THE MASSACHUSETTS PROSECUTORS' MANUAL: OPERATING UNDER THE INFLUENCE

Eighth Edition

2015

Written by
Kimberly A. Fogarty
Updated and Revised by
Andrea Nardone
Staff Attorney, Vehicular Crimes

One Bulfinch Place, Suite 202
Boston, Massachusetts 02114
617-723-0642
www.mass.gov/mdaa

Tara Maguire
Executive Director

THE MASSACHUSETTS PROSECUTORS' MANUAL: OPERATING UNDER THE INFLUENCE

Eighth Edition

2015

Written by
Kimberly A. Fogarty

Updated and Revised by
Andrea Nardone
Staff Attorney, Vehicular Crimes

Acknowledgements

The Massachusetts District Attorneys Association and this author express their deep appreciation to the Executive Office of Public Safety and Security, Highway Safety Division, without whose support and generosity the *Massachusetts Prosecutors OUI Manual* would not have been created.

This author would like to acknowledge the following people who were particularly helpful in sharing their expertise and creative insight:

- John Bosse, Assistant District Attorney, Berkshire County
- Officer Peter Buck, Athol Police Department
- Gregory Connor, Assistant District Attorney, Norfolk County
- John T. Dawley, Jr. Assistant District Attorney, Middlesex County
- Sergeant Don Decker, State Drug Evaluation and Classification Coordinator
- Steven Greenbaum, Assistant District Attorney, Northwestern County
- Lieutenant Daniel Griffin, Massachusetts State Police, Traffic Programs
- Trooper John Jakobowski, Massachusetts State Police, Traffic Programs
- Special Agent Benjamin Lavine, CSX Transportation Police
- Jason Lederman, Assistant District Attorney, Berkshire County
- Paul Machado, Assistant District Attorney, Bristol County
- Detective Richard MacLean, Amherst Police Department
- Trooper Jamie Magarian, Massachusetts State Police
- William J. Melkonian, Director of Training and Supervisor of Motor Vehicle Offense Prosecutions, Essex County
- Trooper Michael Miskell, Massachusetts State Police
- Lieutenant Stephen C. Mullaney, Massachusetts State Police
- Trooper Kevin Packard, Massachusetts State Police
- Andrew Padellaro, Assistant Clerk Magistrate, Lynn District Court
- Neil Scannell, Legal Counsel, Driver Control Unit, Registry of Motor Vehicles
- Nicholas Walsh, Assistant District Attorney, Suffolk County
- Lieutenant Stephen Walsh, Massachusetts State Police

THIS MANUAL WAS FUNDED BY A GRANT AWARDED TO THE MASSACHUSETTS DISTRICT ATTORNEYS ASSOCIATION BY THE HIGHWAY SAFETY DIVISION, OFFICE OF GRANTS AND RESEARCH, EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY.

POINTS OF VIEW IN THIS DOCUMENT ARE THOSE OF THE AUTHOR AND DO NOT NECESSARILY REPRESENT THE OFFICIAL POSITION OR POLICIES OF THE MASSACHUSETTS DISTRICT ATTORNEYS ASSOCIATION OR THE EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY.

TABLE OF CONTENTS

INTRODUCTION

This manual, created especially for prosecutors in Massachusetts, is designed to include everything prosecutors need to know about an operating under the influence (OUI) case – from investigation to case preparation through trial and sentencing. The manual succinctly offers all the information required to truly understand the complex legal and evidentiary issues that arise in many OUI cases. It also provides the means by which prosecutors can always feel ready for trial and prepared to respond to defense challenges.

Ask any prosecutor about her first jury trial and you'll most likely hear that it was an "OUI" case. The reason most prosecutors cut their trial teeth with an OUI is that trying an OUI case seems straightforward: there are only three elements to prove – two of those are often subject to a stipulation (operation and public way), leaving a prosecutor with the seemingly easy task of proving that the defendant in her case was under the influence of alcohol. How difficult can that be? After all, most jurors have either been under the influence themselves at some point or at the very least observed someone in that state.

Truth be told, OUI prosecution is quite complex. First, OUI prosecution actually involves a lot more than just proving the elements. Many OUI cases encompass a host of complicated legal and evidentiary issues that challenge *any* level of trial attorney. Second, although it can be a benefit that jurors are personally familiar with impairment, this fact can also be a hindrance as jurors may identify with the defendant and find it difficult to convict without evidence of a collision or injuries. Third, many OUI defendants have the means to hire seasoned, well-trained defense attorneys who often specialize in handling OUI cases and are on the "cutting edge" of OUI defense.

Recognizing the need to effectively prosecute OUI cases and the challenges prosecutors face in doing so, the Highway Safety Division (HSD), Office of Grants and Research, Executive Office of Public Safety and Security provided grant funds to the Massachusetts District Attorneys Association (MDAA) to provide training and resources to prosecutors in the area of vehicular crimes. A portion of those funds was dedicated to the creation, updating and publication of the *Massachusetts Prosecutors OUI Manual*. The MDAA hopes this manual will provide the necessary framework for Massachusetts prosecutors to excel at trying OUI cases.

CHAPTER I: ALCOHOL TOXICOLOGY

Toxicology is the study of drugs and poisons. Alcohol is considered a moderate toxin or "poison" as it can cause death at extremely high levels.

Most jurors think of operating under the influence as "drunk driving" and thus equate an impaired driver with an individual who is "falling down drunk." A person is "operating under the influence" in violation of G.L. c. 90, § 24 if their *ability to safely operate a motor vehicle is impaired by the consumption of alcohol*. Most individuals are affected by alcohol at low concentrations.

A successful OUI prosecution requires the jury to understand and appreciate the distinction between "drunk" and "under the influence" or "impaired." A solid understanding of the effects of alcohol consumption on the human body and the factors that affect the degree of impairment is essential.

ALCOHOL DEFINED

Ethyl alcohol is the principle component of alcoholic beverages. It is also referred to as grain alcohol, neutral spirits, ethanol and alcohol.[1]

Alcohol is produced by fermentation of either sugar (wine, brandy, champagne) or grains (beer, bourbon, scotch, vodka, rum). Although pure alcohol does have a slight odor, it is the *additives* that contributes to the identifying smell on a person's breath because the amount of alcohol in an alcoholic beverage is typically small. This is why the police always testify to "an odor of an alcoholic beverage" as opposed to an "odor of alcohol."

"Proof" equals twice the amount of the percentage of alcohol present in a beverage. The average drink size is as follows:

12 ounces of beer – 5% alcohol by volume
5 ounces of wine – 12% alcohol by volume
1.5 ounces of hard liquor – 40% alcohol by volume

Despite their differences in concentration, each of the above drinks packs the same punch.

[1] For purposes of this manual, the term "alcohol" will refer to ethyl alcohol as defined above.

HOW DOES ALCOHOL TRAVEL THROUGH THE BODY?

The body wants to eliminate alcohol as fast as possible because alcohol is a poison. The body is eliminating alcohol at the same time a person consumes it. Why is this important?

Understanding how alcohol moves through the body is essential for any prosecutor utilizing a scientist in the Commonwealth's case-in-chief and/or responding to defense attacks on the accuracy of a blood alcohol concentration (BAC) result.

The body processes alcohol in three phases: (1) the absorption phase; (2) the distribution phase; and (3) the elimination phase.

ABSORPTION PHASE

Alcohol is generally ingested through the mouth when one drinks an alcoholic beverage such as beer, wine or hard liquor. The alcohol is absorbed into the body's blood stream and then distributed throughout the body in proportion to the water content of the body's tissues and the amount of blood supply the tissues receive.

There is some delay before a significant amount of alcohol is absorbed. The absorption phase can take as little as 30 minutes, but can also take up to several hours to complete.

The rate at which alcohol is absorbed is affected by:

- The amount and nature of the contents of the stomach – as a general rule, alcohol is absorbed into the bloodstream quicker on an empty stomach. Alcohol consumed with meals or after meals will be absorbed more slowly as a result of being mixed with food.
- The amount of alcohol present in the ingested drink.
- The general health of the individual.
- Medications.

Though alcohol is primarily ingested orally, it can also be ingested by other means such as injection, inhalation, skin absorption, or insertion. While these other methods are possible, they do not create viable defenses for the involuntary ingestion of alcohol.

- **INHALATION:**
  Alcohol can be absorbed into the blood supply through the lungs if alcohol vapors are present in the environment or room air, creating a positive BAC result. HOWEVER, studies have shown that this only occurs after forced heavy respiration of alcohol has occurred for three to four hours in a confined space. This created a concentration of alcohol so irritating to the lungs that the test subjects became nauseous. Additionally, the lungs eliminate the alcohol quite rapidly.

- **ABSORPTION:**
  The rate of absorption is less than the rate of elimination; therefore, no detectable blood levels have ever been reported. Spilling a glass of wine on one's skin will not create a BAC.

- **INJECTION AND INSERTION:**
  Both methods may provide a means for getting drunk and it is highly unlikely that either method could have been employed "involuntarily." However, for purposes of an OUI trial in this manual, alcohol is ingested orally.

ABSORPTIVE OR POST-ABSORPTIVE PHASE?

In the absorptive phase the subject is still absorbing alcohol, as well as eliminating it. Once a person begins absorbing alcohol, they are simultaneously eliminating it. In the post-absorptive phase, the subject eliminates the alcohol.

An understanding of the difference between these two phases is crucial to combat defense challenges to the BAC result. For example, assume a driver claims they finished their last drink a few minutes before being stopped by the police. If this were true, at the time they were stopped they were still in the absorptive phase and their BAC was still rising. If they later took a breath test, they would most likely be in the post-absorptive phase, at which point their BAC would have already peaked. Therefore, they would have had a lower alcohol level when they were stopped than when the test was taken.

DISTRIBUTION PHASE

Alcohol is hydrophilic, meaning it is drawn to water. Alcohol is distributed throughout the water in the body via the blood stream. The amount of water in the body is proportionate to the volume of distribution – the more water in the body, the more dispersed the alcohol will be.

To illustrate, assume that two males each drink one fluid ounce of alcohol. One male weighs 200 lbs.; the other weighs 100 lbs. Every male has 68 lbs. of water for every 100 lbs. of body weight. The heavier male must consume twice as much alcohol as his lighter counterpart to attain the same blood alcohol level because the alcohol is distributed evenly throughout more water (136 lbs., to be exact).

This explains *why alcohol generally has a greater effect on women than men*. Men typically have more "water weight" than women. Women have approximately 55 lbs. of water for every 100 lbs. of body weight. Thus, a 100 lb. male must drink more alcohol than a 100 lb. female to attain the same blood alcohol level.

ELIMINATION PHASE

Ninety-five percent (95 %) of alcohol is eliminated through the liver. Alcohol is directly excreted from the body via the urine, some leaves the body via the breath, and a very small amount gets excreted out in perspiration, tears, saliva or seminal fluid.

The overall alcohol level will start to decrease when the rate of absorption falls below the rate of elimination. Nothing can speed up the process of eliminating alcohol from the body – one cannot increase elimination by drinking coffee, exercising or consuming other foods containing fructose or sugar. Other factors such as the general health of a person can affect the elimination rate. For example, if a person has a diseased liver, elimination will take place more slowly. A person with a high BAC will tend to have an increased elimination rate in order to eliminate the alcohol more rapidly.

"BURN-OFF RATE"

This is the term given to the rate at which the liver eliminates alcohol. It is important to note that an individual's elimination rate is a personal characteristic that remains constant (unlike the rate of absorption, which varies depending on certain factors described above). The burn-off rate can be much higher for an alcoholic and much lower for a non-drinker.

Though the rate varies from person to person, 95% of the population eliminates alcohol at a rate between .009% and .029% per hour. The average person eliminates alcohol at a rate of 0.019% per hour. Scientists often use the *average* rate of elimination (.019%) in extrapolation calculations (see below).

RETROGRADE EXTRAPOLATION

Retrograde extrapolation is the process of predicting what an alcohol level *would have been* at an earlier time based on a BAC taken some time later. This becomes important when there is a delay in obtaining the blood or breath sample or when alcohol was supposedly consumed after the offense but prior to providing the sample. Retrograde extrapolation can also be used to predict the number of drinks the subject would have had to consume to reach the reported BAC. It is affected by numerous factors such as the amount a subject had to drink, types of drinks ingested, and what and when the person last ate.

At trial, a scientist may offer expert testimony to predict the BAC levels at the time of the offense and/or the number of drinks the defendant consumed to acquire that BAC level. In *Commonwealth v. Senior*, 433 Mass. 453 (2001), the Supreme Judicial Court (SJC) deemed the retrograde extrapolation process admissible as it met the *Daubert/Lanigan* standard.

NOTE: the SJC has ruled that when the Commonwealth proceeds on a "per se" theory of operating under the influence, prosecutors are **not** required to present expert

testimony on retrograde extrapolation to admit a breath test result if the test was given within 3 hours of the arrest. *Commonwealth v. Colturi, 448 Mass. 809 (2007).*

Retrograde extrapolation is not a simple task. The scientist needs to know several pieces of information to accurately predict the BAC at the time of the offense, i.e. the weight of the subject, when the last drink was ingested, what/how much the subject ate before drinking, the percentage of alcohol in the drinks consumed and the volume of the drinks consumed. The scientist utilizes a formula, in conjunction with this information, and estimates the amount of alcohol that should be consumed to reach the reported BAC result. This process assumes that the defendant has reached peak absorption and is in the elimination phase at the time of the test.

EFFECTS OF ALCOHOL

Alcohol is a depressant of the central nervous system (CNS) and always impairs the CNS, despite the appearance or lack of outward signs of impairment. Areas within the brain affected by alcohol are those controlling judgment and self-control. Individuals may appear to be in a euphoric mood despite the fact that alcohol is suppressing brain cells and central nervous system activities while in the early stages of alcohol consumption. *This is one of the most dangerous stages of impairment as there are often no discernable signs of alcohol impairment that would lead the individual to perceive that he or she is incapable of driving safely.* Also, consumption of excessive quantities of alcohol can lead to death due to respiratory depression.

THE LEGAL LIMIT – 0.08

In Massachusetts it is against the law to operate a motor vehicle with a BAC of .08 or greater. How did the legislature establish a legal limit of .08? Research shows that at a BAC of .08, virtually everyone's ability to safely operate a motor vehicle is impaired.[2] Based on this research, National Highway Traffic Safety Administration (NHTSA) recommended, in its *1992 Report to Congress*, that every state set the legal limit at .08. On June 30, 1993 Massachusetts lowered its legal limit for intoxication from a .10 to a .08 BAC.

PER SE LAW

A *per se* law makes it illegal *in and of itself* to operate a motor vehicle with an alcohol concentration measured at or above the established illegal level (0.08), regardless of whether or not the driver exhibits visible signs of intoxication.

In its 1992 Report to Congress, NHTSA recommended that all states should enact .08 *per se* laws for drivers 21 years of age or older. In 1997, NHTSA established an action plan to reduce alcohol-related driving fatalities on U.S. highways to 11,000 by the year 2005. NHTSA's plan, titled *Partners in Progress: An Impaired Driving Guide for Action*,

[2] National Highway Traffic Safety Administration (NHTSA)

recommended that all states pass a wide range of measures to combat OUI, including the enactment of illegal *per se* laws, and illegal limits of .08 BAC.

In October 2000, President Clinton signed the Department of Transportation's Appropriations Act for FY2001, which included the landmark provision that states must enact .08 BAC *per se* laws by 2004 or begin losing federal highway construction funds. In 2003, Massachusetts was the last state to pass a .08 *per se* law.

Critics of .08 *per se* fear that there is a movement towards *zero tolerance* – "a person can't go out and have a glass of wine with dinner!" These comments are quite misguided since a BAC of .08 is not just "2 beers." Generally, it takes a 170 lb. man, approximately 4 drinks in one hour on an empty stomach to achieve a BAC of .08 – a 137 lb. woman must drink approximately 3 drinks in that same hour. This is not social drinking. When drivers reach a .08 BAC, their critical driving skills, like distance and speed, steering, visual tracking, concentration, braking, and staying in driving lanes are severely impaired. At a .08 BAC, a person is 11 times more likely to be involved in a fatal crash than someone who has had nothing to drink. [3]

WHAT ARE THE OUTWARD SIGNS OF IMPAIRMENT?

Experience shows that the outward signs of impairment vary widely from person to person, depending on age, disposition, alcohol tolerance and race. Despite the fact that people are reacting differently to alcohol, they are all nonetheless similarly affected as alcohol always depresses the central nervous system and thus has an impact on a person's ability to drive safely, regardless of the person's outward appearance.

HOW IS THIS INFORMATION USEFUL AT TRIAL?

EFFECT ON VISION

- Alcohol has a significant impact on the ability of a person to see, especially at night. Glare is bothersome and distance judgments are impaired. Many car crashes occur at night, while the individual is in traffic dealing with the headlights of on-coming vehicles and the eye cannot react to the glare created by headlights.

- Alcohol also accounts for diminished peripheral vision.

ALCOHOL IS A DEPRESSANT ON THE CENTRAL NERVOUS SYSTEM THAT:

- Reduces the ability of the body to properly react

[3] **The risk of being involved in a crash increases substantially by .08 BAC.** Compared to drivers with no alcohol in their blood system, the risk of being in a crash gradually increases at each BAC level, but rises very rapidly after a driver reaches or exceeds .08 BAC.

    - Reaction time is an important skill in driving, particularly when the driver encounters an impediment in the road or other unanticipated event. The driver is unable to swerve or apply the brakes in a timely manner when impaired.
- Impairs judgment and decision-making ability
    - A person takes risks he or she might not otherwise take. This accounts for driving at excessive speeds or getting behind the wheel after having too many drinks.
    - Also, an impaired person may not realize how impaired they actually are – typically as a person's blood alcohol concentration (BAC) rises, confidence in their abilities also increases.
- Lowers inhibitions
- Affects depth perception
    - A driver's ability to correctly judge the distance between his car and a pedestrian or other car is diminished.
- Affects hand-to-eye coordination
- Disrupts a person's divided attention ability (i.e. ability to do two or more tasks at the same time)
    - Many people can handle a single, focused attention task fairly well when impaired. However, most people cannot satisfactorily divide their attention to handle multiple tasks when impaired. Driving involves multi- tasking.

CHAPTER II: THE ELEMENTS OF AN OUI CASE

In an OUI prosecution, the Commonwealth must prove the following elements:

- OPERATION; AND
- PUBLIC WAY; AND
- UNDER THE INFLUENCE OF INTOXICATING LIQUOR; OR
- WITH A BLOOD ALCOHOL CONCENTRATION OF .08 OR GREATER

Without proof of each element, an OUI case will not survive a directed verdict. Many prosecutors tell war stories about the 0.20 breath test case they lost because they forgot to put in evidence of public way. To avoid this, secure a stipulation from defense counsel regarding public way and operation if those elements are not live issues. In the event that you do not obtain a stipulation, below is a summary of the law defining those elements. The various tools used by law enforcement to establish that a defendant was "under the influence" are also described in detail below.

OPERATION OF A MOTOR VEHICLE

DEFINITION OF A MOTOR VEHICLE

A motor vehicle is defined in G.L. c. 90, § 1 as a vehicle "constructed and designed for propulsion by power other than muscular power including such vehicles when pulled or towed by another motor vehicle." This includes all-terrain vehicles. *Commonwealth v. Gonsalves*, 56 Mass. App. Ct. 506, 508-509 (2002). *Commonwealth v. Soldega*, 80 Mass. App. Ct. 853 (2011).

The statute specifically excludes railroad and railway cars, highway construction equipment that cannot travel at more than 12 M.P.H., wheelchairs, vehicles operated or guided by pedestrians and mopeds.

DEFINITION OF OPERATION

Operation is defined as the intentional manipulation of the ignition or any mechanical part of the vehicle, or use of any electrical agency, which alone or in sequence will set in motion the motive power of that vehicle. *Commonwealth v. Uski*, 263 Mass. 22, 24 (1928). Thus a vehicle does not need to be moving, nor the engine running in order to prove operation.

The Courts have found operation in the following factual scenarios:

- *Commonwealth v. McGillivary,* 78 Mass. App. Ct. 644 (2011) – Evidence of an impaired person in the driver's seat, slumped over the wheel of a parked vehicle, with keys in the ignition with the electricity on, but not the engine.
- *Commonwealth v. Congdon,* 68 Mass. App. Ct. 782 (2007) – Reasonable to infer defendant was the operator when the ignition was on, no one else was in the vicinity, and she went to the car to retrieve her purse.
- *Commonwealth v. Petersen,* 67 Mass. App. Ct. 49 (2006) – Proof of operation may rest entirely on circumstantial evidence.
- *Commonwealth v. Sudderth,* 37 Mass. App. Ct. 317 (1994) – Impaired defendant found in a legally parked car with the engine running.
- *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008 (1987) – Defendant found asleep in the front seat of an erratically parked car with the engine running and the headlights on.
- *Commonwealth v. Ginnetti,* 400 Mass. 181 (1987) – Individual inserting a key and activating the electrical system alone constitutes operation, despite fact that the vehicle could not have been moved due to a road condition.
- *Commonwealth v. Henry,* 229 Mass. 19 (1918) – At night, defendant left his automobile standing on a public way and turned out his lights.

According to *Sudderth*, *supra*, evidence of an impaired person sleeping in the driver's seat of a parked vehicle with keys in the ignition and the engine running is sufficient for a finding of operation. This does not mean, however that the jury should be instructed that they must find operation on those facts. *Commonwealth v. Plowman*, 28 Mass. App. Ct. 230 (1990).

Plowman is an important case on operation and should be read in its entirety. This case is often cited in error for the proposition that a person cannot be convicted of OUI upon evidence that he was impaired while sleeping in the driver's seat of a car whose engine is running. In *Plowman*, the Appeals Court reversed the conviction, not because the evidence was insufficient but rather because the judge improperly instructed the jury that the facts compelled a finding of operation. Also, the instructions ignored the defendant's affirmative defense that he entered a friends' car without any intention of driving. This case deals only with the propriety of the judge's instructions.

See *Commonwealth v. Cavallaro*, 25 Mass. App. Ct. 605 (1988) for facts that are insufficient to support a finding of operation.

CIRCUMSTANTIAL EVIDENCE OF OPERATION

When the defendant is in the driver's seat of his car as he is traveling down Route 128, operation will not be an issue. The issue typically arises when the evidence of operation is merely circumstantial. In those instances, usually the defendant is found passed out behind the wheel of a parked car, or standing outside the vehicle when the police arrive

on the scene of a crash. Despite the lack of an eye-witness to operation, the circumstances (and some common sense) dictate that the defendant had been operating the vehicle just prior to the arrival of the police.

The following cases illustrate factual scenarios in which the court found circumstantial evidence of operation sufficient:

- *Commonwealth v. Cromwell,* 56 Mass. App. Ct. 436 (2002) – The defendant was the registered owner of a car that appeared to have just been in a collision and matched the witness' description; defendant was visibly shaken when police spoke to him at the scene and he cooperated with field sobriety tests.
- *Commonwealth v. Balestra,* 18 Mass. App. Ct. 969 (1984) – Defendant who had been observed driving away from a bar was later found behind the wheel of the wrecked vehicle.
- *Commonwealth v. Wood,* 261 Mass. 458 (1927) – Sole occupant of a car was found slumped over the driver's seat immediately after the collision, even though the car's engine was not running and the car was not moving.

See also *Commonwealth v. Otmishi*, 398 Mass. 69 (1986); *Commonwealth v. Smith*, 368 Mass. 126 (1975); *Commonwealth v. Rand*, 363 Mass. 554 (1973); *Commonwealth v. Colb*y, 23 Mass. App. Ct. 1008 (1987); *Commonwealth v. Geisler*, 14 Mass. App. Ct. 268 (1982); *Commonwealth v. Doyle*, 12 Mass. App. Ct. 786 (1981).

For cases where the circumstantial evidence was held insufficient, see *Commonwealth v. Shea*, 324 Mass. 710 (1949); *Commonwealth v. Mullen*, 3 Mass. App. Ct. 25 (1975).

DEFENDANT'S ADMISSION AS EVIDENCE OF OPERATION

What about circumstances where the defendant *admits* that he was driving his car? Is this enough to prove operation?

For all criminal cases, an admission alone is not enough to sustain a conviction. The rationale behind this rule is to ensure that a crime did in fact take place and that "the criminal act was committed by someone, that is, that the crime was real and not imaginary." *Commonwealth v. Forde*, 392 Mass. 453 (1984). However, an admission supported by *any* corroborating evidence is sufficient. The issue is typically, what constitutes sufficient corroboration?

The following cases cite examples of evidence sufficient to corroborate an admission of operation:

- *Commonwealth v. O'Connor,* 420 Mass. 630 (1995) – Details the defendant provided about the crash and the fact that he cooperated with field sobriety tests.
- *Commonwealth v. Adams,* 421 Mass. 289 (1995) – Identification of defendant as the operator by another motorist.

- C*ommonwealth v. Manning*, 28 Mass. App. Ct. 557 (1993); *Commonwealth v. Towers*, 25 Mass. App. Ct. 557 (1993); *Commonwealth v. McNelley*, 28 Mass. App. Ct. 985 (1990) – Defendant was standing alone by the side of his damaged and disabled vehicle.
- *Commonwealth v. Hilton,* 398 Mass. 63 (1986) – The fact that the car was parked half in the street, half on the sidewalk with the key in the ignition and the defendant sleeping in the vehicle.

Commonwealth v. Leonard, 401 Mass. 470 (1988) is a very important case with regard to admissions of operation and is often cited incorrectly. Defense counsel may try to convince the court that, because of the holding in *Leonard*, an admission of operation is never enough to sustain a conviction.

What does *Leonard* actually say?

- *Leonard* is a very fact specific case in which the evidence was confusing and contradictory, with a possibility that the defendant's wife was actually driving.
- The defendant's admission, made when he was highly intoxicated, was uncorroborated since both he and his wife were outside their vehicle when first observed by witnesses.
- The defendant's wife testified at trial that she had been driving.
- Evidence that the wife's cigarettes were on the passenger floor and the defendant's demand that his wife "give back the keys" was not enough based on the contradictory testimony.

The Court in *Leonard* cites to *Commonwealth v. Forde*, 392 Mass. 453 (1984) which states corroborative evidence to prove operation would require, "some evidence, besides the confession, that the criminal act was committed by someone, that is that the crime was real and not imaginary."

PUBLIC WAY

General Laws chapter 90, § 24 applies to motor vehicles operated on (1) a public way, or (2) a place to which members of the public have access or (3) a place to which members of the public have access as invitees or licensees**.**

(1) A public way is defined in the Model Jury Instruction as any public highway, or a private way that is laid out under authority of a statute, or a way dedicated to public use, or a way that is under the control of park commissioners or a body having similar powers. G.L. c. 90, § 1. Interstate and state highways, as well as municipal streets and roads, would all be included in this definition.

In determining whether a road is a public way, the fact finder may consider:

whether the road is paved, whether it has street lights, street signs, traffic signals, curbing and fire hydrants, whether there are abutting houses or businesses, whether it has any crossroads intersecting it, whether it is publicly maintained, and whether there is an absence of signs prohibiting public access.

It is not necessary to prove that all four wheels of the defendant's vehicle made contact with a public way. See *Commonwealth v. Ginnetti*, 400 Mass. 181, 184 (1987) – A defendant's front wheels came to rest on state highway.

(2) A place to which members of the public have access is a public place that is not a "way," but where the general public still has a right of access by motor vehicle. Examples of this type of "way" are a parking lot that is adjacent to city hall or the parking area of a public park. G.L. c. 90, § 1.

(3) A place to which the public has a right of access as invitees or licensees is a place whose access is limited by the invitation or tolerance of the property owner.
- An "invitee" is a person who is at a place, usually a business establishment, at the request or invitation of the owner.
- A "licensee" is a person who is at a place with the implicit permission of the property owner, for example, a person driving on a private way that is commonly used by the public without the owner's objection.

It makes no difference whether the person is an "invitee" or "licensee" for purposes of G.L. c. 90, § 24D.

Examples of this third alternative include shopping centers, roadside fuel stops, and store and restaurant parking lots. The Appeals Court has held that roads on the grounds of a military installation extensively used by the public fall within the public way statute. *Commonwealth v. Brown*, 51 Mass. App. Ct. 702 (2001). A pier may qualify as a "public way" even where its entrance is blocked by a closed swinging gate and signage limits access to authorized vehicles. *Commonwealth v. Belliveau, 76* Mass. App. Ct. 830 (2010).

In most instances, evidence of the "public way" element is clear and, aside from surviving a directed verdict, proof for the fact finder is not a concern. Circumstances may arise, however, where "public way" is actually a live issue. For instance, what if a defendant is found in the parking lot of a building, after hours, in which "no trespassing" signs are posted?

The test is not based on the subjective intent of the property owner but rather the *objective appearance of the property*, i.e. whether from appearances "members of the public may reasonably conclude that it is open for travel to invitees or licensee of the abutters." *Commonwealth v. Hart*, 26 Mass. App. Ct. 235, 238 (1988). For instance, the parking lot of a closed shopping mall may be a way to which members of the public have

access as invitees or licensees, if the mall has amenities that are accessible (i.e. ATM, payphones, newspaper boxes) regardless of whether the mall is open. *Commonwealth v. Kiss*, 59 Mass. App. Ct. 247, 250 (2003).

A good test is to ask whether the defendant could have been subject to prosecution for trespass for being on the property. See *Commonwealth v. Callahan,* 405 Mass. 200 (1989). If so, the property probably will not qualify as a public way.

The following places have been determined not to qualify as a "public way" for purposes of G.L. c. 90, § 1:

- Sandpit – *Commonwealth v. Callahan, supra* – A sandpit that the owners gave no authority for the public to use was not a public way, despite the fact that the owners knew that the public often used the sandpits for recreation yet took few affirmative steps to keep the public out.
- Softball field – *Commonwealth v. George*, 406 Mass. 635 (1990) – A softball field is not a place to which the motoring public has access.
- Isolated dirt road – *Rivers v. Warwick*, 37 Mass. App. Ct. 593 (1994) – An isolated dirt road occasionally plowed and graded by town as an accommodation to home owner did not make the road a public way.
- Grated gravel haul road – *Commonwealth v. Smithson*, 41 Mass. App. Ct. 545 (1996) – A grated gravel haul road leading to a sandpit with clearly posted business hours was not a public way after hours and/or on a national holiday.
- Shared driveway – *Commonwealth v. Virgilio*, 79 Mass. App. Ct. 570 (2011) – A driveway and parking area which were shared by and accessible to the occupants and guests of two residential buildings is not a public way notwithstanding that it was neither gated nor posted.

General Laws chapter 233, § 79F provides that a certificate from the proper state/municipal official that a way qualifies as a "public way" shall be admissible as *prima facie evidence* of that element. Other official documents including a conveying deed, a certificate of municipal acceptance, a certificate that the roadway is in a municipal road directory are admissible as evidence tending to show that a particular road is a public way. It is important to note, that there may be a Confrontation Clause challenge to this evidence in light of *Crawford v. Washington*, 541 U.S. 36 (2004), but remember these documents were not prepared in anticipation of trial.

NOTE: Whether a street is a public way is an issue of fact and not a subject of judicial notice. *Commonwealth v. Hayden,* 354 Mass. 727 (1968).

UNDER THE INFLUENCE OF ALCOHOL

Most law enforcement officers in Massachusetts have received specific training on how to investigate impaired driving cases. This three-day training was developed by the

National Highway Traffic Safety Administration (NHTSA) and is outlined in a student manual entitled *DWI Detection and Standardized Field Sobriety Testing* (most recent version is May 2013).

Police officers trained in accordance with the NHTSA course[4] learn to conduct an OUI "investigation" in three phases:

(1) **VEHICLE IN MOTION** – the officer is looking for cues of impairment in the manner of operation of the motor vehicle.
(2) **PERSONAL CONTACT** – the officer must pay close attention to the subject's outward appearance, looking for visible signs of impairment**.**
(3) **PRE-ARREST SCREENING** – if the officer suspects that the subject is impaired, the officer utilizes law enforcement tools such as standardized field sobriety tests and/or a portable breath test device to assist in developing probable cause to believe the subject is impaired by alcohol, drugs or a combination of the two.

Once the arrest is made, the officer has two means available that, with the consent of the defendant, can measure the defendant's BAC. This can be done by either a breath test or a blood test**.**

If a defendant is taken to a hospital and refuses to consent to a blood test, the officer may still be able to obtain a BAC reading. When a defendant is brought to the hospital his blood is drawn for medical purposes, the medical records of the treatment facility should contain a BAC from blood tests taken and can be summonsed to court.

MANNER OF OPERATION

What better evidence that alcohol impairs one's ability to safely drive a motor vehicle than observations of that inability? Police officers receive specific training on how to detect recognizable indicators of impairment while driving.

According to *DWI Detection and Standardized Field Sobriety Testing*, NHTSA has identified **4 categories** of 20 cues that are associated with impaired driving. These cues were developed from interviews with law enforcement specialists, from a detailed analysis of more than 1,000 OUI arrest reports, and from a field study in which the cues were observed in more than 600 motor vehicle stops.

The cues are as follows:

PROBLEMS MAINTAINING PROPER LANE POSITION

- Weaving, weaving across lines
- Straddling a lane line, swerving

[4] Full-time municipal police officers are required to attend police academy training through the Municipal Police Training Committee. The Committee employs the NHTSA course, as does the State Police Training Academy.

- Turning with a ride radius, drifting
- Almost striking a vehicle or other object

SPEED AND BRAKING PROBLEMS

- Stopping problems (too far, too short, or too jerky)
- Accelerating or decelerating for no apparent reason
- Varying speed, slow speed (10+ miles under limit)

VIGILANCE PROBLEMS

- Driving in opposing lanes or wrong way on a one way street
- Slow response to traffic signals
- Slow or failure to respond to officer's signals
- Stopping in lane for no apparent reason
- Driving without headlights at night
- Failure to signal or signal inconsistent with driving action

JUDGMENT PROBLEMS

- Following too closely
- Improper or unsafe lane change
- Illegal or improper turn (too fast, jerky, sharp, etc.)
- Driving on other than the designated roadway
- Stopping inappropriately in response to officer
- Inappropriate or unusual behavior (throwing objects from vehicle, arguing, etc.)
- Appearing to be impaired

This list is not an exhaustive one; nor must each cue be present to indicate impairment. The cues described are just that: cues to alert the officer that a driver may be impaired.

VISIBLE SIGNS OF IMPAIRMENT

As alcohol affects the body and one becomes impaired, he or she will exhibit various signs of that impairment. Some of the most common signs are the following:

- Odor of an alcoholic beverage on the breath or about the person
- Bloodshot and watery eyes
- Poor balance
- Unkempt or disheveled look
- Bruises, bumps or scratches on the face and/or body
- Fumbling fingers
- Poor vision
- Pupils are slow to react to light
- Suspect feels sick and/or nauseous
- Slow reaction to verbal commands

- Slow reaction to external stimuli
- Sleepy-eyed look
- Flushed face
- Loud or raunchy behavior or abusive language
- Poor judgment
- Slowed or poor hand to eye coordination
- Unusual actions or statements
- Slurred speech

In making their assessment of impairment, police officers are also trained to be on the alert for:

- Physical evidence such as containers of alcohol, drugs or drug paraphernalia
- Unusual odors including but not limited to the odor of alcohol, marijuana or cover up odors like breath sprays
- Admissions of drinking
- The manner in which the subject gets out of his vehicle – this is known as the "exit sequence" where the police officer is looking for any of the following signals:
  - An angry or unusual reaction to the officer's request to exit the car
  - Inability to follow instructions
  - Inability to open the door
  - Leaving the vehicle in gear
  - Climbing out of the vehicle
  - Leaning against vehicle
  - Keeping one's hands on the vehicle for balance

Aside from making observations, police officers are also trained to test the subject's ability to divide his attention by:

(1) Asking for two or more documents simultaneously – an impaired driver may forget to produce either document or produce documents other than the ones requested. Also, he may fail to find the license, registration or both while searching through his wallet, fumble or drop his wallet, license or registration, or may be unable to retrieve the documents at all.
(2) Asking interrupting questions – an impaired driver may ignore the question and concentrate only on the first questions asked, forget to resume his search after answering the question, or supply a grossly incorrect answer to the question.
(3) Asking unusual questions, i.e. "what is your middle name?" or "what is your birth date?" while looking at the subject's license.

STANDARDIZED FIELD SOBRIETY TESTS (SFSTS)

"Field sobriety tests" is the term given to all tests of skill that the police officer conducts to determine if a driver is impaired. NHTSA-trained police officers are taught to administer three (3) scientifically validated psychophysical field sobriety tests. These tests are referred to as the Standardized Field Sobriety Tests (SFSTs) and were selected after exhaustive research on the subject. Beginning in 1975, NHTSA-sponsored studies were conducted to determine which roadside field sobriety tests were the most accurate. Six tests were examined and the following three tests were found to be highly reliable for distinguishing BACs above 0.10%.

1. **Horizontal Gaze Nystagmus**
2. **Walk and Turn**
3. **One-Leg Stand**

These tests are designed to be simple and are easily performed by the average person when sober. They were selected because they simulate the divided attention characteristics of driving and exercise the same mental and physical capabilities that a person needs to drive safely such as: information processing; short-term memory; judgment and decision making; balance; steady sure reactions; clear vision; small muscle control; and coordination of limbs. Given the national trend toward a lower BAC limit (0.08), a study was conducted in 1998 that found the SFSTs to be extremely accurate in discriminating between BACs above and below 0.08%. See Appendix D.

HORIZONTAL GAZE NYSTAGMUS (HGN)

HGN is the most reliable of all field sobriety tests because the observation of nystagmus, or involuntary jerking of the eyes, indicates that *something* is disrupting and interfering with the central nervous system. Whether that "something" is alcohol is a question to be answered by a variety of factors, including the observations of the police and ruling out other causes of nystagmus such as head trauma, disease, or other drugs.

The principles behind HGN are rather simple. The movement of the eye is controlled by six muscles through the central nervous system control center. As alcohol disrupts the central nervous system, certain bodily functions are slowed down including this muscle control (this also accounts for the onset of slurred speech and unsteadiness). The result is that the eye can no longer move smoothly because the operation of the controlling muscles has been slowed. This causes an inability of the eye to control its movement and is seen as an involuntary "jerking" of the eye as it moves up and down (vertical) and from side to side (horizontal). This loss or inability to smoothly control the eyes is termed nystagmus.

It is important to note that, unlike the other field sobriety tests, nystagmus is completely involuntary – an impaired subject might be able to practice and master the walk-and-turn but cannot control how their eyes move.

ADMINISTRATION OF THE TEST:

- If the person is wearing glasses, the officer requests they be removed.
- To eliminate a medical disorder as the cause for nystagmus, both eyes are checked for equal tracking (can they follow an object together?) and equal pupil size. The officer positions the stimulus (pointer, pen, pencil, etc.) approximately 12-15 inches from the person's nose and slightly above the eye level. The officer then moves the stimulus smoothly across the person's entire field of vision. If eyes don't track together it could indicate a possible medical disorder or injury. Also, if the pupils are not equal in size, this could indicate a head injury.
- Beginning with left eye, the police officer looks for the following 3 validated cues or signs:
    1. **LACK OF SMOOTH PURSUIT** – the officer moves the stimulus to the right, smoothly at a speed that requires approximately 2 seconds to bring the eye as far as it can go. The officer then moves the stimulus all the way back to the left and checks the right eye. The officer then repeats this portion of the test. As the eyes move from side to side, do they move smoothly or do they jerk noticeably? As people become impaired by alcohol, their eyes exhibit a lack of smooth pursuit as they move from side to side. When a person is not impaired their eyes will move smoothly like a marble rolling across a smooth plane of glass (as opposed to a marble moving across sandpaper).

    2. **DISTINCT AND SUSTAINED NYSTAGMUS AT MAXIMUM DEVIATION** – the officer moves the stimulus to the right until the left eye has gone as far to the side as possible (no white should be showing at the corner of the eye). The officer will hold this position for a minimum of 4–6 seconds and observe the eye. The officer then moves the stimulus all the way across the person's face to check the right eye. This portion of the test should also be repeated. When the eye moves as far to the side as possible and is kept at that position for 4–6 seconds, the officer is looking to see whether it jerks distinctly and is sustained.

    3. **ONSET OF NYSTAGMUS PRIOR TO 45-DEGREES** – the officer then moves the stimulus toward the right, taking about 4 seconds for the stimulus to reach the edge of the subject's shoulder. The officer carefully watches the left eye for any sign of jerking. If the officer notices jerking of the eye, the officer should stop and verify that the jerking continues. Next the officer checks the right eye. The officer moves the stimulus to the left, taking 4 seconds to reach an approximate 45-degree angle, again repeating this portion of the test. As the eye moves toward the side, the officer is looking to see whether it starts to jerk before it has moved through a 45-degree angle.

RESULTS:
Since there are three cues and two eyes, the maximum number of cues that may appear in any given person is **six.** The original research shows that if **four** or more cues are evident, the central nervous system has been impaired and, if that impairment is due to the consumption of alcohol, it is likely that the subject's blood alcohol concentration is above 0.10%. With four-or-more cues present, this test is 77% accurate.

According to NHTSA research, HGN is the most reliable of the three standardized tests and alone can provide valid indications to support arrest decisions at a BAC of 0.08%. For more information on this topic, see **Chapter III: Preparing Your Case for Trial – when the HGN test was administered**

WALK AND TURN
This test is administered in two stages:

(a) The instructions stage – the officer provides instruction while the subject listens, standing with both feet in a specific heel-to-toe position and arms at their sides. These tasks test balancing and information processing abilities.
(b) The walking stage – the subject takes nine heel-to-toe steps, turns in a prescribed manner and takes nine heel-to-toe steps back while counting steps out loud, watching their feet, arms at their side and told not to step until the test is completed as instructed. These tasks test balancing, small muscle control and short-term memory.

While the test is being administered, the police officer is looking for eight (8) validated cues:

1. Inability to balance during instructions
2. Starts too soon during instructions
3. Stops while walking
4. Does not touch heel-to-toe (1/2 inch or greater)
5. Steps off line
6. Uses arms to balance
7. Improper turn
8. Incorrect number of steps

Studies show that, 68% of the time, drivers who exhibit two or more cues have a BAC of 0.10% or greater.

NOTE:

- The officer should explain and demonstrate the test to the subject.
- The test should not be repeated from the beginning if the subject has difficulty but should be continued from the point of the problem.
- The officer is looking for the presence of the clue, regardless of the number of times the clue is exhibited. For instance, failure to touch heel-to-toe counts as one clue no matter how many times the defendant fails to touch heel-to-toe.

- Ideally, the test should be performed on a straight line (real or imaginary); on a reasonably dry, hard, level, non-slippery surface; there should be sufficient room for the suspect to perform the test. NHTSA recognizes the fact that this condition may not always be realistic and validation studies show that varying environmental conditions have not affected a subject's ability to perform this test.
- For officer safety, the subject should be observed from a safe distance.
- The subject may opt to remove any footwear they feel it will hinder their performance on the test.

ONE-LEG STAND

This test is administered in two stages:

(a) The instructions stage – the subject must stand with their feet together, keeping their arms at their sides while listening to instructions. This tests the subject's balancing and information processing abilities.

(b) The balance and counting stage – the subject must raise one leg (either left or right) approximately six inches off the ground, with raised foot parallel to the ground, keeping both legs straight, with arms at sides. While looking at the elevated foot, the subject must count out loud until they are instructed to stop. This is a 30 second exercise timed by the officer. The subject should count for 30 seconds as studies show that impaired individuals are able to stand on one leg for up to 25 seconds but that few can do so for 30 seconds. This is a divided attention task which tests mental and physical impairment.

While the test is being administered, the police officer is looking for four (4) validated cues:

1. Swaying while balancing
2. Using the arms to balance
3. Hopping
4. Putting foot down

Studies show drivers who exhibit two or more cues or those who cannot complete the test or who put their foot down three or more times during the 30-second period have a BAC above 0.10%, 65% of the time.

NOTE:

- The officer should explain and demonstrate the test to the subject.
- If the subject puts their foot down, they should continue counting from that point.
- Ideally, the test should be performed on a reasonably dry, hard, level and non-slippery surface. NHTSA recognizes the fact that this ideal condition will not always be realistic.

- The subject may opt to remove any footwear they feel will hinder their performance on the test.

ARE THESE TESTS RELIABLE INDICATORS OF IMPAIRMENT?

The following findings were made regarding the reliability of the 3 standardized field sobriety tests:

- By combining HGN and the walk and turn test, 80% accuracy in identifying subjects with BAC over 0.10% can be achieved.
- Correct decisions to arrest were made 95% of the time.
- Correct decisions to arrest were made 91% of the time at a BAC level of 0.08% and above, with HGN being the most reliable test.

This validation applies only when (1) the tests are administered in the prescribed standardized manner; (2) the standardized cues are used to assess the subject's performance; and (3) the standardized criteria are employed to interpret that performance. If any element is changed, the validity is compromised. **See Chapter V, Section I: Common Defense Pre-Trial Motions, for a discussion on the admissibility of field sobriety tests at trial.**

NON-STANDARDIZED TESTS

Many police officers use other methods to test a subject's sobriety. Some of the more common tests are:

- Alphabet test – recitation of the alphabet from A-Z.
- Finger count – subject is asked to touch the tip of the thumb in turn to the tip of each finger on the same hand while simultaneously counting up (one, two, three, four), then reverse direction while counting down (four, three, two, one).
- Finger-to-nose test – subject is asked to touch the tip of their nose with their forefinger.
- Romberg test – the subject stands with feet together, eyes closed and hands by the sides for an estimated 30 seconds.

Although these tests are not included in the battery of standardized tests, they may nonetheless aid officers in making their determination of probable cause.

MEASURING ALCOHOL CONCENTRATION: BLOOD/BREATH

Although alcohol is evenly distributed throughout all body water, its concentration can be measured in the blood and/or the contents of exhaled air. A reading of one's blood alcohol level (BAC) can help determine whether a person is legally "impaired."

MASSACHUSETTS LAW REGARDING BAC LEVELS[5]

Based on the determination that persons with a BAC of 0.08% or greater cannot safely operate a motor vehicle, the Massachusetts Legislature amended G.L. c.90, § 24 in 1993, reducing the legal limit from .10% to .08%. In 2003 the legislature took it a step further and enacted a *per se* law of .08%. What about those persons arrested for OUI who take a breath/blood test and the result is *below* .08%?

G.L. c. 90, § 24(1) (e) provides the following:

- A reading of 0.05% or below creates a permissible inference that the defendant is not under the influence of intoxicating liquor and they shall be released forthwith (be careful – not released from all charges but rather just the OUI alcohol charge). If the reading is 0.02% or higher and defendant is under 21 years of age, the Registry will suspend the license.
- A reading of 0.06% or 0.07% does not create a permissible inference of intoxication but the defendant can still be charged and held pending bail.

Note: Prior to the enactment of the *per se* statute, the law included language that indicated a reading of 0.08% or above created a permissible inference that the defendant was under the influence at the time of offense. That language was eliminated when the *per se* statute was enacted in 2003.

VARIOUS METHODS USED TO MEASURE BLOOD ALCOHOL LEVEL

THE PRELIMINARY/PORTABLE BREATH TEST DEVICES (PBT)

The preliminary or portable breath test device (PBT) is used roadside by the investigating officer. It is a pre-arrest screening technique that assists the officer in making their determination as to probable cause for arrest and should be used as the final field sobriety test.

Similar to a breath test instrument, the PBT detects the presence of alcohol and provides the officer with a BAC reading. PBTs are certified by the Office of Alcohol Testing (OAT) on a yearly basis. It is important to note that the breath testing regulations (501 CMR 2.00 et seq.) do not apply to portable breath test instruments.

Officers administering the PBT need not be certified as breath test operators, but must become certified PBT operators. This certification is valid for life.

PBT results are generally not admissible in the Commonwealth's case-in-chief. The primary reason for this bar to admission has to do with the type of technology that the

[5] **Note:** Those with commercial licenses are held to a different standard. According to G.L. c. 90F, § 10, detection of any amount of alcohol will place the driver out of service for 24 hours. If the BAC is 0.04% or greater, the operator will lose his commercial license for one year.

PBT employs. General Law Chapter 90, § 24K states that breath test results shall only be valid for introduction into evidence when performed using "infrared breath-testing devices." A PBT is not an infrared device but rather utilizes *fuel cell technology* to detect the presence of alcohol in the breath. Although this type of technology is reliable, our general laws have not recognized its validity.

There may, however, be circumstances in which PBT results will be admissible. **See Chapter V: Defense Challenges, for a full discussion of this topic.**

THE BREATH TEST

HOW DOES THE BREATH TEST INSTRUMENT WORK?

There is a relationship between the amount of alcohol present in the breath and the amount of alcohol present in the blood. That relationship is a constant and is not dependent on sex, weight or metabolism of the individual or how much the individual consumed. Henry's Law, which states, *at a constant temperature, the amount of a given gas that dissolves in a given type and volume of liquid is directly proportional to the partial pressure of that gas in equilibrium with that liquid*, defines the relationship between liquid and gas as a ratio.

All breath-testing instruments certified in the Commonwealth use the 2100:1 blood/ratio to calculate the blood alcohol concentration of an individual. This ratio is biased in favor of the accused.[6] The instrument collects a breath sample, analyzes the sample for alcohol content, multiplies the result by 2100 and reports the result as the individuals BAC. A sample of deep lung air is required for analysis. Deep lung air is where the exchange takes place between the capillaries and the air sacs. The capillaries contain the blood that is mixed with alcohol.

Infrared breath testing instruments utilize a source of infrared light to analyze a breath sample and report an individual's BAC. Each molecule of alcohol absorbs infrared light at particular wavelengths within the spectrum unique to alcohol. Beer's Law states that a relationship exists between light passed through an absorbing material and the amount of light that is absorbed. This relationship can be measured or quantified. With respect to breath testing, the light is the infrared light given off by the source and the absorbing material is the ethanol molecules present in the deep lung air sample.

WHAT TYPE OF BREATH TESTING DEVICE IS USED IN MASSACHUSETTS?

Prior to 2002, the type of breath test instrument used by the police varied from department to department. In an effort to establish uniformity throughout the Commonwealth, the Highway Safety Division, Office of Grants and Research, Executive

[6] A ratio of 2300:1 may be more accurate but the 2100:1 ratio was approved in *State v. Downie*, 117 N.J. 450, 569 (1990), *cert denied*, 111 S.Ct. 63 (1990). State v. State v. Chun, et. al, 191 NJ 308 (2007). Using this ratio actually underreports a person's blood alcohol by anywhere from 9-12%.

Office of Public Safety and Security granted funds to the Office of Alcohol Testing (OAT) to design and distribute a new standardized, uniform breath alcohol testing system, also known as BATS. As of December 2004, most local and state police departments in Massachusetts were equipped with the Draeger Alcotest 7110 MKIII-C. In July 2010, the OAT began a statewide upgrade of the breath testing system. As of October 2012, the Draeger Alcotest 9510 has replaced the Draeger Alcotest MKIII-C across the state.

Implementation of a centralized, statewide breath testing system has brought about significant changes in the execution of a breath test, as well as the manner in which the device is maintained and records are kept.

The Draeger Alcotest 9510 uses ***dual*** technology, (infrared *and* fuel cell) to analyze a breath sample for alcohol content. As stated earlier, only results obtained on infrared breath testing devices are considered valid under Massachusetts law. Therefore, the Breath Test Report Form will only report the infrared result as being a subject's BAC. The fuel cell result is used to ensure there are no interfering substances present in a subject's breath sample. Prosecutors should be aware that the fuel cell result is available and is printed on every breath testing document that comes from the Office of Alcohol Testing.

Every breath testing device across the state is connected to a central OUI server located in Chelsea. Breath test results are printed locally at the police department or barracks at the completion of a test. This information is transmitted over a secure network and stored in a central server located in Chelsea. The breath testing technology utilized by the Alcotest 9510 is the same as the Alcotest 7110; the main difference between the instruments is the mechanism by which the data is transported over the network to Chelsea.

The OAT can access the data contained in the breath testing records from the Chelsea server; however, the records from OAT will not be in the same format as the original documents and cannot be altered in any way to look like the records from the breath test instrument.

THE LAW:

***COMMONWEALTH V. BARBEAU,* 411 MASS. 782 (1992)** – The Commonwealth must establish the existence of, and compliance with, requirements of a periodic testing program for breathalyzer instruments in accordance with G.L.c.90 s.24K, and regulations promulgated there under, before the results of a breathalyzer test may be admitted in evidence against a defendant charged with operating a motor vehicle while under the influence of intoxicating liquor.

M.G.L. C. 90 S. 24K – **"**Chemical analysis of the breath of a person charged with a violation of this chapter shall not be considered valid under the provisions of this chapter, unless such analysis has been performed by a certified operator, using infrared

breath-testing devices according to methods approved by the secretary of public safety. The secretary of public safety shall promulgate rules and regulations regarding satisfactory methods, techniques and criteria for the conduct of such tests, and shall establish a statewide training and certification program for all operators of such devices and a periodic certification program for such breath testing devices; provided, however, that the secretary may terminate or revoke such certification at his discretion." 501 CMR 2.00 et seq. establishes the Office of Alcohol Testing and defines its duties. "Said regulations shall include, but shall not be limited to the following: (a) that the chemical analysis of the breath of a person charged be performed by a certified operator using a certified infrared breath-testing device in the following sequence: (1) one adequate breath sample analysis: (2) one calibration standard analysis; (3) a second adequate breath sample analysis; (b) that no person shall perform such a test unless certified by the secretary of public safety; (c) that no breath testing device, mouthpiece or tube shall be cleaned with any substance containing alcohol."

501 CMR 2.00 ET SEQ. – Rules and regulations promulgated by the Secretary of Public Safety regarding breath testing in the Commonwealth (current version effective April 2010).

THE FIVE AND THREE RULE:

To introduce a breath test a prosecutor needs to prove:

1. The defendant consented to take the test.
2. The operator was certified.
3. The instrument was certified.
4. The instrument was working properly at the time of the test.
5. The breath test was valid.

To introduce a breath test result into evidence a prosecutor needs the following documents:

1. The Statutory Rights and Consent Form
2. The Breath Test Report Form
3. The Periodic Test Report

THE BLOOD TEST

Blood test evidence comes in two forms: **consensual** (done at the defendant's request) and **nonconsensual/no state action** (taken as part of medical treatment).

CONSENSUAL

If the defendant consents to a test of his blood, the defendant must be under arrest for OUI and the blood must be drawn at the direction of a police officer. For administration of the test the defendant must be taken to a licensed medical facility under G.L. c.111, § 51. The blood will be transported by a police officer to the Massachusetts State Police

Crime Laboratory for analysis. The reported BAC is in whole blood and needs no conversion.

The statutory medical exceptions to a blood test are listed below.[7]

1. Hemophiliacs
2. Diabetics
3. Persons having a condition that requires anticoagulants

NOTE: The State Police Crime Laboratory disposes of blood samples after six months unless it receives a written request to retain the sample. It may be wise to request preservation of the sample as a matter of course if you believe your case is going to trial. Remember to notify the lab when your case is disposed and the blood is no longer necessary.

NONCONSENSUAL/NO STATE ACTION

Quite often an individual involved in a collision who is suspected of driving while under the influence of alcohol is taken to the hospital. If this occurs before the police can make independent observations of the driver, the officer should use the opinions of EMT's, witnesses, and/or other evidence available at the scene to determine whether the driver was under the influence of alcohol or drugs. The officer will be able to apply for a search warrant to obtain the results of the driver's hospital blood test when probable cause exists that the driver was under the influence of alcohol or drugs.

Blood is drawn at the hospital routinely for non-forensic purposes. A laboratory technician conducts a variety of routine tests. One of these tests is an examination to determine the level of alcohol (ETOH) in the blood. Most hospitals analyze the serum portion of the blood, not the whole blood. Thus, the hospital determines the alcohol concentration in the serum. Studies show that ninety five percent (95%) of serum readings are from 1.12 to 1.18 higher than whole blood readings. On average, serum results will be approximately .14% higher than whole blood tests. This does not mean that the tests are inadmissible. The serum result simply needs to be converted from a serum result to a whole blood result. A conversion chart can be found in **Appendix C**. Additionally, a prosecutor can request a serum conversion report based on the specifics of their case from a chemist at the Office of Alcohol Testing.

For more discussion on the admissibility of blood test results, see the following chapters/sections:

- Chapter III: *Preparing Your Case for Trial* – when there is a blood test done
- Chapter IV: *Admitting Evidence at Trial* – medical records/blood alcohol result
- Chapter V: *Defenses Challenges* – blood test

[7] Compare the breath test. There are no medical exceptions for breath.

.08 *PER SE*

On June 30, 2003, the Legislature enacted significant legislation that created an alternative for culpability – .08 *per se*. This legislation means that it is against the law to operate a motor vehicle with a blood alcohol level (BAC) of .08% or greater. No evidence of actual impairment is necessary for a defendant to be found guilty under this theory of culpability.

Because there are now two theories by which a defendant may be found guilty under G.L. c. 90, § 24, it is important for the jury to render a special verdict. A special verdict is one in which the fact finder must state the theory of culpability in which they relied in finding the defendant guilty. The jury must unanimously agree on the verdict and the specific theor(ies) of culpability.

A special verdict slip will look something like this:

We, the jury, unanimously return the following verdict:

- ❑ NOT GUILTY
- ❑ GUILTY OF
  (check one or both of the following:)

- ❑ OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF INTOXICATION LIQUOR
  AND/OR
- ❑ OPERATING A MOTOR VEHICLE WITH A BLOOD ALCOHOL LEVEL OF .08% OR GREATER

This issue becomes particularly important in the event of an appeal or motion for new trial. To illustrate, consider the following scenario. Defendant Jones is arrested for OUI after the police opine he is under the influence. Once under arrest, he takes a breath test with a result of .10. All evidence is presented to the jury and the defendant is found guilty of one count of OUI. On appeal, the Court rules that the breath test should have been suppressed. Can the conviction stand? If a special verdict had been rendered, indicating the jury had relied on evidence of *impairment* to convict, the conviction would most likely be upheld. This is why it is so important that the jury be clear in rendering their verdict.

PRACTICE TIP: Remember, the jury is not being asked to find guilt on two crimes; simply to decide which theory or theories of culpability apply to the facts of the case. The prosecutor does not need to elect the theory of culpability on which she wishes to proceed *Commonwealth v. Colturi*, 448 Mass. 809 (2007). If faced with a judge who orders the Commonwealth to make such an election, remind the judge of other areas in the law in which alternative theories of culpability are presented to the jury. For

example, the crime of first degree murder can be committed in several ways: with premeditation and deliberation, with extreme atrocity and cruelty, and/or during the commission of a crime punishable by death or life imprisonment. See. G.L. c. 265, § 1. The jury must select the theor(ies) by which to find the defendant guilty, but the defendant will only be found guilty of one count of murder in the first degree. In this case, the complaint is similarly configured. The jury can find the defendant guilty of one count of violating G.L. c. 90, § 24, but must select the theor(ies) on which to find him guilty (operating with a BAC of .08 or greater or operating under the influence – or both).

SUBSEQUENT OFFENSE

OVERVIEW:

"General Laws c. 90, § 24, is the Massachusetts OUI statute. Section 24(1)(a)(1) makes it a crime to operate a motor vehicle on a public way while under the influence of an intoxicant, and sets forth more severe penalties for those convicted of second or subsequent offenses." *Commonwealth v. Maloney*, 447 Mass. 577, 580 (2006). The purpose of this guide is to teach the prosecutor how to prepare for a subsequent OUI trial from arraignment through trial.

THE ARRAIGNMENT

- Review the defendant's Massachusetts criminal record and out-of-state record to insure that the defendant has been charged appropriately. If the defendant has a prior OUI conviction that has not been charged in the original complaint file a written motion to amend the complaint pursuant to Mass. R. Crim. P. 4(d).

"When used to enhance a penalty, prior convictions must be alleged in the complaint or indictment and proved. If a defendant is made susceptible to a prescribed statutorily enhanced penalty because of a former conviction, the predicate offense must be alleged in the complaint or indictment." *Commonwealth v. Pagan*, 445 Mass. 161, 167 (2005).

The prior offense is not a freestanding crime but concerns "solely the sentence of a person convicted of a [current] violation…who has previously been convicted of at least one similar…offense. The prior offense is not an element of the crime for which a defendant is charged but concerns the punishment to be imposed if he is convicted [of the current offense] and the prior offense is proved." *Commonwealth v. Miranda*, 441 Mass. 783, 788 (2004), quoting *Bynum v. Commonwealth, 429 Mass. 705, 708-709 (1999).*

- Amending a complaint or indictment to include the repeat-offender conviction is a matter of form, not substance. *Commonwealth v. Miranda*, 441 Mass. 783, 788 (2004).

"Matters of form are those that are 'not essential to the description of the crime charged.'" *Commonwealth v. Ruidiaz*, 65 Mass. App. Ct. 462, 463 (2006), quoting *Commonwealth v. Knight*, 437 Mass. 487, 491 (2002).

