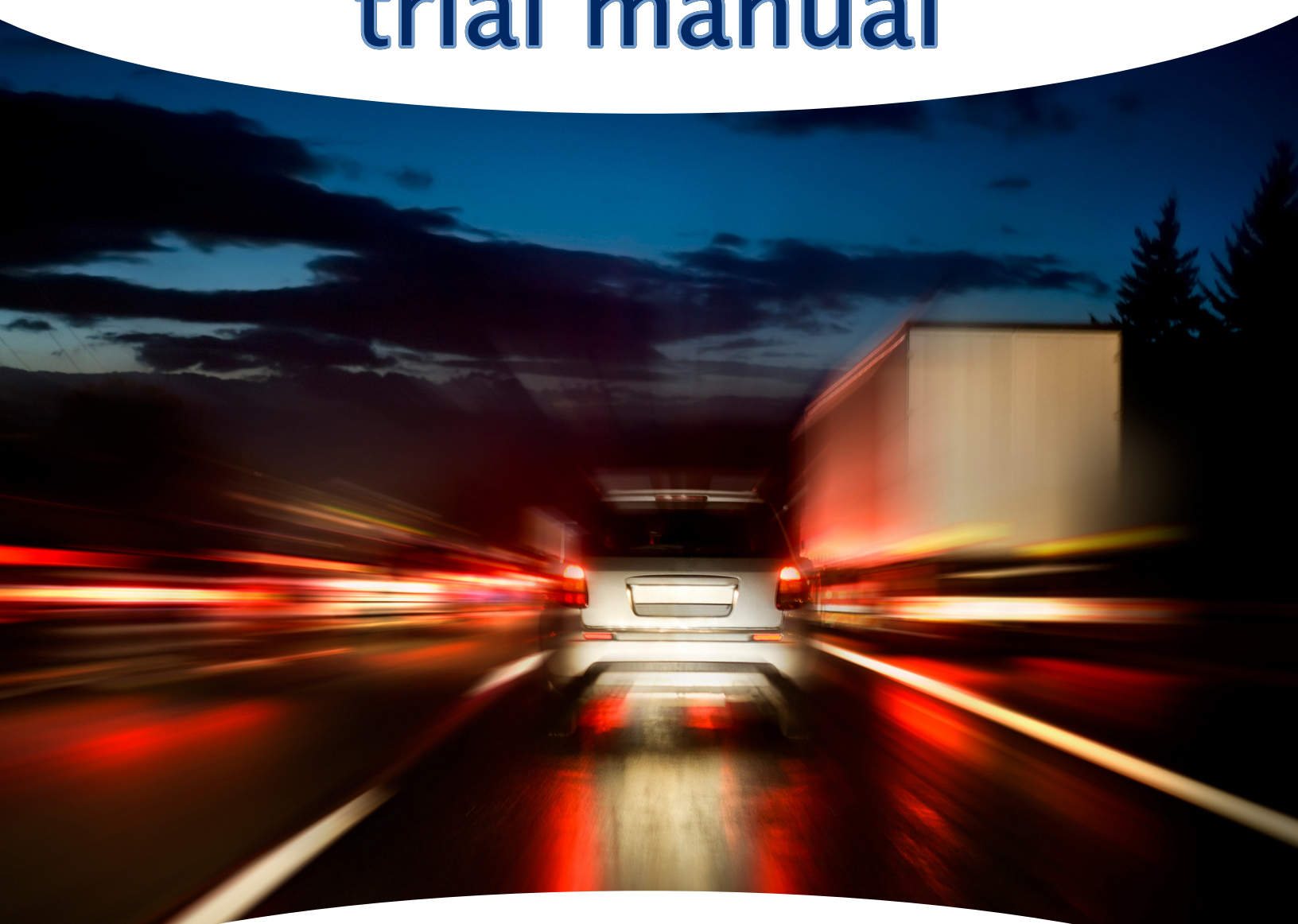


# The prosecutor's *DRUNK DRIVING* trial manual



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“And, Finally, Ladies and Gentleman, I Ask You to Remember That I Cannot Speak to You Again. Please Listen to the Prosecutor’s Argument as I Will, Thinking of the Arguments That My Client and I Cannot Make.”

# INTRODUCTION

*This instruction manual for prosecutors has been gleaned from a number of outlines used by prosecution offices over several years. It will give you insight into how the prosecution is likely to approach your case.*

A DUI trial, like any other, needs a theme. One of the most employable prosecution themes is the “complete picture” theme. The idea is that a juror will need to look at all the facts, taken together, in order to arrive at the truth. This theme effectively rebuts the usual defense tactic of isolating certain facts, while ignoring others, and explaining those isolated pieces away.

Accordingly, it is important in a DUI trial to solicit from the People’s witnesses ALL evidence, even evidence that is arguably exculpatory. By proceeding in this fashion, you accomplish three things:

- First, you send your “complete picture” theme.
- Second you take the wind out of defense sails by soliciting exculpatory evidence.
- Third, you show the jurors that you are a “truth seeker.”

# PREPARING FOR TRIAL

## Reviewing the Police Reports

### 1. In General

The prosecutor's initial case preparation involves a careful reading of all police reports prepared in connection with the arrest. Although various law enforcement agencies use different formats for driving under the influence reports, the following information should be contained in each report and should be studied by the prosecutor:

#### Driving Pattern

Bad driving is not an element of the crime, but is evidence the jury may consider in determining whether the defendant was under the influence. See CALJIC 16.832. The defendant should not expect to receive bonus points or a gold star simply because he or she did not weave in the lane, or park up on or run into the curb, or hit the Botts dots. It is important to remember that a person is supposed to drive properly! It is the mistakes made while driving, no matter how small, that demonstrate impairment.

#### Age

Older persons often receive jury sympathy, and any poor performance on coordination tests is not necessarily strong evidence of alcohol or drug impairment. Age (both old and very young) can affect a person's tolerance to the effects of alcohol. Youthful offenders often have a low tolerance to alcohol due to their inexperience with drinking. The prosecutor should explore these areas with the expert, prior to putting the expert on the stand, and be ready to present any favorable testimony regarding age and tolerance.

#### Gender

If a female arrestee was violent and physical force was necessary to subdue her, claims of "brutality" should be anticipated. Also, assertions of sexual misconduct by

a male arresting officer are occasionally made, especially if there is a long period of time between the stop and the booking.

#### Race

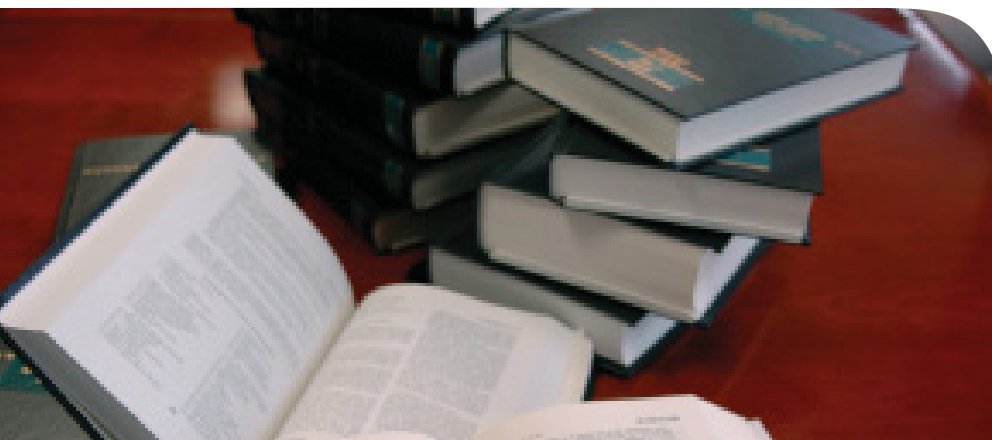
Recently, assertions of racial bias have been on the rise, due in part to certain high profile cases that have received national media attention and have brought forth claims of police brutality and conspiracy. Officers would be well advised to tape-record any arrests where they suspect this claim will be raised, and also to take photos of the defendant before booking to show that no physical harm occurred.

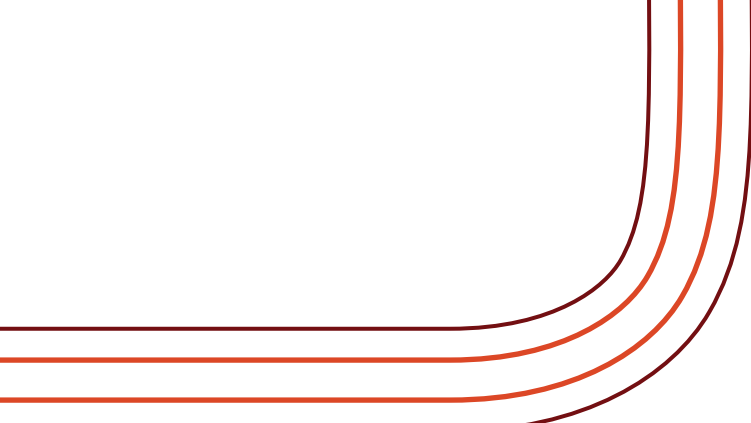
#### National Origin

Assertions of national origin bias are also common, particularly in refusal cases where English is not the defendant's primary language. Persons who do not speak English well (or at all) often base their defense on that fact. They can also claim that they did not understand the officer's directions on the FSTs, or that they did not understand the officer's explanation of the chemical tests and that is why they refused them. They may claim that their manner of speech (accent or difficulty dealing with English) gave the appearance of intoxication (confusion and seemingly slurred speech) to the officer. If an interpreter is used at the scene, and/or during the chemical tests admonition, any statements by the suspect can come in through the officer. *People v. Torres* (1989) 213 Cal. App. 3d 1248 holds that when a declarant makes an out of court statement through an interpreter, if that statement is otherwise admissible, the hearsay rule does not bar a percipient witness other than the interpreter from testifying to the content of the out of court statement, even though the witness testifies to the words uttered by the interpreter, not the declarant. [Note: the interpreter still needs to be called to testify as to his or her qualifications and that he or she accurately translated the questions and responses.]

#### Height and Weight

Persons in good physical condition can be expected to perform better on the FSTs even when impaired, than persons in poor condition. For example, an obese person may have problems performing some tests even when sober. In addition, the defendant's weight is a very important factor used by the lab expert to compute the minimum amount of alcohol consumed by the defendant to reach the reported blood alcohol level. Therefore, it is necessary to ask the arresting officer, during direct examination, to esti-





mate the defendant's weight at the time of the arrest. This is a permissible lay opinion (see Evidence Code section 801) to lay the foundation for the subsequent hypothetical question to the lab expert. If your officer copied the information from the defendant's driver's license, be sure to ask (in advance) if that information was consistent with his or her recollection of the defendant's size at the time of the arrest.

Although weight is very important to determine the number of drinks consumed, the height of the defendant has absolutely nothing to do with the blood alcohol level. With the weight, blood alcohol level, time of stop, time of test, and any statements by the defendant, the expert can form an opinion about the number of drinks that the defendant has consumed. This opinion often proves that the defendant either lied when he or she talked to the officer after the stop or when the defendant testified in court. Either way, it is a big plus for the prosecutor in argument.

### ○ Medical Condition and/or Treatment

Always check to see if the police report reflects any medical condition or problems claimed by the defendant. Ask the officer if the defendant mentioned any medical problems or any physical/mental limitations that the officer may not have written in the report. IF the defendant attempts to explain on direct exam his or her poor performance of the FSTs, or other physical signs commonly attributed to alcohol or drug impairment at trial, the prosecutor will be able to show that the defendant never told this to the officer.

It is also important to determine whether the defendant received any medical treatment or if he or she was taken to a medical facility for any reason after the arrest. Most reports describe any medical treatment (or refusal of medical treatment) in the narrative portion of the report. If the defendant was seen by medical personnel, a copy of the medical report should be obtained before the trial. These reports may contain observations of signs of intoxication or lack thereof, and even the hospital's blood alcohol test result, both of which may be relevant in determining the strength of the People's case. This may also be valuable in cases involving drug intoxication where there are no chemical test results.

### ○ Physical Oddities/ Special Medical Problems

Physical disabilities or special medical problems are often used in trial to explain the defendant's poor coordination. An absence of such notations in the police reports tends to impeach the defendant who raises such a claim for the first time at trial. Be sure to check a medical/pharmacy reference book if the defendant claims he or she was taking a prescription medication, to determine what, if any, effects the medicine has—particularly if combined with alcohol! Prozac (depression), Zantac and Tagamet (ulcers), and Nyquil (colds) are the most common medications used to explain away blood alcohol levels by the defense. Remember that a person can be driving under the influence of a legal drug, as well as an illegal drug, and still be in violation of Vehicle Code Sections 23152(a).

Another common defense (in breath cases) is that the defendant was exposed to paint fumes. This can be easily refuted if your county lab uses an Intoximeter 3000 that will register "Interfering Substance" when chemicals contained in the paint are blown into it. See CALJIC 16.831.

### ○ AKAs (Aliases)

Check for prior convictions under all names used by the defendant. See §A:10 "DMV Printouts."

### ○ DMV Printouts

The DMV printout submitted on a DUI case can be particularly useful in finding other DUI cases the defendant might have pending. Check the printout to see if he or she has any Vehicle Code §14601.1(a) suspensions showing "J" service plus a reason of "Excessive Blood Alcohol." Check the date on any such suspension. It could be that the defendant was arrested recently for DUI, but the case is still pending in the system (i.e., CII, FBI, NCIC).

Also, be sure to familiarize yourself with the out-of-state DMV codes. You can get a list from the local DMV that shows DUI, wet reckless, or other alcohol and driving offenses. convictions. E.g., "17" is the code for a DUI conviction outside the state of California.

### ○ Time Booked

Excessive or unexplained delays between the arrest and booking, especially where the defendant is female and the arresting officer is male, present potential problems. Be sure to ask your officer to check his or her shift log to see if the officer made other stops during the time the defendant was in custody. Also, delays between arrest and blood alcohol testing may pose problems for experts in their attempts to "relate back" the blood alcohol level to the time of driving. But remember, even if the time period between driving and the test is over three hours—a violation of Title 17—this goes to weight and not admissibility. See *People v. Perkins* (1981) 126 Cal.App.3d Supp. 12, 18-20.

### Destination and Origination

It is good practice to check the location from which the defendant claims he was coming, and his claimed destination. Many times the defendant's explanation of where he was going and what he was doing do not correspond to where he was seen driving, the direction of driving and/or the location at which the defendant was stopped by the officer. This information can also be useful when combined with the times given by the defendant as to any drinking pattern. Most officers are more than happy to drive a particular path described by the defendant and calculate the time it took, when necessary to impeach a defendant. A common claim of DUI defendants is that the officer was watching the bar where they were drinking, waiting for drivers they know have been drinking. While some jurors may find this offensive, it is no defense.

### Clothing Worn

Although generally not useful in the People's case-in-chief, have the officer review information in his or her report pertaining to manner of dress. This very common area of cross-examination involves testing the officer's memory of the events surrounding the arrest. However, the clothing may be highly relevant in a "switch" case (when the defense is that someone else in the car was driving) or occasionally, when someone claims the officer forced him to perform the FSTs in clothing or shoes that were inappropriate for the conditions (e.g., barefoot on hot pavement, high heels on an incline, etc.). Also, when a defendant wears a military uniform to court, it is good to point out to the jury that the defendant was not wearing a fancy military uniform on the date of the arrest.

### Vehicle Driven

Similarly, the officer should review the make, model, color, and year of the vehicle driven by the defendant to avoid impeachment. In addition, the defense frequently claims that the poor driving can be explained by the poor condition of the vehicle, especially if it is old. To counter such assertions, the prosecutor should look for indications that the vehicle was examined or driven by an officer. Also, be sure to request discovery if there are indications the defendant is going to produce some type of repair documents at trial that will show the car had some pre-existing defect.

## 2. Statements Made by the Defendant

### Alcohol Consumption

Any statement made by the defendant indicating intoxication or that any alcohol was consumed can be ex-

tremely valuable in strengthening the People's case. Typically, the defendant will admit the consumption of some alcohol (usually "two beers"). This statement is useful for these reasons:

- It lets the jury know there was some alcohol involved, thereby corroborating the officer.
- It allows questions regarding the size of the drink container, i.e., pitchers, large cans, tall glasses.
- It also allows questions about the timing of the drinks (it is rarely credible when a defendant can precisely time a drinking pattern drink-for-drink).

The statement may later be used to discredit the defendant when the lab expert testifies that the defendant's blood alcohol level and weight prove that considerably more alcohol had been ingested. It proves that the defendant lied because it is not possible to reach the defendant's blood alcohol level based on the amount of alcohol the defendant claims to have consumed.

### Obscenities

Defendants often make other statements that are helpful to demonstrate intoxication. For example, the defendant's statements may have been laced with obscenities. While it is not necessary to dwell on the language, the officer should relate the specific language used by the defendant. Such evidence helps the jury to picture the defendant's behavior at the time of the offense, in contrast to the defendant's appearance and demeanor in court.

### Fatigue

Statements revealing when the defendant last slept and for how long can be important. Alcohol generally affects a tired person more quickly than one who is rested. These statements also alert the prosecutor to a potential "fatigue" defense to explain the defendant's impairment. (Be sure to review the "concurring cause" portion of CALJIC 16.831 [1981 Revision].) If, in an attempt to explain poor driving or poor FST performance, the defendant claims that he or she was tired, the prosecutor should make sure to ask why the defendant was drinking and why the defendant was driving, if he or she was so tired.

### Rising Blood Alcohol/Absorption

This is an extremely important area for preparation. Statements regarding what the defendant had eaten and when the defendant started and stopped drinking are relevant to the blood alcohol level for both the A count (driving under the influence) and the B count (driving with a blood alcohol over .08). Under count A (driving under the influence), the defendant's state of sobriety at the time of the driving is the issue, not his or her sobriety at the time of the subsequent chemical test. (But check with your local jury

instructions and statutes for any that create an inference based in blood alcohol at the time of the test.)

