

DWI Prosecutor's Handbook



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A DWI PROSECUTOR'S HANDBOOK

INTRODUCTION

This monograph is designed to provide a comprehensive guide for prosecutors about the fundamentals of a DWI¹ prosecution. As with the prosecution of all other criminal cases, DWI cases have unique statutory elements and evidentiary issues. It is vitally important that before you begin a case analysis, you familiarize yourself with your State statutes pertaining to DWI, the criminal procedure rules, your local court rules, relevant case law, and which breath test instruments are used by your law enforcement agencies (if applicable). Be aware that different agencies throughout your jurisdiction may use different breath test instruments.

The prosecution of a DWI case involves the examination of the totality of the circumstances surrounding the incident: operation of the motor vehicle, all visual observations of the defendant made by the police or civilian witnesses, statements made by the defendant, his² performance of psychomotor tests (standardized field sobriety tests) and the result of any chemical test (i.e. breath, blood, or urine).

In reviewing a DWI case and in preparing it for trial it is helpful to keep these ideas in mind:

- What did the defendant do wrong?
- What are the signs or observations of impairment?
- What did law enforcement/experts do right?
- What are the potential defenses?

In addition, always remember that a DWI is a crime. If a crash occurs as a result of a DWI, it is never an “accident.” It is a “crash,” “collision,” or a “wreck.” An accident is often considered an unavoidable situation, usually occurring without any negligence. Alcohol-related crashes are completely avoidable. Your use of these powerful visual terms will help and will reemphasize that his actions were criminal.

PRELIMINARY CASE REVIEW

Defendant's background

Once a defendant is arrested by the law enforcement agency, their reports and other documents will be prepared detailing the events leading to his arrest. As a prosecutor, you must have in your possession all of the documents that were prepared so that you can begin your case review. Initially, you should obtain all available background information

¹ The terms DWI (driving while intoxicated), DUI (driving under the influence) and OUI (operating under the influence) are considered interchangeable for the purposes of this publication.

² The male gender pronoun is used throughout this publication for ease of presentation.

pertaining to the defendant. This information will enable you to access, among other things, the defendant's prior behavior, the potential for increased charges being filed as a result of a prior conviction, the potential for repeat behavior, and sentencing options. If you as the prosecutor are responsible for making charging decisions, as opposed to the arresting agency, it is important to remember that much of this information may not be available prior to your need to make a charging decision. Do not create a lengthy delay in your charging decision by waiting for less-than-essential records.

The following is a list of documents that should be obtained and reviewed:

- Department of Motor Vehicles Report (Driver's Abstract or Driver's License Record)
- State and Local Criminal History Report (rap sheet)
 - Many local jurisdictions often have more complete criminal histories than those reported to and kept by State agencies.
- FBI Criminal History Report
- Out of State Criminal History Report
 - This is especially important if the Driver's Abstract shows a prior or present out-of-State residency. Depending on your State statutes, an out-of-State conviction for DWI may be used to enhance a DWI charge in your jurisdiction.
- Any prior pre-sentence reports (if the defendant was previously convicted of a crime)
 - This report is often prepared by the local probation department to inform a sentencing court about the defendant's school, military, and criminal history. It may also make reference to any prior need for alcohol or substance abuse treatment. This report may help you get a more complete picture of the defendant's history.
- All Medical Records of the victim and also the defendant, if possible, if a crash occurred
 - Any prior mental health or substance abuse treatment programs that the defendant participated in, if available. This material is often only available from the defense attorney. The defense may ask the prosecutor to review this information in order to decide if alcohol treatment and/or treatment court are options in the disposition of the criminal case.

Documents

The following is a list of additional documents that should be obtained before you begin your case analysis:

Law Enforcement Arrest and Investigative Reports

These reports should include information detailing the pedigree information of the defendant, what drew the officer's attention to the defendant's motor vehicle, all physical signs and indications of impairment, presence of alcohol or drugs in the vehicle or on the defendant's person, and all statements made by the defendant.

Copies of traffic infraction citations or charging documents pertaining to the operation of the vehicle. These will give you the basis for the stop of the motor vehicle. Be advised, not all states prepare traffic citations for each traffic violation.