An amendment that adds an essential element to the offense is a matter of substance. See *Commonwealth v. Ruidiaz*, 65 Mass. App. Ct. 462, 464 (2006).

- If the judge does not allow the motion to amend or the defense does not assent to the motion, the Commonwealth can file a new complaint, **and then** dismiss the original OUI complaint.

No double jeopardy violation where Commonwealth dismissed with "prejudice" the original complaint charging OUI, First Offense, and replaced it with a new complaint charging OUI, Second Offense. No trial had begun and jeopardy had not attached. *Commonwealth v. Magnuson*, 39 Mass. App. Ct. 903 (1995).

- After the arraignment immediately start on your discovery requests which should include the minimum:

    1. Certified attested copy of the defendant's prior OUI convictions and appearance or waiver of counsel.

    2. Certified attested records from the registry of motor vehicles (RMV), which includes the defendant's driving history.

    3. If the defendant has out-of-state OUI convictions request a certified attested copy of the defendant's driving history from the RMV of the state where the OUI occurred. The out-of-state driving history will often contain information and details about the out-of-state OUI conviction and biographical information about the defendant. This helps corroborate the information within the certified convictions.

    4. Booking video from the defendant's underlying OUI. The defendant may had made admissions to have previously been convicted of OUI.

THE PRETRIAL HEARING

MOTION TO DISMISS:

A situation may arise during the pretrial stage where defense counsel files a motion to dismiss the prior OUI convictions alleged in the complaint. A defense attorney may

argue that the complaint was issued in error because there is no probable cause that the defendant was previously convicted of OUI. For example, a defense attorney may file a motion to dismiss on grounds that an out-of-state OUI conviction is not a "like offense" to the Massachusetts OUI Statute.

The prosecutor should file a memorandum in opposition to the defendant's motion to dismiss and argue that under G.L. c. 278, § 11A (Repeat Offender Enhancement Statute), the defendant's motion to dismiss is premature.
Section 11A states in pertinent part:

"If a defendant is charged with a crime for which more severe punishment is provided for second and subsequent offenses, and the complaint or indictment alleges that the offense charged is a second or subsequent offense, the defendant on arraignment shall be inquired of only for a plea of guilty or not guilty to the crime charged… If a defendant pleads guilty or if there is a verdict or finding of guilty after trial, then before sentence is imposed, the defendant shall be further inquired of for a plea of guilty or not guilty to that portion of the complaint or indictment alleging that the crime charged is a second or subsequent offense. If he pleads guilty thereto, sentence shall be imposed; if he pleads not guilty thereto, he shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trial. A defendant may waive trial by jury."

"The subsequent offense portion of the charge against a defendant does not create an independent crime; rather, it concerns only the punishment to be imposed **if a defendant is convicted of the underlying crime** and the prior offenses are proved." *Commonwealth v. Pelletier*, 449 Mass. 392, 396 (2007).

Under § 11A, a Court should not entertain such a motion to dismiss prior convictions until there has been either a plea or guilty verdict on the underlying OUI.

DISCOVERY:
The pretrial stage is an opportunity for the prosecutor to make sure that all discovery relevant to proving the prior convictions is turned over to the defense in a timely fashion. The prosecutor does not want to give the defense an opportunity to argue that discovery was turned over only a few days before trial or even on the day of trial. If you have not received the prior convictions by the first pretrial hearing, get on the phone and start making calls to the courts where the convictions are on file.

SUBSEQUENT OUI TRIAL

OVERVIEW OF THE LAW GOVERNING REPEAT OFFENDER TRIALS:
"In order to subject a repeat OUI offender to these greater penalties, the Commonwealth must prove the prior convictions in a separate proceeding pursuant to G.L. c. 278, § 11A." *Maloney, supra*, 447 Mass. at 580. Section 11A requires a

bifurcated procedure. Under the procedure a defendant is "required to be tried…first, on the underlying substantive crime, and, then, in a separate proceeding, on that component of the charge referring to the crime as a second or subsequent offense." *Commonwealth v. Miranda*, 441 Mass. 783, 787-788 (2004).

Section 11A provides in pertinent part:

"If a defendant is charged with a crime for which more severe punishment is provided for second and subsequent offenses, and the complaint or indictment alleges that the offense charged is a second or subsequent offense, the defendant on arraignment shall be inquired of only for a plea of guilty or not guilty to the crime charged…If a defendant pleads guilty or if there is a verdict or finding of guilty after trial, then before sentence is imposed, the defendant shall be further inquired of a for a plea of guilty or not guilty to that portion of the complaint or indictment alleging that the crime charged is a second or subsequent offense. If he pleads guilty thereto, sentence shall be imposed; if he pleads not guilty thereto, he shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials…Upon the return of a verdict, after the separate trial of the issue of conviction of one or more prior offenses, the court shall impose the sentence appropriate to said verdict."

Proceedings under § 11A "are subject to all of the provisions of law governing criminal trials and the Commonwealth must prove prior convictions beyond a reasonable doubt." *Maloney*, 447 Mass. at 580. (internal quotation marks and citations omitted).

JURY WAIVER:

After a plea or guilty verdict on the underlying OUI, the defendant can plead not guilty to the prior convictions and request a jury trial. § 11A, *supra*. If the defendant elects to proceed by bench trial, make sure the trial judge conducts a jury waiver colloquy and procures a written waiver from the defendant. See *Commonwealth v. Dussault*, 71 Mass. App. Ct. 542, 547-549 (2008) (OUI, Third Offense conviction vacated where judge failed to conduct a jury waiver colloquy or procure a written waiver from the defendant after the jury found the defendant guilty of the underlying OUI offense.) There has been established a bright-line rule "that to effectively waive his right to a jury trial, a defendant must sign a written waiver form pursuant to G.L. c. 263, § 6, and the trial judge must conduct a colloquy to assure himself that the defendant's waiver was voluntary, knowing, and intelligent." *Dussault*, 71 Mass. App. Ct. at 547. "Absent satisfaction of both requirements, a conviction cannot stand." *Id*. at 548.

Contrast *Commonwealth v. Saulnier* (Appeals Court No. 12-P-931) (December 6, 2013) (In OUI, Fourth Offense, because Trial Judge conducted jury waiver colloquy and defendant submitted a written waiver of his right to a jury trial on the underlying OUI offense, Trial Judge was not required to conduct a colloquy and obtain a written jury trial waiver before a bench trial commenced on the subsequent offense portion of the complaint).

The difference being, in *Dussault*, the defendant was tried by a jury on the underlying offense and thus there was never a jury waiver for the subsequent offense portion. In *Saulnier*, the defendant waived his right to a jury trial on the underlying offense, and thus, the Court did not have to repeat the jury waiver colloquy or procure a written waiver from the defendant for the subsequent offense portion.

EVIDENCE TO PROVE PRIOR OUI CONVICTIONS:
The Commonwealth must prove that the defendant in the courtroom is the same person named in the prior convictions. *Commonwealth v. Koney*, 421 Mass. 295, 301-302 (1995). "Mere identify of name is not sufficient to indicate an identity of person." *Id*. at 302.

"While identity of name alone is insufficient, when the conviction records include more identifying information than merely the offender's name,…this requirement will be met." *Dussault*, *supra*, 71 Mass. App. Ct. at 547 (2008). (internal quotation marks and citations omitted).

1. *Testimony of Arresting Officer or Booking Officer on the underlying OUI*. Following opening statements in the subsequent OUI trial, the prosecutor will want to call the arresting officer or booking officer on the underlying OUI. At the trial, the officer should identify the defendant as the person that was arrested and convicted of the underlying OUI. Also, the officer will be able to testify about the defendant's biographical information, such as:

- Full name including middle initial;
- Date of birth;
- Height and weight;
- Color of eyes and hair;
- Current residential address;
- Driver License number.

The defendant's biographical information is important in order to help link the defendant to the prior convictions. See *Koney*, *supra*.

Routine questions by police at booking, including questions regarding name, address, height, weight, eye color and date of birth, are not interrogation and may be asked without Miranda warnings. *Commonwealth v. Guerrero*, 32 Mass. App. Ct. 263, 267 (1992).

2. *Documentary Evidence*. Massachusetts Generals Laws Chapter 90, section 24(4) lists the documents that can be introduced at a subsequent OUI trial. Section 24(4) states as follows:

"In any prosecution commenced pursuant to this section, introduction into evidence of a prior conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, **or** certified attested copies of the defendant's biographical informational data from records of the department of probation, any jail or house of corrections, the department of correction, or the registry, shall be prima facie evidence that the defendant before the court had been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction. Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior convictions described therein. **The Commonwealth shall not be required to introduce any additional corroborating evidence, nor live witness testimony to establish the validity of such prior convictions.**"

Section 24(4) permits "the use of various types of records (jail, house of correction, department of correction, probation, or RMV) **as alternatives** to certified prior convictions to establish prima facie evidence of a defendant's previous conviction." *Commonwealth v. Bowden*, 447 Mass. 593, 600 (2005). "The meaning of 'prima facie' in the criminal context is that in the absence of competing evidence, the jury [are] permitted, but not required, to find that the inferred or presumed fact [is] true beyond a reasonable doubt." *Commonwealth v. Parenteau*, 460 Mass. 1, n. 8 (2011). (internal quotations and citations omitted).

"It was not the purpose of the amendment that added § 24(4) to render the evidence listed therein the sole method of proof…" *Bowden*, 447 Mass. at 599.

The most common documents that the Commonwealth will introduce at a subsequent OUI trial are certified attested copies of the prior convictions and the RMV records. Often, the prior convictions and RMV records along with the testimony of the arresting or booking officer on the underlying OUI will be sufficient proof to link the defendant to the prior convictions beyond a reasonable doubt. See *Bowden*, 447 Mass. at 596, 602 (2006).

Besides containing information regarding the disposition of a case, such as the sentence or type of punishment, as well as the date of conviction, certified convictions will often contain the defendant's name, date of birth and their address at the time of the prior offense. The defendant's driving history within the RMV records will reference the prior OUI offenses, including the court where the prior OUI was prosecuted and the finding date ("date conviction was entered"). The last page of the driving history will also include the defendant's full name (including previous names), date of birth, social security number, sex, height, mailing and residential address. The defendant's driver's license number, and any former numbers (note that many former license numbers were the same as a person's social security number) can also be located on the last page of

the driving history. Besides *Bowden* and *Maloney*, *supra*, for another great case as to how properly attested RMV records are relevant and admissible in a subsequent OUI trial see *Commonwealth v. Cahillane*, 78 Mass. App. Ct. 1104, (2010) (Unpublished Order pursuant to Rule 1:28; No. 09-P-666). Judge properly ruled that Registrar's attestation at the beginning of RMV records applied to the entire group of documents, including the driving history. *Id*. at *2. Driving history is in the same format as the first page of the exhibit and contains the same "certification date." *Id*. "In addition, at the bottom of the last page of the driving history are the words 'End of Report.'" *Id*.

The prosecutor will argue that the information within the certified prior convictions matches the information within the RMV records. Further, the prosecutor should argue that the biographical information testified to by the arresting or booking officer on the underlying OUI also matches the information within the prior convictions and RMV records. Also, if the defendant has an unusual first or last name, this can be considered in linking the defendant to the prior convictions. See Co*mmonwealth v. Dussault*, 71 Mass. App. Ct. 542, 547 (2008) (A judge can take into account that a defendant's last name is an unusual one); *Commonwealth v. Paroli*, 2012 Mass. Unpub. LEXIS 26, *6 ("The judge could take into account the fact that the defendant's first and last names were unusual ones.").

Recently in *Commonwealth v. Bigley*, 85 Mass. App. Ct. 507 (2014), the Appeals Court held that the defendant's ***certified*** Board of Probation record could be admitted into evidence at the Defendant's subsequent portion of his trial for OUI, Fourth Offense. "The probation record was admissible as a business record and as a summary of records regularly maintained by the Board of Probation." *Id.* at 516.

The Court in *Bigley*, further held that "[t]aken together with the defendant's identifying information contained in the court dockets, the RMV records, and the Board of Probation records, there was sufficient evidence from which the judge could conclude that the defendant had previously been convicted of three offenses of operating while under the influence of alcohol." *Id.* at 517.

AUTHENTICITY REQUIREMENT:

Massachusetts certified convictions and RMV records are also admissible under G.L. c. 233, § 76 and § 78. See *Commonwealth v. Martinez-Guzman*, 76 Mass. App. Ct. 167, 168, 171 (2010). Further, the RMV records are admissible under G.L. c. 90, § 30.[8] To be admissible under all these statutes, it is important that these records be "certified attested" copies. "An 'attested' copy of a document is one which has been examined and compared with the original, with a certificate or memorandum of its correctness,

[8] "General laws c. 90, § 30,…provides in relevant part: 'The registrar may issue a certified copy, attested by him or his agent,…Certified copies of such records of the register, attested by the registrar or his authorized agent, shall be admissible as evidence in any court of the commonwealth to prove the facts contained therein.'" *Commonwealth v. Martinez-Guzman*, 76 Mass. App. Ct. 167, 172 n. 4 (2010).

signed by the persons who have examined it." *Commonwealth v. Deramo*, 436 Mass. 40, 47 (2002), quoting Black's Law Dictionary 127-128 (6th ed. 1990). "To qualify as an 'attested' copy, there must be 'a written and signed certification that it is a correct copy.'" *Deramo*, 436 Mass. at 47. "It is a well-established principle that in the absence of a statutory directive, a signature may be affixed in many different ways. It may be written by hand or it may be stamped, printed, or affixed by other means." *Commonwealth v. Johnson*, 32 Mass. App. Ct. 355, 357 (1992). See also *Commonwealth v. Martinez-Guzman*, 76 Mass. App. Ct. 167, 171 (2010) (A stamped signature on a certificate authenticating RMV documents is a proper attestation under G.L. c. 233, § 76.).

"When a party takes a properly authenticated copy of an official record and then makes his own copy of it, the official whose attestation is required has not 'attested' to the authenticity of that later copy. Merely making a copy of the original attestation along with a copy of the underlying record does not serve the purpose of the attestation requirement, as the copies attestation no longer signifies that the official in question is vouching for the authenticity of the copy that has just been made." *Deramo*, 436 Mass. at 48.

Thus, in accordance with *Deramo*, be sure to introduce the "certified attested" document into evidence. **DO NOT** introduce a Xerox copy of such document into evidence.

BOWDEN CASE LAW:
Commonwealth v. Bowden, *supra*, is also significant because it is a case in which the defendant was charged with OUI, Fourth Offense and the Supreme Judicial Court held that "A judgment of conviction for a third offense may appropriately be relied on to establish culpability for the first two offenses." *Bowden*, 447 Mass. at 599.

For example, in 2012, a defendant is charged with OUI, Fourth Offense in Pittsfield District Court. The defendant's prior OUI convictions are as follows:

1978 – Lawrence District Court, 1st offense
1982 – Woburn District Court, 2nd offense
2005 – Quincy District Court, 3rd offense

The prosecutor in Pittsfield receives notice from the clerk's office in Lawrence and Woburn that the first and second offense cannot be located. However, the prosecutor receives the certified attested copy of the Quincy conviction which states that in 2005 the defendant was convicted of OUI, Third Offense. Under *Bowden*, the Quincy conviction would be sufficient to demonstrate that the defendant has three prior OUI convictions.

REPRESENTATION BY COUNSEL OR WAIVER OF COUNSEL IN PRIOR OUI PROCEEDINGS:
In *Commonwealth v. McMullin*, 76 Mass. App. Ct. 904 (2010), the defendant, convicted of OUI, Fourth Offense, contended for the first time on appeal that the evidence of his prior convictions was insufficient because the records of his prior convictions were inadmissible absent proof that he had been represented by or had waived counsel in those proceedings. Relying on *Commonwealth v. Saunders*, 435 Mass. 691, 695-696 (2002),[9] and the presumption of regularity to guilty pleas as stated in *Commonwealth v. Lopez*, 426 Mass. 657, 663-665 (1998), the Appeals Court held that a **"defendant generally is presumed to have been represented by (or to have waived) counsel in prior proceedings that resulted in a conviction, and the Commonwealth need not come forward with proof on the point unless the defendant first makes a showing that the conviction was obtained without representation by or waiver of counsel."** *McMullin*, *supra* at 905.

Even with the ruling in *McMullin*, it is **strongly recommended** that the Commonwealth continue to request documentation evidencing that the defendant had or waived counsel in the prior OUI proceedings. The prior conviction will often indicate that the defendant was represented by or waived counsel. Also, if the defendant was represented by an attorney, a court can provide you with a certified copy of the attorney's "Notice of Appearance."

OUT-OF-STATE PRIOR OUI CONVICTIONS:
Many states do not label "impaired operation" as "OUI." Rather, you will often see "DWI" or "DUI." The fact that other states may label impaired operation differently from Massachusetts does not make a difference. See *Bowden*, 447 Mass. at 595 n. 5 ("We understand that 'DWI,' driving while intoxicated, is the same as the offense of 'operating under the influence' or OUI.").

A "certified attested" copy of an out-of-state OUI conviction is admissible under G.L. c. 233, § 69. Section 69 provides:

"The records and judicial proceedings of a court of another state or of the United States shall be admissible in evidence in this commonwealth, if authenticated by the attestation of the clerk or other officer who has charge of the records of such court under its seal."

As referenced above under "The Arraignment," be sure to introduce into evidence the "certified attested" copy of the defendant's out-of-state driving history, which will often reference the prior OUI convictions and contain biographical information about the

[9] In *Saunders*, the Supreme Judicial Court held that prior to introducing a felony conviction to impeach a defendant, a presumption will exist that the defendant was represented by counsel in the case that led to such felony conviction, "and the Commonwealth will not have to come forward with proof on the point unless the defendant first makes a showing that the conviction in issue was obtained without representation by, or waiver of, counsel." *Id*., 435 Mass. at 695-696.

defendant. This information is helpful in linking the defendant to the prior convictions. The out-of-state driving history is admissible as a public record under G.L. c. 233, § 79A.

Lastly, you will need to demonstrate that the out-of-state conviction is a "like offense" to the Massachusetts OUI statute. Similar to Massachusetts, many states prosecute under both the "per se" and the "impaired ability" theories. Thus, in order to show that the out-of-state conviction is a "like offense," print a copy of the other state's OUI / DWI / DUI statute and ask the court to take judicial notice of the statute pursuant to G.L. c. 233, § 70. In comparing the out-of-state statute to the Massachusetts OUI statute, you will often see that the impairment theory elements are virtually identical.

A great resource for information on the OUI laws of all 50 states is the *Prior Convictions in DUI Prosecutions Manual,* created by the National District Attorney's Association's National Traffic Law Center. http://www.ndaa.org/pdf/prior_convictions_aug_2004.pdf

CERTIFIED PRIOR CONVICTIONS AND THE CONFRONTATION CLAUSE:

The United States Constitution's Sixth Amendment Confrontation Clause provides that, "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." The United States Supreme Court has held that this "bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004). The Confrontation Clause "guarantees a defendant's right to confront those 'who bear testimony' against him." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009). "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.*

Crawford described the core class of "testimonial" statements as follows:

"ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford, 541 U.S. at 51-52. (internal quotation marks and citations omitted). "The right of a criminal defendant to confront witnesses who testify against him is also protected by art. 12 of the Massachusetts Declaration of Rights..." *Commonwealth v. Nesbitt*, 452 Mass. 236, 242 (2008).

In *Commonwealth v. Weeks*, 77 Mass. App. Ct. 1, 5 (2010), the Appeals Court held that certified convictions are nontestimonial. "Certified records of convictions are created to establish the fact of adjudication, so as to promote accountability to the public

regarding official proceedings and public knowledge of the outcomes of those proceedings." *Id*. "Unlike drug certificates, docket sheets are not prepared for an upcoming case and are not testimonial since the authors are not witnesses against the criminal defendant." *Id*. See also *Melendez-Diaz*, 129 S. Ct. at 2539 (A clerk can by affidavit authenticate or provide a copy of an otherwise admissible record, but cannot create a record for the sole purpose of providing evidence against a defendant).

CERTIFIED RMV RECORDS AND THE CONFRONTATION CLAUSE:

See *McMullin*, *supra*, 76 Mass. App. Ct. at 904-905 (admission of records of the RMV did not violate the defendant's Sixth Amendment right to confrontation and admissible under G.L. c. 90, § 30).

In *Commonwealth v. Parenteau*, 460 Mass. 1, 5 (2011), the defendant was found guilty of operating a motor vehicle after his license had been revoked for operating while under the influence of intoxicating liquor. At the trial the Commonwealth introduced an RMV certificate on "which appeared a stamped attestation of the register stating, in relevant part: 'I hereby certify that the annexed instrument(s) are true copy(s) of the driving history and notice(s) of suspension(s)/revocation(s) that were mailed on the date(s) appearing on the notice to the last address on file as appearing in the registrar's records in accordance with the provisions of [G.L. c. 90, § 22].'" *Id*. at 4. The Supreme Judicial Court held that the admission of the RMV Certification "in the absence of testimony from a registry witness violated the defendant's Sixth Amendment right to confrontation." *Id*. at 9. "We conclude that the registry certificate, like a certificate of drug analysis, is testimonial in nature. It is a solemn declaration made by the registrar for purpose of establishing the fact that a notice of license revocation was mailed to the defendant…" *Id*. at 8. "The certificate did not simply attest to the existence and authenticy of records kept by the registry but made a factual representation based on those records that a particular action had been performed – notice had been mailed on a specified date." *Id*.

"We assume without deciding that the defendant's 'driving history' is a record kept in the ordinary course of registry business." *Parenteau*, 460 Mass. at 10 n. 9. The Court (Spina, J.) further stated:

"Our conclusion does not contradict recent decisions by the Appeals Court. In *Commonwealth v. McMullin*, 76 Mass. App. Ct. 904, 904, 923 N.E. 2d 1062 (2010), the Appeals Court concluded that the admission of certified copies of 'records' from the registry did not violate the defendant's Sixth Amendment right of confrontation. The opinion does not specify the particular 'records' at issue in that case. We caution that it is critical that a court examine each individual 'record' at issue to determine whether it is testimonial and therefore subject to confrontation." *Parenteau*, 460 Mass. at 10 n. 10.

In a recent unpublished 2014 case, the Appeals Court (Kafker, Trainor & Milkey, JJ.), addressed *Parenteau*. In contrast to *Parenteau*,

"the RMV records had a certification that the copies were true and accurate *but the factual representations that were relevant to the proceeding were contained in the records themselves*. (emphasis added). The record included two notices concerning suspending/revoking the defendant's license. Each notice stated that the suspension/revocation was due to the two prior OUI offenses. The record also included the defendant's driving history. The notices and the driving history are both nontestimonial business records." *Commonwealth v. Langevin*, 86 Mass. App. Ct. 1119 (2014) (unpublished).

Thus, in *Langevin*, the RMV records did not contain the testimonial language that was contained in the RMV records in *Parenteau*. See *Langevin*, *supra* at 10.

There are other cases from the Appeals Court which have held that RMV records are nontestimonial:

Commonwealth v. Martinez-Guzman, 76 Mass. App. Ct. 167, 171 (2010) ("Unlike the certificates at issue in *Melendez-Diaz*, which are created solely to prove an element of the prosecution's case, RMV records are maintained independently of any prosecutorial purpose and are therefore admissible in evidence as ordinary business records under G.L. c. 233, § 78, as well as pursuant to G.L. c. 233, § 76."). The defendant's claim that records from the RMV violated his right to confrontation under the Sixth Amendment to the United States Constitution was "without merit where it is clear that the RMV is an independent agency of State government charged with keeping complete records on the status of drivers' licenses and 'a record of all convictions of persons charged with violations of the laws relating to motor vehicles.'" *Id*.

Commonwealth v. Ellis, 79 Mass. App. Ct. 330, 335 (2011) (No confrontation clause violation where RMV records were kept in the ordinary course of the business of the RMV and were admissible as business records and as summaries of records regularly maintained by the registry of motor vehicles).

Commonwealth v. Ducoing, 2011 Mass. App. Unpub. Lexis 1227, * 5 (In prosecution for OUI, Fifth Offense, RMV records properly admitted as "nontestimonial business records because they were, as attested by the stamp and digital signature of the Registrar, true copies of records kept by the RMV in the ordinary course of its business.").

PROBATION DOCUMENT AND THE CONFRONTATION CLAUSE:

In *Commonwealth v. Ellis*, 79 Mass. App. Ct. 330 (2011), the defendant was convicted in Chelsea District Court of OUI, Fourth Offense. *Id*. at 331. In 1990 the defendant was convicted of OUI, Third Offense in the South Boston Division of the Municipal Court Department. *Id*. At the defendant's trial in Chelsea, the Commonwealth introduced into evidence a document entitled "Certification of Probation Information and Prior OUI Offense." *Id*. at 331-332. The probation document was completed by a probation officer of the South Boston Division of the Boston Municipal Court Department and indicated

that the defendant had been convicted in 1990 of OUI as a third offense. *Id*. at 331. The Appeals Court held that the probation record was admitted in error as it had "every appearance of having been prepared in anticipation of litigation – the litigation being the defendant's criminal trial for OUI as a fourth offense." *Id*. at 333. "In fact, the certification is addressed, as if it were a memorandum, to the assistant district attorney who would be the prosecutor."[10] *Id*.

Contrast *Commonwealth v. Bigley*, 85 Mass. App. Ct. 507, 516, *supra*, where the Appeals Court held that the defendant's certified board of probation record was properly admitted into evidence at the subsequent OUI trial and was not testimonial, because unlike the probation record in *Ellis, supra*, the record simply listed the defendant's convictions that were "automatically generated" and "regularly maintained by the Board of Probation."

WHEN BIFURCATION IS NOT REQUIRED UNDER G.L. C. 278, § 11A

The charges of OAS for OUI or OAS for OUI While OUI, G.L. c. 90, § 23, ¶ 3 and 4, respectively, are not bifurcated from an underlying charge of OUI. *Commonwealth v. Beaulieu*, 79 Mass. App. Ct. 100, 102 (2011). The reason for the suspension or revocation of the license is an element of the OAS charge and is not a sentencing enhancement. *Id*. at 102.

It is "incumbent on the Commonwealth to ensure that any stipulation concerning the existence of an element of the crime charged or of any material fact related to proof of the crime is presented in some manner to the jury as part of the evidence of the case." *Commonwealth v. Ortiz*, 466 Mass. 475, 476 (2013).

See also *Commonwealth v. Lopes*, 85 Mass. App. Ct. 341, 349 (2014) (district court judge presiding over a jury trial, did not commit error by refusing the defendant's offer to stipulate that his license was suspended for OUI). The defendant was charged with OUI, Fifth Offense and OAS for OUI While OUI and did not want the reason for the license suspension presented to the jury during his underlying OUI case. *Id*. at 343-344. Relying on *Ortiz*, *supra*, the district court properly concluded that the reason for the license suspension was an element of the OAS for OUI While OUI charge that had to be presented to the jury during the Commonwealth's case. *Id*. at 349.

However, the Court in *Lopes* did state that bifurcation with similar facts to the defendant's case "is an option worthy of serious consideration" in order "to prevent potential prejudice" to defendants. *Id*.

[10] "The subject OUI offense was April 26, 2008, and court proceedings ensued with arraignment on April 29, 2009. The probation certification was generated by a probation officer of the South Boston Division of the Boston Municipal Court Department on June 24, 2008. The trial on the charge in this case was held on September 16 and 17, 2009." *Id*. at 333 n.6.

GRAND JURY TIP:
It is the better practice to bifurcate the underlying OUI offense from the prior convictions during presentment of the case to the Grand Jury.

CHAPTER III: PRETRIAL PREPARATION

DISCOVERY

Discovery obligations are generally governed by Rules 11, 13, 14 and 23 of the Massachusetts Rules of Criminal Procedures. The Supreme Judicial Court amended some of the Massachusetts Rules of Criminal Procedure, including Rules 11 and 14, on September 7, 2004. The new rules apply to all cases initiated by complaint or indictment on or after September 7, 2004. Below is a summary of the rules.

WHAT MUST YOU PROVIDE TO THE DEFENSE?

1. AUTOMATIC AND MANDATORY DISCOVERY

- Any facts of exculpatory nature in the possession, custody or control of the prosecutor, person under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case.

    - Defined as evidence that tends to negate the guilt/support the innocence of the defendant or mitigates punishment, i.e. evidence that provides some significant aid to the defendant's case whether it furnishes corroboration of the defendant's version of facts, calls into question a material (although not indispensable element) of the Commonwealth's version, or challenges the credibility of a key Commonwealth witness.
    - For example, if the defendant told the officer he had only two beers and your officer interviewed the bartender who corroborated that fact, you must inform the defense of the bartender's statement.
    - Use this litmus test: if the evidence makes your case weaker or the defendant's case stronger, you are likely in the possession of exculpatory evidence.

- Written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant in possession, custody or control or prosecutor, person under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case.

    - This would include a videotape of the defendant, *if* accompanied by sound or a videotape *not* accompanied by sound if, for example, it shows a defendant who is not swaying and not having difficulty walking.
    - Any oral statement of the defendant that you intend to introduce at trial must be provided to the defense prior to trial, particularly as these statements may be subject to a motion to suppress. Thus, be certain to

review this issue, particularly with officers and/or witnesses who have not written reports and/or statements.

- The grand jury minutes (including all grand jury exhibits), and the written or recorded statements of a person who has testified before a grand jury.

- Intended expert opinion evidence, including the identity of the expert, his or her curriculum vitae, any relevant reports, and any publications relied upon by the expert.

- Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any persons or of scientific tests or experiments, and statements of persons the Commonwealth intends to call as witnesses.

    - Be careful as this rule may also include letters from witnesses, diary items, etc., if those items pertain to your case. They do not, however, include victim impact statements, unless the statement discusses the facts of the case.
    - Typically this includes copies of breath test documents such as the BATS Completion Record, Breath Test Report Form, and the Period Test Record for the instrument.
    - With regard to medical records, you still must comply with statutory notice requirements to introduce them into evidence, unless such notice is waived.
    - May include fingerprint analyses, drug certifications, accident reconstruction report, etc.

- A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

- Disclosure of all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial.

- Names, addresses and dates of birth of all prospective witnesses other than law enforcement witnesses – prosecutors are <u>prohibited</u> by Criminal Offender Record Information ("CORI") rules from disclosing criminal records to *anyone*, including victims and/or other Commonwealth witnesses. Defense counsel must go through probation to get a copy of a witness' record.

- The names and business addresses of prospective law enforcement witnesses.

NOTE: Keep in mind that until all mandatory discovery has been provided to the defendant, the defendant is not required to provide any reciprocal discovery to the Commonwealth. See Rule 14(a) (1) (B).

2. OTHER DISCOVERY

The rules of procedure now require the Commonwealth to give notice to the defendant of certain relevant evidence NOT in the custody or control of the Commonwealth, but rather in the control of a third party. See Rule 14(a) (1) €. Thereafter, either party may seek a court order to preserve such evidence for possible later production at trial.

You may also receive requests for information not covered in automatic discovery. Be aware of the following types of discovery requests, as you are not necessarily obligated to provide defense counsel with everything he requests:

- Requests for information that are overbroad (i.e., "Documents regarding the breathalyzer from 2002 – 2012"). Absent good cause, agree only to those documents relative to the time period surrounding the defendant's arrest.
- Requests for information that are irrelevant (i.e. OUI Police reports of Officer Smith from arrests dated June, 2005 – present). Defense counsel is probably on a fishing expedition to get the reports of the arresting officer to show that all of his reports of OUI arrests contain the same language. Though defense counsel may cross examine the officer regarding his lack of ability to remember each case, the Commonwealth certainly should not be the entity that provides him with more ammunition for this mode of cross examination. Also, blanket requests for information that go to a witness' credibility (i.e. "Disciplinary report of Officer Smith") should not be discoverable as specific instances of lying/misconduct are generally not relevant for impeachment purposes. See generally, *Commonwealth v. Wanis*, 426 Mass. 639 (1998).

WHAT SHOULD THE DEFENSE PROVIDE TO YOU?

Once the Commonwealth has provided the defendant with mandatory discovery, the defendant is obligated to provide the Commonwealth with similar discovery. Additionally, there are two other ways to get information from the defense: (1) file a motion for reciprocal discovery; or (2) have the defendant agree to discovery in the pretrial conference report. If you decide not to file a motion, at the very least utilize the pre-trial conference report to get as much information as possible from the defense prior to trial. Here are some suggestions for making the most of the pre-trial conference report:

- **STIPULATIONS** – if operation and public way are truly not at issue, get defense counsel to stipulate to those elements in the pre-trial conference report. This saves the trouble of having to ask for the stipulation on the day of trial.

- **EVIDENCE** – enumerate specific items i.e., "medical records of the defendant, photographs, diagrams, or any other evidence that the defendant intends to offer at trial."
- **WITNESSES** – along with "name, address and date of birth", request a telephone number so you can contact the witnesses prior to trial and hear what they intend to say.
- **STATEMENTS OF WITNESSES** – be sure to ask for both, statements of the prospective defense witnesses, as well as any statements of your witnesses in the possession of the defense, e.g. through their investigator, they intend to introduce at trial for impeachment or otherwise.
- **OTHER AGREEMENTS** – request notice regarding expert testimony, including name, address and *curriculum vitae* of expert, as well as a written summary of the nature and basis of the expert's opinion and reports, if any.
- Finally, set a compliance date such as "two weeks before trial" and make the date firm to enable you to conduct some of your own investigation.

In summary, the rules of discovery are rather complex. When in doubt, follow this **GENERAL RULE** – if evidence is in your possession and/or you intend to introduce evidence at trial, give a copy to defense counsel or notify him of your intent to introduce the evidence at trial. Also, if you have in your possession or know of evidence that you think may bear on the defendant's guilt or innocence, err on the side of caution and disclose it to the defense.

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE[11]

RULE 11. PRETRIAL CONFERENCE AND PRETRIAL HEARING

(a) **THE PRETRIAL CONFERENCE.**
At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to attend a pretrial conference on a date certain to consider such matters as will promote a fair and expeditious disposition of the case. The defendant shall be available for attendance at the pretrial conference. The court may require the conference to be held at court under the supervision of a judge or clerk-magistrate.

(1) **CONFERENCE AGENDA.**
Among those issues to be discussed at the pretrial conference are:

[11] The rules set forth herein include the amendments effective September 7, 2004. For the text of the rules prior to that date, please consult your "West's Criminal law and Procedure" book or other appropriate legal resource.

(A) Discovery and all other matters which, absent agreement of the parties, must be raised by pretrial motion. All motions which cannot be agreed upon shall be filed pursuant to Rule 13(d).

(B) Whether the case can be disposed of without a trial.

(C) If the case is to be tried, (i) the setting of a proposed trial date which shall be subject to the approval of the court and which when fixed by the court shall not be changed without express permission of the court; (ii) the probable length of trial; (iii) the availability of necessary witnesses; and (iv) whether issues of fact can be resolved by stipulation.

(2) **CONFERENCE REPORT.**

(A) **FILING.**
A conference report, subscribed by the prosecuting attorney and counsel for the defendant, and when necessary to waive constitutional rights or when the report contains stipulations as to material facts, by the defendant, shall be filed with the clerk of the court pursuant to subdivision (b)(2)(i). The conference report shall contain a statement of those matters upon which the parties have reached agreement, including any stipulations of fact, and a statement of those matters upon which the parties could not agree which are to be the subject of pretrial motions. Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding.

(B) **FAILURE TO FILE.**
If a party fails to participate in a pretrial conference or to cooperate in the filing of a conference report, the adverse party shall notify the clerk of such failure. If a conference report is not filed and a party does not appear at the pretrial hearing, no request of that party for a continuance of the trial date as scheduled shall be granted and no pretrial motion of that party shall be permitted to be filed, except by leave of court for cause shown. If the parties fail to file a conference report or do not appear at the pretrial hearing, the case shall be presumed to be ready for trial and shall be scheduled for trial at the earliest possible time. The parties shall be subject to such other sanctions as the judge may impose.

(b) **THE PRETRIAL HEARING.**
At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to appear before the court on a date certain for a pretrial hearing. The defendant shall be

available for attendance at the hearing. The pretrial hearing may include the following events:

(1) **TENDER OF PLEA.**
The defendant may tender a plea, admission or other requested disposition, with or without the agreement of the prosecutor.

(2) **PRETRIAL MATTERS.**
Unless the Court declines jurisdiction over the case or disposes of the case at the pretrial hearing, the pretrial hearing shall include the following events:

(i) FILING OF PRETRIAL CONFERENCE REPORT.
The prosecuting attorney and defense counsel shall file the pretrial conference report with the clerk of court.

(ii) DISCOVERY AND PRETRIAL MOTIONS.
The court shall hear all discovery motions pending at the time of the pretrial hearing. Other pending pretrial motions may be heard at the pretrial hearing, continued to a specified date for a hearing, or transmitted for hearing and resolution by the trial session.

(iii) COMPLIANCE AND TRIAL ASSIGNMENT.
The court shall determine whether the pretrial conference report is complete, all discovery matters have been resolved, and compliance with all discovery orders has been accomplished. If so, the court shall obtain the defendant's decision on waiver of the right to a jury trial, and assign a trial date or trial assignment date. If completion of either the pretrial conference report or discovery is still pending, the court shall schedule and order the parties to appear for a compliance hearing pursuant to Rule 11(c) unless the aggrieved party waives the right to a compliance hearing.

(iv) The court may issue such **ADDITIONAL ORDERS** as will promote the fair, speedy and orderly disposition of the case.

(c) **COMPLIANCE HEARING.**
A compliance hearing ordered pursuant to Rule 11(b) (2) (iii) shall be limited to the following court actions:

(1) Determining whether the pretrial conference report and discovery are complete and, if necessary, hearing and deciding discovery motions and ordering appropriate sanctions for non-compliance;

(2) Receiving and acting on a tender of plea or admission; and

(3) If the pretrial conference report and discovery are complete, obtaining the defendant's decision on waiver of the right to a jury trial, and scheduling the trial date or trial assignment date.

RULE 13. PRETRIAL MOTIONS

(a) **IN GENERAL**

(1) **REQUIREMENT OF WRITING AND SIGNATURE; WAIVER.**
A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule.

(2) **GROUNDS AND AFFIDAVIT.**
A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) **SERVICE AND NOTICE.**
A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) **MEMORANDA OF LAW.**
The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he or she may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) **RENEWAL.**
Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

(b) **BILL OF PARTICULARS.**

(1) **MOTION.**
Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the court upon its own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) **AMENDMENT.**
If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

(c) **MOTION TO DISMISS OR TO GRANT APPROPRIATE RELIEF.**

(1) All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

(d) **FILING.**
Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court.

(1) **DISCOVERY MOTIONS.**
Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown. A discovery motion filed after the conclusion of the pretrial hearing shall be heard and considered only if (A) the discovery sought could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing, (B) the discovery is sought by the Commonwealth, and the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing, or (C) other good cause exists to warrant consideration of the motion.

(2) **NON-DISCOVERY PRETRIAL MOTIONS.**
A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b) or (c) or within 21 days thereafter, unless the court permits later filing for good cause shown.

(e) **HEARING ON MOTIONS.**
The parties shall have a right to a hearing on a pretrial motion. The opposing party shall be afforded an adequate opportunity to prepare and submit a memorandum of law prior to the hearing.

(1) **DISCOVERY MOTIONS.**
All pending discovery motions shall be heard and decided prior to the defendant's election of a jury or jury-waived trial. Any discovery matters pending at the time of the pretrial hearing or the compliance hearing shall be heard at that hearing. Discovery motions filed pursuant to subdivision (d) (1) after the defendant's election shall be heard and decided expeditiously.

(2) **NON-DISCOVERY PRETRIAL MOTIONS.**
A non-discovery motion filed prior to the pretrial hearing may be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session. A non-discovery motion filed at or after the pretrial hearing shall be heard at the next scheduled court date unless otherwise ordered.

(3) Within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal, the clerk or the judge shall assign a date for hearing the motion, but the judge or special magistrate for cause shown may entertain such motion at any time before trial. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, and the moving party so notifies the clerk in writing at the time of the filing of the motion, the clerk shall mark up the motion for hearing at that time subject to the approval of the court. The clerk shall notify the parties of the time set for hearing the motion.

RULE 14. PRETRIAL DISCOVERY

(a) **PROCEDURES FOR DISCOVERY**

(1) **AUTOMATIC DISCOVERY**

(A) **MANDATORY DISCOVERY FOR THE DEFENDANT.**

The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:

(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

(iii) Any facts of an exculpatory nature.

(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.

(v) The names and business addresses of prospective law enforcement witnesses.

(vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b) (2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the Commonwealth intends to call as witnesses.

(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

(ix) Disclosure of all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial.

(B) **RECIPROCAL DISCOVERY FOR THE PROSECUTION.**
Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A) (vi), (vii) and (ix) which the defendant intends to use at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to use as witnesses at trial.

(C) **STAY OF AUTOMATIC DISCOVERY; SANCTIONS.**
Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) **RECORD OF CONVICTIONS OF THE DEFENDANT, CODEFENDANTS, AND PROSECUTION WITNESSES.**
At arraignment the court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivisions (a)(1)(A)(iv) and (v) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) **NOTICE AND PRESERVATION OF EVIDENCE.**

(i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(viii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or

evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it.

(ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) **MOTIONS FOR DISCOVERY.**
The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) **CERTIFICATE OF COMPLIANCE.**
When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) **CONTINUING DUTY.**
If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) **WORK PRODUCT.**
This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse

party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff'.

(6) **PROTECTIVE ORDERS.**
Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) **AMENDMENT OF DISCOVERY ORDERS.**
Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(8) A party may **WAIVE THE RIGHT TO DISCOVERY** of an item or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a) (1) (A) and (a) (1) (B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) **SPECIAL PROCEDURES.**

(1) **NOTICE OF ALIBI.**

(A) **NOTICE BY DEFENDANT.**
The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) **DISCLOSURE OF INFORMATION AND WITNESS.**

Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence a' the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) **CONTINUING DUTY TO DISCLOSE.**
If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) **FAILURE TO COMPLY.**
Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(E) **EXCEPTIONS.**
For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b) (1) (A) through (D) of this rule.

(F) **INADMISSIBILITY OF WITHDRAWN ALIBI.**
Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) **DEFENSE OF LACK OF CRIMINAL RESPONSIBILITY BECAUSE OF MENTAL DISEASE OR DEFECT.**

(A) **NOTICE.**
If a defendant intends to rely upon the defense of lack of criminal responsibility because of mental disease or defect at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d) (2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) Whether the defendant intends to offer testimony of expert witnesses on the issue of lack of criminal responsibility because of mental disease or defect;

(ii) The names and addresses of expert witnesses whom the defendant expects to call; and

(iii) Whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition at the time of the alleged crime or criminal responsibility for the alleged crime.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) **EXAMINATION**.

If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime will be relied upon by expert witnesses of the defendant, the court, upon its own motion or upon motion of the prosecutor, may order the defendant to submit to a psychiatric examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical and psychological examinations and physiological and psychiatric tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the time the alleged offense was committed. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer at trial psychiatric evidence based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical or physiological observations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written psychiatric report which shall contain his or her findings, including specific statements of the basis thereof, as to the mental condition of the defendant at the time the alleged offense was committed. The report shall be sealed and shall not be made available to the

parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime, or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) during trial the defendant raises the defense of lack of criminal responsibility and the judge is satisfied that (1) the defendant intends to testify or (2) the defendant intends to offer expert testimony based in whole or in part upon statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime.

If a psychiatric report contains both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(4) **NOTICE OF OTHER DEFENSES.**
If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d) (2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) **SANCTIONS FOR NONCOMPLIANCE.**

(1) **RELIEF FOR NONDISCLOSURE.**
For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery,

grant a continuance, or enter such other order as it deems just under the circumstances.

(2) **EXCLUSION OF EVIDENCE.**
The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b) (2) of this rule.

(D) **DEFINITION. THE TERM "STATEMENT", "S USED IN" THIS RULE, MEANS:**

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration.

PREPARING YOUR CASE FOR TRIAL

WITNESSES: WHO YOU SHOULD SUMMONS FOR TRIAL

WHEN YOU HAVE NUMEROUS POLICE OFFICERS AS WITNESSES

In some OUI cases, two or more police officers are present during the investigation and arrest of the defendant. There are two schools of thought on whether both/all officers should testify.

One school of thought opines that jurors like to have as much evidence as possible and feel as though the prosecutor is "hiding" evidence when he doesn't bring all potential witnesses. The other school of thought opines that, the more officers that testify, the more chance they have of contradicting one another.

The bottom line is that each case should be assessed individually. If you have two superb police officers on the scene that have both read their reports and have an independent memory of the arrest, by all means summons them and put them on the stand.

If, however, your back-up officer cannot recall the arrest or his testimony is weak at best, you may want to consider not summonsing that second officer but instead

summonsing the booking officer, who can offer an independent opinion regarding the defendant's sobriety.

On another note, make sure you have a *percipient witness to each element* of the crime. For example, look out for circumstances where one police officer stops the defendant and another officer conducts the investigation and writes the report. In this instance, be certain that both officers are summonsed.

WHEN THERE IS A BREATH TEST RESULT

In order to get the results of a breath test admitted into evidence, you need to summons the following:

- The breath test operator:
  1. To prove the defendant consented to take the test. *Statutory Rights and Consent Form.*
  2. To prove the breath test operator was certified. *Breath Test Report Form*
  3. To prove the test was valid. *Breath Test Report Form*
- The Officer In Charge:
  1. To prove the instrument was certified. *Breath Test Report Form*
  2. To prove the instrument was working properly at the time the defendant took the test. *Periodic Test Record*

PRACTICE TIP:

- All documents necessary to introduce a breath test result are located at the police department/barracks. However, you will want to request a copy of the records from OAT to provide to the defendant in discovery.
- In *Commonwealth v. Zeininger*, 459 Mass. 775 (2011), the Court ruled that annual certification records for a breath test instrument are admissible in evidence as business records pursuant to G.L. c. 233, § 78, and do not require live witness testimony from the chemist who performed the certification testing on the instrument. If you have not summonsed in your OIC, you can argue that *Zeininger* covers the periodic test record as well as the annual certification records and does not require the Commonwealth to produce a live witness at trial.

WHEN THERE IS A BLOOD TEST DONE IN LIEU OF A BREATH TEST

Summons the following for trial:

- The rights officer – to show that the defendant knowingly consented to the blood test;
- Person who drew blood – to show that it was done by a qualified person and that the proper procedures were followed;
- Certificate of analysis – to show result of test (**NOTE:** you may get a *Melendez-Diaz* challenge if trying to introduce the certificate without the analyst to testify to the content);

- Also, if chain of custody is an issue, you may need to summons the evidence officer (who took custody of the sample from the hospital to the state lab) and the chemist (who conducted the analysis). This is not necessary unless chain of custody is a live issue, as chain of custody generally goes to weight not admissibility.

WHEN THERE IS A BLOOD TEST DONE FOR MEDICAL PURPOSES

In order to get the results of the defendant's blood test (drawn for medical purposes), you will need to summons the following:

- The defendant's medical records, pursuant to G.L. c.233, § 79;
- The doctor/nurse who drew the blood to show that it was drawn properly and for medical purposes, unless the records themselves clearly show that blood tests were administered pursuant to hospital procedure. See *Commonwealth v. Russo*, 30 Mass. App. Ct. 923, 926 (1991) (records revealed that a battery of tests identified as "routine chemistry" were conducted and the defendant received the "full work-up"). If the doctor/nurse does not have a specific recollection of the defendant, she can at least testify as to emergency room protocol;
- A scientist to make the conversion from serum to whole blood (typically someone from the Office of Alcohol Testing (OAT). To request a scientist from the OAT to testify, fax the official "Serum Conversion Request" to the OAT. The request form can be found in Appendix C. Alternatively, you may consider asking defense counsel to stipulate to the Serum Conversion Chart or ask the judge to take judicial notice of the chart.

WHEN THE HORIZONTAL GAZE NYSTAGMUS (HGN) TEST WAS ADMINISTERED

To establish the validity of the underlying principles of HGN, you need to summons a qualified law enforcement officer, optometrist, ophthalmologist, neurologist, or appropriate medical professional. You will need to establish that individual to be sufficiently qualified in the administration of the test and knowledgeable about the scientific principles upon which it is based. *Commonwealth v. Sands*, 424 Mass. 184 (1997).

During trial you will have your qualified expert testify to the administration of the HGN test and the scientific principals behind the exam. You will then have the officer who administered the HGN exam testify as to how the exam was administered and the results.

It is imperative that you speak to the law enforcement officer and/or medical professional before attempting to admit HGN at trial. Contact the Massachusetts District Attorneys Association or the Office of Alcohol Testing for more information on this topic.

OTHER POTENTIAL SOURCES OF EVIDENCE

Many OUI cases come in the form of a police report that contains the standard information regarding observations, field sobriety tests, and an opinion that the defendant was under the influence. Unfortunately, the day of trial is too late to make a case like this better. Clearly there is other evidence of the defendant's guilt: What did he drink and how much? Where did he drink? Who was he with? Who else witnessed his behavior and believed him to be intoxicated? What else is out there?

Turning a "generic" case into a winner takes some thought and pre-trial preparation. Obviously, given the volume of OUI cases in some courts it is unrealistic to expect hours of preparation to go into each case. However, when time permits and/or when the facts command special attention, a few extra steps can make all the difference. Below is a list of suggestions for making the most of your case.

WHEN THERE IS A COLLISION

Was it a one or multi-car collision? Either way, a crash report must be filled out and may contain additional information, including the name and address of the insurance company. If the defendant and/or other parties involved make an insurance claim, the insurance company often conducts its own investigation. Check with the insurance company to see if this was done and, if so, summons a copy of the investigative report.

THE EMERGENCY MEDICAL TECHNICIAN (EMT)

EMTs make great witnesses, especially since they are trained to detect intoxication and have virtually no stake in the outcome of the case. Find out as early as possible the name of the EMT who attended to the defendant and get a copy of her "trip sheet." (Because of the Health Insurance Portability and Accountability Act (HIPAA), you may need a court order to obtain a copy of an EMT's report. Also, speak with the EMT and if she has valuable information, summons her for trial and notify defense counsel that you intend to call her as a witness.

MEDICAL RECORDS:

Consider this scenario: The defendant in your case causes a car crash. He is injured in the collision and taken immediately to the emergency room. While at the hospital, the emergency room nurse notes that the defendant "smells of alcohol" and "appears intoxicated." The nurse notes this in the medical record. Additionally, the defendant's blood is drawn and tested as part of his treatment. Medical personnel need to know what, if any substances the defendant ingested before they can give him treatment and/or medication. One of the substances tested for is ethyl alcohol, or ethanol (ETOH). Both the observations of the nurse and the results of the defendant's blood test make for great evidence in an OUI case.

- **HOW TO OBTAIN MEDICAL RECORDS:**

General Laws chapter 233, § 79 allows for the admission of certified hospital and other medical records. This statute acts as an exception to the hearsay rule. Once the records are certified by the keeper of the records, the records "shall be deemed to be sufficiently admissible in evidence if admissible in all other respects." G.L. c. 233, § 79G also authorizes the admissibility of medical records but is much broader than § 79 in that, upon proper notice, § 79G states that the records shall be admissible as evidence of prognosis, diagnosis, opinion, etc. In general, § 79 controls the admissibility of hospital records and, when used for the purposes discussed above, notice pursuant to § 79 shall suffice.

The Commonwealth's admission of a toxicology report as part of a hospital record pursuant to G.L. c. 233, § 79, does not constitute a violation of that statute because the toxicology report relates directly to the treatment and medical history of the patient. *Commonwealth v. McLaughlin,* 79 Mass. App. Ct. 670 (2011)

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) forbids disclosure of medical information without patient authorization. These regulations, which came into effect on April 14, 2003, are designed to provide extensive privacy protections to medical information and records. There are several exceptions that permit law enforcement officials to obtain patient information that is germane to a legitimate law enforcement purpose. For simplicity's sake, however, the best way to proceed is to obtain a court order for records. The order should contain the following information: the name and date of birth of the defendant, date of treatment, and docket number. Include information as to where to send the records (the records must be delivered to and remain in the criminal clerk's office to render them admissible) and a sample affidavit for the keeper-of-the-records to certify the records.

- **WHAT TO DO WITH THE RECORDS ONCE YOU RECEIVE THEM:**

Once the records are in the clerk's office, check to see if the records contain any information you may want to use at trial. If so and you intend to offer the records, you must notify defense counsel, preferably in writing. Notification can also be given on the pre-trial conference report.

If you intend to introduce the records under § 79G, you must follow the statutory notice requirements: a copy of the records must be sent to the opposing party at least ten days prior to trial, with an affidavit stating

compliance with the statute and return receipt to be filed with the Court. *Commonwealth v. Irene,* 462 Mass. 600 (2012) – hospital medical records, ordinarily admitted through G.L. c. 233, § 79, are not admissible as business records through G. L. c. 233, § 78.

Medical records revealing a defendant's blood alcohol content are not testimonial and thus, admission without testimony of the blood analyst does not violate one's right to confrontation under Sixth Amendment or Mass. Const. Decl. Rights art. 12. *Commonwealth v. Dyer,* 77 Mass. App. Ct. 850 (2010).

If the results of the defendant's blood test are available, use the Serum Conversion Chart (found in Appendix C) to convert the result to whole blood and determine the defendant's BAC.

WHEN YOU HAVE A BAC RESULT AND SIGNIFICANT TIME HAS ELAPSED FROM THE TIME OF THE OFFENSE TO THE TIME OF THE TEST

Whether the test is of the defendant's blood or breath, it is important to remember that the result will be the defendant's BAC *at the time of the test*. If your case involves serious injury or death and a considerable amount of time passed from the time the defendant was operating his car to the time of the test, you may want to consider utilizing a toxicologist to perform retrograde extrapolation. However, the Massachusetts Supreme Judicial Court has ruled that, where the Commonwealth proceeds on a "per se" theory of operating under the influence, prosecutors are not required to present expert testimony on retrograde extrapolation to admit a breath test result if the test was given within 3 hours of the arrest. However, when proceeding only on an "under the influence" theory with a breath test result, the Commonwealth is required to present expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such results. *Commonwealth v. Colturi,* 448 Mass. 809 (2007)

If given a specific BAC reading, a scientist can calculate the estimated BAC at the time of the offense by multiplying the number of hours elapsed by the elimination rate, and adding that figure to the reported BAC. (See *Commonwealth v. Senior*, 433 Mass. 453 (2001)) for a discussion on admissibility of retrograde extrapolation.) This computation assumes: (1) the defendant was in the elimination phase at the time of the offense; and (2) the defendant's rate of elimination is that of the average person – .019 per hour. The scientist may elect to use a range of elimination rates (.009% to .029%), which covers 95% of the population. This will in turn create a range of potential BAC readings thereby giving the defendant the benefit of the doubt.

TO ILLUSTRATE:

Assume a driver is involved in a collision at 12:00 a.m. Assume further that the defendant had his last drink at 11:00 p.m. He is taken to the hospital and his blood is

tested at 3:00 a.m. The reading is 0.07%. To determine his BAC at the time of the collision (12:00 a.m.), assume the defendant has eliminated .057% alcohol (.019% x 3 hours). Add that to his later BAC, making the defendant's BAC approximately 0.127% at the time of the collision.

WHEN THE DEFENDANT'S CAR HAS BEEN TOWED

Who towed the truck? The police must keep a log of the name of the towing company. Did the tow truck driver see the defendant? If so, can the driver corroborate any of the police officer's observations? Did he believe the defendant was too impaired to drive? An experienced tow truck driver has likely seen many intoxicated drivers and may be able to offer some insightful observations.

OTHER POTENTIAL WITNESSES

Check with your arresting officer as to the existence of any passengers in the defendant's car. Never assume that the lack of passenger information in the police report means that there were actually no passengers.

Ask your police officer to conduct some follow-up investigation. Perhaps the defendant told the officer where he had been drinking or had a copy of his bar bill on his person when arrested. If so, ask your officer to interview the bartender and/or wait staff on duty that night. People who serve alcohol are trained to detect intoxicated persons through the Alcoholic Beverages Control Commission (ABBC). Also, they might be able to provide you with a copy of the defendant's bar tab, itemizing food (or lack of food) and each drink. If the bartender/wait staff has useful information, summons them for trial and notify defense counsel in writing and/or on the pre-trial conference report as to the name, address and date of birth of the potential witness.

Finally, take a good look at the time and location of the defendant's arrest. Are there any other potential witnesses to be identified: area shop owners; gas station attendants; toll workers; crossing guards – anyone the police might have overlooked?

OTHER POTENTIAL EVIDENCE

Often times "concerned citizens" call the police to report an erratic driver on the road. When this occurs, the police report usually contains one or two sentences about the calls being made. If so, immediately request that the 911 tape be preserved[12] and get a copy of the tape. Sometimes callers provide their name and address, unbeknownst to the officer who wrote the report.

Ask your police officer to take photographs of the area in which the defendant was arrested. The more visual aids you can provide to the jury the better chance you have of sustaining their attention. A photo showing the smooth roadway on which the

[12] Many police departments destroy tapes after 30-45 days. Check with your police department regarding this policy and ask them to preserve the tape if you think it might be relevant in the future.

defendant performed the field sobriety tests or the straight roadway on which the defendant could not control his car can be very telling. Almost every person carries some sort of smart phone these days. The photo can be taken on the phone and emailed to you for printing.

Also, get a copy of the defendant's booking photo. The photo may corroborate the police officer's description (disheveled appearance; red glassy eyes; unshaven) or just be a great depiction of the defendant's drunken appearance.

Once you get a list of defense witnesses, run their criminal records (as well as the defendant's) and, if appropriate, subpoena a certified copy of the criminal conviction from the appropriate court to be used for impeachment. Since the documents are equally available to both parties as they are public documents you do not necessarily need to provide a copy to the defense. If, however you have the documents in your possession, the better practice is to provide a copy to the defense, or at least notify defense of the fact that you have them prior to trial.

The Commonwealth's use of records of defendant's prior convictions to prove that he had been convicted before, not to prove an underlying evidentiary fact, did not violate defendant's confrontation rights. *Commonwealth v. Weeks*, 77 Mass. App. Ct. 1 (2010)

PRE-TRIAL MOTIONS YOU SHOULD FILE

WHEN YOU HAVE HGN TEST RESULTS

Admission of HGN is a source of much confusion and controversy. Admissibility is governed by the SJC decision in *Commonwealth v. Sands*, 424 Mass. 184 (1997). In *Sands*, the SJC held that the results of HGN were admitted in error because the Commonwealth failed to lay an evidentiary foundation for the admission of scientific evidence.

The primary issue resolved in *Sands* was whether HGN is an ordinary field sobriety test whose principles are within the common knowledge of a lay juror or a scientific principle requiring expert testimony. The Court considered the nature of the test and the fact that testimony concerning the results "relies on an underlying assumption that there is a strong correlation between intoxication and nystagmus, which is not within the common experience of jurors." *Id*. at 186. Thus, "the HGN test relies on an underlying scientific proposition and therefore expert testimony is required for its admission." *Id*. *Sands* does not require the expert witness be a medical professional so you should consider a law enforcement officer that has been qualified in the area of HGN as a potential witness in your case.

In order for the HGN results to be admitted as scientific evidence, the Commonwealth must lay a foundation utilizing expert testimony to establish the following:

1. The underlying scientific theory of HGN is generally accepted within the relevant scientific community (*Lanigan* standard), or that the theory is reliable or valid through other means (*Daubert* standard);
2. The individual who administered the HGN test was qualified to do so;
3. The individual who administered the HGN test did so properly.

Since the above issues present a threshold to admissibility, you should file a motion in limine for a preliminary hearing regarding the admissibility of the test. The benefits to being proactive (as opposed to reactive, waiting to respond to the defense motion in limine to exclude the test results) are numerous. First, by filing a motion for admission, you define the issues to be resolved. Second, you will be prepared to argue the issues in court. Finally, you can be confident in mentioning the HGN test results in your opening statement, as the test's admissibility has already been determined.

A sample direct exam of an optometrist and HGN test administrator can be found in Appendix B.

CHAPTER IV: TRIAL

JURY SELECTION

INFORMATION ABOUT POTENTIAL JURORS

In Massachusetts, lawyers have little to no guidance when selecting a jury in an OUI case, as the only information provided to them is by way of a Confidential Juror Questionnaire that each juror is required to complete prior to coming to court.

