DUI/DWAI MANUAL

A Guidebook for Colorado Prosecutors

2001

Produced by
Colorado District Attorneys' Council
Denver, Colorado
Peter A. Weir, Executive Director

DRUNK DRIVING PENALTIES

(as of July 1, 2002)

42-4-1301

	OFFENSE:	PENALTY:	FINE:
(7)(a)(I)	DUI, Habitual User, Per Se	5 days – 1 Year, the court can suspend all jail with alcohol evaluation and Level I or II; and 48-96 Hours Useful Public Service.	$300-$1000
(7)(a)(II) applies to the following:		90 days – 1 Year, the court can suspend 80 Days; if 1. Alcohol Evaluation 2. Completes Level I or II 3. Abstaining for 1 Year 4. Monitored by treatment facility; and 60-120 Hrs. Useful Public Service:	$500-$1500
(7)(a)(III)(A)	Conviction for DUI, Habitual User, Per se, and previous conviction for DUI, Habitual User, Per se, Vehicular Homicide, Vehicular Assault or Driving Under Restraint		
'a)(III)(B)	DUI, DWAI or Per se when Blood Alcohol Content >.20		
(7)(a)(IV)	DUI, Habitual User or Per se and previous conviction for DWAI	70 days – 1 Year, the court can suspend 63 Days; if: 1. Alcohol Evaluation 2. Completes Level I or II 3. Abstaining for 1 Year 4. Monitored by treatment facility; and, 56-112 Hrs. Useful Public Service	$450-$1500
(7)(b)(I)	DWAI	2 – 180 days, the court can suspend all jail with alcohol evaluation and level I or II; and 24-48 hours Useful Public Service.	$100-$500

(7)(b)(II)	2nd or subsequent DWAI	45 days – 1 Year, the court can suspend 40 days, if: 1. Alcohol Evaluation 2. Completes Level I or II 3. Abstains for 1 Year 4. Monitored by treatment facility; and, 48-96 Hrs. Useful Public Service	$300-$1000
(7)(b)(III)	DWAI and Previous Conviction for DUI, Habitual User, Per se, habitual user, Vehicular Homicide, Vehicular Assault, or Driving Under Restraint	60 Days – 1 Year, the court can suspend 54 days, if: 1. Alcohol Evaluation 2. Completes Level I or II 3. Abstains for 1 Year 4. Monitored by treatment facility; and, 52-104 Hrs. Useful Public Service	$400-$1200

ACKNOWLEDGMENTS

The 2001 edition of the DUI/DWAI Manual is based on the work of contributors to earlier editions. The Colorado District Attorneys Council wishes to thank all the contributors to the 2001 edition of the manual, and everyone who has worked on previous editions of the DUI/DWAI Manual .

The 2001 manual was compiled by prosecutors from many judicial district around the state who work was invaluable. Without the generous time commitments of these individuals there would be no manual.

INTRODUCTION

It is ironic that the first cases handled by new county court deputies are those involving driving under the influence. While every prosecutor cuts his teeth on these cases, the truth of the matter is that a DUI prosecution is a fairly complex undertaking; there are not only complicated evidentiary foundations which must be laid, but complex scientific principles to understand and explain to the jury. DUI prosecutions require you to get scientific evidence admitted and work with experts. Once you can accomplish all of these with skill, you are ready to admit most every kind of scientific evidence. The goal of the 2001 edition of the DUI/DWAI manual is to provide a "nuts and bolts" guide to a DUI case. This volume does not attempt to serve as a substitute for preparation, experience, and study. It is a very useful starting place for the prosecutor faced with his or her first DUI trial. It will hopefully assist the more experienced prosecutor as well.

Predicate questions are provided where appropriate and should be used as a guide when formulating your own questions as you prepare your case for trial. While it is possible to use the questions provided verbatim, it is not advisable. The process of preparing a direct examination of the intoxilyzer operator, for example, will teach you much more about laying a foundation for testimony than simply repeating at trial the predicate questions from this manual. In addition, the questions provided may not be suited to your style, the witness's strengths or the jurors' backgrounds.

A word about DUI Per Se. This manual does not directly address the prosecution of Per Se cases. However, most of the concepts, suggestions and foundations provided in this manual apply with equal force to both a Per Se case and a traditional DUI case. The distinction is in the "effect" element of a traditional DUI case. There is no such element in a Per Se case. Rather, under section 42-4-1202(1.5) C.R.S., the act of driving with .10 alcohol level in the blood or breath is outlawed. In short, the Per Se law is an act of prohibition. It makes the act of driving with an excessive alcohol level illegal regardless of the effect that the alcohol level had on the person's driving ability. As you read this manual keep this distinction in mind. Note those portions of a DUI prosecution which are common to both a Per Se charge and a traditional DUI charge, and those which are not. This will help prepare you to prosecute both types of charges.

The foundations suggested in Chapter 9 are only that. They have been deemed acceptable in some county courts. The judges in your respective judicial districts may require a different or additional foundation. Know the practice in your jurisdiction. Then modify the foundation as necessary.

All who have been involved with this project hope that this volume will serve you well in your county court endeavors.

CHAPTER 1 - CHARGING

CHAPTER 2 - CASE PREPARATION

CHAPTER 3 - MOTIONS

CHAPTER 4 - JURY SELECTION

I. INTRODUCTION

The first step of a successful DUI prosecution is to make certain that the charges are filed correctly.

The requirements for a proper criminal Summons and Complaint are fairly simple and include:

1. Name of the defendant;

2. Offense charged;

3. Statutory citation;

4. Brief statement or description of the offense in the language of the statute; as of July 1, 1989 it is sufficient to describe DUI as "Drove Vehicle While Under the Influence of Alcohol or Drugs or Both", section 42-4-1202(1)(h), C.R.S., DWAI as "Drove a Vehicle While Impaired by Alcohol or Drugs or Both", section 42-4-1202(1)(i), C.R.S., and DUI - Per se as "Drove a Vehicle With Excessive Alcohol Content", section 42-4-1202(1.5)(c), C.R.S.

5. Date and approximate location of the offense; including county and state;

6. Order for the defendant to appear at a specified date, time, and place before a specified county court;

   NOTE: Pursuant to 42-4-1505(3)(a), C.R.S., the time specified in the criminal summons portion of the Summons and Complaint must be at least twenty (20) days after the date the criminal Summons and Complaint is served, unless the defendant demands an earlier court date.

7. If the criminal Summons and Complaint is served personally, service must be done by a peace officer (section 16-2-106 C.R.S. and Crim.P. 4.1).

   Double check the dates, times and locations on police reports, intoxilyzer printouts, etc. to make sure that all information tracks with the charging information.

Be sure that all of the above elements are present on the Summons and Complaint. Only those elements need be present under the simplified procedures in county court. Francis v. County Court, 175 Colo. 308, 487 P.2d 375 (1971).

II. AMENDING THE SUMMONS AND COMPLAINT

The safest and surest way to amend a Summons and Complaint is to do so before trial begins. Do not wait until after the evidence is in!

The defendant may move to dismiss before or during trial because of an alleged defect in the Summons and Complaint, but current case law seems to indicate that a motion to dismiss should be allowed only when the defect is jurisdictional in nature, or when substantial rights of the defendant would be prejudiced by allowing the prosecution to amend.

The Colorado Supreme Court in People v. Hertz, 196 Colo. 259, 586 P.2d 5 (1978), extended the logic of Crim.P.7(e), to defects in a Summons and Complaint:

If the defect goes to the very substance of the offense, such that an amendment would charge a different or additional offense, then the defect might be fatal. But, when the amendment is merely of a formal or technical variety, such as the deletion of the words "or drugs" from a complaint alleging "driving under the influence of intoxicating liquor or drugs", then the defect is not fatal and amendment should be allowed.

The Colorado Supreme Court has applied the reasoning in Hertz, supra., to allow amendment of the Summons and Complaint as to formal matters even after the prosecution has presented its evidence and rested. People v. Dickenson, 197 Colo. 338, 592 P.2d 807 (1979).

In Dickenson, the Court held that the defendant had "waived" any objections to the Summons and Complaint by waiting until the People had rested before bringing up the objection. See also Crim.P.12(b)(2) and (3).

What constitutes a "fatal defect" in a Summons and Complaint is a question that has gone largely unanswered by the case law and the rules. It generally appears however that the absence of one of the required elements noted above, may be fatal if not corrected and an amendment

which seeks to correct such a defect will not be allowed if it would substantially prejudice the rights of the defendant. See Crim.P.7(e).

NOTE: Although a summons and complaint is required to state the date and approximate location of the offense charged, these two elements are not "deemed to be material elements of the offense charged as long as the court has jurisdiction". Crim.P.4.1(c)(4), (emphasis added).

Keep in mind that the MAIN PURPOSE OF THE CHARGING DOCUMENT IS TO PROVIDE THE DEFENDANT WITH SUFFICIENT NOTICE OF THE OFFENSE CHARGED SO THAT HE MAY PROPERLY PREPARE A DEFENSE.

SEE: People v. Moore, 200 Colo. 481, 615 P.2d 726 (1980); People In Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

A Summons and Complaint which charges the wrong offense or contains the wrong statutory citation will be insufficient. However, if the defendant has filed a Motion for Production of a Breath or Blood Sample, or a Motion to Suppress Roadside Sobriety Tests, then it is at least arguable that the defendant is aware of the charge he is facing, regardless of any defects in the Summons and Complaint. The Supreme Court used this reasoning in Dickenson, supra., and it should be reiterated whenever the defendant makes a Motion to Dismiss during trial for a supposedly "fatal defect" in the Summons and Complaint.

A defect going to "jurisdiction" is fatal. Clearly charging an offense on which the statute of limitations has expired or which occurred in another state raises jurisdictional issues. However as to other defects the cases have not clearly distinguished between defects which are jurisdictional and those which are not.

A common error found on summons and complaints that is often considered jurisdictional by the trial court is the designation of a court holiday or a weekend date for a defendant's appearance. This defect, if it effects the court's jurisdiction at all, goes to personal jurisdiction over the defendant, not the court's subject matter jurisdiction. While you can argue with the court that it has jurisdiction of the case, if the defendant fails to appear in court, the court will not obtain personal jurisdiction of the person or the defendant. Therefore, as a practical matter, if the defendant is ordered to appear on a weekend or court holiday, the best course of action is probably to dismiss the case (if the court has not already done so) and have the case re-filed and the defendant re-served. Language such as

"You are summoned and ordered to appear before the court at 8:00 a.m. on , 20 , IF THIS DATE IS A SATURDAY, SUNDAY OR HOLIDAY, YOU ARE TO APPEAR ON THE NEXT COURT BUSINESS DAY, . . . appears to eliminate this problem, but be prepared to re-file and re-serve if the court determines that this language is not specific enough to advise the defendant of the duty to appear.

III. SECOND ALCOHOL OFFENSES

Section 42-4-1301(9)(e)(II)

For Sentencing purposes concerning convictions for second and subsequent offenses, prima facie proof of a defendant's previous convictions shall be established when the prosecuting attorney and the defendant stipulate to the existence of the prior conviction or convictions or the prosecuting attorney presents to the court a copy of the driving record of the defendant provided by the department of revenue of this state, or provided by a similar agency in another state, which contains a reference to such previous conviction or convictions or presents an authenticated copy of the record of the previous conviction or judgment from any court of record of this state or from a court of any other state, the United States, or any territory subject to the jurisdiction of the United States. The court shall not proceed to immediate sentencing when there is not a stipulation to prior convictions or if the prosecution requests an opportunity to obtain a driving record or a copy of a court record. The prosecuting attorney shall not be required to plead or prove any previous convictions at trial, and sentencing concerning convictions for second and subsequent offenses shall be a matter to be determined by the court at sentencing.

IV. JOINDER

A. VEHICULAR ASSAULT/HOMICIDE

Sections 18-1-408(2) and 18-1-301, C.R.S. prohibit more than one prosecution for offenses arising out of the same act or series of acts. The special significance of these statutes to DUI prosecutions arises when the DUI charge arises from a traffic accident involving serious bodily injury or death. If it appears from the police reports, witnesses or victims statement that vehicular assault or vehicular

homicide should have been charged, then the Summons and Complaint should be dismissed immediately. Otherwise, the defendant may plead guilty to the DUI count and the prosecution will probably be barred from bringing the appropriate felony charges. The best practice is to check with a supervisor or other experienced deputy before the case comes on for arraignment, to determine whether the felony should be filed.

SEE: Ruth v. County Court, 198 Colo. 6, 595 P.2d 237 (1979).

B. DRIVING AFTER JUDGMENT PROHIBITED CASES (HABITUAL TRAFFIC OFFENDERS)

Occasionally, a deputy is faced with a defendant who is a Habitual Traffic Offender, (see section 42-2-202, C.R.S.) Pursuant to section 42-2-206, C.R.S., the felony charge of Driving After Judgment Prohibited must be filed if the facts warrant. The felony investigation is most often done by the arresting officer or a detective from his department. Because Habitual Traffic Offender is now a misdemeanor, unless the defendant is committing a major traffic offense, you should check with your supervisor to determine if a felony charge should be filed.

Until the felony charges are filed, or the decision is made not to file a felony, your job is to prevent the defendant from entering a guilty plea to the misdemeanor DUI or DWAI charge prior to a determination regarding a felony filing. This should be done by notifying the court, preferably in writing, that the District Attorney objects to the entry of a guilty plea in the misdemeanor case until such time as a felony filing decision can be made.

The same joinder considerations apply to habitual traffic offender cases as to vehicular assault and homicide cases: if the defendant pleads guilty to the misdemeanor DUI or DWAI charge, prosecution of the felony count will probably be barred.

I. PREPARING THE PROSECUTION CASE

A. CASE FILE CHECK LIST

The first step of case preparation is a thorough and critical reading of the case file. You must familiarize yourself with all the relevant materials. When reading the file think in terms of persuasion, theories and themes of the case. Any time you look at a file you must think of the theme or theory, i.e., what do you want to start with in the jury selection and finish with in the closing argument.

Does the file contain a:

- Properly charged Criminal Summons and Complaint, (see Chp. 1)
- List of witnesses
- Affidavit in support of warrantless arrest, if the defendant was arrested
- Sobriety examination or equivalent report
- Traffic Accident Report (if applicable)
- Miranda Advisement/Waiver form
- DMV Express Consent form
- Certified documents from the Colorado Department of Health (CDH) including the CDH Certificate, the Intoxilyzer Certification Record, the CDH Certificate to the agency or jurisdiction, the Standard Simulator Solution label and the CDH Maintenance Record for the Intoxilyzer.
- Intoxilyzer operator and solution changer certificates
- Blood/ Urine analysis consent and results form

- Litigation/trial packet from laboratory that performed blood or urine analysis
- Intoxilyzer operational checklist
- Standard solution label with date it was placed into service.
- Log sheets from the Intoxilyzer
- Intoxilyzer print-out
- Drug influence evaluation
- Defendant's driving record and criminal history
- Narrative reports
- Photos, videos or dispatch tapes
- Witness statements and witness criminal histories
- Return of subpoenas or waivers

- Be sure that all dates, times and identification numbers match up, i.e. date on print-out matches date on Criminal Summons and Complaint; Intoxilyzer serial number matches print-out, etc.

- Double check that the Summons and Complaint or Endorsement of Witnesses lists all witnesses necessary to prove the elements of the case. If a necessary witness is not listed on the front of the Summons and Complaint, file a Motion to Endorse Witnesses as soon as possible. (Often technical witnesses such as lab technicians are left off).

- Check the file for any inconsistencies or irregularities. Discuss any such items with the officers involved or other deputies and clear them up immediately.

- After you have reviewed the case file you should, gather any additional evidence; decide the theory or theme of the case; identify possible defenses and plan strategies to counter them.

NOTE: Not all of the documents listed above will be created in each case, depending on the type of case and the law enforcement agency. Check with a supervisor or experienced deputy in your office to determine what documents should be submitted by the agencies.

B. DISCOVERY RULES CRIM P 16

A discussion, in depth, of the criminal discovery rules is beyond the scope of this manual. However, violations of the automatic and continuing disclosure provisions of Crim.P.16 can cause serious headaches for prosecutors.

MAKE SURE YOU HAVE MADE AVAILABLE ALL DISCOVERABLE MATERIAL. This includes talking with the investigating police officer to determine if there are any statements by the defendant that are not included in his written report. Compare your file to the agency file to make sure you have all the necessary material. You almost certainly will be precluded at trial from using such statements or material if they were requested by defense counsel and not disclosed prior to trial. See People v. District Court (Denver), 808 P.2d 831for possible sanctions when the Rules of Discovery are violated.

It is a good idea to send each defendant or defense attorney a standardized letter stating that it is your office's policy (if indeed that is a fact) to make all files available to the defendant or his attorney (subject to obvious Crim.P.16 limitations). This may place an affirmative burden upon the defense to obtain discovery. Be wary of Rule 16, however, it does not require the defense file a motion to obtain discovery, rather it speaks of automatic disclosures. Familiarize yourself with the office policies and the practice of the local defense bar.

Further, you should file a separate pleading requesting compliance with the defendant's discovery obligations under Crim.P. 16 (II). The rules of discovery are different for prosecutors than defense attorneys. So too are the sanctions for violation of the rules, see People v. Pronovost, 773 P.2d 555 (Colo. 1989) and People v. Lopez, 946 P.2d 478 (Colo. App. 1997)

- Crim.P. 16 requires the prosecution to turn over the written statements of all witnesses and the defendant. Crim.P. 16(a)(I). However, this does not impose an obligation to reduce oral witness statements to writing. People v. Garcia, 627 P.2d 255 (Colo. App. 1980), People v. Graham, 678 P.2d 1043 (Colo. App. 1983).

- Be aware of the need to determine whether or not any witness or the defendant has a record of prior criminal convictions. The prosecution has an obligation to turn such information over to the defense. Crim.P. 16 (I)(a)(V).

- Any information which is potentially exculpatory or which is "new" and falls under the prosecutors disclosure obligations pursuant to Crim.P. 16(I)(a) must be made available to the defendant, or his attorney, as soon as possible after you receive or are made aware of it. Crim.P. 16(III)(b). This requirement includes oral statements made by witnesses. Be mindful of the exculpatory nature of inconsistent statements. The prosecutor has both a statutory and constitutional obligation to disclose to defense any material, exculpatory evidence the attorney possesses. Salazar v. People, 870 P.2d 1215 (Colo. 1994)

- SEE: Crim.P. 16(I)(a)(2) and III(b).

- If in doubt - always err on the side of caution and turn the information over to the defense. As prosecutors we should not fail to reveal any information.

II. THE SCENE

If you are able to visit the scene you should. In most jurisdictions it is difficult to visit the scenes of the five DUI/DWAI cases set for trial on a given day. Thus, talk to the law enforcement officers and other eyewitnesses to obtain as much information from them as possible. Reread the reports and narratives, paying attention to the little details such as weather, lighting etc. Always ask the officer the location and condition of the ground where the roadsides were conducted. Some cases call for an on scene view. If at all possible have the officer walk you through the scene. Knowing and understanding what the scene looks like will enhance your ability to make the jury "see" the events portrayed in the testimony. Strongly consider using charts, diagrams, photos, videos and multi-media presentations throughout the case. Effective use of exhibits not only enhances the case but also makes you a more effective advocate.

III. WITNESS PREPARATION

You must talk to your witnesses before they take the witness stand. Adequately preparing witnesses for trial is a critical step in the total prosecution effort. Preparation includes preparing a witness for both direct and cross-examination. Carefully consider each of the following witness preparation steps:

- Always instruct witnesses to TELL THE TRUTH.
- Review with the witness all of the events you consider important to the case - your case and the case you think the defense may present.
- Let the witness read through all statements or reports in the case file. Ask them questions about their reports and the statements. Check them for accuracy of fact and substance. Add any notes to your case and build questions that you will ask your witness at trial.
- Clear up any contradictions, inconsistencies, and questions which you have noted when reviewing the case.
- If your witness will be testifying from a diagram, be sure that it is prepared prior to trial and that the witness knows exactly how the diagram and the events fit together.
- If the witness's testimony is important as to estimates of time, distance, speed, or unusual circumstances be sure that you have discussed each estimate thoroughly in advance and that all such details are firmly planted in his/her mind.
- Review the witness's opinion of the defendant's state of sobriety. You should go over this portion of the testimony with your witness more than once. Be sure that your witness can articulate a sound basis for the opinion.
- Prepare your witness for direct examination by reviewing all of the questions you intend to ask. Prepare him for cross-examination by anticipating the defense's questions.
- Have the witness narrate the events about which they will testify. Probe the facts with them. Make sure all the details are discussed. Witnesses, both police officer and lay, will often recall details of the offense which are not recorded in any report or statement if

they are forced to relate the facts in narrative form, with follow-up questions asked by you.

- Discuss whether an Express Consent or Motions Hearing was held in the case. Talk about issues and facts that might have been important in previous appearances.

- If you plan on the officer demonstrating the roadside maneuvers tell him or her. The officer should be prepared in case the defense attorney asks for a demonstration.

IV. RECOMMENDATIONS TO THE WITNESS ABOUT GIVING TESTIMONY

In addition to what is said by your witness at trial, the manner in which testimony is given during direct and cross-examination contributes greatly to credibility. The following recommendations can be applied to your advantage:

- The witness should dress for the role and responsibility. Ask your police officer witness to wear his uniform if he or she is on duty. Ask lay witnesses to wear what they normally wear at work.

- Tell your witnesses not to compete with the defense attorney on cross-examination. They are to answer the question being asked and nothing further. Witnesses should not change their manner during cross-examination.

- Caution your witness to testify only to those facts, events or statements he personally observed or heard. They should not guess.

- Advise witnesses to avoid memorizing what they intend to say at trial or to sound like what they think a witness should sound like. Remind the officers that their reports may be used to refresh their recollection, if necessary.

- Encourage them to talk in plain language -- their own words to the jury. Avoid "cop talk." Witnesses should not try to impress, make speeches or do anything other than respond to questions.

- Discuss exhibit(s) with your witnesses. Explain to the witness how you will introduce the exhibit through them. Let them see the exhibits before the trial begins.

- Cross-examination will happen and the witness will survive. Prepare your witnesses accordingly. Officers must be able to explain mistakes, discrepancies or omissions.

I. TIME FOR FILING

The first line of defense to the defendant's pre-trial motions is to insist that they be made in accordance with the Colorado Rules of Criminal Procedure.

Crim.P. 12(b)(3) requires that a motion to dismiss for defects in the Summons and Complaint be filed within 20 days of arraignment.

Crim.P. 41(g) requires that a motion to suppress be filed before the trial unless opportunity did not exist or the grounds for the motion were unknown. The Colorado Supreme Court has held that the trial court may deny a hearing on a motion to suppress evidence for an alleged constitutional violation if the defense waits until the day before trial to bring the motion and the grounds for the motion were known to defense counsel well before the trial date. See Morgan v. People, 166 Colo. 451, 444 P.2d 386 (1968). However, the court, in its discretion may entertain a suppression motion at trial. People v. Stevens, 183 Colo. 399, 517 P.2d 1336 (1973). If defendant could not, by exercise of reasonable diligence discover grounds for such a motion in advance of trial, defendant should not be deemed to have forfeited the right to seek suppression of evidence arguably obtained by constitutionally prohibited means. People v. Tyler, 874 P.2d 1037 (Colo. 1994) (This ruling has a detrimental effect on the prosecutors because it means that they may not know in advance of trial if evidence that is important to their case will be suppressed.) This situation should be rare.

Crim.P. 45(d) requires five days notice before a hearing can be held on any pre-trial motion.

Section 18-1-202(11) C.R.S. requires motions challenging the county of trial be filed in writing no later than twenty days after arraignment.

As a responsible prosecutor, you may insist on the following:

1. That all motions be filed before trial and within the applicable time frames; and

2. That the minimum requirement of 5 days notice be allowed in order to properly prepare for the hearing

The two issues that may be raised by motion at any time, including during the trial are:

Subject Matter Jurisdiction

Failure of the summons and complaint to charge an offense.

When arguing suppression motions, always remind the court of the significant prejudice to your case whenever the defendant is permitted to move to suppress evidence on constitutional grounds during trial. If the court suppresses the evidence, the prosecution will be precluded from any meaningful right of appeal by the double jeopardy provisions of the state and federal constitutions, section 18-1-301 C.R.S. If the evidence is suppressed prior to trial, the People have the opportunity to file an interlocutory appeal, pursuant to Crim.P. 37.1. The trial court should not hear suppression motions made during trial unless there is some overwhelming reason to do so. People v. Barela, 826 P.2d 1249 (Colo. 1992) (This is very helpful to the prosecution, because it means in most cases, the court will not be willing to hear a suppression motion during trial, and therefore, they can be assured what the evidence will be prior to trial).

II. BURDENS OF GOING FORWARD AND BURDENS OF PERSUASION

Whether by custom or confusion most prosecutors, defense attorneys, and judges automatically assume that the People always bear the burden of going forward and the burden of persuasion on Fourth and Fifth Amendment issues. In fact, on the issue of voluntariness of statements it appears most everyone believes that the People bear the burden of raising the issue in the first instance. From a procedural perspective such a practice is untenable.

A. ARREST, SEARCH AND SEIZURE

There may be sound tactical and practical reasons for assuming a burden not properly yours, however, "[a]t a suppression hearing the defendant, as the moving party, has the burden of going forward with evidence that an arrest, search, or seizure does not conform to constitutional requirements. A stipulation or other evidence that the police officers did not have a warrant authorizing

their actions satisfies that burden". People v. Jansen, 713 P.2d 907, 911 (Colo. 1986), (emphasis added). "Once that threshold requirement has been met, the burden of going forward shifts to the prosecution." Jansen, at 911. The ultimate burden of persuasion usually rests with the state in arrest, search and seizure cases. However, where a warrant has been issued, the validity of the arrest, search or seizure is presumed, Jansen, at 911, and the defendant bears the ultimate burden of demonstrating a constitutional violation. People v. Gouker, 665 P.2d 113 (Colo. 1983).

B. CONFESSIONS AND STATEMENTS - VOLUNTARINESS AND MIRANDA

The initial burden of going forward, or at least objecting to the admission of a confession or statement of a defendant on voluntariness, appears to lie with the defendant. In Ciccarelli v. People, 147 Colo. 413, 364 P.2d 368 (1961), the defendant argued that the trial court erred in failing to hold a hearing on the issue of the voluntariness of his statements. The court held that where the defendant failed to challenge his confession's voluntariness, failed to demand a hearing on the issue, and denied even making the statement, there was no error in the trial court's failure to address the voluntariness issue on its own motion. Cases consistent with this ruling include People v. Jensen, 747 P.2d 1247 (Colo. 1987), and People v. Rhodes, 729 P.2d 982 (Colo. 1986). "When a defendant claims that a confession was involuntary, the prosecution must establish, by a preponderance of the evidence, the voluntary nature of the confession." Rhodes, at 984 (citing Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed. 2d 618 (1972). A defendant's inculpatory statement is involuntary only "if coercive governmental conduct played a significant role in inducing the statement." People v. Harlan, 8 P.3d 448 (Colo.2000) citing People v. Gennings, 808 P.2d 839, 843 (Colo.1991) (see the list of factors the court sets forth).

Where a statement is made in the context of a custodial interrogation, the People bear the burden of showing that the defendant was given a Miranda advisement and thereafter voluntarily waived his rights. Miranda v. Arizona, 384 U.S. 436 (1966). Logically however the defendant must make an initial showing that the confession or statement was the product of an interrogation which occurred while the defendant was in custody.

The Miranda advisement is only required when a suspect is subjected to custodial interrogation. Miranda. The questioning of a driver incident to a traffic stop does not generally arise to the level of "custodial interrogation," Berkemer v. McCarty, 468 U.S. 420 (1984), People v. Archuleta, 719 P.2d 1091 (Colo. 1986). Given the non-coercive nature of a traffic stop, the protections afforded by Miranda need not be applied unless the defendant's freedom of action is curtailed to a degree associated with formal arrest. People v. Reddersen, 992 P.2d 1176 (Colo.2000). "Routine traffic stops do not constitute custody as matter of law." Id.

Whether you decide to press the issue and force the defendant to meet his initial burden depends on tactical and policy decisions beyond the scope of this manual. Suffice it to say that the best way to deal with the "boiler-plate" motion to suppress may be to announce to the court that "the People are ready to proceed to hearing on the defendants motion to suppress once the defendant presents evidence sufficient to raise a constitutional issue".

A word of caution: While you may be on solid legal ground in demanding that the defendant go forward with evidence or in not proceeding with a voluntariness hearing unless the issue is raised, as a practical matter you run the risk if you take that position. You run the risk that the court will grant the suppression motion because you failed to proceed; many judges refuse to require the defendant to produce evidence at a suppression hearing. You also run the risk that the defendant will raise the issue of the voluntariness of his statements during trial. If the court finds the statements to be involuntary your appeal of his ruling will be an empty gesture; double jeopardy will prevent a re-trial. Therefore, before you demand that the defendant assume the burden of going forward, know how your judge will react. (You can prevent this problem by laying a foundation for the voluntariness of the statement during your questioning of the officer). Further, if you have any questions at all about the voluntariness of the defendant's statements, raise the issue yourself - before the trial begins.

III. REASONABLE SUSPICION TO STOP/DETAIN AND PROBABLE CAUSE TO ARREST

The defendant may move to suppress all police observations and other evidence obtained after the initial stop on the basis that the officer lacked reasonable suspicion to stop and detain the defendant in addition to lacking probable cause for the arrest.

In a case in which there is no arrest warrant (as in almost all DUI cases), the burden of proving reasonable suspicion for the stop and probable cause for the arrest falls on the People. (But keep in mind that the court should require the defendant to produce evidence that he was "stopped", "detained" or "arrested", (i.e. seized) before requiring the prosecution to present evidence of the officer's reasonable suspicion or probable cause.) See II. A. above. Evidentiary rules are somewhat relaxed in such a proceeding. See C.R.E. 1101(d). Since one of the issues is the reasonable suspicion in the mind of the officer at the time of the stop, statements which the officer heard should be admissible. If a hearsay objection is made argue that:

1) The rules of evidence are inapplicable to a hearing pursuant to C.R.E. 1101;

2) That you are not offering the statement for its truth, but for its effect on the hearer.

What a reasonable officer in the position of your officer would believe is the issue, not the ultimate truth of the statement. People v. Wells, 676 P.2d 698 (Colo. 1984).

There are three types of citizen-police encounters:

A. CONSENSUAL CONTACTS

This type of contact does not invoke 4th Amendment protections. A police officer can walk up to a citizen and talk to her in the same manner that you could. A police-citizen contact is consensual so long as no restraint on liberty is implicated, the citizen cooperates voluntarily, and the questioning is non-coercive. The test is whether a reasonable person under the circumstances would believe that she is free to leave and to disregard the officer's

request for information. People v. Johnson, 865 p.2d 836 (Colo.1994).

A seizure requires either (1) physical force, or where that is absent, (2) actual submission to an assertion of authority. People v. T.H., 892 P.2d 301, 303 (Colo. 1995) citing California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991).

B. INVESTIGATORY STOPS

A peace officer may stop any person who he reasonably suspects is committing, has committed, or is about to commit a crime and may require him to give his name and address, identification if available, and an explanation of his actions. See Section 16-3-103(1), C.R.S.

The statute specifically provides that such a stop and initial questioning "shall not constitute an arrest." See also section 42-4-1302, C.R.S. as applied to alcohol-related cases.

Constitutional support for this initial detention is found in: Terry v. Ohio, 392 U.S. 1, (1968), and People v. Stone, 174 Colo. 504, 485 P.2d 495 (1971). In order to lawfully conduct an investigatory detention, the peace officer must:

1. Have a reasonable suspicion that the individual has committed, is committing, or is about to commit, a crime;

2. The purpose of the detention must be reasonable; and

3. The character of the detention must be reasonable when considered in light of its purpose.

   People v. Rodriguez, 945 P.2d 1351 (Colo. 1997); Stone, supra.

