, jury experience, or personality, are strong candidates to be the foreperson of the jury. One of your goals is to ensure that there is an intelligent, personable leader on the jury who will be able to avoid rancor and keep the jury deliberations positively focused. But if you have two jurors on your panel, each of whom appears to be aggressive, take-charge types, you may want to excuse one of them for fear that his or her competitive need to control may divide your jury into two camps.

Although the rest of this chapter will attempt to provide a rational analysis of how to pick a jury, ultimately, the two basic rules relied on by most experienced prosecutors are: (1) Go with your gut, and (2) When in doubt, kick them out.
What these truisms attempt to convey is that the process of choosing a good jury is more a matter of human experience and intuition than formal education or treatise reading. Your daily human interactions and insights are the training grounds for your selection of a good jury.

In every trial you will ask yourself: “Should I keep Juror #6 (or whichever)?” In answering this question, note that you did not wonder about the other 11 sitting members of the panel. In other words, your intuition/gut has spotted something in this particular juror’s tone of voice, personal reactions, answers to the questions, or something else that has caused your tummy to go tilt. While it may not be immediately apparent what you are responding to, your insight is probably trustworthy. Go with your gut.

The corollary to the first point relates to your indecision as to whether you should really trust your intuition. Regardless of whether you are engaged in a short DUI trial or a two-month murder case, there is no value in revisiting the question, “I wonder if I made a mistake with Juror #6?” Trials require concentration and focus. There is no value in leaving an issue open that will invite second guessing and divert your energy. When in doubt, kick them out.

B. Collect Information from the Jurors

The most important jury-picking skills for a prosecutor to develop are to watch and to listen. It is a real gift that your voir dire comes after the defense (at least in most counties in California). This gives you time to observe who these people are and how they relate to the judge, the defense attorney, and each other. Thus, you are able to gather a wealth of information even before you begin your voir dire.

Your voir dire should include open-ended questions because you want to get them to talk. If you do not invite information from your jurors, how will you ever know which ones are keepers and which ones should go back to the jury assembly room? Particular areas of information may help you identify those jurors who might be antagonistic to your case. While the presence of any of these factors may not support a challenge for cause, this information will help you decide who must go and who gets to stay.

1. Those Who Themselves (or Someone They Know) Have Been Charged or Arrested for a Similar Offense

Jurors who feel they were wrongly arrested or charged with a DUI will likely impose their experiences and emotions into your case. If the juror was present when a close friend or family member was arrested for DUI, this event may have tainted the juror’s ability to be fair. Even if the juror was not present at the arrest, it is likely that the rendition of the event he or she heard from the friend or relative was less than impartial. But if a juror observed the arrest of a parent and, at some point characterizes that parent as an alcoholic, this may indicate sufficient distance from the parent’s experience to trust the juror.

While it is true that many jurors who openly share DUI experiences may have an ax to grind, there is often value in allowing them to tell their story. Often the juror will readily admit that justice was served or that a valuable lesson was learned. Even if you commit to excusing this juror, you should still let the juror tell the story, as it may leave a good message ringing in the ears of the jurors.
2. **Those Who Have Personally Observed a Field Sobriety Test (FST)**

In every jury panel lurks someone who falls within this category. It could be someone who merely observed a California Highway Patrol officer administering an FST on the side of the highway. It also could be someone who was stopped, suspected of DUI, administered an FST, and maybe even given a breath test at the station before being released by law enforcement. How will this experience impact the juror’s ability to be fair and impartial? Who knows? But having this information will assist you in making your decisions.

Evaluate the pros and cons of allowing the juror to expand on her or his experience. A juror who was stopped and evaluated for signs of impairment and then let go may well be a pro-prosecution juror. Think about the positive message that this exchange may bring: “Gee, police officers let some people go.”

3. **Those Whose Driving Privileges Have Been Suspended by the Department of Motor Vehicles (DMV)**

Privileges are commonly suspended as a result of a DUI arrest. Also, anyone who has suffered any driving-privilege suspension may harbor some residual resentment toward the government and its agents—maybe even you.

4. **Those Who Went to Court to Contest a Traffic Ticket**

While most drivers have been ticketed at one time or another, few have been riled enough to take off from work in order to fight City Hall. Any prospective juror who falls into this category, regardless of the traffic-court outcome, probably is worthy of shunning.

5. **Those Possessing Reservations About the Nature of the Charge**

Extremist Libertarians and Constitutionalists, for instance, may dispute the government’s role in regulating such personal conduct as the consumption of alcohol and drugs. Other potential jurors may resent the “implied consent” law, believing that it is unfair for the state to require citizens to provide evidence against themselves. Any juror willing to volunteer this information is likely looking for a way out. Do not fight with them—let them go.

6. **Those Who Harbor a Bias Against Law Enforcement**

There are jurors whose experiences with law enforcement, whether personal or from tales of family or friends, prevent them from being capable of objectively evaluating the testimony of an officer. It is critical you identify these jurors and excuse them from service lest they infect the rest of your jury.

One of the tricky things about obtaining this information is that while the judge might inquire about such issues with the first batch of prospective jurors, judges normally only ask subsequent jurors, “Did you hear the questions asked of the other jurors? Do you have any ‘yes’ answers to any of those questions?” Even if jurors wish to be forthcoming, neither they (nor you, for that matter) can recall all of the questions that have been previously asked.
Therefore, you may want to reiterate to the new jurors those questions that relate to contacts with law enforcement.

*Note:* If in response to inquiry by the judge, your opponent, or yourself, a juror wants to launch into the saga of how he or she was mistreated by the police, you have the right to ask the judge that the juror’s answer be heard at a sidebar. There is no value in exposing your jurors to some five-minute dissertation contending that officers are thugs or whatever.

In those unfortunate instances when a juror has unsavory comments to make about the police, note carefully how this is being received by the other jurors. Note the body language of the other jurors. This often creates a moment of polarization. You should be on the lookout for those jurors who are not enjoying the anti-law-enforcement rant—you probably want to keep them.

7. **Those Antagonistic to Scientific Evidence, Chemical Tests, and Expert Testimony**

There are members of every community who have no faith in anything more subtle than what is generated by their own five senses. Obviously, these are the wrong jurors for a case that is likely predicated on the wonders of science. Thank and excuse these jurors to the court down the hall where the barroom brawl is being prosecuted.

In summary, the old line “knowledge is power” is key to voir dire. The more you know about your jurors, the better jury you will select.

C. **Educate Your Jurors and Gauge Their Reactions**

Voir dire is your initial opportunity to teach the jury important case-related basic concepts (i.e., that drunk driving is not what this case is about, and you are not required to show that the defendant was drunk, but merely impaired). To do this during voir dire gives the jury a context within which to work and allows you to evaluate how your jurors are responding to the charges alleged and whatever information is conveyed. If they appear disinterested or in someway soured to sitting on your case, you have gained invaluable information.

Voir dire also is an opportunity to “belly up” to the weaknesses of your case, and every case comes with some (i.e., “Juror #3, unlike your last jury service on a DUI case, there may not be a chemical result in this case. Would that fact, by itself, automatically create a reasonable doubt for you?”). To ask this question allows you to gauge how important the absence of a chemical test result will be to that particular juror. Additionally, by alerting the jurors of a missing piece in your case as soon as you can, you steal the benefit the defense hoped to gain from what now is old news.

This marks an opportunity to raise the issue of lay observations of impairment. There will usually be universal agreement among the jurors that observations like red and watery eyes, poor coordination, and changes in demeanor are all signals of possible impairment. The value in fostering this dialogue is that your officer will likely be referencing these exact factors during direct examination when he or she is recounting all of the observations.
D. Begin to Establish Your Credibility and Professionalism with the Jury

This is your first opportunity to demonstrate that you are trustworthy and someone the jurors can rely on for the straight scoop without hidden agendas or ulterior motives.

E. Prevent Opposing Counsel from Tainting the Jury

There are instances in which defense counsel will improperly attempt to elicit sympathy for the defendant or to misstate the law in an apparent effort to gain an advantage. The attention you pay to the process, and the professional manner in which you handle these situations, will keep garbage out while furthering the jury’s perception of you as a straight shooter and someone they can trust.

II. A Little History and the Current Law of Voir Dire

Historically, the Code of Civil Procedure provided litigators the right to conduct a reasonable examination of prospective jurors for actual or implied bias. This was expanded by the California Supreme Court in People v. Williams (1981) 29 Cal.3d 392, 407, to allow an almost unlimited range of “questions reasonably designed to assist in the intelligent exercise of peremptory challenges.”

In 1990, voters passed an initiative commonly known as Proposition 115 that, amongst its goals, was to shorten the jury-selection process. Consequently, the right to conduct voir dire was given exclusively to the trial judge. The court had authority, upon a showing of good cause, to permit counsel to conduct voir dire themselves or (more commonly) submit questions for prospective jurors to the court. Many judges declined to permit questioning by counsel, and some even refused to ask submitted written questions.

In 2001, after a significant increase in hung juries in some jurisdictions, prosecutors regained the right to conduct voir dire in criminal cases. Code of Civil Procedure section 223 now permits a prosecutor to voir dire the jury, subject to time and content limitations imposed by the trial court. Most judges strictly govern the type and scope of questions permitted, so it is crucial that a prosecutor adheres to the court’s rules in order to make a good initial impression on the jury.

Code of Civil Procedure section 225 permits three ways to challenge a juror: by general disqualification, “for cause,” or by peremptory challenge. A general disqualification commonly relates to a juror who has some physical or mental incapacity that would prevent that person from performing the duties of a juror. (Code Civ. Proc. § 228.)

A challenge for cause is predicated on a showing of either “actual” or “implied” bias. Section 225(a)(1)(C) defines “actual bias” as:

[T]he existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial right of any party.

Examples of this would be (1) if a prospective juror were to say that under no circumstances would he or she ever believe a police witness, or (2) if a juror indicated that police only arrest guilty people, and the trial really is a waste of time. Unfortunately, if the prospective juror was to then conclude, “But I can be fair and impartial in this case, and I will follow the law,” the judge may be disinclined to excuse the juror for cause.
“Implied bias” is broadly defined in section 225 as “when the existence of the facts as ascertained, in judgment of law, disqualifies the juror.” Implied bias includes a relationship to a party or witness, connection to the action itself, some unqualified belief as to the merits of the case based on knowledge of material facts, or possessing some enmity toward a party or in a capital case, having such an objection to the death penalty that the juror would not convict. (Code Civ. Proc. § 229.)

A “peremptory challenge” is a challenge exercised by a party against a juror if it is believed that, for any nondiscriminatory reason, that juror may be unfavorable. \((People v. Jones\) (1997) 15 Cal.4th 119, 163.) Peremptory challenges may be based on a broad spectrum of evidence suggestive of juror partiality, from the obviously serious to the apparently trivial, and from the virtually certain to the highly speculative. \((People v. Wheeler\) (1978) 22 Cal.3d 258, 275.)

Each side in a criminal case generally has 10 peremptory challenges. (Code Civ. Proc. § 231.) If the punishment for the charged crime does not exceed 90 days in county jail, each side is limited to six peremptory challenges. In a multiple-defendant case, each side has 10 peremptory challenges plus an additional five challenges for each defendant. (I.e., in a three-defendant case, the defense would have 10 shared peremptory challenges that would be exercised by agreement, and each defendant would have five additional, separate challenges; the prosecution would have an equal total of 25 peremptory challenges.)

III. Preparing for Voir Dire

If the jury commissioner in your court puts out a jurors’ handbook (most do), obtain a copy, read it, and try to work the handbook language into your voir dire. If the handbook accurately states the law, you enhance your own credibility by referring to the handbook information in your questions. If the handbook misstates the law or is slanted toward the defense, remind the jurors that the handbook is merely a guide, and their primary duty is to follow the court’s instructions.

Many jury commissioners circulate a video produced by the Administrative Office of the Courts (AOC). The video presentation details the jury process and touts the nobility of serving as a juror. Prospective jurors are required to view this video. This video can be requested through the AOC.

There is also tremendous value in incorporating the language of CALCRIM into your voir dire. This can be done without arguing the law. For example, look carefully at the language used to define the term “under the influence.” \((See CALCRIM 2110.\) You will note that very simple terms are used.

Preparation should begin before you enter the courtroom. Assuming your county does not excuse kicked jurors from further jury duty, check with fellow prosecutors of recent jury trials for information about current jurors. Determine whether there are jurors awaiting trial assignment who have been excused from other recent panels because of antagonistic views toward the courts, law enforcement, prosecutors, etc. Remember, the juror excused from your colleague’s case this morning (she is in a Proposition 36 program; her husband is in prison; her boyfriend is in county jail; and her son is facing his own third-strike robbery trial; but she promises she will be fair) may be back in the jury assembly room and is now available for your case.

You can gain points with the court staff by preparing in advance a list of prospective witnesses, with names correctly spelled (preferably on formal pleading paper with the caption of the case), before the start of voir dire. By providing copies to the court clerk, court reporter, bailiff, and defense
counsel, you show one and all that you are prepared. Identify law enforcement officers by their titles, departments, and assignments, if in a large organization with many geographic divisions. Identify expert witnesses by their employers or organizations. You may also list the date, time, and location of the crime. Reducing this information to writing will help impress the jury with your preparation and professionalism, and save you from the awkward act of flipping through the file looking for witnesses’ names in front of the jury.

IV. The Mechanics of Voir Dire

Most judges will meet with the attorneys before the jury is called into the courtroom. Because the judge has read only the complaint in the case, he or she will want to learn of any issues that might prove relevant to the selection of the jury. This is also your opportunity to present to the court any matters for voir dire that you would prefer the court handles rather than counsel. (An example might be where the defendant and arresting officers are of different races. You would prefer the judge deal with jury questions of racial bias rather than permit your opponent’s voir dire to attempt to shift the central issue from guilt to the nature of discrimination in America.)

Pretrial is also the appropriate time to get the trial judge’s ruling on how much time can be spent on voir dire. The operative facts in your case may well create the need for more time. For instance, “Refusals,” “No Observed Driving,” and “Checkpoint” cases create the potential for confusion. The advantage to getting the ruling in advance is that it eliminates disruption during your active voir dire.

When you return to the courtroom, and before the jurors enter, be sure to get a jury sheet from the court clerk. This is a jury seating chart. The number of squares on the page will likely inform you as to whether the judge conducts voir dire 12 jurors at a time or some version of a “six pack” where 18 jurors or more may be quizzed.

In many jurisdictions, judges provide jurors with a list of preliminary questions to read in the hallway prior to entering the courtroom. This questionnaire is likely the product of the California Standards of Judicial Administration. Be sure to get a copy of your court’s questionnaire from the bailiff, for many judges rely on them for the initial questioning of the jury panel.

After the judge takes the bench and everyone is in their place, the jury will be permitted to enter and take seats in the audience. The judge will then introduce all parties, including the attorneys and the defendant. You likely will be the first lawyer to be introduced, so take the opportunity to stand, smile, and confidently bid them, “Good morning,” or, “Good afternoon.” At that moment, you are like the host welcoming visitors into your house. The court may then ask you to name your witnesses. Read from your previously prepared list, stating in a clear and confident tone, “Your Honor, the People may call the following witnesses at trial.” Remember, first impressions do count, and the jurors who are in a strange setting are eager to find someone they can trust in this unfamiliar place. Ideally, the warmth of your greeting and the apparent ease and obvious preparation you show in response to the judge’s inquiry will be a successful first effort to encourage the jurors to invest their trust in you to guide them through this process—and to reach the right conclusion.

The court will then proceed to determine from the prospective jurors whether jury service in your case would impose some form of hardship. You will be amazed at how many people in your community have something happening that they just cannot put off. If the attorneys are in
agreement, the judge will likely excuse most of the folks who want out. As a general rule, if some prospective juror has voiced a wish to not be on the jury, you probably will want to go along. People who have other things on their mind or who really do not want to be there probably are not good jurors for the prosecution anyway. (Not to mention that if they sense you were the cause of their dilemma, they may choose to punish you later during deliberation.)

Frequently, jurors prefer to answer sensitive voir dire questions in private. Most courts permit jurors, in the presence of counsel, to provide information at a sidebar or in chambers (e.g., arrests, convictions, or having been the victim of a crime).

After culling the jury panel down to those who are willing to be there, the court will call prospective jurors to fill the jury box and possibly the additional chairs inside the railing. The jury sheet you received from the court clerk will help you identify which juror is sitting in which seat. Post-it notes are useful for writing the initial information that jurors are obliged to provide, including city of residence, occupation, marital status, occupation of spouse/significant other, whether they have children, prior jury experience, whether it was a criminal or civil matter, and (without revealing for whom) whether there was a verdict. Most prosecutors develop a shorthand method that allows the cramming of all of this information onto a 1” x 1” Post-it. There likely will be value in you using a notepad as well as the jury sheet during voir dire. This will enable you to write additional information about each prospective juror. Your notes can be used to remind you of questions you may want to ask a particular juror. Additionally, because defense allegations of group bias are a fairly common ploy, there may be value in noting the objections you have to a juror unrelated to the juror’s gender and apparent ethnicity. The notes and the Post-its are invaluable aids that will permit you to recall which side kicked which juror, in what order, and the reasons you had for your challenges to the respective excused jurors. These items should not only be retained during voir dire, but should likely be stored with the case file after the trial’s conclusion in case there is some subsequent challenge on appeal related to the voir dire process.

In most counties, the defense has the first opportunity to question the jury. After you complete your questioning, if you believe any jurors should be excused for cause, ask to approach in a sidebar in order to make your motion to excuse a particular juror. Do not challenge the juror in open court. There is no value in you alerting the particular juror that you do not believe he or she could be fair and impartial. Further, if the court were to deny your challenge in open court, your status with the rest of the jurors may suffer. If, after you conclude your questioning, you see no challenges for cause, announce: THE PEOPLE PASS FOR CAUSE, YOUR HONOR.

Even before the defense completes its voir dire, you probably will have decided that at least one juror must go. If you note that person on your jury chart or notepad before you start your voir dire, you will be ready, without fumbling or hesitation, to exercise your first peremptory challenge as soon as the judge announces, “The peremptory is with the People.” The jurors will again observe that you are poised, polished, professional, and prepared: YOUR HONOR, THE PEOPLE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR #6, MR. JONES.

When you ask the court to excuse a juror, be sure to observe the reactions, if any, on the part of the remaining jurors. Does anyone appear miffed or upset by your actions? If so, consider a subsequent kick of that juror as well.
When the judge calls for a People’s peremptory challenge, there is a possible alternative response:

**YOUR HONOR, THE PEOPLE ACCEPT THE PANEL AS PRESENTLY CONSTITUTED.**

*Note*: To pass on a peremptory challenge does not preclude you from exercising one later in the process, and you will not lose one of your allotted perempts by passing.

The prosecution has the first peremptory challenge (cf. Code Civ. Proc. § 231(d)), and the defense has the last peremptory, assuming no one passes an opportunity to challenge. Some prosecutors dislike giving the defense the power to have the final opportunity to alter the composition of the jury. Therefore, if a prosecutor early on were to accept the panel as constituted, a switch in order would occur. The prosecution would then have the last peremptory challenge and the final word on jury composition. There is a major risk to this strategy, however. A savvy defense attorney might immediately accept the sitting jury after the prosecutor does. This could occur when the defense attorney believes there are already a couple of solid defense jurors in the box. Because the prosecution needs 12 jurors agreeing to win and only one juror disagreeing to hang, the defense attorney might choose to trump the prosecutor’s tactic, believing a hung jury in the hand is worth a who knows what in the bush.

After the 12 jurors are selected to hear the case, the court will begin the process of selecting alternate jurors. Many prosecutors can tell stories of how they suffered mistrials because a sitting juror got sick and no alternate juror had been chosen. Having an alternate juror is like an insurance policy protecting against a needless retrial of a case. Some judges dislike expending extra time in jury selection and, if the attorneys are ambivalent about alternates, the judge may want to immediately proceed to opening statements. Be firm in your support of the selection of at least one alternate juror. Each side will be permitted one peremptory challenge for each alternate allowed to sit. (Cf. Code Civ. Proc. § 234.) In other words, each side would have two peremptory challenges if the court decides to go with two alternate jurors.

Upon completion of the jury selection, the court clerk will swear in the jury. It is this event in a jury trial that determines when jeopardy has attached. (Cf. People v. Finch (1953) 119 Cal.App.2d Supp. 892, 895.)

V. **Tips for Conducting an Effective Voir Dire**

There probably are as many tips on how to be effective during voir dire as there are litigators litigating. The ideas included here are common to the trade; however, be sure to discuss the issue with the more experienced trial attorneys in your office. Every jurisdiction presents unique issues of jury selection and different notions of competent practice. In any event, develop your own instincts and selection process. Remember, just because something works for other prosecutors does not guarantee it will work for you—no more than their shoes necessarily will fit your feet.

A. **Be Observant**

The greatest jury-picking skill you can develop is to become a keen observer of what is unfolding in your courtroom. As you learn to really see and hear what is happening with your jurors, you will develop instincts for which jurors you want to keep, even before you start your own voir dire.
Get out of your notes and come up for air. Stop, look and listen! Be sure to gauge the responses to all questions posed. Although reading body language is by no means an exact science, it can sure help.

Your observation will begin when the panel first enters the courtroom. If the custom in your courthouse encourages you to stand when the jury enters, be sure to do that. Watch the prospective jurors enter, and learn what clues each juror provides that might give you some insight as to who that person is and how he or she might affect the determination of your case. Often, the way jurors choose to present themselves, their demeanor, how they dress, what reading material they brought with them, how they seem to interact with one another and react to what is likely an unfamiliar environment may be quite revealing as to their attitudes about the community and their jury service. A person who exhibits an apparently resentful attitude toward being there, or someone wearing a T-shirt with “Question Authority” emblazoned on it, or someone who causes you to query how he or she was able to make bail are not the folks you want to entrust with your case. Although first impressions are not always 100 percent accurate, they are telling and should be accumulated. Making notes about a juror who stands out may help you recall that juror if voir dire is carried over a day and that juror later gets into the box sporting a redo of his or her appearance.

There likely will be an extended period of time before your voir dire. Use it. During the judge’s initial inquiry, watch the prospective jurors to see how they act when they and the other panel members are being questioned. Are they interested, attentive, and responsive, or are they bored with the process and seemingly uncaring? Do they visibly react in response to certain areas of questions? What can you glean from the exhibited body language?

Note how the jurors relate and react to defense counsel during voir dire. Did any of the jurors seem especially enchanted by your opponent? Although a trial is not a popularity contest, if a juror is particularly open and involved in defense counsel’s voir dire but closed and nonresponsive to yours, this may be a clue that it would be an error for you to keep that person on your jury.

Listen carefully to your opponent’s inquiries. Often, the defense theory of the case will be revealed during voir dire. Also note how the respective jurors are responding to the topics and concepts that the defense presents. Most defense counsel will use voir dire to attempt to educate the jury about the believed equities in the defense case. Sometimes your opponent may go beyond what is permissible in this area (we will discuss this in greater detail later). Although you may want to shut down an objectionable defense inquiry early, depending on where the defense is going, there may be value in laying back and hearing what particular jurors reveal in their responses to the defense.

During the questioning by the court and defense counsel, note any follow-up questions that you would like to ask a prospective juror in order to gain a clearer picture of that person.
B. Your Turn

1. Tools of Courtroom Communication

Being a good trial attorney does not require prior experience as a public speaker, but developing the ability to communicate with folks within the courtroom is vital. Here are some considerations that likely will enhance your effectiveness.

a. Memorizing Names

If your jurisdiction permits jurors to identify themselves by name, address the jurors by name during your voir dire. You will have time during the court’s inquiry and that of your opponent to learn the names of the 12 to 18 persons sitting. By addressing the juror by name, you subtly demonstrate that you consider that person important. Also, a juror in a courtroom feels the anxiety one would naturally feel in an unfamiliar, formal environment. Your use of that juror's name will likely set him or her at ease. Further, by being able to use a juror’s name without the awkward process of searching the jury sheet for the right Post-it, you again communicate your competence and organization to the jury. Finally, because it is unlikely that your opponent will have had the opportunity to have done this, you forge forward in the juror’s subjective likeability scale.

b. Eye Contact

It is crucial to make eye contact with your jury, regardless of whether you are asking a group or individual question. To look at the subject of your inquiry communicates that you care about his or her answer. Also, by looking at the juror, you may pick up some subtle nonverbal act of communication that you would have totally missed if your eyes were wedded to your question outline deciding which question you want to ask next. The task at hand is as if you were choosing someone to house-sit your place during a vacation. Your best choice for this important function would not be determined by you merely reading each of the important questions you prepared for the interview, but rather in using all of your senses and intuition in gauging whether the person before you should be trusted in your house. Your courtroom is your house.

Note that it is easier to establish rapport with a juror when you are in a comfortable posture. So loosen up that grip on your notes and work the room! Think talk show host, not survey taker.

c. Chairs, Railings, and Podiums

Unless your court has some local rule that requires attorneys to sit during voir dire, do not. Being on your feet provides you with more energy, thus guaranteeing that you will be more alert and focused on what is happening around you. Further, the jury will find a moving speaker is of more interest than one in a static seated position.

Unfortunately, anyone who has ever watched a courtroom drama on the screen can recall the scene where the attorney, while addressing the jury, is leaning on the jury railing.
and dramatically pitching for justice. The human reality is that in most courtroom configurations, an attorney who leans on the rail or is even close enough to touch the rail is likely to undermine the desired effort at positive communication. In most courtrooms, the seated jurors are lower than the standing attorney. This means that as the lawyer leans forward on the rail to emphasize the important point, the juror likely feels the hovering lawyer is intruding on his or her personal space. The common human response to this situation is not to embrace the point that is being made, but to wonder how soon the speaker will back off. The best you can hope for after leaning over a juror is that the resentment will be short-lived.

Podiums are often used as a leaning post and security blanket by attorneys. They deem it reassuring to have something to hold onto. But prosecutors who cultivate the practice of standing to the side of the podium rather than hiding behind it subtly communicate to the jurors in a nonverbal way that they have nothing to hide. This is exactly the perception you want your jurors to have about you and your case. Additionally, by not leaning, you will bring more energy to the task and find jurors more engaged in what you have to say.

d. Group and Individual Questions

You gain information from your jurors by either addressing them as a group or individually. While group questions will permit you to cover more subjects, it is less likely to provide much information about a particular juror or permit you to establish any rapport with any juror. On the other hand, individual questioning permits you to learn more about each juror in a friendlier, conversational manner.

Note: The judge likely will allow too brief a period to engage exclusively in individual questions.

The solution may be in mixing and matching the two processes. You may want to use group questions to initiate a topic of concern, and after getting group agreement for the basic proposition, use individual questions to refine the point and determine individual attitudes. For instance, assume the facts of your case reflect no bad driving by the defendant. You want to teach the jury that bad driving is not necessary in a DUI case, and you want to check out your jurors' attitudes on this issue. Your group question might be, “Do you all agree that it is fair to charge someone with DUI, even if there is no evidence of a crash?”

This opening of the subject might be followed by individual questions that gauge respective jurors' attitudes as well as expand on the theme. For instance:

Ms. Smith, suppose in a particular case, an officer stopped a driver for having a broken headlight and, in conversation with the driver, the officer concluded the driver may have had too much to drink. What do you think that officer should do at that point?

Note: Never use your case facts as the basis for a hypothetical. The judge will likely deem such an effort as asking the jury to prejudge the evidence.
If you follow the question to Ms. Smith with related questions to other jurors, you accomplish five things: (1) you educate; (2) you learn what your jurors think; (3) you actually engage individual jurors in a conversational give and take; (4) you provide the group with practice in expressing thoughts and listening to one another without judgment—necessary tools for any jury working for unanimity; and (5) you plant the seeds for themes you may want to argue at the end of the trial. (“You all remember at the beginning of the trial when we talked about_______, and there was agreement that ________.”)

One last thing, in asking individual questions, devise a method that does not involve a sequential marching through the jury. If your first question is to juror #1 and your second is to juror #2, jurors 10 through 12 will conclude they can ignore your next eight to 10 questions, respectively. If, however, you bounce your questions off jurors in an apparently random process, all jurors will stay tuned, lest they be embarrassed in front of a group of strangers.

e. “Willing” vs. “Able”

Many new prosecutors, in asking individual questions of a prospective juror, confuse or use interchangeably the words “willing” and “able.” As lawyers, words are as important to us as colors are to an artist. Therefore, subtle differences in meaning are significant. For example, a new prosecutor may inflict an unintended slight by asking a juror whether he or she is “able to be fair and impartial.” This question impliedly asks whether the juror possesses the base capacity to be fair. One might imagine an irritated juror responding, “Of course I do. Do I look like a cretin or something?” Equally destructive to your case would be the juror who did not utter the response but merely fumed in silence. But if the juror had been asked, “Are you willing to be fair and impartial?” the question assumes the juror’s capacity and is appropriately inquiring about whether there is something about the case that leaves the juror disinclined to be fair. So be careful about your word selection to avoid unintentionally offending someone you wish to trust with your case.

2. So Which Jurors Do I Select?

a. General Observations

By the conclusion of the defense voir dire, you likely have divided the jurors into three groups: those you know you want, those you know you do not want, and those about whom you are indifferent or not sure. Those jurors who have apparently bonded with the defense are not worth much of your time because they are not long for this panel. Similarly, further quizzing of a panelist you perceive as a good prosecution juror may only serve to encourage the defense to use a peremptory challenge. But if you have a juror, such as a member of Mothers Against Drunk Driving, who you believe is a likely early defense kick, you might want to use that juror as your partner in getting some pertinent concepts about DUI before the jury. As each point is made by the soon-to-be-absent juror, you can then ask another juror, “How do you feel about that?” This process not only serves to educate your jurors, but reinforces the process of sharing views and reaching agreement—a necessity for a unanimous verdict. Ultimately, you probably will decide to use most of
your court-allotted time to determine which jurors in your undecided third group are keepers.

A juror’s occupation may be quite revealing. For example, a juror who is a bartender warrants exploration on voir dire in order to determine whether the juror’s job might impact the ability to be fair in a DUI case. Of course, it is also possible that a bartender-juror will nod in knowing agreement at the officer’s testimony about the physical signs of impairment and be a great prosecution juror. Asking the bartender if he or she has ever had to cut someone off creates a win-win scenario. The answer will almost always be “yes,” creating the opportunity to allow the bartender to explain all the factors that led him or her to believe that the customer was impaired.

If a juror indicates that he or she is a “homemaker” or that he or she is retired, be sure to inquire what that person did previously. Today’s homemaker may once have been a public defender. Also ask jurors whether they do any volunteer work within the community. Be sure to ask about the work done by the juror’s spouse and children. You may gain an insight into the jurors’ attitudes by learning what their family members do. For jurors who indicate that they are unemployed, inquire what their usual or last work was and how long they have been seeking employment.

In many jurisdictions, it is difficult to get citizens to serve on a jury. Yet ironically enough, you might want to be cautious of someone who seems to be too eager or intently auditioning for the role of juror. If someone is too agreeable, too smiley, too good to believe, he or she may be seeking a spot on your jury for some unknown ulterior motive. Trust your instincts.

In exercising your peremptory challenges, always keep an eye on how many remaining jurors are still seated in the audience. Remember, in most jurisdictions when there is just one remaining juror, the clerk will call for additional prospective jurors of whom you have not a clue. Sometimes a mediocre in the hand is better than an unknown to be named later.

b. Jurors Who Present Unique Challenges

There are identifiable classes of jurors that may present unique issues and are regularly seen in every jurisdiction.

(1) The Juror with Prior DUI Convictions

What do you do when one of your jurors reveals that he or she has suffered a DUI conviction? Some prosecutors might immediately jump to the conclusion that this is an enemy from the dark side and must be banished. Not so fast. If the juror acknowledges the error of his or her ways and is of the mind that the police acted professionally, this juror may be your diamond in deliberation. But how do you know?

Initially, if the juror tells you that the case did not go to trial, that may be a personal acknowledgment that it was “their bad,” and consequently, he or she may still be a good juror. Conversely, if the juror tells you the matter went to trial, say goodbye! This
is so because commonly, people who feel they were wronged are the ones seeking a trial. You do not need this person on your jury. Do not spar with this juror over his or her reasons for going to trial. Just say goodbye.

Secondly, ask the juror if there was a chemical test in his or her case. If the answer is, “Yes,” you know that the juror went along with the program when arrested. But if the juror says, “No,” there likely was some conflict with the officers. This does not sound like your match made in heaven.

Finally, inquire whether the juror’s test results reflected how he or she was feeling when stopped by law enforcement. If the answer is, “Yes,” you may have hit the jackpot with a juror who knows he or she did wrong, has no animus toward the police, and will be your expert in the jury room on chemical testing and blood-alcohol content readings. Does it get any better? Of course, based on additional factors, you might still decide that this juror must go, but a prior conviction alone need not scare you off.

(2) The Really, Really Strong Pro-Prosecution Juror

You will periodically come in contact with a juror who is not only pro-prosecution, but is remarkably verbally supportive of law enforcement and may even articulate a belief that all who seek trial are probably guilty, and further, that trials are sort of a waste of taxpayers’ money. At first blush, you might think this juror is too good to believe. Indeed, you might assume this juror is clearly going to be your opponent’s first kick. Well, maybe not.

A jury that is able to reach a verdict is made up of 12 persons benefitting from enough mutual respect to be willing to work together, engage in reasoned discussion about the facts and issues presented, and reach a shared conclusion. If a jury has a member who is too adamant or too opinionated about matters related to the case, it is likely that person will alienate others and effectively polarize your jury.

A polarized jury will not convict.

Therefore, even if you come across a juror who may seem to be a slam dunk for your side, but you perceive him or her to possess the brittleness of a know-it-all, your cause may be best served by a quick kick. Besides, the other jurors will appreciate you dumping the problem child.

(3) The Juror Who Served on a Jury That Hung

Commonly, jurors during voir dire are asked if they previously served on a jury, whether it was a criminal or civil case, and whether the jury reached a verdict. There is always concern when a prospective juror indicates there was prior criminal jury experience, but the jury failed to reach a verdict. Because you are not permitted to ask which way your prospective juror voted, how do you find out if you have the hanger of that other criminal case?
As a general rule, most juries convict rather than acquit. In a like manner, the majority of most hung juries favor conviction. Although you may not ask the prospective juror how he or she voted, you may ask how it felt to sit on a jury that did not reach a verdict. You then can follow up with a question of whether he or she was part of the majority or minority during deliberations.

Given the statistical premise, a juror who indicates majority membership probably favored conviction.

(4) The Lawyer

All litigators puzzle about what to do with a prospective juror who is a lawyer. Some prosecutors like lawyers on juries, believing that they will be logical and not be swayed by emotion. Many others do not like lawyer-jurors for fear that they will be hypercritical of the People's case or that the juror may spend time second-guessing how the prosecutor presented the evidence. You likely can get anecdotal tales from the senior members of your office to support either position. The one definite thought to keep in mind is that a lawyer-juror will be worth more than one vote during deliberation. There is also a strong chance that the lawyer-juror will be the foreperson.

It is common for citizen-jurors to believe a lawyer-juror has all the answers. Consequently, it is likely that three other jurors are sure to follow the juror with a J.D. Therefore, the selection of a lawyer for your jury presents a high-risk, high-gain situation.

VI. Responding to Defense Voir Dire

Your opponent likely believes that voir dire is the first opportunity to get the defense perspective before the jury. Because in most California counties the defense goes first (the only time in the trial when the defense has this procedural advantage), adept defense attorneys can get the jury leaning their way early and make prosecuting the case even more of an uphill battle than it already is. Therefore, beware of defense counsel’s attempts to sell the jury notions that are either contrary to the facts of your case or to the law. If you are confronted with such a circumstance, you will have to make a quick tactical decision as to whether to object or handle it in your voir dire. As a general proposition, whatever defense counsel does during voir dire, you can artfully undo when it is your turn. One technique would be to go back to the same jurors used by the defense and give them your countering view.

In some instances, the defense effort is such a misstatement of the law or so improper that an immediate response is necessary in order to clear the air and prevent germination of a bad seed of misinformation. In fact, if the judge sustains your objection and admonishes the attorney, it may serve as a strong early statement to the jury that your opponent may not be trustworthy. If you believe the issue is important enough and that your judge will back you, object. But many judges choose to give attorneys wide latitude in voir dire, so be careful. To have your objection overruled may give the jury the incorrect impression that you are attempting to obstruct the process.
Consider addressing the matter of proper vs. improper voir dire questions in limine. This is especially helpful in situations where you are well aware of some of the shenanigans that might be coming. This is especially appropriate when you have a history with a certain defense attorney.

If you are in voir dire with an opponent whose every effort is worthy of a sustainable objection, do not. The risk is that the jury may conclude that your opponent is incompetent, thus inviting sympathy for the lawyer and the defendant. An additional concern would be that if you keep objecting and the judge keeps sustaining, some jurors may wrongfully come to believe that it is two against one, thus turning your opponent into a David against the state’s Goliath. If this is your situation, formulate counterpoints for each of the wrongheaded points presented by your opponent. Your voir dire will then become your opportunity to properly educate the jurors on the law. It may be even more effective if you can preface your counters with, “I’m sure counsel didn’t mean to misstate the law when she said …” If you can present your counterpoints professionally and without anger, the jury will understand the defense attorney was attempting to be fast and loose with the facts or the law of your case.

Often, a defense effort to brainwash a jury is long-winded. You can demonstrate your preparation and professionalism by being focused, succinct, and not unnecessarily repeating questions previously asked by the court or counsel. Jurors will appreciate this. Of course, obtaining the vital information to assist in selecting a jury you want to entrust with your case is more important than brevity.

Here are some common defense voir dire ploys for which to be prepared:

YOU AGREE THAT JUST BECAUSE MY CLIENT HAS BEEN ARRESTED IS NO EVIDENCE OF HIS [OR HER] GUILT, DON’T YOU?

DO YOU UNDERSTAND THAT MY CLIENT IS INNOCENT UNTIL PROVEN GUILTY?

AND, THAT IF THE JUDGE WAS TO ASK YOU TO DELIBERATE AND VOTE RIGHT NOW, EACH OF YOU WOULD HAVE TO VOTE NOT GUILTY?

DO YOU UNDERSTAND THE DIFFERENCE BETWEEN THE BURDEN OF PROOF IN A CIVIL CASE [holds arms out from sides] AND THE BURDEN IN A CRIMINAL CASE [holds arms up at exaggerated angle]?

DO YOU THINK IT’S POSSIBLE FOR AN OFFICER TO LIE?

YOU WOULDN’T GIVE THE TESTIMONY OF A POLICE OFFICER MORE WEIGHT JUST BECAUSE IT CAME FROM A POLICE OFFICER, WOULD YOU?

IF I CHOOSE NOT TO PUT THE DEFENDANT ON THE STAND BECAUSE I DON’T THINK THE PROSECUTOR HAS PROVEN HIS [OR HER] CASE, WILL YOU HOLD THAT AGAINST MY CLIENT?
YOU WON'T HOLD IT AGAINST MY CLIENT THAT HE [SHE] WAS TOO POOR TO MAKE THE EXORBITANT BAIL IN THIS CASE, WILL YOU?

Or other questions that attempt to elicit sympathy for the defendant.

VII. In the Final Analysis

Always be courteous.

Never embarrass, cross-examine, or argue with any juror. To be confrontational, even with an antagonistic juror, will likely raise resentment among some of the other members of your panel.

Ask short, open-ended questions. Remember, the goal is to get them to talk so you can figure out who they are. Permit their voices and thoughts to have priority.

Never attempt to rehabilitate a juror who has communicated a disinclination to be fair and impartial in your case. Such an effort works as well as trying to push toothpaste back into the tube.

Choose jurors you would be comfortable with in a social context. Can you and they relate?

Select jurors you believe will form a cohesive group, willing to work together to reach consensus and agreement, and who appear willing to accept you as a key spokesperson.

Be sure to select a power person who appears intelligent, affable, and able to lead without rancor and to keep the jury focused on the issues.

VIII. Wheeler Motions and Group Bias Claims

The law precludes any attorney from excluding a person from a jury merely because of membership in a particular racial, ethnic, religious, or gender group. (Cf. Code Civ. Proc. § 231.5) Attorneys who represent the People of the State of California are particularly aware of how wrong and unprofessional it would be to practice or perpetuate group bias. It is an unfortunate current truth, however, that some members of the defense bar may readily resort to claims of prosecutorial group bias as a tactic to affect and influence the selection of a jury. It is therefore necessary to discuss the Wheeler case and its import to the process of voir dire.

California became one of the first states to preclude group bias as the basis for the use of a peremptory challenge in the case of People v. Wheeler (1978) 22 Cal.3d 258, 276–287. Wheeler held that the prosecution’s use of peremptory challenges to remove jurors solely based upon their membership in a legally cognizable group violated the defendant’s state constitutional right to a representative cross-section of the community. The United States Supreme Court adopted a similar position under federal constitutional rights in Batson v. Kentucky (1986) 476 U.S. 79.

An entire body of law has evolved clarifying which groups constitute legally protected cognizable groups whose members may not be systematically excluded from a jury by means of peremptory challenges. The California District Attorneys Association (CDAOA) has published a Prosecutor’s Notebook entitled Meeting the Wheeler Challenge: Legal, Ethical, and Tactical Approaches to Jury Selection (CDAOA, Prosecutor’s Notebook, Volume XIX (1998)). This excellent monograph by
San Francisco Assistant District Attorney Jerry Coleman gives guidance, with legal authorities, to help you meet your ethical responsibilities in ensuring a fair trial to both sides while providing you the means to fend off inappropriate defense allegations.

Note: Prosecutors also have the right to challenge an opponent’s peremptory challenges that reflect group bias.

Unfortunately, a *Wheeler* challenge may be raised by defense counsel for the sole purpose of attempting to intimidate the prosecutor from exercising a proper peremptory challenge against a juror who happens to be a member of a cognizable class. Some judges do not understand that they must first make a judicial finding in agreement with the defense’s prima facie showing before requiring the prosecutor to justify the use of a peremptory challenge. It is therefore vital that you be familiar with the *Wheeler* procedure and with the permissible grounds for exercising peremptory challenges.


B. To be timely, the motion must be made “during the selection process itself.” (*People v. Ortega* (1984) 156 Cal.App.3d 63, 68.)

C. The moving party must:

1. Make as complete a record as possible.

2. Establish that excluded jurors are members of a cognizable group.

3. Establish a “strong likelihood” that challenged jurors were excluded due to group association, e.g., racial, ethnic, religious, or gender. (*Wheeler*, supra, at 280.)

   Note: People 70 years old and older are not a cognizable group. (*People v. McCoy* (1995) 40 Cal.App.4th 778, 783–786.)

D. Once the moving party submits, the court must initially determine “whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone.” (*Wheeler*, supra, at 281; *People v. Turner* (1986) 42 Cal.3d 711.)

E. When responding to a *Wheeler* challenge:

1. Insist that this procedure be followed.

2. You are not obliged to justify your peremptory challenges unless, and until, the judge preliminarily rules that your peremptories were improperly used.

   Note: If you respond before the necessary judicial finding, an appellate court will deem your actions as conceding that a reasonable inference had been raised that your kicks were motivated by some group bias. (*Turner*, supra, at 719.)
3. If the defense fails to meet its burden, ask the court to so find.

*People v. Douglas* (1995) 36 Cal.App.4th 1681, 1689–1690, held no prima facie showing where the prosecutor challenged two black jurors who had relatives with extensive criminal histories.

*People v. Irvin* (1996) 46 Cal.App.4th 1340, held no prima facie showing was made during the first motion. In the second motion, the trial court accepted the prosecutor’s explanation. Each motion is separate—one prima facie showing does not extend to the others.

4. The issue at this stage is only whether race-neutral justification exists, not whether the justification is reasonable. Whether the justification is reasonable or pre-textual is to be determined at the next stage. (*Purkett v. Elem* (1995) 514 U.S. 765 [The prosecutor challenged two black jurors because of long, unkempt hair, and one was an armed-robbery victim while this case was strong-arm robbery. Ultimately, the U.S. Supreme Court affirmed defendant’s conviction.]).

**F.** If the court finds a prima facie case has been made, the burden shifts to the respondent to show that the peremptories were not predicated on group bias, but were “reasonably relevant to the particular case, its parties or witnesses.” (*Wheeler, supra*, at 281–282.) The trial court must determine if a neutral explanation is genuine or is a subterfuge to disguise an improper peremptory challenge. Whether there was “good cause” to excuse the juror is not the test. (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1012–1020.)

*People v. Perez* (1994) 29 Cal.App.4th 1313, 1320–1330, held that the prosecutor’s peremptories of Latino jurors to be race-neutral (inadequate life experience, not answering juror questionnaire, and inappropriate laughter).

*People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1043–1055, held that an appellate court will not review a trial court’s conclusion that the prosecutor’s explanations of peremptory challenges were race-neutral and not a mere pretext.

1. Subjective reasons (body language, demeanor, attitude) may be adequate to justify a non-group-bias peremptory challenge. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1218–1219.) Some subjective demeanor-type attributes that have been found acceptable by appellate courts include: soft-spoken, long hair, unkempt/poorly groomed, frowning, tentative/low-keyed, inappropriate laughter, hostile, hesitant, cavalier, looked away from prosecutor, smiled at defendant, was fidgety, nervous, upset, defensive, tired, overweight, and/or weird. (*Meeting the Wheeler Challenge, supra*, at 33.)

2. Make a good record. In addition to a juror’s statements that mandate use of a peremptory, note body language or facial expressions that cause you to want to excuse a juror. Note the composition of the panel before and after each peremptory, the number of times you accepted the panel, the composition of the remainder of the venire, and strategic concerns you have for the particular case. You must always be prepared to articulate the specific reasons for each peremptory. This is why it is important to keep your voir dire notes—even the Post-it notes that provide information about the gender, ethnicity, and any other cognizable group membership noted. Because years after trial you may be required to relate your reasons for
excusing jurors in some subsequent habeas proceeding, learn to store your trial information in a permanent file.

Historically, a *Wheeler* challenge was a motion to quash the jury venire. If the court granted the motion, the court’s remedy was to declare a mistrial and to repeat jury selection with a new venire. It was reversible error to sanction the offending party by disallowing the discriminatory peremptory challenge and seating the improperly challenged juror. (*Lopez, supra, 3 Cal.App.4th Supp. 11.*)

The supreme court holding in *People v. Willis* (2002) 27 Cal.4th 811, however, affirmed the actions of a trial court that did not excuse the venire and bring in a new jury panel after a successful *Wheeler* motion. At trial, the defense attorney, after unsuccessfully objecting to the composition of the venire, proceeded to remove seven white male jurors. The trial court found the defense attorney had violated *Wheeler*. The defense counsel then sought a mistrial based on his own *Wheeler* violation. The trial court denied the motion, articulating its suspicion that the defense motion was an improper effort to gain a new jury panel.

*Note:* The prosecution waived its right to a new venire in favor of financially sanctioning defense counsel and continuing voir dire with the present panel.

**IX. Sample Questions for Prosecution Voir Dire**

The following questions are examples of the types of questions typically asked by the prosecutor in DUI cases. Similar questions can be formulated for cases involving DUI-drugs and in cases where violations of the per se law (Vehicle Code § 23152(b)) are charged.

These questions are suggestions only and are not meant as a substitute for good trial sense.

Although many of the questions are phrased as group questions, it is often more effective to pose the question to one juror and then to ask the group, “Has anyone else had an experience similar to Ms. Garcia’s?” Follow-up questions should be used to elicit specific information in response to positive responses to any of the general questions. Keep in mind, this is not cross-examination; you are attempting to gain information so you can select proper jurors for this particular case. If your questions alienate a potential juror, you have not advanced your cause.

Although all of these questions should be allowed, the trial court has considerable latitude in determining the length and scope of voir dire questions. You also will have an idea of areas of voir dire the court will or will not allow based upon the defense attorney’s voir dire conducted before you begin. If the court continually interrupted defense counsel with, “That doesn’t go to cause, counsel,” you may be advised to avoid that area of questioning. If you are permitted only a very limited time, such as 15 minutes, focus your questions on the jurors about whom you have not yet made a decision rather than wasting time with the jurors you already know you want to keep or excuse.

In situations where you have very limited time, it is often beneficial to focus on questions aimed at getting potential jurors to discuss their observations of people affected by alcohol. As previously discussed, in most instances there will be universal agreement among the potential jurors that certain mental and physical signs indicate possible impairment. See sample question numbers 14, 15, 17
and 18 as good examples of questions that invite jurors to talk about observing people impaired by alcohol.

1. **DO YOU ALL AGREE THAT DRIVING UNDER THE INFLUENCE SHOULD BE AGAINST THE LAW?**

2. **HAS ANYONE EVER HEARD THE TERM “DRUNK DRIVING”?**

3. **DO YOU ALL UNDERSTAND THERE IS NO CRIME ON THE BOOKS CALLED “DRUNK DRIVING”?**

4. **DO YOU ALL UNDERSTAND THAT WHAT IS AGAINST THE LAW IN CALIFORNIA IS DRIVING UNDER THE INFLUENCE?**

5. **SO, I DON’T HAVE TO PROVE THE DEFENDANT WAS DRUNK WHEN HE [SHE] WAS DRIVING. DOES ANYONE HAVE ANY DISAGREEMENT WITH THAT NOTION?**

6. **DO YOU ALL AGREE THAT MY BURDEN IN THIS CASE IS MERELY TO SHOW THAT THE DEFENDANT WAS IMPAIRED DUE TO ALCOHOL [DRUGS] AT THE TIME HE [SHE] WAS DRIVING? DOES ANYBODY THINK THAT IS UNFAIR?**

7. **DOES ANYONE FEEL THAT THE LAW SHOULD BE CHANGED SO THAT ONLY DRUNK DRIVING SHOULD BE PROHIBITED?**

8. **HAS ANYONE HERE HAD FAMILY, FRIENDS, OR EVEN THEMSELVES CHARGED WITH AN OFFENSE SIMILAR TO WHAT WE’RE TALKING ABOUT HERE TODAY? IF SO, WHEN WAS IT, AND WHAT WERE THE CIRCUMSTANCES?**

9. **DID THAT CASE GO TO TRIAL?**

10. **WAS THERE A CHEMICAL TEST OF SOME SORT USED IN THAT CASE? WHICH ONE WAS IT?**

11. Assuming it was the juror who was previously charged: **DID THE TEST RESULT REFLECT HOW YOU WERE FEELING WHEN THE OFFICERS STOPPED YOU?**

12. **HAS ANYONE EVER SEEN A FIELD SOBRIETY TEST BEING GIVEN, SUCH AS WALKING A STRAIGHT LINE, TOUCHING THEIR NOSE, ETC.?**

13. **HAS ANYONE EVER SEEN A CHEMICAL TEST BEING GIVEN TO DETERMINE THE AMOUNT OF ALCOHOL IN A PERSON’S BODY?**

14. **HAS ANYONE EVER BEEN A PASSENGER IN A CAR DRIVEN BY SOMEONE WHOSE DRIVING APPEARED TO BE AFFECTED BY ALCOHOL? HOW COULD YOU TELL THAT THE DRIVER WAS AFFECTED BY ALCOHOL?**
15. DO ANY OF YOU HAVE FAMILY MEMBERS OR CLOSE FRIENDS WHO HAVE WHAT YOU WOULD CONSIDER TO BE A PROBLEM WITH ALCOHOL? DOES THAT PERSON DRIVE A CAR? AFTER DRINKING? HAVE YOU EVER SEEN THAT PERSON GET INTO A CAR TO DRIVE WHEN YOU FELT THAT HIS OR HER DRIVING ABILITY WAS AFFECTED BY ALCOHOL? WHAT WERE YOUR THOUGHTS WHEN YOU SAW HIM OR HER DRIVE AWAY?

16. DO ANY OF YOU KNOW ANYONE WHO HAS ENROLLED IN A DRUG OR ALCOHOL EDUCATION PROGRAM? WHO WAS IT? WHAT WERE THE CIRCUMSTANCES?

17. HAS EVERYONE SEEN SOMEONE WHOSE BEHAVIOR HAS BECOME ALTERED OR PHYSICAL COORDINATION AFFECTED AFTER THE CONSUMPTION OF ALCOHOL? HOW COULD YOU TELL THE ALCOHOL WAS AFFECTING HIM OR HER? DO YOU HAVE MEDICAL TRAINING? SO YOU WOULD AGREE THAT IT IS POSSIBLE TO DETERMINE SOMEONE IS AFFECTED BY ALCOHOL EVEN IF ONE DOESN'T HAVE A MEDICAL DEGREE?

18. IS THERE ANYONE WHO BELIEVES THAT IT IS NOT POSSIBLE TO TELL IF SOMEONE IS AFFECTED BY ALCOHOL BY OBSERVING AND TALKING TO THE PERSON?

19. THE LAW MAKES IT A CRIME TO DRIVE WHILE UNDER THE INFLUENCE EVEN IF THERE IS NO BAD DRIVING. DOES ANYONE THINK THIS IS UNFAIR? DOES ANYONE THINK AN OFFICER SHOULDN'T BE ALLOWED TO ARREST SOMEONE UNTIL THERE IS A CRASH OR AT LEAST BAD DRIVING? (Be sure to use if there is minimal driving in your case.)

20. SO, IF AN OFFICER STOPS SOMEONE FOR AN EQUIPMENT VIOLATION AND THE OFFICER BELIEVES THE DRIVER IS UNDER THE INFLUENCE, DOES ANYONE THINK THE OFFICER SHOULD WAIT AT LEAST UNTIL THE DRIVER HITS A PARKED CAR BEFORE ARRESTING THAT DRIVER FOR DUI? (Hopefully your jurors will find humor in the absurdity of this question.)

21. HAS ANYONE HERE EVER RECEIVED A TRAFFIC TICKET? (This will likely bring 12 raised hands and some embarrassed giggles.)

22. DID ANYONE'S TRAFFIC TICKET GO TO TRIAL? HOW LONG AGO WAS THAT? (Bye, bye, Charlie!)

23. Refusal cases only: MR. [MS.] ____, YOU INDICATED YOU PREVIOUSLY SAT AS A JUROR IN A DUI CASE? WAS THERE A CHEMICAL TEST RESULT IN THAT CASE? NOW, ASSUMING IN A PARTICULAR CASE, THERE WAS NO CHEMICAL TEST TELLING HOW MUCH ALCOHOL WAS IN THE DEFENDANT'S BODY, WOULD THAT FACT ALONE CREATE A "REASONABLE DOUBT" FOR YOU? SO THEN, WOULD YOU BE WILLING TO LISTEN TO THE EVIDENCE PRESENTED AND MAKE YOUR DECISION ON THE EVIDENCE YOU HEARD?
24. HAS ANYONE HEARD OF INFRARED TECHNOLOGY [GAS CHROMATOGRAPHY]? WHAT DO YOU KNOW ABOUT IT?

25. NOW, THERE MAY BE SOME TESTIMONY ABOUT THAT. IS THERE ANYONE WHO WOULD RATHER NOT SIT THROUGH SUCH SCIENTIFIC EVIDENCE?

26. IS THERE ANYONE WHO DOESN’T PARTICULARLY TRUST TECHNICAL INSTRUMENTS OR THE RESULTS THEY PRODUCE?

27. Consider using this question only if there are problems in the maintenance record of the instrument used to test the defendant: HAS ANYONE HAD A CAR BREAK DOWN? WERE YOU ABLE TO DRIVE THAT CAR SOME TIME LATER ON? WAS THAT AFTER YOU TOOK IT TO THE MECHANIC? AND IT THEN WORKED ABOUT AS WELL AS IT DID BEFORE, RIGHT?

28. IS THERE ANYONE HERE WHO IS NOT A LICENSED DRIVER?

29. IS THERE ANYONE HERE WHOSE DRIVING PRIVILEGE WAS EVER SUSPENDED BY THE DMV?

30. HAVE ANY OF YOU, YOUR CLOSE FRIENDS, OR RELATIVES EVER BEEN ARRESTED, CHARGED, OR CONVICTED OF ANY CRIME OTHER THAN A MINOR TRAFFIC VIOLATION?

31. DOES ANYONE HERE DISAGREE WITH THE LAW THAT REQUIRES ALL DRIVERS TO GIVE A BLOOD OR BREATH TEST IF ARRESTED FOR DUI?

32. DO YOU ALL UNDERSTAND IT IS MY JOB TO PROVE THIS CASE MERELY BEYOND A REASONABLE DOUBT? DOES ANYONE HAVE ANY DISAGREEMENT WITH THAT?

33. DO YOU ALL UNDERSTAND THAT IT IS NOT MY JOB TO PROVE THIS CASE BEYOND A SHADOW OF A DOUBT OR BEYOND ALL DOUBT, BUT JUST BEYOND A REASONABLE DOUBT? DOES ANYONE DISAGREE WITH THIS?

34. IN OTHER WORDS, IT’S MY JOB TO REASONABLY SATISFY YOU OF THE TRUTH OF THE CHARGES BEYOND A REASONABLE DOUBT. DOES ANYONE DISAGREE WITH THIS NOTION?

35. IS THERE ANYONE HERE WHO IS NOT A REGISTERED VOTER?
(Some judges will not permit this question, others will. Many prosecutors believe that a prospective juror who does not have sufficient interest to complete a prepaid, preaddressed postcard and register to vote probably does not have sufficient interest or stake in the community to sit as a juror. To exclude all unregistered voters would likely be deemed a neutral reason for exercising a peremptory challenge.)
36. IS THERE ANYONE HERE WHO, FOR WHATEVER REASON, WOULD PREFER NOT TO SIT ON THIS CASE?
(Use this as your concluding question. It may provide an opportunity for those jurors who hold religious reservations about judging others to speak up, thus revealing a potential challenge for cause. In a similar manner, a juror who really does not want to be there but had not found an earlier opportunity to say that will now have the chance to explain why he or she does not belong. Also, it may invite those jurors who had previously stated personal hardships but were not excused by the court to reiterate their time conflict. Assuming you believe you have enough peremptory challenges, you may wish to excuse such a juror “to attend his daughter’s first violin recital” or whatever—and thus earn good-person points with the remaining jurors.)


Frank Horowitz, the Director of CDAA’s Driving Under the Influence Prosecution Project from 2001–2003, has practiced criminal law for nearly 30 years. His experience includes an initial five-year stint as a Los Angeles County Public Defender, followed by a 19-year career as a prosecutor in the Los Angeles City Attorney’s Office. Mr. Horowitz then joined the Butte County District Attorney’s Office, ultimately serving as the Deputy in Charge of the Chico Branch.

Mr. Horowitz’s involvement in prosecutor training began in 1980 when he served for two years as the Supervising Attorney in charge of the Los Angeles City Attorney’s nationally acclaimed training program. This training format and process served as an early model for the current CDAA Trial Advocacy Workshop. He has been a CDAA instructor since 1985 and was selected Outstanding Instructor from 1985–1987.

Mr. Horowitz received both his Juris Doctor and Bachelor of Arts degrees from UCLA. He has twice served on the faculty of the National Advocacy Center in Columbia, South Carolina. Mr. Horowitz has also taught law-related courses at Pasadena City College, Santa Monica College, California State University, Dominguez Hills, and Chico State University, and criminal law at Cal Northern School of Law. In 2001, he received a Pro Bono Service Award from the State Bar of California for his volunteer work at the Chico office of Legal Services of Northern California.

Lawrence Morrison is a Deputy District Attorney in the Los Angeles County District Attorney’s Office. He has worked there for more than 20 years. Mr. Morrison has prosecuted more than 175 felony jury trials including four DUI-murder convictions. He was a prosecutor for the FBI-LAPD task force for the investigation and prosecution of the Reginald Denny case arising from the 1992 Los Angeles riots.

Mr. Morrison received a Juris Doctor degree from the Southwestern University School of Law. He also earned a Masters degree in Public Administration with a specialty in Court Administration from the University of Southern California. Mr. Morrison received a Bachelor of Arts degree in Economics with Distinction from San Diego State University. Thereafter, he completed some graduate work in Economics at San Diego State University and the University of Oregon.

Mr. Morrison taught the national award-winning Trial Attorney Program (TAP) for the Los Angeles County Bar Association for 15 years. TAP was an intensive (90+ hours) misdemeanor jury
Mr. Morrison has also lectured for law-enforcement programs in California and Texas, made presentations at national and international conferences, and testified at legislative hearings.

During his career, Mr. Morrison has won awards from the Los Angeles County Deputy District Attorneys Association, Justice for Homicide Victims, Mothers Against Drunk Driving, Microsoft Corporation, and the Recording Industry Association of America. He has also received commendations from the FBI, the LAPD Robbery-Homicide Division, the Los Angeles Sheriff’s Department, and the Long Beach Police Department.

**Chapter Updated in 2010 by Stephen F. Wagner, TSRP**: Stephen Wagner served as a deputy district attorney in San Benito County for six years before joining the CalTSRP in November 2007. He has prosecuted a broad range of criminal offenses from simple assaults to various forms of homicide/murder. He has been a consistent editor and author for CDAA publications, including *Behind the Wheel* and the former *Case Digest*. Teaching Criminal Law & Procedure at Monterey College of Law, Mr. Wagner is a graduate of NDAA's Faculty Development Course and has served as an instructor at the National Advocacy Center and at CDAA's New Prosecutors Seminar. As CalTSRP for the Coastal Region, he is based in Monterey County.
Chapter IX

The Opening Statement in a DUI Case

by Frank M. Horowitz, Former Director of
CDAA's Driving Under the Influence Project

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(Updated 2010 by Stephen F. Wagner, TSRP, Coastal Region)

An anxious parent, wanting her daughter to succeed in dance class, asked the teacher how long a ballet dancer’s legs should be. The teacher responded, “Long enough to reach the floor.”

New prosecutors preparing for their first trial, understandably anxious and eager to do well, often ask senior members in their office what is permitted in an opening statement, what is effective, and, “How long is long enough?” This chapter answers these questions specifically within the context of a driving-under-the-influence (DUI) trial.

I. What Is it Good For?

You remember from your law school trial-advocacy course; the opening statement comes between the picking of the jury and the calling of your first witness. Penal Code section 1093(b) permits the prosecutor to “make an opening statement in support of the charge.” This does not mean this is an opportunity for argument. Rather, an opening statement merely assists the jury by providing an overview of what evidence is forthcoming. (People v. Stoll (1904) 143 Cal. 689, 693.) To satisfy this end, you may use items that will be later introduced into evidence, or audio or visual aids that will “prepare the minds of the jury to follow the evidence and more readily to discern its materiality, force and effect.” (People v. Green (1956) 47 Cal.2d 209, 215, overruled on other grounds by People v. Morse (1964) 60 Cal.2d 631, 648–649; People v. Wash (1993) 6 Cal.4th 215, 257.)

The defense is also entitled to an opening statement. The defense may present its opening statement after yours, or the defense can reserve opening for the start of its case. In some counties, it is common for the defense to reserve, and ultimately choose to waive, the opening statement.

II. Legal Considerations: When in Doubt, Have a Hearing

At some point in their careers, all prosecutors experience the pangs of frustration and anxiety when, after their opening statement, a mentioned witness or piece of evidence either fails to materialize or is deemed inadmissible. This can occur in any criminal prosecution, although more likely in misdemeanor cases given the shorter opportunity for case preparation. The effect is that your opening statement has become an opening overstatement.
Even though the law is clear that statements made in opening statement are not to be considered as evidence, jurors will likely hold the prosecutor accountable for all claims made in the opening statement. Another obvious hazard of making overstatements is illustrated below (see defense closing argument quote).

An experienced defense attorney will usually take extensive notes of what the prosecutor says in opening statement. The defense’s intent is to use in final argument every possible discrepancy between what the prosecutor promised and what was actually presented. The thrust of the defense argument is, “If the State had presented everything it mentioned in opening statement, then possibly there would be sufficient evidence to convict. But given the prosecution’s failure to deliver, there is clearly a reasonable doubt as to the defendant’s guilt.”

Although this offering by the defense in closing argument may not result in the jurors having reasonable doubt, these overstatements can often undermine the credibility of the prosecutor.

The moral here is to not overstate your case. If there are important items of evidence that may raise issues of admissibility, it is wise to have a pretrial hearing to resolve the issue. Then you can feel confident that the jury will see, hear, and touch the items you said would be forthcoming.

If the rules of engagement are clearly defined before you address the jury, this will enable you to deliver with more confidence.

Assume the jury convicts and, in spite of your best efforts, the evidence that is adduced at trial is less than what your opening statement envisioned. Is there a defense remedy on appeal? Even appellate courts understand that trials are living events that, at times, veer in unexpected directions. Consequently, prosecutorial overstatement is not usually a successful ground for reversal of a conviction. (People v. Wrest (1992) 3 Cal.4th 1088, 1109.)

If a prosecutor’s opening statement includes reference to known inadmissible evidence, however, there is greater likelihood that an appellate court will find the conduct so egregious as to require a reversal of the conviction. (People v. Harris (1989) 47 Cal.3d 1047, 1080.) An example of this would be where a prosecutor in opening statement told the jury of the defendant’s failure to pass a lie-detector test, knowing full well that the results would be inadmissible at trial. Furthermore, there is case law that makes it clear that the contents of a prosecutor’s opening statement, just as in final argument, may create reversible error even in the absence of prosecutorial bad faith. (People v. Barajas (1983) 145 Cal.App.3d 804, 809; People v. Hill (1998) 17 Cal.4th 800, 822–823.) Again, the best way to avoid such issues is to request an evidentiary hearing, before opening statement, on any item for which admissibility is in question.

III. Misdemeanor Opening Statement: Keep it General—Keep it Simple

Opening statements, like your wardrobe, need different styles for different occasions. The opening statement you would prepare for a multi-count murder case obviously would be markedly different from the one prepared for a one-witness petty-theft case. If the opening statement in the homicide case reflected no greater organization, preparation, or presentation than the petty-theft case, the jury would be ill prepared to take on the task of absorbing and understanding the People’s case. Conversely, if the opening statement in the theft case were as long as in the homicide, the jury would surely conclude, “Overkill!” Therefore, just as one considers the audience when he or she dresses to
impress, the savvy prosecutor evaluates the complexity and significance of the charged offense when preparing the opening statement.

Much is said about the importance of establishing themes when presenting a case to a jury. Establishing themes in murder for hire cases or kidnapping for ransom cases is easy, right? But in a simple DUI, the creative thematic options are usually more limited. Therefore, the best approach in adopting a theme in a simple DUI is to choose one that is both simple and universally palatable. Consider themes like “choices,” “decisions,” and themes that center on safety. These are safe selections because they are sure to resonate with a broad cross-section of jurors.

In misdemeanor trial practice, preparation is usually accomplished on the fly. Sometimes your witness interview is a telephone conversation at 10:00 p.m. the night before testimony. Sometimes it is not possible to interview your witnesses until after voir dire, or worse, during a brief time out between opening statement and when that witness takes the stand. While such events will develop character and do make for great stories, they put inordinate pressure on the creation of a well-founded, cogent opening statement. Given the additional likelihood that your adversary is writing down each point you make in the hopes that you fail to deliver on a couple of them, you can see how a misdemeanor opening statement comes with both benefits and risks.

One of the ways to deal with this dilemma is to find a way to provide your jurors with just enough information. Give them enough specificity so they will know, in a general way, what is going to happen next. But avoid being so detailed that your case will topple when the inevitable surprise or two occurs. After all, you do not want the defense attorney to pounce and growl in argument, “There’s reasonable doubt here because the case turned out differently than the prosecutor said.” In the world of misdemeanors, there is value in thinking of your opening statement as the foundation supporting a 20-story building on top of an earthquake fault. You want the foundation to be strong enough to support all the stories on top, yet with enough give and play to withstand the inevitable temblor.

**IV. How NOT to Begin**

By the time you stand up for your opening statement, you have already been introduced by the court, and the jurors may have even formed some notion of who you are as a person. After all, they had an extended period to observe you during voir dire. Therefore, reintroducing yourself is unnecessary and a weak beginning to your presentation. Nor is there any need to reiterate the charges against the defendant. If your jurors cannot recite the charges after your voir dire, either they have stopped breathing or you have entrusted your case to a dozen toadstools.

