

WHAT OUR CLIENTS SAY...

Mr. Keefer gets the job done.

What stood out to me the most were two things: 1. As a college student and as his client, I felt he spoke to me as an adult but understood that I was someone who lacked legal expertise and answered every and any question I had for him. 2. He portrayed a realistic picture of outcomes for my case and was as honest with me as I would expect any professional to be. At the same time, he is someone who was willing to exhaust any and all options for my case. He didn't stop exploring avenues when potential roadblocks arose. I had called several lawyers in the area and had met with one or two before I was recommended by a very reliable source to hire Mr. Keefer. The other attorneys told me that I was better off pleading guilty so I could be charged as a "first time offender". That decision would have left me facing: 6-12 months of probation, a hike in auto insurance rates, a restricted driver's license, and a mandate to attend ASAP classes as well as random drug testing. I told my story to Bob Keefer, just as I had done with other attorneys, but he told me right off the bat that I could fight the charges and should not accept having to plead guilty. I am pleased to say that I am not facing any of the aforementioned consequences as a result his services. He is a good man and is a good hire, especially for college students, if you want someone who will give you the "full picture" in an honest way and get the job done.

Bob Keefer Law Firm...

Simply put, the end results are what matter in the cases Bob specializes in. Be prepared to face the appeals process but this is where Bob and his staff are particularly able to be effective. I appreciated Bob's quick response to my e-mails and efforts to answer all the questions I had as my court day approached. I appreciated Bob's willingness to postpone court days until the best times for my unique situation. Mr. Keefer's staff were particularly helpful in my case and they have my sincere gratitude. They were also supportive and helpful through out my entire interaction with the law firm. Beth and the rest of Mr. Keefer's support staff may well be what gives him the extra edge during cases that go to trial. There was no doubt that Bob was "on my side" and approached the case with that mentality. If you are in need of a lawyer who specializes in the cases Bob handles chances are you are facing some severe penalties if found guilty. With that in mind I highly recommend the Keefer Law Firm

A great lawyer to go to when you have...

Bob Keefer is just the person you need when a member of your family has a legal problem. He is experienced and knowledgeable. He knows the local courts system intimately and has great judgment in handling his clients cases. He knows when to go slow and when to use his considerable advocacy skills. He gets great results.

He has poise and confidence which has a calming effect on his clients. He relates very well to young folks. He is exactly the kind of expert counsel that you need on your side when it counts the most. He did a great job for me and my son.

Mr. Keefer and his staff are superb!!!!!!

Mr. Keefer is an excellent attorney and I am so glad that I retained him for my case. He went above and beyond anything I expected from an attorney. In my case, I knew I was innocent, and Mr. Keefer did everything he possibly could do to prove that for me. I have no regrets about retaining him and honestly feel no one could have done a better job at representing me. His staff is wonderful as well. They are so very easy to work with and are there for whatever you need. I will always give the Keefer Law Firm as a referral when an attorney is needed. Mr. Keefer is a wonderful attorney and was always there for communication, even if it was a weekend. There aren't enough stars for the rating for this firm. Mr. Keefer and the Keefer Law Firm won a gold medal with me and I know they would for anyone who chooses him for representation!!!!!!!!!!

Mr. Keefer is AWESOME!!

Mr. Keefer and his staff did a awesome job on my case. I was faced with a DUI charge. I was also faced with losing a great job, my insurance was gonna go up. I decided to call Mr. Keefer In April a month before going to court. Mr. Keefer and his staff were able to get my charge reduced to improper driving and a fine. I would recommend Mr. Keefer and his staff to any of my family or friends he is well worth it. Thank's very much.

Honesty, Sincereness, Expertise,...

These are only a few of the ways that describe Bob Keefer. Mr. Keefer goes above and beyond to ensure his clients are defended to the fullest. I highly recommend his services.

Keefer Law service

We were very pleased with the service by Mr. Keefer and his staff. They were very professional, and gave us personalized attention. We never felt like a name on a file. Mr. Keefer is very experienced and straight forward. They did a great job with our case.

THE RESULTS OF SPECIFIC CASES REPORTED ARE NOT MEANT TO BE A PREDICTION OR GUARANTEE OF ANY OTHER CASE. EACH CASE CONSISTS OF FACTORS UNIQUE TO THAT CASE.

DUI/DWI Arrest Survival Guide

The Guilt Myth

Second Edition

**Bob Keefer, Esquire
and
Bob Battle, Esquire**

Word Association Publishers
www.wordassociation.com

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2nd Edition

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INTRODUCTION

IS THIS BOOK FOR ME? WHAT SHOULD I GET OUT OF IT?

Is this book for me?

If you have been charged with a DUI/DWI¹, this book could make a real difference in your life. It also contains information that is of value to anyone who drives. Even if you have never had so much as a drop of alcohol to drink in your entire life, a police officer might still suspect you of driving under the influence and decide to pull you over. While this book contains information that is potentially valuable to nearly everyone, if you have been arrested for driving under the influence—no matter at what stage of the legal process you are—you cannot afford to put this book down.

What should I get out of it?

This book will provide you with a general overview of DUI law nationwide. While a great deal of what you need to know is the same no matter what State you live in, no State is exactly the same when it comes to DUI law.

This book contains valuable information that pertains to every major step of the DUI legal process. It will tell you what will happen and what you will need to know if you are pulled over by a police officer, if you are arrested and if your case goes to trial.

If you are like most people and do not know very much about DUI law, you will learn a great deal from reading this book.

However, it will be far short of everything there is to know, which is why this book cannot take the place of a lawyer. Finding a competent, experienced attorney is the single most important thing that you can do after being charged with a DUI. It cannot be stressed enough: no matter what your situation, if you have been charged with a DUI, you both need and deserve a lawyer who will fight for your rights.

If you have been arrested for a DUI, you probably have a lot of questions about what you are going through and how the legal process will unfold. That is why, for the most part, this book is organized in terms of the kinds of questions that you will probably have along the way. Sometimes knowledge provides empowerment, other times it gives us peace of mind. If you have been arrested for a DUI, you could probably benefit from both. If by the end of reading this book you feel more empowered to play an active role in fighting for your rights, and feel less anxious about a process you did not understand before, then this book will have served its purpose.

Guilty or innocent, you deserve an experienced attorney to represent you, as well as the full rights and protections to which you are entitled. But if you know or firmly believe yourself to be innocent, chances are you *are* innocent. Unfortunately, you and the countless others who have been falsely arrested of DUI must contend with what we call *The DUI Guilt Myth*. According to the Guilt Myth, the very thing that has happened to you—a false arrest—simply does not happen.

The reality is that there are countless ways in which false arrests and convictions can and do happen. Because these scenarios are so rarely acknowledged or understood, this book also includes several *Guilt Myth* chapters, which discuss in detail the potential for “false positives.” In all likelihood, you may read about the exact scenario that landed you in the back of a police car under false pretenses. But as much useful information as these chapters contain, there are simply too many ways in which a person could be falsely accused or convicted of a DUI to explain them all. Reading this book cannot take the place of an experienced attorney with an in-depth knowledge of the ways in which false arrests and convictions occur, and more importantly how to fight them.

CHAPTER 1

FACT VS. FICTION—THE TRUTH ABOUT DUI

Driving Under the Influence (DUI) is one of the most common criminal infractions reported, but it is also one of the most misunderstood. Among the public, and even among many attorneys, the truth about DUI is riddled with myth. The unfortunate result is that many of those who are accused of driving under the influence do not know their rights. And because they do not know their rights, they do not obtain adequate legal representation and they receive unfair and unjust penalties, regardless of whether they are guilty or innocent. Before we look at each phase of the DUI process in detail, let us begin by setting the record straight on some common and damaging misconceptions.

Myth #1: “Most people accused of DUI are guilty.”

This is what we call *The DUI Guilt Myth*. Many people unconsciously assume that, if a person is arrested, “they must have done *something* wrong.” This assumption is especially widespread when it comes to DUI. Though it is understandable why someone might feel this way, this is not the way the law works. It is not the way the law *should* work. Being accused of a DUI is not a conviction. No matter what your situation is, if you have been accused of driving under the influence, you have every right to the fairness, justice and protection that the American legal system guarantees.

Myth #2: "These cases can't be won."

Because they hold this mistaken belief, and because they do not know their rights, many people end up pleading guilty to a DUI charge when they should have fought the flimsy evidence against them.

Myth #3: "DUI cases are just like any other criminal case."

This couldn't be further from the truth. DUI law is markedly different from many other areas of law. Some even say that there is a DUI exception to the Constitution. Most of the time, a police officer must have "reasonable suspicion" before pulling you over. In layman's terms, the reasonable suspicion requirement means that an officer must have some concrete reason to believe that a person is breaking the law. While this is always true if a single officer pulls you over on the road, consider the fact that, with sobriety checkpoints, a police officer needs nothing more than for you to drive through it.

Myth #4: "A DUI is a minor offense."

DUI laws get tougher every year. Politicians know that they can gain points among their constituents by increasing the penalties and prosecutions of DUI. Over the years, a DUI charge has become more and more serious in most States. This is yet another reason why it is so crucial that individuals understand the process and the rights they are guaranteed. Search for my Internet article on the 88 consequences of a Virginia DUI conviction.