The first requirement is satisfied if the "specific and articulable facts known to the officer, which taken together with rational inferences from those facts, created a reasonable suspicion of criminal activity." Mascarenas, at 645. The remaining two requirements are tested by a "reasonableness under the circumstances" standard which in turn will depend on the facts of

the particular case. In determining the validity of a particular investigatory stop the court must look at the totality of the circumstances. People v. Savage, 698 P.2d 1330, 1335 (Colo. 1985)

C. WARRANTLESS ARRESTS

In order to make a lawful arrest without a warrant, a peace officer:

1. Must have probable cause to believe that an offense was committed and probable cause to believe that the offense was committed by the person arrested; or

2. The crime must have been committed in the officer's presence.

Section 16-3-102(1)(c), C.R.S.

Probable cause exists "when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been, or is being committed." People v. Martinez, 689 P.2d 653 (Colo. 1984). All evidence within the officer's knowledge may be considered even though the evidence may not be competent evidence at trial. People v. Gonzales, 186 Colo. 48, 525 P.2d 1139 (1974). The officer's training and experience should also be considered in determining whether the officer had probable cause to make an arrest. People v. Boileau, 36 Colo. App. 157, 538 P.2d 484 (1975). In reviewing whether probable cause for an arrest existed the court should examine the "totality of the circumstances". See People v. Pannebaker, 714 P.2d 904 (Colo. 1986)

In the context of a DUI prosecution there are several different situations in which an officer will stop and detain or arrest a driver.

1. An officer may observe a traffic violation. People v. Brown, 174 Colo. 513, 485 P.2d 500 (1971), (failure to dim lights); People v. Teague, 173 Colo. 120, 476 P.2d 751 (1970), (failure to observe stop sign); Alire v. People, 157 Colo. 103, 402 P.2d 610 (1965), (careless driving); Snyder v. City and County of Denver, 123 Colo. 222, 227 P.2d 341 (1951), (failure to stop for red light).

2. An officer may detain a driver in the course of an accident investigation. People v. Garrison, 176 Colo. 516, 491 P.2d 971 (1971); People v. Amato, 193 Colo. 57, 562 P.2d 422 (1977).

3. A driver may be stopped for an investigation if the officer reasonably suspects the driver is in violation of section 42-4-1302, C.R.S. In the context of the DUI case the officer may notice that a vehicle is traveling well below the speed limit, weaving within its own lane, or speeding up and slowing down erratically for no apparent reason. In this category of stops the officer needs to be able to articulate both what he saw and why it caused him to suspect that the driver had, was, or was about to commit a criminal offense, including driving under the influence or while impaired. (See section on Investigatory Stops, above.)

4. If, following an illegal stop or attempted stop, the detained person's response is itself a new, distinct crime, then the police constitutionally may arrest the person for that crime and the evidentiary fruit of that arrest will not be suppressed. People v. Smith, 870 P.2d 617, 619 (Colo.App. 1994).

5. Sobriety checkpoints and roadblocks provide an additional basis for stopping motorists. The law in this area continues to develop as the U. S. Supreme Court and the Colorado Supreme Court address this issue.

   In the federal arena, the most often cited case in support of roadblocks, Delaware v. Prouse, 440 U. S. 648 (1979), has recently been joined by Michigan Dep't. of State Police v. Sitz, 493 U. S. 1000, 110 S. Ct. 558, 107 L.Ed. 2d. 554 (1990). The U. S. Supreme Court upheld the constitutionality of a roadblock stop as being a reasonable Fourth Amendment intrusion. The Sitz case does not provide much guidance in terms of the elements of a proper sobriety checkpoint. See also, City of Indianapolis v. Edmund, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 221 (2000) (drug interdiction checkpoint violated the 4th Amendment).

   In People v. Rister, 803 p.2d 483, 486 (Colo.1990), the Colorado Supreme Court applied the Sitz balancing test--

which involves a balancing of the state's interest in preventing drunken driving, the extent to which the checkpoint system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped--and held that the sobriety checkpoint and roadblock in question was constitutional.

Whatever the theory behind a stop or arrest, remind the Court that it must make specific findings of fact and conclusions of law. People v. Jenkins, 174 Colo. 26, 481 P.2d 714 (1971). The Court in Jenkins found "probable cause" for the arrest, but made no "findings relative to the basic and underlying facts necessary to support such a conclusion". Jenkins, at 715. The Supreme Court remanded to the trial court for the necessary findings.

IV. SUPPRESSION OF DEFENDANT'S STATEMENTS

The defendant may move for suppression of statements made to a peace officer on the ground that they were involuntary, made in response to custodial interrogation without an advisement and waiver of rights, or both.

NOTE: Statements made to private parties cannot be suppressed unless some state action exists to warrant constitutional protection. For example, a private citizen acting as a police agent. Hunter v. People, 655 P.2d 374 (Colo. 1982).

A. VOLUNTARINESS

A confession or statement of an accused must be voluntary in order to be admissible at trial. Jackson v. Denno, 378 U.S. 368 (1964); People v. Freeman, 668 P.2d 1371 (Colo. 1983). "When a defendant claims that a confession was involuntary, the prosecution must establish by a preponderance of the evidence the voluntary nature of the confession" People v. Rhodes, 729 P.2d 982, (Colo. 1986) (citing Lego v. Twomey, 404 U.S. 477 (1972)) "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the due process clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157 (1986). In determining whether a statement or confession is voluntary the court must look at the totality of the circumstances. People v. Jensen, 747 P.2d 1247 (Colo. 1987). The question of voluntariness is a question for the

court, not the jury, to decide. Deeds v. People, 747 P.2d 1266 (Colo. 1987).

B. CUSTODIAL INTERROGATION

Pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), if the Court finds that the defendant was in custody and his statements were made in response to interrogation, then the defendant must have been informed of, and waived his right to remain silent and right to have an attorney present during questioning.

The test as laid down in Miranda, is:

1. Whether or not a reasonable person would believe themselves to be deprived of his freedom in any significant way; and

2. Whether or not the individual is subject to interrogation.

The test of what constitutes "custody" or a significant deprivation of freedom in the Fifth Amendment sense of Miranda presents a complex issue. In People v. Archuleta, 719 P.2d 1091 (Colo. 1986), the Colorado Supreme Court adopted the reasoning of Berkemer v. McCarty, 468 U.S. 420 (1984), as it applied to questioning of a driver during an ordinary traffic stop. The Court said [i]t is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' Berkemer, at p. 440; See also Archuleta, at 1093. In People v. Reddersen, the Colorado Supreme Court specifically held that routine traffic stops do not constitute custody as a matter of law. 992 P.2d 1176, 1179 (Colo.2000).

At some point in the DUI investigation, the officer will take the driver into custody or subject him to "formal arrest". If the officer intends to question the driver once the arrest is made or treats him in a manner that "renders him 'in custody' for practical purposes," the requirements of Miranda apply. Berkemer, at 440.

The preceding definition of "custody" for Miranda purposes may not apply in Colorado outside the context of a traffic stop. In People v. Trujillo, 785 P.2d 1290 (Colo. 1990), the Colorado Supreme Court stated the standard for determining whether a

person has been subjected to custody as: "Whether a reasonable person in the suspects position would have considered herself deprived of her freedom of action in a significant way during a police interrogation in which the suspect was exposed to the risk of self incrimination." Trujillo, at 1293 (cites omitted). "Neither the subjective state of mind of the officer . . . nor the suspect's mental state is determinative of whether a reasonable person would have considered the interrogation to be custodial." Trujillo, at 1293 (citing Berkemer v. McCarty, 468 U.S. 420 (1984)). The "formal arrest" language is conspicuously absent from the court's opinion. Later cases utilize the "formal arrest" language. People v. Gennings, 808 P.2d 839 (Colo. 1991), People v. Hamilton, 831 p.2d 1326 (Colo. 1992) (the continued absence of the formal arrest language, and even the specific reference in Hamilton, that states that in custody includes more than just constrains associated with formal arrest, would seem to indicate that a defendant may be considered in custody before any constraints of a formal arrest have been applied and therefore, the Miranda rights are invoked. This may cause a problem for prosecutors, because it would create a broader scope of statements that could be found involuntary).

"Interrogation" is not limited to express questioning, but is defined as any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); People v. Rivas, 13 P.3d 315 (Colo. 2000).

If the court finds custodial interrogation, it must also find a voluntary waiver of the defendant's Fifth Amendment rights in order to admit the statements. The prosecution must prove a waiver of rights by a preponderance of the evidence. People v. Hopkins, 774 P.2d 849 (Colo. 1989). The voluntariness of a waiver of Miranda rights depends, as does the voluntariness of statements and confessions, on the absence of governmental coercion. Colorado v. Connelly, 479 U.S. 157 (1986).

NOTE: If a confession or a statement is suppressed solely because of a Miranda violation ask the Court to make a ruling as to the voluntariness of the statements so that you may have an opportunity to use them to impeach if the defendant testifies. See, Harris v. New York, 401 U.S. 222 (1971).

NOTE: Volunteered statements are admissible without the necessity of proving an advisement and waiver. Miranda v. Arizona, supra. Thus, the statement, "I've been drinking all night," ould be admissible if it is volunteered by the defendant without any inquiry by the officer.

SAMPLE QUESTIONS FOR AN OFFICER REGARDING VOLUNTARINESS OF DEFENDANTS STATEMENTS AND THE MIRANDA ADVISEMENT AND WAIVER:

- Name and occupation?
- On (date) did you have occasion to contact (defendant's name)?
- Is the person you contacted present today in this courtroom?
- Where is that person seated and how is he/she dressed? (Record should reflect identification.)
- At what time did you initially contact the suspect?
- What was the total time of your contact?
- Between the time you first contacted the defendant and the time the defendant was released or turned over to another officer, did he make any statements?
- During your contact with the defendant, did you advise the defendant of his rights pursuant to Miranda? Exactly what did you advise him?
- When?
- Did the defendant make any statements before you advised him of his rights?
- What statements did he make?
- Describe the circumstance at the time the defendant made those statements.
- Describe where each statement was made.

- Were you and he seated? Standing? (etc.)
- Was the defendant forcibly restrained in any way?
- Did he appear aware of his surroundings and circumstances?
- What did he do or say which indicated an awareness of his surroundings and circumstances?
- Were you armed?
- Where was your weapon at the time of the questioning?
- Who else was present during the interview?
- Describe your tone of voice?
- Did you in any way threaten the defendant?
- Did you make any promises to the defendant?
- Did anyone else to your knowledge threaten or make any promises to the defendant?
- Did the defendant ever indicate he was ill or in need of medical assistance?
- Did the defendant ever ask for cigarettes, water or other refreshments?
- Did the defendant make any statements which were not in response to questions asked by you or other officers?
- Did you ask him if he understood those rights?
- Did he ask you any question about his rights?
- What question(s)?
- Did you ask if he wished to waive his rights?
- If so, how did he indicate this? Did you use a written form?

- Did the defendant indicate verbally, or through gestures, that he wished to reassert his rights and/or discontinue questioning?
- Did he ever indicate that he was too upset to continue?
- What questions did you ask and what responses did he make?

V. SUPPRESSION OF ROADSIDE SOBRIETY TESTS AND BLOOD/BREATH TESTS

A. ROADSIDE SOBRIETY TESTS

In People v. Ramirez, 199 Colo. 367, 609 P.2d 616 (1980), the Supreme Court decided, at least partially, the long-standing controversy with regard to roadside sobriety tests. In that case, the Court held that use of roadside sobriety tests was not violative of the Fifth Amendment because the tests were non-communicative and non-testimonial in nature, citing Schmerber v. California, 384 U.S. 757 (1966). Roadside sobriety tests do, however, constitute a seizure of the person and therefore present a Fourth Amendment question. People v. Carlson, 677 P.2d 310 (1984). The result of roadside sobriety tests and the observations of the officer made during the test are admissible if they were voluntary under the totality of the circumstances or if there was probable cause to believe the defendant was driving under the influence or while impaired, Carlson. Evidence of a defendant's refusal to submit to roadside sobriety tests is admissible if at the time the request to submit was made the officer had probable cause to believe the defendant was driving under the influence or while impaired. Section 42-4-1201(7)(e), C.R.S. McGuire v. People, 749 P.2d 960 (Colo. 1988)

B. BLOOD/BREATH TESTS

A motion to suppress may be filed alleging that the defendant's due process rights were violated because no second sample of blood or breath was saved. In People v. Humes, 762 P.2d 665 (Colo. 1988) the Colorado Supreme Court held that the Colorado Constitution does not require a police agency to preserve a second sample for independent testing. This conclusion was reached based upon the holding in People v. Greathouse, 742 P.2d 334 (Colo. 1987). Greathouse adopted the U. S. Supreme Court standard applied to the destruction or loss of evidence. See, California v. Trombetta, 467 U. S. 479 (1984).

"To prove that a due process violation has occurred, it must be shown that:

1. Evidence was suppressed or destroyed by the prosecution;

2. The evidence possessed an exculpatory value apparent before it was destroyed; and

3. The defendant cannot obtain comparable evidence by other reasonably available means."

Humes, at 667 (citing People v. Greathouse, 742 P.2d 334, 337 (Colo. 1987)). The latter two prongs of the test also provide a definition of "constitutional materiality". Evidence must be constitutionally material before the court can address an alleged due process violation for its loss or destruction. Trombetta.

If the evidence does not meet the Trombetta standard, the matter falls under the confines of Arizona v. Youngblood, 488 U.S. 51 (1988), adopted by Colorado in People v. Wyman, 788 P.2d 1278 (Colo.1990). The court characterized evidence of this nature as that which might have been "of conceivable evidentiary significance" in a prosecution, and "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Youngblood, supra, 488 U.S. 51 at 57-58. The court concluded that when this is all that can be said about the exculpatory value of the evidence that was destroyed, a defendant may still successfully claim that his due process rights were violated, but only if he can demonstrate that

the prosecution acted in bad faith. See People v. Eagen, 892 P.2d 426 (Colo.App. 1994)

The Colorado Supreme Court held in People v. Reynolds, 895 p.2d 1059 (Colo.1995), that an involuntary blood alcohol test was not supported by probable cause when an accident had occurred in which defendant motorist was involved and he admitted drinking three beers six to nine hours prior to the accident. The court followed People v. Sutherland, 683 P.2d 1192 (Colo. 1984), where they had adopted the four-part test of Schmerber.

1. Must be probable cause for arrest of defendant on alcohol related driving offense.

2. Must be clear indication that the blood sample will provide evidence of defendant's level of intoxication.

3. Exigent circumstances must exist which make it impractical to obtain a search warrant.

4. Test must be a reasonable one and must be conducted in a reasonable manner.

Sutherland, 683 p.2d at 1194.

In addition to this four-part test, the court adds an additional requirement when bodily fluid is involved. "The officer must have probable cause to believe and there must exist a clear indication that the relevant evidence will be obtained through such an intrusive search. Reynolds, 895 p.2d 1059 at 1060. The court concluded that the mere fact of the officers experience or training does not create probable cause.

You may get a motion to suppress the results of a chemical test because the result of a retest varied from the results of the evidentiary test (a so-called "20% rule"). There is no 20% rule in Colorado. Charnes v. Robinson, 772 p.2d 62 (Colo.1989). The fact that the results of two tests vary at all does not indicate that the either test was unreliable. The only issue with respect to admissibility of either sample is that set forth in People v. Bowers, 716 P.2d 471 (Colo. 1986). If the Bowers test is satisfied, the results of any test are admissible. The fact-finder is to determine if there is any significance to be assigned to the differences in results. People v. Nhan Dao Van, 681 P.2d 932 (Colo. 1984).

VI. MOTIONS TO DISMISS

A. DEFECTIVE SUMMONS AND COMPLAINT

See Motion to Amend Summons and Complaint, Chapter 1.

B. SPEEDY TRIAL

Section 18-1-405, C.R.S. and Crim.P. 48 state the law governing the defendant's statutory right to dismissal for failure to provide a speedy trial. The statutory right to a speedy trial found in these provisions is intended to give effect to the constitutional right to a speedy trial. People v. Deason, 670 P.2d 792 (Colo. 1982). However, these provisions do not limit an accused's constitutional speedy trial right in any way, and compliance with these provisions does not preclude a defendant from asserting his constitutional right to a speedy trial. Casias v. People, 160 Colo. 152, 415 P.2d 344 (1966)

1. Statutory Speedy Trial

Pursuant to 18-1-405, C.R.S. and Crim.P. 48 the defendant is entitled to be tried within six months from the date he enters his plea of not guilty. If he is not tried, (or if the case is not disposed of by guilty plea or otherwise,) the defendant is entitled to a dismissal of the charges with prejudice, section 18-1-405(1), C.R.S. However, the defendant must assert the right. If the defendant does not move for dismissal prior to the commencement of his trial, prior to commencement of any pre-trial motions hearing, or prior to the entry of a guilty plea, the defendant waives his statutory speedy trial right. Section 18-1-405(5), C.R.S.

Certain conduct on the part of the defendant will result in the tolling or restarting of the six month speedy trial period. For example, if the defendant moves to continue a trial after a trial date has been set, the six-month period begins from the time the continuance is granted. See section 18-1-

405, C.R.S. and Crim.P. 48 for the rules regarding the calculation, tolling and restarting of the speedy trial period.

2. *Constitutional Speedy Trial*

The deputy must distinguish the statutory speedy trial requirements from the separate and distinct constitutional speedy trial requirement of the Sixth and Fourteenth Amendments. In Barker v. Wingo, 407 U. S. 514 (1972), the U. S. Supreme Court stated that the speedy trial clause is not to be regarded as inflexible and constitutional speedy trial issues must be reviewed on a case-by-case basis, balancing the conduct of the prosecution and the defense. All relevant circumstances should be taken into account, including: the length of delay, the reason for delay, the defendant's assertion of the right, and the prejudice to the defendant in light of the interests the speedy trial rule is designed to protect. These interests are identified as the prevention of oppressive pretrial incarceration, minimization of anxiety and concern of the accused and limiting the possibility that the defense of the case will be impaired. In short, while there is no specific time frame on the right to a speedy trial under the constitution, compliance with the six month statutory period does not preclude an attack on speedy trial grounds. See Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed2d 520 (1992).

VII. PRE-TRIAL DISCOVERY MOTIONS

Crim.P. 16 governs the discovery process in criminal trials. Certain material must be made available to the defendant. Sections (a)(1) - (3) of Crim.P. 16 delineate materials which must be made available to the defendant. In order to be subject to the provisions of Crim.P. 16, the materials listed -- police reports, witness statements, records of the defendants prior criminal convictions, etc., -- must be within the possession or control of the prosecuting attorney, his staff and any others who have participated in the investigation of the case and regularly report to the prosecutor or have reported in the particular case. Any documents with regard to blood alcohol content, field sobriety tests, statements by the

defendant or witnesses reduced to writing, video tapes of the defendant, and other physical and documentary evidence would therefore be subject to the mandates of the rule.

If there has been a failure to comply on the part of the prosecution (technical or otherwise), Crim.P. 16 III(g) provides:

> the Court may order . . . discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

The rule indicates that the exercise of the court's power in the case of non-compliance is discretionary and should be based on the circumstances. People v. Lyle, 200 Colo. 236, 613 P.2d 896 (1980), People v. Madsen, 743 P.2d 437 (Colo. App. 1987). If the non-compliance has been inadvertent or of a technical nature, argue for more time to comply with the discovery motion, or for the imposition of a minimally restrictive sanction. See, People v. Rivers, 727 P.2d 394 (Colo.App. 1986); People v. Graham, 678 P.2d 1043 (Colo. App. 1983). Remember to argue that dismissal is an extreme sanction, one to be used only in very limited circumstances. "The purpose of the discovery process . . . is to advance the search for truth. When a party violates Rule 16, we believe the court should impose the least severe sanction that will ensure that there is full compliance with the court's discovery orders." People v. District Court, Roan, 793 P.2d 163, 168 (Colo. 1990).

The Colorado Supreme Court has clarified what obligation a prosecutor has to disclose witness statements made during an interview in preparation for trial. Not all notes made during an interview are discoverable People v. District Court, 790 P.2d 332 (Colo. 1990). While witness statements made during the course of an interview are not automatically discoverable, they may be discoverable under Crim.P. 16(I)(a)(2) or Crim.P. 16(I)(d)(1). In order for a prosecutor's interview notes to be discoverable, the witness statements must either tend to negate guilt pursuant to Brady v. Maryland, 373 U. S. 83 (1963), or the court must determine the material is relevant and the defense request for the material is reasonable.

You will likely get motions for discovery requesting items that are privileged (e.g. medical or psychiatric records. C.R.S. 13-90-107), records from another jurisdiction, or not in your "possession and control." Be aware of what your obligations are and that often the defense's recourse is

to issue a subpoena duces tecum to the custodian of such records, in compliance with Crim.P. 17(c).

The defendant also has certain obligations regarding discovery under Crim.P. 16 II(a) through (d). While some of these obligations are subject to constitutional limitations and disclosure is discretionary with the court, you should ask the defendant, or his attorney, if he is represented, for the materials listed in the rule. You can argue that the specific provisions of Crim.P. 16 V, control over the general language of Crim.P. 16 II.

Crim.P. 16 was amended in 1999 (effective 1/1/2000). One of the more significant changes has to do with the defense disclosing witnesses. The rule now requires the defense to disclose the names and addresses of all persons the defense intends to call as witnesses at trial. Crim.P. 16(II)(c). The earlier version of the rule could be interpreted as requiring the defense only to disclose witnesses to their case-in-chief. The defense would often bring in other, non-disclosed witnesses, label them rebuttal witnesses, and argue that Rule 16 did not require the disclosure of rebuttal witnesses.

VIII. OTHER DEFENSE MOTIONS

- The BAC result cannot be suppressed on grounds that the prosecution cannot show how the defendant became intoxicated. MacRae v. People, 132 Colo. 492, 286 P.2d 618 (1955).

- The opinion of a lay witness with regard to the defendant's state of intoxication cannot be suppressed due to the fact the witness is not an expert. Rule 701, C.R.E.

- The prosecution need not establish that the defendant was driving in a reckless manner, i.e., driving in such a way as would indicate a lack of sobriety. Snyder v. City and County of Denver, 123 Colo. 222, 227 P.2d 341 (1951).

- If the defendant requests a blood test and one is not administered through no fault of the defendant, then the remedy is dismissal. Section 42-4-1301(7)(a)(II)(A), C.R.S. See, People v. Gillette, 629 P.2d 613, (Colo. 1981).

- Exclusion of a blood or breath test due to noncompliance with the rules of the Colorado Department of Health is not a proper pre-trial consideration. The court must allow the People an opportunity to

lay a proper foundation. People v. Bowers, 716 P.2d 471 (Colo. 1986). Statutorily, a failure to strictly comply with Department of Health rules is not a basis for excluding the result of a test of the defendant's blood or breath (or other body fluid) if the noncompliance is not such to impair the validity and reliability of the testing method and test result to an extent which renders it irrelevant. If the noncompliance does not so impair the test method and test result, the noncompliance goes only to the weight of the test result, not its admissibility. See section 42-4-1301(7)(b)(I), C.R.S.

- Motions to dismiss due to improper venue are occasionally made in judicial districts encompassing numerous police jurisdictions. Criminal actions can be tried in the county where the offense was committed, or in any other county where an act in furtherance of the offense occurred. C.R.S. 18-1-202(1). Of additional interest are C.R.S. 18-1-202(6), (7)(a), (10), and (11). These motions must be filed no later than 20 days after arraignment.

- A motion to suppress the results of a chemical test because the officer did not comply with the defendant's original request should not be granted when the officer was merely attempting to accommodate a citizen's request. People v. Shinaut, 940 P.2d 380, 384 (Colo.1997).

I. INTRODUCTION

Two of the most important purposes for voir dire are:

1. To obtain the best possible jurors for your case, and

2. To provide an opportunity for the prosecutor to impress the jury members with his or her own personal integrity.

The prosecutor wants jurors who will be the most likely to convict. He or she also wants people who will pay close attention to the evidence and who will be fair to the defendant and to the state.

In making your selections, bear in mind that most people finally seated on a jury will be followers - those who will generally go along with the majority opinion or with those other jury members who have stronger personalities and who exhibit leadership characteristics.

Within the construct of the second purpose, the prosecutor has a first opportunity to impress the jury with his or her personal integrity at the time it is impaneled. Most of all, indicate that you are not there merely to represent a point of view.

Convey to the potential jury members that you believe in your case and that you have a purpose in presenting it - a purpose that goes to the very heart of the whole judicial process. Let the jury know that your job is to maintain and defend society by upholding its laws.

It is categorically improper to tell the jury members that you personally believe the defendant was driving under the influence of alcohol and that the offense, if left unpunished, might well lead to the injury or even death of others. It is enough that they get the strong impression that you take your job seriously and that from the moment all of you enter the courtroom, you share an enormous responsibility.

Much has been written about the occasionally mysterious and always intriguing process of selecting the right jury. To repeat these many ideas would be beyond the scope of this text. But some general principles merit attention.

Take the job of jury selection as seriously as you take the process of case preparation and presentation. Think of voir dire as an opportunity for you to educate the jury about general principles of law and to uncover hidden

attitudes and beliefs that you have a right to challenge. Use voir dire to establish a basic rapport and a sense of fairness upon which you can build as the case unfolds.

In most instances, the questions you ask will depend upon the discretion of the court. The extent to which you can instruct and educate the jury on the law will also have limits imposed by the court, including time limits.

Questions should be aimed at allowing you to exercise an intelligent challenge, either for cause, or peremptory. This does not mean that anything other than a question is prohibited. Explanatory statements are often necessary to ask an intelligent question related to the topic of the statement. Most courts, for example, will allow counsel to explain stock instructions such as those dealing with the presumption of innocence, burden of proof, credibility of witnesses and reasonable doubt. Although counsel might make these explanations primarily to educate the jury, he or she should be ready to justify the same as a necessary foundation for later questions to the jury.

The amount of voir dire conducted by the attorney will depend upon the voir dire conducted by the court. While the ratio varies from court to court, the prevailing trend is for the courts to take over more of the voir dire. If the judge makes all the introductions, explains the sequence of events at trial, talks about stock instructions, and even probes the relationship of the jurors to the case, then the role of the prosecutor is obviously abbreviated.

An effective voir dire presentation requires skill and considerable practice. Be yourself, believe in your case and seek justice!

II. CHALLENGES FOR CAUSE

Theoretically, the basic purpose of voir dire is to seat the fairest possible jury for your case. By law, certain types of jurors have been deemed incompatible with this goal. That type of individual must be excused from service on the jury if challenged for cause by either side.

A. STATUTORY AUTHORITY

Section 16-10-103, C.R.S. provides:

(1) The court must sustain a challenge for cause on one or more of the following grounds:

(a) Absence of any qualification prescribed by statute to render a person competent as a juror;

(b) Relationship within the third degree, by blood, adoption, or marriage, to a defendant or to any attorney of record or attorney engaged in the trial of the case;

(c) Standing in the relation of guardian and ward, employer and employee, landlord and tenant, debtor and creditor, or principal and agent to, or being a member of the household of, or a partner in business with, or surety on any bond or obligation for any defendant;

(d) The juror is or has been a party adverse to the defendant in a civil action or has complained against or been accused by him in a criminal prosecution;

(e) The juror has served on the grand jury which returned the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information, or on any other investigatory body which inquired into the facts of the crime charged;

(f) The juror was a juror at a former trial arising out of the same factual situation or involving the same defendant;

(g) The juror was a juror in a civil action against the defendant arising out of the act charged as a crime;

(h) The juror was a witness to any matter related to the crime or its prosecution;

(i) The juror occupies a fiduciary relationship to the defendant or a person alleged to have been injured by the crime or the person on whose complaint the prosecution was instituted;

(j) The existence of a state of mind in the juror evincing enmity or bias toward the defendant or the state; however, no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;

(k) The juror is a compensated employee of a public law enforcement agency or a public defender's office.

(2) If any juror knows of anything which would disqualify him as a juror or be a ground for challenge to him for cause, it is his duty to inform the court concerning it whether or not he is specifically asked about it. The jury panel shall be advised of this duty and of the grounds for challenge for cause before any prospective jurors are called to the jury box.

(3) If either party desires to introduce evidence of the incompetency, disqualification, or prejudice of any prospective juror who upon the voir dire examination appears to be qualified, competent, and unprejudiced, such evidence shall be heard, and the competency of the juror shall be determined, by the court, out of the presence of the other jurors, but this action cannot be taken after the jury has been sworn to try the case except upon a motion for mistrial.

SEE ALSO: Crim.P. 24(b)

Additionally, a juror may be disqualified if one of the six basic grounds for disqualification set forth in section 13-71-105, C.R.S. exists:

(a) Being under the age of eighteen;

(b) Inability to read, speak, and understand the English language;

(c) Inability, by reason of a physical or mental disability, to render satisfactory jury service. Any person claiming this disqualification shall submit a letter, if the jury commissioner requests it, from a licensed physician or authorized Christian science practitioner, stating the nature of the disability and an opinion that such disability prevents the person from rendering satisfactory jury service. The physician or authorized Christian science practitioner shall apply the following guideline: A person shall be capable of rendering satisfactory juror service if the person is able to perform a sedentary job requiring close attention for three consecutive business days for six hours per day, with short breaks in the morning and afternoon sessions;

(d) Sole responsibility for the daily care of a permanently disabled person living in the same household to the extent that the performance of juror service would cause a substantial risk of injury to the health of the disabled person. Jurors, who are regularly employed at a location other than their households may not be disqualified for this reason. Any person claiming this disqualification shall, if the jury commissioner requests it, submit a letter from a licensed physician or authorized Christian science practitioner stating the name, address, and age of the disabled person, the nature of care provided by the prospective juror, and an opinion that the performance of juror service would cause a substantial risk of injury to the disabled person;

(e) Residence outside of the county with no intention of returning to the county at any time during the succeeding twelve months;

(f) Service for five days or more as a trial or grand juror in any municipal, tribal, military, state or federal court within the preceding twelve months or has been scheduled for juror service within the next twelve months. Any person claiming this disqualification must submit a letter or certificate

from the appropriate authority verifying prior or pending juror service.

Additionally, Section 13-71-105, C.R.S. indicates that any person who is a United States citizen and resides in a county or lives in such county more than fifty percent of the time, whether or not registered to vote, shall be qualified to serve as a trial or grand juror in such county. Citizenship and residency status on the date that the jury service is to be performed shall control.

B. CASE LAW

Only two areas covered by the case law are presented in this section. Readers wanting a more thorough review should refer directly to the annotations following Crim.P. 24.

One area with which the trial attorney should be well acquainted deals with preconceived ideas of a juror about the case. For instance, a juror might think the defendant must have done something wrong or he would not be in court, or that the defendant will take the stand if he is innocent and will not testify if he is guilty.

To the inexperienced attorney, these ideas, once expressed by a juror, might seem to be automatic grounds to sustain a cause challenge. Not true. If the challenge is to be sustained, a foundation must be developed showing not only the existence of such an idea, but also that this idea will prevent the juror from rendering an impartial verdict. See Nailor v. People, 612 P.2d 79 (Colo. 1980); People v. Russo, 677 P.2d 386 (Colo. App. 1983). In other words, if a juror can demonstrate to the satisfaction of the court that he or she can set aside a previously formed or expressed opinion, and render a verdict according to the law and to the evidence, a challenge for cause should not be sustained.

SEE: Section 16-10-103 (l)(j), C.R.S.; People v. Carrillo, 974 P.2d 478 (Colo. 1999)

Some tactical considerations when deciding whether or not a challenge for cause should be exercised are discussed later in this chapter. As for challenges to the entire array, See: Colo. Rule Crim. P. 24(c).

III. PEREMPTORY CHALLENGES

Where there are no grounds for removing a prospective juror for cause, he or she may be removed by peremptory challenge without assigning any reason for the challenge. The peremptory challenge does not need to be justified by the attorney.

Crim.P. 24 states the number of peremptories which are allowed in different types of cases. Normally, in a misdemeanor case, such as DUI or DWAI, three peremptory challenges are allowed.

Both the order of exercising peremptories and the effect of waiving peremptories are explained in Crim. P. 24. Take note of the effect of waiving the peremptory challenge:

Counsel waiving the exercise of further peremptory challenges as to those jurors then in the jury box may thereafter exercise peremptory challenges only as to jurors subsequently called into the jury box without, however, reducing the total number of peremptory challenges available to either side. Crim. P. 24(d)(4).