There is zero value in starting your opening statement with, “This is the opening statement, and what I am about to say here is not evidence.” Although this is legally accurate, the jurors will hear it as, “Don’t pay attention to anything I’m about to tell you because it is not evidence.” Can you think of any benefit for an advocate to tell his or her audience, “Please disregard until further notice?”

It is also common for prosecutors to begin by likening the opening statement to: (1) a roadmap, (2) the picture on a puzzle box, or (3) a preview of coming attractions. Although each of these is somewhat apt, it is all hackneyed stuff that will cause your judge, clerk, court reporter, and bailiff to groan in unison.
If not any of these, then what? The jurors have been sitting through the voir dire anticipating what the case is about. The judge told them the charge, and the efforts of each counsel to educate have provided the jurors with some inkling of what is involved. But the picture is not clear, and their curiosity has been piqued. They are ready to be told what the story is about. Taking advantage of this inquisitive moment, you might begin with something as simple as, “I’m sure during the process of picking a jury you were all wondering what this case is about. This is my chance to tell you a little about what happened here.” Your beginning need not be profound, merely engaging.

V. All the World’s a Stage

Most jurors’ ideas about trials come from dramatically edited court TV programs, movies, books, or plays. Right or wrong, jurors anticipate that your trial, if not entertaining, will at least minimally mirror the process they have come to know. They expect a show.

Think about the last time you watched a play. I will bet it did not begin with an actor coming forward and proclaiming, “This is act one. In this act you will note the appearance of three characters. The first will tell you what happened on the fateful day …”

The play is the thing. In lieu of some quasi-academic analysis of what is about to happen, the players immediately sweep you up in the commencement of the tale to be told. While it must be conceded there is less drama in a typical DUI trial than a Broadway play, the more your opening statement reveals a human saga rather than a dry recitation of evidence that supports a corpus, the more the jury will become invested in your case.

Some experienced prosecutors advocate that you develop a theme for each trial. For instance, if one were prosecuting a DUI with injury, the theme might be, “This is a case about irresponsibility and thoughtlessness causing tragedy.” If this method works for you, go for it. In any event, it is probable that your jurors, once they get caught up in facts of your case, will capably define their own sense of theme. Although trials are slower and less dramatic than movie renditions, each is its own morality play involving right and wrong.

Your task as the first actor on stage is to begin to tell the tale. You can best do this by providing a narration that relates what occurred from the perspective of your key witnesses rather than providing a detached chronology. Envision yourself as the storyteller at the children’s section of the library rather than a lecturer at the engineer’s conference explaining the latest in road-construction materials.

It is a fruitful practice in opening statement to lightly introduce (or reference) the cast of witnesses that you anticipate calling, but be careful not to invade the potential testimony.

Use your voice tone, pauses, and volume to move the story along. Talk to your jurors, not at them. Make eye contact. Engage in measured movement. Do not stay behind the podium and lecture. Addressing your jurors without clutching the podium tells them that you have nothing to hide and that your case, just like you, can stand without supports. The same can be said of clutching your notes: Release that Kung Fu grip on your notes and communicate the ultimate message to the jury—“I know my case!”
If there are items of evidence that will help the jurors understand what happened, do not be afraid to use them. For instance, if your victim was struck by a hammer that was recovered, use it to give substance to the description of fear felt by the victim as the defendant approached.

If the judge permits, you may want to use charts, diagrams, or slides to help your jurors visualize what you are talking about or give definition to your words. If you do, practice their use. Speaking to a jury while handling props requires coordination; learn to do it seamlessly. Remember that if you have clipped or tacked several pieces of chart paper to a chart holder and plan to turn each in sequence, it is easier to pull the respective pages toward you rather than to attempt to flip the finished pages back over the board. For instance, if you plan to use four consecutive pages of chart paper, before you attach the pages to the chart holder, put page one at the bottom and page four at the top. In this way, you can more easily pull over the pages in sequence. Do not talk while changing charts or changing slides. A listener's attention is dissipated during transitions.

VI. Components of a DUI Opening Statement

If the DUI case you are about to begin includes a crash, then you might choose to relate the events from the perspective of the victim. A short, artful description of what occurred when the defendant’s car collided with the victim will get your jurors’ attention.

In most DUIs, the observer of the defendant’s actions is a law enforcement officer. DUI evidence generally divides into four parts:

- the observed driving;
- the officer’s observation of the defendant’s objective physical signs or symptoms of impairment;
- the defendant’s impaired performance on the field sobriety tests (FST); and
- the chemical test results or test refusal.

The explanation of how these four components were uncovered through the officer’s observations, investigation, and expertise teaches your jury how an officer identifies an impaired driver as well as what evidence is forthcoming. These cases give the jurors a real chance to play Sherlock Holmes. A successful opening statement will show the jurors how to personally piece together the four components to the officer’s observations and investigation that, in totality, permit only one truthful conclusion—the defendant was impaired when driving.

A DUI arrest report commonly includes a great deal of specific information. The report may relate how many times and by how many inches the defendant’s vehicle crossed the Botts dots. The report may specifically relate how many times the defendant searched his or her wallet before finding the license. The report may indicate where each finger-to-nose attempt landed during the FST.

Is it a good idea to tell the jury of each specific fact included in your evidence? While you want your jurors to understand what your case is about, do not be overly specific. Remember, you do not want to overstate your case, and even if you know what your witness is about to say on the witness stand, there is great likelihood that some discrepancies will occur—it is often advantageous to intentionally leave out detailed references to certain items of incriminating evidence in your opening statement. Consider giving the jurors just enough to whet their appetites. This strategy creates much greater impact and anticipation when the supporting witness describes the event(s).
The defense will use the sum of those discrepancies to indict your officer’s investigation and conclusions. Therefore, while you will want to tell your jurors, “It was the defendant’s weaving between lanes that initially attracted the officer’s attention,” and, “The defendant’s performance on the finger-to-nose test was consistent with someone who was under the influence,” you do not want your opening statement to so pin down the facts that any surprise changes in anticipated evidence will permit a defense contention that the overstatement establishes a reasonable doubt.

VII. The Dismount: “Hey, How Do I Get Off This Thing?”

Anyone who has ever observed a gymnastic competition has marveled at the grace and dexterity with which the athlete dismounted the various apparatuses. It sure looked easy! What these athletes, after considerable practice, have accomplished is the achievement of dynamic closure. They figured out how to leave the audience with a sense of completion that was the logical extension of what came before.

You also will benefit by developing a “dismount” for your opening statement. Work out something that is appropriate, effective, and will leave the jurors with a sense of what you want from them within the context of what you have already told them. It may be as simple as, “We’re confident that after you hear all the witnesses in this case, you will be satisfied, beyond a reasonable doubt, that on January 1, Mr. Dowrong was too impaired to safely drive his car.”

Thinking about your dismount before trial will help your performance in two ways. First, by choosing a comfortable and effective ending to your opening statement, you can feel confident that you are concluding with a bang, not a whimper. We have all personally observed—or experienced—a presentation that started strong, only to meander to a conclusion. Not only did it appear weak and ineffective, but the distance back to the chair felt like a marathon. Choose a good ending in advance and practice it until it is yours. This will positively impact the jury and demonstrate your professionalism.

Second, the world of misdemeanors is jet-propelled. Judges in these courts often act more like cattle herders, pushing their cases like critters to market, than sagacious seekers of justice. By pre-thinking and standardizing common parts of your trials, you provide yourself more time to dedicate to the specifics of your case. So give some advanced thought to a concluding sentence or two that will both sum up what you want from the jury and provide an easy segue to what follows.

VIII. Conclusion

The opening statement is your first real opportunity to let your jurors know what your trial is all about and why they should care. While it is unlikely that your cause will be won or lost at this stage, a good opening statement will set the tone for your case, encourage your jurors to trust you as their guide, and be “long enough to reach the floor.”

Frank Horowitz, the Director of CDAA's Driving Under the Influence Prosecution Project from 2001–2003, has practiced criminal law for nearly 30 years. His experience includes an initial five years as a Los Angeles County Public Defender, followed by 19 years as a prosecutor in the Los Angeles City Attorney’s Office. Mr. Horowitz then joined the Butte County District Attorney’s Office, ultimately serving as the deputy-in-charge of the Chico Branch.

Mr. Horowitz’s involvement in prosecutor training began in 1980 with two years as the supervising-attorney-in-charge of the Los Angeles City Attorney’s nationally acclaimed training program. This training format served as an early model for the current CDAA Trial Advocacy Workshop. He has been a CDAA instructor since 1985 and was selected Outstanding Instructor from 1985–1987.

Mr. Horowitz received both his Juris Doctor and Bachelor of Arts degrees from UCLA. He has twice served on the faculty of the National Advocacy Center in Columbia, South Carolina and has taught law-related courses at numerous colleges and universities. In 2001, he received a Pro Bono Service Award from the State Bar of California for his volunteer work at the Chico office of Legal Services of Northern California.

Chapter Updated in 2010 by Stephen F. Wagner, TSRP: Stephen Wagner served as a deputy district attorney in San Benito County for six years before joining the CalTSRP in November 2007. He has prosecuted a broad range of criminal offenses from simple assaults to various forms of homicide/murder. He has been a consistent editor and author for CDAA publications, including Behind the Wheel and the former Case Digest. Teaching Criminal Law & Procedure at Monterey College of Law, Mr. Wagner is a graduate of NDAA's Faculty Development Course and has served as an instructor at the National Advocacy Center and at CDAA's New Prosecutors Seminar. As CalTSRP for the Coastal Region, he is based in Monterey County.
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Chapter X

The Interview and Courtroom Examination of the Officer

by Frank M. Horowitz, Former Director of CDAA's Driving Under the Influence Project
and
Dan Kleban, Deputy City Attorney
Los Angeles City Attorney's Office

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(Updated 2010 by Rosalind Russell-Clark, TSRP, Los Angeles and Ventura)

I. Introduction

This chapter is divided into two parts: The first section is intended to provide some ideas of how to best interview the officer in your case; the second section provides a series of questions to give you an idea of appropriate areas of inquiry and specific possible questions. It is not intended that this sequence of questions is the be-all-and-end-all of a direct examination of a law enforcement witness. It is a direct-examination script that has been used and altered by successive generations of prosecutors. Certainly, the facts of your specific case, your own style and creativity, and increased trial experience will enable you to develop your own string of questions.

II. The Interview of the Arresting Officer

The testimony of the arresting officer is the most crucial component in the successful prosecution of a driving-under-the-influence (DUI) case. The effectiveness of the officer’s testimony will in part depend upon the quality of the pretrial interview. It is during this interview that you learn firsthand about the facts of your case. Of even greater import, you are provided with your first opportunity to gauge who this officer is and what sort of a witness he or she will make. Finally, the interview is your opportunity to prepare the officer to make the best possible presentation before the jury.

The best law enforcement witness is one who can assume the role of a polite and professional teacher before the jury. Ideally, you want your officer perceived as a knowledgeable DUI officer who can clearly relate the facts of the case—avoiding cop lingo—and who is skilled in making the technical aspects easy to understand. Your success at trial is generally linked to your officer’s ability to meet this profile.
A. Know Your Case Before the Interview

Prior to the interview, it is essential that you read the entire arrest report, and review all related evidence thoroughly. It is helpful to have a pre-interview checklist to follow before every DUI Interview. See the following example of a pre-interview checklist:

1. Find out from the arresting officer if there were officers at the scene not listed in the report.

2. Get full names and serial numbers of all officers who were at the scene, but not listed in the report.

3. Get identifying information on all civilian witnesses who were at the scene or may have some knowledge about the case.

4. If the officer does not have names of civilian witnesses, find out why. Did witnesses refuse to give their names and addresses? Did the officer fail to ask for the relevant information?

5. Have the arresting officer prepare a rough draft diagram of the scene.

6. Ask the arresting officer if he or she has visited the scene since the arrest.

7. If the officer has revisited the scene since the arrest, ask if the scene has changed in any manner.

8. If the scene has changed—for example there is now a crack in the sidewalk where the FSTs were conducted—you need to be aware of what changes have occurred.

9. Ask the officer if he or she had a camera at time of arrest.

10. If officer had a camera, were pictures taken of the scene and of the defendant? If not, why not?

11. Did the officer have a PAS device at the scene? If not, why not?

12. Did the officer take notes of the defendant’s performance during the FSTs?

13. If not, how did he or she properly record the results?

14. How long after the arrest, were the FST results recorded?

15. Are there any errors in the report regarding the FSTs? (I.e. an error in the amount of time defendant held one leg up on the Romberg test.)

16. Were there any FSTs given to the defendant that were not listed in the report?

17. Did the partner officer administer any of the FSTs?
18. If there was a language barrier, was an interpreter called to the scene? If not, why not?

19. Were there any statements made by the defendant that were not listed in the arrest report? If so, why were those statements omitted?

20. Were there any statements made by the defendant’s passengers that are not in the report? If so, why were the statements omitted?

21. Was there any hostility between the officer and the defendant?

22. Did the officer have to use any type of force against the defendant at any time?

23. Was there any hostility between the officer and the defendant’s passengers?

24. Were any of the defendant’s passengers intoxicated?

25. Did any of the defendant’s passengers witness the FSTs?

26. Are there any reports pertaining to the arrest that are not included?

27. If defendant’s car was impounded, was there an impound report?

28. If there was a traffic accident, is the Traffic Collision report attached?

29. Did the partner officer write any of the arrest report?

30. Did the partner officer review the arresting officer’s report before the case was filed?

31. Are there any errors in any of the DUI related reports?

32. Did any of the officers involved in the DUI arrest prepare any supplemental reports?

33. Is there any vital information not discussed that the officer can share?

34. Is the officer aware of the defense(s) that the defendant will put forth? If not, discuss with the officer the possible defenses that you see or anticipate.

Most reports will contain some errors or omissions. It is possible that some reporting error is the sole reason the defendant is going to trial; although that is relatively rare. Mistakes in the arrest report, by themselves, are almost never fatal to your case. All discovered errors, after discussion with the officer, can be dealt with during the officer’s direct examination, in response to a defense question on cross-examination, or on redirect examination. Although the defense will attempt to weave all errors into a tapestry of reasonable doubt, the jury will likely understand that no reporting error changes the fact that the defendant was driving a vehicle while under the influence and/or above a 0.08 blood-alcohol level.
B. Get the Officer on the Prosecution Team

Prosecutors sometimes feel deferential to officers during the interview session. This is particularly true if the prosecutor is relatively new and the officer is a veteran who may have made hundreds of DUI arrests. Prosecutors must get past this tendency to defer to the officer, especially if the deference will interfere with the preparation of the case for trial. When you encounter an officer who is very experienced but who does not seem to believe that an extensive pretrial interview is necessary, please take control in a professional manner, explaining that the more you know, the better prepared the both of you will be. Never let an experienced officer intimidate you by trying to shortcut your interview. Your goal is to make the officer understand that the two of you are a team. You should get as much information from the experienced officer as you need. Please do not hesitate to get valuable phone numbers from your officer. Often times you are very busy and are unable to reach certain key officers. Your experienced officer can be a great help with getting these necessary witnesses to call you for an interview. The key is to get the officer to buy into the fact that you are a team.

Most officers, even experienced ones with numerous DUI arrests, will have testified in court on only a small percentage of their arrests. Therefore, while they may be experts in the investigation and arrest of impaired drivers, even a new prosecutor is more knowledgeable about presenting evidence to a jury. Ideally, the officer and the prosecutor will form a team in which the officer is the expert about everything that happened in the field—and the prosecutor is the expert in how best to present the People’s case to the jury.

C. Attitude Readjustment

As your interview with the officer begins, you may be confronted with a bad attitude. Officers sometimes come to court tired and visibly unmotivated. This may be because they have just finished working the graveyard shift or because they have been ordered to appear in court on their day off or some other unknown reason. You can commonly overcome the bad attitude by determining its cause and providing some empathy. It is a good idea to try and accommodate the officer as much as possible by scheduling interviews and court appearances to least interfere with their schedules. If the officer knows that you value his or her time, you will likely get more positive responses to your questions. This is turn will aid you in having a successful interview.

Sometimes pointing out that it is his or her work product that is being tested in trial helps to convince your officer to become an active member of the prosecution. And as a prosecution team, you share an ultimate goal to see that justice is served in the case at hand.

Finally, one of the truths about those who choose law enforcement as a career is that they hate to be embarrassed in public. Therefore, you can always point out to the officer that if he or she fails to properly prepare for his or her role in the trial, the officer faces a greater likelihood of being humiliated in front of the jury during cross-examination. Such information can provide the motivation to persuade the officer to prepare properly for trial.
D. Let the Officer Review the Report Alone

Another perplexing problem commonly confronted by prosecutors is that the officer, even if he or she is a willing member of the prosecution team, has not bothered to review his or her arrest reports or related documents. This is due, in part, to the officer’s experience that the vast majority of cases in which subpoenas are issued result in pleas or continuances, neither of which requires the officer’s testimony. It is a great idea to have extra copies at hand of the officer’s arrest report since most of them will not have one when they arrive to your office. Whenever you get a case for trial, one of the first things you want to do, is to make extra copies of all related DUI reports. This will save you valuable time down the road when you are attempting to interview a witness who is not prepared with the necessary documents.

You likely are already feeling pretrial pressure building at this point, and the knowledge that your prime witness has not bothered to refresh his or her recollection about the case in which you are engaged can certainly cause panic. At this point, inform the officer of the necessity of reviewing the reports as though he or she was prepping for a final exam. Leave the officer alone with the report for 5–10 minutes. This is important because trying to read while another person looks on is distracting to the reader and diminishes comprehension. Upon your return, you will likely be gladdened to learn how well the officer recalls the facts of the case. Commonly, officers who authored the reports only need a little alone time with their reports to bring the events back to them.

E. Have the Officer Explain the Case Before You Discuss Problem Areas

Assuming that your review of the related police reports revealed certain problem areas that you believe to be vital to the defense, how should you handle this with your officer? It is highly unlikely that your relationship with the officer will benefit if the first words out of your mouth are about the report’s deficiencies. No one, including an officer, likes to be placed immediately on the defensive about his or her work product. It is helpful to use your pre-interview checklist that you would have already prepared as a guide to get the information you need to effectively prosecute your case. Although you do not want to offend the officer, you must be clear that it is important to discuss the problem areas openly and honestly.

You can also give the officer an idea of how the defense attorney would address the problem areas. I call this a mock cross-examination of your officer on the problem areas. When you prepare the officer for the worst-case scenario by cross-examining that person yourself, he or she will heave a sigh of relief when they actually are cross-examined by the defense, because they were already prepared for the worst—and in most cases when you know what issues you will be hit with, you can handle them better.

After the officer has read the arrest report, you can start your interview with your pre-interview checklist, or you can ask your witness a general question, such as, “What’s this case about?” This will allow the two of you to engage in conversation and develop some rapport before you get to the meat of your concerns about the officer’s report. Additionally, during the officer’s articulation of the facts of the case, you will have an opportunity to determine what sort of a witness the officer will make on the stand. This process will prove invaluable in determining how best to utilize any witness in a trial.
Note: In addition to using the pre-interview checklist, a prosecutor may want to use the script included in Section III of this chapter as a guide to assist in the initial discussion of the case.

At the end of the officer’s initial recitation of the facts, be sure to ask whether the defendant made any statements that are not in the report or whether there were any passengers in the defendant’s car. Finally, ask whether there is anything else of import that you should know about the case. If there were statements or additional facts, you obviously need to provide the defense with that information.

After the officer has concluded the recitation of the facts of the case, you will want to inquire about the areas of concern you previously spotted in the officer’s reports. Ideally, if there are errors, omissions, or inconsistencies evident in the report, your officer will be comfortable acknowledging them before the jury. Juries generally are more accepting of an officer who made a mistake than one who refuses to concede an obvious error.

In virtually every case you will try, there will be inconsistencies or errors in the officer’s reports. This is true because the distractions and routine of police work will likely prevent the officer from writing a perfect report. Also, a defense attorney who has the motivation and opportunity to critically peruse an officer’s report is likely to find something he or she can turn into an issue.

Once you have discovered some error or omission in the report, you have two choices. You can plan to expose the error yourself in your direct examination of the officer, commonly termed “bellying up.” The logic here is that if you are the first to expose the error and have the officer explain it, then you rob the defense of the opportunity of “stinging” the officer on cross-examination.

The alternative is to discuss the error with the officer in the interview and flesh out the reasons for the apparent problem. If you are confident that the officer can satisfactorily explain the error, you may choose to not deal with it on direct examination, but trust the officer to clear up the issue on cross-examination with follow-up by you, if necessary, on redirect. The advantage of this approach is that if the defense has not spotted the issue, why alert them? Additionally, if your officer can clearly and professionally explain the error or omission without defensiveness, there may be some extra credibility points to be gained during the defense’s cross-examination. This is clearly a tactical decision. There is one school of thought that says you should always take the sting out of questions by the defense; on the other hand you must be mindful that some errors are so trivial that to address all of them could make you appear worried about the strength of your case. The best way to decide how to handle it would be to evaluate the strengths of your case and the experience of your officer, and then decide which approach you will employ. Remember this decision also has a lot to do with your particular style as a trial attorney. Some prosecutors like to address every detail, and others only hit issues they perceive may be a problem if not addressed.

Lastly, be mindful that your decision on how to handle errors will change based on the case you are trying. Some situations may call for you to bring up all errors in your direct because of the particular defense attorney you are opposing. If you have a defense attorney who successfully makes a huge deal out of officers’ mistakes, you might want to address the errors in your direct. You will learn with experience which approach is best.
F. Additional Officer Help That Will Perfect Your Case

At some point in the interview, it may become evident that the officer will need to revisit the driving or arrest location. Do not feel reluctant to suggest the officer do this. At worst, it will constitute a minor inconvenience for the officer. It is absolutely necessary that the officer get clarification if relevant ascertainable details in the case are either missing or incorrect in the arrest report. If you have the opportunity to go to the scene of the arrest, by all means do so. It is very helpful to the success of your direct examination and cross of any defense witnesses to know the scene of the arrest very well. Often times the defendant will state that certain landmarks were present at the scene that really were not.

In addition there are times when the sidewalk where the FSTs were conducted may be an important fact in your case. If you visit the scene you can see first hand where the FSTs were given, and observe the condition of the sidewalk. There are many advantages to visiting the scene. One advantage is that you are in a better position to ask relevant questions on direct examination, as well as being equipped to effectively cross-exam any defense witnesses. You can also counter any discrepancies that come up in testimony. Once you are at the scene, you have the opportunity to take pictures to show the jurors what the scene looks like. Most jurors love to see pictures of the scene. It obviously helps them visualize where the events took place. If possible, try to go to the scene with your arresting officer so you can ask relevant interview questions right at the scene. This will help expedite the interview process and assist you with asking relevant questions.

It is likely that a diagram or chart of the scene will be helpful in illustrating the officer's testimony before the jury. Be sure to ask your officer during the interview to prepare a diagram if you want one. Of greater import is reviewing the diagram before the officer begins his or her testimony. This is necessary so that you can be certain that you understand everything depicted on the diagram, and it covers what you want to be illustrated to the jury. If you plan to have the diagram depicted on PowerPoint, please make sure the officer has the opportunity to review your PowerPoint diagram.

G. Interview Preparation for Two Common DUI Defenses

Two crucial areas of inquiry in the interview and the direct examination relate to the common defenses of “on the rise” and “mouth-alcohol contamination.” An on-the-rise defense presumes that the defendant’s BAC level was lower at the time of the defendant’s initial contact with the officer than later at the time of the chemical test. Thus, contends the defense, the chemical test erroneously overstates the defendant’s level of impairment at the time of the driving.

If your officer’s recall is that the defendant’s level of impairment was unchanged between the stop and the chemical test or that the defendant was more impaired at the stop than at the time of the chemical test, these are important facts in your case because they relate to a possible on-the-rise defense. This is so because if the defendant were truly on the rise, one would expect the defendant to show increased levels of impairment between the stop and the chemical test. Therefore, if the defendant’s level of impairment was either constant or diminished between the stop and the breath test, the on-the-rise claim is rebutted.

If your officer states in the interview, that the defendant’s level of impairment was either constant or diminished between the stop and the breath test, make sure on direct examination or, if you
choose, in re-direct to bring these facts out. If you are relatively confident that the on-the-rise defense will be used, you should bring up the defendant’s demeanor on direct. When you call your expert/chemist, you should also elicit testimony from that witness about the lack of the defendant’s change in his or her level of impairment as it relates to the on-the-rise defense.

The defense of mouth-alcohol contamination may suggest that the chemical test results were higher than accurate and were caused either by the defendant smoking, drinking, vomiting, or regurgitating during the 15-minute waiting period prior to the breath test or by the defendant spitting or regurgitating into the breath instrument during the test.

*Note:* It is important to recognize that Title 17 says nothing about burping, but only regurgitating. When a defense attorney starts asking questions about burping, your relevance objection should be sustained.

To counter these possibilities, first be sure to have the officer establish that the defendant did not smoke, drink, vomit, or regurgitate at any time between the arrest and the breath test. Most commonly, the defendant was handcuffed during this period, thus limiting access to cigarettes or liquids. (See *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227.)

As for the second defense contention of external contamination, the officer would have likely detected if there was anything unusual about the way the defendant blew into the instrument because the officer is in very close proximity to the defendant during the breath test. By verifying these points with your officer during the interview, you have gone a long way toward supporting the credibility of the chemical test result and successfully rebutting the notion that the test results were a product of some external contamination.

**H. Preparing for the Defense’s Cross-Examination**

A thorough interview with an officer will include the possible cross-examination questions that the officer may confront. Generally, the defense attacks in a DUI case will focus on one of six areas:

1. errors or omissions in the officer's investigation or report;
2. the officer’s memory of the events;
3. the officer’s observations and perception, including whatever the officer observed or did not see about the defendant’s driving, symptoms, or FSTs that might be consistent with the defense’s theory that the defendant was not impaired;
4. a prior inconsistent statement in the officer’s testimony when compared to the arrest report;
5. some deviation from Title 17 in the manner in which the officer administered the chemical test; or
6. some allegation of bias or prejudice by the officer towards the defendant.

You obviously will be the best judge as to whether the defense may be aiming its cross-examination at any of these areas. If you sense your witness is vulnerable to any particular attack, it is essential that you learn from your witness all of the surrounding facts that relate to the area of concern. Generally, assuming the professionalism of your officer, once all of the pertinent information is brought out, what may appear to be vulnerable to cross-examination is either not true or capable of rational explanation.
In preparing your officer for cross-examination, it is important that you explain to him or her what you will expect once he or she is seated before the jury. Although officers know how to conduct themselves in the field, they may be much less experienced in testifying in court. They may assume that you are their lawyer and that they can look to you for signs or clues of how to answer a particular question. They may see themselves as the agents of good engaged in verbal warfare with an agent of evil—the defense counsel. It is urgent to your case that you correct these misconceptions.

In order to avoid any misconceptions before the jury, you may want to communicate to your officer that you will not be looking in his or her direction during the cross-examination in order to avoid any possible hint of witness-prosecutor communication. Of even greater and utmost importance in preparing your witness for the ordeal of cross-examination is that you impress upon your officer that no matter how hostile, rude, argumentative, or inane defense counsel may choose to be, the officer at all times must remain polite, low key, and give no hint of a bad attitude. There is nothing that is more likely to destroy your witness’s credibility and your cause before the jury than a showing of unprofessional conduct by the officer. This is so even if the actions of defense counsel are over the top and inappropriate. While jurors may not approve of defense tactics, they commonly attribute defense rudeness to the strain of defending someone accused of a crime. Jurors make no such accommodation for impolite police witnesses who fail to act professionally. If you have a refusal allegation in your case, or there is some allegation that the officer was physically or verbally abusive to the defendant, it is especially important to stress to your officer that he or she must stay calm and collected at all times during cross-examination by the defense.

I. Attire and Hallway Demeanor

Because you better understand how the officer’s attire might affect the jury’s evaluation of the forthcoming testimony, it is your task to make clear how to dress for court. In many jurisdictions, an officer in uniform will be accorded great respect. In other jurisdictions, members of the jury may harbor negative feelings about people in uniform. You, not your officer, are closer to the pulse of your juries and therefore know better what attire will be most appropriate. In any event, whether you want the officer in uniform or in civilian garb, advise your officer that he or she should dress as though he or she was appearing for a promotional interview. For officers in uniform, this would mean that the helmet, leather jacket, and jangling keys are to be left outside. For officers in civilian dress, ask them to avoid cowboy boots and large, overly ornate belt buckles, unless those are positives in your jurisdiction. Advise all officers that as representatives of their departments it is inappropriate to use sunglasses, gum, or toothpicks in a courtroom.

Further explain to your officer that the jury’s judgment of him or her and his or her testimony is affected by more than what occurs on the stand. Indeed, the jury’s ultimate evaluation begins in the court parking lot, continues into the court’s hallway, and then follows the officer onto the stand. Trial jurors spend inordinate amounts of time outside of the courtroom waiting. It must be impressed upon your witness that what he or she says and how he or she conducts themself in all public areas of the courthouse is noted by the jurors. Therefore, the officer must be polite, professional, and appropriate at all times in order to ensure that his or her courtroom testimony is not discounted because of something that occurred outside the courtroom. Please advise the
officer not to have conversations with anyone in or around the courtroom because that person could be a juror or a witness in the case.

J. Summary

Officers are commonly assertive people who are trained to be in control in their work situations. They will be more comfortable, and consequently do a better job in court, if you tell them what it is you expect of them and what is coming when they are on the witness stand. Therefore, thorough pretrial preparation is in the best interest of both the officer and the prosecution. Remember, you can never be too prepared.

III. Direct Examination of the Officer

This direct examination assumes that the defendant has been charged with driving under the influence of alcohol. If your trial is a DUI-drug case, please turn to Chapter II “Prosecuting the Drug-Impaired Driver.” The sample questions appear in ALL CAPS. The additional material is intended to be explanatory. Remember, not all questions may apply to your case, and your case may require questions not contemplated here.

A. Overview

The single most important trial skill a prosecutor can develop is the ability to continually evaluate through “the eyes and ears of juror number six” what is going on in court. Every trial is a tug of war between adversaries with different goals and different views of the evidence. Under the stress of such an event, it is easy to get so riveted to one’s outline and questions that one fails to see and hear how this show is playing out for juror number six. We all would agree that if the choices at trial’s end were between our successful completion of our carefully prepared outline of questions or to have the jurors agree with our view of the case, we would gladly choose the latter.

The way to have your outline and the verdict too is to pay attention to what is happening. The asking of a particular question may not complete your work with that question. By listening to the witness’s answer with the ears of a juror, it may become evident that a particular follow-up question is now necessary. It is possible that the asking and answering of this additional question assists the jurors to understand the facts the way you do. On the other hand, to become rigidly wedded to a carefully prepared string of questions and be thinking of the next question rather than listening to the present answer may successfully complete the outline but lose the jury vote.

The following outline of questions is presented with the hope that it helps point the direction—and with the guarantee that each trial will require a significant alteration of the outline.

B. Areas of Direct Examination

The likely areas of your direct examination of the officer include:

1. The introduction of the officer, including his or her background, training, and experience in the investigation of DUI cases;
2. the **jurisdiction** of the events (county/city);

3. the **identification of the defendant** as the driver arrested;

4. the **factual evidence** against the defendant:
   a. the defendant’s **driving pattern** that caused the officer to pay attention;
   b. the defendant’s observed **symptoms** of alcohol impairment;
   c. the defendant’s performance on the **field sobriety tests** (FSTs)—this would include any PAS test results;
   d. the **chemical test**, including all the information surrounding the defendant’s choice of a chemical test, the officer’s training and experience in administering a breath test, the actual administration of the breath or blood test (or, in the alternative, the facts surrounding the defendant’s refusal to take a chemical test and the officer’s advisement of the consequences pursuant to Vehicle Code sections 13353 and 23612(a)(1)(D)).

C. **Foundational Questions**

1. **GOOD MORNING, OFFICER. PLEASE STATE YOUR NAME, AND SPELL IT FOR THE RECORD.**
   (The court clerk will ask the officer to state his or her name and spell it for the record.)

2. **HOW ARE YOU EMPLOYED?**

3. **HOW LONG HAVE YOU BEEN SO EMPLOYED?**

4. **HAVE YOU RECEIVED TRAINING SPECIFICALLY RELATED TO THE INVESTIGATION OF DRIVING-UNDER-THE-INFLUENCE CASES?**

5. **PLEASE TELL US ABOUT YOUR BACKGROUND, TRAINING, AND EXPERIENCE IN CASES INVOLVING IMPAIRED DRIVERS.**
   (The witness will likely discuss his or her training in the academy, additional specific classes he or she may have taken, roll-call training, training by senior officers, and on-the-job observations and experience with persons subsequently arrested for DUI. Generally, the nature of the training relates to the observation and evaluation of persons under the influence, including signs and symptoms of impairment, conducting FSTs, and training related to operating breath-test instruments. Commonly the answer to this question will provide information warranting additional follow-up questions. This is an area that you should spend a little time on. Your follow up questions should first address the officer’s background; next, any training; and lastly, all experience possessed. Do not go through these follow up questions too quickly because this is your opportunity to show the jurors how skilled and experienced this DUI officer is. Often times you will also receive valuable testimony from the officer about additional training that was not discussed in the interview. Please do not skip over that testimony. All DUI training is obviously very important in a DUI prosecution. Your goal is to present the officer(s) as well trained and experienced in recognizing when a person is under the influence of alcohol.)
6. APPROXIMATELY HOW MANY PEOPLE HAVE YOU ARRESTED FOR DUI DURING THE COURSE OF YOUR CAREER?

7. HAS EVERY TRAFFIC STOP YOU’VE CONDUCTED RESULTED IN A DUI ARREST?

8. IN YOUR EXPERIENCE, OFFICER, IS IT COMMON THAT THE PERSON STOPPED FOR A TRAFFIC STOP MAY SHOW SIGNS THAT HE OR SHE HAD BEEN DRINKING?

9. WERE EACH OF THOSE DRIVERS ARRESTED FOR DUI?

10. WHY NOT?
(Questions 6–10 should demonstrate to the jury that the officer is both experienced in detecting impaired drivers and able to distinguish the impaired driver from the driver who merely had been drinking. Additionally, in describing the process, the officer establishes that an objective evaluation is used and that he or she applies it fairly and only arrests impaired drivers.)

D. The Driving and Stop

1. WERE YOU ON DUTY ON [THE DATE] AT APPROXIMATELY _________ [A.M./PM]?

2. WERE YOU IN A MARKED POLICE [SHERIFF OR HIGHWAY PATROL] VEHICLE?

3. WERE YOU IN UNIFORM?

4. WERE YOU ALONE OR WITH ANOTHER OFFICER?
(If there was a second officer, establish his or her identity and where in the vehicle he or she was located. It is common in many police agencies that the officer who is driving is the one who conducts the DUI investigation while the passenger officer is responsible for providing security during the investigation. The officer responsible for security is called the cover officer.)

5. DID SOMETHING UNUSUAL OCCUR AT THAT TIME?

6. WHERE WERE YOU LOCATED WHEN THIS OCCURRED?

7. IS THAT WITHIN THE COUNTY [CITY] OF [YOUR JURISDICTION]?

8. PLEASE EXPLAIN WHAT YOU OBSERVED AT THAT TIME.
(This is likely where the officer will start the explanation of the aberrant driving that caught his or her eye. You may want the officer to relate all of the defendant’s driving pattern that was observed at this time. This likely will include some form of driving violation, from speeding to failing to stop for a stop sign to following too closely, etc. Obviously, you will
need to ask several follow-up questions in order to facilitate the officer’s clear and effective recitation of what was observed. Remember to hear the officer’s testimony through the ears of juror number six. This is an area in which you want to take your time and allow the jurors to get a sense of the driving and the environment that existed at the stop. Be careful not to allow the officer to talk too fast. He or she should speak in a narrative about the driving and any other observations at this point. You should control the examination by saying, if needed: OFFICER, I’M GOING TO STOP YOU RIGHT HERE. WHEN YOU SAY THE CAR WAS SPEEDING AS IF IT WAS IN A RACE, WHERE WAS THE CAR WHEN YOU FIRST OBSERVED THIS? WHAT DO YOU MEAN BY “SPEEDING LIKE IT WAS IN A RACE”? This would be an excellent example of an area of testimony in which you could do follow up to enable the jurors to get a good clear picture of the driving pattern by the defendant.)

9. OFFICER, DID YOU PREPARE A DIAGRAM FOR THIS CASE?
(Note: This diagram should be shown to the defense before you use it. Also, in your county, the practice may be that the clerk of the court may want to see it before it is used in testimony, thus enabling the clerk to note the item of evidence for identification and prepare in advance the evidence sticker that will be attached to it. If your court does not require a pre-identification process with the clerk, then ask the court to allow the item to BE MARKED AS PEOPLE’S NUMBER_____ FOR IDENTIFICATION. Remember, if you have a PowerPoint presentation displaying the scene, share it with the defense counsel.)

10. DID YOU PREPARE THIS DIAGRAM AT MY REQUEST?

11. IS THIS DIAGRAM TO SCALE?
(Generally, the diagram is not to scale.)

12. OFFICER, PLEASE EXPLAIN TO US WHAT IS DEPICTED ON THIS DIAGRAM.
(Be sure that the officer explains what each marking and line on the diagram depicts so that the jury will be oriented for the testimony relating to the diagram that will follow. Also, be sure the officer has shown where North is on the diagram. Because most maps generally locate North at the top, your jurors will more likely understand your diagram if it reflects this practice.)

13. OFFICER, IS THIS AN ACCURATE DEPICTION OF THAT LOCATION?

14. NOW, OFFICER, WHERE WERE YOU WHEN YOU FIRST OBSERVED THE VEHICLE YOU’VE MENTIONED?

15. PLEASE INDICATE ON THE DIAGRAM WHERE YOUR VEHICLE WAS AT THE TIME YOU FIRST OBSERVED THE VEHICLE YOU MENTIONED.
(You may want the officer to do this with a rectangle marked with a “P” for police.)

16. NOW, PLEASE SHOW US ON YOUR DIAGRAM WHERE THE CAR THAT YOU MENTIONED WAS WHEN YOU FIRST OBSERVED IT.
17. OFFICER, PLEASE SHOW US ON YOUR DIAGRAM WHERE THE VEHICLE WAS WHEN IT ___________.
(Now, have the officer show what was just spoken about. Each notable event should be depicted on the diagram, noting the weaving path of the vehicle or where the vehicle nearly hit the parked car or where the vehicle went through the red light, etc. This gives the jurors the opportunity to digest the evidence twice, each time through a different sensory organ. Repetition is an important learning process. You may want to depict the defendant’s vehicle with a rectangle marked with a “D” for defendant.)

18. AND, OFFICER, DID YOU STOP THAT VEHICLE? WHY DID YOU STOP THAT VEHICLE?
(This gives the officer a great opportunity to state all the dangerous aspects of the driving, and also commonly testify he or she was concerned about the safety of the public.)

19. HOW WAS THE STOP ACCOMPLISHED?

20. HOW DID THE VEHICLE COME TO STOP [PARK]?

21. WHAT HAD YOU OBSERVED THAT REQUIRED YOU TO STOP THAT VEHICLE? (Here, you want the officer to relate what Vehicle Code violations were observed or summarize the observed driving pattern that a reasonable person would conclude required investigation.)

In having your officer relate the driving pattern observed remember to use whatever factors will help you to make clear what happened. This will likely include the manner in which the defendant’s vehicle responded—or failed to respond—when the officer “lit up” the defendant’s vehicle, and the manner in which the defendant came to a stop or parked. Be sure to refer to specific distances when explaining things, such as how far behind the defendant’s vehicle the officer was when he or she initially began the stop by turning on the patrol vehicle’s lights or how far the defendant continued to drive before he or she appeared to become aware of the officer’s flashing lights. Often, “times” are a good substitute for “distance.” For instance, if the defendant crept along for 10 blocks after being lit up by the officer, the point of the defendant’s inattention may be better brought home to the jury by pointing out the defendant continued onward for five minutes before stopping rather than talking about the 10-block distance.

In particular cases, the weather, traffic, or lighting conditions may be important in conveying to the jury how impaired and dangerous the defendant’s driving was. In a freeway context, for example, the fact that other drivers veered away from the defendant’s vehicle as it straddled several lanes would help to underscore how other percipient witnesses reacted to the defendant’s driving.

In short, think about the facts available to you that will best bring home to your jurors what was happening and why they should care. Then be sure to develop on direct examination every fact available so that the 12 jurors will come to see and hear the evidence the way you do.
E. The Identification of the Defendant

*Note*: Up to this point, questions have not mentioned the defendant. This is because the chronology of the case has not yet linked, in evidence, the observed vehicle to the defendant. Now is the time to do just that.

1. **DID YOU CONTACT THE DRIVER OF THE VEHICLE?**

2. **DO YOU SEE THAT PERSON IN COURT TODAY?**

3. **WHERE IS THAT PERSON LOCATED?**

4. **WHAT IS THE PERSON YOU RECOGNIZE WEARING TODAY?**

5. **YOUR HONOR, MAY THE RECORD REFLECT THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT?**

F. Initial Contact and Observation of Symptoms of Impairment

1. **OFFICER, DID YOU TALK TO THE DEFENDANT AT SOME POINT?**

2. **WHERE WAS THAT?**

3. **WHAT WAS SAID, IF ANYTHING?**
   (If the defendant made some admissions, this is a good time to have the officer offer those.)

4. **DID YOU ASK THE DEFENDANT FOR HIS OR HER LICENSE OR AUTO REGISTRATION AT THAT POINT?**

5. **DID THE DEFENDANT PROVIDE WHAT YOU REQUESTED?**

6. **AT THIS TIME, APPROXIMATELY HOW FAR WERE YOU FROM THE DEFENDANT?**

7. **DURING THIS BRIEF CONVERSATION, WHAT DID YOU NOTICE ABOUT THE DEFENDANT, IF ANYTHING?**
   (The initial observations of the defendant normally include the following: an odor of alcohol, slurred speech, and red and watery eyes. These symptoms are nearly universally observed because they are common physiological responses to alcohol impairment, and officers are trained to look for such symptoms as possible indicators of impairment. Additionally, the officer may have observed that the defendant had coordination problems that became apparent as the defendant retrieved the documents requested by the officer.)

8. **NOW, OFFICER, GIVEN YOUR BACKGROUND, TRAINING, AND EXPERIENCE, IS AN ODOR OF ALCOHOL CONSISTENT WITH ONE WHO MIGHT BE IMPAIRED DUE TO ALCOHOL?**
9. AND GIVEN YOUR BACKGROUND, TRAINING, AND EXPERIENCE, IS SLURRED SPEECH CONSISTENT WITH ONE WHO MAY BE IMPAIRED DUE TO ALCOHOL?

10. AND THE OBSERVATION OF RED AND WATERY EYES, GIVEN YOUR BACKGROUND, TRAINING, AND EXPERIENCE, IS THAT ALSO CONSISTENT WITH ONE WHO MAY BE UNDER THE INFLUENCE OF ALCOHOL? (The intent of these three questions is to reiterate to the jury that this witness has particular training and experience, and to also present the clues to the jury as they became apparent to the officer in the field. The premise here is that jurors have been trained by TV and the movies to be couch detectives who eagerly collect clues to figure out what happened.)

11. NOW, AFTER YOU MADE THESE OBSERVATIONS, OFFICER, WHAT DID YOU DO? (At this point, the officer likely asked the defendant to get out of the car in order to conduct some FSTs. Note: The officer paid attention to how the defendant exited the vehicle. The officer looked to see whether the defendant stumbled coming out of the car or needed to lean on the car for support or seemed slow in response to the officer's directions. Obviously, all of these observations might be consistent with DUI and thus might be the basis for relevant questions.)

12. WAS THE DEFENDANT ASKED WHETHER SHE HAD BEEN DRINKING? (This is a question that an officer may ask without prior Miranda warnings. The law considers that this question is part of mere investigation rather than custodial interrogation.) (People v. Carter (1980) 108 Cal.App.3d 127.)

13. WHAT WAS THE DEFENDANT'S RESPONSE? (Remember, if the defendant’s answer never made its way to the arrest report, it is necessary for you to provide this information to the defense as part of your ongoing discovery obligation.)

14. HOW MANY DRINKS DID THE DEFENDANT SAY SHE [HE] HAD? (Quite commonly, defendants relate they had “two drinks.” The import of this information is that it is likely that the defendant’s BAC reflects a level way beyond a mere two drinks. Your forensic alcohol expert will be able to establish that the defendant’s BAC supports the notion that the defendant was attempting to minimize the amount he or she had to drink and was not being truthful with the officer. This obvious fact can be used on cross-examination of a defense expert or ultimately argued to the jury that the defendant’s answers reflect the defendant’s awareness of having been caught doing wrong—and an attempt to talk his or her way out of the predicament.)

15. DID THE DEFENDANT TELL YOU WHAT TIME WAS THE LAST DRINK? (This answer may have significant value in rebutting a possible on-the-rise defense claim that the defendant’s BAC does not accurately reflect the level of impairment at the time of the stop. The best factual pattern for the defense would be if a long period had passed between the stop and the defendant’s blow. Conversely, if there was a significant passage of time between the defendant’s last drink and the stop, this would support the conclusion that the
alcohol consumed had all been absorbed by the defendant prior to the stop, thus reducing the viability of an on-the-rise defense.)

G. Field Sobriety Tests

Initially, there are several points to be made regarding the testimony involving the FSTs administered to the defendant. First, be clear that FSTs are intended to be simple, minimally intrusive tasks that require some physical or mental effort and are generally more difficult to perform if one is impaired due to alcohol. Therefore, it is more accurate and useful to portray these tests as tools officers use in the field to help them decide if it is necessary to remove a particular driver from the road and require a chemical test; this is more helpful than to characterize these tests as the sine qua non of the People’s case. In other words, if your facts include a BAC result, it is better to set up your case so that the chemical result, rather than the FSTs, is the most telling conclusion of the defendant’s impairment.

Be aware that it is possible for folks with BACs above 0.20 to perform near-perfect FSTs if their experience with alcohol is such that they have developed a real tolerance. These people obviously would still be mentally impaired; although, they might be able to mask the physical impairment. So while FSTs may provide some evidence of the defendant’s impairment, it is the mathematical numbers reported in the chemical test that will most likely assure your jury that the defendant is guilty as charged.

Second, be aware that there is no answer sheet anywhere that would inform the officer what constitutes a pass or fail on any of these tests. Therefore, it is better not to ask your officer to conclude whether the defendant passed or failed a particular FST. A good defense cross-examiner will use such conclusions as an opportunity to underscore that the officer’s evaluation of each FST is not objectively determined, but is merely a product of the officer’s subjective view. This is an area where the defense may try to get the officer to grade the defendant. If this happens, please object on relevance grounds and facts not in evidence. The question that you ask on direct to the officer is: DID THE DEFENDANT SUCCESSFULLY PERFORM THE FST? This question does not suggest that a grade was given, or even considered, by the officer during the evaluation of the FSTs.

But whenever an officer gives an FST, he or she is determining whether the results exhibited by the defendant are consistent with a person under the influence. This is the point to be brought home to the jury at the conclusion of the officer’s testimony about each of the FSTs attempted by the defendant. Further, the officer’s background, training, and experience in this area likely insulate your officer from defense attack. Hopefully, you have already established those factors.

A common defense attack on cross-examination in this area relates to the officer’s notes. Frequently, an officer will take notes of the defendant’s FST performance. Most officers develop a shorthand method that they write either on their hands or on a small pocket-sized notepad. If the particular stop results in an arrest requiring the writing of a report, the officer likely incorporates the notes jotted down into the text of the report, and then washes his or her hands or throws the notes away because they have served their purpose. A defense attorney may attempt to spring this line of questioning on your officer during cross-examination in an effort to embarrass him or her. If you learn that this is a tactic used by your opponent, you may want to attempt to deal with this in a pretrial in limine motion.
Finally, some prosecutors use officer diagrams to illustrate to the jury the defendant’s performance on each of the FSTs attempted. While it does provide a large chart that is more easily viewed by the jury, it also may present the defense with an opportunity to ensnare your officer by demonstrating that the officer really has no personal recollection of where “the defendant’s third effort to touch his finger to the tip of the nose” landed. While it is not uncommon for an officer to not immediately recall an FST administered 90 days ago or more, this failure at recall may appear more glaring if the officer has prepared a professional looking diagram for trial, but then fails to accurately recall what is depicted on the diagram. If you choose to use a diagram depicting the FSTs, make sure the officer has a solid recollection of the facts so you can avoid any potential pitfalls.

1. OFFICER, AT SOME POINT DID YOU ASK THE DEFENDANT TO PERFORM A FIELD SOBRIETY TEST?

(Note: One can characterize the various tasks of the FST as either a single test with various components or a series of independent tests. It is common for the defense to quiz the officer as to just when he or she concluded that the defendant was too impaired to drive. The defense might claim that many tests were required either because the defendant was so sober that it was a close call or that the officer was so unsure about the defendant’s impairment that additional tests were necessary before a conclusion could be reached. But if the FST is characterized as a single test with numerous parts, then the prosecution notion would be that the officer completed the entire test before reaching any conclusion, and to have come to judgment before the entire test was completed would be both unprofessional of the officer and unfair to the defendant.)

2. WHAT IS A FIELD SOBRIETY TEST (FST)?

3. HOW DOES SUCH A TEST ASSIST AN OFFICER IN THE FIELD?

4. ARE THERE VARIOUS SUBPARTS TO A FIELD SOBRIETY TEST?

5. DOES A FIELD SOBRIETY TEST CONSIST OF A SET NUMBER OF SUBPARTS?

6. ARE YOU LOOKING FOR PHYSICAL OR MENTAL IMPAIRMENT WHEN OBSERVING THE PERFORMANCE OF A FIELD SOBRIETY TEST?

7. WERE YOU TRAINED IN THE ADMINISTRATION OF A FIELD SOBRIETY TEST?

8. COULD YOU ESTIMATE APPROXIMATELY HOW MANY TIMES IN YOUR CAREER THAT YOU HAVE ADMINISTERED A FIELD SOBRIETY TEST?

9. PRIOR TO ADMINISTERING THE FST, DID YOU ASK THE DEFENDANT SOME QUESTIONS IN ORDER TO DETERMINE WHETHER THERE MIGHT BE SOMETHING THAT WOULD PREVENT HIM OR HER FROM SUCCESSFULLY PERFORMING AN FST?

(Note: Many law enforcement agency arrest reports include a series of questions that officers are trained to ask prior to the administration of an FST. Normally included are questions
as to whether the defendant: (1) is sick or injured; (2) is a diabetic or an epileptic; (3) takes insulin; (4) has any physical impairments; (5) bumped his or her head; (6) is under the care of a doctor or dentist; (7) has had any recent surgeries; (8) is taking any medications or drugs; and if so, (9) is he or she currently feeling any effects of the medications. If this was done in your case, be sure to have the officer go over the pre-FST inquiry to avoid the possibility that the defense will attempt to explain away a bad FST performance by raising some medical infirmity. Make sure you ask if the officer explained and demonstrated the FSTs to the defendant before requesting him or her to perform them. You also want to ask the officer what the defendant’s response was. This will prevent a successful claim by the defense that the defendant did not understand the directions given by the officer. You can argue to the jurors in closing that the FSTs were explained by the officer, and also demonstrated, therefore the reason the defendant did not successfully perform any of them is because he or she was impaired.)

10. WHERE WAS THE DEFENDANT LOCATED WHEN YOU ASKED HIM OR HER TO PERFORM THE FST?

11. WHAT WAS THE SURFACE LIKE WHERE THE DEFENDANT WAS STANDING?

12. WHAT WAS THE LIGHTING LIKE?
   (It’s common in the evening for the officer to administer the FST in front of the police vehicle in order to take advantage of the illumination from the headlights. If there were street lights or businesses in close proximity to where the FSTs were performed, elicit questions about those lighting conditions.)

13. DID YOU EXPLAIN TO THE DEFENDANT WHAT YOU WANTED HIM [HER] TO DO?

14. WHAT WAS THE FIRST PART OF THE FIELD SOBRIETY TEST THAT YOU ASKED THE DEFENDANT TO PERFORM?
   (Note: Officers commonly are trained early in their careers to choose a sequence to the parts of the FST and stick to that sequence so that they will always know, when testifying, in what order they conducted the FSTs. Make sure the officer knows the answer to this question before you ask.)

15. WHAT IS INVOLVED IN THAT PART OF THE TEST?

16. DID YOU EXPLAIN THAT PARTICULAR TASK TO THE DEFENDANT?

17. PLEASE EXPLAIN IT TO THE JURY AS YOU EXPLAINED IT TO THE DEFENDANT.

18. DID THE DEFENDANT APPEAR TO UNDERSTAND THE INSTRUCTIONS?

19. DID THE DEFENDANT ATTEMPT THIS PART OF THE TEST?
20. PLEASE DESCRIBE TO THE JURORS THE DEFENDANT’S PERFORMANCE ON THIS TEST

(Be aware that on cross examination, the defense may attempt to have the officer demonstrate how the defendant performed on the date of the arrest. This is not appropriate. It would be better if you handled this issue before trial in a section 402 in limine motion. The officer cannot perform the FSTs the way the defendant did since the defendant was under the influence of alcohol or drugs, and the officer was presumably sober. The conditions were different than they would be in your courtroom. Your objection would be lack of foundation, relevance, and Evidence Code section 352. Most judges will not allow this type of demonstrative evidence; however, they will sometimes allow the officer to demonstrate the FSTs the way he or she demonstrated them to the defendant on the date of the arrest. Make sure the officer is comfortable with doing so in front of the jurors. Recognize the danger that the officer could stumble on some portion of the field sobriety test.)

21. OFFICER, GIVEN YOUR BACKGROUND, TRAINING, AND EXPERIENCE, WAS THE DEFENDANT’S PERFORMANCE ON THIS PART OF THE FIELD SOBRIETY TEST CONSISTENT WITH ONE WHO WAS IMPAIRED DUE TO ALCOHOL?

22. WAS THE DEFENDANT GIVEN AN OPPORTUNITY TO TAKE ANOTHER PART OF THE FIELD SOBRIETY TEST?

23. WHICH ONE WAS THAT?

(Repeat questions 15–20 for each subsequent part of the FST that defendant attempted.)

In addition to the traditional tasks like Finger-to-Nose, Walk-the-Line, Leg-Lift, Counting Backwards, or Alphabet Recitation, an officer may have administered two additional tests: One is the PAS (Preliminary Alcohol Screening) Device, and the second is the Horizontal Gaze Nystagmus (HGN) test. Each of these is discussed more thoroughly in other parts of this manual. Obviously, before testimony may come in regarding the administration of either of these two tests, it is necessary to lay the proper foundation with your witness showing that the officer possessed sufficient background, training, and experience in either test so that he or she could properly administer it to the defendant.

With regard to HGN, a process in which the officer looks to see if the defendant’s eyes reflect a bouncing effect, officers experienced with HGN testing may be able to predict the actual BAC level by applying the formula of “50 minus the degree of onset of the bounce,” but it is unlikely that you will be able to get such testimony into evidence. The trained officer, however, should be allowed to testify that he or she observed the bouncing eye (HGN) just as testimony regarding slurred speech or impaired balance is admissible as a physical symptom that is consistent with one under the influence of alcohol. (Cf. People v. Joehnk (1995) 35 Cal.App.4th 1488.)

H. The Foundation for PAS Tests

The following questions relate to the foundation for admission of the PAS results. These questions include those necessary to establish compliance with Vehicle Code section 23612(i).
Remember to review the facts of your specific case to determine if additional foundation is necessary in a particular area.

Note: It is likely that you will need to call an additional officer, the agency’s PAS coordinator, in order to establish that the particular PAS used was in proper working order on the date the defendant blew into the instrument. The foundational questions for the PAS coordinator appear separately following this section for the arresting officer. (This foundational question string is predicated, in part, on Michael Schwartz’s questions appearing in Chapter 11, “Field Breath Testing: The PAS Test”.)

Regarding Background, Training, and Experience

1. ARE YOU FAMILIAR WITH THE PRELIMINARY ALCOHOL SCREENING INSTRUMENT KNOWN AS THE _____ (PAS INSTRUMENT) MANUFACTURED BY _______?

   YOUR HONOR, I AM HOLDING A PHOTO OF A _____ [PAS INSTRUMENT]. IT HAS BEEN PREVIOUSLY SHOWN TO THE DEFENSE. MAY IT BE MARKED AS PEOPLE'S EXHIBIT [NUMBER] FOR IDENTIFICATION? MAY I APPROACH THE WITNESS?

2. SHOWING YOU PEOPLE'S EXHIBIT _____ [NUMBER], WHAT DOES THE PICTURE DEPICT?

   YOUR HONOR, MAY WE POST EXHIBIT [NUMBER] ON THE BOARD?

3. OFFICER, HAVE YOU BEEN TRAINED TO USE THE PAS INSTRUMENT?

4. PLEASE DESCRIBE YOUR TRAINING.

5. DID YOUR TRAINING INCLUDE THE THEORY OF OPERATION OF THE PAS DEVICE?

6. DID YOUR TRAINING INCLUDE HOW TO OPERATE THE PAS INSTRUMENT?

7. DID YOUR TRAINING INCLUDE PRACTICING HOW TO USE THE PAS INSTRUMENT?

8. DID YOUR TRAINING INCLUDE USING A PROCEDURAL CHECKLIST?

9. DID YOUR TRAINING INCLUDE A WRITTEN OR PRACTICAL EXAMINATION?

10. IS THE PAS TEST ONE OF THE FIELD SOBRIETY TESTS APPROVED BY YOUR AGENCY?
11. HOW MANY TIMES HAVE YOU ADMINISTERED A PAS TEST PRIOR TO ADMINISTERING THE TEST TO THIS DEFENDANT?

12. DESCRIBE HOW A PAS TEST SHOULD BE ADMINISTERED TO A PERSON IN THE FIELD?

Regarding Foundation Linking the Officer to the PAS Instrument Used

13. DID YOU HAVE A PAS INSTRUMENT WITH YOU ON THE DATE YOU STOPPED THE DEFENDANT?

14. DID IT BELONG TO YOUR AGENCY?

15. WHAT WAS ITS SERIAL NUMBER?

16. ARE PAS INSTRUMENTS SIGNED OUT AT THE START OF A SHIFT?

17. WHAT DOES THIS MEAN?

18. DID THE PAS INSTRUMENT APPEAR TO YOU TO BE IN PROPER WORKING ORDER?

19. EXPLAIN WHY YOU BELIEVE IT WAS IN PROPER WORKING ORDER?

20. DID YOU ADMINISTER A PAS TEST TO THE DEFENDANT ON _____ [DATE OF TEST] USING INSTRUMENT _____ [NUMBER]?

21. AT THE END OF YOUR SHIFT, WHEN THE PAS INSTRUMENT WAS RETURNED, WAS THE NUMBER OF TIMES IT HAD BEEN USED DURING YOUR SHIFT RECORDED?

PAS Admonition

22. PRIOR TO ADMINISTERING THE PAS TEST, DID YOU INFORM THE DEFENDANT THAT YOU WERE REQUESTING HIM [HER] TO TAKE THE TEST TO ASSIST YOU IN DETERMINING IF HE [SHE] WAS UNDER THE INFLUENCE OF ALCOHOL?

23. PRIOR TO ADMINISTERING THE TEST, DID YOU INFORM THE DEFENDANT THAT TAKING THE PAS TEST WOULD NOT SATISFY HIS [HER] OBLIGATION TO TAKE A CHEMICAL TEST?

24. PRIOR TO ADMINISTERING THE TEST, DID YOU INFORM THE DEFENDANT THAT HE [SHE] HAD A RIGHT TO REFUSE TO TAKE IT? (Remember, this question does not apply to DUI offenders under age 21 with a blood alcohol level of .01 percent or greater. [See Vehicle Code § 23136(a).] Persons under age 21 are deemed to have given consent to take a PAS test when they meet the requirements of Vehicle
Code section 23136(a). DUI offenders who are on probation for DUI pursuant to Vehicle Code section 23154(a) are also deemed to have given their consent to take a PAS test.

Regarding Pretest 15-Minute Observation Period

25. DID YOU, AT SOME POINT, ADMINISTER A PAS TEST TO THE DEFENDANT?

26. AT WHAT TIME WAS THAT?

27. NOW, AT WHAT TIME WAS IT THAT YOU FIRST CONTACTED THE DEFENDANT?

28. HOW LONG HAD YOU BEEN WITH THE DEFENDANT BEFORE SHE [HE] TOOK THE PAS TEST?
   (You are obviously now setting the foundation that the defendant was under observation for 15 minutes prior to the PAS test.)

29. DURING THAT TIME, HAD THE DEFENDANT EATEN ANYTHING?

30. DRANK ANYTHING?

31. SMOKED ANYTHING?

32. HAD THE DEFENDANT VOMITED OR REGURGITATED DURING THAT TIME?

33. AT THE TIME THE DEFENDANT TOOK THE PAS TEST, DID SHE [HE] APPEAR TO HAVE ANYTHING IN HER [HIS] MOUTH?

Regarding the PAS Tests

34. HOW MANY TIMES DID THE DEFENDANT BLOW INTO THE PAS INSTRUMENT?

35. BEFORE THE FIRST BLOW, WAS THE DEFENDANT GIVEN A NEW, SANITARY MOUTHPIECE?

36. WHAT WAS THE TEMPERATURE OF THE PAS INSTRUMENT AT THE TIME OF THE TEST?

37. WHAT TIME WAS THE DEFENDER'S FIRST BLOW INTO THE INSTRUMENT?

38. WHAT TIME WAS THE DEFENDER'S SECOND BLOW?

39. OFFICER, DID YOU ADMINISTER THE PAS TESTS TO THE DEFENDANT IN THE MANNER IN WHICH YOU HAD BEEN TRAINED?
40. PLEASE TAKE US THROUGH THE PROCESS YOU USED TO ADMINISTER THE PAS TESTS TO THE DEFENDANT.

41. NOW, OFFICER, THIS INSTRUMENT HAS THE CAPACITY TO TAKE A SAMPLE OF BREATH EITHER AUTOMATICALLY OR MANUALLY, DOESN’T IT?

42. PLEASE EXPLAIN THAT TO US.

43. WHICH PROCESS WAS USED DURING THE DEFENDANT’S FIRST BLOW?

44. WHICH PROCESS WAS USED DURING THE DEFENDANT’S SECOND BLOW?

Regarding the PAS Results

45. WHAT WAS THE DEFENDANT’S BREATH-ALCOHOL CONCENTRATION RECORDED ON THE FIRST TEST?

46. WHAT WAS THE DEFENDANT’S BREATH-ALCOHOL CONCENTRATION RECORDED ON THE SECOND TEST?

47. DID YOU RECORD THE TEST RESULTS?

48. WHERE WERE THEY RECORDED?

49. WHAT HAPPENED NEXT?

I. The Arrest

1. NOW, OFFICER, AFTER THE DEFENDANT COMPLETED THE FIELD SOBRIETY TEST, WHAT DID YOU THEN DO? [Answer: “I placed the defendant under arrest.”]

2. WHAT FACTORS DID YOU TAKE INTO CONSIDERATION WHEN YOU DECIDED TO ARREST THE DEFENDANT? (Here is where you want the officer to summarize the facts of your case:
   a. the defendant’s driving;
   b. the symptoms of impairment that were observed: odor of alcohol; slurred speech; red and watery eyes; lack of coordination; loss of balance; and
   c. the defendant’s performance on the FST.
  Have the officer summarize the performance on each task of the FST.)

3. WHAT DID YOU DO WITH THE DEFENDANT ONCE SHE [HE] WAS PLACED UNDER ARREST? (Commonly, arrested defendants are immediately handcuffed and placed in the rear seat of the police vehicle. The handcuffing is done both for the officer’s safety and to prevent the defendant from dumping contraband in the back of the police vehicle. The defendant usually
will remain cuffed during the transportation to the site of the chemical test, during the chemical test, and through booking. This also serves to prevent the defendant from smoking or drinking anything without the officer’s knowledge.)

4. **WHAT TIME WAS IT WHEN THE DEFENDANT WAS PLACED UNDER ARREST?** (This question is a foundational one that will set the beginning time for the 15-minute observation period required by Title 17.)

5. **AT SOME POINT, DID YOU NOTE THE DEFENDANT’S WEIGHT?** (This question is foundational for later testimony by your expert witness.)

6. **NOW, OFFICER, DID YOU ADVISE THE DEFENDANT THAT UNDER CALIFORNIA LAW, SHE [HE] WAS OBLIGED TO TAKE A CHEMICAL TEST TO DETERMINE HOW MUCH ALCOHOL WAS IN HER [HIS] SYSTEM?**

7. **WHICH TEST DID THE DEFENDANT REQUEST?** (If the defendant refused, please proceed to Section L., *infra.*)

**J. The Breath Test**

1. **WHERE DID YOU TAKE THE DEFENDANT FOR THE BREATH TEST?**

2. **AT APPROXIMATELY WHAT TIME DID YOU ARRIVE AT THAT LOCATION?**

3. **DID THE DEFENDANT HAVE ANYTHING TO SMOKE OR DRINK ON THE WAY TO THAT LOCATION?**

4. **HAD THE DEFENDANT VOMITED OR REGURGITATED ON THE TRIP TO THAT LOCATION?**

5. **AT APPROXIMATELY WHAT TIME DID YOU BEGIN THE DEFENDANT’S BREATH TEST?**

6. **APPROXIMATELY HOW MUCH TIME HAD PASSED BETWEEN WHEN YOU PLACED THE DEFENDANT UNDER ARREST AND WHEN YOU BEGAN THE TEST?**

7. **AND HOW MUCH TIME HAD PASSED SINCE YOU FIRST HAD CONTACTED THE DEFENDANT AFTER THE STOP OF HER [HIS] VEHICLE?**


9. **WHAT TYPE OF BREATH INSTRUMENT WAS USED FOR THE TEST?**

10. **WHAT WAS THE IDENTIFICATION NUMBER OF THE PARTICULAR INSTRUMENT THAT WAS USED FOR THE DEFENDANT’S TEST?**
11. HAVE YOU RECEIVED TRAINING IN HOW TO OPERATE THIS TYPE OF BREATH INSTRUMENT?

12. AND YOUR TRAINING INCLUDED INFORMATION ABOUT THE THEORY OF OPERATION OF THIS INSTRUMENT?
   (Note: Title 17 specifically mentions that a trained operator must be instructed in the “theory of operation” of the breath instrument. All police training regarding these instruments has a component that includes theory of operation. Although your officer may not remember having been exposed to this, it was part of the instruction. Usually, officers are taught that the instrument operates with infrared technology and are shown a schematic of how the instrument works.)

13. WHEN DID YOU RECEIVE THIS TRAINING?

14. DID YOUR TRAINING INCLUDE A PRACTICAL HANDS-ON COMPONENT?

15. AT THE CONCLUSION OF THE TRAINING, WAS THERE AN EXAM TESTING YOUR ABILITY TO OPERATE THE INSTRUMENT?

16. DID YOU PASS THAT EXAM?

17. SINCE THEN, APPROXIMATELY HOW MANY TIMES HAVE YOU USED THIS TYPE OF BREATH INSTRUMENT?

18. WERE YOU TRAINED IN THE USE OF A CHECKLIST FOR THE OPERATION OF THIS INSTRUMENT?
   (Note: Many instruments, although clearly not all, incorporate a checklist. This document is a step-by-step statement of the process that the operator should follow in order to conduct a proper breath test. Many of these checklists include space to allow the test results produced by the instrument to be taped to the checklist, thus connecting the procedure followed with the test results on a single document. Normally, such a checklist has a place for the officer’s identification and signature at the bottom.)