Laboratory Submission Form

If any physical evidence is submitted to law enforcement and/or State crime laboratory (blood, urine, hairs, fibers, paint, etc.), a chain of custody document may be prepared by the police officer who had care, custody, and control of the evidence from its source to the laboratory. Be aware that one or more officers may be involved in the chain of custody for any piece of evidence. To submit the results of the laboratory analysis in court, you may be required to prove the chain of custody of the evidence itself. The same is true if the evidence is retained in a law enforcement evidence locker as opposed to being submitted to a crime laboratory for analysis.

In addition, before trial you may need to obtain all internal laboratory control documents if an analysis is conducted and the results of the analysis are to be introduced at trial. These documents are prepared during the analysis process and indicate what internal testing was done on the evidence and by whom.

Consent to Search Form

This document is executed by the defendant or other owner of property to be searched (i.e., the owner of the vehicle operated by the defendant at the time of the commission of the crime).

Preliminary Breath Test Report

If your jurisdiction allows for the admissibility of a preliminary breath test, the officer who administered the test may have prepared a separate report pertaining to its administration and the results.

Breath Test Report

If the defendant consents to a breath test post-arrest, a certified breath test report must be generated by the law enforcement officer. Each breath test instrument produces its own documentation and it must then be certified by the breath test operator. Make sure you are familiar with the operation and documentation for each instrument used in your jurisdiction and the state regulations that pertain to the instrument. Also, calibration records, weekly logs and simulator solution documentation should also be obtained, if applicable to your instrument and jurisdiction.

For a more in-depth discussion about breath testing, visit the National Traffic Law Center Web site at:

www.ndaa.org/apri/programs/traffic/ntlc_home.html

Refusal report

In some jurisdictions, if the defendant refuses to consent to a chemical test (blood, breath, or urine) post-arrest, a report regarding his refusal must be prepared by the police officer who witnessed the refusal after the defendant was advised of his rights. The defendant's verbal responses to the request to submit are noted in this report. In some jurisdictions, evidence of this refusal to submit to a chemical test, and specifically the defendant's comments, may be used by the prosecution in its case in chief.

Request for independent test

Some jurisdictions allow defendant to seek a second, independent chemical test. Know the rules in your jurisdiction—is the officer required to assist defendant in obtaining the test or to advise him of his right to the test? Does the prosecutor have a right to the second test results?

Drug Recognition Expert/Evaluator Report

If the investigating officer believes that the defendant is impaired by a substance other than or in addition to alcohol, he may request that a Drug Recognition Expert/Evaluator (DRE) be called in to examine the defendant. The DRE then makes a determination as to whether the defendant is impaired, and if so, whether it is a result of a medical condition or drugs, and if drugs, which of the seven drug categories is present. Be advised that not all jurisdictions have implemented DREs. Check with your State Traffic Safety Resource Prosecutor (TSRP), the International Association of Chiefs of Police (www.theiacp.org) or your State DRE Coordinator for further information. For a more in-depth discussion about DREs and their training, visit the National Traffic Law Center Web site.

A list of all State Traffic Safety Resource Prosecutors is included as an addendum to this monograph.

All witness affidavits

In many DWI cases, the law enforcement officer does not directly observe the defendant's operation of the motor vehicle. It is often a civilian witness who observes the defendant speeding, driving over the double yellow line, crashing the vehicle or getting out of the driver's seat after a crash. Also, a civilian witness may have been with the defendant when he was drinking or after a crash. The witness may have heard the defendant admit to driving. The civilian's observations may also corroborate the observations of the police officer. If a civilian is involved, the law enforcement officer should attempt to seek a written affidavit from him detailing all observations. The affidavit should also include all pedigree information from the witness: name, date of birth, address, and phone numbers.

Defendant's confession/statements

Once the defendant is arrested and advised of his Miranda rights, the police may take an oral and/or written statement from him detailing operation, impairment and, if applicable, the details of a crash. Always make sure that the defendant was advised of his rights by the law enforcement officer in clear and unequivocal language, a language the defendant knows and can communicate in. The time of the administration of Miranda rights in DWI cases may vary by jurisdiction. The statement may be signed (preferably under oath and under the penalty of perjury) by the defendant and witnessed by police officer. If it is not, contact the police officer and consider requesting a supplemental report detailing why it was not signed or witnessed.