Beware of Batson v. Kentucky, 476 U.S. 79 (1986) which states a defense counsel may question your motives for dismissing a potential juror if he feels that your choice was made because of race. (This was expanded to include gender in J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). You may most often see a challenge when you dismiss a potential juror that is the same race as the defendant, but any defendant may assert a Batson challenge. Be sure that you have race-neutral reasons to give to the Court for your choosing to use a peremptory challenge on that potential juror. See the opinion for complete details about how this procedure works. See also, People v. Cerrone, 854 P.2d 178 (1993)

IV. TACTICS FOR VOIR DIRE

Because the number of peremptory challenges is limited, it is best to be cautious in exercising them. For example, if there are two jurors you will eventually challenge and one is only doubtful whereas everyone in the courtroom knows you must challenge the other one, remove the most obvious one first. By doing this, there is always the chance that the

defendant has doubts about the other juror and will excuse the person you were going to excuse next and you would save a peremptory.

If unsure about a potential juror, should a peremptory necessarily be exercised? Is that juror a key person or will he or she follow the majority? Almost every jury panel contains people who only fill out the required number. When deliberating, this type of person will neither sway others, nor hold out in opposing them. Such a person is not difficult to spot and is probably not important enough to challenge through a peremptory.

Someone must replace the excused juror. Keep in mind the types and quality of the people held in reserve and not yet called to the box.

Developing the proper foundation for a challenge for cause was discussed briefly in an earlier part of this chapter. Recall that once the attorney decides to lay the foundation necessary to remove a juror for cause, he or she must be prepared to remove that juror by use of a peremptory if the court will not remove the juror for cause. A juror challenged for cause may harbor resentment toward the attorney and hence his or her case, since the juror will surely realize that the attorney did not want him or her on the panel.

Foremost in your mind during the selection process should be the type of juror you want to hear your case. A demographic description of the ideal DUI jury from a prosecution point of view is beyond the scope of this book. However, remember that people with a "conservative" perspective are less likely to tolerate drunken driving or to act as apologists for the defendant. Also, remember that the person you are about to kick-off your jury may be much more conservative than the person that replaces them. Do not be too quick to excuse a juror from the panel. Do not expect to find the ideal juror. Be cautious, but not timid. Let common sense and people sense guide you during the selection process.

V. LET THE JURY GET TO KNOW YOU

There are many reasons as to why a jury reaches a particular verdict. One such reason, the importance of which has been the topic of many discussions, is the jury's opinion of the trial attorney. Exactly how significant this is to the verdict is probably not quantifiable, but it is sufficient to say that most attorneys agree that the jury's opinion of counsel does matter.

This opinion is influenced by many factors. We all judge on general appearance and jurors are no exception. To impress the jury, speak clearly, stand and sit erect, maintain good eye contact and dress in a generally conservative style.

Perhaps most importantly, the prosecutor must believe in what he or she is doing. If the prosecutor does not convey belief in the defendant's guilt, jurors can hardly be expected to convict. You begin demonstrating your belief in the defendant's guilt during voir dire; make the most of the opportunity. The prosecutor should be in control and self-assured. He or she should be firm and resolute in addressing the court and the jury. By showing the jury that you know what you are doing, that you are comfortable doing it and that you are going to do it right, you are telling the jury that you know the defendant is guilty or you would not be there otherwise.

Use voir dire to set up your closing argument. Obtain a commitment from each juror that he or she will return a guilty verdict if such a verdict is warranted by the evidence. Then, at the time of closing argument, remind your jury of the promises they made during voir dire.

Remember that the prospective jurors you are judging for fitness to serve will later judge you and your case. Be polite, courteous and sensitive to their feelings and avoid creating embarrassment for a juror in front of other jurors. If you must probe into an embarrassing area, consider a request to speak with the juror out of the presence of the other jurors. (This might also be necessary in order to avoid tainting the entire jury -- particularly when questioning a juror who evidences special knowledge of the case.)

VI. PREPARING FOR VOIR DIRE

Preparing for voir dire is both simple and complex. Learn the grounds for exercising a challenge for cause. Know the number of peremptories available in any given case. Then develop a set of questions that you can use during the process of seating your jury. Create the "ideal" juror in your mind. What are his or her characteristics? Male, Female, twenty to thirty, forty to fifty, employed, retired, "blue-collar" or "white-collar", married or single, children or no children, and so on. You will never get a jury panel wholly comprised of "ideal" jurors. However, constructing such an ideal prior to the selection process will help keep you focused on the qualities you want in the jury that will hear your case.

If basic biographical information on each juror is supplied by the court and is made available to you in advance, study this information and see what you can learn about the makeup of the panel. Build questions around each individual that attracts your specific concern. Are the general characteristics of the juror the same or similar to the ideal juror?

The court will usually supply each attorney with a diagram of the jury box. Be sure to note the name and number of each juror as he or she is called to the box. Note the answers to any question the court or the defendant's attorney asks that you want to explore further. Write short notes to yourself regarding the jurors. Use the notes to develop questions. As a juror is excused, cross his or her name out, and note the name of the replacement. Keep an accurate tally of the number of peremptories used by each side.

Relax. Voir dire is really just meeting people and attempting to learn something about them through questions. Be informal. Talk to them as people, not as "juror number 161". Memorize their names and use their names while you are talking to them. Ask open-ended questions to encourage the jurors to speak. Ask leading questions in the area of legal knowledge and in sensitive areas so as not to cause embarrassment to jurors who lack legal knowledge or who are reluctant to talk about a sensitive topic.

VII. INTRODUCTORY COMMENTS TO THE JURY

The following suggestions are only guidelines. Anticipate your own embellishments as you prepare your presentation. This is your first chance to speak to the potential jury panel. It is your first chance to take charge of the case. Your introductory comments should be brief, direct and presented with confidence. You want the jury to look to you as the person having all the answers in the case. Work toward the role and image of the "master of ceremonies" in the courtroom. Take charge. You know what you're talking about and your words have the weight of your knowledge behind them.

- Introduce yourself, your co-counsel, and any advisory witnesses. Make it clear that you're in court on behalf of the People of the State of Colorado.

- Explain your role; that you are there to seek justice.

- Explain your purpose; that you are making every attempt to select a fair and impartial jury -- both fair to the defendant and to the People. Explain that it is for this purpose that the attorneys are allowed to ask the jurors questions about their background and experiences as well as about relevant issues in the case. Tell them that this will be the only opportunity you will have during the trial to talk with them directly. Urge them to volunteer any information they feel might affect their ability to be fair and impartial to both sides.

VIII. GENERAL BIOGRAPHICAL QUESTIONS

Due to the short amount of time most county court judges allow for jury selection, biographical questions should be minimized. You should inquire into the juror's business and occupation, his or her spouse's occupation, the age and number of his or her children and the length of residence in the county. A juror with a history of short term commitments is probably less likely to possess the conservative characteristics you want. In contrast, a juror who demonstrates stability in their life, work and residence is more likely tied to the community, and thus more likely to be offended by drunken drivers.

IX. EXPERIENCE WITH THE JUDICIAL PROCESS

It is essential to find out at least the following:

- Has the prospective juror had prior jury experience? (If so, find out what type of case it was and if the juror reached a verdict. It is important that this juror realize that he or she must separate the law and evidence of the prior case from the case at hand. Was the experience good or bad? Was that juror the foreman?)

- Has the prospective juror ever testified in a trial before? (This may be important to the prosecutor who is looking for a juror who will be sympathetic to his or her witness when it comes time for the defense attorney to cross-examine.)

- Has the juror ever been a plaintiff or a defendant in a civil suit?

(This juror may have developed a prejudice against the system that could be detrimental to the prosecutor's case.)

- Has the juror, or any member of the juror's family or their close circle of friends ever been charged with a crime, including traffic offenses? (Did he or she contest the charge? If so, was there anything about this experience that would affect him or her in any way? Was the juror satisfied or dissatisfied with the way the matter was handled by the police, prosecutor and judge? If the juror did not contest the charge, ask if he or she would hold it against the defendant because he is contesting the charge?)

X. VOIR DIRE ON INSTRUCTIONS

Some courts will allow counsel to discuss certain stock instructions with the jury.

SEE: Washington v. People, 169 Colo. 323, 455 P.2d 656 (1969) (regarding the discretion of the trial court during voir dire); People v. Brake, 191 Colo. 390, 553 P.2d 763 (1976) (propriety of questions to potential jurors is within the discretion of trial court, and its ruling will not be disturbed on appeal unless abuse of discretion).

Your discussion should take the form of questions.

A. PRESUMPTION OF INNOCENCE

It is probably best that you as the prosecutor initiate the discussion with the jury on the presumption of innocence, burden of proof and the concept of proof beyond a reasonable doubt. Not only will this help in creating an image of fairness with the jury, but it gives you the first opportunity to explain these concepts in your own terms.

Example: You understand that the defendant is presumed to be innocent until proven guilty? If you had to deliberate right now, you would have to find him not guilty because he has not been proven guilty. You understand that this is a burden that the state has placed on itself to protect the innocent and it is not something designed to help the guilty to go free?

B. BURDEN OF PROOF BEYOND A REASONABLE DOUBT

Advise the jury that you carry the burden of proof in the case.

Example: You understand that the People have the duty of proving the defendant guilty beyond a reasonable doubt? Reasonable doubt means simply that -- not just any doubt but a doubt based upon reason. It is not a doubt which is vague, speculative or imaginary. You understand then, that my duty is not to prove the defendant's guilt beyond all possible doubt? You understand that my burden goes only to the material elements of the crime charged? You understand it is not my burden to prove every word of testimony spoken from the witness stand beyond a reasonable doubt -- only the elements of the charge.

C. JURY HAS NOTHING TO DO WITH SENTENCING

Inform the jury that they are not to consider the possible sentence in reaching their decision in the case.

Example: You understand that the judge will decide the sentence in the event of a guilty verdict?

D. CREDIBILITY OF WITNESSES

Explain to the jury that it will be their job to evaluate the credibility of witnesses. This should be strongly emphasized if you anticipate the defendant will testify and/or call witnesses. Explain credibility in terms of the standard instruction.

NOTE: DO NOT INFER THAT THE DEFENDANT MAY TESTIFY OR THAT YOU HOPE THE DEFENDANT WILL TESTIFY.

E. NO "UNWRITTEN LAW" IN THIS CASE

Explain to the jury that the law comes from the judge and only the judge. Get assurances from the jury that they will follow the law even if they personally disagree.

F. SYMPATHY FOR THE DEFENDANT

Ask if the juror will apply the same standards of law to the defendant that he or she would expect to apply to everyone else.

G. SPECIAL AREAS OF INQUIRY IN THE DUI CASE

If permitted by the court, voir dire should be directed toward the more specific instructions and issues of the DUI case.
See XI below.

H. ATTITUDES TOWARD POLICE OFFICERS

Do not neglect this critical area of inquiry. In many instances, your case will be based primarily on the arresting officer's opinion of the defendant's state of sobriety. Consequently, the defense lawyer will be spending a lot of time disputing the officer's opinion. It is therefore essential to eliminate all jurors who express any negative attitudes about police officers. Moreover, it is also necessary to counteract any questioning by defense counsel which is designed to diminish police officer credibility.

> Example: A common defense tactic is to ask jurors if they would give policemen greater credibility as witnesses simply because they are police officers.
>
> Respond to this by asking the same question and adding, "but on the other hand, you wouldn't ignore the fact that the police who will testify in this case might be specially trained in the detection and investigation of persons driving under the influence of alcohol, would you?"

As earlier stated, if it is discovered that a juror has had a bad experience with the police or with the system, he or she should be excused. However, before doing so, you may wish to inquire along these lines for the benefit of the remaining panel:

> "Mr. Jones, I understand that you're a school teacher? Would you agree that there are good teachers just as there are bad teachers? And there are good lawyers and bad lawyers, good doctors and bad doctors? Would you think it fair that a person prejudge all teachers as bad based upon

having had experiences with a bad teacher? Then I would assume that you have not prejudged the police in this case?

XI. THE LAW ON DRIVING UNDER THE INFLUENCE

Because the expression "drunk driving" is commonly used to characterize the charge of driving under the influence, many people believe that before someone can be charged with such an offense, they have to be intoxicated to the point that they are falling and stumbling.

Knowing that a prospective juror may possibly have such an erroneous preconception of the applicable law, it is essential that you question the jury regarding the specific DUI and DWAI instructions.

> Example: You understand that the issue in this case is whether the defendant was capable of driving a car safely and not simply whether he was capable of driving? Do you think that a person would have to be stumbling, falling down drunk before that person would be incapable of driving a car safely? What does being able to safely operate a car mean to you? Do you think that it would include the ability to react quickly enough to step on your brakes or turn the wheel to prevent an accident? Could you follow an instruction from the judge that says a defendant is guilty if, after consuming alcohol, his or her ability to drive safely is affected even to the slightest degree?

XII. USE OF ALCOHOLIC BEVERAGES

The prospective juror should be examined on the subject of his or her use of alcoholic beverages. This is difficult to ask tactfully and great care should be taken to avoid embarrassing any juror. But, questions should be posed in this area for the education of the entire jury and not just a given juror. Common sense dictates that those who consume alcohol frequently will demand more evidence to convict than those jurors who "never touch the stuff."

XIII. BLOOD/BREATH TESTS & THE FORENSIC TOXICOLOGIST

If you have a blood or breath test and supporting expert testimony on the results which you believe will be admitted, you should question the jury on these important points. Find out if the jurors have any knowledge or experience with such tests. Generally, those jurors with knowledge will

give tests greater credence. Explain to the jurors what a forensic toxicologist's area of expertise is and what that means to the gathering, preservation and presentation of evidence. Ask them if they could accept such testimony if it were presented in a reasonable and logical manner.

XIV. OTHER AREAS OF VOIR DIRE INQUIRY

The following inquiry areas are appropriate in almost all cases if the court has not already made inquiry:

- Does the juror know any of the attorneys or their associates, either personally or by reputation?
- Does the juror know the advisory witness or any other endorsed witnesses?
- Prior to jury service, did the juror know any of his fellow jurors? What is the nature of that acquaintance? (Be careful to avoid insulting one juror by excusing another that may be his or her friend).
- Does the juror have any knowledge about this particular case? (Ask this type of question so the juror's response will be a simple "yes" or "no". If you receive an affirmative response, be cautious that further questioning does not bring out responses that prejudice the rest of the panel).
- Encourage the jurors to express their views on the outward signs of alcohol influence.

Remember you are always free to request an in camera hearing with any juror.

XV. ANTICIPATING THE DEFENSE

Going first throughout the trial rarely gives the prosecution an advantage. Voir dire is the exception.

If the prosecutor conducts a thorough and interesting voir dire examination, the defendant's portion will only become repetitious and monotonous for the jury. But, more importantly, the prosecutor can anticipate the defense and thereby steal the defendant's thunder. He or she should soften the weak points in the case rather than allow the defendant to hammer home such weaknesses first.

By bringing these weaknesses to everyone's attention, the prosecutor can get the juror's opinion concerning these facts and better yet, explain them his or her own way. This is far superior to allowing the jury to hear only the defendant's explanations and comments.

XVI. SAMPLE DUI JURY COMMENTS AND QUESTIONS

A. INTRODUCTION

(1) Introduce yourself and any advisory witness to the jury.

(2) Briefly elaborate on the district attorney's function in the proceedings.

(3) Tell the jury that it is not your intention to embarrass any of them but you must ask questions concerning their personal experiences and attitudes in order to assure a fair and impartial jury.

B. INQUIRE CONCERNING LAW ENFORCEMENT CONTACTS

(1) Have you ever been charged with an alcohol or drug related traffic offense? If so, inquire along the following lines:

(a) Without telling us what happened, what are your feelings about what happened to you?

(b) Do you feel you were treated fairly?

(c) In light of that experience, can you be fair and impartial in listening to the evidence and deliberating on a verdict in this case?

(2) Have any of your friends or relatives ever been charged with an alcohol or drug related traffic offense? If so, inquire along the following lines:

(a) What is your relationship with this person?

(b) Did you discuss the experience with this person?

(c) What are your feelings about what happened to that person?

(d) Despite knowing someone who was involved in a matter similar to the one we are trying, can you be fair and impartial in listening to the evidence and deliberating on a verdict?

(3) Have you ever seen someone take a roadside sobriety test? If so, inquire along the following lines:

(a) Would you please tell me about that experience?

(b) Did you form any opinions about the person's state of sobriety after watching the test?

(c) Did you agree with the officer's interpretation of the person's performance on the tests?

(d) Do you think this experience will affect you in any way in being a juror in this case?

(4) Have any of you ever had what you would characterize as a negative experience with a police officer? If so, inquire along the following lines:

(a) When was that?

(b) What happened?

(c) Would you agree with me that there are good and bad police officers, just like there are good and bad members of virtually every profession?

(d) Would you allow one negative experience with a police officer to taint your perception of all police officers?

(e) Will you evaluate the testimony of the police officers in this case based on the evidence in this case, and not upon the basis of your bad experience?

(f) Do you feel that your negative experience will in any way cause you to be less receptive to the prosecution's evidence and arguments in this case?

C. INQUIRE AS TO EXPERIENCE AND ATTITUDES CONCERNING ALCOHOL USAGE

(1) Has everyone here at some time consumed an alcoholic beverage?

(2) Is there anyone here who has never been intoxicated?

(3) Is there anyone here who knows someone who has a drug or alcohol problem? If so, inquire along the following lines:

(a) What is your relationship with that person?

(b) How, if at all, do you think this fact will affect your decision making in this case?

(4) Is there anyone here who does not drink alcoholic beverages at least occasionally? If so, inquire along the following lines:

(a) Is there any particular reason you don't drink alcoholic beverages?

(b) Will your personal decision to abstain from alcohol affect your judgment of someone who has been accused of driving under the influence?

(c) You wouldn't convict the defendant simply because the evidence showed he had been drinking, would you?

(5) Has everyone here had occasion to observe an intoxicated person?

(a) Were you all able to form an opinion as to intoxication based on your observations of that person?

(b) Would you all agree that most people can do that?

(6) Select a single juror and follow-up with him or her individually.

(a) Mr(s). _____, when in the past you formed the opinion that a person was intoxicated, upon what did you base that conclusion?

(b) Were you confident of your conclusion?

(c) Did you know exactly how much the person had to drink?

(d) Did you know what the person's blood or breath alcohol level was?

(e) So, despite the fact that you didn't know exactly how much that person had to drink or his or her blood alcohol level, you were able to conclude that the person was intoxicated based upon your observations and experience, correct?

(f) Would you have lent that person your car if he or she had asked to borrow it, and had promised to drive safely?

(7) Open questioning up again with a question to the whole panel.

(a) Would you all agree with those statements by Mr(s). _____?

(b) Is there anyone who disagrees with any of those statements?

D. INQUIRE AS TO ATTITUDES CONCERNING THE DUI LAWS

(1) There has been considerable public and media attention given to the subject of driving under the influence and the laws enacted to deal with that problem. Does anyone here

have a strongly held opinion concerning this issue? If so, inquire along the following lines:

(a) Is that opinion in favor of or against those laws?

(b) Are you active in any organization which advances your opinion?

(c) Do you recognize that the defendant is entitled to be tried on the basis of the facts in this case alone?

(d) If selected as a juror, could you put aside your personal feelings and make a decision based on the law and the evidence in this case?

(2) Is there anyone who feels that he or she cannot be a fair and impartial juror in a case of this nature?

(3) Will you all commit yourselves to follow the law as given to you by the judge, even if you disagree with it?

(4) In Colorado it isn't a crime merely to have a drink and then to drive, but it is a crime to have consumed alcohol so that it affects one's ability to safely operate a motor vehicle. Do you all feel capable of assessing the evidence to determine whether a person's ability to operate a motor vehicle was affected by the consumption of alcohol? Is there anyone here who would require that a person be falling down drunk before you would conclude he or she was unable to safely operate a motor vehicle?

E. INQUIRE AS TO ATTITUDES CONCERNING BLOOD AND BREATH TESTING

(1) In a refusal to submit to testing case, inquire along the following lines:

Would any of you refuse to convict solely on the basis of the fact that there is no test?

(2) In a test case, inquire along the following lines:

(a) In this case there may be evidence concerning testing to determine alcohol content. Will all of you consider such evidence along with the other evidence in this case?

(b) Is there anyone here who feels suspicious about or reluctant to accept such evidence?

F. INQUIRE CONCERNING EVALUATION OF THE CREDIBILITY OF WITNESSES

(1) At the appropriate time the judge will inform you that it is your function to determine the credibility of witnesses and will list various factors you should take into consideration in performing that function. Do you each feel capable of determining the credibility of various witnesses who testify?

(2) Is there any reason any of you will have difficulty in performing that task?

(3) Select an individual juror and inquire along the following lines:

(a) Mr(s). _____, have you on occasion had to decide who to believe or to what extent to believe a person?

(b) What were some of the things you considered in making this determination?

(c) Will you be willing to look at those and other pertinent factors in making such a determination in this case?

G. ASK EACH JUROR SOME INDIVIDUAL QUESTIONS

(1) Mr(s). _____, do you think you would be a good juror?

(2) Why do you think you would be a good juror?

(3) What would be your strongest trait as a juror?

(4) What would be your weakest characteristic as a juror?

(5) Would you like to be a juror in this type of case?

(6) Is there any reason you would rather not serve on this jury?

H. INQUIRE AS TO ABILITY TO CONVICT

(1) There are some people who do not like making decisions that impact someone else's life - and that is what I am going to ask you to do at the close of this case. I am going to ask you to find the defendant guilty of a crime. I want you all to think about this question very carefully. Is there anyone here who could not convict this defendant of this crime, i.e. render a verdict of guilty, even if I proved each element of this offense beyond a reasonable doubt?

I. POINTS TO REMEMBER

- Always make an opening statement - never waive the opportunity, even in a trial to the court.
- Make it interesting.
  - Tell a compelling story
  - Use visuals if permitted
  - Show enthusiasm and confidence
  - Avoid argument but emphasize strengths
- Be brief, yet demonstrate your knowledge of the case.
- Take advantage of repetition of your strong facts.
- After your opening statement the jury should know and remember why you expect them to convict.

II. THE PURPOSE OF AN OPENING STATEMENT

It is usually said that the immediate purpose of the opening statement is to outline the evidence in an introductory fashion: "The opening statement, like the picture on the box containing a jigsaw puzzle, can give the jury an advance idea of how the various items of evidence fit together. Its purpose is introductory." People v. Barron, 195 Colo. 390, 578 P.2d 649.

But a good opening statement really has a larger and more important purpose from a trial lawyer's perspective. It is a very important tool of persuasion.

Although a proper opening statement is to be delivered without argument, it is perhaps a prosecutor's best opportunity to persuade. Studies of jurors have revealed that the opinion they form after hearing opening statements are usually consistent with the opinions they have at the end of the case. In short, first impressions usually persist and are likely to be reflected in the verdict. So it is important for you to impress the jury early with the strength of your case.

Use your opening statement to "imprint" the jury. Their first impressions after your opening statement should be that (1) the facts to be revealed in trial will show the defendant is guilty, and (2) you are competent, credible, trustworthy, and are their source for accurate information and argument.

III. MAKE IT INTERESTING

Take advantage of your opportunity to go first. One of the benefits of carrying the burden of proof is that you are allowed to go first (your opening statement) and last (your rebuttal closing argument). This should be a benefit to you because people tend to remember best what they hear first, last, and most. So...don't blow your opportunity to go first by being dull.

Make your opening a story. And make the story interesting. If you have a good theme for your case, use it in telling the story. If not, at least organize your opening so it is clear and easy to follow, and tell your story with appropriate enthusiasm.

Be aware of how quickly attention fades - don't squander time with needless introductions or explanations. Get the jury's attention and tell the story of the crime. Keep their attention until you sit down.

Try to create visual images with your language. Create images that allow the jury to mentally "see" what happened by using colorful language.

If you have exhibits such as photographs or physical evidence that you will be introducing in trial, consider showing them to the jury during your opening. This will help keep the jury's interest. Know your judge, however, and get an advance ruling if necessary to show exhibits in your opening statement. Some judges don't allow this procedure in opening statement.

IV. REPETITION IS YOUR FRIEND

Remember the persuasive power of repetition. The jury should hear the strong points of your case from you during your opening statement, from the witnesses during your case in chief, and again from you during your closing arguments. Take advantage of the persuasion opportunity of your opening statement by highlighting your strong facts - the reasons the jury should convict. Employ subtle repetition of these facts during your opening statement so the jury remembers the strengths of your case and why you will be arguing later to them that they should convict.

V. MAINTAIN YOUR ETHICS AND YOUR CREDIBILITY

You should confine your remarks in opening statement to evidence you intend to offer and which you believe in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted into evidence. See ABA Standards Relating to The Prosecution Function Section 3-5.5.

If there are evidentiary issues in question it is prudent to withhold comment on these topics in your opening statement. Consider getting a ruling from the court on these evidentiary issues in advance by a motion in limine. For example, if you are uncertain if the results of the defendant's breath test will be admitted don't mention it in your opening. If the results are later admitted into evidence during trial it will be a nice additional surprise piece of evidence for the jury.

You will lose credibility with the judge and the jury if the facts of the case do not coincide with your opening statement. So, know the facts of your case and don't oversell or overreach.

Remember also that opening statement is not the time for argument. Objections for arguing will be sustained. Learn to present the facts of your case in a persuasive manner without arguing.

VI. MINIMIZE WEAKNESSES

If you know of a weakness in your case or if you know of persuasive evidence the defense will introduce, it is often better to mention it in your opening rather than ignore it. Your goal will be to try to minimize its impact -- to "steal the thunder", so to speak. This is sometimes difficult to do, however, without crossing into argument. One approach you might try that is not argument is to contrast the evidence supporting the defense with the stronger and more corroborated evidence supporting the prosecution. For example: "You may hear evidence in this case that [the weakness]. But you will also hear evidence that [strength]. And you will also hear that [strength]. And you will see [strength]." So long as you avoid an argumentative tag line (i.e. arguing that the "strength" is more probative than the "weakness") your point will be conveyed persuasively without argument.

VII. MISCELLANEOUS SUGGESTIONS

- Take advantage of the opportunity to persuade that is provided by the opening statement. Do not treat it casually. Be prepared, practice. Remember that trial studies have shown a rather remarkable truth: the opening statement - like a first impression - is the one that sticks.

- Put away your notes and speak from your memorized outline of them if possible. Give the jury the impression that you are totally familiar with the case.

- Have critical facts memorized - times, important dates, locations, witnesses, and other basic facts.

- Know what you must prove. Have all of the elements of the offense clearly in mind.

- Be brief and concise. Do not allow yourself to get bogged down in too much detail.

- Limit your opening statement to what you believe in good faith will be proved during the trial.

- Be positive -- never apologetic. Attitudes you have about the case will come booming through in your opening statement and will make an impression on the jury.

- Avoid the temptation to portray the defendant as a monster criminal in your opening statement. The technique often backfires and some jurors will think you are being unfair to the defendant or are trying to manipulate them by impugning the defendant's character.

- Do not give your personal opinion in the opening statement. Doing so is not only objectionable, but unethical.

- Anticipate defenses that will arise, but don't mention what you think the defense will raise, or evidence the defense might present. Do not suggest that the defendant has no defense. THE DEFENDANT IS UNDER NO OBLIGATION TO PRESENT A

DEFENSE. If you in some manner suggest that the defendant may or will present a defense, you may find yourself accused of trying to shift the burden of proof on the defendant to prove himself innocent.

- Try to make eye contact with each member of the jury.

- Move with a purpose, such as to speak to the jury from a different spot in order to keep their interest. Eliminate distracting movements and movements without purpose.

- If a motion for judgement of acquittal is made by the defense because of your opening statement, be aware of People v. Barron, 195 Colo. 390, 578 P.2d 649 (1978) and of People v. Gomez, 131 Colo. 576, 283 P.2d 949 (1955).

> "The court has never imposed rigid requirements on the content of an opening statement in a criminal case." People v. Barron, 195 Colo. 390, 578 P.2d 649 (1978).
>
> "Before the court is warranted in terminating a case after the opening statement of [the prosecutor], it must affirmatively be established that [the prosecution] has no right, under any circumstances, with all inferences considered in a most favorable light to it, to recover, and, further, after the [prosecution] has been given full opportunity to correct, amend or embellish [its] opening statement subsequent to the defendant's motion to dismiss..." People v. Gomez, 131 Colo. 576, 283 P.2d 949 (1955).

VIII. A SUGGESTED OUTLINE FOR AN OPENING STATEMENT

A. START STRONG. CATCH THE JURY'S ATTENTION AND GENERATE INTEREST.

- Mention interesting and compelling facts at the beginning of your story to grab the jury's interest.

- If you have a good theme that will catch the jury's interest, mention it early and then weave facts into your story that support your theme.

- While a chronologically ordered story is usually easiest to follow, you don't have to begin your opening statement with the first event in the story. It is more important to begin strong and capture interest. After catching the jury's interest you can then segue back to the beginning of your story and tell it in chronological order. (Recall movies you have seen that begin with an interesting attention getting scene then transition back to an earlier time to begin the story line, then move forward chronologically).

- If you don't have a good theme and you don't have particularly unusual or interesting facts, you may begin by simply briefly reciting the strong evidence that shows the defendant is guilty. Then you can transition to the beginning of your story and tell it chronologically, and mention each piece of strong evidence again, on piece at a time, in the context of the story.

B. TELL A STORY

- Work to keep the jury's interest by telling a story. Make it interesting. Tell it with enthusiasm and confidence.

- Emphasize the strengths of your case.

- Avoid chopping your story into segments such as "First, witness James will testify to this" and "then Mary Jones, the school teacher will testify to that." Instead, tell it like a story.

- Don't overload the jury with details.

C. IF NECESSARY, MINIMIZE WEAKNESSES IN YOUR CASE

- Contrast weaknesses with the strengths of your evidence.

D. TELL THE JURY TO CONVICT

- For example. "Based on the evidence you will hear, and based on the instructions of law the judge will give you, I will ask you at the end of this trial to find beyond a

reasonable doubt that the defendant is guilty of the charge of Driving Under the Influence of Alcohol. I will ask you to return a verdict of guilty".

I. INTRODUCTION

Preparation for police witnesses begins with a thorough reading of all police reports. In some cases, the report may consist solely of the notes which appear on the back of the Criminal Summons and Complaint. But, if there are additional reports, each should be reviewed in detail.

After review of the file:

1. Isolate the elements of the offense.

2. Determine what witnesses will be necessary to prove those elements.

Double check the summons and complaint to be sure that all necessary witnesses are listed, and if not, that they have been endorsed. Make sure all the witnesses you need have been subpoenaed (or otherwise notified of the trial date and time.)

If you believe that any reports, witness statements, forms, or documents are missing, track them down immediately and make them available to defendant's counsel for discovery. (Proper case preparation at the beginning will help eliminate this sometimes "fatal" problem.) ANY DOCUMENTS (ESPECIALLY DEFENDANT'S STATEMENTS) WHICH HAVE BEEN UNAVAILABLE FOR DISCOVERY BY THE DEFENSE MAY BE INADMISSIBLE! See, Crim.P.16

In advance of trial, try and contact each necessary witness by phone:

1. Determine that they are available for the trial.

2. Refresh their memories with regard to specifics of the case.

- Date
- Location
- Accident?
- Unusual circumstances/behaviors
- Etc.

3. If there are any motions pending be sure the officer knows what the issues are (also be sure that the officer has been subpoenaed or otherwise notified of the motions hearing).

4. If there is some question regarding the "location", i.e . . ., confusing intersection, visibility of stop sign etc., ask the officer to refresh his memory by driving by the area.

5. Be sure that your witnesses will be able to identify the defendant.

6. Get witness on-call information!

   - Work schedule
   - Pager numbers
   - Home phones, etc.!!

7. Ask your witnesses to arrive early so that they may review the reports and statements.

   - If you need to hang on to your copy of the file, make extra copies of police reports.

8. Prepare any diagrams in advance!!

9. If your court usually sequesters witnesses and the witness will arrive during jury trial -- advise them NOT to discuss the case with other witnesses once they have arrived.

II. ELEMENTS OF THE DUI CASE

There are four essential elements of the DUI case:

- Jurisdiction
- I.D.
- Driving
- Intoxication or Impairment

In most cases the arresting officer will be the witness on each element.

In most cases the first three elements present no special problems, the fourth element, intoxication/impairment, is more complex and it is almost always at issue. Occasionally the primary issue in a case will be whether the defendant was "driving".