Most likely the clerk or court officer will have provided you with copies of the completed questionnaire for each juror. Jurors are asked to provide the following information on the questionnaire:

- Name
- City/town
- Place of birth
- Employment status (employed, self-employed, at home, retired or unemployed)
- Occupation
- Employer (or former employer)
- Type of business
- Employment address
- Spouse's name
- Employment status of spouse
- Occupation and employer of spouse
- Type of spouse's business and employment address
- Marital status (single, married, separated, divorced, widowed)
- Sex (female or male)
- Age
- Ages of children
- Highest education level
- Previous dates of service as a juror

They are also asked:

- "Have you or anyone in your household or family ever had any of the following experiences with the law – yes/no? Been arrested? Been sued? Been charged with a crime? Etc. If 'YES', please describe. "
- "Have you or anyone in your household or family ever worked for any of the following – yes/no? Law enforcement agency? Corrections/detention system? Court system? Other law-related employer? If 'YES' please describe."
- "Is there anything else in your background, experience, employment, training, education, knowledge, or beliefs that might affect your ability to be a fair and impartial juror – yes/no? If 'YES' please describe."

Other than this form, and your ability to size up a person in a matter of seconds, you will not have much else to guide you in selecting jurors.

VOIR DIRE QUESTIONS

The trial judge will elicit responses from the jury panel regarding bias, understanding of the burden of proof and presumption of innocence, and general reasons a juror may not be able to serve. This process is called *voir dire*. If requested, the judge may ask additional questions tailored to the individual crime. The judge makes the final decision on what *voir dire* questions will be presented to the jury pool. Any potential juror who answers in the affirmative (in essence, answering they believe they will have a problem or conflict serving as a juror) will then communicate that to the judge at "side bar" alongside the prosecutor and the defense attorney. After each juror speaks to the judge, he will return to his seat and the judge will inquire of both attorneys as to their position of that potential juror. The judge makes the final decision as to whether that particular juror will be excused.

With regard to OUI cases, the defense seeks to exclude people from the jury who have strong feelings about drinking and driving, have been victimized by an impaired driver or are sympathetic to law enforcement. To weed out those individuals, the defense may propose a list of questions for the judge to ask of the panel.

A typical defense request for *voir dire* questions may look like this:

- Have you or anybody among your family or friends ever been involved in a collision with somebody who was thought to be driving under the influence of alcohol?
- Are you willing to consider a person charged with driving under the influence, innocent until proven guilty?
- Do you think it is a crime to drink any amount of alcohol and drive?
- Do you or any of your friends and/or family members belong to or make donations to Mothers Against Drunk Driving (MADD) or Students Against Destructive Decisions (SADD)?
- Are you or any of your friends and/or family members affiliated with Alcoholics Anonymous, Alanon, Alateen, or any similar group?

What do you do when you receive this type of request (typically handed over as the jury is entering the courtroom)?

Take heed, as judges are quite used to seeing these requests and usually know exactly how they'll respond. Also, this process lets you get to know your jury pool a little better, which is always a bonus. In the event that you are asked for your opinion, here are some suggestions:

- With regard to all requests, make sure they are not overbroad. For example, asking jurors facts about themselves and their immediate family members might be appropriate. On the other hand, "friends and all family members" is overreaching as it potentially encompasses a huge group of people whose life experiences are probably not relevant to this particular juror's ability to serve.
- Requests involving AA, Alanon, etc. can be an invasion of privacy and/or potentially embarrassing.
- With all requests, make sure the judge follows up with a question as to whether the juror's experience and/or affiliation would affect his ability to impartially decide the case.
- Use your common sense – if a request for an instruction seems ridiculous or irrelevant, don't be afraid to object on those grounds.

CHALLENGING JURORS

Both parties are given *two (2) peremptory challenges* and *unlimited challenges for cause.* You will first be asked if you have any challenges for cause. Keep in mind that challenging a person based on gender, race, nationality or religious affiliation is IMPROPER and an error of constitutional dimension that will certainly result in the case being reversed on appeal.

After challenges for cause from both parties are entertained, the judge will hear peremptory challenges. These challenges require no rationale on the record – you simply say, "I challenge juror number 12."

Remember to exercise your peremptory challenges with care. While the juror in seat #5 might look "questionable," take a look to see who will take his place. Also, be prepared that if you challenge juror 24 for no other reason other than to get juror 25 seated because he has been smiling at you, the defense might also have noted this and will challenge 25. Make certain you can live with the replacement jurors in the event that you run out of challenges.

Once you decide not to challenge additional jurors, simply say, "the Commonwealth is content."

NOTE:

Each judge has his or her own style of empaneling a jury. Check with your colleagues, clerks or court officers to get the information on your judge so you know what to expect. For example, some judges will call prospective jurors out of order – i.e., 25, 17, 49, etc. Make sure you are able to go through ALL the questionnaires in case this happens.

OPENING STATEMENTS

An opening statement is a roadmap of your case; a preview of the evidence that you intend to present. It is not evidence…

Does this sound familiar? While the above sentences provide a useful description of an opening statement, they should never be said in one's actual opening. Given the reality that district court prosecutors have little time to prepare their entire OUI case, let alone their opening statement, it may be tempting to fall back on those familiar sentences. While doing so may save time, it may also cost a prosecutor her case. In opening statements, the saying "first impressions are everything," is a truism. *Studies have shown that 80% of jurors reach the same verdict at the end of the trial as they would have reached at the end of opening statements*. It is therefore crucial to have a solid framework of a standard opening statement that you can use in most, if not all of your OUI jury trials. In developing your opening statement, keep in mind the following guidelines:

DEVELOP A THEME

The theory of "primacy and recency" holds that jurors remember the first words they hear and the last words they hear – everything in the middle is questionable.
In order to capture the attention of the jury, every opening statement should begin with one or two sentences that incorporate the theme of your case. This theme should be introduced in your opening statement and continue through to closing argument. A theme should be brief but memorable – like an advertising jingle that will stay in the jurors' minds throughout the case.

Some common themes used in OUI cases:

- **PUBLIC SAFETY** – For example – "Driving a car is something many of us do every day – it requires skills such as mental clarity, motor coordination, self-control, and mastery of reflexes – skills that we use daily and barely realize we're using them. When people drink alcohol, those skills may be reduced – so much so that their ability to drive safely has also been reduced. And that's what happened to this defendant on (date of incident)." *This may be appropriate when you have a case with no collision and/or little evidence of bad driving.

- **CHOICES AND CONSEQUENCES** – For example – "The choices we make often come with consequences. This man made several choices on (date of incident) – he chose to have a few drinks too many; he chose to get behind the wheel of his car even though he shouldn't have. Now he faces the consequences of those choices."

- **FACT SPECIFIC THEMES** – For example – "'I was just having a few beers with friends' – that's what the defendant told the officers on the night he was arrested. It's true – he was just having a few beers with friends, which alone, of course, isn't a

crime. Once he got behind the wheel of his car, however, the defendant's behavior changed from 'just having a night out' to committing a crime – the crime of operating under the influence of alcohol – because, as the evidence will show that those beers impaired his ability to drive his car safely."

TELL A STORY

A good opening statement tells a story in a narrative form. To achieve this effect, imagine telling the "story" of your case to a co-worker or friend. Focus on the important details (i.e. "as the defendant spoke, an overwhelming smell of alcohol came from his breath") and avoid confusing details that do not add to your story (i.e. "first you will hear from the arresting officer, Officer Smith of the Springfield Police Department").

To help yourself get in the habit of storytelling, eliminate the following statements from your opening:

- The evidence will show…
- Mr. Jones will testify …
- Whatever I say is not evidence, but the witness will tell you…
- There are three elements to the crime of operating under the influence…
- I intend to prove to you…

Put the focus on *what the defendant did*, rather than what the officer saw. For example, instead of saying that "the officer will testify that he saw the defendant cross the double yellow line," say "the defendant crossed the double yellow line."

USE SIMPLE LANGUAGE

Nothing alienates you more from a jury than speaking like a lawyer or a police officer. If speaking with your friends or family, would you ever say, "…and then I alighted from my vehicle," or "…as a result of his observations, the police officer effectuated a traffic stop?" Not likely. All the same, prosecutors frequently use convoluted language when making their opening statements. Call a car "a car" and you'll make a better connection with the jury.

Here are some suggestions to change the tone of your opening from legalese to natural:

Instead of:	***Try:***
The defendant went outside the marked lane.	The defendant kept crossing the lines, weaving in and out. He couldn't even stay within his lane.
The defendant alighted from his motor vehicle.	The defendant got out of his car. He had to hold on so he didn't fall over.

The defendant had a strong odor of alcohol emitting from his breath.	The defendant's breath reeked of alcohol. It hit me in the face as soon as he rolled the window down.
His speech was thick and slurred.	The defendant could not speak clearly – his words were slurred. He seemed drowsy and kept stumbling over words.
He was unsteady on his feet.	He swayed from side to side and had to grab onto his car for support.

AVOID TOO MANY DETAILS

Avoid giving away every detail of your trial in your opening statement. Not only will you bore the jurors – you leave nothing for trial. For instance, the jury does not need to hear that the defendant attempted the walk and turn test, which the officer explained and demonstrated; that the defendant stated he had no physical ailments and that he understood the test; that he put his foot down on steps 2 and 7 and failed to count out loud as instructed. It would suffice to say:

> *The defendant then tried what's called the 'walk and turn test,' where he was instructed to walk in a straight line, turn and walk back. The defendant couldn't walk a straight line and was unable to follow the officer's instructions*.

DEALING WITH A BREATH/BLOOD TEST RESULT

In Massachusetts, it is against the law to drive impaired – it is also against the law to drive with a BAC of .08% or greater because everyone is presumed impaired at that BAC level. If you have a BAC in your case, don't forget to mention the result in your opening statement and connect that result to the officer's observations of impairment. Here is a suggestion of how to make such a connection:

> *The officer formed the opinion that the defendant was under the influence of alcohol and he placed him under arrest. Back at the station, the officer gave the defendant a breath test, which confirmed his opinion that the defendant was impaired because the result of the test was .10%. As you will hear from the judge later in this trial, our legislature has determined that no individual can drive a car when the alcohol in his or her system has reached a level of .08%.*

When the BAC result is quite higher than .08%, you can state the following:

> *The defendant took a breath test and the result was a .15%. The legal limit in Massachusetts is .08%, which means the defendant was driving with a blood alcohol level of almost twice the legal limit!*

OTHER RULES OF THUMB

Always make certain to state only those facts that you know, in good faith, will be admissible. If uncertain as to admissibility, file a motion in limine and get a pre-trial ruling before tainting the jury with your opening statement. Also, do not be afraid to mention facts that are unfavorable to your case. Ignoring weaknesses in your case will not make them go away and only takes away some of your credibility. Instead, try to downplay weak facts by addressing them head-on; then draw the jury's attention back to the strengths of your case.

For example, if the field sobriety tests were performed under less than perfect circumstances (bad weather, lots of traffic, etc.); you can address that fact in the following manner:

> *You will hear that these tests were performed in the breakdown lane of Route 128 at 8:00 at night. Yes, there was a lot of traffic and distractions. Yes, the roadway was slightly uneven. Unfortunately these conditions did not create an ideal setting for the defendant to try and perform the tests. The officer did the best he could to make the circumstances better by facing his wag lights away from the defendant's line of vision. Also, the officer offered the defendant an opportunity to do other tasks that would not be affected by the roadway such as reciting the alphabet and placing his finger to his nose.*

SAMPLE OPENING STATEMENT

August 18th was a warm summer night – the skies were clear, the air was warm. It was a perfect night to have some burgers and beers with friends. As a matter of fact, that's what the defendant, Jon Smith was doing that night – enjoying a typical summer night.

What made this night different for Jon Smith was that he had too many beers with his friends. Then he got behind the wheel of his car – something he shouldn't have done – because the beer he drank impaired his ability to drive and that is the crime of operating under the influence.

The witnesses and evidence will show that on that summer night in August, the defendant was driving down Main Street in Plymouth by himself. He was on his way home after hanging out at his friend's in Marshfield. It was about 1:00 in the morning – there weren't a lot of cars or people on the road but the road was clear and well lit.

Officer Smith of the Plymouth Police department was also on Main Street that night. He was on routine patrol, driving by himself in his cruiser. He was driving along when he noticed a car in the opposite lane weaving in and out of the lanes. Officer Smith turned his cruiser around to follow the car. As he followed, he watched the driver continue to

swerve in and out the marked lanes on Main Street, both front tires drifting into the opposite lane.

Based on what he saw, Officer Smith activated his blue lights and pulled the car over. As he got out of his cruiser and walked to the driver's window, he saw the defendant sitting in the driver's seat. It was this man – the defendant – who had been all over the road.

As Officer Smith spoke with the defendant, he immediately noticed that the defendant reeked of alcohol – a strong smell coming from his breath. The defendant also had trouble getting his license and registration. The officer asked the defendant to get out of his car, when he did, he could barely stand up on his own and had to lean on the driver's side door. His eyes were red and glassy and his clothes were a mess.

Officer Smith asked the defendant if he'd been drinking. The defendant said, "Yeah, I had a couple of beers but that was hours ago." The officer asked where he was coming from. The defendant told him, "My friend's in Marshfield. He had a cookout. That's where I had a couple of beers. But like I said, that was earlier in the night." As the defendant spoke to the officer, he noticed the defendant's speech was very slurred and thick-tongued.

All of these observations and the way the defendant was driving led the officer to believe the defendant might have had more than a couple of beers. The defendant then agreed to do some field sobriety tests. The officer will tell you in detail what exactly these tests are. The defendant attempted three tests: to recite the alphabet, stand on one leg for 30 seconds, and walk 9 steps in a straight line – turn and walk back. The defendant tried but he could not do any of those tasks. He couldn't say the alphabet – couldn't even get past the letter J. He couldn't stand on one leg for more than 10 seconds and he couldn't walk a straight line.

At this point, Officer Smith thought the defendant had too much to drink and should not have been driving. He based that opinion, not on one fact, but all the facts taken together – the dangerous manner that the defendant drove his car, the way he smelled, his appearance, the manner in which he spoke, his lack of agility and balance, his inability to perform simple tasks – all of these factors led the officer to his conclusion.

It is your job, ladies and gentlemen, to come to your own conclusion. As the judge will tell you, you don't have to decide if the defendant was "drunk" on that summer night – you only need to determine if what the defendant drank that night impaired his ability to safely drive his car.

At the end of this trial I'll have an opportunity to talk to you again. At that time I will ask you to render a verdict of guilty.

Direct Examination

The goals of direct examination are two-fold:

(1) To elicit testimony and present sufficient evidence to factually and legally satisfy each element of every charge against the defendant; and

(2) To present the evidence in as clear and simple a manner as possible

Here are some tips to help formulate a thorough yet engaging direct examination:

PREPARE YOUR WITNESS

The time constraints imposed by clerks and judges often hinder your ability to effectively prepare your witness. Despite the rush, take a few minutes to speak to the witnesses. It is imperative that you inform your witnesses of any known defenses or challenges to the case before calling them to the stand to testify.

- **LEVEL OF INTOXICATION** – Before trial the police officer may tell you that your defendant was "loaded" or "one of the worst I've seen," yet on the stand he may describe the defendant as merely "under the influence." If your officer is telling you that the defendant was "really drunk," try to encourage him to use those words and explain them in detail on the witness stand. The officer may offer an opinion as to the defendant's level of sobriety, but may not opine whether the defendant operated a motor vehicle while under the influence of alcohol or whether the defendant's consumption of alcohol diminished his ability to operate a motor vehicle safely. *Commonwealth v. Jones,* 464 Mass. 16 (2012), *Commonwealth v. Canty,* 466 Mass. 535 (2013), *Commonwealth v. Saulnier,* 84 Mass. App. Ct. 603 (2103).

- **TEST REFUSAL** – In a case where the defendant refused either the field sobriety tests or breath test, instruct your witness NOT to mention the refusal. Do not assume that your officer knows not to testify to the refusal. If your officer mentions the refusal during your direct examination, the judge will declare a mistrial.

- **"FIELD TESTS"** – Some attorneys will file pre-trial motions to instruct the prosecutor and his witnesses not to refer to the field sobriety tests as "sobriety tests," arguing: (1) that the term "sobriety" unfairly prejudices the defendant, and (2) they are not "tests." In cases where the judge allows this motion, you must instruct the witnesses accordingly, and make a conscious effort yourself to omit those terms from questioning. *Commonwealth v. Wright,* 79 Mass. App. Ct. 1119 (2011) (unpublished) is a decision that holds it is within the judge's discretion to allow the prosecutor to refer to the term "field sobriety test."

- **FIELD SOBRIETY TESTS** – In cases where the defendant submitted to these tests, your police officer witness will testify as to how the defendant performed them on

the date in question. However, before the officer describes the performance, have him describe in simple language: (1) what the tests are designed to do; and (2) specifically how the officer described the test to the defendant on that occasion. Remember, members of the jury may be familiar with the names of the individual tests (Alphabet Test, One Leg Stand, etc.) but chances are that very few know exactly what each test involves. Additionally, make sure your officer does not testify that the defendant passed or failed a test. These tests are administered so the officer can look for clues to determine whether the individual is under the influence of alcohol or some other drug. There is no pass or fail.

- **EXHIBITS** – Forewarn your officer that he will be called upon to draw a diagram of the scene, identify photos or physical exhibits, or possibly demonstrate field sobriety tests on cross-examination. It is unfair to surprise your witness with those tasks on the witness stand.

- **REVIEW THE POLICE REPORT** – Take a minute or two to go over the report with the officer. Make sure that he reviews the report to refresh his recollection. Remind your witnesses that if they are unsure of an answer, they should say so on the witness stand to avoid inconsistent statements amongst the witnesses.

- **GATHER DETAILS NOT IN THE REPORT** – It is surprising how often police officers innocently forget to put things in their reports. An example comes to mind: during cross-examination of the arresting officer in an OUI trial, the existence of the defendant's son in the passenger's seat of the car suddenly materialized. Imagine the surprise of the prosecutor who realized, mid-trial in front of the jury, that there was a percipient witness to this crime! Why wasn't this in the report? Though the answer is unclear, lack of witness preparation is in part to blame. Before trial, ask your officer the following questions, at a minimum:
    - What were the weather conditions?
    - What was the defendant wearing?
    - Was there anyone else present?
    - Where were the field sobriety tests performed?
    - After the defendant was arrested, did his demeanor change?
    - Does the officer recall how the defendant got in/out of the cruiser/walked to the police station?
    - Was the officer present during booking/when the defendant made a phone call?
    - Did the defendant make any statements not contained in the police report?
    - Are there any other facts that you can recall – helpful or not so helpful to our case?

ALWAYS USE A DIAGRAM

A diagram of the scene is crucial in every case as it provides the jury with a visual impression of what the officer observed. Hearing a police officer say, "The defendant went outside of the marked lanes on three occasions" is one thing – actually seeing the path of the defendant's car is another.

1. Prepare a diagram yourself on the board in the courtroom or create your own diagram on poster board in advance of trial. Many courtrooms are equipped with either a chalkboard or a dry erase white board. If you opt to use the court's chalk/white board, seek the court's permission. Most judges hold a brief lobby or bench conference prior to empanelment to discuss trial mechanics. This is a great opportunity to secure the judge's permission to create the diagram in the courtroom before you empanel the jury. Make certain the diagram is accurate by having your police officer present. Include all intersecting roadways, traffic signs or signals, and landmarks such as gas stations, stores, etc.
2. <u>After</u> your officer has testified to the facts of the defendant's conduct, ask him to step down from the witness stand, with the court's permission.
3. Have the officer identify the diagram as a fair and accurate depiction of the roadway on which the defendant was observed.
4. Next, have the officer identify and mark where he and the defendant were when the officer first observed the defendant.
5. Then, have the officer identify and mark the path of the defendant's car.
6. Finally, ask the officer to identify and mark where the defendant eventually stopped his car.
7. The officer should then resume the witness stand.
8. Make sure you describe everything the officer is doing to preserve the record.

By utilizing a diagram, not only have you given the jury a visual of the scene, you have also allowed the officer to repeat the crucial portions of his testimony – the defendant's inability to operate his motor vehicle safely. Also, you can refer to this diagram in cross-examination of the defendant and/or in closing.

In some cases, the manner in which the defendant drove his vehicle is not the strongest evidence of intoxication. For example, perhaps the defendant was in a parking lot or simply speeding. Nonetheless, a diagram helps to set the scene and breaks up the monotony of your direct examination.

ASK SIMPLE, NON-LEADING QUESTIONS

During direct examination the focus should be on the witness, not the person asking the questions. To keep the focus where it should be, ask short, succinct questions that allow the witness to tell his story in a smooth chronology.

Direct examination should *always* be non-leading. Focus your questions on "who, what, when, why and how" to keep the flow of questions proper. Avoid questions that begin with "did, do, does, and is".

PRACTICE TIP: Like most rules, this rule has an exception. In circumstances where the admission of evidence has been limited, (i.e. one or more of the field sobriety tests will be excluded from evidence), it may be wise to gently lead the witness to ensure that he doesn't offer facts that have been ruled inadmissible.

DON'T TALK LIKE A LAWYER

Try to avoid "legalese" in your questions. For example, instead of "what was your location when you first observed the defendant's vehicle?" try "where were you when you first saw the defendant's car?"

Also, don't talk like a cop. More importantly, if your witness is talking like a cop, try to re-phrase his answer in your next question.

Example:
Q: Officer, after the defendant pulled over what did you do?
A: I alighted from my cruiser.
Q: So, after you got out of your cruiser, where did you go?
A: I approached the driver's side of the defendant's vehicle.
Q: And as you approached his car window, what did you see?

DESCRIPTION RATHER THAN CONCLUSION/HIGHLIGHT IMPORTANT FACTS

Be sure not to gloss over important pieces of evidence with conclusory answers. Have your witness paint a clear picture of the events by providing a detailed description of what she saw.

Example:
Q: Please describe the defendant's appearance.
A: His eyes were red and glassy and his clothes were disheveled.
Q: When you say his clothes were disheveled, describe what you saw.
A: His shirt was hanging out of his pants in the back and his zipper was undone.

You can also highlight the more important facts by repetition. This can be achieved by incorporating the witness' answer into your next question.

Example:
Q: Describe the manner in which the defendant got out of his car.
A: He was unsteady on his feet and had to hold onto his car for support.
Q: As the defendant held onto his car for support, what did you do next?

USE TRANSITIONAL SENTENCES

The best way to alert your witness to the direction of your questioning is to use transitional sentences. This method also prepares the jurors for the next subject matter.

Example:

Q: Officer, now I'd like to discuss the defendant's appearance. Please describe how he looked as you spoke with him.

PRACTICE TIP: It is the prosecutor who bears the burden to prove beyond a reasonable doubt each and every element of the charge. DO NOT FORGET to elicit testimony from the police officer witness concerning the "public way" element. Prosecutors may become focused on "operation" or "under the influence" and neglect to prove that the road where the defendant was stopped is a "public way" – i.e., maintained by the city or state, street lights and signs, paved road, painted lines, etc. Failure to do so could result in a directed verdict!

ADMITTING EVIDENCE AT TRIAL

OUI cases rest heavily on the opinion of the police officer regarding the defendant's sobriety (or lack thereof). Often, however, *tangible evidence* exists to help corroborate that opinion. In general, anytime you can offer something tangible to the jury you increase your chances of getting a conviction. Jurors love anything they can see, feel, hear, smell, etc. Anything that helps them visualize the events will help your case.

GENERAL SUGGESTIONS

Before trial, make a list of all evidence you have. Write down the witness(es) you need to authenticate the evidence. Include a reminder to identify the defendant and offer evidence on all elements – forgetting – identification of the defendant or evidence of public way is a terrible way to lose a trial. Make sure that defense counsel has seen each piece of physical evidence prior to trial. As evidence is offered, check it off your list, noting the exhibit number assigned to it so you can easily refer to that exhibit later in the trial.

OUI Trial Checklist

Evidence	Witness	Exhibit #	Notice to D counsel
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Identification of the defendant	_____
Public way	_____
Operation	_____
Under the influence	_____
Blood/breath test result	_____
Other_____	_____
_____	_____
_____	_____

In general, evidence is admissible if:
It is relevant to a material issue;

- Its probative value outweighs the prejudicial effect, if any;
- It is properly authenticated; and
- A proper foundation for admission has been laid.

With regard to each piece of evidence, be sure to show it to defense counsel first; then ask the court's permission to approach the witness. If the number of exhibits in your case is voluminous, you may want to consider having them marked for identification ahead of time.

The following guidelines will assist you in admitting various types of evidence:

BREATH TEST EVIDENCE

To have the results of a breath test admitted into evidence, you must show that the test conforms with *Commonwealth v. Barbeau*, 411 Mass. 782 (1992), G.L. c. 90, § 24K and 501 CMR 2.00 *et seq*.

Commonwealth v. Barbeau, 411 Mass. 782 (1992) – *The Commonwealth must establish the existence of, and compliance with, requirements of a periodic testing program for breathalyzer instruments in accordance with* ***G.L.c.90 s.24K****, and regulations promulgated there under, before the results of a breathalyzer test may be admitted in evidence against a defendant charged with operating a motor vehicle while under the influence of intoxicating liquor.*

M.G.L. c. 90 s. 24K – *Chemical analysis of the breath of a person charged with a violation of this chapter shall not be considered valid under the provisions of this chapter, unless such analysis has been performed by a certified operator, using infrared breath-testing devices according to methods approved by the secretary of public safety. The secretary of public safety shall promulgate rules and regulations regarding satisfactory methods, techniques and criteria for the conduct of such tests, and shall establish a statewide training and certification program for all operators of such devices and a periodic certification program for such breath testing devices; provided, however, that the secretary may terminate or revoke such certification at his discretion. Said regulations shall include, but shall not be limited to the following: (a) that the chemical analysis of the breath of a person charged be performed by a certified operator using a certified infrared breath-testing device in the following sequence: (1) one adequate breath sample analysis: (2) one calibration standard analysis; (3) a second adequate breath sample analysis; (b) that no person shall perform such a test unless certified by the secretary of public safety; (c) that no breath testing device, mouthpiece or tube shall be cleaned with any substance containing alcohol.*

501 CMR 2.00 *ET SEQ*. – The Secretary of Public Safety promulgates regulations that govern the breath testing system in the Commonwealth.

TO INTRODUCE A BREATH TEST RESULT YOU NEED TO PROVE:

1. The defendant consented to a breath test (501 CMR 2.13). You need to introduce the **Statutory Rights and Consent Form** (signed by the defendant) found at the police department.
2. The operator was certified (501 CMR 2.07). You need to introduce the operator's certification located on the **Breath Test Report Form (test ticket)** found at the police department.
3. The breath testing instrument was certified (501 CMR 2.06). You will need to introduce the instrument certification located on the **Breath Test Report Form (test ticket)** found at the police department.
4. When the officer in charge changed the simulator solution he ran five calibration standard analyses (Periodic Test), the results of which were 0.074% – 0.086% (501 CMR 2.11 and 2.12 and *Barbeau*). You will need to introduce the **Periodic Test Report** located at the police department.
5. The breath test result was valid (501 CMR 2.14). You will need to introduce the **Breath Test Report Form (test ticket)** found at the police department.

OR simply the five and three rule……

THE FIVE AND THREE RULE:

To introduce a breath test a prosecutor needs to prove:

1. The defendant consented to take the test.
2. The operator was certified.
3. The instrument was certified.
4. The instrument was working properly at the time of the test.
5. The breath test was valid.

To introduce a breath test result into evidence a prosecutor needs the following documents:

1. The Statutory Rights and Consent Form
2. The Breath Test Report Form
3. The Periodic Test Report

INTRODUCING BREATH TESTING DOCUMENTS AT TRIAL:

It is well settled law that "the operations of the instrumentalities of government constitute 'business' within the meaning of the statute . . ." *Sawyer & Co. v. Southern Pac. Co.,* 354 Mass. 481, 484 (1968), quoting from *LaPorte v. United States,* F.2d 878, 880 (9th Cir. 1962). Additionally, all police departments are required by law to maintain breath test records. This is analogous to a police log of incoming telephone calls, or a stolen car report, both of which have been deemed to qualify under the business

records exception. See, *Commonwealth v. Sellon,* 380 Mass. 220, 230 (1980); *Commonwealth v. Walker, 3*79 Mass. 297. 302 (1979). Only police records containing second level hearsay (i.e. witness statements) have been deemed inadmissible under the business records exception. Finally, breath test records (particularly certificates and periodic testing reports) are created well in advance of any criminal proceedings. *Commonwealth v. Zeininger,* 459 Mass. 755 (2011).

PRIOR TO TRIAL:

You **MUST** educate the officer prior to trial. Sit down and go through the breath test documents so the officer can explain the information contained therein in front of the jury and effectively answer questions during cross examination. Make sure you remind the officer to read over the breath test paperwork prior to taking the stand.

PREDICATE QUESTIONS:

Predicate questions for the arresting officer, booking officer, breath test operator and keeper of records are located in Appendix B. Be careful if you plan to use these questions as they are only a guide and not a script. Review the questions with your officer prior to him or her taking the stand as the flow of the questions may change during testimony.

PRACTICE TIP: Make a copy of the **Periodic Record Report** that will be introduced into evidence at trial. Return the original Periodic Record Report to the police department after trial. Only one original document exists for all breath tests administered on the breath test instrument unless and until the calibration standard is changed and evidence introduced at trial must remain in the court folder for 30 days post-conviction in the event of an appeal. Do not lose your original!

OTHER BREATH TEST INSTRUMENT DOCUMENTS:

The Office of Alcohol Testing maintains the breath testing system for the State and thus keeps various other documentation related to each specific breath test instrument including Annual Certification Records and Maintenance and Repair and Diagnostic Test Reports. These documents are individual to each breath testing device but not specific to an individual defendant's test result. The law does not require you introduce any documents other than those listed above (Statutory Rights and Consent Form, Breath Test Report Form, Periodic Record Report). However, many judges will order the Commonwealth to provide defense counsel with copies of the Annual Certification Records, Maintenance and Repair and Diagnostic Test Reports to prove the instrument was in proper working order at the time of the defendant's test.

If you decide to introduce the annual certification records in your case-in-chief, *Commonwealth v. Zeininger*, 459 Mass. 775 (2011) held that certification records for a breath test instrument are admissible in evidence as business records pursuant to G.L. c. 233, § 78, and do not require live witness testimony from the chemist who performed the certification testing on the instrument.

The Maintenance and Repair Report details anything that is done to the instrument by the manufacturer or a member of the Office of Alcohol Testing (i.e. time change, battery change, software modification). The Diagnostic Test Report is a record of the instrument checking its parameters to ensure they are within tolerance for operation. This is done automatically by the instrument. Although these documents are not necessary to introduce a breath test result into evidence, you may decide to you want these documents to strengthen your case in chief. Currently, these documents can be obtained by faxing a request form to OAT at 978-392-4030.

POLICE OFFICER OBSERVATIONS:
You should be aware that while the breath test is being administered the officer is required to answer questions such as:
PUBLIC WAY?
OBSERVED DRIVING?
UNSTEADY ON FEET?
SLURRED SPEECH?
GLASSY EYES?
BLOODSHOT EYES?

These observations of the officer are statements and must be handed over to defense counsel under Criminal Procedure Rule 14. These observations print out of the breath testing instrument on the first page entitled BATS Completion Record.

MEDICAL RECORDS/BLOOD ALCOHOL RESULT

Medical records may be admitted if "certified by the person in custody thereof to be true and complete" and delivered to and held by the criminal clerk's office. Two statutes govern admissibility:

- G.L. c. 233, § 79 – Admissibility of records and copies of records of hospitals and certain institutions. This statute states that hospital records shall be admissible as evidence "so far as such records relate to the treatment and medical history of such cases."
- G.L. c. 233, § 79G – Medical and Hospital Records. This statute states that records shall be admissible as diagnosis, prognosis and/or opinion if notice of intent to offer the records is provided to the opposing party, along with a copy of the records, via certified mail not less than ten days before the introduction of same into evidence. As you can see, this statute is broader than § 79 in that it allows for diagnosis, prognosis and/or opinion without the testimony of a physician. Thus, a letter written by a doctor that diagnoses the defendant's condition would qualify as a medical record under § 79G. See *Commonwealth v. Schutte*, 52 Mass. App. Ct. 796 (2001).

The records, if properly summonsed, are deemed to be authenticated and shall be admissible upon oral motion. You only need to establish the relevance of the records.

Here is an example:

Q: Officer, did the defendant receive medical treatment as a result of the car crash?
A: Yes, he did.
Q: Do you know where he received that treatment?
A: The defendant was transported by ambulance to the South Shore Hospital.
Q: What was the date of that treatment?
A: August 12, 2010, the date of the incident.
Q: Do you know the defendant's full name and date of birth?
A: John H. Smith, December 1, 1967.
Q: Your honor, at this point I offer the medical records of the defendant from the South Shore Hospital regarding treatment the defendant received on or about August 12, 2010 as Commonwealth's Exhibit #5.

Commonwealth v. Dyer, 77 Mass. App. Ct. 850 (2010) – A defendant's blood alcohol content result included in a hospital record is not testimonial in nature, and thus is not subject to the confrontation clause.

Commonwealth v. Irene, 462 Mass. 600 (2012) – Hospital medical records, ordinarily admitted through G.L. c. 233, § 79, are not admissible as business records through G.L. c. 233, § 78.

REDACTION OF THE RECORDS

Some records contain information that is *prejudicial* to either the Commonwealth or the defendant and should thus be redacted. To illustrate, a medical record may contain a statement that a defendant has a history of alcohol abuse. While this statement is certainly of "interest" to the Commonwealth, its admission may unfairly prejudice the defendant. To ensure the admission of the medical records run timely and smoothly during trial, make sure that the records are redacted *prior to admission.* To do this, discuss the issue with defense counsel ahead of time and try to come to an agreement regarding the portions of the records that should not go to the jury. Be sure to make a copy of the unredacted records and have them marked as an exhibit (for purposes of the appellate record). The redacted copy can be published to the jury.

With the medical records admitted, the toxicology report which includes the blood test is put into evidence as part of those records, assuming the requirements of *Commonwealth v. Russo,* 30 Mass. App. Ct. 923 (1991) have been satisfied. In *Commonwealth v. McLaughlin*, 79 Mass. App. Ct. 670 (2011) the Court held the admission of a toxicology report as part of a hospital record pursuant to G.L. c. 233, § 79, does not constitute a violation of that statue as "going to the ultimate issue in the case" because the toxicology report relates directly to the treatment and medical history of the patient.

Once the records have been admitted, a chemist (typically from the Massachusetts State Police Crime Lab) must testify to convert the results from serum blood or whole blood to a percentage of alcohol, by weight, in the blood. A sample direct examination of a chemist can be found in Appendix B. If you are unable to secure a chemist for trial, seek a stipulation from defense counsel as to the conversion and offer a copy of the Serum Conversion Chart, found in Appendix C.

PHOTOGRAPHS

You do not need the photographer. Any witness can authenticate the contents of the photo by stating that the photo is a fair and accurate depiction of what it purports to be. You only need to ask the following questions to have a photograph authenticated:

Q: Officer, I'm showing you a photograph. Do you recognize this?
A: Yes.
Q: What do you recognize this to be a photograph of?
A: This is a photo of the roadway where the defendant performed the field sobriety tests.
Q: Is this a fair and accurate depiction of the roadway as it looked on the night of the defendant's arrest?
A: Yes.*
Q: Your honor, I offer this photo as Commonwealth's exhibit 1.

*What if the witness responds "No" to the question regarding "fair and accurate depiction"? All is not necessarily lost if the witness can qualify his answer. For instance, what if the photograph was taken during the day and the arrest occurred at night? Or, what if it was snowing on the night of the incident, yet the photo was taken in spring with no snow on the ground? As long as the witness can describe these differences but nonetheless say that the photograph fairly and accurately depicts the important aspects of the scene, the photograph should be admissible and *any discrepancies should go to the weight of the evidence, not the admissibility*.

PHYSICAL EVIDENCE

Physical evidence commonly found in OUI cases may include beer cans, bottles of liquor, drugs (prescription, over the counter, or illegal), etc.

Getting physical evidence admitted involves a showing that the item in your hand is the same item found on the night in question. This task can be accomplished by asking a series of questions of any witness who can identify the item. Here is an example of the questions that should be asked:

Q: Officer, I'm handing you an item. Do you recognize this?
A: Yes.
Q: What is it?

A: This is the beer can I found in the defendant's car on the night he was arrested.
Q: How do you know this beer can is the same beer can you found in the defendant's car?
A: I placed it in this evidence bag and marked it with the defendant's name and date of offense.
Q: So these are your markings on the bag?
A: Yes.
Q: Is the beer can in the same condition it was when you took it from the defendant's car?
A: Yes*
Q: Your honor, I offer this beer can as Commonwealth's exhibit 2.

*Again, if the witness answers "no", the item may still be admissible if the witness can qualify his answer. For example, with regard to the beer can, if the can had been dented during transport from the station to court the officer can testify to that change. Because the change is not material to any issue in the case, the can should nonetheless be admissible.

WHAT ABOUT CHAIN OF CUSTODY?

"Chain of custody" refers to the path taken by a piece of evidence as it is transferred from the defendant/scene, to police custody, to the lab for testing (if necessary), back to police custody and eventually to court. It is relevant to show that the evidence offered at trial is in fact the evidence recovered from the defendant/scene and that the evidence was not tampered with, misplaced or substituted.

Theoretically, to establish chain of custody you must bring in the person who first collected the evidence, the evidence officer who "tagged" the evidence and put it in the evidence locker at the police station; the officer in charge of the evidence locker; the officer who transported the evidence for testing; the officer who retrieved the evidence from the testing facility; and the officer who brought the evidence to court.

However, it is inefficient to call six police witnesses to prove something that usually is not at issue. It is important to remember (and remind the judge and defense counsel) that *chain of custody goes to weight, not admissibility*. *Commonwealth v. Hanscom*, 2 Mass. App. Ct. 840 (1974); *Commonwealth v. Colon*, 33 Mass. App. Ct. 304 (1992); *Commonwealth v. Herring*, 66 Mass. App. Ct. 360 (2006); *Commonwealth v. Charlton,* 81 Mass. App. Ct. 294 (2012). Nonetheless, if you have an item that has been tested, you need to establish the integrity of the transportation and storage of that item. This can be done without calling multiple witnesses. Instead, you can elicit testimony from one officer about the department's policy and procedure of the police with regard to evidence and whether that was procedure was followed in this case.

RMV DOCUMENTS

Certified copies of registry of motor vehicle documents *shall* be admissible as a public document in accordance with G.L. c. 233, § 76. However, on June 10, 2011, the Supreme Judicial Court in *Commonwealth v. Parenteau*, 460 Mass. 1 (2011), decided that the admission in evidence of a registry of motor vehicles certificate attesting to the fact that a defendant had been mailed a notification of the suspension of his driver's license pursuant to G.L. c. 90, § 22(d), in the absence of testimony from a registry witness, is a violation of a defendant's right to confrontation under the Sixth Amendment. The certification by the Registry used to prove notification in an operating after suspension charge was prepared for the purposes of criminal prosecution and thus, not admissible as a business record. In light of this decision, a prosecutor was required to bring in a representative from the RMV to prove the notice element on an operating after suspension offense which many times goes hand in hand with a charge of OUI.

In an effort to solve this "notification" issue, the Registry began using the "United States" Postal Service (USPS) Intelligent Mail system. All certified suspension letters are printed with an intelligent mail barcode positioned to appear in the envelope address window. The Registry prints a USPS ID on the right side of the letter across from the license number field. When the suspension letter is received at by the USPS, the barcode is scanned and the information captured. A record is created when the letter is received by the USPS. The RMV accesses the USPS site on a daily basis and gets proof electronically of the mailing records and incorporates that into the RMV record. The record showing proof of mailing provides proof that the letter was received by the USPS. When a driving history is produced by the RMV for court, the suspension letter together with the confirmation receipt will be produced as part of the RMV's records.

This record is created by RMV, in good faith, in the regular course of business, before the commencement of the criminal proceeding in which it is to be offered, and it will be the regular course of the business of the RMV to make such a record at the time of (or within a reasonable time after) mailing. These are the elements of the business record exception. Mass. Guide Evid. 803(6). If it's an admissible business record, when it is authenticated by an attestation of authenticity from the Registrar, it should be admitted under G. L. c. 233, § 76, G. L. c. 90, § 30, and/or Mass. R. Crim. P. 40.

NOTE

In *Commonwealth v. Norman*, 87 Mass. App. Ct. 344 (2015), the Appeals Court did not address whether the new mailing system was enough to prove notice to a defendant. "In the end, we need not resolve whether the evidence regarding the RMV's mailing practices would have been sufficient on its own, because of the totality of the evidence on notice."

TAPE RECORDINGS (911, VIDEOTAPES)

- **VIDEOTAPES** – Some police departments videotape the booking procedure. If you intend to offer the tape (and if the tape exists, you should offer it so you don't look like you're hiding anything), the admissibility requirements are the same as those for photographs. The only additional concern relates to possible redaction and/or suppression. For example, you never want the jury to see the defendant refusing his right to a breath test! To avoid any issues at trial, watch the tape with defense counsel prior to trial and try to come to an agreement regarding any portions that need to be redacted. The entire tape should be admissible – you can simply lower the volume during the portions that deal with inadmissible material. Make sure, however that if the jury is going to watch the tape during deliberations that the same precautions are taken.

- **911 CALLS** – To admit a 911 tape, you will need a witness who can identify the voice(s) on the tape. In most cases the 911 dispatcher will be necessary to identify his voice and state that the contents of the tape provide an adequate rendition of the conversation, and that it is a fair and accurate representation of what was said. Here are the questions that should be asked of the dispatcher to admit the 911 tape:

Q: As a dispatcher for the Brockton Police Department, what do your duties involve?
A: On my shift, I answer the emergency 911 recorded line into the Police Department and maintain contact with the shift supervisor and all the patrol officers on duty. I also dispatch, officers out to locations in response to emergency 911 calls.
Q: Turning your attention to May 31, 2001, were you on duty then?
A: Yes.
Q: Did you receive a 911 call at approximately 8:45?
A: Yes.
Q: Describe what you did after you answered this call.
A: I spoke with the caller. I also radioed all officers on duty with a description of the car in question.
Q: Was the call recorded?
A: Yes, all calls that come in on the 911 emergency lines are recorded.
Q: Describe what you did when the call ended.
A: I rewound the 911 recorded call, listened to it. Then I recorded my voice stamp on the tape.
Q: What's your voice stamp?
A: At the end of the recorded call, I record onto the tape the caller's name, address and time of the call.
Q: At this time, Your Honor, the Commonwealth requests that the tape

recording be played. [Tape is played with court's permission]
Q: Do you recognize the tape recording that was just played?
A: Yes.
Q: What do you recognize it to be?
A: It is the tape recording of the 911 emergency call I spoke about earlier.
Q: Do you recognize the voices in this tape recording?
A: Yes. The voices are mine and the 911 caller's voice.
Q: Is this recording a fair and accurate representation of the complete conversation you had with the 911 caller on May 31, 2001 at 8:45pm?
A: Yes.
Q: Your Honor, at this time the Commonwealth moves to have this 911 tape recording admitted into evidence as Commonwealth's Exhibit #4.

PRACTICE TIP: If you intend to offer evidence of this nature you will need to do the analysis under *Crawford et al*. and be prepared to argue it to the judge.

CROSS EXAMINATION

The defendant has just testified – he is wearing a suit, presents well, is polite and has just reiterated his version of the night in question, which sounds fairly credible. His friends have also testified – they too present well, sound credible and support the defendant's story.

This scenario is common in many OUI cases, leaving the prosecutor with a feeling of "what do I do now?" Here is the opportunity to strengthen your case by getting the defendant and his witnesses to agree with you on points that strengthen the theory of your case (*concession-based cross examination*). It's also the opportunity to point out to the jury why the version presented by the defendant and his witnesses does not add up *(destructive cross examination).*

This section will describe these distinct goals of cross-examination (building your case and destroying the defense), offer guidance for the legal and stylistic substance of your cross, and present suggestions on cross-examining defense experts.

GOALS OF CROSS EXAMINATION

CONCESSION-BASED CROSS EXAM

Concession-based cross examination is a technique in which the prosecutor uses short succinct questions with which the witness will most likely agree in order to support facts/theories of the prosecution's case.

In preparing this style of cross-examination, list all of the concessions that support your theory of the case to which the witness will agree.

EXAMPLE: Assume that the defense is not challenging the existence of the signs of intoxication, but rather the reason behind those signs. In cross-examining defense witnesses, you can get them to agree with:

- The existence of the signs
    - The defendant had red glassy eyes
    - His speech was slurred
    - He had an odor of alcohol on his breath
    - He was unsteady on his feet
    - He could not perform the walk and turn test
    - He was unable to say the alphabet completely
    - He could not stand on one leg for 30 seconds
- The facts that these signs are sometimes due to being under the influence
    - In your personal experience, is it fair to say that persons who are under the influence often times exhibit signs of that impairment
    - For instance, their eyes might be red and glassy
    - Their speech might be slurred
    - They may have an odor of alcohol on their breath
    - They might be unsteady on their feet
    - They might not able to perform simple tasks, such as saying the alphabet
    - They might not be able to walk a straight line or stand on one leg

DESTRUCTIVE CROSS EXAM

This style of cross exam is conducted to show the incredulity of the defense theory of the case and to highlight the lack of credibility of defense witnesses. This is typically done with questions that explore the following areas of impeachment:

BIAS

The witness' relationship to the defendant should be thoroughly explored.

EXAMPLE: The witness has testified that she is a friend of the defendant.

- The closeness of the friendship
    - You've known the defendant for approximately 5 years
    - The two of you met through mutual friends
    - You are quite close to those mutual friends
    - The defendant is a friend you admire and respect
    - You care about her welfare
    - You wouldn't want to see anything bad happen to her
- How much time they spend together
    - You socialize how often
    - Speak on the phone regularly
    - E-mail and text one another
    - You get together at the holidays
    - You frequent the same social events/parties

    - Your children/spouses/parents are friends as well
- How often the case has been discussed
    - The defendant told you about being arrested soon after it happened
    - The defendant told you she had to go to court because of the arrest
    - And she asked you to testify on her behalf
    - You've obviously discussed the night together
    - You've also discussed your testimony
    - You've met with defense counsel to prepare
    - You drove here with the defendant
    - You spoke last night to make those travel arrangements

PRIOR CONVICTIONS

A witness' (or the defendant's) prior convictions can be used to impeach the witness' credibility. Prior convictions for crimes involving fraud and deceit are highly probative of the defendant's credibility regardless of their prejudicial character. This also may include a crime of violence, since it shows a person's disregard for accepted norms of conduct. *See Commonwealth v. Elliot*, 393 Mass. 824, 835 (1985), *Commonwealth v. Whitman*, 416 Mass. 90, 93 (1993).

General Laws Chapter 233, § 21 outlines the requirements regarding the use of convictions to impeach. In general, the following factors are considered in determining whether a conviction falls within the time line for admissibility: was the conviction for a misdemeanor or felony; what was the date of conviction; what type of sentence was imposed; and was the witness convicted of additional crimes between the date of testimony and the date of conviction?

In general:

- Felony convictions that resulted in no sentence, a fine, a suspended sentence, or sentence to jail or house of corrections can be used to impeach within *ten years* of the date of conviction or imposition of sentence.
- Felony convictions that resulted in a state prison sentence can be used to impeach within *ten years* from the expiration of the minimum term of imprisonment.
- Misdemeanor convictions resulting in a sentence can be used to impeach within *five years* of the date of conviction or imposition of sentence.

A subsequent conviction can be used to *revive an otherwise stale conviction* if the witness was convicted of an additional crime or crimes between the time of his initial conviction and his testimony at trial. For example, assume a defense witness was convicted in 2005 of larceny under $250 (a misdemeanor) and he received a suspended sentence. In 2008, the same witness was convicted of OUI. In 2012, the prosecutor seeks to impeach the witness with the larceny conviction. Even though the five-year time period has expired, the conviction's use has been revived due to the subsequent OUI conviction.

Definitions for purposes of G.L. c. 233, § 21:

- Conviction – a plea or verdict of guilty or adjudication of delinquency.
- Sentence – includes a sentence to jail, house of correction, reformatory, or state prison. The sentence may have been suspended. A term of probation on a conviction of a misdemeanor is not a sentence for purposes of the statute.

The decision whether to admit a prior conviction against the defendant is within the judge's discretion. Therefore, if you intend to impeach the defendant with a prior conviction, you must seek prior judicial approval by filing a motion in limine. If the judge allows the line of questioning, be certain to ask questions to establish the defendant's identity, the crime charged, the fact that the defendant was represented by counsel[13], and the sentence the defendant received.

Example:

- Sir, your full name is Alexander L. Harris.
- Your date of birth is December 1, 1967.
- You are the same Alexander L. Harris who was convicted April 10, 2009 of larceny of property over $250 out of the Salem District Court.
- You were represented by counsel.
- You received a sentence of six months in the House of Corrections suspended for 2 years.
- Your honor, at this point I offer the certified copy of the defendant's conviction for larceny as Commonwealth's Exhibit #6. (The certified copy of the conviction and appearance/waiver of counsel is necessary).[14]

NOTE: Once the conviction has been admitted, the witness is not allowed to explain or extenuate the circumstances surrounding the conviction. See *Commonwealth v. McGeoghean*, 412 Mass. 839, 843 (1992).

PRIOR INCONSISTENT STATEMENTS

In order to effectively demonstrate the fact that a witness has made an inconsistent statement, you need to highlight the original statement and then point out the inconsistency.

[13] If you are seeking to impeach the defendant in your case with a prior conviction AND that conviction resulted in a jail sentence, you must establish that either he was represented by counsel or waived his right to counsel. *Commonwealth v. Proctor*, 403 Mass. 146, 167 (1988). For felony convictions the Commonwealth need not show the defendant had or waived counsel as representation is presumed. *Commonwealth v. Saunders*, 435 Mass. 691, 695-696 (2002).

[14] In order to impeach a witness by a criminal conviction, the conviction must be proved by a court record or a certified copy. *Commonwealth v. Atkins*, 386 Mass. 593, 600 (1982). *Commonwealth v. Clifford*, 374 Mass. 293, 305 (1978). *Commonwealth v. Walsh*, 196 Mass. 369, 369-370 (1907). See G. L. c. 233, § 21.

EXAMPLE:

- On the night you were arrested, Officer Williams asked you several questions about where you were coming from.
- The officer was polite when he questioned you.
- He wasn't threatening or overbearing.
- You knew it was important to be honest with the officer.
- You told the officer you were coming from the Bronze Tavern.
- Today in court you testified that you were coming from a friend's house.

PRACTICE TIP: Don't begin an impeachment question with the words "do you remember…?" If the witness answers "no" the witness might be telling the truth. Better practice is to use an accusatory question that states the point as a fact to be admitted or denied. For instance, instead of "do you recall telling Officer Smith you came from the Bronze Tavern?" ask, "you told Officer Smith you came from the Bronze Tavern?"

OPPORTUNITY TO OBSERVE

Sometimes a witness is testifying to a fact and common sense leads one to ask, "come on, how can you know that?"

EXAMPLE: The defendant's friend claims he knows the defendant drank only 2 beers all night.

- You and the defendant were at the Bronze Tavern that night.
- You arrived together.
- You got there around 6:00 p.m. right after work.
- Neither you nor the defendant had anything to drink before you got to the bar.
- Did you see anyone else you knew at the bar?
- It was a Thursday night.
- That bar draws in a good after work crowd, doesn't it?
- The bar was fairly crowded then.
- You ran into some friends.
- What were they drinking? (Answer irrelevant – if the witness doesn't recall what anyone else was drinking yet has a great memory of the defendant's alcohol intake, why was the witness so focused on the defendant's drinking? If the witness remembers every drink that every person had, the answer sounds rehearsed.)
- So your attention wasn't focused on the defendant the entire time. (Answer irrelevant)
- You paid for the first round.
- The defendant paid for the second round.
- You had a couple more beers.
- Who paid for those beers? (Answer irrelevant)
- You must have used the restroom a few times.

- Did you get up to play pool/put money in a juke box/play Keno?
- You stayed at the bar until 10:30.
- The defendant left the bar with you.
- The two of you were there together for over 4 hours.
- So it's fair to say for 4 ½ hours, you did not monitor everything the defendant did. (Answer irrelevant)
- But it's your testimony that the defendant had no other drinks – nothing other than the one beer you bought and the one beer he bought.

CONSCIOUSNESS OF GUILT

If the defendant engaged in conduct that displays his consciousness of guilt, you can question him about this conduct and, if appropriate, request a jury instruction on the issue.

EXAMPLE: The defendant fled from the scene of an accident

- You had just crashed your car into a telephone pole.
- You didn't call the police.
- You didn't wait around for the police to arrive.
- You left your car on a dark street, unattended.
- You walked home.
- You didn't call the police when you got home either, did you?
- You testified your plan was to have the car towed in the morning.
- Now you admit you'd had a couple of drinks that night.

Though you might be tempted to say, "isn't it true, Mr. Defendant, that you fled the scene because you were drunk and you didn't want the police to know you'd been drinking and driving?" – Don't! That is a point to be reserved for your closing argument (see below for more on the topic of asking one question too many).

PRE-TRIAL SILENCE

If a witness testifies to exculpatory facts and has never before disclosed those facts to anyone in law enforcement, the witness' pre-trial silence may be highlighted. A proper foundation must be laid before employing this type of cross-examination.

According to *Commonwealth v. Brown*, 11 Mass. App. Ct. 288 (1981), the Commonwealth must establish the following:

- The witness knew or should have known of the pending charges in sufficient detail to realize that he possessed exculpatory information;
- The witness had reason to make the information available;
- The witness was familiar with the means of reporting it to the proper authorities;
- Neither the defendant nor his lawyer asked the witness to refrain from doing so.

EXAMPLE:

- You testified that the defendant wasn't impaired on the night he was arrested for operating under the influence.
- You were with him the entire night and when you left him he was "sober" as you said on direct exam?
- As a matter of fact, you're quite certain he only had one and half beers the entire night.
- You are aware that, just minutes after you left him the defendant was stopped by the police.
- And the police arrested him for driving his car while under the influence of alcohol.
- You do know how to get in touch with the police, do you not?
- You knew you possessed information helpful to your friend, the defendant.
- You never went to the police with that information.
- And no one, not the defendant nor his attorney, asked you not to go the police.

Unlike examining a witness with regard to pre-trial silence, questioning the defendant on this issue must be done with caution so as not to encroach on his 5th Amendment right to remain silent.

You cannot question a defendant as to pre-trial silence, unless the defendant has "chosen to speak." For example, assume the defendant testifies at trial that he was not driving on the night in question but had lent his car to his friend. Assume further that this is the first time the defendant has mentioned the friend. If the defendant made no pre-trial statements, you cannot cross-examine him on his failure to disclose that the friend was the actual driver of the car. **HOWEVER**, if the defendant made a pre-trial statement that he wasn't the driver, it is appropriate to question the defendant as to why he failed to identify the friend as the driver. See *Commonwealth v. Hunt*, 50 Mass. App. Ct. 565 (2000). The difference in the two scenarios is that in the latter scenario the defendant waived his right to remain silent when he made a statement to the police. The cross-examination questions simply "point out his omissions and show the inherent weakness of his case." *Id*.

FAILURE TO CALL WITNESS/PRESENT EVIDENCE

Questioning the defendant regarding his failure to call witnesses and/or present evidence presents similar 5th Amendment concerns as discussed above. After all, the defendant is presumed innocent and need not present any evidence on his behalf.

This does not mean, however that the issue is completely off-limits. It is appropriate if certain foundational requirements are met.

With regard to the failure to call witnesses, the foundational requirements are:

- The Commonwealth's case against the defendant is strong, so that the defendant would naturally be expected to call favorable witnesses.
- The absent witness must be expected to offer important testimony supporting the defendant's innocence. The testimony that the witness could have offered must be important and not merely collateral, or cumulative. For instance, the fact that the defendant ate an entire pizza before drinking might be relevant as to the effect of the alcohol he later drank, but expecting the defendant to call a witness to attest to how much he ate is unreasonable. Also, the defendant is not expected to call every witness who might have information. See *Commonwealth v. Schatvet*, 23 Mass. App. Ct. 130 (1986) (error for prosecutor to question defendant as to missing witnesses when prosecutor had no basis to believe those witnesses would offer information other than that presented by defense witnesses who did testify.)
- The absent witness must have been available to testify for the defendant, meaning the defendant knew the identity and whereabouts of the witness. Thus, the bartender who served the defendant on the night of his arrest is not someone who the defense should be expected to call, unless perhaps the evidence shows that the defendant and the bartender know one another and are on friendly terms.
- The witness's absence must not be explained by any of the other circumstances in this case and the defense has not offered any plausible, logical reason for not producing the witness. For instance, if the defendant in the example below had testified on direct examination that the witness left the country a few months prior to the trial and could not be reached, cross-examination on this topic may not be proper.

EXAMPLE:

- You say that your ex-girlfriend was with you all night at the bar.
- You went to the bar together.
- It was around 8:00 p.m.
- You left, alone, around 11:30 p.m.
- As a matter of fact, you had an argument with her, which prompted you to leave the bar
- You were stopped by the police shortly after you left the bar.
- So your ex-girlfriend was with you the entire time you were at the bar.
- Now, you claim you were not impaired when you drove that night.
- That you only had 2 beers.
- You and your ex-girlfriend were together for 2 years.
- You just broke up a couple of months ago.
- You know where she lives.
- You know how to contact her.
- You or your attorney could have summonsed her to come to court today.

If these requirements are met, you may question the defendant and argue his failure to produce this witness in your closing argument. You may also be entitled to a jury instruction on the issue.

With regard to the failure to produce physical evidence, the rules are less clear than those applicable to missing witnesses. *Commonwealth v. Matthews*, 45 Mass. App. Ct. 444, 450 (1998). However, if it seemed natural that the defendant would have produced evidence and failed to do so, an inquiry may be appropriate.

For example, if the defendant testifies he was at the bar for 2 hours, ordered one beer and a cheeseburger, paid for it with his credit card and left, you may be able to question the defendant as to his failure to produce his credit card receipt and/or bill. See *Commonwealth v. Ivy*, 55 Mass. App. Ct. 851 (2002). As a matter of caution, it might be wise to follow the guidelines set forth with regard to missing witnesses and lay a proper foundation.

SUBSTANCE OF THE EXAMINATION

AS A MATTER OF LAW

DO NOT ASK A WITNESS TO COMMENT ON THE CREDIBILITY OF ANOTHER WITNESS

Only the fact-finder determines credibility. Thus, asking a witness to comment on the credibility of another is improper as it invades the province of the jury. *Commonwealth v. Federico*, 425 Mass. 844, 848 (1997).

Asking a witness to comment of the credibility of other witnesses is an error that prosecutors must scrupulously avoid. See how easy it is to make this mistake:

- You heard the officer testify.
- The officer said that you told him you had 4 or 5 drinks that night.
- You testified that you never said that.
- So it's your testimony that the police officer is lying.

DO NOT ASK A QUESTION THAT DOES NOT HAVE A GOOD FAITH BASIS

Attorneys are typically given wide latitude on cross-examination, as long as there is a good faith basis for asking the question. For example, asking an OUI defendant, "Isn't it true you actually had four shots of Goldschlagger that night?" is proper only if you have a good faith basis for the question (i.e. the officer interviewed the bartender who saw the defendant drink that much, a bar tab with four shots of Goldschlagger was found on the defendant's person, etc.) It is not proper to go on a "fishing expedition" or to taint the jury with facts that simply are not substantiated.

AS A MATTER OF STYLE

ORGANIZE

- Ask questions according to subject matter. Create an outline for your cross examination on all the subjects you want to cover (i.e. bias; opportunity to observe; inconsistencies) and write down questions and/or points to be made with regard to each subject.

CHOOSE WORDS AND DEMEANOR CAREFULLY

- Consider the witness and act accordingly. Never be nasty to a witness. Be especially polite to someone's mother.
- Avoid sarcasm and eye rolling at a witness' answer. This is juvenile and unprofessional behavior. Furthermore, you never know what the jury thinks of the witness and you risk alienating those jurors who don't agree with your assessment.
- During direct examination the focus should be on the witness. During cross, however, the focus is on you. If your court allows, position yourself in the jury's view during questioning.
- Avoid the use of tags. Try not to end questions with a tag such as "…didn't you?" or "… isn't that correct?" Instead, use voice inflection to get the witness to provide you with a yes or no answer, emphasizing the word or words that are the focus of your question: "You were at the Hideaway Lounge?"
- Stick to the senses – You saw, smelled, tasted, heard, felt. Avoid opinions or judgments – "Didn't you think…?"

MAINTAIN CONTROL OF THE WITNESS

Often witnesses will try to narrate long answers that may not be responsive to your question, or go beyond what you asked and judges often will allow the witness to explain, seldom instructing the witness to simply answer "yes" or "no." What can you do to maintain control?

ASK ONLY LEADING QUESTIONS

Your questions should have a completely different tenor than those asked on direct examination. The focus is on YOU, not the witness. Questions should be designed to elicit a "yes" or "no" response. Many times the answer is irrelevant to the point you're trying to make. Here is an example of how leading questions are much more effective than open-ended questions:

NON-LEADING QUESTIONS:

- So you were at the bar until 11:00.
- Now, what time had you arrived?
- How long were you there? (*Witness struggles and comes up with the answer "A few hours." Witness controls perception of the time period.*)

- And how many beers did you say you drank during that time period?