The so-called “big gulp” or “absorption” defenses are common, especially if the defendant said to the officers that he or she had just stopped drinking before driving

of certain tests, i.e., Walk-the-Line, Finger-to-Nose, and One-Leg Stand, on a diagram. Many officers now record the proceedings with either audio or video recorders. Poor performance on these tests is relevant evidence of intoxication.

#### Practice Tip:

Object on relevance grounds to any attempt by the defense attorney to have your officer demonstrate the tests in court.

or had an open container in the vehicle. The theory is that the defendant consumed alcohol a very short time before being stopped and that the alcohol had not yet been “absorbed” into the bloodstream and therefore had not affected the driver’s mental or physical abilities to drive. Stated another way, the argument is that the defendant was under the influence at the time of the chemical test, but was not yet under the influence when he or she was driving.

Similarly, the defense could argue that the alcohol level had not reached 0.08 percent while the defendant was driving (making him or her not guilty of the per se offense, even though the blood alcohol level at the time of the test was 0.08 percent or above).

#### Investigatory Questions/*Miranda*

The defendant’s answers to the officer’s investigatory questions at the scene are admissible in the prosecutor’s case-in-chief. Courts have consistently held that these questions are part of the officer’s investigation of criminal activity and not the result of a custodial interrogation. See *Berkemer v. McCarty* (1984) 468 U.S. 420; *People v. Forster* (1994) 29 Cal.App.4th 1746.

As in any prosecution, if the defendant was advised of his or her *Miranda* rights and chose to remain silent, the recitation in trial of the warnings and the defendant’s response would probably result in a mistrial under the theory that the jury would draw a negative inference from the defendant’s choice to exercise the right to remain silent. See *Doyle v. Ohio* (1976) 426 U.S. 610). Caution the officer not to blurt this out. In addition to saving the case, it will also prevent an ethics violation allegation in a misconduct motion. If however, the defense questions the officer regarding the *Miranda* admonition, most courts will find that “the door has been opened,” and the prosecutor would be allowed to question the officer on that area in redirect examination.

### 3. Field Sobriety Tests

#### Officer’s Documentation

The police report will document the defendant’s performance on a series of pre-demonstrated field sobriety tests. Frequently, the officer records the performance

#### Horizontal Gaze Nystagmus

Officers throughout the state have long used the “horizontal gaze nystagmus tests” (HGN) to assist them in determining the defendant’s state of sobriety. Nystagmus (horizontal) is a bouncing movement of the eyes thought to be a clear indication of the ingestion of alcohol. It is typically observed by asking the subject to keep the head still while following a moving object with the eyes. The object is placed in the center of the subject’s line of vision and is moved slowly to the left or right and the eyes are observed as they attempt to follow the object. The point at which the eyes cease a smooth pursuit of the object (beginning to “bounce” horizontally) is termed “onset” of the nystagmus. Some experts believe that the degree of this onset, calculated from the center of the line of vision (in degrees), correlates to the blood alcohol level.

Although the experience of law enforcement officers in using this test as an indication of alcohol impairment is impressive, it has been vigorously battled in the appellate courts of California. The most recent case to discuss horizontal gaze nystagmus is *People v. Joehnk* (1995) 35 Cal.App.4th 1488. In *Joehnk*, the 4th District Court of Appeals held that the arresting officer may use the evidence of the horizontal gaze nystagmus test as part of his opinion on the question of whether the defendant was under the influence of alcohol. Their ruling was based upon the fact that the prosecution called an expert in their case-in-chief to discuss the scientific reliability of HGN, and its acceptance within the scientific community.

#### DUI Drugs

When the basis for the DUI arrest is that the defendant was under the influence of a controlled substance (or a combination of drugs and alcohol), you will most likely have a drug recognition expert (DRE). These officers are specially trained in recognizing the signs and symptoms of someone under the influence of a controlled substance. They follow a standardized 12-step analysis in making their determination of the person’s condition, including testing done at the scene and at the station. The DRE program was developed in the late 1970s and early 1980s by the Los Angeles Police Department. Their officers continue to run training programs for other officers to become certified as DREs.

Not every drug DUI will have a DRE, but there are many officers who have vast experience in this area who have simply not received the specialized DRE training. These officers will still be able to qualify as experts in the area of drug recognition because of their “on the job” expertise.

Even if the officer has neither DRE training nor “on the job” expertise, the prosecution can still present an effective DUI case if there is a positive result for drugs in a chemical test. Remember, the officer arrested the defendant because the officer formed an opinion that the defendant was under the influence (generally of alcohol) for the purposes of driving. The fact that the officer believed the substance was alcohol should not matter. The prosecutor can often use the testimony of the chemist or a narcotics officer to describe the effects of illegal drugs on the system. That testimony, in addition to the officer’s opinion that the defendant was under the influence for the purpose of driving often results in a conviction. A DUI drug case should always be joined with a charge of Health & Safety Code §11550, which is proven by evidence that the defendant is under the influence or has recently used a controlled substance. Note that the definition for “under the influence” for purposes of §11550 is different than that of the DUI statute. See CALJIC 11.060: “If a controlled substance is appreciably affecting the nervous system, brain, muscles, or other parts of a person’s body, or is creating in [him or her] any perceptible, abnormal, mental or physical condition, such a person is under the influence of a controlled substance.”

### Refusals

In some cases the defendant, despite being advised of the potential consequences of such an act, refuses to provide a blood, breath or urine sample as required by law. Evidence of both the refusal and the Vehicle Code section 13353 advisement form used by the officer is admissible in this situation. The fact that someone would knowingly choose to accept a one-year license suspension rather than provide a sample for an objective chemical test is a strong indicator of a “consciousness of guilt” and should be vigorously argued as such to the jury. (See CALJIC 16.835.) Note that some defendants also refuse to do the FSTs. This too, is relevant evidence to bring before the jury.

### DMV Administrative Hearings

In almost every DUI case going to trial, the defendant has had an administrative hearing with the DMV to try to regain his license (especially in refusal cases). These proceedings are tape-recorded and provide a wealth of information about the possible defense being used, as well as for impeachment. They also give the prosecutor an idea of how the arresting officer will testify. If the defendant had an attorney at the time of the hearing, he or she will most likely already have the tapes. Many judges do not require the defense to give the prosecu-

tor copies or transcripts of the tapes because they are impeachment evidence, so it will be necessary to obtain your own set of tapes from the DMV. However, if the prosecutor plans to use the tapes to impeach the defendant or a defense witness, the tapes will most likely have to be transcribed and a copy given to the defense.

### Scene Visits/Photos

After thoroughly reviewing the police reports, it is a good idea, if time permits, to drive by the location of the arrest and to take pictures of the relevant locations. A good photo of the location where the FSTs took place really stifles the defendant’s claim he had to stand and balance on a 45 degree slope. It can also demonstrate how long/far the officer had to observe the bad driving if there was any.

## Interviewing Witnesses

### Police Officers

Most driving under the influence cases involve only police witnesses. In these cases, the officer should read the police report carefully before the witness interview, to refresh his or her memory regarding the incident. Never assume that the officer will bring the crime report to court, let alone read it. Any ambiguities or inconsistencies in the report should be discussed during an interview, and the officer should be made aware of the importance of accurate testimony.

The officer should be prepared to answer all the questions contained in §§A:100—A:120, Direct Examination of the Arresting Officer. Review with the officer his or her training and experience in investigating DUI cases. If a rigorous cross-examination of the officer is anticipated, the officer should be reminded that his or her professionalism during such cross-examination is crucial to the outcome of the case. Most importantly, the officer must be very familiar with the police report, as most defenses rest upon minor inconsistencies between the report and the testimony of the officer.

### Non-Police Witnesses

Non-police witnesses should also be interviewed before trial and may require some orientation to the court system and to procedures that will be used in the trial. These witnesses are usually victims of, or witnesses to, traffic accidents and are needed primarily to establish that the defendant was the driver of a vehicle involved in the accident. However, any observations made by non-police witnesses that demonstrate intoxication are quite persuasive, and all statements made by the defendant to such witnesses should be admissible.

# Preparing for the Introduction of the Blood Alcohol Results

## □ The Breath Test

Many DUI cases involve the breath test. This test requires the officer to fill out a form called a “Precautionary Checklist” to document the procedures followed and the defendant’s performance on the test. It is imperative to review the form to make certain the officer filled it out correctly from top to bottom. The form should include at the top: the defendant’s name, date and time, officer’s name, and the serial number of the instrument used. All boxes preceding the procedural steps should be checked to corroborate the testimony that the steps were followed. The computer generated (on the newer machines) or graph paper printouts should be attached to the checklist, and should also contain the identifying information supplied by the officer at the time of the test. This information is typed directly into the machine by the officer.

The most vital step in the breath-testing procedure is the first step: a waiting period before the test during which the officer (or a combination of officers) observed the defendant to assure that he or she did not drink, burp, regurgitate, or vomit. The arrest report should contain the information regarding this observation period, but often does not. Title 17 requires a waiting period of fifteen minutes (California Administrative Code, Title 17, section 1219.3) although many police departments have a policy to observe the subject for twenty minutes. The purpose of the wait is to allow for the dissipation of any mouth alcohol that could accumulate as a result of burping, regurgitating or vomiting and be tested, resulting in an erroneously high reading.

The period during which the defendant is observed can include the time taken to investigate, to administer FSTs, to transport the defendant to the police station, and the time spent at the station before administering the chemical tests. The same officer need not have observed the defendant for the entire waiting period; however, all officers required to establish that the defendant did not burp, regurgitate, or vomit should be called to testify. Failure to observe the waiting period, however, goes to weight and not the admissibility of the blood alcohol results.

## □ The Blood Test

Blood tests seem to pose few problems at trial. Generally, absent a stipulation, the doctor or nurse who drew the blood must testify that he or she drew blood from the defendant by venipuncture, used a non-alcoholic sterilizing solution, and placed the blood in a tube and gave it to the officer. In a pinch, an experienced traffic officer can testify to his observations of the blood draw

and that the sterilizing solution was betadine and did not smell of alcohol.

The doctor or nurse who drew the blood may be able to testify about preservative and anticoagulants in the blood vial. If not, the criminalist may be able to say that these substances were present, because the blood sample was not rotted or coagulated when it was analyzed some days later. The criminalist may also be able to examine the vial at trial if the presence of preservatives or anticoagulants is an issue. Such an examination should show that even months later, the sample has not spoiled or coagulated. Do not panic if a retest of the blood sample produces a blood alcohol result lower than the initial test result. The criminalist will testify that this is a common occurrence.

## □ The Urine Test

When a urine test is given, the sample for alcohol analysis must be taken from a second voiding of the defendant’s bladder, not from the first. The delay between the two voids must be at least twenty minutes. California Administrative Code, Title 17, §1219.2(a). The sample for drug toxicology analysis may only be from the first voiding, and no waiting period or second voiding is required. If the defendant is a woman, a female officer will have observed the giving of the sample(s) and must testify to establish the chain of custody and the source of the sample, i.e., the defendant. Always make sure that the person who observed the test is subpoenaed to testify—do not assume this is the arresting officer.

## □ The Blood Alcohol Expert

The prosecutor should contact the criminalist or the crime lab before the trial begins to assure the expert’s appearance at trial and to discuss any problems anticipated with respect to the introduction of the chemical test results. It is always helpful to the criminalist to provide him or her with a copy of the police reports so the criminalist can review the information relevant to his or her testimony. In a breath case, any criminalist involved with the laboratory’s maintenance of the breath testing instruments may testify to lay the foundation for the admission of the breath results, even if he or she did not perform accuracy tests on the particular instrument used to test the defendant. In blood and urine cases, however, the criminalist who analyzed the particular sample to be introduced at trial must testify in order to lay the foundation for the admission of the blood alcohol result.

# Response to Discovery Motions

## Typical Defense Requests and Motions

For the majority of cases, prosecutors receive boilerplate discovery letters from the defense on DUI cases sometime after the defense has been provided with copies of the police reports. Typically, they are seeking the “lab packet,” containing the lab results, any notes from the criminalist who did the work, and the maintenance records on the instrument used (in breath tests) that preceded and followed the test. Occasionally, they seek other information specific to the actual case at hand. In dealing with such motions, the following arguments may be of assistance.

## Maintenance History

The maintenance history of a particular instrument is completely irrelevant. “In general, the foundational prerequisites for admissibility of testing results are that: (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.” *People v. Adams* (1976) 59 Cal. App. 3d 559, 561.

## Instructional Manuals

This may be a two-part request. First, the defense may request a manufacturer’s manual. This is something that can be obtained from the manufacturer for a price. Any special manual prepared by the using agency is available only from that agency.

## Witness Rap Sheets

The defendant is entitled to information on felony convictions (or impeachable misdemeanors pursuant to *People v. Wheeler* (1992) 4 Ca.4th 284) suffered by potential prosecution witnesses. The rap sheet itself should not be turned over, particularly if it contains information about arrests or misdemeanor convictions that are not relevant.

# JURY VOIR DIRE AND PROPOSED SAMPLE QUESTIONS

41 Cal.3d144. Current law (Code of Civil Procedure §223) now allows voir dire to aid only in the exercise of challenges for cause. The grounds for challenges for cause are set forth in Code of Civil Procedure §§227-229. Among those grounds are challenges for actual bias or implied bias.

## ○ Bias

Bias is shown by the existence of a state of mind on the part of the juror that would render him or her unable to be impartial. "To find actual bias on the part of an individual juror, the court must find 'the existence of a state of mind' with reference to the case or the parties that would prevent the prospective juror from acting with entire impartiality and without prejudice to the substantial rights of either party." *People v. Sanchez* (1989) 208 Cal. App.3d 721. A juror who expresses an opinion that the type of case at issue would be too emotional and who, consequently, expresses a desire not to sit on such a case has not established an actual bias that will support a challenge for cause. *Sanchez*. However, a juror who admits to having firm opinions on issues involved in the case, if established as fact, can support a challenge for cause. *People v. Williams* (1988) 199 Cal.App. 3d 469.

## ○ Imposition of Judicial Voir Dire

The process of jury selection was radically changed with the passage of Proposition 115 on June 6, 1990, and its approval by courts in subsequent decisions. See *People v. Gilbert* (1992) 5 Cal.App.4th 1372 and *People v. Leung* (1992) 5 Cal.App.4th 482, cases in which Code of Civil Procedure §223 was found to be constitutional. Sections 190 through 236 of the Code of Civil Procedure now govern jury selection. Section 223, specifically, imposes the federal system of judicial voir dire of prospective jurors. This judicial voir dire replaces attorney questioning, except when a party makes a showing of good cause to allow attorney questioning. Good cause, however, is defined neither within the statute nor in the language of Proposition 115.

The provisions of Proposition 115 and its requirement of judicial voir dire have not been universally accepted or applied. Courts are not uniform in their implementation of judicial voir dire from county to county, or even within the same judicial district. Some judges adhere strictly to the requirement of judicial voir dire and will not ask any questions requested by the attorneys; other judges allow limited attorney voir dire for follow-up questions; and some have retained attorney voir dire. It is important for prosecutors to know their judges' preferences for voir dire, so that they are prepared to select a jury before they enter the courtroom.

## ○ Scope of Voir Dire

Prosecutors must be aware that voir dire has also been severely limited in its scope. Prior law allowed voir dire to be used to aid in the exercise of preemptory challenges. *People v. Williams* (1981) 29 Cal. 3d 392, 402. Questions on relevant legal doctrines at issue in a case were also allowable. *Williams*; *People v. Balderas* (1985)



## Voir Dire Questions

A prosecutor should be prepared to request some or all of the questions that follow as an aid in determining whether prospective jurors have an actual bias or an implied bias. The questions are designed to explore the backgrounds of the jurors for circumstances that might prejudice them either for or against the People in a driving under the influence case. These questions are suggestions only and the trial prosecutor should be prepared to formulate issue-specific questions for his or her case. Finally, although most judges prefer group questions versus individual questioning if the answer of a prospective juror raises doubt as to his or her impartiality, do not hesitate to request further follow-up questioning, so that you may develop the record for a challenge for cause.

The following outlines are examples of questions typically asked by the prosecutor in cases alleging driving under the influence, driving with blood alcohol level greater than .08, as well as refusal to submit to alcohol testing and “no driving” cases. Keep in mind these questions are examples that you may choose from, change to fit your style, or add to areas you see fit. Since Proposition 115, your voir dire time may be very limited (5

to 30 minutes) depending on the judge. Typically, the judge will cover basic areas with the prospective jurors. It is important to listen closely to each juror when he or she responds to both the judge’s and the attorneys’ questions. In evaluating the individual responses, use your common sense and follow up as appropriate.

Voir dire questioning is used to determine whether challenges for cause may be made, but it is also proper for gathering information to assist you in exercising your peremptory challenges so long as it is phrased in such a way as to meet the for cause determination mentioned previously. *People v. Williams*, 29 Cal3d 392, 402 (1981). In doing so, you should also educate the jury as to critical points in the prosecution and begin to develop your trial theme. Most importantly, you want to hear each juror speak.

Since your questioning time is limited, you will want the court to cover all the basics. Before the trial begins, submit a list of these areas to the court. If the court fails to inquire into a desired topic, request to approach the bench before the lawyers begin questioning and then ask the court to question on such topics.

These are the topics you want the court to cover:

- Occupation, marital status, number of children, city of residence, number of years in the area. (These facts should be contained in jury information sheets.)
- Previous jury experience.
- Jurors recognize/know any of the lawyers, parties, or witnesses.
- Friends or family in law enforcement or with any legal training or background.
- Any contacts with/feelings about police.

### Practice Tip:

Listen closely and do follow up in this area.

- Know anyone or personally been charged with a similar crime? If so, how were you treated by the system? Harbor any ill will? Have an axe to grind?
- General feelings about DUIs?
- Friends or family with connections with the liquor industry or businesses where liquor is sold?
- Do you understand that the charge is DUI, not drunk driving?

