INSIDE THE MINDS

Strategies for Defending DUI Cases in California

Leading Lawyers Provide Their Insight with Respect to the Prosecution and Defense of DUI Cases in California

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ASPATORE

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Selected Advanced Strategies for DUI Defense

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Introduction

The Author has had the benefit of serving as a prosecutor and a criminal defense attorney for more than twenty five years. Steven Andrade has successfully handled thousands of DUI cases for the prosecution and the defense. Hopefully, the selected topics discussed in this excerpt will be of interest to lawyers and lay persons alike.

Developing Defense Strategies and Arguments

The Benefits of Having Previous Experience as a Prosecutor

The Ventura County District Attorney's Office had a no plea bargaining policy. In some cases, however, a prosecutor could use his or her discretion in the interest of justice. For example, if a defendant had a defense to the charged offense, the complaint could be amended to a more appropriate charge. Experience as a prosecutor provides insight as to what kinds of arguments will be persuasive to prosecutors. If there is a viable defense to a driving under the influence (DUI) charge—e.g., a rising blood alcohol level defense, a no driving defense, or a drinking after the driving defense—a good prosecutor will know that the case may be difficult to win in a trial if the defense is well presented. A dismissal or generous offer will often be made.

As good prosecutors gain experience, they also gain better judgment. Better judgment can result in a prosecutor's giving a defendant the benefit of the doubt in a close case, especially if there will be severe consequences from a conviction. For example, if a truck driver is caught driving his personal car while under the influence of alcohol, a compelling argument can be made that since a DUI conviction will likely result in loss of employment and family income, a reckless driving offer may be appropriate. Good prosecutors in situations like this may require higher penalties in exchange for the charge reduction, such as a higher fine, a longer alcohol education program, community work service, or even a jail sentence. Decades ago, I defended a truck driver who was driving his car while drinking a glass of whiskey. It was a perfect rising

blood alcohol level defense; he was literally drinking as he was driving. To save the truck driver's job, the prosecution eventually offered a reduction of the charge to reckless driving. My client received plenty of punishment for the conviction, but he kept his job.

It is important for defense attorneys to know the prosecutors and judges in the community where they practice. After working with prosecutors and judges for years, attorneys learn what arguments will work with which prosecutors and judges. A sound strategy is to do whatever you can to negotiate settlement of a case with a prosecutor or judge who will be responsive to your arguments. Of course, there are always prosecutors who will never accept any defense argument and will never consider a reasonable offer. For settlement purposes, these prosecutors should be avoided.

The Science of Alcohol Absorption and Elimination

Forensic alcohol experts are frequently called in DUI cases to express opinions concerning accuracy of chemical test readings and scientific principles relating to the absorption and elimination of alcohol.

Typically, after alcohol is consumed, a person's blood alcohol level is rising. Many factors affect the amount of the increase in blood alcohol level and the time it takes for the alcohol to be fully absorbed. Experts will consider the type of alcohol consumed, when the alcohol was consumed, the amount and type of food consumed, whether the food was consumed with, before, or after the alcohol consumption, and whether the person is male or female.

Food in the stomach delays the absorption of alcohol. On an empty stomach, alcohol can be fully absorbed in thirty minutes. With a full stomach, alcohol may take more than ninety minutes to be fully absorbed. While the alcohol is being absorbed, the body is also eliminating alcohol at an average rate of about .015 percent per hour. Rates of alcohol elimination can vary greatly, but most average social drinkers eliminate alcohol at a rate between .01 percent and .02 percent per hour.

In the absorption phase, the person's blood alcohol level is rising because more alcohol is being absorbed than is being eliminated. As the alcohol in the digestive system decreases, so does the rate of absorption. When the absorption rate matches the elimination rate, the person's blood alcohol level plateaus, or remains the same. This plateau phase can last for thirty minutes or longer, depending on many factors.

When the rate of absorption falls below the rate of elimination, the blood alcohol level is in the elimination phase; the blood alcohol level is declining. Experts will try to determine when the alcohol was fully absorbed and then, by extrapolation, render an opinion as to a person's blood alcohol level at an earlier time.

For example, let us assume a traffic accident at 3 p.m. If an expert determines that consumed alcohol was fully absorbed at 3 p.m., and a chemical test at 7 p.m. indicates a blood alcohol level of .06 percent, an expert could testify that at 3 p.m., with four hours of elimination, the person's blood alcohol level at the time of the accident would have been about .12 percent (4 x .015 = .06 + .06 = .12). This would support the prosecution by establishing that the driver's blood alcohol level was above .08 percent at the time of the driving.

But extrapolation can work for the defense, as well. For example, if we assume a traffic accident at 3 p.m., and a chemical test at 4 p.m. indicates a blood alcohol level of .09 percent, the prosecution would have the benefit of an inference that the driver's blood alcohol level was above .08 percent at the time of driving because the chemical test was administered within three hours of the driving.[1]

Expert testimony, however, can be used to rebut this inference. A forensic alcohol expert would know that estimating the blood alcohol level at 3 p.m. would depend upon whether the blood alcohol level was in the absorption (rising) phase, plateau (level) phase, or elimination (declining) phase. If an expert determines that the driver was in the

[1] CAL. VEH. CODE § 23152(b). JUDICIAL COUNCIL OF CALIFORNIA, CRIMINAL JURY INSTRUCTIONS (CALCRIM) 2101, 2111 (2014).

absorption phase at the time of the accident, the person's blood alcohol level would have been rising at the time of the accident. The blood alcohol level would have been lower than .09 percent at the time of the driving, perhaps as low as .07 percent. This is an example of our next topic—the rising blood alcohol level defense.

The Rising Blood Alcohol Level Defense

A rising blood alcohol level is probably one of the best defenses to DUI prosecutions. For example, if a driver had just finished drinking and is pulled over for a minor infraction, a significant amount of time may pass before a chemical test is administered. The officer will talk to the driver, get the driver out of the car, and administer field sobriety tests before administering any chemical test. By then, forty minutes might have passed, and the last two-shot drink the driver consumed is now in his bloodstream. If the defense can prove that the last two-shot drink was consumed shortly before the driving, any forensic alcohol expert would testify that the alcohol from the last drink would not have been in the driver's bloodstream at the time of the driving. This expert testimony may serve to raise a reasonable doubt as to a driver's guilt.

