

**DEFENDING DWIs: A GUIDE FOR THE GENERAL
PRACTITIONER**

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DEFENDING DWIs: A GUIDE FOR THE GENERAL PRACTITIONER

I. INITIAL CALL

Nothing can be more important than initial impressions and this is true in the lawyer-client relationship as well. Often your first involvement in a DWI case is a call from a client either immediately after he has been arrested, and sometimes within the earshot of the arresting officer, or other times after they have been booked into jail.

A. Defendant still with Officer

In these circumstances, you need to be mindful that every word your client speaks may be being recorded so be careful about asking questions like – “how much have you had to drink?” “where were you going this late?” These questions can wait for later. The better approach is to calmly advise your clients of some basic do’s and don’ts:

1. “Do be polite and courteous. Do stay awake until you get to the jail. Do give the officer your name and drivers license. Beyond that, do nothing else – you are under arrest – if not now – real soon. Do SHUT UP.”
2. Don’t take any test, including the eye test, heel to toe, alphabet or one leg or anything else. Don’t blow and don’t agree to a blood sample. Tell them to politely refuse all test based on the advice of their lawyer and then remind them once again to SHUT UP.

If and when the opportunity arises, I gladly will explain to the jury why I advise all of my clients to refuse all tests. However, bear in mind – these instructions will get your client arrested!

B. Obtaining Client’s Release from Jail

If your first contact with your client is not when they are with the arresting officer it may be when they are in jail. Most times, this will be their first encounter with the loss of their freedom. Many times, they will be scared and humiliated. Your job is to calm them, assure them they will get out but that it may take some time. I recommend you intentionally overestimate how long it is going to take to get them out of jail. If they get out sooner than that then you are off to a good start. If at all possible, refrain from getting into the facts of the case. There will be plenty of time for that later. They want one thing and that is to be where you are – on the other side of those bars!

1. Bonding and Bail Procedures – Chapter 17 Texas Code of Criminal Procedure

Most jurisdictions today have some types of pre-printed personal bonds. It is recommended to prepare a notebook to keep in your car with all types of bonds available in your jurisdiction.

- Personal Recognizance
- Percentage Cash Bond
- Surety Bonds

To have these documents ready and at your disposal lets your client know that you are experienced in this type of matter and instills confidence from your first encounter.

a. Personal Bond

If your jurisdiction has a Personal Bond Office pursuant to 17.42 TEX. CODE CRIM. PROC., be careful what your client tells the pretrial services officer. The personal bond officer is charged with the duty to “...gather and review information about an accused....” and report that information to the Court. Routinely, the personal bond officer will inquire about the night in question and what and how much the defendant had to drink. All of the statements will be reduced to writing and noted somewhere in the file of your client.

Although I would strenuously object to any of those statements being used in Court – the best scenario is that there not be any statements in your client’s file. The better approach is to tell the client if they are interviewed to defer all answers regarding the offense on the night in question until their attorney is present.

(1) Art. 17.03 (a) TEX. CODE CRIM. PROC.

Any magistrate in the county where the DWI originated may release a defendant on his personal bond, unless the issuing court set conditions of the bail. In *Guerra v. Garza*, 987 SW2d 593, 593-94 (Tex. Crim. App. 1999), it was held that where the issuing court set bail at “surety only” another court is without jurisdiction to change the “status” of the bail. For a reviewing court to obtain jurisdiction, a defendant must file a writ of habeas corpus pursuant to 11.09 TEX. CODE CRIM. PROC. The writ should be filed in the county courts. For an example of such a writ *see*, **Appendix A**.

(2) Art. 17.031(a) TEX.CODE CRIM.PROC.

Any magistrate in the State may release a defendant charged with DWI on personal bond regardless of whether the charge originated in that magistrate’s county so long as that magistrate “would

have had jurisdiction over the matter had the complaint arisen within the county wherein the magistrate presides”. Furthermore, the personal bond may not be revoked by the issuing court without good cause shown.

b. Conditions of Personal Bond

(1) Upon reasonable belief by the arresting officer or magistrate that there is alcohol abuse related to the offense for which the defendant is arrested, the court shall require as a condition of personal bond that the defendant submit to testing for alcohol and participate in an alcohol treatment or education program, if such a condition will serve to reasonably assure the appearance of the defendant for trial. The State may not use the results of any test against the defendant in any criminal proceeding arising out of the offense for which the defendant is charged. Art. 17.03(c) TEX.CODE CRIM.PROC.

(2) Additional Conditions of Personal Bond –

- Electronic Monitoring Art. 17.43 TEX. CODE CRIM. PROC.
- Home Confinement Art. 17.44 TEX. CODE CRIM. PROC.
- Ignition Interlock Art. 17.441 C.C. P.
 Shall be required if charged with a **subsequent** offense under:
 - § 49.04 P.C. (DWI)
 - § 49.05 P. C. (Flying While Intoxicated)
 - § 49.06 P. C. (Boating While Intoxicated)
 Or **first** offense of:
 - § 49.07 P.C. (Intoxication Assault) or
 - § 49.08 P.C. (Intoxication Manslaughter)

Unless, the court finds that to require the device would not be in the best interest of justice. Art. 17.44 (b) TEX.CODE CRIM.PROC.

(3) Catch All Provision

The court can set any reasonable condition of bond to secure a defendant’s attendance at trial or related to the safety of the victim or the safety of the community. 17.40(a) TEX. CODE CRIM. PROC *See Ex Parte Anderer*, 61 SW3d 398 (Tex. Crim. App. 2001)

C. Client Interview

1. Get to know your client

As far as running a profitable business, one of the most important aspects of a lawyer’s job is the initial client interview. As stated earlier in this paper, first impressions go a long way toward a successful relationship with your client. Always allow 45 minutes to an hour for an initial client interview in a DWI case. One must use an interview style that fits their personality but there are some basics that everyone should employ. First, get to know your client – find out what he does for an occupation – what he enjoys most in life – where he grew up – what his family situation is-married-single-kids-what kind of education or training does he have? All of these questions will let you get to know your client. The same rule applies in interviews as in cross examination, listen to the answers!

2. The Process

Talk about the process. Explain the difference between the ALR proceeding and the DWI. Early in the interview talk about the possibilities of an occupational license. The most commonly misunderstood issues are the various ramifications on a defendant’s driver’s license. Make sure that they understand that their temporary permit is a valid driver’s license until their ALR hearing.

Next explain the court system. Tell them how the County Attorney or District Attorney prosecutes Class B Misdemeanors and that they are heard in County Court or County Courts at Law. Brief them on your jurisdiction’s policy regarding court dates and whether the client will be required to attend all settings or whether you will routinely reset the case. Explain what intoxication means under the law – read the definition and explain that in a jury trial that is the central issue that will have to be answered by the jury. Your ability to explain all of this articulately will instill confidence in your client that they have come to see someone that knows what they are doing. Once that confidence is instilled, then the client will begin to trust you. Caveat: they do not enter your office feeling like they can trust you – you must earn their trust.

3. The Facts

Before going into the facts, explain the attorney/client privilege and if a spouse or parent is present, be sure to remove them from your office at this point. Most young people really like it when you do that!

Fact Finding Inquiry: Thoroughly go over the facts – start with the first thing they did the day they got arrested. Probe for every detail and take copious notes. If you are not a good note taker, have an assistant sit with you through this portion. Find out

where they went, what they had to eat, who they saw, what they talked about and what they were thinking. Ask about any physical issues or medical issues that might have impaired their performance or any of the tests.

4. DWI Related Cost:

After the fact finding inquiry, I think it is important to go over costs-not attorney fees but the costs of a DWI conviction. First, start with what they have already spent on bail, ignition interlock, towing charges, etc...

Then warn that if convicted, there will be surcharges for 3 years after the conviction:

- DWI 1st \$1,000
- DWI subsequent \$1,500
- DWI with BAC of .16 or higher \$2,000

Insurance rates can double or triple. Probation fees may be as high as \$60.00 a month for up to 24 months. Art. 42.12 § 19 TEX. CODE CRIM. PROC. Fines can be as high as \$2,000.00 and court costs \$300-400. One can also assume they will be ordered to pay for and attend alcohol counseling and/or treatment. Numerous websites estimate the cost of a DWI including attorney fees to range from \$5,000-\$50,000 in cost and some estimates are even higher. Just Google “cost of a DWI” and you will be surprised at what you find.

If you have been doing this for a number of years and you know your jurisdiction, you should at this point have some idea as to what the possibilities are concerning a disposition of a particular case. However, remember, you only have your client’s version and nothing else. You need to see the video, the offense report and much more before you can even start to render an opinion about a possible disposition. It is extremely important, in my judgment to keep your clients expectations low. It might cost you the case but it will save you a grievance. Don’t take the bait when the client asks you – can you beat this? Give them a truthful answer that there are too many unknown variables at this time to make that call. Now, you are ready for your final summation – fee setting.