Myth #5: “Once you have seen one DUI, you have seen them all.”

Every DUI case is different. One of the worst mistakes you can make—and a tragically common one—is to assume that your case is just like any other. It is not. While prosecutors must stick to a set mold to prove their case, a good defense lawyer will know how to break the mold in your favor.

Myth #6: “Any attorney can represent a person accused of DUI.”

This is like saying that it is fine to see a podiatrist for high blood pressure. Like medicine, law is an area where it is impossible to know and do everything. There is no way for one person to have all the necessary knowledge and experience. You might know a lawyer who you are sure is competent, decent and trustworthy—all of which are important traits to look for in an attorney—but these qualities cannot substitute for experience in the area of DUI law. Some lawyers spend the time and money to learn all they can about DUI defense. Most of those lawyers belong to the National College for DUI Defense. The College website can be found at www.NCDD.com.

CHAPTER 2

“WHAT ARE THE COSTS OF A DUI ARREST?”

If you have been arrested for driving under the influence, you have probably realized that the costs of a DUI arrest are great, both emotionally and financially. Emotionally, there is the shame of being arrested, of having to go to court, of dealing with an administrative suspension, and of telling your family, maybe even your boss. The emotional and psychological costs of a DUI arrest are different for everyone, but when it comes to the money, everyone is in the same boat.

Even if you decide not to fight the charges against you, your finances will still take a big hit. The initial costs are the fines, penalties and surcharges. You may also have to pay a fee to choose, within certain limits, when you serve your jail time so that it is the least disruptive to your life. There is also a program fee for enrollment in the alcohol classes and you will have to pay the DMV for reinstating your license.

It does not stop there. You may also have to pay for an ignition interlock device if the judge decides it is necessary. An ignition interlock device is basically a breathalyzer that is put in the steering column of your car. Unless it shows that your blood alcohol content (BAC) is below a certain level, the car will not start. Once the vehicle is running, you have to retest every fifteen minutes to one hour.

It also costs money when your license is taken from you when you are arrested. You will have a “restricted license,” which still permits you to legally drive a motor vehicle. Then there is a “hard suspension” when you cannot legally drive. If you are like most people, you will probably still need to get around, whether it is to and from work, your children’s school, the grocery store, and so on. You will not have to pay for gas, but public transportation is rarely free. If you continue to drive while your license is suspended, you will incur additional criminal charges and all the costs involved.

Another cost will be your insurance rates. After the Court suspends your license, you will need to have a certain kind of insurance for years after you can get your license back. If you can find an insurance company that provides it—not all do—this type of insurance is usually more expensive, as you would probably guess. Because this kind of insurance is a tell tale sign of a DUI, some insurance companies will refuse to insure you in the future.

CHAPTER 3

“HOW DO I AVOID BEING STOPPED BY THE POLICE?”

There are preventative steps you can take to avoid being pulled over in the first place. Many of these steps will help you avoid making the driving mistakes that might lead a police officer to suspect that you are impaired and decide to pull you over.

Know The Vehicle

Let us assume you are about to drive a car. If you are at all uncomfortable or unfamiliar with the car you are driving, you are much more likely to make mistakes or drive erratically. And if you are not driving well, you are more likely to get stopped by a police officer.

If you are driving a car you are not used to—a friend’s car, a car you just bought, or a car you have not driven in awhile—it is important that you take a moment to remind yourself where everything is before you start to drive: emergency brake, transmission, turning signals, windshield wipers, headlights, high beams, hazard lights and so on. To get an overall feel for the car, just grip the steering wheel and put your foot on the brake. Also make sure that the seat and steering wheel are adjusted properly for you.

Taking a few seconds to do this is especially important if you are used to driving a car with a different kind of transmis-

sion. If, say, you are driving an automatic when you are accustomed to a manual, spending a minute or two to familiarize yourself with the car can make the difference between getting where you are going safely and slamming on the brake in a frantic search for a non-existent clutch.

Also make sure everything on the outside of your vehicle is in working order and that your vehicle registration tags are current. Police officers often use a minor vehicle infraction like broken taillights or expired registration tags as a reason to stop a vehicle. Things like broken taillights are especially likely to get you pulled over at night when they can be easily seen.

Know Where You are Going

Before you start driving, know where you are going, how to get there, and how to get back home. Getting lost and trying to find the right road will inevitably lead to errors in your driving.

Know Where Not To Go—Avoid Sobriety Checkpoints²

Keep alert to sobriety checkpoints, especially during holiday periods. While the police are legally required to notify the public of where and when the checkpoints will be, you may not have gotten the information in time. Before you go out, check the newspapers or websites of your local area.

Know your Rights

If the unfortunate occurs, and you are stopped, know your rights and what to expect when you are pulled over.

CHAPTER 4

“I’VE BEEN PULLED OVER BY THE POLICE – WHAT SHOULD I KNOW?”

Let us say you are driving down the road and you see the flashing lights behind you. The first thing to keep in mind is that, as soon as the lights start flashing, the officer will begin collecting evidence for the report. The police report, as we will see, is an important document in a DUI trial, so it is very important how you conduct yourself and how you interact with the police officer. Everything that you do and say from this point forward might make it into the police report, including the reason that the officer pulled you over in the first place, as well as how you stop your car and how long it took for you to pull over. So pull over quickly but safely.

“Why have I been pulled over?” – Reasonable Suspicion

The first thing that you may wonder is why you have been stopped. What you should know is that, if the police officer suspects that you were driving under the influence, and pulls you over for that reason, the officer must have had “reasonable suspicion” before pulling you over. There are many things that give a police officer the necessary suspicion to pull you over legally for driving under the influence. The most common ones are listed below.

- Driving on or over the lane divide
- Drifting into the other lane
- Making a wide turn

-
- Making an illegal turn
 - Weaving in your lane
 - Braking frequently
 - Nearly missing an object or another car
 - Driving very slowly, generally more than 10 mph below speed limit
 - Swerving
 - Driving with your headlights off
 - Not making turn signals, or making inappropriate turn signals
 - Stopping in the middle of the road for no reason
 - Accelerating or decelerating too quickly
 - Following another car too closely

Of course, just because a police officer pulled you over for the way you were driving does not necessarily mean that you were driving drunk. As we will see, providing a non-alcohol related explanation for your driving—while it will not help you while you are on the road with the officer—may be crucial in your criminal case if you are charged with a DUI.

While you may feel that what the officer is doing is unfair, unreasonable, illegal or wrong, it is never a good idea to bad-mouth or insult the officer. At best it will make for a very unpleasant experience. At worst it could lead to your arrest. And again, what you say goes into the written report that the officer makes later. The Officer may have a video camera recording what you say and do.

“I’ve been pulled over—what should I do?”

Once you are stopped the officer will approach your vehicle to talk with you. He will first ask you to show your driver’s license, registration and proof of insurance. You cannot be arrested for refusing to identify yourself, but if you do not promptly provide the documents the officer asks for, it is legal for the officer to search your vehicle in any location within the passenger compartment where he believes a drivers license or vehicle registration may be. If this is something you want to avoid, be sure to have your license and registration in a location where you can obtain it immediately so the officer does not have the justification to search your car.

If he suspects that you were driving while intoxicated, the officer will be looking for probable cause to arrest you. From the moment he lays eyes on you he will observe your demeanor and smell the air in the car for any traces for any alcohol. The officer will look for a number of traditional indicators of intoxication, including:

1. Odor of alcohol
2. Bloodshot or watery eyes
3. Slurred speech
4. Flushed face complexion
5. Lack of coordination/fumbling to find your license

At some point he will ask you if you have consumed any alcoholic beverages. It is perfectly within your legal rights to politely refuse to answer the questions. The officer might still decide that he has enough reason to arrest you, but simply refusing to answer the question is not reason enough. If you

have not had anything to drink, the best idea is usually to simply say so.

But no matter how you answer, if the officer still suspects that you were driving under the influence, he will ask you to exit your vehicle.

“I’ve been asked to get out of the car—do I have to?”

If the officer asks you to get out of the car, you must do so or you will be arrested. If the officer pats you down, do not physically resist. He may then ask to search your vehicle. You have the legal right to refuse the search and should refuse. The officer cannot arrest you simply for refusing to consent to a search of your vehicle. In some limited cases, however, your car can be searched without your permission or a warrant, as long as the police officer has probable cause to believe that you have committed a crime. Even if you think that what the officer is doing is illegal, do not resist. If the officer illegally obtains evidence against you, it cannot be used at trial. No matter what else he does, if the officer has asked you to get out of the car, it is likely because he will ask you to take a field sobriety or breath test.

“I’ve been asked to take field sobriety tests—what do I do?”

“Field Sobriety Tests” (SFSTs) are subjective tests designed to determine if you are impaired. **DO NOT** take them. **DO NOT** take them. **DO NOT** take them. The purpose of these tests is to evaluate your motor skills and coordination, as well as your mental attention and ability to process information. You have the legal right to refuse to take a field sobriety test,

even if the officer does not ask your consent. A good way to refuse taking a field sobriety test—or anything that a police officer asked you to do—is to say, “I want a lawyer. If I am not under arrest please let me go. I do not consent to any tests except under implied consent.”