   (Most commonly, these checklists require a 15-minute observation period of the defendant as the first step. This ensures that the sample produced by the defendant is free of any external contamination.)

19. DID YOU USE A CHECKLIST IN ADMINISTERING THE DEFENDANT’S BREATH TEST?

20. WHAT IS THE PURPOSE OF A CHECKLIST?

21. DID YOU SIGN AND DATE THE CHECKLIST THAT YOU USED DURING THE DEFENDANT’S BREATH TEST?

22. DID YOU WRITE THE DEFENDANT’S NAME ON THE FACE OF THAT CHECKLIST?
23. DID YOU WRITE A CASE IDENTIFICATION NUMBER ON THAT DOCUMENT?

YOUR HONOR, I HAVE IN MY HAND A CHECKLIST BEARING
IDENTIFICATION _____ [NUMBER], DATED__________, WITH THE
DEFENDANT'S NAME ON IT. MAY THIS DOCUMENT BE MARKED
PEOPLE'S EXHIBIT _____ [NUMBER] FOR IDENTIFICATION?

YOU HONOR, MAY I APPROACH THE WITNESS?
(Note: This is another document that should have either been provided—or at least shown to
the defense—before trial.)

24. OFFICER, I SHOW YOU WHAT HAS BEEN MARKED PEOPLE'S EXHIBIT
[NUMBER] FOR IDENTIFICATION. HAVE YOU SEEN THIS DOCUMENT
BEFORE?

25. HOW DO YOU RECOGNIZE IT?

26. WHOSE WRITING IS ON THE FACE OF THE DOCUMENT?

27. DO YOU SEE THE OFFICER'S SIGNATURE AT THE BOTTOM OF THE
DOCUMENT?

28. WHO WROTE THAT?

29. WHOSE NAME APPEARS AT THE TOP OF THE CHECKLIST?
(It should be the defendant’s.)

30. AND WHAT DATE APPEARS ON THE DOCUMENT?

31. THAT WAS THE DATE OF THE DEFENDANT'S ARREST?

32. DOES THE IDENTIFICATION NUMBER OF THE INSTRUMENT USED
APPEAR ON THIS DOCUMENT?

33. WHAT NUMBER IS THAT?

34. THAT WAS THE NUMBER OF THE PARTICULAR INSTRUMENT USED IN
THIS CASE?

35. ALL OF THIS INFORMATION WAS RECORDED BY YOU AT THE TIME OF
THE DEFENDANT'S BREATH TEST?

36. OFFICER, WHAT DID YOU DO NEXT?
(It is likely that the officer typed all the case information into the instrument so that the test
result could be correctly identified with the defendant’s case.)
37. OFFICER, DID YOU FOLLOW THE DIRECTIONS OF THE CHECKLIST?

38. WHAT IS THE FIRST STEP ON THE CHECKLIST?
   (The first step requires the defendant be observed for a 15-minute period prior to the breath test.)

   Note: In some cases, the officer who made the arrest is not the officer who administered the breath test. In this situation, you will have to have all officers testify who are essential to show that the defendant did not smoke, drink, vomit, or regurgitate for 15 minutes prior to the breath test.)

39. BY THE WAY, OFFICER, HAD YOU BEEN OBSERVING THE DEFENDANT FROM THE TIME YOU FIRST CONTACTED HER [HIM] RIGHT UP TO THE BREATH TEST?

40. DID YOU OBSERVE ANY CHANGE IN THE LEVEL OF THE DEFENDANT'S IMPAIRMENT BETWEEN WHEN YOU FIRST CONTACTED THE DEFENDANT UNTIL THE BREATH TEST?
   (This question is designed to help thwart a possible on-the-rise defense. If the facts are that the defendant was at the same level of intoxication or that the defendant was less impaired by the time of the breath test, you may want to ask additional questions pinning down that fact.)

41. AFTER OBSERVING THE DEFENDANT FOR AT LEAST 15 MINUTES, WHAT DID YOU DO NEXT?
   (Guide the officer through an explanation of each of the subsequent steps. Be sure that the officer’s explanations are making sense to the “eyes and ears of juror number six.”)

42. DID YOU OBSERVE THE DEFENDANT BLOW INTO THE INSTRUMENT?

43. WAS THERE ANYTHING UNUSUAL ABOUT THE MANNER IN WHICH THE DEFENDANT BLEW INTO THE INSTRUMENT?

44. DID THE DEFENDANT SPIT INTO THE INSTRUMENT?
   (These questions are intended to foreclose any defense effort to argue that the BAC recorded was a function of mouth-alcohol contamination.)

45. WHAT HAPPENED NEXT?
   (Most instruments then run through a “blank sequence” in which they determine they are ready for a second sample.)

46. DID THE DEFENDANT BLOW INTO THE INSTRUMENT A SECOND TIME?

47. WAS THERE ANYTHING UNUSUAL ABOUT THAT SECOND BLOW?

48. WHAT HAPPENED NEXT?
   (The instrument will then print out the test results.)
49. DID YOU REMOVE THE TEST RESULTS FROM THE INSTRUMENT?

50. WHAT DID YOU DO WITH THOSE RESULTS?
   (The officer would then have attached the test results to the appropriate space on the checklist.)

51. SHOWING YOU THE TEST RESULTS ATTACHED TO THE CHECKLIST, ARE THOSE THE RESULTS OF DEFENDANT’S BREATH TEST?

52. OFFICER, GIVEN YOUR BACKGROUND, TRAINING, AND EXPERIENCE, WERE THE DEFENDANT’S BREATH-TEST RESULTS CONSISTENT WITH THE LEVEL OF IMPAIRMENT THAT YOU OBSERVED WHEN YOU FIRST SAW THE DEFENDANT?

K. Expert-Witness Foundation Regarding Working Order of the PAS (PAS Coordinator)

   Note: Some, but not all, of Title 17’s requirements for PAS tests are covered in the following sample examination. Be sure to review the facts and issues specific to your case and formulate additional questions, if necessary, from relevant Title 17 requirements.

   Regarding Background, Training, and Experience

   1. WHERE DO YOU WORK?
   2. HOW LONG HAVE YOU WORKED THERE?
   3. WHAT IS YOUR CURRENT ASSIGNMENT?
   4. IS THERE A SPECIFIC TITLE FOR YOUR ASSIGNMENT? (Commonly, the title is “PAS Coordinator,” but check.)
   5. HOW LONG HAVE YOU BEEN IN THAT ASSIGNMENT?
   6. WHAT ARE YOUR DUTIES?
      (Ideally, the officer will say that his [her] function includes maintaining PAS instruments. If the answer is not clear, follow up.)
   7. THEN, YOU ARE FAMILIAR WITH THE OPERATION OF PAS DEVICES?
   8. WERE YOU TRAINED IN THE OPERATION OF THE PAS INSTRUMENT?
   9. HOW MANY TIMES HAVE YOU ADMINISTERED A PAS TEST?
   10. NOW, DID YOU RECEIVE ADDITIONAL TRAINING WITH PAS INSTRUMENTS TO QUALIFY FOR YOUR POSITION OF ________?
   11. WHAT WAS INVOLVED IN THAT ADDITIONAL TRAINING?
12. WHO PROVIDED THAT ADDITIONAL TRAINING?

13. IS PART OF YOUR CURRENT ASSIGNMENT TO BE A RESOURCE FOR OTHER OFFICERS REGARDING THE OPERATION OF PAS DEVICES?

Regarding Title 17

14. ARE YOU FAMILIAR WITH TITLE 17 OF THE CALIFORNIA CODE OF REGULATIONS?

15. WHAT IS IT?

16. DID YOU RECEIVE SPECIAL TRAINING IN THE REQUIREMENTS OF TITLE 17?

17. HOW DOES TITLE 17 DEFINE YOUR FUNCTION AS A ________?

Regarding Prior Testimony

18. HAVE YOU PREVIOUSLY TESTIFIED IN COURT ABOUT THE OPERATION OF PAS INSTRUMENTS?

19. HOW MANY TIMES?

20. IS IT THE ADDITIONAL TRAINING YOU RECEIVED IN ORDER TO BECOME A ________ THAT ENABLES YOU TO TESTIFY ABOUT THE OPERATION AND MAINTENANCE OF THESE INSTRUMENTS?

Regarding Accuracy

21. OFFICER, ARE YOU AWARE THAT THE NATIONAL HIGHWAY TRAFFIC AND SAFETY ADMINISTRATION OF THE U.S. DEPARTMENT OF TRANSPORTATION REGULARLY PUBLISHES A LIST OF APPROVED BREATH-ALCOHOL TESTING INSTRUMENTS?

22. WHAT IS THE SIGNIFICANCE OF BEING ON THAT LIST, IF YOU KNOW?

23. TO YOUR KNOWLEDGE, IS THE MODEL OF THE PAS INSTRUMENT USED IN THIS CASE ON THAT LIST?

24. DOES THAT MEAN THAT THE U.S. GOVERNMENT HAS TESTED AND APPROVED THIS MODEL OF PAS INSTRUMENT FOR THE PURPOSE OF MEASURING ALCOHOL IN A BREATH SAMPLE?

25. TO YOUR KNOWLEDGE, DOES TITLE 17 IMPOSE AN ADDITIONAL CALIFORNIA STANDARD OF ACCURACY ON BREATH-TESTING INSTRUMENTS?
26. DOES THAT STANDARD PERMIT NO MORE THAN A PLUS OR MINUS .01 REQUIREMENT FOR ACCURACY?

27. PLEASE EXPLAIN TO US WHAT IT MEANS FOR A BREATH-TESTING INSTRUMENT TO BE ACCURATE WITHIN PLUS OR MINUS .01.

28. IS THE PAS INSTRUMENT USED IN THIS CASE CAPABLE OF THE ACCURACY REQUIRED BY TITLE 17?

29. NOW, OFFICER, IN ORDER TO ENSURE THE RELIABILITY AND ACCURACY OF THESE INSTRUMENTS, TITLE 17 REQUIRES THAT THEY BE REGULARLY CHECKED FOR ACCURACY, CORRECT?

30. WHAT IS AN ACCURACY CHECK?

31. WERE YOU SPECIALLY TRAINED IN ORDER TO BE ABLE TO CHECK THE ACCURACY OF THESE INSTRUMENTS?

32. OFFICER, PLEASE DESCRIBE THIS SPECIAL TRAINING YOU RECEIVED.

33. DOES THE MANUFACTURER OF THE PAS DEVICE PUBLISH AN OPERATOR’S MANUAL?

34. HAVE YOU REVIEWED THAT MANUAL?

35. NOW, THESE INSTRUMENTS OPERATE ON FUEL-CELL TECHNOLOGY, ISN’T THAT CORRECT?

36. OFFICER, BRIEFLY EXPLAIN TO US HOW A FUEL CELL MEASURES THE ALCOHOL CONCENTRATION IN A BREATH SAMPLE.

37. ARE THESE INSTRUMENTS SPECIFIC TO ALCOHOL?

38. WHAT DOES THAT MEAN?

39. IS THE MEASUREMENT OF ALCOHOL IN A BREATH SAMPLE PROVIDED BY THE PAS TEST IN CONFORMITY WITH THE STANDARD OF MEASUREMENT REQUIRED BY TITLE 17?

40. SO, A PAS TEST RESULT REFLECTS THE NUMBER OF “GRAMS OF ALCOHOL PER 210 LITERS OF BREATH”?

41. BASED ON YOUR BACKGROUND, TRAINING, AND EXPERIENCE, DOES A PROPERLY CALIBRATED PAS INSTRUMENT ACCURATELY AND RELIABLY MEASURE THE ALCOHOL CONCENTRATION IN A PERSON’S BREATH?
Regarding Print Capabilities (You may want to consider omitting this section if there is no evidence of a PAS printout your case.)

42. DOES THE PAS INSTRUMENT HAVE THE CAPABILITY OF STORING DATA FROM COMPLETED TESTS?
43. DOES THE PAS DEVICE HAVE THE CAPABILITY OF PRINTING THIS DATA?
44. WHAT IS NECESSARY FOR A PAS DEVICE TO PERFORM THIS FUNCTION?
45. DOES YOUR AGENCY HAVE SUCH EQUIPMENT?
46. WHY NOT, IF YOU KNOW?

Regarding Temperature Range

47. DOES THE PAS OPERATE WITHIN A PARTICULAR TEMPERATURE RANGE?
48. WHAT IS IT?
49. WILL THE PAS INSTRUMENT CONDUCT A TEST IF THE TEMPERATURE RANGE IS OFF?
50. IF THE TEMPERATURE RANGE IS OFF, WHAT HAPPENS?

Regarding Deep-Lung or Alveolar Air

51. NOW, BREATH-TESTING DEVICES TEST DEEP-LUNG AIR OR ALVEOLAR AIR, DON’T THEY?
52. IS THAT REQUIRED BY TITLE 17?
53. WHAT IS ALVEOLAR AIR, AND WHY IS IT IMPORTANT THAT THE AIR SAMPLE COME FROM THE ALVEOLI?
54. DOES THE PAS INSTRUMENT TEST ALVEOLAR AIR?
55. HOW DOES IT DO THAT?
   (If the officer does not mention the Flow Thermistor and explain its function, be sure to ask the officer to describe its import.)
56. ARE YOU FAMILIAR WITH THE “FLOW THERMISTOR” IN THE (PAS INSTRUMENT)?
57. WHAT DOES IT DO?
Regarding Mouth Alcohol

58. OFFICER, ARE YOU FAMILIAR WITH THE TERM MOUTH ALCOHOL?

59. WHAT IS MOUTH ALCOHOL?

60. WOULD A BREATH SAMPLE WITH MOUTH ALCOHOL PROVIDE AN ACCURATE RESULT?

61. HOW DOES AN OFFICER ENSURE THAT THE PAS SAMPLE DOES NOT CONTAIN MOUTH ALCOHOL?
   (This is where the officer will talk about the 15-minute observation period as a method of guaranteeing a test free of mouth alcohol.)

62. DOES THE LAW SPECIFY A 15-MINUTE OBSERVATION PERIOD AS WELL?

63. DURING THIS PERIOD, WHAT ACTIVITIES ARE TO BE AVOIDED?
   (Here the officer will mention drinking, smoking, eating, vomiting, and regurgitating.)

64. DOES THE ABSENCE OF THESE ACTIVITIES FOR 15 MINUTES HELP ENSURE THAT THE BREATH TEST IS FREE OF MOUTH ALCOHOL?

65. NOW, OFFICER, GENERALLY, HOW MANY TIMES IS A PERSON TAKING A PAS TEST ASKED TO BLOW INTO THE INSTRUMENT?
   (Note: A PAS test, like the stationary breath instrument used at the station, needs two blows within a 0.02 of one another to confirm the absence of mouth alcohol and assure the accuracy of the results.)

66. DOES TITLE 17 SPECIFY THAT A PAS TEST INCLUDE TWO BLOWS?

67. WHY IS THE PERSON ASKED TO BLOW INTO THE INSTRUMENT TWICE?

68. SO, OBTAINING TWO BREATH SAMPLES HELPS ASSURE THAT THE RESULTS ARE FREE OF MOUTH ALCOHOL?

69. OFFICER, WHAT ELSE DOES TITLE 17 REQUIRE OF THESE TWO READINGS IN ORDER TO ASSURE THE RELIABILITY AND ACCURACY OF A PAS RESULT?

70. HOW DOES REQUIRING THAT THE RESULTS FROM THE TWO BLOWS BE WITHIN 0.02 OF ONE ANOTHER ASSURE THE RELIABILITY AND ACCURACY OF THE PAS TEST?

Only ask the following question if the PAS results have already been testified to by the arresting officer.

71. NOW, OFFICER, IN THIS CASE, THE DEFENDANT’S PAS TESTS REFLECTED READINGS OF ___ AND ___. ARE THEY WITHIN 0.02 OF ONE ANOTHER?
72. OFFICER, GIVEN YOUR BACKGROUND, TRAINING, AND EXPERIENCE WITH PAS INSTRUMENTS, WERE THE DEFENDANT’S PAS TEST RESULTS THE PRODUCT OF MOUTH ALCOHOL?

Regarding Radio Frequency Interference

73. OFFICER, ARE YOU FAMILIAR WITH THE TERM RADIO FREQUENCY INTERFERENCE, ALSO KNOWN AS “RFI”?

74. WHAT IS RFI?

75. IS IT POSSIBLE FOR RADIO FREQUENCY INTERFERENCE TO INTERFERE WITH DEVICES UTILIZING A FUEL CELL?

76. HOW DOES A PAS DEVICE PROTECT AGAINST SUCH INTERFERENCE? (A PAS device with an RFI detector will terminate the test and display the letters RFI. No result will be produced. To continue the test, it is necessary to turn off the device and start over.)

77. NOW, IF THE RFI DETECTOR PICKS UP SUCH INTERFERENCE, WHAT DOES IT DO?

78. OFFICER, IN THIS CASE, RESULTS WERE RECORDED. DO YOU HAVE AN OPINION AS TO WHETHER THERE WAS ANY RADIO FREQUENCY INTERFERENCE PRESENT?

PAS Test Steps

79. PLEASE EXPLAIN TO US THE STEPS AN OFFICER WOULD TAKE TO PROPERLY ADMINISTER A PAS TEST WITH THIS PARTICULAR DEVICE.

Regarding Accuracy Checks and Calibration

80. NOW, OFFICER, IS THE [PAS INSTRUMENT] MANUFACTURED BY [PAS MANUFACTURER], BEARING THE SERIAL NUMBER _____ USED AND MAINTAINED BY YOUR AGENCY?

81. IS YOUR AGENCY RESPONSIBLE FOR CHECKING THE ACCURACY OF THIS INSTRUMENT AND ALSO CALIBRATING IT?

82. ARE YOU ONE OF THE PERSONS RESPONSIBLE FOR THE ACCURACY CHECKS AND CALIBRATION OF THESE INSTRUMENTS?

83. HOW DOES ONE TEST THESE INSTRUMENTS? (The officer will mention the term “simulator solution” in explaining how the PAS device is tested.)

84. WHAT IS A SIMULATOR SOLUTION?
85. WHAT ROLE DOES IT PLAY IN CHECKING THE ACCURACY OF A PAS DEVICE?
(Have the officer explain the process of testing and calibrating the PAS device.)

86. WHERE DOES THE SIMULATOR SOLUTION COME FROM?

87. WHAT ASSURANCES DOES YOUR AGENCY HAVE THAT THE SIMULATOR SOLUTION IS RELIABLE?

88. ARE YOU ONE OF THOSE IN YOUR AGENCY RESPONSIBLE FOR MAINTAINING THE ACCURACY AND CALIBRATION RECORDS FOR THE PAS INSTRUMENT NUMBERED________?

89. DID YOU BRING WITH YOU THE RELEVANT RECORDS FOR INSTRUMENT NUMBER______, THE INSTRUMENT USED BY THE DEFENDANT IN THIS CASE?

YOUR HONOR, I AM HOLDING A DOCUMENT ENTITLED “PAS ACCURACY CHECK AND CALIBRATION LOG.” IT HAS BEEN PREVIOUSLY SHOWN TO COUNSEL. MAY IT BE MARKED AS PEOPLE’S EXHIBIT [NUMBER], FOR IDENTIFICATION? MAY I APPROACH THE WITNESS?

90. OFFICER, SHOWING YOU WHAT HAS BEEN MARKED AS PEOPLE’S EXHIBIT [NUMBER], WHAT IS THIS?

91. ARE YOU A CUSTODIAN OF THIS RECORD?

92. WHO PREPARED THIS DOCUMENT, IF YOU KNOW?

93. IS HE [SHE] EMPLOYED BY YOUR AGENCY?

94. IN WHAT CAPACITY?

95. IS THIS DOCUMENT PREPARED IN THE NORMAL COURSE OF HIS [HER] OCCUPATION?

96. ARE THESE DOCUMENTS FILLED OUT RIGHT AT OR SHORTLY AFTER THE ACCURACY CHECKS?

97. PLEASE EXPLAIN TO US THE INFORMATION THAT IS PROVIDED IN PEOPLE’S EXHIBIT [NUMBER].

98. SO, WHEN, PRIOR TO [THE DATE OF DEFENDANT’S ARREST], WAS PAS INSTRUMENT NUMBER _________ LAST TESTED?

99. WAS IT WORKING ACCURATELY AT THAT TIME?
100. WHEN WAS THE FIRST TIME AFTER [THE DATE OF DEFENDANT'S ARREST] THAT THIS INSTRUMENT WAS NEXT CHECKED?

101. WAS IT WORKING ACCURATELY AT THAT TIME?

102. OFFICER, GIVEN YOUR BACKGROUND, TRAINING, AND EXPERIENCE IN THIS FIELD AND THE DOCUMENTS BEFORE YOU, DO YOU HAVE AN OPINION REGARDING THE WORKING ORDER OF PAS INSTRUMENT NUMBER____ ON [THE DATE OF DEFENDANT'S ARREST]?

103. AND WHAT IS THAT OPINION?

THANK YOU, OFFICER. NO FURTHER QUESTIONS, YOUR HONOR.

I. The Blood Test

Defense Stipulation: Ideally, the defense is willing to join in the following stipulations regarding the blood sample. If the defense does not join in the stipulations, then it may be necessary to bring in the medical person who drew the blood. In some jurisdictions, this may also require a subpoena duces tecum for the defendant’s medical records, assuming the blood draw was at a hospital. Further, it may be necessary to bring in additional witnesses to establish the chain of custody of the blood sample.

The stipulation:

1. COUNSEL, WILL YOU STIPULATE THAT THE DEFENDANT'S BLOOD WAS DRAWN IN A MEDICALLY APPROVED MANNER AND THAT, PRIOR TO THE BLOOD DRAW, THE EXTRACTION SITE WAS CLEANSED WITH A NONALCOHOLIC SOLUTION?

2. AND THAT [NAME OF TECHNICIAN], THE PERSON WHO DREW THE BLOOD IN THIS CASE, IS MEDICALLY TRAINED TO TAKE BLOOD SAMPLES, AS DEFINED BY VEHICLE CODE SECTION 23158?

3. AND THAT THE BLOOD IN THE VIAL ANALYZED IN THIS CASE IS THAT OF THE DEFENDANT?

4. AND THAT THE BLOOD DRAWN WAS PLACED IN A VIAL CONTAINING THE APPROPRIATE MEDICALLY APPROVED PRESERVATIVE AND ANTICOAGULANT, ENSURING THE INTEGRITY OF THE SAMPLE?

5. AND FINALLY, DO YOU STIPULATE TO THE CHAIN OF CUSTODY AND AUTHENTICITY OF THE BLOOD SAMPLE?

The Officer's Direct Testimony Regarding the Blood Sample

1. WHERE DID YOU TAKE THE DEFENDANT FOR THE BLOOD TEST?
2. HOW LONG DID IT TAKE TO GET THERE?

3. WHAT TIME WAS THE BLOOD DRAWN?

4. WHO DREW THE SAMPLE FROM THE DEFENDANT?

5. WAS THE BLOOD DRAWN IN YOUR PRESENCE?

6. WHAT PART OF THE DEFENDANT’S BODY WAS USED FOR THE BLOOD DRAW?

7. DID YOU OBSERVE __________ [THE BLOOD DRAWER] CLEAN THE AREA BEFORE THE BLOOD DRAW?

8. DO YOU KNOW WHICH DISINFECTING SOLUTION WAS USED? (Usually Zephiran, Peroxide, or Betadine is used. The point is that the substance used must NOT contain alcohol.)

9. WAS THE BLOOD PLACED INTO A VIAL?

10. DID YOU SEE THE VIAL BEFORE THE BLOOD DRAW?

11. WHAT WAS IN THE VIAL, IF ANYTHING? (The vials used for this purpose contain a powdery substance that is both a preservative and an anticoagulant. The powder ensures that the sample will not develop either any alcohol-producing fermentation, which could erroneously elevate the BAC reading in the sample, or any biological microbes that might consume some of the alcohol present, thus wrongly reducing the sample’s BAC.)

12. OFFICER, AFTER THE BLOOD WAS DRAWN AND PLACED IN THE VIAL, WAS IT CAPPED IN SOME MANNER?

13. HOW WAS THAT?

14. DID YOU RECEIVE THE VIAL FROM [THE BLOOD DRAWER]?

15. ONCE YOU TOOK CUSTODY OF THE VIAL, DID YOU MARK THE VIAL FOR IDENTIFICATION IN SOME WAY? (Most law enforcement agencies provide evidence labels that are taped over the rubber stopper. Commonly, the label will include the defendant’s name, the date, and the officer’s name and identification number.)

16. PLEASE EXPLAIN THIS PROCESS.
17. WHAT DID YOU THEN DO WITH THE VIAL?
( Commonly, the vial is placed in an evidence envelope, which the officer fills out with relevant identifying information. The envelope is then sealed and placed in a refrigerator at some evidence-gathering location. Ultimately, the blood sample is picked up and transported to the forensic lab where the BAC is determined. You should have the evidence envelope containing the blood sample with you in court. It is likely the officer brought it in. The envelope is again sealed but likely has additional and different sealing tape and label than what was used by the officer. The added tape would have been used by the lab to reseal the envelope after the blood sample was tested.)

Your next task is to lay the foundation for the envelope and vial. By linking them to the defendant and the date of the event, you establish their authenticity.

18. YOUR HONOR, I HAVE IN MY HAND AN EVIDENCE ENVELOPE WITH THE DEFENDANT’S NAME AND BEARING THE IDENTIFICATION NUMBER OF ________. MAY THE ENVELOPE AND ITS CONTENTS BE MARKED AS PEOPLE’S EXHIBIT [NUMBER] FOR IDENTIFICATION?

19. OFFICER, I SHOW YOU WHAT HAS BEEN IDENTIFIED AS PEOPLE’S EXHIBIT [NUMBER]. DO YOU RECOGNIZE THIS ENVELOPE?

20. HOW DO YOU RECOGNIZE THE ENVELOPE?

21. OFFICER, DID YOU BRING THE ENVELOPE WITH YOU TO COURT TODAY?

22. OFFICER, WHERE DID YOU GET THE ENVELOPE FROM?

23. IS THE ENVELOPE IN THE SAME CONDITION AS WHEN YOU LAST SAW IT?

24. IN WHAT WAY IS IT DIFFERENT?
(Note: Many forensic labs use tape and labels that have their names on it. If this is true in your case, you may want the officer to read this information to the jury in order to clear up the mystery of why the envelope looks different than when the officer last saw it.)

25. OFFICER, PLEASE OPEN THE ENVELOPE, AND EXPLAIN WHAT YOU ARE DOING FOR THE RECORD.
(It is important that the process of opening the envelope and the articulation of what is found in the envelope makes its way into the record.)

26. OFFICER, WHAT IS IN THE ENVELOPE?

27. DO YOU RECOGNIZE THE VIAL?

28. HOW DO YOU RECOGNIZE THE VIAL?
29. IS THIS THE VIAL WITH THE DEFENDANT'S BLOOD THAT YOU TOOK INTO EVIDENCE ON [DATE]?

THANK YOU, OFFICER. NO FURTHER QUESTIONS, YOUR HONOR.

Direct Examination of the Blood Drawer

1. PLEASE STATE YOUR NAME, AND SPELL YOUR LAST NAME FOR THE RECORD.

2. WHAT IS YOUR OCCUPATION?

3. HOW LONG HAVE YOU BEEN IN THIS PROFESSION?

4. TELL US ABOUT YOUR EDUCATION AND TRAINING THAT QUALIFIED YOU FOR YOUR POSITION.

5. HAVE YOU RECEIVED CERTIFICATES OR LICENSES FROM THE STATE OF CALIFORNIA ACKNOWLEDGING YOUR PROFESSIONAL EXPERTISE?

6. WHAT ARE THOSE?

7. NOW, WERE YOU WORKING AT _________ ON THE DATE OF ________?

8. WHAT WAS YOUR ASSIGNMENT AT THAT TIME?

9. IS ONE OF YOUR DUTIES IN THAT ASSIGNMENT TO WITHDRAW BLOOD SAMPLES FROM PERSONS BROUGHT IN BY LAW ENFORCEMENT?

10. ON AVERAGE, HOW MANY BLOOD DRAWS DO YOU PERFORM PER WEEK?

11. IS IT A FAIR STATEMENT THAT YOU GENERALLY HAVE LITTLE RECALL OF THE PARTICULAR FOLKS FROM WHOM YOU DRAW BLOOD?

12. NOW, WHAT PROCEDURE DO YOU FOLLOW WHEN DRAWING BLOOD FROM A PERSON IN POLICE CUSTODY? (The blood drawer likely checks that there is preservative in the vial; then uses a non-alcohol-based disinfectant to swab the patient’s arm before the draw; fills out some paperwork that will link the drawer to the defendant; and then hands the vial to the ever-present officer.)

13. NOW, DRAWING YOUR ATTENTION TO THE DEFENDANT, DO YOU HAVE ANY RECALL OF WHETHER YOU DREW BLOOD FROM HIM [HER] ON ______ AT ________ [A.M./P.M.]?

14. HOW DOES A BLOOD DRAWER RECORD THAT HE OR SHE HAS DRAWN BLOOD FROM A PARTICULAR PATIENT?
15. YOUR HONOR, I HAVE A [NAME OF DOCUMENT] WITH THE DEFENDANT’S NAME. MAY THAT BE MARKED AS PEOPLE’S EXHIBIT [NUMBER]?

16. NOW, SHOWING YOU WHAT HAS BEEN MARKED AS PEOPLE’S EXHIBIT [NUMBER], DO YOU RECOGNIZE THIS DOCUMENT?

17. WHAT IS IT?

18. DOES IT IDENTIFY THE PERSON WHO WITHDREW THE SAMPLE FROM THE DEFENDANT ON _____________?

19. AND WHO WAS THAT?

THANK YOU VERY MUCH. NO FURTHER QUESTIONS, YOUR HONOR.

M. Refusal to Submit to a Chemical Test

1. NOW, OFFICER, AFTER YOU PLACED THE DEFENDANT UNDER ARREST, DID YOU EXPLAIN TO HIM [HER] THE OBLIGATION UNDER THE LAW TO TAKE A BREATH OR BLOOD TEST TO DETERMINE HIS [HER] BAC?

2. WHICH CHEMICAL TEST DID THE DEFENDANT CHOOSE?

3. DID YOU ATTEMPT TO EXPLAIN TO HIM [HER] OUR IMPLIED CONSENT LAW, WHICH REQUIRES DRIVERS TO PROVIDE A BREATH OR BLOOD SAMPLE WHEN ARRESTED FOR DUI?

4. AT SOME POINT, DID YOU FORMALLY READ TO THE DEFENDANT WHAT THE LAW REQUIRES AND THAT A REFUSAL COULD RESULT IN A SUSPENSION OF A DRIVER’S DRIVING PRIVILEGE?

5. WHERE DID THAT OCCUR?

6. WHAT WAS THE FORM YOU READ TO THE DEFENDANT?

7. DO YOU HAVE A COPY OF THAT FORM WITH YOU?

8. OFFICER, PLEASE READ TO THE JURY WHAT YOU READ TO THE DEFENDANT AFTER SHE TOLD YOU SHE WOULD NOT TAKE A CHEMICAL TEST?

(In your refusal case, be sure to advise the officer to bring a copy of whatever was read to the defendant. Also, because most people speed up when reading, be sure to advise your officer to read slowly so the jury will understand that the defendant was willing to give up his or her driving privilege rather than reveal his or her BAC.)
9. OFFICER, DID THE DEFENDANT APPEAR TO UNDERSTAND WHAT YOU READ TO HIM [HER]?

10. AFTER ADVISING THE DEFENDANT OF THE LAW, DID YOU ASK THE DEFENDANT ANY QUESTIONS?
     (Generally, the defendant is asked at this stage whether he or she will take a breath test or blood test.)

11. WHAT WAS THE DEFENDANT’S RESPONSE?
     (Note: Generally, the defendant’s comments are admissible at trial unless they would be deemed more prejudicial than probative under Evidence Code section 352. For instance, if the defendant responded, “I’m too drunk to take your damn test,” that is likely to be admissible. But if the defendant’s response was, “I’ve refused to take a test the last three times you S.O.B.s busted me, and I’m not going to give you a test now,” this is likely to be suppressed by your judge, although there are great arguments as to why this statement should come in because it goes directly to the defendant’s consciousness of guilt.)

12. WHAT HAPPENED THEN, OFFICER?
     (Note: Many agencies require a senior officer or watch commander to re-advice the defendant at this point. If this is your case, you may want to bring in that other officer. Not only can he or she reiterate the efforts to have the defendant give a sample, but you also would have an experienced officer who may be able to provide a second opinion that the defendant was under the influence. In the alternative, it is likely that the defendant was then booked for DUI. It is also very helpful to have a police officer who was not at the scene testify, stating: I ALSO INFORMED THE DEFENDANT THAT HE [SHE] WAS REQUIRED TO TAKE A CHEMICAL TEST, BUT HE [SHE] REFUSED. Any defense contentions that the arresting officer was hostile towards the defendant could not be lodged against this more neutral officer who had not been present at the initial stop.)

THANK YOU VERY MUCH, OFFICER. NO FURTHER QUESTIONS, YOUR HONOR.

N. The Officer’s Redirect Examination

The defense’s cross-examination was dedicated to minimizing everything to which the officer testified. This is your opportunity to have the officer clear up whatever misinformation the defense attempted to create. For instance, it is common for officers to give specialized meanings to words or phrases in their reports that the general public might understand differently. Allow the officer to clear up the confusion over any particular phrase in the arrest report.

Some cross-examiners pull sentences out of context from the officer’s report. The effect, if not clarified, might leave the jury with a perception that there is an inconsistency in the report. Your task is to understand what smoke the defense attorney is blowing, and clear it up by showing the entire context surrounding the sentence.

Some cross-examiners will attempt to parse the evidence in an effort to show a particular fact by itself does not require a conclusion of alcohol impairment. The response on redirect is to point
out that it was the totality of factors observed that required the officer, and by extension the jury, to conclude the defendant was driving under the influence.

Defense counsel may also attempt to demonstrate the absence of a particular driving pattern, symptom, or FST result that is common in a DUI. This is done to support the defense's argument to the jury that the absence of that particular fact raises reasonable doubt about defendant's impairment. If this is the defense tactic in your case, you will want to establish on redirect that there are near--infinite combinations of factors that may be present in any DUI case, and in no case will all the possible facts consistent with DUI be present.

In short, if you have had a good interview with your officer, understand the facts of your case, have listened critically to the defense cross-examination, and are patient on redirect, you will likely clear up whatever confusion the defense attempted to create and satisfy the eyes and ears and minds of your jury.

Frank Horowitz, the Director of CDAA's Driving Under the Influence Prosecution Project from 2001–2003, has practiced criminal law for nearly 30 years. His experience includes an initial five years as a Los Angeles County Public Defender, followed by 19 years as a prosecutor in the Los Angeles City Attorney's Office. Mr. Horowitz then joined the Butte County District Attorney's Office, ultimately serving as the deputy-in-charge of the Chico Branch.

Mr. Horowitz's involvement in prosecutor training began in 1980 with two years as the supervising-attorney-in-charge of the Los Angeles City Attorney's nationally acclaimed training program. This training format served as an early model for the current CDAA Trial Advocacy Workshop. He has been a CDAA instructor since 1985 and was selected Outstanding Instructor from 1985-1987.

Mr. Horowitz received both his Juris Doctor and Bachelor of Arts degrees from UCLA. He has twice served on the faculty of the National Advocacy Center in Columbia, South Carolina and has taught law-related courses at numerous colleges and universities. In 2001, he received a Pro Bono Service Award from the State Bar of California for his volunteer work at the Chico office of Legal Services of Northern California.

Dan Kleban has been a deputy city attorney for the Los Angeles City Attorney's Office since 1994. Mr. Kleban graduated with honors from the Ventura College of Law while he was still a member of the Los Angeles Police Department, finishing first in his class. As a police officer, he arrested hundreds of DUI drivers. He also taught criminal law and procedure at the police academy. He retired from the police department to become a prosecutor in the Van Nuys Branch Office of the Los Angeles City Attorney's Office. Within that office, he has taught MCLE classes about search and seizure, *Miranda*, and police procedures. Mr. Kleban also instructs police officers how to write better reports and testify in court more effectively.
Chapter Updated in 2010 by TSRP Rosalind Russell-Clark: Rosalind Russell-Clark has an AA in Administration of Justice from Southwest College, a BS in Criminal Justice from California State University Los Angeles, and a JD from the University of West Los Angeles School of Law. She has served as an instructor at the University of West Los Angeles School of Law on a variety of subjects, focusing primarily on criminal law. The CalTSRP for Los Angeles and Ventura, she currently works for the Los Angeles City Attorney’s Office. In her 20 years as a prosecutor, she has handled more than 75 DUI jury cases, including ones with notable defendants. Ms. Russell-Clark is also the director of a free legal clinic at her church in Carson.
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Chapter XI

Field Breath Testing—The PAS Test

by Michael D. Schwartz, Deputy City Attorney
Los Angeles City Attorney’s Office

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(Updated 2010 by David Radford, TSRP, Northern Region)

I. The Science of Field Breath Testing

A. The Test

The preliminary alcohol screening test (also known as the PAS test) is a hand-held breath test administered by law enforcement officers in the field. PAS tests can be used for two purposes—to show the mere presence of alcohol or to provide a reading measuring the concentration of alcohol. It is the reading of alcohol in a breath sample that reflects the concentration of alcohol in a person's blood. The PAS test is one of the many investigative tools used by law enforcement officers to determine whether probable cause exists to arrest a person for driving under the influence of alcohol or driving with a blood-alcohol concentration of 0.08 percent or greater. The result of a PAS test also provides excellent evidence of the defendant’s blood-alcohol level shortly after the traffic stop.

B. The Alco-Sensor IV

There are several different manufacturers of hand-held breath-testing devices used for PAS tests. As of August 2002, the California Highway Patrol uses the Alco-Sensor IV, manufactured by Intoximeters, Inc. of St. Louis, Missouri.

The Alco-Sensor IV turns on when a mouthpiece is inserted into it. It then displays the date, the time, a test number, and the temperature. If the instrument is not already set, it then displays “SET.” The operator then presses the set button to initiate an air blank. The Alco-Sensor IV displays “BLNK,” indicating that it is testing a sample of air. The absence of alcohol is confirmed and reported as “.000.” It then displays “TEST,” indicating that it is ready to accept a breath sample. If the instrument is unable to perform a test, it displays “NOGO.”

The subject then blows into the mouthpiece. When at least 1,500 cubic centimeters of breath are blown (which commonly takes between 5–10 seconds) and the strength of the breath sample begins to diminish, the Alco-Sensor IV collects one cubic centimeter of the breath sample and measures the concentration of alcohol. Within a few moments, the concentration of alcohol in
the person’s blood is displayed to the third decimal point. The test result is stored in the Alco- 
Sensor IV and can be printed out at a later time. The memory capacity of the instrument permits 
retrieval of the results of the prior 168 tests given.

C. Fuel Cell Technology

The Alco-Sensor IV uses fuel cell technology. This is the same technology used by many of the 
breath-testing instruments located at police stations to determine the concentration of alcohol 
in a person’s blood. Fuel cell technology is state-of-the-art, exceptionally accurate, and specific 
to alcohol. Alcohol in the breath sample reacts with an electrolyte in the fuel cell to produce an 
electrical current. The amount of alcohol in the breath sample determines the amount of electrical 
current generated. With proper calibration, the fuel cell can accurately measure the concentration 
of alcohol in a breath sample and, consequently, determine the concentration of alcohol in the 
person’s blood.

D. How PAS Evidence Is Used in Court

Prosecutors use PAS test concentration results in trial to prove that defendants are guilty of 
violating Vehicle Code section 23152(a)–(b). PAS test results can be exceptionally persuasive 
evidence to prove DUI charges when, among other things, the instrument used for the PAS test 
was properly checked for accuracy, two breath samples were tested after a 15-minute observation 
period, and the two test results are within 0.02 of each other.

Because PAS tests are administered within minutes of driving, their results can be particularly 
persuasive evidence against the “rising blood-alcohol” defense, where a defendant claims that 
although his or her blood-alcohol concentration may have been above the legal limit at the time 
of the post-arrest chemical test administered at the police station, it was not above the legal limit 
at the time of driving. PAS test results can also be particularly persuasive evidence in a “refusal,” 
where a DUI arrestee refuses to take or fails to complete a post-arrest chemical test at a police 
station.

E. Hearings on the Admissibility of PAS Test Results

Hearings to determine the admissibility of PAS test results should occur out of the presence of 
the jury pursuant to Evidence Code section 402. Evidence Code section 405 governs, not section 
admissibility is whether or not the proponent has proved by a preponderance of the evidence that 
the evidentiary foundation of relevance and reliability has been laid. Pursuant to Evidence Code 
section 405, the court, not the jury, determines if that foundation has been laid.

II. Common Legal Issues

A. Authority for Law Enforcement to Administer PAS Tests

The Vehicle Code specifically permits law enforcement officers to administer PAS tests during 
DUI investigations. Vehicle Code section 23612(h) (formerly section 23157(h)) states:
A preliminary alcohol screening test that indicates the presence or concentration of alcohol based on a breath sample in order to establish reasonable cause to believe that the person was driving a vehicle in violation of Section 23140, 23152, or 23153 is a field sobriety test and may be used by an officer as a further investigative tool.

But a pre-arrest PAS test does not constitute the post-arrest “implied consent” test required by Vehicle Code section 23612(i). Therefore, a defendant who submitted to a pre-arrest PAS test is still required to provide a post-arrest chemical test.

In theory, a defendant can be charged with violating Vehicle Code section 23152(b) based on PAS test concentration results (driving with a blood-alcohol concentration of .08 percent or greater) and also be charged with the refusal special allegation. This practice is followed by some prosecutorial agencies in California, but not all.

B. Relevance

Evidence must be relevant to be admitted. (Evidence Code § 350.) "Relevant evidence shall not be excluded in any criminal proceeding." (Cal. Const., art.1, § 28, subd. (f), par. (2).) Relevant evidence is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evidence Code § 210.) “Except as otherwise provided by statute,” proclaims Evidence Code section 351, “all relevant evidence is admissible.”

PAS test results are relevant; they help prove a disputed fact of consequence to the action. Scientific evidence of a defendant’s blood-alcohol concentration as measured through the concentration of alcohol in the defendant’s breath is relevant to determine if a defendant was under the influence or 0.08 percent or above at the time of driving. In fact, PAS test results may be some of the most relevant evidence in a DUI trial because the test is typically administered within minutes of driving.

In People v. Bury (1996) 41 Cal.App.4th 1194, the court of appeal specifically addressed the relevance of PAS test results. Referring to the Legislature’s intent in passing then section 23157(h) of the Vehicle Code, the court found that PAS test results were “relevant, not only to establish cause to arrest, but as tending to prove the essential element of the offense.” (Id. at 1205–1206.) The Bury court upheld the admission of PAS test results into evidence not just for the mere presence of alcohol, but also for the concentration measured by the test.

The defense often objects to the introduction of PAS test results on the grounds of Evidence Code section 352, claiming that the introduction of the results would be “prejudicial.” Evidence Code section 352, however, does not exclude evidence just because it is “prejudicial.” Evidence Code section 352 calls for a balancing of interests. It excludes evidence when the probative value of the evidence is substantially outweighed by the probability that the admission of the evidence creates a substantial danger of undue prejudice.

Although the defense often equates the term “prejudice” in section 352 with “damaging,” the term “prejudice,” as it is used in 352, is not synonymous with “damaging.”
The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is ‘prejudicial.’ The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’”


PAS test results, though “damaging” to the defense, do not create undue prejudice or evoke an emotional bias, nor do they confuse issues or mislead the jury. PAS evidence illuminates a central issue in a DUI prosecution—the concentration of alcohol in a defendant’s blood at the time of driving. The introduction of PAS test results provides tremendously probative evidence and is not unduly time-consuming. Consequently, it should easily survive section 352 challenges.

C. Kelly Issues: Accepted Technique Within the Scientific Community

Scientific evidence, in addition to being relevant and not having a “352 problem,” must also be reliable. As the California Supreme Court explained in People v. Kelly (1976) 17 Cal.3d 24, 30, a party seeking to introduce evidence based on a new scientific technique must qualify the technique as scientifically valid by showing that the technique is generally accepted within the relevant scientific community.

PAS tests are not subject to Kelly scrutiny prior to introduction into evidence. As the Bury court noted as early as 1996, neither the PAS test nor fuel-cell technology are new scientific procedures that require a Kelly hearing.


As the California Supreme Court noted in Kelly:

Once a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community.

(Kelly, supra, at 32; see also People v. Brown (1985) 40 Cal.3d 512, 530.)

It is thus clear that neither fuel-cell technology nor PAS testing is new to the scientific community and that both long ago satisfied the standards articulated in Kelly.
D. PAS Testing and Title 17

Title 17 of the California Code of Regulations governs the maintenance and use of all breath instruments used in our state. (Cal. Code Regs., tit. 17, § 1215–1222.2; hereafter Title 17.) Therefore, it is helpful and important that the operation and maintenance of the PAS instrument used in your case was in compliance with Title 17.

What if either the maintenance or the operation of the PAS instrument used failed to strictly comply with Title 17’s standards? Would this preclude the admission of the PAS test results into evidence? This was the question presented in the California Supreme Court case People v. Williams (2002) 28 Cal.4th 408. The court ruled the evidence of a PAS test result admissible despite a series of Title 17 violations, including failing to check the PAS instrument for accuracy at least every 10 calendar days or after 150 subjects, failing to comply with the 15-minute pretest observation period, and failing to obtain the two requisite breath samples. Despite these and other failures to comply with Title 17, the supreme court upheld the trial court’s admission of the PAS tests results.

The supreme court, noting that “[t]he exclusion of relevant evidence … is barred by the California Constitution's Right to Truth in Evidence provision, unless otherwise compelled by the federal Constitution” (Williams, supra, at 415 quoting Cal. Const., art. I, § 28, subd. (f), par. (2).) held that while there were numerous instances of noncompliance with the specific requirements of Title 17, the foundation for admissibility can be alternatively satisfied by demonstrating: (1) the instrument was properly functioning; (2) the test was properly administered; and (3) the operator was qualified to administer the test. (Williams, supra, at 417, citing People v. Adams (1976) 59 Cal.App.3d 559.) In other words, although compliance with Title 17 satisfies foundational requirements for admission of PAS test results, proof independent of Title 17 can also establish the foundation for admission.

E. Weight vs. Admissibility

If the PAS test used in your case presents some issues of noncompliance with Title 17 and you choose to establish the necessary foundation by satisfying the three-prong test articulated in Adams, be advised that while your judge will likely admit the test results, the jurors will be provided an instruction admonishing them that if they find any noncompliance with Title 17, they may consider it in determining how much weight they should give the PAS evidence. In other words, while the failures in Title 17 compliance will not prevent admissibility of the evidence, it may affect the weight the jury will give it in deciding the case. Obviously, the greater degree of compliance with Title 17 regulations, the less you have to worry about how much weight the jury will give your PAS evidence.

F. The Partition Ratio

The “partition ratio” is a conversion factor used in breath testing instruments throughout the United States, and is codified in Vehicle Code section 23610(b), which reads: “Percent, by weight, of alcohol in the person’s blood shall be based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.”
Put another way, the amount of alcohol in 2,100 milliliters of a person’s “alveolar” or deep-lung air is equivalent to the amount of alcohol in one milliliter of his or her blood. This is often abbreviated as the “2,100: 1 ratio.” This ratio is a scientifically accepted average. However, actual partition ratios may vary from person to person depending on various circumstances including body temperature, illness, red blood cell concentration, and others. The lower the partition ratio (e.g., 1,700: 1), the higher the reported blood-alcohol concentration from the breath test will be.

In 1994, the California Supreme Court found that such partition ratio evidence was not relevant in “per se” Vehicle Code section 23152(b) prosecutions because of the wording of the statute itself, which does not require the prosecutor to prove the defendant was actually impaired. (People v. Bransford (1994) 9 Cal.4th 885.)

On July 9, 2009, the California Supreme Court decided the case of People v. McNeal (2009) 46 Cal.4th 1183. The court held that despite its holding in Bransford, evidence of partition-ratio variability is admissible in Vehicle Code section 23152(a) cases to rebut the presumption (actually, permissive inference) set forth in Vehicle Code section 23610(a)(3) that a person who produces a breath result of .08 percent or higher was “under the influence” of alcohol (and therefore impaired) at the time of driving. Further, the court found that evidence of both the partition-ratio variation in the general population and the variability in the defendant’s personal partition ratio are admissible.

A careful reading of McNeal reveals several important points that give rise to strategies a prosecutor can use to minimize or eliminate the impact (juror confusion) of partition ratio evidence.

McNeal specifically did not overrule Bransford. Partition-ratio evidence is not admissible as to violations of Vehicle Code section 23152(b). In certain cases a prosecutor may wish to consider proceeding on the (b) count only.

As to section 23152(a) prosecutions, partition-ratio evidence may be admitted to rebut the presumption (permissive inference) in Vehicle Code section 23610(b) (as set forth in CALCRIM 2110), but it does not eliminate the presumption. If the prosecutor introduces evidence that the breath test results were .08 percent or higher, he or she is still entitled to have the jury instructed on the presumption if desired.

If the prosecutor does not wish the jury to be instructed on the presumption, then evidence of partition-ratio variability should be excluded as not relevant because it is only relevant when used to rebut the presumption. The prosecutor may wish to advise the court, prior to the beginning of the defense evidence, that he or she will not ask that the jury be instructed on the presumption and move that any partition ratio evidence be excluded.

The McNeal court specifically declined to express an opinion on whether evidence of a defendant’s personal partition ratio would meet Kelly standards of acceptance in the scientific community. The court acknowledged that because a person’s partition ratio may vary due to various factors, it may be difficult, if not impossible, for the defense to lay an adequate foundation as to how a subsequent test correlates to the defendant’s partition ratio at the time of the evidentiary test.
As to general partition ratio variability evidence, several published opinions from California and elsewhere (including McNeal) refer to testimony in which both prosecution and defense experts concede the 2,100:1 ratio tends to underestimate the true BAC and usually works in the defendant’s favor. This can provide fertile ground for cross-examination of defense experts.

G. Reporting Breath-Test Results to the Third Decimal Point

As noted above, Title 17 requires test results to be reported “to the second decimal place, deleting the digit in the third decimal place when it is present.” (Cal. Code Regs., tit. 17, § 1220.4(b).) The third decimal place of a breath-test result, however, is relevant evidence in a DUI trial and admissible. (People v. Wood (1989) 207 Cal.App.3d Supp. 11, 16–17.)

Our common sense and experience as trial judges compel the conclusion that the “third decimal place” number is relevant (see Evid. Code, § 210) or else prosecutors would not seek utilization of it when it is high and criminal defense attorneys would not seek utilization of it when it is low.

(Id. at 16.)

“Whether such evidence is favorable to the People or to the defendant, the clear import of the ‘Truth-in-Evidence’ provision is that the trier of fact be given the opportunity to credit or discredit relevant evidence.” (Id. at 17.)

H. Drivers Under 21 Years of Age

Vehicle Code sections 23136 and 23140 concern drivers under the age of 21. Sections 23136 and 13390 impose civil penalties (not criminal penalties) upon a person under 21 who drives a vehicle while having a blood-alcohol concentration of 0.01 percent or greater, as measured by a PAS test or any other chemical test. Sections 23140 and 40000.1 of the Vehicle Code make it an infraction for a person under 21 to drive a vehicle while having a blood-alcohol concentration of 0.05 percent or greater. Chapter 1 of Division 11.5 of the Vehicle Code (sections 23500–23521) sets forth the penalties for a violation of Vehicle Code section 23140.

III. Title 17 of the California Code of Regulations

A. Title 17’s Jurisdiction

Division 1 of Title 17 is issued by the California State Department of Health Services (Department of Health). The sections pertaining to Forensic Alcohol Analysis and Breath Analysis govern three things: (1) the licensing of forensic alcohol laboratories; (2) the procedures those laboratories use to measure the concentration of alcohol in samples of blood, breath, and urine; and (3) the procedures government agencies (including law enforcement) use to test the concentration of alcohol in a person’s breath. (Cal. Code Regs., tit. 17, § 1215–1222.2; hereafter Title 17)
B. Title 17—An Overview

Title 17’s guidelines for Forensic Alcohol Analysis and Breath Analysis are divided into eight distinct sections—Articles 1 through 8. [A copy of the relevant sections of Title 17 appears in the Appendix of this manual.] Articles 5, 7, and 8 apply to a PAS test administered in the field by a law enforcement officer. In Article 6, only section 1220.4 applies to field breath testing. The remainder of Article 6 does not apply.

C. Title 17 Authorizes Officers to Test Breath Samples

Title 17 differentiates between the testing of breath on the one hand and the testing of blood, urine, and tissue on the other. Under Title 17, only “laboratory personnel” at “forensic alcohol laboratories” are permitted to test blood, urine, or tissue. But both “laboratory personnel” and people who are not “laboratory personnel” are permitted to test breath under Title 17.

“Forensic alcohol analysis” is defined in section 1215.1(b) to mean “the practical application of specialized devices, instruments, and methods by trained laboratory personnel to measure the concentration of ethyl alcohol in samples of blood, breath, urine, or tissue of persons involved in traffic accidents or traffic violations.” “Forensic alcohol analysis,” section 1216(a)(1) states, “shall be performed only by persons who meet the qualifications set forth in these regulations for forensic alcohol supervisors, forensic alcohol analysts, or forensic alcohol analyst trainees.”

Conversely, “breath alcohol analysis” is not limited to “laboratory personnel” only. It is defined in section 1215.1(c) to mean the “analysis of a sample of a person’s expired breath, using a breath testing instrument designed for this purpose, in order to determine the concentration of ethyl alcohol in the person’s blood.”

Section 1221.1(b) expressly states that breath alcohol analysis may be performed “in places other than licensed forensic alcohol laboratories” and “by persons other than forensic alcohol supervisors, forensic alcohol analysts and forensic alcohol analyst trainees” but only if “such places and persons are under the direct jurisdiction of a governmental agency or licensed forensic alcohol laboratory.”

“Breath alcohol analysis” performed by people other than “laboratory personnel” is limited by section 1221.1 to “the immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed,” precisely the type of analysis performed by law enforcement officers with PAS instruments during DUI investigations.

“Breath alcohol analysis” performed by people other than “laboratory personnel” is limited by section 1221.4(a)(5) to persons who have completed the training described in section 1221.4(a)(3) and who “may be called upon to operate a breath testing instrument in the performance of his duties.”

Title 17 thus allows for law enforcement officers to conduct breath testing when: (1) they have received training on how to conduct the test; (2) conducting the test is within the scope of their duties; and (3) they use an instrument that performs an immediate analysis of the subject’s breath.
D. Title 17’s Regulations Relating to Breath Testing

Article 5 (“Collection and Handling of Samples”) sets forth the following regulations that apply to breath testing, including field breath testing:

1. A breath sample shall be expired breath which is essentially alveolar in composition. (Cal. Code Regs., tit. 17, § 1219.3.)

2. The quantity of the breath sample shall be established by direct volumetric measurement. (Cal. Code Regs., tit. 17, § 1219.3.)

3. The breath sample shall be collected only after the subject has been under continuous observation for at least 15 minutes prior to the collection of the breath sample, during which time the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked. (Cal. Code Regs., tit. 17, § 1219.3.)

Article 6 (“Methods of Forensic Alcohol Analysis”) sets forth the following regulations that apply to breath testing, including field breath testing, (pursuant to section 1221.1(b)(2)):

1. Analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 milliliters of blood. (Cal. Code Regs., tit. 17, § 1220.4(a).)

2. Analytical results shall be reported to the second decimal place, deleting the digit in the third decimal place when it is present. (Cal. Code Regs., tit. 17, § 1220.4(b).)

3. A breath alcohol concentration shall be converted to an equivalent blood-alcohol concentration by a calculation based on the relationship: the amount of alcohol in 2,100 milliliters of alveolar breath is equivalent to the amount of alcohol in one milliliter of blood. (Cal. Code Regs., tit. 17, § 1220.4(f).)

Article 7 (“Requirements for Breath Alcohol Analysis”) sets forth the following regulations that apply to breath testing, including field breath testing:

1. Breath alcohol analysis shall be performed only with instruments and related accessories which meet the standards of performance set forth in Title 17. (Cal. Code Regs., tit. 17, § 1221.1(a).)

2. The instruments referred to in item (1) above may be used for the analysis of breath samples in places other than licensed forensic alcohol laboratories and by persons other than forensic alcohol supervisors, forensic alcohol analysts, and forensic alcohol analyst trainees only if such places and persons are under the direct jurisdiction of a governmental agency or a licensed forensic alcohol laboratory. (Cal. Code Regs., tit. 17, § 1221.1(b).)

3. Breath alcohol analysis by persons other than forensic alcohol supervisors, forensic alcohol analysts, and forensic alcohol analyst trainees shall be restricted to the immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the
measurement of alcohol concentration is performed. (Cal. Code Regs., tit. 17, § 1221.1(b)(1).)

4. Breath testing instruments shall be tested by the U.S. Department of Transportation and be capable of conforming to the “Model Specification for Evidential Breath Testing Devices” of the National Highway Traffic and Safety Administration. (Cal. Code Regs., tit. 17, § 1221.2(a)(1) & (b).)

5. Breath testing instruments shall be named on the “Conforming Products List” published in the Federal Register by the National Highway Traffic and Safety Administration. (Cal. Code Regs., tit. 17, § 1221.3.)

6. For each person tested, breath alcohol analysis shall include analysis of two separate breath samples which result in determinations of blood-alcohol concentrations that do not differ from each other by more than .02 grams per 100 milliliters. (Cal. Code Regs., tit. 17, § 1221.4(a)(1).)

7. Breath testing instruments shall be checked for accuracy with a reference sample of known alcohol concentration from a forensic alcohol laboratory to within plus or minus .01 grams of the true value of the reference sample. (Cal. Code Regs., tit. 17, § 1221.4(a)(2)(A).)

8. Breath testing instruments shall be checked for accuracy at least every 10 calendar days or after testing 150 subjects, whichever comes first. (Cal. Code Regs., tit. 17, § 1221.4(a)(2)(B).)

9. Operators of breath testing instruments (i.e., law enforcement officers) shall have received training in the use of the instruments, including the theory of operation, detailed procedure of operation, practical experience, precautionary checklist, and written and/or practical examination. (Cal. Code Regs., tit. 17, § 1221.4(a)(3).)

10. The training referred to in item (9) above shall be under the supervision of persons who qualify as forensic alcohol supervisors, forensic alcohol analysts or forensic alcohol analyst trainees. (Cal. Code Regs., tit. 17, § 1221.4(a)(4).)

11. Operators of breath testing instruments shall be either forensic alcohol supervisors, forensic alcohol analysts, or forensic alcohol analyst trainees or people who have successfully completed the training in item (9) above and who may be called upon to operate a breath-testing instrument in the performance of his or her duties. (Cal. Code Regs., tit. 17, § 1221.4(a)(5).)

12. Records shall be kept for each instrument to show the frequency of accuracy checks and the identity of the person performing the accuracy checks. (Cal. Code Regs., tit. 17, § 1221.4(a)(6).)

13. The records referred to in item (12) above shall be kept at a licensed forensic alcohol laboratory showing compliance with section 1221.4. (Cal. Code Regs., tit. 17, § 1221.4(a)(6)(A).)
Article 8 ("Records") sets forth the following regulations that apply to breath testing, including field breath testing:

1. Law enforcement agencies shall maintain records that clearly represent their activities covered by Title 17. (Cal. Code Regs., tit. 17, § 1222.)

2. The records referred to in item (1) above shall be available for inspection by the Department of Health on request. (Cal. Code Regs., tit. 17, § 1222.)

3. Law enforcement agencies shall keep records for breath testing instruments under their jurisdiction that reflect accuracy checks, analyses performed, results and identities of the persons performing analyses. (Cal. Code Regs., tit. 17, § 1222.2(a)(1)&(2).)

4. Law enforcement agencies shall keep at the location of each instrument the precautionary checklist to be used by operators. (Cal. Code Regs., tit. 17, § 1222.2(a)(3).)

IV. Sample Direct Examination of Arresting Officer

*Note*: Some, but not all, of Title 17’s requirements for PAS tests are covered in the following sample examination. Prosecutors should review the facts and issues specific to each case and formulate questions from relevant Title 17 requirements.

The language “[PAS INSTRUMENT]” in the following script should be replaced by the trial attorney with the actual name of the instrument used. For example, if the instrument was an Alco-Sensor IV, the language “[PAS INSTRUMENT]” should be replaced with “ALCO-SENSOR IV.”

A. Training and Experience

1. ARE YOU FAMILIAR WITH THE PRELIMINARY ALCOHOL SCREENING INSTRUMENT KNOWN AS THE [PAS INSTRUMENT] MANUFACTURED BY ________________?

   YOUR HONOR, I AM HOLDING A PHOTO OF THE [PAS INSTRUMENT]. IT HAS BEEN PREVIOUSLY SHOWN TO THE DEFENSE. MAY IT BE MARKED AS PEOPLE’S EXHIBIT NUMBER ___ FOR IDENTIFICATION? MAY I APPROACH THE WITNESS?

2. SHOWING YOU PEOPLE’S EXHIBIT NUMBER ____, DO YOU RECOGNIZE IT?

3. WHAT IS IT?

4. HOW DO YOU KNOW THAT?

   YOUR HONOR, MAY I POST PEOPLE’S EXHIBIT NUMBER ___ ON THE BOARD?

5. HAVE YOU BEEN TRAINED ON HOW TO USE THE [PAS INSTRUMENT]?
6. PLEASE DESCRIBE YOUR TRAINING.

7. DID YOUR TRAINING INCLUDE THE THEORY BEHIND HOW THE [PAS INSTRUMENT] WORKS?

8. DID YOUR TRAINING INCLUDE HOW TO OPERATE THE [PAS INSTRUMENT]? 

9. DID YOUR TRAINING INCLUDE PRACTICING HOW TO USE THE [PAS INSTRUMENT]? 

10. DID YOUR TRAINING INCLUDE THE USE OF A PROCEDURAL CHECKLIST?

11. DID YOUR TRAINING INCLUDE A WRITTEN OR PRACTICAL EXAMINATION?

12. IS THE PAS TEST ONE OF THE FIELD SOBRIETY TESTS APPROVED BY YOUR AGENCY?

13. HOW MANY TIMES HAVE YOU ADMINISTERED A PAS TEST?

14. HOW SHOULD A PAS TEST BE ADMINISTERED TO A PERSON IN THE FIELD?

B. PAS Instrument Foundation

1. DID YOU HAVE A PAS INSTRUMENT WITH YOU ON THE DATE YOU ARRESTED THE DEFENDANT?

2. DID IT BELONG TO YOUR AGENCY?

3. WHAT WAS ITS SERIAL NUMBER?

4. ARE PAS INSTRUMENTS “SIGNED OUT” AT THE START OF A SHIFT?

5. WHAT DOES THAT MEAN?

6. DID THE PAS INSTRUMENT APPEAR TO YOU TO BE IN PROPER WORKING ORDER?

7. HOW SO?

8. DID YOU ADMINISTER A PAS TEST TO THE DEFENDANT ON [DATE OF TEST] USING INSTRUMENT NUMBER ___?

9. AT THE END OF YOUR SHIFT, WHEN THE PAS INSTRUMENT WAS RETURNED, WAS THE NUMBER OF TIMES IT HAD BEEN USED DURING YOUR SHIFT RECORDED?
C. PAS Admonition

1. PRIOR TO ADMINISTERING THE TEST, DID YOU INFORM THE DEFENDANT THAT YOU WERE REQUESTING HIM [HER] TO TAKE THE TEST TO ASSIST YOU IN DETERMINING IF HE [SHE] WAS UNDER THE INFLUENCE OF ALCOHOL OR DRUGS OR A COMBINATION THEREOF?

2. PRIOR TO ADMINISTERING THE TEST, DID YOU INFORM THE DEFENDANT THAT TAKING THE PAS TEST WOULD NOT SATISFY HIS [HER] OBLIGATION TO TAKE A CHEMICAL TEST IN THE EVENT THAT HE [SHE] WAS ARRESTED FOR DUI?

3. PRIOR TO ADMINISTERING THE TEST, DID YOU INFORM THE DEFENDANT THAT HE [SHE] HAD A RIGHT TO REFUSE TO TAKE IT?

4. DID THE DEFENDANT AGREE TO TAKE THE PAS TEST?

D. Pre-Test 15-Minute Observation Period

1. ARE YOU FAMILIAR WITH THE PRETEST 15-MINUTE CONTINUOUS OBSERVATION PERIOD REQUIRED BY TITLE 17 OF THE CALIFORNIA CODE OF REGULATIONS?

2. DID YOU CONTINUOUSLY OBSERVE THE DEFENDANT FOR 15 MINUTES BEFORE THE PAS TEST?

3. AT WHAT TIME DID YOU GIVE THE PAS TEST TO THE DEFENDANT?

4. AT WHAT TIME DID YOU BEGIN THE 15-MINUTE OBSERVATION PERIOD?

5. DURING THE 15 MINUTES, DID THE DEFENDANT EAT ANYTHING?

6. DURING THE 15 MINUTES, DID THE DEFENDANT DRINK ANYTHING?

7. DURING THE 15 MINUTES, DID THE DEFENDANT SMOKE ANYTHING?

8. DURING THE 15 MINUTES, DID THE DEFENDANT VOMIT?

9. DURING THE 15 MINUTES, DID THE DEFENDANT REGURGITATE?

10. AS FAR AS YOU COULD OBSERVE, WAS THE DEFENDANT'S MOUTH EMPTY AT THE TIME YOU ADMINISTERED THE PAS TEST?

E. The Tests

1. WHAT WAS THE TEMPERATURE OF THE PAS INSTRUMENT AT THE TIME OF THE TEST?
2. DID YOU USE A NEW, SEALED MOUTHPIECE FOR THE TEST?

3. HOW MANY TIMES DID THE DEFENDANT BLOW INTO THE PAS INSTRUMENT?

4. WHAT TIME WAS IT WHEN THE DEFENDANT GAVE THE FIRST BREATH SAMPLE?

5. WHAT TIME WAS IT WHEN THE DEFENDANT GAVE THE SECOND BREATH SAMPLE?

6. PLEASE DESCRIBE THE STEPS YOU TOOK IN ADMINISTERING THE PAS TEST TO THE DEFENDANT.

7. DID THE PAS INSTRUMENT AUTOMATICALLY SAMPLE THE DEFENDANT’S BREATH SAMPLES, OR DID YOU MANUALLY ENGAGE THE SAMPLING?

8. PLEASE EXPLAIN.

F. The Results

1. WHAT DID THE PAS INSTRUMENT REPORT FOR THE FIRST BREATH SAMPLE?

2. WHAT DID THE PAS INSTRUMENT REPORT FOR THE SECOND BREATH SAMPLE?

3. DID YOU RECORD THE TEST RESULTS?

4. WHERE WERE THEY RECORDED?

5. WHAT HAPPENED NEXT?

[Resume direct examination of the officer.]

V. Sample Direct Examination of PAS Foundation/Expert Witness

Note: Some, but not all, of Title 17’s requirements for PAS tests are covered in the following sample examination. Prosecutors should review the facts and issues specific to each case and formulate questions from relevant Title 17 requirements.

The language “[PAS INSTRUMENT]” in the following script should be replaced by the trial attorney with the actual name of the instrument used. For example, if the instrument was an Alco-Sensor IV, the language “[PAS INSTRUMENT]” should be replaced with “ALCO-SENSOR IV.”
A. Training and Experience

1. WHERE DO YOU WORK?
2. HOW LONG HAVE YOU WORKED THERE?
3. WHAT IS YOUR CURRENT ASSIGNMENT?
4. HOW LONG HAVE YOU BEEN A PAS COORDINATOR?
5. WHAT ARE YOUR DUTIES AS A PAS COORDINATOR?
6. DID YOU RECEIVE SPECIAL TRAINING TO BECOME A PAS COORDINATOR?
7. Please describe that training.
8. HOW MANY TIMES HAVE YOU ADMINISTERED A PAS TEST?
9. HAVE YOU TRAINED OTHER LAW ENFORCEMENT OFFICERS ON HOW TO ADMINISTER PAS TESTS?