5. Fee Setting

Fee setting, like the practice of law is an art – not a science. Regardless of your fee, the most important aspect is to be clear about what it is. Explain what is covered, what is not. Explain if the fee includes a jury trial, occupational license, ALR hearing, experts or investigators. Lastly, reduce it to writing once agreed upon. Granted, many DWI cases can be handled as a routine docket call but there are many services a

lawyer can provide to the defendant other than negotiating a plea and appearing in court. I’ve already mentioned the ALR hearing, the occupational license, but the attorney can also assist in scheduling counseling, assisting in obtaining an SR-22, filling out paperwork for probation, drivers license reinstatement just to name a few. All of these matters can be handled by a competent legal assistant and will be greatly appreciated by most clients. Keep in mind your overhead cost while setting fees and set a fee that is fair to both you and your client. The opportunity to earn a fee is available if you take it, but if you do-please earn it. One of the best marketing tools in our profession today is still the old fashioned one--a satisfied client.

II. INVESTIGATION

A. Witness Interviews

Once retained, one of the first steps should be to make arrangements to interview any potential witnesses. Once again, good note taking can be extremely important months or even years later. If you can afford to have an investigator conduct the interviews, that is best, but that is usually not economically practical.

When taking statements from witnesses be mindful of Rule 615, Tex. R. of Evid. which allows the prosecutor to review written statements of any witness who testifies. The better practice is to have your investigator write you a memo rather than draft a statement for the witness to sign. If for some reason, you ever need to impeach the witness, you can do so with your investigator or even his notes.

B. Crime Scene

If this is a case that your experience tells you will most likely end up at trial, it is imperative that you visit the location of the arrest. It is preferable to do it with your client and be sure to take photographs. Most cases do not go to trial for many months and many things can change between the date of the arrest and the trial. Although prosecutors will nearly always have a video tape of the arrest, they seldom if ever have photographs of roadside or the location.

III. ALR

The Administrative Suspension of Driver’s License found in the Texas Transportation Code 524.00 et seq. (breath/blood test failure) and 724.00 et seq. (breath/blood refusal) is commonly referred to as “ALR,” standing for Administrative License Revocation. There are numerous publications that cover in depth the ALR process, statutes and case law. One of the best is *Administrative License Revocations Manual*, Boyd, Lawrence, Knowles Publishing, Inc., 2006.

This paper does not intend to be an exhaustive treatise of ALR law but rather a primer you can look to for quick reference and a basic understanding of the process.

A. Driver's License Confiscation

Upon arrest for DWI, your client will have his driver's license confiscated §524.011(b)(2) Tex. Transp. Code.[hereinafter all §524 and §724 cites refer to the Texas Transportation Code.] He will be issued a Temporary Permit good for 41 days pursuant to 524.011 (f). However, if a request for a hearing is filed with the department (DPS) at its headquarters in Austin, not later than the 15th day after the date on which the person receives notice of the suspension (usually date of arrest), (524.031 on a failure and 724.041 on a refusal) then the suspension will not take effect until an administrative law judge has entered an order to such effect. 524.032 (d) on a failure case and 724.041(c) on a refusal case.

B. Request For A Hearing

1. It is important to train your staff including your receptionist to inquire of any potential DWI client the date of the arrest and inform the client that a request for a hearing must be made within 15 days of their arrest. The 15 day requirement in § 524.031 and § 724.041 are mandatory and cannot be waived. If a hearing is not requested within that time frame, the defendant's license will be suspended on the 40th day after the arrest. § 524.021 (failure) § 724.035(c) (refusal).

2. The hearing can be requested by calling (800) 394-9913, faxing (512) 424-2650 or writing a letter to the Texas Department of Public Safety, Driver Improvement Bureau, P.O. Box 4040, Austin, Texas 78765-4040. The preferred method is by facsimile because you can get confirmation your fax was received and you can do it immediately at any time of the day. Presumably a fax received on the 15th day before midnight is sufficient. For a mailed notice, receipt is presumed on the fifth day after it was mailed. § 524.031(b). All correspondence must include the following information:

- a. Full name
- b. Date of birth
- c. Driver License Number and State
- d. Current Mailing Address
- e. Home and Daytime Telephone #s
- f. Date of Arrest

- g. County of Arrest
- h. Arresting Agency
- i. Arresting Officer
- j. Breath/Blood Test Failure
- k. Breath/Blood Refusal

You must also specify whether you desire to have your hearing by telephone or in person. I have attached as **Appendix B** a copy of the request I use. Once the Department receives your request for a hearing you will receive notice of a scheduled hearing date, usually 4-6 weeks after your request.

C. Discovery

Also included in this letter is a request for discovery for documents. If a proper request is made and the Department fails to provide the requested documents, then the Department may be precluded from using the documents at the ALR hearing. § 155.15(b)(12) Texas Administrative Code ("TEX. ADMIN. CODE") I always request the Notice of Suspension (DIC-25), the Statutory Warnings (DIC-23), the Probable Cause Affidavit (DIC-24) and all other non-privileged documents. The Department almost always provides these documents and files a reciprocal request for discovery for any documents the defendant intends to introduce at the hearing. I normally file a response indicating that I intend to offer at the hearing any video tape made during the arrest and offer the Department an opportunity to come to my office to view and inspect. **Appendix C**. To date, I have never had a DPS lawyer request a copy of the video or an opportunity to inspect.

D. Continuance

The Defendant is entitled to one mandatory continuance, if it is requested 5 business days prior to the hearing § 524.032(b) and § 724.041(g). *see* also § 159.207 TEX. ADMIN. CODE

1. Decision to Have Live Witnesses

Once a final hearing date is scheduled, a decision needs to be made as to whether you want to try a paper case or have live witnesses. In some instances, the paperwork is so defective that the Department cannot prevail if they rely strictly on the written evidence. *See DPS v. Rodriquez*, 953 S.W. 2d 362, (Tex. App.-Austin 1997).

Often times, the probable cause affidavit (DIC-24) will contain double or even triple hearsay. Technically, hearsay is admissible to establish probable cause, *Campbell v. State*, 910 S.W. 2d475 (Tex. Crim. App. 1995), however, double and triple

hearsay should be objected to. Therefore, if your probable cause affidavit contains double hearsay, particularly from a civilian witness, you want to object to the admission of that portion of the document. *See*, Tex. R. Evid. 803(8); *First Southwest Lloyd's Inc. v. MacDowell*, 769 S.W.2d 954 (Tex. App.—Texarkana 1989, writ denied); *All Saints Hospital v. M. S.*, 791 S.W. 2d 321 (Tex. App.—Fort Worth 1990, writ dismissed by agr.)

In many instances in metropolitan areas, one officer will make the traffic stop and DWI task force officer will conduct the DWI investigation and ultimately the arrest. In these circumstances, it is imperative to subpoena both the stopping officer and the arresting officer. If you do so, then if either of the officers fails to appear, you have a valid objection to any information obtained from that officer being used at the hearing. §159.211(c) TEX. ADMIN. CODE. My experience is that ten to twenty percent of the time, the officer will fail to appear and the client's driver's license is not suspended. If the officer appears, then it is an opportunity to gain invaluable discovery for your DWI. There are several advantages to having a contested ALR hearing with live witnesses. First, the Department's burden is pretty easy to meet thus a minimum amount of "wood shedding" goes on. Often you can get favorable testimony from the officer simply because they are not fully prepared for your examination. Second, it gives you, the defense counsel, an opportunity to gauge the credibility of the State's witnesses. In a close case, the officer's inability to articulate in a manner that is convincing can make the difference in the outcome. Many jurisdictions do not allow the defendant to have pre-trial hearing in their DWI case until after a jury is selected or possibly immediately before jury selection. In such a case, the defendant is at a serious disadvantage because you don't know the full extent of what the witness might say. When given the opportunity to depose a witness in an ALR hearing, counsel should know going into trial every answer the witness is going to give when asked at trial. Therefore, even if your chances of prevailing on the ALR are weak – which is usually the case – the time spent on a hearing is more than worth it.

E. Subpoenas

In order to assure the witnesses are present at the hearing, defense counsel must subpoena the witnesses. As stated earlier, if the witness is properly subpoenaed and fails to appear – none of his testimony or documents are admissible. § 159.21(c) TEX. ADMIN. CODE.

To properly subpoena a witness to an ALR hearing, follow the rules and use the forms found on

the State Office of Administrative Hearings (SOAH) website @ www.soah.state.tx.us.