Search Warrants and Applications

In some jurisdictions and where permitted, blood draw warrants are necessary before a blood sample may be drawn from a DWI defendant. Make sure you are aware of the necessary protocol that must be followed in your jurisdiction. The law enforcement officer may contact the prosecutor before the warrant is drafted or executed for guidance. Be sure to obtain a copy of the warrant application and the order signed by the judge for the file. These will be necessary for the chain of custody for the blood. In addition, if any other types of search warrants are obtained (to obtain the defendant's clothes for testing for air bag residue, to search the defendant's vehicle, for example), make sure to have the application and order for those as well.

Autopsy Report

Whenever possible, if someone dies as a result of a DWI crash, an autopsy should be conducted to determine that the cause of death was actually a result of the crash and not a disease or personal defect. The medical examiner will prepare a report detailing the cause and manner of death. As you review the document, familiarize yourself with the medical terminology (a medical dictionary is a must). The better you understand what happened to the victim the better prepared you will be to present the medical examiner to the jury.

In addition, photographs are often taken during the autopsy by the medical examiner's office.

Death Certificate

Familiarize yourself with the agency (Bureau of Vital Statistics, for example) and procedure needed to obtain a certified copy of the death certificate for each victim involved in a DWI crash.

Laboratory Reports

Once all substances submitted to the laboratory have been analyzed, written reports will be generated by the various specialists within the laboratory who conducted the testing. As you prepare for trial it may become necessary to obtain a copy of the laboratory file as it pertains to the exact tests and equipment used to test the samples. The following laboratory reports may be generated in a DWI or DWI crash case:

- Blood or Urine to determine the presence of alcohol or drugs
- DNA
- Fingerprints
- Hair analysis
- Fiber analysis
- Fabric transfers
- Paint transfers
- Paint chip analysis
- Air bag residue

Discovery rules in your jurisdiction may require you to provide to defense counsel reports as to which laboratory equipment was used, the calibration history of the equipment, the training and professional background of laboratory personnel, etc. It may be helpful to have all of this "general" information prepared on a computer program or office network and update as needed rather than pulling it together on a case-by-case basis.

For a more in-depth discussion about alcohol toxicology and drug toxicology, visit the National Traffic Law Center Web site.

Collision Reconstructionist's report

If the DWI case involves a crash, the prosecutor must understand how the crash occurred and who is at fault. It is the responsibility of the prosecutor to make the final determination as to whether or not a crime has been committed by this particular defendant. In order to thoroughly understand and answer those questions, the crime scene itself must be investigated and the data and evidence analyzed. Many law enforcement agencies now have officers who are State-certified Collision Reconstructionists (CR) who perform these functions.

The CR will respond to the crime scene as soon after impact as possible, preferably before the police agency has cleared the scene. He will locate and record the physical evidence, specifics regarding the roadway itself, witness, victim and defendant's statements to determine what happened pre- and post-impact. The CR will prepare a report detailing his findings and ultimately the cause(s) of the crash. The information obtained from this report will assist you in determining the following: Is this defendant at fault? If so, was it criminal negligence or reckless behavior? Does it rise to the level of a vehicular homicide or a murder? Was the victim culpable in any way? For a more in depth discussion about collision reconstruction, visit the National Traffic Law Center Web site.

Motor Vehicle Accident/Crash Report

Some jurisdictions mandate that if a DWI results in a motor vehicle collision, the law enforcement agency must draft a preliminary report of the crash detailing, among other things: the vehicle registration and inspection information, the driver's pedigree information, victim and witness pedigree information, location of the crash, date, time and place of the crash, and the direction of travel of the vehicles pre-impact. In addition to being filed with the police agency's records division, some States require that this document be submitted to the Department of Motor Vehicles or the Registry of Motor Vehicles.