A. JURISDICTION

The proper jurisdiction for the charge is "The State of Colorado". This is established by asking the officer if the location of the offense is located in the state of Colorado. Venue, (i.e. the proper county for filing of the charge and trying the case,) is often dealt with as an issue of jurisdiction. It is not. C.R.S. 18-1-202(11) deals with the proper county for the filing of charges and trying the case. The proof of the county where the offense took place need not be proven unless it is an element of the offense. The place of trial needs to be challenged by motion within twenty days of arraignment, except for good cause shown. If the place of trial is not appropriate the Court should transfer the case to the appropriate county. If venue is not challenged within the time limits set forth the objection to place of trial is waived. Even though it is not an element that needs to be proven, it is always best to go ahead and establish venue by asking the officer what county the offense occurred in.

Example: After the officer has testified as to the location where the defendant was observed driving, ask him; "Officer, what county and state is that location in?"

B. IDENTIFICATION

Sometimes an officer may not feel positive of I.D. If he saw a driver's license, you can ask:

- Did he request the driver's license?
- Was one provided?
- Did the person driving match the picture and description on the license?
- Did he note that information, including the driver's name, in his paperwork?
- What was the name and general description?

Also, if the defendant was booked and photographed the officer can view the photographs prior to trial to refresh his memory.

C. DRIVING

Testimony about driving is usually straight forward. The officer (or other witness) will have seen the defendant driving down the street. Occasionally, however, there will be no witnesses that actually saw the car moving. In that situation you either have to establish that the defendant was in "actual physical control" of the car, or you have to prove by circumstantial evidence that the defendant was driving the car even though nobody saw him do it.

The leading case in Colorado on "actual physical control" of a vehicle is People v. Swain, 959 P.2d 426 (1998) (person in driver's seat, without engine running was in actual physical control of the vehicle.) Actual physical control of a vehicle and operation of a vehicle both constitute driving under the motor vehicle laws.

If actual physical control cannot be established, you will have to prove that the defendant drove the vehicle by circumstantial evidence.

D. INTOXICATION/IMPAIRMENT

The testimony of the police officer with regard to the intoxication element may be broken down for review and presentation in the following manner:

- Officer's experience and training in the investigation of intoxicated persons.
- Defendant's driving behavior.
- Officer's observations of the defendant before, during and after the roadside tests.
- Officer's opinions as to intoxication of defendant.
- Result of a test of the defendant's blood or breath.

REMEMBER THAT REGARDLESS OF THE PARTICULAR FACT SITUATION, ALL OF THE ESSENTIAL ELEMENTS MUST BE COVERED IN YOUR EXAMINATION OF YOUR

POLICE OFFICERS BEFORE YOU FINISH YOUR DIRECT EXAMINATION. No shortcuts.

It may be helpful if you devise a standardized "checklist" containing space provided to hold details relating to your particular case. If you have such a list with you whenever you prepare and present your DUI case you should at the very least survive a motion for judgment of acquittal at the close of the People's case.

III. ROADSIDE SOBRIETY MANEUVERS

For a discussion of the standard roadside tests see DUI Enforcement Manual, Fourth Revised Ed., 1989, prepared by the Colorado Division of Highway Safety.

IV. SAMPLE CHECK LIST

- ☐ Actual observation of the recent consumption of alcoholic beverages by defendant

  _____
  _____

- ☐ Empty or partially empty alcoholic beverage container in defendant's car

  _____
  _____

DRIVING BEHAVIOR

- ☐ Actual Physical Control
- ☐ Keys in ignition
- ☐ Engine running
- ☐ Vehicle in gear
- ☐ Vehicle not in gear
- ☐ Lights on

- ☐ Parking brake on
- ☐ Defendant in driver's seat
- ☐ Vehicle on level surface
- ☐ Vehicle on incline

Driving: Circumstantial Evidence

- ☐ Engine warm or still running
- ☐ Isolated area
- ☐ Defendant sole occupant
- ☐ Passengers
- ☐ Vehicle registered to defendant
- ☐ Vehicle not at scene _____ hours/minutes before officer contact
- ☐ Vehicle in travel portion of roadway
- ☐ Witness heard vehicle arrive
- ☐ Defendant's admission of driving
- ☐ Operation of Vehicle
- ☐ Erratic operation of motor vehicle

  Make ____ Model ____ Year ____ Color ____

  ☐ SPEED: TOO FAST OR TOO SLOW

  Posted Speed: _____ Est. Speed: _____

  Radar: _____yes _____no

  Type of Neighborhood: _____

Road Conditions: _____

Weather Conditions: _____

Traffic Conditions: _____

Irregular Speed Changes: (slow/fast/slow)

_____

☐ Weaving

☐ Across Lanes

☐ Clearly marked

☐ Within a single lane

Road Conditions:

_____

_____

Other Traffic:

_____

_____

Parked Cars:

_____

_____

☐ DISREGARD TRAFFIC SIGNALS

☐ Stop Sign ☐ Stop Light

☐ Other:

_____

_____

Visibility:

_____

Other Traffic:

Lights Properly Cycling:

☐ Failure to Dim Headlights:

☐ Distance to Other Cars:

☐ FREQUENT LANE CHANGING

☐ Signals:

☐ Other Traffic:

☐ Improper Passing:

☐ Oversteering:

☐ OTHER "BAD" DRIVING

- ☐ Approaching Signals Unreasonably Fast or Slow:

_____

_____

- ☐ Driving in Low Gear Without Shifting:

_____

_____

- ☐ Erratic Driving Or Stopping:

_____

_____

- ☐ Driving Too Close to Shoulder or Curb, or Hugging the Edge of the Road:

_____

_____

- ☐ Straddling the Center Line:

_____

_____

- ☐ Driving with Windows Open in Cold Weather:

_____

_____

- ☐ Driving with Head Partially or Completely Out of the Window:

_____

_____

- ☐ Aiming the Vehicle (Oblivious to Traffic):

☐ Failing to Start When a Traffic Light Turns Green/Sitting at a Stop Sign:

☐ Driving Over or Across Median Strips:

☐ Driving on Wrong Side of Road:

☐ Unsafe Backing Up:

☐ Driving Wrong Way On One-Way Street:

☐ Failure to Stop for Emergency Vehicle:

☐ Any Accident Or Collision (Especially a Hit-and-Run):

☐ ACCIDENT

☐ Injuries:

☐ Other Cars:

_____
_____

☐ Road Conditions:

_____
_____

☐ Weather Conditions:

_____
_____

☐ Apparent Mechanical Defects:

_____
_____

☐ Any Other Driving Action which Seems Irregular or Any Traffic Violation, or Combination of Actions:

_____
_____

OBSERVATIONS OF THE DEFENDANT

☐ OBSERVATION OF OBJECTIVE SIGNS OF INTOXICATION (e.g., Staggering, Stumbling, Swaying):

_____
_____

☐ Eyes (e.g., Bloodshot, Watery, Glassy):

_____
_____

☐ Odor of Alcoholic Beverage (e.g., Strength of Odor/Distance Away):

_____
_____

☐ Clothing (e.g., Disarrayed, Soiled; General Appearance):

_____
_____

☐ Skin Coloration (e.g., Any Abnormal Appearance, Flushed, Pale):

☐ Speech Patterns (e.g., Slurred, Incoherent, Not Responsive, Slow):

☐ Coordination (e.g., Hand-Eye Coordination Noted in Handling of the Driver's License/Other):

☐ Insensitivity to Pain, Heat/Cold/Cuts/Falling:

☐ Impaired Sight and Hearing (e.g., Inability to Follow Directions or Focus Eyesight):

☐ Abnormal Reaction of Pupils to Light:

☐ Lack of Awareness of Surroundings or Time of Day:

☐ Unusual Attitude (e.g., Sleepy, Combative):

☐ Unusual Acts (e.g., Vomiting, Belching, Urinating on Clothing):

ROADSIDE SOBRIETY MANEUVERS

PSYCHO/PHYSICAL TEST

- ☐ Rhomberg Balance Test:
- ☐ Falling:
- ☐ Needed Support:
- ☐ Wobbling:
- ☐ Swaying:
- ☐ Follow Directions:
- ☐ 9 Steps:
- ☐ Proper Turn:
- ☐ Balance:
- ☐ On Line:

- ☐ Followed Directions:
- ☐ Alphabet Test:
- ☐ Number of Tries:
- ☐ Letter Sequence:
- ☐ Slurred Speech:
- ☐ Followed Directions:
- ☐ Finger to Nose Test:
- ☐ Balance:
- ☐ Tip of Finger to Tip of Nose:
- ☐ Followed Directions:
- ☐ One Leg Stand Test:

Which Leg Up: Left ☐ Right ☐

☐ Balance:

_____

_____

☐ Time Able to Hold Position:

_____

_____

☐ Followed Directions:

_____

_____

☐ Horizontal Gaze Nystagmus:

Present at maximum deviation: ☐ yes ☐ no

Lack of smooth pursuit: ☐ yes ☐ no

Onset before 45 degrees: ☐ yes ☐ no

Angle of Onset: _____

☐ STATEMENTS BY DEFENDANT:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

☐ Miranda advisement given: ☐yes ☐ no

Rights waived: ☐yes ☐ no

☐ Jackson v. Denno (voluntariness of statements) hearing necessary: ☐ yes ☐ no

Where Driving?

_____

When?

_____

Drinking?

_____

How Much?

_____

What?

_____

When were you drinking (If there is an accident it is important to establish that the drinking occurred prior to the accident and driving. You need to establish that the Defendant was not drinking after the accident and prior to law enforcement contact.)

_____

What Time is it Now?

_____

Where Are You?

_____

Physical or Medical Problems?

_____

_____

Admission of Intoxication/Impairment:

_____

_____

_____

_____

_____

Admission of Driving:

_____
_____
_____
_____
_____
_____
_____

V. SAMPLE QUESTIONS FOR ARRESTING OFFICER

- Name: (Spell last name)
- Occupation:
- How long (if the officer has had previous experience in law enforcement, bring it out).
- Training as law enforcement officer
- Specific training in DUI or DRE cases(emphasize)
- Experience in DUI or DRE cases (prior to date of violation how many investigations or cases involved with)
- Duties
- District (what are the boundaries?)

- Keep preliminary information brief. This is just setting the stage and acts as a backdrop for the officer's credibility.

- Were you on duty on (day of week) (date)?

- What were your duties?
- In uniform?
- Marked or unmarked police cars?
- Alone or with a partner?

- On that date, at approximately (time), were you at the location of (location)?

- Was that location then and is it now within the County of _____, State of Colorado?

  *** Get "was then and is now" answer.

- Describe that area.

- Officer, please tell us what you saw at that time and date at that location.
- (You should now guide the officer/officers through a series of "what next" questions to permit the officer to describe in his own words what driving actions he observed, e.g., fast lane changes, weaving, speeding, and incidental traffic changes like red light violations and others).
- Diagram
- (At this point, a diagram may be used if you think that it will help your case). (Mark diagram as an exhibit.)
- Officer, I'm showing you what has been marked as People's Exhibit _____.
- What is People's Exhibit _____?
- Who prepared this diagram?
- When?
- Is this diagram drawn to scale? (Diagrams are almost never drawn to scale in misdemeanor traffic cases. As long as the diagram accurately represents the area and facts depicted, it should be admissible in spite of the fact it is not drawn to scale, since it is demonstrative, not "real" evidence.)
- Officer _____, please take a moment to orient us with respect to North and South, major streets or intersections, etc.
- Is People's Exhibit _____ a substantially accurate depiction of the area of (location) on (date)?
- Finally, have the officer draw in the pattern of driving.
- It is better to prepare all such diagrams or charts ahead of time, but if that is not possible, proceed as:
- Officer, are you familiar with the location you have mentioned? (or state the location again)
- Would you please draw the area where you first saw this car?

(After drawing all of the important areas of the incident, have the diagram marked for identification as People's Exhibit _____. The following are foundation questions for the admission of the diagram):

- Officer, directing your attention to People's Exhibit ____, would you please explain what it is?
- Is this drawn to scale?

  (Remember, it is not necessary that the diagram be drawn to scale, only that it fairly and accurately portrays the facts which you are trying to illustrate).

- What do the various lines and markings on the diagram represent?
- Is People's Exhibit _____ a substantially accurate depiction of the area of location on the date of offense?

  (Next, have the officer draw in the pattern of driving he observed, or the violations he observed including lights or stop signs run, etc. When the officer testifies, label the diagrams clearly for the benefit of both the jury and the record. Remember, do not offer the diagram as an exhibit until after the officer has completed the diagram in all respects.)

- Your Honor, The People move for admission of People's Exhibit ____. (Ask defense counsel if he wishes to voir dire on the exhibit).

  CAVEAT: Often, strategically, it is better to let the officer finish his testimony before offering the diagram.

- Describe what drew your attention to the defendant's car.
- Have the officer detail all driving irregularities.
- After the officer testifies to driving irregularities, proceed to other traffic conditions.
- What were the weather conditions?
  - Road conditions
  - Lighting conditions
  - Traffic conditions

- How far did you follow the defendant's car?
- Did you stop the defendant's car?
- What, if any, emergency equipment did you use to get defendant to stop?
- How long did it take the car to stop?
- Focus on the particulars of the stop as you know it to be from your officer interview, e.g., lights on, siren, slow or no response to one or the other, sudden stop, where the car stopped and any other evidence that the driver WAS NOT OPERATING THE VEHICLE IN A SAFE MANNER.
- Be sure to get all the mileage you can out of the driving. In your pre-trial conversation with the officer, be sure that he emphasizes any unsafe driving.
- Were you able to speak with the driver of that vehicle?
- Officer, do you see the driver of that car in court today?
- Please point him out and describe what he is wearing.
- Ask that the record reflect that the witness identified the defendant.
- Was there anyone else in the car?
- How many?
- Where was the defendant sitting?
- Did you ask him for identification/drivers license/insurance?
- Was he able to produce those items?
- Did you notice if the defendant had any difficulty in retrieving the items you requested?
- Please describe his actions.
- Did you notice anything else?

e.g.: odor of alcohol on breath of defendant, blood shot eyes, watery eyes, slurred speech, etc.

- How far away from the defendant were you at this time?

- Did you ask the defendant to get out of his car?

    - any trouble exiting the vehicle
    - any trouble standing
    - observations

- Please describe for us the defendant's physical appearance/demeanor

If the officer needs to refer to his written sobriety report or his notes to refresh his recollection, see C.R.E. 612, and/or Past Recollection Recorded, C.R.E. 803 (5). If you wish to have the officer read from his notes you must use C.R.E. 803(5), and you must lay the following foundation:

- officer once had personal knowledge of the events recorded
- the officer can I.D. the report or note
- recalls making the report or note at or near the time of the event
- report or note is accurate

NOTE: Although the officer may read the report or note to the jury, the report or note itself may only be offered into evidence by the defendant. C.R.E. 803(5)

- In your training as a police officer, have you been taught to look for physical characteristics that indicate that a person is intoxicated?

- What are those?

    - odor of alcohol on breath or coming from the person
    - face (how it might appear)
    - eyes (how they might appear)
    - clothing (unkempt, disarray)
    - actions
    - speech (slurred, slow, incoherent)
    - attitude

- balance (stagger, stumble)
- coordination

- Did you notice any of these characteristics in the defendant?
- Please describe what you observed.
- Did you ask the defendant to perform any voluntary psycho/physical or divided attention tests?
- Did you explain to the Defendant that these tests are voluntary?
- What is the purpose of that kind of testing?
- Have you received specific training in administering these tests?
- Did the defendant agree to perform these tests?
- Are there any preliminary questions you ask the Defendant before asking him to perform these tests?
  - Physical defects
  - Sick or injured
  - Taking any medications or drugs
  - Wear contacts or glasses

- Officer, before telling us what tests you had the defendant perform, let me ask you:
  - What the lighting was like.
  - What the weather was like.
  - What the surface conditions were, e.g., level, bumpy, dry, wet, etc.
  - What kind of shoes was the defendant wearing
- How many tests did you ask the defendant to do?
- What tests did you ask the defendant to do?

  For each test given ask:

- What instructions, if any, did you give to the defendant?
- Did you ascertain whether or not he understood the instructions?

- Describe how the test is supposed to be done.
- What do you watch for as someone does the test?
- Describe the defendant's performance.
- Officer, based on your training and experience, did this defendant perform this test as a sober person would have?

NYSTAGMUS
See also part VI below.

- Officer, are you familiar with the horizontal gaze nystagmus (HGN) test?
- Are you certified in the administration of horizontal gaze nystagmus?
- When were you certified in the administration of HGN?
- What training did you receive in order to be certified in the administration of HGN?
- What training and/or experience have you had in giving this test?
- Briefly describe that test to the jury and how it works.
- What does the HGN test show?
- Did you perform a HGN test on this defendant?
- Describe what you did and the defendant's performance.
- Officer, based on your training and experience, did this defendant perform this test as a sober person would have?
- Based on your experience as a police officer, special training in dealing with and detecting intoxicated persons, and your observation of the defendant, did you form an opinion as to whether or not he was under the influence of, or impaired by, alcohol?

(The officer can give this opinion as a lay person. Jones v. Blegen, 161 Colo. 149, 420 P.2d 404 (1966); Alcorn v. Exasmus, 484 P.2d 813 (Colo.

App. 1971). You are not using the questions above to qualify him as an expert. See also C.R.E. Rule 701, Opinion Testimony by Lay Witnesses.)

- What was that opinion?
- Once you formed that opinion, officer, what did you do?
- Did you tell the defendant that he was under arrest?
- Where was the defendant taken?

STATEMENTS OF THE DEFENDANT

If statements were made by the defendant, go in camera. If necessary, at this point if the adequacy of the Miranda advisement or the issue of voluntariness has not already been resolved. See Chapter 3, Motions. Even if a pre-trial hearing has been held, jurors often want to know that the defendant was read his Miranda rights.

- Did you give the defendant a Miranda advisement?
- How was that done?
    - Use form
    - Introduce as an exhibit
    - Show your People's Exhibit ___
    - What is it?
    - Read it. (Specify each right as to which the defendant was advised.)
    - Did the defendant appear to understand?
    - Anything on the form to indicate that the defendant understood?
    - Signature
- Did the defendant ask any questions regarding his rights?
- Did the defendant agree to talk with you?
- Did you make any threat or promises to the defendant?
- What did the defendant say to you?

VI. HORIZONTAL GAZE NYSTAGMUS (HGN)

Prior to the admission of testimony regarding nystagmus many courts required that the officer first qualify as an expert in the field. Other courts will allow the officer to describe the test but not to explain what the result of the nystagmus test mean. Still other courts will allow the officer to testify that the defendant's performance on the test is consistent with alcohol intoxication or impairment, but will not permit the officer to estimate a BAC based on the result. Learn the practice in your court. If you must qualify the officer as an expert in the use of the nystagmus test, see C.R.E. 702 and Chapter 8, Experts.

The Colorado Supreme Court has not yet ruled on the admissibility of HGN. State v. Superior Court, 149 Ariz. 269, 718 P.2d 171 (1986) allowed the use of HGN to show probable cause for an arrest as well as for substantive evidence. The court, however, did not allow HGN to be used to quantify an accused's BAC. Boulder County Court, in People v. Guilmant, 85T10439-7 (1985), took judicial notice of the scientific principals of HGN and the technique used to detect its presence. The court found HGN to be sufficiently reliable to be admitted into evidence in conjunction with other field sobriety tests as evidence of intoxication. Jefferson County District Court, in People v. Hughes, 90CR696, (1990), found that HGN to be a generally accepted test within the scientific community based and can be used reliably to determine whether an individual is affected by the imbibing of alcohol, when used in conjunction with other field sobriety tests.

VII. BLOOD/BREATH TEST

See Chapter 9 for questions regarding blood/breath tests.

VIII. EXPRESS CONSENT

See Chapter 13 for questions regarding express consent and refusals.

I. INTRODUCTION

Preparation is the most important step in presenting the testimony of lay witnesses. Of course, you must first decide which witnesses are important to the case. Witnesses should be selected on the basis of ability to establish elements of the offense and/or the basic case facts.

Witness selection should be done only after a thorough review of the case. Keeping in mind the elements of the offense, sift down through potential witnesses to make an early estimate as to which individuals would be in the best position to articulate the elements of the offense.

If a witness is critical to a specific element, for example, I.D. of the defendant as the driver, be sure that the witness can in fact, put the defendant in the driver's seat. All too often a witness will tell the police what they think may have happened. You must determine how the witness reached such conclusions and prepare a direct examination which will bring forth facts, and not speculation.

II. PRE-TRIAL PREPARATION

Be sure that all necessary witnesses are endorsed and subpoenaed.

Crim.P. 16 requires that the prosecution provide "Any record of prior criminal convictions of any person the prosecuting attorney intends to call as a witness in the case."

Rule 16 also carries an on-going obligation to provide any written statements of witnesses, so any additional witness statements should be forwarded directly to defense counsel.

Be considerate and reasonable! Keep in mind that taking time to come into court is generally time consuming, inconvenient and nerve-wracking. People who are paid by the hour may lose work time, those with young children may have to pay for day care, students miss classes, etc. It's important to try to establish a rapport with a witness. All too often it's a call into the hall for Mr. So & So who you've never met in person.

One of the best ways to minimize the natural hostility set up by such a system is some forewarning. Simple things can eliminate frustrations:

1. Easy to follow directions to the courthouse -- complete with information regarding economical parking.

2. Advance, realistic time estimates. Try and work with your judge and opposing counsel with regards to scheduling.

3. Clear, concise directions regarding where to go once inside the courthouse, i.e. courtroom, witness area, etc. Be sure witnesses understand the rule of sequestration so that they do not wander in unnoticed during other testimony or sit outside and discuss the case with other witnesses. Remember the most logical subject for discussion while waiting to testify will be a comparison of who saw what.

In most cases pre-trial interviews can be done effectively either in person or on the phone provided you are prepared.

1. I.D. yourself -- there should be no doubt about who you are and what it is you want to talk about, i.e. exact date and location of the offense, etc. You want to appear confident and professional -- don't be fumbling for dates, addresses, etc.

2. Be sure that the witness has the time necessary to spend talking with you. Interrupting someone's work, dinner, etc. will result in distracted, incomplete thoughts and answers. If your timing is bad -- make arrangements to call back later.

3. Be sure the witness knows that it is proper and acceptable procedure that he discuss his testimony with you, and the defense.

   Advise the witness that if he is asked whether he has discussed the case with anyone, he is to tell the truth.

4. Remind each witness that the truth is what he knows -- not what he has assumed.

5. A good first step may be to just let the witness tell you what he remembers about a specific incident. By immediately directing questions, you may narrow the information you receive, simply because you never asked!

6. After getting a general overview -- go through the specific questions that you intend to ask. The order of the questions isn't particularly important but wording may be critical.

Let the witness know that it's okay to truthfully say:

- He doesn't know
- He doesn't remember
- He doesn't understand the question

"Helpful" speculating witnesses can bury a case!

7. Explain the order of examination, i.e. direct/cross/re-direct/re-cross.

8. Explain the difference between direct and cross-examination.

Remind the witness to be courteous during cross-examination but not to be led away from what they know to be true. Unsuspecting witnesses may be led astray by artful cross-examination just because they're out of their element and don't know how to correct it.

Forewarn the witness about the direction you think cross-examination may go, i.e.:

- Bias or prejudice of the witness against the defendant.
- Motive of witness to lie.
- Inability of witness to remember.
- Inability of witness to observe or hear.

Ask about lighting, obstacles, vision, relationship with the defendant, etc.

Point out and discuss any inconsistencies between earlier statements, police reports, etc., and statements made during the interview. Have the witness resolve the inconsistency.

Discuss any areas of vulnerability. Encourage the witness not to hold back any information. Become aware of any bias, special interest or criminal record. Talk with the witness about how you will deal with any of these issues and what you expect the defense will attempt to do with them. It is always best to confront any

problems during direct examination and thereby dilute the impact of such revelations on cross.

9. If the witness' testimony involves an estimation of time, distance, speed, or any other such issues, pin down details. Get him to explain to you how he is able to make such estimates.

10. If the witness will be shown diagrams, exhibits, etc., this must be done in advance of his taking the stand. If you are unable to do this, be sure and orient the witness to the diagram before asking him to testify about it, i.e. make sure he can tell where north is, what each symbol stands for, etc.

11. Tell the witness where his testimony fits into the case. This will help him focus and make it clear that his testimony is important.

12. Let the witness know what to expect when he comes into the courtroom, i.e. taking of the oath, positioning of microphones, etc.

13. If there have been any limiting rules by the court, be sure that your witness knows and understands them. Explain carefully that he must not "help" by volunteering any information and must limit his testimony to answering questions.

14. Advise the witness about the effect of objections and that he should stop talking once an objection has been raised.

15. Be sure your witness has access to his prior statements.

16. Call off witnesses you are not going to use.

17. Develop a system within your office to let witnesses know the outcome of the case.

III. DIRECT EXAMINATION OF LAY WITNESSES AND LAY WITNESS OPINION TESTIMONY

Any attempt to provide a sample list of questions for lay witnesses in a DUI case would prove futile. The range of topics upon which you may find yourself calling lay witnesses is very broad. Unlike police officers, lay witnesses have no set role in a DUI investigation. Lay witnesses testimony may establish an element of the offense (I.D., driving, etc.) or may simply be a link in a chain of facts that establish an element. You will need to prepare questions for your lay witnesses on a case-by-case

basis. It is important to remember however, that a lay witness is not limited to testifying about what he or she observed, heard, smelled, touched or tasted. Lay witnesses may testify to their opinions provided a proper foundation is laid and the subject matter is not of a type which requires the special knowledge of an expert. Young v. Burke, 139 Colo. 305, 338 P.2d 284 (1959).

C.R.E. 701 permits a lay witness to testify to their opinion provided it is:

1. Rationally based on their perceptions; and

2. helpful to a clear understanding of the witnesses testimony or a fact in issue.

Lay witnesses have been allowed to offer their opinion in the following relevant areas:

Intoxication - Jones v. Blegan, 161 Colo. 149, 420 P.2d 404 (1966); Alcorn v. Exasmus, 484 P.2d 813 (Colo. App. 1971).

Speed - Eagan v. Maiselson, 142 Colo. 233, 350 P.2d 567 (1960).

Nervousness - People v. Gallegos, 644 P.2d 920 (Colo. 1982).

I. GENERAL OVERVIEW

A. THE EXPERT WITNESS IN THE DETERMINATION OF INTOXICATION

Generally, witnesses can only testify as to what they have seen or heard relating to a particular case. But an expert -- an individual who has superior knowledge of a subject -- is given the opportunity to share that special knowledge with the trier of fact.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

C.R.E. 702

An expert is one who:
Has superior knowledge of a subject and is, therefore, able to afford [the finder of fact] a special assistance, and his knowledge may have been acquired by professional, scientific, or technical training or by practical experience in some field of human activity, conferring on him especial knowledge not shared by people in general.

People v. Williams, 790 P.2d 796 (1990) quoting Stone v. People, 157 Colo. 178, 401 P.2d 837 (1965).

The question in determining whether to accept a witness as an expert and to allow him to give opinion testimony is "whether his knowledge of the subject matter is such that his opinion will most likely assist the trier of fact".

Williams 761 P.2d at 258 quoting United States v. Barker, 553 F.2d 1013 (6th Cir. 1977). People v. Shreck, 22 P.3d 68 (2001).

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. C.R.E. 703

SEE: People v. Beasley, 43 Colo. App. 488, 608 P.2d 835 (1980).

Testimony in the form of an opinion or an inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. C.R.E. 704

The use of expert witnesses has been allowed in the area of intoxication to establish both the principles and methodology of the tests used and the ultimate facts of intoxication.

An expert witness who has been properly qualified, may testify that a person with a specific blood-alcohol content would have his motor reflexes impaired and would be under the influence of intoxicating liquor while operating a motor vehicle.

SEE: People v. Mascarenas, 181 Colo. 268, 509 P.2d 303 (1973).

While an expert witness is allowed to give an opinion on the ultimate issue in a trial, C.R.E. 704. The jury however, is not bound to accept the testimony/opinion of an expert. The court has no power or authority to tell the jury what weight it should give to any expert testimony. Both the credibility of the witness and weight given to such testimony are matters to be determined by the jury and the jury should be so instructed. COLJI:Crim. 4:05

SEE: People v. King, 181 Colo. 439, 510 P.2d 333 (1973); Kallnbach v. People, 125 Colo. 144, 242 P.2d 222 (1952).

B. ALWAYS INTERVIEW YOUR EXPERT WITNESS BEFORE TRIAL

Have a copy of all police reports, documents relating to the breath, blood or other test and any other relevant documents available for your expert well before trial. Take full advantage of your expert's input and explore the expert's special knowledge as you prepare your case and organize your thoughts about the case.

Check your chain-of-custody prior to trial. Make sure it is complete. Never put your expert in a position of having to make on-the-spot judgments as to the identity, form, or substance of evidence while in the courtroom under the pressures of trial. He

may well claim never to have seen such materials before and be unable to make or venture an opinion.

In discussing your expert's testimony, determine what specific questions they can answer favorably. With expert witnesses, even your own, it is extremely important that your questions be precisely worded. Determine, for example, the expert's opinion as to the level of intoxication at which virtually all normal people will be incapable of safely driving a car. The expert will advise you of which areas they can cover, how to phrase questions, and which questions are better left unasked.

Discuss the defense theory of the case with your expert. Frequently, the defense theory will be based on a hypothetical detailing the defendant's drinking exploits on the date of offense. An expert witness who is prepared before testifying may more smoothly field these hypothetical questions. Discuss the possible technical attacks on the test result, the expert's methodology and his or her conclusions. For example, discuss the possibility of a false high intoxilyzer result based upon a contaminated standard solution.

C. STIPULATING TO THE QUALIFICATION OF EXPERTS

Although it may be a time-saver to allow the defense attorney to stipulate to the qualification of your expert, this should only be done if your expert's credentials are not particularly impressive.

If your expert has credentials that are widely recognized and truly impressive, take full advantage. Bring out all of his or her educational, professional and practical achievements and experience in front of the jury. Let the jury members know your expert witness really is an "expert".

Questions about the expert's educational background should focus both on general education and those areas of study and experience which give the expert special understanding of the area at issue. Elicit testimony about the expert's educational level and professional associations. Inquire about his or her professional publications. Have the expert testify about his or her years in the field, their practical experience and the number of times he or she has been qualified as experts in court. In DUI cases, the expert will likely be a toxicologist. Since the general public does not

commonly understand toxicology, the qualifications of your expert can also be used to educate the jury as to the role and function of a toxicologist.

D. OPINIONS AS TO INTOXICATION

Although Colorado law establishes permissible inferences of intoxication and impairment where the percentage of alcohol in the blood or breath is .10 percent or greater, or exceeds .05 percent respectively, and per se intoxication at .10 percent, the prosecutor should still attempt to elicit testimony from the expert establishing how a defendant is effected by a specific alcohol level. Determine before trial whether your expert is comfortable with such a question and how best to phrase it.

SEE: People v. Davis, 187 Colo. 16, 528 P.2d 251 (1974), People v. Tilley, 184 Colo. 424, 520 P.2d 1046 (1974), and People v. Acosta, 620 P.2d 55 (Colo. App. 1980).

Remember that no instrument, including the intoxilyzer is 100% accurate. Be prepared to deal with margins of error (i.e. if the reading were high by a factor of 10% would the expert have the same opinion).

The expert toxicologist may also be asked to determine the approximate number of ounces of alcohol that the defendant consumed to obtain the alcohol level. The defendant's weight is necessary for this determination and must have previously been available. Such testimony will usually conflict with the defendant's claim of having had "only two beers". This formula, known as "Widmark's Formula", can be readily calculated by most expert witnesses. Confirm that your expert can make this calculation prior to putting them on the stand. Find out exactly what information the expert needs to make the calculation. Using this formula, the expert should be able to tell the jury how many beers or drinks were absorbed in the defendant's system at the time the blood was drawn or the breath sample tested.

NOTE: The expert will not be able to testify to the period of time over which the alcohol was consumed: There are too many variables such as contents of stomach, type of beverage, etc.,

involved in such an analysis to reasonably rely on such a conclusion.