Unfortunately, most drivers detained by officers have not had training with respect to the absorption of alcohol. After being asked about alcohol consumption, some drivers either deny drinking anything or say they had two or three drinks hours earlier. The better, and usually honest, answer is for a driver to admit that he recently finished drinking. The fact of the matter is that people do not usually go to bars, drink for a while with their friends, and then wait ninety minutes before they drive home. The normal sequence of events is that the driver will have dinner with alcohol, alcohol after dinner, and then, after a last drink, drive home.

It creates major problems for the defense when drivers think they will be able to talk the arresting officer out of an arrest by saying they stopped drinking hours earlier. If drinking stopped hours before the

driving, the alcohol would normally be fully absorbed, and the blood alcohol level would be in the elimination (declining) phase. Thus, these usually inaccurate statements make things worse for the defense by establishing that the driver's blood alcohol level was declining at the time of the driving. The prosecution expert will add .015 percent per hour of elimination for every hour that passes between the driving and the chemical test. Accordingly, if the test result is .08 percent an hour after driving, the prosecution expert will testify that the blood alcohol level was higher, perhaps .095 percent, at the time of the driving.

The Drinking After Driving Defense

Occasionally, a driver will be contacted by law enforcement a significant time after the driving. If there is an accident, and the driver walks or gets a ride home, the driver may be home for a long time, perhaps an hour or more, before officers contact him. Under these circumstances, even if the driver's appearance, coordination, and chemical tests indicate impairment from alcohol, the prosecution may have difficulty proving that the driver, distraught over the accident, did not drink the alcohol after the accident. If a driver can establish that drinking occurred after the driving, the DUI case may be defensible at trial, or the case may resolve for a much less serious charge of leaving the scene of an accident.[2] However, every case must be evaluated carefully. The nature of the accident and any witness statements relating to the driver's condition before and shortly after the accident must be considered.

Field Sobriety Tests

Many studies have recommended that law enforcement officers use specific field sobriety tests to evaluate a driver's impairment. As a result of numerous scientific studies, recommended field sobriety tests include Horizontal Gaze Nystagmus (HGN), Walk and Turn (WAT), and the One-Leg Stand (OLS). One study concluded that

[2] CAL. VEH. CODE § 20002(a).

with proper administration of these three tests, the reliability rate for identifying drivers with a blood alcohol level above the legal limit is at least 90 percent.[3]

An experienced forensic alcohol expert, especially one who has been involved in controlled alcohol studies, will provide invaluable assistance to a DUI defense lawyer in terms of challenging prosecution claims that the field sobriety tests establish impairment. In addition to problems with the manner in which the officer administered and evaluated the driver's performance on the tests, the age, weight, and health of the driver may affect the validity of the officer's conclusions.

Although some field sobriety tests are useful, the Horizontal Gaze Nystagmus test, if properly performed and if the results are accurately reported, may be the most helpful to the defense. To administer a Horizontal Gaze Nystagmus test, the officer uses a stimulus, perhaps the tip of a pen or a finger, and moves it side to side in front of the face of the suspect. The suspect is asked to hold his or her head steady and follow the stimulus with his or her eyes. The officer should start with the stimulus in the center position and then move the stimulus to the subject's extreme left, then to the extreme right. At least two passes should be made for each eye.

Three things happen when a subject has alcohol in his or her system. The first is that the eyes will not track the item smoothly; the eye will jerk as it is following the moving item. This reaction does not necessarily indicate that the subject's blood alcohol level is .08 percent or above, but it is consistent with alcohol being in the system.

[3] Important studies include: MARCELLINE BURNS & ELLEN W. ANDERSON, A COLORADO VALIDATION STUDY OF THE STANDARDIZED FIELD SOBRIETY TEST (SFST) BATTERY (1995), *available at* http://www.drugdetection.net/ NHTSA%20docs/Burns%20Colorado%20 Study.pdf; MARCELLINE BURNS & TERESA DIOQUINO, A FLORIDA VALIDATION STUDY OF THE SFST BATTERY, *available at* http://www.drugdetection.net/NHTSA%20docs /Burns%20Florida%20Study.pdf; and JACK STUSTER & MACELLINE BURNS, VALIDATION OF THE STANDARDIZED FIELD SOBRIETY TEST BATTERY AT BACS BELOW 0.10 PERCENT (1998), *available at* http:// www.drugdetection.net/NHTSA%20docs/Burns%20Validation%20of %20SFST%20at%20BAC%20below%200.10%20percent%20San%20Diego.pdf.

Second, when the stimulus is moved far to the side, and the eye is in the corner, there will be a distinct, sustained bounce. That, too, is consistent with there being alcohol in the system, but does not necessarily indicate that the subject's blood alcohol level is .08 percent or above or whether the person is under the influence of alcohol.

The third factor is the most important: Does the nystagmus, or bounce, start prior to 45 degrees? To determine whether the onset of nystagmus or bounce is prior to 45 degrees, the stimulus should be moved slowly from the center position to a 45-degree angle relative to the center position and held there. If the eye begins jerking or bouncing prior to the 45-degree position, that finding should be noted. Sometimes, officers are trained to look at whether there is white in the corner of the eye during the bouncing. Normally, if the nystagmus or bounce starts prior to 45 degrees, it is a good indication that the person's blood alcohol level is .08 percent or higher. If the bounce does not start prior to 45 degrees, many experts would expect the subject's blood alcohol level to be below .08 percent.

The Horizontal Gaze Nystagmus test is a reliable test for the vast majority of subjects. However, approximately 4 percent of the population may display nystagmus naturally. Nystagmus may also result from trauma or fatigue.