LEADING QUESTIONS ONLY:

- You were at the bar until 11:00
- You had arrived at 6:00
- So you were there for a total of five hours (*Questioner controls the perception of the time period*)
- And during that entire time, you drank only 2 beers (*voice inflection used to highlight skepticism of statement*)

- Don't let a witness run on and on – use body language such as approaching the witness or raising your hand to stop a witness who keeps "running at the mouth."

- Make sure the witness answers the question. As stated, cross exam questions should for the most part be framed to require a "yes" or "no" response. If a witness tries to avoid the question by giving a long explanation, repeat the question until it is answered.

EXAMPLE:

Q: You could feel the effects of the beer you drank that night?
A: Well, um, I'm not sure what you mean.
Q: You felt different when you finished drinking those beers than when you started drinking them?
A: Different? I don't know if I felt *different*.
Q: Is that a yes or a no? Did you feel different after drinking the beers?
A: I don't know that I would call it different.
Q: Sir, yes or no – did you feel different at all after drinking, as you said, a few beers?

- Don't ask questions you don't know the answer to (unless the answer is irrelevant). The risk that the answer will be unfavorable is too great.

- NEVER ask "why!" This is the cardinal rule of cross examination**!** There is truly never (well, almost never) a reason to ask "why" on cross exam. The following scenario illustrates how one small word can be so devastating:

Q: Sir, you say that you couldn't perform the walk and turn test because of an old knee injury?
A: Yes, that's true.
Q: Now, you were aware of this problem on the night you were arrested?
A: Yes I was.

Q: And the officer asked you if you had any physical disabilities that would prevent you from doing the test, right?
A: Yes he did.
Q: You didn't say anything about your knee injury that night, did you?
A: No, I didn't.
Q: Why is that?
A: Well, I was very nervous and just wanted to do what the officer asked. I didn't even remember my injury until the next day when I was trying to figure out why I wasn't able to do the test.

DO NOT ASK COMPOUND QUESTIONS

Make sure to ask for one fact per question. By asking for multiple facts in one question, the witness cannot give a proper answer by responding "yes" or "no." Also, asking for multiple facts is unfair to the witness.

EXAMPLE: Rather than asking: "So it's your testimony that while you were at work you sat at your desk for eight hours, staring at a computer screen all day, making your eyes very tired and red." Instead, try asking a series of questions to make the same point:

- So you worked all day on the day you were arrested?
- And that was a full day, eight hours?
- You sat at your desk most of the day?
- You worked on your computer?
- Your eyes got tired staring at the screen all day?
- So it's your testimony that that's why your eyes were red and tired?

DON'T ASK ONE QUESTION TOO MANY

This is one of the most common mistakes that attorneys make and goes hand-in-hand with the "never ask why" rule. The time to explain the significance of your questioning is during closing argument, not cross-examination.

EXAMPLE: The prosecutor is attempting to discredit the defendant's claim that he only had "two beers."

- So, your softball team had just won the championship?
- You and your teammates went to Butch's Tavern after the game?
- You got there around 8:00pm?
- You were all very excited?
- You were all in a good mood?
- People were buying rounds of drinks? (Answer irrelevant)
- Everyone was having a few drinks? (Answer irrelevant)
- You were having a good time?
- As a matter of fact, you stayed until almost midnight, right?
- So you were there for almost four hours?

- And you had 2 Bud Lights the entire night?
- That's one beer every two hours, more or less? (Answer irrelevant)

At this point, the prosecutor should cease questioning and, in closing, argue to the jury that it is ridiculous to assume that the defendant had only two beers.

NOTE: Asking that one question too many can undermine your entire line of questioning:

QUESTION: So, isn't it true you actually had more than two beers that night?
ANSWER: Actually, no. I was in a great mood and didn't need to drink anymore. Besides, I never have more than two drinks when I have to work the next day.

CROSS EXAMINATION OF DEFENSE EXPERTS

GENERAL PRINCIPLES

You may have an OUI case where the defense will call an expert witness, typically to attack the breath test result, the testing process, or the alleged degree of impairment. The rule to remember about experts is: they are not going to change their opinions on the witness stand. Just as the defendant is not going to break down on the witness stand and confess, neither will the expert admit that his opinion could be wrong, even if you prove that it is. They are often experienced witnesses and are prepared for cross-examination.

Rarely will you have a vulnerable expert who can be attacked. If the expert is not vulnerable, the best approach is an affirmative or concession based cross- examination. Use the defense expert to agree with as many facts, scientific principles and observations from your witnesses as possible. It serves to confirm the credibility of your witnesses when the defense expert agrees with them.

PREPARATION

Preparation is the key to successfully cross examining an expert. Gather as much information as possible about your expert and his field of expertise. Here are some suggestions for doing so:

TALK TO YOUR EXPERT

Prepare yourself for the defense expert by learning from your own experts. Every chance you get, learn as much about the area of science that is involved in your case as you can. Ask your chemist to give you a tour of their lab, and show you how they do the testing. See how the chain of evidence is handled. Put yourself in the position of the defense lawyer, and ask every question you can think of that would challenge their results, and have them show you how that problem would not affect the results. As you

educate yourself, you will be preparing your expert for the defense cross-examination. Your expert will also appreciate working with a well-prepared and knowledgeable prosecutor.

PRE-TRIAL DISCOVERY

Use the pre-trial conference report or a reciprocal discovery motion to gather as much information as possible about the expert. You should request from the defense:

- A copy of the expert's curriculum vitae
- Copies of articles or books written by the expert
- Any tape recordings, or video tapes of the expert
- All of the materials the expert reviewed or relied on in reaching the opinion and in preparing for the case
- The expert's opinion and basis for that opinion

INTERNET

Conduct an on-line search by putting the name of the expert into a search engine and see what emerges. Specifically, try to find out:

- The expert's exact degree(s), job title and description, and any specialties or specialized training
- The expert's training and experience in this field
- How the expert spends his time (teaching, research, writing, speaking)
- Whether the expert has testified before, and on which side
- The expert's sources of income
- The expert's license status. If the expert is in a field that requires a license, call the licensing agency and find out the status of the expert's license. It is rare, but you may find that the expert is on probation or has been suspended previously.

In addition to using a search engine, check out the website for Committee for Public Counsel Services (CPCS) at www.state.ma.us/cpcs/links/index.htm to determine if the expert has CPCS affiliations.

PROSECUTORS' ENCYCLOPEDIA/TRANSCRIPTS

Since the same experts show up over and over, you may want to review transcripts of prior testimony. The Prosecutors' Encyclopedia (PE) is a national database of expert transcripts and other valuable materials from trials and hearings throughout the country. As soon as you learn that a defense expert will be called, log onto PE (myprosecutor.com) to access transcripts. In 2012, MDAA transferred their entire data base of expert witness transcripts to PE.

Additionally, the National Traffic Law Center has established a brief bank that includes transcripts, motions and memoranda. The materials on file address issues concerning breath test instruments, drug recognition experts, horizontal gaze nystagmus, field sobriety tests, crash reconstruction, retrograde extrapolation, etc. The National Traffic Law Center maintains a professional reference directory of individuals who have

testified on the above areas. See Appendix D for contact information on all of the organizations listed above.

SUBSTANCE OF CROSS EXAMINATION

CONCESSION BASED CROSS EXAM

When cross-examining the defense expert, never try to take on the expert in his own field. No matter how much preparation you do, you will never know as much as the expert. In challenging a competent, qualified expert, the best approach will be an affirmative cross- examination.

- **CORROBORATING YOUR CASE** – You can use the defense expert to corroborate or confirm as much of your case and your expert's testimony as possible. You may be able to use the expert to acknowledge the signs and symptoms of impairment, particularly the ones seen in the defendant, to confirm the accuracy of your witness' observations. In the affirmative cross examination, your goal is to get as much agreement with your case as you reasonably can, and narrow the testimony to the issue(s) remaining in dispute. Have a checklist of your expert's testimony. You can develop it in advance from the questions you are going to ask. The main parts of the testimony will be the scientific principles, the facts, and the opinion. When the defense expert testifies, mark on the checklist all the points the expert agrees with. Note any areas of dispute. The checklist will keep you organized on cross-examination.

- **NARROWING THE SCOPE OF THE TESTIMONY** – Identify areas that the expert does not know about, or is not going to testify about. Narrow the scope of the expert's testimony as much as possible. For example, if the expert is a toxicologist, have him agree that he is only here to give an opinion about the blood test. He is not going to give opinions about the defendant's driving, the field sobriety tests, statements the defendant made to the police, or what the eyewitnesses saw. This approach makes it clear to the jury that although the expert has opinions about one part of the case, there are areas the expert is not disputing which establish impairment. Consider filing a motion in limine to limit the scope of the expert's testimony if appropriate.

- **BOLSTERING YOUR EXPERT** – With the right expert, you may be able to get him to agree that the prosecution expert is also an expert in the field. If the prosecution expert identifies certain learned treatises as authoritative, the defense expert may also agree that those same works are authoritative. Also, many experts travel in the same professional circuit – check to see if the defense expert can bolster training courses or professional organizations with which your expert is affiliated. These tactics can enhance your expert's credibility and conclusions with the jury.

DESTRUCTIVE CROSS EXAM

This involves challenging the expert himself, and/or the manner in which the expert formulated his opinion

THE EXPERT HIMSELF

BIAS – anything that shows the expert is less than an objective scientist.

Areas of bias include:

- **FEE BEING PAID** – Attacking the fee that an expert receives for services rendered should be done with due care. If you know in advance that the expert is court-appointed or is charging a modest fee, omit this line of questioning, as it may seem petty to challenge the fact that the expert is being paid. All professionals receive a fee for their services. If you choose to probe the fee arrangement, ask how much the expert gets per hour of in-court time, how much he is paid for preparation for out-of-court time, and what the total fee is. If the expert hedges, or says that the bill has not been figured, get the hourly figure. Ask the expert how many hours were spent on this case, and do the math. If little time was spent preparing, you can argue that the expert gave "drive-through service." If the expert gives a high number, then the fee will be correspondingly high. It may be an entirely reasonable fee, but to the jury, the fee may seem high.

- **PRACTICE OF WORKING FOR THE DEFENSE** – If you know the expert appears in court frequently and is in the "business" of testifying, you can bring that out. If the expert gets fees from a consulting firm that is hired primarily by defense attorneys, bring that out. The expert will include some work for the prosecution or for the plaintiff in civil cases, so they can appear to be objective and fair. Find out what percentage of time is spent between "prosecution" work and "defense" work, and if there is a significant imbalance, point it out.

  The curriculum vitae (CV) is a good source of information. Many CVs list lectures the expert has given. Determine the audience of those lectures. A "defense expert" may be invited to speak at defense lawyer seminars to educate them on the latest and best tactics. If you can, get video or audiotapes of those lectures as well, both for bias material and/or impeachment material. Lectures given at seminars may be less restrained, and the expert may let the bias show. You may get some quotes you can use to demonstrate the expert's bias and undermine his credibility.

QUALIFICATIONS – You may find that the defense expert is not qualified to give an opinion on the specific topic in which they are called to testify. Ascertain information about this expert beyond the title and profession.

"FORENSIC PATHOLOGIST" – a hospital pathologist is often a general pathologist. Forensic pathology, however, is a sub-specialty that includes the study of substances on the human body, including alcohol. A witness who is a "pathologist" may sound qualified, but in fact be less qualified than another specialist, such as a forensic pathologist.

"COLLISION RECONSTRUCTIONIST" – a collision reconstructionist is a person able to determines speed, distance and manner of operation of vehicles involved in a collision. An engineer with experience in designing roadways may fancy himself a collision reconstructionist when in fact he has little to no experience reconstructing scenes.

If the expert has written articles or books, or given lectures, those can form the basis for an attack on qualifications and experience. For example, if the expert has written articles, but few or none of them are about the subject of impairment, or breath or blood testing, point that out. You can use those articles to show what the witness' primary work is, and it can be far removed from the subject the expert is in court to testify about.

PRACTICE TIP: If you have a credible, qualified expert, an attack on qualifications will likely fail, and you will be better off exploring another area of cross examination.

PRIOR INCONSISTENT STATEMENTS – If the expert–t is in demand, testifies a lot, and is not particularly scrupulous about what he says, he may contradict himself from one case to another. If you can obtain depositions, trial transcripts, or articles or books written by the expert, comb them for statements that potentially contradict what he is going to say in your case.

Make a checklist of relevant statements with a book/page/line cite for quick reference in the courtroom. Mark your checklist as the expert goes through the testimony. On cross, you will do the standard impeachment for an inconsistent statement. Be sure that these are significant contradictions about crucial points in the case. Minor inconsistencies will not be effective.

MANNER IN WHICH OPINION WAS FORMULATED

MATERIAL REVIEWED – Find out ahead of time what materials the defense reviewed before testifying. Prepare a checklist of what materials are available, and note anything that the expert did not review. On cross-examination, point out each item the expert did not review. Ask where the expert got the materials that were reviewed — it will probably be from the defense attorney. Ask if the expert would have liked to have reviewed the

missing materials to make the opinion more complete (the answer will almost certainly be "yes"). This approach is very effective if the prosecution expert did review all the materials.

FACTS ASSUMED – As the expert is testifying, keep a checklist of the facts that the expert is assuming for the purposes of giving the opinion. Note any differences between the facts the expert is assuming and facts in the materials that were not reviewed. Then, go through the missing facts and ask the expert if they would change the expert's opinion.

HAS THE EXPERT SPOKEN WITH THE DEFENDANT?
Find out if the expert talked to the defendant in preparing for the testimony. This is important for two reasons:

First, you want to object to the expert relating the defendant's story, unless the defendant has testified. A defense attorney may try this tactic because it puts the expert's credibility behind the defendant's statements; the defendant may make a poor impression, or may be vulnerable to cross examination. It is important to remember that the defendant's statements are hearsay. The Commonwealth can generally introduce the defendant's statements as admissions or statements of a party opponent. If the defense seeks to admit those statements through another witness however, the statements are typically inadmissible. Make sure the defense does not attempt to introduce the defendant's self-serving statements through an expert.

Second, you want to know if the expert talked personally to the defendant because the defendant may have told the expert a different version than he told the police. If you cannot keep the expert from relating the defendant's statements, listen carefully to what is said, and note any discrepancies between the versions. The expert's opinion is only as good as what the defendant told him. If the defendant is not credible, then the expert's opinion is flawed. You then can go through the discrepancies one by one, and ask the expert whether he would change his opinion if the facts were different. This approach enables you to neutralize the opinion without having to attack the expert personally or professionally. Tactically, you may choose to leave the inconsistency alone on cross examination and later argue to the jury that the opinion is not reliable because the defendant told two different stories.

NO PERSONAL OBSERVATION OF THE DEFENDANT – Every expert is vulnerable because he did not personally observe the defendant on the night of the offense. The expert is getting his information from the reports provided by the defense, and from the defendant himself. You can point out that the expert has no personal knowledge of the case and that he was not present when the crime was committed. This type of cross-examination will not discredit the expert, but it may neutralize the impact of his testimony.

CLOSING ARGUMENTS

For most prosecutors, this is the most fun, challenging portion of any trial – a chance to make sense of all the evidence and use your skills of advocacy and persuasion to convince a jury to convict.

Unfortunately, closing argument is also an opportunity to easily (but unintentionally) commit error that could result in a mistrial or reversal on appeal. This section of the manual provides some tips on what you can and cannot say in your closing argument.

STRUCTURE OF THE ARGUMENT

It is imperative that your closing argument be organized. You have little time to give the jury a tremendous amount of information and this task is done most effectively when the information is presented in a clear, organized format. While there is no set formula on how an argument should be delivered, the suggested guidelines below include all the essentials that should be incorporated into your closing.

INTRODUCTION

Remember in the section on opening statements when we discussed "theme?" Here is an opportunity to pull your entire case together by incorporating that theme into your closing.

Some examples that parallel the suggested themes in the *Opening Statements* section are as follows.

- **DEFINITION OF IMPAIRMENT** – "This case is not about how well the defendant drove that night after having a few beers – how he didn't get into an accident, didn't go through a red light, didn't pull over for the officer. This case is about *impairment* –the fact that those few beers reduced the defendant's mental clarity, self-control and reflexes so that his ability to drive was impaired."
- **CHOICES AND CONSEQUENCES** – "Earlier in this trial I spoke to you about choices and the consequences of those choices – how on <date of incident> this defendant made several choices – to have a few beers and get behind the wheel of his car. He took a risk and he got caught. Now comes the time for him to face the consequences of those choices."
- **FACT SPECIFIC THEMES: USING THE DEFENSE ATTORNEY'S THEME TO YOUR ADVANTAGE –** Assume defense counsel has characterized the case as a "bad judgment call" by the officer – "the police officer jumped to conclusions in arresting the defendant without knowing all the facts or bothering to learn them." "Defense counsel has hinted that this case was based on a bad judgment call made by the officer. The only bad judgment made here was on the defendant's part – when he got behind the wheel of his car after having too much to drink."

THE ELEMENTS

In an OUI case, you generally have three elements to prove beyond a reasonable doubt:

operation, public way, and under the influence or .08 *per se*. Focus on the contested issue without wasting time on issues that are not at issue. Do not, however, overlook strong, aggravating facts that relate to an uncontested issue. For example, if the facts involve driving on Route 128 at 6:00 on a Tuesday night, remind the jury the defendant was driving on an extremely busy highway during rush hour.

Remind the jury exactly what you do have to prove, and what you do not have to prove. For instance, the defense attorney might argue that the jury has to find that the defendant was falling-down drunk in order to find her guilty. Inform the jury of the proper standard, using exact words from the jury instructions such as "the alcohol she consumed reduced her ability to drive safely" or "she has consumed enough alcohol to reduce her mental clarity, self-control and reflexes."

RELATE THE FACTS TO THE ELEMENTS

Meticulously associate facts with the elements you need to prove the case. A helpful way to focus the jury's attention on the strength of the Commonwealth's case is to utilize a chart that displays each element and highlights all the evidence that was presented to prove each element. You can literally "check off" each element as you show the jury that it has been proven.

Here is an example:

- ❑ Operation
- ❑ Public Way
- ❑ Under the Influence or .08
  - Drove erratically, weaving in and out of lanes
  - Breath smelled of alcohol
  - Slurred speech
  - Eyes red and glassy
  - Clothes disheveled
  - Could not retrieve license
  - Stumbled when got out of car
  - Admitted to having a "couple of drinks"
  - Couldn't say the alphabet
  - Couldn't walk and turn 9 steps
  - Couldn't stand on one-leg for 30 seconds
  - Police officer's opinion and experience

As you can see, a visual list of all evidence against the defendant helps to show how much evidence of intoxication really exists, combating defense claims that the Commonwealth has little to no evidence.

CONCLUSION

End with one or two strong sentences that once again incorporate your theme. Also, remember to tell the jury what you want them to do – convict! Your last words should be in the nature of "find the defendant guilty."

SUBSTANCE OF THE ARGUMENT

The Massachusetts Appellate Courts and the Board of Bar Overseers scrutinize the closing arguments of prosecutors. Superior Court Judge Peter Agnes wrote an article for the Massachusetts Bar Association[15] in which he stated, "to say that there is a problem – a chronic problem – with improper closing arguments in the trial of civil and criminal cases in Massachusetts is an understatement." On the heels of Judge's Agnes' comments, the Boston Globe featured an article describing how cases can be overturned based on prosecutor error in closing argument. Defense attorneys are unfortunately not held to the same standard as prosecutors for there are few repercussions for improper defense argument. Fair or not, clearly these facts demonstrate the increasing intolerance for improper argument. Here are some guidelines to help you avoid this while still being a good advocate for your case.

AS A MATTER OF LAW [16]

NEVER REFER TO THE DEFENDANT'S FAILURE TO TESTIFY AND/OR PRESENT EVIDENCE

The defendant has a constitutional right to remain silent and need not testify or present any evidence. Any statement in your closing argument that encroaches upon that right might create reversible error. Most prosecutors know not to say the obvious, "The defendant must be guilty – if he were innocent, he would have gotten on the stand and told you so." But what about the not-so-obvious?

EXAMPLES OF STATEMENTS THAT IMPROPERLY COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY:

"I really don't know how much the defendant drank that night – only he knows."

IT IS ACCEPTABLE TO SAY: "We don't know how much the defendant drank that night – nor is the Commonwealth required to prove exactly how much the defendant drank. The evidence shows, however that it was enough to impair his ability to drive his car safely."

EXAMPLES OF STATEMENTS THAT ENCROACH ON THE DEFENDANT'S FAILURE TO PRESENT EVIDENCE:

"The evidence is uncontroverted."

IT IS ACCEPTABLE TO SAY: "It is uncontroverted that the defendant was driving that night."

---

[15] *Massachusetts Law Review*, Massachusetts Bar Association, Volume 87, No. 1, Summer 2002

[16] For a discussion of the Court's view of the "forbidden tactics" of closing arguments, read *Commonwealth v. Kozec*, 399 Mass. 514 (1987).

"The defendant wants you to believe he wasn't driving the car on the night of the collision. Well, where was he? We haven't heard one word about where he was."

IT IS ACCEPTABLE TO SAY: "The defendant wants to you to believe he was not driving the car on the night of the collision, but all evidence points to him as the driver."

"The defendant claims he only had two beers that night. Well, where's the bartender who served those two beers? Where is his bar tab to show he only had two beers? Where are his buddies who were with him all night?"

IT IS ACCEPTABLE TO SAY: "The defendant claims he only had two beers that night with his friend John. Now, you heard that the defendant and John are still friends; he knows where John lives; John is not ill or out of the country or unavailable. So where was John? Why didn't he come to corroborate the defendant's story?"

NOTE: Never comment on the defendant's failure to call a witness without getting the court's permission first. The courts have set forth very specific requirements regarding arguing a negative inference on the failure to call witnesses.

EXAMPLES OF STATEMENTS THAT ENCROACH ON THE DEFENDANT'S RIGHT TO REMAIN SILENT (WHETHER OR NOT THE DEFENDANT TESTIFIES AT TRIAL)

"The defendant gets to sit in the courtroom all day and listen to all the testimony before he takes the witness stand.

IT IS ACCEPTABLE TO SAY: "The defendant sat in the courtroom and listened to all the testimony before taking the witness stand. He then testified to reasonable explanations for all of the Commonwealth's evidence. These reasonable explanations are a lot different than what the defendant told the police on the night he was arrested. For example, that night he told the officers he had nothing to drink. In court, all the witnesses say they smelled alcohol on his breath. After hearing that testimony, the defendant's reasonable explanation for the smell is 'I had two beers.'"

> ***THE DISTINCTION:** The latter statement is pointing out inconsistencies and suggesting a reason for the defendant's sudden change of story.

"The defendant claims that he only had two beers that night. Yet he never told the officer that fact – he didn't tell the officer anything about how much he had to drink."

IT IS ACCEPTABLE TO SAY: "The defendant claims that he couldn't do the walk and turn test because he had a bad knee. Yet he never told the officer that fact – the officer specifically asked him if he had a condition that would prevent him from doing the test and the defendant said "no." That was the time to bring it up – not six months later in court."

***THE DISTINCTION:** In the first statement, the defendant exercised his right to remain silent and was under no obligation to say anything to the police. In the latter statement, the defendant had waived his right to remain silent and agreed to answer the officer's question – he omitted information that would have naturally been provided and that omission is fair game for comment.

NEVER MISSTATE THE EVIDENCE OR REFER TO FACTS NOT IN EVIDENCE

Too often attorneys find themselves misstating evidence, either accidentally or during the heat of argument. This sometimes occurs when the testimony you expected to offer differs from the actual testimony admitted. Be careful to stick to the facts as presented to the jury, not those contained in the police report or previous interviews. On a similar note, be sure not to mischaracterize the evidence.

EXAMPLE OF IMPROPER REFERENCE TO FACTS NOT IN EVIDENCE:

Assume the police officer stopped the defendant in response to numerous cell phone calls about an erratic driver "all over the road." The calls are hearsay and thus were not admitted into evidence. It is improper to refer to those calls in your closing argument.

EXAMPLE OF MISCHARACTERIZATION OF THE EVIDENCE:

If the defendant's prior convictions were offered for impeachment, you cannot refer to them in closing for any other purpose. You cannot say, "The defendant was abusive to the police that night. We know this is probably true – after all, you heard about his prior conviction for assault and battery."

IT IS ACCEPTABLE TO SAY: "There is an issue of credibility in this case. The defendant testified that he completed the field sobriety tests without any problems. The police officers testified much differently. In assessing credibility, the judge will provide you with some instructions. You can consider the witness' demeanor, candor or lack of candor and stake in the outcome of the case. You can also use your common sense. The defendant testified – you observed his demeanor. You also heard that he was convicted in 2009 of larceny. While that certainly has no bearing on his guilt in this case, you can consider that conviction in determining his truthfulness."

DO NOT INTERJECT YOUR PERSONAL OPINION

It is not appropriate for a prosecutor to inject her personal belief about *any* aspect of the case. This includes your opinion regarding the defendant's guilt and/or the credibility of the witness' testimony. Stick to the facts and argue why the jury should be convinced that the facts add up to one conclusion – the defendant's guilt.

PRACTICE TIP: A prosecutor should never, ever use the pronoun "I" during the course of a trial. Train yourself to avoid this pitfall. Instead ask the jury to draw inferences from the evidence, using phrases such as "the evidence shows"; "the evidence proves."

EXAMPLES OF STATEMENTS THAT VOUCH FOR THE CREDIBILITY OF A WITNESS:
"You heard the testimony of Officer Smith. He came in and told you the truth"

IT IS ACCEPTABLE TO SAY: "It's your job to decide whether the officer's testimony was credible. In doing so, you can consider a number of factors. For instance – the officer's candor. He admitted on several occasions that he didn't recall certain details. He also told you of facts that were favorable to the defendant – that he was polite, that he was able to retrieve his license without any problems.

> ***THE DISTINCTION:** It is perfectly appropriate to comment on facts that bolster the credibility of your witness. You may argue for credibility by commenting on the demeanor, motive of the witness, or consistency of the witnesses' stories – as long as those comments are fact, not personal belief.

NOTE: In talking about credibility of witnesses, do not give the jury an ultimatum, i.e., "In order to find the defendant not guilty you have to disbelieve all of the Commonwealth's witnesses." You can, however remind the jury that they can still convict the defendant even if they don't agree with everything your police officer said.

NEVER COMMENT ON THE PUBLIC SAFETY CONSEQUENCES OF A NOT-GUILTY VERDICT
The jury should not be made to feel a burden of protecting public safety or that they owe a duty to the police or society to convict.

EXAMPLES OF STATEMENTS THAT IMPROPERLY COMMENT ON THE PUBLIC SAFETY CONSEQUENCES OF A NOT-GUILTY VERDICT:
"Send a message – convict this man of operating under the influence of liquor."

"You have a duty to keep the streets safe. If this man is found not guilty, he'll be behind the wheel of his car in your neighborhood."

DO NOT MISSTATE THE LAW
Generally, explaining the law should be left to the judge. A misstatement of the law not only confuses the jury but also forces the judge to instruct the jury that what you just told them is wrong! With that said, it is effective to use some of the language from the jury instructions in arguing your case – just be sure to get the language right!

EXAMPLE OF PROPER STATEMENT OF THE LAW:
"You may have heard the crime of operating under the influence referred to as 'drunk driving.' That's actually an inaccurate description of the law– the standard is not whether the defendant was drunk, but whether he drank enough alcohol to reduce his ability to safely drive a motor vehicle. The judge will instruct you further on this standard."

DO NOT PLAY ON RACIAL, ETHNIC, OR RELIGIOUS PREJUDICE

It is almost never appropriate to comment on a person's racial, ethnic or religious background. In OUI cases, this is typically not an issue – don't mention it.

EXAMPLE OF SITUATION WHERE SUCH A COMMENT MIGHT BE APPROPRIATE:

Assume the defendant is from Haiti and claims he does not speak English well so he didn't understand the officer's instructions about the field sobriety tests. You may mention the defendant's ethnicity to point out how long he's been in America, the fact that he understood other aspects of the officer's instructions/questions, etc.

NEVER PLAY ON THE JURY'S SYMPATHY OR EMOTIONS

Prosecutor's closing arguments must focus on the evidence. It is error, often reversible error, for prosecutors to try to elicit sympathy for the victim. It is proper, however to acknowledge that a person has been victimized.

EXAMPLE OF IMPROPER APPEAL TO JUROR'S SYMPATHY:

"Imagine how scary it was for Mrs. Smith that night – being run off the road by this man."

IT IS ACCEPTABLE TO SAY: "Let's not forget the impact the defendant's actions had on Mrs. Smith. Mrs. Smith was driving down Main Street, minding her own business when the defendant, who couldn't control his car carelessly slammed into her. The force of that crash – caused by the defendant – kept her in the hospital for 3 days – she still has pain in right knee today. Why? All because the defendant got behind the wheel of his car after having too much to drink."

AS A MATTER OF ADVOCACY

USE ALL THE EVIDENCE YOU ADMITTED

Too often prosecutors work arduously to get evidence admitted at trial and forget to use it in closing argument. If a piece of evidence was important enough for you to summons it to court, have witnesses identify it, offer it as an exhibit and fight defense counsel's objections, then clearly it needs to be discussed in closing. Here are some examples of commonly overlooked gems:

- **PRIOR CONVICTIONS OF THE DEFENDANT** – The defendant's prior convictions are admissible only as impeachment, thus argument must be limited to that purpose. Don't ignore them – give them context.
- **MEDICAL RECORDS** – The records are introduced for a purpose, typically when a blood alcohol level is contained within the records. Don't forget to remind the jury to look at the records. Direct their attention to portions of the record that contain notes such as "patient had ETOH on the breath"; "patient was intoxicated", or "patient admitted to having 'a few drinks.'"

- **BAC RESULTS** – Although you may have had an excellent witness explain how the blood sample was tested or how a breath test was administered, do not assume that the jury connects the significance of the testing procedures to the theory of your case. Explain to the jurors why a particular fact is so important. Additionally, scientific tests, particularly breath and blood tests, provide persuasive evidence to the jury. Be sure to point out the significance of the procedures used and the objective nature of the test. Stress that the accuracy of the instrument was verified before and after testing. Point out how the test is one piece of evidence that helps establish the element of impairment.

DO NOT SIMPLY RESTATE THE FACTS

This is closing *argument* – make certain to spend your time doing just that: *arguing*. In this sense, the word *arguing* does not mean getting belligerent– it means organizing and clarifying the evidence in a persuasive manner to show the jury why the defendant is guilty. The jury has heard the facts, probably several times at this point. Now they want to know whom they should believe and why they should convict.

Do not include every detail– For example, the jury has already heard the officer explained and demonstrated the walk and turn test, that the defendant listened to the instructions, acknowledged that he understood them and then attempted the test. Instead, acknowledge what was important about the testimony. For example:

> "You heard the defendant was unable to perform simple tests. With regard to the walk and turn test, the defendant wants you to believe that he couldn't walk in a straight line because of an old knee injury. You heard the officer – he specifically asked the defendant if he had any injuries that would prevent him from completing the test. The defendant said nothing about a knee injury – his answer was 'no'. Also, you saw the defendant walk to the witness stand – he was able to walk a straight line in court."

COMMENTING ON THE DEFENDANT'S APPEARANCE/CONDUCT IN COURT

DEFENDANT'S APPEARANCE

Be very careful about ever commenting on the defendant's appearance in the courtroom. Your comments must be directly related to the evidence. If the defendant's appearance is relevant to an issue at trial, comments in closing argument on that appearance are not only proper but a matter of good advocacy.

For example, if the defendant claimed a knee injury prevented him from doing the field sobriety tests, you can direct the jury's attention to the fact that the defendant did not limp or walk with any strain whatsoever as he made his way to the witness stand.

You cannot, however comment on facts about his appearance that suggest that he is an excessive drinker ("look how red his face is, ladies and gentlemen. We all know what that's from – too much drinking!").

DEFENDANT'S CONDUCT:

It is improper to comment on the defendant's conduct in the courtroom when that conduct is appropriate (i.e., taking notes, consulting with counsel, etc.) However, it is proper to comment on the defendant's inappropriate behavior such as laughing, smirking, mocking the witnesses, etc. *See* C*ommonwealth v. Smith*, 387 Mass. 900 (1983).

USE THE EXHIBITS

"A picture is worth a thousand words." This maxim is particularly true for closing argument, when the jury is getting anxious about their deliberations and their attention may be waning. The jurors will appreciate the use of visual aids, not only to assist them in understanding the evidence but also to keep them alert and focused on your argument.

Before getting up to do your closing, assemble the exhibits. Use the exhibits in your argument and always refer to them by exhibit number. For example, if you are directing the jury's attention 'o something in a photograph, tell the jury, "In Commonwealth's exhibit #3, you can see the road in question." This avoid" confusion in the record on appeal.

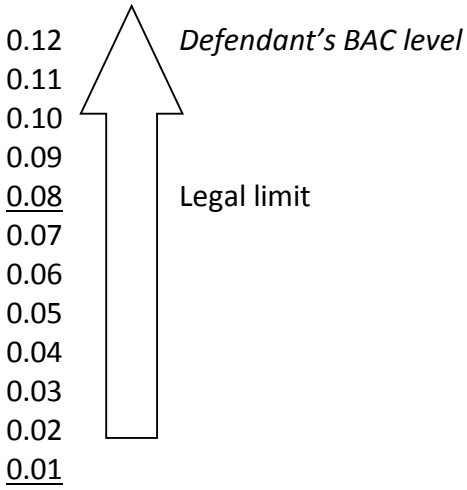
Any time you talk about the exhibit, hold it up where the jury can see it. If any witness drew a map of the scene, use the map when describing the defendant's driving.

DEMONSTRATIVE EVIDENCE

As discussed earlier, you can also develop charts specifically for use during your closing argument. For example, prepare a chart that lists each of the elements you must prove, describe how the evidence establishes each of the elements, and check each element off. You might want to have an exhibit, such as the breath test document, enlarged so that the whole jury can see it as you discuss it.

Another effective use of demonstrative evidence can be done when you have a BAC level and want to explain to the jury the significance of the number. A line or arrow showing the legal implications of a BAC of .08 of greater creates an excellent visual for the jury.

To illustrate, assume the defendant took a breath test and the result was a 0.12.



DRAW INFERENCES FROM THE EVIDENCE – BUT THEY MUST BE FAIR INFERENCES

Often evidence of impairment and/or operation is circumstantial. Remind the jury that they can convict solely on circumstantial evidence. Demonstrate to the jury how the reasonable inferences you draw from the evidence are the *only reasonable* possibilities.

The inferences suggested by the prosecutor need only be reasonable and possible and need not be necessary and inescapable. *Commonwealth v. Dinkins*, 415 Mass. 715 (1993).

AN EXAMPLE OF PROPER USE OF AN INFERENCE:

"The police officer stopped the defendant at 12:30 a.m. He told the officer he left the bar at 12:00, dropped off a friend and was heading home. You can assume, ladies and gentlemen, that the defendant had nothing to drink between 12 and 12:30. Thus, as the chemist testified, the defendant must have already absorbed all the alcohol into his system when he took the breath test at 1:15."

DEAL WITH THE WEAKNESSES IN YOUR CASE

Do not ignore weaknesses in your case, hoping that they will just disappear or be forgotten. Acknowledge the weaknesses in your case, put them in context with the rest of the evidence, and move on.

FOR EXAMPLE: Assume the police officer did not administer the field sobriety tests in the standardized manner and defense counsel vigorously cross-examined the officer on the test administration. You can address that weakness by saying:

> "You heard a lot of discussion about the field sobriety tests and the fact that they were not administered in the standardized manner. It's true – Officer Smith did not administer the tests exactly as he was trained to do. However, consider the substance of these tests – the walk and turn and

> the one-leg stand. While there is a standardized way to administer them, they also test basic functions, such as listening to instructions, walking in a line and standing on one leg. The defendant couldn't do any of those things. Why? Not because Officer Smith failed to conduct the test properly but because the defendant was impaired."

USE QUOTES FROM YOUR TRIAL

During the course of the entire trial, listen for quotable statements from your witnesses. Write them down as you hear them and use them in your argument. This is an especially effective tool when using quotes from defense witnesses.

FOR EXAMPLE: Police testimony that the defendant's "eyes looked like road maps they were so bloodshot," is much more effective that than "the defendant had bloodshot eyes." "The whole car shook when they drove past me" is more effective than "they drove by me at a high rate of speed."

USE ANALOGIES AND STORIES

Analogies and stories can effectively develop and define an idea for a juror. Analogies must be short because of the limited time; they must also be relevant, because a story without a point will confuse the jury.

A COMMON EXAMPLE IS THE NEW YEAR'S EVE PARTY: Appeal to the juror's common sense and every day experience. "Have you ever had to work late on New Year's Eve and shown up to the party later than your friends? You knew the instant that you began talking to that person that they had already had several drinks before you arrived and were well on their way to a festive evening. The celebration began without you."

USE FORCEFUL AND PERSUASIVE WORDS

Your verbal style should be as persuasive as your arguments. A good approach is to present closing argument in the same manner you would present your views on an important issue to your friends and family.

ACKNOWLEDGE SYMPATHY FOR THE DEFENDANT IF APPROPRIATE

If a defendant has a particularly sympathetic situation, show the jury that it is permissible to be sympathetic, and still convict the defendant. OUI defendants are usually not hardened criminals. If all evidence shows the defendant is a "nice guy," recognize that and use it.

> "No one questions whether the defendant is a good family man or has a good reputation in his profession. But, that does not excuse the fact that he broke the law. No one is condemning him as an unfit individual. All that is being asked of you is to hold him accountable for his actions. All that is being asked of you is that you follow the law and find that the defendant drove his car while impaired by alcohol."

MOST IMPORTANTLY, BE YOURSELF

Making an effective closing argument is an acquired skill. There is no such thing as "the right way" to make a closing argument. Every trial lawyer learns through experience what kind of presentation he is comfortable with, and what is natural for his personality and style. While you might admire the tenacity or passion of a colleague, it's important to be yourself. You must argue in a fashion that is comfortable for you and allows you to be sincere with the jury. Learning from others is important, but always adapt what you learn to fit your own style.

DEALING WITH THE DEFENSE ARGUMENT

There are several schools of thought on how and when to deal with defense arguments. Some attorneys barely mention the defense argument to avoid giving it any credence. Others find it effective to "crush" every point the defense has made. At the very least, it is wise to meet head on any defense arguments you believe have hurt your case. Avoid the temptation to repeat/reinforce defense arguments. There is no need to answer every argument made – time is precious and much of that time should be spent arguing the strength of your case.

DON'T FIGHT FIRE WITH FIRE

On occasion, defense counsel in closing may make an argument that manufactures or misstates evidence or is outrageous in some other fashion. Do not respond by crossing the line into improper argument. Prosecutors are held to a higher standard of conduct than defense counsel and cannot "fight fire with fire." No matter how inappropriate defense counsel's closing argument may be, the prosecution cannot counter with an equally inappropriate argument. Instead, object for the record and ask the judge for a curative instruction.

ATTACKING THE CREDIBILITY OF DEFENSE WITNESSES

Once a witness testifies, his or her credibility is fair game. Consider discussing the biases and prejudices of the defense witnesses. Show how a defense witness might not have actually witnessed any of the things to which the officer testified. Point out inconsistencies in the witness' testimony but NEVER label the witnesses "liars" or "perjurers."

EXAMPLE OF HOW TO CHALLENGE THE CREDIBILITY OF DEFENSE WITNESSES WHEN THE WITNESSES ARE CLEARLY BIASED:

> "You heard from the defendant's friend, John. John and the defendant have been friends for over 10 years – that's quite a long time. They hang out together almost every weekend. They have many mutual friends. They just had dinner together the night before the trial. John doesn't want to see anything bad happen to his friend – that's natural. Consider John's bias when deciding the credibility of his testimony."

EXAMPLE OF HOW TO CHALLENGE THE CREDIBILITY OF DEFENSE WITNESSES WHEN THE WITNESSES DID NOT HAVE AN OPPORTUNITY TO OBSERVE THE EVENTS:

> "You heard from one of the defendant's co-workers, Alice. Alice told you that she saw the defendant drink two beers at the work party. Alice also told you that she herself had a few drinks – that she was socializing with other co-workers – that that were about 30-40 people at the party. Is it credible that Alice noted everything the defendant drank? Isn't it obvious that what Alice saw him drink wasn't all he drank?"

With regard to expert witnesses, it is perfectly appropriate to comment on the fact that the expert was paid by the defense. It is NOT appropriate to characterize the witness as a "hired gun." Remember, stick to the evidence!

ATTACKING THE DEFENSE ATTORNEY'S TACTICS

No matter how deplorably a defense attorney may act during the course of trial, do not criticize him to the jury. Jurors can see right through such behavior. Your role is to be professional and rise above any inappropriate behavior.

EXAMPLE OF IMPROPER STATEMENT REGARDING THE DEFENSE:

"The defense strategy in this case is despicable." *Commonwealth v. Gentile,* 437 Mass. 569 (2002).

IT IS ACCEPTABLE TO SAY: "The defense attorney is arguing, 'it wasn't my guy – someone else was driving. But if it was my guy, he wasn't drunk.'" *Commonwealth v. Cohen*, 412 Mass. 375 (1992).

Also, never downplay the role of defense counsel. Remember that everyone has a role in the criminal justice system and the role of defense counsel is just as important as your role, the judge's role and that of the jury.

A sample closing argument can be found on the next page.

SAMPLE CLOSING ARGUMENT

Defense counsel just told you that a bad call was made in this case. He's right – a bad call was made – but it was not by Officer Smith; it was made by this man, the defendant – when he made the call to get behind the wheel of his car after having too much to drink.

The evidence you've heard leads to one conclusion – On August 18, 2010, the defendant's ability to drive his car was impaired by the alcohol he drank. So what is that evidence?

First – the way the defendant drove that night shows he was impaired. The defendant was weaving in and out of the lanes. It was a clear night – a straight roadway free from impediments; nothing jumped out in the middle of the road to cause the defendant to swerve. Yet the defendant simply couldn't control his car.

Next, remember the way the defendant appeared that night. He sits before you in court today in a suit and tie, hair combed. That's not the way he appeared the night he was arrested. Try and picture what Officer Smith saw that night – a man whose breath stunk of alcohol; whose eyes were red and glassy; whose clothes were a mess – a man who appeared under the influence. Also, you saw the defendant when he walked up to the witness stand – steady, solid. Nothing like the way he was the night he was arrested. Recall the testimony – he fumbled for his license; he could barely stand up when he got out of the car – he was so unsteady he had to lean on the driver's side door. And when he spoke, his speech was slurred and thick-tongued.

Finally, consider the opinion of Officer Smith. Now most of us through our common sense and experience know what a person who is under the influence of alcohol looks like. Officer Smith has a couple of advantages. First, as a police officer, unfortunately, he encounters intoxicated people on a regular basis so he is quite familiar with the effects of alcohol. Second, and more important, he received very specific training on detecting impaired drivers when he was in the academy. His training taught him to look for the obvious signs and the not-so obvious signs of impairment. So just like an Olympic judge might be trained to look for the subtleties in, for example, a gymnastics routine or a ski jump, police are trained to look for the more subtle signs of impairment.

To assist in his determination, Officer Smith learned to administer what are called "field sobriety tests". The defendant attempted three tests: to recite the alphabet, stand on one leg for 30 seconds, and walk 9 steps in a straight line – turn and walk back. The defendant couldn't say the alphabet – couldn't even get past the letter J. He couldn't stand on one leg for more than 10 seconds and he couldn't walk a straight line. The defendant could not perform these simple tasks and that fact, taken together with all the other evidence – the way the defendant appeared, the manner in which he drove his car, the fact that he admitted to having a "couple of drinks" – all led Officer Smith to the conclusion that the defendant had been driving under the influence of alcohol.

It's your job as jurors to assess the credibility of all the witnesses in this case. In doing so, the judge will tell you to consider the witness' demeanor, bias and/or stake in the outcome. You may also use your common sense and life experience in evaluating all the evidence, but especially the witness's credibility.

The defendant wants you to believe that he had only a couple of beers that entire day and into the night and had actually stopped drinking hours before being stopped. He also wants you to believe that his ability to drive was not impaired – that he swerved because he was tired; that's also why his eyes were red and glassy and why he couldn't perform the field sobriety tests or stand up straight. Ladies and gentlemen, if the defendant was so tired, he wouldn't have stayed at a cookout until 11:00 in the evening. If he was exhausted to the point that he couldn't stand up, wouldn't he have left earlier to get some sleep? The evidence suggests it was more than exhaustion that made the defendant unable to drive; unable to stand or speak properly. It was the alcohol he drank that caused those inabilities.

You heard the testimony of the defendant's friend, Joe Williams. Mr. Williams has known the defendant for over 5 years – they work together; see each other socially; have met their respective families and have spoken at length about this case. He too testified that the defendant was exhausted and that he only drank 2 beers. Mr. Williams would have you believe that he knows and remembers every detail of that entire afternoon and evening. Mr. Williams monitored everything the defendant drank for an entire day and night? You heard him on cross-examination – he admitted that at certain points in the evening the defendant and he were not together. How could he know everything that the defendant drank?

Soon you will be instructed on the law. You will hear that you don't have to decide if the defendant was "drunk" on that summer night – *you only need to determine if what the defendant drank that night impaired his ability to safely drive his car*. The evidence suggests that it did. We are now at the point in this trial where the case is in your hands – where you the jury go into the deliberating room, evaluate all the evidence and determine the verdict. The Commonwealth asks that when you do so, you render a true and just verdict – a verdict supported by all the evidence in this case – a verdict of guilty.

JURY INSTRUCTIONS

Jury instructions provide an opportunity to have the judge echo your words and to bolster your theory of the case. Below are several jury instructions that you may want to consider requesting when relevant to the facts of your case. These instructions are extremely beneficial to the Commonwealth and may help to strengthen your case in the eyes of the jury. A copy of the most recent Model Jury Instructions for Use in the District Court can be found on the Prosecutors' Encyclopedia MDAA Home Page (myprosecutor.com) or Mass.gov/courts.

ABSENCE OF BREATH TEST EVIDENCE

Many years ago, G.L. c. 90, § 24(1) (e), mandated a jury instruction that admonished jurors against speculation or inferences based upon a lack of evidence of a blood alcohol test. The instruction informed the jury that the police officer had a duty to offer a breath test, that a breath test can only be administered with an arrestee's consent, and that an arrestee may refuse to take the test for a number of reasons, none of which should be considered by the jury.

In 1994, the SJC held that the required jury instruction violated the defendant's privilege against self-incrimination. *Commonwealth v. Zevitas*, 418 Mass. 677 (1994) and the instruction was repealed. Unfortunately, all jurors are aware of the existence of a breath test and notice its lack of mention in an OUI trial.

In *Commonwealth v. Downs*, 53 Mass. App. Ct. 195 (2001), the Appeals Court upheld a trial judge's instruction to a jury not to consider the absence of breath test evidence. The judge instructed the jury:

> *You are not to mention or consider in anyway whatsoever, either for or against either side, that there is no evidence of a breathalyzer. Do not consider that in any way. Do not mention it. And put it completely out of your mind.*

The trial judge's reasoning for giving the instruction, based on his personal experience with jurors, was that many jurors had told him they speculated about the absence of breathalyzer evidence during deliberations. The Appeals Court agreed with the trial judge's concerns, stating:

> *We cannot close our eyes to the fact that there is widespread public information and common knowledge about breathalyzer testing. To instruct the jury without any reference whatsoever to breathalyzer testing could well lead to distinct prejudice to a defendant…. The absence of some form of an instruction could also cause conjecture or speculation resulting in unfairness to the Commonwealth, e.g., the police did not offer the breathalyzer to a defendant or perhaps the breathalyzer was not in working order.*

Given that *Downs* remains valid law, you may decide to request an instruction regarding the absence of breath/blood test evidence. The rationale behind the court's decision in *Downs* can arguably be extended to a lack of field of sobriety tests. A sample Request for Jury Instructions can be found on the MDAA Home Page of Prosecutors' Encyclopedia (myprosecutor.com). In addition, the language from the *Downs* case can now be found in the notes to District Court Model Jury Instruction.

CONSCIOUSNESS OF GUILT

Where evidence is admitted at trial regarding the defendant's consciousness of guilt, you are entitled to a jury instruction that the jury can infer the defendant's guilt on the underlying charge based on her actions.

Examples of consciousness of guilt evidence are:

- Flight – the defendant fled after learning that she was about to be arrested.
- False statements – the defendant intentionally made certain false statements before or after the arrest.
- False name – the defendant used a false name to conceal her identity.
- Evidence tampering – the defendant intentionally tried to conceal, destroy, or falsify evidence.
- Witness tampering or bribery – the defendant intentionally attempted to intimidate or coerce a witness whom she believed might testify against her.

CONTRIBUTING CAUSES (DRUGS)

Consider a scenario where the defendant in your case has admitted to drinking only one glass of wine but that she drank that wine while on a drug that contains a warning "do not drink alcohol while taking this medication." In such cases, the Commonwealth is entitled to a jury instruction that alcohol need only be one contributing cause to the defendant's diminished capacity, not the sole cause. *Commonwealth v. Stathopolous*, 401 Mass. 453 (1988). Thus, where there is evidence of alcohol consumption and drug (legal or illegal) use, request a *Stathapolous* instruction.

Be aware, however that the defendant is also entitled to a jury instruction that the Commonwealth must prove that the defendant knew or had reason to know of the possible effects of the drug on his or her driving abilities. See *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 365 (1982). Make sure the officer seized the drug bottle with the warning label as evidence or call a local pharmacist and get a copy of the warning label given when that specific drug is prescribed.

MISSING WITNESS

An instruction to the jury regarding the defendant's failure to call important witnesses is appropriate if all prerequisites are met. The instruction states that the jury may infer that the missing witness' testimony would not be favorable to the defendant.

This is often a great point to make in closing argument as well. Proceed carefully when making this argument, however. Improper argument regarding the inferences to be drawn from a missing witness violates the defendant's 5th Amendment rights and may well result in the reversal of his conviction on appeal. This is also true for use of the jury instruction, as the courts have stated that the missing witness instruction should be allowed "only in clear cases, and with caution." *Commonwealth v. Schatvet*, 23 Mass. App. Ct. 130 (1986).

The following prerequisites must be satisfied before presenting the "missing witness" argument and/or requesting a jury instruction:

- The Commonwealth's case against the defendant is strong, so that the defendant would naturally be expected to call favorable witnesses.
- The absent witness must be expected to offer important testimony supporting the defendant's innocence. The testimony that the witness could have offered must be significant and not merely collateral, or cumulative.
- The evidence must show that the absent witness was available to testify for the defendant, meaning the defendant knew the identity and whereabouts of the witness.
- The witness's absence is not explained by any of the other circumstances in this case and the defense has not offered any plausible, logical reason for not producing the witness.

An example of a case in which the use of the missing witness instruction was upheld in an OUI case can be found in *Commonwealth v. Rollins*, 441 Mass. 114 (2004). In *Rollins*, up until one-half hour before being arrested for OUI, the defendant had been in the company of his friend. He did not call his friend as a witness at trial. The judge gave a missing witness instruction regarding the defendant's failure to call his friend to testify. The Appeals Court held that, on the facts of this case, all foundational requirements for a missing witness instruction were met: (1) the case against the defendant was strong (the defendant failed three field sobriety tests; an open 40 oz. beer can was found in the car); (2) the missing witness' testimony was central to corroborate the defendant's testimony; (3) the proffered explanation for the witness' absence – that she had recently stopped receiving welfare and did not want to miss work – indicated that the defendant knew the witness and was familiar with her whereabouts; and (4) that reason was not terribly plausible, given the fact that the defendant did not seek a continuance to compel her attendance. See also *Commonwealth v. Perryman*, 55 Mass. App. Ct. 197 (2002).

CHAPTER V: DEFENSE CHALLENGES

COMMON DEFENSE PRE-TRIAL MOTIONS

In many OUI cases, the defense will file pre-trial motions to suppress evidence and/or to dismiss the case on legal grounds. All such motions must clearly state the grounds for the motion and must be accompanied by an affidavit signed by a person with personal knowledge of the factual basis of the motion.

On the day of trial, defense counsel may also file a motion in limine. The purpose of this type of motion is for the parties to obtain a pre-trial ruling regarding the admissibility of evidence. The Rules of Criminal Procedure do not require advance notice for the filing of a motion in limine.

MOTION TO SUPPRESS/IN LIMINE

BLOOD TEST

"MY CLIENT DID NOT CONSENT TO THE BLOOD TEST"

In some cases, the prosecution may obtain the results of the defendant's blood test *without* his consent. This is typically done in cases where the defendant has been involved in a collision and was immediately brought to a hospital or medical treatment facility.

Blood drawn for medical purposes is not subject to a consent requirement, so long as there is evidence that the blood test was related to specific treatment or diagnosis or that blood tests are standard procedure in the hospital for the sort of medical problem presented. *Commonwealth v. Sargent*, 24 Mass. App. 657 (1987). Such evidence can be presented through testimony of a physician (as in *Sargent*) or in the hospital record itself, as in *Commonwealth v. Russo*, 30 Mass. App. Ct. 923 (1991) where records revealed that a battery of tests identified as "routine chemistry" were conducted and the defendant received the "full work-up".

"THE BLOOD TEST EVIDENCE IS NOT RELIABLE."

First and foremost, any motion challenging the reliability of blood evidence generally should be saved for trial as it goes to the weight to be afforded the evidence and not its admissibility.

Nevertheless, be prepared to respond to defense claims of unreliability. These arguments typically attack the validity of the blood test in the following ways:

1. The blood was not drawn properly.
2. The test utilized by the hospital fails to meet the standards of scientific reliability.
3. Chain of custody cannot be established

BLOOD WAS NOT DRAWN AND TESTED PROPERLY

A specific challenge to the certification of the hospital blood analysts is a red herring as the portions of 501 CMR 2.00 et seq. that speak to certification requirements of blood test analysts only apply to those analysts working for the Department of State Police and not to hospital personnel. *Commonwealth v. Dyer*, 77 Mass. App. Ct. 850 (2010).

A general challenge to the propriety of the blood test can be met with the records themselves. If possible, speak with the individual who drew the blood and find out the exact procedure followed. If necessary, draft an affidavit for that person to sign, detailing the procedure of the specific test (if recalled) and the procedures of the hospital in general. Where the person who drew the blood has no independent recollection of the defendant or where you are unable to determine who drew the defendant's blood, summons a witness from the hospital who is familiar with trauma protocol.

If defense counsel makes a particular challenge to the manner in which the blood was drawn, (i.e. an alcohol swab was used to clean the area before the blood was drawn), speak to a toxicologist regarding the validity of the specific claim. You may need to call a witness (the person who drew the blood, a technician from the hospital, or a chemist from the State Police Crime lab) to explain any areas of concern.

As an aside, the fact that an alcohol swab was used to clean the skin is usually of no consequence. *Isopropyl* (rubbing) alcohol is typically used by hospitals and will not affect the detection of *ethanol*. In the event a hospital uses an *ethanol* swab, the blood result will still be accurate assuming appropriate procedures (i.e. not using excessive amounts and waiting briefly for the alcohol to evaporate) are followed. Of course, use of a non-alcohol swab eliminates this particular challenge altogether.

SCIENTIFIC RELIABILITY

To admit the test results, you do not need to demonstrate scientific reliability as the medical records speak for themselves. See G.L. c. 90, § 24(1) (e); *Commonwealth v. St. Hilaire*, 43 Mass. App. Ct. 743 (1997). If faced with a general challenge to the scientific reliability, speak to someone at the hospital to determine the testing procedures and, if necessary, call an expert witness to explain those procedures and their scientific reliability.

The State Police Crime Lab analyzes whole blood using a gas chromatograph. Some hospitals do not use a gas chromatograph but instead use an enzymatic method in which the blood is spun in a centrifuge and the liquid portion of the blood (serum) rises to the top and is tested. The result is different as the concentration of alcohol in serum is higher than whole blood. This fact does not make the test any less reliable; it means only that the result needs to be converted to whole blood. *Commonwealth v. Dyer*, 77 Mass. App. Ct. 850 (2010) – any disparities in the results from the hospital and crime lab analyses go to the weight of the evidence and not its admissibility.

CHAIN OF CUSTODY

"Chain of custody" refers to the path taken by a piece of evidence as it is transferred from the scene, to police custody, to the lab for testing (if necessary), and back to police custody. It is relevant to show that the evidence offered at trial is in fact the evidence recovered from the scene and subsequently tested.

With regard to blood results found in medical records, chain of custody is important but need not be established thanks to G.L. c. 233, § 79. The SJC has declared that the purpose behind c. 233, § 79 is to "spare hospital personnel the burden of spending time in court to verify what is recorded as a matter of professional routine and to accord a presumption of reliability to records whose accuracy is relied upon in the treatment of patients." *Commonwealth v. Russo*, *supra* at 926.

You must be prepared to establish chain of custody at trial should the defense raise the issue. To show the chain of custody of a blood test result you must bring in the person who drew the defendant's blood, the person who received the defendant's blood sample, the person who transported the sample to the laboratory, and the technician who examined the blood and recorded the results. *Commonwealth v. Dyer*, 77 Mass. App. Ct. 850 (2010) – any discrepancies in the chain of custody for hospital blood samples go to the weight of the evidence and not the admissibility.

GENERAL "COMMON SENSE" ARGUMENT

Let us not forget that blood is drawn by medical practitioners for a very important purpose – to determine the contents of the blood prior to administering treatment and/or medication for the safety and welfare of the patient. Is it really logical to assume that the hospital would rely on "unreliable results" in deciding on a course of treatment?

BREATH TEST

"MY CLIENT WAS NOT OFFERED THE OPPORTUNITY TO CONSULT WITH AN ATTORNEY PRIOR TO TAKING A BREATH TEST."

The defense may argue that, "because the defendant is in custody when offered the breath test, he should have been given the opportunity to consult with an attorney pursuant to the Fifth Amendment."

In *Commonwealth v. Brazelton*, 404 Mass. 784 (1989), the SJC decided this issue. In *Brazelton*, the defendant asked the officer for permission to telephone his attorney before deciding whether to take the breath test. The officer told him to make his decision about taking the test "and then you may make a phone call." The defendant refused the test and he was then allowed to use the telephone. He didn't talk to an attorney but rather spoke to a friend or a family member.

The SJC held that the defendant was not entitled to contact his attorney, stating "the moment at which a person must decide to take or to refuse to take a breath test is not a critical stage in the criminal process." *Id*. at 785. The Court reasoned:

> *The recognition of a right to consult an attorney before deciding to take a breathalyzer test presents formidable practical problems. In the present case, the defendant wanted to call his private attorney. If an attorney is not available, a delay may ensue and the test results may then be stale and inaccurate. The same result follows for one who has no attorney or has no money to retain an attorney. Id*.

"MY CLIENT DID NOT VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY CONSENT TO THE BREATH TEST."

Upon arrest, all defendants are offered the opportunity to submit to a chemical analysis of his or her blood alcohol concentration – the form of the test may be either a blood test or a breath test. A defendant has no constitutional right to refuse a blood or breath test. The defendant's "right of refusal" stems from Mass. Gen. Laws Ch. 90, § 24(1)(e),(f), which requires that the tests not be given without consent. Generally, where a right is given by statute and is not a fundamental constitutional right, the Courts apply traditional indicia of waiver of rights. Thus, the voluntary, knowing and intelligent standard applies only to a defendant's consent to the actual relinquishment of a constitutional right. Since refusing to take a blood or breath test in an OUI case is conferred by statute, and not a constitutional right, there is no requirement that the consent or refusal be voluntary, knowing, and intelligent. *Commonwealth v. Davidson*, 27 Mass. App. Ct. 846 (1989).

"THE RECORDS KEPT ON THE BREATH TEST INSTRUMENT ARE INCOMPLETE AND/OR DEMONSTRATE NON-COMPLIANCE WITH G.L. C.90 § 24K AND 501 CMR § 2.00."

501 CMR § 2.00 *et seq.* lays out the strict procedures that must be followed in certifying and maintaining a breath testing device and administering a valid test. Defense counsel is entitled to and will most likely examine the police records. After careful examination, the defense may find something "amiss" with the records and challenge admission of the test result on that basis.

To be prepared for this type of motion, make certain that you examine not only the records from the police department/barracks, but also, the records from OAT including the Maintenance Logs and Diagnostic Test Reports for the instrument used during your defendant's test.

Sometimes these motions have merit. Many times, however, any departure from the CMRs is a mere technicality and has no impact on the validity of the test result. Remember that any deviations from compliance with the prescribed procedures go to the *weight* of the evidence and not admissibility. *Commonwealth v. Kelley*, 39 Mass. App. Ct. 448, 453 (1995).

If you are unclear as to the reliability of the records or the manner in which the test was

conducted, speak candidly with someone from the police department or contact OAT with any specific questions you might have.