B. Title 17

1. ARE YOU FAMILIAR WITH TITLE 17 OF THE CALIFORNIA CODE OF REGULATIONS?
2. WHAT IS IT?
3. DID YOU RECEIVE SPECIAL TRAINING ABOUT TITLE 17?
4. HOW DOES TITLE 17 AFFECT YOUR JOB AS A PAS COORDINATOR?

C. Prior Testimony

1. HAVE YOU PREVIOUSLY TESTIFIED IN COURT ABOUT THE OPERATION OF PAS INSTRUMENTS?
2. HOW MANY TIMES?
3. IS TESTIFYING ABOUT PAS INSTRUMENTS A PART OF YOUR JOB AS A PAS COORDINATOR?

D. Accuracy

1. ARE YOU FAMILIAR WITH THE [PAS INSTRUMENT]?
2. WERE YOU TRAINED HOW TO USE IT?
3. WERE YOU TRAINED HOW TO CHECK IT FOR ACCURACY?

4. WERE YOU TRAINED HOW TO CALIBRATE IT?

5. PLEASE DESCRIBE THAT TRAINING.

6. DOES THE [PAS INSTRUMENT] HAVE AN OPERATOR’S MANUAL?

7. HAVE YOU REVIEWED THAT MANUAL?

8. DOES THE [PAS INSTRUMENT] USE FUEL-CELL TECHNOLOGY TO MEASURE THE CONCENTRATION OF ALCOHOL IN A BREATH SAMPLE?

9. BRIEFLY DESCRIBE HOW FUEL-CELL TECHNOLOGY MEASURES ALCOHOL CONCENTRATION IN A BREATH SAMPLE.

10. IS FUEL-CELL TECHNOLOGY SPECIFIC TO ALCOHOL?

11. WHAT DOES THAT MEAN?

12. DOES THE [PAS INSTRUMENT] USE THE “GRAMS OF ALCOHOL PER 210 LITERS OF BREATH” STANDARD OF MEASUREMENT REQUIRED BY LAW?

13. BASED ON YOUR TRAINING AND EXPERIENCE, IS A PROPERLY CALIBRATED [PAS INSTRUMENT] A RELIABLE INSTRUMENT FOR MEASURING THE ALCOHOL CONCENTRATION IN A BREATH SAMPLE?

14. BASED ON YOUR TRAINING AND EXPERIENCE, IS A PROPERLY CALIBRATED [PAS INSTRUMENT] AN ACCURATE INSTRUMENT FOR MEASURING THE ALCOHOL CONCENTRATION IN A BREATH SAMPLE?

15. IS A PROPERLY CALIBRATED [PAS INSTRUMENT] GENERALLY ACCEPTED IN THE LAW ENFORCEMENT COMMUNITY AS AN ACCURATE AND RELIABLE INSTRUMENT FOR MEASURING THE ALCOHOL CONCENTRATION IN A BREATH SAMPLE?

16. ARE YOU FAMILIAR WITH TITLE 17’S PLUS OR MINUS .01 REQUIREMENT FOR ACCURACY?

17. WHAT DOES IT MEAN FOR A BREATH TESTING INSTRUMENT TO BE ACCURATE WITHIN PLUS OR MINUS 0.01?

18. IS THE [PAS INSTRUMENT] ACCURATE WITHIN THE PLUS OR MINUS .01 REQUIRED BY TITLE 17?

20. WHAT DOES IT MEAN TO BE ON THAT LIST?

21. IS THE [PAS INSTRUMENT] ON THAT LIST?

22. HOW ACCURATE IS THE [PAS INSTRUMENT]?

E. Print Capabilities

1. DOES THE [PAS INSTRUMENT] STORE INFORMATION REGARDING THE TESTS IT HAS PERFORMED?

2. DOES THE [PAS INSTRUMENT] HAVE THE ABILITY TO PRINT THAT INFORMATION?

3. IS CERTAIN EQUIPMENT NECESSARY TO PRINT OUT THAT INFORMATION?

4. DOES YOUR DIVISION HAVE THAT EQUIPMENT?

5. [IF NO] WHY NOT, IF YOU KNOW?
   [Continue with Section F—Temperature Range]


7. DID YOU BRING THE PRINTOUT TO COURT?

YOUR HONOR, I AM HOLDING A DOCUMENT ENTITLED [PAS PRINTOUT]. IT WAS PREVIOUSLY SHOWN TO COUNSEL. MAY IT BE MARKED AS PEOPLE’S EXHIBIT NUMBER ___ FOR IDENTIFICATION? MAY I APPROACH THE WITNESS?

8. SHOWING YOU PEOPLE’S EXHIBIT NUMBER ___, DO YOU RECOGNIZE IT?

9. WHAT IS IT?

F. Temperature Range

1. DOES THE PAS INSTRUMENT HAVE A TEMPERATURE RANGE FOR OPERATION?

2. WHAT IS IT?
3. WILL THE PAS INSTRUMENT CONDUCT A TEST IF THE TEMPERATURE IS OUTSIDE OF THE RANGE?

4. IF THE TEMPERATURE IS OUTSIDE OF THE RANGE, WHAT HAPPENS?

G. Essentially Alveolar Air

1. ARE YOU FAMILIAR WITH TITLE 17'S REQUIREMENT THAT THE BREATH SAMPLE TESTED MUST BE “ESSENTIALLY ALVEOLAR AIR?”

2. WHAT IS “ESSENTIALLY ALVEOLAR AIR?”

3. WHY IS IT IMPORTANT TO MEASURE “ESSENTIALLY ALVEOLAR AIR?”

4. ARE YOU FAMILIAR WITH THE “FLOW THERMISTER” IN THE [PAS INSTRUMENT]?

5. WHAT DOES IT DO?

6. DOES THE [PAS INSTRUMENT] TEST “ESSENTIALLY ALVEOLAR AIR?”

7. HOW DOES IT DO THAT?

H. Mouth Alcohol

1. ARE YOU FAMILIAR WITH THE TERM “MOUTH ALCOHOL?”

2. WHAT IS “MOUTH ALCOHOL?”

3. WHAT CAN CAUSE “MOUTH ALCOHOL?”

4. ARE YOU FAMILIAR WITH TITLE 17’S 15-MINUTE OBSERVATION PERIOD?

5. WHY IS IT IMPORTANT THAT DURING THE 15 MINUTES PRIOR TO A BREATH TEST THAT THE SUBJECT OF THE TEST NOT DRINK?

6. WHY IS IT IMPORTANT THAT DURING THE 15 MINUTES PRIOR TO A BREATH TEST THAT THE SUBJECT OF THE TEST NOT REGURGITATE OR VOMIT?

7. WHY IS IT IMPORTANT THAT DURING THE 15 MINUTES PRIOR TO A BREATH TEST THAT THE SUBJECT OF THE TEST NOT EAT OR SMOKE?

8. DOES COMPLIANCE WITH THE 15-MINUTE OBSERVATION PERIOD HELP ASSURE THAT THE TEST RESULT IS NOT BASED ON MOUTH ALCOHOL?

9. PLEASE EXPLAIN.
10. ARE YOU FAMILIAR WITH TITLE 17’S REQUIREMENT OF TWO SEPARATE BREATH SAMPLES?

11. ARE YOU FAMILIAR WITH TITLE 17’S REQUIREMENT THAT THE RESULTS OF THE TWO BREATH SAMPLES MUST BE WITHIN 0.02 OF EACH OTHER?

12. DOES TITLE 17’S REQUIREMENT OF TWO BREATH SAMPLES WITHIN 0.02 OF EACH OTHER HELP ASSURE THAT THE TEST RESULTS ARE NOT BASED ON MOUTH ALCOHOL?

13. PLEASE EXPLAIN.

I. Radio Frequency Interference

1. ARE YOU FAMILIAR WITH THE TERM “RADIO FREQUENCY INTERFERENCE”— ALSO KNOWN AS “RFI”?

2. WHAT IS “RFI”?

3. DOES THE [PAS INSTRUMENT] HAVE AN RFI DETECTOR?

4. IF THE [PAS INSTRUMENT] DETECTS RFI, WHAT HAPPENS? [The test will be terminated and display the letters “RFI.” No test result is displayed.]

J. Sample Variation

1. ARE YOU FAMILIAR WITH THE TERM “SAMPLE VARIATION”?

2. WHAT DOES IT MEAN?

3. IN PARTICULAR, WHAT DOES “SAMPLE VARIATION” MEAN IN THE CONTEXT OF BREATH TESTING?

K. PAS Test Steps

1. WHAT STEPS SHOULD AN OFFICER FOLLOW TO PROPERLY ADMINISTER A PAS TEST USING THE [PAS INSTRUMENT]?

L. Accuracy Checks and Calibration

1. DOES YOUR AGENCY USE THE [PAS INSTRUMENT] MANUFACTURED BY [PAS MANUFACTURER]? 

2. IS [PAS INSTRUMENT] SERIAL NUMBER ___ ONE OF YOUR AGENCY’S PAS INSTRUMENTS?
3. DOES YOUR AGENCY PERFORM ACCURACY CHECKS AND CALIBRATE ITS PAS INSTRUMENTS?

4. ARE YOU ONE OF THE PEOPLE RESPONSIBLE FOR PERFORMING ACCURACY CHECKS AND CALIBRATING PAS INSTRUMENTS AT YOUR AGENCY?

5. ARE YOU FAMILIAR WITH THE TERM “SIMULATOR SOLUTION?”

6. IS IT USED TO CHECK FOR ACCURACY AND CALIBRATION?

7. HOW DOES YOUR AGENCY CHECK ACCURACY AND CALIBRATE THE [PAS INSTRUMENT]? [The officer will mention the term “simulator solution” in explaining how the PAS instrument is tested.]

8. WHERE ARE THE SIMULATOR SOLUTIONS FROM?

9. HOW DO YOU KNOW THAT THE SIMULATOR SOLUTIONS ARE RELIABLE?

10. ARE YOU A CUSTODIAN OF THE ACCURACY CHECK AND CALIBRATION RECORDS FOR [PAS INSTRUMENT] SERIAL NUMBER ___?

11. DID YOU BRING WITH YOU TO COURT THE ACCURACY CHECK AND CALIBRATION RECORDS FOR [PAS INSTRUMENT] SERIAL NUMBER ___ FOR [DATE OF USE OF PAS INSTRUMENT]?

    YOUR HONOR, I AM HOLDING A DOCUMENT ENTITLED [“PAS ACCURACY-CHECK AND CALIBRATION LOG”]. IT WAS PREVIOUSLY SHOWN TO THE DEFENSE. MAY IT BE MARKED AS PEOPLE’S EXHIBIT NUMBER ___ FOR IDENTIFICATION? MAY I APPROACH THE WITNESS?

12. SHOWING YOU PEOPLE’S EXHIBIT NUMBER ___, DO YOU RECOGNIZE IT?

13. WHAT IS IT?

14. ARE YOU A CUSTODIAN OF THIS RECORD?

15. WHO PREPARED IT?

16. ARE THEY PUBLIC EMPLOYEES?

17. IS EXHIBIT NUMBER ___ PREPARED AS A PART OF THEIR JOB?

18. IS IT PREPARED IN THE REGULAR COURSE OF BUSINESS?
19. ARE THE ENTRIES ON IT MADE AT OR NEAR THE TIME OF THE ACCURACY TEST?

20. HOW IS EXHIBIT NUMBER ___ PREPARED?

21. WHAT IS THE DATE OF THE ACCURACY TEST JUST PRIOR TO [DATE OF DEFENDANT'S TEST]?

22. WHAT WAS THE RESULT OF THAT ACCURACY TEST?

23. WHAT IS THE DATE OF THE ACCURACY TEST JUST AFTER [DATE OF DEFENDANT'S TEST]?

24. WHAT WAS THE RESULT OF THAT ACCURACY TEST?

25. ARE YOU FAMILIAR WITH TITLE 17'S REQUIREMENT THAT INSTRUMENTS BE CHECKED FOR ACCURACY EVERY 10 CALENDAR DAYS OR 150 SUBJECTS, WHICHEVER COMES FIRST?

26. WHAT DOES THAT MEAN—“WHICHEVER COMES FIRST?”

27. ON [DATE OF DEFENDANT’S TEST] WAS [PAS INSTRUMENT] SERIAL NUMBER ___ IN COMPLIANCE WITH TITLE 17’S ACCURACY TEST REQUIREMENTS?

28. BASED ON YOUR TRAINING AND EXPERIENCE, AND THE REQUIREMENTS OF TITLE 17, WAS [PAS INSTRUMENT] SERIAL NUMBER ___ WORKING ACCURATELY AS OF [DATE OF DEFENDANT'S TEST]?

29. HOW DO YOU KNOW THAT?

   NO FURTHER QUESTIONS, YOUR HONOR.

Michael Schwartz has served as a criminal prosecutor for the City of Los Angeles since 1993, where he currently works as a Deputy City Attorney in charge of training. Prior to joining the City Attorney’s Office, he worked as a civil litigator for the law firm of Morrison & Foerster.

Mr. Schwartz received a Bachelor of Arts degree with Magna Cum Laude distinction from the University of California at Los Angeles. He earned a Juris Doctor degree from the UCLA School of Law.

Since 1998, Mr. Schwartz has been an instructor for the Los Angeles County Bar Association’s “TAP Program,” where civil attorneys learn how to try criminal cases and then serve as pro bono prosecutors in prosecuting agencies throughout California.

Chapter updated in 2010 by David Radford, TSRP: Dave Radford began his law enforcement career in police service. Serving as a City of Pleasanton police officer for 24 years, he achieved the rank of captain and worked various assignments including patrol, traffic, SWAT, and narcotics. From 1993–2003, he served as a Drug Recognition Expert (DRE) and DRE Instructor for the California Highway Patrol, holding the title of DRE Emeritus. In his police career he made or assisted in 1,500 arrests/DRE exams. Earning his JD from John F. Kennedy School of Law, Mr. Radford retired from police service in 2003 and became a deputy district attorney in Tuoloume County, and later in Stanislaus County. As CalTSRP for the 27-county Northern Region, he is based in Solano County.
Chapter XII

The Admissibility of Blood-Alcohol Evidence

by Ian Morse Deputy District attorney
Ventura County District Attorney’s Office

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(Updated 2010 by G. Stewart Hicks, TSRP, Central Valley)

I. The Importance of Blood-Alcohol Evidence

The defendant’s blood-alcohol concentration (BAC) is the most important piece of evidence in a driving-under-the-influence (DUI) prosecution. BAC evidence is crucial to proving Vehicle Code section 23152(b)—that the defendant’s BAC was greater than 0.08 percent at the time of driving. BAC evidence also allows the use of a presumption, under Vehicle Code section 23160(a)(3) and CALCRIM 2110 and 2111, in proving that the defendant was impaired at the time of driving.

This chapter discusses the types of BAC evidence and explain the basic foundational requirements for the admission of this evidence. It also describes and offers solutions to many of the common challenges and evidentiary hurdles a prosecutor may encounter when dealing with BAC evidence.

II. Types of Evidence

In DUI cases, the prosecutor will generally have some evidence of the defendant’s BAC. The two most common forms are breath tests and blood tests administered after a DUI arrest. It is still possible, however, to have a urine test. It is also possible to have a case with no post-arrest chemical test or with no test at all.

A. Breath

The most common BAC evidence comes from a breath test.¹ Breath tests require a defendant to blow into an instrument that captures his or her breath sample and automatically analyzes its alcohol content in a matter of seconds. This allows the suspect, the officer, and the prosecutor to know the defendant’s BAC without waiting for analysis from a lab. Breath tests are also easy for

¹ Such tests are often loosely referred to as “Breathalyzer” tests. “Breathalyzer” is a brand of breath-testing instrument, and this term should not be used unless this is the type of instrument used in your case. Another common brand of breath-testing equipment is “Intoxilyzer.”
officers to give. Most officers are trained in the theory and proper operation of these instruments, and most administer the tests themselves.

The most common instrument today is the Preliminary Alcohol Screening (PAS) device. Most officers have these devices in their vehicles. The evidentiary version of the PAS device (the EPAS), which prints out the results, is readily available at all police departments and any other facility where a suspect might be booked. Breath tests are often preferable to blood tests because (1) results can be obtained more quickly than blood tests, (2) they do not involve a needle, and (3) they yield an instant result. The only drawback, and a significant one, is that breath-testing instruments do not retain a portion of the sample for possible retesting.

B. Blood

The other common type of test prosecutors will encounter is a blood test. This involves taking the suspect to a hospital (or sometimes the jail or booking facility), where a qualified technician will draw a sample of the suspect’s blood. The sample is then transported to a lab for analysis. The lab uses an instrument, usually a gas chromatograph, to test the blood. The difficulty with blood tests is that the results are not immediately available to the officer (to assist in arrest or detention decisions) or to the prosecutor (to assist with in-custody filing decisions). Unlike breath tests, however, blood samples can be tested for drugs as well as alcohol. Also, a portion of a blood sample can be retained for further testing or retesting by the prosecution and/or testing by the defense.

C. Urine

Since changes to the California Vehicle Code in 1999, urine tests are no longer among the choices given to suspects arrested for DUI. But sometimes a prosecutor may only have urine-test evidence (e.g., when blood and breath are not available). Sections 1219.2 and 1220.4(e) of Title 17 (California Code of Regulations) lay out the procedures for urine testing. Failure to follow these guidelines does not render the results inadmissible. Non-compliance with Title 17 admissibility requirements merely goes to the weight of the evidence, not admissibility. (See People v. Adams (1976) 59 Cal.App.3d 559, 567.)

D. Absence of Post-Arrest Blood or Breath Test

Occasionally, prosecutors will not have post-arrest blood- or breath-test evidence as defined in the Vehicle Code. Nevertheless, there are other options available to prove your case.

1. Preliminary Alcohol Screening (PAS)

A preliminary alcohol screening, or PAS, test is a roadside breath test, often given by officers to assist in arrest decisions. Assuming the officer gave a PAS test and the proper foundation can be laid (see Chapter XI, “Field Breath Testing—The PAS Test”), the PAS result is admissible to prove both the presence of alcohol and that the defendant was under the influence. (People v. Bury (1996) 41 Cal.App.4th 1194.) In Bury, the defendant gave two PAS blows of 0.17 percent. After arrest, the defendant refused to give a post-arrest chemical sample. At trial, the prosecution introduced the 0.17 percent results as evidence
of the defendant’s impairment. The jury was instructed that it could consider the PAS test results in determining whether the defendant’s BAC was greater than 0.08 percent, thereby allowing the use of the inference instruction (as found in CALCRIM 2110 and 2111) that the defendant was impaired.

Although prosecutors in Bury only charged Vehicle Code section 23152(a), the PAS is excellent circumstantial evidence of the defendant’s blood-alcohol level and is admissible to prove section 23152(b) as well. Even if the PAS numerical results are ruled inadmissible (which should not happen, based on the results in Bury), an arresting officer and an expert may rely on the numbers in forming an opinion as to the defendant’s impairment. If it is clear to the jury that the device gives a reliable numerical readout, and an officer or expert considered this in forming the opinion that the defendant’s BAC was higher than 0.08 percent, the jury will likely understand that the number was greater than 0.08 percent.

2. **Refusal Cases**

A prosecutor may be without BAC evidence because the suspect refused to give a sample. In refusal cases, officers often have administered a PAS test at the roadside. Arguing that the PAS numbers should be received is especially persuasive in refusal cases because the suspect kept a chemical test from being completed. The same argument for the PAS numbers can be made where the defendant delayed in choosing a test, gave poor breath samples, or did anything to hinder a prompt and accurate determination of his or her BAC. (For additional information regarding refusal cases, see Chapter III, “Legal Considerations When Prosecuting Refusals”.)

3. **Collision Cases**

In cases involving serious collisions, the officer’s primary concern is with saving the lives of the suspects or others injured in the crash. Often, suspects are too injured to participate in the performance of the standardized field sobriety tests (FSTs). Occasionally, a PAS test will be given to a DUI suspect on a stretcher at the crash scene or in a hospital room. Assuming the proper foundation has been laid, the PAS numbers are admissible pursuant to Bury.

There are rare instances where the only evidence of the suspect’s BAC available to the prosecutor is the result of a hospital blood test. Most persons admitted to an emergency room after a collision will have a blood test completed by the hospital in order to determine blood type as well as the presence of any drugs or alcohol that might interfere with treatment. While these tests do not comply with the regulations of Title 17, the results of these tests may be made admissible if the proper foundation is laid. (See Section III, E. Hospital Blood Analysis, infra.)

E. **Absence of BAC Evidence**

There are a number of circumstances where the prosecutor may be without BAC evidence. This may, for example, be the result of: evidence having been excluded before or during trial; a lost

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2. CDAA has a brief bank with an excellent brief on this issue.
blood sample; the suspect’s refusal to give a sample; no sample taken (i.e., a serious crash); or, at
the outset, DUI may not have been the primary crime being investigated. These are just a few
examples from a host of other reasons. While having no BAC evidence will likely prevent a
prosecutor from proceeding under Vehicle Code section 23152(b), one may choose to proceed
under section 23152(a). Remember, officers are trained to make arrest decisions based on driving
patterns, objective symptoms of impairment, FSTs, and admissions. These observations are
independent of any chemical test results and should not deter a prosecutor from going forward
with the evidence at hand.

III. Foundation for Blood and Breath Tests

Perhaps the most terrifying moment for a new prosecutor is to ask the key question: “Officer,
what were the results of the breath test you gave to the defendant?” And then to hear: “Objection;
foundation.” And: “Sustained.”

To get past this fear, a prosecutor needs a thorough understanding of what foundation is required in
order to overcome the objection—and how to get help from the judge and defense counsel.

Foundation is simply a preliminary showing of facts that permits the admissibility of other evidence.
For example, in order for the BAC of a blood sample to be relevant in a DUI case, the necessary
preliminary fact shown would be that the blood came from the defendant. Showing that the sample
belongs to the defendant is the foundational fact that must be shown before the BAC of the sample
will be relevant.

Testimony from both the officer and the criminalist are required in order to lay the foundation
for the admissibility of the result of the breath test. If you choose to put the criminalist on first,
you face the possibility that the judge will rule that there is a lack of foundation regarding certain
hypothetical questions asked of the criminalist. Generally, prior to asking hypothetical questions that
include evidence of the defendant’s drinking pattern, driving pattern, results of the FSTs, and other
observations of defendant’s level of impairment, the officer should offer that evidence. Accordingly,
the better strategy is to put on the officer first. This is what the jury will expect because the officer is
the logical first witness.

A. Admissibility of Blood and Breath Test Results

In order for a blood- or breath-test result to be admissible in a DUI case, certain foundational
requirements must be met to assure that the results are sufficiently reliable for the jury to
consider. Title 17 of the California Code of Regulations (see, Appendix) sets forth in detail the
procedures to be followed for breath or blood testing. However, not all of the requirements listed
in Title 17 must be met in order to have the results admitted into evidence. The seminal case on
the issue, as it relates specifically to breath, is Adams, supra, 59 Cal.App.3d 559. (See also People
v. Williams (2002) 28 Cal.4th 408.)

3. In those situations where the only BAC result you have is a PAS result, this is even more important, because the officer will
testify to the driving pattern, the initial observations of impairment (e.g., odor of alcohol, eyes, gait, speech, etc.) and then the
initial BAC result closest in time to the suspect’s driving.
B. People v. Adams

*Adams* set forth three criteria that must be met for a breath sample to be admissible: “(1) the particular apparatus utilized was in proper working order, (2) the test used was properly administered, and (3) the operator was competent and qualified.” (*Adams*, supra, at 561.) Evidence Code section 351 states, “Except as otherwise provided by statute, all relevant evidence is admissible.” There are no statutes that state that Title 17 violations render blood- or breath-test results inadmissible. On the contrary, the courts have been clear. “Evidence obtained in violation of a statute is not inadmissible per se unless the statutory violation also has a constitutional dimension.” (*Id.* at 566, quoting *People v. Brannon* (1973) 32 Cal.App.3d 971, 975.) The key holding in *Adams* is that once the three-prong test is met, the BAC evidence is admissible. Violations of Title 17 go only to the weight of the evidence, not the admissibility of the blood or breath evidence. By analogy, the same rationale should hold for all forms of BAC evidence. (For a more recent discussion of the *Adams* issues as they relate specifically to the PAS device, see, *Williams*, supra, 28 Cal.4th 408.)

1. Instrument Working Properly

   For the first prong of *Adams*, a prosecutor only needs to demonstrate that the testing instrument was working properly. This can be satisfied by the officer’s testimony, based on training and prior experience with the breath testing device, that the instrument used in this particular instance worked as expected and appeared to be working properly. In addition, the prosecutor should elicit testimony from the criminalist that the maintenance logs for this instrument were examined, and that the logs indicate that the instrument was working properly (or there is no evidence to suggest that it was not working properly). It should be noted that “once a test has achieved general acceptance in the scientific community, any possibility of error goes to the weight of the evidence and not its admissibility.” (*People v. Perkins* (1981) 126 Cal.App.3d Supp. 12, 19.)

2. Test Properly Administered

   The second *Adams* prong requires that the test be “properly administered.” This is the same standard of scientific reliability noted above. Failing to follow any of the Title 17 procedures, including the 15-minute waiting period, should have no effect on admissibility.

   Proof that the test was properly administered is comprised of three components. First, the officer must testify that the subject was continuously observed for 15 minutes; second, the test was administered as prompted by the instrument; and, finally, the criminalist should examine the printout card and render the opinion that everything appears as it should and that there is nothing to indicate that the test was anything but properly administered.

3. Operator Competent and Qualified

   The final prong of *Adams* demands the operator be “competent and qualified.” This is a standard of scientific reliability, in contrast to “qualified” as defined under Title 17. Expert testimony that the test is reliable, based on the three *Adams* criteria, is all that is required in order to get the results before the jury. Officers’ testimony regarding their certification on the instrument in question should be sufficient to meet the “competent and qualified” standard.
C. Title 17 and Breath Tests

Title 17 of the California Code of Regulations establishes the specific regulations that must be followed for evidentiary blood and breath testing. Title 17 covers such topics as lab licensing, operator training, equipment maintenance, and record keeping. A good working knowledge of Title 17 will benefit any prosecutor. Some of the key sections, as they relate specifically to breath tests, are described below. (The full text of the relevant sections of Title 17 can be found in the Appendix.)

1. Operator Qualified

Those persons who administer a breath test must be properly trained. Training should include the following: theory of operation, detailed procedure of operation, practical experience, precautionary checklist, and a written and/or practical examination. The training should be taught by qualified persons under the direction of a forensic alcohol laboratory. (17 Cal. Code Regs. § 1221.4(a)(3).) While most officers have received this level of training, few officers seem to remember that this topic was included in their training, nor are they ready to describe in depth the “theory of operation.” A review of the officer’s training during the witness interview may refresh the officer’s recollection.

2. 15-Minute Waiting Period

Before a breath test is given, a subject should be under “continuous observation” for 15 minutes in order to ensure that the subject did not consume alcohol, eat or drink, smoke, regurgitate, or vomit (17 Cal. Code Regs. § 1219.3), because these occurrences may bring alcohol or other material into the mouth that could interfere with the breath testing instrument’s ability to obtain an accurate sample of deep-lung air. The primary purpose of this waiting period is to eliminate the possibility of mouth alcohol. If the waiting period in a case is less than 15 minutes, an expert may be able to testify that the repetition of the BAC level in each of the two samples shows no mouth alcohol was present. Because mouth alcohol dissipates very quickly, if two readings are very similar and spaced a few minutes apart, it tends to show no mouth alcohol is present. (As previously noted, failure to adhere closely to this requirement of Title 17 goes only to the weight of the evidence, not to its admissibility.)

3. Two Samples Within 0.02 Percent

Each person tested must provide at least two samples. The sample results must be within 0.02 percent of each other. (17 Cal. Code Regs. § 1221.4(a)(1).) If the first two samples do not yield results within 0.02 percent of each other, additional tests should be given until two results within 0.02 percent of each other are obtained. While some officers may continue to test subjects five or six times to get two good results, a prosecutor needs to be prepared to explain the varying results to the jury. Discuss the defendant’s behavior and quality of the blows with the arresting officer. Often, defendants will try to give inaccurate or insufficient samples or simply are too intoxicated to understand or comply with the officer’s orders. An expert can help explain some common tricks defendants use to give inconsistent samples.
4. Instrument Tested Every 10 Days or 150 Tests

Every breath-testing instrument must be tested for accuracy. These periodic determinations of accuracy (PDOAs) are to be done at least every 10 days or 150 tests, whichever is sooner (17 Cal. Code Regs. § 1221.4(a)(2)(B)). The PDOAs involve testing the instrument with an alcohol solution of known concentration. The known solution should be between 0.10 percent and 0.30 percent and should be provided by a forensic alcohol laboratory. (17 Cal. Code Regs. § 1221.4(a)(2)(A).) Records of these PDOAs must be kept. (17 Cal. Code Regs. § 1221.4(a)(6).) If the person who performed the PDOAs is unavailable to testify, these records are likely business records and may be admissible under Evidence Code section 1271, with the proper foundation by a custodian of records or other qualified witness, to show the instrument’s accuracy. Remember, an expert with no personal knowledge can interpret PDOA records for the jury, and an expert can give an opinion as to the accuracy of the device based on reviewing documents—whether or not the actual documents are admissible. (Evidence Code §§ 801 et seq.)

5. Third Decimal Place

Title 17 requires that BAC results be expressed in terms of grams of alcohol per 100 milliliters of blood. The results should be reported only to two decimal places, deleting the third decimal where present. This means that 0.099 percent and 0.090 percent both become 0.09 percent for Title 17 reporting purposes. In counties served by the California Department of Justice (DOJ), the EPAS is set up in such a fashion that the third digit is not printed. This is because reporting the third digit violates Title 17.

Nevertheless, case law clearly states that the third decimal place is admissible. (People v. Wood (1989) 207 Cal.App.3d Supp. 11, 16-17.) In close cases, the third decimal place can be persuasive evidence to a jury. It can show that PDOAs were within 0.01 percent as required, and it can show that two given tests are much closer than they appear (e.g., 0.08 and a 0.09 may really be 0.089 and 0.090). Accordingly, whenever the third digit is available, an officer should write the third digit in the report.

D. Title 17 and Blood Tests

1. Blood to Be Properly Drawn

Blood should be drawn from a vein, using a sterile, dry needle and collected in a dry vacuum tube. (17 Cal. Code Regs. § 1219(a), (d) While the nurse or technician who drew the blood can testify to these matters, there are often documents that specify who drew the blood, what needles were used, what skin cleaners were used, what time the blood was drawn, and other facts relevant to the trial. Using a subpoena to get these records before trial may alleviate the need to call the phlebotomist (or other qualified witness) to testify. If one does not have the documents subpoenaed, ask the arresting officer if the police agency has copies. The arresting officer can often lay a foundation for these documents and assist the phlebotomist in completing the paperwork. As a last resort, Evidence Code section 664, which presumes that official duties are regularly preformed, can be used to argue that the blood draw was properly performed.
2. **Non-Alcohol-Based Skin Cleaners**

   The skin should be clean where a sample is collected, but no alcohol-based cleaners should be used. Aqueous zephiran or another aqueous cleaner should be used. (17 Cal. Code Regs. § 1219.1(c).) This is a point worth bringing before a jury. The defense will often argue that such an alcohol cleaner will interfere with the result of the analysis. If a prosecutor has a case where alcohol was used to clean before a blood draw, contact an expert who can testify about what possible effects this would have on the BAC results.

3. **Preservatives and Anticoagulants**

   Blood collected for testing should be mixed with a preservative and an anticoagulant. (17 Cal. Code Regs. § 1219.1(e)(2).) This assures the sample will not ferment or dilute before testing. The preservatives are usually powders already placed inside the vacuum tubes by the manufacturer in order to ensure the accuracy of the blood sample.

   The California DOJ provides the blood-test kits used by blood technicians in some counties. DOJ performs random tests on the test kits, and tests for the level of these substances in the selected tubes. The criminalist can testify that they were there in the proper levels. This type of testimony may not be available statewide, but the agency providing the test kits would be a place to look for this kind of evidence.

4. **The Instrument Used for Testing Was in Working Order**

   The instrument used to test the blood sample must be accurate and working properly. Title 17 of the California Code of Regulations section 1220 sets out the standards of performance, standards of procedure, and quality control for blood testing. The witness who testifies regarding the test results will usually be able to testify that the instrument was in proper working order and reliable.

5. **State Licensing**

   A forensic alcohol laboratory must be state licensed to comply with Title 17. The regulations specify all of the requirements and qualifications for such a license. (17 Cal. Code Regs. §§ 1216–1217.) Licensing is rarely an issue. If a defendant has a sample analyzed, however, it is rarely by a Title 17 forensic alcohol laboratory. This may be worth bringing to the attention of your jury.

E. **Hospital Blood Analysis**

   In cases where the only BAC evidence comes from a hospital blood test, prosecutors may encounter some difficult problems. Be prepared to show chain of custody and to lay an Adams-type foundation. (It should be noted that a break in the chain of custody does not render the evidence inadmissible. It goes to the weight of the evidence.) It may seem impossible to identify the human being who conducted the test. This may take some investigation into how blood is moved within the particular hospital. Use business records to show the blood’s movement if needed. Also, be prepared to show that the hospital test was properly performed by someone who
was trained to do the test and that the test was performed on an instrument that was working properly. This may require calling more than one witness from the hospital.

Hospital results may be expressed in a form other than that which is required by Title 17. The hospital may have tested blood serum, which will yield a different result. A prosecutor may need an expert to convert the hospital result into a useful number for the jury.

IV. Motions Pursuant to Evidence Code Sections 400–406

Defendants will often bring foundational objections before or during trial in the form of “402 motions.” These motions ask the court to make a determination about the presence of the necessary foundation or “preliminary fact” that will affect the admissibility of other evidence. A 402 motion refers to Evidence Code section 402, which lays out the procedure for the determination of preliminary facts. Evidence Code sections 403 and 405 actually define the proceedings of a “402 motion.” Understanding the difference between these sections is essential to responding properly to defense objections and motions as well as understanding the impact of a judge’s ruling on your trial.

Motions pursuant to sections 403 and 405 may be brought before trial, on the day of trial, or during trial. Because these motions involve trial issues, any determination made before trial may be revisited by the trial judge. It is common not to get notice of these motions until the day of trial. Some courts will not hear these motions before trial—and render their section 403 or 405 determinations during trial. If a prosecutor has a good-faith belief that the evidence will be admissible, an offer of proof to the judge and defense counsel may persuade the judge to hear the motion with the trial.

A prosecutor should not be bullied by a judge or defense counsel into not mentioning the test results during the opening statement or when questioning an arresting officer merely because the foundation has yet to be laid. A court may admit the numerical results of a test subject to the foundation being laid later in trial. If a court is reluctant to do this, a prosecutor may choose to have a section 403 or 405 hearing to streamline his or her own presentation of evidence to the jury.

A. Section 403—Preliminary Fact Determined by Both Judge and Jury

Motions under section 403 relate to preliminary facts that are initially determined by the judge but may ultimately be decided by the jury in deliberations. The judge’s initial task is to determine preliminarily whether the proffered evidence is both relevant and competent. Assuming the judge rules that there has been a sufficient foundational showing, the related evidence will be admitted. But the court may, and upon request by a party shall, instruct the jury to determine anew the existence of the underlying foundational evidence before accepting the related evidence.

An example of this would be where a witness claimed to be able to see the intersection where the crash occurred. The opponent of this evidence might ask for a section 403 hearing on the issue of whether, under Evidence Code section 702, the witness was in a position actually to see what was claimed. The judge, after a hearing outside the presence of the jury, may rule that based on the foundational evidence introduced, the witness was in a position to have made the proffered observations. Despite the judge’s mid-trial ruling, the issue of whether the witness could see the scene will likely be given to the jury to resolve prior to deciding how much weight the witness’s testimony deserves.
In simple terms, the court initially screens the issue of whether the preliminary fact is present. If so, the judge must admit the evidence, but ultimately, the jury has the option to decide if it believes the preliminary fact has been proven. The jury cannot consider any evidence based on a preliminary fact it finds not to be true.

B. Sections 405/406—Preliminary Fact Determined Exclusively by Judge

Motions under section 405 relate to foundational issues that are exclusively decided by the court and not later visited by the jury. Under section 405, if the judge believes a necessary preliminary fact has been shown, the judge must then admit the evidence.

Examples of preliminary facts decided in a section 405 hearing include whether a witness qualifies as an expert or whether particular evidence meets an exception to the hearsay rule. If a witness qualifies as an expert, the jury will hear the expert’s opinion, and, if a piece of evidence meets a hearsay exception, it will be admitted. In a section 405 hearing, the judge is essentially making a determination that the proffered evidence is sufficiently reliable for the jury to consider. The jury must then decide what weight the evidence will be given. In contrast, in a section 403 hearing, the judge is telling the jury the proffered evidence is adequately sufficient that a jury could find it relevant. Again, the jury will decide if the underlying fact has been shown, if the evidence is in fact relevant, and what weight it should be given.

Even where a judge has admitted evidence under section 405, the opposing party can always present evidence challenging the credibility of the evidence or argue that the evidence should not be given much weight.

C. Examples of Section 403 and 405 Issues

Below are two common examples of section 403 and 405 issues in the DUI context. For a good discussion of section 403 and 405 motions in the DUI context, see Perkins, supra, at 17–20.

1. Chain of Custody: A Section 403 Motion

In order for the BAC of a blood sample to be relevant in a DUI case, it must belong to the defendant. The defense may bring a motion to have the court rule on the preliminary fact of whether the tested blood came from the defendant. This motion would be brought under section 403. If the judge believed there was sufficient evidence that a jury could find the blood belonged to the defendant, the judge must admit the evidence. The court then may instruct the jury that it must determine if the blood is the defendant’s (whether the preliminary fact exists) before it can consider the results.

2. Adams Foundation: A Section 405 Motion

A defense motion challenging the admissibility of blood- or breath-test results is correctly brought as a section 405 motion. In other words, the judge would be asked to decide if the chemical test was sufficiently reliable (the preliminary fact) for the jury to consider the results. Once the judge determines the instrument is sufficiently reliable, the jury will hear the result. Stated another way, once the Adams foundation has been proven to the judge, the jury gets
to hear the results. The defense is then permitted, pursuant to Evidence Code section 406, to introduce evidence tending to show the instrument was not in proper working order or other noncompliance with Title 17 requirements. This defense evidence goes only to the weight the jury should give the test results, not their admissibility.

V. Penal Code Section 1538.5 Motions

Penal Code section 1538.5 allows courts to suppress evidence obtained from an unreasonable search and seizure. However, section 1538.5 does not allow for general pretrial determinations of other evidentiary questions such as admissibility of blood-alcohol evidence. (For a general discussion regarding what may and may not be the subject of a section 1538.5 motion, see People v. Gale (1973) 9 Cal.3d 788, 793.) Miranda motions and Evidence Code section 403 and 405 motions are not properly addressed in a section 1538.5 motion. Moreover, any pretrial ruling on these issues is not binding on a later trial court.

VI. Trombetta/Youngblood Motions

The law does not impose a duty on the prosecution to gather evidence favorable to the defense. (Miller v. Vasquez (9th Cir. 1989) 868 F.2d 1116.) Once evidence is collected, however, the prosecution has a duty to preserve material evidence relevant to guilt or punishment. Motions alleging destruction of evidence are known as Trombetta and/or Youngblood motions. (California v. Trombetta (1984) 467 U.S. 479; Arizona v. Youngblood (1988) 488 U.S. 51.) These motions can lead to the exclusion of prosecution evidence or sanctions against the prosecutor.

These cases require the defense to satisfy a two-prong test before prosecution evidence will be excluded or sanctions imposed. First, the destroyed evidence must be “constitutionally material.” Second, the destruction was done in “bad faith.” (Youngblood, supra, at 61.) Constitutional materiality requires the defense to show: (1) the destroyed evidence possessed an exculpatory value; (2) that exculpatory value was apparent before the evidence was destroyed; and (3) the defense would be unable to obtain comparable evidence by other reasonably available means. (Trombetta, supra, at 488–489.) The mere possibility of exculpatory value is not sufficient. (See discussion in People v. Hardy (1992) 2 Cal.4th 86, 164–165.)

Any DUI case involving a preserved sample is subject to a motion pursuant to Trombetta/Youngblood if the sample is lost, destroyed, or consumed during testing. While these motions are highly fact-specific, many of the common DUI-related issues have been litigated. Some of the most common are listed below.

A. Failure to Advise a Subject of Choice of Tests or Preservation of Sample

Failure to advise a subject of his or her choice of a blood or breath test will not render the results inadmissible. (Vehicle Code § 23162.) Failure to advise that breath tests do not retain a sample for future testing is not a due process violation. (In re Cheryl S. (1987) 189 Cal.App.3d 1240, 1242–1243.)
B. Failure to Preserve Sample for Retesting

The necessary, total consumption of samples during testing does not violate due process. *(People v. Griffin* (1988) 46 Cal.3d 1011, 1021.) Failure to preserve a breath sample is not a due-process violation. *(People v. Mills* (1985) 164 Cal.App.3d 652, 656.)

C. Failure to Preserve Quality-Control Records

Intentional, non-malicious destruction of calibration or repair records of testing instruments is not a due process violation. *(Perkins, supra, at 18.)*

VII. Partition-Ratio Evidence

Historically, a defendant’s level of impairment was measured only in terms of blood-alcohol levels. Breath-test readings were converted into blood-alcohol results. The relationship between blood alcohol and breath alcohol was predicated on a conversion known as the “partition ratio.” The Vehicle Code defined that partition ratio as 2,100:1. In other words, all breath-testing instruments in California are set to equate the amount of blood found in 2,100 milliliters of breath to the amount of alcohol found in one milliliter of blood. This ratio was selected because it approximates the biological ratio for most humans. The forensic sciences community generally agrees that this selected ratio actually favors the person taking a breath test. Therefore, most drinkers whose alcohol is already absorbed will actually record a slightly lower BAC on a breath test than a blood test.

*Note:* During alcohol absorption into the blood, a BAC result will be higher in a breath sample than in a blood sample. This is because it takes alcohol longer to get into the blood than to be reflected in the breath. During this early period of absorption, the breath test more accurately reports the subject’s impairment than does the blood result.

For years, the defense would attack the breath tests, contending that because the partition ratio was an approximation, there could be no certainty as to the accuracy of the defendant’s BAC reading. In 1990, Vehicle Code section 23152(b) was amended to establish separate standards of alcohol measurement for each chemical test.

In *People v. Bransford* (1994) 8 Cal.4th 885, the supreme court ruled that neither testimony nor evidence regarding partition ratios was relevant in a DUI trial. This includes discussion of how a particular defendant’s partition ratio might be different from that in the Vehicle Code or how blood- and breath-alcohol levels might differ during the absorption and elimination of alcohol.

Although every defense alcohol expert knows this evidence is inadmissible, some persist in bringing this evidence before the jury, particularly when opposing inexperienced prosecutors. If a prosecutor believes this may be a defense tactic in a trial, the prosecutor is advised to mention the issue to the judge in limine or at sidebar, and to request that the witness be admonished not to proffer said testimony before it has a chance of reaching the jury.

It must be noted, however, that the *Bransford* decision was decided in the context of the 1990 amendment to the vehicle code that pertained to section 23152(b). The California Supreme Court has not specifically ruled regarding the applicability of *Bransford* to a charge under section 23152(a).
In fact, the court refused to address the issue. (Id. at 893, fn 10.) Accordingly, a prosecutor should keep in mind that there is no guarantee that the Bransford decision will be applicable to a section 23152(a) charge and may need to be prepared to address the issue.

Urine/alcohol cases present a curious anomaly. DUI/alcohol cases involving urine are rare because urine is no longer one of the generally used chemical tests. In the case of People v. Acevedo (2001) 93 Cal.App.4th 757, the trial court precluded the defense cross-examination of the People’s expert on the blood/urine ratio. The appellate court noted that neither the Vehicle Code nor Bransford altered the ability of one to use a blood/urine ratio to determine the alcohol level in a urine sample. Therefore, the court ruled it was error to terminate the defense’s cross-examination.

VIII. Conclusion—Know Your Evidence, Understand the Law, and Be Creative

The key to a successful DUI prosecution is to have a good grasp of the evidence, know—and do not fear—the law, and most of all, to be creative. Understanding the required foundation for a piece of evidence and confidently arguing the correct law to the judge can often make the difference between winning and losing. Remember, often several witnesses can testify to given events. Using documents and the business-records exceptions can be crucial to fill needed evidentiary gaps. Arguing Evidence Code section 664 (official duties are presumed to be regularly performed) when the defense raises questions about the operation of a breath test or the procedure used in a blood draw can provide the court with the necessary tools to rule in your favor.

The essential requirements under Adams to gain the admissibility of blood or breath results is that the instrument was in proper working order, the test was properly administered, and the operator was competent and qualified. You do not have to show compliance with Title 17. Title 17 violations only go to the weight, not the admissibility, of the result.

Finally, foundation often can be challenging. If you believe that you have laid an adequate foundation but are still getting objected to, ask defense counsel to be specific as to the grounds for the foundation objection. This may help you focus your questions on the missing evidence. If the judge sustains a foundation objection and you do not know why, ask to approach the bench and ask the judge to explain the ruling. It is much better to ask the defense and the judge than to move on without getting your evidence admitted.

Ian Morse is a Deputy District Attorney for Ventura County, who currently works in the juvenile unit. Mr. Morse earned a Juris Doctor degree from Vanderbilt Law School. He joined the Ventura County District Attorney’s Office in 1991. He shares his legal education by providing DUI training to deputies who are new to the Ventura County District Attorney’s Office.

Chapter Updated in 2010 by G. Stewart Hicks, TSRP: Stewart Hicks holds an L.LM. degree in Prosecutorial Science from Chapman University, a JD degree from Western State University College of Law, and a BS degree from Oregon State University. Prior to joining the CalTSRP in 2007, he served as a district court magistrate in Michigan and as a deputy district attorney in Los Angeles and Orange Counties. He has also served as an appellate attorney and as a judge pro tem in the Orange County Superior Court in the Juvenile and Dependency Courts, bringing more than 25 years of prosecutorial and judicial experience to the TSRP Program. Mr. Hicks is assigned to the Central Valley Region, and is situated in Fresno.
Chapter XIII

Examination of the Blood-Alcohol Expert

by Gary LoGalbo, Deputy District Attorney
Orange County District Attorney’s Office
and
Martin H. Breen, Sr. Forensic Scientist
Orange County Sheriff-Coroner Department
Forensic Science Services

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(Updated 2010 by Rosalind Russell-Clark, TSRP, Los Angeles and Ventura)

I. Introduction

The success of a driving-under-the-influence (DUI) trial most often rests on the strength of the scientific evidence of impairment. Commonly, the defense will rely upon challenging either: (1) the reliability of the measurement of alcohol by the particular method or (2) post-driving absorption, also known as “rising-blood alcohol,” explained further in this chapter. The People’s witness is usually a criminalist employed by the responsible forensic laboratory, such as the Department of Justice (DOJ), a county or city crime lab, or a private forensic lab that has contracted with the county.

The expert is necessary to establish two important points. First, that the blood-, breath-, urine-testing instrument is accepted in the scientific community; was operating properly at the time of the test; and rendered a valid alcohol-level result. Second, the expert will explain the significance of the defendant’s alcohol level upon the ability to drive safely.

In sum, the direct examination of the criminalist should be uncomplicated, clean, and crisp. Areas that should be included are how the alcohol is absorbed, distributed, and eliminated by the human body (metabolism of alcohol); how the testing instrument works (method of analysis); and, if a breath test was administered, the principles of breath-alcohol analysis. The novice prosecutor should avoid getting confused by his or her own criminalist on direct. Always confer with your criminalist, either in person or on the telephone, prior to testimony in order to discuss the facts of the case and subsequent opinions that will be rendered based on the facts. This will minimize confusion. Note that each criminalist may vary somewhat in his or her opinions. Blood alcohol is not an exact science. Keep the scientific evidence simple. Jury confusion at this point can be devastating.

Note: As an exception, you may wish to allow the expert to explain any particularly unusual condition during direct examination, for example a breath test from a person with one lung, other unusual
medical conditions suffered by the defendant, or anything atypical about the alcohol-analysis results. The criminalist should be prepared to explain the effect the unusual condition might have on the reliability of the test. Some medical conditions of which you should be aware that are frequently used by the defense are gastroesophageal reflux disease (GERD), diabetes, gingivitis, and other dental conditions that the defense may claim affected the blood results or the reliability of the test. Whenever you are confronted with any of the medical conditions listed, or any medical condition, you should request a section 402 hearing, commonly called a motion in limine, to determine if the medical condition is relevant.

Be prepared to demand that the defense first show proof that the defendant has this medical condition and, if so, how it relates to the DUI charges. More importantly, did the medical condition affect the accuracy of the test results? If the medical condition did not have an effect on the test results, you should object to the admission of the medical condition. Be sure that you immediately inform your criminalist of any medical condition that the defense is asserting.

Often times your criminalist may be able to give you valuable information to support your argument that the medical condition has no relevance or bearing on the accuracy of the test results in the case. You can use that information to help persuade the court in your 402 hearing not to admit the medical evidence. You should always make sure that you receive any discovery about the defendant’s alleged medical condition. Ask the defense for any medical reports, doctor notes, or anything else they plan to use to assert this defense. It is wise to ask for these items on the record. If time permits, file a written motion outlining objections to the defendant’s medical condition evidence. Please do not panic if you do not have the time to file a written motion because you can successfully argue your motion orally. Indeed, most often, section 402 hearings that involve DUI prosecutions are orally argued.

If you are unsuccessful in getting the medical evidence excluded, you can show, through direct examination of your expert, how unreasonable the medical evidence is. You should also prepare your officer to be able to testify on direct examination about the alleged medical condition. In other words, there are circumstances in which the officer would have noticed certain symptoms of the medical condition if it existed.

It can also be suggested that the defendant would have informed the officer about an existing medical condition. On this note, it is very important to have a thorough interview with your officer about the case in general and specifically about a possible medical condition that may have affected the reading of the PAS or other breath instrument. The more prepared your officer is, the better presentation you will have. This will ultimately assist you with dispelling any view by the jurors that the defendant’s display of intoxication was due to a medical condition or a false reading by the instrument used.

You will also notice that in the past, blood-, breath-, or urine-chemical test results were always expressed as a “blood-alcohol” result because blood was perceived as the common denominator of alcohol chemical testing. But Vehicle Code section 23152(b) was subsequently amended, requiring the use of a measurement standard for breath separate from that used for the measurement of a blood sample. Today, a defendant’s alcohol level will only be measured by a blood-alcohol standard if a blood test is used. A separate measuring standard applies if the defendant took a breath-alcohol test.
Presently, it is unlawful to drive a vehicle with 0.08 percent of alcohol by weight, as determined by either a blood- or breath- alcohol measure. \((People \ v. \ Bransford\ (1994) \ 8 \ Cal.4th \ 885.\)\) This is significant because: (1) The overwhelming majority of DUI cases involve a breath test, and (2) it is no longer necessary to correlate the amount of breath alcohol to actual blood alcohol. Therefore, any defense evidence regarding the formula relating a breath sample to a blood standard, known as the “partition ratio,” is now irrelevant.

Although the People's position is that partition-ratio testimony is irrelevant, that is only to Vehicle Code section 23152(b). A recent case to be aware of is \(People \ v. \ McNeal\ (2007) \ 155 \ Cal.App.4th \ 582,\) where the court stated that partition ratio evidence is relevant to Vehicle Code section 23152(a). Keep in mind that the court held in the \(McNeal\) case, that partition ratio evidence is only relevant to rebut the presumption (permissive inference) that is set forth in Vehicle Code section 23610(a)(3) that a person who produces a breath result of .08 or percent or higher was “under the influence” of alcohol (and therefore impaired) at the time.

In addition, the court held that both general partition ratio variation in the population as well as variability in the defendant’s personal partition ratio is admissible on this point. If you choose not to use the presumption (permissive inference) then inform the court that the defense should not be allowed to introduce any evidence on partition ratio. This issue can be taken care of in a 402 motion.

Blood-breath ratios vary both between individuals and at different times in the same individual. Your criminalist will assist you in explaining to the court, if necessary, that there are so many scientific and medical factors that weigh into a person’s partition ratio at any given time, that it would be impossible to duplicate what the ratio was at the time of arrest. This will be helpful to you when the defense attempts to put forth evidence about defendant’s personal partition ratio. If the court is inclined to allow such evidence, it would be wise to ask the court to have the defense outside of the jurors presence, lay an adequate foundation to show what the defendant’s personal partition ratio was at the time of the arrest.

The defendant will not be able to show what his personal partition ratio was at the time of the arrest for the reasons stated above. This may persuade the court not to allow such personal partition ratio evidence. With general partition ratio evidence the \(McNeal\) case discusses that both prosecution and defense experts concede that 2100:1 ratio tends to underestimate the true BAC the vast majority of time, and usually works in the defendant’s favor. You should point this out when cross examining the defense expert.

Remind the court that the legislature has accepted the 2100:1 ratio as discussed in \(Bransford.\) (See Vehicle Code § 23612.) In light of this fact, the defense should be pressed to bring forth evidence to show that the defendant’s partition ratio is different from what is accepted as the legal standard. At least this way you can try and limit what the defense can ask on cross of your expert, and on direct of theirs.

Be aware of \(People \ v. \ Acevedo\ (2001) \ 93 \ Cal.App.4th \ 757,\) in which the defendant submitted to a urine test when he was arrested for DUI. The court stated that partition-ratio evidence was relevant when a urine test is administered. If the defense ever cites the \(Acevedo\) case to support their position to use partition-ratio evidence, make sure you explain to the court that this case does not apply to breath results, but merely to urine samples.
Finally, as prosecutors, each of you has your own style when conducting criminal trials. The questions and suggestions included here are not all-inclusive or absolutely required. Each case will have its own issues that will require some modification, addition, or deletion of questions for the criminalist. This chapter is intended only to give you a strong start so you can get through a DUI trial with your criminalist and elicit the testimony necessary for a conviction.

Prosecutors should also be aware that when their DUI cases involve a blood or urine test, they should have the actual analyst who performed the test to testify in court. The United States Supreme Court in Melendez-Diaz v. Massachusetts (2008) 129 S.Ct. 2527 has ruled that the admission of a certified forensic report without testimony from the lab analyst, who prepared the report, violates a defendant’s Sixth Amendment right to confrontation. If a prosecutor is unable to secure the attendance of the analyst who prepared the report, there should be an effort to get the blood or urine re-tested, and have that analyst come in and testify to his or her report. The Court did not prohibit the parties from stipulating to test results, nor did it require the prosecutor to call the analyst if the defense does not object to evidence of the test results coming from some other source.

The Confrontation Clause requirements do not appear to apply to evidence of chain of custody or testing instrument maintenance and accuracy. The Court stated, “we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case” (Id. at 2532, fn. 1.)

There are other cases you should be aware of that discuss these issues, and even suggest that a prosecutor can call an analyst that reviews another analyst report and renders an expert opinion based on his reliance on that report. See People v. Rutterschmidt (2009) 176 Cal.App.4th 1047. Also be familiar with People v. Dungo (2009) 176 Cal.App.4th 1388, People v. Lopez (2009) 177 Cal.App.4th 202 and People v. Gutierrez (2009) 177 Cal.App.4th 654. Because this issue is so unsettled, it is wise to have the actual analyst who performed the test to testify, to avoid reversal on appeal.

II. Alcohol Testing Processes Made Simple

The most prevalent methods for breath testing at a fixed location are the BAC Datamaster and the Intoxilyzer. Both utilize infrared technology. The most common blood-testing instrument is the gas chromatograph.

The simplest explanation of infrared technology is to picture shining a flashlight at night. We have all noticed particles of dust floating through the beam as we hold a flashlight up. In short, what an infrared instrument does is capture particles of alcohol in a sample and then count them as they float through an infrared beam, just like the dust and the flashlight. Most infrared instruments contain a second alcohol-measuring device powered by a fuel cell. These two testing processes work together to make the breath instrument “specific” for ethyl alcohol—the form of alcohol used in intoxicating drinks. This means that the breath-testing instrument only measures the alcohol found in drinks, and ignores the multitude of other alcohol compounds found in chemistry.

In a blood sample, the gas chromatograph warms the vial of blood. The alcohol in the blood rises into the airspace between the blood and the vial’s stopper (known as the “head space”). This alcohol vapor is then extracted and burned by a flame within the instrument. The greater the alcohol content, the
greater effect on the flame. The instrument is able to provide a blood-alcohol reading by measuring the flame’s burning of the alcohol-laden vapor.

III. Sample Direct Examination of the Criminalist (Breath)

The following are model direct examinations for different types of blood-alcohol tests. They are designed to cover all the necessary information to support the criminalist’s opinion and provide the jury with a simple but thorough understanding of this science. All direct examinations of criminalists involve laying the proper foundation for the criminalists’ qualifications to testify and render opinions based on scientific principles. Following are the general questions that should be asked of all criminalists. Make sure you discuss these questions with the criminalist prior to having him or her testify.

On redirect, you will have the opportunity to ask other questions to clear up any defense attempts at confusion. Examples include testimony that: (1) there is no evidence that the instrument malfunctioned; (2) the instrument has safeguards; (3) there is nothing about the cross-examination that has changed the criminalist’s opinions, etc.

A. Qualifications

1. WHAT IS YOUR CURRENT OCCUPATION?

2. WHAT IS A CRIMINALIST [FORENSIC SCIENTIST, ETC.]?

3. WHAT IS YOUR CURRENT ASSIGNMENT AT THE CRIME LABORATORY?

4. HOW LONG HAVE YOU BEEN EMPLOYED IN THAT CAPACITY?

5. PLEASE TELL US ABOUT THE FORMAL EDUCATION AND TRAINING THAT QUALIFIES YOU FOR YOUR CURRENT POSITION.

6. WHAT IS FORENSIC ALCOHOL ANALYSIS?

7. ARE THERE STATE REGULATIONS GOVERNING FORENSIC ALCOHOL ANALYSIS?

8. WHERE ARE THEY FOUND?

9. Note that some agencies are no longer required to be licensed by the State of California. Make sure you ask your criminalist if the following question should be excluded: IS THE LABORATORY WHERE YOU WORK LICENSED BY THE STATE OF CALIFORNIA TO PERFORM FORENSIC ALCOHOL ANALYSIS UNDER TITLE 17?

10. ARE YOU APPROVED BY THE STATE TO CONDUCT FORENSIC ALCOHOL ANALYSIS?
11. HAVE YOU PREVIOUSLY TESTIFIED IN COURT AS AN EXPERT?

12. HOW MANY TIMES?

13. Determine the answers to the following four questions before your witness takes the stand. If the witness would answer “yes” to any of the questions, ask for details. If the answers would be “no,” then omit these questions:

   HAVE YOU PUBLISHED ANY RESEARCH?

14. HAVE YOU AUTHORED OR COAUTHORED ANY ARTICLES OR PUBLICATIONS RELATING TO FORENSIC ALCOHOL ANALYSIS?

15. ARE YOU A MEMBER OF ANY PROFESSIONAL ORGANIZATIONS?

16. HAVE YOU DONE READING AND RESEARCH IN THE FIELD OF FORENSIC ALCOHOL ANALYSIS?

B. Testimony on Literature and Correlation Studies That Relate to the Effect of Alcohol on the Ability to Drive

1. ARE YOU FAMILIAR WITH THE USE OF CORRELATION STUDIES IN THE FIELD OF FORENSIC ALCOHOL ANALYSIS?

2. PLEASE EXPLAIN WHAT CORRELATION STUDIES ARE.

3. PLEASE EXPLAIN WHAT THEY EVALUATE.
   (Note: Correlation studies in the field are common to demonstrate that humans are better able to perform a variety of tasks while sober, including driving, and that the ability to perform the task diminishes with the introduction of increased levels of alcohol.)

4. PLEASE DESCRIBE THE COMPONENTS OF A DRIVING-CORRELATION STUDY AND WHAT EACH MEASURES?
   (Commonly, a driving-correlation study will include a set number of driving tasks that test the ability to operate a vehicle. There may be reaction-time tests involving emergency-stop situations. There may be tests involving steering through a slalom course. There may be backing-up tests, etc. Usually, the subjects perform the tasks while sober; then drink and attempt the tests a second time at measured levels of impairment, often at 0.08 or 0.10 BAC. Correlation studies vividly demonstrate how one’s ability to operate a motor vehicle deteriorates with alcohol ingestion. Have the expert discuss a driving-correlation study that he or she has either seen or read about. Use your expert to inform the jury that drinking clearly affects the ability to drive.)

5. ARE YOU FAMILIAR WITH THE LITERATURE IN YOUR FIELD THAT DESCRIBES THE EFFECT OF ALCOHOL ON A PERSON’S ABILITY TO DRIVE SAFELY?
6. **WHAT IS THAT EFFECT?**

7. **BASED ON YOUR KNOWLEDGE OF CORRELATION STUDIES AND THE LITERATURE IN THE FIELD, HAVE YOU REACHED AN OPINION AS TO WHETHER THERE IS A CORRELATION BETWEEN THE AMOUNT OF ALCOHOL IN A PERSON'S SYSTEM AND HIS OR HER DEGREE OF IMPAIRMENT FOR THE PURPOSES OF DRIVING?**

8. **WHAT IS THAT OPINION?**  
(It is helpful at this point to ask your expert to create a chart that will illustrate the various levels of alcohol ingestion and the related levels of impairment. Commonly, criminalists' charts reflect some variation of the following information. Remember to request that your chart be marked for identification purposes so you can have it introduced into evidence.)

<table>
<thead>
<tr>
<th>BAC</th>
<th>IMPAIRED FOR THE PURPOSES OF DRIVING</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.00-0.04</td>
<td>Probably impaired, depending on prior experience with alcohol</td>
</tr>
<tr>
<td>0.05-0.07</td>
<td>Definitely impaired for the purposes of driving</td>
</tr>
<tr>
<td>0.08 &amp; up</td>
<td>Legally under the influence for the purposes of driving</td>
</tr>
</tbody>
</table>

9. **WHEN A PERSON REACHES THE 0.08 LEVEL, HOW DOES IMPAIRMENT MANIFEST ITSELF?**  
*(Note: There are two stages of impairment when a person drinks: The initial effect is “mental impairment,” which affects a person's judgement, risk-taking inclinations, and ability to handle the multitude of activities related to driving, often referred to as divided-attention skills. The secondary effect is “physical impairment.” Physical impairment relates to physical coordination and balance. The common actions of a drunk as depicted in movies and TV would be extreme examples of this type of impairment. All persons who reflect physical impairment are already mentally impaired. Often, people who are not yet physically impaired have already reached mental impairment and are unsafe to drive. A simple way to understand this concept is that mental impairment happens first.)*

10. **WHAT ARE FIELD SOBRIETY TESTS (FSTs)?**  
(Make sure your chemist is prepared to give a simple explanation of what FSTs are.)

11. **WHAT PURPOSE DOES ADMINISTERING FSTs SERVE?**

12. **IN YOUR EXPERIENCE, IS IT COMMON FOR A DRIVER WHO IS MENTALLY IMPAIRED DUE TO HIS OR HER DRINKING TO STILL BE ABLE TO PERFORM ADEQUATELY ON A FIELD SOBRIETY TEST?**

13. **WHY IS THAT?**

14. **IS PERFORMING AN FST AS COMPLICATED A TASK AS DRIVING A MOTOR VEHICLE?**

15. **WHY NOT?**
16. ARE YOU FAMILIAR WITH THE CONCEPT OF “TOLERANCE” AS IT RELATES TO DRINKING AND IMPAIRMENT?
(The premise here is that different people, because of personal constitution and experience with alcohol, will have different physical reactions to similar levels of BAC. But regardless of how they may mask the physical impairment, all are mentally impaired when their BAC reaches the 0.08 level. Your chemist may have addressed tolerance in question 12; if so, do not ask this question.)

17. WHAT IS TOLERANCE?

18. DOES THE CONCEPT OF TOLERANCE ALTER THE CONCLUSIONS YOU MARKED ON YOUR CHART?

19. WHY NOT?

C. The Breath Test

1. PLEASE DESCRIBE THE DIFFERENT TESTS THAT ARE USED TO DETERMINE THE AMOUNT OF ALCOHOL IN A PERSON’S SYSTEM.

2. DO BREATH INSTRUMENTS MEASURE GRAMS OF ALCOHOL PER 210 LITERS OF BREATH?
(Before asking this question, consult with your chemist/expert to make sure you are not opening the door to partition-ratio evidence.)

3. ARE YOU FAMILIAR WITH A [NAME OF INSTRUMENT], THE BREATH INSTRUMENT USED IN THIS CASE?

4. IS THIS INSTRUMENT APPROVED BY THE UNITED STATES DEPARTMENT OF TRANSPORTATION?

5. WHAT IS YOUR TRAINING AND EXPERIENCE WITH [NAME OF INSTRUMENT]?

6. IS THIS INSTRUMENT SPECIFIC FOR ETHYL ALCOHOL?

7. WHAT DOES THAT MEAN?

8. HAS THE STATE APPROVED THIS INSTRUMENT FOR MEASURING ALCOHOL IN SAMPLES OF BREATH?

9. BRIEFLY EXPLAIN HOW THE INSTRUMENT WORKS.

10. DO OFFICERS RECEIVE TRAINING IN THE OPERATION OF [NAME OF INSTRUMENT]?
11. WHAT IS THE FIRST STEP THAT OFFICERS ARE TRAINED TO MAKE IN PREPARING TO ADMINISTER A BREATH TEST?
(The answer is that officers are to observe the subject for 15 minutes prior to the breath test in order to be assured that the subject does not drink, smoke, vomit, or regurgitate just prior to the breath test. Remember, Title 17 uses the word “regurgitate,” not “burp.” If a defense attorney attempts to cross your chemist/expert or any witness about burping, please object on relevancy grounds.)

12. AFTER THE 15 MINUTES OF OBSERVATION, IF THE OPERATOR WERE TO OMIT ANY SUBSEQUENT STEP IN THE ADMINISTRATION OF THE TEST, WOULD A HIGHER RESULT BE OBTAINED?

13. DURING THE BREATH TEST, IS IT POSSIBLE FOR SOMEONE TO MANIPULATE THE INSTRUMENT TO CHANGE A READING?

D. Foundation Regarding the Instrument Being in Good Working Order

1. IS YOUR LAB RESPONSIBLE FOR THE MAINTENANCE OF [NAME OF INSTRUMENT], INSTRUMENT [NUMBER], THE INSTRUMENT USED IN THIS CASE?

2. DOES TITLE 17 REQUIRE THAT THESE INSTRUMENTS BE REGULARLY CHECKED AND CALIBRATED?

3. HOW OFTEN IS A LAB REQUIRED TO CHECK A BREATH INSTRUMENT? (Title 17 requires calibration every 10 days or 150 tests, whichever occurs first.)

4. PLEASE EXPLAIN HOW YOUR LAB CHECKS A BREATH INSTRUMENT FOR ACCURACY.
(Some urban counties are able to check a breath instrument for accuracy using the phone lines. More commonly, a criminalist takes a premixed solution of alcohol and water with a known reading and bubbles it into the breath instrument. If the instrument is working correctly, it will accurately report the level of alcohol in the lab sample.)