It is a common practice for officers at DUI checkpoints to administer the nystagmus test. If a knowledgeable, well-trained officer performs a nystagmus test and does not see nystagmus or a bounce prior to 45 degrees, he or she will know that the person's blood alcohol level is not .08 percent or above. These drivers frequently escape further detention.

In one of my cases, the original officer who administered a Horizontal Gaze Nystagmus test admitted that the bounce did not start prior to 45 degrees. My expert testified that my client would not have been at .08 percent or above. This was consistent with the client's rising blood alcohol level defense. Even the Department of

Justice expert agreed that he had never seen someone at a .08 percent blood alcohol level fail to display a bounce prior to 45 degrees during a Horizontal Gaze Nystagmus test. This compelling evidence resulted in my client being acquitted of all charges.

Appellate court cases in California have held that law enforcement officers should not be allowed to give an opinion as to a specific blood alcohol level based on lateral gaze nystagmus test results.[4] However, when the nystagmus test results have been favorable to my client, my experts have always been allowed to explain the significance of the results to the jury.

Keep Simple Notes Readily Available

When handling the defense of a DUI case, it is beneficial for the defense lawyer to have case notes while negotiating a resolution. Appropriate notes for a DUI case are simple:

- The time of the driving
- A description of the driving pattern
- The reason for the contact, noting whether there are any issues with respect to the pullover or detention
- The times and results of preliminary breath tests, if given
- The time of the arrest
- The times and results of the evidentiary tests
- Eating/drinking pattern attributed to the client as described in the police reports
- Eating/drinking pattern described by the client, if different from the description in the police report

With these notes, a defense lawyer can assess a DUI case at a glance. Often, a pattern can be seen indicating whether the driver's blood alcohol level was going up or down at the time of the driving. When maintenance and calibration records for breath test devices are

[4] *People v. Loomis*, 203 Cal. Rptr. 767 (Cal. App. Dep't Super. Ct. 1984).

obtained, notes should be added to indicate whether the devices were reading high or low and by how much.

Find the Weak Spots

A timeline similar to the one described above can be used by the defense lawyer to look for weaknesses in the prosecution case. Is there a problem with the detention? Is there merit to a motion to suppress evidence? Are there *Miranda* issues based on an officer conducting a post-arrest interview without a *Miranda* advisement? Even without a formal arrest, should the officer have given a *Miranda* advisement because the driver was arguably in custody?[5] Based on a thorough review and analysis of the case, is the case defensible on the merits?

The Importance of Discovery

Discovery in DUI cases is critically important. Defense attorneys must obtain all discovery as quickly as possible.

Video and Audio Recordings

Officers conducting DUI investigations usually have recording devices. The recording devices mounted in the police car normally record a video of not only what the camera picks up, but also at least part of the officer's conversation with the driver. Occasionally, there will be video recordings of the arrestee in the back seat of the patrol car. Reviewing the videos will allow the defense lawyer to determine whether sufficient cause existed for the officer to pull over the vehicle or detain the driver. The videos record the sequence of events in real time so that the attorney may determine whether the length of the detention was unreasonable under the circumstances.[6]

[5] *People v. Boyer*, 768 P.2d 610 (Cal. 1989), disapproved on other grounds in *People v. Stansbury*, 889 P.2d 588 (Cal. 1995).
[6] *People v. Gomez*, 12 Cal. Rptr.3d 398 (Cal. Ct. App. 2004); *Williams v. Superior Court*, 213 Cal. Rptr. 919 (Cal. Ct. App. 1985).

Videos of the driving pattern are important because the officer and driver will often disagree as to the driving. If a video displays the driving pattern, it can be used either to disprove or to confirm the law enforcement officer's account. Frequently, when the client sees the video, he or she will admit to the bad driving. This saves the time and expense of pursuing a meritless motion. The defense attorney can then focus on other options to resolve the case successfully. Thus, the recorded videos are beneficial to the prosecution and the defense.

It is worthwhile to have all recorded conversations transcribed. Frequently, the police report inaccurately describes the conversations to the detriment of the driver. The actual conversations can be used by the defense to show that the officer incorrectly admonished the driver as to legal requirements. This may be used to establish that the driver submitted to a chemical test involuntarily. It may also establish a *Miranda* violation requiring suppression of statements to the officer.

As noted above, most law enforcement agencies in California are using videos now. In the 1980s, when I was a prosecutor in Ventura County, the Simi Valley Police Department started using videos to record field sobriety tests in DUI cases. We noticed that videos of persons who had blood alcohol levels slightly above the legal limit looked unimpaired in the videos. People with blood alcohol levels in the .09 percent to .14 percent range seemed to do very well on field sobriety tests. Sometimes the videos showed the drivers standing straight and performing other field sobriety tests well. The clues that officers believed indicated impairment could not be seen on the video. In addition, experienced drinkers often appear to have good balance despite being impaired. At blood alcohol levels below .14 percent, the videos of the field sobriety tests became a concern for prosecutors.

Other people in law enforcement must have been concerned, as well, because now, most law enforcement officers administer the field sobriety tests to the side of the police car, outside the view of the camera. This is not good for the defense because without a video

showing the field sobriety test performance, the officer's testimony will likely be accepted by the court or jury. If there is a video of the field sobriety tests, the court or jury is at least able to see the tests and make their own assessments. Although defense attorneys can criticize officers for purposefully performing the tests outside of the range of the camera, justice would be best served by having the actual evidence. The best practice for the prosecution and the defense is for law enforcement to record everything possible.

The Influence of New Technologies and Scientific Procedures on Discovery

It is essential in DUI cases in which breath tests were administered always to order maintenance logs and calibration records of the breath test devices. In California, the state regulations outlined in Title 17 provide directives. Title 17 requires that breath testing devices be checked for accuracy and, if necessary, calibrated, after 150 tests or every ten days, whichever occurs first.[7] The maintenance logs and calibration records enable defense lawyers to check the accuracy of the device in question. An alcohol solution or dry gas sample with a known value, frequently .100 percent, is used to test the accuracy of the breath test device. The logs document by date and time the value indicated by the machine to the third digit, for example, .105 percent.