### Practice Tip:

This is a point you should re-emphasize in your questioning.

- Does everyone have a driver’s license?
- Anyone been involved in a traffic accident where one of the drivers was apparently under the influence or affected by alcohol?
- Does anyone distrust scientific instruments?
- Have friends, family, or self been convicted of a crime, other than a minor traffic offense?
- How many drink socially? Anyone not drink?

### Practice Tip:

You want jurors who have some experience with alcohol.

- Would sitting as a juror create a hardship for anyone?
- Anyone have problems with vision or hearing?
- Anyone prefer not to sit on this type of case?
- Understand you cannot do experiments or visit the crime scene?
- Anyone have trouble sitting in judgment of another? (i.e., anyone have any religious or moral beliefs that would make it difficult to sit as a juror?)
- Will you follow the law?

### Practice Tip:

You also want the court to admonish the jury that during the trial, none of the attorneys or witnesses may interact with them. This makes the jurors understand why you will pass them in the hall without speaking.

Your voir dire will be limited so prioritize questions according to the facts of your case. If it is an accident case, look for people who feel DUIs cause harm. If it is refusal, look for people who feel you *must* cooperate with authority.

# OPENING STATEMENT

## The Prosecution's Position

### Strategy Checklist

- Opening statement is not the point in the trial where you are allowed to discuss the law in depth. However, give the jury a brief introduction to the two different counts and emphasize that although the counts are somewhat related and corroborate one another, for the most part, they are treated separately and different evidence will be presented to prove each charge.

### Practice Tip:

If you are calling witnesses out of order, alert the jury of that fact, and explain that one of the reasons why you get to give an opening statement is to give some order to the evidence to be presented.

- The evidence should be presented in a chronological fashion, so start at the beginning when the officer makes his/her first observations. Emphasize that this is when the People's evidence gathering commences.

### Practice Tip:

This is a good point to make because the defense may argue that the prosecution didn't disprove where the defendant says he/she was, or disprove how many drinks he/she said they had. First off, usually we can disprove the number of claimed drinks with the chemical test; and second, the defendant can say whatever he/she wants and the police officer will write it down. The police officer wasn't with the defendant—so what! It's not our burden to disprove these things; that doesn't mean they have to be believed either.

- Start building up your police officer's experience and training. Let the jury know his/her opinion was formed before any chemical tests were given.
- Start developing your complete picture theme. Be sure to give the defendant credit for any good things he did, like pulling over promptly and without hitting the curb, getting out his/her wallet without fumbling and so on. Emphasize how the officer didn't form an opinion until the officer gathered as much evidence as possible.
- If there are any weaknesses/problems with your case let the jurors know about them here. Better they hear it from you first.
- Begin educating the jury on the scientific evidence. You may want to use a picture of the Intoxilyzer and explain how it works. Also, you may want to explain the calculations that the criminalist will use to testify that the defendant was over .08 at the time of driving.
- On a breath case, emphasize how easy it is to operate a breath machine. Like a copy machine, once you start it up, it runs itself and in fact instructs the operator how to proceed step by step.

### Practice Tip:

This is to diffuse operator error inferences and arguments by defense. So when the defense starts getting into it with the operator on cross, the jury has already heard from you and the operator how automated the Intoxilyzer is.

### □ A and B Count

Opening argument is an opportunity to educate the jury on the law and the facts that support a conviction. Discuss the A and B count separately. Use charts to list the elements of the two counts. The charts should be provided with words large and dark enough for all jurors to read easily. The following is an example of a simple chart for each count.

#### Count A. 23152 (a) V.C.

1. Driving.
2. Under the influence of alcohol.

### Practice Tip:

It is very important to emphasize that defendant is charged with two separate counts. Make a separate chart defining "under the influence." See CALJIC 16.831.v

#### Count B: 2315 (b) V.C.

1. Driving.
2. Blood alcohol level of .08% or more.

### Practice Tip:

Emphasize "no impairment required."

Prepare a chart listing the facts that support the above elements. These facts should include:

1. Quality of driving.
2. Symptoms of intoxication:
  - a. Odor of alcohol.
  - b. Bloodshot and water eyes.
  - c. Slurred speech.
  - d. Poor balance and coordination.
  - e. Performance on FST.
3. Admission of drinking alcohol.
4. Officer's opinion—"Defendant driving under the influence."
5. Criminalist opinion—"Defendant driving under the influence."

## Preempting the Defense Arguments

### □ The A Count

The defense argument is that the symptoms and other facts listed on the chart are caused by something other than alcohol (e.g., mechanical or physical impairment).

In response, stress the cumulative weight of the evidence. Go through each symptom, discuss it, dwell on it, and concede that we could think of a cause other than alcohol for each symptom taken individually. Emphasize that we shouldn't base an opinion on any one thing taken separately, that you must take everything into account. And the one and only thing that each and every symptom can be caused by is alcohol. The one common denominator for every symptom is alcohol. Even the things that the defendant did correctly are consistent with being under the influence, since:

- a. Alcohol affects everyone differently and every person will exhibit some symptoms but not all imaginable symptoms.
- b. The defendant's BAC (.10) is such that he/she is impaired for the purpose of driving a motor vehicle but not to such a level that he/she will necessarily be "drunk."

The defense will have to discount the (a) count symptoms one at a time and you will have already empha-

sized over and over how the only fair judicious way to decide the (a) count is to take everything together—The Complete Picture.

### □ The B Count

As to the (b) count, use a chart emphasizing the following applicable points:

Breath Test Machine—Intoxilyzer 5000

1. Title 17 approved.
2. Licensed lab maintains machine.
3. Trained Operator.
4. Automated machine—practically runs itself.
5. Maintenance and calibration checks.
6. Safeguards:
  - a. Mouth alcohol/negative slope detector built in.
  - b. Calibration check within allowable limits and done for every test.
  - c. Two sample by defendant within the allowable limits of .02 (self-authenticating results).
7. Machine fair:
  - a. Correlation studies show breath tests 95% of the time underestimate true BAC by .01-.02.

8. Common sense:
  - a. We've been able to put men on the moon for over 25 years; surely we can test a person's BA level with today's technology.
9. Trombetta:
  - a. Defendant had a chance to preserve a sample of blood or urine if he/she disagreed with the breath result and he/she chose not to.
10. Inference by Law—taken within 3 hours of driving.

#### Practice Tip:

Remember any noncompliance with Title 17 on any of these tests goes to weight and not admissibility.

11. Consistent with, corroborated by (a) count symptoms.

### □ Additional Points for Blood or Urine

1. Available for further testing by defendant.
2. Address chain of custody re: tampering allegations.

### □ Refusal

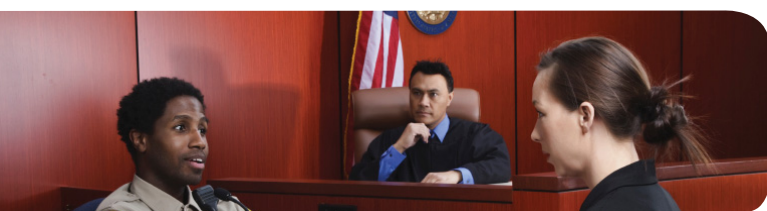
Argue the consciousness of guilt instruction and how a person who was not under the influence would demand all three tests and be righteously indignant.

# DIRECT EXAMINATION OF ARRESTING OFFICER AND OTHER PROSECUTION WITNESSES

## Preparation for Examination of Arresting Officer

### □ Preparation Before Trial

Direct examination of the arresting officer is generally the key to a successful prosecution. The prosecutor must make sure that the officer comes across to the jury as both fair and accurate. By working questions precisely and advising the officer not to volunteer information while on the witness stand (to either the prosecutor or defense counsel), the testimony should meet these goals.



It is very important to review all the facts with the officer before trial, beginning with the first observations through the entire arrest sequence. The prosecutor should make certain that the officer can identify the defendant and discuss the facts of DUI evaluation information with the officer. If the officer prepares any exhibits, or has photographs or tapes, the prosecutor must show them to defense counsel before the trial begins, as part of the discovery. Some courts want exhibits to be pre-marked. If this is the case, the exhibits should be marked before the jury enters the courtroom.

The direct examination of the arresting officer should begin with laying a foundation by going over the officer's training and experience in investigating DUI offenses. These foundational questions, which ultimately lead to the officer's opinion that the defendant was under the influence, should cover the officer's background in observing driving, signs of intoxication and use of the field sobriety tests (FSTs). In refusal cases, in which no criminalist will testify about an alcohol test result, the officer's qualifications are especially important.

If the prosecutor discovers there are mistakes in the officer's report, he or she may want to bring them out in direct to draw out the sting. However, the mistakes may be so minor that they could be ignored. If the problems are raised, the jury may infer that the prosecution is not covering facts for the officer but rather is presenting all of the facts. For example, the officer could tell the jury that he or she had a long shift and mistakenly wrote the wrong date, instead of having a defense attorney question the officer's mental acuity.

### □ Checklist for Preparing Officer to Testify

Here is a list of things you should make sure to go over with the arresting officer prior to trial:

- Talk to the officer before trial and go over his/her reports and testimony with him/her.

#### Practice Tip:

Try to get him/her to go by the scene before testifying and try to go there yourself. The defense will invariably make an issue out of something at the scene.

- Go over any problems or contradictions with him/her and prepare him/her to explain them.
- If the officer testifies to facts not found in his/her report, have him/her prepared to explain to the jury why they are not present. Most officers will tell you that the report is used to detail elements of the crime and to refresh their memory for trial.

#### Practice Tip:

Good place here to let the jury know that the report is not a piece of evidence.

- Advise the officer to look at the jury while testifying.
- Have the officer prepare diagrams for trial.
- Prepare the officer for the facts you want him/her to demonstrate for the jury, for example, how the defendant was instructed to do FSTs.
- Show all diagrams and exhibits you plan to use in trial to defense counsel beforehand.

#### Practice Tip:

Try and have all exhibits marked by the court clerk before hand.

- Prepare the officer to give defendant credit for good things he/she did and to maintain a "Joe Friday, cop-just-doing-his job" demeanor.
- Have the officer read the report a couple of times to cut down the number of times while testifying that the officer will have to refresh his/her memory. However, remind the officer that it is okay not to remember everything and not to guess at an answer but ask to refer to his/her report.
- Remind the officer to readily admit that you went over the officer's testimony with him/her or that you talked before trial. The defense attorney will ask whether you two talked and he will do it in an insinuating tone of voice.

### □ Checklist for Questioning Officer at Trial

In addition to the facts of the case, a quick checklist follows of things you must be sure to cover each time you question an officer in a DUI case:

- Foundation (name/occupation/training/experience);
- Jurisdiction (county);
- Identification of the defendant as the driver;
- Officer's opinion that defendant was under the influence for purposes of driving; and
- Chemical test foundation if blood, breath or urine test, and test result if breath test, or Vehicle Code section 13353 form advisement for a refusal.

# Sample Direct Examination Questions for Arresting Officer

The sample questions are set forth below. Remember, not all questions apply to every case.

## Practice Tip:

Go over the questions with your officer before hand. It will make his/her testimony go smoother and help avoid some embarrassing moments.

## General Background

- Q: Good morning officer, please state your full name and spell your last name for the record.
- Q: What is your occupation and assignment?
- Q: What are your job duties?
- A: (E.g., protect the peace, enforce traffic laws and the penal code, and assist citizens who need help.)
- Q: How long have you been a police officer?
- Q: Before becoming a police officer, did you attend an academy?
- Q: In that academy, did you receive training regarding investigation of driving under the influence offenses?
- Q: Please describe that training.

## COMMENT :

Typically, the officer will merely name the classes and number of hours of training, and generically describe the content as something like "recognition of symptoms commonly associated with alcohol impairment." The officer should relate training in the signs or symptoms commonly exhibited by persons under the influence of alcohol. If this is a drug or combination of drugs and alcohol case, be sure to cover training in the signs of intoxication of the particular drug. Again the defendant's signs of intoxication should be included in what the officer has been trained to observe, e.g., bloodshot and/or watery eyes, odor of alcoholic beverage emanating from breath, slow or slurred speech, staggering gait, holding onto vehicle for support, and so forth.

The officer should describe training in administering and evaluating performance on FSTs, pre-demonstrated and pre-explained simple balance and coordination tests designed to detect the types of impairment caused by alcohol.

Draw out specific symptoms he/she has trained to look for with follow up questions such as:

- Q: Were you trained to look for things about a person's general appearance that might indicate alcohol consumption or impairment?

## COMMENT :

The officer should describe things like bloodshot, watery eyes, odor of alcohol, slurred speech, and disheveled appearance.

- Q: Were you trained to look for certain physical problems like balance or reflexes or motor control?
- Q: Were you trained to administer field sobriety tests (FSTs)?
- Q: What are FSTs? What are they used for?

## COMMENT :

The officer should indicate that they are a tool to test a persons balance and coordination.

- Q: Did you receive additional training in dui investigations after your initial academy training?

## COMMENT :

Once again the officer will probably go through a list of classes and in service, roll call updates, and refresher courses. Flesh these out with questions like:

- Q: When you first went out into the field, did you ride with experienced officers?
- Q: Did you receive in-field DUI training from these experienced officers?
- Q: Can you describe what type of training regarding dui investigation you have received?
- Q: The refresher courses you've attended, where were they held and who taught them?

## Practice Tip:

If the officer has received any commendations or awards, or was a part of any special task force relating to DULs, ask him/her about it.

- Q: Approximately how many DUI investigations have you conducted or participated in?
- Q: As a result of these \_\_\_\_\_ investigations, how many arrests were made for DUI?

## COMMENT :

The number of arrests is usually 50%-70% of the number of investigations. This helps show the jury that the officer is fair and knows what he is doing.

## Practice Tip:

Occasionally an objection to this question is sustained. If that happens, simply ask the officer, "Do you arrest everyone you investigate for DUI?"

## ○ The Stop

- Q: Were you on duty as a \_\_\_\_\_ (police officer/ sheriff/CHP) on \_\_\_\_\_ (date), at approximately \_\_\_\_\_ am/pm (time)?
- Q: Were you in a marked police car?
- Q: What was your assignment?
- Q: Were you alone or with a partner?
- Q: Were you in uniform?
- Q: At approximately (time of observation), what was your location?
- Q: Is that in the county of \_\_\_\_\_?
- Q: Did a particular vehicle attract your attention?
- Q: Describe the vehicle.
- Q: Why did it attract your attention?

### COMMENT :

The officer will relate a pattern of driving or a vehicle code violation.

- Q: Have you prepared a diagram of the area where the driving took place?

### COMMENT :

Have the diagram marked as People's One. If the stop was for an equipment violation or not due to bad driving, you probably don't want to use a diagram.

- Q: Did you prepare this diagram for your testimony in court here today?
- Q: Does the diagram fairly represent the locations depicted as they appeared on date of accident?
- Q: Is the diagram to scale?
- Q: Describe the diagram for us.
- Q: With a black marker, note on the diagram with a "p" where your vehicle was when you first observed the other vehicle.

### Practice Tip:

Bring markers and chart paper to court with you. The court doesn't always have them.

- Q: With a red marker please mark with a "d" where the other vehicle was when you first saw it.
- Q: Now officer, please describe the driving you witnessed, and as you do, take the red marker and diagram the driving pattern of the defendant's vehicle.

### COMMENT :

Develop the entire driving and parking sequence while filling in all the relevant details regarding: vehicle speeds; distance traveled; distance between vehicles; traffic conditions; road and weather conditions; type of area (residential vs. commercial); timing and manner of defendant's response including how far from curb vehicle stopped; describe the lighting of the area, especially where stopped.

The diagram should be offered into evidence with all the other exhibits at the conclusion of the People's case, just before resting.

Q: Identify where you stopped the vehicle.

Q: Why did you stop it?

### COMMENT :

The officer may have suspected a DUI driver or it may have been only a Vehicle Code violation. You may want to have the officer cite any Vehicle Code section violated. Any suppression motion should have been handled pre-trial, but *People v. Uribe (1993) 12 Cal.App.4th 1432*, states that with any Vehicle Code violation, an officer may stop the vehicle and detain.

Q: How did the vehicle pull to the side of the road?

### COMMENT :

Ask for greater detail if the driver had some difficulty pulling over.

## ○ First Contact With Defendant

Q: Did you have any opinion as to the condition of the driver at this point?

### COMMENT :

The answer should be no—a suspicion maybe, due to time of night and type of driving, but not an opinion.

- Q: Did you make contact with the driver? How?
- Q: Do you see the driver of that vehicle in court here today?
- Q: Could you identify him/her for the jury please? Your Honor, may the record reflect that the witness has identified the defendant.

Q: Was there anyone else in the car? (If yes) How many and where were they seated?

### Practice Tip:

If passengers were present and may testify, try and get officer to describe their conditions if they were drinking.

Q: Did you speak with the defendant/driver/Mr./Mrs. \_\_\_\_\_ ?

### Practice Tip:

Your style and how the defendant appears will dictate how you refer to him or her. Typically a DUI defendant looks like an average citizen and you may not want to use the "defendant" moniker.

Q: While speaking with the defendant, did you notice anything unusual?

COMMENT :

Typically the officer's response will be that he/she smelled an odor of alcohol. Go through all the symptoms the officer noted at that first contact while defendant was in the car as well as typical symptoms that defendant didn't exhibit. If you don't, the defendant's attorney most assuredly will. Not all people exhibit all the possible symptoms. Alcohol affects everyone differently.

Q: Did you notice anything unusual about his/her eyes?

Practice Tip:

Depending on the police department's DUI form, the officer just checks a box. For eyes, the descriptions are usually red, watery, bloodshot, or glassy. If the defense attorney makes a big deal out of the choice of words, emphasize through the officer that he/she uses the same pre-printed form for all DUI investigations and merely checks the appropriate box.

Q: How about his/her face?

COMMENT :

| Flushed is usually the description.

Q: Did you notice anything unusual about defendant's speech?