When giving the tests, the officer asks the subject to do one or several of the following five tests. The subject should follow instructions and not start until the officer specifically says to begin.

1. Horizontal Gaze Nystagmus (HGN)

In this test the officer is looking at what your eyes are doing. He will be looking to see if your eyes are wavering or if they cannot smoothly track and follow a finger or a pencil approximately 12 to 15 inches from your nose, slightly above the eyes. You will “fail” this test if the officer sees your eyes trembling or jerking even though the actual test employs an grading criteria.

2. One Leg Stand (OLS)

This test is designed to measure balance, while your mental attention is focused on something else. One possibility is that the officer will instruct you to place your hands at your side, to extend one foot six inches and count by thousands (“one, one thousand, two, one thousand, . . .”). The officer will be looking to see if you begin too early, lose count, sway, use your arms for balance, lose your balance or put your foot down.

3. *Walk and Turn (WAT)*

In this test, you will be asked to walk a nine heel-to-toe steps away, then turn and walk the same number of heel-to-toe steps back. You will “fail” this test if you begin too early, step off the line, lose your balance, take the wrong number of steps, use your arms for balance, or put space between your heel and toe.

4. *Finger to Nose*

This test involves standing erect with feet together, closing your eyes, extending your arms and touching your finger to your nose. You will “fail” this test if you begin too early, lose your balance or miss your nose.

5. *The Rhomberg Balance Test*

In this test, the officer will instruct you to stand erect, close your eyes, tilt your head back and estimate how long thirty seconds lasts. The officer will be looking for any muscle spasms or tremors and to see whether alcohol might have slowed down your perception of time.

“Did I pass the field sobriety test?”

Whether you pass or fail is based totally on the officer’s observations and impressions. Remember, these tests are entirely subjective—they do not conclusively determine whether you are drunk or not. Also keep in mind that the officer asked you to take field sobriety tests because he suspects that you were driving while intoxicated. At this point he has probably already decided to arrest you. It might surprise you that most people, sober or otherwise, “fail” these tests. You should

never take these tests as they simply provide evidence to be used against you.

There are a number of other factors that influence how you do on these tests, having nothing at all to do with alcohol. How even the pavement is, whether it is gravel or concrete, the volume of traffic passing by (which will likely slow down to stare at you), the amount of lighting available, and the weather (you could be shaking because you are cold, not intoxicated, for example)—all of these things impact how you do on a field sobriety test. In addition, your physical condition may affect the results, whether you are overweight, elderly, or have physical impairments of your limbs, back, or eyes. Even the type of shoes you are wearing might affect the test. Finally, you are probably *very* nervous, humiliated, angry, and tired.

The important thing to keep in mind, no matter what kind of field sobriety test you take and no matter how you think you did an experienced defense attorney will attempt to ensure that you are not convicted simply because of the police officer's personal opinion. In the next chapter we will take a closer look at field sobriety tests and their questionable validity as measures of intoxication and impairment.

Preliminary Breath Tests

The other test that you may be asked to take is a preliminary alcohol screening device test (PBT). Just like the field sobriety test, you have the legal right to refuse to take a PBT in Virginia and should always refuse the PBT.

Based on the alcohol content of your breath the PBT estimates the percentage of alcohol in your blood, which is what determines whether you are “above the legal limit.” However, a roadside breath test is not considered scientifically accurate, so it cannot be used as evidence against you at trial. However, it can be used as evidence to establish probable cause to arrest. A failed PBT is also a common justification for arrest. We will also scrutinize the reliability of these tests in the next chapter.

“Did I say too much?”—Incriminating Statements or Actions

One of the most common mistakes that people make when they are pulled over by a police officer is saying too much. It is important to remember that *everything* you say from the point you are approached by the officer until you are released from custody can, and most likely will, be in a subsequent police report and it may be used against you at trial. You need not say anything to the officer other than to show your driver's license and insurance information. I advise my clients to say only: “I want my lawyer. If I am not under arrest please let me go.” You do not want to discuss your evening with the officer, whether you had anything to drink or whether you think you are intoxicated.

Once you are arrested, the officer is then required to provide you with a *Miranda* advisory. A *Miranda* warning—which most of us know from movies and television—advises individuals of their constitutional right to remain silent, to not answer questions that would incriminate them and to have a lawyer present before answering any questions. The officer is re-

quired to read you your *Miranda* rights because, if he does not, *nothing* that you say can be used against you in a court of law, making it harder to prove that you committed a crime.

The problem is that most people do not know that they have the right to refuse to answer questions that might incriminate them *before* they are arrested and read their rights. The rights that are listed in the *Miranda* advisory are rights that we always have, not just when we are arrested. The less you say the better. You should consider telling the Officer “I want a lawyer and if I am not under arrest please let me go” immediately after giving the Officer your license and information.

CHAPTER 5

“THE GUILT MYTH”—FIELD SOBRIETY TESTS, SLURRED SPEECH AND ROADSIDE BREATH TESTS

There are a number of reasons that police officers give for arresting someone of a DUI. Three of the most common are a “failed” field sobriety test, slurred speech, and a PBT reading positive for alcohol. In this chapter we will examine each of these things in detail and show that, contrary to what is commonly assumed, they are far from infallible indicators of intoxication.

Field Sobriety Tests

Remember from the last chapter that by the time the officer has decided to ask you to perform a field sobriety test, he has probably already decided—consciously or unconsciously—to arrest you. At this point, the officer is already looking for evidence that you are intoxicated. As we all know, when we look for something—be it the car we are thinking about buying, a house for sale, or whatever else—we tend to find it everywhere. This is simply a fact of human psychology, and police officers are only human after all. However, this still introduces bias into a process that should be as objective as possible.

In spite of this bias, we would still hope that the officer has been trained to reliably interpret subjects’ performance on the field sobriety tests. We would assume that police officers are proficient at determining whether a person is intoxicated by watching the subject perform an FST.

And this is precisely what most people think. Most people assume that if someone failed a FST according to a police officer's judgment, the person was almost certainly drunk. This assumption is understandable given the stereotypical scenario that most people have in their heads: a guy who, when asked to walk a line, wobbled along before falling flat on his face. Even if we concede that reality does not always fit the stereotype, we would still like to think that police officers should be able to tell—maybe not 100 percent of the time, but at least most of the time—whether a person is drunk or not based on their performance.

Unfortunately, this is not the case. Two researchers from Clemson University decided to do an experiment to see how good police officers were at distinguishing someone who is under the legal limit from someone who is too drunk to drive, based entirely on watching them perform field sobriety tests.³ Fourteen local police officers were shown videotapes of 21 subjects taking six common field sobriety tests and were asked to decide which were too intoxicated to drive.” On average, the police officers determined that 46 percent of the subjects were legally intoxicated.

So how did they do? Not well, considering that not a single subject had consumed alcohol. None. The blood alcohol level of every subject was .00 percent! This is a particularly disquieting result considering that, if the officers had pulled these individuals over, they would have arrested an innocent person almost half the time.

In addition to performing field sobriety tests, the subjects in this study also performed a number of “normal abilities” tests, including counting from 1 to 10, walking normally, and reciting personal information (such as their Social Security number, drivers license number, date of birth, home address and phone number). The police officers—who judged 46 percent of the subjects to be intoxicated from watching them perform FSTs—determined that only 15 percent of the subjects were intoxicated when watching them perform these normal abilities tests. The moral of the story is this: compared to “normal” activities, field sobriety tests had the effect of making people appear drunk.

Okay, so police officers are not well trained on assessing the results of field sobriety tests. Would more training help? Can anybody make fairly reliable judgments based on field sobriety tests? Surely these tests have a sound basis in science.

Wrong again. Field sobriety tests have little to no scientific basis. Here is a quick history of the modern FST. In the late 1970s the federal government gave a grant to a research group called the Southern California Research Institute (SCRI) to come up with a procedure for administering field sobriety tests that was more reliable than the ones being used at the time. The tests that the group eventually came up with, by their own admission, were still far from perfect. The group’s own data showed that roughly half of subjects tested would have been arrested, despite their BAC being under the legal limit. Unsatisfied with these results, the federal government gave SCRI another crack at it. In 1981 they came up

with some better data. This time roughly 30 percent of subjects would have been falsely arrested.

In 1981, SCRI published a report claiming that the barely passable 32 percent false arrest rate has been brought down to a confidence-inspiring 9 percent. Is this because these tests have been refined and “standardized”? While this is certainly what they claim, a careful examination of the actual studies that yielded these results paints a very different picture. A few researchers obtained their data and experimental design through the Freedom of Information Act and made a startling discovery.⁴ What they found was that a large proportion of the subjects had blood alcohol levels so far over the legal limit that their performance on FSTs was nearly irrelevant. They suggest that this is what field sobriety tests are really only good for: identifying people with blood alcohol levels way over the legal limit.

While it might sound unfair or exaggerated, the legitimate scientific studies on field sobriety tests point towards an unsettling conclusion: field sobriety tests are not only unscientific and unreliable, but, in the way they are actually used in on the roads, are designed to make people fail.

