

I N S I D E T H E M I N D S

Witness Preparation and Examination for DUI Proceedings

*Leading Lawyers on Understanding
the Role of Witnesses in DUI Cases*



ASPATORE

©2016 Thomson Reuters/Aspatore

All rights reserved. Printed in the United States of America.

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors nor the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

For customer service inquiries, please e-mail West.customer.service@thomson.com.

If you are interested in purchasing the book this chapter was originally included in, please visit www.legalsolutions.thomsonreuters.com

Knowing Your Witnesses and Building a Successful Defense for the DWI Client

James B. Seplowitz

Founding Partner

Foy & Seplowitz LLC



ASPATORE

Introduction: Evaluating Witness Testimony in DWI Cases

A popular joke goes as follows: *Why does the Mafia dislike Jehovah's Witnesses? Because the Mafia does not like any witnesses.*

In all drunk driving cases, defense counsel will be facing potential witnesses ready and willing to provide damaging testimony against the accused. Defense attorneys do not need to like those witnesses, but we do need to know how to minimize the damage from their testimony and elicit positive testimony for the accused. It is also crucial to evaluate each case individually to determine whether the defense should call any witnesses and which types of witnesses.

In New Jersey and other jurisdictions where driving while intoxicated (DWI) cases are heard only by judges, rather than juries, the assessment of each witness's value must be guided accordingly. We can know only in hindsight whether it was the right decision to call a witness to the stand or cross-examine one of the prosecutor's witnesses. But the foresight in making that decision must at least be informed after a full analysis of all aspects of the witness and the case. This chapter will focus on how to prepare for the testimony of witnesses most frequently encountered in DWI trials.

The Arresting Officer

In every DWI case, the prosecutor will present, at the very least, the testimony of the arresting officer who stopped, detected, tested, and arrested your client¹—i.e., effectuated a motor vehicle stop based on a perceived traffic infraction(s), detected an odor of alcohol or other signs of possible intoxication, conducted field sobriety tests, and then arrested the subject to be transported to police headquarters for a breath test and processing. Most likely, the prosecutor and arresting officer will focus on facts unfavorable to your client. Through cross-examination, it is defense counsel's duty to elicit any favorable facts, attempt to neutralize bad facts, and highlight the absence of unfavorable facts that are frequently noted by arresting officers in other DWI cases.

¹ Depending on your client's demeanor and behavior, the officer may have also detested your client.

First, the arresting officer will testify as to what led him or her to effectuate a motor vehicle stop. A motor vehicle stop constitutes a seizure under the Fourth Amendment and corresponding state constitutional provisions.² Thus, to justify a motor vehicle stop, a police officer must have a reasonable and articulable suspicion that the driver committed a motor vehicle offense.³ Some motor vehicle offenses can be indicative of an intoxicated operator, while others do not lend such an inference. For instance, a driver's inability to maintain his or her lane will be a factor taken into account in determining intoxication.⁴ In addition, under the New Jersey DWI statute, an accident resulting in injury or property damage shall be considered by the police officer "along with all other facts and circumstances in determining whether there are reasonable grounds to believe that person was operating a motor vehicle [while intoxicated]."⁵

However, non-erratic driving violations, such as speeding, are not indicia of intoxication.⁶ Therefore, when the basis for the motor vehicle stop is a non-erratic driving violation, that fact should be duly noted during cross-examination of the officer. If the driving is depicted as erratic, then the officer should be questioned as to whether other causes of such driving were excluded from consideration, such as cell-phone use, fatigue, adjusting the radio, or distraction by a passenger, etc. The officer will generally be unable to exclude all alternative causes of erratic driving.

After the motor vehicle stop, the officer will request the driver's license, registration, and insurance card and possibly converse with the driver. To expand the scope of the initial traffic stop and further detain the driver for field sobriety testing, the officer must be able to articulate a reasonable suspicion based on particularized facts that the driver appeared intoxicated.⁷ The most common indicia of intoxication noted by police officers before the subject is ordered to alight from the vehicle are odor of alcohol, bloodshot and/or watery eyes, slurred or incoherent speech, and fumbling hand movements when retrieving driving credentials. Most of those observations

² *State v. Chapman*, 332 N.J. Super. 452, 461 (App. Div. 2000).

³ *State v. Locurto*, 157 N.J. 463, 470 (1999); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

⁴ *See, e.g., State v. Breslin*, 392 N.J. Super 584, 588-89 (App. Div. 2007).

⁵ N.J.S.A. 39:4-50(a).

⁶ *See State v. Samarel*, 231 N.J. Super. 134, 143 (App. Div. 1989); *State v. Morton*, 74 N.J. Super. 528, 531 (App. Div. 1962).