Photographs, Video and Audio Tapes

Photographs are one of the most useful tools in the prosecution of a DWI or DWI crash case. Remember, "*A picture is worth a thousand words.*" Often times the crime scene or the victim is photographed with a camera and with a video. If the police video has sound, make sure that your duplicate copy has sound as well. Be sure that you obtain copies of all photographs, videos and audio tapes taken throughout the case, including but not limited to:

- Defendant's operation of the motor vehicle
 - Video from the police vehicle
 - Driving clues (Vehicle in Motion)
 - Traffic stop (Personal Contact)
 - Administration of the standardized field sobriety tests (Pre-Arrest Screening)
- Crime scene
- Booking photograph of defendant
(Remember, the defendant's appearance will almost certainly have changed from the night of the crime to the day of trial.)
- Victim photographs during recovery
- Photographs taking during processing of evidence
- Autopsy photographs
- Defendant interviews
- Witness interviews

- Booking process
- Administration of the breath test at the police station
- 911 tapes
Copies of 911 recordings often contain the actual call from a citizen informant and may be admissible under Crawford v. Washington, 541 U.S. 36 (2004) as it may constitute an “ongoing emergency.” Depending on the agency, these recordings may not be kept indefinitely. A duplicate tape should be requested and obtained as early as possible.
- Stationary surveillance cameras (at intersections, shopping malls)
- Any photographs taken by witnesses
- Television news footage, if applicable

Event Data Recorders

Event Data Recorders (EDRs, commonly but erroneously referred to as “black boxes”) are now standard issue in many vehicles made after 2000. These devices are installed at the factory to record the speed of a vehicle five seconds before and up to five seconds after the deployment of airbags. This information can be extremely important to the collision reconstruction in determining the speed of the vehicle at time of impact. Special software is needed to download the information from the EDR and many jurisdictions require a search warrant to obtain the EDR and remove the data. For more information concerning EDRs, visit the National Traffic Law Center Web site.

Medical authorization

If your DWI case involves a victim who has survived the DWI crash, you should obtain from the victim, as soon as possible, medical authorizations to obtain his medical records from all of his treatment providers, if applicable in your jurisdiction. If the victim is unable to execute an authorization due to his injuries, contact the victim’s next of kin to obtain one on his behalf. HIPAA (Health Insurance Privacy and Portability Act) regulations are very strict regarding the release of medical records. The authorization should specifically designate the prosecutor’s office as the recipient of the records, not the police agency investigating the crime. If the victim changes doctors be sure to obtain new medical authorizations specific to each doctor. These records will indicate the victim’s diagnosis, cause of the injuries and prognosis. All of this information is necessary to determine the proper charges to be filed against the defendant. As the doctor may eventually become a witness for the prosecution, obtain a copy of his Curriculum Vitae for your file.

Physical Evidence

After obtaining all of the necessary documents generated in the case, locate the physical whereabouts of all of the evidence. In conjunction with office policies, remember, no evidence should be released until after the case has been litigated and the defendant’s appeal process has been exhausted. Notify the investigating law enforcement agency immediately that no physical evidence should be released without the written consent of

the prosecutor's office. Should an insurance company and/or a defense attorney wish to examine or photograph the evidence, it is best to have a law enforcement officer present at all times to avoid any potential tampering with or destroying evidence. Examination of the evidence may occur at the following locations:

- Evidence room at police department
- Crime laboratory
- Secured police garage
- Medical examiner's office
- Prosecutor's office

CASE EVALUATION

Timeline

The next process in the DWI prosecution is the evaluation of the evidence against the defendant. Preparing a detailed timeline of events will show the defendant's activities leading up to his arrest. It is an easy way to see what evidence may be missing and the strengths and weaknesses of the case. Always remember the significance of date, time, and place throughout a DWI case. If there is a victim, it is a very helpful to include the information about his whereabouts and activities in the timeline. It makes for a vivid picture of the parallels and differences between the choices they made. The timeline should include the following information:

Defendant

- His locations prior to first observation by police
- Persons he was with
- Food and drink: type and quantity
- Drugs: type and quantity
- Type of vehicle he was driving
- Time/place of first contact with police
- Time/place of admissions/statements regarding operation/intoxication
- Time/place administration of Standardized Field Sobriety Tests (SFSTs) and/or other field sobriety tests
- Time/place defendant placed under arrest
- Time/place of observation period (know the required time for your jurisdiction)
- Time/place administration of breath test/urine/blood test

Time of Crash

Victim

- His/Her locations prior to crash
- Intended location and time he anticipated arrival
- Time of death
- Length of stay in hospital/rehabilitation center recuperation period