Basically, the witness must be served 5 calendar days before the hearing, the DPS Legal and SOAH must receive copies of the subpoenas along with the returns at least 3 days prior to the hearing and a \$10.00 witness fee check for each witness must be sent to SOAH at least 3 days prior to the hearing. Attached as **Appendix D** are copies of subpoenas from the SOAH website. *See* Rules of Procedure for Administrative License Suspension Hearings, Title 1, Part 7, Chapter 159 Texas Administrative Code found on the Internet at www.soah.state.tx.us/aboutus/alr_rules_bikmkd_n_linked_eff_20090120.pdf or go to SOAH web site referenced above and click on the first tab "Amendments to SOAH's Chapter 159 rules of procedure". These amendments became effective Jan. 20, 2009.

An attorney licensed in the State of Texas may issue up to two subpoenas for witnesses to appear at a hearing. One subpoena may be issued to compel the presence of the peace officer who was primarily responsible for the defendant's stop or initial detention and the other may be issued to compel the presence of the peace officer who was primarily responsible for finding probable cause to arrest the defendant. If the same officer was primarily responsible for both the defendant's stop and arrest, the attorney may issue only one subpoena §159.103(b). TEX.ADMIN.CODE.

If a party intends to call more than two peace officers, a request for subpoena must be filed with SOAH that demonstrates good cause no later than ten days prior to the hearing. § 159.103(c).TEX.ADMIN.CODE

As stated previously, the opposing party is entitled to notice at the time of the issuing of the subpoena and once it is served, a copy of the return must be sent to the opposing party at least three calendar days prior to the hearing.

F. Hearing

1. The rules of evidence apply at all SOAH hearings unless a specific rule dictates otherwise. The State has the burden of proof and must establish by a preponderance of the evidence that;

- a. reasonable suspicion or probable cause existed to stop or arrest the person;
- b. probable cause existed to believe that the person was operating a motor vehicle in a public place while intoxicated;
- c. the person was placed under arrested by the officer and was requested to submit to the taking of a specimen; and

- d. the person refused to submit to the taking of a specimen on request of the officer or the person submitted to the taking of the specimen and had an alcohol concentration of .08 or greater while driving.

See Todd v. State, 956 SW2d 777, 778 (Tex. App. – Waco 1997, pet. Ref’d) and *Martin v. DPS*, 964 SW2d 772, 774-75 (Tex.App. – Austin 1998, no pet.)

2. Once the hearing is terminated, the ALJ will issue his final decision. This is usually mailed or faxed to the defendant’s attorney within several days of the hearing. Transcripts of the hearing are available by making a written request to SOAH § 524.044. The cost depends on the length of the hearing but usually is less than \$100.00. Alternatively, you can request a copy of the tape for \$1.00 and have it transcribed by your staff. However, for impeachment purposes, I recommend getting a certified transcript from SOAH.

G. Appeal

1. If you are not satisfied with your ALJ ruling, you can appeal the decision to county court. The appeal will be governed by § 524.041 and must be filed within 30 days of the ALJ decision and it is the responsibility of the appealing party to provide the transcript to the county court. The reviewing court may not substitute its judgment for that of the ALJ on the weight of the evidence, but it may reverse the case if the substantial rights of the appellant have been prejudiced because the administrative finds are :

- a. in violation of constitutional or statutory provisions;
- b. in excess of the agency’s statutory authority;
- c. made through unlawful procedure;
- d. effected by other error of law;
- e. not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
- f. arbitrary and capricious.

Texas DPS v. Watson, 945 SW2d 262, 264-65 (Tex. App. – Houston[1st Dist.] 1997 no writ).

2. Stay

An appeal will automatically stay the imposition of the suspension unless the defendant has previously been convicted of DWI related offense within the last 10 years or had his license suspended for an alcohol or drug related contact within the last 5 years. The stay,

however, is good for only 90 days after the date the appeal petition is filed. *See generally* 524.042.

H. Periods of Suspension and Occupational Licenses

The duration of the suspension depends on the reason for the suspension and the past record of the defendant. Additionally, some suspension have waiting periods before an occupational license can be obtained and others strictly prohibit any occupational license during the suspension.

- 1. For adults (age 21 or older) the suspension is as follows:

- § 724.035 Refusal

- 180 days suspension

- Prior contact within 10 years – 2 years suspension

- § 524.022 Failure

- 90 days suspension

- Prior contact within 10 years – 1 year suspension

- 2. Minor (younger than 21)

- 524.022(a) Failure or Detectable Amount

- 60 days suspension

- Prior conviction 120

- 2 prior convictions 180

- 3. Occupational Licenses

There are also required waiting periods for occupational licenses in some instances. In other words – minimum periods of time that some defendants must go without any type of drivers license. For example, if a defendant has had prior ALR contact within 5 years, he cannot obtain an occupational license for 90 days after the suspension begins and 180 days if there was a prior DWI conviction within 5 years. 521.251(a). For an excellent chart listing all of the suspensions and waiting periods *see* Christopher Hoover’s article *Ten DWI Statutes Everyone Should Know*, 29th Annual Advanced Criminal Law Course 2003, State Bar of Texas CLE Library and reprinted with permission here as **Appendix E and F**.

IV. PRETRIAL

If you are fortunate enough to be allowed a pretrial hearing pursuant to 28.01 TEX.CODE CRIM. PROC. prior to your trial date, generally, you should take advantage of this opportunity. However, there also is a downside to an evidentiary pretrial.

One downside is educating your prosecutor as to your defensive issues. Another is exposing an inexperienced officer to your prosecutor. Once the prosecutor realizes the officer's weakness they may shore their case up with other officers on the scene or by effectively wood shedding their officers. Also, if there are other weaknesses that are going to become apparent through an evidentiary hearing, such as embarrassing statements by the officer on tape or poor performance on the field sobriety testing ("FST"), then unless you are looking for a deal, you may want to reserve your pretrial issues until the time of trial. This is especially true if you have had your ALR hearing and learned all you need to know for trial at that hearing. It is a rare occasion when a prosecutor has obtained the ALR transcript.

So, before setting a case for an evidentiary pretrial, make sure you really want one. Always file pretrial motions even if you do not have an evidentiary pretrial until the day of trial. Generally, you are attempting to accomplish one of the following:

- Suppress oral statements by the defendant that are not helpful to your case;
- Suppress evidence of contraband found;
- Discover who the state's experts will be and any articles or treatises they will rely on;
- Notice of any prior bad acts or convictions the state intends to offer into evidence against the defendant; and
- Suppress the arrest and any evidence obtained thereafter.

Often times, especially in major metropolitan areas where the case loads are overwhelming the prosecutor may simply not have time to provide you with notice regarding experts or extraneous offenses and if so, you will have a valid objection at trial to exclude those witnesses and evidence. A generalized pretrial motion to suppress was criticized in a recent Texas Court of Criminal Appeals decision. In a footnote in *Amador v. State*, 275 S.W. 3d872, 874 fn. 3 (Tex. Crim. App. 2009) the Court commented: "Appellant's motion to suppress did not identify what evidence he wanted to suppress, nor...was such evidence identified at the hearing. *citations omitted*

...It could be argued that, under such circumstances, the trial court could properly deny the motion to suppress as inadequate." *citations omitted*. In light of this footnote, I recommend listing specifically the items you are seeking to suppress.

V. NEGOTIATIONS

Plea negotiations in a DWI case are no different than plea discussions in any other criminal case. The single most important aspect for defense counsel is to come across as reasonable. All jurisdictions have policies, or practices, whether written or not, regarding recommendations in DWI cases. Know your jurisdiction – know your prosecutor and thus know what is reasonably attainable in your situation. And, if you don't know these things, hire someone who does.

Prepare for your plea discussions as you would prepare for mediation in a civil case. Write out for yourself the mitigating or inculpatory evidence you believe helps your cause.

List any physical or medical/psychological issues or conditions which help explain your client's behavior during the arrest or on the FST.

Physical impairments such as:

- eye disease
- knee surgeries
- ankle injuries
- bad back
- inner ear infections – vertigo
- overweight
- age

Mental/Psychological conditions:

- panic disorders
- bipolar
- anxiety attack
- depression

The facts are, prosecutors in most jurisdictions have more cases to try than they know what to do with so give them something they can hang their hat on.

It is a good idea, early on, to get your client evaluated and into some type of alcohol education or treatment program. If convicted, most likely some counseling will be required, so why not do it in advance and use it as a basis of negotiations. If you

are dealing with a repeat offender, your interlock records or urine specimens while out on bond should be obtained. The fact that they have remained alcohol free for several months can be persuasive. Finally, if for no other reason than to build up your clients' self esteem, "atta boy" letters are always nice to have in the file. If you are representing a student – transcripts with good grades can sometimes move a prosecutor. As stated earlier, know your prosecutor and provide him/her with information you know they will appreciate.

VI. TRIAL

Some cases just need to be tried. It may be that your client is the type that is just never going to be satisfied with anything short of an acquittal. It may be that the prosecutor is just hard wired and never going to give in. It could be the judge who will take nothing less than the "standard" deal and sometimes, it's just the facts demand a trial. There is no better case to try in the criminal system than DWI. Nearly everyone can relate in some way to the defendant. Either, they have "been there done that" or know someone who has.