COMMENT :

| Slow, thick, slurred are the usual responses.

Q: Did you inform the defendant as to why you stopped him?

Q: What was the defendant's response (if any)?

COMMENT :

All statements elicited from the defendant up until the arrest are considered investigatory and are admissible under *Berkemer v. McCarty* 468 U.S. 420, 82 L.ED.2d 317, 104 Sup.Ct. 3138 (1984).

Q: Did you ask the defendant to provide you with a driver's license and registration?

Q: Did the defendant comply?

COMMENT :

| If the defendant did comply this question may be skipped.

Q: Did you ask the defendant to step out of his/her vehicle and come to the side of the road?

COMMENT :

This is permitted by *People v. Beal* (1974) 44 Cal. App.3d 216, 220. Have the officer describe how the defendant got out of his/her car: e.g., stumbled when walking or getting out of the car; leaned

| on car for support; walked away from car; slow to respond to verbal commands.

Q: Was there anything unusual you noted about the defendant's appearance?

COMMENT :

The officer has probably already stated the following symptoms of alcohol intoxication. If not, have the officer relate what he observed: red/watery eyes; slurred speech; stupor/glazed look; alcohol on breath.

Q: Did you ask the defendant if he/she had been drinking?

COMMENT :

| If the defense raises a *Miranda* objection, see below.

Q: What was the defendant's response?

Q: Did the defendant tell you how many drinks he/she had consumed?

COMMENT :

| This is very important for the expert's testimony later in your case.

Q: Did you ask the defendant any other questions related to your investigation of whether or not the defendant was driving under the influence?

COMMENT :

This covers the standard investigative questions. Did the defendant feel the effects of the alcohol; how many total drinks were consumed; was the defendant under a doctor's care or taking any medication; what was the time of the last drink; what was the time of last meal; where was the defendant going to/coming from.

Officers normally ask the above questions before administering the FSTs. If the officer forgets during testimony, ask if he inquired into the above areas. These questions are permissible pursuant to *Berkemer v. McCarty*, (1984) 468 U.S. 420, 435-442; *People v. Carter* (1980) 108 Cal. App.3d 127.

Q: Did you record the defendant's weight on your report?

COMMENT :

| This information is necessary for your expert to correctly calculate the defendant's blood alcohol level at the time of driving.

Q: What was the defendant's weight?

## FSTs

Q: What did you do next?

### COMMENT :

The officer will indicate at this point, he had the defendant step out of his/her vehicle and walk to the side of the road to do FSTs. Administration of FSTs does not violate any constitutional protection. *Whelen v. Municipal Court* (1969) 274 Cal. App.2d 809; *People v. Bennett* (1938) 139 Cal. App.3d 767.

Videotape of a defendant's statements during FSTs are allowed. See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 602-603.

- Q: What are field sobriety tests?
- Q: Were you given training in how to conduct field sobriety tests?
- Q: How many times have you had people perform FSTs for you?
- Q: Where were you and the defendant standing when you asked the defendant to perform the FSTs
- Q: Did you explain the purpose of FSTs to the defendant?

### COMMENT :

Commonly, officers will explain to suspects what FSTs are and give them some general instructions. It is important for the jury to hear this because often defendants will not follow directions.

- Q: Why did you have defendant perform FSTs?
- Q: Did you watch the defendant exit his/her vehicle?
- Q: Did defendant have any difficulty? (If so....) Please describe (e.g., used door and side of car for assistance, stumbled, almost fell out, etc.).
- Q: Did you direct defendant to a particular location to administer the FSTs?
- Q: Did you observe defendant walk to that area?
- Q: Did you notice anything unusual about how the defendant walked to that area? (If so...) Please describe (e.g., staggered, stumbled, used side of car for balance, etc.).

### Practice Tip:

There is usually a box in police reports for describing the manner of "walking," other than during the FSTs (which have their own boxes). This is the only "walking" the officer will observe, so you want it clear that the staggering or stumbling that is referred to occurred during this walking and is not the same as that which may or may not have occurred during the FSTs.

Q: Describe the area where you conducted the FSTs.

### COMMENT :

The officer should address lighting and surface area.

Q: Mark on the diagram with an "x" where this area was in location to the vehicle(s).

### Practice Tip:

This may be important if defendant has a passenger he/she calls to testify regarding the performance on the FSTs.

Q: Describe for us how the defendant was standing?

### Practice Tip:

The officer may note some sway while standing not associated with an FST. This is where that observation typically comes in.

Q: Did you explain to the defendant why you were having him/her step over to the sidewalk?

### Practice Tip:

This may be important if defendant made some incriminating response.

Q: Prior to giving the FSTs did you ask the defendant some questions?

Q: Is that a standard set of questions that you ask all persons that you are investigating for DUI?

### COMMENT :

Go through each and every question and response. Don't just select the ones that help your case. Remember, you are just laying out all the facts. You are fair. The most important responses are drinking pattern, any claimed car problems or physical defects, any admissions of feeling the effects of alcohol, and disorientation with regards to location and time.

Q: Did you also put in your report the defendant's height and weight? And what were those?

### Practice Tip:

You need the weight for the criminalist.

Q: Was the defendant cooperative?

Q: Did you form an opinion at this point as to whether or not the defendant was under the influence of alcohol?

### COMMENT :

The answer should still be no, unless the defendant was falling down drunk. The idea being, the officer shouldn't jump to any conclusions, but be fair and wait until he has gathered all the evidence available.

Q: Did you then ask the defendant to perform some FSTs?

Q: Did you notice what kind of footwear the defendant had on?

COMMENT :

If it was boots or high heels, the officer will usually request that the defendant take them off.

Q: What was the first FST you asked him/her to perform?

COMMENT :

Typically it will be the MPA—modified position of attention.

Q: Did you demonstrate and instruct the defendant how to do this test before you asked him/her to do it?

Q: Could you please demonstrate for the jury exactly how you demonstrated for the defendant

Practice Tip:

You want the jury to see that the officer can do this by rote. This may become important later, when the defendant contends that the officer failed to instruct on certain parts of the test, as an excuse for his/her poor performance. Also, ask the officer how he physically held a flashlight, demonstrated the test, and took notes; and what became of those notes. A jury will wonder about these things.

Q: Did the defendant attempt the test before you finished instructing?

Q: Was the defendant told not to start the test before you finished instructing or told him/her to begin?

Q: Is ability to follow instructions one of the things you look for when administering these tests?

Q: Did the defendant attempt his/her FST?

Q: Could you describe his/her performance?

COMMENT :

Typically the defendant will have some sway on these tests. This is the point in questioning on each of the FSTs that you should go through and point out the bad and the good aspects of the defendant's performance, and then ask for the officer's evaluation of that performance. If you don't bring out the good things the defendant did, the defense attorney most assuredly will and you and your police officer will lose credibility with the jury. Plus, by doing this, you completely take the wind out of the defense attorney's sails.

Practice Tip:

If the defense attorney asks the officer to demonstrate how the defendant performed, this is objectionable as the officer's acting ability is not in issue.

Modified Position of Attention Test

Here is an example of how some specific follow-up questions and answers for the Modified Position of Attention Test could work.

Q: Officer, did the defendant put his/her feet together and his/her arms at his/her side as you instructed him/her to?

A: Yes.

Q: And officer, did he/she tilt his/her head back and close his/her eyes as you instructed him/her to?

A: Yes he/she did.

Q: And officer, did the defendant maintain that position for approximately 30 seconds as you had instructed him/her to?

A: [Yes or no, depending on performance.]

Q: Officer, you indicated the defendant had some sway on this test. could you elaborate?

A: He/she swayed two to three inches from side to side.

Practice Tip:

On the two to three inches of sway, ask your officer beforehand if that is one and one-half inch from center or two to three inches from center, and ask what he used as a point of reference for center. You will typically find that the two to three inches is from center, and many times, the officer used a telephone or light pole behind the defendant as a point of reference. If so, bring all that out.

Q: Officer, overall how would you evaluate the defendant's performance on the particular test?

A: Well, in my opinion, it was unsatisfactory.

Q: And why is that?

A: I base that opinion on the sway. Overall the defendant didn't do too badly, except for the sway.

Practice Tip:

Draw out of the officer, that this particular test is used primarily to see how much sway there is.

Q: Officer, based on the driving, the objective symptoms you observed, and the defendant's performance on this test, did you form an opinion regarding the defendant's condition?

A: No, I hadn't.

Q: Why not?

A: Because I base my opinion on everything and had yet to see how he performed on the other tests.

Q: Did you have the defendant perform another FST?

Q: What test was that?

Q: Did you demonstrate and instruct the defendant as to that test?

Q: Could you once again, officer, demonstrate that test for the jury as you did for the defendant on date?

Q: Did he/she appear to understand the instructions?

Q: Did he/she attempt to perform that test?

COMMENT :

Go through each FST with the police officer emphasizing the poor aspects of defendant's performance and conceding the things the defendant did properly.

- Q: What choices were given to him/her?
- Q: How did you give the defendant the choices?

COMMENT :

The officer should indicate that he read (or from memory) gave the defendant the admonition. If he read it, approach with a copy of the admonition and have him read it. If he gave the admonition from memory, have him explain to the jury how he gave it.

- Q: Did the defendant appear to understand what he/she was being told?
- Q: Did the defendant choose a test?
- Q: What test did he/she choose?
- Q: What did he/she say to indicate he/she wanted a \_\_\_\_\_ test?

Refusal Admonition

- Q: Officer, you indicated the defendant would not choose a chemical test. What exactly did he/she say to indicate this?
- Q: Can you describe the tone of voice he/she used in refusing?
- Q: Is there another admonition that you actually read to people refusing chemical tests?
- A: Yes.
- Q: Did you read that admonition for the defendant?
- Q: Could you read the admonition for the jury please, as you read it to the defendant?

COMMENT :

The refusal admonition must be read in court to get in all the elements required in the jury instruction.

Post-FST Questions

- Q: During the FSTs, did the defendant ever complain of physical defects or injuries?
- Q: Did you observe any physical defects or injuries?
- Q: (If yes) Did you take them into account in evaluating the defendant's performance?
- Q: Did you form an opinion as to the defendant's condition?
- Q: What was that opinion?
- A: The defendant was under the influence for purposes of driving a motor vehicle.
- Q: When did you form that opinion?
- A: At the end of all of the testing.
- Q: What did you base that opinion on?
- A: Everything. The totality of the circumstances. Driving, symptoms, performance on FSTs, along with training and experience.
- Q: Did you base that opinion on any one single factor?
- A: No, on the totality of all observations.
- Q: Do you take nervousness into account when evaluating FST performances?
- A: Yes.
- Q: What did you do next?
- A: Placed the defendant under arrest.

Practice Tip:

At this point, go through, in chronological order, what happened after the defendant was placed under arrest, including any spontaneous statements the defendant made on the ride to the station, the reading of the chemical admonition, the selection (or refusal) of a chemical test, and the administration of the test (if given). If the officer had the car moved for the defendant to a place where it wouldn't get towed, solicit that evidence, as well as what was the condition of any passengers and what became of them. Furthermore, if there were any back-up officers present, have the arresting officer downplay that officer's involvement in the arrest, since he/she wouldn't have generated a report, and typically won't remember much about arrest, and if called would be used by defense to contradict your arresting officer. Try to get in touch with any back-ups and question them beforehand, especially in refusals.

Practice Tip:

Before trial, do a dry run with the officer. Sometimes the officer's reading in court is so disjointed that you may lose the refusal allegation because of the way it is read, i.e., it was not clear to the defendant.

Chemical Test Admonition

- Q: Did you explain to the defendant the requirement to take a blood alcohol test?
- Q: Did you tell the defendant he/she had a choice of tests?

- Q: After reading the admonition, did the defendant indicate in any way that he did not understand what you had just read to him/her?
- Q: Did he/she then indicate whether he/she would be willing to take a test?
- Q: What was that response?
- Q: Did anyone else advise the defendant of the requirement that he/she take a chemical test?
- Q: What was the defendant's response to that second advisement?
- Q: did the fact that a blood alcohol test was never taken of the defendant due to his/her refusal in any way affect the opinion you formed regarding his/her condition?

## Breath Test

### General

Q: Where did you take the defendant to administer the breath test?

#### COMMENT :

Beforehand, ask the officer if he/she left the pac set/walkie talkie outside of the breath room. If he/she didn't don't ask about it in court. The reason to ask this is that the defense may try to suggest that electronic interference affected the machine.

Q: Who administered the breath test?

#### COMMENT :

If the officer did, then continue questions with him/her. If someone else administered the test, but the officer did the 15-minute observation period, go through the observation period questions with the officer. If the arresting officer did not administer the test but gave the Trombetta Advisement after the test, be sure to get that into evidence before he/she gets off the stand.

Q: What machine was used to administer the breath test?

### Operator Training

Q: Have you received training in the operation of the Intoxilyzer 5000?

Q: Where did you receive this training?

#### COMMENT :

The next six questions are leading but should be allowed as foundation, if not, ask the operator to describe the training received.

Q: Did your training include the theory of operation of the Intoxilyzer 5000?

Q: Did your training include learning all about the mechanical and electrical components that make up the machine and how they function?

#### COMMENT :

The answers to the two preceding questions will be no. You want it made clear that the operators are not experts in how the machine functions. They are like key operators for copier machines.

Q: Did you receive any practical experience in operating the Intoxilyzer during your training?

Q: Could you briefly describe for the jury how you administer the breath test?

#### COMMENT :

Optional question. Good to ask if you have a picture of the Intoxilyzer.

## Trombetta Advisement

#### COMMENT :

The next two questions are to be asked of the officer that gave the Trombetta Advisement (if one was given) that the machine does not retain a sample for retesting, but the defendant may choose to give a blood or urine sample for further testing. The failure to give such an advisement pursuant to VC §23157.5 (formerly §13353.5) does not affect the admissibility of the blood alcohol result. VC23157.5(d), *People v. Mills* (1985) 164 Cal.App.3d 652, 657; *People v. Lyon* (1985) 171 Cal.App.3d Supp. 20, 23.; *People v. Trombetta* (1985) 173 Cal.App.3d 1093, 1104; *People v. Alvarado* (1986) 181 Cal.App.3d Supp. 1, 4.

Q: Was the defendant made aware of his/her test results? or was the defendant made aware that his/her test results were over .08?

Q: Does the breath machine retain samples that can be retested?

Q: Was the defendant advised of that fact?

Q: What was the advisement he/she was given?

Q: Was the defendant advised that he/she could take a blood or urine test to preserve for testing?

#### Practice Tip:

If advisement was not given, you may want to take the sting out of it now by asking the officer why it wasn't given if you think the defense may get into it. Or just prepare your officer to be ready to provide whatever reason he has for not giving it.

## Blood Tests

#### COMMENT :

The following are sample questions asked of the arresting officer who will also have watched the blood draw as well as the technician who actually drew the blood. If the technician is not available you can still get the blood and test results into evidence if the police officer can remember some details about the draw, or through a declaration from the technician pursuant to Evidence Code section 721.

#### Practice Tip:

Have your police officer pick up the blood vial from the crime lab and bring it to court with him/her. Call the lab so they will have it ready at the front desk so the officer doesn't have to wait.

Q: Did you take the defendant to obtain a blood sample?

Q: Where?

Q: Did you observe the defendant sign any papers

relating to the taking of the blood sample?

- Q: Who else signed them?
- Q: Was the blood taken in your presence?
- Q: From what area of the defendant's body was the blood sample drawn?
- Q: Who did the actual blood draw?
- Q: Did the technician/nurse clean the defendant's arm with something?
- Q: Do you know what solution was used?
- Q: Did you smell the odor of alcohol from that solution?
- A: No.
- Q: Did you observe the blood actually being drawn?
- Q: Have you seen blood drawn before?
- Q: Anything unusual about this blood draw?

### Practice Tip:

The next 11 questions must be asked of the officer if the technician/nurse will not testify. The officer must have independent recollections of the draw, specifically that the solution applied to defendant's arm didn't have an alcohol smell and white powder was in the vial. If not and he's challenged on these points, a judge may keep the blood and results out of evidence for lack of evidence that the blood was drawn in a medically-approved manner (even though that lack should only go to weight and not admissibility.) If this happens, as to the white powder being present:

- a. Get the blood technician/nurse/supervisor in to testify as to the technician's/nurse's training re: blood draws.
  - b. Get a criminalist from the crime lab to look at the condition of the blood and testify that the powder must have been present or the blood would have coagulated; and/or
  - c. Get a criminalist (preferably the one who prepared the vial) to testify how the vials are prepared.
- As to the solution used:
- a. Try to get the technician's/nurse's supervisor to testify to the solution that the technician/nurse is equipped with; and/or
  - b. Get a criminalist to testify as to how the testing results help indicate the absence of a contaminant or alcohol-type solution.

- Q: What did the technician/nurse do with the blood after it was drawn?
- Q: Did you observe the vial, before the blood was placed into it or when it was empty?
- Q: Did the empty vial contain anything?
- A: Yes, a white powdery substance.
- Q: Do you know what that white powdery substance was?

### COMMENT :

The officer is not required to know what the substance is, so long as it was present.

- Q: Did you make any identifying marks on the vial?

### COMMENT :

End of questions required if technician/nurse will not testify.

- Q: What time was it when the sample was taken?
- Q: Were there any identifying marks of the defendant put on the vial?
- A: Yes, a thumbprint and his name.
- Q: After the sample was taken from the defendant, what happened to the vial?
- A: It was put in an envelope and sealed.
- Q: Did you mark the envelope in any manner?
- Q: How did you mark it?

### COMMENT :

Get the full description and have him/her look at it in court and point out the markings.

- Q: What was done with the envelope?

### COMMENT :

Booked into property, or taken by the technician/nurse.