Title 17 requires that the reading be within .01 percent of the known value.[8] If the test is not within .01 percent of the known value, the machine must be calibrated. If the machine is within .01 percent of the known value, calibration is not required, but operators sometimes will calibrate the device if the machines are reading high or low. When the machines are reading on the low side, perhaps .007 percent too low, which benefits the driver, operators frequently will adjust the device so that it reports a higher, more accurate blood alcohol level. When the machines are reading on the high side, perhaps .008 percent too high, however, operators tend to leave them alone. They

[7] CAL. CODE REGS. tit. 17, § 1221.4 (2014).
[8] *Id.* § 1221.4(a)(2)(A).

are within Title 17 guidelines, but that .008 percent inaccurately high reading can make a huge difference in a close case.

Title 17 provides that even though evidentiary breath test devices determine an alcohol level to the third decimal place or third number, the testing agencies are required to report results to only the second decimal place.[9] Thus, if a driver provides two breath samples for an evidentiary test, resulting in readings of .08 percent, the printed slip shows only two numbers; it does not show the third number on the printout. If you consider our driver with the .08 percent reading, it becomes critically important to know the third number.

The third number is stored in the memory of the breath test device. Defense counsel must request this information for the subject test. If the evidentiary test reading to the third digit is .083 percent, and .008 percent is deducted because the device is reading high, then the driver's accurate reading would be below .08 percent. In a close case, that could make the difference between an officer giving someone a warning and that officer making an arrest. Establishing that the device in question was reading .008 percent too high would be helpful evidence to challenge a DMV driver's license suspension or to offer at trial.[10]

Obtaining Discovery

Once charges are filed against a driver, the defense is entitled to receive all evidence against and in favor of the accused. This includes police reports, visual and audio recordings, and records relating to the accuracy of breath testing devices and blood tests. In Santa Barbara County, defense attorneys simply fill out a form requesting the documents, and they are normally provided.

Occasionally, prosecutors put up a fight over the records for the preliminary breath test device because it is not the "evidentiary test."

[9] *Id.* § 1220.4 (b).
[10] *Brenner v. Dep't of Motor Vehicles,* 116 Cal. Rptr. 3d 716 (Cal. Ct. App. 2010).

They question why the defense needs the records. However, if the preliminary breath test results help the prosecution, prosecutors will certainly present that evidence to the jury. The preliminary breath test results are important to the defense because the preliminary test results may help establish whether the person's blood alcohol level was rising or declining at the time of the driving.

For example, if a preliminary breath test revealed a blood alcohol level of .09 percent shortly after the driving, and an evidentiary breath test forty minutes later revealed a blood alcohol level of .11 percent, this would support an argument that the driver's blood alcohol level was rising. At the time of driving, the driver's blood alcohol level was likely below .09 percent. This evidence may establish a defense at trial or at least result in a reasonable offer from the prosecution. The prosecution and defense also need to evaluate the maintenance logs and calibration records for the preliminary tests, as well as the evidentiary tests.

In Santa Barbara, law enforcement agencies are using Alcotest devices by Dräger. Records for this breath testing device not only document the accuracy of tests performed on the device, but also provide, for every test, the volume of air that resulted in the reading.

This scientific evidence turned out to be important in a case that I defended several years ago. My client was involved in a serious accident in which a young man died. The prosecution claimed that my client, while under the influence of alcohol and above a .08 percent blood alcohol level, made an illegal U-turn. A young man riding a motorcycle hit my client's car and died from the impact. My client provided evidentiary breath test samples resulting in readings of .08 percent and a .09 percent. Both the law enforcement officer and the Department of Justice forensic alcohol expert for the prosecution testified that the .09 percent reading was the accurate test because it resulted from a deeper, stronger blow.

We obtained all maintenance and calibration records, which included records of test results of drivers who were tested using the same

device, the accuracy test results for the device, and the volume of air that resulted in the readings for each of the evidentiary tests. Upon review of the records, we found out that the volume of air had almost nothing to do with the numerical reading. More than half the time, the breath samples with less volume produced higher readings than the breath samples with more volume. The scientific records proved that a larger volume of air, at least with the Dräger Alcotest device, does not produce a higher, more accurate reading.

Whenever the defense can destroy a prosecution expert's opinion, the strategy should be to pin the expert down so that the individual cannot take back or qualify his or her position and then lower the boom. In our case, we prepared a giant exhibit showing that the prosecution expert's testimony was scientifically incorrect. (Appendix A, Evidentiary Test Results chart.) We highlighted in pink tests of the same subject in which greater breath volume resulted in lower blood alcohol level results. The chart also revealed many instances in which vastly different breath volumes resulted in identical blood alcohol level results. This was devastating to the prosecution.

Ultimately, the jury found that my client's U-turn was legal, that my client did not drive while under the influence of alcohol, and that she did not drive with a blood alcohol level of .08 percent or above. This was a phenomenal win, in large part due to the scientific evidence we obtained through discovery and the exceptional testimony of defense experts.

The Value of Expert Witnesses

Defense attorneys should hire the best experts possible if the case is a felony, involves serious injuries, or, for whatever reason, is likely to go to trial. Even the most experienced, exceptional DUI attorneys accept guidance from their experts with respect to case evaluation and strategy.

Experts will answer questions regarding the client's case and suggest how to deal with prosecution experts. When a DUI accident results in serious bodily injury or death, law enforcement agencies will normally

send a team of accident reconstruction experts to evaluate the physical evidence at the scene, the vehicles involved, and any information recorded by the vehicle's event data recorder.

It is imperative that the defense provide reports, photographs, and other discovery to an expert with expertise in accidents similar to the one in the client's case. If a motorcycle is involved, an accident reconstructionist with motorcycle accident expertise will give the defense a significant advantage in trial. After review of the materials, the accident reconstruction expert will offer opinions and recommendations. In a serious case, experts may be needed to rebut the prosecution's position.