Police

- Jurisdiction/authority
- Arrival at scene
- How the incident came to their attention (e.g., dispatched to call for service, on-view)
- Whether the police vehicle was marked and the officer in uniform

Preliminary Witness List

Preparing a preliminary list of persons involved in your DWI case will enable you determine who will be able to provide proof in your case in chief or for rebuttal, who may become a defense witness, and who provides no pertinent information at all. As you prepare the case for trial, this list may change dramatically. When preparing the list, list each witness's title, rank, or other manner by which they prefer to be addressed. This will enable you to introduce the witness in a formal and respectful manner. Most jurisdictions have statutory requirements for when a witness list must be presented to the defense and the court prior to trial and what information about the witnesses must be disclosed. For example, the witness's date of birth, city of residence, and prior criminal history are often required. Similarly, the defense may be required to provide a reciprocal witness list to the prosecution at the same time. Once the defense witness list is obtained, ascertain as much background information about each witness as possible. This will aid in the preparation of cross examination. Witnesses may include:

Police Officers

- Observations of defendant's driving
 - Initial contact with defendant
 - Common law signs of intoxication
- First responding to crash scene
- Initial contact with victim
- Administered SFSTs and/or other field sobriety tests
- Breath test operator
- Maintenance/upkeep on breath test instrument
- Chain of custody – lab transport/evidence room
- Witness interviews
- Evidence Technician
- Collision Reconstructionist

Civilians

- Defendant's operation of the vehicle
- Person who called 911
- Observations of defendant's drinking
- Defendant's statements
- Observed the crash

Medical personnel

EMS and/or Fire Department Personnel

- Defendant's statements
- Defendant's appearance

Hospital

- ER doctor for victim and/or defendant
- Person who drew defendant's blood
- Treating physician
- Rehabilitation providers

Medical examiner

Toxicologist

Charge Review

After the facts of your case have been reviewed, determine if the defendant has been properly charged. First, review each and every element of the crimes charged and the definitions that pertain to those elements. Second, determine if the law enforcement officer had reasonable suspicion for the stop of the defendant's vehicle and probable cause to arrest the defendant. Finally, decide if there is a factual basis to support each element of each charge beyond a reasonable doubt.

Obviously in a DWI case you must prove operation and impairment. Operation can be proven in several ways, including but not limited to: direct observation by the law enforcement officer, observation by a civilian, and defendant's statements. If the defendant is out of the vehicle when the law enforcement arrives, as in a crash, they should note the seat position of vehicle in relation to the size of the defendant, any injuries consistent with striking the windshield, steering wheel or dashboard, hairs in the windshield that can be matched to the defendant, registered owner, absence of anyone else in the area who could have driven the vehicle (no other footprints in the snow, etc.).

Impairment/intoxication may be proven through the combination of all of the sights, sounds, smells, and statements made by the defendant from the time of operation until he is lodged in the jail. This may also include changes in the defendant's behavior as he begins to become sober. Law enforcement officers should note in their reports all signs of impairment at each point of contact with the defendant. For example, while the defendant was seated in his vehicle and talking with the officer, the officer observed disheveled clothes, an odor of alcohol, slurred speech, red and bloodshot eyes, fumbling with his wallet, and trouble getting out of the car when requested. Additional signs may include but are not limited to the following:

- Performance of SFSTs
- Admissions to drinking
- Spontaneous statements in police car
- DRE observations
- Refusal to perform SFSTs
- Breath, blood or urine test
- Refusal to submit to a chemical test

Once you have determined that you can prove the elements of the crime of DWI beyond a reasonable doubt, you must then consider whether the proper charges have been filed against the defendant. Are the charges currently lodged against the defendant appropriate for facts? Should charges be enhanced or reduced? Should additional charges be filed? Does the fact that the defendant has a prior DWI conviction enhance the new DWI charge against him? Does the date of the prior conviction have any relevance? Do you need to obtain a certified record of conviction to prove the prior conviction? Did the defendant have a valid license at the time of operation? Did a death occur after the defendant was arrested?

Plea negotiation restrictions should also be considered when deciding if additional or enhanced charges should be filed. Many jurisdictions have enacted plea negotiation restrictions on DWI cases. These restrictions limit the ability of the prosecutor to reduce a charge during plea negotiations. In addition, many jurisdictions have also established sentencing guidelines for misdemeanors and felonies. Some may be unique to DWI cases.