"THE COMMONWEALTH DID NOT STRICTLY COMPLY WITH 501 CMR 2.14(1) WHEN THE BOOKING OFFICER AND NOT THE ARRESTING OFFICER OR BREATH TEST OPERATOR DOCUMENTED CONSENT."

501 CMR 2.14 (1) states: "*The arrestee's consent to a breath test shall be documented by the arresting office or the BTO."* Neither the OUI statute nor the regulations specify how an arrestee's consent is to be documented. "Mere deviations from meticulous compliance with the regulations… are inadequate to justify suppression of the results of the breathalyzer test." *Commonwealth v. Zeininger,* 459 Mass. 755, 792 (2011). Furthermore, the Appeals Court found in *Commonwealth v. Kurilo, 83 Mass. App. Ct. 1102 (2012)* an unpublished decision that the statutory rights and consent form, signed by the defendant and an officer -- notwithstanding that the officer was neither the arresting officer nor the breathalyzer test officer – complies with the approved "satisfactory methods" for conducting breathalyzer tests pursuant to G.L. c. 90, § 24K.

"I NEED ACCESS TO THE SOURCE CODE OF THE INSTRUMENT BECAUSE THE BREATH TESTING INSTRUMENT WAS NOT WORKING PROPERLY ON THE DATE MY CLIENT TOOK THE TEST."

The source code is the programming that makes an instrument work. All instruments have a source code. A common discovery motion by the defense bar in cases involving a breath test result is to request access to the source code of the breath testing instrument. The source code is thousands of pages comprising tens of thousands of lines of incomprehensible computer language that only an expert is able to decipher. Massachusetts does not have the access to the source code programming. Draeger owns the rights to the source code programming and will allow the defense access to the source code if the defense attorney and expert sign a nondisclosure agreement with the company. If given access to the source code for the instrument the defense bar will hire a computer expert to "analyze" the source code and point out potential problems with the programming that could affect the reliability of the instrument and ultimately prove the defendant's breath test result to be unreliable.

On June 12, 2015, the Supreme Judicial Court in ***Commonwealth v. Camblin,*** 471 Mass. 639 (2015) ruled that the defendant is entitled to a Daubert-Lanigan hearing to raise a reliability challenge to the breathalyzer based on questions with the source code and other issues, including whether the instrument tests exclusively for ethanol or whether the calibration system fails to adequately measure the reliability of the device.

History:

Approximately 61 defendants, including Camblin, had been charged with operating under the influence of alcohol. Each defendant, at the time of arrest, submitted to a breath test producing a result that the Commonwealth intended to admit into evidence at trial. The breath test instrument in the Commonwealth, at that time, was the Draeger Alcotest 7110. The cases were consolidated by the District Court Administrative Office. Judge Mark A. Sullivan was assigned to hear the cases. The defendants filed a

collective *Motion in Limine to Exclude Alcotest Results as Scientifically Unreliable* claiming that the source code within the Alcotest instrument fails to meet with general acceptance within the scientific community. They also claimed that blood-breath conversion ration used by the instrument fails to meet the general acceptance standard. They moved the Court to hold a Daubert-Lanigan hearing and exclude the breath test results from evidence. The Court denied the defendants' motion for a hearing finding:

- *The standards set forth in 'Daubert' and 'Lanigan' are not applicable to breath test evidence, which is expressly made admissible by statute.*

- *Any alleged "defects" in the source code of the breath test instrument do not undermine the scientific reliability of the device.*

- *The 2100:1 blood-breath ration is scientifically reliable.*

After the denial of the motion to exclude the breathalyzer results, the defendants filed a motion to reconsider which denied. The defendants then filed a petition pursuant to G. L. c. 211, § 3, challenging the denial of the motion to exclude the breath test results and relief was denied. The case proceeded to trial and the defendant was convicted of operating under the influence, second offense. The defendant appealed his conviction claiming the motion judge abused his discretion by denying a hearing on the reliability of the breath test. The Supreme Judicial Court granted an application for direct appellate review.

Ruling:

The Court vacated the judge's order denying the motion to exclude the breathalyzer evidence, remanded the case to the District Court for a hearing on that motion, and retained jurisdiction of the case. "We conclude that because breath test evidence, at its core, is scientific evidence, the reliability of the Alcotest breath test result had to be established before evidence of it could be admitted, *see* Commonwealth v. Lanigan, 419 Mass. 15, 25-26 (1994), and, in this case, a hearing on and substantive consideration of the defendant's challenges to that reliability were required."

SYSTEM UPGRADE IN 2013:

As of October 2013, Massachusetts completed upgrading the entire breath testing system from the Draeger 7110 to the 9510 instruments. The *Chun, Daens* and *Camblin* cases only deal with the source code programming for the Draeger 7110 instruments and not the 9510. Presumably, the source code on both the 7110 and the 9510 will be litigated.

DEFENDANT'S MEDICAL RECORDS

"MY CLIENT'S MEDICAL RECORDS ARE PRIVILEGED AND HE HASN'T WAIVED THAT PRIVILEGE."

Massachusetts does not recognize a statutory physician-patient privilege. There is, however a legislatively created policy that favors confidentiality of medical records. M.G.L. c. 111, § 70 provides in part that hospitals must maintain "records in the treatment of the cases under their care including the medical history and nurses' notes" and that such records shall be subject to public inspection upon judicial order. In addition, federal law -- the Health Insurance Portability and Accountability Act (HIPAA) -- prevents medical records from being disclosed without the patient's consent or a court order. Thus, obtaining a judicial order for the records should waive any argument regarding confidentiality of the records. See *Commonwealth v. Senior*, 433 Mass. 453, 457, n.5.

The SJC has held that admission of the defendant's blood test results contained in hospital records does not violate the defendant's right to privacy and/or confidentiality. *Commonwealth v. Dube*, 413 Mass. 570, 572 (1992).

"THE CONTENTS OF THE RECORDS ARE INADMISSIBLE AS PREJUDICIAL/IRRELEVANT/UNRELIABLE AND GO TO THE ULTIMATE ISSUE AT HAND."

G.L. c. 233, § 79 authorized the admission of certified hospital records with the proviso that "nothing therein contained shall be admissible as evidence which has reference to the question of liability." The defendant may claim that his blood test results go to his "liability" or culpability. While this claim might appear to have some merit on its face, the SJC has interpreted the statute to permit the admission of records relating directly and primarily to treatment, even though incidentally the facts may have some bearing on the question of liability. See *Commonwealth v. Dube*, *supra* at 573 (blood test results admissible). *Commonwealth v. McLaughlin,* 79 Mass. App. Ct. 670 (2011). Therefore, statements in the hospital record such as "the defendant had strong odor of alcohol" and "the defendant was very drunk" may be admissible and used against the defendant at the court's discretion. *Commonwealth v. McReady,* 50 Mass. App. Ct. 521, 524 (2000); *Commonwealth v. Atencio*, 12 Mass. App. Ct. 747, 751-52 (1981).

FIELD SOBRIETY TESTS

"THE OFFICER DID NOT HAVE PROBABLE CAUSE TO ORDER MY CLIENT FROM HIS CAR TO PERFORM FIELD SOBRIETY TESTS."

The SJC has held that probable cause is not required for the administration of field sobriety tests. See *Commonwealth v. Blais*, 428 Mass. 294, 297 (1998). An officer with a reasonable suspicion that a person is operating under the influence of drugs or alcohol may administer field sobriety tests "in order to assure himself that he is not turning loose a drunk driver on the traveling public." *Id* at 298.

"THE OFFICER DID NOT ADVISE MY CLIENT THAT HE HAD A RIGHT TO REFUSE THE TESTS."

The defense may complain that the defendant should have been advised that he could refuse the field sobriety tests. In order for this argument to have any validity, the Fifth Amendment must be implicated. The Fifth Amendment right against self-incrimination is only implicated during custodial interrogation and the SJC has held that a driver who is temporarily detained after being stopped on suspicion of OUI is not held in custody. Therefore, an investigating police officer is not required to furnish *Miranda* warnings to a driver before administering field sobriety tests. *VanHouton v. Commonwealth*, 424 Mass. 327, 331 (1997) citing *Berkemer v. McCarty*, 468 U.S. 420, 438-440 (1984) and *Commonwealth v. McGrail*, 76 Mass. App. Ct. 904 (2010).

Additionally, the officer need not inform the driver that he has a right to refuse the tests. *Commonwealth v. Blais*, *supra* at 299 (1998). A police officer, however, may not compel performance of field sobriety tests because "the very nature of the tests involved here makes the use of force to compel their performance obviously inappropriate." *Id*. at 301.

"THE VERBAL PORTIONS OF THE FIELD SOBRIETY TESTS ARE TESTIMONIAL IN NATURE AND SHOULD BE SUPPRESSED."

In conjunction with the above argument, the defense is claiming that, because *Miranda* warnings were not furnished prior to the administration of the field sobriety tests, all testimonial evidence should be suppressed.

Article 12 of the Massachusetts Declaration of Rights protects against the forced disclosure of testimonial or communicative evidence, namely evidence that reveals the subject's knowledge or thoughts concerning some fact. *See Commonwealth v. Brennan*, 386 Mass. 772, 780 (1982). The major flaw with this defense argument is that field sobriety tests merely require the defendant to exhibit physical coordination or lack thereof and are not testimonial. *Commonwealth v. Ayre*, 31 Mass. App. Ct. 17 (1991). *Commonwealth v. Cameron*, 44 Mass. App. Ct. 912 (1998).

The alphabet test is unique in that it does not primarily involve physical coordination but rather *verbal recitation*. With regard to the alphabet test, the SJC has stated the following:

> *The recitation of the alphabet from A to Z is an exercise, which when utilized as a field sobriety test with a suspect asked to perform the test in his or her own language, is not subject to the privilege contained in art. 12. The fact that a motorist must use his or her voice to perform the test does not necessarily make the response testimonial any more so than would the giving of a voice exemplar. The alphabet constitutes a set of generic linguistic symbols that the average person masters early in life and learns to recite by rote. The alphabet cannot be fabricated or guessed at, so a person reciting it is not faced with the dilemma of deciding between a true or false answer. As such, the recitation of the alphabet*

lacks inherent communicative value because it does not convey knowledge of any fact specific to the person being questioned.

VanHouton v. Commonwealth, *supra* at 335-36. The SJC has spoken on this issue, dismissing defense claims that implicate the Fifth Amendment and Article 12 with regard to field sobriety tests administered roadside.

"MY CLIENT AGREED TO PERFORM FIELD SOBRIETY TESTS AND THEN STOPPED IN THE MIDDLE OF THE TEST."
The defendant who initially consents to take the field sobriety tests and then stops the test midway stating he is too drunk to do the test may argue that he refused to perform the field sobriety tests and none of his statements are admissible in evidence. *Commonwealth v. Brown*, 83 Mass. App. Ct. 772 (2013) held that a defendant who attempts unsuccessfully to perform field sobriety tests and in the process comments about the difficult or inability to perform the tests, while testimonial, is not the result of governmental compulsion and thus is admissible in evidence.

"THE OFFICER DID NOT ADMINISTER THE TESTS IN THE STANDARDIZED MANNER."
Most police officers are trained to administer the three scientifically validated field sobriety tests. This training was developed by the National Highway Traffic Safety Administration (NHTSA) and is discussed in detail in Chapter II, Section III: *Under the Influence*. In Massachusetts, every recruit is given a 24 hour block on field sobriety testing during the academy. This 24 hour block includes two alcohol workshops. The current recruit classes are being trained with the 2013 version of the manual. There are currently 11 versions of the NHTSA Standardized Field Sobriety Training Manual:

1987	2002
1988	2004
1992	February 2006
1995	August 2006
1997	2013
2000	

In 2000, the Ohio Supreme Court decided the case of *Ohio v. Homan*, 732 N.E. 2d 952 (Ohio 2000). In *Homan*, the Court held that standardized field sobriety tests (SFTSs) performed in a manner that deviates from the procedures established by NHTSA "are inherently unreliable." *Id*. at 955. Despite the fact that Massachusetts is not controlled by Ohio law, defense attorneys have successfully cited this case to convince judges to exclude the SFSTs. Additionally, after the *Homan* decision, Ohio promptly passed a statute that stated "substantial" compliance did not invalidate the test.

WHAT IS A PROPER RESPONSE TO THIS CLAIM?

- First, was the officer trained in accordance with the NHTSA manual? If your police officer cannot state with certainty that he was trained with the NHTSA

manual, any mention of the procedures in that manual is irrelevant. However, recognizing the difficulties facing them in getting officers to recall the specific manual they used for training years ago, many defense attorneys come prepared to answer this question for the officer. Upon request, the Municipal Police Training Committee (MPTC) will certify that a particular officer was trained on the NHTSA manual. Make sure to review this fact with your officer before he testifies. The MPTC will also provide either party with a copy of the manual. Defense counsel may seek to have the manual admitted into evidence to impeach the officer's manner of test administration. Remember that the manual is *inadmissible hearsay*. *Commonwealth v. Schutte*, 52 Mass. App. Ct. 796, 801 (2001). Defense counsel may, however, impeach the officer's credibility by showing deviations between the understanding and practices of the officer and the recommended procedures in the manual.

- Second, assuming your police officer was trained using the NHTSA manual, was he administering the *standardized* field sobriety tests? Keep in mind, NHTSA has standardized only three (3) tests: one-leg stand; walk-and-turn; and HGN. Any other "tests" your officer used in determining sobriety do not fall under NHTSA standards and thus compliance with the NHTSA manual is not an issue.

- Third, if the officer administered SFSTs, was this done in the manner prescribed by NHTSA? This is a question of fact and cannot be determined without the testimony of the officer. The correct procedure the officer should follow in administering the tests is discussed in Chapter II. It is important to note, however, that not all police departments trained through NHTSA utilize the scoring method. For example, on the walk and turn test, NHTSA scores the failure to touch heel to toe as one clue no matter how many times the defendant fails to touch heel to toe. Some officers prefer to note the number of times the defendant failed to touch heel to toe even if it is on all 18 steps. Do not allow defense counsel to confuse the judge/jury into thinking that the scoring process invalidates the clues of impairment. Failure to touch heel to toe is a clue of impairment no matter how the officer notes it in his report.

- Finally, if the officer did not administer SFTSs in the prescribed manner, what observations did the officer make? Occasionally an officer will not administer the SFSTs as prescribed. If not, the test should be treated like a non-standardized test. Non-standardized tests still provide information to the officer about impairment and, although the officer might be prohibited from saying the defendant's performance "indicated impairment," he can nonetheless describe his observations.

PRACTICE TIP: When facing a challenge to the admissibility of field sobriety test results, any problems alleged by the defense go to the *weight* to be afforded the tests, and not their admissibility. *Commonwealth v. Schutte, supra*. Field sobriety tests are based on

common knowledge that alcohol ingestion causes observable physical and behavioral reactions.

"THE HORIZONTAL GAZE NYSTAGMUS TEST IS INADMISSIBLE WITHOUT AN EXPERT WITNESS."

The SJC has determined that the principles supporting HGN are not within the common knowledge of jurors and thus expert testimony is necessary. *Commonwealth v. Sands,* 424 Mass. 184, (1997). As a threshold to admissibility, the Commonwealth must show either general acceptance in the scientific community or reliability of the scientific theory. *Id*. at 185-86. Also, '[t]here must be a determination as to the qualification of the individual administering the HGN test and the appropriate procedure to be followed." Therefore, you do in fact need expert testimony to establish the above requirements. An experienced law enforcement officer can be qualified by the Court to testify as an expert in HGN. You should handle this like a drug distribution case – one officer to testify as an expert about the indicators you would see in a distribution case and the arresting officer to testify as to what he actually saw in the current case. Tie the testimony of the two officers together for the judge or the jury.

BE CREATIVE!

If the trial judge refuses to allow the HGN test results, you may want to argue that testimony regarding the defendant's performance on the test should nonetheless be admissible. Aside from detecting nystagmus, the test also involves the ability to perform basic tasks such as standing still and following directions. Suggest to the judge that the officer should be allowed to testify to the defendant's behavior during the test administration, i.e. swayed while following the stimulus, had to hold on the car for balance, and couldn't keep her eyes open. These observations go directly to the officer's opinion and are relevant to the jury's determination of impairment. The defendant will not be unfairly prejudiced by admission of this testimony if the officer is only testifying about observations he made of the defendant as long as the officer does not refer to a test, evaluation, nystagmus or clues.

PHYSICAL EVIDENCE – NO PROBABLE CAUSE TO SEARCH

"THE POLICE OFFICER DID NOT HAVE PROBABLE CAUSE TO SEARCH MY CLIENT AND/OR HIS AUTOMOBILE."

When faced with a defense motion to suppress evidence based on lack of probable cause to search, make as many of the following arguments that apply to your case:

AUTOMOBILE EXCEPTION

A warrant is not necessary to search an automobile if the police officer has probable cause to search and exigent circumstances exist. *Carroll v. United States*, 267 U.S. 132, 149 (1925). The inherent mobility of the automobile itself provides the requisite exigency to justify a warrantless search. *Commonwealth v. Motta*, 424 Mass. 117 (1997). *See also Commonwealth v. Gajka,* 425 Mass 751 (1997). It is not necessary to impound the car and/or post a guard while awaiting a warrant. *Commonwealth v. Ortiz*, 376 Mass. 349 (1978).

Probable cause to search an automobile extends to all compartments and containers, whether locked or unlocked, in the automobile, provided that the object of the search could feasibly be found in the compartment or container being searched. *Commonwealth v. Cast*, 407 Mass. 891, 906-908 (1982). *See also Commonwealth v. Wunder,* 407 Mass 909 (1990). For example, if a police officer is searching for a stolen television, he cannot justify a search of the glove compartment. Likewise, if police have probable cause that an object will be in a certain place (i.e. the trunk), they cannot lawfully search the entire vehicle without independent probable cause for the search.

Therefore, if the officer in your case has just arrested the defendant for operating under the influence, and the defendant made a statement that he had a gun in the car, the officer need not get a warrant to search for that gun, but should confine his search to only those places where a gun could be found. This would include most areas of a car, including the glove compartment and the trunk, but might not include a small space such as the ashtray.

ODOR OF MARIJUANA

In light of the 2008 statutory amendment that decriminalized possession of less than one ounce of marijuana, there have been several questions as to how an officer should handle the smell of marijuana during a traffic stop. The following cases lend some guidance in the area:

POSSESSION:

Possession of a small quantity of marijuana (one ounce or less), standing alone, will not support the search of a person, a backpack, or a vehicle for an additional quantity of marijuana or other evidence of criminal activity. *Commonwealth v. Fontaine, 84 Mass. App. Ct. 699 (2014)*

Passing a joint back and forth does not provide probable cause that a crime is being committed. *Commonwealth v. Jackson, 464 Mass. 758 (2013)*

FORFEITURE:

Possession of one ounce or less of marijuana is a civil offense BUT the marijuana is subject to forfeiture (medical marijuana cannot be forfeited unless evidence of a crime such as OUI-Drugs).

Officers cannot enter a car to recover a noncriminal quantity of marijuana, even though the noncriminal quantity is subject to forfeiture, under G.L. c. 94C, § 32L. *Commonwealth v. Sheridan,* 470 Mass. 752 (2015).

UNBURNT ODOR:

Odor alone is not enough reasonable suspicion for an exit order.
Commonwealth v. Craan, 469 Mass. 24 (2014)

Odor alone is not enough probable cause to search a car. *Commonwealth v. Overmyer, 469 Mass. 16 (2014)*

BURNT ODOR:
Odor alone is not enough reasonable suspicion for an exit order. *Commonwealth v. Cruz, 459 Mass. 459 (2011)*

Odor alone is not enough probable cause to search a car. *Commonwealth v. Cruz, 459 Mass. 459 (2011)*

Odor and occupant surrendering less than an ounce of marijuana is not enough to search a car. *Commonwealth v. Daniel, 464 Mass. 746 (2013)*

Odor and the presence of less than an ounce of marijuana is not enough to search the trunk. *Commonwealth v. Pacheco, 464 Mass. 768 (2013)*

OBSERVATIONS:
An officer's observation of a bag of marijuana inside a car that he estimated weighed about one-ounce, did not establish that a crime was being committed and therefore, the officer could not issue an exit order, conduct a pat frisk of the driver, or search the car. Additionally, a suspect's nervous behavior combined with the observation of a noncriminal quantity of marijuana in a car does not establish probable cause that the car contains a criminal quantity of marijuana. *Commonwealth v. Sheridan*, 470 Mass. 752 (2015).

WHAT IS ENOUGH?
Facts to support probable cause to believe that a criminal amount of contraband is present in the car for exit order and warrantless search. *Commonwealth v. Cruz, 459 Mass. 459 (2011)*

When applying for a search warrant, the odor of unburnt marijuana, along with other factors including: absence of any smoking devices, large bundles of currency, excess wiring, manner in which the marijuana is packaged, inconsistency between the strength of the odor and the small package, prior drug offenses of the occupants, is enough.

FEDERAL LAW:
Because one ounce of marijuana or less is not a criminal offense in Massachusetts, federal law for illegal possession cannot be enforced. *Commonwealth v. Craan, 469 Mass. 24 (2014).*

PENDING MARIJUANA CASE AT THE SJC:
Commonwealth v. Rodriquez (SJC-11814) (oral argument held on March 5, 2015; case under advisement).

ISSUE: Whether an officer who smells burnt or burning marijuana emanating from a moving motor vehicle is justified in stopping the vehicle in order to issue a citation for the civil offense of possession of marijuana, pursuant to G.L. c. 94C, § 32L.

MEDICAL MARIJUANA:
105 CMR 725.000 – Implementation of an act for the humanitarian medical use of marijuana.

- Effective January 1, 2013
- There are no medical marijuana cards currently being issued.
- Written prescription will suffice
- Allowed to carry a sixty day supply (10 ozs of marijuana) or more if doctor deems necessary.
- Must carry a label reading: "Do not drive or operate machinery when under the influence of this product, keep this product away from children."
- Law enforcement may not forfeit the drugs unless they are in violation of the law and regulations.

NOTE: An officer who smells burnt marijuana during a traffic stop should immediately start looking for signs of drug impairment in the driver. The decriminalization statute specifies that "[n]othing contained herein shall be construed to repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or polices concerning the operation of vehicles or other actions taken while under the influence of marijuana." *Commonwealth v. Daniel, 464 Mass. 746 (2013)*

CONSENT
Perhaps the defendant acquiesced to the police search of his car/person. If so, you still might face several challenges.

FIRST, DID THE DEFENDANT ACTUALLY GIVE CONSENT?
Generally this is a question of credibility. At a motion hearing, the officer must testify to the defendant's statement of consent. If the defendant doesn't testify, the motion judge has only the defendant's affidavit upon which to rely. If the defendant does testify, you may inquire as to the defendant's mental state and level of impairment, as it goes to the defendant's ability to recall and understand the events.

There may also be an issue as to whether consent was given by a third party on the defendant's behalf. For example, assume the defendant has been arrested and transported to the station for booking. His girlfriend, who remained at the scene, authorized the police to search the defendant's car. Is that consent valid?

For third party consent to be valid, the question is whether the property is mutually used by persons generally having joint access or control for most purposes. Therefore, if the girlfriend generally has access to her boyfriend's car, she can probably give consent to search. She cannot, however, give consent to search containers under the exclusive

control of another (i.e. defendant's suitcase found in the car). *Commonwealth v. Walker,* 370 Mass 548 (1976).

SECOND, WAS THE DEFENDANT'S CONSENT GIVEN VOLUNTARILY?

Note at the outset that consent to search is not subject to *Miranda*. Thus, while consent must be voluntary, *Miranda* warnings are not required.

The question of voluntariness again is one of fact: given the totality of the circumstances, did the defendant freely and voluntarily give her consent? The burden is on the Commonwealth to show voluntariness by a preponderance of the evidence.

The following factors may be considered in determining voluntariness:

1. The circumstances under which consent was given. Did the defendant feel coerced into giving consent? For example, did the police have their guns drawn when asking for consent?
2. The mental or emotional state, physical condition, intelligence, maturity, level of education, etc. of the defendant. Was the defendant taken to the hospital after a serious collision? If so, he may not have been in a condition to knowingly give consent. Was the defendant so intoxicated that he could not give consent? If so, make sure the defendant files his signed affidavit to that effect, which becomes ammunition for cross-examination.

FINALLY, DID THE POLICE EXCEED THE SCOPE OF THE CONSENT GIVEN?

This is generally a question of objective reasonableness: what would the typical person have understood the exchange between the officer and the defendant to mean? For example, a police officer's request to "take a look in the truck" might presumably include a search of a closed suitcase found in that truck. On the other hand, a request to check the contents of a bag might not extend to the entire car in which the bag is located.

INEVITABLE DISCOVERY

Also known as the "we would have found it eventually" response. The test is whether evidence found because of a constitutional violation would inevitably have been discovered *lawfully*. See *Commonwealth v. O'Connor*, 406 Mass. 112 (1989); *Commonwealth v. Benoit,* 382 Mass. 210 (1981).

For example, assume your police officer finds a bag of cocaine under the defendant's front seat after placing him under arrest for OUI. Further assume the officer had no probable cause to search the vehicle. Finally, assume the police department has a written inventory policy that mandates the officer to tow the vehicle, search it thoroughly and inventory its contents.

In the above scenario, you can argue that the officer's lack of probable cause to support the search of the car is of no consequence, as the officer would inevitably have found the cocaine during the lawful inventory search.

PROCEDURALLY SPEAKING…

At the motion hearing, the Commonwealth must prove the facts bearing on inevitability of discovery by a preponderance of the evidence. Once established, the motion judge must then determine whether, on those facts, discovery by lawful means was certain as a practical matter. *Commonwealth v. O'Connor, supra*.

Further considerations for the motion judge in deciding whether to admit evidence under this doctrine are as follows:

1. The nature and severity of the constitutional violation – for instance, was a search warrant required to justify the search? If so, it is unlikely that the evidence will be admitted. See *Commonwealth v. Benoit, supra*.
2. The character of the police wrongdoing – did the police act in bad faith?
3. Was the Commonwealth's case aided, or the defendant's case harmed, by the unlawful premature discovery of the evidence?

INVENTORY SEARCH

Most police departments have policies that mandate an inventory search of all vehicles impounded by the police. Taking inventory of impounded cars serves to alleviate a number of public concerns. First, it safeguards the personal property of the car's owner. Second, it affords the police and/or towing company's protection from claims of theft or damage. Finally, it protects police officers and the public from dangerous items.

Often during the inventory process the police inadvertently run across contraband and/or incriminating evidence. Such evidence, if found pursuant to a lawful inventory, may be lawfully seized.

WHAT IS A LAWFUL INVENTORY?

The lawfulness of an inventory search focuses on the reasonableness of the inventorying police officer's actions, and does not focus on the existence (or non-existence) of probable cause. An examination into the lawfulness of the search focuses on three questions:

(1) **THE IMPOUNDMENT –** was the original impoundment lawful or simply a pretext to search for evidence?
(2) **THE POLICY** – was the search carried out according to a standard policy?
(3) **THE SEARCH** – did the search exceed the scope of the policy?

Each of the above three questions will be addressed in further detail.

THE IMPOUNDMENT – Since the enactment of Melanie's Law on October 28, 2005, police officers are now required to impound the vehicle of a person charged with operating under the influence of alcohol for a period of 12 hours.

THE POLICY – Under Massachusetts law, an inventory policy must be in writing. *Commonwealth v. Bishop*, 402 Mass. 449 (1988); *Commonwealth v. Figueroa*, 412 Mass. 745 (1992). The rationale behind this rule is that a standard policy reduces the police officer's discretion to search at will or use the inventory as a ruse for an investigative search. A policy that allows police to open and inspect closed but unlocked containers is constitutional. *Commonwealth v. Cacerres*, 413 Mass. 749 (1992).

PRACTICE TIP: If you intend to defend a police officer's actions by claiming that he was conducting an inventory search, be sure to get a copy of that police department's inventory policy. Go over the policy with your police officer to ensure compliance. At the motion hearing, offer the copy of the policy as an exhibit.

THE SEARCH – After obtaining a copy of the inventory policy, you must now determine if the police exceeded the permissible boundaries for the search. In general, the police may only search those areas of the automobile authorized by their department policy. Thus, without specific authority, the contents of any closed containers, even if unlocked, should be not searched. *Commonwealth v. Rostad*, 410 Mass. 618 (1991). However, search of a locked trunk is permissible, even in the absence of express authority in the written policy. *Commonwealth v. Garcia*, 409 Mass. 675 (1991).

PAT-FRISK FOR OFFICER SAFETY

Assume the following scenario: The officer, suspecting the defendant is impaired, has asked him to get out of the car. The defendant puts his hands in his jacket pocket and appears to be reaching for something. The officer orders the defendant out of the car and, concerned about what the defendant might be hiding, conducts a pat-frisk of the defendant and finds a small bottle of vodka in the defendant's pocket. Was the search permissible?

In Massachusetts a police officer must have an objectively reasonable basis for belief that his or her safety and/or the safety of another is threatened in order to justify an exit order. Once an individual is lawfully out of his vehicle, a police officer may conduct a pat-frisk of the individual only if the officer has a reasonable belief that his or her safety, or that of others is in danger and that the defendant is engaged in criminal activity. *Commonwealth v. Torres*, 433 Mass. 669 (2001) and *Commonwealth v. Narcisse*, 457 Mass. 1 (2010).

What constitutes "reasonable belief?" The standard is an objective one: whether a reasonably prudent officer would have a reasonable, articulable suspicion that the safety of the officer or others is in danger. The officer must be able to articulate that fear for his safety on the stand in open court. It is not always easy for an officer to

admit they were scared with the defendant sitting in front of them. Address this point with the officer prior to his testimony.

The Courts have held that blanket statements such as "furtive gestures" or "high crime area" are not sufficient to justify an exit order/pat-frisk. The police officer must be able to articulate specific conduct that gave rise to his fear. The following cases illustrate examples of what the court considers a "reasonable and articulable suspicion" of fear:

- *Commonwealth v. Stampley*, 437 Mass. 323 (2002) – The driver and passengers displayed empty hands; front passenger, who did not have ID, made several furtive gestures to the floor.
- *Commonwealth v. Torres*, *supra* – The car with six passengers, one of which ran off with backpack while remaining passengers "bent over" and "messed with something" on the floor.
- *Commonwealth v. Ciaramitaro,* 51 Mass. App. Ct. 638 (2001) – The defendant's behavior, i.e. speaking excitedly and unintelligibly, not following directions and repeatedly getting out of his vehicle.

PLAIN VIEW

Police officers may seize "objects falling in the plain view of an officer who has a right to be in the position to have that view…" Commonwealth v. Fields, 2 Mass. App. Ct. 679 (1974). Thus, if a police officer sees incriminating evidence while conducting a lawful inquiry, he has probable cause to seize the evidence and arrest its owner. For example, if the officer has stopped a driver for a speeding violation and, when requesting the driver's license and registration the officer sees what he believes is cocaine in the glove compartment, the officer may seize the cocaine and arrest the defendant. See generally, *Commonwealth v. Blake*, 23 Mass. App. Ct. 456 (1987).

Additionally, evidence lawfully discovered pursuant to the plain view doctrine may lead to a more thorough search of the area. Therefore, the officer in the above scenario may then search the rest of the car, even the trunk, for additional contraband. *Commonwealth v. Owens*, 414 Mass. 595 (1993); *Commonwealth v. Moses*, 408 Mass. 136 (1990).

SEARCH INCIDENT TO ARREST

Pursuant to G.L. c. 276, § 1, a police officer may conduct a search incident to a lawful arrest for the following purposes:

1. Seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment;
2. Removing any weapons that the arrestee might use to resist arrest or affect his escape.

SCOPE OF THE SEARCH

Article 14 of the Declaration of Rights requires that the police must have probable cause to believe that the search incident to arrest will yield evidence of the crime for which the arrest was made. This search includes a search of the arrestee's full person, his effects and the area under his immediate control. The search may be broader if exigent circumstances – the risk that the defendant is concealing a weapon or will destroy evidence – exist. *Commonwealth v. Madera,* 402 Mass. 156 (1988).

The search may also include a search of the defendant's automobile. For example, a defendant arrested for distribution of cocaine is likely to have fruits of the crime, i.e., drugs and/or paraphernalia in his car. Searching the car of a defendant arrested for OUI, however, may not be a permissible search incident to arrest since OUI is not the type of crime that typically yields "fruits." The search might nonetheless be justified if officer safety is at issue.

There are no "hard and fast" rules, but here are some case examples that help define the scope:

- *Commonwealth v. Elizondo*, 428 Mass. 322 (1998) – Drugs found in bathroom four to five feet away from locus of defendant's arrest were arguably within the defendant's "lunge zone."
- *Commonwealth v. Madera*, 402 Mass. 156 (1988) – Police officers' warrantless, contemporaneous search of a closed bag carried by the defendant when they lawfully arrested him, which they had probable cause to believe contained contraband, was not unreasonable.
- *Commonwealth v. Gliniewicz*, 398 Mass. 744 (1986) – Defendant's clothing, personal property, etc. that constitutes evidence may be searched and seized without a warrant in conjunction with the defendant's arrest.
- *Commonwealth v. Brillante,* 399 Mass. 152 (1987) – Troopers were justified in making a protective search of the driver's side of the automobile and the contents of any package which might conceal a weapon or destructible contraband given stop took place after 2 A.M. in a high crime area.
- *Commonwealth v.* Degray, 77 Mass. App. Ct. 122 (2010), *Commonwealth v. Cruz*, 459 Mass. 459 (2011) – Probable cause exists for a police officer to search the trunk of a car based on an odor of burnt marijuana as long as there are other factors, such as physical evidence of use, that support the connection between the contraband and the vehicle. The odor of burnt marijuana alone is not enough.

LAWFULNESS OF ARREST

The arrest must be supported by probable cause for the search to be lawful. Probable cause to arrest exists where, "at the moment of arrest, facts and circumstances within the knowledge of police are enough to warrant a prudent person to believe that the individual arrested has committed or was committing an offense." *Commonwealth v. Santaliz*, 413 Mass. 238 (1992). Probable cause may be based on credible hearsay that may not necessarily be admissible at trial. *Commonwealth v. White*, 422 Mass. 487

(1996). The collective knowledge of several police officers may also be "pooled" to establish probable cause. *Commonwealth v. Gullick*, 386 Mass. 278 (1982).

PRELIMINARY/PORTABLE BREATH TEST INSTRUMENT (PBT)

"THE RESULTS OF THE PBT INSTRUMENT ARE NOT RELIABLE AND THEREFORE ARE INADMISSIBLE."
General Laws chapter 90, section 24K states that breath test results shall only be admissible in evidence when performed using "infrared breath-testing devices." A PBT is not an infrared device but rather utilizes *fuel cell technology* to detect the presence of alcohol in the breath. Although this type of technology is reliable, our general laws have not recognized its validity; therefore any attempt to admit the test result at trial will likely be unsuccessful.

An argument can be made that the PBT result is relevant on the issue of intoxication and it satisfies the standard of admissibility set forth in *Commonwealth v. Sands,* 424 Mass. 184 (1997), as it is generally accepted within the relevant scientific community. Most police departments utilize PBT instruments that have been certified by the Office of Alcohol Testing (OAT). These instruments have also gained national acceptance, having been approved by NHTSA and been placed on the Conforming Products List. Furthermore, the requirements of admission of a breath test administered post-arrest do not apply to the PBT because the statute and CMRs apply to breath tests of persons "charged with" or "arrested" for OUI. The PBT is a field sobriety test administered prior to arrest/charging.

Nonetheless, given the present state of the law you should check with your appellate bureau before attempting to introduce the PBT result at trial, particularly with more serious cases (i.e. subsequent offenders, collisions resulting in bodily injury).

There are other not-so-controversial instances in which evidence of the PBT result may be admissible:

- Probable cause to arrest – If the defense is challenging the officer's probable cause to arrest, the test result should be admissible at a motion to suppress hearing.
- Rebuttal – If the defendant testifies that he didn't drink, the PBT result showing the presence of alcohol could be used to rebut this claim.
- Rehabilitation – If defense counsel cross-examines the police officer regarding the propriety of his investigation ("you really didn't gather much evidence, did you officer?"), you can argue that on re-direct the officer should be able to explain that he did as much as he could under the circumstances, including administering a PBT.

STATEMENTS OF THE DEFENDANT

"THE OFFICER DID NOT GIVE MY CLIENT HIS MIRANDA RIGHTS."

Miranda warnings are only necessary prior to a custodial interrogation. Two questions arise in deciding whether *Miranda* warnings should be given: (1) was the defendant in custody at the time of questioning; and (2) was the defendant interrogated or did he voluntarily make statements? The first question is often the most problematic in OUI cases.

DEFINING "CUSTODY"

A police officer has a duty/right to ask preliminary investigative questions without issuing *Miranda* warnings. A police officer who comes upon the scene of a collision is at first uncertain as to whether a crime has occurred and must also assess the safety and welfare of the parties involved. These tasks could not be performed efficiently if *Miranda* warnings were required prior to any questioning. "General investigative questioning" has been defined as interrogation "to obtain facts which would allow the police 'to exercise reason and informed judgment …in determining whether a violation has occurred.'" *Commonwealth v. Doyle*, 12 Mass. App. Ct. 786 (1998), quoting *Commonwealth v. Pappas*, 384 Mass. 428 (1981).

In deciding whether a defendant is in "custody," courts have looked to a number of factors:

- The nature of the crime – was there an accident involved? Were the police focused more on determining the safety of the people involved as opposed to investigating a crime scene?
- The place where the questioning took place – was the defendant questioned on the street or back at the police station?
- The status of the investigation at the time of the questioning – were the police certain that a violation of the law took place? If so, did they know the identity of the violator?
- The conduct of the police toward the defendant – were the officers coercive in their questioning or did they convey their desire to obtain information as to what occurred?
- The defendant's reasonable belief as to his freedom of action – objectively, did the defendant have the right to terminate questioning and leave freely?
- The ability of the defendant to voluntarily leave the place of questioning – was the defendant handcuffed or placed in the back of a cruiser?

DEFINING "INTERROGATION"

Interrogation is questioning, or any comments made by the officer designed to elicit an incriminating response. Sometimes defendants make incriminating statements without any prompting at all. These statements are not subject to *Miranda* and should be admissible.

WHAT ABOUT BOOKING QUESTIONS?

Some statements, such as name, address, date of birth, etc. though made in custody in response to police questioning, are not subject to *Miranda*. Generally, statements made in response to "routine booking questions" are exempt from *Miranda* as these questions are necessary to obtain "biographical data necessary to complete booking or pretrial services." *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

Therefore, if a police officer asks a defendant for his "full name," and he gives a wrong or incomplete answer, that answer may be used against him at trial to show that he was too impaired to answer a simple question.

Compare, however, questions asked during booking designed to elicit an incriminating response (i.e. "Which bar were you coming from when you were pulled over?"). Those types of questions require *Miranda* warnings and, without a knowing and intelligent waiver, a defendant's responses may not be admissible. Consider the following examples of instances in which the Court ruled the defendant's booking statements inadmissible:

- *Commonwealth v. Sheriff*, 425 Mass. 186 (1997) – defendant was asked a series of questions designed to test his mental acuity; conduct of police deemed inappropriate where the defendant asserted an insanity defense.
- *Commonwealth v. Woods,* 419 Mass. 366 (1995) – questions about current occupation asked during a drug arrest.
- *Pennsylvania v. Muniz,* 496 U.S. 582 (1990) – defendant unable to give date of his sixth birthday, suggesting mental impairment at time of his arrest for OUI.

"MY CLIENT DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS* MIRANDA *RIGHTS."

A defendant may elect to waive his *Miranda* rights and speak to the police. The Commonwealth has the burden of showing that this waiver was voluntary and made knowingly and intelligently, beyond a reasonable doubt.

WHAT MAKES A MIRANDA WAIVER VOLUNTARY?

A statement is voluntary if it is "the product of any meaningful act of volition." Therefore, a confession made by a defendant going through alcohol withdrawal who is told by the police that he will get treatment once he makes his statement is probably not "voluntary." Voluntariness is a question of fact that, according to the humane practice rule, must first be determined by the judge and then by the jury. The humane practice rule is well established in Massachusetts common law. See *Commonwealth v. Marshall*, 338 Mass. 460 (1959), and cases cited.

HUMANE PRACTICE RULE – The humane practice rule creates a two-stage determination of voluntariness. First, the judge must make a determination, beyond a reasonable doubt, that a defendant's statement was voluntary. Once that determination is made and the statement is admitted into evidence, the jury is then instructed to make its own

determination regarding voluntariness and how much weight should be afforded the statement. This is essentially the equivalent of a motion to suppress during trial.

WHAT CONSTITUTES A KNOWING AND INTELLIGENT WAIVER?
Miranda rights can be waived, as long as the defendant was fully aware both of the nature of the right being abandoned and the consequences of the decision to abandon that right.

THE CONUNDRUM: A defendant, after receiving *Miranda* warnings, makes incriminating statements. The police officer opines that the defendant is under the influence and places him under arrest. The defendant later claims that he was too intoxicated to comprehend his *Miranda* rights and thus could not knowingly and intelligently waive those rights.

There may be some merit to a defendant's claim of "mental incapacity," but this is obviously a risky tactic for the defense to employ. *Commonwealth v. Shipps*, 399 Mass. 820 (1987); *Commonwealth v. Brady*, 380 Mass. 44 (1980) - alcohol intoxication may render a statement involuntary, but there is no per se rule. In order to make this claim, a defendant must aver that he was too intoxicated to knowingly and intelligently waive his rights, and must sign an affidavit setting forth those facts. Thereafter, if the defendant testifies at trial, you can use this affidavit to impeach him regarding his level of intoxication. Unfortunately the affidavit cannot be used unless the defendant testifies.

"MY CLIENT HAD RETAINED THE SERVICES OF AN ATTORNEY AND THUS ANY QUESTIONING WAS IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT TO COUNSEL."
It is not uncommon for an OUI defendant to have access to an attorney immediately upon arrest. The question for the police becomes: *when has the defendant exercised his right to counsel?*

The right to counsel attaches upon custodial interrogation. In the above scenario, the defendant has no right to consult with his attorney before cooperating with the police – he is not necessarily in custody at the time he has been stopped. The right typically attaches after arrest and, once the right has been asserted, the police must cease questioning until a lawyer is made available or unless the defendant himself initiates further communication. *Edwards v. Arizona*, 451 U.S. 477 (1981).

When an attorney has identified himself to the police as the defendant's legal counsel, either in person or by telephone, the police must end their interrogation and notify the defendant of the attorney's efforts to render assistance. *Commonwealth v. Mavredakis*, 430 Mass. 848 (2000) and *Commonwealth v. McNulty*, 458 Mass. 305 (2010). That duty, however, does not extend to informing a defendant that a third party (such as a friend or family member) intends to retain legal counsel. *See Commonwealth v. Nelson*, 55 Mass. App. Ct. 433 (2002).

Once a defendant has asserted his right to counsel (either himself or through counsel), all police-initiated interrogation must cease. That is not to say, however, that a defendant cannot change his mind and later elect to speak to the police.

MOTIONS TO DISMISS

CITATION

"MY CLIENT DID NOT RECEIVE HIS CITATION IN A TIMELY MANNER."

Generally, a police officer is required by G.L. c. 90C, § 2 to issue a citation in connection with all motor vehicle infractions at the time of the violation. The purpose of this statute (also called the "no fix" statute) is two-fold: (1) to provide proper and definite notice of the offense alleged; and (2) to prevent police officers from "fixing" traffic tickets. G.L. c. 90C, § 2 states that failure of the officer to issue the citation at the time and place of the offense constitutes a defense to the charge**.** Private citizens may seek charges even if no citation was issued. G.L. c. 90, § 4. However, prosecution and police may not cure a late citation by procuring a private citizen to seek charges. *Commonwealth v. Riley*, 41 Mass. App. Ct. 234 (1996).

"THE CITATION WAS NOT TIMELY FILED WITH THE CLERK'S OFFICE."

When an officer requests issuance of a criminal complaint on a citation, the officer must file a copy of the citation with the clerk-magistrate of the district court for the judicial district where the violation occurred not later than the end of the sixth business day after the date of the violation. G.L. c. 90C, § 2. Although the legislature did not specify the consequences of failure to timely file a citation, the SJC has held that dismissal is the appropriate remedy. *Commonwealth v. Clinton*, 374 Mass. 719 (1978).

As you can see, § 2 creates a technical defense unique to motor vehicle crimes because it creates a complete defense to the charge. The defendant need not show prejudice to successfully assert this defense. However, as with most laws, there are exceptions to the rule. Upon receipt of a motion to dismiss based on G.L. c. 90, § 2, ask the following questions:

WAS THE DEFENDANT ARRESTED AT THE SCENE?

If the defendant was arrested, prompt delivery of a citation is not necessary.[17] *Commonwealth v. Gorman*, 356 Mass. 355 (1969). In *Gorman*, the Court reasoned that "[w]here a person is arrested and generally dealt with by the police in such a manner that he can have no doubt about the offence with which he is charged, the provisions for the prompt and definite notice contained in c. 90C, Section 2, are amply satisfied."

[17] Operating a motor vehicle while under the influence of intoxicating liquor, marijuana, narcotic drugs, depressants or stimulant substances is an arrestable misdemeanor offense under G.L. c. 90, § 21.

The Court went on to hold that "…an arrest, accompanied by the arrested person's awareness that he is being charged with a motor vehicle violation negates the necessity of the issuance and delivery of a citation at the time and place of the offense."

WHEN AND IN WHAT MANNER WAS THE CITATION GIVEN TO THE DEFENDANT?

The statute exempts the police from providing immediate notice in the following circumstances:

1. Where the violator could not have been stopped.
2. Where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator.
3. Where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure.

In the above situations, the officer should execute a citation as soon as possible after the violation and deliver it to the defendant in-hand or by mailing it to him at his legal address. However, the fact that a police officer *never* issues a citation is not "fatal to the prosecution" if one or more of the above exemptions exist. See *Commonwealth v. Kenney*, 55 Mass. App. Ct. 514 (2002) (seriousness of victim's injuries and fact that defendant was on notice of charges obviated need for citation).

The prosecution bears the burden of showing that one of the statutory exceptions applies. *Commonwealth v. Mullins*, 367 Mass. 733 (1975). The Commonwealth is not, however, required to prove receipt of the citation as part of its case-in-chief. *Commonwealth v. Freeman*, 354 Mass. 685 (1968). The following cases provide examples of the exceptions outlined above:

- ***Commonwealth v. Moulton,*** 56 Mass. App. Ct. 682 (2002) – at the scene of a car crash, the investigating officer formed the opinion that the defendant was under the influence; he did not issue a citation to the defendant at that time but instead mailed a citation to her later that day when his investigation was complete. The Court found the failure to immediately deliver the citation was justified by the officer's need to complete his investigation.
- ***Commonwealth v. Pappas,*** 384 Mass. 428 (1981) – crisis and confusion at the scene and the necessity to collect additional information needed to determine the nature of the violation justified the four and a half hour delay between the motor vehicle accident and the giving of a citation.
- ***Commonwealth v. Provost***, 12 Mass. App. Ct. 479 (1981) – delay of twenty-seven days in issuance of citation was justified because police officer needed to gather and carefully analyze information concerning how the accident occurred.
- ***Commonwealth v. McCarthy,*** 11 Mass. App. Ct. 655, 657 (1981) – defendant who failed to provide police with a correct address and did not return to the police station to do so as requested, cannot benefit from the statutory

protection since he frustrated the efforts of the police to comply with the statute.

Finally, an argument can always be made under the "catch-all" exception that failure to comply with the statutory timelines of c. 90C, § 2 should not warrant dismissal as the purpose of the statute has not been frustrated. See *Commonwealth v. Babb*, 389 Mass. 275 (1983). As stated, the statute has two purposes: to provide notice of the allegations and to prevent "ticket-fixing." With regard to "ticket-fixing," when faced with a serious offense, argue that the "seriousness tends to minimize the importance of absolute observance of the procedures because … 'fix' is virtually excluded." *Id*. With regard to notice, look at the facts of your case and argue that it is inconceivable that the defendant did not have actual notice of the seriousness of the incident.

CLERK'S HEARING

"MY CLIENT DIDN'T RECEIVE A CLERK'S HEARING AND WAS ENTITLED TO ONE BECAUSE HE'S CHARGED WITH A MISDEMEANOR."

A person charged with a misdemeanor offense has the right to notice and a hearing before a clerk magistrate prior to the issuance of a criminal complaint, unless any of the following apply:

1. An imminent threat of bodily injury exists.
2. There is an imminent threat of the commission of a crime.
3. There is an imminent threat of flight from the Commonwealth.
4. The accused was arrested for the offense in question.

G.L. c. 218, § 35A. In the case of most OUI offenses, subsection (4) above will apply. Therefore, if the police arrested the defendant at the scene, the issue becomes moot, as the defendant is clearly not entitled to a magistrate's hearing.

Other situations are not so clear. For example, if a defendant is taken to the hospital after causing a collision, the investigating officer may decide to send the defendant a citation rather than keep watch over his hospital bed. The defendant would then be entitled to a clerk's hearing, assuming all criminal charges are misdemeanors.

Each citation contains notification that the "violator" may request a hearing in writing within four days of the violation. This notification satisfies the notice requirements of c. 218 § 35A. *G.L. c. 90C, § 3(B) (2*). If a police officer gives a citation in-hand, clearly the defendant has received actual notice of the charges and his rights. If the citation was sent in the mail, the defendant has received constructive notice, even though he might claim he never received the citation because he moved, was away on vacation, etc. To combat his claim of lack of notice, check all court documents, probation, the registry – every place the defendant might have his address listed and see if the information corresponds with the address on the citation. Also, remind the judge that it is the

obligation of the defendant to keep his address current with the Registry of Motor Vehicles. *See G.L. c. 90, § 26A*.

Some judges will give the defendant the benefit of the doubt and, erring on the side of caution, will allow the motion to dismiss and grant a clerk's hearing. If the Court does grant a dismissal, the case is not necessarily closed since it is dismissed *without* prejudice and simply reverts back to a clerk's hearing. *See Commonwealth v. Tripolone*, 43 Mass. App. Ct. 23 (1997). And, if the clerk fails to issue a complaint, the Commonwealth can appeal the clerk's decision to a judge. *See Bradford v. Knights*, 427 Mass. 748 (1998).

EXTRATERRITORIAL STOP/ARREST

"THE OFFICER DID NOT HAVE THE AUTHORITY TO ARREST MY CLIENT IN ANOTHER JURISDICTION."
A police officer's authority is limited to the territorial jurisdiction of his appointment, unless he is in "fresh and continued pursuit" of an arrestable offense. G.L. c. 41, § 98A. The jurisdiction of the state police is the entire Commonwealth of Massachusetts, so this issue should not arise when a state trooper has made the arrest within the Commonwealth's borders.

This issue does arise, however, when local police cross city/town lines to effectuate an arrest. The primary issue is: when does a civil infraction rise to the level of an arrestable offense to validate the extra-territorial arrest as "fresh and continued pursuit?"

The officer must have probable cause to believe that the suspect has committed an arrestable offense *in the officer's jurisdiction*. Thus, an observation that the defendant was speeding and went through a red light by itself would not justify an extra-territorial arrest. See *Commonwealth v. LeBlanc*, 407 Mass. 70 (1990). An officer who makes observations such as weaving, excessive braking, etc. that rise to the level of probable cause to believe that the defendant is operating under the influence or operating so as to endanger may pursue the operator outside of the officer's jurisdiction and make an arrest. Also, a police officer in one jurisdiction can relay his observations of arrestable activity to a local police officer in a neighboring jurisdiction, thereby creating probable cause for the local police officer to arrest in the neighboring jurisdiction. *See Commonwealth v. Zirpolo*, 37 Mass. App. Ct. 307 (1994).

In preparing to argue against a motion to dismiss based on extraterritorial pursuit, get as much information as you can from the arresting officer. Have the officer testify to every detail of his observations, all pointing to the conclusion that the defendant had committed an arrestable offense before leaving the officer's jurisdiction. The offense

need not be OUI. Operating to endanger, for example, is also an arrestable offense[18] thus you can argue that, at the very least, the officer had probable cause to believe the defendant committed the crime of operating to endanger.
Commonwealth v. Limone, 460 Mass. 834 (2011) - A uniformed off-duty police officer outside of his jurisdiction is entitled to take the same reasonable steps to ensure public safety that an ordinary citizen can take. This includes removing the keys from an impaired motorist's car and telling him to wait until the local police arrive. Such actions do not rise to the level of an "arrest" in violation of the common law rule prohibiting extra-territorial arrests.

Commonwealth v. Bartlett, 465 Mass. 112 (2013) - A police officer from one town who observes a defendant driving erratically in a second town, and notifies the second town's police shortly after effectuating a stop of the vehicle, is justified in his actions under the authority of the towns' mutual aid agreement.

NO PROBABLE CAUSE TO ARREST

"THE POLICE DID NOT HAVE PROBABLE CAUSE TO ARREST MY CLIENT."
This type of motion, also known as the "motion to dismiss for lack of evidence" is completely improper as a pre-trial motion. The defense is essentially saying that, "based on the police report, you have no case" citing *Commonwealth v. DiBennadetto,* 436 Mass 310 (2002). Contrary to the Defendant's claim, the SJC's decision in *DiBennadetto* has no effect on the resolution of a motion to dismiss. *DiBennadetto* concerned whether the Boston Municipal Court ("BMC") or the district courts could conduct evidentiary hearings to determine whether probable cause existed to issue a complaint following a show cause hearing before a clerk-magistrate.[19] In holding that further evidentiary hearings in the BMC or the district courts are inappropriate, the SJC stated that the proper procedure to challenge an issued complaint is to file a motion to dismiss. *See id.* at 313. Thus, post-*DiBennadetto*, a motion to dismiss may be granted only where the Commonwealth stipulates to the facts of the case or agrees to the affidavit procedure described in *Brandano*. Otherwise, the prosecution would be denied "its privilege to establish evidence of guilt by compelling testimony at the trial." *Rosenberg v. Commonwealth,* 372 Mass. 59 (1977).

[18] Operating under the influence and operating to endanger are both arrestable offenses. *Commonwealth v. Zirpolo*, 37 Mass. App. Ct. 307, 310 (1994). Also, a police officer may arrest for misdemeanors committed in his presence that constitute a breach of the peace. *See Commonwealth v. Gorman*, 288 Mass. 294, 296-298 (1934); *Commonwealth v. Cavanaugh*, 366 Mass. 277 (1974).

[19] In DiBennadetto, a clerk-magistrate conducted two show cause hearings to determine the existence of probable cause to issue a criminal complaint. See id. Thereafter, upon a challenge to the show cause proceeding by the defendant, the BMC conducted a third evidentiary hearing and concluded that no probable cause existed to issue the complaint. See id. at 311. The Supreme Judicial Court held that neither the BMC nor the district courts could conduct such evidentiary hearings. See id. at 313.

Defense counsel may also cite *Commonwealth v. O'Dell,* 392 Mass. 445 (1984) and *Commonwealth v. McCarthy,* 430 Mass. 1195 (1981) as grounds for the motion to dismiss. These cases are not applicable in the district court as they both deal with insufficient evidence presented to a grand jury to sustain an indictment.

The defendant may bring a motion to suppress evidence based on lack of probable cause to arrest. If the police arrest the defendant without probable cause, any evidence seized as a result of that arrest must be suppressed. *Commonwealth v. Hill*, 51 Mass. App. Ct. 598 (2001).

NO REASONABLE SUSPICION TO STOP

"THE POLICE HAD NO REASON TO STOP MY CLIENT."

A "seizure" takes place once a police officer activates his blue lights, since a reasonable driver would believe that he or she was not free to leave. *Commonwealth v. Smigliano*, 427 Mass. 490 (1998). Thus, in order to stop a motor vehicle, a police officer must have a reasonable and articulable suspicion to believe that the occupants of the motor vehicle have committed, are committing or are about to commit a crime. C*ommonwealth v. Moses*, 408 Mass. 136 (1990).

If a defense attorney makes a Fourth Amendment challenge to the stop, consider the following:

WAS THE STOP BASED ON THE OFFICER'S OBSERVATIONS?

If a police officer has a reasonable and articulable suspicion that criminal activity is taking place, he has sufficient justification for a motor vehicle stop. With regard to OUI stops, the suspicion need not necessarily be that the operator is driving impaired. For example, if a police officer has a reasonable suspicion that a person is driving with a suspended license and later finds that person to be impaired, the officer's original intent will suffice as grounds for the stop and subsequent OUI arrest, regardless of the outcome of the suspended license offense. Additionally, commission of a civil motor vehicle infraction is also a sufficient basis for a motor vehicle stop. *Commonwealth v. Torres*, 433 Mass. 669 (2001). If a stop begins with a civil infraction and ends in arrest, the officer need not ultimately cite the operator for the traffic violation for the stop to be justified.

A police officer may, *without any suspicion*, run license plate numbers to check on a vehicle's status, as doing so does not violate one's privacy interests. In *Commonwealth v. Starr*, 55 Mass. App. Ct. 590 (2002), the Court found that the occupant of the vehicle has no reasonable expectation of privacy in car's number plate. Thus, if an officer determines that a car on the road is unregistered, uninsured, etc., he may make a stop based solely on that information. The SJC took this principle one step further. If a police officer sees a motor vehicle on the road that is registered to an individual whose license has been suspended, that police officer may stop that motor vehicle. The officer does

not need to first verify the information with the Registry as long as he reasonably believes that his knowledge is accurate. *Commonwealth v. Deramo*, 436 Mass. 40 (2002).

WAS THE STOP BASED ON INFORMATION RELAYED TO THE OFFICER FROM ANOTHER PARTY?

Sometimes the police receive information from other sources and stop a vehicle based on that information. If the "other source" is a police officer, the stop is justifiable on the principle that the knowledge of one police officer is imputed to all police officers.

In many OUI cases, however, the police are acting on tips from concerned citizens, particularly those drivers with cell phones who see erratic driving and are sufficiently alarmed to call the police. If the police officer makes independent observations and forms his own reasonable suspicion, the tip is of no consequence in performing a constitutional analysis of the subsequent stop.

The problem arises when the police, acting on information from dispatch regarding numerous cell phone calls reporting a car driving erratically, stop a motor vehicle *solely* on that information. If faced with this factual scenario, an analysis of the tip must be conducted under the two-pronged *Aguillar-Spinelli* test. The two prongs are: (1) basis of knowledge (how does the source know what he or she purports to know?); and (2) veracity (is the source reliable?). Either prong may be supported by independent police corroboration. Because the standard is "reasonable suspicion" as opposed to "probable cause," the *Aguillar-Spinelli* analysis can be somewhat relaxed.

Cell phone callers rarely have an established base of veracity. If, however, the caller has provided identifying information and is willing to be named, she should be reliable. *See Commonwealth v. Burt*, 393 Mass. 703 (1985); *Commonwealth v. Freiberg*, 405 Mass. 282 (1989). Furthermore, a citizen witness who presented himself in person to the police and was readily identifiable is afforded more reliability than an anonymous informant. *Commonwealth v. Love*, 56 Mass. App. Ct. 229 (2002) (unidentified tipster was readily identifiable since he contacted the police in person and got out of a car whose license plate was visible to the desk officer, placing his anonymity at risk); *See also*, *Commonwealth v. Cox*, 56 Mass. App. Ct. 907 (2002) (a citizen informant who places a cell phone call regarding an erratic operator and later presents herself to the police is reliable).

Independent police corroboration can make up for deficiencies in one or both prongs, thus *any* observations made by the police are relevant, regardless of whether those observations rise to reasonable suspicion. *See Commonwealth v. Lyons*, 409 Mass. 16, 19 (1990). In preparing to argue the validity of a stop, get as much information as possible from your officer. What was the exact information given to him in the dispatch? Was he told the car's make, model, license number, color, number of occupants? Did the car in question match some or all of those details? Was the officer given the exact location of the cell phone caller and his or her proximity to the suspect

car? Was the car spotted at or near that location? Any facts that corroborate the tip will be helpful in creating an argument to save your case.

WAS THE POLICE OFFICER EXERCISING HIS COMMUNITY CARE-TAKING FUNCTION?

There are times when a reasonable suspicion is not necessary to justify a stop. For example, with regard to matters of public safety, a police officer may approach a motor vehicle to check on the well-being of its occupants. *See Commonwealth v. Eckert*, 431 Mass. 591 (2000) (trooper woke defendant who was asleep in car at rest area); *Commonwealth v. Murdough,* 428 Mass. 760 (1999); *Commonwealth v. Leonard*, 422 Mass. 504 (1996) (trooper approached vehicle in breakdown lane and opened driver's side door to check on well-being of operator); *Commonwealth v. Evans*, 436 Mass. 369 (2002) (officer's approach and conversation with a driver of a car for purposes of his caretaking function is not a seizure); *Commonwealth v. McDevitt,* 57 Mass. App. Ct. 733 (2003) (an encounter that is based on an objectively justifiable community caretaking function is not a seizure, even if police may have subjectively believed that the citizen was engaged in illegal activity). This conduct is justified under the community care-taking function of the police.