Good lawyers look for experts with exceptional education, training, and experience. Experts who have had experience teaching at a college or training law enforcement officers normally have excellent communication skills and will be able to explain complicated scientific principles to jurors. Jurors dislike pompous witnesses. Experienced lawyers should assess how the expert will come across to a jury. Does the expert come across as unbiased and professional? Does the reasoning of the expert make sense, given the facts of the case and scientific principles? Will the expert concede points when it is appropriate to do so? Does the expert have a sense of humor?

Even exceptional lawyers need experts to develop strategies to mount a compelling defense. In cases involving scientific principles relating to accident reconstruction and driving under the influence of alcohol or drugs, experts are key.

Current Trends in California DUI Law

Foundation Required for Expert Testimony

In *Sargon Enterprises v. University of Southern California*,[11] the California Supreme Court ruled that an expert's opinion may not be based on

[11] *Sargon Enters v. University of S. Cal.,* 288 P.3d 1237 (Cal. 2012).

assumptions of fact without evidentiary support or on speculative or conjectural factors. The court upheld a trial court's exclusion of expert testimony for lack of foundation.

In DUI cases, prosecutors will often pose a hypothetical question to a forensic alcohol expert concerning a subject's blood alcohol level at the time of driving. If it is beneficial for their case, prosecutors may include facts that have not been proved in the hypothetical. As an example, during a recent preliminary examination, a prosecutor asked the Department of Justice forensic alcohol expert to assume that at the time of driving, alcohol consumed by the driver was "fully absorbed." As phrased, this hypothetical guaranteed that the alcohol expert would add .015 percent to the blood test result for every hour between the driving and the blood draw. Since the blood was drawn four hours after the driving, the expert added .06 percent to the result of the blood test.

Evidence presented at the hearing showed, however, that a significant amount of alcohol was consumed by the driver shortly before the driving. Thus, it was scientifically impossible for this alcohol to be fully absorbed. At the time of the driving, the driver's blood alcohol level was in the absorption (rising) phase, not the elimination (declining) phase.

Under *Sargon*, the prosecution expert's opinion would be inadmissible. Hypothetical questions and the expert's answers must conform to the proven facts. Defense attorneys should object to expert opinions that are not based on proven facts. If the case is going to trial, defense attorneys should file a motion *in limine* to exclude an expert's opinion testimony until sufficient factual foundation to support the opinion is established.

Search Warrants for Collecting Blood Samples

The recent US Supreme Court case, *Missouri v. McNeely,*[12] provides great benefit to DUI defense lawyers. In *McNeely*, the Supreme Court ruled

[12] *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

that law enforcement officers are required to obtain a search warrant before they take a non-consensual blood sample from a person.

The Supreme Court noted that since most jurisdictions have on call prosecutors and judges, a search warrant can be obtained very quickly. Most law enforcement agencies have partially filled out affidavit forms so that an officer need only add the facts to the form describing the exigent circumstances. The court also noted that with the use of current technology, including smart phones, text messaging, and e-mails, a search warrant may be obtained quickly and easily. To their credit, many prosecuting offices have developed new procedures and have trained law enforcement officers to ensure that a search warrant is secured before obtaining a non-consensual blood draw.

There is an exception to the requirement of obtaining a warrant to secure a nonconsensual blood sample if there are exigent circumstances, but the court made it clear that the body's elimination of alcohol over time does not by itself qualify as an exigent circumstance excusing the warrant requirement. The burden is on the prosecution to establish the existence of exigent circumstances.

The need for law enforcement to focus on investigation of a serious traffic accident might constitute exigent circumstances. In one of my recent cases, our position was that law enforcement officers should have obtained a search warrant before ordering a nurse to draw a blood sample from my client. My client and his best friend passenger were both seriously injured and taken to a hospital. One officer was at the hospital for almost two hours before he ordered the blood draw. This officer spent more than an hour interviewing witnesses at the hospital; he had plenty of time to obtain a search warrant.

Despite the officer being at the hospital for two hours and having ample evidence to justify a search warrant, the trial court ruled that because of the accident and because of the ongoing investigation, exigent circumstances excused the need for the officer to obtain a

search warrant. Of course, every case will be factually different. Defense attorneys should challenge the taking of a blood sample without a warrant absent truly exigent circumstances.

McNeely has had another effect. Some defense attorneys are now challenging breath test samples without a search warrant, alleging that the breath samples were not given voluntarily and were obtained without a warrant. Some courts have suppressed evidentiary breath test results when the officer's admonitions concerning the tests were inaccurate and the court concluded that the driver was involuntarily submitting to the authority of the officer.

Similarly, some trial courts have suppressed preliminary alcohol breath test results obtained prior to arrest when the officer failed to advise the driver that the preliminary test is voluntary; the driver can refuse to take this test. The video and audio recordings obtained through discovery may assist the defense in establishing that the officer misstated the law and that the driver's compliance with the officer's demands was involuntary.

Several cases in which courts have suppressed breath test results, in part based on *McNeely*, are on appeal. Hopefully, an appellate court decision addressing these issues will be made and certified for publication by mid-2015.

Changes to the "No Driving" Defense

For many years, legislative changes have made it much more difficult for defense attorneys in DUI cases to prevail. In years past, one of the best defenses in a DUI case was the "no driving in presence of officer" defense. California Penal Code Section 836 provided that for a misdemeanor arrest to be valid, the offense must occur in the officer's presence.[13] There were, however, exceptions. If an officer had

[13] CAL. PENAL CODE § 836: *Music v. Dep't of Motor Vehicles*, 270 Cal. Rptr. 692 (Cal. Ct. App. 1990). At the time *Music* was decided, CAL. VEH. CODE § 40300.5 listed these, and only these, exceptions.

probable cause to believe that the person was driving the vehicle while under the influence of alcohol or drugs, the officer could make an arrest even without seeing the driving if the vehicle was involved in an accident or if the vehicle was blocking a roadway. Thus, if a driver had a flat tire, was parked legally, and was waiting for help when law enforcement made contact, the prosecution could not justify the arrest. There was not an accident; the vehicle was not blocking a roadway; and the offense did not occur in the officer's presence.