5. ARE THE RESULTS OF THESE ACCURACY CHECKS RECORDED BY YOUR LAB?

6. WHAT ARE THESE DOCUMENTS CALLED? (Accuracy Reports.)

7. DID YOU BRING COPIES OF THESE REPORTS TO COURT TODAY?

8. HOW ARE THESE DOCUMENTS PREPARED?

9. ARE YOU ONE OF THE PERSONS ENTRUSTED WITH CUSTODY AND CONTROL OF THESE DOCUMENTS?
10. ARE THESE DOCUMENTS PREPARED IN THE REGULAR COURSE OF BUSINESS?

11. DO THESE REPORTS CORRECTLY REFLECT THE ACCURACY OF THE INSTRUMENT USED IN THIS CASE?

12. THE DEFENDANT IN THIS CASE WAS ARRESTED ON [DATE OF ARREST]. PLEASE TELL US THE DATE OF THE ACCURACY CHECK FOR INSTRUMENT [NUMBER] JUST PRIOR TO THAT DATE.

13. WHAT WAS THE RESULT OF THE ACCURACY TEST OF THAT INSTRUMENT ON THAT DATE?

14. WHEN WAS INSTRUMENT [NUMBER] NEXT CHECKED AFTER THE DATE OF DEFENDANT'S ARREST?

15. WHAT WAS THE RESULT OF THE ACCURACY TEST DONE ON THAT DATE?

16. GIVEN THE RESULTS OF THESE TWO ACCURACY CHECKS, DO YOU HAVE AN OPINION AS TO THE WORKING ORDER OF INSTRUMENT [NUMBER] ON __________ AT _______ O'CLOCK, THE DATE AND TIME OF THE DEFENDANT'S TEST?

17. WHAT IS THAT OPINION?

E. The Defendant's Blood-Alcohol Content (BAC)

1. LOOKING AT THE PRINTOUT OF THE DEFENDANT'S BREATH TEST, WHAT WAS THE DEFENDANT'S BLOOD-ALCOHOL LEVEL ON THAT EVENING? (You may want the criminalist to then record the defendant's BAC on the impairment chart prepared earlier so that the jury can visually see how the reading relates to the levels of impairment.)

2. ASSUMING THAT THE OFFICER OPERATED THE [NAME OF INSTRUMENT] [NUMBER] PROPERLY, AND, ASSUMING THE INSTRUMENT WAS WORKING PROPERLY, WOULD AN ACCURATE READING BE OBTAINED FROM THE DEFENDANT'S BREATH SAMPLES?

3. BASED SOLELY ON THE DEFENDANT'S BAC READING OF ________, WHAT IS YOUR OPINION OF THE DEFENDANT'S ABILITY TO SAFELY OPERATE A MOTOR VEHICLE AT THE TIME OF HIS [HER] ARREST?

The following questions are most often used at the end of the direct examination of the criminalist. Their purpose is to: (1) show the defendant lied about how many drinks he or she had; (2) show the approximate number of drinks the defendant actually consumed had based on his or her blood-alcohol level; (3) show the person's blood-alcohol level at the time of driving; and (4) close with a final statement from the criminalist that the defendant in your
case was under the influence for purposes of operating a motor vehicle at the time he or she was stopped by the police.

4. THIS TEST RESULT REFLECTS ONLY THE AMOUNT OF ALCOHOL IN THE DEFENDANT'S SYSTEM AT THE TIME OF THE BREATH TEST, CORRECT?

5. THE RESULT DOES NOT MEASURE THE ALCOHOL THE DEFENDANT ALREADY BURNED OFF PRIOR TO THE CHEMICAL TEST OR THE ALCOHOL THE DEFENDANT STILL HAS IN HIS [HER] DIGESTIVE TRACT, DOES IT?

6. ARE YOU ABLE TO DETERMINE SCIENTIFICALLY WHAT THE DEFENDANT'S ALCOHOL LEVEL WOULD HAVE BEEN AT AN EARLIER TIME IF GIVEN ADDITIONAL INFORMATION?

   (If one assumes the alcohol was absorbed at the time of the arrest, then the defendant’s reading on the instrument is lower than it was at the time of the stop.)

8. ASSUMING A MALE [FEMALE] OF __________ POUNDS, CAN YOU TELL US HOW MANY OUNCES OF 86-PROOF LIQUOR WOULD NEED TO BE IN HIS [HER] SYSTEM TO REGISTER A BAC OF ________?

9. HOW MANY OUNCES OF 12 TO 14 PERCENT BY VOLUME WINE?

10. HOW MANY OUNCES OF 4 PERCENT BY VOLUME BEER?

11. ASSUME A PERSON WAS OBSERVED DRIVING LIKE [ARTICULATE THE DEFENDANT'S DRIVING PATTERN]; DISPLAYED THE FOLLOWING PHYSICAL SYMPTOMS [ARTICULATE THOSE OF THE DEFENDANT]; PERFORMED THE FIELD SOBRIETY TEST IN THE FOLLOWING MANNER [DESCRIBE DEFENDANT'S FST PERFORMANCE]; AND WAS RECORDED ON A WORKING BREATH INSTRUMENT TO HAVE A BAC OF ______. WHAT IS YOUR OPINION OF THAT PERSON'S ABILITY TO SAFELY OPERATE A MOTOR VEHICLE?

F. Tips on Redirect

The defense will likely attempt to show that the test results are inaccurate because:
1. the defendant regurgitated or vomited during the waiting period;
2. there was mouth alcohol present;
3. the instrument was not calibrated correctly;
4. the instrument had a long history of requiring maintenance;
5. there was radio interference; and
6. the officer violated some provision of Title 17 that makes the breath-test results untrustworthy.

It is common for defense attorneys to use a laundry list of possible breath-testing malfunctions secured from various DUI defense references. It is important for you to know that for virtually every nightmare scenario presented by the defense attorney (each of which are commonly punctuated with the question: “Wouldn’t that produce a result that is other than accurate?”), the technology of breath testing has a remedy that either causes the instrument to shut itself down or provide a reading that is “lower” than what was recorded.

The criminalist is likely able to testify that the breath instrument has several built-in safeguards:

1. It can detect mouth alcohol. (It will note the substance’s presence and shut itself off.)
2. It can tell if there was power interruption. (No power means no results.)
3. It can detect radio frequency interference. (It will note the interference and shut itself off.)
4. It can detect other chemicals present in the instrument that mimic alcohol (acetone) and are lethal if present in detectable levels in breath air. (Most of our breath instruments are specific for ethyl alcohol and will only measure that singular alcohol compound.)
5. A minor deviation from Title 17 does not impact the accuracy of the defendant’s test. (See People v. Adams (1976) 59 Cal.App.3d 559; People v. Williams (2002) 28 Cal.4th 408.)

**G. Mouth-Alcohol Contamination**

A breath-testing instrument measuring a sample of breath does not know where that sample came from. The instruments are designed to require a subject to blow long enough to capture a sample of deep-lung (alveolar) air. This sample of air provides the truest sample of a subject’s BAC.

It is possible, though highly unlikely, that the subject’s breath sample, as it was traveling from the alveoli to the breath instrument, was tainted by alcohol that somehow was deposited in the subject’s mouth. This could be done by a regurgitation, a recent alcoholic drink, etc. All defense attorneys choose to believe that this highly unlikely scenario definitely occurred in their clients’ cases.

The way to demonstrate to the jury that this did not happen in your case is to:

1. Point out that the 15-minute waiting period is required to provide a sufficient time buffer between the test and what the subject might have been doing before police observation. Fifteen minutes is long enough to purge the mouth of any residual alcohol.
2. As mentioned above, modern breath-testing instruments are sophisticated to the point of being able to detect mouth alcohol, note it, and terminate the test.
3. One of the reasons that a valid test requires two blows within 0.02 of each other is that such results prove that mouth alcohol was not a factor. In short, if mouth alcohol was present in the sample of one of the blows, there is virtually no possibility that the second blow would satisfy the 0.02 requirement. This is so because the mouth alcohol present would dissipate by the second blow. If, for argument’s sake, the subject regurgitated just before each blow, this still would not produce two readings within 0.02 of one another. In order for regurgitation to produce two readings within 0.02 of one another, it is necessary that each time the subject regurgitated, he or she regurgitated the exact same quantity of mouth alcohol; the mouth alcohol occurred twice in the time sequence relative to each of the subject’s acts of blowing; and the identical quantities of mouth alcohol twice were deposited at just the right time, and then twice successfully managed to overcome gravity and evade the instrument’s purging process in order to enter the instrument to be tested in the allotted time sequence by the infrared process. Truly, you and I have a better chance of winning the lottery than these events occurring.

H. Rising-Blood-Alcohol Defense

The rising-blood-alcohol defense rests on the premise that the defendant, when stopped, had not yet absorbed all the alcohol consumed and, therefore, was not yet impaired. Later, when tested at the jail, the test result reflected the effect of the additional alcohol absorbed and was markedly higher than it was at the time of the defendant’s driving.

Remember, the criminalist will testify that most alcohol is absorbed within 40–60 minutes of consumption (the beginning of drinking) and 20–30 minutes at the end of the drinking time period. The intoxication interrogation will usually reveal that the defendant claimed he or she was drinking much earlier in the day. (It is the tendency of arrestees to claim their drinking occurred hours before the arrest as well as minimizing the amount consumed.) The defendant’s statement of the drinking pattern is inconsistent with the factual predicate for a rising-blood-alcohol defense. This can be used for cross-examining the defendant because the rising-blood-alcohol defense usually relies upon heavy drinking right before driving. This will also contradict any statement to the officer that he or she had only “two beers” with dinner. You can also ask your criminalist/expert about the drinking pattern that the defendant gave the officer. The criminalist can take the amount of drinks at the time stated and give a result. If the defendant stated he or she was drinking much earlier before the time of driving, this will assist you with combating the rising-blood-alcohol defense.

You can also present the defendant’s drinking pattern to his or her expert, if they choose to call one. This becomes very important because most defense experts who are retained to support the rising-blood-alcohol defense will give a drinking pattern favorable to the defendant. You would then be able to cross examine the defense expert and show that the statements given to the officer do not support the testimony that the defense expert is giving. For example, the defense expert may testify that a defendant who drank two of his last four beers in a time span of 15 minutes right before he was stopped by the police would not be in the absorption phase; however your evidence is that the defendant told the officer he drank four beers six hours before the stop. You can take this information and cross examine the expert to show that (1) the expert is testifying to facts not in evidence, and (2) the facts that are in evidence are consistent with the defendant being fully absorbed.
Another way to refute the rising-blood-alcohol defense is to determine from the officer whether the defendant exhibited any significant change in impairment between the first observation at the time of the stop and the time the defendant provided a chemical test. If rising-blood alcohol has any merit in your case, one would expect a marked increase in the signs of impairment between the arrest and the test. But if the officer indicates that the defendant either exhibited a constant level of impairment or, better yet, a reduction in the signs of impairment between arrest and test, these facts would be helpful with dispelling the rising-blood-alcohol defense.

IV. Blood Testing

This examination format assumes that the blood sample the defendant provided when arrested is in evidence, that the officer authenticated the vial by his or her initials or other markings, and that the laboratory technician has testified to withdrawing the sample. Some counties dispense with the blood technician, but, in the absence of a stipulation, it is hazardous to do so. First, it leaves an “empty chair” for several “Is it possible?” error questions such as the type of swab and type of vial used. Second, it is difficult for the officer to testify that a non-alcohol swab was used without relying upon hearsay.

It is sometimes possible to secure a stipulation with the defense regarding the manner in which the blood was drawn. For example, a stipulation may occur like this:

1. COUNSEL, WILL YOU STIPULATE THAT THE DEFENDANT’S BLOOD WAS DRAWN IN A MEDICALLY APPROVED MANNER AND THAT, PRIOR TO THE BLOOD DRAW, THE EXTRACTION SITE WAS CLEANSED WITH A NON-ALCOHOLIC SOLUTION?

2. AND THAT [NAME OF TECHNICIAN], THE PERSON WHO DREW THE BLOOD IN THIS CASE, IS MEDICALLY TRAINED TO TAKE BLOOD SAMPLES, AS DEFINED BY VEHICLE CODE SECTION 23158?

3. AND THAT THE BLOOD IN THE VIAL ANALYZED IN THIS CASE IS THAT OF THE DEFENDANT?

4. AND THAT THE BLOOD DRAWN WAS PLACED IN A VIAL CONTAINING THE APPROPRIATE MEDICALLY APPROVED PRESERVATIVE AND ANTICOAGULANT, INSURING THE INTEGRITY OF THE SAMPLE?

5. AND FINALLY, DO YOU STIPULATE TO THE CHAIN OF CUSTODY AND AUTHENTICITY OF THE BLOOD SAMPLE?

Customarily, the officer does not take the blood sample to the laboratory. The officer usually places it in an evidence locker, or the blood technician drops it off at the crime lab in an evidence locker. But, depending on the customs of your court, it is seldom necessary to call any property or evidence officers as witnesses. It is easier to rely upon the officer’s testimony that the envelope was sealed when he or she relinquished it, and the criminalist’s testimony that it was sealed when he or she received it. Also, the criminalist can usually testify to the method by which blood alcohol samples are routinely received and processed.
A. Blood Evidence Questions

1. I AM SHOWING YOU WHAT IS MARKED AS PEOPLE’S [NUMBER] FOR IDENTIFICATION. DO YOU RECOGNIZE IT?

2. HOW DO YOU RECOGNIZE IT?

3. WHEN AND WHERE DID YOU SEE IT BEFORE?

4. WAS THE ENVELOPE SEALED OR UNSEALED WHEN YOU FIRST OBSERVED IT?
   [If the answer is “unsealed,” you may want to lay foundation as to the general laboratory procedures in processing blood samples for forensic alcohol analysis.]

5. WAS THIS BLOOD-ALCOHOL KIT PREPARED BY YOUR LABORATORY?

6. If yes:
   IS THE METHOD OF PREPARATION OF THIS KIT APPROVED BY THE STATE OF CALIFORNIA UNDER TITLE 17?

7. HOW ARE THESE KITS PREPARED?

8. WHAT IS THE PURPOSE OF THE WHITE POWDER THAT IS PLACED IN THE VIAL BY THE MANUFACTURER?

9. DID THIS BLOOD SAMPLE APPEAR TO BE CLOTTED AT THE TIME OF ANALYSIS?

10. HOW DO YOU KNOW IT WAS [WAS NOT] CLOTTED AT THE TIME OF THE ANALYSIS?

11. OF WHAT IMPORT IS IT WHETHER THE SAMPLE IS CLOTTED OR NOT?

12. WHAT METHOD DID YOU USE TO DETERMINE THE ALCOHOL CONTENT OF THIS BLOOD SAMPLE?

13. IS THIS METHOD APPROVED BY THE STATE OF CALIFORNIA UNDER TITLE 17 FOR FORENSIC ALCOHOL ANALYSIS?

14. PLEASE BRIEFLY EXPLAIN THIS METHOD.

15. HOW DO YOU INSURE THE ACCURACY OF THIS METHOD IN DETERMINING A BLOOD-ALCOHOL LEVEL?

16. DOES YOUR LABORATORY ALSO PARTICIPATE IN PROFICIENCY-TESTING PROGRAMS?
17. WHAT IS A PROFICIENCY-TESTING PROGRAM?

18. PLEASE DESCRIBE THESE PROGRAMS.

19. DID YOU ANALYZE THIS BLOOD SAMPLE FOR ALCOHOL CONTENT?

20. WHAT WAS THE ALCOHOL LEVEL OF THE SAMPLE YOU ANALYZED?

Move the blood kit into evidence.

**Tips on Redirect**

Every method of testing is vulnerable to mishandling. With blood, the defense cross-examination may attempt to raise an inference that an alcohol-based cleansing swab was used on the defendant’s skin, and this contaminated the blood draw. Or the defense, on cross-examination, may suggest that the defendant’s blood sample contained insufficient preservative and thus permitted alcohol fermentation.

On redirect, you can establish:

- The gas chromatograph distinguishes between isopropyl (used for sanitizing) and ethyl (liquor) alcohol. Therefore, the use of an alcohol swab does not affect the reliability of the test because only ethyl alcohol is measured.
- A gray-colored stopper in the vial is used in the industry to indicate that the vial contains sufficient blood preservative to prevent fermentation. Also, studies have shown that the blood-alcohol level actually stays the same or decreases after collection and storage more than 99 percent of the time.

*Note:* If several months have passed between the date of the defendant’s blood draw and the date of the defense collection of a split of the sample, it is likely that the results of the defense split will be lower than your forensic lab result. This happens because the alcohol content erodes and evaporates with time.

**V. Urine Testing**

Urine testing for blood alcohol is rare today because urine is no longer a choice when arrested for DUI unless there are breathing problems (asthma) or hemophilia or some other blood disorder. The direct examination is very similar to that for blood, except the officer has to lay the entire foundation (i.e., that the defendant urinated into the bottle in the officer’s presence).

*Caution:* If the defendant and officer are not of the same gender, it is most likely that the void and sample were obtained by a peace officer of the same gender as the defendant. In the absence of a stipulation, this other officer is essential to your case.

Each method of testing is vulnerable to certain claims of mishandling, and urine is no exception. In order for a urine test to be accurate, it must be preceded by a void of at least 20 minutes. If there is no earlier void, it is not possible to offer an opinion about the blood-alcohol level.
For that reason, the defense will often try to establish that the void was incomplete. To the point, the defendant testifies that he or she did not completely void all urine from his or her bladder. Testimony by the officer and cross-examination of the defendant on this point can become indelicate but necessary. Suffice it to say, there is no objective way to determine if the entire bladder contents was voided. Similar to blood, the defense may also contend that the urine was improperly preserved, causing fermentation.

If no one witnessed the actual specimen going into the bottle, the defendant may have tried to dilute the urine with water or put only water in the bottle. The criminalist can determine if no urine is present and testify to that fact. In other words, the criminalist can, when appropriate, testify that the sample is water. Mere dilution, however, is more problematic.

A. Urine Questions

1. I AM SHOWING YOU WHAT IS MARKED PEOPLE’S [NUMBER] FOR IDENTIFICATION, DO YOU RECOGNIZE IT?

2. HOW DO YOU RECOGNIZE IT?

3. WHEN AND WHERE DID YOU SEE IT BEFORE?

4. WAS THE KIT SEALED OR UNSEALED WHEN YOU FIRST OBSERVED IT? (If the answer is “unsealed,” you may want to lay foundation as to the general laboratory procedures in processing samples for forensic alcohol analysis.)

5. WAS THIS URINE-ALCOHOL KIT PREPARED BY YOUR LABORATORY?

6. IS THE METHOD OF PREPARATION OF THIS KIT APPROVED BY THE STATE OF CALIFORNIA UNDER TITLE 17?

7. HOW ARE THESE KITS PREPARED?

8. WHAT IS THE PURPOSE OF THE WHITE POWDER PLACED IN THE JAR?

9. WHAT METHOD DID YOU USE TO DETERMINE THE ALCOHOL CONTENT OF THIS URINE SAMPLE?

10. IS THIS METHOD APPROVED BY THE STATE OF CALIFORNIA UNDER TITLE 17 FOR FORENSIC ALCOHOL ANALYSIS?

11. PLEASE BRIEFLY EXPLAIN THIS METHOD.

12. HOW DO YOU INSURE THE ACCURACY OF THIS METHOD IN DETERMINING A URINE-ALCOHOL LEVEL?

13. DOES YOUR LABORATORY ALSO PARTICIPATE IN PROFICIENCY TESTING PROGRAMS?
14. PLEASE DESCRIBE THESE PROGRAMS.

15. WHAT IS THE STANDARD PROCEDURE FOR URINE COLLECTION?

16. WHAT IS THE RELATIONSHIP OF THE ALCOHOL CONCENTRATION IN URINE VERSUS THAT OF BLOOD?

17. WHAT RATIO DID YOU USE TO CALCULATE THE REPORTED ALCOHOL LEVEL?

18. IS THIS RATIO, 1.3 TO 1, REQUIRED BY TITLE 17?

19. DID YOU ANALYZE THIS URINE SAMPLE FOR ALCOHOL CONTENT?

20. AFTER USING THE RATIO, WHAT ALCOHOL LEVEL DID YOU DETERMINE?

21. NO FURTHER QUESTIONS.

VI. Conclusion

Having read this chapter, you now have a leg up in understanding and using the “stuff” of DUI prosecutions. You may still feel confused, but remember:

- You know more than your jurors.
- Your knowledge of this material is probably closer to your jurors than your expert.
- The jurors will appreciate your ability and willingness to ask the basic questions in an effort to help them understand why the defendant is guilty.

Gary LoGalbo has been a deputy district attorney for the Orange County District Attorney’s Office since 1998. Prior to joining the district attorney’s office, Mr. LoGalbo served as a police officer with the Placentia Police Department for 10 years. He was honored as the Placentia Police Officer of the Year in 1995 and recognized as the Orange County Narcotics Officer of the Year in 1997.

Mr. LoGalbo received his Juris Doctor degree from Western State University College of Law and graduated cum laude. He also graduated cum laude from California State University, Fullerton with a Bachelor of Arts degree.

A part-time instructor in California State University, Fullerton’s Criminal Justice Department, Mr. LoGalbo is also a lecturer for the California Narcotic Officers’ Association and a frequent presenter for MADD Southern California who honored him with an award for his DUI Prosecution Training.

Martin Breen is the senior forensic scientist/supervising criminalist for the Orange County Sheriff-Coroner’s Office and the supervisor of the Forensic Alcohol Program with over 25 years experience.

Mr. Breen received a Bachelor of Science degree in Biology/Chemistry from Saint Mary’s College. He earned a Master of Science degree in Criminalistics from California State University, Los Angeles.

Mr. Breen has qualified as an expert in Forensic Alcohol Analysis and Interpretation more than 1,600 times in California superior courts, in federal court, and in state-compensation hearings. He is a Datamaster Breath Instrument Instructor for the Orange County Sheriff-Coroner’s Office and a Forensic Alcohol Supervisor Instructor for the state Department of Justice. Having numerous articles published in international publications about topics such as the Evidential Portable Alcohol System, the effect of “one for the road” on peak breath-alcohol concentration, and forensic alcohol training programs, he has also made presentations on similar topics in California as well as Colorado, Illinois, Montana, Canada, Sweden, France, and Germany.

Chapter Updated in 2010 by Rosalind Russell-Clark, TSRP: Rosalind Russell-Clark has an AA in Administration of Justice from Southwest College, a BS in Criminal Justice from California State University Los Angeles, and a JD from the University of West Los Angeles School of Law. She has served as an instructor at the University of West Los Angeles School of Law on a variety of subjects, focusing primarily on criminal law. The CalTSRP for Los Angeles and Ventura, she currently works for the Los Angeles City Attorney’s Office. In her 20 years as a prosecutor, she has handled more than 75 DUI jury cases, including ones with notable defendants. Ms. Russell-Clark is also the director of a free legal clinic at her church in Carson.
Chapter XIV

Common Defenses to Driving Under the Influence Cases

by Jeffrey Gallagher, Deputy City Attorney
Los Angeles City Attorney’s Office

The California District Attorneys Association owes many thanks to Michele Levine of the Riverside County District Attorney’s Office and Carol Shipley of the Stanislaus County District Attorney’s Office for their peer-review and editing assistance for this chapter.

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I. Introduction

It is crucial in any driving-under-the-influence (DUI) case that you determine what defense, if any, the defendant intends to present in court. Such information makes it less likely that you will be blindsided by unknown facts and issues, and more likely that you will be well prepared to present a smooth, professional case.

Frequently, a DUI defense is predicated on an effort to raise a series of possible or hypothetical problems with the People's case and then hopefully weave them together into a tapestry of “reasonable doubt.” For instance, a defense expert has no personal knowledge whether the defendant was impaired when stopped by the officer. But the expert will attempt to raise a series of plausible defense scenarios, generally none of which can actually be proven, that, taken together, are intended to cast some doubt on the heart of your case—the accuracy of the chemical test results.

The easiest manner in which to discover a defense is to talk to the defense attorney. Most defense attorneys are eager to discuss with prosecutors the merits of their cases and, in the atmosphere of a friendly chat, will divulge details of the defenses they intend to rely on. Always remember that defenses to a DUI prosecution are synonymous with weaknesses in the prosecution’s case. Good defense attorneys are experts at finding those weaknesses and building defenses around them. A serious discussion about the case with your defense counterpart will allow you to pinpoint potential weaknesses in your case. The better you listen, the more you may learn. Possibly, you will be alerted to something you had not been aware of before.

The most fail-safe method for discovering a defense is by objectively critiquing the case yourself. This involves taking a step back and objectively reviewing the facts of the case, the demeanor and professionalism of the involved officers, and the applicable law that will govern the specific issues. It also involves an awareness and understanding of the scientific evidence you will present in the prosecution’s case in chief. How would you attack the facts of the case if you were defending? A
prosecutor who engages in a tough, thorough critique of the case should be able to discern any weaknesses and therefore be on the alert for potential defenses.

Once you have been alerted to a defense, you should then develop a trial strategy to counter it. The worst thing a prosecutor can do is to ignore a potential defense, and let it fester and swell until it threatens to undermine a guilty verdict. This chapter discusses common DUI defenses and offer some trial strategies to counter them.

The golden rule to any competent prosecution is preparation, preparation, preparation. By following this primary rule, you should be able to discern and be prepared to combat a DUI defense even before you have appeared in court.

II. The Mouth-Alcohol Defense

A. The Defense Claim

The defendant's breath-alcohol readings are inaccurately high and the product of a sample of breath tainted by mouth alcohol.

The mouth-alcohol defense can be raised in any case where a defendant has given samples of his or her breath to determine a blood-alcohol level. In other words, this defense is only applicable when a defendant blows into a breath-testing instrument.

A breath sample must come from deep-lung air (alveolar air) in order for a reliable measurement of a subject’s blood-alcohol level to be determined. This is mandated by Title 17 of the California Code of Regulations, which controls the procedure used for blood-alcohol testing. Deep-lung air is produced into the sample chamber of the instrument after a person has blown through the mouthpiece for several seconds. Breath-testing instruments are designed to snatch only the last part of exhaled breath into the instrument’s sample chamber for testing purposes, thereby ensuring that only deep-lung air is tested.

The mouth-alcohol defense essentially claims that the breath-testing results are a product of alcohol in the mouth or throat of a defendant (not deep-lung air) at the time he or she blew into the breath-testing machine. The defense will claim that this latent alcohol found its way into the mouth or throat through belching or burping; that mouth alcohol then found its way into the sample chamber of the breath-testing instrument when the defendant blew; therefore, the sample was contaminated, and the results may not represent the defendant’s true blood-alcohol level.

The defense is often aided by flawed or missing information in the police observation period that must precede a breath test. Title 17 mandates that a defendant be continuously observed for at least 15 minutes prior to giving a breath sample. The observer (usually the officer who is about to administer the breath test) is to make sure that the defendant does not ingest any fluids, regurgitate, vomit, eat, or smoke. One of the main purposes of this observation period is to allow for the dissipation of any potential mouth alcohol in a subject. When the observation period is not continuous or not 15 minutes in duration, this leads the defense to claim that the breath samples may have been contaminated with mouth alcohol.
The important language of Title 17 concerning the observation period is “regurgitate.” Defense attorneys often interpret regurgitate to mean “belch” or “burp,” although nothing in Title 17 supports this. The mouth-alcohol defense usually claims that by belching, the defendant has brought up traces of unabsorbed alcohol from his or her stomach into the mouth area. Therefore, defense attorneys often claim that while an officer was not directly observing the defendant, the defendant burped, which caused a contamination of his or her mouth and throat with alcohol.

B. Combating the Defense:

You can combat the mouth-alcohol defense in several ways.

1. Officer Interview

   You should interview in great detail the officer who conducted the observation. You must find out if there was continuous observation for the 15-minute duration. You need to establish precisely when the observation period started, where it was conducted, and how it was conducted. The observation period ends the moment the defendant blows into the instrument. Therefore, work back at least 15 minutes from the time of the first blow to determine the start of the observation period.

   The defense may attempt to portray the manner in which the observation period is conducted to be crucial to the accuracy of the breath test. The best prosecution scenario is when the officer sits the defendant before the breath testing instrument and directly observes him or her for 15 minutes before obtaining samples. But often, officers cannot simply stare at a defendant for 15 minutes. Officers likely begin filling out paperwork while the defendant is seated next to them during the observation period. This is still a valid observation pursuant to Title 17. For although the officer may be filling out paperwork (i.e., the checklist to the breath-testing instrument), he or she is in very close proximity to the defendant who is likely handcuffed. The officer, from this position, is able to regularly monitor the defendant’s activities during this 15-minute time period. (See [Manriquez v. Gourley (2003)](https://www.ca10.uscourts.gov/opinions/enforcement_cases/03-1227.pdf), 105 Cal.App.4th 1227.)

   It is also important to note if more than one officer was involved in completing the observation period. In other words, it is possible the arresting officer observed the defendant for five minutes and a transporting officer was with the defendant for the next 10. The crucial point is that there are at least 15 continual minutes of observation prior to breath samples being given.

   In summary, if the defense is attempting to undermine the credibility of the observation period, its focus will be on the possible or hypothetical shortcomings of the officer’s observation.

   Note: Be clear. The accuracy of the test results is actually contingent not on the officer’s actions, but on the fact that the defendant did not drink, eat, smoke, vomit, or regurgitate for the 15 minutes prior to the breath test. Indeed, you might want your officer to inform the jury on direct that the defendant was handcuffed and unable to move during the observation period.
period. And in cross-examination of the defendant, you may want the defendant to agree that he or she did not drink, eat, smoke, vomit, or regurgitate before the breath test.

2. Breath Samples

The strongest rebuttal to a mouth-alcohol defense is that two breath samples were taken and that each sample was within 0.02 of the other. In order to understand the import of two replicate samples within 0.02, you must understand a couple of the basic concepts of breath testing.

Alcohol (also known as ethanol) is a very volatile substance. Heat and air tremendously increase its volatility and cause it to evaporate at high rates. Any alcohol present in a defendant’s mouth is subjected to both heat and air. The heat comes from a person’s body temperature inside the mouth or throat. The air comes from human breathing and the consequent blowing into the instrument. These two factors make a volatile substance—alcohol—even more volatile. Therefore, the quantity of alcohol inside a person’s mouth or throat is constantly changing and dissipating. Combine this with the fact that the breath samples are given at a minimum of one to two minutes apart (an unrealistically long time for mouth-alcohol levels to remain constant) and the volatility would greatly affect any residual amount of latent mouth alcohol.

Given this volatility, the likelihood of getting the same quantity of mouth alcohol in two breath samples so that the readings would be within 0.02 of each other is all but impossible. In fact, there is no credible scientific study that has been able to record two breath samples within 0.02 of each other due to mouth alcohol. True mouth-alcohol readings would be wildly different from one another due to alcohol’s volatility. True mouth-alcohol readings would look something like a 0.35 followed by a 0.12. This is merely an example, but it demonstrates the wide fluctuations you would see with true mouth alcohol.

3. Breath Instruments

Generally, the breath instruments used by law enforcement in California are able to detect if a breath sample contains mouth alcohol. Pursuant to Title 17 and the design and engineering of the instruments, breath samples are necessarily composed of only deep-lung (alveolar) air. By sampling deep-lung air, the instrument is assured of ascertaining a reliable blood-alcohol level of the defendant. Therefore, current breath instruments are sophisticated enough to spot mouth alcohol and either void that particular blow or terminate the test with a notation that mouth alcohol was present.

We can see from the above that you can overcome a mouth-alcohol defense by first presenting evidence to the jury through officer testimony that the 15-minute observation period was properly conducted and that the defendant did not do any of the disallowed activities. Next, you will demonstrate through the People’s expert that mouth alcohol is not a possibility because of the volatility of alcohol and the impossibility of tainted samples being within a 0.02. And finally, you will explain that the instrument only analyzes deep-lung air and can detect the presence of mouth alcohol. These points can obviously also be utilized as
ammunition in any cross-examination of a defense expert who attempts to raise the specter of mouth-alcohol contamination.

III. The Rising-Blood-Alcohol Defense

A. The Defense Claim

_The defendant may have been above 0.08 when tested, but was markedly below that level at the time of the stop._

The rising-blood-alcohol defense is common when a defendant has a lower BAC (i.e., 0.09-0.12) and an extended period of time elapsed between the defendant’s stop and the chemical test. Additionally, it is likely alleged that most of the drinking occurred just before the officer made the stop, and, thus, the alcohol had not yet been absorbed. The crux of this defense is that the defendant may have tested above the legal limit after driving, but at the time of driving, he or she was below 0.08.

To better understand this defense, let us assume you are preparing a case for trial in which the police stopped the defendant at 10:15 p.m. for driving over the center dividing line of the road and almost causing a head-on collision. The police immediately recognized the objective symptoms of alcohol intoxication and proceeded to give the defendant field sobriety tests, which he failed. The officers did not have a PAS device. The officers then arrested the defendant for driving under the influence, transported the defendant to the station, and administered a breath test at 11:15 p.m., which reflected 0.08 and 0.09 BAC.

In talking to the defense attorney, you learn that the defendant claims that he entered the bar at 10:00 p.m. and had not previously consumed any alcohol that day. He ordered a gin martini straight up with a double olive (approximately three ounces of 80-proof liquor) and gulped it down by 10:05 p.m. He immediately ordered another, and the bartender quickly prepared and served the second martini. The defendant quickly gulped down this drink by 10:10 p.m. (The defendant has now imbibed six ounces of hard liquor.) He then immediately said goodnight to the bartender, got into his car, and drove off. At 10:15 p.m., virtually within blocks of the bar, the defendant was stopped by the police after swerving the car while attempting to locate a dropped, lit cigarette. The officers were curt with him, had no interest in his explanation regarding the driving, and arrested him in short order. Defense counsel concedes that while the defendant may have had a blood-alcohol level over the legal limit at 11:15 p.m., he was not impaired at 10:15 p.m. when he was driving.

In this case, the defense will argue that the only relevant blood-alcohol level is at the time of driving. The contention will be that a significant portion of the six ounces of alcohol the defendant consumed was still unabsorbed in his stomach when arrested, and, thus, he was not yet impaired. It is further opined that at 10:15 p.m., the defendant’s BAC was probably less than 0.05; therefore, a not-guilty verdict to both Vehicle Code section 23152(a) and section 23152(b) would be in order.

Initially, note how this defense is integrally connected to the notion of “absorption”—the body’s process of distributing the ingested alcohol through the blood system and impairing the workings
of the central nervous system. Generally, the defense requires a scenario involving a brief drinking pattern by the defendant just prior to the stop and a longer than 15-minute period between the stop and the test. If, conversely, the facts established that the defendant’s drinking pattern extended over a longer period, i.e., one or two hours, then the related science would not support the defense. This is so because the longer drinking period would allow time for the absorption of the initial drinks, and the subsequent drinking, depending on the amount, would either equal the burn off of the first drinks or add to the alcohol within the defendant. An extended drinking pattern normally means the majority of the defendant’s alcohol has been absorbed by the last drink.

A variation attempts to cover a longer drinking period. For instance, it concedes the defendant had two to four drinks over a one- to three-hour period but then had a double “for the road.” The defense argument is again that the BAC was less than 0.08 at the time of the driving, but the last drink “kicked in” between the stop and the chemical test, explaining the reading.

B. Combating The Defense:

There are several avenues available to you in combating the “on-the-rise” defense.

1. Driving, Symptoms, and Field Sobriety Tests (FSTs)

   Strategically, one of the benefits of an on-the-rise claim for the defense is that it may distract you and the jurors from the facts of your case. The defense will not be tearful at all if the trial takes a tangent and becomes mired in the question of what the defendant’s drinking pattern was. Amongst your facts that rebut the on-the-rise defense are the officer’s initial observations. Make clear that the defendant’s drinking and the officer’s observations are not coincidences. If you are able to keep the jury focused on the aberrant driving, the physical symptoms observed, and the defendant’s performance on the FSTs, all of which are consistent with someone who is already impaired, the jurors will conclude the defendant was DUI when stopped, and whether the defendant’s BAC went higher later on is truly irrelevant.

2. Preliminary Alcohol Screening (PAS)

   Virtually all law enforcement agencies are equipped with a portable breath instrument known as the PAS. Unfortunately, not all agencies keep and use their instruments in compliance with Title 17. But if your local agency does, and if your court admits PAS results into evidence, at least when an on-the-rise claim is being presented by the defense, then you have the most relevant and best evidence of what the defendant’s BAC was when stopped. (See California Constitution, Article I, section 28(d) to support admission of PAS results.) Of course, PAS results below 0.08 will be strong evidence in support of the defense.

   Note: As of publication date (summer 2010), the Department of Justice has new portable breath instruments that are about to be distributed to the CHP and many local agencies. These new instruments will be completely compliant with Title 17, maintained and calibrated by DOJ labs, and ultimately replace the stationary breath instruments currently used around the state. These scientific critters will likely sound the death knell to the on-the-rise defense.
3. The Defendant’s Initial Statements to the Officer at the Time of the Stop

Every law enforcement agency in the state likely uses an arrest report that has a section dedicated to retaining the defendant’s statement regarding: (a) when the drinking began; (b) the time the drinking stopped; (c) what beverage was being consumed; and (d) how much. Whether it is because defendants are most likely to tell the truth at the time of the stop or that they are attempting to create as much of a time gap as possible between the last drink and the driving, it is common that the defendant’s statement of the drinking pattern will indicate several hours between the last drink and the driving.

Obviously, the longer the time period between the drinking and the driving, the less possible is an on-the-rise defense, since all of the alcohol would likely have been absorbed if the stated period is an hour or longer. The defendant’s own contemporaneous statements are therefore great weapons in dealing with a defense expert’s attempt to establish an on-the-rise defense.

Remember, a hypothetical question of an expert requires that all the facts that would support the hypothetical conclusion must already be in evidence. In other words, if there is no evidence of the defendant’s drinking pattern before the stop, the expert would have no basis upon which to utter an opinion.

If the defendant did not speak to the officer at the time of the stop but subsequently talked to the defense expert and provided “facts” that support an on-the-rise claim, you obviously can establish on cross-examination that the expert was not present when the defendant was drinking. Therefore, the expert’s conclusions are all predicated on the statements of someone with a vested interest in the outcome of the case and a motive to lie.

4. The Officer’s Observation of the Defendant’s Impairment Between the “Bust” and the “Blow”

Because the essence of the on-the-rise defense is that the defendant was more intoxicated at the chemical test than while driving, one would expect that the defendant would exhibit more pronounced signs of impairment in that interim period between the arrest and the test. It is important to inquire of your officer in every DUI case, and certainly those in which you suspect an on-the-rise claim, whether the defendant showed increased, constant, or diminishing signs of impairment between the stop and the test. Evidence that there were constant or diminishing signs of impairment is important to you, as it is inconsistent with this defense. In our hypothetical, given the quantity of alcohol and the extremely short drinking pattern, the defendant would have clearly demonstrated increased impairment in the hour between the stop and the test.

5. Assuming All the Alcohol Was Absorbed at the Time the Defendant Was Stopped

If the defense is using an expert, it is likely that the defense counsel has a series of hypothetical questions prepared that will enable the expert to somehow magically conclude that the defendant was a 0.07 or less at the time of the driving. Because there is often no real evidence to support the defense’s conclusions, you are well within your rights to ask the defense expert on cross-examination, “DR. QUACK, THE DEFENDANT RECORDED
RESULTS OF 0.08 AND 0.09 AT 11:15 P.M. IF WE ASSUME ALL THE ALCOHOL WAS ABSORBED AT 10:15 P.M., THE TIME THE DEFENDANT WAS STOPPED, ARE YOU ABLE TO CALCULATE WHAT THE DEFENDANT’S BAC WOULD HAVE BEEN AT THAT TIME?" The defense expert can obviously perform this simple calculation, and, because we know that absorbed alcohol burns off at 0.02 an hour, the defense expert will necessarily testify that the defendant would have been at 0.10 and 0.11 when stopped. This testimony that the defendant could actually have had an even higher BAC at the stop will ideally neutralize the expert’s earlier conclusions.

6. Human Experience and Common Sense

Often, the proffered defense facts that support an on-the-rise claim just do not square with human experience or common sense. For instance, in your hypothetical case, the defense is premised on the defendant going to a bar, choosing to chug six ounces of hard liquor in 10 minutes, and then leaving. While it might be conceded that someone could do this, the jurors’ own life experience and common sense can be enlisted to reject this scenario as unlikely and merely a defense ploy. Indeed, the act of belting six ounces of booze and then rushing out to drive is more likely an illustration of a person whose judgement has been impaired by alcohol.

C. Jury Instructions

There are two jury instructions relevant to an on-the-rise defense: CALCRIM 2111 and CALCRIM 2110. Review these instructions carefully, and seriously consider using them in your closing argument to the jury.

CALCRIM 2111 provides in relevant part:

If the People have proved beyond a reasonable doubt that a sample of defendant’s blood, breath or urine was taken within three hours of the defendant’s driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant’s blood alcohol level was 0.08 percent or more at the time of the alleged offense.

This inference, although not binding, is squarely contrary to the on-the-rise defense. A jury can infer the defendant drove a vehicle while over a 0.08 BAC so long as he or she tested at a 0.08 BAC no more than three hours later. This instruction is anathema to the defense. But because the inference is nonbinding, you must give jurors reasons why they should follow it. Argue all those facts concerning driving, objective symptoms, drinking pattern, and FSTs as to why the jury should follow this instruction.

CALCRIM 2110 provides:

If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.
This instruction is tailored to the under-the-influence charge (Vehicle Code section 23152(a)) clearly stating a proposition similar to CALCRIM 2111. This instruction puts no time limitation on the chemical test and simply states that if the defendant tested at a 0.08 BAC or higher at the time of driving [time of the alleged offense], you may infer he or she was under the influence. As with CALCRIM 2111, argue the facts of intoxication as to why the jury should adopt this inference.

In concluding this discussion of the on-the-rise defense, remember that, as a prosecutor, you should always stress common sense. This is especially true with this defense.

IV. “I Didn't Drink Until After the Crash” Defense

A. The Defense Claim

*The defendant was so shaken and upset by the crash that a drink was needed to calm his or her nerves. Therefore, while the subsequent chemical test results are accurate, the defendant had been sober when driving.*

The factual setting that might support this defense involves a crash, the passage of significant time before the arrival of law enforcement, and the apparent opportunity for the defendant to drink. The brilliance of this defense is that it has the effect of neutralizing the chemical test results. The defense can concede the defendant’s recorded BAC while contending it is irrelevant to the issue of the driver’s sobriety at the time of the crash.

Let us assume that the defendant is involved in a solo crash into a tree in front of a house. The homeowner calls the police. It takes the police 30 minutes to get to the scene. When they arrive, the defendant appears to be impaired. Four empty beer cans are found in the vehicle’s backseat. The defendant testifies he was driving a friend’s car he was not familiar with and lost control going around a curve. He had nothing to drink prior to the crash but had the four beers in the backseat. He was so upset by the circumstances that he drank the beer while waiting for the police.

B. Combating the Defense

There are several ways to neutralize this defense.

1. Witnesses

If there were identified witnesses to the crash, they hopefully had an opportunity to observe the defendant and can testify about the signs of impairment and any contemporaneous statements that will refute the defense. It is fairly common that victim witnesses had an opportunity to be near the defendant and form an opinion regarding impairment. Normally, these witnesses, because they have to be in court anyway on the issue of “driving,” are more inclined to provide helpful testimony. Conversely, a passerby witness is often less likely to want to get involved. In the hypothetical above, the homeowner might prove a great witness if he or she approached the defendant to see if all was OK. Or maybe the homeowner can talk about what the defendant was doing (hopefully not drinking beer) before the police arrived.
2. Expert Testimony on Amount of Alcohol Necessary

It is common in these defenses that the defendant will have to walk a fine line if the jury is to be persuaded. On the one hand, a jury may believe that after a harrowing experience, a person may take a drink. But the jury will not likely go along if the defendant testifies to a lot of drinking or too many drinks for the time period between the crash and the arrival of law enforcement.

Check to see if the defendant’s stated amount of consumed alcohol matches his or her BAC. It is very possible that the defense testimony of “four beers” will not square with the BAC of 0.12 for instance. Your expert will then be able to return to the stand on rebuttal and demonstrate how the defendant is lying. Additionally, your expert will be able to establish how much alcohol is necessary for the defendant to get up to a particular BAC. In the hypothetical, if the expert says that a person of the defendant’s gender and weight could only reach 0.08 on four beers and would need six beers to be at 0.12, the jurors are less likely to be swayed by the defense.

3. Common Sense

The common sense argument. In the hypothetical above, if it can be established that the defendant knew of the calling of the police before drinking, it obviously strains the limits of common sense to contend that the defendant, knowing the police were on the way, pounded four beers in 30 minutes in anticipation of their arrival. Such a factual contention either is a lie or supports a conclusion that the defendant was already “mentally impaired” by previously consumed alcohol.

4. Officer Observations

Like in the on-the-rise defense, the defendant’s facts probably will show a quick consumption of alcohol just before the arrival of police. Similarly, such a scenario would likely produce an observable expansion in the symptoms of impairment. If the officer saw no increase in impairment from the time of arrival to the chemical test, you can argue that the defense is contrived.

V. The Low-Blow and No-Bad-Driving Defense

A. The Defense Claim

\textit{It is not against the law to drink and drive. The defendant had something to drink, but given the absence of impaired driving and the low blow, the defendant was not under the influence when stopped by the police.}

The cases that go to trial are usually the ones in which the People’s evidence is not overwhelming. The defense attorney knows that material evidence may be undermined by cross-examination and is willing to risk a good plea agreement to take his or her chances at trial. Remember that the defense needs only one juror with reasonable doubt to stop the prosecution from winning a conviction.
DUI cases in which the defendant has a low blood-alcohol level combined with no bad driving are always problematic. These cases generally have the following fact pattern: First, the defendant has not engaged in any driving pattern commonly associated with alcohol, such as swerving between lanes or causing an auto collision. Generally, the probable cause to stop the defendant is other than a moving violation, like a non-working tail light, expired registration tags, or not wearing a seatbelt. After the officer makes the stop, he or she notices the objective symptoms of intoxication and does a DUI investigation. The objective symptoms are often minimal, i.e., a slight odor of an alcoholic beverage and some of the FSTs are improperly performed. Last, the defendant has a low range blood-alcohol concentration, ranging in the area of 0.08–0.09. The defense contention is that if the defendant was truly impaired, the officer would have observed some evidence of bad driving. And since there were no signs of bad driving, the defendant was not impaired.

The defense will ceaselessly point out to the jury all the facts that suggest innocence. The defense will have the officer reinforce all the parts of the observed driving that are consistent with sobriety as well as testify to the absence of common DUI driving errors. Additionally, all observed objective symptoms or errors on the FSTs will be isolated and given innocent explanations. For example, the defense will say that the odor of alcohol is an indication of how recently the person drank and not the quantity consumed; red eyes can be caused by allergies; the defendant’s slightly slurred speech as claimed by the officer is in reality the defendant’s normal “fluid” or accented speech; the defendant could not properly do some of the FSTs due to an old war injury; or the officer was being hypercritical. The defense may also argue that the BAC results have a margin of error that calls for reasonable doubt. (Remember, our own expert may concede our 0.08 could have been a 0.07, or the defendant can always claim mouth alcohol if there is a breath test.)

The best way to combat this defense is to stress the totality of the circumstances, the expertise of your officer, and the accuracy of the blood-alcohol reading. Obviously, a prosecutor will do this in any case, but with a “low blow” and no-bad-driving defenses, it is imperative that you maximize facts that show guilt.

When the defense attempts to isolate facts and provide innocent explanations, you need to show that no fact is ever looked at in isolation. A fact is always viewed in the context of the big picture—the totality of the circumstances. This is basic common sense. Make the point as many times as possible that while there may be innocent reasons for some isolated facts, the presence of all the facts in your case is not a matter of mere coincidence. And taken together, the only logical conclusion consistent with common sense is that the defendant was impaired.

Show that your officer was a well-trained professional who was not out to get the defendant. One of the greatest errors a novice prosecutor makes is in not wanting the officer to say anything good about the defendant. If the defendant did well on a certain FST, then do not hesitate to bring out that fact in your opening statement and during direct examination. This will speak to the officer’s objectivity and likely gain credibility with the jurors, who will then give greater weight to his or her testimony when the officer testifies how the defendant was under the influence. If you and the officer stubbornly refuse to admit that there are facts that are favorable to the defendant, you will lose credibility with the jury.
On a low BAC case with breath samples, you need to show that the test results are very accurate. Often, the defense will try to claim that the breath-testing instrument has a margin of error of plus or minus 0.01. This is simply not true. The 0.01 margin of error is only a Title 17 minimum requirement. In reality, the instruments are far more accurate.

To find the true accuracy of your instrument on the specific date of the test results, look at the accuracy testing records that Title 17 mandates are kept. Title 17 mandates an accuracy check must be done every 10 days or after every 150 subjects. In these records you will see a simulator solution value. (The simulator solution is an alcohol and water solution used to test the accuracy of the instrument.) The value of the simulator solution is the content of alcohol in the solution. The instrument tests the known value of the simulator solution and gives a recorded result on the accuracy records. The difference (if any) between the simulator solution value and the accuracy check results is the true margin of error for the instrument.

Generally, modern breath-testing apparatuses have margins of error between 0.000 and 0.005. This true margin of error is far less than the minimum standard of Title 17. Be sure your jury understands that fact. Then you can confidently present the BAC results as precise measurements and not susceptible to the alleged 0.01 margin of error.

Another crucial manner in which to enhance the likelihood of a conviction is to be sure you properly explain the law to the jury concerning the under-the-influence charge (Vehicle Code section 23152(a)). Often, defense attorneys, and at times judges, tell the jury that the crime is “drunk driving.” This is simply not true. CALCRIM 2110 states:

A person is under the influence if, as a result of drinking an alcoholic beverage, his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

As we can see, the actual legal threshold for driving while under the influence is mental or physical impairment—far less than “drunk driving.” Make sure your jury understands and applies this jury instruction to your case.

In conclusion, the low blow, no-bad-driving case needs to be carefully evaluated and prepared before it is presented to a jury. (What case should not be?) The prosecution’s expert is always crucial to such a case in order to explain to the jury why a low blow still necessarily means impairment. The police officer’s investigation must be presented to the jury as professional and complete. Totality of the circumstances is the key to prevailing in these cases.

VI. The No-Driving Defense

A. The Defense Claim

The police arrested the wrong person.
When is a DUI case not a DUI case? Answer: When there is a “no-driving defense.” When a defendant claims that he or she did not drive the vehicle, this immediately changes a scientific case full of technical jargon and experts into a simple whodunit.

No-driving defenses generally sprout up when the officer does not witness a defendant driving or briefly loses visual contact with the suspect vehicle. The fact patterns can be very diverse. Examples of no-driving scenarios can include: (1) a traffic collision where the officer does not arrive on the scene until after everyone has exited their vehicles; (2) the defendant’s vehicle is found along a freeway either broken down, out of gas, or simply stopped, and the defendant is either inside the vehicle or nearby; (3) the defendant and a front-seat passenger attempt to pull off the switch between the time the vehicle is stopped and the officer’s approach to the vehicle; (4) the defendant is asleep behind the driver’s wheel on the freeway shoulder; (5) the defendant is asleep behind the wheel in the middle of the road on a city street; or (6) the defendant is behind the driver’s wheel at a drive-thru fast food establishment. All these and many more can be the foundation for a no-driving defense.

Let us confront each scenario. When dealing with a traffic collision, make sure during your interview with the officer and the civilian witness you find out if the defendant ever admitted to being the driver at the time of the accident. If there was an eye witness to the driving, be thorough in how you interview this witness about their observations so you can ultimately present convincing evidence to a jury. Ask the witness to the driving to articulate to you how they are sure the defendant was the driver. Prepare the driving witness for anticipated defense questions that will cast doubt on their testimony. When a defendant’s vehicle is found along a freeway stopped for any reason, and he or she is inside the vehicle or nearby, you can usually present evidence to show that the defendant was in fact the driver. It is crucial to find out if the defendant is the registered owner of the vehicle to show that he or she is the most likely candidate for driving. If the defendant is in the passenger seat upon the officer’s arrival, find out during your interview with the officer if the defendant ever admitted to being behind the driver’s wheel. If the defendant was simply nearby the vehicle upon the officer’s arrival, find out during the officer’s interview if the defendant ever admitted to driving the vehicle, and whether the officer checked the position of the driver’s seat to see if it fit the height of the defendant. For example, if the defendant is six feet tall, and claims the driver who left to get gas was five feet tall, the fact that the height measurement of the driver’s seat is more consistent with a person who is six feet will be valuable evidence to show that the defendant was the driver.

The scenario where the defendant and the passenger switched positions before the officer stopped the vehicle is a unique situation. It is important to highlight the officer’s initial observations. You must be very detailed in your direct examination of the officer as to facts that show the witness is sure that the defendant was the driver. For example, there may have been distinct height differences between the driver and the passenger when the officer first observed the driving. There may also have been a noticeable difference in the style of hair of the driver and the passenger upon first observation of the driving. These are facts that you would point out to a jury to show that the initial observations of the officer were correct, and the defendant was definitely the driver.

When the defendant is found asleep on the side of a freeway shoulder, a common argument is the defendant never drove the vehicle to that location; instead a friend drove him there and left
to get gas or help. When confronted with this scenario, ask the officer how long the defendant claimed he or she had been at this location before the officer arrived. This is important because most often it will be a CHP officer patrolling the freeway, someone who is trained to notice vehicles stopped on the shoulder. If the defendant claims his vehicle was on the shoulder for at least an hour before the officer arrived, you can contradict this statement by pointing out that the CHP officer was on that particular portion of the freeway during that time frame and did not see any stranded vehicles. Of course you should ask the officer if he or she got the alleged driver’s name from the defendant. Most often the defendant will not present a name or any other credible information. You should subsequently point out these weaknesses in the no-driving defense presentation.

If a defendant is found asleep in the middle of the road behind the driver’s wheel alone, he or she is more than likely the driver. The defense may argue that someone else was initially driving; however the defendant was left behind the wheel by a friend. The claim could be that there was an argument between the friend and the defendant, so the defendant intended to move the car out of the road but fell asleep before he or she could do so. Once again, you need to find out if the alleged friend’s contact information was given to the officer. You also want to know how long the car was in the middle of the road before the officer arrived. If someone was asleep in the middle of the road for any substantial period, there would most likely have been several help calls from citizens driving in the area. You should familiarize yourself with the area to determine if there were any businesses open at or near the location of the vehicle. It is important to be as detailed as possible in your interview with the arresting officer to combat the arguments the defense will present regarding this scenario.

The last scenario is where the defendant is in a drive-thru fast food establishment at the window ordering food. The defendant’s story is he was sitting in the passenger’s seat when his friend drove into Wendy’s and got out of the car to talk to a person standing on the sidewalk nearby. The defendant’s friend decided to leave with the person who was on the sidewalk without informing him. The defendant moved over to the driver’s seat only to order the food because the clerk could not hear him from the passenger seat. The moment the defendant moved to the driver’s seat, a car ran into the back of the vehicle. When the police arrived, the defendant was identified as the driver. At first blush this scenario may seem very unreasonable; however, you must be aware that there are jurors who may believe it happened the way the defense stated.

In light of this fact, you must find out as much as you can about the circumstances before the defendant reached the window to order food. Can the driver of the vehicle that hit the defendant testify that he or she saw the defendant move the vehicle before approaching the window? Can any witness state they saw the defendant driving prior to approaching the window? In your interview of the officer, find out if the defendant ever gave a reason why the alleged driver left without informing him. Did an argument occur before the departure? Was the alleged driver in the habit of leaving the defendant without an explanation? This information or lack of answers to the officer of these questions will assist you later in your case.

B. Combating the Defense

There are crucial things that a prosecutor should do when confronted with the infamous no-driving defense.
1. Go to the scene of the crime. You need to know the landmarks for cross-examination purposes.

2. Interview every witness who can testify that the defendant was the driver.

3. Know every statement the defendant made regarding driving, including inconsistent statements. For example, the defendant initially states he was the driver but, later in the investigation, decides to recant his statement upon arrest.

4. Be aware, to the extent possible, of every person who was in the car with the defendant during the driving. Make sure you know what statements were made by persons in the defendant’s vehicle.

5. Find out if there is a significant height or weight difference between the defendant and the alleged driver.

6. If the alleged driver is planning to testify, find out if that person had a valid license at the time of the driving.

7. Find out if the alleged driver was under the influence of alcohol at the time of driving.

8. Ask the officer if he noticed any stranded vehicles when patrolling the freeway during the time the defendant claims to have been stopped.

9. Ask the officer if he received any help calls from citizens regarding a stalled vehicle.

10. Ask the officer if he or she checked the driver’s seat for height position.

There are many other investigative questions you can ask depending on the facts of your case. The above listed ones are given to help you start thinking about how to attack the no-driving defense. With time and experience, you will certainly add many more investigative questions to your interview.

The defense quite often relies on the jurors to believe that there was someone else driving the vehicle. If the alleged driver is ready to testify and did not hold a valid license or was intoxicated at the time of driving, you should inform the court that the witness should consult an attorney before taking the stand. The witness could very well be subjected to criminal prosecution if he or she proceeds to testify. I have found that a significant amount of defense witnesses have had a change of heart when they are advised by an attorney that they could be charged with a crime if they testify to being the driver when they did not hold a valid license or was intoxicated when driving. This could change the tenor of the negotiations.

If you encounter a situation where the defense fails to call the person who can support their defense that the defendant was not the driver, you may comment on this fact during your closing argument. (See People v. Font (1995) 35 Cal.App.4th 50.) The court stated in this case that it would be Griffin error whenever a prosecutor or court comments, either directly or indirectly, upon defendant’s failure to testify. It is well established, however, that the rule prohibiting
comment on the defendant’s failure to testify does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. The People’s position should be that the defense certainly would have called the alleged driver to testify that the defendant was not the driver, and that they were. This would definitely fall under the logic of the Font case. Who would be a more material or logical witness than the alleged driver? This is the question you would pose to the jurors.

When confronting this defense, it is crucial you speak to the defense attorney to glean as much information as possible. Certainly find out the identity of the alleged driver and whether this person will testify at trial. If so, attempt to interview this person in the company of an investigator or law clerk who might later testify, and get the specifics of the witness testimony. If the alleged driver will not testify, find out why not. After getting enough information to understand the nature of the no-driving defense, you can start preparing how to deal with it in court.

Generally, the manner in which a prosecutor combats this defense is through circumstantial evidence. The prosecutor must place the defendant behind the wheel through a series of connected facts that leads a jury to convict. Did the car belong to the defendant? Was the defendant in the driver’s seat? Was the engine warm? Who had the keys? Was the defendant alone at the side of the freeway? In a crash situation, were the defendant’s injuries consistent with the damage to the driver’s side? (For instance, does the defendant’s cut forehead match the damage to the driver’s windshield?) These and myriad other questions can be extremely relevant in a no-driving defense. Be aware that if you have a witness to driving in a no-driving defense, point out to the jurors that this is not a circumstantial evidence case on the issue of driving. Too often prosecutors fall into the trap of arguing facts they do not need to. If you have a civilian witness or an officer who can testify that they actually saw the defendant driving, tell the jurors this is direct evidence that the defendant was the driver. You can show the jurors that the defense is trying to cloud the issues in an attempt to present reasonable doubt. If there is also circumstantial evidence to support that the defendant was driving, by all means present those facts as well.

The recall of the officer about specific things such as color of clothing, presence of hats, facial hair observed, and location of the car keys may prove important. The contemporaneous statements of the defendant or of the passengers or what the defendant said before the car was being impounded all might prove vital.

Note: It is necessary to establish some slight or minimal evidence of the crime before the defendant’s statements can be introduced. (See People v. McNorton (2001) 91 Cal.App.4th Supp. 1.) Unfortunately, officers who receive statements from passengers or other witnesses that corroborate the defendant was the driver may not include the statements or witness identifications because the officer cannot imagine anyone will suggest months later at trial that the arrest of the defendant was an error.

Your cross-examination skills will be tested on a no-driving defense. The defense usually will put a witness on the stand to either claim he or she was the driver or someone else was. If you erode the credibility of this witness, you will almost certainly prevail in the case. Sometimes the defendant will take the stand to put facts into evidence that he or she was not the driver. Again,
you must erode the credibility of this testimony in order to prevail. The questions you might ask the witness (or defendant) are so varied that it is difficult to give any standard advice. Sometimes the best you can do on cross-examination is to elicit from defense witnesses as much agreement with the officer’s testimony as possible. This may only involve minor points, but it may provide a foundation for your argument to the jury that even though the defense agreed with much of your officer’s testimony, they conveniently chose to disagree on the related facts that established the defendant was the driver.

In closing argument, you need to be able to rattle off enough circumstantial facts so that the jury feels confident that the defendant was the driver. Hopefully, your cross-examination has poked enough holes in the defense case so you can also argue that it is simply not worthy of belief.

VII. The Necessity Defense

Defense attorneys love necessity defenses. I do not know why because such a defense almost always results in conviction. It often appears to be akin to “guilty with an explanation.” There is a large body of case law and legal treatises concerning this defense, and you should be familiar with the parameters of necessity for your advocacy before both the court and jury.

There are two California cases that are very insightful concerning the necessity defense and driving-under-the-influence cases. They are People v. Pena (1983) 149 Cal.App.3d Supp. 14 and People v. Slack (1989) 210 Cal.App.3d 937. The Pena case established in California the applicability of the necessity defense to a DUI case. Both cases discuss the different elements needed to be established by the defense in order for a necessity defense to be valid.

Also crucial to the applicability of a necessity defense is CALCRIM 3403. You will need to review this instruction carefully, and know the elements cold. This jury instruction lists the six different elements of necessity that the defense must meet by a preponderance of the evidence for the necessity defense to be valid. Remember that all six elements must be proven by a preponderance of evidence, and, if not, the jury (or the court) must reject such a defense.

Your adversary will be more than eager to tell you why his or her client had to drive under the influence to prevent some disaster or evil. Therefore, getting the alleged facts as to the necessity defense should not be very difficult. Generally, once you have ascertained that the defense intends to pursue this defense at trial, you should notify the court and request an Evidence Code section 402 hearing (outside the presence of the jury) to have defense counsel formally put forth the facts it claims support such a defense. Because there is an actual evidentiary burden with this defense, the prosecutor has the right to see if a minimum threshold of evidence exists for this defense to even be presented to a jury.

Often, the defense cannot show a factual basis for all six elements of necessity. When that happens, move that the necessity defense be stricken as a matter of law; therefore, the defense cannot raise the issue at trial. Courts are very hesitant to allow a defendant to tell a jury he or she had a right to break the law and endanger the community by his or her behavior. Only where legitimate facts exist to warrant such a defense will most courts allow it. This is precisely why you want a section 402 hearing.

Usually, the defense will admit at trial that the defendant drove while under the influence. Never let the jury forget, even for a second, that the defendant admits to committing a dangerous crime.
I have told jurors that first they should review the evidence concerning the defendant’s driving under the influence and decide if a criminal act took place. In almost all cases, the evidence will be overwhelming. Once they have decided that the defendant is guilty of the crime; then, the jurors must decide if they will sanction the crime via a necessity defense. When presented in this manner, juries are very hesitant to sanction criminal behavior.

The highest hurdle to clear for most necessity defenses is the element that there was no reasonable legal alternative to driving under the influence. Almost always the defendant could have called a cab, walked, had a friend drive, called the police or an ambulance, etc. Be sure to emphasize through cross-examination all of the alternatives the defendant had other than endangering the community.

Additionally, a successful necessity defense requires the jury to believe that the defendant’s act of driving impaired and presenting a risk of serious harm to all on the highway was less potentially harmful than the imminent evil the defendant was attempting to avoid. Although the defendant may well have driven under the influence and luckily not crashed his or her vehicle in your particular case, history is littered with the gruesome results of the inappropriate mixture of alcohol and driving. Never let the jury forget the potentially deadly consequences that could have resulted from the defendant’s criminal acts.

In summing up how to combat this defense, you should attack it head on. If the necessity defense is not stricken by the court, you should be the first to tell the jury about it and why the facts will indicate that the defendant’s criminal behavior should not be sanctioned. Your cross-examination of defense witnesses should be well planned to deflate this defense. Above all else, you should be very familiar with the law of necessity so both the judge and jury will properly understand the defense and why it is not warranted in your particular case.

VIII. Summary

Initially, it may impress you that your adversary has some nerve raising a defense in your case. A secondary response may be momentary panic. Neither reaction is necessary nor helpful. Defense attorneys exist within the system to raise defenses. Their presence and creativity are what will allow you to grow as a trial advocate. The sense of panic you might feel is unwarranted for the facts and witnesses in your case, coupled with your own trial abilities and the jury’s common sense, will most likely ensure that justice is done.

Jeffrey Gallagher is a deputy city attorney in the Los Angeles City Attorney’s Office. He has been employed there since 1994, where he has worked in both the civil and criminal divisions, completing 67 jury trials, 40 of which were driving-under-the-influence cases.

Mr. Gallagher earned a bachelor’s degree in Spanish and a master’s degree in Latin American studies from the University of Arizona. He earned a Juris Doctor degree from the Southwestern University School of Law.

Chapter Updated in 2010 by Rosalind Russell-Clark, TSRP: Rosalind Russell-Clark has an AA in Administration of Justice from Southwest College, a BS in Criminal Justice from California State University Los Angeles, and a JD from the University of West Los Angeles School of Law. She has served as an instructor at the University of West Los Angeles School of Law on a variety of subjects, focusing primarily on criminal law. The CalTSRP for Los Angeles and Ventura, she currently works for the Los Angeles City Attorney’s Office. In her 20 years as a prosecutor, she has handled more than 75 DUI jury cases, including ones with notable defendants. Ms. Russell-Clark is also the director of a free legal clinic at her church in Carson.
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Chapter XV

Dealing with a Defense Expert

by Frank M. Horowitz, Former Director of
CDAA’s Driving Under the Influence Project

The California District Attorneys Association would like to give special thanks to Jeff Gallagher of the Los Angeles City Attorney’s Office; the Honorable Eugene Gini, formerly of the Placer County District Attorney’s Office; Dorothy Klishевич of the San Joaquin County District Attorney’s Office; and Barbara Schackleton of the Riverside County District Attorney’s Office for their assistance in the peer review and editing of this chapter.

(Updated 2010 by Stephen F. Wagner, TSRP, Coastal Region)

I. Introduction

There is nothing easy about putting on a trial, but new prosecutors, even those whose only background in the sciences is political science, can survive their first driving-under-the-influence (DUI) trial. Feverish late-night cramming with sources like this manual will teach what needs to be proven, what facts to marshal, and which witnesses to call. Putting your own case-in-chief together is a confusing process of selection and presentation, but it is doable. It is much like being a new teacher deciding on the lesson plan and how best to teach the students so that they will understand and believe what they are being taught.

Responding to your opponent’s defense is more difficult. And if the defense calls its own expert, your sense of dread, not to mention wonderment at your choice of occupation, may rocket out of control. For it is one thing to piece together the evidence to support your case, but it is a wholly different process to withstand defense assertions that your evidence has more holes in it than a thin slice of Swiss cheese.

The intent of this chapter is to help you understand the role of a defense expert in a DUI case, to discuss ways to limit the effectiveness of the expert, and to arm you with an approach that will ideally thwart the defense expert’s impact on your jury. This comes with no guarantees, however; but these materials will serve as a starting point. Common sense, creativity, and knowledge of your case and jury will ultimately serve you better than any manual in achieving justice in your court.

Note: One other threshold inquiry that is helpful toward the mastery of dealing with the defense expert centers on understanding the so-called “defense.” If you become well-versed on the defense, then your cross-examination of the expert will become much more compelling.
II. So Why Is the Defense Calling an Expert Anyway?