- Q: Did you bring that envelope to court with you today?
- Q: To the court: Your Honor, I have in my hand an envelope labeled \_\_\_\_\_, which has been shown to defense counsel. May this be marked as people's \_\_\_\_ for identification? May I approach the witness?
- Q: Officer, I'm showing you an envelope marked as people's \_\_\_\_\_. do you recognize it?
- Q: How do you recognize it?

### COMMENT :

He/she will identify it by the marking on the envelope and the vial inside.

- Q: Where did you obtain this envelope before coming to court today?
- Q: Is the envelope in the same condition as when you last saw it/or booked it into property?

### COMMENT :

The answer will be no. Have the officer describe the different condition, usually new seals and additional markings from the crime lab.

## Urine Test

- Q: Did you take the defendant somewhere to give him/her a urine test?
- Q: As part of the procedures, was the defendant's bladder voided prior to giving a sample?
- Q: Where did this occur?
- Q: How do you know?
- Q: After the initial voiding, how much time elapsed until the sample was obtained?

- Q: Did you give the defendant a container for the sample?
- Q: Where did you get this container?
- Q: Was the container sealed when you got it?
- Q: Did you break the seal?
- Q: Did you notice anything inside the container? What?

**COMMENT :**

Check with officer before asking this question; there should have been a preservative, usually in the form of a crystal chip or powder, in the container.

- Q: Did you watch the defendant urinate into the container?
- Q: Why did you watch?
- A: To ensure no dilution or substitution of the sample.
- Q: After the defendant gave a sample, did you seal the container?
- Q: Did you mark the container in some manner? How?
- Q: What did you then do with the container?
- A: Booked it into property.
- Q: Did you bring that container with you to court today?
- Q: To the Court: Your Honor, I have in my hand (describe the container or envelope if it was placed into an envelope.) which has been shown to the defense attorney. May this item \_\_\_\_ be marked as people's \_\_\_ for identification. May I approach the witness?
- Q: Officer, I am showing you people's \_\_\_\_\_. Do you recognize it?
- Q: How do you recognize it?
- Q: Where did you obtain this item before coming to court today?

object and state that the officer's acting ability, specifically the ability to act like a person under the influence, is not relevant.

**Was the Defendant 647(f) (Drunk in Public) or Other Arrestable Offense?**

Whether the defendant was 647(f), is clearly not relevant. DUI does not require that the defendant be drunk. If defendant was "647(f)," do not object; let the officer answer the question.

**Redirect Examination**

If the defense brings out that a person who is not DUI can also fail particular field sobriety tests, point out that is the reason why more than one FST is given. If the defense has brought out that not all the facts testified to by an officer are contained in his/her police report, the officer should be given the opportunity to explain the purpose of writing reports, i.e., to record enough information so that he/she can recall the complete incident when he/she revises the report months later.

If the defense has brought out that the officer cannot remember anything about the arrests before or after this defendant, ask questions allowing the officer to explain how he/she has not reviewed the arrest reports of those persons which would refresh his/her recollection, as has been done in this case.

- Conclude your redirect examination by asking:
- Q: Officer, is there anything about any of your answers to the questions on cross-examination that affect your opinion as to the defendant's condition?
  - A: No my opinion still is that he/she was under the influence and unable to safely drive an automobile.

## Cross-Examination and Redirect Examination of Officer

**Cross-Examination of the Officer**

Explain the expected areas of cross-examination to the officer in your witness interview. Many defense attorneys follow questions suggested in Erwin's Defense of Drunk Driving Cases (3rd ed. 1975). Relate how many areas raised on cross-examination can be dealt with on redirect by you.

**Demonstration of FSTs by Officer**

If the defense asks the officer to demonstrate FSTs, you should object. If the court allows it, insist that the demonstration be performed in the manner demonstrated to the defendant at the time of arrest. Anything beyond that is clearly not relevant. If the defense asks the officer to perform FSTs the way the defendant did,

## Questions for Other Prosecution Witnesses

**Breath Machine Operator Questions**

(In some jurisdictions this is the officer, in some there is a separate breath technician. These questions, or similar ones, should be what you would see in either case.)

- Q: Are you familiar with the Intoxilyzer model 5000?
- Q: What is an Intoxilyzer 5000?
- Q: Is this instrument approved by the Federal Department of Transportation?
- Q: Is this instrument approved for use by the state of California under Title 17 of the administrative code?
- Q: What is Title 17?
- Q: Please describe your training with the Intoxilyzer 5000.
- Q: Please explain how an Intoxilyzer measures a breath sample for alcohol content.

Q: What steps are taken to insure that the Intoxilyzer is operated properly to produce acceptable results?

COMMENT :

Give criminalist the breath test checklist and breath test card.

Q: Showing you what is marked People's \_\_\_\_ for identification, is this an Intoxilyzer checklist?

Q: Referring to this checklist, what is the serial number of the instrument that was used?

Q: What is the purpose of the 15-minute waiting period prior to the subject giving a sample?

A: To insure against mouth alcohol.

Practice Tip:

If there was some problem(s) with the observation period, ask about the other safeguards for mouth alcohol.

Q: What is the purpose of the air blanks?

Q: What is the purpose of the duplicate breath results?

Q: What is the purpose of the blank breath?

Q: What is the purpose of the simulator test/calibration check?

Q: Referring to the checklist, what was the actual result of the simulator solution as determined by the Intoxilyzer?

Q: Based on the checklist, what was the concentration of the simulator solution used?

Q: Do these results agree within the accepted range permitted by Title 17?

Q: Based upon the checklist, the print card, the activity log, and the accuracy records before you, do you have an opinion as to whether this Intoxilyzer was working properly at the time of the tests?

Q: What is that opinion?

Q: Referring to the checklist, what was the result of the first breath sample?

Q: Referring to the checklist, what was the result of the second breath sample?

Q: What is the acceptable range for a subject's duplicate breath tests?

Q: Are these within the acceptable range?

Q: [Optional] Do you know how many people a year are tested in Orange County with Intoxilyzer 5000 machines?

A: 7,000-10,000.

COMMENT :

This is a good question to ask when the integrity of the machine is being attacked.

Blood Technician/Nurse Questions

Q: On \_\_\_\_\_, what was your occupation?

Q: By whom are you employed?

Q: Can you please give me your educational background?

Q: Are you licensed by the state?

Q: Can you please tell the jury what a blood alcohol kit is?

A: Each kit consists of an envelope, a vial containing a white powder and a label.

Q: Did you use a kit when you drew the defendant's blood?

A: Yes.

Q: Where did you get this kit?

A: It was in some approved storage area.

Q: Was it in a sealed condition when you got it?

A: Yes.

Q: Who has access to these kits?

Q: Was there a white powder in the vial?

A: Yes, it is zephherine chloride, a preservative.

COMMENT :

The technician probably is qualified only to testify to the presence of a white powder but not what the white powder is.

Q: To your knowledge, who prepares these kits?

A: The Orange County Crime Lab. The criminalists have access to records of kit preparation. The technician/nurse does not have access to these records.

Q: Do you remember the defendant?

COMMENT :

Usually the answer is no. It is not necessary for the technician/nurse to identify the defendant because the officer has already testified that he/she saw the defendant's blood go into the vial. The officer has also testified that he/she marked the vial and can identify it.

Q: Why don't you remember the defendant?

A: Because I draw so many samples every week.

Q: Then how do you know this is the defendant's blood vial?

A: By my initials/signature on the vial label and the envelope. The officer was present the entire time.

Q: Do you always follow the same steps every time?

A: Yes, I always follow the same steps in drawing the blood, marking the vial and envelope, etc.

Q: Do you always process defendants one at a time?

A: Yes, I never interrupt one withdrawal to begin another one or anything like that.

Q: What steps did you follow when you withdrew the defendant's blood?

A: I followed the steps on the envelope.

COMMENT :

Have the technician go through steps.

Q: Who was present?

A: Myself, the defendant and the officer.

Q: Did you take any precautions in order to prevent any contaminants from getting on the needle, on the defendant's arm or in the vial?

- A: Yes, including swabbing the defendant's arm with a non-alcoholic solution.
- Q: What time did you withdraw the blood?
- Q: Did you place the defendant's fingerprints on the label?
- Q: Were the vial and envelope marked and sealed?
- Q: What happened next with the vial and envelope?

COMMENT :

The technician/nurse may have retained them and placed them in a locker at a later time, the technician/nurse may have given them to the officer, or the technician may have immediately deposited them in an appropriate receptacle.

- Q: When and where did you see it before?

COMMENT :

Dates and times can be determined from labels on vial.

- Q: Was the vial opened or sealed when you first observed it?

COMMENT :

If the answer is "opened," you may want to lay a foundation as to the "general laboratory procedure" in processing blood samples for forensic alcohol analysis.

- Q: Was the blood alcohol kit prepared by your laboratory?
- Q: Is the method of preparation of this kit included in your method approved by the state of California under Title 17?
- Q: How are these kits prepared?
- Q: What is the purpose of the white powder placed in the vial?
- Q: Did this blood sample appear to be clotted or coagulated at the time of your analysis?
- Q: How do you know it was/wasn't coagulated?
- Q: What method did you use to determine the alcohol content of this blood sample?
- Q: Is this method approved by the state of California under Title 17 for forensic alcohol analysis?
- Q: Briefly explain this method.
- Q: How do you insure the accuracy of this method in determining a blood alcohol level?

- Q: Does your laboratory also participate in alcohol proficiency testing programs?
- Q: Please describe these programs.

COMMENT :

This is where the state sends blood samples to the lab with known BA values for quality control testing.

- Q: Did you analyze this blood sample for alcohol content?
- Q: What was the alcohol level you determined?

COMMENT :

Place blood alcohol kit (vial and envelope) into evidence at this time.

# EXAMINATION OF THE PROSECUTION'S ALCOHOL EXPERT

## Introduction

### Goals for Direct Examination of Criminalist

Most often, the success of a DUI trial depends 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 instrument; or (2) delayed absorption, also known as “last gulp,” explained further below. The People’s witness is usually a criminalist, employed by the Department of Justice or the county crime lab. Occasionally, the criminalist will use the title “Forensic Alcohol Supervisor,” which indicates that he or she is licensed to test blood for alcohol content and testify to findings. It does not denote rank or supervisory status. The expert is necessary to establish two important points for you:

First, the blood/breath/urine testing instrument is accepted in the scientific community, was operating properly at the time of the test, and thus rendered a valid alcohol level result.

Second, the significance of this alcohol level upon the ability to drive safely.

In sum, the direct examination of the criminalist should be uncomplicated, clean, and crisp. The more complicated scientific matters, such as how alcohol is absorbed, “burn-off,” and the absorption of light by alcohol vapor in the Intoxilyzer should be deferred until redirect. The novice prosecutor should avoid getting fouled up with his or her own criminalist on direct. Jury confusion at this point is devastating.

#### EXCEPTION :

You may wish to allow the expert to explain during direct examination a highly unusual condition, such as a breath test from a person with one lung or other unusual medical conditions suffered by the defendant, or widely divergent Intoxilyzer readings (i.e., .08/.11/.10). These issues arise rarely. The criminalist will usually explain that they do not affect the reliability of the test.



## ☐ Blood Alcohol Not Exclusive Measurement of Impairment

You will also notice that we no longer rely upon blood alcohol as the exclusive measure of impairment. Presently, it is unlawful to drive with .08% by weight of blood or breath alcohol. Vehicle Code §23152(b); *People v. Bransford*, (1994) 8 Cal 4th 885, 35 Cal. Rptr 2d 613. This is significant because (1) the overwhelming majority of DUIs involve a breath test; and (2) it is no longer necessary to correlate the amount of breath alcohol to actual blood alcohol, thus making evidence of the “partition ration” inadmissible.

## ☐ Testing Methods

The two most prevalent testing methods in Northern California are the Intoxilyzer 5000 for breath testing and the gas chromatograph for the analysis of blood samples. The Intoxilyzer 5000, introduced around 1990, is a computerized version of the Omicron Intoxilyzer, which was used for about twenty years. The science is the same: the absorption of light at particular frequencies to detect the level of alcohol.

Officers like to use the Intoxilyzer because it is easy and they get immediate results. Arrestees like the breath test because it is non-invasive—no needles—and many people have trouble producing the second urine sample following the initial void. Urine testing is much less common.

The gas chromatograph uses the “headspace” air (between the cork and the liquid blood) to measure the blood alcohol level. It utilizes a slightly more complex scientific principle, although the lab report is usually a certain number (i.e., .105, .115).

## Breath Test Short-Form Direct Examination Questions

A model direct examination follows. It is designed to make the direct examination track your opening statement—specifically, that the Intoxilyzer has been used in excess of 20 years for breath testing, it was working fine, and the results are \_\_\_\_ breath alcohol, which impairs driving. On redirect you will have the opportunity to ask other questions to clear up the defense attempts at confusion. Examples include testimony that (1) there is no evidence that the instrument malfunctioned; (2) the instrument has safeguards, etc. Remember, at this point in the trial (direct examination of the criminalist), your focus is that the particular alcohol testing method is reliable.

## ☐ Intoxilyzer 5000

The following is the minimum number of questions necessary to establish the level of alcohol and its effect.

- Q: What is your occupation?
- Q: What is a criminalist?
- Q: What are your qualifications to hold that position?
- Q: Are you familiar with an instrument known as the Intoxilyzer 5000?

### COMMENT :

Always refer to the Intoxilyzer as an instrument, not a machine. Machines are used to wash clothes, are not scientific, and break easily.

- Q: Can you describe the Intoxilyzer 5000?
- Q: Is it accepted within the scientific community as a method of detecting and measuring alcohol from a breath sample?
- Q: Can you give us a simple explanation of how such an instrument works?

### COMMENT :

This should be just that—that deep lung air is trapped in a chamber, a certain spectrum of light is passed through it which is absorbed by alcohol vapor, and a photometer detects how much light is absorbed. It is often compared to light or dark coffee—the more light absorbed, the higher the breath alcohol level.

- Q: Was the instrument working properly on (date of test)?
- Q: How do you know?

### COMMENT :

The response should be that it was calibrated within 10 days before the test and within 10 days after the test. If this is a DOJ instrument, the calibration is done remotely by telephonic signal.

- Q: Showing you people’s exhibit \_\_\_\_ (the breath test record). Do you recognize such a record?
- Q: Assuming it is the test record for the defendant, what results does it show?

### COMMENT :

The answer you are looking for is the breath alcohol level at a particular date and time.

- Q: Does it indicate the presence of any problems or abnormalities during the test?
- Q: [Optional] Assuming the defendant had absorbed all the alcohol at the time of driving, what would his/her alcohol level be at the time of driving, say \_\_\_\_ am/pm?

### COMMENT :

You need not necessarily attempt to relate back the later test results to the time of driving. Instead, you could choose to rely upon the presumption in Vehicle Code §23152(b) that the defendant drove with that blood alcohol level if the test was conducted within three hours. The disadvantage of

asking this question on direct is that it is probably where the defense will focus. The full absorption of alcohol must be part of your hypothetical or the criminalist will not be able to relate back reliably. Also, not all criminalists agree that the burn-off rate is .02 per hour. Instead of asking this question, you may choose to clear up the question on redirect.

Q: Are you familiar with the effect of alcohol upon the ability to drive safely?

COMMENT :

Notice the emphasis on the ability to drive safely. Anyone who is still conscious can drive a car.

Q: Would you explain your training and experience in this regard?

Q: Based upon your training and experience, do you have an opinion about at what alcohol level all persons are impaired and unable to drive safely?

COMMENT :

It is wise to do this now for two reasons. In the heat of battle, you may forget to do it later. Second, you will find out now—before the criminalist leaves—whether further foundational facts are necessary.

### □ Tips on Redirect

Almost surely the defense will endeavor to show that the test results are inaccurate because (1) the defendant burped or vomited during the waiting period; (2) there was mouth alcohol because of a cut inside the mouth (when an accident occurred); (3) the instrument was not calibrated correctly or the instrument had a long maintenance history; (4) radio interference; and (5) most commonly, that the absorption of alcohol was delayed, also known as “last gulp.”

The criminalist can testify that the Intoxilyzer 5000 has several built-in safeguards:

1. It can detect mouth alcohol vs. deep lung air;
2. It can tell if there was power interruption;
3. It can detect radio interference; and
4. Other chemicals that mimic alcohol in the Intoxilyzer, such as acetone, are lethal if present in detectable levels in breath air.

### □ Notes on Delayed Absorption

The defense theory is that the defendant had unabsorbed alcohol in his/her stomach while driving. Later, when tested at the jail, the additional alcohol absorbed and caused the test result to be higher than at the time of driving.

Remember: (1) The criminalist will testify that most alcohol is absorbed within 15 minutes of consumption; (2) the intoxication interrogation will usually reveal that

the defendant claimed that he or she was drinking much earlier in the day. (It is the tendency of arrestees to deny drinking right before driving and to minimize their consumption.) This is inconsistent with the factual predicate for last gulp. This can be used for cross-examination of the defendant, as the last gulp usually relies upon heavy drinking right before driving.

This will also contradict the defendant's statement to the officer that he/she had a glass of wine with dinner, and that was all.

## Blood Draw Direct Examination

### □ Blood Alcohol Results

This examination format assumes that the blood 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 tech,” 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-alcoholic swab was used without relying upon hearsay.

However, an experienced “blood tech” will have the officer initial the empty swab packet and place it in the small envelope with the blood sample.

Q: What is your occupation?

Q: What is a criminalist?

Q: What qualifications do you possess to hold such a position?

Q: Are you familiar with the analysis of blood to determine the blood alcohol level?

Q: Can you describe your training and experience in this regard?

Q: Showing you people's exhibit \_\_\_\_ (envelope with vile), do you recognize it?

COMMENT :

A competent criminalist will readily find his/her writing on the envelope and vial and will describe when he/she tested it.

A note on chain of evidence: Customarily, the officer does not transmit the sample to the lab; the officer usually places it in an evidence locker. However, depending on the customs of your court, it is seldom necessary to call the evidence technician as a witness. It is easier to rely upon the officer's testimony that the envelope was sealed when he/she relinquished it, and the criminalist's testimony that it was sealed when he/she received it. Also, the criminalist can usually testify to the method that blood alcohol samples are received and processed in the lab.