To resolve this "problem," the California legislature made exceptions to effectively eliminate the benefits of Penal Code Section 836. Vehicle Code Section 40300.5 now provides that, in addition to the traffic accident and road obstruction exceptions, a misdemeanor offense does not need to occur in the presence of the officer if:

1. The person will not be apprehended (caught for DUI) unless immediately arrested;
2. The person may cause injury to himself or herself or damage property unless immediately arrested; and
3. The person may destroy or conceal evidence unless he or she is immediately arrested.[14]

Prosecutors have argued successfully that even if the offense does not occur in the presence of the officer, an arrest is authorized because without an arrest:

1. There will not be a blood or breath sample to prove the driver's guilt; the driver will not be "apprehended";
2. The driver's intoxicated state may result in injury to the driver or others; and
3. The driver will "destroy evidence" by the body's natural elimination of alcohol.

Further, Vehicle Code Section 40300.6 provides that all of its provisions in Section 40300.5 that authorize an arrest should be

[14] CAL. VEH. CODE § 40300.5 (1996).

liberally construed. Accordingly, with respect to DUI arrests, the prosecution will be able to justify almost every arrest.

Even if the arrest can withstand defense attack, other defenses may be available when the officer does not see the driving. If the driving occurred more than three hours before a chemical test, regardless of the results of the test, there is no inference that the driver's blood alcohol level was greater than .08 percent at the time of driving.[15] In some cases, the defense may be able to raise a reasonable doubt as to who was driving. In one of my cases, a husband admitted being the driver so that his wife would not be arrested. Shockingly, the arresting officer did not conduct a thorough interview of the wife. Even though this was the driver's second DUI offense, the prosecution dismissed the DUI charges on the eve of jury selection.

DMV Hearings

In California, after a .08 percent or higher DUI arrest, officers will seize the arrestee's driver's license and serve a notice of suspension. If the driver does nothing, the driver's license suspension goes into effect thirty days after the notice. It is a four-month suspension for a first offense, but a restricted license may be obtained after the first thirty days of suspension if the driver enrolls in a first offender alcohol program and provides proof of insurance.

The Department of Motor Vehicles (DMV) imposes a twelve-month suspension if the driver had a prior DMV suspension or DUI or reckless driving related to alcohol conviction within the previous ten years. It is possible to obtain a restricted license ninety days after a second DUI offense conviction if the driver is enrolled in the multiple offender program, has proof of insurance, and installs an interlock device on the vehicle he or she drives. The interlock device will prevent a driver from starting the car if the device detects alcohol from a breath sample.

[15] *Id.* § 23152(b); JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 2.

The notice of suspension provides that if the driver wants to challenge the suspension, the driver must request a hearing within ten days of service. Every driver should request a hearing and a stay of any driver's license suspension until after the DMV hearing ruling is issued. These requests will enable the driver to continue driving until further notice from the DMV. It also gives the driver's attorney time to review the case and determine whether there is a viable defense to the suspension.

DMV administrative hearings are odd proceedings. The hearing officer is a DMV employee. The hearing officer presents the evidence in support of the suspension. If the defense attorney or driver objects to evidence, the hearing officer ordinarily overrules the objection. The defense may present testimony from lay witnesses or experts. The hearing officer cross-examines the defense witnesses. After the evidence is presented, the driver or his attorney may make a closing argument.

Typically, the matter is taken under submission, and a written ruling is issued in a week or two. Unfortunately, the ruling is made by the same hearing officer who offered the evidence in support of the suspension! During the early years of DMV administrative *per se* hearings, drivers and defense lawyers often prevailed if the defense case had merit. Defense expert testimony would sometimes carry the day. If the defense could establish Title 17 violations or an illegal arrest, the driver might have his driver's license suspension set aside.

Unfortunately, the current trend with respect to DMV hearings is that the vast majority of suspensions will be imposed by the hearing officer and upheld if the driver requests an administrative review by another DMV employee. Drivers do have an option of filing a writ in Superior Court to overturn a DMV suspension, but this can be an expensive and time-consuming effort.

Changes in Apprehension Methods: DUI Checkpoints

A leading case with respect to DUI checkpoints is *Ingersoll v. Palmer*. In *Ingersoll*, the California Supreme Court ruled that as long as there is

compliance with guidelines, a sobriety checkpoint may be operated in a manner consistent with federal and state constitutions.[16] The case established important guidelines relating to the selection of checkpoint locations, checkpoint procedures, limitations on the discretion of field officers to ensure that detentions are not arbitrary or capricious, and advance publicity of checkpoints[17] and minimizing the length and nature of detentions.

Ingersoll indicates that checkpoints should have some kind of signage ahead of the checkpoint so that people who do not want to be detained can avoid the checkpoint. An exit route should be available so that drivers can avoid the checkpoint. Unfortunately, adequate signage and escape routes are rarely seen at DUI checkpoints.

In one case, we challenged a detention because after seeing a checkpoint ahead, my client made a legal U-turn, drove away from the checkpoint, and then made a left turn down a side street. One of the officers at the checkpoint saw her avoid the checkpoint and thought that was a good reason to pull her over. Sure enough, my client was arrested for DUI.

We challenged the pullover because under *Ingersoll*, avoiding a checkpoint does not justify a detention. The police report did not cite any infraction to justify the pullover. During the motion to suppress evidence, the officer stated for the first time that my client failed to use a turn signal prior to her left turn, and that is why he pulled her over. A conservative Santa Barbara Superior Court judge accepted this testimony and denied the suppression motion. This shows what DUI defense lawyers are up against. How could anybody believe that an officer would not include the reason for the pullover in his report? The officer came up with the justification for the pullover after our suppression motion was filed.