You yourself may have been a victim of an officer’s inability to interpret your performance on field sobriety tests, as well as the lack of sound science behind these tests. If you are fairly certain, or completely certain, that you were not driving with a BAC above the legal limit, but you still “failed” a battery of field sobriety tests, then this is precisely what hap-

pened to you. The best thing you can do is to find an attorney who knows the truth behind these tests.

Slurred Speech

There is also a good chance that, in addition showing that you “failed” field sobriety tests, the police report also notes that you were slurring your speech. Slurred speech is one of those commonly accepted indicators of intoxication. But is it really true? Is slurred speech a reliable indicator of intoxication?

Yes and no. “Yes” in the limited sense that intoxication is indeed a common cause of slurred speech. If someone has been drinking heavily, it is likely that it will affect the person’s speaking fluency. And, yes, it goes the other way: if someone is heavily slurring his or her speech—and in the absence of a speech impediment or neurological disorder—the person has probably been drinking. Research has indeed shown that most people can differentiate between sober and intoxicated speech when listening to recordings of people talking.

However, this does not mean that it is possible to judge, with a high degree of reliability, that a person is above the legal limit simply based on listening to them talk. Drinking and driving, remember, is not against the law. What is against the law is to operate a vehicle with a certain blood alcohol content or while being significantly impaired. So let us put the question a different way. Can a person accurately distinguish between someone who is too drunk to drive versus someone who consumed alcohol but can nonetheless drive legally, all based on how they talk?

To that question the answer is decidedly “No.” Studies have shown that even experts in speech analysis are not that much better than the average person, or the average police officer for that matter, at making this kind of judgment. It is true that both experts and non-experts can usually tell a person who has been drinking heavily from someone who has not, but neither can consistently determine the relative amount of alcohol a person has consumed.

The other problem with using speech as an indicator of intoxication is that alcohol is not the only thing that causes one to slur one’s words. The most common of these other potential causes of slurred speech, and the most likely to lead a police officer to make an unfair assumption, is stress. Stress can have a host of different effects on speech, such as a higher pitch, stuttering, and, yes, slurring. And as we all know, being pulled over is always a stressful experience. When we are extremely preoccupied with saying the right thing—as we are when talking to a police officer—we often cannot seem to form a normal English sentence, much less speak eloquently. Fatigue can also cause slurred speech and many DUI arrests occur late at night when most people are fatigued.

The Roadside Breath Test

The PBT, which is used on the roadside, as well as the somewhat more sophisticated breath-test machine at the police station, are both subject to error. For the most part, both of these devices have the same weakness because they both work the same basic way—by measuring the alcohol content of the breath and using this measurement to estimate the alcohol content of the blood.

One of the most important factors that influence the results of both of these tests is breathing pattern. One study showed that holding your breath for 30 seconds before blowing into the breathalyzer increases the result a whopping 15.7 percent. Hyperventilating for 20 seconds, on the other hand, decreases it by 10.6 percent.⁵

Yet another way in which breathing pattern can affect the results of a breathalyzer test has to do with what part of the breath the machine is exposed to. In other words, different parts of the exhalation will give different blood alcohol readings. The first part of the breath, made up of air from the top of your lungs, has much less alcohol in it than the last part of the breath, which comes from the bottom of the lungs.

Unfortunately, many police officers, knowing this, give the subject instructions like “Blow hard! Keep going!” Following these instructions will insure that the machine is exposed to the alcohol-rich blood from the bottom of your lungs. It is staggering to consider how many falsely high breathalyzer results have been obtained—and how many people have been arrested as a result—because of these instructions and the device’s potential for inaccuracy.

In Harrisonburg, Virginia in 2008 Bob Keefer found a breath test result of over 0.60 BAC, the highest reading possible, a fatal dose for almost everyone. Two hours later the subject tested 0.00 BAC in a blood test; no alcohol whatsoever.

CHAPTER 6

"I'VE BEEN STOPPED AT A SOBRIETY CHECKPOINT— HOW DOES THIS WORK?"

While most DUI stops are made by individual officers on the road, there may be times when you encounter a sobriety checkpoint. There are a number of rules that govern how sobriety checkpoints are set up and conducted, rules that you should be familiar with. One of the most important is that the location of the checkpoints must be announced to the public before they are set up, commonly in newspapers and on the internet. There is nothing wrong with learning where the checkpoints will be in order to avoid them. That is your legal right.

Another important thing to know is that not all cars are stopped. Vehicles are selected by a mathematical formula, not by how people look or drive. Finally, checkpoints must minimize the average time each motorist is detained. This means that the officer cannot ask you to step out of your car or ask to you to take any tests unless there are noticeable signs of impairment—erratic driving, the smell of alcohol on the breath, slurred speech, glassy eyes, etc. If you do not show any of these signs, you should be allowed to drive on. If the officer does decide that you display signs of impairment, you will be directed to a separate area for field sobriety tests. From this point forward, it is no different from being pulled over by a police officer.

CHAPTER 7

"I'VE BEEN ARRESTED AND TAKEN TO THE POLICE STATION - WHAT HAPPENS NOW?"

You have been arrested. Your car has been towed away, or driven home by a passenger or other person who the officer determines is not impaired. Remember that you will still be under observation from the time you get in the police vehicle until you are released, and anything you say or do is noted and placed in a police report.

The best thing you can do is *pay attention*—both to what you are told and what you are asked to do. In order to collect viable evidence to be presented at trial, the police must follow very specific rules and procedures. No matter how competent an attorney you get, he or she will not have been with you when you arrive at the police station, so it is up to you to know if your rights have been violated or if these procedures have not been followed. This knowledge could make all the difference at trial.

The primary reasons why you have been taken to the police station—besides the required paperwork, fingerprinting, etc.—is for you to take a more “scientific” test of your blood alcohol level, one that can be used as evidence in court. Because of the time constraints on taking a proper test, this is almost always the first order of business once you arrive at the police station.

“Can I refuse to take a test?”

There are situations where you could refuse a test, but these situations are rare. If the officer suspects that you are under the influence of a drug or other substance, which breath tests cannot detect, then you can be required to take a blood test. Lastly, if you have a physical disability that makes it impossible to take a breath test, you may be excused from the requirement, but it is up to you to tell the officer of your disability so that a blood test can be arranged, if possible.

Aside from these special circumstances, refusing to take a test can have severe consequences and is usually not the wisest course of action. Virginia has an “Implied Consent” law. “Implied Consent” means that, simply by driving, you have already given your consent to a test. Going back on your “implied consent” by refusing to take a test will usually mean that your license will be revoked for at least a year with no restricted license available.

When the officer asks you to provide a specimen, you will be read an advisory informing you of your rights and the consequences of taking or refusing to take a test. If the officer does not accurately communicate your rights—if the officer misleads you, misinforms you, exaggerates the consequences of refusing to take the test or makes any threats or inducements to take the test—a judge may decide to throw out the evidence against you. So *pay attention* to what you hear so you can eventually discuss it with your lawyer.

“What kind of test should I take—blood, breath or urine?”

You probably will not be given a choice of tests.

“What do I need to know about the Breath Test?”

The breath test is the most common test that people are asked to take once they are taken to the police station, but it is also highly susceptible to error. If the test is not taken just right, then it will not accurately measure your blood alcohol concentration and your lawyer may be able to persuade the judge to throw it out. Below is a list of factors that can make a breath test unreliable. We will examine each of these factors in detail in the next chapter.

- Calibration of the Machine
- Residual Alcohol in the Mouth
- Belching, Hiccupping or Vomiting Prior to a Test
- The Temperature of Your Breath
- How Fast Your Body Eliminates the Alcohol
- Other Chemical Compounds in Your Mouth
- Diabetes

“What about a lawyer?”

You may and should ask to see a lawyer as soon as you arrive at the police station. Because you are now under arrest—where anything you say might be used against you—you should not say anything without a lawyer present or until you have talked to a lawyer.

Within a reasonable time after your arrest or booking at the jail, you have the right to make a local phone call to a lawyer, bail bondsman and/or any relative or other person. The po-

lice may not listen to the call to the lawyer and any communications made to your lawyer. Your call should be discrete and made in such a way that you cannot be overheard by any other person. Pay attention to your surroundings when you make the call and notice if the police or anyone else can overhear the conversation.

“When will I be released?”

Before you are released, the police will contact a Magistrate who decides whether you will be released without bail, with bail or kept in custody. Most likely, you will be released without bail and you will be given paperwork telling you when your next court date is and where the Court is located. This is called being released “on your own recognizance.”

If the Magistrate decides to set bail instead, you will be given additional paperwork. When you are released you should contact a lawyer regarding the possibility of lowering your bail or being released on your own recognizance instead.

If the Magistrate decides not to release you, you must be taken before the Judge on the next available Court day after your arrest. Generally speaking, this will occur within 48 hours of your arrest, whether you were arrested on the weekend or any other day during the week. If you are in custody when you appear in Court for the first time, the Judge must decide whether to adjust your bail or release you on your own recognizance. The Judge will consider several factors when making this decision, including the charges filed against you, your living arrangements, your employment, your family con-

siderations, prior criminal record, probation status, and any other reasons why you should or should not be released.