The main reason that DWIs are such good cases to try as a defense attorney is that the stakes are relatively low. On a first offender, even if the defendant is found guilty, the punishment assessed is usually less than the offer and jail time is almost unheard of.

This section of the article deals with the most common type of DWI trial-- the no breath test case. If you are preparing for a breath test case I recommend *DWI: Breath & Blood* by George Scharmen II, Advanced Criminal Law Course 2005, TexasBarCLE or Christopher N. Hoover's article *DWI: Breath and Blood*, Advanced Criminal Law Course 2006, TexasBarCLE. The most comprehensive book on this subject that I have used is Lawrence Taylor's *Drunk Driving Defense*, (6th ed. 2006) Aspen Publisher. If you are preparing for a "total refusal" –no breath test, no field sobriety test, Andrew J. Forsythe wrote an excellent article, *The Art of Saying No: Defending the Total Refusal Case*. Advanced Criminal Law Course 2008, TexasBarCLE.

A. Field Sobriety Testing

The overwhelming majority of tried DWI cases are non-breath test cases with a video tape of the defendant performing roadside. Roadside testing is not new, it has been around for a long time. As early as 1974, the National Highway Traffic Safety Administration (NHTSA) began contracting researchers to validate roadside testing. Initial research was supposedly done in Finland in the late sixties. Regardless of its origins, it is here to stay. Generally it is referred to as Field Sobriety Testing

("FST") or Standardize Field Sobriety Testing ("SFST").

Prosecutors and defense attorneys alike should be familiar with and have access to the NHTSA studies and manuals. To order NHTSA training manuals for students and instructors contact the National Technical Information Services in Springfield, Virginia or fax (703) 605-6900. For additional information regarding DWI Standard Field Sobriety Testing, you may visit the NHTSA website at <http://www.NHTSA.dot.gov/people/injury/alcohol/SFST/htm>. Training of law enforcement personnel on sobriety testing procedures has become an integral part of peace officer certification in Texas. *See, Soto v. State*, ___ S.W.3d___, 2009 WL 722266 (Tex. App.—Austin, March 19, 2009); 37 Tex. Admin. Code § 221.9 (2008) Increased training has had a direct relationship to an increase in DWI arrest i.e. the more specialized training an officer has the more arrest he/she will make. Today's standardized test are the Horizontal Gaze Nystagmus ("HGN"), heel to toe and one leg stand. Although not approved by NHTSA you will sometimes see other test such as the "nose touch", "alphabet reciting", "finger touch" and "Romberg" (tilted head back-close eyes and estimate 30 seconds).

This sections attempts to briefly summarize the procedures used in Field Sobriety Testing, including HGN and prepare the practitioner for presentation of the testimony and/or cross examination thereof. When preparing for trial, time is always limited and staring a banker boxes full of lengthy articles is somewhat discouraging. Therefore, this article attempts to be brief in an effort to give the reader a quick reference that highlights these subjects. Included are several checklists that can be easily copied and placed in your trial notebook. The tests are designed to determine the suspect's balance, coordination, and/or mental faculties. A poor performance on these tests is then linked to the suspect's driving ability. With practice and preparation, defense counsel can usually diffuse bad results of FSTs through effective cross-examination.

1. Focus The Jury

Basically, defense counsel should focus the jury's attention on four issues during cross examination on this subject:

- a) the defendant's emotional and/or physical condition (independent of alcohol) affected his ability to perform;
- b) the tests were administered under difficult conditions;

- c) the officer was biased in his analysis, and/or exaggerated the results;
- d) the tests are not as easily performed by a sober person as it would initially appear.¹

Once the officer smells alcohol coupled with bad driving they are generally predisposed to believing that the subject is impaired. By the time the FST's are given, the officer has generally made up his mind that the suspect is intoxicated and he is now simply gathering evidence to support his opinion. Therefore, establish that the officer has (in his opinion) already observed erratic driving, the smell of alcohol, and suspects that the defendant is intoxicated. If he denies this, then the argument can be made that the defendant looked and acted normally until he had to perform these difficult tests. It is important to demonstrate this initial bias to the jury and allow them to see that the results of the tests were colored by the officer's decision that the person was intoxicated.

Next, defense counsel should stress to the jury, through cross-examination, the nervousness, intimidation, and fear that would be felt by anyone who was pulled over by an officer, much less by someone who was asked to perform these tests. Point out to the jury that this nervousness can be even more consistent with innocent behavior because alcohol will sometimes lead to a false sense of security.

2. Limiting The Officer

Force the officer to commit himself to isolation the exact moment when he formed the opinion that your client was drunk. Most often the officer will say that his opinion was based on the cumulative effect of all observations up to that point. Now that the officer is limited by his own admission, counsel can proceed to minimize each observation. All observations before forming his opinion were insufficient to justify an arrest and all the observations afterwards are colored by his preconception that the defendant is guilty. Thus, it is a "can't lose" question. Therefore, regardless of what the officer answers, a good follow up question will be effective. If he commits too soon, he can be crossed for jumping the gun. If he waits until all of the tests are completed, regardless of how poorly he claims the defendant performed, his credibility is damaged with the jury.

In summary, stress to the jury:

- that he suspected that the defendant was intoxicated before the tests;
- that if his opinion was based on the cumulative evidence, then no one test was

performed so poorly that he "thought" defendant was intoxicated at that point;

- that if he formed his opinion before all the tests were completed, then he jumped the gun and the rest of the tests are colored by his already formed opinion

3. Defendant's Physical Condition

Be sure to examine the physical condition of the client. Make sure to note their age and any physical disabilities. For example, are they overweight, in their sixties, or have they had a cold recently? Even allergies can affect a person's balance.

NHTSA's own studies also have found that certain individuals are likely to have trouble with these tests under any situation. People over sixty-five and people overweight by fifty or more pounds often have very poor balance and should not be expected to perform well on the tests.²

Additionally, be prepared to point out any differences between your client and the physically fit officer. Officers with any experience and training have demonstrated the FSTs hundreds, maybe thousands of times and as everyone knows—Practice Makes Perfect.

Therefore, have the officer compare:

- his fitness to that of the defendant;
- his age to that of the defendant (if applicable);
- his size to that of the defendant (if applicable);
- his experience with the FSTs to that of the defendant.

4. Location Where Tests Are Conducted

Next examine the location where the tests were given. The lawyer should at least be familiar with the area where the tests were performed. Always photograph the area of the arrest; if nothing else this forces the attorney to spend some time with his client and familiarize himself with locale. Generally, the tests are given on the side of the road, except for those at the station house. Make a determination as to whether there was a gravel shoulder, whether they were parked on an incline, etc. Walking a straight line on a gravel shoulder or on a slope would be much more difficult than performing the test on the smooth court room floor. Since most DWIs occur at night, most tests are given at night. Was there adequate street lighting or was it particularly dark on that segment of the highway? NHSTA also use to admit that darkness could cause difficulty in performing the tests.³ Once again point out the difference between the

evenly lit court room and the side of the road at night. What was the weather like? Rain, fog, or bitter cold could all be shown to have affected the subject's performance on the tests.

Certain shoes can make it more difficult to perform this test. NHTSA suggests that the officer allow the subject the option of removing their shoes if they are wearing heels over two inches high.⁴ Determine whether the client was wearing cowboy boots, pumps, etc. Even shoes two inches and less can hinder a person's ability to perform these tests. My own personal observations are that the wearing of boots or going barefooted causes me the most difficulty.

Checklist:

- a. examine the location where the test was given;
- b. photograph the location;
- c. determine the slope and any other surface conditions;
- d. explore the lighting conditions;
- e. find out the weather conditions;
- f. what type of shoes, boots, high heels, pumps, etc., was the defendant wearing.

5. Inconsistencies

It can also be beneficial to compare the testimony of the officer at different times during the stop. For example, did the officer testify that the defendant could hardly get out of the car and then also testify that the defendant was able to keep his head stable in order to perform the HGN test, or hold out his leg in the one-leg-stand? These types of comparisons in testimony will also call the officer's credibility into question.

B. Horizontal Gaze Nystagmus (HGN):

In the last twenty years HGN has taken on significant notoriety and is becoming the preferred Field Sobriety Test among many law enforcement agencies. In fact, the National Highway Traffic Safety Administration (NHTSA) cites it as the most effective procedure for testing drivers at roadside to determine whether or not they are intoxicated.⁵ Its usefulness had been debated in numerous articles, however, its admissibility if properly administered, was put to rest in *Emerson v. State*, 880 S. W. 2d 759 (Tex. Crim. App. 1994). There are, however, standards set out in *Emerson* that should be met prior the admission of the results of an HGN test. The defense has not fared too well in the appellate courts when making this argument. *Quinney v. State*, 99 S.W. 3d 853 (Tex.