INDEPENDENT BLOOD TEST

"THE POLICE FAILED TO ADVISE MY CLIENT OF HER RIGHT TO AN INDEPENDENT BLOOD TEST."

G.L. c. 263, § 5A mandates that every suspect/arrestee charged with OUI has a right to an independent examination by a physician, including the right to an independent blood alcohol test.[20] The police must inform all OUI arrestees of this right. The statutory rights form explains to arrestees all these rights, including a right to a blood test. A copy of the form signed by the arrestee is solid evidence that the police complied with the statute.

The defendant need not demonstrate that he has been prejudiced by the failure of the police to comply with c. 263, § 5A to be victorious on a motion to dismiss. C*ommonwealth v. Andrade,* 389 Mass. 874 (1983). However, if the police did not for some reason advise an arrestee of her rights under c. 263, § 5A, several arguments can be made in their defense. For instance, if a defendant is brought directly to the hospital as a result of the incident that led to his arrest, failure of the police to apprise him of his c. 263, § 5A rights does not warrant dismissal. *Commonwealth v. Attencio*, 12 Mass. App. Ct. 747 (1981). Additionally, an argument can be made that suppression of evidence is a more appropriate remedy than dismissal. *Commonwealth v. Andrade,*

[20] Compare the breath test. With regard to the breath test, while the statute is not phrased in terms of the arrestee's rights, the police are required to administer the breath test, unless the arrestee refuses. G.L. c. 90, § 24 (1)(f)(1) ("Such test *shall* be administered at the direction of a police officer…") (emphasis added). These cases refer to a defendant's right to take a breathalyzer test: *Commonwealth v. Falco*, 43 Mass. App. Ct. 253, 254 (1997) citing G.L. c. 90, § 24(1)(e); *Commonwealth v. Maylott*, 43 Mass. App. Ct. 516, 517 (1997); *Commonwealth v. Sabourin*, 48 Mass. App. Ct. 505, 506 (2000).

supra at 881-882; *Commonwealth v. Hampe*, 419 Mass. 514 (1995); *Commonwealth v. King,* 429 Mass 169 (1999). If *evidence of intoxication is overwhelming***,** the defendant has not been prejudiced because it is highly unlikely that she would have been able to obtain exculpatory evidence from her physician. *Commonwealth v. Andrade, supra* at 882. Thus, suppression of the breath test results and/or observations made by the police after the violation of the statutory right might be a more appropriate way to remedy the violation.

"MY CLIENT REALLY WANTED TO EXERCISE HER RIGHT TO AN INDEPENDENT BLOOD TEST BUT THE POLICE PREVENTED HER FROM DOING SO."

The problem arises when an arrestee is advised of her right to a blood test and she wants to exercise that right but does not or cannot, for a variety of reasons. For instance, the arrestee tells the police "Hey, I want my own doctor to examine me. He'll see I'm not drunk," but for some reason the arrestee is not released or cannot make bail and is held until the next morning for arraignment. What are the police obligated to do at this point?

If the defendant has communicated her desire to exercise her right to a blood test, the police cannot prohibit her from exercising that right, but they need not assist her in doing so. *Commonwealth v. Alano,* 388 Mass. 871 (1983)*, Commonwealth v. Rosewarne,* 410 Mass. 53 (1991) (police not required to transport defendant to medical facility). It is the primary responsibility of the defendant, not the police, to obtain her own blood test. *Commonwealth v. Lindner*, 395 Mass. 144 (1985).

If bail is an issue, however, the police must timely contact a bail commissioner and advise the arrestee of her right to bail. Failure to do so is tantamount to prohibiting an arrestee from exercising her right to an independent medical exam. *Commonwealth v. Hampe*, *supra* at 521 (1995).

The police may justify their delay in releasing the defendant on other grounds:

1. **PROTECTIVE CUSTODY** – If a person is so incapacitated due to intoxication that she is either unconscious, in need of medical attention, likely to suffer or cause harm, or disorderly, police may place her in protective custody. General Law chapter 111B, section 8 outlines very specific guidelines for placing intoxicated person in protective custody. If a police officer tells you that he did not release a defendant on bail because she was in protective custody, be certain that the officer can back this up by showing that he has complied with c. 111B, § 8. See *Commonwealth v. O'Brien*, 434 Mass. 615 (2001) - failure of police to comply with specific rules of protective custody, while improper, did not require dismissal of OUI charge.

2. **PUBLIC SAFETY** – If the arrestee is still intoxicated after posting bail, it is unreasonable to expect the police to unleash an intoxicated person back

onto the roadways. See *Commonwealth v. Hampe, supra* at 521, n.6. No motor vehicle impounded pursuant to an arrest for OUI may be released prior to the passing of twelve (12) hours following arrest. This language was incorporated into Melanie's Law and was passed to prevent those persons arrested and subsequently bailed for OUI from driving, upon release from the police station, while still impaired. It is important to be aware of this law in the event the defendant argues that she had no means of transportation to obtain an independent medical exam.

Again, a final argument to be made is that dismissal is not necessarily a proper remedy for curing the errors of the police. Suggest to the court an alternative remedy, such as suppression of the breath test results or all observations made after the violation of rights has occurred. *Id*. at 523-524.

RIGHT TO BAIL

"THE POLICE DID NOT AFFORD MY CLIENT OF HIS RIGHT TO BE BAILED."

This motion is typically filed in conjunction with a motion regarding the right to an independent medical exam because generally a defendant must be admitted to bail in order to obtain an independent test. As stated, the police need not assist a defendant in exercising his rights under c. 263, § 5A, but they also cannot hinder the exercise of those rights. Thus, when courts are not in session, the police must promptly contact a clerk magistrate or bail commissioner or allow the defendant to do so himself within a reasonable time of the arrest. C*ommonwealth v. Hampe, supra* at 521.

The bail commissioner shall hold a hearing and admit the defendant to bail on his personal recognizance, unless the bail commissioner determines in the exercise of his discretion "that such a release will not reasonably assure the appearance of the prisoner before the court." G.L. c. 276, § 58.

None of the applicable bail statutes[21] set a time limit within which a bail hearing must be held. The SJC, however, has stated that the "bright-line six-hour limit on police questioning is suggestive of the permissible outer limit of confinement." *Commonwealth v. Chistolini*, 422 Mass. 854 (1996).

If faced with a motion to dismiss for failure to timely bail, look at the facts of your case and ask, "were the actions of the police reasonable given all the circumstances?" It is possible that even though the defendant is admitted to bail, the police may decide not to release him for several reasons. For instance, if the defendant has no means of transportation from the police station, the police are not expected to allow an

[21] See G.L. c. 276 §, 42, 57, and 58.

intoxicated person to aimlessly walk the streets and the police have no duty to transport him. *See Commonwealth v. Hampe, supra* at 521, n.6.

Additionally, if the defendant is so intoxicated that he cannot comprehend the bail proceeding and/or conditions of release, the police may extend the reasonable time period in which to call the bail commissioner. *Commonwealth v. Chistolini*, *supra* at 857.

Finally, look again at the prejudice to the defendant and argue the alternative remedy – suppression of evidence after the violation as opposed to dismissal.

SOBRIETY CHECKPOINTS

"THE SOBRIETY CHECKPOINT IN QUESTION WAS UNCONSTITUTIONAL."

The Supreme Judicial Court in C*ommonwealth v. McGeoghegan*, 389 Mass. 137 (1983) upheld the constitutionality of sobriety checkpoints and has set minimum standards that police must follow in setting up a checkpoint are as follows:

1. The selection of motor vehicles to be stopped must not be arbitrary;
2. The safety of motorists must be assured and inconvenience minimized;
3. Supervisory personnel must devise a plan and police must act pursuant to that plan; and
4. Advance notice of the checkpoint should be published.

The State Police general order and TRF-15 (guidelines) are constitutional because they permit a vehicle to be diverted only when the screening officer has reasonable suspicion that the driver was under the influence. *Commonwealth v. Murphy,* 454 Mass. 318 (2009) and *Commonwealth v. Swartz,* 454 Mass. 330 (2009). The odor of alcohol alone is enough to establish reasonable suspicion. *Commonwealth v. Bazinet,* 76 Mass. App. Ct. 908 (2010). A copy of the State Police Sobriety Checkpoint Guidelines can be found in Appendix C.

The Commonwealth does not need to show that there is no equally effective yet less intrusive method to enforce G.L. c. 90, § 24. *Commonwealth v. Lovelace*, 402 Mass. 1002 (1988). The Commonwealth need only show that the police strictly adhered to the checkpoint guidelines. *Commonwealth v. Anderson*, 406 Mass. 343 (1989).

MOBILE BREATH TESTING UNITS

There are currently two Blood Alcohol Testing (BAT) Vehicles in operation in Massachusetts. The Massachusetts State Police work in conjunction with local departments conduct sobriety checkpoints. Sobriety checkpoints are scheduled on a regular basis throughout the state. Below is information a prosecutor should know when handling a checkpoint case.

If a prosecutor is handling a case where the defendant is charged with Operating Under the Influence (OUI), the prosecutor should ask the following questions:

1. Does the arrest stem from a sobriety checkpoint?
2. Was the defendant's arrest processed on the BAT vehicle?

If the answer to either question above is yes, then potential documents and witnesses for trial will vary from the typical roadside OUI arrest.

1. Sergeant William Robertson and Trooper Timothy Weldon of the Massachusetts State Police Traffic Programs Section maintain all periodic test records for the breath test instruments on both BAT vehicles. Sergeant Robertson can be reached at 508-988-7020. Trooper Timothy Weldon can be reached at 508-988-7021.

2. If there is a motion to suppress the arrest based on checkpoint procedures, the prosecutor must call the officer in charge (OIC) of the checkpoint to testify to the sobriety checkpoint plan. This is a Lieutenant or Captain from the State Police from one of the five troop headquarters:
   Troop A – Danvers
   Troop B – Northampton
   Troop C – Holden
   Troop D - Middleboro
   Troop H – South Boston
   - *The checkpoint OIC* and not the OIC of the BT instrument or the OIC of the BAT vehicle, is responsible for the checkpoint plan.
   - The arresting officer is not qualified to testify on the checkpoint plan.

3. The OIC on the BAT vehicle (distinct from the OIC of the checkpoint and the OIC of the BT instrument) conducts booking procedures; however, the arresting officer administers all rights and breath testing procedures. The local police department arrests are generally not processed on the BAT vehicles; however, the current breath testing instruments (Draeger 9510) now allow local officers this option. The arresting officer, whether it be a MSP trooper or a local department officer, is responsible for all documents associated with the arrest.

SOBRIETY CHECKPOINT DOCUMENT CHECKLIST

1. Department of State Police – General Order TRF-15 "Sobriety Checkpoints" – effective April 23, 2009
2. Department of State Police – Division Commander's Order 15-DFS-044
3. "Highway Safety Programs" – effective March 30, 2015
4. Troop Commander's Letter Authorizing the Sobriety Checkpoint
5. Site Problem / Selection Sheet
6. Request for News Release

7. Public Affairs Unit News Release
8. Massachusetts State Police – Duty Assignment Narrative
9. Duty Assignment Sheet
10. Checkpoint Duty Assignments (Signature Sheet)
11. Site Diagram
12. Sobriety Checkpoint Data Sheet
13. Massachusetts State Police HSD Supervisor's Activity Index
14. Massachusetts State Police – Sobriety Checkpoint Activity Log

COMMON DEFENSES AT TRIAL

ALTERNATIVE EXPLANATIONS FOR IMPAIRMENT

These defenses concede that the defendant was impaired and/or was exhibiting signs of impairment and thus corroborate the officer's observations. They offer alternative explanations in an effort to excuse or explain away the signs of impairment the officer observed – e.g. nervous defendant couldn't find license; bloodshot eyes caused by contacts. These defenses are sometimes offered as a "convenient excuse" for the symptoms of impairments.

DIABETES

"MY CLIENT WAS NOT IMPAIRED BY ALCOHOL BUT SUFFERING FROM A DIABETIC REACTION."

With the diabetes defense, the defendant is admitting that he was impaired but offering a legally recognized excuse. There are several issues to address when rebutting a diabetes defense.

First, it is important to recognize that there are two types of diabetes: Type I (insulin dependent) and Type II (non-insulin dependent).

Type I diabetes is a disease in which the body does not produce any insulin and thus Type I diabetics must take insulin injections to lower their blood sugar. The onset of Type I diabetes is typically during childhood/young adulthood and accounts for 5-10 percent of diabetes.

Type II diabetes is a metabolic disorder resulting from the body's inability to make enough or properly use insulin. It is the more common type of diabetes and does not typically onset until later in life. Type II is usually controlled through diet and/or oral medication, but may also require insulin injections.

When a diabetic does not eat regularly or enough, he may suffer from low blood sugar or hypoglycemia/insulin reaction. Hypoglycemia will occur even more quickly if a diabetic drinks alcohol without eating. The symptoms of an insulin reaction may be

similar to a person under the influence of alcohol: slurred speech, uncoordinated movements, confusion, and an alcohol-like odor on the breath (acetone). These symptoms would be more likely to occur if a Type I diabetic were having an insulin reaction, thus this defense is typically raised by Type I diabetics.
To determine if a defendant has a valid diabetes defense, you should know the following:

- Do the defendant's medical records support that he is a diabetic?
- Did the defendant inform the arresting officer that he had diabetes?
- Was the defendant diagnosed before or after his arrest?
- Does the defense plan to call an expert witness to testify that the defendant was suffering from low blood sugar at the time of his arrest?
- Is the expert the treating physician? Did he examine the defendant on the night of arrest? If the expert is not the treating physician, has he ever examined the defendant?
- Did the defendant seek medical treatment after the arrest?
- Is the defendant a Type I or Type II diabetic?
- Was the defendant wearing a bracelet identifying herself as a diabetic?

If you are in doubt as to whether the defendant has a valid diabetes defense and suspect it may be a red herring, consider the following:

- A diabetic must receive treatment or she may eventually lapse into a diabetic coma. Therefore, if the defendant does not offer any evidence that she received treatment after her arrest, her claim is definitely suspect.
- Also, how long was the defendant at the police station? Was she quickly released or in the cell awaiting bail? Did the police officer observe her after booking? Did she appear to "sober up" at all? If so, it is highly unlikely she was suffering from a diabetic reaction, since a diabetic's condition would deteriorate, not improve, without treatment.

NHTSA issued a report in September 1985 regarding acetone interference in breath alcohol measurement. NHTSA's report concluded that diabetics with higher than normal acetone levels usually suffer from "uncontrolled" diabetes (inability to maintain blood sugar at normal levels or non-diabetic levels) which would make the true diabetic too sick to drive and would generally require hospitalization. Diabetics with their condition under control would not generate significant enough amounts of acetone on their breath to interfere with a breath alcohol measurement. A non-insulin diabetic is unlikely to even emit acetone from his breath.

Moreover, the breath testing instrument has the ability to screen for interferents such as acetone. The instrument will record the presence of an interferent and abort the test. An expert from the Office of Alcohol Testing can explain the instrument's capabilities if this becomes a live issue.

For more general information on diabetes, check out the American Diabetes Association's website at www.diabetes.org.

FATIGUE

"MY CLIENT WASN'T IMPAIRED BY ALCOHOL – HE WAS JUST TIRED."

A defendant who claims fatigue is not really challenging the officer's assessment of impairment, he is merely offering an alternative explanation for that impairment. Most OUI cases contain evidence of defendant's drinking in addition to the observations of impairment, such as the odor of alcohol on the defendant's breath or open containers in the car. Therefore, a defendant usually will not deny alcohol consumption, but claim that he drank a minimal amount but was just over tired.

Ask the following questions:

- Did the defendant offer the fatigue excuse to the officer at the scene?
- If so, what did the officer do to determine if fatigue was a factor?
- Did the officer ask or note in the report how long it had been since the defendant last slept?

If the defendant testifies, get him to admit that driving while fatigued is unsafe. Ask the defendant if he has driven tired before to show that he is familiar with the impact of doing so. Question him about just how much he had to drink if only to confirm the minimal amount told to the officer. Get the defendant to admit that people do not drink alcohol to stay awake; that he knows that alcohol actually makes one tired.

During closing argument remind the jurors to apply their common sense, which says that alcohol has a more pronounced effect on a fatigued driver. Stress the alcohol-related signs of impairment (i.e. odor of alcohol on the defendant's breath; admission of coming from a bar) and the combination of alcohol and fatigue on impairment. Argue that most people "wake-up" when stopped by the police, no matter how tired they had been before being stopped. This "rush" often experienced by people when stopped by the police would vitiate the signs of fatigue. If the signs remain present throughout the stop, they are probably not due to fatigue alone.

MEDICATION

"MY CLIENT WASN'T IMPAIRED BY ALCOHOL – HE WAS ONLY TAKING THE MEDICATION THAT HIS DOCTOR PRESCRIBED."

This defense presents a number of issues:

1. Does the medication alone cause impairment?
2. If so, did the defendant know the effects?
3. Does the medication cause impairment when combined with alcohol?

4. If so, was the defendant aware of this side effect?
5. Was the intoxication "voluntary"?

Essentially the defendant is blaming his impairment on medication. While driving while medicated is not necessarily a crime[22], the law in Massachusetts states a defendant may be found guilty of OUI alcohol if his ability to operate a motor vehicle safely is diminished and alcohol is *one of the contributing factors*. It is not necessary for the Commonwealth to prove that alcohol is the sole or exclusive cause. It is enough if the defendant's capacity to operate a motor vehicle was diminished because of alcohol, even though concurrent causes contributed to that diminished capacity. *Commonwealth v. Stathopoulos*, 401 Mass. 453 (1988). The Commonwealth is entitled to a jury instruction on this issue.

The Commonwealth must prove (and the defendant is entitled to a jury instruction) that the defendant knew or had reason to know of the possible effects of the drug on his driving abilities. *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 365 (1982).

The defendant is also entitled to a jury instruction on the issue of criminal responsibility where the defendant presents expert testimony that his intoxication was involuntary due to the ingestion of prescription drugs. *Commonwealth v. Darch*, 54 Mass. App. Ct. 713 (2002).

In *Darch*, the defendant was taking four prescription medications on the night she was arrested for OUI. She admitted to also having a couple of drinks (although a BAC reading of .14 more than 8 hours after her arrest suggests it was more than a couple) The neuropsychiatrist who treated her after her arrest testified for the defense as to the effect of combining all four medications with alcohol, stating the combination "caused her to become psychotic and unable to control her behavior in a rational way" and that her decision to drive "was influenced by delusions." The defense claimed that the defendant was "involuntarily intoxicated" and thus lacked criminal responsibility at the time of the incident. The defense attorney failed, however, to request an instruction on criminal responsibility. On appeal, the defendant claimed such a failure rises to the level of ineffective assistant of counsel.

The Court did not decide the ultimate issue but rather sent the case back to the trial court for a hearing to determine whether defense counsel's actions were part of a broader trial strategy. The Court did, however, find that *in the absence of contradicting evidence* the doctor's testimony was sufficient to create a potential defense of lack of criminal responsibility, thereby entitling the defendant to the appropriate jury instruction.

[22] Driving under the influence of certain drugs (including some medications) is a crime. See Chapter VI: *OUI Drugs* for a thorough discussion of which types of drugs qualify under the statute.

PRACTICE TIP: The ruling in this case may inspire defense counsel to seek an instruction on criminal responsibility without putting forth much evidence in OUI cases where the defendant was taking medication. To protect against unfair surprise, make certain defense counsel follows all notice requirements of M.R.C.P. Rule 14 regarding lack of criminal responsibility defenses. Also, be prepared to offer evidence to counter the defendant's claims, as the Court in *Darch* points out that the defense evidence was uncontradicted.

- Did the defendant tell the police he was on medication at the time of the arrest? Usually officers will ask if the defendant was ill, injured or on medication of any type that would influence his ability to perform field sobriety tests. If the defense surfaces for the first time at trial, jurors will likely see it as untrue.
- Find out all you can about the medication the defendant claims to have been taking. Contact a pharmacist and/or check the Physician's Desk Reference (PDR)[23] for information about effects: warnings about drowsiness, driving while taking the medication, or combining the medication with alcohol or other drugs. Pin down the amount and when it was taken in relation to driving.
- If the defendant takes the stand, ask how long he has been taking the medication and what effects he has felt. Ask if he read the package inserts and if they warn against driving or about drowsiness as a side effect. If it is a prescription medication, what warnings was the defendant given about possible impairing effects? Was he warned against combining the medication with alcohol or other drugs? Has he ever combined this drug/medication with alcohol? If so, did it make him impaired? If he answers "yes", then he knew not to drive. If he answers "no", then it probably wasn't the drug that impaired him the night he was arrested!
- There will likely be independent evidence of alcohol consumption, such as the odor. Did the defendant admit drinking, even in small amounts? Stress the warnings against combining the medication and alcohol. You may call an expert witness to testify about alcohol and drug combinations. Although jurors may be sympathetic to someone on medication, they will not be if it can be shown that the defendant was irresponsible in not following the directions. Stress the dangerousness of combining alcohol with even over the counter medications.

MEDICAL IMPAIRMENT

"MY CLIENT'S SYMPTOMS WEREN'T CAUSED BY ALCOHOL CONSUMPTION BUT RATHER [INSERT MEDICAL CONDITION]"

[23] If you don't have access to a PDR, you can go to www.pdrhealth.com, or www.rxlist.com. Both sites provide information about a plethora of drugs and medication, including side effects and warnings.

The defendant is admitting to the existence of the symptoms of impairment, but offering a medical or physical condition to explain the symptoms. Typical medical/physical conditions asserted by defendants: allergies, obesity, inner ear imbalance, back or leg injury, and/or foot problems. For example, field sobriety tests in part test one's ability to balance. A claim that a defendant has an inner ear disorder that affects his balance helps explain poor performance on the field sobriety tests.

HAS THE DEFENDANT OFFERED MEDICAL TESTIMONY AND/OR RECORDS TO SUPPORT HIS CLAIM?
Without medical records, the defendant should be prohibited from testifying to any diagnosis and typical symptoms, as these facts are hearsay. The defendant can only testify to what he personally experiences.

If the defendant has offered medical records, be certain that the records have been properly summonsed to the clerk's office and that you have received timely notice pursuant to c. 233, § 79 or § 79G. To ensure that you receive a copy of the records, file a motion for reciprocal discovery.

If the defendant has given notice pursuant to § 79G (copy of records sent via certified mail at least 10 days prior to trial), those records shall be admissible as evidence of diagnosis, prognosis and/or opinion. The case of *Commonwealth v. Schutte*, 52 Mass. App. Ct. 796 (2001), contains a good discussion on what qualifies as a "record" under § 79G. In *Schutte*, the defendant asserted an inner ear disorder to explain his inability to balance. To support his claim, the defendant sought to admit a letter written by his physician. The letter was part of the medical record offered pursuant to c. 233, § 79G, with proper notice to the Commonwealth. The trial judge excluded the letter. On appeal, the Court held that the letter should have been admitted, regardless of the fact that it was not written in the regular course of treatment.

To be admissible the report or document must be written by a physician who examined and treated the patient and must be attested to by the physician. Only the opinion document is admissible under § 79G and all other medical records should be excluded unless they comport with § 79. For instance, evidence of an independent blood test or urinalysis done hours after the arrest to demonstrate the defendant was not intoxicated is inadmissible. *See Commonwealth v. Sheldon,* 423 Mass. 373 (1996). For more information on admissibility of medical records, see Chapter III, Section II: *Preparing Your Case For Trial*.

Since § 79G requires advance notice to the opposing party, you will receive the records in advance of trial. Therefore, read them! This will help you:

- Know what the defense will argue
- Prepare your officer accordingly; and
- Object to portions of the record that are too remote in time or irrelevant (the fact that the defendant got into a car accident and injured his elbow in 1982 is interesting, but not relevant to his present ability to perform FSTs). If the

records are remote/irrelevant, object to their admission. If admitted over your objection, you can nonetheless argue their remoteness/irrelevance to the jury.

If anything in the records is confusing or questionable, contact an expert or the nurse/physician who created the record.

WAS THE DEFENDANT'S PHYSICAL CONDITION EXPLAINED TO THE OFFICER AND WHAT DID THE OFFICER DO TO CORROBORATE IT?

Officers are instructed to ask defendants if they are suffering from conditions that would impair their ability to perform FSTs. Was that done in this case? Did the defendant answer affirmatively? If so, was the defendant given FSTs that would not be affected by the condition, such as the finger-to-nose? Results of the HGN test are particularly critical in these types of cases.

IS THERE OTHER EVIDENCE OF IMPAIRMENT THAT WOULD NOT BE AFFECTED BY THE MEDICAL CONDITION?

Remember that an OUI arrest is based on the totality of the circumstances. It is unlikely that the only evidence of impairment is the defendant's performance on the FSTs or his ability to walk or stand. Usually the first things noticed by the officer are the driving pattern, odor of alcohol, bloodshot eyes, slurred or incoherent speech, or an inability to produce a license. Stress the officer's observations that cannot be explained away by a bad back, etc.

WHAT WERE THE DEFENSE WITNESS OBSERVATIONS OF THE DEFENDANT?

During cross-examination of defense witnesses, pin them down to their observations of the defendant prior to his arrest. The witnesses will be concerned with painting a sober picture of the defendant and will probably tell you that he was "fine." This fact may rebut the defendant's claim of imbalance or injury.

HOW DOES THE DEFENDANT APPEAR IN COURT?

Jurors will observe the defendant's appearance and demeanor in court. If the defendant testifies and claims to suffer a chronic back ailment that causes balance problems, were any balance problems observed as he walked around the courthouse? In closing, point out to jurors the discrepancy between the defendant's claim and his physical condition in court.

HORIZONTAL GAZE NYSTAGMUS

"THE REASONS FOR MY CLIENT'S FAILURE ON THE HGN TEST ARE MEDICAL IN NATURE (AS A RESULT OF DISEASE, TRAUMA, ETC.)."

A thorough discussion of HGN can be found in Chapter II, Section III: *Under the Influence of Alcohol.* It is important to remember that *nystagmus indicates only that something is disrupting or disturbing the central nervous system.* Whether that "something" is alcohol or drugs is not a fact that can be determined by the HGN test

alone. The officer's observations and investigations will assist him (and ultimately the jury) in determining impairment. HGN is simply a tool (albeit a very reliable one) that may corroborate the officer's determination.

OTHER POSSIBLE CAUSES OF NYSTAGMUS

Since HGN indicates central nervous system impairment, it is possible that it is caused by something other than alcohol or drugs. Neurological dysfunction, for example, may cause nystagmus. Your expert witness should be able to explain the other causes of nystagmus either on direct or in rebuttal. As with all field sobriety tests, alternative explanations for the officer's observations go to their weight, not admissibility.

Spinning a person rapidly or irrigating the ears with either hot or cold water may induce nystagmus. The defendant may try to confuse the issue by referring to these other causes of nystagmus. None of the alternative methods of inducing nystagmus are likely to occur outside of a laboratory setting and are thus irrelevant. The common sense response to these and other methods of inducing nystagmus is that there is no evidence that the defendant had hot and cold water poured in his ears, or that he was spun rapidly. It is also important to note that the nystagmus ceases rapidly when induced by these means. For example, a defendant who was in a crash may claim that the car spun around several times during the crash and this caused the nystagmus. This type of nystagmus passes rapidly and would not be observable by the time the officer administered the HGN test.

NERVOUSNESS

"MY CLIENT WASN'T IMPAIRED – HE WAS JUST NERVOUS."

The defendant is claiming that all indicators (slurred speech; inability to perform field sobriety tests, etc.) were due to his nervousness. It is certainly natural that someone who has just been stopped by the police would be nervous, particularly if that person had been drinking, and many jurors will be sympathetic to this fact.

In preparing the police officer to testify, inform him that you will ask questions about whether the defendant appeared particularly nervous or if he expressed nervousness that night. Also, ask the officer if in his experience, are people nervous when they have been stopped by him and, if so, does that nervousness affect their ability to respond appropriately or perform field sobriety tests? Also, ask the officer, as a result of his training and experience, whether he has been able to differentiate between nervousness and being under the influence.

If the defendant testifies, ask if he is nervous in court. Usually the response will be "yes", as the jury will not believe a negative response. Find out if he is more or less nervous than on the night of his arrest. In closing, point out that the defendant was

coherent, able to answer questions, walked to the witness stand without losing his Balance, etc., even though he was nervous.

Establish that the officer was courteous and professional; that he never threatened or intimidated the defendant.
During closing argument highlight all of the evidence that supports the defendant's impairment that would be unaffected by nervousness: driving pattern, odor, slurred speech, HGN, etc.

THE "OTHER" DEFENSES

Necessity

The defendant is not contesting that he drove while impaired but that this conduct should be excused because circumstances made it necessary to drive. The defendant may claim that he drove to avoid a fight or take someone to the hospital.

The necessity defense is recognized in Massachusetts and the requirements are set out in *Commonwealth v. Brugmann*, 13 Mass. App. Ct. 373 (1991). The elements of the defense are as follows:

1. The defendant is faced with a clear and imminent danger, not one which is debatable or speculative;
2. The defendant can reasonably expect that his action will be effective as the direct cause of abating the danger;
3. There is no legal alternative that will be effective in abating the danger; and
4. The Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.

This is an affirmative defense. Thus the defendant must present evidence on each and every element for the jury to be instructed on necessity. *Commonwealth v. Pike*, 428 Mass. 393 (1998). Even if all four elements are satisfied, a necessity defense is sustainable "[o]nly when a comparison of the 'competing' harms in specific circumstances clearly favors excusing" the defendant's conduct. *Id*.

The Phantom Driver

"MY CLIENT WASN'T DRIVING – SOMEONE ELSE WAS."

This defense is raised when operation is an issue, typically when police respond to the scene of a collision and don't witness the defendant actually driving.

In the absence of an eyewitness who can place the defendant behind the wheel of the car, what is the evidence that the defendant was the driver?

- Did the defendant tell the police at the scene that he was not the driver or is this just surfacing at trial? If the defense is raised at trial, the jury is likely to see it as a lie. Point out in closing that the logical time to raise this issue is during the investigation when the police have the opportunity to investigate further and exonerate the defendant.
- Whether or not defendant told the police that he drove, it is important to have the police testify regarding the investigation and all evidence that supports the officer's conclusions that the defendant was the driver.
    - Was the defendant still in the car and in what position?
    - Is the defendant the owner of the car or the logical person to have been driving (i.e., is it the defendant's parent's car)?
    - Was there any evidence to suggest that another person had been in the car and left the scene, e.g. foot prints leading from the scene?
    - Was there any clothing or personal belongings in the car or at the scene?
    - Were there witnesses who came upon the scene immediately after the crash and did they see anyone else in the area?
    - Did the defendant identify the other driver? Was the driver a friend or some unknown person that the defendant met at the bar the night of the crash?
    - Is the defendant's explanation about the driver consistent with the evidence? Does it make sense? (How many people ask total strangers to drive their car?)
    - Where were the keys, in the ignition or in the defendant's possession?
    - Did the keys belong to the defendant? Were there other keys on the ring belonging to him?
    - Was the defendant at the scene or had he left? If located away from the scene, did he lead police to the scene or indicate knowledge of the location of the crash?
    - Did the defendant try to leave when the police arrived?
    - What physical evidence exists?
        - What was the position of the driver's seat in relation to the defendant's height?
        - Did the defendant sustain any abrasions or injury consistent with being the driver, such as bruising form the steering column, seatbelt abrasions, injuries from broken glass or hitting the windshield? Check for blood, tissue or hair transfers to the vehicle interior.
        - Did the defendant have knee injuries from contact with the dashboard?
        - Are there brake pedal or accelerator marks on the defendant's shoes?
        - Are the defendant's fingerprints on the key and/or rearview mirror?

- Are there items on the passenger seat and/or floorboards negating the likelihood of a passenger?

PRACTICE TIP: Most police officers do not have training in crash reconstruction and crash reconstruction experts are usually not asked to investigate single car crashes that do not result in serious injury. Advise your police officers to look for the above items of physical evidence, e.g. find out the defendant's height and the position of the driver's seat. If the car is still available, ask that it be fingerprinted.

Also, paramedics often respond to the scene of a crash. Do not overlook the testimony of paramedics who may be able to testify to location of injuries and defendant's statement of how the injuries were sustained, e.g. hitting the steering column.

"I only had two beers."

Most defendants will admit to drinking "a couple of beers." This is a perfect defense – it explains the odor of alcohol on the breath and time spent in a bar, and everyone knows it is okay to just have "a couple of beers."

A counterpart to this defense is a claim that the defendant was only drinking non-alcoholic beer**.** Again, it provides an explanation for the odor of alcohol without the consequences.

Trying to explain to the jury that "two beers" could have impaired the defendant's ability to drive is not a good tactic – most jurors have driven after a couple of beers and don't want to convict on that basis. Focus on the evidence of impairment – slurred speech; inability to retrieve license; unsteadiness; failure of field sobriety tests, the size of the defendant (different body types will be impacted differently by the amount of alcohol consumed) etc. Though the defendant will probably (1) have an excuse for each of these symptoms; or (2) claim the police officer was mistaken/is lying, the jury will get the picture.

Also, be sure to cross-examine the defendant and his witnesses as to the details of their evening – from first beer to second (and allegedly last) beer. Locke them in to the amount of time that lapsed; what they were doing other than drinking; what they had to eat; who was present and how much alcohol did each person consume. A story that is too "tight" will sound rehearsed and contrived.

In closing argument, remind the jurors to use their common sense – is the defendant's story credible? Point out the inconsistencies between the officer's observations of the defendant and the impact of "two beers." Highlight the fact that the defendant has an excuse for each symptom the officer noted – odor of alcohol was caused by two beers; red glass eyes caused by smoke in the bar, etc.

Then remind the jury of the totality of the circumstances. Yes, the officer related a litany of observations made about the defendant, but it was all those observations, coupled with common sense and experience, that led the officer to the opinion that the defendant was under the influence.

CHALLENGES TO THE EVIDENCE

BLOOD TEST RESULT

"THE ANALYZED BLOOD SAMPLE WAS SERUM AND NOT WHOLE BLOOD AS REQUIRED BY THE STATUTE. A VALID CORRELATION CANNOT BE MADE BETWEEN SERUM AND WHOLE BLOOD."

Hospitals typically test serum rather than whole blood. Serum is a component of whole blood. When whole blood is spun in a centrifuge, the heavier red blood cells go to the bottom and the lighter serum remains on the top, where it is mixed with water. Alcohol has an affinity for water and migrates where water is located. A test performed on serum therefore will result in a higher alcohol reading than a test performed on whole blood.

Although serum tests result in higher alcohol readings than tests on whole blood, Massachusetts recognizes a correlation between serum and whole blood, and a conversion is necessary to get a reading. Serum values are 14-18% higher than whole blood.

THE CONVERSION

Hospital results are typically measured in milligram per deciliter (mg/dl). To convert to whole blood, the result must first be converted to grams per deciliter (g/dl) thus the result should be divided by 1000. The result is then divided by three (3) conversion factors (1.12, 1.14, and 1.18) in order to report a range the BAC would be within. The result obtained when dividing the serum value by 1.14 reports the average BAC reading for an individual. The conservative result that is most favorable to the defendant is obtained by dividing the serum value by 1.18. A less conservative result is obtained by dividing the serum result by 1.12.

The defendant may challenge the conversion, claiming that every individual has a different serum/whole blood conversion ratio. While individual ratios may vary, experts generally agree that there is a known range within which a person's conversion ratio will fall. That range is between 1.12 and 1.18 with the average being 1.14 and applies to 95% of subjects tested. The defendant may argue that he was taking medication, dehydrated, or running a fever, claiming that any one of these factors can alter the test results. None of these conditions would substantially affect an accurate serum or whole blood reading.

The analysis of a specimen and the interpretation of the results are two separate steps in the application of science to the law. Both steps are important. The process of converting a serum reading to whole blood reading does not involve complex equations. Defense counsel's attempts to make a basic conversion ratio much more complicated than it is can be easily defeated by preparing yourself and your expert witness in advance.

For more information on the topic of serum conversion, see Chapter I, Section III: *Under the Influence.* Also, a serum conversation chart developed by the Office of Alcohol Testing can be found in Appendix C.

BREATH TEST RESULT

Challenges to the breath test will be numerous and varied. Some of these challenges may have merit, but only if the defendant's circumstances fit within the factual scenario. If not, many challenges are simply red herrings to distract the jury from the validity of the science of breath testing.

Do not forget that when a defendant takes a breath test, he is already under arrest for OUI. This means a police officer has amassed enough evidence to establish probable cause that the defendant was under the influence of alcohol. The defendant was not arrested based on the breath test result - the reading simply corroborates the other evidence of impairment (i.e., poor driving or a traffic violation, odor of alcohol, physical appearance, lack of balance, poor motor skills, and impaired judgment among other things.)

In general, here are some important pointers to consider whenever you have a breath test result.

- **IS THE CHALLENGE RELEVANT TO THE CASE ON TRIAL?** Some defense attorneys challenge all aspects of the instrument, regardless of whether the challenge has any applicability to the case being tried. The defense may also seek to "compound" the challenges to show that, although each challenge to the instrument might have a minimal effect on the test result, all the challenges taken together show there is *no way* for the instrument to give a valid test result. As you will see from the discussion below, each challenge to the breath test is very fact specific and only those that actually apply to the defendant on trial should be considered.

- **IS EXPERT TESTIMONY REQUIRED?** Many challenges to the breath test require explanation by a defense expert witness while some are simply based in common sense. If an evidentiary challenge is first revealed at trial, ask for a sidebar and request that defense counsel make an offer of proof as to the nature of the challenge to determine if an expert is required.

- **IF SO, HAS NOTICE BEEN PROVIDED?** At a minimum, the pre-trial conference report mandates that the defense must provide notice of the names of all witnesses to be called at trial. If no notice has been provided, object strenuously to the testimony on those grounds alone.
- **IF NOTICE HAS BEEN PROVIDED, FILE A MOTION IN LIMINE TO PROHIBIT CHALLENGES THAT HAVE NO FACTUAL BASIS.** For example, defense counsel may assert that the breath test result could be skewed if a person was exposed to paint fumes prior to taking the test. If there is no evidence that this defendant was exposed to paint fumes prior to taking the test, the challenge is irrelevant. As a side note, the BATS programming will detect any interference from paint fumes (volatile substances) or other alcohols that may be present through the use of the dual technology (fuel cell and infrared detector) that it employs when analyzing a breath sample.

- **EDUCATE THE JURY ON THE TECHNOLOGY BEHIND BREATH TESTING.** The more you know and understand the science behind breath testing, the better equipped you will be at educating the jury as to the accuracy of the breath test result. Take the time to educate the jury through the breath test operator (or the defense expert, if one testifies). Have the police officer take a photo of the breath test system and introduce it into evidence. If your breath test operator is knowledgeable about breath testing, and comfortable conveying that information to a jury (and prepared to do so), consider asking some general questions about the mechanics of a breath test.

- **FINALLY, REMEMBER THAT THE MANNER IN WHICH A BAC IS CALCULATED IS DESIGNED TO GIVE THE DEFENDANT THE BENEFIT OF THE DOUBT.** First, the test results are "truncated" meaning that any third or subsequent decimal place is dropped prior to the comparison of the results (see 5.01 CMR 2.15). To illustrate, if the instrument reads a BAC of 0.178%, the instrument will drop the third decimal and report a reading of 0.17%, even though the actual reading was closer to 0.18%. Second, the lower of the two readings is reported as the official test result (see 501 CMR 2.15). So, if a defendant provides two samples with readings of 0.17% and 0.19%, his "official" test result will be 0.17%.

"MY CLIENT WAS EXPOSED TO TOLUENE[24] (OR SOME OTHER VOLATILE SUBSTANCE) PRIOR TO TAKING THE BREATH TEST, WHICH SKEWED THE RESULTS."

[24] Toluene is a volatile substance commonly found in paints, paint thinner, fingernail polish, gasoline, etc. Exposure to toluene may also cause symptoms similar to those exhibited due to alcohol impairment. These symptoms typically subside, however, once exposure ceases.

The defense may try to discredit the breath test result by stating that the instrument might have detected another substance that the defendant claims he was exposed to and recorded it as alcohol.

Most substances that a defendant claims would be detected by the breath test instrument would be unlikely to be found in a person's system, such as toluene, propane, butane, etc. For many of these substances, a toxic dose would be required before it would have any appreciable effect on the breath test. Furthermore, if someone had ingested these substances, he would not be in a condition to give a breath test but would require immediate medical intervention. Therefore, it is important to know the substance to which the defendant claims he was exposed.

- Was this information given to the police either at the time the defendant was stopped or when the breath test was administered?
- Did the officer make any observations that would either corroborate or cast doubt on the defendant's assertion? For example, was there paint on the defendant's clothing?
- Pin the defendant down to exactly when he was exposed to the substance, the length of the exposure, when the exposure terminated in relation to the breath test, and, if possible the ingredients of the item to which he was exposed. Even lengthy exposure to fumes will pass out of the system in a relatively short period of time.
- Have the officer explain that the instrument requires deep lung air in order to analyze the sample. You may be able to get the defendant to agree with you on cross exam as to how much effort he expended to give a sample. You can argue that if it takes that much of a breath to get a reading, then a large amount of the other substance (paint, gasoline, etc.) would have to be present to register.
- Establish through the breath test technician or expert from the Office of Alcohol Testing the ability of the breath test instrument to detect interferents. All BATS instruments will detect certain volatile substances and abort the test. Also, ask the expert to opine as to the concentration of the interferent that would be required to actually register on the breath.

Inhaling toxic substances such as paint, gasoline, and glue is a way to get high. Operating under the influence of certain inhalants (namely vapors of glue) is also a violation of G.L. c. 90, § 24. See Chapter VI: *OUI Drugs* for details on this topic.

The defendant may not claim that he was exposed to anything. He may simply attempt to cast doubt on the test result by showing the non-specific nature of the breath test instrument. Point out in closing that there is no evidence to suggest that the instrument analyzed anything but alcohol on the defendant's breath and that the defense argument is a "red herring."

"THE TEST RESULT IS INFLATED BECAUSE OF RESIDUAL MOUTH ALCOHOL OR THE PRESENCE OF ALCOHOL FROM MOUTHWASH OR BREATH SPRAYS TAKEN TO HIDE THE ODOR OF DRINKING."

The defense is claiming that mouth alcohol may be present from belching and bringing up alcohol from the stomach, or the use of mouthwash or breath spray. The issue is how long this mouth alcohol is detectable in a BAC**.**

Studies show that mouth alcohol is virtually undetectable after approximately 5 minutes. The breath test operator must observe the defendant for 15 minutes immediately prior to administering the test to ensure that no alcohol is introduced into the mouth prior to the administration of the test (see 5.01 CMR 2.13). The BATS programming is designed to detect the presence of mouth alcohol. The instrument actually draws itself a picture of the breath sample submitted. A breath sample containing mouth alcohol would look like a sharp peak and then a rapid decline followed by a plateau whereas the deep lung air sample would look like a gradual incline followed by a plateau. If mouth alcohol is detected by the instrument, a "mouth alcohol" message will appear and the breath test operator must begin the 15 minute observation period again (see 5.01 CMR 2.13).

PRACTICE TIP: Be aware that the defense may seek to cast doubt on the officer's actual observations during the waiting period by having the officer admit on cross examination that during the waiting period he was doing paperwork, talking on the phone or was otherwise distracted and not directly watching the defendant. Therefore, the officer could not possibly have noticed whether the defendant hiccoughed or burped. Be sure to discuss with the officer before trial his activities during the observation period and establish how closely he actually watched the defendant.

Also, do not discount the defendant's claims of using mouthwash or taking cough syrup. Alcoholics are known to substitute mouthwash, cough syrup, or other products with high alcohol content when alcoholic beverages are unavailable.

"THE BREATH TEST RESULT IS NOT AN ACCURATE REFLECTION OF THE BAC AT THE TIME OF DRIVING."

Here the defendant claims he was not over the legal limit at the time of driving due to unabsorbed alcohol in the stomach, however, by the time the test was administered, the defendant had absorbed sufficient alcohol to put him over the limit. The defendant, for example, may have testified that he had a couple of "quick" drinks right before getting arrested. At that point in time he was in the alcohol absorptive phase. His BAC was rising and was actually lower than the test result taken at some point subsequent to his arrest. Review Chapter I, Section II, which discusses the manner in which alcohol moves through the body.

Recall that alcohol begins absorbing into the body almost immediately and most alcohol will be absorbed within 60 minutes (absorption could take as long as 2 hours, but most

people will have absorbed the alcohol within 30-60 minutes). The body also eliminates alcohol as it is absorbing it. As long as a person continues to drink, he is both absorbing and eliminating alcohol. You may want to consider consulting with a toxicologist prior to trial when you have this defense. You may want to consider calling him/her as a rebuttal witness.

In order for this defense to be valid, the defendant would have to have consumed his last drink within 60 minutes prior to taking the test. You need to challenge the credibility of that fact.

To illustrate, consider the following scenario.

- The defendant is stopped at 12:00 a.m.
- After determining that he is under the influence of alcohol, the officer arrests the defendant and transports him back to the station. The defendant is booked and decides to take a breath test. The test is administered at approximately 1:00 a.m. (60 minutes after arrest, during which time the defendant is under the watchful eye of the police and does not consume any alcohol). The defendant's BAC is .08.
- In order for the defendant's claim to be valid (that he was still absorbing alcohol at the time of the test), his last drink must have been immediately prior to 12:00 when the police stopped him. Assume the defendant testified that he had two quick drinks right before leaving the bar at 11:30.
- Giving the defendant the benefit of the doubt (i.e. that he is a rare individual who takes 90 minutes to fully absorb alcohol), then, if his last drink was at 11:30, it is *possible* that he was still in the absorption phase at the time of the test. HOWEVER:
    - Recall that many factors affect the absorption rate, such as contents of the stomach, amount of alcohol in the drink, etc. Be sure to cross-examine him on this issue. For example, alcohol is absorbed faster on an empty stomach. Did the defendant have a "full stomach" at 11:30 at night?
    - A person who has just had two quick drinks would not yet exhibit the outward signs of impairment. Cross-examine the defendant on the effects of those two "quick drinks." Highlight in closing the existence of the signs of impairment.

Consider using a chalkboard or flip chart to draw a timeline for the jury to illustrate the principles of retrograde extrapolation.

PRACTICE TIP: This defense can most easily be defeated by knowing when the defendant drank, how much and where. It is also helpful to know what the defendant had to eat and when. Consider working with the police to encourage the officers to obtain this information when questioning an OUI defendant. When asked, most defendants will downplay their drinking and tell the police they had stopped drinking long before the

officer pulled them over. If this is the case, a defense based on a rising BAC is factually insupportable.

"OTHER SUBSTANCES SUCH AS MENTHOL (IN COUGH DROPS), WORCESTERSHIRE SAUCE, WONDER BREAD, TOOTH PASTE, ETC. CAUSED AN ARTIFICIAL BAC READING."

Defense counsel may claim that his client chewed cough drops, brushed his teeth, ate bread, used a condiment, etc., which led to a false reading.

Again, this defense should only be raised through a defense expert (of which you would have received notice). Try to limit questioning to those substances that the defendant *actually* did ingest. More importantly, the breath testing instrument is designed to detect and "weed out" interferents, which have a different spectrum than alcohol. An expert from the Office of Alcohol Testing can explain the instrument's capabilities.

With this defense in particular, remember that ingestion of Wonder bread, Worcestershire sauce, tooth paste, and cough drops does not (1) affect one's ability to drive safely; (2) cause an odor of an alcoholic beverage, (3) make field sobriety tests more challenging; or (4) impair a person in anyway. At the time the breath test was administered, the police already opined that the defendant was under the influence *of alcohol* (not cough drops!)

"THE PARTITION RATIO USED (2100:1) IS NOT RELIABLE BECAUSE THE RATIO ACTUALLY VARIES FROM PERSON TO PERSON, FROM DAY TO DAY."

A partition ratio defines the relationship between a gas (breath) and a liquid (blood). Because the law only allows reporting of a blood alcohol concentration, the breath test instrument must convert the breath test reading into a blood test reading. On average, there is 2300 times more alcohol in the blood than in the breath, making the partition ratio 2300:1. The breath test instrument uses a slightly lower ratio to convert breath to blood (2100:1). This benefits the defendant by reporting a lower BAC.

It is true that partition ratios vary from person to person, from day to day, depending on factors such as body temperature, gender, medical conditions, and race. An individual's partition ratio may be anywhere from 1900:1 to 2400:1 (defense experts may suggest a wider range of 1500 – 3000). It is important to remember, however that the *majority of the population typically has a partition ratio closer to 2300:1*, therefore, using a ratio of 2100:1 actually underreports the average person's blood alcohol level - this underreporting can be anywhere from 9-12%.

The defense must call an expert in order to challenge the reliability of the partition ratio that the breath test instrument employs. If the expert testifies *generally* to disparate partition ratios, the testimony is not terribly relevant. To be relevant, the defendant

needs to present evidence that his particular partition ratio was below 2100:1 at the time he took the breath test. If not, the challenge is speculative at best.

If the defendant did have a partition ratio below 2100:1 at the time he took the test and the test result was 0.08, this challenge may have some merit. Under those circumstances a person's BAC might have actually been slightly lower than 0.08. However, this challenge is inconsequential when dealing with higher BACs. Also, don't forget that the breath test generally underreports most BAC readings, giving the defendant the benefit of the doubt. Consider the following:

- The breath test results are truncated, which means the third decimal is dropped when read. So, if a person's BAC is 0.079 on the breath test, the result will be shortened to read 0.07, again underestimating the amount of alcohol in the blood.
- Also, under current procedures, the lower of two breath test results is reported as the "official" test result. So if a person provides a first breath sample with a reading of 0.09 and a second breath sample with a reading of 0.07, the reported reading is a 0.07.

On March 17, 2008, the New Jersey Supreme Court decided *State v. Chun, 191 NJ 308 (2007),* a case that challenged the overall scientific reliability of the breath test instrument, the Court ruled there is evidence to support the continued use of a 2100:1 blood/breath alcohol ratio to estimate a defendant's blood alcohol level from a breath sample.

"MY CLIENT HAS GERD (GASTROESOPHOGEAL REFLUX DISEASE) AND THE GAS IN HIS STOMACH (WHICH CONTAINS ALCOHOL) CAN BE RELEASED TO THE LUNGS CREATING A HIGHER BAC."

This challenge can only be raised through expert testimony. First, try to limit the testimony of the defense expert. Does the defendant have this condition AND have medical records to support the existence of that condition? If not, it's not relevant!

Second, the physiology of the human body is such that, when blowing into a breath test instrument, a person's epiglottis closes off the esophagus (and the stomach) from the larynx so that air from the lungs and not the stomach exits into the mouth. A study[25] published in 1999 concluded that GERD has little to or no effect on the BAC, particularly when the subject is in the post-absorptive phase (approximately 90 minutes from ingestion of the last drink). This study was the first of its kind to be conducted and has been published in a peer review journal (Journal of Forensic Sciences). Also, according to this study, drinking high-proof alcohol beverages, as well as beer and white wine can actually induce GERD. (See page 816 of the study).

[25] Kechagias, et al., *Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease*, JOURNAL OF FORENSIC SCIENCES (1999), 44 (4): 814-818.

If the defense expert testifies that the defendant's breath test result could have been skewed due to GERD, consider asking her the following questions on cross-examination to show that the expert had no firsthand knowledge as to whether (1) the defendant was suffering from GERD when he took the breath test; and (2) if he was suffering from GERD, that he was still in the absorption phase:

- Are you familiar with a study conducted in 1999 entitled "Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease?"
- This study was published in the Journal of Forensic Sciences.
- That is a peer reviewed journal, is it not?
- According to this study, isn't it true that GERD does not have any impact on a BAC result when the person is in the post-absorptive phase?
- And that phase is typically between 30 and 90 minutes, depending on the person?
- So in order to conclude that GERD had an effect on the breath test result, the defendant would have to be in the absorption phase.
- The defendant would also have to be suffering from GERD at the time the test was administered.
- You were not with the defendant on the night he was arrested.
- You don't know what he drank that night.
- You don't know how much he had to drink.
- You don't know when he stopped drinking.
- You weren't with the defendant when he took the breath test.

FIELD SOBRIETY TESTS

At trial, most attacks on the field sobriety tests will surround the propriety of test administration. These issues have been discussed in Chapter V, Section I: C*ommon Defense Pre-Trial Motions,* as many defense attorneys seek to have the tests suppressed before attempting to invalidate the results during cross exam.

OFFICER'S CREDIBILITY/BASIS FOR OPINION

"THE POLICE OFFICER JUMPED TO A CONCLUSION IN FORMING PROBABLE CAUSE TO ARREST."

During cross-examination, the attorney will ask your officer to identify the exact point in which he established probable cause. She will go through a painstaking series of questions:

Q: Officer, after you smelled alcohol on my client's breath, at that point did you establish probable cause to believe that he was under the influence?
A: No, not yet.
Q: Well, how about when you claim he stumbled when he got out of the car?

A: No, not at that point.
Q: Perhaps when he was unable to complete the first test – the alphabet test. Is that when you established probable cause?

This is a tactic employed by many defense attorneys and places your officer in a Catch-22. If the officer answers "yes" at the outset, he will look as though he intended to arrest the defendant the second he suspected him of drinking. If he answers "no," the attorney can argue in closing that, if it took the officer that long to establish probable cause, her client could not have been that bad!

The best way to counteract this defense is to prepare your witness to respond appropriately to this style of questioning. Assume that all attorneys will employ this tactic and talk to your officer about how he establishes probable cause. Instruct him to be prepared for these questions and that you will re-direct if necessary to give him a chance to explain his investigation and thought-process.

In most cases in which an OUI arrest is made, it is a series of events or combination of facts that allow the officer to determine probable cause to arrest. When a defense attorney asks, "Did you believe my client was under the influence when he stepped from his vehicle?" she is looking for a "yes" or "no" answer. Let the officer know that he should not be afraid to provide a complete response to that type of question. He does not have to provide a "yes" or "no" answer if such an answer is not appropriate. The officer should be allowed to explain to the jury his thought process – how he started out with a suspicion or belief which, based on a combination of facts, became probable cause.

Whether to re-direct is a decision to be made on a case-by-case basis. You must assess the damage, if any, done to your witness and determine whether re-direct will help repair the damage or simply highlight the problems. If you decide to re-direct, you may want to ask the officer the following questions:

Q: Officer, on cross-examination, counsel asked you a series of questions about the exact moment in which you formed probable cause to arrest the defendant. How do you determine whether you have probable cause to arrest?
A: <*officer should explain significance of determining probable cause to arrest*>
Q: How do you know when you've established probable cause?
A: <*officer can describe to the jury the phases of investigation and tools the officer uses to satisfy probable cause*>
Q: And how did you establish probable cause in this case?
A: <*officer should share the "building-up" of facts that led to the officer's conclusion in this case*>

"THE OFFICER DID NOT SEE ALL INDICATORS ONE EXPECTS TO SEE IN AN IMPAIRED INDIVIDUAL."

The NHTSA manual instructs officers to look for numerous indicators in making their determination regarding impairment. Savvy defense attorneys will obtain a copy of the NHTSA manual and cross-examine the officer regarding the absence of certain indicators.

Q: Now officer, isn't it true you were trained to look for 20 cues in the manner of operation to detect an impaired driver?
A: Yes.
Q: For example, you should look for a car turning with a wide radius, correct?
A: Yes.
Q: And you didn't see my client do that, did you?
A: No.
Q: You're also trained to look for a car straddling the center or lane marker, right?
A: Yes.
Q: And you didn't see my client do that either, did you?

Response:
While NHTSA has identified common traits exhibited by impaired persons, the absence of one or more cues is not indicative of sobriety. It is the totality of the circumstances: the manner of operation; the defendant's appearance; his ability to perform field sobriety tests and response to questions, etc. – all of those factors combined with the officer's training, common sense and experience that contribute to the officer's opinion. On re-direct, ask your officer if he has ever seen *every* cue exhibited by one person.

"THE OFFICER DID SEE MY CLIENT PERFORM ACTIVITIES INDICATING MY CLIENT'S SOBRIETY."

The defense is essentially claiming, "since my client could perform all these tasks without a problem, clearly he was not impaired." The attorney will also point out that the officer was trained to monitor the defendant's performance on these tasks in making his determination regarding impairment.

Here are some of the common tasks that attorneys will claims their clients have done well:

Q: Officer, it's true, is it not, that my client was able to produce his license and registration?
A: Yes.
Q: And when you placed him under arrest, he walked unaided to the cruiser.
A: Yes.
Q: He also got into the back seat, while handcuffed, correct?
A: Yes.
Q: Back at the police station, he politely cooperated with the booking officer.
A: Yes.
Q: He was able to answer all the booking questions, including providing his social security number and his mother's maiden name.

A: Yes.
Q: He signed the booking sheet
A: Yes.
Q: As a matter of fact, this is his signature, is it not? (Defense attorney shows officer copy of booking sheet)
A: Yes, I believe it is.
Q: And it's legible, isn't it?

This defense ignores the fact that the defendant's ability to do some things correctly does not mean that he was not impaired. The signs that impaired individuals' exhibit are not consistent and cannot be predicted, as they are affected by a variety of factors and vary from individual to individual. Also, although there are many common traits that OUI drivers share, no defendant will exhibit every impairment indicator.

You can address both of the above defenses in your closing argument by reminding the jury of all the signs of impairment the officer did see. Also, remind the jury to use their common sense and experience – have they ever seen an intoxicated person? Remind the jurors that alcohol affects different people in different ways - some people get sad; others loud or angry. An experienced drinker with a high BAC level may exhibit no or few signs of impairment while an inexperienced drinker with a lower BAC level may appear highly intoxicated. Ask the question: Do all individuals who've had "too much to drink" look/act/sound the same? A person who's had six drinks and cannot say the alphabet but can produce his license: is he safe to drive? Have the jurors ever had a conversation with a person they believe to be impaired yet they still understood what the person was saying? Should that person get behind the wheel?

"THE OFFICER'S POLICE REPORT IS INCOMPLETE; THEREFORE HE EITHER LYING OR INCOMPETENT."

The defendant is attempting to show the officer is lying when he testifies about information not in the report or that the officer was intending to arrest the defendant from the beginning so he never wrote down anything favorable to the defendant.

The defense will argue the following:

- A truly competent officer would have written down every little detail that supports his arrest. The report will be read by his superiors and the officer knew he may have to come to court to testify from the report. Wouldn't he want it to be as complete as possible?
- The officer has had hundreds of encounters with citizens and probably several other OUI arrests between the time of this arrest and the trial. If the information the officer testifies to is not in the report, how can the jurors be sure the officer really remembers? Maybe he has confused this case with another.
- The officer's failure to note favorable information about the defendant in his report shows that he was planning to arrest the defendant from the moment he made contact with him; therefore his motives are suspect.

To proactively respond to this attack, establish with the officer on direct examination the purposes of writing a report, one of which is to help him recall an arrest that took place months ago. It is not intended to list everything that happened, only those details that are pertinent to the officer's decision to arrest.

Review the report with the officer before he testifies. Prepare the officer for the fact that you may *refresh his recollection* if necessary. Remind the officer that he should not, under any circumstances, simply read from his report. Inform him of the proper procedure:

- Ask the officer if his memory is exhausted – officer should respond, "Yes."
- Ask the officer if it would refresh his memory to review his report – officer should respond, "Yes."
- Ask the officer to read the report to himself. Direct the officer to the relevant portion of the report if necessary. Ask the officer to look up when he is through reading.
- Ask the officer if his memory is refreshed – officer should respond, "Yes."
- Ask the officer the same question that led to the "memory exhaustion."

Defense counsel may also stress that the officer did not write down anything that was favorable to the defendant in the report, such as that he parked correctly after pulling over or that his speech was not slurred. In preparing your police officer for trial, ask him to clarify any omissions or discrepancies in his report. Explain that he will probably be questioned about the report on cross-exam. Ordinarily questions about the report will be reserved until the report has been called into question.

If you get a sense that the defense attorney has done some "damage" to your case, consider asking some of the following re-direct questions:

- When was the report prepared? (*immediately after arrest*)
- Why do you write a report? (*to document pertinent facts and/or observations*)
- Have you listed everything related to the defendant's arrest in this report? Why not?
- You testified on cross-exam that the defendant pulled over to the curb correctly in response to your overhead lights. Why isn't that noted in your report?
- Did you take into account what the defendant did correctly in your decision to arrest?
- You testified that the area where the fields sobriety tests were given was well lit, however that fact is not in your report. How do you recall the lighting conditions?