[16] *Ingersoll v. Palmer*, 743 P.2d 1299 (Cal. 1987).
[17] In *People v. Banks*, 863 P.2d 769 (Cal. 1993) the court ruled that police are not required to publicize sobriety checkpoints.

Challenging Probable Cause

Video and audio recordings are the best ways to determine whether the arresting officer had probable cause to detain or arrest a person. Once in a while, the defense will have other witnesses who can testify to the driving pattern, and if they are unbiased and were sober, a court may conclude that the officer's account is untruthful, exaggerated, or simply wrong. The credibility of the officer can be challenged with witnesses, but defense lawyers should prepare for a hard battle.

During a suppression motion several years ago, an officer testified that a car passed his patrol car going in the opposite direction at a high rate of speed. He lost sight of the car, made a U-turn, drove to the intersection, and could not see the car anywhere. He did see brake lights six or seven blocks away. He turned on his red lights, sped up the street, and caught my client going into her house. The officer arrested her for DUI. At the hearing, the officer was adamant that it was my client's car that sped past him before he lost sight of her. The trial court concluded, based on the testimony of my client and her friend, that it was not my client's car that sped past the officer. The DUI charge was dismissed.

Defending a Repeat Offender

Representing a person charged with DUI with one or more prior convictions can be very challenging for the defense lawyer. Penalties for convictions are severe, and borderline cases are less likely to be resolved with a plea to a reduced charge. On the other hand, prosecutors do not want to lose trials. If a case is defensible, a defense lawyer still has some bargaining power. If weaknesses in the prosecution case result in an offer of reckless driving related to alcohol, the offer should be considered. By accepting the offer, the defendant typically will avoid having to attend the expensive eighteen-month multiple offender alcohol school. This defendant will also avoid a mandatory jail sentence and will pay a lower fine for the reckless driving conviction.

A lawyer should analyze the merits of the prosecution case; if the case is defensible, taking the case to trial remains an option. By requesting bifurcation of the trial as to the prior offenses or by admitting the prior conviction or convictions prior to trial, the jury will not be advised of the priors.[18]

As with first-offense cases, the attorney should evaluate whether any standard DUI motions have merit. In addition, the lawyer must determine whether a motion to strike a prior conviction should be made. This will involve obtaining the record of any convictions, including the minute orders, written waivers of constitutional rights, and any transcript of the plea. To prevail in a motion to strike a prior DUI conviction, the defense normally must establish that the defendant's constitutional rights were infringed in the proceeding that gave rise to the conviction.

If the prior conviction is from another state, the conviction will be stricken if the defense can establish that the conviction was not for a priorable, equivalent California crime.

Challenges for Prosecutors

Mistakes by Law Enforcement Officers

The top challenges prosecutors have in successfully prosecuting DUI offenses result from poor law enforcement investigation. When I was training law enforcement officers, I advised them to obtain every bit of information possible. If an officer arrives at the scene of an accident, it is essential that he or she interview as many witnesses as possible to positively identify the driver. A person may admit driving to protect a spouse or friend, and this might be the defense at trial. A thorough investigation will make this defense more difficult to establish.

If a case is going to be a borderline blood alcohol level case, it is essential that officers pin down the driver with respect to his eating

[18] *People v. Weathington,* 282 Cal. Rptr. 170 (Cal. Ct. App. 1991).

and drinking pattern. If the defendant driver is not pinned down as to what he had to drink and when, and what he had to eat and when, the defense has a huge advantage.

Most law enforcement agencies now have forms with all of the appropriate questions listed on them. A good officer is going to use the forms to ensure that all important questions are asked. They include questions such as:

- When did you last eat?
- When did you last sleep?
- What did you eat for dinner?
- How long have you been drinking?
- Where have you been drinking?
- What have you been drinking?
- When did you have your last drink?
- Are you sick or injured?
- Are you diabetic?

By obtaining answers to these questions, potential defenses can be identified or eliminated.

Moral Imperative Cases

It is a burden on prosecutors when they have a "moral imperative" case—a case in which the prosecution must take an aggressive stance because of the criminal history of the defendant or the seriousness of the case. Examples include when a DUI defendant has multiple prior DUI convictions or a case in which a DUI accident resulted in death or serious injury. In these situations, the prosecutor may have the difficult burden of going to trial with a difficult case that normally would have settled. The "moral imperative" results in the district attorney or a supervisor insisting that the case go to trial unless the defendant pleads guilty to everything.

Advice for Drivers Detained for DUI

Consider Your Drinking Pattern

If a driver believes that his or her blood alcohol level is borderline—i.e., in the range of .08 percent—and the driver consumed an alcoholic beverage shortly before the driving, the blood alcohol level should be rising. In this situation, taking a chemical test sooner rather than later should yield a lower chemical test result.

A driver can ask the detaining officer to administer a preliminary alcohol breath test before lengthy questioning and other field sobriety tests. Many officers will comply if the driver's symptoms of intoxication are borderline. Obtaining a lower blood alcohol level result may enable a driver to avoid being arrested or to obtain a better resolution of his or her case should charges be filed.

If the driver had consumed the alcohol long before the driving—perhaps an hour earlier on an empty stomach, perhaps two hours earlier on a full stomach—the driver's blood alcohol level should be declining. In this situation, the more time that passes before a chemical test is administered, the lower the blood alcohol level should be. This driver should not agree to a voluntary preliminary breath test or the evidentiary breath test. More time will pass if the driver requests a blood test. With each hour that passes between the driving and the chemical test, the blood alcohol level should decline by .015 percent.

Even if obtaining a lower blood alcohol level test result does not result in the driver having a defensible case, the lower blood alcohol level may result in a better disposition of the case. For example, for first offenders, many district attorney offices impose jail sentences based on the blood alcohol level. The higher the level, the longer the jail sentence. In addition, many offices will require that an offender complete a longer, more expensive alcohol school if the blood alcohol level is high, typically either .15 percent or above or .20

percent or above. If a driver's strategy results in a lower blood alcohol result, he or she may avoid these harsher penalties.