App.-Houston[14th Dist.] 2003, no pet.); *Compton v. State*, 120 S.W. 3d 375 (Tex. App.-Texarkana 2003, pet. ref'd); *Soto v. State*, ___ S.W.3d___, 2009 WL 722266 (Tex. App.—Austin, March 19, 2009). *Plouff v. State*, 192 S.W. 3d 217 (Tex. App.-Houston [14th Dist] 2006 pet. denied) The defense practitioner should however, continue to use every effort to keep the testimony regarding HGN out of evidence. The fact that it has a "scientific foundation" might have a devastating effect on an uninformed juror. However, my experience and that of most trial lawyers I have visited with agree that most jurors are unimpressed with this test. Generally they do not understand it and more importantly they cannot see it. Very few officers will do a close up video of the eyes during the test. If all attempts to suppress the testimony fail, a prepared cross examiner can severely undermine the credibility of most police officers who claim to be experts on the subject. In order to do this, the defense lawyer must have a solid understanding of the principles of HGN and its inherent fallacies in roadside testing.

1. Principles of HGN

Nystagmus means an involuntary jerking of the eyes. HGN refers to an involuntary jerking that occurs as the eyes move (gaze) toward the side while tracking a moving object such as a pencil or penlight. The eye movement or jerking of the eye is an involuntary response, and the subject being tested is generally unaware or unconscious of the fact that his/her eye is jerking and apparently is unable to stop or control it. According to a number of scientific studies, there is a direct correlation between alcohol consumption and observable nystagmus.⁶ The theory is that the more alcohol one consumes, the more noticeable the nystagmus or jerking becomes as the eyes track an object, and the earlier the nystagmus appears as the eyes move to the side.

According to NHTSA's training manual, three signs often will be observed if a person is under the influence of alcohol:

- a. The suspect will not be able to follow a slowly moving object smoothly with the eyes; instead, the eyes can be observed to jerk or "bounce" as they move left and right in pursuit of a smoothly moving object, such as a pencil or penlight.
- b. When the suspect moves his/her eyes as far to the side as possible, distinct jerking will be evidenced when the eye is held at maximum deviation. Some people exhibit slight jerking of the eye at maximum deviation, even when sober, but when under the influence of alcohol, the jerking is likely

to be very pronounced and easily observable.

- c. The more intoxicated a person becomes, the less the eyes have to move toward the side before jerking begins. Usually when a person's blood alcohol concentration (BAC) is 0.10% or more, the jerking will begin before the eye has moved 45° to the side.

The HGN test, as set out in the NHTSA's manual, involves the following procedures:⁷

2. Procedures

- a. The officer instructs the subject to hold his/her hand still; the officer may use his free hand or flashlight as a chin rest.
- b. The officer holds an object (penlight) above eye level approximately 12-15 inches in front of the eyes.
- c. The officer moves the object to the side until the subject's eyes cannot move any further to the side; this position is called maximum deviation. This should be done in about 2 seconds. The officer should observe any jerking in the eyes.
- d. The officer estimates a 45° angle of gaze, and repeats the procedure, taking about 4 seconds. The officer observes any jerking before the 45° angle.
- e. The place where the eye continues to jerk once the object is stopped is deemed the "onset" point;
- f. The officer repeats the entire procedure with the other eye

3. Scoring

The police are instructed to look for three clues of intoxication in each eye. They are to give one point for each clue for a maximum of six points.

- a. The right eye cannot follow a moving object smoothly;
- b. If the right eye, when moved as far as possible to the right, exhibits distinct or moderate nystagmus;
- c. If onset of HGN in right eye occurs before 45°. The officer should not score a point here against the suspect unless some white is visible on the outside of the right eye (closest to the ear) at the point of onset.
- d. Repeat this criteria for the left eye.

Out of the six (6) possible points, four (4) or more supposedly classify the subject as above 0.10% BAC.

According to NHTSA, this criterion should classify 77% of the subjects correctly.⁸

Because the 45° angle is a key factor in assessing a suspect's sobriety, it is essential to accurately record the angle of onset of nystagmus. The training manuals instruct the officer how to estimate a 45° angle by using a template as shown in **Appendix G**.

A template is simply a square with a line drawn diagonally from corner to corner. The edge of the template is then placed against the subject's nose and perpendicular to the face. The subject is told to follow an object (as demonstrated in Figure 1) until the eye is looking down the 45° diagonal (*See Figure 2*). The officer is told that with practice, he/she will be able to accurately determine the 45 degree angle without using any type of device.

4. Cross Examination Topics

a. Reliability

A significant number of studies have been published both validating and invalidating HGN as a useful tool in roadside testing. It is important to note that the studies relied upon by NHTSA are primarily studies financed by the Department of Transportation and conducted at the Southern California Research Institute.⁹

There is an abundant supply of research which undermines the NHTSA studies and good artillery for attacking the reliability of HGN as a roadside sobriety test. One such study, cited in Lawrence Taylor's book, *Drunk Driving Defense*¹⁰ and printed in the Journal of Forensic Science Society, found that officers consistently overestimated the angle of onset with low BAC and underestimated it at a high BAC. These particular researchers from the *police crime lab* concluded that HGN cannot be used to accurately predict BAC.¹¹ In this study the officers actually used a special protractor to help measure the angle of onset. Despite the use of an instrument, the research demonstrated that determining the angle of onset at roadside is highly impracticable. A plethora of studies can be found in the scientific literature which contradict the NHTSA studies.¹²

b. Specificity

Another common area for criticism of this test is that nystagmus is not necessarily specific to alcohol. That is, there are many other causes of gaze nystagmus unrelated to the consumption of alcohol. There are numerous drugs, physiological problems, eye problems, and various other factors that can affect HGN. Below is a general checklist of such matters:

- (1) Drugs that can cause HGN:¹³
 - Barbiturates;

- Antihistamines;
 - Phencyclidine;
 - Other depressants;
 - Other anti-convulsants; and
- (2) Other common substances, such as:
- caffeine;
 - nicotine; and
 - aspirin
- (3) Physiological problems that can cause HGN: ¹⁴
- Brain damage;
 - Influenza;
 - Streptococcus infections;
 - Vertigo;
 - Measles;
 - Hypertension;
 - Hypotension;
 - Arteriosclerosis;
 - Muscular dystrophy;
 - Multiple sclerosis;
 - Brain hemorrhage;
 - Epilepsy;
 - Psychogenic disorders;
 - Syphilis;
 - Korsakoff's syndrome;
 - Motion sickness;
 - Sunstroke;
 - Changes in atmospheric pressure; and
 - Inner ear problems
- (4) Eye problems that can cause HGN: ¹⁵
- Congenitally poor vision due to bilateral amblyopia;
 - Eyestrain;
 - Eye muscle fatigue;

- Glaucoma; and
- Hard contact lenses; the NHTSA manual recommends having the subject's remove all corrective lenses especially hard contacts.¹⁶

It has also been shown that a fatigued driver or a driver with eye strain may have a falsely high onset of nystagmus.¹⁷ Additionally, the angle of onset may decrease by about 5 degrees due to the biorhythms of an individual, between the hours of midnight and 5:00 A.M.¹⁸

Some articles state that extreme fear or anxiety of an individual can elicit gaze nystagmus.¹⁹ It takes little imagination to suggest to the jury the anxiety and fear your client must have been experiencing during the roadside investigation. Most individuals accused of DWI are law abiding citizens who are unfamiliar with police *Tex.Admin.Codetics* and certainly would be expected to experience fear and anxiety from such an incident.

c. 45° Angle

The most fruitful area of cross-examination is the officer's estimation of the 45° angle. The officer is taught that if he sees nystagmus while the eye is tracking the target (pencil or penlight), he is to stop the movement to see if jerking continues. If it does, he is to determine whether this angle of onset is less than 45°. If the onset of nystagmus occurs before the 45° angle, then the officer is to score one point for each eye against the suspect. One should begin the attack of this testimony by questioning the officer's ability to determine the actual angle without the use of any type of instrument. The cardboard template is seldom, if ever, used at roadside. There is no verifiable record of the officer's test; it is wholly subjective and nothing more than a guess as to precisely what angle the eye was positioned when the jerking began. It is generally being done at night under poor lighting conditions with squad car lights flashing in the background or highway traffic lights passing by at high speeds. Several questions on this issue alone should raise serious concerns in most jurors.

d. Officer's Lack of Knowledge

An officer untrained in the field of optometry may very easily misidentify non-alcohol related jerks of the eye as HGN. Alcohol gaze nystagmus consists of two movement components of unequal speed. When a person's eye looks to one side, there is a slow drift of the eyeball toward the nose, followed by a quick corrective movement back to the lateral position known as saccade. Because this succession of movements can be very fine, with the eyeball flickering back and forth within a fraction of a degree,

the minimally trained officer could mistake the quick saccadic jerks that the eyeball always makes while tracking a moving object, such as the officer's penlight, for nystagmus.