Unlike many cases you will prosecute, a DUI is truly an egalitarian crime. People from every economic class leave a saloon foolishly believing they can drive home even though they are so blitzed that locating their car in the parking lot is a challenge. And because the penalties for DUI have increased markedly over the last two decades, even the wealthy are facing forms of punishment that they eagerly wish to avoid. Supply and demand being what it is, many defense counsel now devote their practices and their energy exclusively to DUI cases. DUI-defense experts, while pricey, have become an integral part of the private counsel’s DUI-defense team. Equal protection properly guarantees clients of public defenders equal access to the expert testimony that wealthier defendants can afford.

From the defense’s perspective, the most important part of the prosecution’s case for them to neutralize is the testimony of the criminalist. After all, the forensic alcohol evidence establishes that the instrument was working, specifies how much booze the defendant had on board when tested, shows the jury that no humanoid with the defendant’s blood-alcohol content (BAC) could safely operate a motor vehicle, and even figures what the defendant’s BAC would have been at the time of the initial traffic stop. Checkmate.

The defense bar’s response to this is, “If you can’t beat ‘em, join ‘em.” The premise is that the “normal” (i.e., scientifically impaired) juror, when confronted with two different scientific takes on the evidence, will more likely have a reasonable doubt about the accuracy of the test results. This may explain why defense attorneys nearly always kick the more scientifically sophisticated engineers, nurses, and biologists away from DUI juries. In any event, being a DUI-defense expert witness has blossomed into a California cottage industry.

Defense experts generally have at least a B.S. degree in some related scientific major. (This is not an intentional slur against the experts’ educations.) They commonly have additional practical background and training in forensic alcohol analysis. Many have a background that includes a stint as a criminalist with a law enforcement lab before leaving public service in pursuit of fame and fortune. Those who once worked on the side of the angels before they crossed over, frequently present the greatest challenge to prosecutors.

*Note: Along with the value of understanding why the defense is calling an expert, prosecutors must think about the “Big Picture” and carefully evaluate exactly what the defense must do to get the jurors to bite. Can the defense pull this off without the defendant testifying? A good example would be post-collision drinking: rising-blood argument. How detailed should your cross-examination be? Remember, in some cases, short cross or no cross may well be the best strategy.*

III. So What Is Their Point?

At the outset, let us be clear. There are cases in which our side somehow messed up. If a defense attorney presents you with facts that plausibly suggest the defendant is not guilty, and conversation with your forensic alcohol analyst corroborates that something went amiss in the processing of the case, it is not wrong or a failure to reevaluate your case and do justice. In most cases, however, the defense expert testimony is no more than a generic laundry list of things that possibly or hypothetically might have affected the accuracy of the defendant’s test results.
**Note:** Most often, an expert witness has no personal knowledge of the facts of your case. (Compare Evidence Code §§ 702 & 821.) This means that, unlike the arresting officer, the defense expert did not see the defendant’s driving, physical symptoms, or field sobriety test (FST) performance, and was not present during the 15-minute observation period or chemical test. Therefore, it is likely that the defense expert has nothing specific to say about the facts of your case and is left with nit-picking about how a difference in facts, process, or method might have achieved the “Dr. Quack standard” of scientific certainty.

Although dealing with a defense expert in a field you know little about can be very challenging, remember: **Your officer was there; the defense expert was not.** One of your tasks will be to figure out how to creatively use this fact to demonstrate to the jury these things:

- One doesn’t need a B.S. degree to know when someone is “deuced,” a.k.a., driving-under-the-influence (DUI).

- The defense expert’s professional opinion regarding the defendant’s impairment would be much more accurate if the expert had observed the driver at the time of the stop.

- An observer with your officer’s professional experience is trained to easily spot a DUI.

- Between the officer and the expert, only one was actually present at the stop to make those observations … and it was not the defense expert.

The points listed above are compelling in both cross-examination and in closing argument. After all, the jury is hearing evidence in an impaired-driving case, and, in DUI trials, “impairment at the time of driving” is the focal point and the hallmark of Vehicle Code 23152(a)(b). Ladies and gentlemen, we do not need a Monday-morning quarterback because we have the investigating officer.

One more benefit of using these bulleted points to form questions on cross-examination is that most defense experts cannot overcome the temptation to spar with the prosecutor and nine times out of ten, they end up looking silly.

**IV. Understanding the Game and Issues of Strategy**

Going toe to toe with defense experts is much like tap dancing blindfolded through a mine field: You are on their turf. They likely have forgotten more about this stuff than you care to know. Even if you are one of those who understand all the involved scientific principles and believe that you can scientifically best the defense’s expert, **do not do it.** There is nothing more boring to a jury than watching two folks screaming pseudoscience at one another. Even if you force the defense’s “Dr. Quack” to wave the white flag, the exchange necessary to get to that point has probably put the jury to sleep.

Before you start your cross-examination, decide in what ways the defense expert can support your case. What points do you want to make with this witness? Do not wander through your cross-examination. If you do, defense will clobber you. Swoop in; score your points; and get out. Do not try to destroy the so-called expert. Your goal is to get him or her to nod in agreement with you five times or so, and then sit down. **Note:** There are several resources available that illustrate what is commonly
known as a “concession-based” cross-examination. One old adage that comes to mind is, “You can catch more flies with honey than you can with vinegar.”

Because a defense expert is only able to stay in business if the defense bar is willing to continue to pay the tab, you should not be surprised if, at every opportunity, their expert will attempt to answer your question with a point that seems to favor the defense team. Defense experts also seem to perfect the ability to either avoid a prosecutor’s question entirely or choose a nonresponsive tangent. He or she hopes that you will either forget the point you were after or lose patience and move on. If this is tried on you, stay focused. Remain polite. (Showing anger in court rarely improves the jury’s image of your case or of you.) Repeat your question. If you are lucky, the defense expert will again attempt to “shuck and jive.” Do not be afraid to repeat your question yet again. At this point, the jurors are beginning to understand that the purported expert is really no more than a cheerleader with a briefcase—and no objective student of science. Point goes to Team Prosecution.

V. The Preemptive Strike: Is Voir Dire Worth Doing?

Evidence Code section 720 defines what must be shown before someone can be deemed an expert witness. After the defense has laid the foundation regarding the witness’s background, training, and experience supporting expert status, you have the right to take the witness on voir dire regarding those qualifications. (Cf., People v. King (1968) 266 Cal.App.2d 437, 444.) The real question is, should you?

It is rare in a litigator’s career that a bench officer will not deem anyone with some sort of additional education or unique background or experience an expert. It is unlikely that you will be so lucky while doing DUIs. So why bother attempting to do something you know is doomed to fail?

This is why—to conduct a preemptive strike:

- to expose to the jury the expert’s true function as a defense nit-picker and cheerleader;
- to show that he or she is not that knowledgeable of an expert; and
- to lessen the impact of the defense expert’s testimony before it happens.

The following topics are intended only as examples and starting points for ideas that might help you demonstrate to the jury the real role of a DUI-defense expert. Assuming you choose to voir dire, remember the judge, who has already concluded that the defense witness is an expert, will have no patience for an extended inquiry by you. Therefore, it is imperative that you be clear about what points to make, and that you make those points expeditiously. Note that these areas of inquiry can obviously be used in cross-examination if you choose not to conduct voir dire.

A. Education: The Game of “No”

While most defense experts will have some formal education in the sciences, it is not often that any have taken college classes specific to the subject matter of their testimony. The more specific your questions are, the more this will appear obvious. The goal in this portion of your voir dire is to get as many “no” answers from the defense expert as possible. Ideally, if you show the jurors at the outset that the so-called expert’s education does not appear pertinent to the matters at hand, it may reduce the jury’s acceptance of the expert’s opinions.
Note: If a defense attorney ever attempts to use a similar attack on your expert in voir dire, your response ought to emphasize: (a) your expert works in a state-licensed lab; (b) your expert had to pass tests specifically related to forensic-alcohol analysis before being entrusted with the present duties; (c) your expert has greater daily hands-on lab experience; and (d) your expert’s college training served merely as the necessary background to qualify him or her for the continuing education and experience the expert has received in his or her present assignment.

Sample Questions:

1. YOU HAVEN’T TAKEN ANY UNDERGRAD OR GRADUATE COURSES EXCLUSIVELY STUDYING THE EFFECTS OF ALCOHOL ON THE HUMAN BODY WHILE DRIVING, HAVE YOU?

2. HAVE YOU TAKEN ANY COLLEGE COURSES THAT DEALT WITH THE PRACTICAL USE OF INFRARED, GAS CHROMATOGRAPHY, OR FUEL-CELL ANALYSIS OF BLOOD OR BREATH SAMPLES FOR ALCOHOLIC CONTENT?

3. HAS YOUR FORMAL EDUCATION INCLUDED COURSES ON THE EFFECT OF ALCOHOL ON THE RESPIRATORY SYSTEM WHILE DRIVING?

4. HOW ABOUT THE CIRCULATORY SYSTEM WHILE DRIVING?

5. HOW ABOUT THE NERVOUS SYSTEM WHILE DRIVING?

6. HAVE ANY OF YOUR COLLEGE COURSES INCLUDED CORRELATION STUDIES TESTING THE EFFECT OF ALCOHOL ON A PERSON’S ABILITY TO OPERATE A MOTOR VEHICLE?
   (If the expert has previously worked as a criminalist in a law enforcement lab, he or she does have experience with correlation studies. Check this out before asking this question.)

B. Professional Organizations

It is possible to demonstrate for the jury that the defense expert is outside the realm of reasonable forensic alcohol experts by establishing that he or she has no active membership in any of these professional groups:

- The California Association of Toxicologists
- The California Association of Criminalists
- The American Academy of Forensic Sciences

Note: The membership of each of these groups tends to include folks who are currently employed in a law enforcement lab. Therefore, it is likely that the prosecution expert is a member of one or more of these professional associations while the defense expert is not.
C. Current Employment Status

These few questions may help the jurors distinguish between the prosecution criminalist and the defense's expert. Your criminalist will answer “yes” to all of these questions. The defense expert will be unable to answer “yes” to any of them.

1. DO YOU CURRENTLY WORK IN A LAB LICENSED BY THE STATE OF CALIFORNIA TO CONDUCT FORENSIC ALCOHOL ANALYSIS?
2. DO YOU CONDUCT INDEPENDENT FORENSIC ALCOHOL ANALYSIS FOR STATE AGENCIES?
3. FOR COUNTY AGENCIES?
4. HOW ABOUT MUNICIPAL AGENCIES?
5. FOR ANY PUBLIC AGENCIES?
6. ARE YOU A CERTIFIED FORENSIC ALCOHOL ANALYST UNDER TITLE 17 OF THE CALIFORNIA CODE OF REGULATIONS?

D. Defense Expert: The Hired Gun

The following series of questions is an effort to demonstrate to the jurors that the defense expert is really nothing more than a hired gun whose business card likely reads: “Have Testimony, Will Travel: A ‘Reasonable Doubt’ for a Reasonable Fee.”

There are two factors to keep in mind here. First, it is common for a defense expert to also appear in civil hearings or trials, frequently for the plaintiff. Therefore, be sure to limit your questions to the expert’s work in criminal cases. If you fail to do this, you give that person the opportunity to misrepresent his or her experience by possibly claiming, “In my last 50 court appearances, I’ve testified for the defense about 30 times.” The jurors are led to believe that the alleged expert, as an “objective” student of science, has a varied practice, testifying for the defense 60 percent of the time and, assumedly, for the prosecution 40 percent of the time. What the expert really means is that 60 percent of his or her workload is criminal defense, and 40 percent is civil plaintiffs’ work.

Second, be sure to limit your inquiries to the present. Because many defense experts have had prior careers as criminalists, a common wily attempt to make themselves sound more ecumenical is to lump all of their experience together so that they can answer, “In my career, I’ve testified about an even number of times for the prosecution and the defense.” If this tact is taken, be sure to pin the witness down as to how long it has been since he or she left public service and entered private practice, and what percent of appearances in criminal cases—since the change—have been on behalf of the People? Odds are nada, zero, zilch.

1. CURRENTLY, WHAT PERCENT OF YOUR COURT APPEARANCES ARE IN CRIMINAL CASES?
2. **IN WHAT PERCENT OF THOSE CRIMINAL CASES DID YOU TESTIFY FOR THE DEFENSE?**

3. **HOW LONG HAVE YOU WORKED AS A CRIMINAL DEFENSE EXPERT?**

5. **HOW MANY OTHER SCHEDULED COURT APPEARANCES FOR THE DEFENSE IN CRIMINAL CASES HAVE YOU HAD THIS WEEK?**

6. **HOW MANY TIMES A MONTH DO YOU TESTIFY IN CRIMINAL CASES?**

7. **AND THEY ARE ALL FOR THE DEFENSE, AREN’T THEY?**

8. **YOU DO REALLY GOOD WORK FOR THE DEFENSE ATTORNEYS WHO HIRE YOU, DON’T YOU?**

9. **IN FACT, WHENEVER [THE DEFENSE COUNSEL IN THIS CASE] GOES TO TRIAL ON A DUI, HE [SHE] ASKS YOU TO COME AND TESTIFY, DOESN’T HE [SHE]?**

10. **HOW MUCH ARE YOU BEING PAID FOR YOUR TESTIMONY TODAY?**
    
    (Note: Evidence Code section 722(b) permits this inquiry. In fact, the Law Revision Commission’s Comments for the section provide, “The jury can better appraise the extent to which bias may have influenced an expert’s opinion if it is informed of the amount of his fee—and, hence, the extent of his possible feeling of obligation to the party calling him.”) (See also People v. Price (1991) 1 Cal.4th 324, 456–457.)

11. **WHAT PERCENT OF YOUR INCOME LAST YEAR, NOT COUNTING DIVIDENDS AND INVESTMENTS, CAME FROM TESTIFYING FOR THE DEFENSE?**

12. **DO YOU HAVE HOURLY RATES, OR DO YOU GET PAID BY THE COURT APPEARANCE?**

13. **AND HOW MANY HOURS DID IT TAKE FOR YOU TO PREPARE FOR YOUR TESTIMONY TODAY?**

14. **YOU WROTE A REPORT ABOUT THIS CASE FOR DEFENSE COUNSEL, DIDN’T YOU?**

15. **AND YOU REVIEWED IT IN PREPARATION FOR YOUR APPEARANCE TODAY, DIDN’T YOU?**
    
    (If you get an affirmative answer to this question, ask to see the report.) (Evidence Code § 771.)

16. **AND YOUR TESTIMONY AS DEVELOPED THUS FAR IS BASED ON THAT REPORT, CORRECT?**
17. NOW, YOU DID TALK TO DEFENSE COUNSEL ABOUT YOUR TESTIMONY TODAY, DIDN’T YOU?

18. BUT YOU DIDN’T READ THE ARREST REPORT IN THIS CASE, DID YOU?

Assuming the witness contends that the arrest report was reviewed:

19. HOW MUCH TIME DID YOU SPEND ANALYZING THE ARREST REPORT IN THIS CASE?
   (If expert claims an inordinate amount of time for the length of the related arrest report, you might want the witness to review the report while on the witness stand and then tell the jury how many paragraphs or lines are in the report. Generally, DUI reports are quite short.)

20. YOU DIDN’T TALK TO THE DEFENDANT ABOUT THE CASE, DID YOU?

21. AND THAT WAS BECAUSE HIS INFORMATION WAS IRRELEVANT TO YOUR TESTIMONY TODAY, ISN’T THAT RIGHT?
   (Note: There is no requirement that you must actually argue against the expertise of the witness after voir dire. If you are ever in a situation where you do want to challenge the expertise of the witness, be sure to do that at sidebar. There is no value in having the judge broadcast before the jury that the defense witness is an expert.)

VI. The Testimony of the Defense Expert (The Evidence Code Is Your Ally)

As an expert settles in to provide testimony that may confound the jury with outrageous tales of scientific whimsy, it is important to understand that some rules of evidence apply. To know these rules may help you to limit the show the defense intends to present to your jurors.

A. An Expert Witness Has Limited Expertise

It is common for new prosecutors to treat someone deemed an expert witness with greater and broader deference than necessary. The defense will presume that once their witness is acknowledged as an expert in forensic alcohol analysis matters, the good “doctor” should be permitted to answer any and all questions of interest to the defense. This defense presumption is wrong. An expert witness’s expertise relates to a limited area.

Note: The more strategically sound tactic may be to reach this issue in a motion in limine and/or Evidence Code section 402/405 hearing—the goal being to limit the playing field up front and hope for a definitive ruling.

If the defense attempts to ask medical questions, questions of law enforcement procedure, or other unrelated scientific questions, the objection you might want to raise to the court would be: “OBJECTION. BEYOND THE SCOPE OF THIS WITNESS’S BACKGROUND, TRAINING, AND EXPERIENCE.”
B. The Right to See All Reviewed Documents Prior to Testimony

It is common for defense experts with busy practices to provide defense counsel with reports summarizing the facts of the case and outlining the nature of the anticipated testimony. It also sometimes happens that defense counsel will forget to provide the prosecution such reports as required by Penal Code section 1054.3(a).

Pursuant to Evidence Code section 771, you are entitled to see any “writing” reviewed by a witness in anticipation of testimony. This obviously includes any report written by the expert for defense counsel. You should be permitted to review such writing before the expert’s testimony. The report may provide subject matter for your cross-examination, and you are permitted to introduce any relevant part of the written material into evidence. It may be advantageous to include this inquiry as part of your voir dire of the expert. To have a copy of this material before the defense expert’s testimony could provide you with a preview of coming attractions and might cause your opponent some consternation if the rules of discovery have been inadvertently violated.

C. What If the Defense Expert Uses A “Writing” During Testimony

It is common for a defense expert to produce a copy of Title 17, a journal article, or the operations manual for a breath instrument during direct examination. This may occur because every good actor needs a prop. The premise is that if the presumed expert is able to wave a document while explaining how “the sky is falling,” then jurors may assume that there is some written support for an otherwise shaky proposition. If the expert witness pulls a “writing” from a briefcase, you are entitled to inspect the document before any questions about the document may be asked. (Evidence Code § 768(b).)

In the proper situation, this code section is a valuable tool. It breaks the momentum of the defense’s direct examination. It permits you to inspect the written material and determine where the forthcoming testimony is going. It gives you time to see what the document really says before the jury hears the defense’s claim of what it says. Finally, it provides you time to figure out what you might want to do next. Your inspection of the document may raise the need for a hearing outside the presence of the jury to determine the relevance and admissibility of the intended witness’s testimony. Remember, while an expert witness may use hearsay evidence in forming an expert opinion, an expert is not permitted to be a conduit for irrelevant hearsay material merely being presented to improperly sway a jury. (See Evidence Code § 803.)

D. The Use of Hypothetical Questions

Often, defense counsel will ask the defense expert a series of hypothetical questions intended to communicate to the jurors that the defendant was not at 0.08 BAC when stopped by the police. Because the defense expert did not witness any of the facts or events of your case, the only way he or she can utter an opinion about anything is in response to a question that includes a statement of assumed facts. Sometimes, defense counsel, after establishing the witness’s expertise, will attempt to jump to the expert’s conclusions without including any facts. This would be an improper hypothetical. It is important that you object to the question before it is answered.
As you remember from Evidence class, a hypothetical question requires: (1) a statement of assumed facts, and (2) that the facts be in evidence. The rationale for this is that because only relevant evidence is admissible, the only way an expert’s opinion is relevant is if it is related to the factual evidence in the case. Do not permit a defense expert to utter an opinion that is not predicated on facts that are in evidence.

Note: It is possible that the court may permit an expert to answer a hypothetical—subject to a motion to strike—in which all the assumed facts are not yet in evidence, but the judge believes the defense representation that the necessary missing facts will ultimately be provided before the end of the defense case. If the defense fails to meet its promised offer of proof to the court, be sure to ask the court to strike the expert’s opinion and instruct the jury to disregard the related testimony.

E. Impeaching a Defense Expert with a Transcript of Prior Testimony

In many prosecutorial agencies, it is common to develop libraries of transcripts of expert testimony for those witnesses who regularly appear for the defense. Oftentimes, an expert’s testimony today is contradicted by his or her prior court testimony. Assuming you believe that the jurors might conclude that the alleged expert is a “liar, liar, pants on fire” if they were to learn of the prior inconsistent statements, how do you do this?

First, it is likely necessary for you to decide whether to use the prior inconsistent transcript before you begin your cross-examination of the expert. Evidence Code section 770 only permits the impeachment with extrinsic evidence of a prior inconsistent statement if the witness is confronted with the inconsistent statements during cross-examination and given an opportunity to explain or deny the inconsistency. If the witness finishes testifying and is excused by the court without ever being confronted, you will likely be precluded from using the prior transcript or its contents.

How is it done?

1. [DEFENSE EXPERT’S NAME], IN RESPONSE TO A QUESTION ASKED BY DEFENSE COUNSEL TODAY, YOU INDICATED THAT ONLY 10 PERCENT OF THE POPULATION IS ACTUALLY UNDER THE INFLUENCE AT A 0.08 BAC LEVEL, ISN’T THAT CORRECT?

2. AND HOW LONG HAVE YOU HELD THAT OPINION?

3. AND THAT OPINION IS BASED ON THE YEARS OF READING AND RESEARCH YOU’VE CONDUCTED IN THIS FIELD AS AN OBJECTIVE STUDENT OF SCIENCE, IS THAT CORRECT?

4. AND THERE HAVEN’T BEEN ANY RECENT SCIENTIFIC BREAKTHROUGHS IN THIS AREA, HAVE THERE, DOCTOR?
5. NOW, DOCTOR, DO YOU RECALL TESTIFYING ON [INSERT DATE AND CASE INFORMATION FROM PRIOR TESTIMONY]? (I.e., January 8 of this year in the case of People v. DoWrong, case number 1234.)

6. AND DO YOU RECALL TESTIFYING AT THAT TIME IN RESPONSE TO A QUESTION BY THIS VERY SAME DEFENSE COUNSEL THAT “ONLY 20 PERCENT” OF THE POPULATION IS UNDER THE INFLUENCE AT A 0.08 BAC LEVEL?

7. NOW, THAT STATEMENT SUGGESTS YOU BELIEVED ON THAT DATE THAT TWICE AS MANY FOLKS IN THE POPULATION ARE UNDER THE INFLUENCE AT 0.08 THAN YOU BELIEVE TODAY, ISN’T THAT RIGHT?

8. HAVE YOU ANY EXPLANATION AS TO THIS CHANGE OF OPINION? (If the expert does not concede the discrepancy, it will be necessary to impeach the witness with the specific statements in the transcript. A certified copy of the prior transcript will likely be necessary in order to authenticate the document. In the alternative, it is always possible to authenticate a transcript by having a hearing outside the presence of the jury in which the court reporter of the prior transcript, under oath, establishes a foundation for the transcript and its accuracy. This authentication process can of course be avoided with a defense stipulation, but do not hold your breath. The court reporter, if available, would be the best witness to testify to the jury about the witness’s prior statement.)

VII. The Cross-Examination of the Defense Expert

Know where you are going. One of this chapter’s themes is that it is imperative that you understand what points you are going after when cross-examining a defense expert. Here is a good and safe mantra: “Shooting from the hip can often mean shooting yourself in the foot.”

The direct examination of the defense’s expert likely has attempted to raise questions regarding the accuracy of the testing process and the working order of the breath instrument, or it has tried to seduce the jury into believing that the defendant’s later BAC results were markedly higher than when driving (the infamous “On-the-Rise Defense”). Chapter XIV, “Common Defenses to DUI Cases,” provides solid information about how to effectively handle these defenses. Therefore, this section of the chapter will confine itself to a suggestion of a beginning and a conclusion for your cross-examination of the defense expert. The notion here is that the specific material you choose to rebut the defense expert’s testimony is the central core of your cross-examination. But like a championship competition for a skater or gymnast, it is the start and finish of the exercise that stays with the judges.

A. In the Beginning …

1. [DEFENSE EXPERT’S NAME], YOUR TESTIMONY TODAY IS AS AN OBJECTIVE STUDENT OF SCIENCE, ISN’T IT?

2. YOU’RE NOT ATTEMPTING TO CONFUSE THE JURORS AS TO THE FACTS OF THIS CASE, ARE YOU?
(If you are lucky, this may bring an objection by your opponent, which some jurors may view as an effort by the defense to hide something.)

3. **NOW, YOU WERE NOT PRESENT WHEN THE DEFENDANT WAS STOPPED BY THE POLICE ON [INSERT DATE] WERE YOU?**

4. **SO, YOU REALLY DO NOT KNOW WHETHER OR NOT THE DEFENDANT WAS MENTALLY IMPAIRED DUE TO ALCOHOL AT THAT TIME, DO YOU?**

5. **AND ALL OF YOUR TESTIMONY TODAY IS REALLY FOCUSED IN THE REALM OF THE POSSIBLE OR THE HYPOTHETICAL, ISN’T IT?**

6. **IN FACT, YOU ARE NOT HERE TO TESTIFY THAT THE DEFENDANT WAS NOT IMPAIRED WHEN HE [SHE] WAS STOPPED BY THE POLICE, ARE YOU?**

7. **AND THAT IS BECAUSE YOU REALLY DO NOT KNOW, DO YOU?**

8. **NOW, CERTAINLY, IF YOU HAD BEEN PRESENT AT THE SCENE TO OBSERVE THE DEFENDANT’S DRIVING, THAT WOULD HAVE HELPED YOU IN FORMING A REAL CONCLUSION AS TO WHETHER OR NOT THE DEFENDANT WAS TOO IMPAIRED TO DRIVE, ISN’T THAT RIGHT?**

9. **AND, IF YOU HAD BEEN PRESENT TO OBSERVE THE DEFENDANT’S SYMPTOMS—that is the odor of alcohol, the eyes, the speech, the balance—these factors would have helped you in determining whether or not the alcohol had impaired the defendant, isn’t that right?**

10. **NOW, ISN’T IT TRUE THAT FOLKS WHO ARE MENTALLY IMPAIRED DUE TO ALCOHOL HAVE DIFFICULTY PROCESSING INSTRUCTIONS AND PERFORMING DIVIDED-ATTENTION ACTIVITIES?**

11. **SO, IF YOU HAD BEEN PRESENT TO OBSERVE HOW THE DEFENDANT RESPONDED TO THE FST INSTRUCTIONS AS WELL AS HIS PERFORMANCE ON THE FST, THAT WOULD HAVE HELPED YOU IN CONCLUDING WHETHER OR NOT THE DEFENDANT WAS MENTALLY OR PHYSICALLY IMPAIRED, WOULDN’T IT?**

A note of caution for questions 3–11: Most defense experts are very uncomfortable with this line of questioning because they know that they must concede these points or risk looking silly in front of the jury. But remarkably, even in the face of this conundrum, most defense experts can not overcome the temptation to challenge the prosecutor on these points. Most defense experts deflect these questions with mild or heavy sarcasm or sheepishly concede the points with an explanation. No matter what the defense expert offers in response, do not go off script—stay on course and finish all nine of these questions. You will very likely return to this exchange in your closing argument.
12. BUT YOU WERE NOT PRESENT, WERE YOU?

13. NOW, AN ACADEMIC DEGREE IS NOT NECESSARY TO BE ABLE TO DETERMINE WHETHER SOMEONE HAS HAD TOO MUCH TO DRINK, IS IT?

14. INDEED, PARTY HOSTS AND BARTENDERS REGULARLY EXERCISE THAT JUDGMENT, DON’T THEY?

15. CERTAINLY, AN OFFICER WHO HAS RECEIVED SPECIALIZED TRAINING WITH [NUMBER OF YEARS] OF EXPERIENCE IS ABLE TO DETERMINE WHETHER SOMEONE IS MENTALLY OR PHYSICALLY IMPAIRED FOR THE PURPOSES OF DRIVING, WOULDN’T YOU SAY?


17. AND THAT OFFICER, UNLIKE YOU, WOULD HAVE BEEN ABLE TO GAUGE THE DEFENDANT’S SYMPTOMS OF IMPAIRMENT, CORRECT?

18. AND THAT OFFICER, UNLIKE YOU, WOULD HAVE BEEN ABLE TO EVALUATE THE DEFENDANT’S ABILITY TO UNDERSTAND THE FST INSTRUCTIONS AND TO EVALUATE THE DEFENDANT’S PERFORMANCE ON THOSE TESTS, ISN’T THAT RIGHT?

19. NOW, THE DRIVING, THE SYMPTOMS OF IMPAIRMENT, THE FSTs ARE ALL CRUCIAL FIRST-HAND FACTORS THAT ENABLE SOMEONE TO DETERMINE WHETHER A PERSON IS MENTALLY OR PHYSICALLY IMPAIRED, AREN’T THEY?

20. INDEED, WOULDN’T YOU AGREE THAT AN IMMEDIATE, ON-SITE EVALUATION OF THE TOTALITY OF THESE FACTORS WOULD PROVIDE THE BEST EVIDENCE OF WHETHER OR NOT A PERSON WAS MENTALLY OR PHYSICALLY IMPAIRED DUE TO ALCOHOL?

21. BUT YOU WERE NOT PRESENT FOR ANY OF THESE, WERE YOU?

B. Not with a Whimper, But a Bang

The following question string can be used at the end of your cross-examination, and it is intended to leave the jury with the conclusion that the defense’s expert is in agreement with the People’s case. Once again, it is hoped that these questions will encourage you to develop your own materials that will serve you well in these situations.
Note: The bracketed, lowercased portion of each question is where you would insert your relevant facts.

1. LET'S ASSUME A DRIVER [drives through two separate stop signs without stopping]. THAT DRIVING PATTERN COULD BE CONSISTENT WITH IMPAIRED DRIVING, ISN'T THAT RIGHT?

2. LET'S ASSUME THAT [on a well-lit street, a black-and-white police car is driving directly behind the driver at that time, although the driver gives no indication of being aware of the police car]. SUCH INATTENTIVENESS WOULD BE CONSISTENT WITH SOMEONE WHO MAY BE UNDER THE INFLUENCE, CORRECT?

3. LET'S ASSUME THAT [the driver then accelerates to approximately 50 mph, still apparently unaware of the following police car]. THAT'S CONSISTENT WITH THE ACTIONS OF AN IMPAIRED DRIVER, ISN'T IT?

4. LET'S ASSUME THAT [the driver speeds up to and nearly rear-ends the car in front of it]. THAT WOULD BE CONSISTENT WITH THE INATTENTION THAT IMPAIRED DRIVERS DEMONSTRATE, WOULDN'T IT?

5. LET'S ASSUME THAT [when the officer lights up the vehicle, the driver does not respond for a full mile, and then only after the officer uses the public-address system]. THAT AGAIN REFLECTS THE INATTENTION THAT IS COMMON OF IMPAIRED DRIVERS, DOESN'T IT?

6. LET'S ASSUME [the driver comes to a stop about four feet from the curb]. THAT'S CONSISTENT WITH IMPAIRED DRIVING, ISN'T IT?

7. LET'S ASSUME THAT [as the officer stands next to the driver's door, the officer detects the driver has a strong odor of alcohol]. THAT'S CONSISTENT WITH DRIVING UNDER THE INFLUENCE OF ALCOHOL, ISN'T IT?

8. LET'S ASSUME [the officer observes the driver's eyes are red and watery]. THAT IS ALSO CONSISTENT WITH SOMEONE DRIVING UNDER THE INFLUENCE OF ALCOHOL, ISN'T IT?

9. ASSUME [the officer, while in conversation with the driver, detects slurred speech]. THAT'S CONSISTENT WITH DRIVING UNDER THE INFLUENCE OF ALCOHOL, ISN'T IT?

10. [When the officer asks the driver to exit the vehicle, the officer notes that the driver uses the vehicle for balance]; THAT IS CONSISTENT WITH SOMEONE UNDER THE INFLUENCE OF ALCOHOL, ISN'T IT?

11. [During the next several minutes of observation, the officer notes that the defendant is unable to stand without swaying.] THAT'S CONSISTENT WITH A PERSON UNDER THE INFLUENCE, ISN'T IT?
12. LET’S ASSUME [that the officer administers a field sobriety test to the defendant involving touching the tip of the finger to the tip of the nose. Let’s further assume the defendant, a healthy, athletic person in his late twenties, is only able to touch the tip of his nose with the tip of his finger a mere 25 percent of the time.] THAT PERFORMANCE WOULD BE CONSISTENT WITH SOMEONE IMPAIRED DUE TO ALCOHOL, WOULDN’T IT?

Obviously, this line of questioning would be extended to include all of the facts of your case, including the BAC. The intent here is to get the defense expert away from the world of the hypothetical, and endorse and corroborate the real notion that your case—and all its component parts—point to only one conclusion: that the defendant was an impaired driver.

VIII. Summary

You are now armed with at least one possible approach to dealing with the “Dr. Quacks” of the DUI world. The exciting part is that even as you are reading this chapter, defense experts and defense attorneys are sitting around tables concocting new and different hypothetical possibilities that they believe will establish a reasonable doubt to the veracity of the prosecution's case.

One of the best facets of a DUI trial is being able to take on the defense expert, divide science from pseudoscience, and communicate it all to the jurors in a way each will understand.

Although your time prosecuting DUIs may be short, the skills you are about to develop in handling defense experts will support you throughout your career. For, like the little boy who spotted the emperor's lack of duds, you are the one with the vision to distinguish the real from the make believe.

Frank Horowitz, the Director of CDAA’s Driving Under the Influence Prosecution Project from 2001-2003, has practiced criminal law for nearly 30 years. His experience includes an initial five years as a Los Angeles County Public Defender, followed by 19 years as a prosecutor in the Los Angeles City Attorney’s Office. Mr. Horowitz then joined the Butte County District Attorney’s Office, ultimately serving as the deputy-in-charge of the Chico Branch.

Mr. Horowitz’s involvement in prosecutor training began in 1980 with two years as the supervising attorney-in-charge of the Los Angeles City Attorney’s nationally acclaimed training program. This training format served as an early model for the current CDAA Trial Advocacy Workshop. He has been a CDAA instructor since 1985 and was selected Outstanding Instructor from 1985-1987.

Mr. Horowitz received both his Juris Doctor and Bachelor of Arts degrees from UCLA. He has twice served on the faculty of the National Advocacy Center in Columbia, South Carolina and has taught law-related courses at numerous colleges and universities. In 2001, he received a Pro Bono Service Award from the State Bar of California for his volunteer work at the Chico office of Legal Services of Northern California.

Chapter Updated in 2010 by Stephen F. Wagner, TSRP: Stephen Wagner served as a deputy district attorney in San Benito County for six years before joining the CalTSRP in November 2007. He has prosecuted a broad range of criminal offenses from simple assaults to various forms of homicide/murder. He has been a consistent editor and author for CDAA publications, including Behind the Wheel and the former Case Digest. Teaching Criminal Law & Procedure at Monterey College of Law, Mr. Wagner is a graduate of NDAA’s Faculty Development Course and has served as an instructor at the National Advocacy Center and at CDAA’s New Prosecutors Seminar. As CalTSRP for the Coastal Region, he is based in Monterey County.
Chapter XVI

Closing Argument in DUI Cases

by Rachel Solov, Deputy District Attorney
San Diego County District Attorney’s Office

The California District Attorneys Association wishes to extend special thanks to Ed Hazel of the Monterey County District Attorney’s Office and Cindy Zimmer of the Kern County District Attorney’s Office for their assistance in the peer review and editing of this chapter.

(Updated 2010 by G. Stewart Hicks, TSRP, Central Valley Region)

I. Introduction

A. The Time Has Come

Let’s take a look at what you have accomplished up to this point. You have interviewed perhaps as many as four dozen individuals for the position of juror. You have chosen the people you wanted for the job. You have given them a clear idea of where your evidence would take them. You have survived the pretrial motions. You have managed to get your witnesses into court, and you have put them on the witness stand. You have survived the testimony of, and cross-examined, the defense expert and defense witnesses. You may have had the opportunity to cross-examine the defendant. You have fought over jury instructions. You are probably exhausted and drained, but one of the most important, and oftentimes one of the most fun, aspects of a trial awaits: closing argument.

1. Preparation

Preparation of your closing argument must be done long before your first witness has taken the witness stand. You should start thinking about what and how you are going to argue to a jury from the minute you open the case file. It is often a good idea to keep a separate pad available to outline your closing argument. Keep the pad accessible throughout your preparation and the trial itself. This will enable you to write down ideas as they occur to you and will eliminate the inevitable failure to remember a brilliant idea when the time comes to refine and finalize your argument.

Take time to watch your colleagues. Learn from them. Consider keeping a file of good arguments on topics such as circumstantial evidence, reasonable doubt, witness credibility, etc. If the information is at your fingertips, you can easily refresh your memory on relevant topics before presenting your argument to the jury.
2. Know Your Jury

You have already spent a substantial amount of time interviewing those persons whom you have selected to be on your jury. You have taken steps to educate them on the issues, such as “under the influence,” “impairment,” and “reasonable doubt.” You should know what their preconceptions were, and you should have established the validity of your view of the case. Remember, in spite of the fact that many DUI cases are quite similar, every case is a little different. You should also remember not to do anything that would alienate your jury. If you come across as arrogant, indignant, or self-righteous, you will likely alienate your jurors and cause them to be sympathetic to the defendant. Finally, remember to continue with the conversational tone you have used with your jury each time you have spoken to them, from voir dire through rebuttal argument. As you have done before, just tell them the story of your case.

II. Goals of Closing Argument

A. Eliminate Juror Confusion

In the typical case, you have had the opportunity in opening statement to state the facts in the order in which they occurred. During the presentation of your case, you had the opportunity to present your evidence in that same logical order. After the defense attorney tried to create confusion by raising objections during direct and by confusing the timeline during cross examination of your witnesses, you put it back in order after each witness. Your jury should have heard your case in a logical order at least three times. Now you are going to do it again.

Another area of confusion is often the jury instructions. Whether the instructions are given before or after your argument, you must get the jury to focus on the evidence you have presented, and you must get them to see it clearly.

How do you do that?

1. The Totality of the Evidence

You want your jury to see the big picture. If you have done your job while presenting your evidence, i.e., in a logical and chronological order, your jury is already very familiar with the facts of the case. However, due to the manner in which trials are conducted—e.g., recesses, objections, witnesses presented out of order, jury instructions, etc.—most jurors are not as clear on the facts and the issues as you would like them to be. At this point, they should probably know your case as well as you know it. However, that is highly unlikely. Accordingly, your responsibility is to get them to focus on the totality of the evidence and to enable them to see that the evidence is sufficient to convict beyond a reasonable doubt.

2. Be Organized

You cannot succeed in getting the jury to focus on the evidence if you are not focused and organized. Many successful prosecutors prepare their closing argument prior to trial. Accordingly, the entire trial is merely a buildup to what is going to be said at the end, and the
inevitable variations in testimony and evidence are merely bumps on the path to conviction. If you have followed the prescriptions laid out above, you have been prepared for your argument since you offered your opening statement.

III. The Argument

A. Preliminary Matters

1. Start Strong

When you stand in front of the jury and prepare to utter your first words, you will have the jury’s undivided attention. Do not squander this precious time with wasted words. Do not reintroduce yourself. Do not give them a civics lesson. While this type of introduction may serve as a warm up for you, the jurors will most likely have tuned you out by the time you get to the meat of your argument.

2. Emphasize Your Theme

You should have identified your theme while preparing your case for trial, and you should have presented your theme to the jury during opening statement. In nearly every DUI, your theme should have focused on the defendant’s conduct. Your theme may have come from a piece of evidence or something the defendant said. (In the right case, your theme can come from the impact the defendant’s conduct has had on the victim’s life. For instance, in a felony driving-under-the-influence-causing-injury case, the injuries suffered by the victim might provide the theme. You might focus on how the defendant’s conduct forever altered the victim’s life or caused the victim months of pain and rehabilitation.)

In the typical misdemeanor DUI case, your theme might be based upon the “choices” the defendant made. For example, focus on how the defendant chose to go to a bar/restaurant/party; the defendant chose to drink; the defendant chose not to have a designated driver; the defendant chose to leave the bar/restaurant/party and walk to his or her car; the defendant chose to retrieve the keys for his or her car; the defendant chose to put the key into the ignition and start the engine; the defendant chose to put the car into drive; etc. You get the idea. The bottom line is that it is the defendant’s choices that endangered not only the defendant, but also everyone else on the road. This is what required the defendant’s arrest and what now demands a guilty verdict.

B. The Body of Your Argument

Begin your argument by weaving your theme into the facts that were presented throughout the trial. Next, begin weaving the law into the theme and the facts. As previously stated, it is important for the jurors to know what happened. Usually, the best way for them to understand the facts is for them to understand the facts as they happened. However, do not simply repeat the testimony in chronological order. Now is the time to relate the facts to the elements of the law.

By use of the facts, the theme of your case, and the law, tell them a story that will interest them. Explain the charges to the jury. Use prepared charts that outline each element you must
prove. (You should always review the jury instructions prior to preparing charts for the jury. For DUI trials, see CALCRIM 2100, 2101, 2110, and 2111. See also CALJIC 12.61, 12.61.1, and 17.02.) This will give the jury a framework for deciding the case as well as serve to organize your argument. Keep your charts simple. (Note: if possible, use PowerPoint or something similar. The impact on a jury is much more memorable than a handwritten chart.) For example:

Chart One:

<table>
<thead>
<tr>
<th>COUNT ONE: DRIVING UNDER THE INFLUENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Driving</td>
</tr>
<tr>
<td>2. Under the Influence</td>
</tr>
<tr>
<td>• Impairment</td>
</tr>
<tr>
<td>Physical or Mental</td>
</tr>
<tr>
<td>• Cannot Drive as a Sober Person</td>
</tr>
</tbody>
</table>

Chart Two:

<table>
<thead>
<tr>
<th>COUNT TWO: DRIVING WITH A MEASURABLE BLOOD ALCOHOL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Driving</td>
</tr>
<tr>
<td>2. With Blood Alcohol 0.08 Percent or Greater</td>
</tr>
</tbody>
</table>

Prepare charts that outline the facts, and highlight the facts that prove your case. Make a chart of facts that mimics your chart of the legal elements. This will help the jurors follow your argument and will demonstrate to them how all of the evidence you have presented points to the defendant’s guilt. The typical case revolves around the defendant’s driving pattern, physical appearance, objective symptoms of alcohol intoxication, the defendant’s performance on the standardized field sobriety test, the results of the chemical test or the defendant’s refusal, statements by the defendant, the officer’s expert opinion, and your blood alcohol expert’s opinion. For example, a chart for count one, Driving Under the Influence, might look like this:

<table>
<thead>
<tr>
<th>COUNT ONE: DRIVING UNDER THE INFLUENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. DRIVING</td>
</tr>
<tr>
<td>Defendant was behind the wheel when stopped</td>
</tr>
<tr>
<td>2. UNDER THE INFLUENCE</td>
</tr>
<tr>
<td>• Driving Pattern</td>
</tr>
<tr>
<td>• Odor of Alcohol</td>
</tr>
<tr>
<td>• Bloodshot &amp; Watery Eyes</td>
</tr>
<tr>
<td>• Slurred Speech</td>
</tr>
<tr>
<td>• Coordination and Balance</td>
</tr>
<tr>
<td>• Statements</td>
</tr>
<tr>
<td>• Field Sobriety Tests</td>
</tr>
<tr>
<td>• PAS</td>
</tr>
<tr>
<td>• Officer’s Expert Opinion</td>
</tr>
<tr>
<td>• EPAS</td>
</tr>
<tr>
<td>• Expert Opinion</td>
</tr>
</tbody>
</table>
Regarding the defendant’s statements, emphasize those statements or admissions about how much the defendant had to drink, where the defendant was drinking, when the defendant started drinking, when the defendant stopped drinking, when the defendant started driving, etc. Usually, these statements are not truthful. Point out to the jury how the statements cannot be true based upon the testimony of your blood-alcohol expert. Then argue how the defendant’s untruthfulness shows his or her consciousness of guilt. If, however, you are fortunate enough to have a modicum of truth from the defendant, emphasize the drinking pattern and the accuracy of the blood alcohol expert’s opinion.

Regarding the Standardized Field Sobriety Test, list each element of the test and review the defendant’s performance. It is imperative that the jury understand that each element of the test is designed to assist an officer in determining whether or not an individual has reached the level of impairment that demonstrates that the individual may not drive. Explain how each element of the test, like driving, requires divided attention. In other words, drivers must be able to do more than one task at a time. Drivers must see what is going on around them; they must process that information; and they must react appropriately. If the defendant cannot perform simple balance and coordination tests, then the defendant is clearly too impaired to drive a car in a safe and prudent manner. This is also a good time to remind the jurors that the officer viewed all the evidence at his or her disposal before expressing the opinion that the defendant was under the influence and too impaired to drive.

Regarding your officer’s expert opinion, remember that your officer is an expert because of his or her extensive training and experience. Evidence Code section 720 defines an expert as a person who “has special knowledge, skill, experience, training, or education to qualify him as an expert on the subject to which his testimony relates.” Accordingly, it is very important to highlight that training and experience. The greater the experience of your officer, the greater the emphasis you should place upon that testimony. This provides you with another opportunity to remind the jury to look at the totality of the evidence, as your officer did in forming his or her opinion regarding the defendant’s level of impairment. Your officer didn’t rely on only one aspect of the evidence, and neither should the jury.

Regarding blood-alcohol test results and the blood-alcohol expert’s opinion or refusal, if the defendant refused to provide a sample, you must argue consciousness of guilt. Convey to the jurors that it is the defendant who wanted to keep this important evidence from them. If you have been able to get into evidence the consequences of defendant’s refusal, the defendant’s loss of his or her driving privilege, then you should emphasize the fact that the defendant chose that option rather than reveal his or her level of impairment. This can be incredibly persuasive in communities lacking in public transportation. When you have blood-alcohol test results, emphasize your expert’s opinions regarding the defendant’s level of impairment.

Keep it brief and to the point. Your charts will assist you in remaining organized, will reduce your need for notes, and the charts will serve as a visual demonstration to the jury that you have proven all the elements of the crime.
C. Conclusion

Finally, ask the jury to convict. It is a good idea to have your last few lines committed to memory so you can finish strongly. Do not walk back to counsel table until you have finished uttering your final words, and do not utter your closing words as you are walking back to your chair. This looks weak and gives the impression you cannot wait to get out of there. Your final lines should be forceful and confident. Do not let your body language detract from your closing remarks. When you are finished, pause for a brief second, and then return to your chair.

IV. Defense Argument

Take notes during the defense counsel’s argument, but do not write so furiously that you distract the jurors and make them think the defense is making numerous valid points. Many successful prosecutors make a list of arguments expected to be presented by defense counsel. Accordingly, you may simply place a check mark next to the items about which you wish to offer rebuttal, and the jury sees you as confident, prepared, and nonplussed. Be prepared to object if the defense argues improperly or misstates the evidence. Decide which arguments are worthy of rebuttal.

V. Rebuttal Argument

A. Little Or No Script

Rebuttal in DUI trials is not completely without predictability. Generally, you have a pretty good idea where the defense arguments are likely to go. Nevertheless, remember that rebuttal is your opportunity to “rebut” what the defense has argued, and you are permitted only to respond to those arguments. Accordingly, do not save a crucial part of your argument for rebuttal. If you fail to argue a specific point, the defense may choose not to argue it, and you will not be given the opportunity to bring it up in rebuttal. However, you should save for rebuttal those “zingers” that will answer and destroy defense arguments. Learn to balance the benefit of having the final word while avoiding sandbagging.

B. Stay Organized and Remember Your Goals

In most trials, the defense wants the jury to put your case under a microscope. After the defense argument, you will need to refocus the jury on the totality of the evidence. You will need to counter the defense spin of the facts. You will be required to counter the defense misstatements of the law. These are givens.

C. Common Defense Arguments

1. Burden of Proof

The standard is “reasonable doubt,” not proof beyond all doubt or proof beyond a “shadow” of a doubt. You should develop good, practical illustrations for your jury that will show that a mere “hypothetical, imaginary, or impossible” alternative does not equate to “reasonable doubt.” There are many ways in which to respond to the attempt by the defense to confuse the jury regarding the burden of proof.
One way is simply to ask the jurors to use their common sense and life experiences in viewing the evidence. Your jury is made up of 12 people. If the average age of the jurors is 30, you have 360 years of life experience and common sense. For example, if the defendant testified, explain that the presentation of the defendant’s story does not, by itself, create reasonable doubt. Tell the jurors that before the defendant’s story can create reasonable doubt, they must believe the defendant is telling the truth. You must then show the jurors how the defendant’s story is untruthful and unreasonable. Emphasize that the defendant is the one with the motive to fabricate because he or she is the one with the greatest stake in the outcome of the trial. Show the jurors how their 360 years of life experience and common sense help them reject the unreasonable and accept the only reasonable conclusion—the defendant is guilty.

Another common method is to ask the jurors to take the phrase apart and to examine each word separately. For example, the word “reasonable” means “to reason.” The word “doubt” generally refers to a “question.” If a juror has a question, they should be able to articulate that question. They should be able to “reason” with another juror regarding that question. If they are unable to do so, then the “doubt” is not a reasonable one.

2. **Credibility (Put the Officer On Trial)**

In general, the defense attacks the officer while they attempt to wrap the defendant in a cloak of credibility. However, there are some specific defense tactics you may encounter.

There are several manifestations of this attack.

The officer is out to get the defendant: Point out the parts of the officer’s testimony that are either in favor of the defendant or are neutral. Argue that if the officer were intent on wrongly accusing the defendant, surely the officer would have been more consistent in developing the false image of the defendant’s guilt.

The officer lied: Ask the jury who has the motive to lie? Why would the officer risk his or her entire career, retirement, credibility, reputation, family, livelihood, etc.? Why would the officer risk his or her entire career to convict this particular defendant of misdemeanor driving under the influence? The only person with the motive to lie, and the only person who will reap the consequences of his or her actions is the defendant.

The officer made mistakes or omissions in reporting or in the investigation: The defense will often focus on the shortcomings of the officer and/or the investigation. Identify for the jury exactly what the defendant is attempting to do—dodge responsibility for breaking the law by shifting the blame from the defendant’s behavior to the officer. Bring the jury’s focus back to the defendant’s conduct, because the defendant’s conduct is the reason for the trial. This is often a great time to remind the jury of your theme, such as “choices.” The defendant is the one on trial because of the choices made on that fateful day by the defendant, not the officer.

3. **No Bad Driving**

Many DUI defendants are stopped for seat belt or simple equipment violations. Under these circumstances, it is inevitable that the defense will argue that because the defendant’s
driving was not “bad,” the defendant was not under the influence. This is sometimes referred to as the “no harm, no foul” defense. Direct the attention of the jurors back to voir dire when you educated them on the concept that officers should not have to wait for bad driving or collisions before arresting someone for DUI. Remind the jury that they agreed in voir dire how absurd it would be for such a requirement to exist. Good driving does not equal “not under the influence.”

4. The FSTs Were Not That Bad

Defense attorneys will spend forever cross-examining the officer about everything the defendant did well. Defense attorneys go to great lengths to focus the jury upon the minutia. It is your responsibility to get the jury to refocus on the totality of the evidence, just as the officer did. Counter the defense contention that the defendant was “only a couple of inches off” by arguing that a “couple of inches” in driving may be the difference between life and death. Point out that the distance between the gas pedal and the brake is only “a couple of inches,” and a minor mistake while driving may prove fatal.

5. Rising-Blood-Alcohol or the Last-Gulp Defense

This defense is “fact specific.” You will need to review the specific facts regarding the defendant’s drinking pattern—time of first drink, time of last drink, number of drinks, type of drinks, driving time, and the test times. Most blood-alcohol experts will be able to debunk this popular defense.

6. The Breath Test is Invalid or Untrustworthy

The most common challenge is to attack the 15-minute waiting period. For example, often the officer will not have eyeball-to-eyeball contact with the defendant for the entire waiting period preceding the breath test. To rebut this alleged deviation of the breath test requirements, you should have established through questioning of the officer that the defendant did not have access to food, liquid, or any kind of tobacco product from the point the defendant was arrested to the time of the test.

Usually, the defendant is handcuffed from the time of arrest through the breath test and booking. You should have established that the defendant did not vomit, regurgitate, or burp during this time period. Your officer should have looked into the defendant’s mouth prior to the breath test to verify that there was nothing in the defendant’s mouth immediately prior to the test. In argument, tell the jury why the test is trustworthy, i.e., there is no evidence the defendant ate, drank, smoked, vomited, or burped. So the fact the officer did not stare at the defendant for 15 minutes is of no import.

Another common challenge by the defense will be to attack the maintenance logs of the individual breath testing device. This attack is fact specific and will require you to work closely with your witnesses to counter this attack.
D. Rebuttal Style Options

There are probably as many rebuttal “style” options as there are prosecutors. Nevertheless, here are a couple of ways in which you might choose to respond to defense arguments in DUI cases.

Some defense attorneys take great pleasure in marking up your charts. If you know that you are going up against such an attorney, you may wish to have a duplicate set of charts for rebuttal. Clean charts will help you to redirect the jury back to the totality of the evidence without focusing on the “mess” the defense has tried to create.

One way of using those new, clean charts is “the reverse” or “the end around.” Some counties are now filing the charges in reverse order. Count I is the “measurable amount of alcohol” charge, and Count II is the “under the influence” charge. Whether or not your county files the charges in this manner, you may wish to argue your case in this order if you have evidence that gives rise to the presumption allowed in the “.08 percent” charge. The reason for this is that arguing the “.08 percent” first facilitates the natural segue from the “presumption” created by the alcohol expert’s testimony—because the defendant’s blood alcohol level was .08 percent or greater, the defendant may be presumed to be under the influence at the time of driving. It permits a prosecutor to argue that in spite of the fact that the jurors may presume under the influence and that no other evidence need be shown, there is overwhelming evidence that the defendant was under the influence.

Another increasingly popular method of dealing with the defense arguments is the “Post-it” method. One prosecutor ran out of paper during the defense closing and began to write his notes on “Post-its.” When he began to respond to individual defense arguments, he picked up the appropriate Post-it, offered his response, crumpled the Post-it, dropped it onto the table, and moved on to the next point. At the conclusion of his rebuttal, the counsel table was littered with the remnants of the defense arguments. After trial, jurors commented on the effectiveness of the visualization of the worthlessness of the defense arguments. What began as simply a way to keep track of defense arguments quickly became a great way to demonstrate the value of those arguments.

VI. Ethical Considerations

As prosecutors, we must take the moral high ground. We have a duty to the People of the State of California to be tenacious advocates. Equally important, however, is our duty to ensure a criminal defendant is afforded due process and a fair trial. We absolutely cannot have a “win at all costs” mentality. We have a higher calling. Our job is to seek justice.

The United States Supreme Court has stated

prosecuting attorneys are government officials and are clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. It is their duty to see to it that those accused of crime are afforded a fair trial. . . . The prosecutor may prosecute with earnestness and vigor . . . but, while he may strike hard blows, he is not at liberty to strike foul ones.

(Berger v. United States (1935) 295 U.S. 78, 88.)
You must be familiar with the rules. Unintentional violations of the rules are nevertheless violations. “The defendant generally need not show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of his or her conduct, because the prosecutor’s conduct is evaluated in accordance with an objective standard.” (People v. Bradford (1997) 15 Cal.4th 1229, 1333.) The following is a list of some of the basics. It is by no means meant to be an exhaustive list.

A. What You Cannot Do

1. **Griffin Error**

Never comment, even indirectly, on the defendant’s failure to testify. It is improper for the prosecutor to comment in argument on the fact that the defendant exercised his or her constitutional right not to testify.

> “The defendant certainly knows whether [the victim] had this beat up appearance at the time he left her apartment … ¶ “These things he has not seen fit to take the stand and deny or explain. ¶ “And in the whole world, if anybody would know, this defendant would know. ¶ “[The victim] is dead, she can’t tell you her side of the story. The defendant won’t.”

This is the argument that was the basis of the reversal of a conviction in *Griffin v. California* (1965) 380 U.S. 609, 610–611.

2. **Doyle Error**

Never comment on the defendant’s invocation of his or her right to remain silent after being advised of his or her *Miranda* rights. In *Doyle v. Ohio* (1976) 426 U.S. 610, 618, the defendant invoked his right to remain silent pursuant to *Miranda*. At trial, the defendant claimed he was framed. On cross-examination, the prosecutor asked the defendant why he failed to mention this earlier. The conviction was reversed, because the defendant’s invocation of his right to silence could not later be used against him.

Note, however, that *Doyle* does not apply to pre-arrest silence or post-arrest silence where the *Miranda* admonishment was not given. (*Fletcher v. Weir* (1982) 455 U.S. 603.)* Doyle* does not apply to silence to civilians. (*People v. Martin* (1980) 101 Cal.App.3d 1000, 1006; but see *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520.)* *Doyle* may apply to “silence” at other criminal hearings.

3. **Never Impugn the Integrity of Defense Counsel**

A prosecutor is held to a standard higher than that imposed on other attorneys because he or she exercises the sovereign powers of the state. “Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the people in whose name they serve.” Personal attacks on the integrity of opposing counsel constitute prosecutorial misconduct. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1076, quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)
4. Never Make it Personal

Many defense attorneys will try to get the best of you by personally attacking you. If you react to their taunts, you give them power over you that they have not earned. Remember that we prosecutors are held to a higher standard. Saying such things as, “reasonable doubt for a reasonable fee,” or “what some people will do for a fee,” are improper.

In most trials, jurors hold prosecutors to a higher standard than defense attorneys in these exchanges. We represent the People of the State of California, and we are expected to travel the moral high road at all times.

5. Never Appeal to the Jury’s Passion or Prejudice

This concept seems quite obvious, and the voir dire process is an attempt to weed out any individuals who would decide the case based upon improper considerations. Likewise, you are not permitted to argue your case in such a manner.

6. Never Ask Jurors to Put Themselves in the Place of the Victim

It is error to state, “Suppose instead of being Vickie Melander’s kid, this happened to one of your children.” (People v. Pensinger (1991) 52 Cal.3d 1210.)

7. Never State Your Own Personal Beliefs

You cannot express your personal opinions regarding the evidence, the weight of the evidence, or the credibility of witnesses. You cannot vouch for evidence or persons. In order to avoid even accidentally stating your own beliefs, eliminate the word “I” from your closing-argument vocabulary.

8. Never Argue Facts Not in Evidence

This should not be something that needs to be said. However, in the heat of battle, many attorneys forget what has and has not been admitted as evidence. There will always be some piece of evidence that you were unable to introduce. It is your responsibility to remember exactly what the jury was able to hear and consider, and you may only argue those facts.

B. What You Can Do

1. Call the Defendant a Liar Under the Appropriate Circumstances

When a witness [including the defendant] tells one story when arrested and another story on the trial, one of the stories is untrue, i.e., is a lie, and the person who tells such conflicting stories can properly be characterized as a “liar.” (People v. Mora (1956) 139 Cal.App.2d 266, 272–273; People v. Edelbacher (1989) 47 Cal.3d 983.) In most situations, you will not actually use the word “liar.” However, there will be circumstances where no other word will suffice.
2. Comment on the Defense’s Failure to Present Logical Witnesses

The failure of a defendant to call an available witness whom he or she could be expected to call if that witness’s testimony would be favorable is itself relevant evidence. (People v. Ford (1988) 45 Cal.3d 431, 447–448.) In many DUI trials, the defendant offers evidence regarding the persons he or she was with on the day in question. When the defendant offers this information, and these individuals are not brought in to testify on behalf of the defendant, and there is no proof of their unavailability, it is proper to comment on their absence.

3. Comment on the Fact That the Defendant Had the Benefit of Hearing All the Evidence Before Testifying

It is not a Fifth, Sixth, or Fourteenth Amendment violation to argue that the defendant had the benefit of sitting in court and listening to the testimony of all the other witnesses before he or she testified, and that gave him or her a big advantage to think about what to say, how to say it, and how to comment about the other evidence. (Portuondo v. Agard (2000) 529 U.S. 61.)

VII. Conclusion

As prosecutors, we are fortunate to have one of the most amazing jobs in the world. It is hard work, and it is often a thankless job. But it is also fun and exciting. We do good work because we do the right thing for everyone involved, including the defendant. We strive to do what is just and noble.

The decisions we make on a day-to-day basis have the power to forever alter people’s lives. Every time we file a case, we change the lives of those involved for the remainder of their lives. Whether it is an individual’s first or fiftieth contact with the criminal justice system, their lives will be changed. That applies to prosecutors as well. We have the authority to seek to deprive defendants of their liberty, and in the most heinous cases, we can pursue the ultimate penalty—death. The public entrusts us with enormous responsibility and power. Our daily challenge is to perform our duties fairly and wisely. Work hard, do good work, and you will enjoy this career you have chosen to its fullest.

Rachel Solov is a Deputy District Attorney for San Diego County. She has worked in that office since 1999. Ms. Solov is currently assigned to the felony trial team in superior court at the downtown office. She transferred there from the El Cajon Branch, where she had worked since 2000, in May 2002. Ms. Solov earned a Juris Doctor degree from the University of San Diego, where she was the Executive Editor of the Law Review. While in law school, Ms. Solov interned at both the San Diego County District Attorney’s Office and the Attorney General’s San Diego Office.

Chapter Updated in 2010 by G. Stewart Hicks, TSRP: Stewart Hicks holds an L.LM. degree in Prosecutorial Science from Chapman University, a JD degree from Western State University College of Law, and a BS degree from Oregon State University. Prior to joining the CalTSRP in 2007, he served as a district court magistrate in Michigan and as a deputy district attorney in Los Angeles and Orange Counties. He has also served as an appellate attorney and as a judge pro tem in the Orange County Superior Court in the Juvenile and Dependency Courts, bringing more than 25 years of prosecutorial and judicial experience to the TSRP Program. Mr. Hicks is assigned to the Central Valley Region, and is situated in Fresno.
I. Vehicles Subject to Forfeiture

Pursuant to Vehicle Code section 23596, a vehicle may be subject to forfeiture and sold by declaring the vehicle a nuisance. A motion to declare a vehicle a nuisance may be brought by either the prosecutor or the court on its own motion, if the defendant is the registered owner of the vehicle and has been convicted of violating any of the following statutes:

- Penal Code section 191.5—Gross Vehicular Manslaughter While Intoxicated;
- Penal Code section 192.5(a)—Gross Vehicular Manslaughter While Boating;
- Vehicle Code section 23152—Driving Under the Influence of Alcohol or Drugs, which occurred within seven years of two or more offenses of either Penal Code sections 191.5 or 192.5(a), or Vehicle Code sections 23152 or 23153, or any combination thereof that resulted in convictions; or
- Vehicle Code section 23153—Driving Under the Influence of Alcohol or Drugs Causing Injury, which occurred within seven years of one or more separate offenses of Penal Code sections 191.5 or 192.5(a), or Vehicle Code sections 23152 or 23153, that resulted in convictions.

II. Notice and Hearing

Notice of the motion must be given to the defendant, and the court must hold a hearing before the vehicle may be declared a nuisance.

III. Sale of the Vehicle

At the time of pronouncement of sentence, once a defendant has been convicted, the court with jurisdiction over the offense shall order any vehicle declared to be a nuisance to be sold. Several procedures must be taken to ensure the proper notice of a forfeiture sale.

Any vehicle ordered to be sold must be surrendered to the sheriff of the county, or the chief of police of the city in which the offense occurred. Law enforcement shall then promptly ascertain all of the legal and registered owners’ information as listed with the Department of Motor Vehicles. Within
five days of receiving the legal and registered owners’ information, notice of the pending sale of the
vehicle must be sent by certified mail to all legal and registered owners other than the defendant. The
notice must inform the legal and registered owners of the date and location of the sale. The notice
must also inform any legal owner of law enforcement’s right to conduct the sale of the vehicle. Any
legal owner that is a vehicle dealer, bank, credit union, acceptance corporation, or other licensed
finance institution legally operating in the state, or the agent of that legal owner, may take possession
of the vehicle and conduct a sale on its own accord.

The legal owner must notify the proper law enforcement officer of any intent to sell the vehicle
individually, within 15 days of the mailing of the notice. If the legal owner fails to notify the proper
law enforcement officer of an intent to sell, the vehicle will be sold at a public auction within 60 days
of the vehicle being ordered sold.

At least 10 days, but not more than 20 days, prior to the sale of the vehicle, law enforcement must
advertise once in a newspaper of general circulation within the county or city. This advertisement will
serve as a notice and shall contain the following specific information:

- make of the vehicle
- model of the vehicle
- year of the vehicle
- identification number of the vehicle
- license number of the vehicle
- date, time, and location of the sale

If the vehicle being sold is a motorcycle, then the engine number must also be included.

If no newspaper of general circulation within the county or city is available, law enforcement shall
post a notice in three of the most public places in the city or county for 10 consecutive days prior to,
and including the day of, the sale of the forfeited vehicle.

IV. Proceeds of Sale

The proceeds of a sale of a vehicle declared to be a nuisance shall be disposed of in the following
order:

1. To satisfy the cost of the sale, including the costs of taking and keeping the vehicle pending the
   sale.

2. To the legal owner(s) to satisfy indebtedness owed as of the date of sale, including accrued
   interest, finance charges, or delinquency charges.

3. To any subordinate lien or encumbrance holders on the vehicle to satisfy any indebtedness. But a
   written notification of demand must be received before distribution of the proceeds is completed.
   Additionally, the holders of a subordinate lien or encumbrance shall produce reasonable proof of
   their interest, and unless a request is made, are not entitled to distribution.

4. To any other interest established, including community property, to the extent the interest is
proved.

5. If the vehicle was forfeited as a result of a felony conviction of Penal Code section 191.5(a) or Penal Code section 192.5(a) or Vehicle Code section 23153 resulting in serious bodily injury to another person (not being the defendant), the balance, if any, to the city or county to be deposited in its general fund.

6. Except as provided in (5), the balance to an adolescent substance abuse treatment program.

Proceeds of the sale shall be disbursed and a written accounting provided to all persons entitled to a share of the proceeds within 15 days after the sale.

Any vehicle that cannot be readily sold to the public generally shall be destroyed or donated to an “eleemosynary” institution (i.e., a nonprofit group).

V. Exceptions to Forfeiture Provisions

A vehicle may not be sold if it was stolen, unless the legal and registered owner cannot be easily identified or reasonably ascertained.

Additionally, if the vehicle is owned by another, or if there is a community property interest owned by a person other than the defendant and the vehicle is the only automobile available to the defendant’s immediate family, it may not be sold.

Lee Carter is a deputy district attorney for Santa Barbara County. He has worked in that office for more than 20 years. He is the asset forfeiture deputy for the southern half of Santa Barbara County. As such, he handles all of the civil (and most of the criminal) matters involving the forfeiture of property. Mr. Carter received a Juris Doctor degree from the McGeorge School of Law. The next year, he earned an L.LM. also from McGeorge. Mr. Carter is a frequent instructor at CDAA asset forfeiture training seminars. He specializes in the area of Vehicle Code forfeitures.

Brandi Periera is a Legal Secretary for the Santa Barbara County District Attorney’s Office. She received her Juris Doctor degree in December 2002. Ms. Pereira started her legal career as an intern in the Stanislaus County District Attorney’s Office. Later, she worked for that same office as a Victim Advocate for victims of sexual assault and statutory rape.