CHAPTER VI: OUI DRUGS

Alcohol is a drug that affects a person's ability to operate a motor vehicle. There are a multitude of other drugs that also alter a person's mental condition, whether used recreationally or for medical purposes. Individuals often combine alcohol and drugs and/or different types of drugs to achieve a certain effect. No matter what the purpose of taking the drug, G.L. c. 90, § 24 makes it a crime to operate on a public way while under the influence of alcohol, marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue**.** It is important to remember that the statute applies to both licit (including prescription drugs and medication) and illicit drug use. As for over-the-counter (OTC) medication, the statute may not apply – you must first determine if the OTC medication is a narcotic, depressant or stimulant and fits the statutory definition.

The crime of OUI drugs creates additional challenges for the prosecutor. Aside from proving the three elements of operation, public way and under the influence, you must also prove the substance alleged. Here are some guidelines to assist in these difficult cases.

DETECTING DRUG IMPAIRMENT IN GENERAL

In many OUI drugs cases, the arresting officer determines the defendant is under the influence of some substance, other than or in addition to alcohol. He arrests the defendant for operating under the influence and administers a breath test with the defendant's consent. The test result is low (under 0.05%) or 0.00%. The officer must now determine the identity of the impairing substance. The following facts will generally assist him in making that determination:

- The officer finds drugs on the defendant's person or in the defendant's car
- The defendant admits to drug use
- A blood or urine test was performed and a toxicology test shows that the defendant had a specific drug(s) in his system
- A drug recognition expert (DRE) specially trained to detect drug impairment determines that the defendant was under the effect of a certain category of drug.

DEFINING THE DRUG

The statute identifies the "drugs" as marijuana, narcotic drugs, depressants, stimulants, or vapors of glue.

With the exception of vapors of glue, drugs are further defined by G.L. c. 94C § 1.

- **MARIJUANA** is defined as:

  All parts of the plant Cannabis sativa L, whether growing or not; the seeds thereof; and resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin.

- **NARCOTIC DRUGS** are defined as:

  (a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate; (b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (a), but not including the isoquinoline alkaloids of opium; (c) Opium poppy and poppy straw; (d) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

  Some of the more commonly known narcotic drugs include cocaine, heroin, oxycontin, morphine, codeine, vicodin and methadone.

- **DEPRESSANTS OR STIMULANTS** are defined as:

  (a) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming; or (b) a drug which contains any quantity of amphetamine or any of its optical isomers; any salt of amphetamine or any salt of an optical isomer of amphetamine; or any substance which the United States Attorney General has by regulation designated as habit forming because of its stimulant effect on the central nervous system; or (c) lysergic acid diethylamide; or (d) any drug except marihuana which contains any quantity of a substance which the United States Attorney General has by regulation designated as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

  Depressants or stimulants include valium, xanax, ketamine (Special K), barbiturates, and ecstasy. In addition to being a narcotic, cocaine is also a stimulant, as the United States Attorney General has classified it as having a potential for abuse.

VAPORS OF GLUE

Detection of vapors of glue can be very tricky without an admission, eyewitness or expert opinion. In Massachusetts, the State Police Crime Lab does not test for inhalants – testing for the presence of inhalants must be done out of state. Furthermore, inhalants are very difficult to detect by a toxicology test. The toxicology screen will commonly reveal the presence of toluene, which is a hazardous substance used in making, among other things, adhesives. Other inhalants, interestingly enough, are not encompassed in c. 90, § 24, as the statute only identifies "vapors of glue."[26] Also, see G.L. c. 90, § 21[27]

DUST OFF/AIR CLEANER

Officers are often finding cans of Dust-Off or similar type products in the car with an impaired driver. The main chemical in the air cleaner is difluoroethane. The actual components are (depending on which Difluoroethane):

1,1 – Difluoroethane (ethylidene fluoride).
1,2 – Difluoroethane (ethylene fluoride).

The 1,2 Difluororethane is specifically listed in the power of arrest statute, G.L. c. 90, § 21, "… operating a motor vehicle while under the influence of intoxicating liquor, marijuana or narcotic drugs, or depressant or stimulant substances, all as defined in section one of chapter ninety-four C, or under the influence of the vapors of glue, carbon tetrachloride, acetone, *ethylene*, dichloride, toluene, chloroform, xylene or any combination thereof …" You will need a chemist to testify that ethylene is a component of 1,2 Difluoroethane. Dust-off is 1,1 Difluoroethane. The chemist will likely be able to show that ethylidene fits the definition as well.

However, ethylene, like most inhalants, is not specifically listed in G.L. c. 90, § 24, G.L. c. 94C, § 31 nor are they found on the federal schedule. You will need to argue that even though technically, ethylene is only mentioned in § 21 and not in § 24, certainly the intent of the legislature must have been to prevent people from driving on inhaled substances. Under § 21, a law enforcement officer has the right to arrest an individual driving under the influence of Dust-off but then cannot charge that person with operating under the influence of drugs under § 24 because ethylene is not specifically

[26] Compare G.L. c. 270, § 18, also known as the "huffing statute," which makes it a crime to "intentionally smell or inhale the fumes of any substance having the property of releasing toxic vapors, for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system, nor possess, buy or sell any such substance for the purpose of violating or aiding another to violate this section."

[27] Compare G.L. 90, § 21 which states, in part, " … or who the officer has probable cause to believe has operated or is operating a motor vehicle while under the influence of intoxicating liquor, marihuana or narcotic drugs, or depressant or stimulant substances, all as defined in section one of chapter ninety-four C, or under the influence of the vapors of glue, carbon tetrachloride, acetone, ethylene, dichloride, toluene, chloroform, xylene or any combination thereof …"

listed under the OUI statute. Why then would there be a huffing statute, G.L. c. 270, § 18, prohibiting intoxication but allow that individual to drive intoxicated on that same substance? The logic is just not there. At the very least, the argument should be made that an individual can be charged with driving under the influence of the drugs listed in G.L. c. 90, § 21, "…*carbon tetrachloride, acetone, ethylene, dichloride, toluene, chloroform, xylene or any combination thereof … .*"

NOTE: This issue is currently on appeal out of Middlesex in *Commonwealth v. Sousa.*

PROVING THE DRUG

In all OUI drug cases, the Commonwealth must prove that the substance alleged is a drug that falls within the purview of G.L. c. 90, § 24. There are two prongs involved proving this issue.

FIRST PRONG - PROOF THAT THE DEFENDANT INGESTED THE DRUG IN QUESTION

This can be done in a variety of ways:

- **ADMISSIONS OF THE DEFENDANT** - In some instances a defendant will have admitted to the police that he ingested illegal drugs or was taking prescription medication at the time of his arrest. The defendant's statements, coupled with some corroborating evidence of drug use, should suffice.
- **CIRCUMSTANTIAL EVIDENCE** – Police may have found illegal drugs or a bottle of prescription medication on the defendant's person or in his car. This fact, coupled with the corroborating observations of the officer, may create an inference that the defendant ingested that drug prior to driving. In order to make such a nexus, however, you need to show that the substance found was what you purport it to be. For example, if a marijuana cigarette was found in the defendant's ashtray, you need to offer the cigarette and evidence that the cigarette contains marijuana (such as a certificate of analysis and expert testimony). The 2008 initiative, while decriminalizing possession of small quantities of marijuana, explicitly did not alter Massachusetts laws relating to operating while under the influence. *Commonwealth v. Daniel,* 464 Mass. 746 (2013).
- **TOXICOLOGY TESTS** – The results of a blood or urine test may be available if the defendant consented to such a test, or if the defendant received medical treatment on the night of his arrest.

  NOTE: if you intend to offer results of a drug test done at a hospital, you will need a drug confirmation test. A drug screening test quickly identifies common substances in a person's system. The result is either "positive" or "negative" for the presence of drugs. Positive results must be analyzed further by appropriate confirmatory tests. A drug confirmation test provides an analysis of the substance found in the defendant's blood or urine. If the confirmatory test

corroborates the screening test result, the presence of the drug can be established with certainty.

To make sure you are offering a reliable test result, check the medical records! If you see something like this – "THIS TEST IS A RAPID SCREENING SYSTEM FOR DRUGS OF ABUSE IN URINE. A SECOND METHOD MUST BE USED TO OBTAIN A CONFIRMED ANALYTICAL RESULT" – chances are you have a drug screening test and the records alone will be insufficient to prove the test result. See *Commonwealth v. Johnson*, 59 Mass. App. Ct. 164, 168 (2003) (such a disclaimer calls the reliability of the test into question so that the record alone is not competent proof of the medical facts recited therein.)

In certain cases you may consider getting a warrant for the hospital blood and urine to guarantee a confirmatory test. Most hospitals will discard urine within 24 hours so the turnaround time is very quick.

SECOND PRONG – PROOF THAT THE DRUG IN QUESTION IS A DRUG SPECIFIED IN G.L. C. 94C § 1

Some drugs are delineated in the statute, thus no further proof is required. For example, lysergic acid diethylamide (LSD) is specifically identified as a depressant or stimulant substance.

WHAT ABOUT THE DRUGS NOT STATUTORILY DEFINED?

According to *Commonwealth v. Green*, 408 Mass. 48, 50 (1990), the Commonwealth must prove that the substance in question is included in the definition of a narcotic, depressant or stimulant. In *Green*, the evidence showed that the defendant had consumed codeine, which is a derivative of opium and therefore within the statutory definition of a narcotic. *Id*. at 49. However, the Commonwealth introduced no evidence identifying codeine as a narcotic and thus the conviction was reversed. *Id*. at 50.

The Court in *Green* held that the trial judge may take judicial notice of the fact that the substance in question is a narcotic, depressant or stimulant. *Id*. at 49. Despite the fact that drug classification is not within the common knowledge of the trial judge, it is a subject of "generalized knowledge readily ascertainable from authoritative sources, and thus appropriate for judicial notice." *Id*. at 50, n. 2, citing *Commonwealth v. Whynaught*, 377 Mass. 14, 17-18 (1979).[28] It is important to remember that judicial notice of a fact does not equal proof beyond a reasonable doubt. A jury is free to disregard judicial notice and the defense may present contrary evidence.

[28] The Physician's Desk Reference (PDR) provides a convenient resource of drug classification. In addition, the United States Code (21 U.S.C. 811, updated annually by 21 C.F.R. 1308) classifies most drugs and can be used as an "authoritative source."

In an OUI drugs case, the arresting officer and/or drug recognition expert must make a determination as to the substance involved and will include this information in the police report and complaint. The prosecutor's job is to determine where that drug falls within the statute and then present evidence to the court as to that fact.

To illustrate how this can be done, assume you have a case in which the arresting officer opines the defendant is impaired due to drugs. The officer's opinion is corroborated by the fact that the defendant later admits to taking klonopin and in fact the officer finds a prescription bottle containing klonopin pills on the defendant's person. He thus charged the defendant with OUI drugs, to wit: klonopin. To prove the drug at trial:

- First determine whether klonopin is a type of drug or a brand name for a drug. You can accomplish this task by looking up the word "klonopin" in a Physician's Desk Reference (PDR) or www.pdr.net.[29] Doing so would reveal that klonopin is a brand name for the generic drug clonazapam.
- Next determine whether clonazapam is a narcotic, depressant or stimulant. G.L. c. 94C, § 31 is the statute that establishes the five classes of controlled substances in Massachusetts. According to § 31(a), clonazapam is a Class C substance, which has a *depressant* effect on the central nervous system.
- In the event that clonazapan could not be found in the Massachusetts statute (94C, § 31), look to the federal statutes to determine the nature of the drug. The United States Attorney General has classified drugs according to their potential for abuse. The drug classifications can be found at 21 U.S.C. 811. Clonazapam is not specifically listed in 21 U.S.C. 811. However, the classifications are annually updated and located at 21 C.F.R. 1308. According to 21 C.F.R. 1308.14, clonazapam is a *depressant* found on Schedule IV.
- The result: Klonopin – the brand of clonazapam, is a *depressant* for purposes of G.L. c. 90, § 24.

In the above scenario, to prove that klonopin is a depressant, file a pre-trial motion for judicial notice, citing the appropriate PDR and/or statutory references.

PROVING IMPAIRMENT

Much like an OUI alcohol case, the officer in an OUI Drugs case must highlight his training and experience in recognizing the effects of drugs. If your officer does not have the necessary qualifications to testify about drug effects and classification, consider calling a narcotics expert from the local police department or state police, an Emergency Medical Technician (EMT), a toxicologist, a pharmacist or a DRE. This witness may be able to testify that what the police officer observed is consistent with the known signs and symptoms of a person who has taken that particular drug.

[29] You can also obtain information about drugs on the Internet at either www.pdr.net or www.rxlist.com.

Regardless of qualifications, a judge may not allow the witness to offer an opinion as to the type of drug the defendant took. In the alternative, have the witness testify in a general sense as to the effects and physical manifestations of the drug category and argue the similarities to the jury.

If you are fortunate to have a Drug Recognition Expert involved in your case, the task of proving impairment is much easier.

DRUG RECOGNITION EXPERT (DRE)

The Drug Recognition Expert Program is a method used by law enforcement to determine if someone is under the influence of drugs. A Drug Recognition Expert (DRE) is a law enforcement expert who has received rigorous, specialized training in the detection of drug impairment. The International Association of Chiefs of Police has established minimum standards for DRE training, certification and recertification.

The DRE program was first developed by the Los Angeles Police Department in the early 1980's, and is a systematic and standardized 12-step procedure to determine whether an individual is under the influence of a certain drug or drugs.

THE 12-STEP PROCESS

1. BAC – the DRE has been called in because the BAC is not consistent with the degree and/or type of impairment
2. Interviewing the arresting officer[30]– the DRE gets information from the officer, including the suspect's condition at the time of the arrest, statements made, and drugs found on his possession, etc.
3. Preliminary examination – the DRE makes his own observations of the suspect to rule out medical problems. This examination includes questioning the suspect as to his medical history, conducting a pupil size and eye tracking examination, and taking the suspect's pulse. If the DRE at any time finds evidence of a serious medical condition, the DRE will cease the evaluation and obtain medical help. If drug use is suspected, the evaluation continues.
4. Eye examination – The DRE checks for horizontal and vertical gaze nystagmus and eye convergence (CNS depressants, inhalants, PCP and cannabis impair the ability to converge or cross the eyes).
5. Divided attention testing – the following tests are administered in the order listed: Rhomberg Balance test, walk and turn test, one-leg stand test, finger-to-nose test.
6. Vital signs examination – the DRE takes three vital signs: blood pressure, body temperature and pulse.

[30] DREs in Massachusetts are trained to administer *Miranda* warnings prior to conducting the 12-step process.

7. Darkroom examination – the DRE measures the arrestee's pupil sizes in different light levels: room light, near total darkness, and direct light. The DRE also examines the suspect's nasal and oral cavities for evidence of drug use.
8. Muscle tone – certain drugs cause skeletal muscles to become rigid whereas others cause flaccid muscles. The suspect's arms are gently moved to determine muscle tone.
9. Injection sites examination – the DRE checks for the presence of injection marks into blood vessels and a third pulse is taken.
10. Statements, interviews – the DRE conducts a standard questioning of the suspect.
11. Opinion – the DRE makes an informed opinion based on the totality of the evaluation after evaluating objective criteria. DREs are trained that, when in doubt, the DRE shall always find "in favor of freedom" of the suspect.
12. Toxicology, specimen and subsequent analysis – with the defendant's consent, the DRE obtains a urine and/or blood specimen from the suspect, which is later analyzed for the presence of certain drugs.

A DRE IS RESPONSIBLE FOR MAKING THREE DETERMINATIONS

THE ARRESTEE'S IMPAIRMENT IS NOT CONSISTENT WITH THE BAC

- In most instances, the arresting officer actually makes this determination and is seeking the assistance of the DRE to help determine the identity of the impairing substance.

THE ARRESTEE IS UNDER THE INFLUENCE OF DRUGS AND NOT SUFFERING FROM A MEDICAL CONDITION THAT REQUIRES IMMEDIATE MEDICAL ATTENTION

- This is critical as many medical conditions such as stroke, epilepsy, multiple sclerosis, and uncontrolled diabetes produce effects that mimic drug impairment. The DRE needs to be able to quickly and accurately assess the arrestee for the presence of these conditions.

THE ARRESTEE IS UNDER THE INFLUENCE OF A SPECIFIC CATEGORY (OR CATEGORIES) OF DRUGS

- The DRE classifies drugs of abuse into seven categories, based on the premise that each drug within a category produces a pattern of effects, known as signs and symptoms. These classifications are not necessarily the same as those created by Massachusetts General Laws, which can often cause much confusion when it comes to defining the drug. The seven categories are: CNS depressants (includes alcohol); inhalants, phencyclidine (PCP), cannabis, CNS stimulants, hallucinogens, and narcotic analgesics.

POLY-DRUG USE

Many users combine drugs, creating an additional challenge for the DRE. The DRE applies four concepts to interpret multiple drug use:

- **ADDITIVE** – each of the drugs used produce the same effects and one drug is reinforcing an effect of the other. For example, stimulants and cannabis independently elevate pulse rate. Taken together, the user's pulse will be elevated probably to a greater degree than either drug would separately.
- **ANTAGONISTIC** – each of the drugs produces an opposite effect. For instance, cocaine dilates the pupils while heroin constricts them. The pupils may be dilated, constricted, or normal, depending on the dose of each drug, the user's tolerance to each drug, and the point in time the user is evaluated by the DRE (i.e. since cocaine wears off more quickly than heroin, the effects of heroin will dominate later).
- **OVERLAPPING** – one of the drugs produces the effect, but the other drug is neither additive nor antagonistic to it. For example, alcohol produces HGN but cocaine does not. If alcohol is taken with cocaine, HGN will be present due to the alcohol alone.
- **NULL** – neither of the drugs used produces the effect. For example, neither cocaine nor heroin produces HGN. Taken together, the user will not have HGN.

MASSACHUSETTS DRE PROGRAM[31]

In Massachusetts, the DRE program was first introduced in 1995. Many DRE officers have been recognized in court as an expert and allowed to testify to their expertise. The issue of the admissibility of DRE testimony has not yet been addressed in the appellate courts.

PROVING KNOWLEDGE – PRESCRIPTION (LICIT) DRUGS

When the impairing substance alleged is a prescription/licit drug, the Commonwealth has the added burden of proving that the defendant knew or should have known of the impairing effects of the medication. *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358 (1982). The reason for this rule of law is that only *voluntary impairment* is a criminal offense.

For example, assume a defendant lawfully received a prescription for codeine and, after taking the prescribed dose, drove his car. The defendant was stopped and subsequently charged with OUI drugs to wit: codeine, as the codeine had impaired his ability to drive safely.

To establish that his impairment was involuntary, the defendant may be entitled to introduce evidence that:

- He did not know of the possible effects of the medication on his driving ability;
- He did not receive warnings as to use of the medication;
- He had no reason to anticipate the effects that the drugs induced. *Id*.

[31] For information the on the Massachusetts DRE program, including a list of certified DREs, visit www.massdre.org.

To counter this defense, consider the following:

- Did the police find a prescription bottle on or near the defendant? Did the bottle contain warnings? If so, this is pretty good evidence that the defendant knew, or should have known of the side effects.
    - Even if no evidence was found, remember that G.L. c. 94C, § 21 requires pharmacists to label prescription medication with any directions for use or warnings as to potential side effects.
- Additionally, ask the defendant a number of questions on cross-examination:
    - Is this the first time the defendant has taken the medication? If not, he most likely experienced the side effects in the past and therefore should have known how he would react on the medication.
    - What was the purpose in taking the medication? He was most likely examined by his physician to receive the prescription. Did the physician fail to disclose the side effects?
    - When he picked up the prescription, did he fail to notice the multiple pages attached to it? Most jurors will have personal experience with prescriptions and know the plethora of literature that typically accompanies medication.
    - If the defendant paid no attention to the warnings, did he not think it was important to know the potential side effects?

MEDICAL MARIJUANA: The legalization of medical marijuana went into effect on January 1, 2013. Although any person with a "debilitating condition" can get a prescription for use, it is still illegal to operate a motor vehicle under the influence of marijuana. Every dispensary is required to distribute literature to patients that includes warnings about the dangers of driving while impaired. In addition, each prescription filled must have the following warning displayed on the bottle: *"THIS PRODUCT HAS NOT BEEN ANALYZED OR APPROVED BY THE FDA. THERE IS LIMITED INFORMATION ON THE SIDE EFFECTS OF USING THIS PRODUCT, AND THERE MAY BE ASSOCIATED HEALTH RISKS. DO NOT DRIVE OR OPERATE MACHINERY WHEN UNDER THE INFLUENCE OF THIS PRODUCT. KEEP THIS PRODUCT AWAY FROM CHILDREN."* 105 CMR 725.105(E)(2)(h)

CHAPTER VII: SENTENCING

SUMMARY OF THE PENALTIES: G.L. CHAPTER 90, § 24

DISPOSITIONS FOR OUI OFFENSES

FIRST OFFENSE: (misdemeanor)	up to 2 ½ years HOC, 1 year LOL **OR** section 24D alcohol education Program with probation for 2 years and fees 45 – 90 day LOL
GUIDELINE:	G: 1 year probation with 24D program, 45 day LOL
SECOND OFFENSE: (misdemeanor)	60 days to 2 ½ years HOC 30 days mandatory minimum **OR** 14 day inpatient program with fees 2 year LOL
GUIDELINE:	G: 6 months ss for 2 years with the 14 day inpatient program, 2 year LOL
THIRD OFFENSE: (felony)	150 days to 2½ years HOC 2½ years to 5 years SP 150 days mandatory minimum 8 year LOL
GUIDELINE:	G: 2½ years HOC, 6 months to serve, balance ss for 3 years, 8 year LOL
FOURTH OFFENSE: (felony)	2 years to 2½ years HOC 2 ½ to 5 years SP 1 year mandatory minimum 10 year LOL
FIFTH OFFENSE: (felony)	2½ years HOC 2 ½ years to 5 years SP 2 year mandatory minimum Lifetime LOL

SUBSEQUENT OFFENSES

Chapter II discusses proving the prior conviction in a case in which the defendant is charged with a subsequent offense. Upon conviction, the defendant will be sentenced according to the statutory mandate for sentencing, as described above.

WHAT IF THE COMPLAINT IS IN ERROR AND FAILS TO ALLEGE "SUBSEQUENT OFFENSE?"

Imagine it is the day of trial - all witnesses are present, the defendant has answered ready for trial, and the judge is about to call in the jury. A last look at the defendant's criminal record shows a CWOF on an OUI from 3 years prior. You check the complaint and "subsequent offense" has not been alleged and the complaint was not amended at arraignment.

The day of trial is usually too late to amend a complaint to allege a subsequent offense as this is a substantive amendment and cannot be done without the defendant's consent.

If you want to appropriately charge the defendant with all prior offenses, you can at any time before the commencement of a trial or acceptance of a plea obtain a stay of the proceedings and, with the police, apply for a new complaint. If you make such application, upon your motion the Court must stay the proceedings. Make sure you have evidence of the prior conviction(s) to present at the hearing on the new complaint. If a new complaint issues, the original complaint is dismissed by the Court. See c. 90, § 24 (1)(a)(1).

If for some reason getting a new complaint is impracticable and you must proceed on the deficient complaint, consider the following:

1. The conviction counts toward future offenses since the statute counts number of prior convictions, without regard to the manner in which each conviction was charged.
2. The judge has the authority to review the defendant's record and sentence accordingly. So despite the fact the defendant was convicted of OUI only, he can still be sentenced to, for example, 180 days in jail if the record indicates two previous convictions.

There are, however, several drawbacks:

1. The sentencing judge is not bound by the statutory penalties and can sentence at her discretion.
2. With regard to offenses that mandate periods of incarceration (OUI 3rd and higher), the parole eligibility varies. For instance, a defendant convicted of OUI 3rd is not eligible for parole until he has served 150 days of the minimum 180-day sentence. If that same defendant is convicted of OUI 2nd but received an OUI 3rd disposition, he will be eligible for parole upon the expiration of one half of his sentence.

CONTINUANCE WITHOUT A FINDING

M.G.L. c.90 § 24 states, in part:

> *A prosecution commenced under the provisions of this subparagraph shall not be placed on file or continued without a finding except for dispositions under section twenty-four D.*

Thus, any subsequent convictions (2nd and higher) cannot be continued without a finding.

Pre-trial probation is not an appropriate disposition of an OUI case, particularly over the Commonwealth's objection**.** See *Commonwealth v. Tim T*., 437 Mass. 592 (2002) (pre-trial probation not appropriate without Commonwealth's consent); *Commonwealth v. Quispe,* 433 Mass. 508 (2001) (pre-trial probation not appropriate with regard to OUI complaint). General Law chapter 90, section 24E provides the only procedure available for dismissal of an OUI complaint.

WHAT IS THE SIGNIFICANCE OF § 24E AS IT RELATES TO A CWOF?

Section 24E allows those whose case has been continued without a finding (CWOF) with an order to enter and complete a 24D alcohol treatment program to petition the court for a hearing, held any time after sixty days but not later than ninety days from the date of admission, to review compliance with the program and determine whether dismissal of the charge is warranted. This statute provides a huge incentive to eligible defendants to complete treatment because probation may be terminated well before the expiration of its court-ordered term (normally one year).

Section 24E applies only to cases continued without a finding. The statutory provision is not relevant at the sentencing phase of the case as its imposition would be premature since the defendant has not yet shown his good faith attempts to comply with treatment. If the judge is persuaded by the defendant's satisfactory compliance, the judge may enter a dismissal of the charges and issue appropriate orders relative to program participation or a later hearing, subject to the duration of the term of the probation. Failure to comply with these "post-dismissal" orders may result in license revocation for the remainder of the statutory term. Presently, judges are very reluctant to dismiss cases early under § 24E and usually only do so in cases where the defendant is entering the military or moving out of state.

IMMIGRATION CONSEQUENCES

DOES A CONVICTION/CWOF HAVE IMMIGRATION CONSEQUENCES?

The SJC has held that it is improper for the court to consider immigration consequences when imposing a disposition. *Commonwealth v. Quispe*, *supra* at 513. Nonetheless, you may hear defense attorneys arguing for leniency for a defendant because of his

immigration status and potential consequences of an admission to or conviction for a charge of OUI.

A defendant convicted of any crime who is sentenced to one year in jail or more (either to be served or suspended) is exposed to possible deportation. Probation is not a "sentence," thus, deportation is not really a concern in most OUI prosecutions. The guidelines for deportation can be found in USC, Title 8, Chapter 12, subchapter 11, part IV, § 1227(a)(2).

Some enumerated crimes have been designated as triggering deportation, regardless of the sentence the defendant has received. Misdemeanor OUI is not one of those crimes.

DEFENDANTS UNDER 21 YEARS OF AGE

The Legislature has created stiffer penalties for persons under 21 who consume alcohol and drive. The administrative license losses listed blow will run consecutively to one another.

- A person under the age of 21 who is convicted of a first offense OUI will receive a 210 day loss of license.
- A person under the age of 21 who submits to a chemical test and the BAC reading is 0.02% or above will receive a 30 day loss of license. See G.L. c.90, § 24(1)(f)(2)(iv).
- A person under the age of 21 who refuses to submit to a chemical test will receive a three year loss of license. See G.L. c, 90, § 24 (1)(f)(1).
- A person under the age of 21 who fails or refuses a chemical test will receive a 180 loss of license. A person under the age of 18 who fails or refuses a chemical test will receive a one year loss of license. See G.L. c. 90, § 24P.

APPENDIX A: CASE LAW

THE STOP

***Commonwealth v. Bernard**, 84 Mass. App. Ct. 771 (2014)* - The use of a license plate cover (tinted or not) does not violate G.L. c. 90, § 6 or 540 Code Mass. Regs. § 2.23(1) unless it obscures the registration numbers.

***Commonwealth v. Brazeau,** 64 Mass. App. Ct. 65 (2005)* – A police officer is not justified in stopping a car solely because he observes items hanging from the rearview mirror.

***Commonwealth v. Chown,** 459 Mass. 756 (2011)* - During a routine traffic stop, a police officer who has reason to believe that a nonresident driver is operating in violation of the enumerated factors laid out in G.L. c. 90, § 3 ½ , may request a copy of the operator's liability policy or insurance certificate. An operator's failure to produce the documents may result in the issuance of a citation or summons, but it is not an arrestable offense under G.L. c. 90, and does not provide probable cause to arrest.

***Commonwealth v. Craan,** 469 Mass. 24 (2014) - Odor* alone is not enough reasonable suspicion for an exit order.

***Commonwealth v. Cruz,** 459 Mass. 459 (2011)* – In light of the 2008 statutory amendments that decriminalized possession of less than one ounce of marijuana, the odor of burnt marijuana, standing alone, no longer provides probable cause or reasonable suspicion of criminal activity to justify an exit order from an automobile.

***Commonwealth v. Daniel,** 464 Mass. 746 (2013)* – The smell of freshly burnt marijuana inside a stopped vehicle, and an occupant surrendering a noncriminal amount of marijuana, without more, is not enough to justify a search of the vehicle.

***Commonwealth v. Davis,** 63 Mass. App. Ct. 88 (2005)* - After receiving an anonymous tip of a potentially intoxicated driver and confirming the make, color, description and license number of the vehicle, the police were justified in stopping the driver on the basis of the emergency exception to the warrant requirement.

***Commonwealth v. Degray,** 77 Mass. App. Ct. 122 (2010)* - Probable cause exists for a police officer to search the trunk of a vehicle based on an odor of burnt marijuana as long as there are other factors, such as physical evidence of use, that support a connection between the contraband and the vehicle.

***Commonwealth v. Depiero,** 87 Mass. App. Ct. 105 (2015)* - After an unidentified 911 caller reported a possible drunk driver on the roadway, identifying the color, make and license plate number of the car, it was reasonable for a police officer to stop the motor

vehicle for suspicion of driving under the influence despite the officer's lack of corroborating observations. The reliable report of a significant danger coupled with the knowledge of the defendant's criminal history gave rise to reasonable suspicion that the crime of operating a motor vehicle while under the influence of alcohol had been or was being committed

Commonwealth v. Fontaine, *84 Mass. App. Ct. 699 (2014)* - The odor of unburnt marijuana alone does not provide a police officer with reasonable suspicion of criminal activity to either detain a person or issue an exit order, or probable cause to conduct a search. However, probable cause exists for an officer to believe a criminal quantity of marijuana is hidden in a vehicle based on the "overwhelming" odor of unburnt marijuana along with other factors, such as the absence of any implements for smoking marijuana, sizable bundles of currency, excess wiring under the dashboard and throughout the passenger compartment consistent with hides, the manner in which the marijuana in the small bag in the console was packaged, the inconsistency between the strength of the odor and the amount in the small bag, and the fact that the occupants had prior criminal convictions of drug offenses.

NOTE: The Court noted, "[i]t is therefore unnecessary for us to decide whether the "overwhelming" odor of unburnt marijuana alone provided probable cause to support the issuance of the search warrant."

Commonwealth v. Hurd, *29 Mass. App. Ct. 929 (1990)* – A stop is justified as an emergency exception when an unidentified caller told police that a man who appeared to be drunk was getting into a blue car with New Hampshire license plates at a package store. The caller noted there were three small children in the vehicle. The distinguishing factor in this case was the children in the vehicle.

Commonwealth v. Jackson, *464 Mass. 758 (2013)* – An officer's observation of several individuals passing a marijuana cigarette back and forth between themselves does not provide probable cause to believe the individual is committing a crime.

Commonwealth v. Ka, *70 Mass. App. Ct. 137 (2007)* – Miranda warnings are not required for general on scene questioning incident to a routine traffic stop, including a question about whether or not the driver had been drinking.

Commonwealth v. Keefner*, 461 Mass. 507 (2012)* – An officer's observation that an individual had used marijuana without any indication of that person's intent to distribute did not justify a warrantless search of his person.

Commonwealth v. LeBoeuf, Jr., *78 Mass. App. Ct. 45 (2010)* - It is not a violation of an individual's Fourth Amendment rights for a certified law enforcement officer to randomly stop a commercial vehicle for the purpose of conducting an administrative safety inspection, and to request that the driver produce his license.

Commonwealth v. Lora, *451 Mass. 425 (2008)* - Evidence of racial profiling is relevant in determining whether a traffic stop is the product of selective enforcement in violation of the equal protection guarantee of the Massachusetts Declaration of Rights; and any evidence seized in the course of a stop in violation of equal protection should be excluded at trial.
Commonwealth v. Miller, *78 Mass. App. Ct. 860 (2011)* - 540 Code Mass. Regs. § 2.23 (3), which prohibits a vehicle owner from '*covering or obscuring in any manner the register number or any other words, symbols or numbers lawfully imprinted on or affixed to such number plate*,' is "likely" invalid because it exceeds the scope of the enabling statute, G.L.
c. 90, § 6.

Commonwealth v. Overmyer*, 469 Mass. 16 (2014)* - Odor alone is not enough probable cause to search a car.

Commonwealth v. Pacheco, *464 Mass. 768 (2013)* – the smell of freshly burnt marijuana combined with the presence of less than an ounce of marijuana in the vehicle does not give rise to probable cause for an officer to search the trunk.

Commonwealth v. Sheridan, *470 Mass. 752 (2015)* – During a motor vehicle stop when a law enforcement officer observes a non-criminal amount of marijuana, with nothing more, it is a violation of the driver's rights for the officer to issue an exit order and subsequently search the vehicle for the purpose of securing and forfeiting the marijuana pursuant to G. L. c. 94C, § 32L.

Commonwealth v. Smigliano, *427 Mass. 490 (1998)* – A police officer was justified for stopping a car where the officer received a report from an unidentified motorist that the defendant's car was "all over the road" and the officer saw the defendant's car veer to the right twice nearly hitting parked cars.

OPERATION

Commonwealth v. Adams*, 421 Mass. 289 (1995)* – An admission by the defendant and identification of defendant as the operator by another motorist is enough to prove operation.

Commonwealth v. Balestra, *18 Mass. App. Ct. 969 (1984)* - Defendant who had been observed driving away from a bar was later found behind the wheel of the wrecked vehicle.

Commonwealth v. Colby, *23 Mass. App. Ct. 1008 (1987)* - Defendant found asleep in the front seat of an erratically parked car with the engine running and the headlights on.

***Commonwealth v. Congdon**, 68 Mass. App. Ct. 782 (2007)* – Reasonable to infer defendant was the operator when the ignition was on, no one else was in the vicinity, and she went to the car to retrieve her purse.

***Commonwealth v. Cromwell**, 56 Mass. App. Ct. 436 (2002)* - The defendant was the registered owner of a car that appeared to have just been in a collision and matched the witness' description; defendant was visibly shaken when police spoke to him at the scene and he cooperated with field sobriety tests.

***Commonwealth v. Ginnetti,** 400 Mass. 181 (1987)* – Individual inserting a key and activating the electrical system alone constitutes operation, despite fact that the vehicle could not have been moved due to a road condition.

***Commonwealth v. Henry,** 229 Mass. 19 (1918)* - At night, defendant left his automobile standing on a public way and turned out his lights.

***Commonwealth v. Hilton,** 398 Mass. 63 (1986)* – The fact that the car was parked half in the street, half on the sidewalk with the key in the ignition and the defendant sleeping in the vehicle is enough for operation.

***Commonwealth v. Leonard,** 401 Mass. 470 (1988)* – A defendant's admission to operation alone is not enough to prove beyond a reasonable doubt.

C*ommonwealth v. Manning, 28 Mass. App. Ct. 557 (1993)* - Defendant admitted operation and was standing alone by the side of his damaged and disabled vehicle.

***Commonwealth v. McGillivary,** 78 Mass. App. Ct. 644 (2011)* - Evidence of an impaired person in the driver's seat, slumped over the wheel of a parked vehicle, with keys in the ignition with the electricity on, but not the engine, is sufficient for a finding of operation.

Commonwealth v. O'Connor, 420 Mass. 630 (1995) – Details the defendant provided about the crash and the fact that he cooperated with field sobriety tests along with an admission of operation.

***Commonwealth v. Peterson,** 67 Mass. App. Ct. 49 (2006)* - Proof of operation may rest entirely on circumstantial evidence. The defendant in this case was outside of the vehicle; however, the engine was still warm and the defendant was holding the car keys in his hand.

***Commonwealth v. Sudderth,** 37 Mass. App. Ct. 317 (1994)* – Impaired defendant found in a legally parked car with the engine running.

***Commonwealth v. Wood**, 261 Mass. 458 (1927)* – Sole occupant of a car was found slumped over the driver's seat immediately after the collision, even though the car's engine was not running and the car was not moving.

PUBLIC WAY

***Commonwealth v. Kiss,** 59 Mass. App. Ct. 247 (2003)* - The parking lot of a closed shopping mall qualifies as a "public way" where services at the mall (atm, payphone, etc.) could be accessed even when the stores were closed.

***Commonwealth v. Morris M.,** 70 Mass. App. Ct. 688 (2007)* - "*Public way*" is not an element of the crime of use of a motor vehicle without authority.

***Commonwealth v. Belliveau,** 76 Mass. App. Ct. 830 (2010)* - A pier may qualify as a "public way" even where its entrance is blocked by a closed swinging gate and signage limits access to authorized vehicles.

***Commonwealth v. Virgilio**, 79 Mass. App. Ct. 570 (2011)* - A driveway and parking area which were shared by and accessible to the occupants and guests of two residential buildings is not a public way notwithstanding that it was neither gated nor posted.

STANDARDIZED FIELD SOBRIETY TESTS

***Commonwealth v. Becla,** 74 Mass. App. Ct. 142 (2009)* – Where the officer's subjective intent to arrest the defendant is not communicated in any way to him, and where no other factor points toward a conclusion that the defendant was objectively in custody, that intent alone will not suffice to trigger the need for Miranda warnings.

***Commonwealth v. Blais,** 428 Mass. 294 (1998)* - Conducting field sobriety tests does not constitute a search requiring probable cause. The officer does not have to advise an individual of his right to refuse prior to the administration of the tests.

***Commonwealth v. Brown,** 83 Mass. App. Ct. 772 (2013)* – A defendant who attempts unsuccessfully to perform field sobriety tests and in the process comments about the difficulty or inability to perform the tests, while testimonial, is not the result of governmental compulsion and thus is admissible in evidence.

***Commonwealth v. Cameron,** 44 Mass. App. Ct. 912 (1998)* - Miranda warnings are not required prior to conducting field sobriety tests because such tests do not elicit testimonial evidence and thus do not trigger Fifth Amendment protections. The temporary detention, questioning, and administering of field sobriety tests did not constitute custodial interrogation.

Commonwealth v. Grenier, *45 Mass. App. Ct. 58 (1998)* - If a defendant agrees to perform a test, any refusal to perform subsequent tests is excluded.

Commonwealth v. Hamilton, *(Appeals Court – unpublished) (No. 06-P-936) (June 28, 2007)* **–** A police officer with "sufficient education, training, experience and familiarity" with the Horizontal Gaze Nystagmus sobriety field test may be qualified as an expert to provide testimony during trial.

Commonwealth v. Kulbeth, *84 Mass. App. Ct. 1104 (2013)(Unpublished)*- A state trooper's testimony describing the motorists conduct when asked to submit to field sobriety tests can be admitted into evidence.

State v. Homan*, 89 Ohio St. 3d 421 (2000*) - In order for Standardized Field Sobriety Tests to serve as evidence of probable cause to arrest, police must administer the tests in strict compliance with standardized testing procedures.

Commonwealth v. Sands, *424 Mass. 184 (1997)* - The Horizontal Gaze Nystagmus sobriety field test relies on an underlying scientific proposition and therefore, expert testimony is required.

Commonwealth v. Wright, *79 Mass. App. Ct. 1119 (2011) (Unpublished)* – It is not error for a judge to allow the prosecutor to use the term "field sobriety test" in an OUI case.

CHARGING

Commonwealth v. Lee, *466 Mass. 1028 (2013)* - An individual whose license is suspended for an out-of-state operating under the influence (OUI) offense cannot be charged with operating after suspension for OUI under Chapter 90, § 23, third paragraph. A license suspension based on an out of state OUI offense is a suspension issued pursuant to G.L. c. 90, § 22(c). G.L. c. 90 § 23, third paragraph requires that the suspension have been "pursuant to a violation of G.L. c. 90, § 24(1)(a), 24D, 24E, 24G, 24L or 24N, or of G.L. c. 90B, § 8(a), first par., 8A or 8B."

Commonwealth v. Muir, *84 Mass. App. Ct. 635 (2013)* - Leaving the Scene of an Accident after Causing Injury under G.L. c. 90, § 24(2) (a1/2) (1) (subsection 1) is a lesser included offense of Leaving the Scene of an Accident after Causing Death, G.L. c. 90, § 24(2) (a1/2) (2) (subsection 2).

Commonwealth v. Murphy, *68 Mass. App. Ct. 152 (2007)* - An individual cannot be charged with operating after suspension for a prior operating under the influence offense (mandatory 60 day sentence) if that individual has been issued a hardship license by the RMV, even if the individual is in violation of the terms of the hardship

license. The individual can only be charged with operating without a license under G.L. c. 90, § 10.

Commonwealth v. Stathopoulos, *401 Mass. 453 (1988)* - When a defendant is charged with operating while under the influence of intoxicating liquor, it is immaterial whether the driver is under the influence of intoxicating liquor and other substances. In order to find guilt, the jury needs only to find that the liquor contributed to the defendant's impairment.

5A RIGHTS

Commonwealth v. Hampe, *419 Mass. 514 (1995)* – A police officer's decision to hold a defendant charged with OUI overnight rather than calling a bail commissioner was inappropriate. A defendant is entitled to obtain a blood test and because evidence is fleeting, time is of the essence.

Commonwealth v. King, *429 Mass. 169 (1999)* - Once the police have fulfilled their duty to inform a defendant of his right under G.L. c. 263, § 5A to an independent medical examination, they have no obligation to help him in exercising that right. Rather, the statute places on the defendant the responsibility of availing himself of that right once told of it. Nevertheless, the police are required to afford the defendant a "reasonable opportunity" to exercise his right to an independent medical examination and are forbidden from impeding his exercise of that right.

Commonwealth v. Mandell, *61 Mass. App. Ct. 526 (2004)* - A defendant charged with OUI drugs does not have a right (either statutory or constitutional) to an independent medical exam under G.L. c. 263, § 5A.

THE BREATH TEST

Commonwealth v. Barbeau, *411 Mass. 782 (1992)* - The Commonwealth has to prove the existence of and compliance with a periodic testing program.

Commonwealth v. Brazelton, *404 Mass. 783 (1989)* – A defendant does not have a constitutional right to confer with his attorney before deciding whether to submit to the test because the moment at which a defendant has to decide to take or refuse the test is not a critical stage in the criminal process.

Commonwealth v. Camblin, *471 Mass. 639 (2015)* - The defendant is entitled to a Daubert-Lanigan hearing to raise a reliability challenge to the breathalyzer based on questions with the source code and other issues, including whether the instrument tests

exclusively for ethanol or whether the calibration system fails to adequately measure the reliability of the device.

Commonwealth v. Colturi, *448 Mass. 802 (2007)*- Where the Commonwealth proceeds on a "per se" theory of operating under the influence, prosecutors are **not** required to present expert testimony on retrograde extrapolation to admit a breath test result if the test was given within 3 hours of the arrest.

Commonwealth v. Curley, *78 Mass. App. Ct. 163 (2010)* - The introduction of evidence of a failed breathalyzer attempt by the Commonwealth does not violate a defendant's right against self-incrimination.

Commonwealth v. Davidson, *27 Mass. App. Ct. 846 (1989)* – There is no requirement that consent to take the breath test be knowingly, voluntarily, and intelligently given.

Commonwealth v. Ellis, *79 Mass. App. Ct. 330 (2011)* - The Commonwealth's introduction into evidence of a "Certification of Probation Information and Prior OUI Offense" document signed by a probation officer, made in preparation for a defendant's criminal trial, and offered without live witness testimony violates a defendant's Sixth Amendment confrontation rights.

Commonwealth v. Kurilo, *83 Mass. App. Ct. 1102 (2012) (Unpublished)* – The fact that the booking officer and not the arresting officer or the breath test operator documented a defendant's consent to take the breath test in accordance with 501 CMR 2.14(1) is a mere deviation from meticulous compliance that goes to the weight of the evidence, not its admissibility.

Commonwealth v. Pierre, *72 Mass. App. Ct. 230 (2008)* - The CMRs which require a breath test operator to observe the arrestee for fifteen minutes prior to administration of the breath test, does not preclude observation outside the breath testing room prior to being advised of his rights and consenting to take the test.

Commonwealth v. Sabourin, *48 Mass. App. Ct. 505 (2000)* – Once a defendant is advised of his rights and consents to take a breath test the trooper does not need to advise the defendant again if the instrument malfunctions and the defendant is transported to another barracks for the test.

DRUGS

Commonwealth v. Ferola, *72 Mass. App. Ct. 170 (2008)* – In order to sustain a conviction for Operating Under the Influence of Drugs under G.L. c. 90, § 24(1)(a)(1), the Commonwealth must not only prove that the defendant's operation was impaired by a

narcotic drug, depressant or stimulant substance but also, that the drug is defined in G.L. c. 94C, § 1.

Commonwealth v. Shellenberger, *64 Mass. App. Ct. 70 (2005)* – To properly admit evidence of drugs in a defendant's system as a basis for showing the defendant was Operating Under the Influence of Drugs, the Commonwealth is required to prove at a minimum: 1) reliable evidence as to the amount or concentration of the drug in the defendant's system; and 2) expert testimony indicating that the concentration of the drug in the defendant's system would impair the defendant's ability to operate a motor vehicle.

EVIDENCE

Commonwealth v. Arruda, *73 Mass. App. Ct. 901 (2008)* – A defendant's refusal to consent to blood tests requested by medical professionals for medical purposes is admissible even where the defendant is in custody and there are officers present.

Bullcoming v. New Mexico, *131 S. Ct. 2705 (2011)* - A forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, is "testimonial" for Confrontation Clause purposes. The Confrontation Clause bars the prosecution from offering such reports to prove a fact at trial, where the witness neither personally performed nor observed the test reported in the certification.

Commonwealth v. Dyer *, 77 Mass. App. Ct. 850 (2010)* - A defendant's blood alcohol content result included in a hospital medical record is not testimonial in nature, and thus is not subject to the confrontation clause. Medical records continue to be admissible under G.L. c. 233, § 79. The portions of 501 CMR 2.00 et seq. that speak to certification requirements of blood test analysts only apply to those analysts working for the Department of State Police. The references to the regulations in G.L. c. 90, § 24 (1) (e) apply only to testing done at the request of law enforcement; they do not apply to testing completed by medical personnel in hospitals. Any discrepancies in the chain of custody for hospital blood samples go to the weight of the evidence and not its admissibility. Any disparities in the results from the hospital and crime lab analyses go to the weight of the evidence and not its admissibility.

Commonwealth v. Johnson, *59 Mass. App. Ct. 164 (2003)* - Admission of a hospital record containing the drug screening test results and not the drug confirmation test results is prejudicial error that requires reversal.

Commonwealth v. Jones, *464 Mass. 16 (2012),* ***Commonwealth v. Canty,*** *466 Mass. 535 (2013) and* ***Commonwealth v. Saulnier****, 84 Mass. App. Ct. 603 (2013)*
When a defendant is charged with operating under the influence of alcohol, at trial, an officer may offer an opinion as to the defendant's level of sobriety or intoxication, but

may not opine whether the defendant operate a motor vehicle while under the influence of alcohol or whether the defendant's consumption of alcohol diminished his ability to operate a motor vehicle safely.

Commonwealth v. McGrail, *419 Mass. 774 (1995)* - Admitting evidence of a defendant's refusal violated the defendant's privilege against self-incrimination.

Commonwealth v. McLaughlin, *79 Mass. App. Ct. 670 (2011)* - During a trial for operating under the influence, the Commonwealth's admission of a toxicology report as part of a hospital record pursuant to G.L. c. 233, § 79, does not constitute a violation of that statute because the toxicology report relates directly to the treatment and medical history of the patient.

Commonwealth v. McMullin**,** *76 Mass. App. Ct. 904 (2010)* - The Commonwealth's admission of certified court records and certified records from the Registry of Motor Vehicles does not violate a defendant's Sixth Amendment right of confrontation. The Commonwealth is not required to prove a defendant either was represented by counsel or waived his right to counsel in prior proceedings in order to admit a certified prior conviction for sentence enhancement purposes under G.L. c. 90, § 24(1)(a)(1).

Melendez-Diaz v. Massachusetts, *129 US 2527 (2009)* - The admission of a drug certification alone, without live witness testimony from the analyst, is a violation of a defendant's Sixth Amendment Right to confront witnesses.

Commonwealth v. Ortiz, *466 Mass. 475 (2013)* - When the defendant and the Commonwealth have agreed to stipulate to the existence of an element in a case, the stipulation should be placed before the jury before the close of the evidence.

Commonwealth v. Parenteau**,** *460 Mass. 1 (2011)* - The admission in evidence of a registry of motor vehicles certificate attesting to the fact that a defendant had been mailed a notification of the suspension of his driver's license pursuant to G.L. c. 90, § 22(d), in the absence of testimony from a registry witness, violates a defendant's right to confrontation under the Sixth Amendment.

Commonwealth v. Shea, *356 Mass. 358 (1969),* ***Commonwealth v. Hazelton****, 11 Mass. App. Ct. 899 (1980),* ***Commonwealth v. Malloy,*** *15 Mass. App. Ct. 958 (1983)* – Any weaknesses in the breath test operator's knowledge and skill or any procedural weakness in the administration of the test, go to the weight and not the admissibility of the evidence.

Commonwealth v. Zeininger**,** *459 Mass. 775 (2011)* - Annual certification records for a breath test instrument are admissible in evidence as business records pursuant to G.L. c. 233, § 78, and do not require live witness testimony from the chemist who performed the certification testing on the instrument.

EXPERT WITNESS TESTIMONY

Commonwealth v. Colturi, *448 Mass. 802 (2007)* - Where the Commonwealth proceeds on a *per se* theory of operating under the influence, prosecutors are not required to present expert testimony on retrograde extrapolation to admit a breath test if the test was given within 3 hours of arrest.

JURY INSTRUCTIONS

Commonwealth v. Downs, *53 Mass. App. Ct. 195 (2001)* – A judge may instruct a jury that they may not consider the absence of breath test evidence.

SENTENCING ENHANCEMENTS/SUBSEQUENT OFFENSE

Commonwealth v. Beaulieu, *79 Mass. App. Ct. 100 (2011)* – A judge is not required to bifurcate the trial on a G.L. c. 90, § 23 Operating Under the Influence While Suspended for Operating Under the Influence offense because the crime itself is freestanding and not a sentencing enhancement.

Commonwealth v. Bowden, *447 Mass. 593 (2006)* - Proof of a third OUI conviction is sufficient to establish the fact of the first two OUI offenses. The Commonwealth is not required to offer live testimony to link the defendant to the prior convictions.

Commonwealth v. Ellis, *79 Mass. App. Ct. 330 (2011)* - The Commonwealth's introduction into evidence of a "certification of probation information and prior OUI offense" document signed by a probation officer, made in preparation for a defendant's criminal trial, and offered without live witness testimony violates a defendant's Sixth Amendment confrontation rights.

Commonwealth v. Flaherty, *61 Mass. App. Ct. 776 (2004)* - The defendant's plea to driving under the influence in New Hampshire qualifies as a prior conviction under the Massachusetts statute.

Commonwealth v. McMullin, *76 Mass. App. Ct. 904 (2010)* - The Commonwealth is not required to prove a defendant either was represented by counsel or waived his right to counsel in prior proceedings in order to admit a certified prior conviction for sentence enhancement purposes under G.L. c. 90, § 24(1)(a)(1).

Commonwealth v. Pelletier, *449 Mass. 392 (2007)* - A defendant charged with subsequent offense OUI must be tried in a two-step, bifurcated process – first, on the

underlying substantive offense of operating under the influence, and then a separate proceeding on the subsequent portion of the complaint.

Commonwealth v. Saulnier, *84 Mass. App. Ct. 603 (2013)* – When a Judge conducts a jury waiver colloquy and the defendant submits a written waiver of his right to a jury trial on the underlying Operating Under the Influence offense, the Judge is not required to conduct a colloquy and obtain a written jury trial waiver before a bench trial commenced on the subsequent offense portion of the complaint.

LICENSE SUSPENSIONS

Commonwealth v. Cahill, *442 Mass. 127 (2004)* - A defendant convicted of OUI second offense who receives a 24D disposition is entitled to a license loss of 45-90 days --- as opposed to the 2 year loss of license.

DiGregorio v. Registrar of Motor Vehicles & another, *78 Mass. App. Ct, 775 (2011)* - A defendant's mandatory administrative license suspension for an operating under the influence offense begins on the date of conviction rather than the date the Registrar is notified of that conviction.

Commonwealth v. Lee, *466 Mass. 1028 (2013)* - An individual whose license is suspended for an out-of-state operating under the influence (OUI) offense cannot be charged with operating after suspension for OUI under Chapter 90, § 23, third paragraph. A license suspension based on an out of state OUI offense is a suspension issued pursuant to G.L. c. 90, § 22(c). G.L. c. 90 § 23, third paragraph requires that the suspension have been "pursuant to a violation of G.L. c. 90, § 24(1)(a), 24D, 24E, 24G, 24L or 24N, or of G.L. c. 90B, § 8(a), first par., 8A or 8B."

Commonwealth v. Norman, *87 Mass. App. Ct. 344 (2015)* - Taken together, a defendant's admission that he lacked a license, a suspension notice addressed to him produced from RMV's files, coupled with testimony regarding the RMV's systematic mailing practices is enough evidence for a reasonable fact finder to conclude, beyond a reasonable doubt, that the defendant had been notified that his license had been suspended.

NOTE: The Court did not address whether or not the RMV mailing system alone is enough to prove notice to a defendant. "In the end, we need not resolve whether the evidence regarding the RMV's mailing practices would have been sufficient on its own, because of the totality of the evidence on notice."

Commonwealth v. Oyewole, *470 Mass. 1015 (2014)* – In an operating after suspension case, the Commonwealth's introduction of a certified docket sheet indicating a license

suspension as part of the disposition, alone, without more evidence, is not enough to prove the element of notice.

Commonwealth v. Pettit, *83 Mass. App. Ct. 401 (2013)* – An individual whose driver's license has been revoked by the Registrar cannot be charged with operating a motor vehicle without a required ignition interlock device with a restricted license under Chapter 90, § 24S, because that individual no longer holds a valid Massachusetts license.

SOBRIETY CHECKPOINTS

Commonwealth v. Aivano, *81 Mass. App. Ct. 247 (2012)* - A minor discrepancy in details contained in a press release announcing an intention to conduct a checkpoint will not render the checkpoint unconstitutional.

Commonwealth v. Bazinet, *76 Mass. App. Ct. 908 (2010)* - The odor of alcohol alone is enough to establish reasonable suspicion by the screener to further detain an operator for testing at a sobriety checkpoint.

Commonwealth v. McGeoghegan, *389 Mass. 137 (1983)* - Sobriety checkpoints are constitutional as long as the minimum standards are met: 1) not arbitrary; 2) safety assured; 3) inconvenience minimized; 4) supervisory personnel must devise a plan and police must act pursuant to that plan; and 5) advance notice advised.

Commonwealth v. Murphy, *454 Mass. 318 (2009) and* ***Commonwealth v. Swartz,*** *454 Mass. 330 (2009)* - The State Police Sobriety Checkpoint Guidelines (TR-15) are constitutionally sound, because: 1) the guidelines permit a vehicle to be diverted to secondary screening only when the officer has a reasonable suspicion, based on articulable facts that the driver has committed an Operating Under the Influence Offense or some other violation of law; and 2) the discretion provided to the initial screening officers in greeting motorists at a sobriety checkpoint is appropriately limited.

APPENDIX B: PREDICATE QUESTIONS

Arresting Officer

Booking Officer

Breath Test Operator/Keeper-of-the-Records

Drug Recognition Expert

HGN Test Administrator

Optometrist/Ophthalmologist (HGN)

Chemist (retrograde extrapolation)

Chemist (serum conversion)

Sobriety Checkpoint Troopers

PREDICATE QUESTIONS – ARRESTING OFFICER

General background and training

- Please introduce yourself to the jury.
- Where do you work?
- How long have you been a police officer with the city/town of _____ (*or* Trooper with the Massachusetts State Police)?
- Did you attend a law enforcement academy? Did you receive any training regarding the investigation of driving under the influence offenses? Please describe that training.
- Have you received any training in this area since you graduated from the academy? Please describe that training.
- Please describe any other experience you have had that relates to driving under the influence investigations?
- Approximately how many times have you participated in arrests for driving under the influence?

Date of offense – first observation of defendant

- Were you on duty on _____ (Date of offense) at approximately _____ (Time of first observation)?
- What was your assignment at that time? What shift were you working?
- Were you in a marked patrol car (or motorcycle)?
- Were you in uniform?
- Were you alone or with a partner? (If with a partner: who was your partner? Who was driving the patrol car?)
- On _____ (date of offense) at about _____ (time of first observation), a car attracted your attention?
- Where was that car at that time? Please describe the area. Is that within the county (or city) of _____?
- Where were you when you first saw that car?
- Describe the car that attracted your attention?
- Why did that car attract your attention?
- Have you prepared a diagram of the area around _____ (Location of driving and arrest)?
- Who asked you to prepare it? When did you prepare it?
- Does the diagram fairly represent the location as it appeared on _____ (The date of the offense)?
- Officer, with the court's permission, please step down from the witness stand and explain the diagram.*

*At this point in the testimony, develop the entire driving and stopping pattern, using the diagram. Be sure to cover all of the following areas that are applicable to the case:

- locations of officer and defendant's car when first observed;
- distance between officer and car;
- speed of defendant's car;
- road, traffic, weather and lighting conditions;
- description of defendant's driving pattern;
- driver's response to red lights, siren, horn, loudspeaker;
- manner in which defendant stopped; and
- distance from curb that defendant's car was stopped.

The officer should note on the diagram every location where something significant occurred, with the prosecutor instructing the officer to use specific notations, e.g., "D-1" for location where officer first observed the car; "P-1" for location of officer when first observations were made.

Observations of the defendant

- After the car stopped, what did you do?
- Did you observe the driver at that time?
- Do you see the driver in court today? Please identify the driver for the jury by describing what that person is wearing today. (*Or* please point out the driver for the jury.) For the record, the witness has identified _____ (name of defendant).
- Was anyone else in the car with the defendant? Please describe the defendant's appearance at that time. **Follow up with questions covering the period from just after the stop to just before the SFSTs. These questions should be designed to elicit information about the following areas:
  - odor of alcohol on defendant's breath and from car
  - a description of the defendant's face, eyes, clothing, speech, walk
  - the manner in which the defendant located and displayed his license and registration
  - any observable injuries
  - statements of the defendant which should be admissible as investigative, as opposed to custodial.
- At this time, based on your observations of the defendant and his or her driving, did you form a suspicion ("opinion" may be too strong at this early stage of the investigation), as to the state of the defendant's sobriety?
- What was that suspicion?

Field sobriety tests

- Based on that suspicion did you ask the defendant to perform some field sobriety tests (FSTs)?
- What are field sobriety tests?
- Where did you ask the defendant to perform the FSTs?

- What was the condition of the surface at that location? (Level or sloped surface? Smooth or rocky? Wet or dry?)
- What were the lighting conditions?
- Which test did you ask the defendant to perform first?
- What instructions did you give to the defendant?
- Did the defendant complain of any physical defects or injuries before or during the FSTs? Did you observe any physical problems? (If yes, did you take that information into account in evaluating the defendant's performance on the tests?)
- Did you also demonstrate the test for the defendant?
- Did it appear that the defendant understood your instructions?
- Did the defendant attempt to perform the _____ (Name of the test)?
- Describe the defendant's performance.
- Did you ask the defendant to perform another FST? Which one? (Repeat questions for each of the remaining FSTs.)
- In your opinion, did the defendant satisfactorily complete this series of field sobriety tests? (Avoid using the terms "pass" and "fail.")

Opinion re: sobriety

- After the administration of the field sobriety tests, did you form an opinion as to whether the defendant was under the influence?
- What was that opinion?
- What factors did you consider in forming your opinion? (Officer should include the TOTALITY of all observations: driving, objective signs, and SFSTs.)
- What did you do next? (Placed defendant under arrest.)

At this point, ask questions to cover the events that occurred after the arrest, including but not limited to the booking procedure, statements made by the defendant, and any tests the defendant may have agreed to perform. Be certain not to elicit evidence about the breath test if the defendant did not consent to one.

PREDICATE QUESTIONS – BOOKING OFFICER

General background and training

- Please introduce yourself to the jury.
- Where do you work?
- How long have you been a police officer with the city/town of _____ (*or* Trooper with the Massachusetts State Police)?
- What are your duties at the _____ police station/barracks?
- Did you attend a law enforcement academy? Did you receive any training regarding the investigation of driving under the influence offenses? Please describe that training.

Date of offense – first observation of defendant

- Were you on duty on _____ (Date of offense) at about _____ (Time of first observation)?
- What was your assignment at that time? What shift were you working?
- At approx. _____, did Officer_____ bring a prisoner into the station?
- Do you see that individual here in the courtroom today? (ID DEFENDANT) Please describe the defendant's appearance at that time.