e. Training

Most states which employ the HGN test have a three-day training course for police officers. In the course, the officers learn the HGN test in addition to other procedures involving identification of intoxicated or drugged drivers. In order to fully understand the dynamics involved in this discipline, one would need at least a college semester. Three days training is simply insufficient time to adequately prepare someone for such testing.

f. Lingering Effects

Another study on the subject demonstrated that alcohol-induced nystagmus can occur at a blood alcohol concentration of as low as 0.018%, which is equivalent to consumption of less than one beer. Furthermore, the same study showed that nystagmus persisted in every subject tested after all the alcohol had left the blood, lasting on average 5 hours after the blood alcohol level had fallen to zero.²⁰

g. Nystagmus Apparent In Most People

There have been numerous studies which have attempted to determine at what angle nystagmus will be present at certain BAC levels. Most of the studies reach different conclusions, however nearly all studies confirm that at least 50% of the population will have some nystagmus when the eyes are turned to the extreme or maximum deviation.²¹ Therefore, according to NHTSA's own studies, one-half of the population would have two points scored against them every time they are tested. According to the training guide, it only takes four points to be considered intoxicated. One way to emphasize this point is that if the test were conducted on the jury three out of six jurors might show some nystagmus as they sit in the jury box.

5. Checklist For Cross-Examination

a. The qualifications of the officer:

- (1) The officer is not a M.D.;
- (2) The officer has no training in ophthalmology;
- (3) He has no scientific training concerning the eyes, or the link between intoxication and the eyes;

- (4) HGN training consists of approximately 24 classroom hours and the literature consists of a brief training manual;
- (5) Quiz the officer on their training manual after the officer has made clear he is familiar with it;
- (6) How often does he practice with the protractor-type angle device to check himself on consistently estimating a 45° angle?

b. The actual test given to your defendant:

- (1) The head must be perfectly still for the test to be accurate. If the defendant's head was still, this is a sign of sobriety;
- (2) In order to accurately perform the test, the defendant must follow complicated instructions. Did the defendant understand the instructions given? Another sign of sobriety;
- (3) Stress that the materials state that all procedures must be followed or the test will not be accurate; then point out any deviation from the mandated procedures;
- (4) The angle of onset: no instrument used to determine whether it was 45 degrees or 50 degrees. Fifty to sixty percent of the population have nystagmus at maximum deviation;
- (5) Lighting conditions
- (6) Did the officer move the penlight in a 'jerking' fashion? NHTSA cautions that this will also cause the defendant's eyes to jerk.

c. Trial notebook

In order to effectively cross examine a witness on these areas, the defense attorney needs to have a HGN trial notebook, indexed and tabbed, with studies which contradict or undermine the NHTSA studies. If the State qualifies an expert on this subject, then the defense is entitled to have him read favorable passages from treatises, periodicals, or pamphlets, assuming the expert recognized the publication as a reliable source in his/her field.²² If the officer does not recognize the publication, then his credentials as an expert should be undermined before the jury.

In summary, there is more to cross examine with on this subject than needed in most DWI trials. I try to just highlight a few of these areas and minimize the results of the tests. Particularly when the state has not

called a real expert to explain the test rather than relying on the arresting officer. Very few, if any, cases are lost by the defense based on the testimony concerning HGN. Good luck!

VII. RECENT CASE LAW FROM THE TEXAS COURT OF CRIMINAL APPEALS, 2008-2009

A. Notice

The State is no longer required to plead in its information the manner of intoxication, either “loss of faculties” or “alcohol concentration” (.08) because they are neither elements of DWI nor manner and means of committing the offense. *State v. Barbernull*, 257 S.W. 3d 248 (Tex. Crim. App. 2009) The Court stated, “the conduct proscribed by the Penal Code is the act of driving while in a state of intoxication. That does not change whether the State uses the per se definition or the impairment definition to prove the offense.” citing *Bagheri v. State*, 119 S.W.3d 755 (Tex. Crim. App. 2003) The definitions set out in 49.01(2) of “intoxicated” are purely evidentiary matters; therefore, they do not need to be alleged in a charging instrument to provide a defendant with sufficient notice. In so holding the Court expressly overruled *State v. Carter*, 810 S.W.2d 197 (Tex. Crim. App. 1991) which had held that the State must allege which definition of “intoxicated”, loss of faculties or per se, that the State intended to prove at trial. *Barbernull* at 256.

B. Speedy Trial

In *Cantu v. State*, 253 S.W. 3d 273 (Tex. Crim. App. 2008) the Court reversed the Corpus Christi Court of Appeals finding that defendant’s constitutional right to a speedy trial had been violated. There is no set time limit that triggers an analysis for a speedy trial claim, but four months has been held to be insufficient, while a seventeen-month delay was held sufficient. citing *Pete v. State*, 501 S.W. 2d 683, 687) (Tex. Crim. App. 1973). In *Cantu*, the information was not filed for sixteen-months. The court agreed with the trial court that the defendant had not met the third and fourth prong of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 23 L.Ed. 2d 101 (1972). The third prong of *Barker* requires the Defendant’s assertion of the right and the fourth prong requires the Defendant to prove he has been prejudiced by the delay. The Court found that the Defendant made no showing of any attempt to assert his interest in a speedy trial. Although one cannot file a motion for speedy trial until formal charges are made, the right to one can be asserted in other ways. Repeated request for a speedy trial weigh heavily in favor of the defendant while the failure to make such requests supports an inference that the defendant does not really want a trial. *Cantu*

at 283. As to the fourth factor under *Barker*, the Court held that evidence of generalize anxiety is not sufficient proof of prejudice. However, proof of numerous and costly trips to court, loss of wages, loss of exculpatory evidence, interference with employment or numerous urinalysis might be sufficient to show prejudice. *Id.* at 268.

C. Speaking Offense Report

In a 5-4 decision in *Fischer v. State*, 252 S.W. 3d 375, (Tex. Crim. App. 2008) the Court held that an officer’s narration on videotape, contemporaneously dictated, of defendant’s performance on FST, not admissible as a present sense impression exception to the hearsay rule under Tex. R. Evid. 803(1). The court held this narration or dictation was no more than “a speaking offense report” and thus not admissible pursuant to Tex. R. Evid. 803(8)(B). *Fischer* at 328-83.

D. Jury Instructions

Two cases were reversed on improper jury instructions in 2008.

1. First, the Court found an instruction that the jury could consider the fact that a Defendant refused to take a breath test was an improper comment on the weight of the evidence and was reversible error. The court held such an instruction singles out that evidence and violates Art. 36.14, 38.04 and 38.05 of the Code of Criminal Procedure. *Bartlett v. State*, 270 S.W. 3d 147 (Tex. Crim. App. 2008).
2. In another jury instruction case, the Court found that a concurrent causation jury instruction (combination of drugs with alcohol) was improper where the State only alleged intoxication by alcohol alone. The court, however, went on to hold that a “synergistic effect” or “susceptibility” charge would have been permissible under the facts of the case. *Otto v. State*, 273 S.W. 3d 165 (Tex. Crim. App. 2008)

E. Evidence of a prescription drug inadmissible without expert testimony

The Court held that without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding use of prescription medications was not relevant. There was no evidence as to the dosage taken, the exact time of ingestion, or the half-life of the drug, thus a lay juror is not in a position to determine whether Xanax or Valium taken 12 hours earlier, would have any effect on the

defendant's intoxication. *Layton v. State*, 289 S.W. 3d 235 (Tex. Crim. App. 2009).

F. Deadly Weapon

In *Sierra*, the Court held even though the defendant was not driving recklessly and within the posted speed limit, a deadly weapon finding by the jury was appropriate because the State showed that the defendant failed to brake before the impact and could have avoided the accident. The evidence clearly showed that defendant had the right of way and was not "at fault". *Sierra v. State*, 280 S.W. 3d 250 (Tex. Crim. App. 2009)

G. Probable Cause to Arrest

In *Amador*, the Court held that the State's failure to elicit results of the FST did not render the evidence insufficient to sustain probable cause for DWI arrest. The fact that the officer smelled alcohol, defendant fumbled for his driver's license and insurance, observed defendant drive at a high rate of speed, unusually slow movements, and defendant's denial that he had anything to drink were sufficient to justify probable cause to arrest. *Amador v. State*, 275 S.W. 3d 872 (Tex. Crim. App. 2009).

H. Pre Trial Order Denying Defense the Right to Cross Examine Technical Supervisor Regarding Underlying Scientific Principles of the Intoxilyzer 5000.