⁷ *State v. Bernokeits*, 423 N.J. Super. 365, 374-75 (App. Div. 2011).

can be neutralized by alternative causes other than intoxication. More important, if the officer does not mention any of the above and they are omitted from the officer's reports, then the lack of those observations should be brought out through cross-examination. For example:

- Officer, after you approached Ms. Accused, did you ask her for her driving credentials?
- And she provided them to you without any difficulty?
- She retrieved her license from her purse?
- And handed it over to you?
- She did not drop it or exhibit fumbling movements?
- She then retrieved her registration and insurance cards from the glove compartment?
- She also did that without difficulty?
- The registration and insurance cards were in good standing?
- So she obviously understood and comprehended your request?
- And she fully complied?

After neutralizing the initial observations, we must turn our focus to the field sobriety tests (FSTs). When the arresting officer testifies at trial about the specifics of your client's FSTs, it is often many months after the arrest. It is not uncommon for the officer to attempt to read from his or her report when testifying about your client's performance on the FSTs. If the officer reads directly from the report, an objection is warranted, since the officer may use the report only to refresh his or her recollection and then continue testifying as to that refreshed recollection without the report.⁸ Defense counsel may also want to inquire whether the officer took handwritten notes during the tests. If such notes existed and were destroyed without being supplied to defense counsel in discovery, then an appropriate sanction should be imposed, such as an adverse inference against the state's case.⁹

Many field sobriety tests are available to officers investigating a suspected drunk driver. In most cases, officers will at least conduct the three field

⁸ See N.J.R.E. 612; *State v. Carter*, 91 N.J. 86, 123-24 (1982).

⁹ *State v. W.B.*, 205 N.J. 588, 608-09 (2011).

sobriety tests standardized by the National Highway Traffic Safety Administration (NHTSA)—the horizontal gaze nystagmus (HGN) test, the walk and turn or heel to toe test, and the one leg stand test.¹⁰ If an officer gives a conclusory opinion that the subject failed a test, then defense counsel should object, since a non-expert witness can only state his or observations and allow the trier of fact to determine the subject's condition based on the objective standards for the tests.¹¹

In some cases, the FSTs are recorded on video. A copy of the video is provided to defense counsel during the discovery process. At times, the video can be more damaging to the defense's case than the officer's testimony. However, the depiction of an accused on the video is sometimes in stark contrast to the stumbling and rambling drunk that the officer described on direct examination in obvious exaggeration. On cross-examination, it is prudent to lay a foundation for the eventual playback of the video for the judge. For instance, if the officer claims the accused leaned on the car for support, and you know from the video that no such act occurred, then ask the officer whether that observation would be caught on camera. In most cases, officers do not spend the time reviewing the video prior to testifying, and inconsistencies are likely to arise during trial. An impartial judge will note such a glaring discrepancy when viewing the video. Video evidence is considered highly probative, as it presents a more graphic and accurate representation of the subject's condition than the officer's testimony.¹²

At the conclusion of the FSTs, your client is arrested. If he or she was calm and cooperative during the arrest process, try to highlight that fact during cross-examination. You can even take it one step further and ask the officer whether he or she has experience with arrestees acting unruly or combative during the arrest process in other DWI cases. It is not uncommon for a drunk to become easily agitated. If your client remained calm throughout the encounter with the officer, such demeanor could be a sign of sobriety that should be stressed during closing arguments.

¹⁰ This chapter will not focus on the specifics of the standardized field sobriety tests. However, a DWI practitioner must study the NHTSA SFST student manual prior to cross-examining an arresting officer. The manual can be found online at http://www.wsp.wa.gov/breathtest/docs/webdms/DRE_Forms/Manuals/dwi/Student%20Manual%20-%20September%202004.pdf (last visited January 29, 2013).

¹¹ See *State v. Morton*, *supra*, 74 N.J. Super. at 530-32.

¹² See *State v. Bottomly*, 208 N.J. Super. 82, 86 (Law Div. 1984).

Breaking up the arresting officer's testimony into chronological sections enables defense counsel to focus on each phase and dissect the evidence in a manner most favorable to the accused. If you are well versed in the facts, you will find this is not a difficult task. Since the arresting officer is often the most decisive witness in a DWI trial, effective cross-examination of that officer can lead to a not guilty verdict.

The Breath Test Operator

In a case involving a breath test result that was not precluded by way of a pretrial motion, the arresting officer's testimony will usually be followed by testimony from the breath test operator.¹³ New Jersey has implemented a new breath testing device in the past decade, the Alcotest 7110 MK III-C, manufactured by Draeger.¹⁴ For breath test results to be admitted at trial, the prosecutor must submit into evidence certain documents pertaining to the machine and elicit testimony from the operator regarding proper operation of the machine when extracting breath samples from the accused.