Chapter Updated in 2010 by G. Stewart Hicks, TSRP: Stewart Hicks holds an L.LM. degree in Prosecutorial Science from Chapman University, a JD degree from Western State University College of Law, and a BS degree from Oregon State University. Prior to joining the CalTSRP in 2007, he served as a district court magistrate in Michigan and as a deputy district attorney in Los Angeles and Orange Counties. He has also served as an appellate attorney and as a judge pro tem in the Orange County Superior Court in the Juvenile and Dependency Courts, bringing more than 25 years of prosecutorial and judicial experience to the TSRP Program. Mr. Hicks is assigned to the Central Valley Region, and is situated in Fresno.
Chapter XVIII

Vehicular Homicide Involving DUI

by Creg G. Datig, Program Director
CDAA Traffic Safety Resource Prosecutor Program

I. Introduction

The 1980s brought an increased awareness, particularly to the people of California, of the prevalence and dangers of driving under the influence. The formation and high media profile of groups such as Mothers Against Drunk Driving focused like never before the attention of the public, the Legislature, and the courts on the toll in lives resulting from alcohol- and drug-related traffic collisions. In the seminal case of People v. Watson (1981) 30 Cal.3d 290, the California Supreme Court recognized that a vehicular homicide committed while intoxicated may be found to be second-degree murder, rather than manslaughter. Tougher impaired driving laws have since been enacted, including the lowering of the unlawful blood-alcohol limit to 0.08 percent effective in 1990; “Courtney’s Law,” providing for a punishment of 15 years to life for vehicular manslaughter while intoxicated, with enumerated priors (Penal Code § 191.5(d).); and, Vehicle Code section 23550, making a fourth or subsequent DUI conviction within 10 years a “wobbler.” Felony vehicular manslaughter is formally recognized in the Penal Code as a “serious felony” for “strike” and sentencing purposes. (Penal Code § 1192.8.) Nevertheless, thousands of people continue to become casualties at the hands of impaired drivers on our streets and highways. In 2005, 1,719 people were killed in California in alcohol-related traffic collisions, comprising 40 percent of all traffic fatalities in the state; and, another 30,810 persons were injured.1 In order to achieve the goal of reducing the number of vehicular fatalities resulting from driving under the influence, while ensuring the just and fair disposition of the impaired drivers who cause those deaths, the prosecutor should be familiar with the available charging choices as well as effective strategies in handling these often challenging cases.

II. The Charging Decision

Effective charging in vehicular homicide cases involves more than simply assessing whether the elements of a particular crime are supported by the evidence. Perhaps more than in other types of homicide, the prosecutor has the opportunity to assess what charge and penalty will best reflect the defendant’s responsibility and culpability, as well as doing the most good for society as a whole by making our highways safer. Each case must be evaluated on its own merits; however, addressing the following general questions may provide guidance to the prosecutor in determining which of the various charges available is appropriate in a vehicular homicide case. (See also American Prosecutor’s Research Institute (APRI), Problems and Possibilities in Prosecuting Vehicular Fatalities (1997).)

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1. NHTSA, 2007; Calif. DMV, 2007; CHP 2007
A. Offender Considerations

- What was the defendant’s blood alcohol or drug level?
- Does the defendant have prior DUI convictions?
- Is the defendant an alcoholic and/or drug dependent? If so, what weight (if any) should the fact the defendant suffers from this disorder be given in the charging decision, as well as in assessing the “jury appeal” of the case?
- If the defendant is not an alcoholic or dependent on drugs, was this an isolated incident inconsistent with the defendant’s normal behavior?
- What objectives will punishment of this defendant further? Is the defendant a high risk for re-offending?

B. Victim Considerations

- How many people were killed and/or injured?
- Has the defendant shown any remorse for the victim(s) or their families?
- Was there any relationship between the defendant and the victim(s)?
- What outcome does the family of the victim(s) seek?

C. Community/Social Considerations

- How do the courts in this jurisdiction generally sentence in cases of this type?
- How does the community react to this and other vehicular homicide cases?
- Will others be deterred from engaging in similar conduct by the punishment of this defendant?
- If the defendant has a family, what impact will the punishment of the defendant have on them?
- Overall, how heinous or egregious are the facts of this case in comparison to other vehicular homicides? What is the view of the investigating officer(s) regarding the nature of the case?

III. Vehicular Homicide Crimes

A. Vehicular Murder

The most serious charge that may arise from the unintentional killing of a human being or fetus as the result of impaired driving is second-degree murder, in violation of Penal Code section 187(a). Murder in the second degree is punishable by a term of 15 years to life in prison. A defendant may be convicted of second-degree murder based upon facts that would also support a charge of vehicular manslaughter while under the influence if the evidence establishes implied malice, thereby fulfilling the element of malice aforethought necessary to a conviction for murder. (*Watson, supra*, 30 Cal.3d 290). “Implied malice” is defined in CALJIC 8.11 as follows (see also CALCRIM 520):

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.
When it is shown that a killing resulted from the intentional doing of an act with ... implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

Additionally, CALJIC 8.31, which defines second-degree murder resulting from an unlawful act dangerous to life (implied malice), further provides:

When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being.

The concept that a defendant may be held accountable for murder as the result of an unintentional death caused by a traffic “accident” is alien to many potential jurors, who commonly perceive murder as the intentional killing of a particular person arising from a nefarious motive or dispute. In fact, the implied malice murder requirement of conduct posing a danger to life does not require danger to the life of a specific victim as long as the defendant was aware that his conduct posed a high probability of death to some person generally. (People v. Albright (1985) 173 Cal. App.3d 883, 887.) Given this perception, it is not surprising that as a practical matter, significant issues in the trial of Watson murder cases most often focus on the third element of implied malice, the requirement of “knowledge and conscious disregard.” Although such arguments are occasionally made, defense counsel will rarely attempt to suggest that the defendant began driving completely unintentionally—while sleepwalking, for example. Given the amount of public attention and education on the dangers of impaired driving, it is equally unusual for the defense to suggest that driving under the influence is not potentially dangerous to human life. The California Supreme Court in Burg v. Municipal Court (1983) 35 Cal.3d 257 observed: “The drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation.” Therefore, in considering whether to pursue second-degree murder charges, it is vitally important for the prosecutor to evaluate whether sufficient evidence can be presented to persuade the trier of fact that the defendant had sufficient personal knowledge of the dangerousness of his or her conduct, and consciously disregarded the risks posed.

1. Factors to Consider in Filing Vehicular Murder Charges

The following factors may be useful to consider in determining whether second-degree murder charges should be filed, in that they bear on the ability of the prosecutor to demonstrate implied malice. Additionally, these factors can be used as a checklist during trial, to ensure that the prosecutor effectively covers areas relevant to proving the existence of implied malice.

a. Intoxication

- The nature of the intoxicating substance(s)
- Whether the defendant ingested a combination of intoxicating substances
- Drinking or ingesting drugs in anticipation of having to drive later
- Drinking or drug ingestion pattern
- Drinking or ingesting drugs while actually driving or in the car
- The level of intoxication and impairment, as reflected by FSTs, clinical symptoms, and chemical analysis
b. Prior convictions for DUI and related offenses

- Number
- Frequency
- Recency
- Factual circumstances
- Attendance at mandatory impaired driver education programs
- Terms and conditions of probation prohibiting driving under the influence

c. Evidence that the defendant was urged by another not to drive in an intoxicated state

- Attempts by friends to get the defendant to surrender car keys
- Offers to give the defendant a ride or call a cab
- Being “cut off” from further drinking by bartender or host
- Honking or warnings from other motorists or the defendant’s passengers
- If the defendant’s own passenger was killed, whether the passenger was aware that the defendant was impaired

d. Statements at collision scene or afterwards by the defendant reflecting his or her perception of circumstances of the crash and level of awareness

e. Driving pattern

- Near-collisions prior to fatal crash
- Evading officers or failing to yield
- Miscellaneous vehicle code violations
- Road familiar or unfamiliar to the defendant

f. Prevaling highway conditions

- Straight / curved
- Smooth / rough
- Wet / dry
- Traffic volume
- Weather
- Lighting

h. The defendant’s criminal record, age, and license status

i. Any other admissible evidence demonstrating the defendant’s awareness of the dangerousness of his or her driving and choice to disregard the danger to others
2. Admissibility of Evidence Regarding the Defendant’s Awareness of the Dangerousness of DUI

Whether at the filing stage or in trial, the prosecutor handling DUI murder cases should be familiar with case law permitting the admission of evidence demonstrating the defendant’s awareness of the dangers of drinking and driving, as well awareness of his or her own actions. Of particular impact is evidence of prior arrests, convictions, and consequences sustained by the defendant for the very conduct which ultimately led to tragedy. The following cases uphold the admissibility of such evidence.

**People v. Watson** (1981) 30 Cal.3d 290: The defendant’s drinking pattern, drinking in anticipation of driving later, driving at high speeds, near collision prior to crash, and belated attempts to brake prior to collision all admissible to demonstrate the defendant appreciated risk of harm that he created.

**People v. Olivas** (1985) 172 Cal.App.3d 984: Consumption of combination of alcohol and drugs, high-speed driving, near collision, and evading officers all relevant to establish implied malice on the part of the defendant.

**People v. McCarnes** (1986) 179 Cal.App.3d 525: The defendant’s prior convictions for DUI relevant on the issue of his appreciation of the danger of DUI.

**People v. Brogna** (1988) 202 Cal.App.3d 700: Prior convictions for DUI, terms of probation, and attendance at mandatory DUI driver school and alcohol abuse program admissible. Additionally, admission of evidence that the defendant attended AA meetings and had counseling sessions, including lectures, films, and therapy, found proper as relevant to issue of implied malice. Note that subject to Evidence Code section 352, the content of these lectures, films, and therapy is also admissible to the extent that it contributed to the defendant’s awareness of the danger of DUI.

**People v. Murray** (1990) 225 Cal.App.3d 734: Prior convictions, attendance at alcohol education programs, and previous incident of alcohol-induced blackout while driving held admissible on issue of implied malice.

**People v. Johnson** (1994) 30 Cal.App.4th 286: In a DUI murder case, the defendant’s prior DUI convictions are independently relevant to the issue of implied malice, whether or not the defendant actually attended the drinking driver programs ordered as part of his sentence.

**People v. Garcia** (1995) 41 Cal.App.4th 1832: Held that in a DUI murder case, the defendant’s prior arrests for DUI (even if not convicted) are admissible as relevant to the issue of the defendant’s subjective awareness of the danger of DUI.

3. Charging the “Fallback Position”: Courtney’s Law (Penal Code § 191.5(d))

The California Supreme Court has ruled that gross vehicular manslaughter while intoxicated, in violation of Penal Code section 191.5, is not a necessarily included lesser offense of a vehicular murder charge. (**People v. Sanchez** (2001) 24 Cal.4th 983.) The court noted that
the elements of Penal Code section 191.5 do not meet the traditional test for necessarily included lessers, unlike voluntary and involuntary manslaughter. Therefore, a defendant can properly be convicted of both murder and gross vehicular manslaughter while intoxicated, although punishment for both offenses is precluded by Penal Code section 654. Further, the court declined to address the issue of what other forms of vehicular manslaughter, if any, may qualify as lesser offenses of murder. However, given the court’s reasoning, it would appear logical that any vehicular manslaughter charge is unlikely to be found to qualify as a necessarily included offense. This may present a quandary to the prosecutor charging or trying a vehicular murder case who wishes to ensure that the defendant receives an appropriate penalty, even if convicted of something less than murder. At trial, the defense will most likely request involuntary manslaughter instructions, and the punishment for that offense is limited to 2, 3, or 4 years in prison. This dilemma may be solved in many vehicular murder cases by charging the defendant in the alternative pursuant to Penal Code section 191.5(d), known as Courtney’s Law.2

Penal Code section 191.5(d) provides that any person convicted of gross vehicular manslaughter while intoxicated who has one or more prior convictions of:

- Penal Code section 191.5(a) or (b) (Note: section 191.5(b) was codified as Penal Code section 192(c)(3) prior to 01/01/07), or
- Penal Code section 192(c)(1), or
- Penal Code section 192.5(a), or
- Penal Code section 192.5(b), or
- Vehicle Code section 23153;

or who has a prior conviction for Vehicle Code section 23152 punishable pursuant to Vehicle Code section 23540 (second offense within 10 years), 23542 (second offense within 10 years, with probation), 23546 (third offense within 10 years), 23548 (third offense within 10 years, with probation), 23550 (fourth or subsequent offense within 10 years), or 23552 (fourth or subsequent offense within 10 years, with probation), shall be punished by imprisonment for a term of 15 years to life.

Given that the punishment prescribed for a violation of Penal Code section 191.5(d) is the same as that for second-degree murder, in cases where the defendant has the requisite priors the prosecutor would be well advised to charge violations of both Penal Code section 187 and Penal Code section 191.5(d).

Note, however, that the same reasoning does not appear to hold true for charging the vehicular murder defendant in the alternative with a violation of Penal Code section 191.5(a), which carries a punishment range of 4, 6, or 10 years in prison, unless the prosecutor specifically wishes to give the defendant the opportunity to plead guilty to the less serious charge. Additionally, charging the defendant with a violation of Penal Code section 191.5 entitles the defendant to have the trial jury instructed on all lesser forms of vehicular manslaughter, as well as DUI in violation of Vehicle Code sections 23153 and 23152.

2. Assem. Bill No. 1985 (1995-1996 Reg. Sess.) § 1, provides: “This act shall be known and may be cited as ‘Courtney’s Law,’ in memory of Courtney Cheney of Roseville, who was killed by a drunken driver with a long history of driving under the influence.”
4. Limiting and Overcoming Defenses to Vehicular Murder

Common defenses in vehicular murder cases generally fall into two categories:

1. “Causation” defenses, in which it is suggested that the actions of the defendant were not a proximate cause of the collision, or that the defendant should not be held fully accountable because the victim was somehow negligent; and

2. “Awareness” defenses, in which it is urged that the defendant was not subjectively aware of the danger to human life created by his behavior.

It should be realized that in many, if not most vehicular murder cases, the defense will seek to get any possible mitigating evidence it can before the trier of fact, in the hopes that some sympathy for the defendant may be generated and cause reluctance to return a murder conviction. For example, in the case of a defendant with several prior convictions for DUI, the defense may present the defendant as a pathetic alcoholic who suffers from a disease beyond his control, but who is otherwise a good person who laments the tragedy he has caused. It is critical that prosecutors be familiar with both the jury instructions and decisional law regarding legally appropriate defenses prior to tackling vehicular murder cases. In many instances, thorough research and/or aggressive use of pretrial motions can limit or entirely counteract the defense theory, eliminating the specter of jury nullification or compromise.

a. Causation Defenses

*Pre-existing Vehicle Defects: “It Was the Car’s Fault”*

As a general rule, it is very important to have a complete mechanical inspection of a defendant’s vehicle performed soon after the crash. This will effectively eliminate false or erroneous claims that the defendant was involved in the collision as the result of vehicle failure as opposed to his or her own intoxication. The inspection may also provide valuable evidence that can be used by a qualified accident reconstructionist to estimate speed by crush energy analysis, collision dynamics (the movement of vehicles during the collision sequence), and occupant kinematics (the movement of persons within the vehicles). Similarly, it is important to obtain or have prepared physical evidence diagrams and photos of the collision scene. These can also help disprove false claims of vehicle defects, claims that the defendant was not the driver, and incorrect statements regarding how the collision occurred, as well as provide powerful evidence at trial.

The following checklist for evidence may be useful in ensuring that false claims of vehicle defects can be prevented or overcome. (See also Kwasnoski and Gould, “The Vehicle Autopsy” (1998) APRI Between the Lines, Vol. 7, No. 2.)

- **Diagrams and photographs of vehicles and collision scene**
  Can be used by a reconstructionist to estimate speed using various theories, as well as to determine collision dynamics, direction of collision force, movement of persons during collision, and deployment of safety devices such as airbags.
• **Condition of brakes, brake lines, fluid reservoir(s)**
  Can eliminate sudden brake failure as a defense, and provide more exact braking efficiency information used to estimate speed from skid marks.

• **On/off condition of lamps and lights**
  Assists in determining whether turn signals were used or brakes were applied prior to impact, and whether headlights and/or high beams were illuminated at impact. If the condition of lights is likely to be an issue, the lamps and filaments should be preserved for later examination.

• **Condition of seat belts, air bags, and damage to windows and interior of vehicle**
  Helpful in determining seating position of occupants in vehicle, as well as whether seatbelts were in use. Note that the driver and occupants may have bruising or other injuries corresponding to seatbelts, airbags, or damage. Can be especially useful in overcoming defense that the defendant was not driver at time of collision.

• **Type of transmission, gear engaged at time of crash**
  May assist in demonstrating a vehicle failed to stop before entering an intersection. In motorcycle cases, can lead to direct estimate of speed by correlation to tachometer information.

• **Damage to undercarriage, suspension, steering**
  Relates to locating area of impact when undercarriage damage is matched to gouges on roadway caused when vehicle “bottoms out” upon impact. Can eliminate the defense that the defendant suddenly lost control because of failure of steering mechanisms.

• **Missing or damaged parts of vehicle**
  When related to debris at scene, can assist in reconstruction of crash. Also often useful in hit-and-run cases.

**Contributory Negligence / Supervening Cause Defenses**

Despite such arguments being either precluded or severely limited by established law, the defense will often attempt to minimize the culpability of the defendant by suggesting that the victim was contributorily negligent in causing the collision, or that the victim’s negligence, if any, was a supervening cause of his own death. The defense may attempt to closely question the investigating officer on such matters as whether the victim was wearing a seatbelt, speeding, or whether child victims were properly restrained in safety seats. In argument, it will be urged that although the defendant did wrong, he should not be held fully accountable since others were also at fault. A properly prepared prosecutor can often foreclose such a defense before the trial even begins.

CALJIC 8.56 states: “It is not a defense to a criminal charge that the deceased or some other person was guilty of negligence, which was a contributory cause of the death involved in the case.” (See also CALCRIM 620)
California appellate courts have repeatedly approved this principle. (*People v. Pike* (1988) 197 Cal.App.3d 732; *People v. Rodgers* (1949) 94 Cal.App.2d 166.) Since contributory negligence cannot be a defense to criminal charges, the prosecutor should be successful in arguing that such evidence is irrelevant, and also subject to exclusion pursuant to Evidence Code section 352. If the prosecutor succeeds in obtaining a pretrial ruling excluding the evidence, the defense should be prohibited from mentioning it during opening statement or closing argument.

Creative defense counsel may try a slightly different approach and assert that some claimed negligence on the part of the victim created a supervening cause of the death, thereby relieving the defendant from liability for the homicide. This argument may be overcome by citing CALJIC 3.41 or CALCRIM 240, which provide that so long as the conduct of the defendant was a “substantial factor” contributing to the death, it is no defense that the conduct of some other person, even the deceased, contributed to the death. (See also *People v. Roberts* (1992) 2 Cal.4th 271 and cases cited therein, regarding the rules concerning intervening and supervening causes of death in criminal cases.) The trial court may properly exclude mention by defense counsel at trial of the claimed negligence on the part of the victim. (See, e.g., *People v. Wattier* (1996) 51 Cal.App.4th 948.)

### b. Awareness Defenses

Awareness defenses in vehicular murder cases focus on the third element of implied malice, which requires that the defendant act “deliberately … with knowledge of the danger to, and with conscious disregard for, human life.” Generally, this type of defense is based on one or more of the following theories:

1. Excessive intoxication, in which it is claimed that the defendant was too drunk or “high” to perceive or appreciate the danger he was creating;

2. Timing, in which it is suggested that at the time of the commission of whatever unlawful act or Vehicle Code violation immediately preceded the collision, the defendant did not perceive that he was causing danger to others;

3. Unconsciousness, arguing that the defendant was not acting “deliberately” at the time of driving.

**Excessive Voluntary Intoxication**

Command of current applicable law should enable the prosecutor to overcome the first two of these “awareness” defenses. In *People v. Whitfield* (1994) 7 Cal.4th 437, the California Supreme Court indicated that a defendant in a vehicular murder case could present evidence of the effects of his own voluntary intoxication as negating his ability to harbor implied malice; for example, claiming “I was too high on drugs to know what I was doing.” However, effective January 1, 1996, Penal Code section 22 (Stats. 1995, ch. 793.) was amended to exclude such evidence in implied malice murder prosecutions, thereby overturning that portion of *Whitfield*. 
“Timing”

Similarly, pertinent case law demonstrates the fallacy of the “timing” defense. The “intentional act” referred to in the definition of implied malice does not relate to the unlawful act which immediately preceded the collision and gave rise to the victim’s death, such as an illegal lane change. The criminal act underlying vehicular murder is not the traffic violation which may have caused the crash; it is driving under the influence with a conscious disregard for life. It is the act of drinking or taking drugs and driving that creates the risk that the defendant will do an act which proximately causes another’s death. (People v. Brogna (1988) 202 Cal.App.3d 700, 708; People v. Olivas (1985) 172 Cal.App.3d 984, 988-989.) In Whitfield, supra, 7 Cal.4th at 455, the California Supreme Court observed: “A high level of intoxication sets the stage for tragedy long before the driver turns the ignition key.” (See also People v. Bennett (1991) 54 Cal.3d 1032, 1038.) The fact that an impaired driver passed out or became unconscious while driving and caused a fatal crash does not present a defense, provided that it can be shown that at the time the defendant chose to drive while impaired, he was aware of the potentially fatal consequences of his actions and consciously disregarded the risks. (People v. Ricardi (1992) 9 Cal.App.4th 1427.)

Unconsciousness

It is important to distinguish between an “unconsciousness” defense, in which it is asserted that the defendant was not conscious or aware of his actions at the time they were occurring, and the often misused and misunderstood phrase, “alcoholic blackout.” An alcoholic blackout is generally defined as a memory lapse which occurs as the result of consumption of alcohol. However, during the period covered by the blackout, the person is conscious and alert, and may do complicated things; he simply doesn’t remember later what he did. (See also Goodwin, Alcoholism: The Facts (1994); Diagnostic and Statistical Manual of Mental Disorders, Fourth Ed. (“DSM-IV”) 1994, section 291.81.) Alcoholic blackout is characterized as a type of amnesia for events that occurred during the course of the intoxication. Although the term “alcoholic blackout” is often used, even by experts, as being synonymous with loss of awareness during intoxication, this is not technically correct. (DSM-IV (1994), Additional Information on Alcohol-Related Disorders—Associated descriptive features and mental disorders, p. 199.)

In an effort to counteract the effect of the amendments to Penal Code section 22 which foreclose a voluntary intoxication defense in implied malice murder cases, the defendant may present an expert to testify concerning the effect of syncopal episodes. “Syncope” (sin-kuh-pea) is defined as a transient loss of consciousness due to inadequate blood flow to the brain. In the context of alcohol consumption, the defense expert may testify that once the serum concentration of alcohol in the blood reaches certain levels (which may vary from person to person), the brain functions of memory, reasoning, planning, logic, and impulse control may be adversely affected, particularly in the case of persons with chronic alcohol dependence. This may result in a syncopal episode, in which a person who has consumed alcohol becomes unconscious of his surroundings or actions, but may still engage in certain habitual physical activities—a situation similar to sleepwalking,

3. DSM-IV, p.199, “Additional Information on Alcohol-Related Disorders—Associated descriptive features and mental disorders”
sometimes called “conditioned reflex.” (See, e.g., People v. Murray (1990) 225 Cal.App.3d 734, 744.) Significantly, however, there is an almost complete lack of reliable research on the nature, mechanism, and cause of such episodes among alcoholics, and apparently there is no empirical test to determine whether a person has suffered such an episode in the past as the result of alcohol consumption.

The defense may present evidence to suggest that the defendant was in the throes of such a syncopal episode as the result of heavy drinking and chronic alcoholism at the time he began driving prior to the fatal collision, and was therefore unconscious of his actions.

In response to an objection asserting that Penal Code section 22 prohibits such evidence, the defense will counter that Penal Code section 26 (Class Four) provides that unconsciousness is a defense in a criminal action. If the court indicates that such evidence will be permitted, the key to effectively overcoming the defense is a complete and detailed command of the facts. Initially, it is important to remember that since there is no empirical test to determine whether the defendant was unconscious at some point, the defense expert will be compelled to rely on the defendant’s own statements as to what he does or doesn't remember, and what physical sensations he may have experienced. This “self-report” usually occurs long after the fact, in anticipation of trial. If it is suggested that the defendant was unconscious of his actions preceding and during the driving that caused the fatality, then by definition he should not be able to remember what he said and did. An unconscious person is not capable of volitionally responding to his environment. Therefore, if the defendant was able to tell an officer, ambulance attendant, or other person things such as where he was going in his vehicle, where he had come from, what street he was travelling on, etc., he could not have been unconscious of the fact he was driving. Particularly if the defense expert has not spoken with investigating officers or reviewed the police reports, it can be very effective to confront the defense expert with all of the defendant’s volitional actions and coherent statements prior to and following the collision. The expert should be forced to admit that these behaviors are not consistent with unconsciousness. This will nullify the defendant’s attempts to claim that he didn’t know that he was driving. The prosecutor should stress to the jurors that they should give expert opinion only the weight to which they find it to be entitled, and may disregard expert opinion found by them to be unreasonable, relying on CALJIC 2.80, CALCRIM 332, and cases cited therein.

Note that should the jury accept the argument that the defendant was actually unconscious as the result of voluntary intoxication, and find that the defendant did not harbor implied malice as the result of his actions, the crime of which he should be found guilty is involuntary manslaughter, in violation of Penal Code section 192(b) (CALJIC 8.47; CALCRIM 626). As discussed in Section III.A.3, gross vehicular manslaughter while intoxicated is not a lesser included offense of vehicular murder.

B. Gross Vehicular Manslaughter While Intoxicated (Penal Code § 191.5(a))

A violation of Penal Code section 191.5(a) is punishable by 4, 6, or 10 years in prison. The statute provides:

4. This information is based upon the testimony and reports of Dr. Andrew J. Berner, Ph.D., Irvine, CA. (Consulting psychologist, Chemical Dependency Unit, Hoag Memorial Hospital, Newport Beach, CA)
Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence.

Criminal or gross negligence is more than ordinary or simple negligence. It refers to acts that are aggravated, reckless or flagrant and are such a departure from the conduct of a prudent, careful person as to be contrary to a proper regard for human life, or to constitute indifference to the consequences of those acts. The facts must be such that the consequences could reasonably have been foreseen and it must appear that the death was not the result of inattention, mistaken judgment or misadventure (CALJIC 3.36: CALCRIM 590). The California Supreme Court has explained gross negligence as follows:

Gross negligence is the exercise of so slight a degree of care as to raise a resumption of conscious indifference to the consequences. The state of mind of a person who acts with conscious indifference to the consequences is simply, “I don’t care what happens.” The test is objective: whether a reasonable person in the defendant’s position would have been aware of the risk involved.

(People v. Ochoa (1993) 6 Cal.4th 1199, 1204).

In the absence of convincing evidence of the defendant’s personal knowledge of and experience with the life-threatening dangers of driving under the influence and conscious disregard for the lives of others, the prosecutor should consider filing the charge of gross vehicular manslaughter while intoxicated, rather than murder. Reference to the checklist of factors in Section III.A.1 may assist in making the determination of which charge is most appropriate.

1. **Admissibility of Evidence Demonstrating Gross Negligence**

Although the determination of gross negligence is an objective, “reasonable person” test, evidence showing that a defendant actually appreciated the risks involved in his conduct and nonetheless proceeded with it is admissible. (Ochoa, supra, 6 Cal.4th 1199.) Therefore, the jury logically should be permitted to consider “all relevant circumstances … to determine if the defendant acted with a conscious disregard of the consequences rather than with mere inadvertence.” (People v. Bennett (1991) 54 Cal.3d 1032, 1038; see also People v. Costa (1953) 40 Cal.2d 160, 166; People v. Von Staden (1987) 195 Cal.App.3d 1423.) This becomes particularly important given the language of CALJIC 8.94, which states:

The mere fact that a defendant drives a motor vehicle while under the influence of alcohol and violates a traffic law is insufficient in itself to constitute gross negligence. You must determine gross negligence from the level of the defendant’s intoxication, the manner of driving, or other relevant aspects of the defendant’s conduct resulting in the fatal accident.

(See also People v. Stanley (1986) 187 Cal.App.3d 248; CALCRIM 590.)
In *People v. Von Staden* (1987) 195 Cal.App.3d 1423–1428, the court enumerated several relevant factors which may be considered by the trier of fact in determining the presence of gross negligence in a vehicular manslaughter case. These factors include:

- The level of the defendant’s intoxication
- The urging of another that the defendant not drive because of intoxication
- Prevailing highway conditions, i.e., fog, rain, clear, light or dark
- The maximum safe speed
- Defendant’s actual speed and how much it exceeded the safe speed limit

Apart from the circumstances of the offense itself, evidence demonstrating the defendant’s actual awareness of the risks presented by driving under the influence due to prior experience has also been held to be admissible in determining gross negligence. A defendant’s prior DUI conviction, subsequent probation, and attendance at alcohol awareness classes are all relevant in a gross vehicular manslaughter case to show the defendant’s actual awareness of dangers presented. (*Ochoa, supra*, at 1204–1205.)

2. “Unlawful Act” or “Lawful Act in an Unlawful Manner”?

Confusion often arises regarding interpretation of the language of CALJIC 8.93 (see also CALCRIM 590), which sets forth the elements of gross vehicular manslaughter while intoxicated. The jury instruction provides, in pertinent part:

In order to prove this crime, each of the following elements must be proved:

1. The driver of a vehicle violated Vehicle Code section [23140,] [23152,] [or] 23153;
2. In addition to that violation, the driver of the vehicle [committed [with gross negligence] an unlawful act [not amounting to a felony], namely a violation of ___________, dangerous to human life under the circumstances of its commission] [or] [committed [with gross negligence] an act ordinarily lawful which might cause death]; and
3. That [unlawful] [or] [negligent] act was a cause of the death of a human being.

It is reversible error for the trial court to fail to insert a separate offense in element 2 of the instruction, and instead simply insert Vehicle Code section 23140, 23152, or 23153 in the blank. (*People v. Soledad* (1987) 190 Cal.App.3d 74, 79–82.) Because of this, courts and attorneys sometimes become overly concerned with determining which particular separate Vehicle Code violation to specify in element 2, and overlook the fact that both the jury instructions and the case law support a “totality of the circumstances” alternative approach in which gross negligence can be found even in the absence of a particular Vehicle Code violation being relied upon. Gross negligence can be shown by the manner in which the defendant operated the vehicle, that is, the overall circumstances rather than the mere fact of the traffic violation. (*People v. Hansen* (1992) 10 Cal.App.4th 1065, 1075.)

Therefore, the prosecutor should rarely elect to proceed only under the “specific violation” clause. To do so potentially puts the trier of fact in the position of having to find the
defendant not guilty due to the failure of an element if the specific Vehicle Code violation relied upon is not proven, or is not shown to have been dangerous to human life under the circumstances of its commission.

3. **Lesser Included Offenses and Special Allegations**

Penal Code section 192(c)(1), gross vehicular manslaughter without intoxication, and Vehicle Code section 23153(a), driving under the influence causing injury, are lesser and necessarily included offenses of Penal Code section 191.5(a). (People v. Miranda (1994) 21 Cal.App.4th 1464.) Additionally, based on the reasoning of this opinion, Penal Code section 191.5(b), vehicular manslaughter with intoxication (but without gross negligence), and vehicular manslaughter in violation of Penal Code section 192(c)(2) (misdemeanor), are also necessarily included lesser offenses.

Great bodily injury (“GBI”) allegations pursuant to Penal Code section 12022.7 may be pled in conjunction with Vehicle Code section 23153, including in cases where the GBI sustained was death. (People v. Sainz (1999) 74 Cal.App.4th 565.) Penal Code section 12022.7 allegations may also be pled in conjunction with Penal Code section 191.5 in cases in which victims other than the deceased sustained GBI. (People v. Weaver (2007) 149 Cal.App.4th 1301.)

Vehicle Code section 23558 allows for a one year enhancement for each additional victim (up to three) to whom bodily injury or death is caused. Note, however, that if more than one victim is killed, each fatality can be charged as a separate manslaughter, and may be punished consecutively. (People v. McFarland (1989) 47 Cal.3d 798.)

Vehicle Code section 20001(c) provides for a five-year enhancement if the offending driver flees the scene of the crime after committing a violation of Penal Code section 191.5 or 192(c)(1).

4. **Courtney’s Law: Penal Code Section 191.5(d)**

For a complete discussion of the applicability of Penal Code section 191.5(d), please see Section III.A.3.

C. **Vehicular Manslaughter While Intoxicated (Penal Code section 191.5(b))**

Penal Code section 191.5(b) is a wobbler, punishable either by imprisonment in the county jail for not more than a year, or by imprisonment in the state prison for 16 months, 2 or 4 years. (See Penal Code section 191.5(c)(2).) The crime is defined as follows:

[T]he unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, but without gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, but without gross negligence.
1. Defining “Negligence”

“Ordinary negligence” for purposes of vehicular manslaughter is defined in CALJIC 8.91 (see also CALCRIM 593):

Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under similar circumstances. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under similar circumstances.

As is the case regarding gross negligence, as discussed in Section III.B.2, a finding of ordinary negligence need not be based on the violation of a particular Vehicle Code section. Negligent driving of an automobile has itself been held to be an “unlawful act” under vehicular manslaughter statutes. (In re Dennis B. (1976) 18 Cal.3d 687.) For example, a motorist who causes a fatal collision due to inattentiveness resulting from drowsiness and fatigue may be held accountable for vehicular manslaughter. (People v. DeSpenza (1962) 203 Cal.App.2d 283.) Similarly, a motorist may be charged with vehicular manslaughter for failing to see and react to something which would have been visible to him had he exercised care and looked. (People v. Hoe (1958) 164 Cal.App.2d 502.) As noted in Section III.B.2, the prosecutor should rarely elect to rely only on a specific Vehicle Code violation as the basis for culpability in a vehicular manslaughter case, since doing so may foreclose the trier of fact from considering the defendant’s negligent conduct as a whole.

2. Lesser Included Offenses and Special Allegations

Driving under the influence causing injury in violation of Vehicle Code section 23153(a) (note application of Penal Code section 12022.7 enhancement, see Section III.B.3), and vehicular manslaughter (Penal Code section 192(c)(2)) are lesser included offenses of vehicular manslaughter while intoxicated. A one year enhancement may be alleged pursuant to Vehicle Code section 23558 for each additional victim who is injured (up to three), as may great bodily injury enhancements, if applicable. (Penal Code section 12022.7; see also People v. Weaver (2007) 149 Cal.App.4th 1301.) Additional fatalities may also be charged as separate counts of manslaughter (see Section III.B.3).

ABOUT THE AUTHOR

Former Chief Deputy District Attorney Cregor Datig served as vehicular homicide coordinator for Riverside County from 1986 through 2006. He has obtained 20 murder verdicts in vehicular homicide cases, and is a regular instructor for law enforcement, both in California and nationally, on issues related to the investigation and prosecution of vehicular cases. He is now director of the Traffic Safety Resource Prosecutor Program for CDAA. Mr. Datig has served on the CDAA Board of Directors, chaired the Juvenile Justice Committee, and is a member of the Legislation Committee.
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Chapter XIX

Understanding DMV Records

by Frank M. Horowitz, Former Director
CDAA’s Driving Under the Influence Project

CDAA would like to extend a special thank you to Branch Chief Walt Steuben and Branch members Michele Ames and Colleen Baker of the Justice and Government Liaison Branch of the Department of Motor Vehicles (DMV). It was their thorough knowledge of the relevant law and the workings of DMV, in conjunction with their willingness to both patiently educate and dedicate themselves to the ultimate task of editing that permitted the publication of this chapter. Also, deep appreciation is owed to Ellen Sarmiento of the Los Angeles City Attorney’s Office and David Stotland and Linda Peter of the San Diego City Attorney’s Office for their participation in the peer review and editing of this chapter.

(Updated 2010 by David Radford, TSRP, Northern Region)

I. Introduction

The functions of the Department of Motor Vehicles (DMV or “the Department”) include: (1) overseeing the issuance of drivers’ licenses and the vast repository of related records and information; (2) monitoring and enforcing the rules related to the status of a citizen’s driving privilege; and (3) handling the administration of vehicle registration and record keeping.

The accuracy of DMV records is largely contingent on two sources.

A. Law Enforcement

Law enforcement provides DMV with information related to arrests, collisions, and DUI-related administrative per se suspensions of an arrestee’s driving privilege.

B. The Courts

The court clerks in each county are responsible for providing vital data, including defendant information (e.g., address, birth date, aliases [“AKA”], commercial vehicle, etc.) as well as case dispositions (“abstracts”).

The Department possesses an incredible amount of information that can be of particular importance to a public prosecutor. The DMV’s extensive records related to driving histories and vehicle registration may provide just the information you need to prove your case or present vital data about the defendant’s record that reflects additional prior convictions or the existence of other unknown grants of court probation that may make a pending jury trial unnecessary. It is the
DMV’s goal to support prosecutors in the proper use of this reservoir of information in order to better achieve fair and equal justice.

C. Organization

This chapter is organized to deal with the following topics:

- The distinction between the driving privilege and a driver’s license
- Definitions of DMV sanctions
- Drinking, driving, and DMV
- Reasons for DMV suspensions and revocations
- Charging sections for driving when the privilege is suspended
- The law regarding ignition interlock devices
- Issues of identification
- How to read a common DMV CLETS printout
- Getting a DMV CLETS printout into evidence

II. The Distinction Between a “Driving Privilege” and a “Driver’s License”

Within your first year as a public prosecutor, you will be (or were) confronted by a defense attorney contending that the count in your complaint alleging the defendant was driving on a suspended license is wrong. Defense counsel will then likely hand you the defendant’s driver’s license bearing an expiration date for some future time. You will then check the attached DMV printout and notice the information: “LICENSE STATUS: SUSPENDED OR REVOKED.” The obvious defense argument is that if the defendant is in possession of a license that does not expire until the stated future time, the charge of “driving on a suspended license” must be wrong. Actually, most likely, it is defense counsel who is wrong.

The answer to this conundrum has two parts. First, the privilege to drive is different than the simple possession of the hard plastic certificate known as a driver’s license. Indeed, the driver’s license is merely evidence that at the time the license was issued, DMV acknowledged that the defendant was privileged to drive in California.

This proposition is supported by the Vehicle Code. The Legislature has deemed that driving in California is “a privilege, and not a right.” (Vehicle Code § 14607.4(a).) Consequently, the Vehicle Code’s general provisions regarding suspensions and revocations make clear that what is being suspended or revoked is “the person’s privilege to drive a motor vehicle.” (Vehicle Code §§ 13101-13102.) Virtually every section of Article 3 of the Vehicle Code, which governs suspensions and revocations by DMV (§§ 13350–13376), repeatedly refers to the loss of the “privilege” to drive. The term “driver’s license” has no significance in any of these sections.

The DMV-issued driver’s license is no more than a certificate reflecting that at the time of issuance, the driver was privileged to drive on the state’s highways. Separate sections of the Vehicle Code define the violations related to a driver’s license. Vehicle Code section 12500 prohibits driving a vehicle without holding a valid driver’s license, and Vehicle Code section 12951(a) outlaws driving a vehicle without the driver being in immediate possession of a driver’s license.
The second answer to the conundrum is within the reading of the related Vehicle Code charging sections that are commonly termed “driving on a suspended license.” (Vehicle Code §§ 14601 et seq.) The act each section outlaws is driving when one’s driving privilege has been suspended or revoked and makes no mention of a driver’s license.

In summary, the “privilege to drive” is a condition precedent to getting a driver’s license. And being in possession of a driver’s license does not necessarily mean that the driving privilege is still valid. This is so even though the DMV printout uses the term “license status.” For what is actually being provided in the printout is a statement of the driver’s privilege status. If a defendant’s privilege to drive has been suspended, it is not relevant that the defendant is still in possession of a driver’s license. It may be evidence that the defendant did not turn over his or her driver’s license to DMV as requested.

III. Definitions of DMV Sanctions

A. Against the Driving Privilege

1. Revocation

   The entire driving privilege is terminated for an indefinite period. The driver must reapply for a license after the driving privilege is reinstated and all other reinstatement conditions are met.

2. Suspension

   The privilege to drive a motor vehicle is temporarily withdrawn for a defined period. At the end of the suspension, the driving privilege may be reinstated.

3. Withdrawn

   DMV withdraws the privilege to drive for failing to provide documentation showing an out-of-state Problem Driver Pointer System (PDPS) problem has been resolved. The privilege will be reinstated with proof of clearance.

4. Restriction

   The driver’s privilege is limited to driving only to and from specified functions identified by the court or DMV (e.g., “to and from work” or “to and from a DUI program”). DMV has more than 100 restrictions ranging from: corrective lenses; no freeway driving; must not drive on Saturday, Sunday, or any holiday; drive only to and from work; drive only to and from treatment program; transport minor children to school, etc. The DMV also has special restrictions usually used for the elderly to allow them to drive to their medical appointments, the grocery store, and the post office. A particular restriction is based on the laws, type of license, ability to drive, medical limitations, age (provisional restriction), and the needs of the individual.
B. Against the Driver’s License

1. Refusal

DMV has determined not to issue or renew a driver’s license. (Vehicle Code §§ 12805–12806; 12809.)

2. Cancellation

The driver’s license is terminated without prejudice and must be surrendered. The person may immediately reapply for a new license (i.e., a person who wrote a dishonored check and later pays the amount due may then reapply for a new license).

3. Withhold/Withheld

When a driver’s record reflects a failure to appear (FTA) or failure to pay (FTP) court-imposed fine, DMV must withhold or not issue a license to that driver. But if the driver is in possession of an unexpired license, it remains valid. A “withhold” only affects a future issuance or reissuance of a license.

IV. Drinking, Driving, and the DMV

The Legislature, in its efforts to limit impaired driving, has mandated DMV to strictly regulate the driving privileges of those who drive after using intoxicating substances. The Vehicle Code not only provides for DMV actions against a driver’s privilege after a conviction for DUI, but currently also requires a form of preconviction suspension, imposed immediately after arrest.

Note: Many defense attorneys will offer to plead to a count of Vehicle Code section 23152(a) if you will stipulate to a court’s finding that the defendant was “factually innocent” of an allegation of subsection (b) or (d). The defense pitch is that the defendant is admitting the violation, the state is getting a conviction, and a trial is not necessary. Be advised: This is not a stipulation that you should join. Why? Because if the court’s abstract to DMV reflects that the defendant was found “factually innocent” of the subsection (b) or (d) count, then any suspension or revocation that is predicated on a particular blood-alcohol content (BAC) level will be terminated. Conversely, if the (b) count is dismissed “in the interest of justice” after a plea to the (a) count, then DMV knows that the administrative per se suspension remains in effect.

A court’s acceptance of a lesser plea of “wet reckless” (Vehicle Code § 23103.5) does not automatically terminate the administrative per se suspension. An offender who pleads to a wet reckless may regain the privilege to drive after the administrative per se suspension period (four months for a first offender). The defendant may regain the driving privilege before the completion of the court-ordered DUI program. The offender must pay the required fees to DMV and file proof of financial responsibility (auto insurance) for three years.
A. Administrative Per Se Suspension: Vehicle Code Section 13353.2

Administrative per se (APS) actions provide timely and swift sanctions against the driving privilege of those drivers arrested with a 0.08 percent, or higher, BAC. APS differs from traditional suspension and revocation actions in two ways:

1. DMV action is not dependent on a conviction. The mere incidence of an arrest triggers the application of the law.

2. The standard applied is administrative rather than criminal (preponderance of the evidence vs. beyond a reasonable doubt).

The driver’s arrest must be predicated on either an officer’s probable cause to believe the driver violated the law or result from a DUI checkpoint or a traffic collision. Upon the 0.08 percent, or higher, BAC arrest, the officer seizes the driver’s license and serves the offender with a Notice of Suspension of the Driving Privilege (form # DS 367). Law enforcement will then issue the offender a 30-day temporary driver’s license (form # DS 367).

The offender, within 10 days of the arrest, may request a hearing with DMV in order to challenge the APS suspension. DMV has 30 days to schedule the hearing.

*Note:* Nothing determined in the DMV hearing will collaterally estop a subsequent criminal prosecution or preclude the litigation of the same or similar facts heard in the DMV hearing. (Vehicle Code § 13353.2(e).)

Assuming the offender is unsuccessful at the DMV hearing and has no prior DUI offenses, the suspension is for four months. It is possible that the offender may qualify for a restricted driver’s license after completing 30 days of the suspension.

If the offender has prior DUI offenses, the driving privilege will be suspended for one year rather than four months. DMV will not permit a restricted license when the offender has prior DUI offenses.

B. The Effect on an Administrative Per Se Suspension If a Prosecutorial Agency Chooses Not to File Charges

Assume a defendant has been arrested for DUI and has been issued notice of the APS suspension. Subsequently, the prosecutorial agency reviewing the case concludes that the evidence does not warrant a criminal filing. What happens to the driver’s privilege to drive?

Vehicle Code section 13353.2(e) only permits the rescinding of the APS suspension in DUI-related cases if a person is acquitted of all criminal charges or if no criminal case is issued. The offender may request the district attorney complete a DS 702 form, providing a detailed explanation of the evidence and the reasons for not filing charges.
Note: A prosecutor merely declaring a lack of evidence is insufficient for DMV purposes.

DMV will subsequently grant an administrative hearing and, depending upon the reasons for failure to prosecute, the APS action may be set aside. But if the facts of the case include a refusal to submit to, or a failure to complete, a chemical test on the part of the offender, the suspension of the driving privilege remains in effect. (Vehicle Code § 13353.)

C. DMV Actions After a DUI Conviction

The accuracy of DMV’s records is dependent on the information it receives from law enforcement officers, prosecutors, and the courts. Vehicle Code section 1803(a) requires that every clerk of the court shall, within five days after conviction, prepare and immediately forward to DMV an abstract of the court record covering the case for which the person was convicted. It is the receipt of the abstract that permits any addition to a driver’s record. If the conviction, sentence, or probation conditions that you just fought to achieve are not accurately communicated to DMV, they will not be reflected in DMV’s records.

Remember, DMV records are only as accurate as the information the Department receives from law enforcement officers, prosecutors, and the courts.

DMV’s authority to suspend or revoke the driving privilege after a DUI conviction is within Vehicle Code section 13352. The odd-numbered subsections [(a)(1), (3), (5), (7)] define departmental actions after a conviction of section 23152. The even-numbered subsections [(a)(2), (4), (6)] cover actions for section 23153 convictions.

A DMV letter is electronically generated to the offender and mailed to his or her last-known address. This notifies the offender that the driving privilege is suspended or revoked, the length of the action, and what must be done before the driving privilege will be reinstated. Additionally, the offender is told whether or not he or she is eligible for a restricted license during the period of suspension. An offender may obtain a restricted license and thus be permitted to have driving privileges for specific purposes before the conclusion of the suspension. It is necessary to participate in a licensed first-offender program to achieve a restricted license. The notification letter will outline the steps that must be taken for a driver to either regain the driving privilege or obtain a restricted license. The common requirements include:

- Complete the period of suspension or revocation (for reinstatement of the privilege)
- Pay a restriction fee to DMV
- Provide proof of financial responsibility (the insurance policy must be retained for three years from reinstatement date)
- Proof of completion of a DUI program is required to end all DUI suspensions or revocations (similar proof is required if the driver seeks a restricted license during the term of the privilege suspension)
- The letter also informs a multiple DUI offender of the date of eligibility for an optional ignition interlock device (IID) restriction. The multiple offender is eligible for such a restricted license after serving one-half of the suspension or revocation period, showing proof of enrollment in a DUI program, and having no other license sanctions or actions against his or her driving privilege
V. Reasons for DMV Suspensions/Revocations of a Driving Privilege

The Vehicle Code (§§ 13350 et seq.) defines a number of circumstances that require DMV to either suspend or revoke a driver’s privilege to drive.

A. Convictions Requiring Immediate One-Year Revocations

DMV, per Vehicle Code section 13350, will revoke a driver’s privilege to drive for one year after the following convictions:

- Hit and run with injuries (Vehicle Code § 20001)
- Any felony in which a vehicle was used
- Reckless driving with injury (Vehicle Code § 23104)

B. Convictions Requiring Immediate Three-Year Revocations

DMV, per Vehicle Code section 13351, will revoke a person’s privilege to drive for a three-year period subsequent to convictions in the following cases:

- Vehicular manslaughter (Penal Code § 191.5.)
- Flight from pursuing peace officer, resulting in death or serious bodily injury (Vehicle Code § 2800.3)
- Three convictions of the following group within a 12-month period:
  - hit and run with injury (Vehicle Code § 20001)
  - hit and run/property (Vehicle Code § 20002)
  - reckless driving (Vehicle Code § 23103)
  - reckless driving with injury (Vehicle Code § 23104)

C. Vehicle Used as the Weapon in a Felony Penal Code Section 245 Conviction

DMV, per Vehicle Code section 13351.5, will revoke a driver’s privilege for life where a vehicle was the weapon used in a felony conviction for Penal Code section 245.

D. Other DUI-Related Convictions

DMV, pursuant to Vehicle Code section 13352, shall suspend or revoke a driver’s privilege for varying lengths of time contingent on the underlying circumstances. In each of the suspensions or revocations included in this section, the loss of the driving privilege continues until three conditions are met by the driver: (1) completion of the term of suspension or revocation; (2) completion of the required education program; and (3) proof of insurance.

1. First-Time DUI Without Probation (Per Vehicle Code § 13352(a)(1))

- DMV shall suspend the privilege for six months
- The suspension continues past the term of suspension and until the driver completes the required education program and provides proof of insurance
2. **First-Time DUI with Injury (Per Vehicle Code § 13352(a)(2))**
   - DMV shall suspend the privilege for one year
   - The suspension continues until the driver furnishes the DMV proof of completion of the required education program and proof of insurance

3. **DUI Conviction with a Prior (Per Vehicle Code § 13352(a)(3))**
   - DMV shall suspend the privilege for two years
   - The suspension continues until the driver furnishes the DMV proof of completion of the required education program and proof of insurance

4. **DUI Conviction with Two Priors (Per Vehicle Code § 13352(a)(5))**
   - DMV shall revoke the privilege for three years
   - The revocation continues until the driver furnishes the DMV proof of completion of the required education program and proof of insurance

5. **DUI with Injury Conviction (Vehicle Code § 23153) and Two Prior DUIs (Vehicle Code § 13352(a)(6))**
   - DMV shall revoke the privilege for five years
   - The revocation continues until the driver furnishes the DMV proof of completion of the required education program and proof of insurance

6. **DUI with Three Prior DUIs or as a Felony Per Vehicle Code Section 23550.5 (Vehicle Code § 13352(a)(7))**
   - DMV shall revoke the privilege for four years
   - The revocation continues until the driver furnishes the DMV proof of completion of the required education program and proof of insurance

**E. First- or Second-Time DUI Conviction with Probation (Vehicle Code § 23538(a)(2) or 13352.5)**

A convicted first- or even second-time DUI defendant granted probation may obtain a restricted license from DMV. Such a license permits driving to and from work, and to and from the DUI education program.

**F. Suspension of Privilege for Underage Driver’s Conviction of Vehicle Code Section 23140 (Per Vehicle Code § 13352.6) (18 to 20 Years of Age Only)**

The driver’s privilege is automatically suspended and continues in suspension until the driver provides DMV with proof of completion of the required education program and proof of insurance.
G. Admin Per Se Suspensions (Vehicle Code §§ 13353.2 and 13353.3)

If an adult driver is arrested for DUI and has a BAC of 0.08 or greater, the privilege is suspended for four months, to commence 30 days after the person has been served notice. Notice is normally given by a peace officer at the time of arrest, but may be done by DMV at a later time. If the driver has a prior conviction, the admin per se suspension is for one year.

If the driver is under the age of 21, the admin per se suspension is effective upon a finding of 0.01 BAC and is in effect for one year.

H. Suspensions Related to Refusing a Chemical Test (Vehicle Code § 13353)

If a driver is stopped by an officer for DUI and refuses to submit to a chemical test, the DMV shall:

- If the driver has no prior convictions for a DUI-related offense, suspend the privilege for one year
- If the driver has one prior conviction for a DUI-related offense, revoke the privilege for two years
- If the driver has two prior convictions for a DUI-related offense, revoke the privilege for three years

I. Suspensions Related to Failures to Appear in Court or Failure to Pay a Fine (Vehicle Code §§ 13365, 13365.2, and 13365.5)

It is common for traffic offenders to fail to appear (FTA) in court as they promised to do when signing their traffic citations. Sometimes after conviction, they fail to pay (FTP) the court-imposed fine. DMV shall suspend the driver’s privilege in the following situations:

1. If DMV receives notice from a court that a driver failed to appear, failed to pay a court-ordered fine, or failed to comply with other court orders, and DMV’s records reflect that the driver has one or more prior FTAs or FTPs, DMV will then suspend the privilege. (Vehicle Code § 13365.)

2. If DMV is notified by the court that the defendant has not appeared and that defendant is charged with a violation of Vehicle Code section 23152 or 23153, Penal Code section 191.5 or 192(c)(3), DMV shall suspend the privilege. (Vehicle Code § 13365.2.)

VI. The Charging Sections for Driving Despite a Suspended or Revoked Privilege

The Vehicle Code provides numerous bases for suspending or revoking a driver's privilege to operate a motor vehicle. Sections 13200 et seq. articulate the situations in which the court may revoke or suspend a driving privilege. Sections 13350 et seq. define the circumstances that call for suspension or revocation directly by DMV.

Vehicle Code sections 14601 et seq. are the applicable charging sections if a person drives while his or her driving privilege is suspended or revoked. The general corpus for these sections requires proof of three elements:
First, the defendant was driving a motor vehicle.

Second, at that time, the defendant’s driving privilege was suspended by DMV. (It is also necessary that the charged subsection of Vehicle Code section 14601 accurately relates to the specific reason for the defendant’s suspension. For instance, if the defendant is charged with driving while the privilege was suspended because of prior DUI convictions, it is vital that the defendant’s record reflect prior DUI convictions.)

Third, the defendant had knowledge of the suspension prior to the act of driving. The law conclusively presumes the defendant’s knowledge where the Department sent the suspension notification by certified mail to the offender’s most recent known address, and there has been no evidence of failure to deliver returned to the Department. Alternative forms of notification include personal communication by the Department, a peace officer, or in court.

The nature of the offenses covered by Vehicle Code section 14601:

- Driving while the privilege is suspended because of DUI convictions (Vehicle Code § 14601.2(a).)
- Driving in violation of privilege restriction imposed due to DUI conviction (i.e., to drive only to and from work) (Vehicle Code § 14601.2(b).)
- Driving and causing injury to another while the privilege is suspended due to DUI convictions (Vehicle Code § 14601.4)
- Driving while the privilege is suspended because the offender was arrested with a BAC above 0.08 (APS suspension) or offender refused a chemical test or underage offender violated zero tolerance alcohol provision or suspended driver granted a restricted license violated the restriction (Vehicle Code § 14601.5.) (See Vehicle Code § 13353, 13353.1, or 13353.2.)
- Driving while privilege is suspended because offender is deemed a “negligent operator” (Vehicle Code § 14601(a).) (See Vehicle Code §§ 12806, 12809(e), 12810, 23103, 23104.)
- Driving while privilege is suspended for any other reason defined in the Vehicle Code (Vehicle Code § 14601.1(a).) (This is considered the catch-all section that covers all additional reasons for suspension not included in Vehicle Code sections 14601, 14601.2, 14601.4, and 14601.5.)
- A driver will be designated a Habitual Traffic Offender (Vehicle Code § 14601.3) if, during a 12-month period of suspension, that accumulates:
  - two traffic convictions, each worth two points per Vehicle Code section 12810 (Penal Code § 192(c); Vehicle Code §§ 23152–23153 and 20001–20002 are all included); or
  - three traffic convictions, each worth one point per Vehicle Code section 12810 (moving violations); or
  - three crashes reportable per Vehicle Code section 16000; or
  - any combination of the above totaling three points per Vehicle Code section 12810,
The following chart was prepared by Linda Peter of the San Diego City Attorney’s Office. The first column provides the legal authority supporting the suspension of the driver’s privilege. The middle column defines the essence of the suspension. The last column indicates what the appropriate charging section would be if the driver drove despite the privilege suspension.

<table>
<thead>
<tr>
<th>Authority</th>
<th>Description</th>
<th>Charging Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>11350.6 (W &amp; I Code)</td>
<td>11350.6 (W &amp; I Code) Suspended for Failure to Pay Family Support</td>
<td>14601.1(a)</td>
</tr>
</tbody>
</table>
| 12805 (13359) (Vehicle Code) | When DMV is Required to Refuse to Issue a DL:  
(a) Not of Legal Age  
(b) Unable to Understand Traffic Signs or Signals; Lack of Knowledge of Laws  
(c) Unable to Safely Operate a Vehicle  
(d) Unable to Read and Understand Simple English Used in Highway Traffic and Directional Signs  
(e) Failure to Surrender Valid Foreign Driver’s License  
(f) Suspended Foreign License  
(g) Revoked Foreign License | 14601.1(a) |
| 12806 (Vehicle Code) | When DMV Permitted to Refuse to Issue a DL:  
(a) Alcoholism, Addiction to, or Habitual Use of Drugs  
(c) Lapses of Consciousness | 14601(a) |
| 12807 (13359) (Vehicle Code) | Additional Grounds for Refusal:  
(c) Failure to Appear | 14601.1(a) |
| 12809 (13359) (Vehicle Code) | Additional Grounds Permitting Refusal:  
(a) Applicant Not Entitled to License  
(b) Failure to Furnish Application Information  
(c) Unlawful Use of License  
(d) False Information, Fraud, Impersonation, etc. in Application for License  
(e) Negligent or Incompetent Operator  
(f) Narcotics Conviction Under Division 10 of Health & Safety Code  
(g) Failure to Surrender Canceled Nonresident Minor’s Cert. | 14601.1(a) |
<p>| 12810 (Vehicle Code) | Negligent Operator—Traffic Violation Point Count | 14601(a) |
| 12810.5(c) (Vehicle Code) | Negligent Operator—No Proof of Insurance | 14601.1(a) |</p>
<table>
<thead>
<tr>
<th>Authority</th>
<th>Description</th>
<th>Charging Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>12814.6(a) (Vehicle Code)</td>
<td>Suspension of Minor's Provisional License (5) Failure to Appear (7) Negligent Operator</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14601(a)</td>
</tr>
<tr>
<td>13200 (Vehicle Code)</td>
<td>Court Suspension for Speeding Violation or Reckless Driving</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td></td>
<td>Vehicle Code Provisions Relating to Speed Reckless Driving</td>
<td>14601(a)</td>
</tr>
<tr>
<td>13201 (Vehicle Code)</td>
<td>Certain Misdemeanors (a) Hit &amp; Run (b) Reckless Driving with Injury (c) Failure to Stop at Grade Crossing</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14601(a)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13202 (Vehicle Code)</td>
<td>Controlled Substance Offenses (a) Violation of Division 10 of Health &amp; Safety Code—Motor Vehicle Used</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13202.3 (Vehicle Code)</td>
<td>Other Controlled Substance Offenses</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13202.4 (Vehicle Code)</td>
<td>Minor's Unlawful Use of Firearms</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13202.5 (Vehicle Code)</td>
<td>After Controlled Substances or Alcohol-Related Offense Re: Minor</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13202.6 (Vehicle Code)</td>
<td>After Vandalism Conviction</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13350(a) (Vehicle Code)</td>
<td>Required Revocation After Conviction: (1) Felony Hit &amp; Run (2) Any Felony with Use of Motor Vehicle Except 13351, 13352, and 13357 (3) Reckless Driving with Injury</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13351(a) (Vehicle Code)</td>
<td>Required Revocation After Conviction: (1) Manslaughter—Operation of Motor Vehicle (2) Three or More Convictions of 20001, 20002, 23103, or 23104 in 12 Months A Combination of Three or More of Above in 12 Months</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13352 (Vehicle Code)</td>
<td>(a)(1) Through (a)(7) After Conviction for DUI or with a Blood-Alcohol Level of .08 Percent or More (e) Failure to Maintain Proof of Insurance</td>
<td>14601.2(a)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>Authority</td>
<td>Description</td>
<td>Charging Section</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------</td>
<td>------------------</td>
</tr>
<tr>
<td>13352.3 (Vehicle Code)</td>
<td>DUI—Under Age 18</td>
<td>14601.2(a)</td>
</tr>
<tr>
<td>13352.4(b) (Vehicle Code)</td>
<td>Noncompletion of DUI Program</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13353 (Vehicle Code)</td>
<td>Refusal of Chemical Test</td>
<td>14601.5(a)</td>
</tr>
<tr>
<td>13353.1 (Vehicle Code)</td>
<td>Minor’s Refusal to Take Preliminary Alcohol Screening (PAS) Test</td>
<td>14601.5(a)</td>
</tr>
<tr>
<td>13353.2 (Vehicle Code)</td>
<td>Excess Blood Alcohol (Admin Per Se)</td>
<td>14601.5(a)</td>
</tr>
<tr>
<td>13355 (Vehicle Code)</td>
<td>After Conviction for Vehicle Code Section 22348 with a Prior (More Than 100 mph)</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13357 (Vehicle Code)</td>
<td>After Vehicle Code Section 10851 Conviction</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13360 (Vehicle Code)</td>
<td>Suspension or Revocation for Violation of License Restrictions</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13361 (Vehicle Code)</td>
<td>If Suspension Due to Conviction for: (a) Misdemeanor Hit &amp; Run (b) Two or More Convictions of Reckless Driving First Conviction of Reckless Driving with Injury (c) Manslaughter—Operation of a Motor Vehicle</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13362 (Vehicle Code)</td>
<td>Suspended for Failure to Surrender an Erroneously Issued License</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13363 (Vehicle Code)</td>
<td>(a) Conviction in Another State</td>
<td>Depends on Violation</td>
</tr>
<tr>
<td>13365 (Vehicle Code)</td>
<td>Suspended for Failure to Appear</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13365.5 (Vehicle Code)</td>
<td>Suspended for Failure to Comply with Court Order</td>
<td>14601.1(a)</td>
</tr>
<tr>
<td>13801 (Vehicle Code)</td>
<td>Suspended for Failure to Submit to Re-exam at DMV’s Request</td>
<td>14601.1(a)</td>
</tr>
</tbody>
</table>
**VII. The Law Regarding the Ignition Interlock Device (IID)**

**A. Vehicle Code Sections 23247 and 23575**

An ignition interlock device (IID) is a breath-alcohol analyzer connected to the ignition of a car that does not allow the vehicle to start if alcohol is present on the driver’s breath. Courts are required to order installation of the ignition interlock device on any vehicle a person owns or operates for the violations listed below (Vehicle Code § 23575):

1. All Vehicle Code section 14601.2 convictions on or after July 1, 1999.
2. All Vehicle Code section 14601.2 arrests on or after September 30, 2000 that are pled to a lesser conviction of Vehicle Code section 14601, 14601.1, 14601.4, or 14601.5, unless the court finds this requirement is inappropriate in the interest of justice.

When drivers are convicted of Vehicle Code section 14601.2, courts will order installation of an IID for up to three years on any vehicle the offender owns or operates. If the person does not own a vehicle, his or her driver’s license must still be restricted and DMV notified of the IID.
installation or restriction order. The IID restriction is placed on the driver’s record. If the person is cited for driving without an IID, DMV will suspend the driver’s privilege for one year.

Courts are no longer required to order IIDs on multiple DUI offenders, but they have discretionary authority to order IIDs and to give “heightened consideration” to first offenders with two or more moving violations, a high BAC (0.15 percent or higher), or refusals.

Note: If you are prosecuting a case where Vehicle Code section 23247(e) was also cited, it means the driver was restricted to driving a vehicle equipped with an IID due to a conviction for Vehicle Code section 14601.2 or for multiple convictions of DUI (prior to July 1, 1999).

DMV has discretion to utilize a “DMV-Optional IID” condition, permitting a multiple offender, after completing half of the period of suspension and satisfaction of additional conditions, to operate an IID-equipped vehicle.

VIII. Issues of Identification and Record Keeping

California is such a heavily populated state that similarities in names, dates of birth, and descriptions of individuals are common. When a requester’s inquiry contains points of reference that match those in a DMV record, information from that record will normally be provided to the requester. But the DMV’s sending of apparently related information is not a guarantee that you have necessarily received the correct records for your defendant. Therefore, the final determination as to whether the records provided belong to the person in your case must be made by you, the prosecutor.

A. Points of Identification

The more information you provide about an offender, the greater the likelihood that the information you receive from DMV is accurate. The following points of identification are common:

- full name
- driver’s license number (DL) or identity card number (ID)
- birth date
- address
- descriptions (sex, hair color, eye color, height, weight)
- AKAs

DMV has access to additional points of identification that may help insure that the received records belong to your defendant. These include:

- signatures (on applications and DLs and IDs)
- DL photos (they can be compared with booking photos)
- thumbprints

Vehicle Code section 12800 requires that every applicant for a driver’s license, temporary license, or identification card shall provide a fingerprint of the right thumb or other printable finger. If the right thumb is not available, then the following order applies: left thumb; any available finger
on the right hand; any available finger on the left hand. Thumb prints are available to prosecutors upon request. To request a thumbprint, use information request form INF 252 or make the request by phone in urgent situations.

If an individual has both a driver’s license and a California identification card, both cards will bear the same identification number. DMV issues an individual a permanent number at the time of initial application for a California DL or ID. The Department data correlates DL numbers with time periods of issue (See Attachment A on page XIX-35). This information can be checked by you to determine whether the defendant’s proffered DL number is correct. For instance, if the individual’s DOB reflects that he or she was only 13 years of age when the particular permanent number was issued, it is most likely that the card and the individual do not belong together.

**B. Index Numbers (X Numbers)**

DMV is able to upgrade its records because of information it regularly receives from law enforcement (a DUI arrest notification or accident report) or from a court clerk regarding a case disposition (an abstract). Often, the new event information received includes personal-identification information that does not match an existing DL or ID record. Consequently, DMV creates a new record file for the previously unidentified driver using the reported name, birth date, and address.

These records are all given a unique number beginning with the letter “X.” The X signifies that no existing California DL or ID matched the reported name, address, and birthdate information. There were more than 220,000 X records created in 2001 alone.

*Note:* There is no photograph, thumbprint, or physical description maintained in the DMV database for an X record.

While it is likely that some of the X files belong to people who have recently come from other states or have never previously applied for a DL or ID, a great percentage of the X files belong to offenders who intentionally provided fictitious information in an effort to circumvent the system and keep the new event off their record.

**C. Your Input**

If you discover that one of the people you are prosecuting or investigating has both a DL/ID number and an X number, it is imperative that you forward to DMV all information that supports the notion that the defendant has the two DMV records. This would include points of personal identification and court abstracts. DMV will verify the information and combine the records. By engaging in this practice, both you and the courts can be assured that you know all of the defendant’s driving history. This will enable you to better evaluate your case and permit the judge to impose the correct sentence and conditions of probation.

Therefore, it is always a good practice in court to determine the defendant’s correct name, birth date, and current address. This may be garnered from the defendant’s DL and ID. Additionally, if it is determined that the defendant has any aliases (AKAs or “also known as”), check with the
court clerk after the plea to ensure that the abstract being sent to DMV reflects all names. Finally, you may want to ask the court clerk for a copy of the abstract that is being sent to Sacramento.

*Remember:* DMV records are only as accurate as the information the Department receives from law enforcement and the courts.

**IX. Reading a DMV CLETS L1 Printout**

The most common form of an individual’s driving record that DMV provides for law enforcement and prosecutorial agencies is the California Law Enforcement Telecommunications System (CLETS) L1 printout. The format is designed to provide 46 bits of information about the person and the driving record of the person who holds a particular DL, ID, or X number. One of these printouts should be attached to every DUI case at the time it is being reviewed for filing. If during trial preparation you notice that the case file does not have a CLETS printout attached, it is urgent that your office or the arresting agency provide such a printout before you even think about disposing of the case. It obviously would be impossible for you or the judge to know whether the defendant has prior DUI convictions or to determine what would be the appropriate sentence to impose without having a current copy of the defendant’s driving history.

This section is organized to first lay out and define the 46 fields (bits of information) that are common in a CLETS printout. The second part of this section will list the numerous “Service Codes” used in Field 34 of the printout. This field explains how the offender was served the information regarding the changed status of the driving privilege. The third part provides a definition of the “Dispo Codes” used in Field 41 to explain the dispositions of all listed prior traffic convictions. The fourth part of this section includes exemplars of CLETS printouts, illustrating the sorts of information that can be retrieved from these printouts, and a series of questions and answers for each printout. These question sheets are intended to assist in developing your familiarity with the information common in a CLETS printout.