In eight cases consolidated out of the same trial court, the Court reversed the convictions in seven of the cases and affirmed one. *Holmes, Woodall, Williams, Contreras, Jr., Harlow, Rodriguez, Brice, and Widener, Jr. v. State*, 2009 WL 1175044 (Tex. Crim. App. 2009). In all but Woodall's case, the defense filed a pretrial motion to cross examine the State's expert on the operation of the Intoxilyzer 5000. Each motion included a list of eight areas of concern about the internal working of the intoxilyzer. The motions were denied and all defendants entered pleas of no contest and appealed their adverse pretrial rulings. Woodall pled during trial and failed to proffer the complained of excluded testimony, thus his conviction was affirmed. *Id.* at 6.

I. Spinning Wheels Sufficient to Support Traffic Stop

Three judges dissented to the Court's denial of PDR to address the issue of whether an officers "hearing" of spinning tires was sufficient to initiate a traffic stop for violation of § 545.402 Tex. Transp. Code. "An operator may not begin movement of a stopped, standing, or parked vehicle unless the movement can be made safely" § 545.402 Tex. Transp. Code.

END NOTES

1 An excellent source and one from which much of this section originates is Taylor, L. Oberman, S. *Drunk Driving Defense* (6th ed. 2006) Aspen Publishers.

2 See NHTSA's, *DWI Detection and Standardize Field Sobriety Testing*, Student Manual 2006 ed. at VIII-14. DOT HS 178 R8/06; See also *Improved Sobriety Testing*, (1984) NHTSA, DOT HS 802-512. An excellent article on how age affects one's performance on FST see, *The Aging Process and Field Sobriety Tests*, by Mimi Coffey published in *Voice for the Defense*, Vol. 37 No. 10, December 2007

3. Supra, Taylor, L. at 285 FN4 notes that versions prior to 2000 also required adequate lighting for this test so that the suspect will have a visual frame of reference. See 1995 NHTSA Student Manual @ VIII-24.

4. Supra, *DWI Detection and Standardize Field Sobriety Testing*, at VIII. - 11. All references hereinafter are to the 2006 Student Manual.

All references hereinafter are to the 2006 Student Manual.

5. Id. at VIII-1.

6. Burns, Marcelline and Moskowitz, Herbert, *Psychophysical Tests for DWI*; June, 1977 NHTSA (DOT HS-802 424); Tharp, V., Burns, M. and Moskowitz, H., *Development and Field Test for DWI Arrest*, March 1981, NHTSA (DOT HS-895 864); Lehti, H.M.J., *The Effect of Blood Alcohol Concentration on the Onset of Gaze Nystagmus*, BLUTALKOHOL 1976, 13: 411-414; Goldberg, L., *Effects and After Effects Of Alcohol Tranquilizers And Fatigue On Ocular Phenomena, Alcohol And Road Traffic*: Proceedings of the Third International Conference on Alcohol & Road Traffic, London, British Medical Association, 1963.

7. Supra, *DWI Detection and Standardize Field Sobriety Testing*, at VIII-6-7.

8. Id. VIII-1.

9. NHTSA, DOT HS 806-724, *Pilot Test of Selected DWI Detection Procedures for use at Sobriety Checkpoints* (1985); NHTSA, DOT HS 806-512, *Improved Sobriety Testing* (1984); NHTSA, DOT HS 806-475, *Field Evaluation of a Behavioral Test Battery for DWI* (1983); NHTSA, DOT HS 805-864, *Development and Field Test of Psychophysical Tests for DWI Arrest* (1981); NHTSA, DOT HS 802-424, *Psychophysical Tests for DWI Arrest* (1977). This is not a comprehensive list of all studies done by NHTSA.

10 See note 1, supra Taylor, L.

11 Id. See also, *The Correlation of Angle of Onset of Nystagmus with Blood Alcohol Level: Report of a Field Trial*, 25 *Journal Of The Forensic Society* 476 (1985).

12 *Horizontal Gaze Nystagmus: The New Drunk Driving Alchemy*, Pangman, William CHAMPION, April 1987 for a list of studies.

13 Supra, Taylor, L. at 968.

14 Id.

15 Id.

16 Id. at

17 Goldberg, L. *Effects and After Effects of Alcohol, Tranquilizers and Fatigue on Ocular Phenomena, Alcohol and Road Traffic* (1963).

18 Supra, Taylor, L. at 978.

19 4 Am. Jur. Proof of Facts 3d (1989)

20 Aschan, Different Types of Alcohol Nystagmus, 140 OTOLARYNGOLOGICA Supp. 69 (1957);

21 Supra, Taylor, L. at 269. NHTSA also acknowledges that many unimpaired subjects will exhibit nystagmus at maximum deviation. *see, DWI Detection and Standardize Field Sobriety Testing*, at VIII-5.

FN 22. Statements in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art may be read into evidence (but may not be received as exhibits) if the source is established as a reliable authority by the testimony of a qualified expert or by judicial notice. This exception is limited to statements that are called to the attention of an expert on cross-examination or that are relied on by an expert in direct examination. See also Tex. R. Crim. Evid. 803(18); Mendoza v. State, 787 S.W.2d 502 (Tex. App. – Austin, 1990 not pet.).

APPENDIX A

NO. _____

EX PARTE	§	IN THE DISTRICT COURT
	§	
VS.	§	OF WILLIAMSON COUNTY,
TEXAS		
	§	
BILLY SCOTT	§	_____ JUDICIAL DISTRICT

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Billy Scott, Applicant in the above-entitled and numbered cause, and files this Application for Writ of Habeas Corpus, and in support of such motion shows:

I.

Applicant, Billy Scott, is illegally restrained and confined at the Williamson County Jail of Williamson County, Texas, by the Respondent, Mr. Sheriff, Sheriff of Williamson County, Texas.

II.

Applicant is charged with the offense of Driving While Intoxicated (Felony). Applicant was arrested on the 6th day of November, 2008, and has now been held in custody for 12 days.

III.

Applicant was committed to custody for failure to enter into bail on said charge in the amount of Seven Hundred Fifty Thousand (\$750,000.00) Dollars set by order of Justice Court No. 3, Honorable Jimmy "High Bond Martz" on or about November 6, 2008.

IV.

The bail required of Applicant by such order is excessive. Applicant has attempted, both individually and through family to post bail in said amount but has been unsuccessful in raising the

money necessary to post a cash bond or pay the professional bondsman premium required for a surety bond in said amount.

V.

The Applicant has only minimal financial resources, but could raise the funds required to post bail through a professional bondsman in the amount of Ten Thousand (\$10,000.00) Dollars. The posting of bail in such reduced amount will reasonably and adequately secure the presence of Applicant before this Court and any other Court to which these proceedings may subsequently be transferred to answer the charges against him.

VI.

No previous application has been made for the issuance of a Writ of Habeas Corpus seeking the relief requested herein.

WHEREFORE, PREMISES CONSIDERED, Applicant respectfully requests that the Court issue the Writ of Habeas Corpus and conduct a hearing thereon and that Applicant be ordered discharged from illegal custody and restraint, or alternatively, that bail be reduced to Ten Thousand (\$10,000.00) Dollars.

Respectfully submitted,

Law Office of Randy T. Leavitt
Randy T. Leavitt
Phone No. (512) 476-4475
Fax No. (512) 542-3372

By: _____
RANDY T. LEAVITT
State Bar No. 12098300

ATTORNEY FOR BILLY SCOTT

AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Billy Scott, who after being duly sworn stated:

"I am the Applicant in the above entitled and numbered cause. I have read the foregoing Application for Writ of Habeas Corpus and swear that all of the allegations of fact contained therein are true and correct."

 APPLICANT

SUBSCRIBED AND SWORN TO BEFORE ME on this the _____ day of _____, 2008, by the said _____.

 Notary Public, State of Texas
 Printed Name of Notary:

 My Commission Expires:

NOTICE OF HEARING

A hearing on the above and foregoing Application for Writ of Habeas Corpus is hereby set for the _____ day of _____, 2008 at _____ o'clock ____M.

 JUDGE PRESIDING

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Writ of Habeas Corpus and Notice of Hearing has been mailed by U.S. Postal Service to the office of Mr. John Bradley, District Attorney, Criminal Justice Annex, 405 MLK Blvd., Georgetown, Williamson County, Texas 78626 on this the _____ day of November, 2008.