The expert toxicologist should be presented as an impartial scientist who has no interest in the case other than as a search for the truth. It may be particularly useful, where appropriate, to elicit testimony that your expert has previously appeared as a defense expert and is thus not "pro-prosecution". Since very few jurors have any knowledge of chemistry or toxicology, the juror's acceptance of the testimony of the toxicologist is based primarily on the believability of the expert rather than on an understanding of methods or tests used.

The jury will only become confused if the testimony of the expert is allowed to become too specific and bogged down in detail. The toxicologist should attempt, in general terms, to explain his or her methodology, and then emphasize the effects of the alcohol on the Defendant and his ability to safely operate an automobile. Anticipate, however, that a well-prepared defense attorney may closely cross-examine your expert. Prepare your expert for this and remember that the more knowledgeable you are in the area the better you can present your re-direct questions.

Courts have held that one does not have to be a physician or surgeon to be qualified to render an opinion as to alcohol intoxication and its effects on the body, if sufficient knowledge is learned through training or experience. No specific form of training or degree is required to establish expertise. Colorado Arlberg Club v. Board of Assessment Appeals, 719 P.2d 371 (Colo. App. 1986), (rev'd. on other grounds). However, an expert must acquire, through experience or study, more than a casual familiarity with the topic. Greene v. Thomas, 662 P.2d 491 (Colo. App. 1982). Chemists, chemical engineers, biochemists, and medical technicians have been allowed to give opinions as to intoxication and the methods of determining B.A. levels.

SEE: Kallnbach v. People, supra (medical technologist, registered as a professional in the field and whose work involved blood analysis, qualified as an expert to testify to her analysis of alcohol in Defendant's blood).

SEE: 12 Am. Jur. Proof of Facts, p. 635: C.R.E. 702.

A lay witness can render an opinion as to whether a defendant was intoxicated, and should be able to render an opinion as to whether a person was too drunk to drive safely, providing a proper foundation is laid pursuant to C.R.E. Rule 701. Pre - 1980 case law precludes a lay witness from testifying that a defendant's ability to operate a motor vehicle was affected by alcohol.

SEE: Jones v. Blegen, 161 Colo. 149, 420 P.2d 404 (1966).

However, C.R.E. 704, effective January 1, 1980, permits testimony in the form of an opinion or inference even if it embraces an ultimate issue to be decided by the trier of fact. This rule seems to permit a witness, lay or expert, to testify that a Defendant's ability to safely operate a motor vehicle had been affected by the alcohol the Defendant consumed.

SEE: People v. Collins, 730 P.2d 293 (Colo. 1986).

In Collins, the court said:

> "An often expressed concern in allowing a witness (whether expert or lay) to state an opinion as to an ultimate fact is that the witness would be "usurping the functions of the jury." We believe that concern is unfounded. As Wigmore puts it: Such reasoning is "a mere bit of empty rhetoric" and "no legal power, not even the judge's order, can compel them [the jury] to accept the witness' opinion against their own." 7 J. Wigmore, Wigmore on Evidence 1920 (Chadbourn Rev.1978). The Federal Advisory Committee Comment on rule 704 is consistent with this view. It states in pertinent part:
>
> > The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule. (citations omitted.)
>
> While Rule 704 does not prohibit a witness from testifying to an issue of ultimate fact, obviously, it does not mean an expert may testify that a particular legal standard has or has not been met. The question that elicits the opinion

testimony must be phrased to ask for a factual, rather than a legal opinion. To the extent that our interpretation of C.R.E. 704 conflicts with case law in existence prior to our adoption of the rule, we hold that the rule is the better alternative.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions, however. C.R.E. 701 and 403 afford ample assurances against the admission of opinions that would merely tell the jury what result to reach.

SEE: Collins, supra at 305-306.

E. SCOPE OF EXPERTS TESTIMONY

C.R.E. 702 provides that an expert may testify in the form of an opinion or otherwise within the areas pertaining to his special knowledge, skill, training, or education.

HOWEVER, under the rules of evidence, lay witnesses, likewise, are entitled to give opinions, AS LONG AS THOSE OPINIONS FALL WITHIN THE DICTATES OF C.R.E. 701:

> If the witness is not testifying as an expert, his testimony in the form of opinion or inferences is limited to those opinions or inferences, which are:
>
> a. Rationally based on the perception of the witness; and
>
> b. Helpful to a clear understanding of his testimony or the determination of a fact in issue.

While several things differentiate the expert's testimony from that of a lay person, only two will be addressed here. First, C.R.E. 703 permits the expert to form an opinion on facts or data perceived by or made known to him at or before the hearing. The facts or data must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. If the facts or data are of that type they need not be admissible in

evidence. Second, an expert may give an opinion based on a hypothetical.

Thus, it is clear, that the expert NEED NOT TESTIFY FROM HIS OWN PERCEPTIONS OR OBSERVATIONS while the lay person must.

F. USE OF HYPOTHETICAL

An expert may testify and give his opinion in response to hypothetical questions. The use of hypothetical questions is governed by several requirements:

1. A hypothetical question may not be in a form that may mislead or confuse the jury.

2. It should include only those facts which are supported by the evidence.

3. It may not omit material facts essential to the formation of a rational opinion.

   SEE: People v. Nhan Dao Van, 681 P.2d 932 (Colo. 1984).

However, hypothetical questions need not be based solely on the undisputed evidence, if there is some evidence which supports the question.

SEE: Lembke v. Hayutin, 148 Colo. 334, 366 P.2d 673 (1961).

In a DUI trial, hypothetical questions (i.e. a question which asks the expert to assume the truth of the facts presented in the question), can be an effective way to elicit favorable testimony from your expert, and can be used in cross-examination of defense experts. For example, if the defense expert is qualified as an expert in the effects of alcohol or drugs on humans, you may want to build a hypothetical based on the defendants performance of the roadside test, his demeanor, etc. See IV. infra.

II. PREDICATE QUESTIONS - DIRECT EXAMINATION

A. DIRECT EXAMINATION OF FORENSIC CHEMIST/TOXICOLOGIST

NOTE: Where possible tailor these questions to emphasize strengths or minimize weaknesses in your expert's qualifications and the particular substance or substances involved.

1. Qualifying the Expert

- Would you please state your name and address for the record?
- What is your occupation?
- Where are you employed?
- For how long?
- Where previously employed?
- Would you please describe for the jury the general nature of your work as a forensic chemist/toxicologist.
- Does forensic chemistry/toxicology include the analysis of blood/breath/urine/saliva samples to determine their content?
- How long have you worked in this field?
- What education and training have you undergone to become a forensic chemist/toxicologist?
- What educational degrees do you hold?
- Are you currently a member of any professional societies or associations?
- Which societies or associations?
- Do you perform analyses of blood/breath/ urine/ saliva samples as part of your regular duties?

- Have you had any additional specialized training in the area of blood/breath/urine/saliva analysis?
- Do you keep current on the developments that occur in this field?
- How long have you been performing that type of analysis?
- Does that include analyzing blood/breath/urine/saliva for its alcohol content?
- Approximately how many times have you performed a blood/breath/urine/saliva analysis to determine its alcohol content?
- Have you had training/education/experience in the effect of alcohol on human beings?
- What training/education/experience have you had?
- Have you previously testified as an expert in the field of forensic chemistry/toxicology?
- How many times? In which courts? (Where appropriate establish that your expert has also testified as a defense expert.)

(Offer the witness as an expert in the field of forensic chemistry/toxicology, or both if he is qualified.)

NOTE: If the witness qualifies as an expert in both fields have him explain the difference between the two areas of forensics.

NOTE: Your expert may be an expert in the area of clinical toxicology as opposed to forensic toxicology. These predicate questions will work for a clinical, forensic, or theoretical toxicologist as well as other types of experts in the area, i.e., physicians.

2. *Introducing Test Results*

Your expert witness may be the same person who performed the blood-alcohol analysis in blood test cases. See the Chapter 9 on Tests for predicate questions on admitting the blood or breath test result.

3. *Effects of Alcohol on the Human Body*

NOTE: These questions can be tailored to cover drug intoxication or impairment. "BA" as used in these questions means breath alcohol and blood alcohol. Use the appropriate term when asking these questions.

- Have you had any experience/training/education in the area of the effects of alcohol on human beings?
- What training/education/experience have you had?
- Have you conducted any studies, which relate to the effect of alcohol/drugs on a persons mental/physical abilities?
- Have you conducted any studies which relate the effects of alcohol to a person's ability to drive a car?
- Please describe these studies.
- Have you previously testified as an expert on the effects of alcohol on the human body? How often? (Again, where appropriate elicit previous experience as a defense expert.)
- (Offer the witness as an expert on the effects of alcohol on the human body.)
- NOTE: Many judges may deem this area of expertise to be included in the field of forensic or chemical chemistry/toxicology.
- Is alcohol considered a drug?
- What type of drug is alcohol?
- What type of general effect, does alcohol have on human beings?

- Are there any specific effects of alcohol which are unique to alcohol?
- Please draw a diagram (or, referring to the diagram marked People's Exhibit _____,) and explain how alcohol effects the various portions of the brain and central nervous system.
- (Some experts will discuss here effects of alcohol on the new brain, mid-brain and old-brain.)
- Are there visible effects of alcohol?
- What are they? (Sloppy physical movements, slurred speech, bloodshot and watery eyes, impaired balance, exaggerated emotional responses and Horizontal Gaze Nystagmus.)
- Are there invisible effects of alcohol?
- What are they? (Diminished reaction time, dulled sensory perceptions, reduced inhibition, and diminished visual acuity.)
- Is there a BA level at which the average person will experience the visible effects of alcohol?
- What BA is that?
- Is there a BA level at which the average person experience the invisible effects of alcohol?
- What BA is that?
- Would you be able to testify with a reasonable degree of scientific certainty as to how various body functions and abilities associated with driving a car would be effected by the consumption of alcohol?
- Is a driver's vision effected by alcohol?
- How?
- Is a driver's hearing effected by alcohol?
- How?
- Is a driver's judgment effected by alcohol?

- How?
- Is a driver's reaction time effected by alcohol?
- How?
- Is a driver's coordination effected by alcohol?
- How?
- Is a driver's balance effected by alcohol?
- How?
- In your opinion, at what BA level is the average person effected by alcohol so that they are substantially incapable of safely driving a car? (Expert opinion will vary between .05 and .10 BA)
- In your opinion, at what BA level is the average person affected by alcohol so that their ability to safely drive a car is affected to the slightest degree?
- Are you familiar with the concept of tolerance and compensation as they relate to the effects of alcohol on human beings?
- What do those terms mean as they relate to the effects of alcohol on human beings?
- Can an experienced drinker compensate for some of the effects of alcohol?
- To what extent can they compensate? (An experienced drinker can compensate in most motor functions with the important exception of Horizontal Gaze Nystagmus, which is an involuntary phenomenon.)
- Can an experienced drinker compensate for the invisible effects of alcohol?
- To what extent can they compensate?
- Will you describe the concept of absorption, distribution and elimination as they relate to alcohol in the human body?

- What do these terms mean as they relate to the effects of alcohol on human beings?

- Do you know how alcohol is absorbed in the human body?

- How? (Two mechanisms: 5-10% is absorbed through the stomach; 90-95% goes into the intestines and is absorbed through veins into the liver; from the liver it enters the bloodstream and is distributed throughout the body.)

- Is there anything significant about how alcohol is distributed through the body?

- What? (Alcohol distributes most quickly in water and thus travels most quickly to the brain and kidneys, organs filled with water. The brain, therefore, is affected by the alcohol before the alcohol level in the bloodstream yields a true BA. The driver is thus feeling the effects of the alcohol, initially, at a level higher than his BA would indicate. It takes 1/2 to 1-1/2 hours to reach maximum alcohol content or equilibrium in the bloodstream after a drink is consumed.)

- Do you know how the human body eliminates alcohol?

- How? (Excretion through the bladder, kidneys and lungs accounts for 5-10% of the alcohol. The remaining 90-95% is metabolized, or broken down, primarily in the liver.)

- Are you familiar with the rate at which the human body eliminates alcohol?

- At what rate does the body eliminate alcohol? (An average rate of .015 per hour for most people, but very "hard core" drinkers can eliminate at up to twice this rate.)

- Are you familiar with the "peaking theory?"

- What is the peaking theory? (When the alcohol distribution is in disequilibrium, there is as much as 10 times more alcohol in the brain and other organs than can be found in the blood or breath. Equilibrium is reached when the alcohol is evenly distributed throughout the body so that the BA in the blood or breath is representative of the entire system. The important point here is that even if a person rapidly consumes a quantity of alcohol just prior to driving, he will feel the

effects of the alcohol long before a breath or blood analysis will reflect his true BA.)

- Are you familiar with Widmark's Formula?
- What does the formula calculate?
- In your expert opinion, if the defendant weighs _____ and was found to have a BA of _____, how many 1 oz. alcohol drinks would the defendant have had in his/her system at the time the test was taken? (Drinks will be referred to as 12 oz. 4% beers, 3 oz. glasses of 12-15% wine or 1 oz. shots of 86 proof whiskey.)
- Could the Defendant have consumed more than that?
- Could the Defendant have consumed less than that?
- At a BA level of _____, what effect would the alcohol have had on the defendant's ability to safely drive a car? (Note, this question may be overkill and is subject to the objection that the BA at the time of the test or blood draw is not necessarily identical to the BAC at the time of the stop.)
- Is there a progression of effects which corresponds with increasing BA levels?
- If I were to call your attention to various body functions and abilities associated with driving skills, would you be able to elaborate with a reasonable degree of scientific certainty as to how they would be affected by various levels of alcohol in the body?
- How is vision affected?
- How is the hearing affected?
- How is judgment affected?
- How is reaction time affected?
- How is balance affected?
- At what BA level does a person begin to be affected in his operation of a motor vehicle?

- At what BA level is a person under the influence, so as to be substantially incapable of safely operating a motor vehicle?
- At a BA level of grams of alcohol per 100 milliliters of blood (Defendant's BA), what effects would occur?
- Do you have an opinion to a reasonable degree of scientific certainty as to whether a person with a BA level of ___ grams of alcohol per (100 milliliters of blood/210 liters of breath) (Defendant's BA) would be capable of safely operating a motor vehicle?
- What is that opinion?
- Is a BA of ___ grams of alcohol (per 100 milliliters of blood/210 liters of breath) (Defendant's BA) consistent with the following characteristics:
  (Hypothetical based on observations of Defendant's condition)?

Again, all of the above questions and the answers they elicit should be tailored to your particular expert witness and the facts of your case. An infinite number of complimentary and supplementary questions can be effectively asked as the nuances of your case and the defense's case theory unfold.

B. EXAMINATION OF ACCIDENT RECONSTRUCTION EXPERTS

Many DUI cases involve an automobile accident. Often it is difficult to present testimony as to how the crash occurred in the absence of eye-witnesses. However, the facts surrounding crashes are often inculpatory and, by use of an accident reconstruction expert, the prosecution may be able to provide important evidence to a jury with respect to the defendant's inability to operate a motor vehicle safely -- an important element in virtually every DUI case. It is also often necessary for proving the underlying traffic charge (i.e. careless or reckless driving.)

In bringing such expert witnesses to the trial, the first task of the prosecutor is to qualify the witness as an expert in the field of accident reconstruction.

There are many publications available which contain excellent materials, suggestions, and predicate questions appropriate to the qualification of such witnesses, but any series you select should follow the general pattern of:

IDENTIFICATION of the witness:

Identification of OCCUPATION:

The relationship of OCCUPATION to THIS CASE:

The LENGTH OF TIME the expert witness has been a professional in accident reconstruction.

The specific TRAINING and LENGTH OF TRAINING involved: Any training in computer enhanced reconstruction should be greatly emphasized here.

Specific CERTIFICATIONS, ACKNOWLEDGMENTS, or diplomas from SPECIALIZED SCHOOLS that the witness holds:

The PRACTICAL EXPERIENCE accumulated by the witness in the specific area of investigation of traffic accidents:

The number of times the witness has been previously qualified as an expert witness BY THE COURTS in accident reconstruction. (Where appropriate, add history as a defense expert):

WHERE the witness was so qualified by the COURTS to serve as an expert witness.

The accident reconstruction expert's conclusions or opinions (as with any expert) as to the cause of an accident, must be more than simply conjecture or speculation. There must be some statement of probability and that probability must be approaching or close to a certainty.

SEE: Daugaard v. People, 176 Colo. 38, 488 P.2d 1101 (1971).

Before qualifying the witness as an expert in accident reconstruction, the prosecutor should evaluate what conclusions or what evidence is desired. More often the expert's testimony will contradict the defendant's version of the facts of a particular case.

Thus, this testimony may be useful either in the prosecutor's case-in-chief or in rebuttal.

C. DRUG RECOGNITION EXPERTS

The same general principles regarding the qualifications of forensic toxicologists and accident reconstruction experts apply to Drug Recognition Experts (DRE). An additional consideration in the area of drug recognition experts, the evaluations they conduct and the opinions they form is the issue of whether the DRE process, procedure and theory is a proper subject for expert testimony. In other words, is the DRE process sufficiently reliable and sufficiently accepted by the scientific community to warrant submission of this type of evidence to a jury?

For more on the Drug Evaluation and classification process and Drug Recognition Experts, see Chapter 10. A discussion of the scientific basis of the DRE program is beyond the scope of this manual. Suffice it to say that you may meet with resistance by the judge and defense counsel. You should be prepared to lay a foundation pursuant to People v. Shreck, 22 P.3d 68 (2001), which held that CRE 702, rather than the Frye test, is the standard for admission of scientific evidence. In applying this standard, the trial court should focus on the reliability and relevance of the proffered evidence and make a determination as to (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury. In determining reliability, the trial court should conduct a broad inquiry and consider the totality of circumstances of each specific case. The trial court must issue specific findings under both CRE 702 and CRE 403.

III. GENERAL OVERVIEW -- CROSS-EXAMINATION OF DEFENSE EXPERTS

Should the defense elect to call witnesses they seek to qualify as experts, the prosecutor's role becomes initially, one of voir dire as to the expert's qualifications, and secondly cross-examination.

Absent qualifications as an expert, a witness can only give opinions based on personal observations. C.R.E. 701.

NOTE: If you know the defense expert is qualified and will be qualified as an expert in the area offered, your voir dire (if you do it at all) should be

limited. Do not extensively review the Defendant's expert's qualifications and thereby enhance his or her credibility with the jury.

A. VOIR DIRE OF THE "EXPERT"

After the defense moves to have the witness qualified as an expert, the prosecutor has an opportunity to voir dire the witness concerning his/her qualifications as an expert in the specified field. Therefore, the prosecutor should be acutely aware of the basic test of what qualifies a witness as an expert. Voir dire affords the opportunity to find the limits of the witnesses' expertise, or to challenge that expertise outright. Caution should be used in attacking a witness's expertise altogether, as the witness can generally be qualified as an expert in some area relevant to the defense case. Make certain you combat an overbroad recognition of the expert's area of qualification. This must be done at the foundational stage. See I. A. Supra.

For example, if the defense seeks to qualify a medical doctor as an expert for purposes of explaining various characteristics or injuries of a defendant, the prosecutor should listen attentively to determine whether the required foundation has been laid. Testimony should include where the doctor is licensed to practice, where they attended medical school, where they have practiced, the nature of their practice (whether general or specialized), and how their practice, experience and training relates to the particular issues to which they will testify.

Frequently, the defense will call a toxicologist to testify as to the accuracy or inaccuracy of a test result, the result of analysis of the second sample, or to the effects of alcohol on human beings. The prosecutor should make the witness clarify during the voir dire examination the extent of the witness's training and experience in these areas. Further, the witness's experience in performing and analyzing tests on blood and breath should be established, as well as any tests they may have conducted on the effects of alcohol on human subjects. At best, the defense witness may lack the requisite training and experience to be expert-qualified but, at a minimum, the parameters of their expertise can be revealed to the judge and jury.

The areas of expertise that a witness is qualified in should be clearly drawn and limited so that opinions expressed outside the

scope of that expertise are not allowed and so that proper objections can be made.

B. OBJECTIONS TO EXPERT TESTIMONY

See, IV, infra.

The prosecutor should listen carefully to the expert testimony and promptly object to any testimony which falls outside the witness's delineated field of expertise. A second area which the prosecutor should closely scrutinize is the hypothetical question. While the use of the hypothetical question is proper, their use is subject to a number of conditions. See I.F. Supra.

Whether a particular hypothetical question will be allowed is a matter of discretion for the court. People v. Nhan Dao Van, 681 P.2d 932 (Colo. 1984). The caution is to ensure that such questions are properly constructed, that they embrace all of the accurate variables, and they do not go beyond the evidence.

C. CROSS-EXAMINATION

The initial decision is whether or not to even cross-examine the defense witness. It will be a rare case, however, when a defense witness, qualified as an expert, has not inflicted some damage to your case. Thus, the prosecutor should discern what damaging points were elicited from the expert and how they can be ameliorated or countered on cross-examination. For a more detailed analysis of cross-examination, see Chapter 15, but the following guidelines are particularly important in dealing with experts.

1. Questions should be carefully limited, ideally requiring only "yes" or "no" responses. Avoid opening the door so that the expert can reinforce his direct testimony.

2. Ask only questions that you know the answer to. Remember, an expert witness is often an expert at testifying as well as an expert in his field. Be cautious and don't take risks by asking open-ended questions.

3. Work toward an admission by the expert that their conclusion is not the only conclusion which is reasonably supported by the evidence.

4. Decide what areas or points you will cover before commencing your cross-examination. This is not a fishing expedition. Request a brief recess to prepare your examination and, whenever possible, interview the defense expert prior to their testimony.

5. Ask those questions which you know will be favorable to your case. Confirm that the prosecution witnesses observations of the defendant's breath, eyes, speech and balance are consistent with alcohol intoxication or impairment. Establish that virtually all people are affected by alcohol at a certain level and that the alcohol effects the human body in both visible and invisible ways.

IV. QUESTIONS FOR CROSS-EXAMINATION

Because of the very nature of cross-examination, it is not practical to outline specific questions for cross-examining a defense expert. (See generally Chapter 15 II. D., sample questions.) Cross-examination, whether the witness is an expert or lay witness, should elicit only information and opinions favorable to the prosecution case or discrediting to the defense case. Thus, the facts of the case, the defense theory, and the testimony of the expert on direct will fashion the prosecutor's cross-examination. Generally, the same concepts elicited from a prosecution expert can be elicited from the defense expert. Remember, in cross-examining the defense expert, your questions will need to be precisely phrased as the witness will not be inclined to be generous with her answers. Through the careful use of narrow, leading questions helpful testimony should flow just as smoothly during cross-examination as in the prosecutor's case-in-chief. It is essential that you listen carefully to all of the defense expert's testimony. Do not allow yourself to be so engrossed in formulating your cross-examination that you miss critical direct testimony.

A. EXPERTS QUALIFICATIONS

Initially, you must decide if you want the jury to believe that this defense witness is truly an expert or whether you should attack his credibility. Because of the nature of the case or because the expert

is credible and fair, you may actually want the jury to listen attentively to the defense expert. If their expert refuses to allow for favorable prosecution testimony or frontally attacks your case or test, however, you may well wish to discredit him. This can be achieved by establishing the parameters of their expertise or by revealing inconsistencies between his testimony and the evidence. If the expert witness is professionally consistent, the better approach is to enlist his help and expertise so he can be of benefit to your case.

B. HYPOTHETICAL QUESTIONS

Frequently, the defense will attempt to reduce the defendant's BA level by asking the witness to extrapolate the BA level back to the time of driving. To do this the defense will formulate a hypothetical question which will include all of the variables as testified to by the defendant including: weight, number of drinks, time each drink was consumed, food consumed and time of driving. If these variables are not in evidence, the prosecutor should object as the question assumes facts not in evidence.

In countering such a hypothetical from the defense, the expert will have to readily admit to the prosecutor that the answer is entirely predicated on the facts as offered by the defendant. If the defendant did not perform well on the roadsides, you can establish that the performance is consistent with intoxication despite the defendant's hypothetical BA. It is also important to elicit an admission of the possibility that, pursuant to the peaking theory, the defendant was feeling the alcohol at a level exceeding his projected BAC at the time of driving. Also establish that each person is different in their reaction to alcohol and that the response assumes an average or typical person.

In a similar manner, emphasizing the failed roadside can discredit a defense hypothetical which shows a projected BA which falls below the .05 level. When their defense embraces a low BA, keep emphasizing all of the observations and behavior of the defendant which tend to contradict their hypothetical. You want to leave the jury thinking that the defense hypothetical is just that, a hypothetical, which is not consistent with the evidence.

C. EVIDENCE CONSISTENT WITH INTOXICATION

Defense experts will generally be quite reluctant to concede that the prosecution evidence is consistent with intoxication. After having attacked the accuracy of the blood or breath test, they will often explain that the observations made of the defendant, his performance on the roadsides and his driving are not necessarily consistent with intoxication. They will testify that innumerable variables could have caused the defendant to exhibit poor balance, nystagmus, bloodshot eyes, slurred speech, etc . . . This testimony should be expected but should not cause undue concern as it can usually be remedied on cross-examination. Also keep in mind that your closing argument can emphasize that while there may be a possible explanation for each indication of intoxication that the cumulative effect of those indications makes the defense theory untenable.

Establish that alcohol acts as a depressant and has a significant effect on the human body as consumption increases. Make the same points on cross-examination that you would ask on direct if the expert were your witness but use leading questions. An ethical expert will have to disclose the visible and invisible effects of alcohol on the body. By establishing this foundation the expert should have to concede that the indices of intoxication observed by the arresting police officer are consistent with intoxication. The same line of questioning should elicit the expert's admission that the defendant's errors on the roadside maneuvers are also consistent with intoxication.

It is important that these points be made but don't expect any more concessions from their expert in this area. Defense experts will not say that your evidence, even taken as a whole, tends to show intoxication; nor will they always say that your evidence is consistent with intoxication, but rather, that it may be consistent or at least is not inconsistent. The prosecutor should keep in mind that for every conclusion reached by an expert witness, there are other conclusions which can as easily be reached by a different witness given the same set of facts. Most experts are sensitive to this point, and it is basic to their credibility that other possibilities are recognized. Your job is to show the jury that the defense expert is testifying to possibilities, not facts or even probabilities.

D. ESTABLISHING THE EFFECTS OF ALCOHOL

Each expert will have his or her own style and method of describing the effects of alcohol. Not all experts will speak in terms of old brain, mid brain and new brain (neo-cortex). As you become more familiar with a particular expert, you can more effectively tailor your cross-examination to her individual approach.

Begin by establishing that alcohol is a drug. Then, have the defense expert describe the various ways that alcohol impairs normal human functioning on both a visible and invisible level. Have the expert identify each area of impairment and describe the potential effect on a person's ability to safely drive a car. Eliciting such information from the defense's own expert witness can be extremely persuasive to a jury. Lead the expert into admitting that there is a level at which a person's ability to safely drive is affected to the slightest degree. From there, develop that there is also a level at which people are incapable of safely driving a car.

Successful cross-examination in this area does not necessarily include pinning down a BA level which corresponds to impairment or intoxication. Ascertain, if possible, prior to your cross-examination whether the witness will give an opinion as to what level people become impaired or intoxicated. Depending on the BA level indicated by the blood or breath analysis, you may not want to ask this question. It is also important to phrase the question in terms that the expert will agree to answer it. The question may need to be framed in terms of "virtually all normal people", or "the average person" or some similar formulation.

E. CORROBORATING THE TEST

Whenever possible, try to elicit testimony from the defense expert which tends to corroborate the accuracy of your test. This is particularly true when their expert attacks your test result. Again, caution should be used, and the inquiries should be carefully limited to undisputed facts which tend to show the accuracy of your test. Begin by establishing that each step taken in determining the BA was in compliance with the Colorado Department of Health (CDH) Rules and Regulations pertaining to blood and breath tests. Establish that the primary purpose of the rules and regulations is to yield scientifically-reliable results. If

one or more technical regulations were not followed, then you will obviously want to minimize the importance of the particular regulation. (See the Chapter 9 on tests for a more detailed discussion of CDH Rules.) (The regulations are in the appendix)

Another tactic, again depending on the defense theory, is to show the consistency between the roadside maneuvers and the BA revealed by the test. Establish point-by-point that the Defendant's roadsides performance is consistent (or at least not inconsistent) with a person at the BA level established in the case.

At times, the defense expert will attack the test in your case but will not testify regarding a retest or second test. When this happens, the prosecutor should inquire, in camera, whether the expert performed their own analysis. If they did perform a test, it will likely be consistent with the primary test, or it would have been previously offered by the defense. The objection that is certain to be raised is that the defendant is not compelled to present any evidence. They will further argue that such cross-examination tends to shift the burden of proof or at least creates an obligation of going forward with evidence. The prosecutor's response should be that the defense has widely opened the door by calling an expert to attack the validity of your test. Therefore, it is proper cross-examination to elicit evidence, known by their expert, tending to corroborate your test. The defense may also object on the basis that the retest is covered under the attorney-client privilege. The prosecutor should counter that any privilege was waived when the defense called the expert to attack the validity of the primary test. This situation, when it arises, should be utilized to the prosecutor's advantage, but raise the issue during cross-examination and out of the presence of the jury. Often a defense attorney will tell you at arraignment or pre-trial conference whether he has had a retest and what the result was or that it was close to the initial test. Always note this on your file. It may be useful later.

V. PROBLEM SOLVING

A. PROSECUTORS MUST KNOW THEIR SUBJECT

Nothing can more effectively sabotage an examination of an expert witness than an attorney who is not well-versed in the subject matter. In presenting a DUI case it is important that the prosecutor

have an in-depth knowledge of every facet of DUI enforcement. A naive deputy can hide his ignorance through many stages of the trial, but when it comes time to cross-examine a defense expert in forensic toxicology, (or any other area of scientific, medical or technical endeavor), the rattled prosecutor will often be left scrambling to find a fig leaf. Often a more experienced prosecutor in your office can offer specific advice as to useful areas of inquiry with a particular witness. Consider keeping an office file on experts listing date, case and the nature of the testimony. Should an expert fail to testify consistently you can confront the expert with that fact. The impact will be heightened by the use of the specifics so take care that such information is carefully and accurately recorded.

An excellent starting point is reading this manual from cover to cover. A deputy should also know the Colorado DUI statute, section 42-4-1301, C.R.S., as well as the plethora of pertinent case law. The Colorado Department of Health Rules and Regulations pertaining to alcohol-analysis of blood and breath samples is also "required" reading. The last requisite area of study is in the field of toxicology.

A prosecutor's ignorance will be quickly revealed and exploited by the defense expert on cross-examination. As previously stated, most forensic toxicologists are experts at testifying. Naturally, they will not be inclined to volunteer favorable testimony. The expert can engage in semantic evasiveness and effectively stonewall the beleaguered prosecutor without a working knowledge of toxicology. A deputy should, therefore, be familiar with the effects of alcohol on humans, and be able to articulate that knowledge when cross-examining the defense expert. The deputy must also be familiar with the testing devices, namely the gas chromatograph and the intoxilyzer. An expert will have a difficult time clouding the evidence and discrediting a test when a knowledgeable prosecutor can intelligently present that evidence. Only a good witness can give good direct testimony, and only a good attorney can conduct a good cross-examination.

B. KNOWING YOUR WITNESS

A second area which can create problems in a DUI prosecution is when a deputy is not familiar with the experts. Traditionally, expert witnesses, have been viewed by lawyers as hired guns who

come to court wearing either a black or white hat. Cross-examination, therefore, generally became a matter of convincing the jury that the expert witness was a gunfighter, paid to shoot holes in the evidence. In truth, most experts are neutral and professional witnesses from whom both sides can glean favorable testimony. Becoming acquainted with these witnesses and sharing their knowledge and experience is crucial.

Again, a prosecutor must spend some time discussing the case with the expert before trial. Discuss your test result and other evidence with the expert to determine what opinions they can render. Determine that the chain of custody is complete and that the CDH Rules and Regulations were followed. Potential problems should be identified early so your expert can suggest a proper response. Too often, deputies discover problems during trial along with the jury.

Being familiar with a particular defense expert witness and your evidence can also greatly enhance a cross-examination. Learn how each particular expert can help your case. Be aware of the expert's individual opinion as to the level at which most people become impaired and intoxicated and how they prefer those questions to be asked. Be prepared for every expert, as they have the potential to either clinch or devastate your case.