Regarding sentencing, many judges will request the prosecutor's input on sentencing either at the pre-trial stage or post conviction. Knowing these restrictions will also help when the case is reviewed with the defense attorney prior to meeting with the judge. Some jurisdictions include monetary sanctions associated with DWI convictions (in some states the monetary sanctions are mandatory and cannot be waived by the court as part of a plea negotiation). License sanctions and a requirement of the placement of an ignition interlock device for DWI convictions are often listed in the same sentencing guidelines.

Statutory speedy trial requirements must also be reviewed before the defendant is formally charged with additional or enhanced charges.

Victim Notification

If the DWI case involves a crash, it is important to meet with the victim or the surviving family to review the prosecution process. Remember to respect the victim's recovery process and/or grieving period when the meetings are scheduled. Consider waiting until some time has passed from the funeral or the victim has been released from the hospital. Also, consider inviting the lead investigating officer to the meeting so that the family/victim is aware of the investigation that has occurred, what is ongoing and that there is a team approach to the prosecution. Explain to them what the law is that applies to their particular case and that the process may be long and arduous.

Court dates, potential contact from the media or the defense, trial procedures, the judge, sentencing guidelines and restitution are some of the topics that should be reviewed with the victims. Keep them apprised of what is happening. Be honest with them, above all else. Remember “Always beating beneath the surface is that one memory of loss.” They will live with that loss forever.

A victim advocate may offer great assistance to both you and the victim/family. They can provide information about a variety of issues including, but not limited to:

- Funeral expenses
- Medical bills
- Grief therapy
- Family therapy
- Assisting with media contact
- Keeping company with the victim/family in courtroom/waiting room

Many jurisdictions have a local MADD affiliate (Mothers Against Drunk Driving www.madd.org), or an advocate from another agency that works within the prosecutor’s office to assist victim with these issues.

In addition, many States have specific statutory requirements regarding victim notification or involvement in a criminal case. Be sure to check your State statutes before the initial meeting with the victim.

Arraignment

Jurisdictions will vary as to when the defendant will be formally arraigned on DWI charges. Often times, the law enforcement agency will make a determination if the defendant will be arraigned immediately after arrest by a local judge in the jurisdiction where the crime occurred or taken into custody immediately after processing and arraigned the next day. The initial accusatory instruments should be provided by the law enforcement agency to the court and the prosecutor if present at the arraignment.

If the prosecutor is present at the arraignment, he should make a bail argument. Jurisdictions will vary as to factors that may be considered in a bail argument. The following factors are commonly considered when addressing the bail issue:

- Defendant’s criminal and driving history
- Prior bench warrants
 - Potential for flight from jurisdiction
 - Potential to commit additional crimes while out on bail
- Basic facts of case – BAC result, crash
- Substantial likelihood of success of prosecution
- Defendant’s ties to community
- Sentencing guidelines

Trial Preparation

Case Theory

Trial preparation begins with the development of a case theory. The theory is based upon an analysis of the facts and a review of the evidence, the totality of the circumstances. By so doing, you can more readily remain focused, confront the positive and negative aspects of the case and anticipate potential defense attacks. The theory should carry through the entire presentation of your case and should remind the jury that the defendant has committed a crime. Some familiar theories in DWI prosecutions include:

- The defendant made bad choices
- The defendant didn't control his drinking, so he couldn't control his driving

Research

Research potential legal issues and challenges immediately. If you anticipate a legal challenge to the admission of evidence or to a topic your witness may discuss, be prepared to present supporting testimony or documentation to the court. There are many resources available to assist with DWI challenges: The National Traffic Law Center has information on all topics pertaining to DWI, as do State Traffic Safety Resource Prosecutors.

Terminology

DWI cases often involve language and terminology that is not common to the average prosecutor or juror. The prosecutor must be familiar with the pronunciation and meaning of these words in order to easily converse with the witness and convince a jury that these are not foreign or difficult things to comprehend. For example, certain laboratory testing instruments, drug and drug metabolite names, parts of the body and collision reconstruction terminology can be complex and intimidating. If you can easily use the language while you are questioning the witness, the jurors will be less intimidated by it. In addition, if a witness has a difficult name to pronounce, practice it. It shows to the jury that you respect the witness and so should they.