**A. Driver’s License Record Format**


(Fields 1 and 2 reflect the date and time that the printout was generated.)

DMV RECORD FOR LAW ENFORCEMENT USE ONLY


(Field 3 is the permanent driver’s license or identity card number assigned to the person. If the number begins with the letter X, this indicates that the subject of this printout cannot be matched with any other license record information on file. Field 4 reflects the DOB provided by the subject of this printout. It is set up to reflect two digits for the month, day, and year [i.e., 01-09-61]. Field 5 is the name provided by the subject when he or she last applied for a DL or ID. The name order is: LAST, FIRST, MIDDLE. The names are not separated by commas, and hyphenated names are run together.)
[6] RES/ADDR AS OF:

(Field 6 provides the date the last-known address was submitted and the address.)

[7] OTH/ADDR AS OF:

(Field 7 provides the date of the submission of the subject’s previous address and the address.)

[8] AKA:

(Field 8 provides other names that the subject is “Also Known As.” Maiden names, former married names, and other name changes are included.)

IDENTIFYING INFORMATION:


(Field 9–13 are self-explanatory.)


(Field 14 shows the date the driver’s license, or interim or temporary license, was issued. Field 15 provides the date the DL will expire or may reflect that the DL was canceled [“CANC”] or revoked [“REV”]. If present, Field 16 relates to the subject’s eligibility to renew the license by mail. Field 17 indicates the class of DL the subject was most recently issued [e.g., commercial, noncommercial, etc.].)

[18] ENDORSEMENTS:

(Field 18 normally pertains to commercial drivers and relates to additional driving duties permitted [i.e., a “Hazardous Materials” endorsement means the subject is permitted to transport hazardous materials].)

[19] MEDICAL EXAM EXP:

(Field 19 indicates the date commercial drivers must update their medical examination reports. This field also relates to noncommercial drivers who have been required by DMV to provide health questionnaires.)

[20] LATEST APP:

(Field 20 provides the date of the most recent application to DMV.)
[Field 21 reflects the nature of the most recent application (e.g., renewal, ID, obtaining a duplicate, correction of information, etc.). Field 22 reflects the date the application was started or when an interim DL was issued. Field 23 reflects the three-letter abbreviation for the DMV office that handled the application. Field 24 provides information as to whether a photo was taken of the subject during the application process. The notations “POL” and “MAG” indicate DMV has a photo of the subject on file. An “NNN” notation in this field informs that DMV has no photo of the subject.]

[Field 25 only reflects information if the subject began, but did not complete, the application process. An applicant has one year to complete the process.)

[Field 26 provides the current status of the subject’s DL. It may reflect “VALID,” “NONE ISSUED,” “EXPIRED,” or “SUSPENDED OR REVOKED.”]

[Field 27 provides the current status of the subject’s DL. It may reflect “VALID,” “NONE ISSUED,” “EXPIRED,” or “SUSPENDED OR REVOKED.”]

[Field 28 lists the actions DMV has taken that affect the subject’s driving status. The date of the termination of the action is also provided if DMV has ended the action.)

[Fields 29–35 only appear when the subject’s driving privilege has been suspended, revoked, canceled, or restricted by DMV. Field 29 informs which action was taken against the subject’s driving privilege. Field 30 reflects the date that the action against the subject’s driving privilege began. Field 31 reflects the date DMV sent the order to the subject informing of the suspension of the driving privilege. [Note: The date informing of the suspension is always before the effective date of the suspension.] Field 32 identifies the Vehicle Code section that defines and authorizes the suspension of the driving privilege. Field 33 articulates the reason for the suspension [e.g., “EXCESSIVE BLOOD ALCOHOL,” “FAILURE TO APPEAR,” “ACCIDENT,” etc.]. Field 34 reflects how the subject was notified of the suspension. The code that is used to convey this information is comprised of a letter from the alphabet [see B. Service Codes, infra]. It is necessary to prove that the subject had knowledge of the suspension in order to prosecute for driving with a suspended privilege charge [Vehicle Code §§ 14601 et seq.]. This field will also inform if the communication to the subject was returned to DMV as unclaimed. Field 35 reflects the date the suspension of privilege ended.)
CONVICTIONS:

(Field 36 is the heading for the portion of the CLETS printout that will list the subject’s prior convictions and related information for the prior seven years [10 years for DUI related convictions]. The source for all this data is each court clerk who sends an abstract of the case’s disposition to DMV.)

VIOL/DT [38] CONV/DT [39] SEC/VIOl [40] DKT/NO

DISP [41] COURT [43] VEH/LIC

(Field 37 reflects the date the violation occurred [commonly corresponding to the date of arrest]. Field 38 reflects the date the subject suffered the conviction in court. Field 39 identifies the code section of the conviction, and the code involved is identified by two letters at the end of the code section [e.g., VC is Vehicle Code; PC is Penal Code; H&S is Health and Safety Code]. Field 40 reflects the court’s case (docket) number. This is important information if a certified copy of the prior conviction is necessary for trial. Field 41 designates the court’s sentence as communicated by a letter from DMV’s Dispo Code. [See C. Disposition Codes, infra.] Field 42 uses a five-digit code number to identify the California court that handled the case. Each prosecutorial agency has a copy of the DMV court codes. Field 43 provides the vehicle license number of the car the subject was driving when the violation occurred. This may be helpful in proving the prior conviction belongs to this subject if, for instance, the vehicle used in each crime was the same vehicle and owned by the subject.)

DMV POINT COUNT:

(Field 44 relates the number of points against the privilege to drive that the subject has accumulated. Any conviction of Vehicle Code sections 14601; 14601.1; 14601.2; 14601.3; 14601.5; 20001; 20002; 23152; 23153; 2800.2; 2800.3; 21651(b); 22348(b); 23109(a), (c); 23109.1; 31602; 23140(a)-(b); Penal Code sections 191.5(a)-(b); 192(c)(1)-(4); 192(3)(c)-(d); and any conviction of reckless driving carries two points a piece. All other moving violations and at-fault collisions are worth one point each [Vehicle Code § 12810].)

(For commercial operators, the point counts are elevated to three (3) points for any conviction of Vehicle Code sections 14601; 14601.1; 14601.2; 14601.5; 20001; 20002; 23152; 23153; 2800.2; 2800.3; 21651(b); 22348(b); 23109(a), (c); 31602; 23140(a)-(b); and any conviction of reckless driving. Point counts are elevated to one and a half (1.5) points for other moving violations [Vehicle Code § 12810.5(b)(2)].)

FAILURE TO APPEAR:

(Field 45 indicates the instances in which the subject failed to appear in court to take care of a citation. A Failure to Pay notation indicates the subject was convicted of the citation violation but failed to ever pay the fine. Instances of FTA/FTP will appear on this record regardless of whether the court issued a bench warrant.)
ACCIDENTS:

(Field 46 includes information regarding collision involvement, including the date, city, license number of the vehicle the subject was driving, the report number, and who was found most at fault.)

B. Service Codes

Service codes (field 34) indicate how the driver was notified of a departmental action. They also indicate if the notice was returned unclaimed. The date displays when the notice was served or mailed (certified to the driver). The codes used are as follows:

A Regular mail (Certified mail was used prior to 09/30/02 when it was changed for state budgetary reasons.)
B Served: Signed document on file
D Personal service: Document on file
H Acknowledged, no signature
I Returned “unclaimed”
J Written notice: Served by officer
K Refused
L Deceased
M Verbal notice: Document on file
P Personal service (used 06/30/95-01/01/99)
R Personal service unsuccessful (used 06/30/95 – 01/01/99)

C. Disposition Codes

Disposition codes (Field 41) reflect the court’s sentence for each conviction reflected in the DMV printout.

DISPOSITION CODES

<table>
<thead>
<tr>
<th>Dispo. Code</th>
<th>Disposition Code Is Used When</th>
<th>Additional Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Dismissal</td>
<td>This will dismiss and remove the abstract from record.</td>
</tr>
<tr>
<td>AF</td>
<td>Traffic Violators School (TVS) dismissal</td>
<td>One TVS dismissal within any 18-month period will not show on the driver record (unless you are looking at a court printout or the defendant has attended TVS more than once in the 18-month time period). The 18-month period is calculated from violation date to violation date, plus one day.</td>
</tr>
<tr>
<td>B</td>
<td>Bail forfeiture</td>
<td>Defendant posted bail.</td>
</tr>
<tr>
<td>C</td>
<td>Fine</td>
<td>Work program in lieu of fine, fine partially or completely suspended.</td>
</tr>
</tbody>
</table>
## Disposition Codes

<table>
<thead>
<tr>
<th>Dispo. Code</th>
<th>Disposition Code Is Used When</th>
<th>Additional Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>D</td>
<td>License suspended by court</td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>License restricted by court</td>
<td>Disposition code E will denote an IID was ordered if Vehicle Code section 23246 is present on the abstract.</td>
</tr>
<tr>
<td>F</td>
<td>Referred to traffic school</td>
<td>This is a conviction and will appear on the record.</td>
</tr>
<tr>
<td>G</td>
<td>Court probation or juvenile program of supervision</td>
<td></td>
</tr>
<tr>
<td>H</td>
<td>Referred to a 30-month DUI treatment program</td>
<td>DADP-licensed DUI-treatment program for multiple offenders.</td>
</tr>
<tr>
<td>I</td>
<td>IID installation ordered and driving privilege restricted (Violations 07/01/99 or later)</td>
<td>Term required not to exceed three years.</td>
</tr>
<tr>
<td>J</td>
<td>Jail, prison, youth authority</td>
<td></td>
</tr>
<tr>
<td>K</td>
<td>A motor vehicle was used in the commission of a felony</td>
<td>License will be suspended for one year from conviction date. If Vehicle Code section 13351.5 and Penal Code section 245 are on the abstract, the driving privilege will be revoked for life (55 years).</td>
</tr>
<tr>
<td>L</td>
<td>Sentences suspended</td>
<td>Suspended sentence is a conviction on the driving record.</td>
</tr>
<tr>
<td>N</td>
<td>Referred to alcohol clinic</td>
<td>Example: A.A., Raleigh Hills, etc.</td>
</tr>
<tr>
<td>O</td>
<td>Referred to a licensed 18-month DUI</td>
<td>Licensed DUI program for multiple program offenders.</td>
</tr>
<tr>
<td>PP</td>
<td>If present, DMV will not suspend DL for drug conviction</td>
<td>If the court determines there are compelling circumstances for DMV not to suspend the driving privilege.</td>
</tr>
<tr>
<td>Q</td>
<td>Referred to licensed DUI program</td>
<td>Persons convicted of first DUI (first-offender program completion required at minimum). Persons convicted of wet reckless (educational component required at a minimum). Persons convicted of Vehicle Code section 23140 (educational component required at a minimum).</td>
</tr>
<tr>
<td>Dispo. Code</td>
<td>Disposition Code Is Used When</td>
<td>Additional Information</td>
</tr>
<tr>
<td>------------</td>
<td>-----------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>R</td>
<td>Alcohol- or drug-related reckless (wet reckless) Vehicle Code section 23103.5</td>
<td>Used only when Vehicle Code section 23152 reduced to a Vehicle Code section 23103 conviction.</td>
</tr>
<tr>
<td>S*</td>
<td>Court ordered restriction</td>
<td>Can only drive to and from work.</td>
</tr>
<tr>
<td>T*</td>
<td>Court ordered restriction</td>
<td>Can only drive during course of employment (COE).</td>
</tr>
<tr>
<td>U</td>
<td>Court ordered DMV to delay driving privilege</td>
<td>Must be used with Vehicle Code section 13202.4, 13202.5, 13202.6, 13202.7, or 23140 only. Only for use with juveniles.</td>
</tr>
<tr>
<td>V*</td>
<td>Court ordered restriction</td>
<td>Can only drive to and from licensed DUI program.</td>
</tr>
<tr>
<td>W</td>
<td>Fine or jail in lieu of fine</td>
<td>None.</td>
</tr>
<tr>
<td>X</td>
<td>Court ordered DMV to suspend driving privilege</td>
<td>Term may or may not be present.</td>
</tr>
<tr>
<td>Y</td>
<td>Court ordered DMV to revoke driving privilege</td>
<td>Term may or may not be present.</td>
</tr>
<tr>
<td>Z</td>
<td>Other</td>
<td>Miscellaneous code.</td>
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</tbody>
</table>
DATE: 11-08-00  TIME: 02:21

DMV RECORD FOR LAW ENFORCEMENT USE ONLY

DL/NO: B2635148* B/D: 06-07-68* NAME: SMILEY LOVEY LISA*
RES/ADDR: AS OF 07-06-00 2627 LAS VEGAS AVE THOUSAND OAKS 91360*
OTH/ADDR: AS OF 10-27-99 2627 LAS VEGAS THOUSAND OAKS*

IDENTIFYING INFORMATION:
SEX: FEMALE* HAIR: BROWN* EYES: BRN* HT: 5-02* WT: 125*

LIC/ISS: 05-24-96* EXPIRES: 06-07-00* CLASS: C NON-COMMERCIAL*

LATEST APP:

DL TYPE: RENEWAL* ISS/DATE: 07-06-00* OFFICE: THO* BATES: POL*

PEND/APP: PENDING AUTOMATED APP*

LICENSE STATUS:

EXPIRED*

DEPARTMENTAL ACTIONS:
NONE

CONVICTIONS:

VIOL/DT   CONV/DT   SEC/VOL   DKT/NO   DISP   COURT   VEH/LOC
11-04-98   12-11-98   22350 VC   *NAN696   C   30420

DMV POINT COUNT 1

FAILURES TO APPEAR:
NONE

ACCIDENTS:
NONE

END
D. CLETS Printout Exemplars

Questions regarding DMV CLETS printout (re: Lovey Lisa Smiley) – page 24

1. On what date was this CLETS printout produced?
   A: 11-08-00. (On the first line of information / Field 1.)

2. What is the driver's license number?
   A: B2635148. (On the third line / Field 3.)

3. If a California ID was subsequently issued, what would its number be?
   A: It would be the same number. DMV issues a single number to be used for both
documents.

4. What gender is Lovey?
   A: She is female. (Line 7 / Field 9.)

5. On what date was Lovey's DL issued?
   A: 05-24-96. (Line 8 / Field 14.)

6. When did it expire?
   A: 06-07-00. (Line 8 / Field 15.)

7. Why are the month and day of expiration different than the month and day of issuance?
   A: Regardless of the date of application or issuance, DMV always uses the driver's DOB
as the date of expiration.

8. What was the date of the renewal?
   A: 07-06-00. (Line 10 / Field 22.)

9. Why is Lovey's license status “EXPIRED” if the license has been renewed?
   A: Note: The date reflected in Field 22 is actually the date of application, not the date of
issue. Line 11 / Field 25 “PEND/APP: PENDING AUTOMATED APP” informs
us that DMV has not completed the application process, and, thus, Lovey’s license
status remains “EXPIRED.”

10. What was the disposition of Lovey’s speeding case in 1998?
    A: Lovey was fined (dispo code C) as a result of her conviction for speeding in 1998.
        (Line 18 / Field 41.)
DATE: 10/31/00  TIME:12:30  

DMV RECORD FOR LAW ENFORCEMENT USE ONLY  

DL/NO:N6784932*B/D:03-11-1957*COOK TERRI LYNN* 
RES/ADDR: AS OF 02-24-97: 2415 1ST AVE SACRAMENTO 95818* 
OTH ADDR: AS OF 11-26-96: 1532 CULINARY LN RICHMOND*  
AKA: COOKINGTON TERRI LYNN*  

IDENTIFYING INFORMATION:  
SEX: FEMALE*HAIR:BLACK*:EYES:BLU*:HT:5-05*WT:125*  

LIC;ISS:02-24-97*EXPIRES:03-11-01*CLASS C NON-COMMERCIAL* 
ENDORSEMENTS:NONE*  

LATEST APP:  
DL TYPE:RENEWAL*ISS/DATE:03-01-97*OFFICE:SAC*BATES:MAG*  

LICENSE STATUS: 
SUSPENDED OR REVOKED  

DEPARTMENTAL ACTION:  
PROOF REQUIRED: O/003-02-00/NONE  

DRV LIC SUSPENDED *EFF:07-02-00*ORDER MAILED:06-02-00*AUTH:133524* 
REASON:DUI PROGRAM COMPLETION REQUIRED*SERVICE: M/07-15-00* 
VERBAL NOTICE-COURT, LAW ENFORCEMENT AGENCY, OR DMV*  

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<td>34420</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>COURT PROB 03 YR</td>
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DMV POINT COUNT 2  

COURT PROBATION TERMS THROUGH 03-02-03, 
VIOLATION DATE 02-15-00, DOCKET NUMBER 12869B  

SHALL NOT COMMIT CRIMINAL OFFENSE, REFUSE BAC TEST, OR DRIVE VEHICLE WITH ALCOHOL IN BLOOD.  

FAILURE TO APPEAR:  
NONE  

ACCIDENTS:  
NONE  

END
Questions regarding second DMV CLETS printout – page 26

1. What other name is the driver known as?
   A: Terri Lynn Cookington. (Line 6 / Field 8.)

2. What was the driver’s address prior to 02-24-97?
   A: 1532 Culinary Ln., Richmond. (Line 5 / Field 7.)

3. On what day was the driver arrested for DUI?
   A: 02-15-00. (Line 22 / Field 37.)

4. What was the court’s sentence in this case? How long is the driver’s grant of probation? What is the last day of the defendant’s probation?
   A: The driver was fined (C), placed on probation (G), given jail time (J), required to do a DUI first-timers program (Q), and restricted in use of her vehicle (V). (Line 22 / Field 41.) The driver was placed on a three-year probation grant. (Line 23.) The last day of the driver’s probation is 03-02–03. (Line 25.)

5. If you need to get a certified copy of the prior conviction, what case information will the court request?
   A: The case number (DKT/NO) of the prior conviction: 12869B. (Line 22 / Field 40.)

6. What is the date this CLETS printout was printed?
   A: 10/31/00. (Line 1 / Field 1.)

7. What is the date of expiration of the subject’s driver’s license?
   A: 03-11-01. (Line 9 / Field 15.)

8. What is the driver’s license status?
   A: “SUSPENDED OR REVOKED.” (Line 14 / Field 26.)

9. When did the suspension go into effect? [Are answers to #7, #8, and #9 consistent?]
   A: 07-02-00. (Line 17 / Field 30.) Yes, the answers are consistent. While the document called a “driver’s license” in the printout will not expire until a date nearly four and a half months later than the date of this printout, DMV suspended the privilege to drive after the license was issued and before it expired. Note: Although the printout uses the terms “LICENSE STATUS” (Field 26) and informs that the “DRIV LIC SUSPENDED” (Field 29), the terms related to “driver’s license” in these two fields actually are declarations regarding the status of the driving privilege. It is common for a driver whose privilege has been suspended to still be in possession of an unexpired driver’s license.

10. How was the driver notified of the suspension? And on what date?
    A: The driver in this case actually received two notifications regarding the suspension. On 06-02-00, DMV mailed a notification of suspension to the driver. And on 07-15-00, the driver was personally notified in court of the suspension (“SERVICE: M”). (Lines 17-18 / Fields 31 & 34.)
DATE: 08-15-00*TIME: 15:52*

DMV RECORD FOR LAW ENFORCEMENT USE ONLY

DL/NO: B116666648*B/D: 11-03-1948* NAME: GREENWAY FRANCIS SALVATORE
RES/ADDR: AS OF 01-13-00: 811 NIFTY WAY HOLLISTER 95023*
OTH/ADDR AS OF 08-04-89: 6850 GLENN DR GILROY *

IDENTIFYING INFORMATION:
SEX: MALE*HAIR: BROWN* EYES: BRN* HT: 5-07*WT: 160*

LIC/ISS: 09-20-99* EXPIRES: 11-03-04* CLASS: C NON-COMMERCIAL
& M1 MOTORCYCLE*

LATEST APP:
DL TYPE: DUPLICATE* ISS/DATE: 01-13-00* OFFICE: HOL* BATES: POL*

RESTRI: ADMIN PER SE RESTRICTED TO DRIVING TO/FROM/AND DURING COURSE OF
EMPLOYMENT, ADMIN PER SE RESTRICTED TO DRIVING TO AND FROM TREATMENT
PROGRAM

LICENSE STATUS:
SUSPENDED OR REVOKED*

DEPARTMENTAL ACTIONS:
PROOF REQ: H/04-15-01* TERM: 04-15-04*
OWNERS COVERAGE PROOF ON FILE*

DRV LIC SUSPENDED *EFF: 02-15-00* ORDER MAILED: 02-11-00* AUTH: 133532 ,
END STAY - DMV UPHeld**
REASON: EXCESSIVE BLOOD ALCOHOL LEVEL* SERVICE: A/02-11-00* CERTIFIED MAIL*
ACTION ENDED: 03-15-00*

DRV LIC RSTRICTION *EFF: 03-15-00* ORDER MAILED: 04-14-00* AUTH: 133537 *
REASON: EXCESSIVE BLOOD ALCOHOL LEVEL* SERVICE: A/04-14-00* CERTIFIED MAIL*

DRV LIC SUSPENDED *EFF: 04-15-00* ORDER MAILED: 03-16-00* AUTH: 133532, 133585*
REASON: EXCESSIVE BLOOD ALCHOL LEVEL* SERVICE: J/03-16-00*
WRITTEN NOTICE SERVED BY OFFICER*

CONVICTIONS:

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<th>CONV/DT</th>
<th>SEC/VIO</th>
<th>DKT/NO</th>
<th>DISP</th>
<th>COURT</th>
<th>VEH/LIC</th>
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<tr>
<td>02-15-00</td>
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<td>23152B VC</td>
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<td>CGQS 35640</td>
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<td></td>
</tr>
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</table>

* COURT PROB 03 YR
90 DAY REST

DMV POINT COUNT 2

FAILURES TO APPEAR:
NONE

ACCIDENTS:
NONE

END
11. What was the reason for the DMV suspension?
   A: The driver’s privilege was suspended because she failed to complete the mandated
   DUI program following her 03-02-00 DUI conviction. (Line 18 / Field 33.)

12. Was there a crash when the driver was arrested for DUI?
   A: There presumably was no crash involved because lines 30 and 31 note
   “ACCIDENTS” and list “NONE.” (Field 46.)

Questions regarding third DMV printout — page 28

1. What is the driver’s DOB?
   A: 11-03-48. (Line 3 / Field 4.)

2. What types of vehicles is the driver permitted to drive?
   A: Noncommercial (class C) and motorcycle (M 1). (Lines 8 & 9 / Field 17.)

3. How many times did the driver come to DMV seeking a DL? On what dates?
   A: Twice: on 09-20-99, and then the driver sought a duplicate on 01-13-00. (Lines 8 & 11 / Fields 14 & 22.)

4. When will the driver’s license expire?
   A: The expiration date is 11-03-04. (Line 8 / Field 15.)

5. What was the status of the driver’s privilege to drive on the date of this printout? On what date did that initially become effective? On what date did that action end? What, if anything, took its place?
   A: The driver’s privilege was suspended effective 02-15-00. (Line 20 / Field 30.) That
   suspension ended on 03-15-00 (Line 23 / Field 35) when DMV changed the status
   from suspension to restriction. (Line 24.) The restricted license permitted driving
to/from work and to/from a treatment program. (Lines 12-14.)

6. Has the driver suffered a DUI conviction?
   A: Yes. (Line 30 / Fields 36 et seq.)

7. What was the date of the driver’s DUI conviction?
   A: 07-26-00. (Line 30 / Field 38.)

8. What was the DMV-coded court number involved in this case?
   A: 35640. (Line 30 / Field 42.)

9. On the date this printout was generated, how long had the driver been on probation?
   A: 20 days: from 07/26/00 (“CONV/DT”) to 08/15/00 (printout date).

10. What was the reason the driver’s privilege was suspended effective 02-15-00?
    A: “EXCESSIVE BLOOD-ALCOHOL LEVEL.” (Line 22 / Field 26.)
    Note: This phrase generally means a DUI arrest occurred, and an admin per se
    suspension was issued.
11. What section of the Vehicle Code provided the authority for the suspension?
A: Vehicle Code section 13353.2. (Line 20 / Field 26.)

12. Was this driver's privilege suspended a second time? Why?
A: Yes. “EXCESSIVE BLOOD ALCOHOL.” (Line 26 / Field 26.) In this case, the two designations, each reflecting a separate suspension for “EXCESSIVE BLOOD ALCOHOL,” and each with a different “EFFECTIVE DATE” and “SERVICE DATE,” are indicators that this driver actually has been stopped twice for DUI.

13. Of what significance to this case is it that the driver received a service order J on 03-16-00 (Line 27)?
A: In reviewing this printout, it is noteworthy that the driver's privilege was suspended twice, once effective on 02-15-00 and a second time effective 04-15-00. In looking at the three lines of related information for the latter suspension (Lines 26-28), we see the notation “REASON: EXCESSIVE BLOOD ALCOHOL.” We also see that the driver was provided this information by an officer (“SERVICE / J”) on 03-16-00. Piecing this information together tells us that the driver was likely arrested for a second DUI on 03-16-00 and was the subject of a separate admin per se action of suspension. So this driver may have a second DUI case out there somewhere.

14. Assuming the driver was arrested for DUI on 03-16-00, why is it not reflected in the “CONVICTIONS” part of this DMV printout?
A: Because this printout was generated on 08-15-00, we can conclude that it has been about five months since the driver’s second arrest for DUI, yet there is no mention of it in the CLETS printout. Why? Possible reasons may include: (a) the prosecutor’s office rejected the case for some reason; (b) the case was filed and is still pending disposition; (c) the case was filed but was subsequently dismissed or the driver acquitted; (d) the driver was convicted, but the court clerk did not submit an abstract to DMV; or (e) DMV has received the abstract but has not yet input the information. Often, the reality is that there is another case on this driver waiting to be found. Note: Good sources for locating what happened to a case with no known disposition or locating other undiscovered DUIs include the defendant’s CII rap sheet or your county’s case-tracking system.
DATE:11-12-00*TIME:13:01*
DMV RECORD FOR LAW ENFORCEMENT USE ONLY
INDEX NO X4603126 NO PERMANENT CAL D/L ISSUED*
B/D: 10-12-74* CLEMONS PAT*
RES/ADDR: AS OF 11-17-98: 2415 1ST AVE SACRAMENTO 95818*
OTH/ADDR AS OF 09-13-98: 2415 1ST AV SACRAMENTO *

IDENTIFYING INFORMATION:
NONE

DEPARTMENTAL ACTIONS:

DRV LIC SUSPENDED* EFF: 10-21-98* ORDER MAILED: 10-31-98* AUTH:13352A1*
REASON:DRUNK DRIVING OR DRUGS* SERVICE:A/10-31-97* CERTIFIED MAIL*

CONVICTIONS:
VIOL/DT CONV/DT SEC/VIOL DKT/N DISP COURT VEC LIC
09-13-98 10-21-98 23152A VC *TWV223 CGJQX 36110 X360512
*COURT PROB 36 MO

DMV POINT COUNT 2

COURT PROBATION TERMS THROUGH 10-20-01,
VIOLATION DATE 09-13-98, DOCKET NUMBER *TWV223
SHALL NOT COMMIT CRIMINAL OFFENSE, REFUSE BAC
TEST, OR DRIVE VEHICLE WITH ALCOHOL IN BLOOD

FAILURES TO APPEAR:
VIOL/DT SEC/VIOL DKT/NO COURT VEH/LIC
05-29-98 12500A VC 2256744 19463 1KUU395
22102 VC
4000A VC
40508A VC

ACCIDENTS:
NONE

END
Questions regarding fourth DMV printout — page 31

1. Why is there no “DL/NO” on this printout?
   A: Because this driver has “NO PERMANENT CAL D/L ISSUED.”
   (Line 3 / Field 3.)

2. What is the import that this driver has an “INDEX NO” with an X?
   A: The X number indicates that the driver listed on this printout has no known file with
   the DMV. This may be because the driver is new to the state and/or never bothered
   to apply for a driver’s license or may have provided a phony AKA in order to prevent
   the depicted events from becoming part of the driver’s DMV file.

3. What is the status of the driver’s driving privilege, and why?
   A: This driver’s privilege is suspended. (Line 10.) Note: Even though the driver has no
   known driver’s license, DMV still has the authority to suspend the privilege. If
   this driver were to attempt to secure a DL, DMV would not issue one as long as the
   suspension remains in effect. The reason for the suspension is that the driver suffered
   a DUI conviction. (Line 11.) Note: The stated reason for the suspension is “DRUNK
   DRIVING OR DRUGS.” These words mean the driver has suffered a conviction. In
   the prior printout, we saw the designation “EXCESSIVE BLOOD-ALCOHOL
   LEVEL.” Those words reflect merely a DUI arrest and an admin per se suspension.

4. What was the license number of the vehicle the driver was operating when arrested for DUI?
   A: X360512. (Line 14 / Field 43.)

5. Has the driver ever not made a court appearance relating to a traffic matter?
   A: Yes. (Lines 21 et seq.)

6. What was the date of the violation? What is the DMV-coded court number at which the
   driver failed to appear? What was the license number of the vehicle the driver was driving
   when cited for the traffic violation?
   A: 05-29-98 (Line 23 / Field 45); 19463 (Line 23); 1 KUU395 (Line 23).

X. Getting a CLETS Printout Introduced into Evidence

Since the 1970s, the Legislature and related criminal justice agencies have been working to achieve
the goal that “the recording, reporting, storage, analysis, and dissemination of criminal offender
record information in this state must be made more uniform and efficient, and better controlled and
coordinated.” (Penal Code § 13100(e).) In the 30 years since this statement of purpose, the state’s
electronic reporting, maintenance, and dissemination systems have been perfected, and the contained
information is generally accurate, trustworthy, and admissible.

Two cases that have acknowledged the admissibility of a CLETS printout are People v. Martinez
of these cases dealt with the admissibility of the defendant’s rap sheet rather than a DMV printout,
the analysis and argument are the same.
Traditionally, in providing the foundation for the admissibility of a document or writing, the proponent has three hurdles to clear: (1) authentication (Evidence Code §§ 1400 et seq.); (2) the Secondary Evidence Rule (Evidence Code §§ 1520 et seq.); and (3) qualifying the document as an exception to the Hearsay Rule (Evidence Code §§ 1200 et seq.). The foundational requirements necessary for the introduction of the CLETS/DMV printout are narrowed because we are talking about a document maintained and produced by a public entity. (Evidence Code §§ 200; 1530; 1532.) The central defense objection to admissibility, as evidenced by the two cited cases, is that the printout is a hearsay statement.

Your argument for admissibility of the CLETS/DMV printout is, therefore, predicated on Evidence Code section 1280, the “Official Records” exception to the Hearsay Rule. In order to qualify the printout under section 1280, you must demonstrate:

- The writing was made by and within the scope of duty of a public employee.
- The writing was made at or near the time of the act, condition, or event.
- The sources of information and method and time of preparation were such as to indicate its trustworthiness.

A. Your Argument

The first task is to satisfy the judge that the CLETS/DMV printout is an official record. California law imposes numerous obligations on law enforcement, the courts, and administrative agencies to compile and report driving history information. The CLETS/DMV printout may be defined as an official record precisely because it is the product of this series of statutory mandates.

Initially, note that a judge is obliged to take judicial notice of all state statutory law. (Evidence Code § 451(a).) Once this is established, have your judge acknowledge the following statutory provisions:

1. It is the Legislature’s intent that DMV and the courts establish and maintain a data and monitoring system to track violations and convictions. (Vehicle Code § 1822.)

2. Consequently, every court clerk shall provide DMV with records of convictions within five days of the conviction. (Vehicle Code § 1803.)

3. The DMV shall store and maintain these records of convictions. (Vehicle Code § 1806.)

4. The DMV may store all maintained records in any feasible manner, including electronic media or any other form of data compilation. (Vehicle Code § 1801(b).)

5. Notwithstanding any other provision of law, these records shall be deemed original documents and shall be admissible in judicial proceedings. (Vehicle Code § 1801(c).)

6. The DMV is obliged to provide records of these convictions to the California Attorney General. (Vehicle Code § 1807.5(b)(3).)

7. The state’s Department of Justice, under the direction of the California Attorney General, shall maintain a statewide telecommunications system. (Government Code §§ 15152–15153.)
8. The Department of Justice shall maintain state criminal history information. (Penal Code § 11105.)

9. The Department of Justice shall operate the California Law Enforcement Telecommunications System (CLETS). (Government Code § 15100.)

The foregoing legal litany should convince your judge that the CLETS/DMV printout is an “official record.” Now to qualify it as an exception to the hearsay rule pursuant to Evidence Code section 1280.

A basic, useful premise here is that an “official duty is regularly performed.” (Evidence Code § 664.) This rebuttable presumption is your answer to every defense unsupported contention that there must have been a mistake made.

The first requirement of Evidence Code section 1280 is that the record was made within the scope of duty of a public employee. Every officer, or employee, or agent of a public entity is a public employee. (Evidence Code § 195.) And each link in the reporting chain imposes a statutory duty to report the relevant information. Therefore, all involved court clerks and DMV staff were working within the scope of duty of their respective agency, and each is presumed to have regularly performed his or her official duties.

Second, you must establish that the entries were made at or near the time of the event. Because there are statutory time limits defined for the various functions (i.e., convictions are to be reported by the court to DMV within five days (per Vehicle Code section 1803) and, given the presumption that official duties are regularly performed, this prong is satisfied.

Finally, you must prove that the document is deemed trustworthy. It should not be difficult to satisfy your judge that given the official nature of the record, in combination with the numerous statutory requirements governing the collection and storage of the included information, and given the assumption that all involved effectively performed their official duties, the element of trustworthiness is satisfied. The CLETS/DMV document is admissible as an official record.
### Attachement A

**Driver's License Number Series and Issue Date**

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<td>With No Probation</td>
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<td>Court Sentencing For BAC Refusal</td>
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<td><strong>FIRST OFFENSE</strong> (Vehicle Code § 23152)</td>
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<td>VC § 23536</td>
<td>VC § 13352(a)(1)</td>
<td>VC § 23538(a)(1)</td>
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<tr>
<td>Jail: 96 hours (48 hours continuous) to six months and Fine: $390-1,000</td>
<td>Suspend DL for six months from date of conviction</td>
<td>Jail: 48 hours to six months and Fine: $390-1,000</td>
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<td>VC § 23538(a)(2)</td>
<td>Fine: $390-1,000 and Restrict: 90 days to/from program &amp; work/course of employment if necessary</td>
<td>VC § 13352(a)(1)</td>
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<td>VC § 23538(b) for § 23538(a)(1)-(2) sentencing</td>
<td>1st Offender Program BAC -.20: 3 months+ BAC +.20: 9 months+</td>
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<td><strong>SECOND OFFENSE</strong> (Vehicle Code § 23152)</td>
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<td>VC § 23540</td>
<td>VC § 13352(a)(3)</td>
<td>VC § 23542(a)</td>
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<tr>
<td>Jail: 90 days to one year and Fine: $390-1,000</td>
<td>Suspend DL for two years</td>
<td>Jail: 10 days to one year and Fine: $390-1,000 18-month licensed DUI program</td>
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<td>Optional IID restriction after completion of one year of suspension term</td>
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<td>Optional IID restriction available after completion of 90 days of suspension term</td>
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<tr>
<td>VC § 23542(a)(1)</td>
<td>Jail: 96 hours (in two 48-hour increments) to one year and Fine: $390-1,000 18-month licensed DUI program Restrict: DL to/from program and work and course of employment, if necessary</td>
<td>VC § 13352.5</td>
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# Vehicle Code Section 23152 Court Sentencing/DMV Action Guidelines

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<tr>
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<th>With No Probation</th>
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<th>Court Sentencing for BAC Refusal</th>
<th>Court Sentencing for Impound if Defendant is Reg. Owner of Vehicle (Prior is Within Five Years)</th>
<th>Court Sentencing for Minor (Under 14) Passenger in Addition to Other Penalties</th>
<th>DMV Admin Per Se</th>
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<tr>
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<td>Court Sentencing</td>
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<td>VC § 23594(a)</td>
<td>VC § 23572(a)(3)</td>
<td>VC § 13353.3</td>
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<tr>
<td>Jail: 120 days to one year</td>
<td>Jail: 120 days to one year</td>
<td>Jail: 120 days to three years</td>
<td>Shall for not less than one day nor more than 30</td>
<td>Court shall order 30 days in jail mandatory</td>
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<td>Fine: $390-1,000</td>
<td>Fine: $390-1,000 and 30-month licensed DUI program</td>
<td>Optional IID restriction available after completion of six months of revocation term</td>
<td>Interest-of-justice clause</td>
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<td>Jail: one year or Felony (PC 18): state prison and Fine: $390-1,000</td>
<td>Jail: 180 days to one year</td>
<td>Jail: 180 days to four years</td>
<td>Shall for not less than one day nor more than 90</td>
<td>Court shall order 90 days in jail mandatory</td>
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# Vehicle Code Section 23153 Court DUI Sentencing/DMV Action Guidelines

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<th>Court Sentencing for Impound if Defendant is Reg. Owner of Vehicle (Prior is Within Five Years)</th>
<th>Court Sentencing for Multiple Victims VC § 23558</th>
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<td>VC § 13353.3</td>
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<td>Jail: 90 days to one year or Felony (PC § 18): state prison and Fine: $390-1,000</td>
<td>Jail: five days to one year and Fine: $390-1,000</td>
<td>Suspend DL for one year</td>
<td>Additional 48 hours jail</td>
<td>May impound for not less than one day nor more than 30</td>
<td>Suspension: four months</td>
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<td>Licensed First-Offender Program</td>
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<td>Restriction: three or five months</td>
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<td>VC § 23567(a)(2)</td>
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<td>Jail: five days to one year and Fine: $390-1,000</td>
<td>Jail: at least 120 days and Fine: $390-5,000</td>
<td>Revoke DL three years</td>
<td>Optional IID restriction available after completion of 12 months of revocation term</td>
<td>Revoke DL two years</td>
<td>Suspension: one year</td>
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<td>Jail: 120 days to one year or Felony (PC § 18): state prison and Fine: $390-5,000</td>
<td>Jail: at least 120 days and Fine: $390-5,000</td>
<td>Jail: one year and Fine: $390-5,000 and 18- or 30-months licensed DUI program</td>
<td>Revoke DL five years</td>
<td>May order forfeiture</td>
<td>Suspension: one year</td>
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<td>VC § 13353.3(b)(2)</td>
<td>VC § 13353.3(b)(2)</td>
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<td>Prison: two, three, or four years and Fine: $1,015-5,000</td>
<td>Jail: one year and Fine: $390-5,000 and Make restitution per PC § 1203.1</td>
<td>Jail: one year and Fine: $390-5,000 and Make restitution per PC § 1203.1</td>
<td>Shall impound for not less than one day nor more than 90</td>
<td>May order forfeiture</td>
<td>Suspension: one year</td>
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<td>Revoke DL for five years</td>
<td>Jail: one year and Fine: $390-1,000 and 18- or 30-months licensed DUI program</td>
<td>Optional IID restriction available after completion of 12 months of revocation term</td>
<td>Revoke DL three years</td>
<td>May order forfeiture</td>
<td>Suspension: one year</td>
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<td>Revoke DL: three years</td>
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### Vehicle Code Section 23153 Court DUI Sentencing /DMV Action Guidelines

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<tr>
<th>With No Probation</th>
<th>With Probation</th>
<th>Court Sentencing for BAC Refusal</th>
<th>Court Sentencing for Impound if Defendant is Reg. Owner of Vehicle (Prior is Within Five Years)</th>
<th>Court Sentencing for Multiple Victims VC § 23548</th>
<th>DMV Admin Per Se</th>
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<tr>
<td>Court Sentencing</td>
<td>DMV Action</td>
<td>Court Sentencing</td>
<td>DMV Action</td>
<td>Based on number of DUIs on which this conviction is based</td>
<td>Based on number of DUIs on which this conviction is based</td>
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<td>Based on number of DUIs on which this conviction is based</td>
<td>Based on number of DUIs on which this conviction is based</td>
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<td>N/A</td>
<td>DMV action is based on the DUI arrest, not court conviction</td>
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**Vehicle Code § 23152 or 23153 with prior felony conviction within 10 years**

- VC § 23550.5: Jail: one year or Felony (PC § 18); state prison and Fine: $390-1,000
- VC § 13352(a)(7): Revokes DL for three years
- VC § 13352(a)(8): Revoke: five years if there are three or more 23153's in combination within 10 years
- VC § 23550.5: Jail: one year or Felony (PC § 18); state prison and Fine: $390-1,000
- VC § 13352(a)(7): Revokes DL for four years
- VC § 13352(a)(6): Revoke: five years if there are three or more 23153's in combination within 10 years
- Advise of HTO status per § 13550(b)
- Based on number of DUIs on which this conviction is based

To obtain an APS, first- or second-offender restriction, DUI offenders must: pay DMV fees, give Proof of Financial Responsibility (SR 22), and provide a DL 107 Proof of Enrollment in a licensed DUI program.

To obtain full driving privileges, all DUI offenders must: Pay DMV fees, give proof of Financial Responsibility (SR 22), and provide a DL 101 Proof of Completion of a licensed DUI program.

After serving half of their suspension/revocation term, all multiple DUI offenders may apply to DMV for an optional IID restricted driving privilege. Pay DMV fees, provide proof of Financial Responsibility (SR 22), DL 107 (from second 23152 offenders), DL 101 (from all other multiple offenders), DL 920 Verification of Installation.

DUI in Commercial Vehicle: See VC §§ 15300, 15302.

DUIs Juvenile/Minor: See VC §§ 13202.5, 13352.3, 23140, 23502.
## Vehicle Code Section 14601 Sentencing

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<tr>
<th>Section</th>
<th>Suspension Reason</th>
<th>First Offense</th>
<th>Second Offense Within 5 Years of Any § 14601 Prior</th>
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<tr>
<td>14601.5</td>
<td>General</td>
<td>0–180 days jail $300–1,000 fine</td>
<td>Min. 10–365 days jail $500–2,000 fine</td>
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<tr>
<td>14601.5</td>
<td>Arrested with .08 BAC or chem test refusal or violation of restricted DL</td>
<td>0–180 days jail $300–1,000 fine</td>
<td>Min. 10–365 days jail $500–2,000 fine</td>
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<tr>
<td>14601(a)</td>
<td>Deemed “negligent operator”</td>
<td>Min. 5–180 days jail Min. $300–1,000 fine</td>
<td>Min. 30–365 days jail Min. $500–2,000 fine</td>
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<tr>
<td>14601.2(a)</td>
<td>DUI convictions</td>
<td>Min. 10–180 days jail and $300–1,000 fine and IID installation</td>
<td>Min. 30–365 days jail and $500–2,000 fine If 6/7 years post-conv., min. 10 days jail</td>
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<td>Violation of DUI conviction restriction</td>
<td>Min. 10–180 days jail and $300–1,000 fine and IID installation</td>
<td>Min. 30–365 days jail and $500–2,000 fine If 6/7 years post-conv., min. 10 days jail</td>
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<td>Prior DUI convictions with current crash with injuries</td>
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<td>“Habitual Offender”</td>
<td>30 days jail $1,000 fine</td>
<td>If within 7 years: min. 180 days jail $2,000 fine</td>
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<td></td>
<td>If per VC § 14601.3(e)(3) 180 days consec. jail $2,000 fine</td>
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Appendix

California Code of Regulations
Title 17

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§ 1215.1. Definitions.

(a) “Alcohol” means the unique chemical compound, ethyl alcohol, with the exception that reference in these regulations to compounds to be avoided as skin antiseptics includes the generic class of organic compounds known as alcohols.

(b) “Forensic Alcohol Analysis” means the practical application of specialized devices, instruments, and methods by trained laboratory personnel to measure the concentration of ethyl alcohol in samples of blood, breath, urine, or tissue of persons involved in traffic accidents or traffic violations.

(c) “Breath Alcohol Analysis” means analysis of a sample of a person’s expired breath, using a breath testing instrument designed for this purpose, in order to determine the concentration of ethyl alcohol in the person’s blood.

(d) “Concentration” means the weight amount of alcohol contained in a unit volume of liquid or a unit volume of gas under specified conditions of temperature and pressure; in the case of a solid tissue specimen, “concentration” means the weight amount of alcohol contained in a unit weight of specimen.

(e) “Forensic Alcohol Laboratory” means a place at which specialized apparatus, instruments, and methods are used by trained laboratory personnel to measure the concentration of alcohol in samples of blood, breath, urine, or tissue of persons involved in traffic accidents or in traffic violations; this may be an activity of a laboratory engaged in activities other than alcohol analysis.

(f) “Forensic Alcohol Supervisor” means a person employed by a forensic alcohol laboratory who can be responsible for all aspects of the performance of forensic alcohol analysis and for the supervision of personnel who perform such analysis.

(g) “Forensic Alcohol Analyst” means a person employed by a forensic alcohol laboratory who performs the technical procedures of forensic alcohol analysis.

(h) “Forensic Alcohol Analyst Trainee” means a person employed by a forensic alcohol laboratory for the purpose of receiving comprehensive practical experience and instruction in the technical procedures of forensic alcohol analysis under the supervision of a forensic alcohol supervisor or forensic alcohol analyst.

(i) “Method” means the steps used by a trained person to make a measurement of alcohol concentration.

(j) “Instrument” or “Device” means any item or combination of items of equipment used to make a measurement of alcohol concentration; simple and complex devices are included in this meaning.

(k) “License” means a document issued by the State Department of Health to a laboratory to perform the tests referred to in the Health and Safety Code, Sections 436.51 and 436.52.
(l) “Sample” or “Specimen” means a representative portion of breath, blood, urine, or tissue or of an artificially constituted material, taken for the purpose of measuring its alcohol concentration.

(m) “Alveolar” refers to the smallest air sacs in the lungs and to that portion of the expired breath which is in equilibrium with respect to alcohol with the immediately adjacent pulmonary blood.

(n) “Department” means the California State Department of Health and its duly authorized representatives.


(a) Every laboratory performing forensic alcohol analysis shall have a valid license issued in accordance with the provisions of these regulations.

(1) Forensic alcohol analysis shall be performed only by persons who meet the qualifications set forth in these regulations for forensic alcohol supervisors, forensic alcohol analysts, or forensic alcohol analyst trainees.

(A) A trainee may perform forensic alcohol analysis only under the supervision of a forensic alcohol supervisor or forensic alcohol analyst.

(2) The Department shall not be limited by these regulations in performing functions in administration of the alcohol analysis and licensing program.

§ 1216.1. Qualifications for Licensing.

(a) A laboratory meets the qualifications for licensing by:

(1) Employing at least one forensic alcohol supervisor. If forensic alcohol analysis is performed by persons other than forensic alcohol supervisors, such persons shall meet the qualifications set forth in these regulations for forensic alcohol analysts or forensic alcohol analyst trainees;

(2) Maintaining a quality control program in forensic alcohol analysis procedures;

(3) Demonstrating satisfactory performance in a proficiency testing program conducted by or approved by the Department;

(4) Passing such on-site inspections as the Department may require;

(5) Showing ability to meet the requirements set forth in these regulations.

(b) These qualifications shall be maintained at all times by each licensed laboratory.

(c) The Department may deny a license or renewal thereof, or take disciplinary action against a licensee, for failure to maintain these qualifications in a manner which meets the Department’s standards for approval.

(d) Whenever a licensed laboratory employing only one forensic alcohol supervisor loses that person, the Department may upon petition of the laboratory extend the license for a period not exceeding 90 days during which time the laboratory shall hire another forensic alcohol supervisor.
(1) Such an extension shall be contingent on the laboratory’s having in its employ at least one forensic alcohol analyst and upon the laboratory’s successfully demonstrating to the Department continued competence in forensic alcohol analysis through such proficiency tests, examinations, and on-site inspections as the Department may require.

(e) A forensic alcohol supervisor is a person who meets the following qualifications:

(1) Possesses a baccalaureate or higher degree, or an equivalent, in chemistry, biochemistry, or other appropriate discipline as determined by the Department;

(2) Has two years of experience in performing forensic alcohol analysis, such experience to include experience in interpretation and correlation of alcohol analyses with subjective observations of the demeanor and behavior of persons who have ingested known amounts of ethyl alcohol; or, in lieu of such two years of experience, satisfactorily completes a training course approved by the Department, such training course to include at minimum the following schedule of subjects:

(A) Value and purpose of forensic alcohol analysis, including breath alcohol analysis;

(B) Physiological action of alcohol;

(C) Pharmacology and toxicology of alcohol;

(D) Laboratory methods of alcohol analysis;

(E) Instruments and procedures for breath alcohol analysis;

(F) Practical laboratory demonstration of the student’s ability to perform alcohol analysis;

(G) Interpretation of results of alcohol analysis, including correlation of alcohol analyses with subjective observations of the demeanor and behavior of persons who have ingested known amounts of alcohol;

(H) Court testimony;

(I) Court decisions regarding chemical tests of alcohol to determine alcohol influence; and

(J) Requirements of these regulations;

(3) Successfully demonstrates accuracy in the analysis of proficiency test samples submitted by the Department, and successfully passes examinations prescribed by the Department;

(4) Demonstrates the ability to adhere to the provisions of these regulations; or (in lieu of (1) and (2) above)

(5) Either is a person who, prior to January 1, 1971, qualified as director of a clinical laboratory operating under the provisions of the California Business and Professions Code, or is a person who, for a period of one year prior to January 1, 1971, has been employed in the activities of a forensic alcohol supervisor.

(f) A forensic alcohol analyst is a person who meets the following qualifications:

(1) Successfully completes at least 60 semester-hours, or their equivalent in quarter-hours, of college level courses, including 8 hours of general chemistry and 3 hours of quantitative analysis;
(2) Successfully completes a training period in alcohol analysis on forensic or clinical specimens in a forensic alcohol laboratory or in a clinical laboratory;

(3) Performs during the training period a minimum of 25 analyses of alcohol concentration in blood samples, at least half of which contain alcohol;

(4) Successfully demonstrates accuracy in the analysis of proficiency test samples submitted by the Department, and successfully passes examinations prescribed by the Department;

(5) Demonstrates ability to adhere to the provisions of these regulations; or (in lieu of (1), (2), and (3) above)

(6) Either is a person who, prior to January 1, 1971, was a clinical laboratory technologist licensed under the provisions of the California Business and Professions Code, or is a person who, for a period of one year prior to January 1, 1971, has been employed in the activities of a forensic alcohol analyst.

(g) A forensic alcohol analyst trainee is a person who meets the following qualifications:

(1) Meets the educational qualification set forth as (1) for a forensic alcohol analyst;

(2) Is employed by a licensed forensic alcohol laboratory.

§ 1217. Forensic Alcohol Laboratory License.

(a) Upon receipt of a completed application which shows ability to meet the requirements set forth in these regulations, and upon payment of any required fee, the Department shall submit such proficiency test samples and perform such examinations as are required for that laboratory to complete the qualifications.

(b) Upon the laboratory’s successfully completing all the qualifications, the Department shall issue to the applicant laboratory a forensic alcohol laboratory license.

§ 1217.1. Renewal of Licenses.

(a) Licenses under these regulations shall be renewed as required by the Department as long as the activity requiring authorization continues. Renewal shall be contingent upon the laboratory continuing in the qualifications set forth in these regulations.

(1) A forensic alcohol laboratory license shall be valid from January 1 to December 31 of a calendar year. Applications for renewal and applicable fees shall be submitted to the Department on or before October 1 of each year.

(2) Failure to apply for renewal shall result in forfeiture after a period of three months from the day on which the application for renewal should have been submitted, with the exception that the Department may grant a temporary extension under special circumstances.

(3) An application for renewal shall not list as a forensic alcohol analyst trainee any person who fails to comply with the requirements of Section 1216.1(f)(4) within a period of one year after he was first listed with the Department as a trainee. The Department may extend this period for a justifiable reason, such as illness.
§ 1217.2. Application Forms.

Application for a license and renewal thereof, shall be made on forms furnished by the Department. The applicant shall set forth all pertinent information called for by the form.

§ 1217.3. Report of Change or Discontinuance.

(a) A person responsible for the operation of a forensic alcohol laboratory shall report to the Department in writing within 30 days any change in qualified personnel who may be performing forensic alcohol analysis, change of ownership, change of address or change or discontinuance of an activity authorized under these regulations.

(b) Such reports shall be made on forms furnished by the Department and shall set forth all pertinent information called for by the form.

(c) Persons who formerly qualified as forensic alcohol supervisors or forensic alcohol analysts in another laboratory may be required to demonstrate again their ability to meet the requirement of Section 1216.1(e)(3) or 1216.1(f)(4) using the method, apparatus and facilities of the forensic alcohol laboratory which newly lists them in such a Report of Change or Discontinuance.

§ 1217.4. License Implications.

Licenses issued under these regulations shall not imply approval of anything carried out by a laboratory other than what is specified on the document.

§ 1217.5. Licensing Records.

Forensic Alcohol Laboratory Licenses shall become part of permanent records available to the courts for legal proceedings or to the Department.

§ 1217.6. Inspection and Additional Requirements.

(a) Display of Licenses. Licenses issued under these regulations shall be displayed on request to representatives of the Department.

(b) Access to Premises. The Department may enter at all reasonable times upon any laboratory for the purpose of determining whether or not there is compliance with the provisions of these regulations.

§ 1217.7. Surveys and Proficiency Tests.

(a) Laboratories having been licensed or applying for licensing as forensic alcohol laboratories shall be subject to on-site surveys by representatives of the Department, the results of which must meet the requirements of these regulations, and shall accept periodic evaluation samples, perform analyses and report the results of such analyses to the Department.
These analytical results shall be used by the Department to evaluate the accuracy of the forensic alcohol analyses performed by the laboratory, and the results must meet the requirements of these regulations.

§ 1217.8. Fees and Other Procedures.

The annual application fee for a Forensic Alcohol Laboratory License or its renewal shall be one hundred dollars ($100). A laboratory operated by the state, city or county or other public organization shall be exempt from the annual application fee requirement. Other procedures in the administration of these regulations shall be carried out as set forth in Chapter 5 (commencing with section 436.50) of Part 1 of Division 1 of the Health and Safety Code. Such other procedures include suspension or revocation of license, denial of license, and disciplinary action.

§ 1218. Training Program Approval.

Any organization, laboratory, institution, school, or college conducting a course of instruction for persons to qualify under these regulations shall submit a course summary and list of instructors and their qualifications to the Department for approval.

§ 1218.1. Additional Requirements.

At the discretion of the Department, any phase or portion of a training program shall be subject to alteration in an effort to update the program as technological advances are made or if a portion has been judged inappropriate.

§ 1218.2. Contracts.

The Department may contract with persons it deems qualified to administer such practical tests and written or oral examinations as may be required under these regulations. This section shall not be construed to authorize the delegation of any discretionary functions conferred on the Department by law, including, but not limited to, the evaluation of tests and examinations.

§ 1219. General.

Samples taken for forensic alcohol analysis and breath alcohol analysis shall be collected and handled in a manner approved by the Department. The identity and integrity of the samples shall be maintained through collection to analysis and reporting.


(a) Blood samples shall be collected by venipuncture from living individuals as soon as feasible after an alleged offense and only by persons authorized by Section 13354 of the Vehicle Code.
(b) Sufficient blood shall be collected to permit duplicate determinations.

(c) Alcohol or other volatile organic disinfectant shall not be used to clean the skin where a specimen is to be collected. Aqueous benzalkonium chloride (zephiran), aqueous merthiolate or other suitable aqueous disinfectant shall be used.

(d) Blood samples shall be collected using sterile, dry hypodermic needles and syringes, or using clean, dry vacuum type containers with sterile needles. Reusable equipment, if used, shall not be cleaned or kept in alcohol or other volatile organic solvent.

(e) The blood sample shall be deposited into a clean, dry container which is closed with an inert stopper.

(1) Alcohol or other volatile organic solvent shall not be used to clean the container.

(2) The blood shall be mixed with an anticoagulant and a preservative.

(f) When blood samples for forensic alcohol analysis are collected post-mortem, all practical precautions to ensure an uncontaminated sample shall be employed, such as:

(1) Samples shall be obtained prior to the start of any embalming procedure. Blood samples shall not be collected from the circulatory system effluent during arterial injection of embalming fluid. Coroner’s samples do not need a preservative added if stored under refrigeration.

(2) Care shall be taken to avoid contamination by alcohol from the gastrointestinal tract directly or by diffusion therefrom. The sample shall be taken from a major vein or the heart.

(g) In order to allow for analysis by the defendant, the remaining portion of the sample shall be retained for one year after the date of collection.

(1) In coroner’s cases, blood samples shall be retained for at least 90 days after date of collection.

(2) Whenever a sample is requested by the defendant for analysis and a sufficient sample remains, the forensic alcohol laboratory or law enforcement agency in possession of the original sample shall continue such possession, but shall provide the defendant with a portion of the remaining sample in a clean container together with a copy or transcript of the identifying information carried on the original sample container.

§ 1219.2. Urine Collection and Retention.

(a) The only approved urine sample shall be a sample collected no sooner than twenty minutes after first voiding the bladder.

(b) The specimen shall be deposited in a clean, dry container which also contains a preservative.

(c) In order to allow for analysis by the defendant, the remaining portion of the sample shall be retained for one year after the date of collection.

(1) Whenever a sample is requested by the defendant for analysis and a sufficient sample remains, the forensic alcohol laboratory or law enforcement agency in possession of the original sample shall continue such possession, but shall provide the defendant with a portion of the remaining sample in a clean container together with a copy or transcript of the identifying information carried by the original sample container.
§ 1219.3. Breath Collection.

A breath sample shall be expired breath which is essentially alveolar in composition. The quantity of the breath sample shall be established by direct volumetric measurement. The breath sample shall be collected only after the subject has been under continuous observation for at least fifteen minutes prior to collection of the breath sample, during which time the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked.

§ 1220. General.

(a) All laboratory methods used for forensic alcohol analysis shall be subject to standards set forth in this Article.

(b) Each licensed forensic alcohol laboratory shall have on file with the Department detailed, up-to-date written descriptions of each method it uses for forensic alcohol analysis.

(1) Such descriptions shall be immediately available to the person performing an analysis and shall be available for inspection by the Department on request.

(2) Each such description shall include the calibration procedures and the quality control program for the method.


(a) Methods for forensic alcohol analysis shall meet the following standards of performance:

(1) The method shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 5 percent of the value; these limits shall be applied to alcohol concentrations which are 0.10 grams per 100 milliliters or higher;

(2) The method shall be capable of the analysis of ethyl alcohol with a specificity which is adequate and appropriate for traffic law enforcement.

(3) The method should be free from interference from anticoagulants and preservatives added to the sample;

(4) Blood alcohol results on post-mortem samples shall not be reported unless the oxidizable substance is identified as ethyl alcohol by qualitative test;

(5) The method shall give a test result which is always less than 0.01 grams of alcohol per 100 milliliters of blood when living subjects free of alcohol are tested.

(b) The ability of methods to meet the standards of performance set forth in this Section shall be evaluated by the Department using a laboratory’s proficiency test results and such ability must meet the requirements of these regulations.
§ 1220.2. Standards of Procedure.

(a) Methods for forensic alcohol analysis shall meet the following standards of procedure:

(1) The method shall be calibrated with standards which are water solutions of alcohol.

(A) Such alcohol solutions are secondary standards.

(B) Each forensic alcohol laboratory shall establish the concentration of each lot of secondary alcohol standards it uses, whether prepared or acquired, by an oxidimetric method which employs a primary standard, such as United States National Bureau of Standards potassium dichromate;

(2) The procedure shall include blank and secondary alcohol standard samples at least once each day that samples are subjected to forensic alcohol analysis.

(A) The blank and secondary alcohol standard samples shall be taken through all steps of the method used for forensic alcohol analysis of samples.

(3) The procedure shall also include analysis of quality control reference samples as described in Section 1220.3 and shall include at least duplicate analyses of samples for forensic alcohol analysis.

(A) A quality control reference sample shall not be taken from the same lot of alcohol solution which is used as a secondary alcohol standard.

(4) Alcohols or other volatile organic solvents shall not be used to wash or rinse glassware and instruments used for alcohol analysis;

(5) All instruments used for alcohol analysis shall be in good working order and routinely checked for accuracy and precision.

§ 1220.3. Quality Control Program.

(a) Methods for forensic alcohol analysis shall be performed in accordance with the following quality control program:

(1) For each method of forensic alcohol analysis it performs, each forensic alcohol laboratory shall make or acquire a suitable quality control reference material containing alcohol, a sample of which it shall analyze along with each set of samples; the alcohol concentration in the reference material shall be between 0.10 and 0.20 grams per 100 milliliters of liquid;

(2) For each lot of quality control reference material, the laboratory shall determine a mean value of at least 20 replicate analyses, at a rate of no more than 2 analyses per day, with the method used for analysis of samples for forensic alcohol analysis;

(3) Acceptable limits of variation for the method shall be set as follows:

(A) The lower limit shall be calculated by subtracting, from the mean value, 0.01 grams per 100 milliliters;

(B) The higher limit shall be calculated by adding, to the mean value, 0.01 grams per 100 milliliters;
(4) At least one sample of the quality control reference material shall be analyzed with each set of samples analyzed for the purpose of forensic alcohol analysis;

(5) Whenever analysis of the quality control reference material is outside the acceptable limits, the method shall be regarded to be in error, and a forensic alcohol supervisor shall take remedial action to investigate and correct the source of error;

(6) Until such time as the error has been corrected, as shown by return of the analysis of the quality control reference material to values within the acceptable limits, no samples shall be analyzed for the purpose of forensic alcohol analysis.

§ 1220.4. Expression of Analytical Results.

(a) With the exception of tissue analysis, all analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 milliliters of blood.

(1) The symbols, grams %, %, and % (W/V), shall be regarded as acceptable abbreviations of the phrase, grams per 100 milliliters of liquid.

(b) Analytical results shall be reported to the second decimal place, deleting the digit in the third decimal place when it is present.

(c) Blood alcohol concentrations less than 0.01% in living subjects may be reported as negative.

(d) Blood alcohol concentrations less than 0.02% on post-mortem blood samples may be reported as negative.

(e) A urine alcohol concentration shall be converted to an equivalent blood alcohol concentration by a calculation based on the relationship: the amount of alcohol in 1.3 milliliters of blood is equivalent to the amount of alcohol in 1 milliliter of urine.

(f) A breath alcohol concentration shall be converted to an equivalent blood alcohol concentration by a calculation based on the relationship: the amount of alcohol in 2,100 milliliters of alveolar breath is equivalent to the amount of alcohol in 1 milliliter of blood.

(g) Tissue analysis results shall be expressed in terms of a weight amount of alcohol in a unit weight of the specimen

§ 1221. General.

Breath alcohol analysis shall be performed in accordance with standards set forth in this Article.

§ 1221.1. Authorized Procedures.

(a) Breath alcohol analysis shall be performed only with instruments and related accessories which meet the standards of performance set forth in these regulations.
(b) Such instruments may be used for the analysis of breath samples in places other than licensed forensic alcohol laboratories and by persons other than forensic alcohol supervisors, forensic alcohol analysts and forensic alcohol analyst trainees only if such places and persons are under the direct jurisdiction of a governmental agency or licensed forensic alcohol laboratory.

(1) Breath alcohol analysis by persons other than forensic alcohol supervisors, forensic alcohol analysts and forensic alcohol analyst trainees shall be restricted to the immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

(2) Except for the requirements of Section 1220.4, such immediate analysis shall not be subject to the requirements of Article 6.

§ 1221.2. Standard of Performance.

(a) Instruments for breath alcohol analysis shall meet the following standard:

(1) The instrument and any related accessories shall be capable of conforming to the “Model Specifications for Evidential Breath Testing Devices” of the National Highway Traffic Safety Administration of the U.S. Department of Transportation, which were published in the Federal Register, Vol. 49, No. 242, Pages 48854-48872, December 14, 1984, and are hereby adopted and incorporated.

(b) The ability of instruments and any related accessories to conform to the standard of performance set forth in this section shall be tested by the U.S. Department of Transportation.

§ 1221.3. Approved Instruments.

(a) Only such types and models of instruments and related accessories as are named in the “Conforming Products List” published in the Federal Register by the National Highway Traffic and Safety Administration of the U.S. Department of Transportation shall be used for breath alcohol analysis in this State.

§ 1221.4. Standards of Procedure.

(a) Procedures for breath alcohol analysis shall meet the following standards:

(1) For each person tested, breath alcohol analysis shall include analysis of 2 separate breath samples which result in determinations of blood alcohol concentrations which do not differ from each other by more than 0.02 grams per 100 milliliters.

(2) The accuracy of instruments shall be determined.

(A) Such determination of accuracy shall consist, at a minimum, of periodic analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 0.01 grams % of the true value; these limits shall be applied to alcohol concentrations from 0.10 to 0.30 grams %. The reference sample shall be provided by a forensic alcohol laboratory.
1. Such analysis shall be performed by an operator as defined in Section 1221.4(a)(5), and the results shall be used by a forensic alcohol laboratory to determine if the instrument continues to meet the accuracy set forth in Section 1221.4(a)(2)(A).

(B) For the purposes of such determinations of accuracy, “periodic” means either a period of time not exceeding 10 days or following the testing of every 150 subjects, whichever comes sooner.

(3) Breath alcohol analysis shall be performed only with instruments for which the operators have received training, such training to include at minimum the following schedule of subjects:

(A) Theory of operation;

(B) Detailed procedure of operation;

(C) Practical experience;

(D) Precautionary checklist;

(E) Written and/or practical examination.

(4) Training in the procedures of breath alcohol analysis shall be under the supervision of persons who qualify as forensic alcohol supervisors, forensic alcohol analysts or forensic alcohol analyst trainees in a licensed forensic alcohol laboratory.

(A) After approval as set forth in Section 1218, the forensic alcohol laboratory is responsible for the training and qualifying of its instructors.

(5) An operator shall be a forensic alcohol supervisor, forensic alcohol analyst, forensic alcohol analyst trainee or a person who has completed successfully the training described under Section 1221.4(a)(3) and who may be called upon to operate a breath testing instrument in the performance of his duties.

(6) Records shall be kept for each instrument to show the frequency of determination of accuracy and the identity of the person performing the determination of accuracy.

(A) Records shall be kept for each instrument at a licensed forensic alcohol laboratory showing compliance with this Section.

§ 1221.5. Expression of Analytical Results.

Results of breath alcohol analysis shall be expressed as set forth in Section 1220.4.

§ 1222. General.

Forensic alcohol laboratories and law enforcement agencies shall maintain records which clearly represent their activities which are covered by these regulations. Such records shall be available for inspection by the Department on request.
§ 1222.1. Forensic Alcohol Laboratory Records.

(a) Each laboratory which is licensed to perform forensic alcohol analysis shall keep the following records for a period of at least three years:

(1) An up-to-date record of persons in its employ who are qualified as forensic alcohol supervisors and forensic alcohol analysts; the record shall include the qualifications of each such person, including education, experience, training and performance in proficiency tests and examinations;

(2) A list of persons in its employ who are forensic alcohol analyst trainees, the date on which each such person began his training period and the number and results of analyses performed during the training period;

(3) Records of samples analyzed by that laboratory under these regulations, their results and the identity of persons performing the analyses;

(4) Records of the quality control program;

(5) Records of laboratory performance evaluation in alcohol analysis as shown by results of proficiency tests;

(6) Records of such determinations of accuracy of breath testing instruments as a laboratory may perform for law enforcement agencies;

(7) Records of such training as a laboratory may provide to persons who operate breath testing instruments for law enforcement agencies.

§ 1222.2. Breath Alcohol Analysis Records.

(a) Each agency shall keep the following records for breath testing instruments which are under its jurisdiction:

(1) Records of instrument determinations of accuracy;

(2) Records of analyses performed, results and identities of the persons performing analyses;

(3) At the location of each instrument, the precautionary checklist to be used by operators of the instrument.
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