Having a breath testing expert present in court for this stage of the proceedings can be crucial to the outcome of the case, as set forth in the next section, because an operator's failure to follow proper protocol or a machine malfunction can lead to exclusion of the breath test results. No person or machine is infallible. Fortunately, we have a legal system in which defendants can challenge any accusation against them and have their day in court to put the evidence to the test.

Expert Witnesses

In many DWI cases, an acquittal would not be possible without the report and testimony of an expert witness. The experts most commonly utilized by defense counsel in New Jersey DWI cases are former New Jersey State Police breath test coordinators. As breath test coordinators, these troopers are responsible for calibrating the Alcotest machines at all police headquarters throughout the state and for training all officers in conducting field sobriety tests and administering the Alcotest. These retired troopers

¹³ In many cases, the arresting officer, if properly certified, also acts as the breath test operator.

¹⁴ The Alcotest was found by the Supreme Court of New Jersey in *State v. Chun*, 194 N.J. 54 (2008) to be a scientifically reliable machine when certain conditions are met.

are routinely accepted by the courts as experts in breath testing and field sobriety testing. They are able to opine about deficiencies in the state's case or the effect of external variables on the reliability of the FSTs or breath test. Employing such an expert can cost the client several hundred or even a couple of thousand dollars, depending on whether the case goes to trial and how many court sessions it takes to conclude the trial. The fees are generally reasonable, and it is ideal to have a DWI expert for almost all cases that go to trial.

There has been a tremendous increase in the number of driving under the influence of drug (DUID) cases in recent years. Many police departments have officers who received specialized training in the detection of someone under the influence of drugs. Most of those officers underwent training through the International Association of Chiefs of Police (IACP) to be certified as a drug recognition expert or examiner (DRE).¹⁵ DUID prosecutions generally involve a report and related discovery prepared by a DRE who examined the driver. It is prudent to retain a retired DRE to review that discovery and any pertinent medical records for your client that could explain some of the observations noted in the DRE discovery. Since there is no *per se* level in DUID cases, a DRE expert for the defense can prove quite helpful in attaining a favorable result.

In some DUID or blood DWI cases, it may be necessary to retain an expert in the field of toxicology or pharmacology. Such expert witnesses are able to testify about the effects of drugs on the body and the analysis of drug or urine/blood samples.

Finally, some cases may require retaining a medical expert. For example, you may need to call a pulmonologist to testify about a client's respiratory problems if charged with refusal based on an insufficient breath sample, or a podiatrist who performs a gait analysis to determine whether a client's inability to perform balance tests is due to a physical ailment and not

¹⁵ In New Jersey, the testimony of an expert witness is the preferred method to prove that an individual was under the influence of drugs, but a DRE certification is not required as long as the officer has sufficient training and experience in detection of individuals being under the influence of drugs. *See, e.g., State v. Bealor*, 187 N.J. 574, 591-93 (2006). However, without a DRE, the prosecutor may have a more difficult time proving the case beyond a reasonable doubt, particularly if the defense has a DRE expert to refute the officer's findings.

necessarily due to intoxication. Medical experts tend to be more expensive than the more common DWI experts noted above and are, therefore, less often employed. Nonetheless, there are cases where a medical expert report or testimony is necessary to achieve the desired result.

The Accused

Many attorneys regret having put a client on the stand, but few regret not having done so. Unless there is a glaring issue in a DWI case that the client must explain to the court, it is usually best to avoid putting the client on the stand. The burden of proof is on the prosecution, and there is no need to assist with that burden if reasonable doubt has possibly been established by poking holes in the prosecution's case through cross-examination of the officers or through testimony from a defense expert witness.

If a client is going to take the stand, then it is imperative to thoroughly prepare the client for both direct and cross-examination, preferably not more than a week before trial so the preparation remains fresh in the client's mind. It is also wise to avoid waging a credibility battle between the officers and the client, particularly in a bench trial, where the judge is more likely to find the local police officer more credible than the allegedly drunk defendant.¹⁶

Of course, it is ultimately up to the client whether to testify.¹⁷ Nevertheless, it has been my experience that most clients will defer to the advice of counsel on that decision. But some clients want their day in court and to speak their mind before the judge. Charles Dickens once wrote, "Lawyers hold that there are two kinds of particularly bad witnesses—a reluctant witness, and a too-willing witness."

¹⁶ Municipal court trial judges' credibility findings are given high deference by appellate courts, even where a basis for the credibility finding is not articulated. *See State v. Locurto, supra*, 157 N.J. at 474-75 ("To require judges in our municipal courts with extremely voluminous case loads to articulate detailed, subjective analyses of factors such as demeanor and appearance to support credibility determinations on each and every witness presented before them would unnecessarily tax a system that is already overburdened.").