Discovery

Every jurisdiction has particular statutory discovery requirements that must be met prior to trial. Every prosecutor should be familiar with these requirements and the penalties for failure to provide the required materials. Document the file as to what discovery items have been sent to the defense and when. In addition, reciprocal discovery should also be obtained from the defense at the earliest permissible date, do not wait until immediately prior to trial. This information can be reviewed with prosecution witnesses to assist in the preparation of cross examination of the defense witnesses.

Transcripts

As the case progresses toward trial, obtain all transcripts of preliminary hearings, suppression of evidence hearings, grand jury, if applicable and license revocation hearings. Review with witnesses all prior written and oral statements prior to trial. It will

give them an opportunity to recall the incident itself and to prepare for cross examination at trial.

Subpoenas

Prepare and serve subpoenas for trial witnesses as soon as possible. In many jurisdictions, courts are hesitant to adjourn trials if the excuse is witness unavailability due to lack of sufficient notice of trial. Determine which witnesses may be unresponsive to the subpoena and make sure they are personally served. By so doing, if the witness fails to appear for trial, the prosecution may request that the court order the witness be located by the local law enforcement agency and brought to court.

Scene of the Crime

If unfamiliar with the area where a DWI arrest occurred or if a crash occurred as a result of a DWI, the prosecutor should visit the scene well before trial. It is especially helpful to view the scene at the same time of day and as close to the time of year that the incident occurred. By physically seeing the area, the roadway, line of sight the driver had, any obstructions, traffic lights, distances between points, etc., it will help you question the witnesses on their recall of the scene and the events they observed. In addition, have additional photographs of the scene taken, if necessary.

Witness Preparation

You should begin preparing each witness for trial as early as possible. Keep in mind that most witnesses have never been in a courtroom before, let alone have had to testify. An extensive background check on each witness should be conducted as soon as possible prior to their first trial preparation meeting. With that information, the prosecutor can review with the witness any potential defense attacks relating to his criminal history, relationship with the defendant, etc. Often times, if unprepared, witnesses become upset or defensive if they are questioned in public about events from their past or things they may have done with the defendant. Explaining to them why this information is allowed by the court should at least educate the witness and allow them an opportunity to prepare for the questions.

Allow the witness an opportunity to review all prior written statements or testimony he gave about the case so that the events are again fresh in his mind. Often, it can be months from the time of the crime to the date of trial and memories can fade. As they are reviewing, it is always important to remind them that the only thing they need to do is to tell the truth based upon their own recollections, not stories they may have heard from others since the crime occurred. In addition, review with each witness the exhibits that they will be asked to identify and allow them the opportunity to inspect it in the prosecutor's presence. By seeing the evidence again, the witness may find it easier to recall and describe the events he observed.

With each witness, review anticipated defenses relating to his testimony and any known "tactics" of the defense attorney. This may ease some of the witness's anxiety about testifying and help him to better understand what the defense is trying to accomplish. It

may also give the witness some sense of control if he can have some time to think about how to respond to the questions as opposed to instantaneously needing to give an answer.

Never forget to give each witness a tour of the courtroom prior to trial. The fact that the witness will know where each person will be sitting, how close they will be to the defendant or the jury and where the judge will be can be of some comfort. In addition, show him how to operate any microphone, video screen, or other instrument prior to his testimony. If you anticipate asking the witness to leave the witness stand to demonstrate something, indicate where you anticipate the demonstration will occur and allow him to practice. Familiarity with his environment will decrease anxiety and present him as a confident witness to the jury.

Expert Witnesses

If the prosecution's case involves expert testimony, obtain a current resume or Curriculum Vitae for each expert. The expert's background should contain specific expertise unique to DWI and/or collision reconstruction. Determine if the expert has published research studies, articles or other materials pertaining to DWI and if so, obtain copies. The expert will be cross-examined on these materials as they are most likely a basis for his opinion. Meet with the expert well in advance of trial and review his testimony. Make sure that the expert has had the opportunity to review all of the necessary documents in the prosecution file prior to trial preparation. Also, follow local discovery statutes regarding notice to the defense of intent to use expert witnesses.