CHAPTER 8

"THE GUILT MYTH"—BREATHALYZERS

The breath test is the most common test that people are asked to take once they are taken to the police station, but it is also highly susceptible to error. If the test is not taken just right, then it will not accurately measure your blood alcohol concentration and your lawyer may be able to persuade the judge to throw it out. Below is a list of factors that can make a breath test unreliable.

Calibration of the Machine

The machine must be accurately calibrated. If it is not, it will not provide an accurate reading.

Residual Alcohol in the Mouth

The main reason for the test's potential inaccuracy is that, while it is supposed to measure how much alcohol is in your lungs, any residual alcohol in the mouth will result in a mistakenly high reading. In other words, the breathalyzer cannot distinguish between alcohol in the mouth (which does not reliably indicate intoxication) from alcohol in the lungs (which does). If there is any food trapped between the teeth, it will absorb alcohol and inflate the test result, as will any blood that is present in the mouth at the time the test is taken. If you suffer from GERD or acid reflux or have an ulcer you may be generating mouth alcohol that will falsely inflate the breath test result.

Belching, Hiccupping or Vomiting Prior to a Test

Time is the most important factor here. A person should not be tested for at 20 minutes after belching, hiccupping or vomiting, as this increases the amount of alcohol on the breath. The officer is required to constantly observe you to ensure that you have not belched, hiccupped or vomited within 20 minutes of taking the test. Constant observation is a rule that the officer must follow. If it is not followed, the results of the test may be called into question.

The Temperature of Your Breath

The breath test works on the assumption that your breath is 34 degrees centigrade. Studies done with this equipment have shown that the real average breath temperature for people who have been arrested on a DUI is closer to 35.5, with some as high as 37. This alone would mean that the result of the test would be between 10 and 20 percent higher than it really is.

How Fast Your Body Eliminates the Alcohol

Everyone has a different metabolism, but the breath test assumes that everyone is the same. This means that a person whose body gets rid of alcohol slower will have a higher BAC than someone with a faster metabolism, even after having the same amount to drink. Breath testing also assumes that the person is “post absorptive.” This means that the test assumes that the person is no longer absorbing alcohol into the blood. If you have a slow metabolism, you might still be absorbing alcohol by the time you take the test. If so, it will read your BAC as significantly higher than it actually is. If you know or suspect that you have a slower than average metabolism, you

may eventually argue that your metabolism skewed the result of your test. (We will return to topic of how metabolism can affect test results in Chapter 11.)

Diabetes

The EC/IR II is not able to distinguish between ethanol, the alcohol people drink, and isopropanol, the alcohol produced on the breath of diabetics with high blood sugar. For that reason, diabetics often receive false positives or inflated results on the EC/IR II.

CHAPTER 9

"I NEED TO CHOOSE A LAWYER—WHAT QUESTIONS SHOULD I ASK?"

So now you have been released. Do not wait. Now is the time to hire a lawyer who can guide you through the complex and ever changing field of DUI law. The process of preparing your case—the investigation, the motions to suppress evidence, the analysis of evidence, and more—needs to get started right away.

It is difficult to pick a lawyer, not only because there are so many out there, but also because—since you are not a lawyer yourself—you do not know what a good one looks like. What is worse is that many consumers fall prey to myths and misconceptions about lawyers and they wind up picking an attorney who is not qualified to meet their needs. Here are a few of the most common myths.

Myth #1: "All lawyers have the same experience and training."

We already touched on this myth in chapter 1 but it is worth mentioning again. Even if a lawyer has practiced law for decades, even if he or she has a fantastic resume, even if he or she has argued cases before the Supreme Court, there is no substitute for expertise in DUI law and experience defending clients who have been arrested for DUI.

Myth #2: “If a lawyer advertises that he takes DUI cases it is because he has experience in DUI law.”

This myth is similar to the first, but it is different in an important way. You may know how important it is that the attorney has experience in DUI law, but you might assume that, because an attorney takes DUI cases, he or she has the necessary experience. As a consumer, you know that advertising is often misleading. This is no less true when it comes to advertising for lawyers.

Myth #3: “The State Bar determines whether a lawyer can advertise as a DUI lawyer.”

The reality is that there is no requirement that a lawyer must meet before the State Bar permits a lawyer to advertise as a DUI attorney. The only thing is needed is a license to practice law.

Myth #4: “All law firms will take my case to trial.”

As strange as this may seem, many law firms are not committed to taking your case as far as it needs to go reach the best outcome for you. Some firms merely escort the client to court and then enter a guilty plea. Some competent lawyers refer to them as “dump trucks” since they take the client to court and dump him.

Myth #5: “All lawyers understand the breath machine.”

Actually, most lawyers have never even seen an evidentiary breath test machine. Many do not even know the name of Virginia’s new evidentiary breath test machine, the EC/IR II. Most do not know that EC stands for electrochemical and

that IR stands for Infrared. They do not know that the EC/IR II is made by Intoximeter. Those lawyers have no idea how to fight this gadget. You want a lawyer who has studied the machine and taken the certification course for the EC/IR II. You want a lawyer who has a machine available to him.

Myth #6: "Calling a Lawyer Referral service or using internet sites that offer to find you a lawyer service is the way to find a competent lawyer."

Lawyer Referral Services and internet sites are a nice idea, but they are far from perfect. Many do not adequately screen the attorneys they refer clients to.

Myth #7: "Lawyers who have a big ad in the Yellow Pages or a TV commercial must be successful because they can afford this advertising."

Just because a lawyer is on TV or has a big two-page yellow page ad does not mean he or she is successful or qualified. All it means is he or she shelled out a lot of money to make people think that. TV stations and yellow page companies do not care if the lawyer is competent; all they care about is that the check clears. Is that the way you want to decide who is going to protect you and your family?

Eventually you will want to speak with a number of attorneys who might represent you. This kind of consultation is usually free. The most important thing to remember when speaking with a potential lawyer is not to be afraid to *ask questions*. The best and most qualified lawyers will welcome your questions and they will take it as a sign that you have done your

homework. Remember that when you are interviewing an attorney, the attorney is also interviewing you to see if he or she wants to take your case. A good lawyer would rather represent a truly prepared client, a client who is committed to getting the best legal representation available.

Here are a few questions you should ask in order to make an informed choice of who will represent you.

- **“How many years have you been in practice?”**

This will tell you much about the attorney’s potential experience. But, also ask what they have done all those years.

- **“How much experience do you have representing persons who are charged with DUI?”**

You should leave the attorney’s office confident that you have spoken to someone who has real expertise and experience in DUI law.

- **“Do you have real experience handling a case like mine?”**

You do not want a lawyer who sees your case as a new experience that he or she would like to try. You want someone with the experience necessary to do the job for you.

- **“Are you certified on the standardized field sobriety tests?”**

You need a lawyer who knows more than the Court and the Officer about these tests. Better yet, try to find a lawyer who is a certified Instructor on these tests.

-
- **“Who in the office will actually be handling the case and what are their qualifications?”**

Most attorneys work with a team. The lawyer that you might be speaking with might not actually be the person who does the bulk of the work.

- **“Are you covered by a legal malpractice insurance policy?”**

There is really no two ways about this. Your attorney should have malpractice insurance. Malpractice insurance is just as much insurance for you as it is for your lawyer.

- **“Have you ever been disciplined by the State Bar?”**

You do not want a lawyer with a long disciplinary rap sheet and you deserve to know if your lawyer has been disciplined in the past.

- **“What are all the potential legal costs, including investigators, experts and the like?”**

The lawyer should be honest with you about what your case might cost. You want to be secure that the lawyer is not luring you in with promises of unrealistically low fees and costs.

- **“What challenges do you see in my case?”**

The lawyer should be able to explain to you what he or she sees as the challenges you face and what they could mean for the ultimate result.

- **“How will you keep me informed about my case?”**

You must feel comfortable with the attorney’s commitment to communicate with you. You should know

if you would really be kept informed of developments in your case.

- **“What will be the final outcome of my case?”**

A good attorney will not promise you a specific result, because it is always impossible to be certain how a case will turn out. Any other answer is dishonest and unethical. A good attorney can only promise to do his or her best job in defending you.

When you look for a potential defense attorney, tell him or her everything that you think is relevant, and then some. Something that you dismissed as a minor detail might make all the difference in your case. Most importantly, be honest. You have nothing to fear. Except in rare cases, if you are talking to an attorney face to face, even before he or she has decided to take your case, you already enjoy attorney-client privilege. This means that *nothing* you say could ever be used against you. If you ever have any doubt that your communication with the attorney is “privileged,” you should simply ask.

Now you have decided on a lawyer who has offered to take your case. You have paid good money and you have entrusted the lawyer to help you. Now you need to tell your lawyer everything about your case. Everything. A common complaint among defense lawyers is that they learned a critical fact that they needed to know, not from their client, but from the prosecutor or a witness. Withholding information can only increase your chances of being convicted. But no matter what, having found an experienced attorney to represent you, you should rest assured that you are well prepared for the next phase of the process: the trial.

CHAPTER 10

“MY CASE IS GOING TO TRIAL—HOW DO I PREPARE?”