C. SEMANTICS

The third area of concern which can create frustration and awkward testimony is not knowing the vernacular. It is not only necessary for the prosecutor to understand the dynamics of forensic toxicology but to also be able to ask precise questions which the expert witness will answer and which the jury will understand. Some witnesses will only answer questions about intoxication if they are worded a specific way. Arguing with such a witness on cross-examination or getting a blank stare on direct will not only prove fruitless but can also damage your case.

Another situation which frequently arises is when an expert answers your questions, but with cryptic, jargon-laden answers. Such testimony will either confuse or annoy your jury. Ask the expert to describe the terms they use: "intoxicated", "impaired", "scientifically reliable", "verifiable", "absorption", "elimination", etc . . . For example, when the defense expert says that neither test

result should be considered because of a BA variance of more than 20%, ask them to define "scientific certainty". Follow this with questions concerning the independent reliability or validity of their own analysis. Get the expert to define their terms so that a jury can quickly see that just because a test is not a "scientific certainty", either or both tests may have yielded valid results and have evidentiary value. The key here is to listen carefully, be flexible, and when possible translate for your jury.

VI. MEETING OBJECTIONS REGARDING BLOOD AND BREATH TESTS & EXPERTS

A. OBJECTION TO QUALIFICATION OF WITNESS AS AN EXPERT

When faced with an objection that your expert is not qualified in the area of expertise offered, refer to C.R.E. 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify hereto in the form of an opinion or otherwise.

First, argue that the testimony of the witness has established that he has skill, experience, training or education which give him superior knowledge of the area in which he has been offered as an expert. The determination of whether a witness is qualified as an expert in a given area is a matter within the discretion of the trial court to determine as a preliminary matter. People v. District Court, 647 P.2d 1206 (Colo. 1982); People v. Lowe, 184 Colo. 182, 519 P.2d 344 (Colo. 1974); White v. People, 175 Colo. 119, 486 P.2d 4 (Colo. 1971). Second, argue that the subject matter is one which is appropriate for expert testimony. There can be little doubt that scientific, technical or specialized knowledge relating to the determination of the defendant's blood alcohol level will assist the trier of fact in understanding the evidence and in determining the fact at issue -- whether the defendant was under the influence or impaired by the consumption of alcohol. The relevance is apparent in light of the fact that a) permissible inferences under the DUI Statute arise specifically from the presence of certain blood or

breath alcohol levels; b) knowledge of the methodology and accuracy of the testing is specialized and not within the knowledge of the average juror; and c) (where you seek qualification of your witness as a toxicologist) toxicology is a scientific, discipline directly relevant to a determination of impairment or intoxication.

Thus, care should be taken to develop the expert's qualifications and to persuade the court that he is adequately qualified. It is useful in this regard to have elicited statements as to previous qualification of your witness as an expert before other courts.

B. OBJECTION TO OPINION RENDERED BY EXPERT WITNESS, BASED ON CLAIM OF INADEQUATE DEGREE OF CERTAINTY OR PROBABILITY

An expert opinion must be predicated upon a reasonable degree of certainty or probability. People v. District Court, 647 P.2d 1206, 1211 (Colo. 1982); Daugaard v. People, 176 Colo. 38, 488 P.2d 1101, 1103 (1971); Jacobs v. Commonwealth Highland Theatres, Inc., 738 P.2d 6 (Colo. App. 1986). Expert testimony, which amounts to no more than conjecture and speculation, is not a competent basis for opinion evidence. Daugaard v. People, 488 P.2d, at 1104). Therefore, it is important that questions eliciting opinions from the expert witness be framed in terms of "reasonable degree of scientific certainty or probability." Make sure your expert's conclusions/results can be stated with a reasonable degree of scientific certainty or probability.

VII. DISCUSSION

The skillful use of the expert witness is a valuable tool in the successful prosecution of the DUI case. With the expert witness the prosecutor can tell the jury the alcohol level in the defendant's body, then translate that percentage into a minimum number of drinks consumed, often shattering the defendant's claimed consumption in the process, and explain the effect that amount of alcohol would have on one's ability to safely operate a motor vehicle.

Jurors, despite their representations to the contrary, frequently desire certainty. The use of the expert witness can transform the subjective opinion of the police officer into the detached conclusion of the scientist, sweeping away the specter of reasonable doubt.

The predicate questions which have been provided are intended as a guide to the examination of the expert witness. They encompass the types of witnesses which are generally encountered in a DUI/DWAI prosecution.

One potential witness in all blood test cases is the blood drawer. (See Chapter 9 on Tests) This person will usually withdraw and collect blood samples under the supervision of a physician or registered nurse. The police officer will frequently provide the blood drawer with a blood draw kit assembled by the laboratory which will conduct the analysis. Use the blood draw witness to show that the defendant's blood was properly drawn and collected and to authenticate that part of the chain of custody which relates to the initial drawing of blood and processing of the blood kit. Section 42-4-1301(7)(b)(II), C.R.S., as of July 1, 1989, allows specifically for the introduction of blood test results where the blood drawer is not called, provided that another witness (usually the arresting officer) can express a reasonable belief as to the blood drawer's qualifications. Where the blood drawer will not testify it is critical that the officer observing the blood draw testify as to the contents of the blood kit and the chain of custody.

An expert witness will have conducted an analysis of the blood sample for determination of alcohol content. This witness will be either a technician trained and experienced in blood analysis or a toxicologist. If the witness is a blood analysis technician he will only be able to testify to the blood alcohol result and not as to the effects of the blood alcohol level on the defendant. Section 16-3-309 C.R.S. allows for the admissibility of the blood alcohol result without any testimony from the individual who performed the analysis. However, section 16-3-309(5) C.R.S. allows any party to demand that the person who conducted the analysis testify in person. It is always a better strategy to have the results of the blood test admitted through the live testimony of the individual who conducted the analysis.

The toxicologist expert witness can testify to the analysis of the blood sample, if he conducted it, and the effects and meaning of the defendant's blood alcohol level. In cases where a blood analysis technician did the analysis of the blood, a toxicologist can be called to testify on toxicological issues. The testimony of the toxicologist is especially useful in situations where there is little or no bad driving observed or where the defendant didn't do that poorly on the roadside sobriety maneuvers. In those situations, the toxicologist's testimony as to the invisible effects of the alcohol (affects on perception, judgment, reaction, etc.) can establish the defendant's inability to safely operate a vehicle, despite some indications to the contrary.

The prosecutor should become familiar with the questions and types of witnesses he will use to introduce the blood or breath test result. This technical information can confuse a jury. Confusion is more likely to occur where the prosecutor has only slightly more experience with what he is doing than the jury. The prepared prosecutor is a confident prosecutor, and this cannot help but be conveyed to the jury.

If you are inexperienced, try to learn about your witness. A well-qualified expert with good experience as a witness can be given more latitude on the stand. This is after all, their area of expertise, but they cannot rehabilitate themselves on re-direct if you don't give them a chance.

Where possible, the prosecutor should provide the witness with a copy of the questions that will be asked. This will help put the witness at ease (just because he is an expert doesn't mean he isn't nervous about testifying) and increase the likelihood that the witness and the prosecutor are on the same wavelength with respect to the terminology and subject matter of the examination. Try to acquaint your expert with any particular concerns or factual glitches in your case. Often times the expert can shed light on them. At any rate your expert is then better aware of the context in which his testimony takes place.

The examination of expert witnesses in prosecutions for Driving Under the Influence is a valuable training ground for the development of prosecutorial skills. The prosecutor who has mastered this type of examination will be better prepared to handle other types of experts who will be encountered in the prosecution of other criminal matters. Becoming a skillful examiner of expert witnesses in this context should benefit the prosecutor throughout his or her career.

I. INTRODUCTION

Determination of Blood and Breath Alcohol Levels

The use of the results from blood and breath testing can be enormously helpful in obtaining a conviction in DUI cases and it is of vital importance that every prosecutor knows intimately the law, the apparatus, and the body chemistry that is involved in this scientific arena.

The DUI Statute (Section 42-4-1301, CRS):

> A defendant may be inferred to be under the influence of alcohol if his blood or breath level is .10 percent, or above. The statute further establishes that a defendant may be inferred to be legally "impaired" by alcohol or breath exceeds .05 but is less than .10. A person may be found to be under the influence of alcohol in that range when, such a finding is supported by other competent evidence.
>
> Once blood or breath alcohol results are properly admitted into evidence, the prosecution is entitled to an instruction on the permissible inference of intoxication or impairment.
>
> The offense of Drove With Excess Alcohol Content, is applicable when the blood alcohol level is above .10 at the time of driving or within 2 hours thereafter.

This section of your DUI manual contains information on current methods of blood or breath alcohol testing used in Colorado – the how's and why's – so that the prosecutor may not only comprehend this scientific area, but also be able to handle the many predicate questions for introducing such test results into evidence.

II. BREATH TESTS

This is the method you will see most often. Remember that statutory framework used breath alcohol levels as well as blood alcohol levels. It is <u>not</u> necessary to convert breath alcohol into blood alcohol levels. There are currently two instruments used for breath testing, the 4011AS and the Intoxilyzer 5000.

IF YOU HAVE NOT PERSONALLY OPERATED THESEE UNITS AND HAVE NOT HAD AN OPPORTUNITY TO LEARN BOTH THEIR STRENGTHS AND WEAKNESSES, PLEASE CONTACT THE COLORADO DEPARTMENT OF HEALTH TO ARRANGE FOR AN OFFICE DEMONSTRATION.

In the Intoxilyzer, a breath sample is introduced into a chamber through which infrared light is passed. A photo detector is at the opposite end of the chamber and measures the amount of light which has been absorbed by the alcohol in the breath sample. The decrease in light is translated electronically into a breath alcohol concentration. The amount of light absorbed is directly proportional to the amount of alcohol contained in a breath sample.

The 4011AS has four operational modes:

1. Zero Set: in this mode, the operator adjusts the ZERO ADJUST KNOB until the digital panel reads a positive .000, .001, .002, or .003 (the acceptable range).

2. Air Blank: when the internal air pump is connected to the breath tube, the sample cell is cleared automatically.

3. Breath: this mode is used when a subject is being tested for alcohol on the breath.

4. Calibrate: when the operator wishes to check the instruments against a standard known alcohol solution, the internal pump is connected to the input of a simulator containing this solution and the breath tube is connected to the output of the simulator. In the calibrate mode, the air pump will fill the sample cell with the reference gas.

The following information will serve to give a basic familiarity with these instruments and better prepare you for a first-hand encounter.

A. THE INTOXILYZER – MODEL 4011AS

Intoxilyzer 4011AS –Controls

- Power Switch – A two-position toggle switch that applies AC power to the instrument when set at "on"

- Power Indicator – A yellow indicator that lights when the power switch is in the

- "on" position.
- Ready Indicator – A green indicator that lights when the sample cell has been heated to proper temperature.
- Cycle Complete Indicator - A yellow indicator that lights when proper timing cycles have been completed in the Air Bank. Breath and Calibrate test positions of the MODE SELECTOR switch.
- Breath Strength Indicator – A green indicator that light s when a sufficient breath sample is being given.
- Error Indicator – A red indicator that lights when the operator has not properly operated the instrument.
- Mode Selector – A rotary four-position switch for selecting the mode of operation for the instrument.

  1. Zero Set
  2. Clearing the Cell
  3. Breath Testing
  4. Analyzing Reference Samples

- Zero Adjust – A potentiometer that controls the amplitude of the detected signal from the sample cell. This control is only used in the ZERO SET MODE ON THE SELECTOR switch.
- Pump Hose – the ¼ inch plastic tubing connected to the internal air pump that is used to purge the sample cell and when running the optional simulator.
- Breath Hose – Reinforced ¼ inch plastic tubing which is connected to the sample cell. This hose is stored within the instrument when not in use.
- Display – A three- digit numeric readout with decimal point in front of the first digit in test positions AIR BLANK, BREATH and CALIBRATE, only the first two digits are used.
- Printer – Prints a letter (alpha) and two digits (numeric) on the evidence card. The letter indicates the position of the MODE SELECTOR and digits correspond to the display

reading. The third digit from the DISPLAY must be hand written in.

- Interference Indicator – A red indicator which light sup if a breath sample contains enough acetone to contribute .01% or 10% of the BA to the display reading.

- Beam Attenuator – An accessory allowing convenient verification of intoxilyzer calibration.

B. INTOXILYZER MODEL 5000

The intoxilyzer Model 5000 is an evidentiary breath testing instrument that is designed to detect and measure hydrocarbons present on a person's breath. The principle target is the hydrocarbon portion of ETHANOL. The testing procedure utilizes the principles of Spectrophotometry to perform analytical measurements of concentration. The Model 5000 incorporates two monitoring systems: one that requires the subject to deliver a specimen of breath that is essentially alveolar in composition and, an interference detection system that allows for the systematic screening for the presence of other substances.

Major Functional Assemblies in the Model 5000

- Three Channel Processor
- Central Processing Unit
- Digital Display
- Printer
- Sample Chamber/Optical Bench
- Keyboard
- Breath Tube
- Chassis
- Recirculation Feature

Parts, Controls and Indicators:

- Breath Tube – A heated reinforced plastic tube through which the subject blows into the sample chamber.

- Mouthpiece – A disposable, clear plastic trap which fits in the end of the breath tube, accepts the subject's breath, and

prevents unwanted substances from entering the instrument.

- Digital Display – A sixteen character alphanumeric readout that relates which operation the instrument is performing, alerts the operator to required actions, and expresses Breath Alcohol Concentration (BRAC) in percent weight by volume.

- Start Test Switch – A push button switch used to initiate a test.

- Power Switch – A push button switch used to apply A/C/ power to the instrument.

- Simulator Bracket Screws – Four screws used to attach a bracket that holds a Toxitest ™ alcohol breath simulator.

- Simulator Vapor Port – A plastic male adapter through which alcohol vapor passes from an attached alcohol breath simulator to the instrument's sample chamber.
- Key Latch – A hardened steel lock with a removable key used to unlock the hinged door on the side of the instrument to expose the Mode Selections switches.

- Mode Selection Switches - Dip, slide and BCD (Binary Coded Decimal) switches located on the side of the instrument behind a lockable hinged door. The Mode Selection switches enable one to select a mode sequence, set the time and date, and perform diagnostic tests on several of the instrument's basic functions.

- Evidence Card – A formatted, multi-copy card that provides a printed record of the date, model and serial number of the instrument, test procedure, test results and time of test.

- Mounting Screws – Two miscellaneous, 10-32 x 3/8 screws that can be used to secure the instrument to the surface.

- Three Amp Fuse – The instruments main fuse.

- Power Cord – An eight foot cord that supplies power to the instrument.

- Computer Reset Switch – A rocker switch activated only in isolated circumstances to cancel all operations and return the instrument to its initial "NOT READY" condition.

Intoxilyzer Model 5000 Operation

Operational Model Sequence – ACABA

Intoxilyzer Model 5000s, certified for use in the State of Colorado, are prepared for field application by personnel of the Colorado Department of Health – Laboratory Division. Part of the installation procedure is to select the mode sequence ACABA. The sequence is initiated automatically by depressing the START TEST SWITCH on units not equipped with a keyboard. On units equipped with the keyboard option, the sequence starts after the test identifying information is entered via the keyboard.

The first Air Blank is accomplished to clear the sample chamber of potential absorbing molecules present in the immediate surrounding of ambient air or, in the chamber itself prior the automated sequence. The Intoxilyzer Model 5000 will detect interferants in the and will give a system message of "AMBIENT FAILED" if the concentration of the interferent is large enough o cause analytical errors. If such a message is observed, the surroundings should be checked for chemicals or, smoke, etc. The reading of the first Air Blank should be 0.000.

The Calibrator is automatically initiated after the first Air Blank is finished. This is also in accordance with standard analytical procedure and with the Board of Health's Rules and Regulations. The purpose is to verify the response of the Intolxilyzer to a known reference Ethanol vapor. The Ethanol standard is prepared and certified to deliver an Ethanol concentration of 0.100 grams per 210 liters at 34 degrees C. According to the Rules and Regulations, the reference analysis must agree with the certified value within the limits of +/- 10%. In other words, the 0.10g/210L vapor must produce a reading between 0.090 to 0.110 g/210L. The Model 5000 is programmed to recognize these limits.

A Second Air Blank is started after the reference analysis to purge the sample chamber of Ethanol vapor from the standard solution to insure that no Ethanol is present to bias the analysis of a subject's breath. The instrument readout should be 0.000.

The breath portion is automatically started after the Air Blank by prompting "PLEASE BLOW INTO THE MOUTHPIECE UNTIL TONE STOPS." Then a flashing prompt of "PLEASE BLOW". There are two things to keep in mind about the breath portion of the analysis.

(1) The subject must wait for the "PLEASE BLOW" prompt to blow. Otherwise an "INVALID TEST" will result with a prompt of "SAMPLE INTRODUCED AT IMPROPER TIME."

(2) The subject has three minutes to provide an adequate breath specimen from the flashing "PLEASE BLOW" prompt. If the subject has not provided a specimen within three minutes, a "DEFICIENT SAMPLE" system message is produced. The instrument displays the highest reading obtained, if any and, the printout of the highlighted of an asterisk (*) to indicate the value represents the highest value observed.

Requirements of Breath Specimens

Pressure – the Intoxilyzer Model 5000 has a pressure switch installed to monitor the specimen pressure.

Slope – The Model 5000 has a slope detection circuit that monitors the BRAC signal's rise and/or fall. Optimally, the resultant BA climbs to a maximum then holds the maximum until a printout is achieved. The minimum amount of time required for a test at a maximum reading is four seconds.
If mouth alcohol is present the maximum is first achieved then, as the mouth alcohol dissipates, the maximum drops. The Model 5000 will detect this and generate an "INVALID SAMPLE" message.

The Model 5000 sample chamber is heated to 45-47 degrees Centigrade to keep the sample gaseous and, the breath tube is heated to 53 degrees Centigrade to prevent condensation of aqueous vapor. If the subject stops blowing before providing a sufficient sample, "PLEASE BLOW" flashes on the screen again.

After the breath specimen is obtained and spectrophoto-metrically analyzed, a system message " PLEASE ATTACH COLLECTOR DEVICE AND PRESS START TEST SWITCH" appears, followed by a flashing "ATTACH COLLECTOR." This signals the operator to attach the silica gel tube to obtain the second sample which is to be made available for defense testing. This is followed by a final Air Bank sequence. The operator then detaches the second sample apparatus and returns the instrument to its Start Test mode.

III BLOOD TESTS

The only method for blood alcohol testing (BA) is use (at the time of printing) in Colorado is the Head Space Method of Gas Chromatography. The precise model in use by a particular laboratory will vary. As such it is impossible to fully present the mechanism of the testing device. However, the following should give you an idea of the basic principles.

The name " Head Space Method" is derived from the fact that air is collected from inside a sealed container of blood which has been allowed to stand for approximately 15 minutes.

The air between the liquid (blood) and the stopper is called the "head space". The head space air is withdrawn through the stopper by use of a hypodermic needle and injected into the gas chromatograph just as if the subject had blown into the machine.

The air above the enclosed liquid will achieve the exact proportions of the mixture percentages as that of the liquid if the temperature and pressure are normal.

The specimen from the "Head Space" is then transferred by a piston into a closed column driven by an inert gas used for carrying the specimen into the detector .

The carrier gas (inert gas) takes approximately one minute to transport the specimen to the detector. The detector, a sampling valve, and the column, are housed in a temperature-controlled oven. The oven burns the

specimen and the burning creates an electronic signal which is amplified and transported to the recorder and digital readout accessory.

The recorder displays the signal as a peak, the height of which is directly proportional to the amount of ethyl alcohol in the specimen.

The instrument must be in proper working order and calibrated properly in order to ensure an accurate reading.

IV. DUI: INTRODUCING A BREATH TEST

A. GENERAL DISCUSSION

There is no single way to introduce a breath result. People v. Bowers, 716 P.2d 471 (Colo. 1986) requires as a foundation that the test method is reliable, that the instrument was in proper working order when the test was administered, and that the test was properly conducted by a qualified operator. These may each be shown, in theory, without any of the five documents: intoxilyzer certificate, checklist, standard solution label, log sheet, and test record card. It is possible, for example, for you expert to introduce the test result after having reviewed the related documents outside of court pursuant to C.R.E. 703 titled Bases of Opinion Testimony by Experts. The better practice is to introduce the documents. They can help assure the confidence in the test result and are often the only exhibits a jury will have. Get to know your court's requirements as to which of these documents it will require as a foundation for the breath test.

Where your standard solution changer is not your intoxilyzer operator, you may wish to bring him in part way through direct on the operator to establish the solution label, that the test was run within the time and test number requirements of CDH forth standard solution (for the intoxilyzer 500 –100 tests and changed every 30 days; 4011AS – 25 tests and every 7 days), and that the standard read properly when changed. If you do this, be sure your record is clear that the operator is to be recalled to the stand. Often the solution changer will have more expertise than your operator. You may wish to benefit from this by asking additional questions to bolster the reliability of breath testing in general or to obtain testimony about the workings of the instrument. While it should be the same model as used in your test it need not be the same

exact instrument. If you do this, you do not want to move the admission of the exhibit since it will become part of the record for appeal if any is taken. Instead you may wish to submit a photocopy of the exhibit.

Before approaching a witness with an exhibit briefly show it to defense counsel. Besides showing courtesy you will avoid interruption from counsel requesting to know the nature of your exhibit. When doing so keep the exhibit in your hand. Although counsel should be familiar with the exhibit through discovery, some may use the opportunity to theatrically stare at the document as though it were the 17th putative will of Howard Hughes. By retaining the exhibit in your possession, you maintain control of the process.

A further note: while the following format entails moving for admission of the exhibits jointly at the end, you may wish, to move to admit each exhibit upon completion of the foundation pertaining to the exhibit. Should you face a challenge to admission this has the advantage of allowing you, where necessary, to further develop testimony regarding the exhibit while the nature of previous foundational testimony is fresh in both you mind and that of the witness. Should there be an objection, make sure that you attempt to elicit specifics from the defense counsel. A general objection of lack of foundation is less helpful to you and your witness than a specific detailing of what foundational aspect is claimed to be missing.

Finally, keep a copy of each exhibit with you. This will avoid the need to approach the witness to refer to the contents. Label the copy with the exhibit number for reference and mark on it or a separate list when the exhibit is admitted to ensure that you have all you evidence in.

B. EXPERIENCE AND BACKGROUND OF OPERATOR

- What is your training on the intoxilyzer?
- Are you certified by the Colorado Department of Health to Operate the Intoxilyzer?
- When were you first certified?
- When were you last certified?
- Were you certified on the date of the Defendant's arrest, _____(date)?

- Did you administer the test on the Defendant on _____(date)?
- Did you observe the Defendant for twenty (20) minutes at least before administering the test?
- Was the Defendant in custody?
- Did the Defendant belch, regurgitate, or take any foreign substance into his/her mouth during this time?
- What would be the significance if he/she had belched, regurgitated or taken any foreign substance into his/her mouth?
- Did you learn the Defendant's body weight on _____(date of the offense)?

C. INTOXILYZER CERTIFICATE

Note: Some courts may require a certified copy - the document comes in under C.R.E. 902(1) and/or C.R.E. 803(8).

- Where was the test administered?
- What type of instrument was used? (Intoxilyzer 5000 or 4011AS)
- Your Honor, may the record reflect that I am now showing defense counsel what has been marked as People's Exhibit number _____?
- May I approach the witness?
- I'm handing you what has been marked as People's Exhibit number____.
- Do you know what it is?
- What is it? Is this kept in the ordinary course of business?
- Does the certificate certify the instrument the Defendant took the test on?
- What is the serial number for the intoxilyzer referred to?
- Was the instrument certified on _____(date of offense)?

D. OPERATIONAL CHECKLIST

- Your Honor, may the record reflect that I am showing defense counsel People's Exhibit number _____.
- May I approach the witness?
- I am now handing you what has been marked as People's Exhibit _____.
- Do you know what it is?
- What is it?

- Could you describe the purpose of this checklist?
- Who provides the checklist to the police agencies? Colorado Department of Health
- Did you use this checklist when administering the test to the Defendant?
- To whom does the checklist refer?
- What is the date shown?
- Whose signature is on the checklist?
- What is the case number shown?
- Is the checklist kept in the ordinary course of business at _____ (police dept.)?
- Did you precisely follow the steps outlined on the checklist?
- Did you check or initial each step? (Read each step)
- Can you tell by looking at this checklist whether the instrument was operated properly?
- How?
- If a certified operator was using a certified instrument and was following this checklist in sequence – would you have an opinion regarding the operation of the instrument?
- What would your opinion be?

E. STANDARD SOLUTION LABEL

Note: As with the intoxilyzer certificate you may need a certified copy – if the standard solution was changed by another person you may need testimony from that person to avoid a hearsay objection.

- Is there anything done to determine if the intoxilyzer is in proper working order? How is the accuracy and calibration of the instrument checked?
- Can you explain the Standard Solution.
- Who provides the sample? (CDH)
- What are the Colorado Department of Health requirements for the Standard Solution? What are acceptable values?
- When is the Standard Solution run through the instrument?
- Your Honor, may the record reflect that I am now showing defense counsel, People's Exhibit number _____.
- May I approach the witness?
- I am now handing you what has been marked as People's Exhibit number _____.
- Do you know what it is?
- What is it?

- Is it kept in the ordinary order of business?
- Who's duty is it to accurately record the information on this label?
- When is this information recorded?
- What is this document attached to?
- Does this label refer to any particular batch or lot?
- Does this label reflect the Standard Solution value?
- What is it?
- Is this an acceptable value under the Colorado Department of Health regulations?
- What date was this batch prepared?
- What date was the solution placed into use? (this will generally appear on the log sheet and/or the label itself)

E. LOG SHEET

NOTE: WHERE OPERATOR AND STANDARD SOLUTION CHANGER ARE NOT THE SAME YOU MAY NEED FOUNDATION FROM BOTH TO GET THIS DOCUMENT IN.

- What is the standard operation procedure regarding their changing of the Standard Solution?
- Is this in compliance with the Colorado Department of Health regulations?
- Your Honor, may the record reflect that I am showing defense counsel Peoples' Exhibit number _____?
- Do you know what it is?
- What is it?
- Does it refer to the Defendant?
- Is it kept the ordinary course of business at _____ (police dept.)?
- When is the information recorded on the logsheet?
- Is that standard operating procedure?
- Who made the entry referring to the Defendant?
- Was it your duty to accurately record the entry?
- Whose duty is it to change solution?
- How often is the solution changed?
- Specifically in this case, when was the solution changed?

G. SOLUTION CHANGER (USE ONLY WHERE NECESSARY)

- Experience & Training
- Police Officer (how long – where)
- What are your special duties regarding the intoxilyzer?
- What is your training on the intoxilyzer?
- How long have you been the solution changer?
- Are you familiar with the rules and regulations of the Colorado Department of Health regarding when the solution should be changed?
- What is required?
- Then go through label, intoxilyzer certificate, and logsheet questions?

H. TEST RECORD

- Your Honor, may the record reflect that I am showing defense counsel People's Exhibit number _____?
- May I approach the witness?
- Handing you what has been marked as People's Exhibit number _____?
- Do you know what it is?
- What is it?
- Is it kept in the ordinary course of business?
- Who does it refer to?
- Is there a case number on the test record? What?
- Is there a time on the test record? What?
- Is there a date on the test record? What?
- Is there an intoxilyzer serial number on the test record? What?
- Is that serial number the same serial number on the instrument upon which the Defendant took the test?
- What do you look for on the test record to determine if the instrument is operating properly?
- If the instrument is working properly, from bottom to top how are the letters supposed to read?
- Whose writing is on the 3rd column of the printed numbers? (4011 AS has manual addition on 3rd digit?)
- Why is that writing there?
- When were those things written?
- Whose duty was is to accurately record this information?
- Is there anything irregular about the test record in terms of the sequence of letters?
- Did anything unusual happen when you gave the test?
- What is the bottom letter on the print out?

- What does it mean?
- If the test was properly run what number should be next to that letter? (Defendant's test result?)
- Also make sure that when the test result is expressed you elicit that the number reflects grams of alcohol per 210 milligram?
- What does the print out next to the A indicate?
- What is next to the bottom letter on the test record?
- What does it mean?
- If the test was properly run what number should be next to the C?
- What does the print out next to the C indicate? Is the calibration in the acceptable range?
- What is second to the last letter?
- What does it mean?
- If the test was run properly what number should be next to the Defendant?
- What does the print out next to the Defendant indicate?
- What is the letter just above the A.
- Without giving the results – what does the letter B stand for?
- Is it possible for alcohol previously tested persons or the Standard Solution to remain in the instrument and make an individual's breath test higher than it actually is?

Note: Make sure you move the court for admission of all five (5) documents. You just did a lot of work to get them in?

V. INTRODUCING A BLOOD TEST

The foundational requirement for a blood test are generally less complex that for a breath test. Typically there will be one document, the test sheet, through additional documentation of chain of custody may be necessary as well as proof of certification of the testing lab and of the contents of the blood test kit. The test sheet will need foundation testimony from as many as three (3) people (the arresting officer, blood drawer and lab technician/toxicologist) though section 16-3-309(5), C.R.S. and 42-4-1301(7)(b)(II), C.R.S. may make testimony from the lab technician/toxicologist and blood drawer, respectively, unnecessary.

Be aware of the chain of custody/tampering issues discussed elsewhere. Inattentiveness in that area can be costly. Most seasoned defense attorneys would rather challenge a breath test than a blood test. The blood drawer can often act as a persuasive witness to intoxication and has the additional benefit of not normally being a law enforcement employee. A good lab technician/toxicologist can be particularly effective in convincing a jury of the effectiveness of the testing method both generally and as applied to the Defendant.

A. BLOOD TEST – OFFICER

- Did the Defendant agree to take a blood test?
- Where was the test to be taken?
- Did you call a nurse/Dr/EMT? (blood drawer)
- What time was blood drawn?
- How long after the arrest/stop/accident?
- Who was present when blood drawn?
- Have you observed blood being drawn from people before? How many times?
- Did anything unusual happen on this occasion?
- Did you provide anything to the blood drawer?
- What was that? (Blood Test Kit)
- Where did you get the kit?
- Was the kit sealed when you got it?
- Was there a number on the seal?
- What was the seal number?
- I am handing you what has been marked as People's Exhibit _____. (blood draw consent form and test result).
- Do you recognize it?
- What is it?

- Where did you get this form?
- To whom does this form refer?
- Is the form dated?
  What is the date?
- Does any handwriting appear on the form?
- Whose?
- Any signatures?
- Whose?
- What does your signature mean?
- What does the Defendant's signature mean?
- Did you witness the Defendant's signature?
- Is there a seal number on the form?
- Does that number correspond to the blood kit utilized in taking a sample of Defendant's blood?
- What happened after the blood was drawn? (sealed and labeled)
- What was done with the blood release form? (Nurse signed it and put it in the kit?)
- What was done with the kit after it was resealed? (Mailed/delivered to the lab)

WHERE THE BLOOD DRAWER WILL NOT BE CALLED
(See 42-4-1301(7)(b)(II), C.R.S.)

- Did you observe the blood being drawn from the Defendant?
- Who drew the blood? (Name, nurse, doctor, EMT, etc.)
- Do you know if that person was authorized to draw blood?

B. BLOOD TEST – BLOOD DRAWER

- Name?
- Occupation Duties? One of your regular duties include drawing blood?
- How long employed?
- What kind of training?
- Trained to draw blood?
- Authorized to draw blood? (If authorized but only under the supervision of a doctor or registered nurse, elicit testimony regarding the supervision)
- How many times have you drawn blood?