For a more in-depth discussion of this topic and to assist with preparing an expert witness for trial, see "The Criminal Justice System: A Guide for Law Enforcement Officers and Expert Witnesses in Impaired Driving Cases" published by the National Highway Traffic Safety Administration. The reference code is: DOT HS 810 707 (2007). This monograph is available at the NHTSA Web site:

www.nhtsa.dot.gov/people/injury/enforce/GuideforOfficers/index.htm

Exhibit List

As preparation for trial begins, the prosecutor will need to determine what pieces of evidence will be necessary for his case in chief. All evidence collected in the case, including but not limited to photographs, pieces of physical evidence, video and audio recordings from the police vehicle of the standardized field sobriety tests, breath test results, and laboratory reports should be reviewed. During the review of evidence, make a list of the necessary exhibits and which witness or witnesses will be necessary to introduce each exhibit. Remember, not every piece of evidence collected or photograph taken is necessary for a successful prosecution. It may be helpful to make two lists: one of each piece of evidence and one for those the prosecutor actually intends to offer at trial.

Creating and introducing demonstrative exhibits can be extremely useful as well. Consider creating a map of the defendant's driving route including all of the businesses, speed limit signs, stop signs, schools, etc. he passed while in an impaired condition.

Documents and photographs (e.g., the breath test printout or the collision scene) may also be enlarged for easier viewing by the jury.

Once an exhibit has been introduced through a witness and received by the court, update the exhibit list to indicate the court's receipt. Always reconfirm that an exhibit has been received by the court before the witness is offered to the defense for cross-examination and, also, as an added precaution, before the prosecution rests its case, review the exhibit list to make sure each exhibit has been offered and received by the court.

Be aware, some jurisdictions require that the prosecutor pre-mark each exhibit prior to trial. If required to do so, make sure that the exhibit list indicates the number or letter assigned to each exhibit for easy reference.

Jury Instructions

Many jurisdictions have the prosecutors prepare written proposed jury charges for the court's review prior to jury selection. This is helpful to the prosecutor because he has the ability to then use the language from the jury charges throughout his opening, witness testimonies and summation. This will repeatedly put the specific charge language in the jurors' minds and how it relates to the evidence they have heard. As a result, the charges should not be foreign or confusing to the jurors when they enter the jury room for deliberations.

Common Defense Challenges

From the moment you begin your case review you should begin to anticipate the defense challenges to your case. Listed below are a few of the challenges that may be raised:

- Invalid traffic stop
- 5th Amendment – Miranda Defenses
- Attacking observations during personal contact
- Attacking field sobriety tests
- Attacking breath testing instrument results

For a more in-depth discussion of this topic and to assist with responding to common defense challenges, see "Overcoming Impaired Driving Defenses: Targeting Hardcore Impaired Drivers" published by the National District Attorneys Association, American Prosecutors Research Institute (2003). This monograph is available from the National Traffic Law Center Web site.

CONCLUSION

DWI cases are among the most challenging and technical criminal cases that a prosecutor will ever handle. They are often confronted with vigorous defense efforts and jury empathy. Successful prosecution of DWI cases therefore requires careful attention and presentation in a professional and thorough manner. For further information or assistance, contact the National Traffic Law Center by telephone at 703.549.4253 or email at trafficlaw@ndaa.org.

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www.nhtsa.gov

National District Attorneys Association
www.ndaa.org

National Traffic Law Center
Link from NDAA home page

Mothers Against Drunk Drivers
www.madd.org

National Association of Prosecutor Coordinators
www.napcsite.org

International Association of Chiefs of Police
www.theiacp.org

Drug Evaluation and Classification Program
www.decp.org

National Sheriff's Association
www.sheriffs.org

Traffic Injury Research Foundation
www.trafficinjuryresearch.com

Accreditation Commission Traffic Accident Reconstruction
www.actar.org

Governors Highway Safety Association
www.ghsa.org

International Association of Forensic Toxicologists
www.tiaft.org

International Council on Alcohol, Drugs & Traffic Safety
www.icadts.org

National Institute on Alcohol Abuse and Alcoholism
www.niaaa.nih.gov

National Center for Victims of Crimes

www.ncvc.org

The Century Council

www.centurycouncil.org

National College of DWI Defense

www.ncdd.com



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