You do not have to know everything about the trial process and how to argue your case—that is what an attorney is for. This chapter is simply meant to help you understand the basics of what the trial process looks like and the kinds of arguments that work in your favor.

Return Date

The process begins with a return date at which time your case comes to Court for the first time. At this time Court dates are set.

Pretrial Motions

After your arraignment, the process of arguing your case will begin. After your attorney has thoroughly reviewed the facts, the next step is to file pretrial motions. A motion is a document that your attorney files on your behalf asking the Court (i.e. the Judge) for a certain action. There are several different types of motions, each with a different goal. But filing successful motions, no matter what the specific type, will help you and your attorney to shape the trial process in a way that benefits your case.

- Motion to Suppress

When the prosecutors begin preparing their case against you, they start by collecting all the evidence that supports their

claim that you were breaking the law. However, just because they have collected it and want to present it at trial does not mean that it is automatically admissible. There are legal requirements that determine whether a piece of evidence can be presented at trial. An important part of making your case is arguing that the evidence that the prosecutors want to present at trial does not meet these requirements and therefore cannot be used against you.

A motion to suppress asks the court to “suppress” or exclude certain evidence from a trial because it was obtained improperly or illegally by the police officer. For example, a motion to suppress might argue that the officer did not have reasonable suspicion to pull you over. This motion would need to argue that the officer’s belief that you were committing a crime was not “reasonable.” This means that the officer’s justification for pulling you over must be something he actually saw. An anonymous tip, for example, might not be enough. If this motion were successful, all evidence that was made possible by pulling you over (which is nearly everything) might also be suppressed.

A motion to suppress might also question the results of the BAC tests that you took at the police station. Recall the discussion in chapter 6 about the various factors that can make the tests unreliable. Any of these reasons might be used as a basis to argue that the test results should be suppressed.

- Discovery Motion

This type of motion asks the prosecutor to release additional evidence. Discovery is based on the idea that the defense is entitled to all the information that will be used by prosecutors in their attempt to convict. Some of the time the prosecution will simply give your lawyer the evidence, making a discovery motion unnecessary. There is an informal discovery process that happens between the prosecution and the defense, without the judge getting involved. Each side provides the other with a list of the information that they would like to be given. The kinds of evidence that your attorney will receive in this informal discovery process include things like the names and addresses of prosecution witnesses, statements made by you, relevant evidence seized or obtained as part of the investigation, results of scientific tests, and all written or recorded statements of witnesses whom the prosecutor intends to call at a prospective trial.

However, if either side refuses to provide a piece of evidence that the other side requested, then a formal discovery process begins. This process requires filing motions so that the judge can decide whether to order that the prosecution give your lawyer the evidence you want.

- Motion to strike prior DUI convictions.

This motion asks the Court to make it so that any prior DUI convictions from the last ten years are not taken into account when deciding a sentence. As you might expect, the penalty goes up with each additional DUI you get.

The more of these motions that are successful—suppression, discovery, strike prior DUI convictions, pitches—the more likely the case against you will simply be dismissed without a trial. If not, your case proceeds to a pre-trial conference.

Pretrial conference

A pre-trial conference is an opportunity for the prosecutor and your attorney to discuss various options to resolve your case without a trial. The district attorney will offer a plea deal that you will consider with your attorney. If you choose to take the prosecution's offer, or to have your attorney counter with an offer of your own, your case may be resolved at this stage. If not, then you are set to go on to trial. Your trial in the General District Court in Virginia will be decided by the Judge. A jury trial is available in the Virginia Circuit Court at the request of the prosecution, the Accused or the Court.

Trial

The U. S. Constitution guarantees each criminal defendant the right to a speedy and public trial. Because of busy trial calendars in many courthouses, the right to a speedy trial has been given specific guidelines, which vary from State to State. These guidelines set time limits on how long you have to wait before your trial. If you are still in custody, you probably will not have to wait as long as you would if you were released on your own recognizance. If your lawyer needs more time to build your case, do an investigation or file motions, he or she can request that these time limits be extended. However, this decision to delay the trial is ultimately up to you: only you can waive your right to a speedy trial.

The jury trial is a hearing in which all of the evidence is presented to the jurors, with the Judge presiding. The trial will have witnesses from both sides, including the officer or officers who observed you from the time you were stopped until you were released from jail, as well as expert witnesses who will testify regarding the tests that were taken at the police station. You may also testify if you and your lawyer decide it is a good idea, and you may also call other people, such as passengers, who will testify on your behalf.

The process of selecting jurors from a pool of potential jurors is called “voir dire.” Both sides—your lawyer and the prosecutor—want to choose jurors who will be most sympathetic to their case. In voir dire, both sides are allowed to ask questions of potential jurors and each side is allowed to “challenge,” or reject, a certain number of potential jurors without having to provide a reason. The idea behind the process is that, if both sides are allowed to challenge potential jurors that they believe are biased against them, the jury will be fairly balanced when all is said and done.

Once the jury is selected, the trial will officially begin with each side offering opening statements. The opening statement that your lawyer makes to the jury provides an overview of your version of what happened. It is a story that your lawyer will attempt to persuade the jury of by providing evidence, questioning witnesses and poking holes in the prosecution’s version of events. But before your attorney can present your case fully, the prosecutors must present theirs. In a jury trial, the prosecution always presents its case first. Finally, once all

the evidence has been presented and all the witnesses have testified, both sides will present closing arguments. The jury will then be given its instructions as to how to weigh the evidence presented to them, after which they will begin deliberation. Once the jury finishes deliberating, all that is left is for them to present their verdict.

Expert Witness Testimony

At some point during the trial your lawyer will probably decide to call an “expert” to testify. Experts can be called to testify about the chemical tests, field sobriety tests, accident reconstruction, and other scientific aspects of your case. Experts are usually necessary to prevail in a DUI/DWI case.

Chemical Tests: Experts can discuss flaws with breath, blood and urinalysis tests. For example, the breath machine was not properly calibrated or fermentation occurred in the blood and a higher alcohol reading resulted.

Field Sobriety Tests: Field sobriety tests are considered “scientific,” but the results can work in your favor if your lawyer calls an expert witness to testify on your behalf. If you performed reasonably well on the field sobriety test—displaying good balance, coordination, attention and reasoning—the expert can use your performance on the field sobriety test to support the opinion that you were not under the influence at the time of driving. If you showed signs of physical impairment but not mental impairment, the expert will testify that, because alcohol always affects your mind before your body, the physical impairment was probably due to something other than alcohol.

Alcohol Level at Time of Driving vs. at Time of Testing: The use of BAC tests at trial is based on the assumption that, if a person was impaired at the time of the test, they must have been impaired at the time of driving. In other words, the inference is that the BAC falls as time passes. Experts can be called to rebut this inference in certain cases. Under certain circumstances the BAC could actually be rising, which means it is higher at the time of the test than when driving. Since this is an extremely technical area, an expert is essential to explain it to the jury and raise reasonable doubt as to whether the person was over the legal limit at the time of driving.

Accident Reconstruction: If there was an accident before the arrest, an expert in the field of accident reconstruction may be used to reconstruct the events of the accident based on facts in the case. The accident reconstruction expert can testify regarding the mechanics of the accident, and give his or her opinion regarding whether or not the accident was the fault of the impaired driver, the other party, or would have been unavoidable regardless of impairment.

CHAPTER 11

"THE GUILT MYTH"—"PROOF" IN THE DUI TRIAL

At trial, one of the most important pieces of evidence against you is the chemical test that you took at the police station. But consider for a moment that when a suspect takes a chemical test at the police station, the only thing the test actually proves—leaving aside the myriad ways in which these tests can go wrong—is that the suspect is drunk at the police station. And it is safe to say that there are no laws on the books that make it illegal to be drunk at a police station.

So how can you tell that the person was above the legal limit an hour or two before taking the test? The answer is a process called “retrograde extrapolation,” which means estimating what a suspect’s blood alcohol level (BAC) was based on what it is hours later, given how fast the average person metabolizes alcohol. For most people, their BAC falls over time as the body breaks down the alcohol.

But what if your metabolism is different from the “average person”? Studies have shown that it is relatively common for a person’s metabolism to vary substantially from the norm. And it is not as though we needed a study to tell us this. Every one of us has a friend who can eat twice what we can and still stay thin, or a friend who eats half what we do but is somehow our same size.

Not only does “retrograde extrapolation” assume that everyone’s metabolism is the same, it also assumes that a suspect’s BAC is always lower at the police station than it was in the car. While probably true in the majority of cases, it is not always something you can count on.

In order to be even remotely accurate, chemical tests at the police station must be taken after the suspect has reached what’s called the “post-absorptive” state—a state of equilibrium that is reached when the person is no longer absorbing alcohol into the blood stream. During the “absorptive state,” on the other hand, BAC is often rising. This means that if you test a suspect too soon, the BAC result might actually be higher at the police station than it was in the car.

And what determines when someone has reached the post-absorptive state? Average metabolism! The moral of the story is that if you are tested too early for your metabolism, not only will “retrograde extrapolation” produce an inaccurate result, but it will estimate in the wrong direction!