- How many times have you used a blood kit?
- Were you employed with _____ on _____?
- I am handing you what's been marked as People's Exhibit ____? (Blood draw consent form and test result) Do you recognize it?
- What is it?
- Does your signature appear on the form? What does your signature mean.
- To whom does it refer?
- What date is on that form?
- Is there a seal number on that form? What number? To what does that number refer?
- Where did you get the blood kit from in this case?
- Was there anything unusual about the blood kit you received?
- Was it sealed?
- What was in the blood kit?
- How did you draw blood in this case?
- What method of equipment did you use? (Venipuncture – vein, sterile syringe & hypodermic needle, skin cleansed and disinfected with non-alcoholic solution/non-phenol swabs, took two (2) samples)
- What did you see in the tubes? (Anticoagulant/antibacterial agent – sodium fluoride, at least 1%.
- Did the blood sample mix with the anticoagulant?
- What did you do next? (Sealed and labeled)
- Then what? (given back to the officer/or sent to the lab)
- Did anything unusual occur during the blood draw?
- What would you have done if there had been? Signed form?
- Did you draw the blood in accordance with CDH procedures?
- Do you see the person whose blood you drew? (I.D.) (Omit if blood drawer can not I.D. – Officer should have already laid the foundation for tying the defendant to the blood drawer)
- Did you observe anything unusual about the defendant? (eyes, breath, alcohol odor, stumbling, attitude)
- How many times have you drawn blood from people who were intoxicated?
- Do you have an opinion as to the Defendant's state of sobriety at the time of the test? What is that opinion?

C. DIRECT OF BLOOD ANALYSIS TECHNICIAN/TOXICOLOGIST

SEE ALSO CHAPTER 8

1. Qualification to Analyze Blood

- What is your professional address?
- ***What is your occupation?***
- Would you briefly describe for the jury the nature of this occupation?
- For how long have you been engaged in this field?
- Do your normal occupational activities include the analysis of blood samples for the determination of alcohol content?
- With what frequency have you conducted such analyses?
- What education and training did you receive in order to qualify to analyze blood samples for the determination of alcohol content?
- Please describe the particular method of analysis with which you have had experience and training?
- Is this method of analysis approved by the Colorado Department of Health?
- Has your laboratory been certified by the Colorado Department of Health to conduct tests of blood for alcohol content?
- Was it so certified on _____ (date test conducted)?
- What did your laboratory have to do to receive and retain this certification?
- What type of quality control and quality assurance programs does your laboratory have in place?
- Have you had occasion in the past to testify in the county and district courts of the State of Colorado as an expert in the field of analysis of human blood for determination of alcohol content?
- Approximately how many times have you so testified?

MOVE FOR DECLARATION OF WITNESS AS AN EXPERT IN THE FIELD OF ANALYSIS OF HUMAN BLOOD FOR DETERMINATION OF ALCOHOL CONTENT.

2. Authentication and Explanation of the Blood Kit

- Does your laboratory also assemble blood kits for the use of law enforcement agencies in the investigation of alcohol related driving offenses?
- What components make up one of these blood kits?
- Are you familiar with Colorado Department of Health Rules and Regulations Relating to Chemical Tests for Alcohol Determination?
- Do the blood kits assembled by your laboratory comply with the Colorado Department of Health Rules and Regulations Relating to Chemical Tests for Alcohol Determination?
- Describe the sterility of the syringe hypodermic needle and test tubes contained within one of your blood kits.
- What type of antiseptic solution is used with the disinfecting swab, and is this solution either alcoholic or phenolic in nature.
- What is the purpose of the sodium fluoride contained in the tubes? (Anticoagulant and antibacterial agent)
- How much sodium fluoride is contained in each tube, and what final concentration of sodium fluoride does this produce when the tube is properly filled with blood? (Not less than 1%)
- I hand you what has been previously marked as "People's Exhibit A" (blood draw consent form and test result), and ask you to examine it and tell me if you recognize it?
- What do you recognize "People's Exhibit _____" to be?
- Does "People's Exhibit _____"

- I hand you what has been marked as "People's Exhibit _____" (chain of custody card), and ask you to examine it and tell me if you recognize it?
- What do you recognize as "People's Exhibit _____" to be.
- How do you recognize "People's Exhibit _____" ?
- When and how would your laboratory have received "People's Exhibit _____ and ____"?
- When you first received "People's Exhibit _____ and ____", what part was already filled out?
- What accompanied "People's Exhibit ____ and ___" when they were received by your laboratory?

3.

- Did you analyze one of these tubes of blood to determine its alcohol content?
- When did your analysis take place?
- Assuming that collection of the blood took place at the date and time indicated on the blood draw part of "People's Exhibit ___" did you analysis take place within ten days of the collection of the specimens.
- Before conducting you analysis, did you examine the tubes to determine if their seals were intact?
- Was there any evidence of tampering with the seals on the tubes of the blood?
- On what instrument did you conduct your analysis of the blood?
- Please briefly describe for the jury how that instrument measures alcohol content in a blood sample (Explanation of Head Space method of Gas chromatography.)
- Before testing the blood sample, did you do anything to guarantee that the instrument was properly operating and accurate?
- What?

- Please describe how you went about analyzing the blood accompanying "People's Exhibit ____ and ____".
- What was the blood alcohol concentration of the blood sample expressed in terms of number of grams of alcohol per 100 milliliters of blood?
- After analyzing the sample and determining the result that you have expressed, did you record that result on "People's Exhibit ____"?
- Does "People's Exhibit _____" fairly and accurately reflect how that document appeared after you had completed your analysis and recorded the results.

Move for the admission of People's Exhibit ___ and ___.

VI. MEETING OBJECTIONS TO BLOOD/BREATH TESTS

A OBJECTION TO ADMISSION OF TEST RESULT, BASED ON CLAIMED NONCOMPLIANCE WITH COLORADO DEPARTMENT OF HEALTH REGULATIONS

The first step in meeting an allegation that the test result was not conducted in compliance with CDH regulations occurs prior to trial. Be familiar with CDH regulations in effect at the time of the test. CDH amends its regulations from time to time and the Defendant's objection maybe based on a lack of compliance with a repealed or superseded regulation.

At trial, the prosecutor should, when necessary, request that the defense indicate the specific nature of the alleged violation of CDH regulations. In the absence of such specificity, the objection may be so broad as to make it difficult to respond in an appropriate manner.

Once the defense has advised the prosecutor and court of the specifics of the objection, the prosecutor should, where appropriate, explain to the court how the evidence introduced has established compliance and argue that no foundational defect exists. Have the applicable regulation at hand, cite it to the Court and, if necessary, quote the regulation.

If it becomes apparent that no evidence as to a specific requirement of the regulation has been introduced, the prosecution should continue the examination of the expert witness and lay the additional foundation necessary.

If the prosecutor is unable to demonstrate compliance with the specific regulation, argue that the violation does not impeach the accuracy or reliability of the test. People v. Bowers, 716 P.2d 471 (Colo. 1986), is the leading case in this area.

Note: Bowers related to compliance with a Board of Health rule relating to the operation of a breath testing device, but it is equally applicable to blood testing. Subsequent cases have specifically addressed blood tests; See People v. Nahn Dao Van, 681 P.2d 932 (Colo. 1984) and Dye v. Charnes, 757 P.2d 1162 (Colo. App. 1988)). Section 42-4-1301(3)(b)(I), C.R.S. codifies these cases.

In Bowers the court ruled that even though the test has not been conducted in strict compliance with a CDH rule, "the test results may nonetheless be admitted if the trial court is satisfied that the proponent of such evidence has adequately established that the test actually administered was scientifically valid and reliable and was conducted by a qualified person using properly working testing devices. The court concluded that under its ruling "it will be incumbent on the trial court to determine. As a preliminary question of admissibility under C.R.E. 104, whether the extent of non-compliance...has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible." Bowers.

Therefore, the prosecutor should elicit testimony from the expert to the effect that the technical noncompliance in question has not impaired the validity and reliability of the testing method and test results. After eliciting this testimony, ask the court to rule that the test is admissible under the rationale of Bowers.

You should also be aware of section 16-3-309(5), C.R.S., which provides for the admissibility of a report or findings of a criminalistic laboratory in evidence without the presence of the person who conducted the test. The defense may override this by notice of demand that the lab technician must appear, which notice must be 10 days prior to trial. Absent such notice you should be able to get your result in. If your court is unfamiliar with section

16-3-309(5) C.R.S., you must be prepared to argue that it applies, using prior subsections, in particular subsection (4), to convince the court that alcohol or drug results are contemplated by the statute. Note that this statute in conjunction with changes in section 42-41301 (7)(b)(II), C.R.S. make it possible to bring in blood alcohol or blood drug test results without testimony of either the blood drawer or the lab technician/toxicologist, given prior testimony from witnesses as to reasonable belief of the blood drawers qualification. Obviously, in some circumstances your case is bolstered by producing these witnesses anyway. Dye v. Charnes, 757 P.2d 1162 (Colo. App. 1988), while pertaining to an administrative hearing, allowed a blood test result without the testimony of the blood drawer, ruling that the omission went to weight, not admissibility.

Section 42-4-1301(7)(b)(1), C.R.S., statutorily adopts the Bowers holding for offenses committed on or after July 1, 1989 and should be argued as conclusive of the issue absent a court finding that the violation of Colorado Department of Health standards has so impaired the validity of test results as to make the evidence inadmissible.

B. OBJECTION TO ADMISSION OF BLOOD ALCOHOL RESULT, BASED ON CLAIMED FAILURE TO ADEQUATELY ESTABLISH CHAIN OF CUSTODY OF BLOOD SAMPLE.

The leading Colorado case on this issue is People v. Sutherland, 683 P.2d 1192 (Colo. 1984). The case involved the use of a blood kit; two tubes of blood were placed in a styrofoam container within a cardboard mailing carton, and then mailed to a laboratory for analysis. At the trial the prosecution failed to call the officer who actually sealed and mailed the container, although another officer testified as to what had occurred in that regard. The court stated:

> The general rule is that the proponent of real evidence must establish a chain of custody which insures that the evidence offered is in the same condition as when it was obtained, (citation omitted). The burden is upon the party offering the evidence to show to the satisfaction of the court, with reasonable certainty, that there was no alteration of or tampering with the evidence, (citation omitted). The chain

> of custody of any blood sample must be established, and failure to do so may be excused only when circumstances provide reasonable assurances of identity and unchanged condition of the sample, (citation omitted). However, when there is some confusion about the chin of custody, so long as the evidence was accounted for at all times, the evidence is admissible, (citation omitted). Here, the prosecution's evidence satisfactorily demonstrates that the sample of the defendant's blood was accounted for at all times. Moreover, the defendant offered no evidence that anyone has tampered with the defendant's blood sample.
>
> We hold that in the absence of any evidence of tampering or lack of authentication, the proponent of evidence relating to the results of a blood-alcohol test and the supporting exhibits is not required to call each witness who may have handled the exhibit.
>
> Sutherland, at 1197.

The court went on to point out that there was no evidence in the record to suggest that the sample tested by the toxicologist was not the sample of the defendant's blood which had been drawn at the time in question. The court then stated that "when it is only speculation that there was tampering, it is proper to admit the evidence and let the jury determine its weight." Sutherland, at 1198.

Therefore in responding to a chain of custody objection the prosecutor should argue that the identifying information accompanying the sample (blood draw consent form and chain of custody card) and the testimony as to its handling and condition establishes that it was the defendant's blood, and that there is no evidence of tampering. Pursuant to the authority of Sutherland the evidence should be admitted with any defects in the chain of custody going to the weight not the admissibility. Obviously, you should bring out through your witnesses that all seals were undisturbed, that no signs of tampering were observed and that the witness would have noted any signs of tampering with the seals.

C. OBJECTION TO ADMISSION OF BLOOD ALCOHOL RESULT BASED ON CHALLENGE TO THE ACCURACY OF THE TEST.

The response to such an objection is that the challenge goes to weight not admissibility, and, therefore, the objection should be overruled. The case to cite to the court in support of this response is People v. Nhan Dao Van, 681 P.2d 932, 936 (Colo. 1984). In that case the court stated, "evidence which relates to the accuracy of the chemical test conducted by a toxicologist affects the weight to be accorded the testimony rather than its admissibility. (citing Kallnbach v. People, 125 Colo. 144, 242 P.2d 222 (1952).

I. CHARGING

The definitions of Driving Under the Influence and Driving While Ability Impaired to encompass the consumption of alcohol or one or more drugs, or a combination of alcohol or one or more drugs. For purposes of charging these violations, it is statutorily sufficient to describe the offenses as Drove a Vehicle Under the Influence of Alcohol or Drugs or Both (DUI) or Drove Vehicle While Ability Impaired by Alcohol or Drugs or Both (DWAI). See sections 42-4-1202 (1)(a), (1)(b), and (1)(d), C.R.S.

II. DRUG RECOGNITION EXPERTS (DRE)

Many Colorado jurisdictions now have the benefit of DRE certified officers. For additional information of the DRE process and procedures see the DUI Enforcement Manual, Fourth Revised Ed., 1989, prepared by the Colorado Division of Highway Safety.

A. COMPONENTS OF THE DRUG EVALUATION AND CLASSIFICATION PROCESS.

The Drug Evaluation and Classification Process is a systematic, standardized method of examining a suspect to determine:

1. Whether the suspect is intoxicated or impaired; and,

2. If intoxicated or impaired, whether the intoxication or impairment is the result of alcohol, or drugs or both, or is due to a medical condition; and,

3. If drugs, the category or combination of categories of drugs that is the likely cause of the intoxication or impairment.

The process is based on a variety of observable signs and symptoms that are known to be reliable indicators of drug intoxication and impairment. An officer certified as a drug recognition expert never reaches a conclusion based on any one element of the examination, but instead on the totality of facts that emerge. These facts are obtained from careful observation of the suspect's:

- appearance
- behavior

- performance of psychophysical tests
- speech
- eyes
- vital signs

The process is standardized in that it is conducted in exactly the same way, by every drug recognition expert, for every suspect. A drug recognition expert never leaves out any step in the examination, even if it is not expected to provide a positive indicator of the type of drugs that the technician may suspect. The examination is never modified by including some unproven "indicators" that the expert thinks may be helpful.

Standardization is very important, because it helps:

- avoid errors of omission or commission
- promote professionalism among drug recognition technicians
- secure acceptance in court

The Drug Evaluation and Classification Process can be broken down into twelve major components.

1. *Breath Alcohol Test:*

By obtaining an accurate and immediate measurement of BAC, the drug recognition expert can determine whether alcohol may be contributing to the suspect's observable intoxication or impairment, and whether the concentration of alcohol is sufficient to be the sole cause of that intoxication or impairment. It is always possible that a person suspected of being under the influence of drugs other than alcohol may actually have consumed only alcohol. However, it is also very common to find that a suspect has consumed alcohol and other drugs.

2. *Interview of the Arresting Officer:*

Most officers are not as knowledgeable about drugs as are drug recognition experts. The arresting officers may have uncovered some drug paraphernalia, observed symptoms of drug impairment, or overheard the suspect using drug-related "street" terms, without recognizing their

significance. A few minutes spent interviewing the arresting officer can alert the drug recognition expert to the most promising areas of investigation to be explored with the suspect. For more detail regarding this component of the drug evaluation and classification process, see part C. below.

3. *The Preliminary Examination:*

The preliminary examination is a structured series of questions, specific observations and simple tests that provides the first opportunity to examine the suspect closely and directly. The first major purpose of the preliminary examination is to determine if the suspect may be suffering from an injury or some other condition not necessarily related to drugs. Another major purpose is to begin systematically assessing the suspect's appearance, behavior, etc. for signs of possible drug intoxication or impairment. The preliminary examination is discussed in more detail in part C. below.

4. *The Eye Examination:*

The eye exam includes horizontal gaze nystagmus, vertical nystagmus and a check for lack of convergence. Certain categories of drugs induce nystagmus, an involuntary jerking of the eye that may occur as the eyes gaze to the side or as they are elevated. The presence of nystagmus, and the point at which it becomes observable, can shed light on the possible presence of those drugs and the extent to which they may be affecting the suspect. The lack of nystagmus will also indicate the presence of other drug categories that do not induce nystagmus. The inability of the eyes to converge toward the bridge of the nose also gives evidence of the possible presence of certain types of drugs.

5. *The Divided Attention Psychophysical Tests:*

These tests include the Walk and Turn, the One Leg Stand, the Rhomberg Balance and the Finger to Nose. The suspect's performance on these tests provides articulable evidence of his or her psychophysical impairment. The specific errors of omission or commission may point

toward the categories of drugs that are affecting the suspect.

6. *The Dark Room Examination:*

The dark room exam is a systematic check of the reaction of the suspect's pupils to light. Certain categories of drugs affect the eyes and especially the pupils in predictable ways. By examining the eyes under carefully controlled lighting conditions, important evidence of those drugs may be obtained. The officer will also check for evidence of ingestion of drugs by nose and mouth.

7. *The Vital Signs Examination:*

The vital sign exam includes a check of the suspect's blood pressure, pulse rate, and temperature. Certain categories of drugs may elevate blood pressure and pulse rate, raise the body temperature, and cause breathing to become rapid. Other drugs will have the opposite effect. Examination of the suspect's vital signs can provide valuable evidence about the presence and effect of a variety of drugs.

8. *Examination for Muscle Tone:*

Certain categories of drugs will cause the muscles to become hypertense, and thus very rigid. Other types of drugs cause muscle flaccidity. Muscle tone will be observed throughout the exam. During this stage, however, the DRE actually moves the suspect's arms to better examine muscle tone.

9. *Examination for Injection Sites:*

Some drug users ingest their drugs via intravenous or intramuscular injection. Evidence of needle use (scars, "tracks", or open sores etc.) may be found on the arms, hands or the back of the knees, between the toes, etc. The presence of needle marks is an indicator of use rather than impairment by drugs.

10. Suspect's Statements and Other Observations:

Based on the nine previous components of the examination, the drug recognition expert should have formed an articulable basis for categorizing the drug or drugs that may be present. The technician then proceeds, after a Miranda advisement and waiver to interview the suspect concerning the drug or drugs involved.

11. Opinions of the Evaluator

Based on all of the evidence and observations obtained during the preceding ten steps, the drug recognition expert should be able to reach an informed conclusion concerning:

- Whether the suspect is under the influence of, or impaired by, a drug or drugs; and if so,
- The category or combination of categories of drugs that is the cause of the suspect's intoxication or impairment.

The DRE opinion may not specify the exact drug causing impairment. More likely, the DRE will state an opinion such as "In my opinion the arrestee is under the influence of a central nervous system depressant to the degree that he/she cannot safely operate a motor vehicle."

These conclusions should be documented, along with a narrative summary of the observed facts that led to the conclusions.

12. The Toxicological Examination:

The toxicological test or tests provides an analysis of the suspect's urine or blood to substantiate the drug recognition expert's conclusions. The collection of the urine or blood sample is governed by the Expressed Consent provisions discussed in Chapter 13. Admission of the test results, or is discussed in Chapter 9.

Refusal to submit to blood, saliva, or urine test is admissible evidence at trial for DUI-D, in the same manner

as refusal to submit to blood or breath would be admitted in Dui alcohol trial. See, C.R.S. 42-4-1301(7)(e).

B. GENERAL GUIDELINES FOR INTERVIEWING THE ARRESTING OFFICER

In most cases, the DRE will not be the officer who made the initial contact. Some other officer usually will have stopped the suspect and will have made the arrest. The reasons for the stop vary widely and may or may not involve a traffic-related offense. In any event, the situation will usually be that the arresting officer (or someone else) recognizes that the suspect may be intoxicated, has some reason to believe that drugs other than alcohol may be involved, and asks a DRE to conduct an examination of the suspect.

In a particular case, the arresting officer may happen to be quite knowledgeable about drugs and may have some very well informed suspicions as to what types of drugs the suspect may be using. In another case, the arresting officer may not have the slightest idea as to the kinds of drugs that may be involved. But in all cases there is the possibility that the arresting officer may have seen, or heard, or smelled or uncovered something that could be a significant clue to a trained drug recognition expert. A few minutes spent with a careful, systematic interview of the arresting officer may supply the DRE with some very important insights as to the categories of drugs most likely to be found in the particular case at hand. You should be sure to find out what information the arresting officer gave the DRE.

The key concept here is that the interview be systematic. The DRE should not simply ask the arresting officer an open-ended question such as "What do we have here?" The arresting officer may not be sufficiently knowledgeable about drugs to recognize what is relevant and what is not. Instead, the DRE should inquire in logical sequence as to the suspect's behavior, statements and any physical evidence that may have been uncovered. The same format is useful when you interview the officer initially making contact with the suspect.

1. *Suspect's behavior:*

   a) What vehicle/operator actions, maneuvers, etc. were observed? (This may disclose evidence of impaired divided attention ability, relaxed inhibitions, etc.)

   b) Was there a collision? (This can indicate whether the suspect may have suffered injuries that could confound the drug examination.)

   c) Was the suspect observed smoking, drinking or eating? (All of these are common means of ingesting various drugs.)

   d) Was the suspect inhaling any substance? (Another common method of ingesting certain drugs.)

   e) How did the suspect respond to the arresting officer's command to stop? (Actions during the stopping sequence may also disclose indicators of intoxication or impairment.)

   f) Did the suspect attempt to conceal or throw away any items or materials? (Such materials may have been drugs or drug-paraphernalia.)

   g) What was the suspect's attitude and demeanor during contact with the arresting officer? (This information can be very relevant to the DRE's own safety, and can also shed light on the kind of drug related effects the suspect may be experiencing.)

2. *Suspect's statements:*

   a) Did the suspect complain of an illness or injury? (An illness or injury could confound the drug examination, but could also suggest the use of certain types of drugs.)

   b) Did the suspect use any "street terms" or slang associated with drugs or drug paraphernalia?

NOTE: The arresting officer might not recognize "street terms" for what they are. It may be helpful to follow up this question by asking the officer whether the suspect used any unusual or unfamiliar words or phrases.

c) How did the suspect respond to the arresting officer's questions? (Intoxication or impairment may be evidenced in a variety of ways from the manner of the suspect's responses.)

d) Does the suspect's speech appear to be slurred, slow, rapid, thick, mumbled, incoherent, etc? (Drugs affect speech in various ways.)

e) What, specifically, did the suspect say to the arresting officer?

3. *Physical Evidence*

a) What items or materials were uncovered during the search of the suspect and/or vehicle? (Even seemingly innocuous or familiar items may be recognized by trained DREs as being associated with drug use.)

b) Was any smoking paraphernalia uncovered? (Even common smoking items, such as commercially produced cigarettes, pipes, etc. may disclose evidence of drugs.)

c) Was there any injection-related material? (Such material could include needles, syringes, leather straps or rubber tubes used as tourniquets to help expose veins, bent spoons or bottle caps used in heating and dissolving drugs, etc.)

d) Were there any balloons, plastic bags, film canisters, small pieces of folded paper (called bindles) or any similar items? (These kinds of items frequently are used for carrying or storing drugs.)

e) What was the suspect's breath alcohol concentration?

C. OVERVIEW OF THE PRELIMINARY EXAMINATION

The preliminary examination of the suspect consists of a series of questions, observations of the suspect's face, breath and speech, an initial check of the suspect's eyes, and the first of three checks of the suspect's pulse rate. The questions are a set of inquiries about any injuries or medical problems from which the suspect may be suffering. If there is any doubt as to whether asking the questions under the circumstances amounts to custodial interrogation, the questions should be preceded by a Miranda advisement and waiver. The questions include:

- Are you sick or injured?
- Do you have any physical defects?
- Are you diabetic or epileptic?
- Do you take insulin?
- Have you ever had a head injury?
- Are you under the care of a doctor or dentist?
- Are you taking medication?

Answers to these questions may disclose circumstances that could impede or confound the subsequent steps in the drug examination. The suspect's answers and the manner in which he or she answers may also provide evidence of the possible presence of certain types of drugs.

The observations of the suspect's face, breath and speech are straightforward. It is important to note whether the suspect's face appeared flush or pale or whether the suspect appeared to be perspiring. Any noteworthy odors of the breath should be recorded, such as the odor of alcoholic beverages, an odor characteristic of marijuana or, a chemical odor, such as ether. If the suspect's speech is in any way distorted, this too should be recorded.

The initial check of the suspect's eyes includes an estimation of the size of the suspect's pupils. This estimation is made by using an instrument called a pupillometer, which has a series of small dark circles of

various known diameters. These circles are compared to the suspect's pupils to estimate the pupil size. Dilated or pinpoint pupils are often a sign of drug use.

Another check of the eyes is done to determine the presence of nystagmus, both horizontal and vertical, and to check for convergence or lack of convergence.

III. PREDICATE QUESTIONS FOR DRE

NOTE: If the DRE has prepared a resume the better practice is to include it in discovery, but Crim.P. 16 does not appear to require disclosure.

- What is your occupation?
- How long have you been a police officer?
- What is your current assignment?
- Officer _____, have you had any specific training to qualify you for your current assignment? (Brief account here - detailed later, i.e. in questioning.)

Arrest and Evaluation

- Officer, directing your attention to time, on date , did you have occasion to be at (location of examination)
- What was your purpose for being there?
- Did you make contact with Officer ?
- What was the nature of this contact?
- Did you ask any questions of Officer ? (reason for the stop, initial observations, etc.)
- What was the purpose of your conversation?
- Did you ask the officer about his observations of the driving of the person he had stopped?

- Did you ask the officer about his observations of the person when he made contact with him?
- Did you review with the arresting officer the person's performance of the field sobriety tests?
- Did you contact the person?
- Is that person in the courtroom today?
- Please point to him/her and describe what he/she is wearing. (Record should reflect I.D. of the Defendant.)
- Where was that contact?
- Did you make any observations of the defendant?
- What were your initial observations?
- What is the purpose of those observations?
- Did you conduct a preliminary evaluation?
- How was the evaluation documented?
- What is the purpose of that preliminary evaluation?
- (To rule out medical problems or need for medical attention.)
- Was the defendant advised of his Miranda rights?
- (By whom? How? When?)
- Did he waive those rights voluntarily?
- What questions did you ask? Questions should include:

    1. Are you sick or injured?
    2. Do you have any physical defects?
    3. Are you diabetic or epileptic?
    4. Do you take insulin?

5. Have you ever had a head injury?
6. Are you under a doctor's or dentist's care?
7. Are you taking any medication?

- What were the defendant's responses?
- What did you do next? (evaluation report)
- What is a drug recognition evaluation?

It is a standardized and systematic approach for distinguishing whether observable intoxication or impairment is the result of injury or disease or whether it is the result of drug ingestion. If drug ingestion is suspected, it provides a method for determining if it is the result of alcohol alone or whether it is the result of other drugs. It also provides a method for determining the category of drugs which is causing the intoxication or impairment.

- Were the results of this evaluation recorded?
- Qualifications as a Drug Recognition Expert.

NOTE: Never stipulate to the DRE's qualifications. The jury needs to appreciate the unique qualifications of your witness, particularly if the defense plans to call a "Doctor" to rebut his conclusions. For Experts generally see Chapter 8, part I and II A.1.

What training have you received?

a. Drug Evaluation and Classification training program, consisting of ____ hours of classroom training and hands-on evaluations of suspects.

b. I had to pass a qualifying exam with an 80% score.

c. 40 hours of supervised certification training.

d. I had to conduct and write a minimum of 15 evaluations under the supervision of a certified Drug Recognition Instructor in a minimum of four categories of drugs which had to be verified by toxicology.

e. I had to pass both oral and written certification tests.

f. I was recommended for certification by two instructors who observed me conduct evaluations.

What was covered in your classroom training?

a. Examination procedures. These examinations include:

   1) Preliminary assessment of a person's speech, breath, appearance, demeanor, behavior.

   2) Examinations of the subject's eyes for nystagmus, tracking ability, ability to converge, pupil size, pupil reaction to light, etc.

   3) Psychophysical evaluations of the subject based on the divided attention tests.

   4) Examinations of the subject's vital signs (blood pressure, pulse rate and temperature).

   5) Inspection of the subject's arms, neck, nasal and oral cavities for signs of drug ingestion.

b. Training to be able to distinguish seven broad categories of drug categories based on their symptoms.

c. Conducting a standardized evaluation in a specific sequence and documenting the results.

d. Interpretation of the results.

e. Development and maintenance of up-to-date resumes to document my use of the evaluation system in order to monitor my proficiency.

What does your resume reflect?

My resume reflects the evaluations I have conducted and any subsequent and toxicological confirmation that have occurred. It also includes articles and books on the subject of drugs which I have read.

How may drug evaluations have you conducted?

Have your evaluations been verified by toxicology?

How many times?

Offer Witness as a Drug Recognition Expert

- Cite CRE 702
- Why did you decide to perform a drug recognition evaluation on the defendant.
- What maneuvers were done?
- Are all these tests validated field sobriety tests?
- Which maneuvers are validated?
- What do you mean by validated?
- Which test did you ask the defendant to perform first?

NOTE: Nystagmus -- be sure your court accepts testimony on the use of nystagmus.

I first observed the defendant's tracking of his eyes and observed that they tracked the same. I also observed that his pupils were the same size. A head injury will generally affect the opposite eye and cause it to act differently than the other. I also performed what is known as a gaze

nystagmus test in which, among other things, I look for the same behavior in one eye as the other.

- Before I ask you to explain how you checked the defendant's eyes, could you please explain to the jury what nystagmus is?

It is an involuntary jerking of the eyes as the eyes are moved from side to side. There are a variety of causes of HGN, among which are various drugs. Gaze nystagmus can also be caused by disease or injury, but in the latter case, the jerking of the eyes will occur irregularly and will not be observed to occur symmetrically in the eyes.

- How many types of nystagmus are there?

- Have you received training in administering a nystagmus test?

Use HGN questions, from Chapter 6. YOU WILL HAVE TO QUALIFY THE DRE as an Expert in the administration and interpretation of Nystagmus test before the Court will allow the DRE to testify about the results of the test and the correlation to drug intoxication or impairment. See Chapter 8, Experts.

- Will you please explain to the jury how you performed the preliminary eye examinations you gave to the defendant.

- Did you make any further conclusions on the basis of the nystagmus you observed?

- What is the significance of lack of convergence?

- Is there some correlation between what you observed and drug intoxication or impairment?

- What category of drug causes the nystagmus you observed?

- Did you also look for lack of convergence?

- What does lack of convergence mean?

- Did the defendant exhibit lack of convergence?
- Did you look for any other type of nystagmus? (vertical nystagmus)
- Did the defendant exhibit vertical nystagmus?
- What is the significance of vertical nystagmus in your evaluation?
- Officer, have you ever had a case where you determined that the subject was suffering from illness or injury? When? What did you do?
- What are you trained to do when there is an indication of injury or disease in your evaluation of a person?

To seek medical assistance since my concern then would have been for the safety of the person.

- Officer, what did you do next?

I conducted the walk and turn test.

- Please explain the walk and turn?
- What are you looking for?
- How did the defendant perform this maneuver?
- What was the next maneuver you asked the defendant to perform? The one leg stand.
- Would you please explain what you are looking for when the defendant performs the one leg stand?
- How did the defendant perform this maneuver?
- Are these sometime referred to as psychophysical maneuvers?
- What does psychophysical mean?

- What does it have to do with driving?
- What maneuvers did the defendant perform next? The Rhomberg - finger to nose.
- Explain the Rhomberg and how the defendant performed?
- Explain finger to nose and how the defendant performed?
- Were these all the physical maneuvers which you asked the defendant to perform?
- Do you always conduct your evaluation using the same procedures?
- Why?

  I want to do the evaluation the same way every time. The reason is that the procedure has been validated by certain studies, particularly the Johns-Hopkins Medical School study. Also I want to be consistent, so I can compare one evaluation with another. My objective is to be able to form an opinion and to testify to that opinion not only on the basis of my training but also my experience.

- What precisely is involved in the evaluation itself?

  First I need to explain that there are four broad categories of observations that I'm making:

  a. I observe the general behavior and appearance of the person (have officer give examples e.g. fidgety or sleepy, appears stiff or very relaxed.) As I proceed through the evaluation, some very subtle clues can be compiled that can target the category of substances that may be involved.

  b. I make psychophysical observations. This is the portion where I am observing and evaluating the ability of the person to

coordinate his brain with his body, in other words to understand and follow directions. The method that I use is substantially the same as the field sobriety test used by the arresting officer, except that the tests I do are conducted in a controlled environment. This portion is to an extent dependent on the will of the person to perform and also is affected by a person's tolerance to a particular drug, whether it be alcohol or something else.

c. I observe clinical signs. These consist of horizontal and vertical gaze nystagmus, pulse and blood pressure, which are normally beyond the control of a person's will, eye convergence, pupil dilation, and pupil reaction.

d. I make a physical examination of the person's body for evidence of drug ingestion, (track marks, traces of material, etc.)

- How does making these observations allow you to form an opinion as to a person's use of drugs?