Q: What method did you use to test the blood?

- Q: Is the gas chromatograph generally accepted within the scientific community as a method of determining the level of alcohol within blood?
- Q: Was the instrument working properly on the date the blood was tested?
- Q: How do you know?
- A: It was calibrated before and after the “run.”
- Q: What were the results of your analysis?
- Q: Are you familiar with the effect of alcohol consumption upon a person’s ability to drive safely?
- Q: Would you describe your training and experience in this regard?
- Q: Do you have an opinion regarding the blood alcohol level at which all persons are under the influence of alcohol?
- Q: What is that opinion?

**COMMENT :**

- | Move your exhibits into evidence.
- | No further questions.

**Redirect Examination**

Each method of testing is vulnerable to mishandling. With blood, the defense may attempt to show one, or both of two things peculiar to blood alcohol testing: (1) If an alcohol-based swab is used, it is possible that the needle will absorb some as it penetrates the skin, thus raising the alcohol level; and/or (2) improperly preserved blood contains alcohol ferments, causing the alcohol level to skyrocket.

On redirect, you can establish: (1) the gas chromatograph distinguishes between isopropyl (rubbing) and ethyl (liquor) alcohol. Therefore, the use of an alcohol swab does not affect the reliability of the test; (2) a grey stopper is an industry standard, indicating that the vial contains a blood preservative to prevent fermentation. Also when alcohol ferments, the alcohol level goes way up—usually beyond lethal levels. Most criminalists agree that .50% and above is lethal. Therefore, these contents did not ferment.

**Urine Testing**

**In General**

Urine testing for blood alcohol content is less common than breath or blood testing. 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 his/her presence).

**CAUTION :**

- | If you have a female defendant and a male officer, it is most likely that the void and sample were obtained by a female corrections officer. In the absence of a stipulation, this person is essential to your case.

**Points of Attack**

Each method of testing is vulnerable to certain kinds of mishandling, and urine is no exception. In order for a urine test to be accurate, it must be preceded by a void at least twenty minutes prior to the actual sample. If there is no first 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/she did not completely void all urine from his/her bladder. Testimony by the officer and cross-examination of the defendant on this point can become indelicate, but necessary: suffice it to say that there is no objective way to determine if the entire contents were voided.

Similar to blood, the defense may also contend that the urine was improperly preserved, causing fermentation.

**Practice Tip:**  
 With female defendants, it is unlikely that the attending officer actually watched them urinate into the bottle. This can lead to “dipping” by defendants to dilute the urine. The criminalist can, however, determine if no urine is present and testify to this fact. In other words, the criminalist can, when appropriate testify that the sample is water. Mere dilution, however, is more problematic.

**General Questions and Blood Alcohol Calculation Questions**

**Opinion Testimony by Experts**

The criminalist from the crime lab can offer his/her opinion as an expert on the evidence as can the defense expert. Both will usually give their opinion as to whether or not the defendant is under the influence for purposes of driving. To give that opinion they will rely upon the driving, appearance and condition, FSTs, drinking pattern and chemical test. Note that the defense attorney will often describe the driving condition and appearance and FSTs inaccurately. Almost always there will be a new drinking pattern.

The opinion of your expert that defendant was over .08 at time of driving is important for your case. Always strongly argue the .08 inference by law.

**General-Interpretation Questions**

- Q: Have you conducted any research regarding the effect of alcohol on the human body, especially as it relates to the ability of a person to drive a motor vehicle?

- Q: Did that research include correlation studies?
- Q: What are correlation studies?

**Practice Tip:**

Make sure to draw out details of correlation studies. How they corroborate amounts of alcohol consumed with blood alcohol levels; correlate blood breath and urine tests with each other; correlate blood alcohol levels with observable symptoms; test driving abilities at various blood alcohol levels, as well as correlating amounts of alcohol consumed with performances on FSTs.

**Practice Tip:**

If you are trying a breath case, have the criminalist elaborate on the fact that in the correlation studies 95% of the breath result's were the same as, or lower (by as much as .02), than the blood results.

- Q: Have you personally conducted or been involved in any correlation studies?
- Q: How many are you conducting or involved in now?
- Q: Please describe one of the more recent correlation studies you have conducted, participated in or observed.
- Q: What is peak?

**COMMENT :**

You want the distinction between absorption and peak made here. A defense expert will confuse the terms to help the rising defense.

- Q: Is there an acceptable rate for how long it takes the average person to peak?

**Practice Tip:**

Be sure and ask your criminalist for any articles or studies relating to a rising BA and the range of absorption periods specifically relating the variations on those times.

- Q: How is alcohol eliminated from the body?
- Q: What is elimination/burn-off? describe it please.
- Q: Is there an accepted average burn-off rate?
- A: Yes. .015 to .02 per/hour for men and .018 to .02 for women.
- Q: Does the BA level include alcohol still in the stomach or intestines?
- A: No.
- Q: Does the BA level include alcohol that has been eliminated from the system?
- A: No.
- Q: So when you have a BA level, is that a measure of the alcohol you have in the blood and the other tissues it supplies?
- A: Yes.
- Q: Does alcohol affect everyone the same?

- A: No.
- Q: Is there such a thing as tolerance to alcohol?
- A: Yes.
- Q: What is tolerance?

**Practice Tip:**

Tolerance will mask gross motor skill impairment, therefore a person with a high BA could have successfully completed part of the FSTs. Look for mental impairment on the FSTs because alcohol will affect a persons' mental ability before their physical ability.

- Q: Does tolerance vary from person to person?
- Q: What is an FST?
- Q: What is your training and experience in regards to FSTs?
- Q: Why are FSTs a useful tool in determining a person's ability to operate a vehicle safely?
- Q: Can a person do well on all or most of the FSTs and still be under the influence for the purpose of operating a vehicle safely?
- A: Yes
- Q: Why is that?
- Q: Based on your training and experience do you have an opinion as to when all persons are under the influence of alcohol and cannot operate their car safely?
- Q: What is that opinion?
- Q: Does your opinion include a person's tolerance to alcohol?
- A: Yes.

**Practice Tip:**

Some criminalists still have an opinion of .10%, so if you have a .08 or .09 BA then you can deal with this problem in the following manner:

- a. See if another criminalist is available to testify; or
- b. Ask the criminalist when most people are under the influence instead of all.

Present a hypothetical of the driving symptoms and FST performances of your defendant to the criminalist and ask for his/her opinion as to that hypothetical person's fitness to safely operate a motor vehicle. Make sure you include in your hypothetical at least some of the things the defendant did well.

- Q: Can you explain why?
- Q: Do you base that opinion on any one thing?
- Q: [Optional question] Would it change your opinion if [symptom] was caused by [excuse/other explanation by defense]?

**COMMENT :**

You may use questions like this when defense has gotten into evidence through your police officer other explanations/excuses for certain symptoms.

Q: Can you think of any one thing other than alcohol that could cause the presence/occurrence of all of these symptoms?

A: No.

Q: Are these symptoms and FST performances consistent with (defendant's BA level)?

## Blood Alcohol (BA) Calculation Questions

The defendant's blood alcohol "at the time of driving" is important and you must get into evidence a BA greater than .08 to survive an 1118.1 motion on the (b) count. Almost always the drinking pattern given to the police officer is untruthful in some respect, either in the number of drinks or time of drinking or both. Either way, it is not going to add up to a BA greater than .08. So first present the defendant's weight, time of driving and the time of the test. The calculation by the criminalist with this information will typically come out to a very low BA or .00. By doing this you've demonstrated that the facts from the defendant (at least as to the number of drinks) are not trustworthy, hence the only reliable unbiased evidence available to determine defendant's BA is the chemical test. With the chemical test certain assumptions need to be made and extrapolation calculations need to be done back to the time of driving.

It is imperative that you go over these calculations with the criminalist before he/she testifies.

- Q: Given the following facts (give the defendant's drinking pattern, start and stop times, and number of drinks, as well as the defendant's weight), what would you expect that person's BA to be at time of test?
- Q: What would you expect that person's BA to be at time of driving?
- Q: Can you calculate a person's BA at [time of driving] if given a chemical test result of that person at [the time of test]?

### COMMENT :

The criminalist will say yes, if certain assumptions are made, such as:

- A drink is defined as a 1 oz. shot of 80 proof alcohol, a 12 oz. beer or an 8 oz. glass of wine, and
- The burn-off rate used is .015, and
- The defendant is post-peak when tested. (The criminalist can safely make this assumption if 1 hour has passed from drinking to test time.)

Q: [Hypothetical] A person is driving at (time of driving) and is tested at (time of test), what would you calculate that person's BA to be at the time of driving?

### COMMENT :

If 1 hour hasn't passed from driving to testing, the criminalist can only give a range of BA levels

because defendant could be rising. That's fine if the range is greater than .08. If it's not, then you will have to use the defendant's stopped drinking time—be careful.

- Q: How much would one drink affect a person that weighed (defendant's weight)?
- Q: how many drinks would a male/female who weighed (defendant's weight) have to have in his/her system to be a (defendant's BA at test time) or (driving time)?
- Q: how many drinks would a male/female who weighed (defendant's weight) have to consume between (defendant's starting time if given) and (defendant's ending time if given) to be a (defendant's BA result) at the time of testing?

### Practice Tip:

The two preceding questions are optional. The first is a good one to use in a higher BA case, to demonstrate the number of drinks the defendant would have to have in his/her system to be a certain blood alcohol level. Example, in a case where defendant's BA is a .14, if defendant is a 160 pound man, he should have to have seven drinks (.02 per drink) in his system at the time of testing! Further, if you have reason to believe that the defendant's drinking pattern is credible (or one that the defense will stick with) but he/she lied about the number of drinks, use the second question. In doing so you will impress the jury not only with the number of drinks the defendant had in his/her system when tested but also the number of drinks he/she had throughout the course of the evening.

Example: Defendant (160 lb. male) drinks from 7:00 pm to 10:30 pm, and is tested at say 12:00 am with a BA result of .10. A .10 result means that the defendant has five drinks in his system (since one drink affects a 160 lb. male .02) when tested, but would have burned off approximately .08 since 7:00 pm (.015 to .02 X 5 hours), which would be the equivalent of four more drinks. With that information you can impress upon the jury that although the BA is only a .10 the defendant had at least nine beers/drinks and then got behind the wheel of a car (could this be a sign of poor judgment?). Furthermore, this calculation undoubtedly proves defendant's claim of two beers to be a lie.

Q: So, is there any possible way that a person could have had (the number of admitted drinks by defendant) between (times of drinking, if given) or have a result of (BA result) at (at time of testing)?

### COMMENT :

This is repetitive of Step 1 but reinforces how defendant was untruthful about the number of drinks.

# COMMON DEFENSES FOR CHEMICAL TESTS

## General

### □ Main Defense Approaches

The defense typically raises several defenses depending upon the chemical test in your case. Below is a list of the most popular defenses with suggested ways to handle them. As soon as you figure out which defense(s) are being used, then you can address them either:

- On direct of your criminalist, or
- On redirect of your criminalist, or
- On cross-examination of the defense expert.

There are four main approaches the defense attorney and their experts use to attack our test evidence and that we use to attack theirs:

- Qualification and bias of criminalist and defense expert.
- Blood alcohol result.
- The expert's opinion of the evidence.
- Hypothetical's as relate to this case (prolonged absorption, rising alcohol etc.).

### □ Qualification of Criminalist

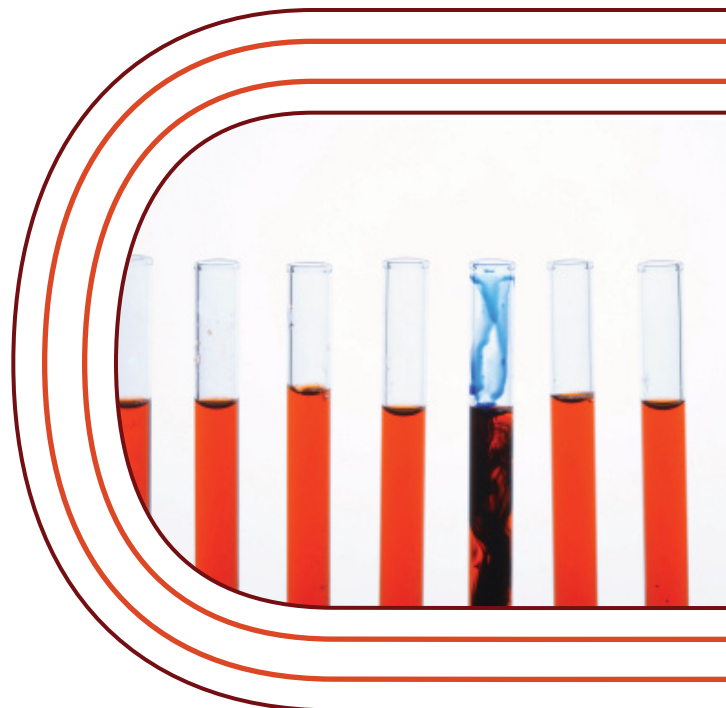
The defense attorney will try to show his/her guy is more educated, more qualified and smarter than our guy. Most of defense experts you will come in contact with have lengthy qualifications but when you tear them apart they are not "as good as they sound." Find out all you can about the defense expert before he/she takes the stand.

Our experts are younger and have less job history so you will probably want to spend some time attacking the defense expert's qualifications.

## Breath Analysis Defense Issues

### □ Overview

Defense attorneys and their criminalists have a field day with breath tests. Here are the popular areas of attack and how to handle them. Remember your general questions cover the fact that the machine, the lab, the personnel, the testing and maintenance procedures are all approved by Title 17. Emphasize that many of the crime labs' testing procedures exceed Title 17 requirements. Discuss with your criminalist beforehand.



### □ Partition Ratio Generally

This is a ratio that expresses the conversion of the amount of alcohol in the breath to what it would be in the blood. Studies indicate that the average ratio among the general population is 2300 to 1; however Title 17 mandates a lower figure of 2100 to 1 be used. This ratio results in the breath tests coming in lower than blood tests by .01% on the average. This explains why correlation studies indicate the breath test is the same or lower than a corresponding blood test 95% of the time. Furthermore, 99.5% of the population falls between 1750 to 2800 to 1. If the defense alleges that the defendant has an unusually low partition ration (hence lower BA), draw all these facts out of your criminalist as well as the fact that a person can be tested for partition ratio (to argue when the defendant hasn't.)

### NOTE :

*People v. Bransford* 15 Cal.App.4th 1626 (May 1993) held that partition ratio evidence is irrelevant, thus prosecutors can run 402 motions before trial and keep out even the mention of partition ratios at trial. Review of this case was granted in August, 1993, and as of November 1993, it was not citable. However, keep abreast of the developments in this area and argue the rational of the Bransford case to attempt and keep partition ratios from the jury. It's just another thing to confuse them.

The bottom line is, if the defense is asking the jury to consider that the defendant may have an unusually low partition ratio (where the defendant was not tested), point out that what the defense is really asking the jury to do is to speculate (guess), or consider evidence that has not been presented.

Although the defense has no obligation to present any evidence if they want the jury to consider this possibility they have the obligation to present evidence, particularly where the defendant could be tested. Essentially when the defense asks the jury to speculate they are asking the jury to disregard the law.

### Defendant's Individual Partition Ratio

Some criminalists will do a blood partition ratio on the defendant in their lab. You may want to run a Kelly/Frye hearing outside the presence of the jury to keep the test out by showing that this procedure is not accepted as reliable within the scientific community and is not accurate because:

- The conditions and environment on the day of the DUI cannot be duplicated;
- The ratio at another day and time has no relevance to what it was on the day in question;
- Ratios calculated at low levels do not apply to the higher levels (and typically the defendant will be tested at a much lower level than on the day he/she was arrested);
- The ratio is ever-changing. No person's ratio remains the same;
- Whatever other reasons our criminalist(s) point out to you.

See *People v. McDonald* 206 Cal.App.3d 877; also make a 352 argument.

#### Practice Tip:

If you run a Kelly/Frye motion have your criminalist sit in and take notes to:

1. Provide you with tips on areas to cross-examine on, and
2. So he/she can be prepared to testify to refute the defense.

If the defendant has been tested and the defense is allowed to put on evidence of the defendant's partition ratio test, cross-examine on the above mentioned areas as well as the specifics:

1. Calibration, maintenance, and record keeping of the breath machine used. Go through everything that our lab does with our machine, such as specifics about calibration checks, simulator solution preparation and changes, maintenance checks, safeguards against mouth alcohol, Title 17 licensing and testing procedures etc. You will find independent labs keep sloppy maintenance records, don't use the Intoxilyzer checklist, aren't licensed by Title

17, don't have printout result capabilities, have no built-in safeguards, and don't even come close to our machines for reliability.

2. Blood testing procedures. Naturally, to do a partition ratio study, a number of breath tests will be done and compared to simultaneously taken blood tests. Questions on specifics of the blood draws should be asked such as:
  - a. Who prepared the kits and ensured the preservative and anticoagulants were present?
  - b. Where are the blood samples?
  - c. Who was the trained and licensed LVN or technician who drew the samples and where is he/she to testify?
  - d. How can we be assured the blood was drawn in a medically-approved manner with a non-alcoholic swabbing solution?
  - e. Was the blood drawn at the same time the breath samples were taken?
  - f. What procedure was used to test the samples and was it approved by Title 17? Typically the enzymatic method of testing will be used so ask: "Isn't it true that that procedure is used by less than 5% of the labs across the county?"
  - g. How many times was each sample tested to assure the accuracy of the testing?

#### Practice Tip:

By the time you are though tearing apart the testing procedures, the jury is at the point where they not only distrust the test but the defense criminalist as well.