In response to these difficult issues of proof, many states have tried to simplify matters by passing laws governing how the chemical tests should be interpreted. Many states have laws that say that, unless you can prove otherwise, the BAC result at the police station will be inferred or with to be the same as it was when driving. These laws are an attempt to fashion a compromise between two facts: 1) retrograde extrapolation is inaccurate (as the defense would point out) and 2) BAC is almost always lower at the police station (as the prosecution would respond). So let’s just split the difference.

The first problem with these laws is that they are based on an untruth. BAC is hardly ever the same at the police station as it was in the car. The second problem, and potentially more important than the first, is that they shift the burden of proof. In our legal system, the prosecution has the burden of proof. In other words, a suspect is presumed innocent unless it can be proven otherwise beyond a reasonable doubt. But when it comes to the question of how to interpret chemical test results in DUI cases, the burden of proof falls on the defense. If you were arrested for drunk driving and your test result registered above the legal limit, it is up to you to prove that the results are inaccurate, as they so often are.

These kinds of laws have been ultimately responsible for countless DUI convictions. But because these laws are based on a basic faith in the unreliable and error-prone methods of breath testing and retrograde extrapolation, among these convictions have been countless people who should never have been arrested in the first place. It is imperative that you find an attorney who knows how to prevent you from becoming a victim of bad luck, which so often can mean the difference between a correct and incorrect test result.

CHAPTER 12

“WHAT DO I NEED TO KNOW ABOUT THE LAW IN MY STATE?”

—DUI LAW IN VIRGINIA

Differences in DUI Law in Virginia from Other States

The Virginia legal system for DUI's has several notable differences from other state these major differences will be outlined below.

DWI and DUI in Virginia are the Exact Same Offense

In most states there is a difference between DWI, “driving while intoxicated” and DUI, “driving under the influence.” For an example, in most states driving while intoxicated is a more serious offense than driving under the influence. Other states have even a third finding available such as operating while impaired or OWI.

In Virginia, there is no difference between DUI and DWI. Virginia Code Section 18.2-266 makes it illegal to drive while intoxicated or under the influence of alcohol and/or drugs or with a blood alcohol content of .08 or more.

The Virginia Code defines intoxicated as follows: “**Intoxicated**’ means a condition in which a person has drunk enough alcoholic beverages to observably affect his manner, disposition, speech, muscular movement, general appearance or behavior.”

Blood Alcohol Content (“BAC”) relates to BAC While Driving

Another difference from many states is that Virginia looks at the blood alcohol content (“BAC”) *while driving*. Other states will base their legal limit on the BAC at the *time of the taking of the breath or blood sample*. The distinction is that Virginia motorists are able to present evidence that their BAC while driving was lower than the subsequent blood or breath test.

Under Virginia DUI law, anyone driving on the highways of Virginia has, according to Virginia’s implied consent law, given their “consent” to a breath or blood tests if they are arrested for DUI. If this test results is a .08 or above, there are significant effects in the prosecution of one’s case. One way of proving DUI, known as the “per se” law, looks at nothing but the breath result. If it is .08 or above, the person is guilty of DUI; if it is below .08, the person is not guilty of DUI. However, since Virginia looks at the BAC at the time of driving, the defendant still has the ability to present expert testimony that his BAC while driving was in fact less than a .08.

Similarly, another way of proving DUI looks at the .08 or higher breath result as one of the pieces of evidence in the overall trial. Although the statute says that if the BAC is .08 or above, there is a “presumption” of intoxication, the Virginia Court of Appeals ruled in 2007 that such presumptions are an unconstitutional infringement upon the Constitutional guarantee of the presumption of innocence in any criminal trial unless the language is interpreted to mean that there is not a mandatory presumption of intoxication. The Virginia Court of Appeals ruled that the courts must interpret the

words “shall be presumed” to mean “may be inferred.” Thus, in a DUI prosecution under this section, the judge **may infer** (but is no longer **required to presume**) that someone is intoxicated if the prosecutor proves that they were a .08 or above while driving. Again, the defendant may present evidence that in fact his actual BAC while driving was below a .08 or that the results should not be given much weight because of issues with the machine or manner of testing. If the defendant is able to do this, then the judge may not make any inference based on the breath result.

Right to New Trial on Appeal to Circuit Court – Trial de Novo

General District Court, most commonly referred to as “traffic court” for DUI defendants, is the lower of the two trial courts in Virginia. There are no jury trials at the General District Court level. Doesn’t the Constitution of the United States guarantee a criminal defendant the right to a trial by jury? Yes.

Virginia grants anyone convicted in General District Court what is called a “trial de novo” on appeal to the higher trial level court in Virginia, known as the Circuit Court. Thus, any DUI defendant in Virginia who is unhappy with the judge’s ruling or sentence in the General District Court, has the ability to appeal to the Circuit Court and as soon as the appeal is noted, the conviction of the lower court is completely wiped off his record. I like to tell my clients that it is just like taking an eraser to a blackboard, and the client is in the exact same position that they were prior to the first trial (i.e. they are presumed to be innocent and have not been con-

victed of DUI.) Or, to use a golf analogy, Virginia allows all DUI clients a “Mulligan” on their first DUI trial!

The trial courts rule on both fines and jail time and license suspension issues

In many states, a DUI charge leads to two separate trials. The trial in court in front of a judge who determines whether someone is guilty and what fine and/or jail time someone receives, and in administrative license hearing in front of that state’s Division of Motor Vehicles. Virginia does not have a separate hearing for the determination of the status of someone’s driver’s license. By statute, the judge has to suspend the person’s license for a specific time based on whether it is a first or subsequent offense. The judge has the authority to grant a Restricted License allowing the person to drive to work, school, alcohol education classes and certain medical and family driving.

VIRGINIA DUI PENALTIES

Administrative License Suspension (ALS)

For a first DUI offense and/or breath test refusal, your driver’s license will be automatically suspended for seven days if your BAC is 0.08 percent or higher.

For a second DUI offense and/or breath test refusal, your license will be automatically suspended for 60 days or until you go to trial, which ever comes first.

For a third DUI offense and/or breath test refusal, your license will be automatically suspended until you go to trial. Conviction of a DUI offense will result in suspension of your driver's license and other penalties in addition to the administrative suspension.

First Offense - Penalties

i) **BAC < .15**

Class 1 misdemeanor (Up to \$2,500 fine and 12 months in jail) with a mandatory minimum fine of \$250.

ii) **BAC .15 to .20**

If the person's blood alcohol level as indicated by the chemical test administered as provided in this article was at least 0.15, but not more than 0.20, he shall be confined in jail for an additional mandatory minimum period of 5 days or,

iii) **BAC > .20**

If the BAC level was more than 0.20, he shall be confined in jail for an additional mandatory minimum period of 10 days.

License Suspension

License revoked for 1 year. Eligible for immediate Restricted Operator's License. Ignition Interlock required for BAC of .15 or above.

Second Offense - Penalties

- A) Committed within less than 5 years from a prior offense
- Minimum \$500 fine

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- Confinement in Jail for one month to one year. 20 day mandatory minimum jail sentence.
 - If the BAC was between .15 and .20, additional 10 days mandatory minimum jail sentence.
 - If the BAC was greater than .20, additional 20 days mandatory minimum jail sentence.

B) Committed within 5 to 10 years from a prior offense

- Minimum \$500 fine
- Confinement in Jail for one month to one year. 10 day mandatory minimum jail sentence.
- If the BAC was between .15 and .20, additional 10 days mandatory minimum jail sentence.
- If the BAC was greater than .20, additional 20 days mandatory minimum jail sentence.

License Suspension

License revoked for 3 years.

- 2nd conviction within 5 years- eligible for Restricted Operator's License after 1 year. Ignition Interlock required for Restricted OL.
- 2nd conviction within 5-10 years- eligible for Restricted Operator's License after 4 months. Ignition Interlock required for Restricted OL.

Third Offense - Penalties

A) All 3 committed within 5 years period

- Class 6 FELONY: 1-5 years imprisonment; or up to 12 months in jail and \$2,500 fine.
- Mandatory minimum jail sentence of 6 months
- Mandatory minimum fine of \$1,000.

B) All 3 committed more than 5 years and up to 10 year period

- Class 6 FELONY: 1-5 years imprisonment; or up to 12 months in jail and \$2,500 fine.
- Mandatory minimum jail sentence of 90 days.
- Mandatory minimum fine of \$1,000.

License Suspension

License revoked indefinitely.

Fourth Offense in 10 Years- Penalties

Class 6 Felony with mandatory minimum 1 year imprisonment and mandatory minimum \$1,000 fine

License Suspension

License revoked indefinitely.

Transporting Children While Under the Influence

Conviction of any DUI offense involving a juvenile passenger (age 17 or younger) in the vehicle at the time of the offense carries an additional mandatory five-day jail term in addition to all other fines and jail sentences. You may also be assessed an additional fine of at least \$500 and up to \$1,000.

A second DUI offense with a juvenile (age 17 or younger) in the vehicle carries an additional 80-hour community service requirement in addition to all other fines and jail sentences.

Multiple Offenders and the Trauma Center Fund

Virginia also requires anyone has been previously been con-

victed of DUI/DWI in any state to pay \$50 to the Trauma Center Fund to subsidize the cost of emergency medical care to accident victims in alcohol or drug use car crashes.