 RANDY T. LEAVITT

APPENDIX B

THE LAW OFFICES OF RANDY T. LEAVITT

1301 Rio Grande
Austin, Texas 78701
randy@randyleavitt.com

Board Certified - Criminal Law
Texas Board of Legal Specialization

(512) 476-4475
Facsimile: (512) 542-3372

March 6, 2009

Texas Department of Public Safety
Driver Improvement and Control
VIA FACSIMILE NO. (512) 424-2650
Texas Department of Public Safety
Legal Department
VIA FACSIMILE NO. (512) 424-5221

RE: Request for ALR Hearing

To Whom It May Concern:

Please be advised that I have been retained to represent the referenced individual with regard to a notice of suspension of their driver's license. Please consider this letter as a formal request for an in person hearing in connection with the proposed suspension. As required, we are providing the following information:

Name: Mr. DWI
Mailing Address: 2500 Turtle Circle, Austin, Texas 78746
DOB: 1/22/32
DL No.: 12345678
Type of Case: Breath/Blood Refusal or Breath/Blood Failure (must specify which one)
Arresting Agency: Austin Police Department
Arrest Date: 3/5/09
County of Arrest: Travis

Please also consider this letter as a formal request for discovery. We request that we be provided a copy of the Notice of Suspension (DIC-25), the Statutory Warnings (DIC-23), the Probable Cause Affidavit submitted by the Arresting Officer (DIC-24), as well as all other non-privileged documents contained with DPS files regarding the Defendant and this proposed license suspension.

Please forward the hearing date and the requested discovery to the undersigned counsel. Please feel free to contact me if there are any questions.

Sincerely,

Randy T. Leavitt
State Bar No. 12098300

APPENDIX C

CAUSE NO. _____

TEXAS DEPARTMENT OF PUBLIC SAFETY	§	STATE OFFICE OF
	§	
	§	
VS.	§	ADMINISTRATIVE HEARINGS
	§	
[CLIENT NAME]	§	AUSTIN, TEXAS

RESPONSE TO REQUEST FOR PRODUCTION

To: Plaintiff, The Texas Department of Public Safety, by and through its attorney of record, _____, P.O. Box 15327, Austin, Texas 78761-5327.

[CLIENT NAME], Defendant, makes this response to the request for production served by the Texas Department of Public Safety and would show that Defendant may offer into evidence the video tape of the arrest and Plaintiff can contact Defendant to make arrangements to view and/or copy the video tape. No other items have been identified after a diligent search that are responsive to the Plaintiff's request.

Respectfully Submitted,
Law Office of Randy T. Leavitt
1301 Rio Grande
Austin, Texas 78701
Phone: (512) 476-4475
Fax: (512) 542-3372

By: _____
Randy T. Leavitt
State Bar No. 12098300
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

By my signature above, I, Randy T. Leavitt, hereby certify that a true copy of the foregoing Response to Request for Production has been sent via facsimile to the counsel of record shown below on this the ____ day of _____, 200____.

Texas Department of Public Safety
(512) 424-5221

**RETURN TO
THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

Defendant Name: _____ **SOAH Docket No.:** _____

Date of Hearing: _____ **Officer/Witness Name:** _____

↑ [This Information must be completed] ↑

CERTIFICATE OF SERVICE

I received this subpoena for service on _____ at _____ (A.M.) (P.M.).

I executed this subpoena by delivering a copy to _____ in
person at _____ on _____ at _____
 (A.M.) (P.M.).

Any and all fees and costs incurred for service of this subpoena were submitted to the requesting Party for payment.

I declare the foregoing is true and correct:

Date: _____

Signed: _____

Name: _____

Address: _____

- Copies to: (1) Texas Department of Public Safety
(2) Defendant or Attorney

ACCEPTANCE OF SERVICE

I acknowledge that I received and accepted service of this Subpoena at _____
on _____ at _____ (A.M.) (P.M.). I further understand my legal obligation to appear at
the hearing.

_____ Date

_____ Witness signature

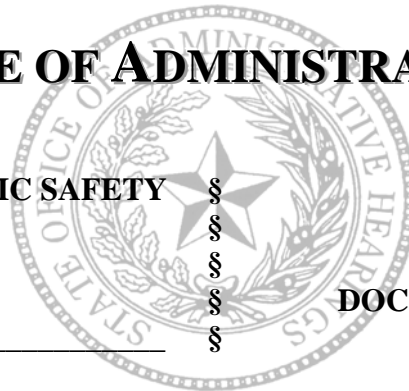
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS DEPARTMENT OF PUBLIC SAFETY

VS.

SUBPOENA

DOCKET NO. _____



THE STATE OF TEXAS

TO: Any Sheriff; Constable; or Person not less than 18 years old and not a party:

YOU ARE COMMANDED to serve this Subpoena by delivery to the following person:

Witness: _____

Address: _____

GREETING,

YOU ARE COMMANDED to appear to testify in this proceeding at the following place and time:

Address:	Room:
	Date and Time:

YOU ARE COMMANDED TO BRING with you the following document(s) and object(s) related to Defendant's arrest if they are in your actual possession:

- None.
- Probable cause affidavit.
- Offense report. (Report # _____, if known).
- DIC 23.
- Video or digital recording.
- DIC 24.
- Any other report you prepared.

If you have any questions in regard to this subpoena, please call the nearest office of the Department of Public Safety at:

Austin - (512) 424-5193

Garland - (972) 203-6254

Tyler - (903) 939-6016

Fort Worth - (817) 882-8263

Houston - (713) 219-4170

San Antonio - (210) 531-4300

Corpus Christi - (361) 698-5522

McAllen - (956) 984-5715

Lubbock - (806) 472-2819

Midland - (432) 498-2195

Amarillo - (806) 468 -1419

El Paso - (915) 834-7628

Bryan - (979) 776-3148

Waco - (254) 759-7172

Subpoena issued on the request of: _____

[Attorney's name, address and phone]

This subpoena shall remain in effect until you are excused by the Administrative Law Judge. Witness fees will be paid to you upon your appearance.

Date

Attorney at Law

Occupational License Waiting Periods

APPENDIX E Administration License Suspension - Adults

Statute	Prior Alcohol Related Contact Type	Waiting Period
TTC §521.251(a)	No Prior Contact Suspensions	None
TTC §521.251(b)	Prior ALR Contact within 5 years	90 days
TTC §521.251(c)	Prior DWI Conviction Contact within 5 years Intoxication Assault, Intoxication Manslaughter	180 days

Administration License Suspension - MINORS

NOTE: Not applicable to refusals. Only for failure or detected by other means cases See TTC §522.022(d)

1 st DWI or DUI arrest and ALR Suspension			30 days
1 Prior Conviction	ABC §106.041, Penal §49.04, 49.07 or 49.08		60 days
2 Prior Convictions	ABC §106.041, Penal §49.04, 49.07 or 49.08		Entire Suspension Period

DWI 1st Offense (or beyond 10 years) - Conviction Suspension

Prior Alcohol Related Contact Type	Waiting Period
No Prior Contact Suspensions	None
Prior ALR Contact within 5 years	90 days
Prior DWI Contact within 5 years	180 Days

(No DWI Education Class)

DWI 2nd Offense (§49.09 punishment)

Prior Alcohol Related Contact Type	Fact Situations to Look For	Waiting Period
No Prior Contact Suspensions within 5 years	Prior Obstruction & ALR Win	None
Prior ALR Contact within 5 years	Prior Obstruction & ALR Loss	90 days
Prior DWI Contact within 5 years	Prior DWI with No education Class	180 days
NEW STATUTE TTC §525.251(d)	*****	Waiting Period
If final conviction or offense dates within 5 years of instant case. Manslaughter or Intoxication Assault or Manslaughter		1 year from date suspension begins

APPENDIX F

Suspension Periods

ADULTS - Administrative License hearing

Statute	Type	No Prior Contact*	Prior contact w/in 10 years
TTC §524.022(a) 724.035 (a)	Refusal	180 days	2 years
TTC §524.022(a)	Failure	90 days	1 year

* §524.001(3) "... 'contact' means a driver's license suspension from:

1. Conviction for intoxicated offense
2. Refusal to submit to taking of specimen
3. BAC test ≥ 0.080 (Failure)

MINORS - Administrative License Hearing

Statute	Type	No prior convictions*	1 prior conviction	2 prior convictions
TTC §524.022(b)	Failure ≥ 0.080	60 days	120 days	180 days
TTC §524.022(b)	Detected by Other Means	60 days	120 days	180 days

*Conviction for 106.041, 49.04, 49.07 or 49.08 (deferred adjudication for 106.041 is considered a conviction)

DWI Conviction Suspension Periods

Statute	Offense Level	Least Amount	Highest Amount
CCP §42.12 Sec. 13 (k)	First DWI Offense	90 days	1 year
CCP §42.12 Sec. 13 (k)	Second DWI within 10 years	180 Days	2 years
CCP §42.12 Sec. 13 (k)	Second DWI within 5 years	1 year	2 years
CCP §42.12 Sec. 13 (m)	MINOR DWI Probated	90 days	DLID required as condition of probation

***NOTE: TTC§521.344(c) - "The court shall credit toward the period of suspension a suspension imposed...for refusal to provide a specimen..." (180 days credit) {Not applicable to DWI 2nd or Minors §521.342(b)}

APPENDIX G