¹⁷ *See Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); *State v. Savage*, 120 N.J. 594 (1990) (defense counsel must advise the defendant of his her right to testify and of the advantages and disadvantages of doing so).

On the rare occasion that a client elects to testify against your advice, make sure to write a file memo memorializing your discussions with the client about that choice. If the client indicates he or she will commit perjury,¹⁸ then defense counsel must refuse to cooperate with the client, and doing so is not considered ineffective assistance of counsel.¹⁹ Our duty to zealously advocate on behalf of clients “is circumscribed by an ‘equally solemn duty to comply with the law and standards of professional conduct.’”²⁰ Thus, when dealing with the dilemma of putting a client on the stand, defense attorneys must always be mindful of the governing rules of professional conduct. Preventing a client from committing perjury can actually be considered effective advocacy, especially since most lies are obvious and often revealed through the crucible of cross-examination. The right to remain silent extends through trial and is too often forsaken by our clients.

Conclusion

Although a defendant charged with an offense is presumed innocent unless proven guilty beyond a reasonable doubt in a court of law, the reality for DWI defendants is that they are presumed guilty. A DWI defense attorney will be swimming upstream when fighting the charges. Therefore, a DWI trial necessitates concentrated preparation for the witnesses who will testify for and against the accused. The pretrial preparation and strategizing is frequently more consequential than the trial techniques.

There is a Latin proverb about war that applies equally to DWI trials: “To win a war quickly takes long preparation.” Do not take that preparation lightly.

Key Takeaways

- Minimize the damage that can be caused by the testimony of the state’s witnesses in DWI cases by eliciting positive facts and diffusing negative ones through cross-examination of those witnesses.

¹⁸ Ironic if the old saying of *in vino veritas* holds true.

¹⁹ See *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (“Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.”).

²⁰ *People v. DePallo*, 96 N.Y.2d 437, 441 (2001).

- Examine the video evidence to uncover discrepancies between what is on the video and what is in the officer's report.
- Consider hiring an expert in every DWI case. Discuss that possibility with your client at the initial consult and advise the client of the additional costs.
- Avoid putting clients on the stand unless there is a particular issue they need to testify about. Virtually all clients need extensive preparation for trial. If the client is going to testify, conduct a mock direct examination and cross-examination, and give the client pointers to tighten up the answers.

James B. Seplowitz practices exclusively in the field of criminal and driving while intoxicated (DWI) defense in New Jersey and New York. In his ten years of practicing law, he has represented hundreds of clients charged with DWI and tried dozens of those cases to conclusion. He is currently a partner at the firm of Foy & Seplowitz LLC and prior to that was a partner at the Rem Zeller Law Group. He started his legal career as a law clerk to the Honorable Donald R. Venezia JSC in the Criminal Part of the Superior Court of New Jersey.

Mr. Seplowitz is a graduate of the Benjamin N. Cardozo School of Law and holds a master's degree in criminal justice. He has attained an AV Preeminent rating from the Martindale-Hubbell Peer Review Rating system on ethical standards and legal ability and is listed in the 2012 and 2013 New Jersey Super Lawyers publication as a "Rising Star" in the field of criminal defense. He has published several legal articles and participated in many continuing legal education (CLE) lectures regarding DWI and criminal law.

Mr. Seplowitz is a member of the New Jersey State Bar Association (NJSBA), the Bergen County Bar Association (BCBA), the National Association of Criminal Defense Lawyers (NACDL), and the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ). He has served as president of the Young Lawyers Section for the BCBA and as a co-chair of the BCBA's Criminal Practice Committee. He is currently a co-chair of the BCBA's Municipal Practice Committee and a member of the BCBA's board of trustees.

Acknowledgments: *I wish to acknowledge the Honorable Donald R. Venezia JSC. I began my legal career as a law clerk to Judge Venezia, and he instilled in me a real passion*

for the law and faith that our criminal justice system is capable of upholding our constitutional rights and operating in a fair and just fashion.

Dedications: *This chapter is dedicated to my mentor, Joseph P. Rem Jr., Esq., who has taught me how to advocate effectively on behalf of my clients and to treat my profession as more than just a job. I am fortunate and privileged to have worked under Joe's tutelage for close to a decade. He is truly an exceptional trial lawyer, and I am grateful for everything he has imparted to me.*

Finally, thank you to my beautiful wife and wonderful children for putting up with my long work hours, and to my parents for always being supportive and serving as incredible role models for me. I love you all.



ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal titles that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the business and legal communities. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.



ASPATORE