Virginia Alcohol Safety Action Program (ASAP)

If convicted under Va. §18.2-266 (DUI/DWI statute) or Va. §46.2-341.24 (DUI/DWI of a commercial vehicle), Virginia statute requires enrollment in ASAP. This course costs at least \$300. The program is 20 hours long and focuses on substance abuse and driving, substance abuse and health, and self-evaluation of potential for substance abuse.

Ignition Interlock Program

Virginia requires that anyone convicted of a second DUI or anyone that has a BAC greater than .15 for their first DUI have an ignition interlock system installed. This system records the drivers BAC via breath test each time the car is started. It also requires that the driver blow into the breath analyzer as he drives.

8 SECRETS YOUR PROSECUTOR DOESN'T WANT YOU TO KNOW ABOUT YOUR VIRGINIA DUI

1. If everyone insists on their constitutional right to go to trial, the prosecutor will be in court all day.

2. In most cases, the mandatory minimum sentences for DUI are so harsh that a defendant in a DUI trial risks absolutely nothing by going to trial.

Many clients ask me if a judge will penalize them with a harsher sentence if they assert their right to trial. The Virginia legislature has now raised the minimum sentence for all DUI cases to such a high level, that, if you decide to go to trial on your case, in most instances, as a practical matter, you are going to get the same sentence as the person who pleads guilty.

3. The prosecutor doesn't want to be there.

No one takes a job at a prosecutor's office because they fantasized about prosecuting in traffic court! In most jurisdictions, the prosecutors would rather be prosecuting their felony cases than handling a traffic court docket. Furthermore, the prosecutor has 20 to 30 other cases with attorneys on the traffic court docket that they must handle that day. When Bob Battle was a prosecutor in Fairfax County, there would be at least five traffic courts with five different prosecutors going on every day. The first prosecutor to arrive would get to pick

which courtroom they would be in. The only consideration on every prosecutor's mind was to pick the judge that was known to be the fastest, so they could be through with court as soon as possible.

4. The prosecutor is unprepared.

In the vast majority of jurisdictions in Virginia, prosecutors do not look into traffic cases ahead of time. Most of my clients are shocked when I tell them that it is impossible for me to contact a prosecutor with knowledge about their case prior to the court date to discuss their case, because the prosecutors do not look into the cases ahead of time. In most jurisdictions, if someone shows up without an attorney, the prosecutor does not get involved. Thus, it is impossible for someone attempting to represent himself in these jurisdictions to discuss a possible plea bargain with the prosecutor, because the prosecutor will not speak to them. In some jurisdictions, such as Virginia Beach, there is not even a prosecutor for any traffic case, even a DUI with an attorney!

5. The police officer is unprepared.

Your case is just one of an entire docket full of cases that the officer has on that date. It is not unusual for an officer to have 5 to 10 DUI cases on one date in addition to dozens of other traffic tickets. The officer often has little if any recollection of your arrest. That becomes apparent time and time again in court when I object to an officer testifying by reading from his notes and, after my objection is sustained by the judge,

the officer clearly has no independent recollection of the arrest.

6. Most prosecutors know very little about the science (or lack thereof) behind field sobriety testing.

At no time during law school does the professor ever say, “Today we’re going to learn about standardized field sobriety testing.” A thorough knowledge of these tests would actually hurt their cases and prevent them from making arguments that I routinely hear prosecutors make to judges while trying to argue that the results of these tests should be given more weight than they were ever intended to. For example, the three standardized field sobriety tests were only used to predict a BAC of .10 or above. Since the legal limit is now .08, there is almost no weight that a judge could give to these tests on someone with a BAC of .08 or .09.

7. The police officer did not follow proper procedures for the field sobriety tests.

If a police officer receives proper training about field sobriety tests, they will be told the proper standards and procedures according to the National Highway Traffic Safety Administration (“NHTSA”). However, for example, on the “follow the pen with your eyes” test (the horizontal gaze nystagmus test, or HGN), the manual says that if the suspect moves his head during the test, the officer should use his flashlight or his free hand as a chin rest of the suspect. Over 20 years of practicing law, I have **never** seen an officer use anything as a chin

rest for a suspect, even though in the vast majority of those cases the officer testifies that the suspect was swaying and unsteady on his feet! The manual also states that the walk-and-turn and one-leg stand test should not be done if the suspect is over 50 pounds overweight or has physical impairments that could affect his balance. The manual also states that the walk-and-turn test “requires a line that the suspect can see.” This is rarely done.

8. The breath testing equipment is inaccurate.

The breath testing machine is just that- a machine. The machine uses an assumption to calculate the amount of alcohol in a person’s blood based on the amount of alcohol that is released into a person’s breath. The amount can vary from between 1100 and 3200. However, the machine uses a standard ratio of 2200, the average between the two. If you exchange alcohol at the 1100 rate, the machine gives a reading twice as high as it should. On the other hand, if you exchange at the 3200 rate, it gives a reading half as high as it should. In any event, the principle is flawed and readings can vary up to 50% from the actual breath content.

On April 23, 2008, Virginia entered into a contract to purchase a new breath tester. On that same day, in accordance with its Regulations for Breath Alcohol Testing, Virginia began listing Intoximeter’s EC/IR II with the Virginia test protocol as an approved breath test device.

Alka Lohmann was the chief of Virginia's then unaccredited breath alcohol section. At the May 5, 2008 Scientific Advisory Committee meeting, Ms. Lohmann gave a status report on the EC/IR II. She reported that out of 50 states this tester is used in only four states besides Virginia: West Virginia, Wisconsin, North Carolina and Tennessee. Ms. Lohmann did not indicate why only 10% of the states used the EC/IR II. She stated that the new tester offered enhanced communication capabilities, increased trouble shooting from the lab and the ability to use a dry gas. Ms. Lohmann was asked about the types of reports that can be requested related to the device. She stated that the same reports presently available will be available for the new machine.

One of the basic principles of analytical chemistry is the each analysis such be corroborated by an independent, alternative method. Agreement between the two different analytical methods insures the reliability of the results.

The name EC/IR II implies that the machine will measure the subject's alcohol concentration in two methods: EC (electrochemical or fuel cell) and IR (infrared technology). In so doing, the EC/IR II would insure reliability of its results by these different analytical methods. This internal corroboration would give the EC/IR II a distinct reliability advantage over devices utilizing only one technology.

Unfortunately, Intoximeter was unable to coordinate the different analytical methods. For that reason, the device does not employ two independent alternative methods to measure

alcohol concentration. Instead, the EC/IR II uses only the fuel cell to measure alcohol and determine blood alcohol content. The infrared is used to monitor breath sample quality and to detect mouth alcohol.

The fuel cell component does not have the ability to detect mouth alcohol. The fuel cell merely measures total concentration of alcohol present whether from lung air or mouth.

Fuel cells change in sensitivity over time which requires more frequent calibrations than IR detectors. When the electrode microstructure changes it causes drift in the sensor baseline. That drift takes the EC out of synchronization with the IR detector.

Recalibrations of the instrument every couple of weeks is very time consuming. Some states have resolved that issue by disabling the IR detector entirely. Once the IR detector is disabled the device has no capacity for detecting mouth alcohol.

CONCLUSION

A DUI charge is liable to make you feel overwhelmed and at the mercy of a Court system, police system and legal system that you do not understand. With the police and the prosecutor trying to convict you, you might think that it is useless to fight the charges against you.

The goal of this book is to help you feel more in charge of this potentially overwhelming ordeal, to shed some light on what you are going through, and to help you find a qualified defense attorney who will work to ensure that justice is done. When it comes to your case, justice means demanding that the police follow proper procedure, that only legally admissible evidence is presented at trial, and that you are not convicted on the basis of anyone's opinion or prejudice.

Regardless of the particulars of your case, you deserve to find a lawyer who knows what your are going through, who knows what you are up against and who has years of experience going to bat for others in your situation by fighting the *DUI Guilt Myth*. And a chance to fight for your rights is not simply what you deserve. It's the law.

ENDNOTES

¹ Driving Under the Influence (DUI) and Driving While Intoxicated (DWI) are only two common names given for the crime of operating a motor vehicle while intoxicated. From this point forward, we will use the name DUI as a generic label for this crime. While DUI and DWI are the most common, many States have different names for driving under the influence, including DUII (Driving Under the Influence of Intoxicants), OMVI (Operating a Motor Vehicle while Intoxicated), OUI (Operation Under the Influence) and still others. In certain States you can be charged for two separate crimes, a DUI and a DWI, where only one hinges on blood alcohol level.

² You should find out whether your state conducts Sobriety Checkpoints. Though most states have them, some have made them illegal.

³ Cole and Nowaczyk. "Field Sobriety Tests: Are they Designed for Failure?" *Perceptual and Motor Skills Journal*. 79 (1994): 99-104.

⁴ Hlastala, Polissar and Oberman. "Statistical Evaluation of Standardized Field Sobriety Tests." *Journal of Forensic Sciences*. 50(3) (2005).

⁵ "How Breathing Techniques Can Influence the Results of Breath-Alcohol Analyses." *Medical Science and the Law*. 22(4) (1982): 275

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