#### Practice Tip:

A defense criminalist will always say a breath test is unreliable if done pre-peak (before equilibrium) of the absorption phase. Therefore, if the partition ratio test consists of only two or three tests, there is no way that defendant's absorption pattern could have been tracked and you can challenge the fact that we don't know what stage of absorption the defendant was in when tested. Hence the partition ratio testing is unreliable.

### Mouth Alcohol

The defense may try and say the breath sample or samples were contaminated with mouth alcohol. The reasons this is a bogus claim are because:

1. The 15-minute waiting period and questioning of the defendant guarantees that no mouth alcohol is present and any that was previously present will have dissipated. Title 17 mandates 15 minutes, which was followed, so argue it.
2. The results themselves are a safeguard evidencing that no mouth alcohol was pres-

ent, since they are within .02 of one another. If mouth alcohol was present, it would have been expelled in one of the blows and the readings would have a much greater disparity than the allowable .02 variance and the machine would shut itself down.

3. The Intoxilyzer has a built in negative slope detector that senses mouth alcohol and will shut the machine down.
4. Dubowski, a recognized expert, says mouth alcohol is always gone in 9 minutes.

### ○ Maintenance of Instrument

Have the criminalist explain how the maintenance done by the crime lab exceeds the Title 17 requirements.

### ○ Radio Frequency Interference

1. The machine has an RFI detector.
2. If the defense asserts that the RFI detector was not working:
  - a. It is only a problem if the officer brought his/her radio into the breath room and if it is transmitting, or if there is a power surge—unlikely!

#### Practice Tip:

Ask the officer on direct if he/she left his/her pac set outside of the room. Most are trained to do so.

- b. Interference from a radio is typically de minimis, and if it was detectable it would cause random test results that would be detected.
3. The fact the tests were within .02 of one another indicates there was no problem.

### ○ Acetone and Solvent Interferences

The defense may claim some substances mimic alcohol and fool the instrument. This just doesn't happen. The instrument is set up to detect and invalidate where there is a foreign substance. The old Intoxilyzer 4011A0 could be fooled and this is why diabetics used to have a defense. This is no longer true with the Intoxilyzer 5000.

### ○ Arterial vs. Venous Blood

The breath machine tests arterial blood, which has higher concentration of alcohol than venous blood for blood draws, especially during the absorption phase. The only real noticeable difference when arterial blood can be drastically higher than venous is very early in the absorption phase, because alcohol makes its way into the arteries before the veins. By the time the defen-

dant is tested he/she is well into or past peak absorption where, if anything the defendant will be falling at that time.

The arterial and venous blood will be the same or so close the difference is unremarkable. The venous always catches up to the arterial, and after all what's so wrong with testing the arterial BA level? Aren't the arteries pumping oxygen and the alcohol to the brain? And doesn't the brain control all the functions of the body?

### ○ Temperature

A person with a fever could blow a higher test, but it would take a 2 degree Fahrenheit in body temperature to affect a test by .01.

### ○ Hematocrit

Measure of blood made up of cells. The variation is not more than .01% difference.

### ○ Mother Solution for Calibration Checks

The crime lab mixes up 25 liters of the original solution and uses it for 4 or 5 months. The solution is rechecked constantly and the Intoxilyzer also checks it every time it is used. Bogus defense.

### ○ Low Calibration Checks Readings

Pursuant to Title 17, the acceptable range for the calibration check is .01 difference from the known value. One low calibration check does not make a .07. However, if the defense subpoenas the activity maintenance logs and can show a pattern of the machine consistently reading low, they can argue the test is really closer to being .01 less than the reading, however:

1. This cuts both ways if we can show it is consistently reading high.
2. Remember the breath machines underestimate the true BA, so it's a wash.
3. The machine truncates the third digit; you can get the other digits into evidence if available through your criminalist.

### ○ Simulator Solution Temperature

Title 17 mandates the temperature of the solution be above 33.8 degrees and below 34.2 degrees. Outside these ranges will cause some difference in the calibration check result but doesn't necessarily affect the breath results. Any non-compliance with Title 17 goes to weight and not admissible.

# Blood Analysis Defense Issues

## ○ Lack of Preservative/Anticoagulant

Have criminalist shake/smell/observe the blood tube. Preservative anticoagulant is a powder mixture put in all at once. Free flowing blood has anticoagulant in it, thus it is also preserved. No bacteria can grow to produce alcohol or destroy alcohol, and no clotting has taken place to alter the blood alcohol result on the gas chromatograph.

## ○ Micro Clots

Since blood samples are mixed/homogenized prior to testing, micro clots don't make a micro difference.

## ○ Bacterial Growth

Doesn't happen.

## ○ Contamination of Sample From Arm Swab

Typically a non-alcoholic solution is used to swab the arm. Our approved arm swabs contain so little alcohol it won't register. Injected straight, it is only a .02% and it is used diluted. Common sense dictates that it is nearly impossible to get any of this solution into the needle when you think about the procedure used.

## ○ Switched Samples

Samples are done in duplicate by two criminalist who both check LR numbers. If the results don't agree within .01% the test is repeated.

## ○ Instrument Calibration

Runs contain two quality control samples, one calibrator checks sample, at least two linearity samples, one blank and a separation sample. All ranges will cause some difference in the calibration check result but don't necessarily affect the breath results. Any non-compliance with Title 17 goes to weight and not admissibility.

## ○ Hematocrit (Blood Cell Count)

Normal healthy variation in hematocrit can change blood alcohol level less than .01%; this is a smoke screen.

## ○ Drug/Alcohol Interactions

Most drugs are made more potent by alcohol, especially tranquilizers and antidepressants. Stimulants give you an alert drunk, i.e., a little less drowsy, but still slower to react.

## ○ Aspirin/Tagamet

Drugs that affect the stomach lining may speed the absorption of alcohol so that more alcohol is absorbed sooner. The blood alcohol level will be a little higher than otherwise, but it is a real blood alcohol level.

## ○ Venous vs. Arterial Blood

Hitting an artery is a cardinal sin for blood technicians. One would have to be purposefully trying to do this. A criminalist may be able to tell by color of blood.

# Urine Analysis Defense Issues

## ○ 1.3:1 Ratio (Blood to Urine)

Variation in the blood to urine ratio does occur but is between 1.1 and 1.5 to 1. This is only in properly-collected second samples. The ratio has a strong tendency to be 1.3 to 1 during elimination and when the BAC is above a .04%. Strange ratios occur below .04 or during absorption.

## ○ Void Studies

Wide variations in ratios are commonly found in studies that analyze the void (first) urine samples. The authors commonly state that for this reason urine is a poor substitute for blood alcohol analysis UNLESS THERE IS A VOID. This is irrelevant to second samples, those taken after a void. Flannagan, Morgan, Payne, Forjentes, etc. all did studies using voids (i.e., first time samples).

## ○ Residual Urine

It is physiologically impossible to completely void the bladder. However, the amount of urine left in a cooperative healthy subject is insignificant to the BA result of the second sample.

## ○ Special Note

Urine is the poorest choice for an alcohol test. To be valid:

- The urine sample must be obtained during the elimination phase of alcohol ingestion.
- The BAC must be above a .04%.
- The urine sample must be from a second voiding of the defendant's bladder 20 to 30 minutes after a first void.

# Widmark Calculations

## Defense Issues

### Time to Peak Alcohol Level

Peak alcohol level varies according to the amount of food in the stomach and also sometimes the type of drink. On an empty stomach, the peak may be reached within 15 to 45 minutes, averaging 30 minutes, and sometimes taking up to 60 minutes, especially with strong drinks straight. On a full stomach the rate is 15 minutes to 90 minutes, with an average of 60 minutes, sometimes up to 120 minutes. The curves are lower and broader than empty stomach curves. Time to peak is different than time to total absorption. Absorption phase is up to peak. Elimination is after peak. Defense experts will stretch out the time it takes to reach peak to help the rising BA defense.

### Burn-Off Rate

Burn-off rate varies between .010% per hour to .030% per hour. The average is between .015% and .020% per hour. Calculations may be done using whatever factor you wish. Using .015 to .018 gives the benefit to the defendant.

### Widmark's Factor

Widmark's factor varies for men from .60 to .73; for woman it is between .44 and .66. Averages are .68 for men, .55 to .60 for women. This relates to the percentage of the body that will attract alcohol (alcohol is attracted to any tissue or other part of the body containing water). Lower numbers are for fatter people. Higher numbers are for trim, athletic people.

### Special Note:

Many defense criminalists will use ranges rather than averages and go on possibilities rather than probabilities to create doubt as to accuracy.

# CROSS-EXAMINATION OF DEFENSE WITNESSES

## Cross-Examination of Defense Expert

### □ Breath Questions

Always inquire about Dubowski before you start to question defense expert if it hasn't come up on direct.

- Q: In forming your opinions about people who are under the influence for purpose of driving, have you read and relied upon the work of Dr. Kurt M. Dubowski?
- Q: Isn't it true that Dr. Dubowski is an acknowledged expert in the area of chemical testing for alcohol?
- Q: Are you familiar with his published work?

### Mouth Alcohol

- Q: Hasn't the vast majority of scientific literature reported that 15 minutes is more than long enough for any source of mouth alcohol including food, candy, dentures, dental work, breath sprays and medical inhalers to be eliminated?
- Q: Doesn't Dr. Dubowski state in "recent developments in alcohol analysis" that he found mouth alcohol always gone in 9 minutes, and in 6 minutes if the person rinsed the mouth after drinking alcohol?

### Acetone

- Q: Doesn't Dr. Dubowski state that, even at the maximum breath acetone concentrations possible in diabetics and dieters, there is no significant effect on breath testing instruments?

### Radio Frequency Interference

- Q: Doesn't Dr. Dubowski in state that RFI is a "spurious allegation?"
- Q: Isn't it true that Dubowski said he doesn't like the conversion of breath to blood concept of the breath test, but that the instrument itself is not a problem? That the result should be straight breath alcohol conversion, as the law now is in California?

### □ Questions if Defense Says FSTs Are Not Valid

- Q: Isn't it true that FSTs are intended to allow the officer to observe the ability of the person to mentally follow instructions as well as physically carry them out?

- Q: To your knowledge do most police agencies use FSTs?
- Q: Is it your opinion then that police agencies are wrong to use FSTs and are just wasting their time in giving them?
- Q: Are you assuming that something other than alcohol consumption caused the poor driving observed by the officer on date of arrest?
- Q: Are you making that assumption because it favors the defendant?
- Q: You were not present at (time of arrest) on (date of arrest) were you?
- Q: So you don't know what caused the defendant to drive the way he did?
- Q: You are simply assuming that it wasn't caused by alcohol consumption aren't you?

### □ Questions Defense Expert Says It Takes Two Hours for Absorption

- Q: Isn't it true that the average rate of total absorption of alcohol into the blood is 45 minutes plus or minus 15 minutes?
- Q: Do you have any personal knowledge or evidence to prove that this defendant did not have an average absorption rate on (date of arrest)?



## ○ Questions to Show Bias of Defense Expert

- Q: Do you consider yourself any unbiased witness in this case?
- Q: Are you being paid for your preparation and testimony?
- Q: How much?
- Q: Do you consider yourself a professional witness?
- Q: How much of your income is from misdemeanor DUI cases?
- Q: How many times have you testified in DUI cases in the last year?
- Q: What is your total income in the last year as a result of being called as a defense witness?
- Q: Isn't it a fact that you are concerned that if this defendant is convicted it may reduce the number of times you are called as a defense witness in the future?
- Q: How many times have you testified as an expert for the defense in DUI cases in the past two years?

Another way to go about doing this:

- Q: How many times have you testified as an expert for the prosecution in the past two years? (If the expert says he/she has at all, ask for specifics like court, DA presiding judge, case..... The expert won't be able to give any.)
- Q: Isn't it true that in each and every one of those (number of cases) that you testified where there was a chemical test, your opinion was that the defendant was under .08 at the time of driving?....
- Q: And that regardless whether the defendant took a blood, breath, or urine test?
- Q: And in fact, you've testified that a person with a test result of .28 was less than a .08 at the time of driving. Isn't that true?

## Cross-Examination of Defendant/Defense Witnesses

### ○ Strategy

Like cross-examination of any witness you should try not to be chained to a script of questions but rather have areas you want to cover. You will be at your best if you relax, listen closely, and follow up on things that don't make sense. Don't just go over the defendant's story again with him/her. The defendant has practiced that story over and over and having him/her reiterate it again only reinforces it. Jump around on areas of questioning to keep the defendant off guard. Try and recognize when you are not getting anywhere or are getting hurt and move on. Try to end on a high note. Save an area you know you'll score some points on to the end.

### ○ Driving Patterns

1. If there is a pattern of weaving, have the defendant mark the driving pattern on the same diagram used by the officer. (Have the defendant use a different colored marker than the officer used.)
2. Pin the defendant down on whether the officer accurately described the driving pattern. If not, how is it different?
3. Ask the defendant if the description by the officer represents the defendant's normal driving pattern.
4. If the defendant offers an excuse for poor driving, ask whether the defendant offered that excuse to the officer at the time of the stop. Ask this question only if he/she didn't, and, officer has testified this excuse was not offered.

### ○ Activities Prior to Arrest

1. Pin the defendant down in detail as to all activities, including food and drink consumption, work activities, rest, etc., during the entire day prior to the arrest.
2. Find out everyone who saw the defendant prior to arrest and after drinking had concluded. Find out if these people know the defendant; if not, find out whether any effort was made to find them. If they are not called as witnesses, mention this in argument.
3. If the defendant offers any medical excuse, ask whether the arresting officer was so advised. Find out whether medical treatment continues and from whom; if medical testimony is not offered or something other than alcohol is used to explain; first go into detail as to every way in which it was different, then, at the end, ask if it isn't possible if these differences might be in part associated with the consumption of alcohol.

### ○ Symptoms That Alcohol and Over Consumption Usually Produce in Defendant

Inquire whether the defendant has had sufficient experience with alcohol to know what personal symptoms it produces, particularly when an excessive amount has been consumed. If such symptoms are admitted, then go down the list of all symptoms the officer observed and ask if each is a symptom in the personal experience of the defendant after an excessive amount of alcohol has been consumed. Usually the defendant will concur; then you have developed some good opportunities for argument.

The "Have you stopped beating your wife?" question of DUIs is "Would you consider yourself a light or heavy drinker?" The defendant will invariably state he/she is a light drinker and then you can:

1. Confront him/her with the number of drinks you've calculated he/she had that evening; and/or

2. Use this statement to follow up with questions about how he/she would feel the effects right away or have low tolerance because they are a light or inexperienced drinker.

### □ The Obvious

Don't be afraid to comment on or question the obvious. When the defendant keeps looking over to his/her attorney before answering, ask, "Do you need to talk to him/her before you answer my questions? He wasn't there that night was he?"

If the defendant volunteers something gratuitous like "I go to church all the time," ask why the defendant felt the need to volunteer that to the jury. Or if the defendant starts sweating or looking down when you start questioning, you don't have to be confrontational or even comment on these things if they are very obvious or you don't feel comfortable. Develop your own style and be yourself.

### □ New Drinking Pattern

The defendant will have changed his/her drinking pattern to take advantage of the rising BA defense. If the defendant hasn't taken the position that the cop was lying or mistaken about the old drinking pattern, confront the defendant with the fact that he/she lied to get out of trouble.

### □ Drinking Companion Questions

- Q: You distinctly remember at this time that the defendant had one drink when you first arrived and one drink about an hour later?
- Q: You distinctly remember at this time that you had only one drink during the course of the evening?

#### COMMENT :

At this time the jury should have been left with the impression that the witness enjoys total recall. If there were other persons present in addition to the witness and the defendant, have the witness describe exactly how much and what they had to drink. Memory is likely to fade quickly and this will seem odd if you have previously established that recollection of the number of drinks the defendant had was a product of the witness' own recall as opposed to a suggestion of the defendant or someone else. Inquire as to how many times the witness has been with the defendant on similar occasions and then test recall as to drinks consumed on those occasions. Ask the witness to describe what the defendant was wearing; if the witness remembers the number of drinks, such things as attire should also be remembered.

Toward the end of your examination, ask if the witness knew what defendant's condition was at the time of the arrest. This is an especially good question if the witness and defendant parted company a few hours before the stop.

To establish through the defense witness that the defendant was under the influence (if the witness has stated an opinion that the defendant was not drunk) the following approach is suggested. The first thing to do is define the terms. When a witness testifies the defendant was not drunk, it is a negative statement; the witness is not saying the defendant was sober. You're not interested in whether defendant was "drunk" or intoxicated. Generally, the answer includes inference to slurred speech, staggering, swaying, inability to stand, etc. Once you have established this description from the witness, then work down the scale of intoxication. Often you can get a witness to say that the defendant was "having a good time." Use the term "loose" or "relaxed." Most people rationalize drinking alcohol by indicating that it is a relaxant; i.e., it makes them feel relaxed and loose. Also ask the witness to compare the defendant's nondrinking personality (i.e., in court) with the defendant's drinking personality (i.e., in the bar). In the event you cannot get the witness to say that the defendant was "relaxed," then you should turn to the question of whether the witness has seen the defendant drunk before.

- Q: Then I take it that what you are saying is that the defendant was not falling down drunk?

#### COMMENT :

Keep in mind during the cross-examination of the defense witness (or the defendant), that the witness may honestly believe that the defendant was not intoxicated. This belief is based on the witness' concept of someone who is too intoxicated to drive, which usually is a person bouncing off the walls. Therefore, do not conclude with a mere negative statement that the defendant was not intoxicated. Make the witness convey to the jury a picture of someone who is too intoxicated to drive. You will find that more often than not the witness' concept of the driver who is under the influence is about the standards set by law.

If the witness admits never having seen the defendant intoxicated, then start questioning the basis of the witness' opinion. For example:

- Q: You have never seen the defendant under the influence?
- Q: Do you base your opinion that the defendant was not drunk on comparison with intoxicated persons you have seen?
- Q: Would that be the person with the slurred speech, staggering gait, etc.?
- Q: You say you have never seen the defendant intoxicated, have you seen the defendant drink an alcoholic beverage before?
- Q: You do agree that there are degrees of intoxication ranging from "under the influence" to "dead drunk"?
- Q: You do agree that a person can feel the effects of alcohol without being drunk?