Do Not Refuse to Complete an Evidentiary Test

If a driver is lawfully arrested for driving under the influence of alcohol or drugs and is advised properly of the consequences of refusing to submit to a chemical test, penalties for refusing to submit to or failure to complete a chemical test are severe.

For a first offender who refuses to submit, or perhaps who fails to complete a chemical test, the DMV will impose a one-year driver's license suspension with no opportunity for the driver to obtain a restricted driver's license.[19] This is a very severe suspension penalty. Even if a driver is convicted of a first- or second-offense DUI, there are options available for the driver to secure a restricted license after part of the suspension period.

DMV will impose longer periods of suspension or revocation if a driver has a history of prior refusals or conviction of specified DUI-related offenses.[20]

In addition, a court will impose a harsher sentence, including a minimum jail sentence if the prosecution pleads and proves that the driver refused to submit to or complete a chemical test.[21]

Conclusion

It is essential that attorneys strive to master the complex scientific and legal issues involved in the defense of DUI cases. Hopefully, this chapter will encourage attorneys to work diligently to develop the best strategies to defend their clients successfully.

[19] CAL. VEH. CODE § 13353(a)(1).
[20] *Id.* § 13353(a)(2), (a)(3).
[21] *Id.* § 23577(a).

Key Takeaways

- Know your case. All details provided by the client and all discovery materials must be thoroughly reviewed and evaluated to develop the best defense strategies.
- Develop professional relationships with forensic alcohol experts, forensic toxicologists, and accident reconstructionist. Experts are invaluable resources for case evaluation, development of strategies, and prevailing at DMV hearings, motions, and trials.
- Master scientific principles relating to alcohol absorption, alcohol elimination, and blood alcohol testing devices.
- Know the prosecutors, judges, and DMV hearing officers with whom you will be dealing. Attempt to resolve or litigate your case with persons who will be receptive to your arguments.

Steven R. Andrade, owner of Andrade Law Offices, was raised the younger of two siblings in a blue-collar family near San Francisco, California. His father was a shipping clerk, and his mother was a bookkeeper for a grocery store chain. When he was a teenager, his father was laid off from his job after decades of service. This resulted in significant stress to the family. The young man decided to go to law school, in part, so that he would always have the option of having his own business and would be able to take care of his parents in their later years.

Mr. Andrade graduated magna cum laude from San Francisco State University with a Bachelor of Arts degree in political science. After college, he attended University of California, Davis, King Hall School of Law, where he received his juris doctor degree in 1977. He made law review at UC Davis.

After law school, Mr. Andrade served as a deputy district attorney for Ventura County and then as an assistant attorney general in the Northern Mariana Islands. In 1987, he opened Andrade Law Offices in Santa Barbara, California, specializing in litigating personal injury and criminal defense cases. With the reputation for being an attorney who is not afraid to take any case to

trial, he is also known as a great courtroom strategist. He has recovered millions of dollars in personal injury verdicts and settlements and in 2002 obtained a jury verdict in excess of $60 million in Los Angeles. He has handled thousands of criminal cases, ranging from DUI cases to capital offenses. Mr. Andrade loves the law and, after more than thirty years as a trial attorney, has no plans of retiring any time soon.

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APPENDIX A

EVIDENTIARY TEST RESULTS (10/31/2007)

Rel?	Serial No.	Agency	Arrest Log	Type	Test No.	Test Date	BAC1 Res	BAC1 Time	Vol1	BAC2 Res	BAC2 Time	Vol2
Y	ARRA0104	CHP BUELLTON	Santa Barbara	EVD	357	01/07/2007	.10	00:25	5810	.10	00:29	5810
Y	ARRA0104	CHP SANTA BARB	Santa Barbara	EVD	358	01/07/2007	.12	02:15	2280	.11	02:19	3120
Y	ARRA0104	CHP SANTA BARB	Santa Barbara	EVD	359	01/07/2007	.15	22:42	2050	.16	22:45	2710
Y	ARRA0104	CHP SANTA BARB	Santa Barbara	EVD	360	01/07/2007	.16	23:03	3650	.14	23:07	2460
Y	ARRA0104	CHP SANTA BARB	Santa Barbara	EVD	361	01/10/2007	.15	18:12	5530	.15	18:15	1870
Y	ARRA0104	CHP SANTA BARB	Santa Barbara	EVD	362	01/10/2007	.15	00:01	1710	.15	00:05	4030
Y	ARRA0104	CHP SANTA BARB	Santa Barbara	EVD	363	01/11/2007	.13	02:27	3280	.11	02:30	2030
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	364	01/11/2007	.19	23:31	4650	.19	23:35	3900
Y	ARRA0104	CHP SANTA BARB	Santa Barbara	EVD	365	01/12/2007	.08	02:32	3710	.07	02:35	4330
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	387	05/05/2007	.00	23:42	3510	.00	23:45	3050
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	389	05/06/2007	.07	02:12	2740	.08	02:15	2640
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	393	06/03/2007						
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	396	06/09/2007	.20	01:40	2170	.20	01:43	2440
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	399	06/15/2007	.20	04:48	2140	.18	04:51	2690
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	404	06/28/2007	.18	12:21	2350	.17	12:24	2940
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	406	06/29/2007	.00	20:50	5030	.00	20:54	4210
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	410	07/07/2007	.15	01:59	5810	.18	02:03	4600
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	412	07/08/2007	.10	04:10	4210	.09	04:14	4350
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	416	07/18/2007	.12	03:20	5190	.11	03:24	1800
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	421	07/21/2007	.01	20:57	3990	.00	21:00	3810
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	424	07/22/2007	.09	01:20	5310	.08	01:24	2490
Y	ARRA0104	SO SANTA BARB	Santa Barbara	EVD	430	08/22/2007	.15	00:19	2300	.15	00:23	3330
Y	ARRA0104	UC SANTA BARBPD	Santa Barbara	EVD	436	09/13/2007	.09	23:01	2760	.07	23:04	2620

Courtesy of Steven R. Andrade, Andrade Law Offices

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