    - Follow-up questions may be appropriate regarding the following: odor of alcohol on defendant's breath and from car
    - a description of the defendant's face, eyes, clothing, speech, walk
    - any observable injuries
    - statements of the defendant made upon showing of *Miranda* waiver or in absence of interrogation
- What rights, if any was the defendant advised of when he arrived at the police station? (*be sure to avoid mention of the breath test if the defendant did not consent to the test*)
- How did you advise him of those rights?

Opinion re: sobriety

- Approximately how much time did you spend with the defendant?
- Did you have an opportunity to observe the defendant during that time?
- How close were you to the defendant?
- Did you form an opinion as to whether the defendant was under the influence?
- What was that opinion?
- What factors did you consider in forming your opinion? (Officer should include the TOTALITY of all observations)

PREDICATE QUESTIONS – BREATH TEST OPERATOR/KEEPER-OF-THE-RECORDS

General background and training

- Please introduce yourself to the jury.
- Where do you work?
- How long have you been a police officer with the city/town of _____(*or* Trooper with the Massachusetts State Police)?
- What are your duties at the _____ police station/barracks?
- Please describe those duties pertaining to breath testing.
- You mention that one of your duties is to keep records – what records do you maintain?
- What is the purpose in maintaining those records?
- Is it the ordinary course of business for the police department/barracks to maintain those records?

Date of offense – first observations and test consent

- Were you on duty on _____ (Date of offense) at about _____ (Time of first observation)?
- What was your assignment at that time? What shift were you working?
- At approx. _____, did Officer_____ bring a prisoner into the station?
- Do you see that individual here in the courtroom today? ***ID DEFENDANT*** Please describe the defendant's appearance at that time.

  Follow-up questions may be appropriate regarding the following:
  - odor of alcohol on defendant's breath and from car
  - a description of the defendant's face, eyes, clothing, speech, walk
  - any observable injuries
  - statements the defendant made upon showing of *Miranda* waiver or in absence of interrogation
- What rights, if any, was the defendant advised of when he arrived at the police station?
- How did you advise him of those rights?
- You mention that you advised the defendant of his right to a breath test. Did he agree to take the breath test?
  INTRODUCE STATUTORY RIGHTS AND CONSENT FORM

Breath test – instrument and operator certification

- Let's talk now about the breath test in general - What is a breath test?
- Did you receive any specialized training regarding the administration of the breath test?
- Please describe that training.
- Once you successfully completed that training, were you certified to administer breath tests?

- For how long was that certification valid?
  INTRODUCE BREATH TEST REPORT FORM
- Was the certification valid on the date the test was administered in this case? Please show the jury where that is indicated on the form.
- Referring to the breath test instrument, does the _____ police department have its own instrument?
- Where is it kept?
- Is there a state entity that monitors the instrument?
- What is that entity and where is it located?
- What, if anything, does the Office of Alcohol Testing do regarding your breath testing equipment?
- How often do they certify the instrument?
- Was the certification up-to-date when the defendant's test was administered?
  INTRODUCE BREATH TEST REPORT FORM (or refer to it if already introduced)
  Please show the jury where that is indicated on the form.
- As the Officer In Charge of the breath test instrument, are there any regular duties required of you to ensure the instrument is in proper working order when a test is administered?
- What is Periodic Testing?
- You mentioned that the solution/gas must be changed. Why is that?
- How can you determine if the simulator is working properly?
- What happens if you get a reading below the acceptable range on the 5 calibration tests?
  INTRODUCE PERIODIC TEST RECORD

Breath test administration in general

- Let's talk about the test itself. Is there a procedure that you've been trained to follow when you administer a breath test?
- Were those procedures followed in this case?
- Please describe how the breath test was administered.
- You mention that you must observe the defendant for 15 minutes. Why is that?
- Was that done in this case?
- What did you do after the 15 minute waiting period?
- Was the test recorded by the instrument?
- Do you have the test results with you in court today?
  INTRODUCE BREATH TEST REPORT FORM
- Please describe the information contained on the form.
- According to the test, what was the defendant's BAC?
- Did you inform the defendant of the test result?

PREDICATE QUESTIONS - DRUG RECOGNITION EXPERT

General Background and training

- Please introduce yourself to the jury.
- Where are you employed?
- How long have you been a police officer with the city/town of _____ (*or* Trooper with the Massachusetts State Police)?
- What is your current assignment?
- How long have you been assigned to that division?
- Describe your duties and responsibilities in your current assignment.

DRE Program

- What is the drug recognition evaluation program?
- What is a drug recognition expert?
- What is the role of a DRE?
- When you refer to "type of drug," what do you mean by "type"?
- What is the basis of these categories?
- What are the categories of drugs?
- What training did you receive to become a DRE?
- Are you required to take a formal examination?
- At the end of the seven-day class are you certified?
- Describe the certification stage.
- Who were these people that you evaluated?
- Where were the evaluations conducted?
- Would you briefly describe what an evaluation involves?
- Was anyone else present?
- Was there any check on your evaluation and whether the person was under the influence?
- Are there any other components of the certification stage?
- What is the approximate time period to complete all the stages of certification?
- When were you certified?
- Are there any requirements to maintain your certification?
- What are the requirements?
- Is DRE training offered throughout the United States?
- Who coordinates the training program?
- Who developed DRE?
- When was DRE developed?
- Who certified you?
- What is the International Association of Chiefs of Police (IACP)?
- Does IACP set the certification standards?
- Does every police officer receive this training?
- How were elected to receive this training?

- In addition to DRE training, do you have any additional training in this area?
- Have you attended any trainings within the past year?
- Please briefly tell the court about: (If Applicable):
    - Have you had any training regarding drug abuse?
    - Have you received any academic degrees?
    - Have you received any awards?
    - Have you written anything in the area of drug usage?
    - Have you ever made a presentation concerning drug abuse?
    - Are the degrees, awards and publications you told about listed in your resume?
- Have you ever testified before about the effects of alcohol?
- Have you ever testified before about the effects of drugs other than alcohol?
- Approximately how many times have you testified in these areas?
- In what courts have you testified?

Law enforcement experience

- Officer, I want to talk with you about your law enforcement experience. You told us that you have been a police officer for ____ years.
- Have you been with _____ Police Department for that entire time?
- (If applicable) Have you worked in any other law enforcement capacity?
- Anything else?
- Prior to becoming a _____ Police Officer/State Trooper, did you attend the Police Academy?
- When and where?
- Summarize what your training entailed.
- When did you start active duties with the _____ Police Department?
- What was your first assignment?
- How long?
- Describe your primary duties.
- What was your next assignment?
- How long in _____ Division?
- What shift did you work?
- What were your primary duties?
- What was your next assignment?
- Is that where you have been since _____?
- Approximately how many OUI investigations have you handled?
- Have any of these investigations resulted in arrests?
- Have any of the investigations <u>not</u> resulted in arrests?
- How many arrests for driving under the influence have you made since _____?
- Approximately how many have been for OUI/alcohol?
- What were the other arrests for?
- On what do you base your decision as to whether an arrest is made?

- Were you in the courtroom when Arresting Officer _____ testified to the tests she administered to the defendant on _____?
- Are they the same tests you are now referring to? (SFSTs)
- Have you received training in SFST?
- When? Where?
- How many DRE evaluations have you conducted including your certification?
- Do you document your drug evaluations?
- How do you document your evaluations?
- What information do you specifically document?
- Are the evaluations you have done documented in your log?
- Did you review your log before coming to court today?
- Of those evaluations, how many times did you determine that a suspect was under the influence of drugs?
- What was the outcome of the other evaluations?
- Of the evaluations where you determined the suspect was under the influence, what drugs did you identify the suspects to be under?
- Is there any way that your opinion is confirmed?
- How?
- Of these evaluations, did you have blood or urine samples for them?

Date of arrest - 12-step DRE evaluation conducted on defendant

STEP 1: DRE called in

- Let's go back to _____ (date of arrest). What was your assignment?
- How did you get involved in this matter?
- Did you have contact with the defendant that day?
- Can you point out the defendant here today?

STEP 2: Interview with the arresting officer

- Did you first speak with the arresting officer?
- Based on the information you received from the officer, did you begin the DRE evaluation?

STEP 3: Preliminary examination

- Did you initially examine the defendant?
- What did you observe, sense?
- Did you inquire about his/her health and physical wellbeing?
- Can you briefly summarize your questions and his/her answers during the initial conversation?

STEP 4: Eye examination

- After examining the defendant, what was the next step in evaluation?
- What is the first eye observation you made?
- Describe what tracking is and what you were looking for?
- Would you show us how you performed this?
- What did this test show?

- What is nystagmus?
- Do all drugs cause it?
- What is your Background in performing this test?
- Do you record the results of this test for each eye?
- Please demonstrate how you test for this.
- What did you observe about the movement of the defendant's eyes during this test?
- What does this indicate?
- Did you conduct a test for vertical nystagmus?
- What did this test reveal?
- How did these observations help you in evaluating the defendant's condition?
- What is the next component of evaluation of the eye?
- What is convergence?
- What can this show?
- What observations did you make regarding the defendant as he/she tried this?

STEP 5: Divided attention testing

- What is the next component of your evaluation?
- What are divided attention tests?
- Describe your training and experience with these tests.
- Why is divided attention important?
- How did you explain each test to the defendant?
- Did the defendant indicate at any time that he/she did not understand what to do?
- What is the Rhomberg balance Test?
- Why is it used?
- How did the defendant perform on this test?
- Could you describe the next test?
- What specifically are you looking for with this test?
- How did the defendant perform on this test?
- What is the next test in this battery of observations?
- Could you describe the one-leg stand test?
- What do you look for in this behavior?
- What did you observe when the defendant attempted this test?
- What is the final test?
- Could you explain this test?
- What are you looking for in the performance of this test?
- What did you observe about the defendant's performance of this test?
- How did you evaluate the results of these four tests on the defendant?

STEP 6: Vital signs examination

- What is the next step in your evaluation?
- What vital signs did you check and record?
- How is the pulse taken?
- What were the defendant's pulse rate readings?

- Did you take the defendant's blood pressure?
- How is the blood pressure measured?
- Did you measure the defendant's temperature?
- What was his/her temperature?
- Why are vital signs checked at different times?
- What did these results tell you about the defendant's condition?

STEP 7: Darkroom examination

- What is the next evaluation step?
- Where was this done?
- What are you looking for in your observation of the pupil's reaction to light?
- How many different lighting conditions do you use in this test?
- How do you measure the change in pupil size?
- What did you observe in regular room light?
- What did you observe in a near total darkness?
- How do these observations help you?

STEP 8: Muscle tone

- What did you observe when examining the defendant?
- Did this information assist your evaluation?
- What was your next evaluation exam?
- What are you looking for in checking muscle tone?
- What were your observations?
- Did this provide you with any useful information?

STEP 9: Injection sites examination

- What examination do you perform next?
- Why do you look for injection sites?
- What did your examination disclose?

STEP 10: Interview

- After the physical evaluation, did you have an opportunity to speak with the defendant?
- What, if any, statements did he make?
- How long did you spend with the defendant that night?
- How long did your evaluation process take?

STEP 11: Opinion

- Based on your training, experience, and evaluation, do you have an opinion as to whether the defendant was under the influence of alcohol or drugs on _____?
- What is that opinion?
- What is the basis for this opinion?

STEP 12: Toxicology, specimen and subsequent analysis

- Did you order any additional tests?
- How was this done?
- What did this test disclose?

- Are you familiar with the drug(s) _____?
- Which of seven categories of drugs does it fall in?
- What are the common observable effects of someone who has used _____ (drug in question)?
- Are your observations of the defendant that night consistent with use of the drug _____?
- How does the presence of the drug in the defendant's system fit in with your observations?

PREDICATE QUESTIONS – HGN TEST ADMINISTRATOR

General Background and training

- Please introduce yourself to the jury.
- Where do you work?
- How long have you been a police officer with the city/town of _____ (*or* Trooper with the Massachusetts State Police)?
- Did you attend a law enforcement academy? Did you receive any training regarding the investigation of driving under the influence offenses? Please describe that training.
- Have you received any training in this area since you graduated from the academy? Please describe that training.
- Please describe any other experience you have had that relates to driving under the influence investigations?
- Approximately how many times have you participated in arrests for driving under the influence?
- Approximately how many times have you stopped a driver suspected of being under the influence, and then released the driver because your investigation determined that he or she was not under the influence?

At this point, ask questions regarding the officer's involvement in the case leading up to the administration of the HGN test.

Administration of HGN test

- Did you ask the defendant to perform field sobriety tests?
- What are field sobriety tests?
- Were you trained in administering these tests?
- Officer, I want to ask you specifically about a test known as horizontal gaze nystagmus or HGN. Are you familiar with this test?
- What part of the body are you observing when you give this test?
- Have you received specific training in the administration of the HGN test?
- What is HGN?
- Where did you receive your training in the administration of the HGN test?
- How many hours of training did you receive?
- When did you receive this training?
- Who were the instructors?
- Was there an alcohol workshop as part of your training?
- What is an alcohol workshop?
- At the workshop, do you know how much an individual has had to drink before you test him/her?
- Do all of the subjects at the alcohol workshop drink?
- Do you know before administering the field sobriety tests whether a particular subject has been drinking or not?

- Other than the alcohol workshops, have you given the HGN test to persons that you knew were sober?
- Under what circumstances?
- What differences have you observed in the eye movements of sober persons vs. impaired persons in doing this exercise?
- When you learned the HGN test, were you required to pass a practical skills examination? Please describe this examination.
- As a result of your training, did you receive any certificates?
- From what organization(s) did you receive this certificate?
- Do you have this certificate here today?
  (If you wish to have the certificate entered into evidence, be sure to have a photocopy to submit. Have the officer bring the original in case there are questions about authenticity, however, enter the photocopy into evidence. Otherwise, the officer may not get the certificate back for months.)
- Have you had any additional training in the administration of the HGN test other than that which you have just described?
- Please describe that training.
- Approximately how many times have you given the HGN test?
- Officer, based on your training and experience, is the presence of HGN a reliable indicator that a person has consumed alcohol?
- Is there a standard way in which the test for HGN should be given?
- Please describe the test.
  (Consider using as demonstrative evidence a videotape of the HGN test.)
- What specifically are you looking for when you administer this test?
- Did you give the test to the defendant in the same way that you have described?
- Did you ask the defendant if s/he understood what s/he was supposed to do?
- Did s/he indicate that s/he understood?
- Did the defendant have any difficulty in following your directions?
- Officer, I would like to ask you about the six cues you previously testified that you are looking for when you give this test. What is the first clue of the HGN test? (Lack of smooth pursuit)
- Can you describe for the jury what you mean by a lack of smooth pursuit?
- When you gave this part of the test to the defendant, what did you see?
- What is the second clue of the test? (Distinct nystagmus at maximum deviation)
- How long do you hold the stimulus at the point of maximum deviation?
- Why?
- When you gave this part of the test, what did you see?
- What is the final part of this test?
  (Angle of onset)
- How is this part of the test done?

- How do you estimate the angle of onset?
- When you gave this part of the test to the defendant, what did you see?
- What did your observations of the defendant's performance on this test indicate to you?
  In your experience, is there a connection between horizontal gaze nystagmus and the amount of alcohol a person has consumed?
- What is that connection?
  (Be clear before trial that you are not asking the officer to tell you that a specific angle of onset equals a specific BAC. The information you are seeking is that people who have been drinking tend to show nystagmus and the more they have had to drink, the easier the nystagmus is to see.)
- Officer, are the cues you saw when you administered the test to defendant indicative of alcohol impairment?
- Based on your training and experience, what does the presence of all six cues indicate?
- And how many cues did you see when you gave the test to the defendant?

PREDICATE QUESTIONS - OPTOMETRIST/OPHTHALMOLOGIST

The expert testimony will essentially be the same whether at the evidentiary hearing or at trial. Review questions carefully in advance to determine which questions are applicable to your expert. In addition, the witness may suggest questions that should be asked, particularly if he has testified on other cases.

General Background and training

- Doctor, please introduce yourself to the jury.
- What do you do for a living?
- What education is required for your profession?
- Where did you go to undergraduate school?
- What was your course of study?
- Where did you go to optometry/medical school?
- Please tell the court about the curriculum in optometry/medical school.
- Did any of your course work involve the effects of alcohol on the central nervous system?
- Describe that training.
- In school, did you learn specifically about the effects of alcohol on eye movements?
- Where are you employed?
- What are your specific duties?
- Does one have to be licensed as an optometrist?
- By who are you licensed?
- Are you a medical doctor?
- How does an optometrist differ from an ophthalmologist?
- Do you belong to any professional organizations?
- What are those organizations?
- Have you received any professional recognition or awards from any of these organizations?
- Have you done any clinical research into the effects of alcohol and/or other drugs on the central nervous system?
- Has any of your research focused on the effect of alcohol on eye movements?
- Have you published the results of your research?
- Where has it been published?
- Is that a “peer reviewed” journal?
- What does it mean to be published in a “peer reviewed” journal?
- In addition to your research results, have you published other articles?
- Where have they been published?
- Are these “peer reviewed” journals?
- Are you affiliated with any teaching institutions?
- Please tell the court what those are.

- Are you involved in any consulting work?
- What do you consult on?
- How long have you been doing consulting?
- Have you lectured on the effects of alcohol and/or drugs on eye movements?
- When was that?

Nystagmus in general

- Are you familiar with the term nystagmus?
- What is nystagmus?
- Is nystagmus a topic that is covered in the literature relevant to the field of optometry?
- Is nystagmus a newly discovered phenomenon?
- Do you check for nystagmus in your practice?
- Why?
- What causes nystagmus?
- How long has it been known that alcohol consumption causes nystagmus?
- Are there other types of nystagmus?
- Can they be distinguished from alcohol caused nystagmus?
- Is nystagmus a phenomenon that occurs naturally in some people?
- About what percentage of the population would have a naturally occurring nystagmus?
- Can a person familiar with nystagmus distinguish alcohol induced nystagmus from a naturally occurring nystagmus?

Testing for nystagmus

- How do you test for nystagmus in your profession?
- To what extent does alcohol consumption affect nystagmus?
- Is it accurate to say that the more alcohol that is consumed the more pronounced the nystagmus?
- Is it difficult for someone to administer this test?
- Does it require medical training to administer and interpret the results of a test for nystagmus?
- Are there other drugs which cause nystagmus?
- Would these also be drugs that impair a person's ability to drive?
- Why do alcohol, central nervous system depressants, inhalants, and PCP cause nystagmus?

Horizontal gaze nystagmus test

- Are you familiar with the field sobriety test used by police officers known as horizontal gaze nystagmus?
- What is horizontal gaze nystagmus?
- How did you become familiar with this test?

- What is the purpose for administering this test?
- Have you seen police officers give this test?
- Under what conditions?
- Is the HGN test given by police officers similar to the test you use in your profession to test for nystagmus?
- Do you have an opinion about whether a police officer can be trained to accurately administer and interpret the HGN test results?
- What is that opinion?
- On what is that opinion based?
- Are you familiar with the procedure used by law enforcement to check for HGN?
- In reference to the first step, what is meant by a "lack of smooth pursuit?"
- Why would a lack of smooth pursuit be an important observation?
- What is "maximum deviation?"
- Is there any significance to the presence of nystagmus at maximum deviation?
- What is meant by the "angle of onset?"
- Why is it important to determine an angle of onset?
- Is it accurate to say that the earlier the angle of onset, the higher the suspect's blood alcohol level is likely to be?
- Is it difficult to determine an angle of onset?
- Can a person voluntarily control nystagmus?
- Does a person know when they have alcohol induced nystagmus?
- Do contact lenses affect the results of the HGN test?
- Does poor eyesight affect the ability to do the HGN test?
- Do you have an opinion as to whether the presence of nystagmus is a reliable indicator of the use of a central nervous system depressant, such as alcohol?
- What is that opinion?
- Upon what is that opinion based?
- Are you aware of any scientific publications that state there is no correlation between alcohol consumption and the presence of nystagmus?
- Are you a member of the American Optometric Association?
- What is that organization?
- Are you familiar with the 1993 resolution "Horizontal Gaze Nystagmus as a Field Sobriety Test" passed by the House of Delegates of the American Optometric Association?
- What does that resolution[32] say?

[32] To obtain a copy of the AOA's resolution, contact the MDAA.

PREDICATE QUESTIONS – RETROGRADE EXTRAPOLATION

General Background and training

- Please introduce yourself to the jury.
- Where are you employed?
- How long have you worked there?
- What is your formal education/what degrees have you received?
- What was your major field of study?
- What specialized training have you received?
- What professional organizations do you belong to?
- If applicable, ask the following additional questions regarding the witness' credentials:
    - Where have you taught in your specialty?
    - What articles have you published in your field?
    - How many times have you testified as an expert in your field?
    - In which courts have you testified?
- With regard to alcohol, can you explain the process in which alcohol moves through the body?

Retrograde extrapolation

- Are you familiar with the term "retrograde extrapolation?"
- Please explain this to the jury.
- What scientific principles is retrograde extrapolation based upon, if any?
- Is it generally accepted in the scientific community?
- Have you ever testified as an expert with respect to using retrograde extrapolation to determine a blood alcohol level at a particular point in time?
- Approximately how many times/which courts?
- What materials did you review to prepare for your testimony today?
- Based on the information you reviewed, did you form an opinion as to the defendant's blood alcohol level at _____ (*time of incident*)?
- What variables would you need to know in order to form an opinion using retrograde extrapolation?
- How did you arrive at that opinion?
    - *Witness can explain foundation for his opinion, including formula used, assumptions made, etc.*
- Were you provided with that information in this case?
- Did you make any assumptions in forming your opinion?
- You mentioned "*rate of elimination*." Please describe this to the jury.
- What elimination rate did you use if any and explain why?
- With regard to the *absorption rate*, what do you mean by that?
- Did you consider an absorption rate in forming your opinion?
- Why is it important to know whether a person is still in the absorption phase?

- Given the information provided to you – namely that at _____am/pm, blood was drawn from the defendant and the blood alcohol concentration was _____%, knowing the defendant's body weight of _____ lbs. and general health, assuming the defendant had his last drink at _____am/pm, do you have an opinion, based on the scientific principles of retrograde extrapolation as to the defendant's blood alcohol concentration at the time of the incident, _____ am/pm?
- What is that opinion?
- Please explain the basis for that opinion.
- No further questions.

PREDICATE QUESTIONS – SERUM CONVERSION

General Background and training

- Please introduce yourself to the jury
- Where are you employed?
- How long have you worked there?
- What is your formal education/what degrees have you received?
- What was your major field of study?
- What specialized training have you received?
- What professional organizations do you belong to?
- If applicable, ask the following additional questions regarding the witness' credentials:
    - Where have you taught in your specialty?
    - What articles have you published in your field?
    - How many times have you testified as an expert in your field?
    - In which courts have you testified?
- How many blood alcohol tests have you performed
- Have you ever done a serum conversion?
- How many serum conversions have you testified to in courts?

Serum conversion

- What is serum?
- How does serum differ from blood?
- Are serum alcohol levels and blood levels the same?
- Why is that?
- Are you able to convert a serum alcohol to a blood alcohol?
- How do you do such a conversion?
- If using the medical record: Did you review a (document) provided to you by this office?
- I am showing you Commonwealth's Exhibit A, do you recognize it?
- What do you recognize it to be?
    - *The medical records of (defendant) from (date) at (hospital).*
- Directing your attention to the laboratory results in the record, is there a serum alcohol level reported?
- What is the serum alcohol level?
- If someone has a serum alcohol level, what would the corresponding blood alcohol level be for the average person?
    - *Witness provides 1.14 conversion*
- You testified earlier the level could actually be higher or lower based on the water content of the blood. What would the lower level be?
    - *Witness provides 1.18 conversion*
- What would the higher level be?
    - *Witness provides 1.12 conversion*

- What would the average alcohol level be?
    - *Witness provides 1.14 conversion*
- No further questions at this time.

PREDICATE QUESTIONS – SOBRIETY CHECKPOINT

OVERVIEW

- Selection of M/Vs not arbitrary
- Minimize Inconvenience
    - C/W does not have to show there's no equally effective or less intrusive method of enforcement
        - Immediate + grave danger w/drunk drivers on the road
        - Obvious relationship between drunk driving & public safety
        - Roadblocks remove the menace from the roads
- Conduct pursuant to a plan
    - Traffic 15 is substantially the same as the initial set of guidelines that were found to meet constitutional requirements (Trumble)
    - Compliance w/the plan substitutes for individualized suspicion (Anderson)
        - Strict compliance, but of significant details
- Notice
    - Not a constitutional necessity
    - Publication of date w/o precise location is enough

OFFICER IN CHARGE (OIC)

- **CREDENTIALS**
    - Police Officer Training
        - How many years have you been on the force?
        - What is your current position?
            - What was your position on (date of RB)?
        - Have you made m/v stops?
        - How many?
        - Have you worked details?
        - What kinds of details have you worked?
        - How many details have you worked?
        - Briefly describe your OUI training
        - Have you made m/v stops for suspicion of OUI
        - What are the indicators you look for?
        - Have you made OUI arrests before?
        - How many?
    - Sobriety Checkpoint Training
        - Briefly describe any training you've received on how to conduct a sobriety checkpoint.
    - Working Sobriety Checkpoints

        - Have you worked sobriety checkpoints before?
        - Have you worked as the OIC on a sobriety checkpoint before?
        - How many times have you been the OIC?
    - MSP Standardized policies on checkpoints
        - **Introduce General Order (exhibit #1)(Traffic 15)**
        - **Introduce Commander's Order (exhibit #2)**
    - Roadblock Directive
        - In (month/year) did you receive a directive to conduct a sobriety checkpoint?
        - From whom did you receive this?
        - Who is (person who issued the directive)?
        - What did this directive advise you to do?
        - **Introduce directive (exhibit #3)**
    - Duty Assignment Sheet/Checklist
        - **Introduce duty assignment sheet (exhibit #4)**

- **SPECIFICS ON THIS ROADBLOCK**
    - You were the OIC on the RB conducted on (date/place)?
    - As the OIC, was your assignment?
    - <u>Site Selection</u>
        - **Introduce site selection sheet (exhibit #5)**
        - Is there a method as to how the site was selected?
        - Statistics
            - Did this method include looking at statistics?
            - Where did the statistics come from?
            - What did the statistics reveal?
            - What roadway was the RB conducted on in this case?
                - describe that roadway
                - Does it access the city of New Bedford?
                - Are you familiar with the surrounding area of (place where RB was done)?
                - Is it densely populated?
                - Are there bars in the area that serve alcohol?
            - Prior Sobriety Checkpoints in this area (listed on site selection sheet)
                - Were there previous sobriety checkpoints done in this area?
                - When?
                - Go through each previous RB?
                    - Did the RB conducted on (date) result in arrests?
                    - How many?
                - For these (#) previous RBs, were operators traveling in the same area as the RB in this case?

- Safety
  - In addition to statistics, were there other things taken into consideration for site selection (Yes, safety)?
  - Is there a reason why this location was chosen?
  - What was the reason?
  - Were the hours of operation for the RB determined?
    - What were they?
    - Were those hours chosen for a reason?
  - What night of the week was the RB done?
    - Why was a weekend night chosen?

- Layout of the Checkpoint?
  - Where was the RB scheduled?
  - **Introduce diagram (exhibit 6)**
  - Are there designations on the diagram?
    - What do those designations depict?
  - Was the RB set up as depicted?
  - Were there signs at the RB site?
    - Are those signs depicted on the diagram?
    - Have OIC testify to what each sign on the diagram was for

- Safety Equipment
  - **Introduce materials and equipment (exhibit #7)**
  - Did you confirm that all of this equipment was in place that evening?
  - While the RB was going on, did you confirm that this equipment remained in place?
  - Are you familiar w/department guidelines for the placement of cones?
  - How are you familiar w/the guidelines?
  - How many safety cruisers are there?
  - What role do the safety cruisers play?
  - How many lanes are on this roadway?
  - How many lanes of travel pass through the RB?
  - How gradual is the narrowing of the roadway?

- Media Release
  - News Release
  - **Introduce news release/directions to media dept (exhibit #8)**

- Notice
  - Was there a notice prepared in this case?
  - Did it indicate where the RB was to take place?
  - Was this communicated to the media?

- How?
  - Email
    - **Introduce e-mail to media (exhibit #9)**
  - Fax
    - Does the media relations department maintain fax #s for various outlets?
    - **Introduce list of fax #s (exhibit # 10)**
    - **Introduce fax confirmation page (exhibit #11)**

- **WORKINGS OF THIS ROADBLOCK**
  - Before the RB took place, was there training?
    - Where?
    - When?
    - Did other officers attend?
    - What took place at this meeting
      - Copies of Traffic 15 handed out
    - Were the officers who attended given copies of the protocol?
    - **Introduce signed checklist (exhibit # 12)**
    - Was everybody who attended given an assignment?
  - What is a saturation patrol?
    - Did you do one for this RB?
    - When?
    - Where?
  - How were the vehicles selected to be stopped? (all were stopped)
    - Were there exceptions to this practice? (trailers waived through)
    - Were there other exceptions?
    - If the vehicles backed up past the safety officer, what was the policy? (waived through)
      - Was the policy followed in this case?
  - How many greeting officers were there? (2)
    - Why are there 2? (1 in front of other so 2 cars can go through simultaneously)
    - Did the greeting officers have instructions on how to respond to the vehicles?
    - Are those instructions in writing? (traffic 15)
    - Were you on scene throughout the entire RB?
    - Did you observe the greeting officers responding to motorists?
    - How were they responding?
    - While this was going on, did you make observations of the safety standards?
      - Were the traffic cones still in place?
      - Were the safety cruisers still in place?
      - Were the cars backing up past the safety officers?

        - If so, what did you observe being done?
    - Were the greeting officers given instructions on who to screen?
    - What were those instructions?
    - Were these written anywhere?
    - Once the greeting officers made observations, what were their duties? (refer vehicles to pit?)
- Pit Officers
    - Were there pit officers?
    - How many officers are in the pit?
    - Were they given instructions on what to do w/vehicles passed to them?
        - Were those instructions written anywhere?
    - What were those instructions?
    - **Introduce Data Sheet (exhibit #13)**
        - Read the data sheet

GREETING OFFICER

- Did you work on the RB conducted on (date/place)?
- What was your position on that RB?
- Were you given instructions on as to what your duties were as the greeting officer?
    - Were those instructions written anywhere?
    - What were the instructions? (make observations & greet people)
    - Did you follow those instructions?
- Did you greet the Δ?
- Did you make any observations about him/her?
    - What were those?
    - As a result of making these, what did you do?

CHECKING AREA OFFICER

Do Regular MTS Questioning

APPENDIX C: BLOOD/BREATH TEST DOCUMENTS

501 CMR 2.00 et seq.

Office of Alcohol Testing List of Approved Breath Testing Instruments

Office of Alcohol Testing PBT Information Guide

Office of Alcohol Testing Serum Conversion Chart

Massachusetts State Police Sobriety Checkpoint Enforcement Guidelines

501 CMR 2.00: SAFE ROADS

Section

2.01: Purpose

The purpose of 501 CMR 2.00 is to establish rules and regulations regarding satisfactory methods, techniques and criteria for breath tests of those persons who have been arrested for operating a motor vehicle while under the influence of intoxicating liquor or a related offense. It also establishes a statewide training and certification program for all operators of breath test devices and a certification program of breath test devices in accordance with M.G.L. C. 90, § 24K. These rules and regulations do not apply to portable breath test devices used to conduct pre-arrest screening.

2.02: Definitions

Adequate Breath Sample: a sample of breath that when delivered is sufficient for analysis by an approved breath test device.

Arrestee: a person who has been arrested for operating a motor vehicle while under the influence of intoxicating liquor or a related offense.

Blood Alcohol Content (BAC): the number of grams of alcohol per 100 milliliters of blood; or the number of grams of alcohol per 210 liters of breath. Breath alcohol content is also known as blood alcohol concentration, blood alcohol level and BAC.

Blood Test Analyst (BTA): a chemist of the Department of State Police who performs blood alcohol analysis.

Breath Test Device: an instrument and its components, used as a confirmatory test, that complies

with C 90, § 24K, that is capable of quantifying the amount of alcohol in a breath sample or calibration standard.

Breath Test Instructor (BTI): a breath test operator who has completed the uniform statewide instructor training program.

Breath Test Operator (BTO): an individual who has completed the uniform statewide training and certification program. Only a certified breath test operator can administer a breath test.

Calibration Standard: a sample of known alcohol concentration used to demonstrate the breath test device is operating properly. This sample may be in liquid or dry gas form.

Calibration Standard Analysis: an analysis of the calibration standard.

Colonel: the Colonel of the Massachusetts Department of State Police.

Committee: the Municipal Police Training Committee.

Cylinder: the component that contains a dry gas calibration standard.

Director: The Director of the Office of Alcohol Testing.

Officer In Charge (OIC): a breath test operator responsible for maintaining the breath test device and breath test documentation. The Officer in Charge is the keeper of the breath test records for instruments assigned to his or her individual department or barracks.

Portable Breath Test Device (PBT): a breath test device, used to administer a screening test, that is capable of quantifying the amount of alcohol in a breath sample or calibration standard.

Secretary: the Secretary of the Executive Office of Public Safety and Security.

Serum Conversion Certificate: a report generated by a chemist of the Department of State Police Crime Laboratory containing the BAC calculated from a reported serum or plasma alcohol result.

Simulator: the component that contains a liquid calibration standard.

The State Police Academy: the statewide training facility for the Massachusetts Department of State Police.

2.03: Office of Alcohol Testing

There is hereby established within the Massachusetts Department of State Police Crime Laboratory an Office of Alcohol Testing. The Director and Assistant Director shall be appointed by the Colonel.

2.04: Responsibilities of the Office of Alcohol Testing

The Office of Alcohol Testing shall be responsible for:

(a) establishing and maintaining a list of approved breath test devices in accordance with Massachusetts General Laws and the National Highway Traffic Safety Administration's list of conforming products;

(b) certifying approved breath test devices annually;

(c) approving and distributing all calibration standards used with such breath test devices;

(d) establishing the standards for training and/or certification of BTO(s), BTI(s), OIC(s), and BTA(s);

(e) training BTI(s), OIC(s) and BTA(s);

(f) creating and maintaining the Breath Test Operator's Manual;

(g) providing Serum Conversion Certificates, based on known conversion factors which shall constitute prima facie evidence of a defendant's whole BAC;

(h) providing, insofar as reasonable, expert witness services when requested by the attorney general or district attorneys.

2.05: Requirements for Approved Breath Test Devices

The Director shall establish and maintain the list of approved breath test devices. A device may be added to the list by the Director if it is on the National Highway Traffic Safety Administration's list of conforming products. The device shall have at least the following capabilities, but need not be limited to:

(1) analyzing samples of alveolar or deep lung air;

(2) analyzing a calibration standard;

(3) performing subject breath tests in the following sequence:

(a) one adequate breath sample analysis;
(b) one calibration standard analysis; and
(c) a second adequate breath sample analysis.

(4) using infrared breath testing technology to report the arrestee's blood alcohol content. This requirement does not preclude the use of complementary technologies designed to ensure the accuracy of the results or used to detect interfering substances.

2.06: Breath Test Device Certification

The Office of Alcohol Testing shall certify all breath test devices used in the Commonwealth. Such certifications shall be valid for one year. A valid certification shall contain the model number, the serial number and the effective date of certification. The breath test device certifications shall be noted on the report created at the completion of a valid breath test. This report shall serve as the certified record of the device and shall be admissible in a court of law.

2.07: Breath Test Operator (BTO): Training and Certification

(1) The Director shall establish a uniform statewide training and certification program for BTO(s).

(2) The approved BTO training program shall be implemented by the Committee and the State Police Academy using only instructors designated by the Director.

(3) Upon successful completion of the approved training program, the BTO shall be certified for three years. The Committee and the State Police Academy shall maintain a record of such training and certification and shall provide sufficient evidence of such training to the Director

in a format approved by the Director.

(4) A valid certification shall contain the name of the certified operator and the effective date of certification. The BTO's certification shall be noted on the report created at the completion of a valid breath test. This report shall serve as the certified record of the BTO and shall be admissible in a court of law.

2.08: Breath Test Operator (BTO): Certification Revocation

The Director may suspend or revoke the certification of a BTO who fails to comply with the requirements of M.G.L. C. 90 § 24K, 501 CMR 2.00 or the breath alcohol testing or training procedures established by the Office of Alcohol Testing.

2.09: Breath Test Instructor (BTI): Training and Designation

(1) The Director shall establish a uniform statewide training program for BTI(s). The program shall be implemented by the Office of Alcohol Testing.

(2) BTI(s) must be certified BTO(s).

(3) Upon successful completion of the program, the Director may designate the candidate as a BTI. The Director shall maintain a list of all BTIs and make this information available to the Committee and the State Police Academy. The Office of Alcohol Testing shall maintain a record of such training.

(4) BTI(s) shall be responsible for training BTO(s) in conjunction with the Committee and the State Police Academy.

(5) The Director may remove BTI designation at his or her discretion.

2.10: Officer in Charge (OIC): Training and Designation

(1) For each certified breath test device in the Commonwealth, there shall be at least one designated OIC. The OIC(s) shall be responsible for ensuring the breath test device is in proper working order and shall act as the keeper(s) of the records for such device.

(2) The name(s) of the designated OIC(s) shall be submitted in writing by the chief of police or designee of the department or agency to the Office of Alcohol Testing. Any changes in this designation shall also be submitted in writing to the Office of Alcohol Testing.

(3) OIC(s) must be certified BTO(s).

(4) The Director shall establish a uniform statewide training program for the OIC. The program shall be implemented by the Office of Alcohol Testing.

2.11: Calibration Standards

(1) Only calibration standards approved by the Office of Alcohol Testing shall be used with breath test devices. The Office of Alcohol Testing shall provide an adequate supply of such calibration standards and distribute the same to police departments and law enforcement agencies throughout the Commonwealth. Each such calibration standard shall be labeled with its expiration date, alcohol concentration and lot number. The calibration standard may be liquid or gas.

(2) The liquid calibration standard used as part of a valid Implied Consent Breath Test sequence shall be manufactured at an alcohol concentration of 0.155% +/- .005% at 34º C. The test shall be considered valid and the device operating properly if the result of the analysis of the liquid calibration standard shows an alcohol concentration of 0.140% -0.169%. The results shall be truncated to no less than two decimal places.

(3) The gas calibration standard used as part of a valid Implied Consent Breath Test sequence shall be manufactured at an alcohol concentration of 0.080% +/- .005%. The test shall be considered valid and the device operating properly if the result of the analysis of the gas calibration standard shows an alcohol concentration of 0.074% -0.086%. The results shall be truncated to three decimal places.

2.12: Periodic Tests

(1) The periodic test sequence shall consist of five calibration standard analysis tests. The results of the alcohol concentration of each of these tests must be inside the range specified in 501 CMR 2.11. The periodic test results shall be noted on the report created at the completion of a valid periodic test. If the calibration standard is liquid, the periodic test calibration results shall be reported to at least two decimal places. If the calibration standard is gas, the periodic test calibration results shall be reported to three decimal places. This report shall serve as the record that the device is in calibration and working properly, and shall be admissible in a court of law.

(2) At a minimum, the OIC(s) shall initiate the periodic test sequence whenever the calibration standard is replaced and after the breath test device is certified by OAT.

2.13: Administration of a Breath Test: Requirements

(1) A breath test of an arrestee must be administered in accordance with M.G.L. C. 90, § 24K and 501 CMR 2.00. Neither the statute nor the regulations create an obligation upon law enforcement to administer a breath test to a person who has been arrested for operating a motor vehicle while under the influence of intoxicating liquor or a related offense.

(2) An arrestee who has been offered a breath test and who consents to submit to a breath test, shall be administered a breath test using a certified breath test device within a reasonable period of time.

(3) The BTO shall observe the arrestee for no less than 15 minutes immediately prior to the administration of the breath test. If the BTO has reason to believe the arrestee has introduced any item into his or her mouth, the 15 minute observation period shall be restarted. Also, if during the test sequence, the breath test device reports the presence of mouth alcohol, the test sequence shall end. The 15 minute observation period shall be restarted and a new test sequence shall be started. This observation period is designed to allow the dissipation of mouth alcohol.

(4) The breath test shall be valid and the results admissible in a court of law if it complies with 501 CMR 2.14.

2.14: Administration of a Breath Test: Procedures

(1) The arrestee's consent to a breath test shall be documented by the arresting officer or the BTO.

(2) The breath test shall be administered by a certified BTO on a certified breath test device as defined in 501 CMR 2.02.

(3) The breath test shall consist of a multipart sequence consisting of:

(a) one adequate breath sample analysis;
(b) one calibration standard analysis; and
(c) a second adequate breath sample analysis.

(4) If the sequence described in 501 CMR 2.14(3) does not result in breath samples that are within +/- 0.02 blood alcohol content units, a new breath test sequence shall begin.

2.15: Breath Test Results

(1) The results of the analysis of each breath sample and calibration standard shall be reported to at least two decimal places if the test was administered using a liquid calibration standard. The results of the analysis of each breath sample and calibration standard shall be reported in three decimals places, if the calibration standard is gas.

(2) For the purpose of determining the arrestee's BAC pursuant to M.G.L. C. 90, § 24:

(a) if the two breath sample results are the same, that result shall be truncated to two decimal places and reported as the arrestee's BAC; otherwise,

(b) the lower of the two breath sample results shall be truncated to two decimal places and reported as the arrestee's BAC.

(3) The arrestee shall be informed of his or her BAC upon completion of a valid test, if requested.

2.16: Breath Test Refusal

If after being advised of his or her rights and the consequences of refusing to take a breath test, the arrestee refuses to submit to a breath test, none shall be given. The Registry of Motor Vehicles (RMV) shall be notified of such refusal in a format approved by the Registrar. If at any time following an arrestee's initial consent to the breath test and prior to the successful completion of the test, the arrestee refuses to participate or declines to cooperate, the test shall be terminated and it shall be noted as a refusal. If the arrestee fails to supply the required breath samples upon request, the test shall be terminated and it shall be noted as a refusal.

2.17: Blood Test Refusal

If after being advised of his or her rights and the consequences of refusing to take a blood test, the arrestee refuses to submit to a blood test, none shall be given. The Registry of Motor Vehicles (RMV) shall be notified of such refusal in a format approved by the Registrar.

2.18: Blood Test Analyst (BTA): Training and Certification

(1) The Director shall establish and implement a training and certification program for BTA(s).

(2) Upon successful completion of the program, the BTA shall be certified for three years.

(3) The Office of Alcohol Testing shall maintain a record of such training and certification. A valid certification shall contain the name of the certified analyst and the effective date of certification.

2.19: Blood Test Analyst: (BTA) Certification Revocation

The Director may suspend or revoke the certification of a BTA who fails to comply with the requirements of the written laboratory protocol for blood alcohol analysis.

2.20: Responsibilities of a Blood Test Analyst

A chemist of the Department of State Police who has been certified as a blood test analyst shall perform the following duties:

(a) provide certificates of blood alcohol analysis;
(b) provide Serum Conversion Certificates, based on known conversion factors which shall constitute prima facie evidence of a defendant's whole BAC;
(c) provide, insofar as reasonable, expert witness services whenever requested by the attorney general or district attorneys.

The Commonwealth of Massachusetts
Department of State Police

CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

DANIEL BENNETT
SECRETARY

COLONEL RICHARD D. McKEON
SUPERINTENDENT

Forensic Services Group
Office of Alcohol Testing
124 Acton Street
Maynard, Massachusetts 01754
Phone (857) 377-3030 Fax (857) 377-3035

APPROVED BREATH TESTING INSTRUMENTS

The following infrared breath testing instruments are approved by the Office of Alcohol Testing in accordance with 501 CMR 2.05 for use in completing evidentiary breath tests in the Commonwealth.

COMPANY	INSTRUMENT
Draeger Safety Diagnostic's, Inc. 4040 West Royal Lane Suite 136 Irving, Texas 75063 866.385.5900	Alcotest 9510

Excellence In Service Through Quality Forensic Science

5/2000, Updated 6/2004, Updated 5/2007, Updated 12/2007, Updated 10/2009, Updated 1/2010, Updated 4/2010, Updated 11/2012, Updated 5/2015, Updated 7/2015

The Commonwealth of Massachusetts
Department of State Police

CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

DANIEL BENNETT
SECRETARY

COLONEL RICHARD D. McKEON
SUPERINTENDENT

Forensic Services Group
Office of Alcohol Testing
124 Acton Street
Maynard, Massachusetts 01754
Phone (857) 377-3030 Fax (857) 377-3035

PORTABLE BREATH TEST DEVICES (PBTS)

When making a decision to purchase a PBT, the Office of Alcohol Testing (OAT) will calibrate a make and model of PBT that meets the following criteria:

1) Department of Transportation (DOT) approved device
2) Data stored on PBT is downloadable
3) Saves the Date and Time
4) Compatible with Dry Gas for accuracy checks

Devices which have been previously certified at OAT may continue to be submitted for calibration.
The following are a few of the manufacturers of PBTs:

Manufacturer

CMI, Inc.
316 East Ninth Street
Owensboro, KY 42303
(866) 835-0690
http://www.alcoholtest.com/

Draeger Safety Diagnostic's, Inc.
4040 West Royal Lane, Suite 136
Irving, TX 75063
(866) 385-5900
http://www.dsdi4life.com/

Intoximeter, Inc.
2081 Craig Road
St. Louis, MO 63146
(800) 451-8639
http://www.intox.com/

Lifeloc Technologies, Inc.
12441 W. 49th Avenue, Unit 4
Wheat Ridge, CO 80033
(303) 431-9500
http://www.lifeloc.com/law.aspx

Excellence In Service Through Quality Forensic Science Updated 7/2015

CHARLIE BAKER
GOVERNOR

DANIEL BENNETT
SECRETARY

COLONEL TIMOTHY P. ALBEN
SUPERINTENDENT

The Commonwealth of Massachusetts
Department of State Police

Office of Alcohol Testing

SERUM CONVERSION CHART

SERUM ALCOHOL LEVEL, MG/DL	AVERAGE BLOOD ALCOHOL LEVEL, G%
057-068	0.05%
069-079	0.06%
080-091	0.07%
092-102	0.08%
103-113	0.09%
114-125	0.10%
126-136	0.11%
137-148	0.12%
149-159	0.13%
160-170	0.14%
171-182	0.15%
183-193	0.16%
194-205	0.17%
206-216	0.18%
217-227	0.19%
228-239	0.20%
240-250	0.21%
251-262	0.22%
263-273	0.23%
274-284	0.24%
285-296	0.25%
297-307	0.26%
308-319	0.27%
320-330	0.28%
331-341	0.29%
342-353	0.30%

rev. 9/06

Massachusetts State Police Sobriety Checkpoint Enforcement Guidelines

Department of State Police
General Order

Effective Date	Number
April 23, 2009	**TRF-15**

Subject

Sobriety Checkpoints

Policy

When utilized, Sobriety Checkpoints shall be conducted in conformance with judicial guidelines.

Key Considerations

In the preparation and execution of any Sobriety Checkpoint, the following considerations shall receive special attention:

- Motorist safety shall be assured;
- Motorist inconvenience shall be minimized;
- The action undertaken shall be in accordance with a written plan devised by supervisory personnel and developed prior to implementation of the checkpoint;
- Selection of vehicles to be stopped shall not be arbitrary;
- Advance public notice shall be given to reduce motorist surprise, fear, and inconvenience; and
- A trained Commissioned Officer shall be in charge.

Site Safety

The Officer In Charge (OIC) of the Sobriety Checkpoint shall ensure compliance with the following Work Zone Safety Guidelines:

- Physical barriers shall not be used;
- Sufficient warning signs shall be placed ahead of the checkpoint to provide advance notice for on-coming vehicles;
- Signs should be illuminated or constructed of highly reflective material;
- Sufficient road flares, reflectors, or cones should be used to safely control traffic;
- Auxiliary and/or sufficient street lighting should be in place to illuminate the checkpoint;
- There shall be sufficient law enforcement presence to reduce fear and apprehension, minimize inconvenience, and ensure compliance;
- All officers shall be in uniform;
- All officers shall wear an issued traffic vest, reflectorized belt, or other high visibility clothing;
- Officers shall position themselves so they can be easily observed by motorists;
- Officers shall give visual stop/start commands;
- Marked cruisers shall be utilized as site safety vehicles;
- All cruisers shall have operable visual emergency warning devices; and
- Cruisers shall be positioned in compliance with the predetermined plan.

Continued next page.

Site Safety (continued)

Vehicles shall be waved through the Sobriety Checkpoint without stopping when:

- Traffic is backed up to the safety officer; or
- A commercial vehicle with a gross vehicle weight rating (GVWR) greater than 10,000 pounds causes sight obstructions.

Vehicles which are transporting flammable liquids (including compressed gas as a motor fuel), hazardous materials or explosives as the cargo or a part thereof shall not be parked within three-hundred (300) feet of any portion of the check-point where flares are being utilized. In addition, such vehicles shall be allowed to pass through the checkpoint without stopping.

Site Selection

Individual site selection shall be made based upon selective enforcement identifiers of alcohol related traffic crashes or prior OUI violations such as:

- Time;
- Day of the week; and
- Location.

Site selection data for each Sobriety Checkpoint shall be retained by the Troop Traffic Programs Officer for a period of five (5) years.

Safety considerations for the site location should include:

- Motorist/officer safety;
- Sight visibility;
- Traffic volume and pattern;
- Operator reaction time; and
- Operator stopping distance.

Parking lots, rest areas, or wide shoulders immediately adjacent to the Sobriety Checkpoint should be available and accessible for use as a screening area. This shall ensure that vehicles can be directed out of the normal flow of traffic without creating a traffic safety hazard.

Advance Notification

The OIC shall coordinate activities with Media Relations to ensure that:

- Announcements to the appropriate electronic and print media shall be made, at a minimum, three (3) business days prior to the implementation;
- The press release provides the overall purpose of the Sobriety Checkpoint, thereby allowing the Department to gain the public acceptance, support, cooperation, and voluntary compliance of the endeavor;
- The press release specifies the county the Sobriety Checkpoint shall be conducted in, but does not detail the precise location or hours of implementation; and
- Any inquiries pertaining to the Sobriety Checkpoint are referred to the appropriate Troop Commander.

Operational Plans

Individual Sobriety Checkpoint plans shall be prepared in advance of the date of actual implementation. These plans shall include, at a minimum:

- Date;
- Time and duration;
- Site selection and justification;
- Set patterns of vehicles to be stopped;
- Personnel, assignments, and responsibilities;
- Training for this particular sobriety check-point;
- Field sketch detailing the Sobriety Checkpoint logistics and site configuration;
- Notifications; and
- Equipment and materials needed.

These plans shall be strictly adhered to. There shall be no arbitrary or random modification of Sobriety Checkpoint procedures.

Officers may make suggestions for changes due to extenuating circumstances, but only the OIC can authorize and approve any changes in plans.

All officers shall be briefed and trained on details of the specific plan prior to the start of each Sobriety Checkpoint.

Operational plans shall be maintained at the Troop Headquarters and retained for a period of five (5) years. A copy shall be forwarded to the Traffic Programs Section.

Site Configuration

Site configuration shall be as follows:

- Each Sobriety Checkpoint shall have a clearly marked warning sign;
- All signs, signals, markers, traffic cones, flares, or reflectors shall be placed in accordance with the Work Zone Safety Guidelines;
- The position of the cones, flares, or reflectors should guide vehicles to the appropriate lane of travel and are parallel to the stop location; and
- The position of the cones, flares, or reflectors around the stop location should provide as much protection to the officers in that location as possible.

Subject	Number
Sobriety Checkpoints	**TRF-15**

Stopping Vehicles

The selection of vehicles to be stopped shall be either:

- Every vehicle; or
- A set pattern, e.g., every other, every third vehicle, or other set number desired.

Vehicles stopped at the checkpoint should be greeted for a period of one (1) minute or less.

The operator and/or passengers shall remain within the vehicle to minimize the intrusion.

If there is reasonable suspicion, based upon articulable facts, that the operator and/or passenger(s) is committing or has committed an OUI violation or other violation of law, that vehicle shall be directed from the normal flow of traffic and the offender(s) checked further.

Cruisers

All Department vehicles shall be placed at Sobriety Checkpoint in such a manner as the OIC deems appropriate for safety purposes.

Personnel

The number of uniformed officers needed for a Sobriety Checkpoint shall vary according to site and take into consideration visible authority, motorist safety, and minimizing inconvenience.

There shall only be one (1) Commissioned Officer as the OIC of a Sobriety Checkpoint.

Responsibilities

Position	Duties
Division Commander of Field Services	• Annually, confer with the Traffic Programs Section regarding the efficiency of Sobriety Checkpoints; • Make a determination as to whether or not such checkpoints shall be utilized as a component of the OUI Countermeasures Program; and • Issue a Division Commander's Order directing all Troop Commanders to gather intelligence regarding potential sites for the deployment of checkpoints during the coming year, if such checkpoints are to be utilized.
Troop Commanders	• Shall designate a Commissioned Officer to conduct the site selection and operational planning for each Sobriety Checkpoint; • Approve the written operational plan and site selection; and • Designate a Commissioned Officer to be the OIC of the Sobriety Checkpoint.

Continued next page.

	Position	Duties
Responsibilities (Continued)	**Sobriety Checkpoint OIC**	Ensure: • The safety of all motorists and officers in the OUI checking area; • Motorists are directed into the checking area for screening by at least one (1) officer; • At least one (1), preferably two (2) officers interact with motorists during the screening process; • Motorists not arrested are released as quickly as possible; and • Arrested motorist's vehicles are inventoried and towed in accordance with existing policy or are released to a legal driver/passenger.
	Safety Vehicle Officer(s)	Shall: • Position the safety vehicle(s) prior to the start of the checkpoint setup; • Observe traffic for vehicular operation indicating OUI; • Observe traffic to forewarn other officers and motorists of impending dangerous drivers approaching; • Observe traffic for violations of law and notify the OIC; • Ensure that visual warning devices are activated; and • Monitor traffic for backup. Note: Speed measuring devices may be used by the safety officer.
	Sobriety Checkpoint Screening Officers	Shall: • Be courteous and polite when interacting with motorists. The element of voluntariness reduces the intrusiveness of the procedure; • All contacts shall be kept brief, with a short greeting such as "Good evening, this is a State Police Sobriety Checkpoint. Sorry for the inconvenience, thank you." The inconvenience to motorists must be minimized; • Guide motorists to the screening area to ensure the safety of all other officers and motorists within the OUI checking area; and • Ensure the safety of motorists being checked further by directing them to an appropriate location to park in the OUI checking area.

Continued next page.

Subject	Number
Sobriety Checkpoints	**TRF-15**

Responsibilities (Continued)

Position	Duties
Sobriety Checkpoint Screening Officers	• Minimize the inconvenience of motorists by screening them for OUI as efficiently as possible and administering the standard field sobriety tests, horizontal gaze nystagmus test or portable breath test device (PBT). If all elements of the OUI violation have been clearly established, the member shall arrest the subject, and follow Department arrest procedures.

References

M.G.L. c. 90, s.24
Commonwealth v. McGeoghegan 449 N.E.2d 349
TRF-09 Towing
TRF-10 Motor vehicle Inventory
TRF-14 Operating Under the Influence - Alcohol
MassHighway Work Zone Safety Guidelines

Promulgated By:

APPENDIX D: RESOURCES

STATE CONTACTS

EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY

One Ashburton Place
Boston, MA 02108
Telephone: 617-727-7775
www.mass.gov/eopss

MASSACHUSETTS DISTRICT ATTORNEYS ASSOCIATION

One Bulfinch Place, Suite 202
Boston, MA 02114
Telephone: 617-723-0642
www.mass.gov/mdaa

MASSACHUSETTS STATE POLICE GENERAL HEADQUARTERS

470 Worcester Road
Framingham, MA 01702
Telephone: 508-820-2300
www.mass.gov/msp

COLLISION ANALYSIS AND RECONSTRUCTION SECTION

136 Washington Street
Foxboro, Massachusetts 02035
Telephone: 508-698-0479

MASSACHUSETTS STATE POLICE FORENSIC AND TECHNOLOGY CENTER

124 Acton Street
Maynard, MA 01754
Telephone: 978-451-3300

OFFICE OF ALCOHOL TESTING

31 MacArthur Avenue
Devens, MA 01434
Telephone: 978-392-4061

TROOP A

Headquarters: 485 Maple Street, Danvers, MA 01924; 978-538-6020
Includes the following barracks:

Andover:	978-475-3800
Newbury:	978-462-7478
Concord:	978-369-4100

Medford:	781-396-0100
Revere:	781-284-0038
Danvers:	978-538-6161

TROOP B

Headquarters: 555 North King Street, Northampton, MA 01060; 413-587-5517
Includes the following barracks:

Lee:	413-243-0600
Shelburne Falls:	413-625-6311
Springfield	413-736-8390
Cheshire	413-743-4700
Russell	413-862-3312
Northampton	413-584-3000

TROOP C

Headquarters: 612 Main Street, Route 122A, Holden, MA 01520; 508-829-8300
Includes the following barracks:

Athol	978-249-4341
Millbury	508-929-3232
Brookfield	508-867-2912
Leominster	978-537-2188
Sturbridge	508-347-3352
Holden	508-829-4431
Belchertown	413-323-7561
Devens	978-772-8800
New Braintree	508-867-1170

TROOP D

Headquarters: 326 West Grove Street, Middleboro, MA 02346; 508-923-4014
Includes the following barracks:

Norwell	781-659-7911
South Yarmouth	508-398-2323
Dartmouth	508-993-8373
Middleboro	508-947-2222
Oak Bluffs	508-693-0545
Nantucket	508-228-0706
Bourne	508-759-4488

TROOP E

Headquarters: 50 Massport Haul Road, Boston, MA 02210; 617-946-3051
Includes the following barracks:

Weston	781-431-5050
Charlton	508-721-4040
Westfield	413-572-3100

Ted Williams Tunnel	617-946-3000
Summer Callahan Tunnel	617-561-6130

TROOP F

Headquarters: Logan International Airport – 2 Service Road, East Boston, MA 02128; 617-568- 7300

Includes the following barracks:

Logan International Airport	617-568-7300

TROOP H

Headquarters: 125 William Day Boulevard, South Boston, MA 02125; 617-740-7536

Includes the following barracks:

Beacon Hill	617-727-2917
Framingham	508-820-2250
Foxboro	508-543-8550
Boston	617-727-6780
Brighton	617-727-4812
South Boston	617-740-7710
Milton	617-698-5840

MUNICIPAL POLICE TRAINING COMMITTEE

6 Adams Street
Randolph, MA 02368
Telephone: 781-437-0300
www.mass.gov/mptc

MASSACHUSETTS DRE PROGRAM

Telephone: 978-502-4063
www.massdre.org

REGISTRY OF MOTOR VEHICLES

Massachusetts Department of Transportation
P.O. Box 199150
Boston, MA 02119
Telephone: 857-368-8000
www.massdot/rmv

NATIONAL CONTACTS

NATIONAL TRAFFIC LAW CENTER

99 Canal Center Plaza, Suite 330
Alexandria, VA 22314
Telephone: 703.519.1645
www.ndaa.org/ntlc

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
Telephone: 703-549-9222
Fax: 703-836-3195
www.ndaa.org

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (NHTSA)

Volpe National Transportation Systems Center
55 Broadway
Cambridge, MA 02142
Telephone: 617- 494-3427
www.nhtsa.dot.gov

REFERENCE MATERIALS

- American Prosecutors Research Institute, National Traffic Law Center, *Special Topic Series* (To order a copy of any of the publications listed below, contact the NTLC at 703-519-1645 or download from their website at www.ndaa-apri.org/apri/programs/traffic/ntlc_home.html)

    - *Admissibility of Horizontal Gaze Nystagmus Evidence* (May 2003)
    - *Alcohol Toxicology for Prosecutors* (July 2003)
    - *Crash Reconstruction Basics for Prosecutors* (March 2003)

- DWI Detection and Standardized Field Sobriety Testing, U.S. Dep't of Transportation, National Highway Traffic Safety Administration, HS 178 R2/02

- Horizontal Gaze Nystagmus: The Science & The Law, American Prosecutors Research Institute, National Traffic Law Center, DOT HS 808 938 (July 1999)

- Massachusetts Motor Vehicle Offenses, Massachusetts Continuing Legal Education, 2nd Edition 2009, with 2011 Supplement

- Prior Convictions in DUI Prosecutions: A Prosecutors' Guide to Out-of-State DUI/DWI Convictions, American Prosecutors Research Institute, National Traffic Law Center

- Prosecuting the Drugged Driver, U.S. Dep't of Transportation, National Highway Traffic Safety Administration, HS 171 R1/00

- Standardized Field Sobriety Test Manual, National Highway Traffic Safety Administration, May 2013.