- Q: When you say you have never seen the defendant intoxicated, don't you mean that you have never seen the defendant intoxicated to the point of inability to walk, talk, etc.?
- Q: When asked to search your memory concerning the defendant's state of sobriety on the day of arrest, didn't you think back and remember the defendant was not drunk?
- Q: You weren't searching your mind to determine whether the defendant may have been feeling the effects of alcohol, were you?

### □ Questions for Bartender

- Q: How long after you began working did the defendant arrive?
- Q: Between the time you began working and the time of the defendant's arrival, were there any other customers in the bar?
- Q: How many customers arrived and departed during that period of time?
- Q: How many customers were present at the bar at the time of the defendant's arrival?
- Q: When the defendant arrived was he in the presence of other persons?
- Q: Please identify them.
- Q: What did the defendant do after he arrived at the bar?
- Q: What was the defendant wearing?
- Q: Had you seen the defendant in the bar on other occasions?
- Q: On how many occasions had you seen the defendant in the bar?
- Q: After arriving in the bar, did the defendant order a drink?
- Q: What did the defendant order?
- Q: Did you supply the defendant with a drink?
- Q: At the time you provided the drink were there any other persons present in the bar?
- Q: Please identify the other persons.
- Q: What were they drinking?
- Q: What were they wearing?
- Q: How many bar stool customers do you have to tend to?
- Q: How many cocktail waitresses work in the bar?
- Q: Do you stock your own supplies, get your own ice?
- Q: Do you have to ring up purchases on a cash register?
- Q: You've testified that the defendant was not drunk. You've seen a drunk before, haven't you?
- Q: Describe the symptoms of someone you believe to be drunk.
- Q: Before serving someone do you make it a point to check their state of sobriety?
- Q: Are you aware the law doesn't allow you to serve an alcoholic beverage to a drunk?
- Q: Isn't it a fact that you would lose your license if you served alcohol to a drunk?

- Q: Isn't it a fact that when you are checking a person's state of sobriety you are looking only for the drunk and not the person who is loose, relaxed or a little bit tipsy?

### COMMENT :

The above set of questions is asked for the purpose of making three points on final argument.

1. The bartender's recollection of this particular customer on the day in question is highly questionable.
2. Even assuming the bartender does remember the defendant, the bartender's opinion of the defendant's sobriety is of little value because all the bartender ever really looks for is a person who is drunk to the point that more alcohol should not be served, as opposed to a person who is under the influence.
3. The bartender could not say the defendant was drunk because to do so would be admitting to a violation of the law.

Again, the key word is reasonable and the latter portion of the circumstantial evidence instruction should be emphasized to make it clear that all unreasonable interpretations must be rejected. In addition, the "two reasonable interpretations" argument applies to the totality of the evidence, not to any one fact. Taken as a whole (the totality of the circumstances) there is but one reasonable inference to be drawn.

Finally, the "two reasonable interpretations" issue should be separated from credibility determinations. A witness should not be believed just because he or she might be telling the truth. If that were the state of the law, we would not need juries to determine who is telling the truth!

# CLOSING ARGUMENT

## Introduction

### □ Preparation

Closing argument is your opportunity to persuade the jury that the evidence in your case establishes guilt. It is the time to bring the facts together with the law to show the jury that defendant was driving under the influence.

The key to good argument is preparation. Start by reviewing the charges. Read the jury instructions and know the elements of the law. Next, review the facts. Organize the important facts in a logical fashion. Focus on those facts that establish guilt. Be specific. Do not assume that the jury heard the evidence the way you intended it.

Once you have reviewed the facts and the law, outline your argument.

### □ Moral Behavior and Physical Appearance

As a prosecutor you have an ethical duty to see that justice is done. Always take the moral high ground. Scrupulously avoid any impropriety in argument. Do not mention defendant's failure to testify. Never discuss post-arrest silence. Avoid stating any personal opinion or belief. Finally, do not refer to any facts that were not admitted.

Your physical appearance also sends a message to the jury. Stand straight and tall, make eye contact, and address the jury directly. Speak clearly. Do not pace or move nervously about the courtroom. Finally, keep your argument short. Most people lose patience after 20 minutes.

## First Argument

### □ Outline

Your first argument should cover three things:

- Explain the charges.
- Discuss the facts.
- Argue for conviction.

### □ Explain the Charges

Start by explaining the charges to the jury. Review the jury instructions and prepare a chart of the elements before you argue (CALJIC 16.830, 16.830.1, 16.831).



Use these charts during your argument to explain the law. This gives the jurors a framework for making their decision. Keep it simple:

1. Driving Under the Influence:
  - a. Driving;
  - b. Under the influence.
2. Driving with Blood Alcohol .08 or Greater:
  - a. Driving;
  - b. With blood alcohol of .08 or greater.

Do not assume that the jurors know the law! Help them with their job by giving them this framework to determine guilt.

## □ Discuss the Facts

Facts are the motivators that win cases. Use the facts to paint a picture of an intoxicated driver. Get to the point. Review the important facts that establish driving under the influence. Emphasize the facts that help you; do not focus on the weaknesses in your case. Prepare charts that outline the facts. Most cases can be divided into the following areas:

### 1. Driving

Point out unusual driving. Remind the jury of any weaving, speeding, crossing lines, collisions, or other vehicle code violations. Discuss each fact separately, and emphasize these driving errors.

### 2. Physical Appearance

Describe defendant's appearance. Specifically, note the odor of alcohol; red, bloodshot, watery eyes; slurred speech; poor balance and coordination. Repeat the particular phrases used by witnesses during trial. For instance, if the officer said that "the defendant appeared disoriented" remind the jury of that.

### 3. Statements

Repeat defendant's statements that support your case. Emphasize his statements about drinking: how much he had to drink, what he was drinking, where he was drinking, and how long he was at the bar. If defendant was untruthful, emphasize those statements to the jury—for example "only two beers."

### 4. Field Sobriety Tests

List the field sobriety tests and review defendant's performance. Point out the mistakes: put foot down, swayed side to side, and failed to follow instructions. Help the jury understand field sobriety tests by explaining that they are simply balance and coordination tests to help indicate whether defendant was under the influence.

Explain that field sobriety tests and driving both require divided attention. If the defendant is so impaired that he cannot perform these simple balance tests, surely he cannot safely drive a car.

If the Preliminary Alcohol Screening results were admitted to show presence of alcohol, remind the jury of that fact.

## 5. Officer's Opinion

Remind the jury of the officer's opinion that defendant was under the influence. Explain that the officer is trained in the investigation of DUI cases. Emphasize his experience. Point out that the officer's opinion was based on all of the circumstances: erratic driving, physical appearance of defendant, and performance on the field sobriety tests.

## 6. Blood Alcohol Tests Results/Criminalist

Write the blood alcohol test results so the jury can see them. If the accuracy of the test is an issue, remind the jury that the testing method is approved by the State of California. Remind the jury that the criminalist is trained and licensed, and that he also gave an opinion that defendant was under the influence. If the defendant refused to take test, argue that his refusal shows he was conscious of his guilt, and that he did not want to provide a sample that would incriminate him. (CALJIC 16.835)

## □ Ask Jury to Convict

Remind the jury to consider all facts. All facts taken together establish guilt. End your argument with a planned statement asking the jury to convict.

# Defense Argument and Rebuttal

## □ Defense Argument

Most defense arguments will focus on a weakness in one part of your case. These arguments ask the jury to ignore other factors. In reaching a verdict, jurors should consider all of the facts. Point this out. Take notes of the points raised by the defense during argument. Summarize these points so that you can answer them in a logical manner. Most judges allow a wide range in closing argument. Objections should be made sparingly, if at all. You should object if defense argues facts not in evidence or misstates the law.

## □ Rebuttal Argument

Your rebuttal argument is limited to responding to points raised in the defense argument. Rebut these points by returning to the specific facts that support your case. Reconcile any factual conflicts raised by the defense. Answer questions and resolve any confusion that the defense has raised. Do not leave the jury with unanswered questions. Correct misstatements of the law. If the defense has incorrectly stated the law, explain the law to the jury. Finally, ask the jury to convict. Plan your closing sentence to request that the jury convict.

# Checklists for Closing Argument

## What to Do

- Review the charges.
- Review the facts.
- Outline your argument.
- Be logical and organized.
- Prepare charts.
- Use exhibits.
- Practice your argument.
- Make eye contact.
- Speak clearly and directly.
- Stand straight.
- Take the moral high ground.
- Get to the point.
- Keep it short.

## What to Avoid

- Do not state personal beliefs.
- Do not argue facts not in evidence.
- Do not pace or shift nervously.
- Do not make reference to the defendant's failure to testify.
- Make no mention of post-arrest silence.
- Do not argue to emotions or passions.
- Avoid discussing weaknesses in your case.

# Common Defenses/Responses

Here are some common defense arguments and responses to them.

## "My Client Only Made a Few Mistakes on the Field Sobriety Tests."

Driving is a matter of inches. It only takes a slight mistake to cause a fatal accident. There is not room for mistakes.

## "There Was No Accident."

The law does not require an accident—it seeks to prevent accidents. The law requires only that defendant be under the influence. Poor driving is only one of the factors that lead to the conclusion that the defendant was under the influence.

## "My Client Wasn't Driving."

If defendant wasn't driving, who was? Cars don't drive by themselves. Who was driving? If defendant testifies at trial that another person was driving, ask the jury why he didn't tell this to the officer on the night of the arrest?

## "The Officer Made a Mistake in the Investigation."

Defendant seeks to shift the blame to the officer by focusing on errors in the investigation. Identify this argument for what it is—an attempt to shift the blame. Even

if the officer did make a mistake, defendant was still driving under the influence. Focus the guilt back on defendant by refocusing on the facts.

## "The Officer Is Biased and Just Wants to Win This Case."

Let the jury know that the officer was doing his job, keeping the streets safe by investigating driving under the influence. The officer has nothing to gain in this case. The officer will be back on the street tonight, protecting our streets.

## "The Chemical Test Results Are Incorrect."

The testing instrument is approved by the Federal Department of Transportation and regulated by the California Department of Public Health for the analysis of breath, blood, and urine samples for legal purposes; the instrument was properly operated when the defendant took the test; and the instrument was maintained properly under the law to assure accuracy.

In addition, the defense argument is asking the jury to speculate that something may have gone wrong. The jury may not speculate, and the sole evidence should point to a properly operated and maintained instrument.

The jury should again be urged to view all of the evidence together, the "totality of the circumstances." It may be appropriate to argue that the alcohol result is merely "the icing on the cake"—that all of the other evidence supports the alcohol result, and that not too many years ago juries made decision based solely upon the objective signs of intoxication and impairment, i.e., that a chemical test result is a piece of evidence meant to corroborate the conclusion that the impairment was due to alcohol.

## "My Client Had a Rising Blood Alcohol."

This type of argument should be overcome with help from your criminalist. You will need to review the specific facts regarding the time of driving, time of the test, and the alcohol burn-off rate. Have your criminalist help you prepare a chart to explain to the jury.

## "The People Did Not Call a Certain Witness, so You Don't Have All of the Evidence."

Defendant can call witnesses, and could have subpoenaed the witness. Furthermore, one credible witness is sufficient to prove any fact (CALJIC 2.11).

## "The Evidence Leaves a Reasonable Doubt."

In responding to reasonable doubt arguments, emphasize "reasonable." Ask the jury to be reasonable, and to

use their common sense. Remind the jury to consider all facts together. When all facts are considered, it is clear that defendant is guilty.

Intoxicated persons should be prohibited from driving even if they do not cause an accident. Furthermore, the manner of driving is only one of many factors which may be considered in evaluating whether the driver was under the influence; it is the condition of the drive, not the driving itself, which is important. See CALJIC 16.832.

### ○ “There Really Was No Bad Driving in This Case.”

Bad driving is not an element of the offense; the jury need only find that the defendant drove. Consider the risk the officer runs in permitting a person whose driving is even slightly erratic to continue in the hope that worse driving will occur. Driving under the influence enforcement is most effective when the officers act quickly, before the “bad driving.” The argument based upon CALJIC 16.832 indicated in the preceding paragraph is also applicable.

### ○ “The Officer Is Mistaken, or Has Lied.”

Compare the points of view. The officer was sober. The defendant admits to drinking (if applicable) and was found to have a blood alcohol level of \_\_\_% (or refused to take a test which would have shown exactly how much he had to drink). Use all portions of the credibility jury instruction to assist in contrasting the officer’s and the defendant’s believability. The scientific evidence corroborates the officer’s observations, not the defendant’s story.

### ○ Arguments Based on Sympathy, Including Those With Racial Overtones

If there is a chemical result, the instrument can be characterized as a truly unbiased witness. It does not distinguish between persons except as to their blood alcohol levels. If the defense asserts that a conviction will cause the defendant to lose his or her job, to be deported, to be separated from his or her family in order to go to jail, or to suffer any consequences, an objection should be made immediately and discussion should be had at the bench with respect to the clear impropriety of the defense argument. The prosecutor should request that the court admonish the jury to disregard counsel’s remarks and to reiterate the instructions regarding sympathy and penalty or punishment.

### ○ “A Critical Fact Is Missing From the Arrest Report and the Officer Is Now Embellishing on the Report to Make the Case Seem Stronger.”

Use the whole picture, reiterate the extent of the evidence of against the defendant.

### ○ “My Client Was Honest With You. He Didn’t Come in Here and Tell You That he Hadn’t Had Anything to Drink. He Had Two Beers, and That Was All” (the “Two Beers” Defense).

The admission to the officer or during trial to having consumed any alcohol confirms the officer’s detection of alcohol on the defendant’s breath.

The admission itself, in view of the other evidence indicates a consciousness of guilt, and few people would be willing to—or perhaps even able to—reveal the total amount of alcohol consumed under these circumstances. Few count their drinks, and it is especially difficult to do so after two or three. Finally, a few people act the way the defendant was acting after only two beers; those who do, have a low tolerance for alcohol and are under the influence almost regardless of the amount of alcohol consumed.

If there is a blood alcohol reading, it will corroborate the observations of the officer and impeach the defendant’s claim. If the defendant refuses to take a chemical test, the defendant clearly had something to hide, because the test would have shown the actual amount consumed.

### ○ “My Client Explained to You Why He Refused to Take the Chemical Test.”

These explanations vary from case to case and should be discussed in advance with an experienced prosecutor. Occasionally the defendant will assert that the officer did not offer the chemical tests (or refused to let the defendant take one.) The issue then becomes one of credibility, and it may be helpful to call an additional witness in rebuttal that also was present when the defendant refused. It is the practice of many police departments to have a sergeant re-advise the defendant regarding the chemical tests, providing at least two witnesses to the refusal.

### ○ “Only a Minute Sample of Breath Was Actually Analyzed. You Can’t Even See the Alcohol in Such a Small Amount. Can You Convict a Person of a Crime Based Upon Such a Tiny Amount of Alcohol?”

This is truly a bogus argument, yet it may have some appeal to a few jurors if not refuted. If the “minute

sample” is a point raised by the defense during the cross-examination of the criminalist, questions such as the following should be asked in redirect examination: “Would you be any more confident of a result if a quart or a liter of breath was analyzed? Why not?” The responses to these questions proved the best basis for the argument against the “minute sample” appeal. Gas chromatography (or whatever scientific principle was utilized in the test in question) does not depend upon whether the naked eye could detect the alcohol; it was approved by the Department of Health because it is an instrument of analysis.

○ “Because My Client Performed Well on the Field Sobriety Tests, He Should Be Acquitted Because That Performance Raised a Reasonable Doubt.”

This argument (or any argument concentrating on only one factor) views each factor in a vacuum. Good performance on a field sobriety test does not reasonably explain the totality of the evidence.

○ “The People Get ‘Two Bites at the Apple.’ They Get to Argue to You Twice, but I Only Get Once Chance.”

This or a similar comments are almost always made at some point during the defense argument. It is seldom persuasive as to any issue in the trial and may not deserve comment during the prosecutor’s rebuttal. If, however, a response seems to be called for, it might be simply explained that legal rules of procedure dictate the order of the arguments, and that the People are given the opportunity to refute any arguments made by the defense because the People have the burden of proof.

○ “The DA Didn’t Disprove Our Case” or “Show My Client Was Lying; Therefore His Drinking Pattern Is to Be Believed, and Based Upon That Pattern, He Was Less Than .08 at the Time of Driving.”

Emphasize that only on TV is an attorney skillful enough to get the defendant to break down on the stand and admit he is lying, and just because you didn’t prove he was lying does not mean he is to be believed. The defendant can come into court and say anything he wants about what happened before he was stopped by the police. It’s not our burden to disprove that, it is up to the jury to use their common sense and consider the source of the new drinking pattern that just happens to put him under .08 when driving. Did we think for a minute he’d come up with one that put him over? No, the only unbiased, reliable evidence as to his BA is the machine that tested his blood/breath/urine.

EXAMPLE :

We could give the Pope a glass of wine, and Charles Manson water, and the Intoxilyzer would pick out right away which one of those two people had consumed alcohol.

○ “And, Finally, Ladies and Gentleman, I Ask You to Remember That I Cannot Speak to You Again. Please Listen to the Prosecutor’s Argument as I Will, Thinking of the Arguments That My Client and I Cannot Make.”

This is another one of those rare arguments which probably deserves an objection. The defense is asking the jury to be advocates on behalf of the defendant, urging the jurors to formulate arguments for one of the parties prior to deliberations. This is clearly contrary to the jury instruction admonishing the jurors to keep an open mind and not be advocates for either side. See CALJIC 16.000, Section XVI.

NOTE :

The most valuable resource available to you is your fellow deputies. Don’t hesitate to go through the phone list and call any of the deputies in the office and ask about any legal or practical questions you may have.