  A DRE does two things. First, I just look. I look at everything. I try to observe everything I can about the person. Certain clinical responses are consistent with certain categories of drugs, and not with others. Certain observed behaviors are consistent with some categories and not others. However, I have been trained, and my experience tells me that I don't base my opinion on any one factor or on any one combination of factors without reference to the totality of my observations. The first part of the evaluation is therefore just to observe and record. The second part of the evaluation involves an actual examination of the person.

- After you asked the defendant to perform the physical maneuvers, did you begin the clinical examination?

- Can you please explain to the jury how you conducted the clinical examination and what you observed?

First I took the defendant's pulse.

- How did you do that?
- Were you trained to take a pulse?
- By whom were you trained?
- Did you record the defendant's pulse rate?
- How many times was the pulse rate taken?
- Is there a "normal range" for the pulse rate?
- What were the defendant's pulse rates?
- Were these within the normal range?
- What is the significance of determining the pulse rates during a drug evaluation?
- Why do you take a pulse rate more than once?
- What did you do next?

I took the defendant's blood pressure.

- What instrument did you use to accomplish this?
- Are you trained to take blood pressure?
- Who trained you?
- What are the normal ranges of blood pressure?
- What was the defendant's blood pressure as you recorded?

- How does this compare to normal ranges?

- What is the significance of blood pressure in the drug evaluation process?

- What did you do next?

I took the defendant's temperature.

- Why would you take a person's temperature for a drug evaluation?

- Is there a normal range for a temperature?

- What was the defendant's temperature?

- What significance does this have?

- What did you do next?

I estimated the size of the defendant's pupils.

- How did you do that?

I used a pupillometer.

- Was this also part of your training?

- Under what conditions did you perform these examinations?

I observed his pupils under various lighting conditions.

- What were the defendant's pupil sizes in each of the lighting conditions?

- What are the normal ranges for the pupils?

- Were the defendant's pupils in the normal range?

- What is the significance of these estimations?

- Did you make other observations during this examination? Hippus - rebound dilation - reaction to light.
- What is the significance of these observations?
- Did you make other observations besides the pupils during this part of the examination? Oral or nasal cavities.
- What are you looking for?
- What did you find in the nasal area?
- Did this indicate anything to you?
- What did you find in the oral cavity?
- Was this significant?
- Did you look for anything else during this evaluation? Injection sites - muscle tone.
- What was the defendant's muscle tone?
- What is the significance of this?
- Where did you look for injection sites?
- Have you ever seen what an injection site looks like?
- Did you locate any signs of an injection site upon the defendant?
- Did the site(s) appear to be fresh or old to you?
- Where exactly did you locate this site(s)?
- Are those consistent with the use of a hypodermic needle?
- Did this conclude your evaluation?

REMEMBER: Witness must be offered and accepted as an expert prior to giving an opinion. If you have not already done so, offer the witness as an expert.

- Based upon your evaluation of the defendant, did you form an opinion as to whether the defendant was showing signs of intoxication or impairment due to drug ingestion?
- What was your opinion?
- In your opinion, was the defendant able to safely operate or control his vehicle?
- On what specific facts do you base your opinion?
- From you recorded evaluation, were you able to classify possible category(ies) of drugs that likely caused the intoxication or impairment observed?
- What category(ies) of drugs did you feel were responsible?
- Is this consistent with your training and experience? (You may want to have the DRE refer to a drug symptomology chart)
- How is it consistent?

  I look at all the observations I made in light of my training and experience in regard to the physiological and behavioral effects of drugs. My approach allows me to develop an opinion as to a category of drugs which have particular symptoms in common.

- What are the categories?

  The categories I am trained to identify are:

  1. Central Nervous System Stimulants (CNS)
  2. Central Nervous System Depressants (CND)
  3. Narcotic Analgesics
  4. Hallucinogens

5. Cannabis (marijuana)
6. Inhalants
7. PCP and Analogues.

- What if a person is taking several drugs at the same time? Could that confuse you by jumbling up the symptoms?

Not if the drug evaluation was done systematically.

- Why?

My training and experience have enabled me to sort out the additive, overlapping and antagonistic symptoms so that I can develop an opinion in regard to the categories of drugs that are affecting the person.

- What do you mean additive, overlapping and antagonistic?

There are basically three classes of symptoms: Additive, Antagonistic and Overlapping:

a. Additive symptoms are symptoms produced independently by each of the drugs present: For example, alcohol (a CND) and PCP both cause nystagmus; both PCP and cocaine (a CNS) cause elevated vital signs.

b. Antagonistic symptoms on the other hand are opposite. For example, narcotic analgesics, like heroin, cause constricted pupils. The central nervous system stimulants produce the opposite -dilated pupils. Therefore, both operating together at sufficient dosages could mask each other and produce pupils which are within the near normal range.

c. Some symptoms have no antagonists, for example there is no antagonist for gaze nystagmus. In that case we have what are

known as overlapping symptoms: one class of drugs produces certain symptoms and the additional drug class does not affect that particular symptom. For example, a CNS causes dilation of the pupils but does not cause nystagmus. A CND causes nystagmus but does not affect the pupil size. Therefore, if a person is taking a CNS and CND, the person will likely display both dilated pupils and nystagmus.

- Did you attempt to corroborate your opinion by any known means of testing?
- What means of testing did you use?

  Urinalysis, (sometimes blood analysis).

- Explain how the urine sample was obtained?

  (You will need to lay the proper chain of custody foundation in preparation for admission of the test result.) See Chapter 9 for admission of tests.

- Was the sample sealed? If so, how?
- What did you do with the sealed urine specimen cup?
- Do you know who collected the specimen cup after it was locked in the evidence refrigerator?
- Did you complete any type of paper work requesting a urinalysis?
- Do you know what lab conducted the urinalysis?
- Did you ever obtain the result of the urinalysis?
- Was the result consistent with your opinion?
- After you asked the defendant to give you a urine specimen, did you do anything else?

- Interviewed the defendant.
- Did you explain the Miranda rights to the defendant?
- (Have officer specify each right he explained to the defendant.)
- Did the defendant waive those rights?
- How did you do this?
- Signature or oral waiver.

NOTE: The issue of voluntariness of the statements should have already been resolved. See Chapter 3, part IV. If a voluntariness determination has not been already done, and there is an issue regarding voluntariness, you will need to have a hearing out of the jury's presence. For predicate questions regarding the voluntariness of the defendant's statements, see Chapter 3, part IV.

IV. MEETING COMMON CHALLENGES AND DEFENSES

A number of challenges and defenses are commonly raised in the DUI-Drugs case, in which the prosecution relies largely upon the testimony of a DRE officer. The following set of common challenges and defenses are set out with the appropriate response from the prosecutor.

1. The DRE is Just Another Cop

This challenge is generally directed to the qualification of the DRE to testify as an expert, and may include both a challenge to the credentials and training the DRE received, and a challenge to the DRE's qualification to conduct the type of examination involved.

RESPONSE: While the DRE is not a medical doctor, he/she has undergone extensive training which provides expertise by "knowledge, skill, experience, training, or education..." (CRE 702). All DRE instructors have been certified by the International Association of Chiefs of Police, and have taken an additional course to become a certified instructor.

All DREs must evaluate a minimum of 12 people who are under the influence and correctly identify four different drug categories before certification.

Emphasize the DRE's experience. DREs encounter many more drug-impaired individuals than a medical doctor ever will. Through repeated exposure to people impaired by drugs, and validation through toxicology, an experienced DRE has a keen insight into the symptoms and behaviors linked with drug-impairment that few, if any, in our society possess.

2. The DRE Does Not Know The Arrestee's Normal Vital Signs

This is an attempt to discredit the clinical portion of the DRE evaluation by suggesting that the only valid measure of a person's vital signs is to compare it with their vitals under normal, un-impaired condition.

RESPONSE: Normal ranges for pulse, blood pressure, and body temperature have been standardized in the medical community to allow doctors (or trained lay persons) to accurately diagnose conditions, whether they have a clinical history with the person or not. Only a doctor who had occasion to check a patient's vitals over an extended period of time, while checking the patient's toxicology to assure they were not impaired by drugs, would have any advantage over the DRE.

The use of vital signs is not the only indicia used by the DRE to determine impairment. Vitals are often used, in conjunction with other symptoms of impairment, to assist in determining the specific drug category involved.

3. The DRE Is Biased

This challenge is based on the insinuation that the DRE will do his/her best to support the suspicion of his fellow officer who arrested the suspect, utilizing the interview of the arresting officer as a platform for this 'conspiracy.'

RESPONSE: The use of a DRE is a cautious approach to the enforcement of DUI laws that calls for a specialist to determine drug impairment. This approach is analogous to a family practice doctor who sends a patient to a specialist when a particular ailment is identified. The family practice doctor will report the patient's

signs and symptoms, and offer a tentative diagnosis. The specialist may consult with the family practice doctor about his reported findings, as well as other observations. The specialist is not bound by the findings of the family practice doctor. He simply applies his own special training and experience to the patient to determine the particular nature of the illness.

Similarly the DRE must gather all available evidence to arrive at the correct opinion. The arresting officer's observations may assist the DRE in determining if any drug impairment is more or less apparent at the time of the DRE evaluation.

4. Why Are The Field Sobriety Tests Repeated

This challenge is an attempt to show that the DRE distrusts the field sobriety testing of the arresting officer, and/or imply that by repeating the tests, the DRE is simply manufacturing evidence.

RESPONSE: The purpose of the DRE in repeating the field sobriety tests is part of the systematic approach to thoroughly examine the suspect's condition. The DRE conducts the field tests in a controlled indoor environment that allows the DRE to make assessments of more subtle signs which may be lost at roadside because of the conditions under which those tests were administered. Testing in a controlled setting eliminates some of the common excuses associated with field testing such as distraction from passing cars, overhead lights, poor lighting, etc.

There are sound explanations for variance between the suspect's performance at roadside and during the DRE evaluation. The drug's effect may be wearing off. In multiple drug cases, the effect of one drug may begin to dominate the effect of the other. Whether consistent or different, the DRE's consideration of performance on both sets of field sobriety tests assists in arriving at an opinion.

5. Missing Signs And Symptoms

This challenge is used when a defendant exhibits some, but not all symptoms commonly associated with impairment by a particular drug or class of drugs. The defense will argue that the officer was mistaken, or his opinion was a lucky guess. The defense may also focus on the signs and symptoms that were normal in order to

argue that the opinion is inconsistent with the drug in question, or fails to demonstrate impairment.

RESPONSE: It is uncommon for a user to exhibit every sign or symptom associated with a particular drug. Just as there are common signs of alcohol impairment, not every drinker acts exactly the same way. The common signs and symptoms of drug use are an attempt to exhaustively list known symptoms, with no suggestion that all symptoms apply to each user.

Another analogy is to the medical field. Every person who takes the same medication does not respond identically. Each individual is unique. Even when people have contracted the same illness, the symptoms will differ from person to person.

6. Alternative Explanations

This challenge is an attempt to show that the DRE's observations can be explained by any number of causes not associated with drug impairment, to include, medical conditions, fatigue, nervousness, or stress.

RESPONSE: While any single sign or symptom may be caused by something other than drugs, it would be highly unusual for any person to exhibit a significant number of such signs all attributable to alternate causes. The purpose of the twelve-step evaluation is to rule out other explanations.

Carefully refer to the arresting officer's field sobriety testing and the DRE evaluation to see if the suspect mentioned all these alternative explanations at the time. Both officers routinely ask if the test subject is suffering from any injury, illness, or medical condition before proceeding with roadsides. If none was mentioned at the time, this defense lacks credibility as a transparent attempt to explain away the opinion.

This defense may be turned around to lend credibility to the DRE, insofar as it is not a challenge to the DRE's observations, but just to his ultimate opinion based thereon. The defendant is admitting to the signs and symptoms, thereby agreeing that the DRE saw what he reported. In the attempt to then explain away each finding, the defendant risks going too far, and creating a confusing web of happenstance that is too far-fetched to be the least bit credible.

7. The DRE's Opinion Is Subjective Or Guesswork

This defense is an attempt to characterize the DRE process as speculation.

RESPONSE: Toxicology results are the best response, when available. When the defendant refused to provide a sample, the focus should go to the objective results the DRE obtained, such as pulse rate, blood pressure, pupil size, and failures on field test performance. The DRE gathers as many objective facts about the suspect as possible, then applies his training and experience to form an opinion. Because the defense is trying to highlight the subjective nature of the opinion, it is important to demonstrate that the subjective portion of the DRE process is largely limited to the opinion. The opinion should be based on objective findings, and the officer's training, which is backed up by science.

8. Drug Categorization Scheme

This challenge is an attempt to discredit the seven drug categories used in the DRE program as having no basis in science or medicine.

RESPONSE: The DRE program's seven drug categories are grouped by the known effects of those drugs on human behavior. Each drug within a category produces a pattern of observable effects. Even though each category contains numerous different drugs, containing different ingredients, the overall pattern of effects within each category is largely the same. This grouping is based on clinical studies and observations.

The defense may criticize the reliability of the DRE opinion because the specific drug used by the suspect is not identified. This is a trap the prosecutor should avoid conceding. Unless the suspect openly admits the use of a particular drug or drugs, the DRE examination with toxicology provides the best method for determining which drug category, if any, the suspect has ingested. An analogy can be made to the DUI alcohol investigation. The DUI officer is not expected to identify the exact type of alcoholic beverage the suspect drank. Countless different drugs are available legally, and illegally in our society. Expecting a DRE officer to pick the exact drug a suspect consumed is ridiculous.

9. Toxicology

The defense will attempt to negate the relevance of toxicological results in a DRE examination. The most common attack is to emphasize that no established levels of drug concentration in blood or urine are tied to legal impairment. Another attack is to point out that an alleged component of the drug was found in the specimen, but not the drug itself. Challenges will arise in poly-substance cases, especially when the DRE officer states an opinion that the suspect was impaired by only one category of drug, but more than one category was present in the toxicology examination.

RESPONSE: First, the DRE evaluation is the totality of all observations of the arresting officer, the DRE, and the toxicology. Obviously, no case for impaired driving can rest on toxicology alone. Society is increasingly educated to the fact that certain substances, particularly marijuana, can be detected in the body fluids long after any impairing effect has ended. All drugs in the DRE category scheme can cause impairment of the ability to operate a motor vehicle, whether the drug is legal, or otherwise socially acceptable. Toxicology must be viewed as a corroboration of the DRE opinion and findings, assuming the correct drug category was predicted. To argue beyond that is a mistake by the prosecutor. The impairment opinion must be supported by signs and symptoms, erratic driving, and poor performance on field sobriety tests.

The second part of the above challenge is easily defeated by a competent toxicologist. Many drugs do not remain intact once ingested by the human body. The most common example is the metabolism by the body of cocaine into benzoylecgonine. Such compounds are known as metabolites. Metabolites are generally more water soluble and more readily excreted in the urine than the parent drug. Metabolism is the process by which the body rids itself of the drug. In the case of cocaine, it is well established in the scientific community that only the metabolite will be detectable in the blood or urine after ingestion of the drug.

In poly-substance cases, the effects of one category can either dominate or mask the effects of another category. This can make the detection of both categories difficult for the DRE. The DRE's failure to predict both or all categories of drug in such a case is not viewed as an error or incorrect opinion. The toxicologist will often

be able to explain how the presence of both substances causes inherent problems for the detection of both.

I. CHECKLIST

A. PREPARATION

1. If at all possible go to the scene with the officer or a witness.

2. Prepare a diagram ahead of trial if you plan to use one.

3. Assemble and mark exhibits before trial; prepare an exhibit list and give a copy of it to the court.

4. Check discovery to be certain you have complied with all relevant rules.

5. Go over exhibits with witnesses to get them familiar with pictures or diagrams. Have them explain how they know what each exhibit is.

6. Weigh the benefits vs. the disadvantages of each exhibit and use it only if it is helpful.

7. Make arrangements with the bailiff for projectors, marking pens, etc.

8. Discuss stipulations with opposing counsel.

9. Have case law and statutes available which deal with the admissibility of each exhibit.

10. Make sure you have the right witnesses for any evidence which requires a chain of custody, e.g., blood sample, or other specific foundation.

11. Prepare a motion in limine to exclude anticipated improper defense exhibits.

12. Prepare your officer to demonstrate the ease of doing the roadsides if a demonstration is to take place at trial.

B. ADMISSION OF DEMONSTRATIVE EXHIBITS

1. Have exhibit identified:

   a. Marked by number or letter; and

   b. Make a record of what it is. (e.g., Mr. Witness, I hand you what has been marked for identification purposes as People's Exhibit A.)

2. Have the witness tell the Court what the exhibit purports to be and how he knows. (Mr. Witness, what is Exhibit A and how do you recognize it?)

3. Lay any necessary foundation, e.g. if the exhibit is a photograph, elicit testimony that the photo accurately depicts the scene represented.

4. Offer the exhibit into evidence.

5. The Court will allow voir dire examination by the defendant to test relevancy and authenticity.

6. The Court admits, requires more foundation, or denies admission.

II. MAKING AND MEETING OBJECTIONS

A. EVIDENTIARY RULES

The relevance of all evidence is determined by a three tiered analysis under the Colorado rules of evidence: (a) that the proffered evidence relates to a fact that is of consequence to the determination of the action; (b) that the proffered evidence makes the existence of a fact of consequence more or less probable than it would be without the evidence; and (c) whether the probative value of the evidence substantially outweights the danger of unfair prejudice, confusion of the issues, or misleading the jury. see C.R.E. 401-403; People v. Vasquez, 768 p.2d 721 (Colo.App. 1988).

1. Photographs -- Court has discretion to weigh probative value versus prejudicial effects. People v. Viduya, 703 P.2d 1281 (Colo. 1985); See C.R.E. 1001, et.seq.

2. Drawings -- Admissible if accurate and useful to the understanding of testimony, even if made based on observations after the crime as long as there have been no material changes in the scene and the witness creating the drawing was familiar with the scene at the relevant time. Oaks v. People, 161 Colo. 561, 424 P.2d 115 (1967).

3. Inaccurate drawings or pictures are inadmissible. People v. Wright, 182 Colo. 87, 511 P.2d 460 (1973).

4. Tape Recordings -- Court has discretion to admit; admissible even if segments inaudible, if found to be reliable. People v. Roy, 723 P.2d 1345 (Colo. 1986), People v. Jeffers, 690 P.2d 194 (Colo. 1984).

5. An exhibit may be admitted conditioned on foundation being provided later in trial. C.R.E. 104(b); People v. Lyle, 200 Colo. 236, 613 P.2d 896 (1980).

6. Summaries, calculations, or explanatory flow charts are admissible under C.R.E. 1006.

III. GENERAL DISCUSSION

It is largely your choice to determine which exhibits are introduced -- use the opportunity wisely. Ask yourself a few questions in preparation. First, is the exhibit useful to the case? That is, is it necessary to prove an element and does the benefit gained by the exhibit outweigh any disadvantage. Second, can you lay a sufficient foundation for the admission of the exhibit? Third, have you prepared your witness for his testimony regarding the exhibit?

People usually absorb information better when they can see as well as hear it. Remember that an exhibit will go with the jurors into their deliberation room. Therefore, it will likely create a lasting impression with the jurors.

Certain exhibits will generally be necessary in a DUI trial if there is a test of the defendant's blood, breath or urine. (But be aware that many of the

exhibits you will admit in a DUI trial regarding tests of the defendant's blood, breath or urine are merely substitutes for live testimony. For example, the technician that prepared the standard solution used in the intoxilyzer could come into court and testify that the solution contained .100 percent alcohol.) Those exhibits are discussed in Chapter 9.

Use your imagination to go beyond what is merely necessary and use exhibits which graphically illustrate your points. If you have a blood test for example, the jury may better understand the significance of a .121 if a chart of BA levels from .000 to the .200 is prepared. Show on the chart where the inferences of DWAI and DUI fall. Try drawing a few different charts until you find a format which has the visual impact you desire.

Check out the booking photograph of the defendant. It may clearly show how dishevelled he looked when arrested. Consider showing the jury the defendant's signature if it is a real mess or off the line on one of the documents he signed when arrested.

You may wish to bolster your witness' credibility by introducing photographs of the scene, roadsides, intersection, etc. This can help: (1) blunt the cross examination by reducing the opportunity for "fishing-type" questions; (2) refresh your witness' memory; (3) preclude defense witness testimony which is contrary to your witness; and (4) make a routine case seem more thorough by the additional evidence.

If you anticipate that a witness will testify poorly, consider using exhibits to aid his testimony. This will help concentrate the jury's attention on the exhibit rather than the witness.

IF YOU ARE GOING TO UTILIZE AUDIO, COMPUTER, OR VIDEO EQUIPMENT TO PRESENT EVIDENCE, BE SURE YOU KNOW HOW TO USE ALL EQUIPMENT PRIOR TO TRIAL. THIS WILL SAVE YOU FROM EMBARASSMENT AND ENSURE THE JURY IS LOOKING AT THE EVIDENCE AND NOT STARING AT YOU AS YOU FUMBLE WITH EQUIPMENT. YOU SHOULD ALSO LISTEN TO OR VIEW ALL SUCH EVIDENCE PRIOR TO TRIAL AS OFTEN THE QUALITY OF THE INFORMATION ON TAPES CAN BE MARGINAL, AND THUS OF LITTLE USE TO THE JURY.

Make a tactical decision on when you want the jury to see the exhibit. Some items are best left to your closing argument before giving the jury a close look. Other times you may want to present an uninterrupted view of

the exhibit juror by juror during the testimony. Remember though, that an exhibit used only during closing argument will not be admitted into evidence and will not go with the jury into the deliberation room.

For additional materials see:

1. "Real, Documentary and Demonstrative Evidence" Christopher Munch, Trial Techniques, National College of District Attorneys, 6th Ed. 1984.

2. "Demonstrative Evidence", McCormick on Evidence, West Publishing.

3. Evidence Manual: A Trial Case Book for the Practicing Colorado Prosecutor, Colorado District Attorneys Council (2001) pp. D1-D14.

I. JUDGMENT OF ACQUITTAL

A motion for judgment of acquittal is a defendant's allegation that the prosecution has failed to establish a prima facie case. Crim.P. 29(a), states:

[t]he court on motion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment or information, or complaint, or summons and complaint after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses.

The courts have adopted the following test when ruling on a motion for judgment of acquittal:

- Whether the relevant evidence
- when viewed as a whole
- in the light most favorable to the prosecution
- is substantial and sufficient
- to support a conclusion by a reasonable mind
- that the defendant is guilty of the charge
- beyond a reasonable doubt." People v. Ramos, 708 P.2d 1347 (Colo. 1985).

This standard has also been stated as:

- Whether the evidence
- when viewed in its totality
- in the light most supportive of a guilty verdict
- is sufficient to support the conclusion in the minds of reasonable persons
- that the defendant was guilty
- beyond a reasonable doubt." People v. Pickett, 194 Colo 178, 571 P.2d 1078 (1977).

The standard is the same whether the case is being tried to a jury or to the court. People v. Gomez, 189 Colo. 91, 537 P.2d 297 (1975). The trial judge, in viewing the evidence in the light most favorable to the prosecution, must give the prosecution the benefit of every reasonable inference which may be fairly drawn from the evidence. People v. Bartowsheski, 661 P.2d 235 (Colo. 1983). Contradictions, discrepancies, and inconsistencies in the testimony of the prosecution's witnesses are to be resolved by the jury. People v. Aalbu, 696 P.2d 796 (Colo. 1985);

People v. Brassfield, 652 P.2d 588 (Colo. 1982); People v. Martinez, 191 Colo 428, 553 P.2d 774 (1976). Inconsistencies in the testimony of a witness do not necessarily make the witness unworthy of belief; they are for the jury's consideration as bearing on credibility. Miller v. People, 141 Colo, 576, 349 P.2d 685 (1960), cert. denied 364 U.S. 851 (1960). It is only when a witness' testimony is "so palpably incredible and so totally unbelievable as to be rejected as a matter of law" that a court may properly take the function of assessing witness credibility from the jury. People v. Franklin, 645 P.2d 1 (Colo. 1982). Testimony that is "incredible as a matter of law" is that which is in conflict with nature or fully established or conceded facts. It is testimony as to facts which the witness physically could not have observed or events that could not have happened under the laws of nature. People v. Ramirez, 99CA1973 (Feb. 15, 2001). Even when testimony of a witness is ruled incredible as a matter of law, judgment of acquittal is improper if other evidence is sufficient to support a finding of guilt by a reasonable person beyond a reasonable doubt. People v. Cummings, 768 P.2d 718 (Colo. App. 1988), aff'd in part, rev'd in part, 785 P.2d 920 (Colo. 1990).

A motion for judgment of acquittal made at the close of all the evidence should be denied if, viewing all the evidence presented at trial most favorably to the prosecution, it is substantial and sufficient to support a rational conclusion of guilt beyond a reasonable doubt. People v. Walters, 39 Colo. App. 119, 568 P.2d 61 (1977). A defendant moving for acquittal at the close of all the evidence cannot assert error on the state's evidence alone. People v. Becker, 181 Colo. 384, 509 P.2d 799 (1973); Silcott v. People, 176 Colo. 442, 492 P.2d 70 (1971).

II. APPEALS BY THE PROSECUTION

The Colorado Supreme Court takes a dim view of appeals by the People on the basis of sufficiency of evidence:

"[T]his type of appeal challenging the sufficiency of the evidence serves little purpose and is rarely productive of any precedential value." People v. Martinez, 198 Colo. 577, 603 P.2d 944 (1979).

Should the prosecution win on appeal, retrial is precluded even where the trial court errs as a matter of law in granting the judgment of acquittal. People v. Paulson, 198 Colo. 458, 601 P.2d 634 (1979).

I. INTRODUCTION TO EXPRESS CONSENT

Under Colorado's express consent law, the act of driving in Colorado operates as consent to having one's blood or breath tested for alcohol content. 42-2-1301(7)(a)(I), C.R.S. This consent may be acted upon by a law enforcement officer having probable cause to believe the person drove a motor vehicle while either impaired by or under the influence of alcohol. 42-4-1301 (7)(a)(II), C.R.S. In practice, this means that when an officer contacts a driver suspected of being under the influence, the driver has to cooperate in producing the evidence the state will use to prosecute.

A driver who refuses to consent to that testing may limit the evidence available in a case, but faces revocation of his or her driving privilege for that refusal. 42-4-1301(7)(d), C.R.S. Indeed, the statute states that even failing to cooperate with the testing constitutes a refusal. 42-4-1301(7)(a)(IV), C.R.S. A refusal, or failure to cooperate, results in a driver facing a one year revocation of his or her driving privilege for a first time refusal, two years for a second and three years for a third or subsequent refusal. 42-2-126(6), C.R.S.

Upon refusal, the officer issues the driver a notice of revocation, takes the driver's license and issues him or her a temporary license valid for seven days or until a final order is issued at the DMV hearing. 42-2-126(5), C.R.S.

II. PROSECUTORIAL USE OF A DEFENDANT'S REFUSAL

Colorado law provides that a defendant's refusal to take a test when directed to do so by a law enforcement officer having probable cause to believe the person has committed a violation of section 42-4-1301, C.R.S., is admissible as evidence against him in a trial. Specifically, section 42-4-1301 (7) (e), C.R.S., provides:

If a person refuses to take or to complete, or to cooperate with the completing of, any test or tests as provided in this subsection (7) and such person subsequently stands trial for a violation of subsection (1) of this section, the refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to admission of refusal to take or to complete, or to cooperate with the completing of, any test or tests.

A defendant's refusal to take a test can and should be a key piece of evidence in the prosecutor's case against the defendant. Jurors have come to expect the introduction of test results as evidence in the DUI case. The failure to produce that evidence because of the defendant's refusal to take, or cooperate with the taking of, a test places responsibility for the lack of that evidence squarely with the defendant.

The prosecutor can base forceful arguments on the defendant's refusal to take a test. The logical inference to be drawn from the refusal is that the defendant desired to conceal the amount of alcohol within his system. Such a desire is not consistent with the consumption of only a small amount of alcohol and suggests that the defendant was aware that he had consumed too much alcohol. When it is established that the consequence of a refusal to take a test (a one year revocation of the driving privilege) was explained to the defendant, it can be persuasively asserted that the defendant must have been certain of the fact that he was under the influence, or at least impaired, at the time of the offense.

Use of the defendant's refusal can also be an effective tool for cross-examination. If a defendant takes the stand and claims, as he often will, that only a couple of drinks were consumed, the prosecutor can cast doubt on this claim by demonstrating its incompatibility with a refusal to submit to a test; the test would substantiate a claim of minimal consumption. In this regard the prosecutor should attempt to use cross-examination to show that the defendant was well aware of the consequences of refusing and knowingly persisted in his refusal. The prosecutor may also want to emphasize the importance to the defendant of being licensed to drive so as to highlight the magnitude of the consequences that resulted due to his unwillingness to test his blood alcohol content..

Finally, the prosecutor should try to enjoy him or herself in the presentation of this type of case. A DUI refusal case is relatively straightforward, without any major evidentiary issues relating to the presentation and admission of scientific evidence. Such a case is frequently presented through the use of only one witness (the arresting officer), and it affords fertile ground for creative argument and cross-examination.

III. EXPRESS CONSENT QUESTIONS FOR DIRECT EXAMINATION

- Officer _____, after making those observations of the defendant, what did you do?

- What did you arrest him for?
- How did you go about placing the defendant under arrest?
- Did you ask the defendant to take a test?

NOTE: Do not ask the next three questions if the officer did not give an express consent advisement.

- After placing the defendant under arrest, did you advise him of Colorado's express consent law?
- Would you please go through that advisement as you went through it with the defendant on the date in question?
- How did the defendant respond to this advisement?
- Did the defendant agree to take a test?
- How did the Defendant refuse (exact words or conduct)?
- After he refused to take a test, did you advise him of the potential consequences of refusing (ask only if you know the answer)?
- Did you again offer the Defendant the opportunity to take the test (ask only if you know the answer)?
- How many times? Why (to be fair)?
- How did he respond (looking for evidence of uncooperativeness, if any)?

IV. MEETING OBJECTIONS

The defendant will probably attempt to foreclose your use of his refusal. The grounds will vary, but the most common are:

A. OBJECTION BASED ON THE PRIVILEGE AGAINST SELF INCRIMINATION

The defendant may try to argue that introducing evidence of his or her refusal violates his or her privilege against self incrimination. This argument is negated by rulings by the U.S. Supreme Court, the Colorado Supreme Court and by the Colorado statute, 42-4-1301(7)(e), C.R.S.

In South Dakota v. Neville, 459 U.S. 553 (1983), the Court ruled that evidence of a refusal to take a blood test after a lawful request to do so by a police officer does not violate the privilege against self-incrimination or the due process clause of the U. S. Constitution. The Court held that this was the case even when the defendant was not specifically advised that his refusal could be used against him at trial.

The Colorado Supreme Court interpreted the Colorado Constitution as providing the same standard as the U.S. Constitution in Cox v. People, 735 P.2d 153 (Colo. 1987). The Colorado court held "[a] refusal to take a blood or breath test when a police officer has lawfully requested it is not compelled testimony entitled to protection under the Colorado constitution". Cox, 735 P.2d 153, at 156.

With regard to the claim that because the defendant wasn't warned by the officer that his refusal could be used against him, the admission into evidence of his refusal to submit to a blood or breath test violated the right to due process under article II, section 25 of the Colorado constitution, the Court said:

Failure to warn a driver that evidence of his refusal to take a blood or breath test may be used against him at trial coupled with the subsequent use of the evidence at trial does not violate due process under either the federal or state constitution. Cox, at 157.

Finally, the DUI statute specifically provides that evidence of a refusal to take or complete a test can be admitted in a trial and that admission of such evidence does not violate the defendant's privilege against self incrimination. 42-4-1301(7)(e), C.R.S..

B. OBJECTION BASED ON EVIDENTIARY GROUNDS OF LACK OF RELEVANCE AND PREJUDICIAL EFFECT

In Cox v. People, 735 P.2d 153 (Colo. 1987), the Court made clear that claims of relevance and prejudicial effect under C.R.E. 401 and 403 are not an appropriate basis for excluding evidence of the defendant's refusal to submit to a test. The Court ruled:

> The effect of section [42-4-1301(7)(e)], C.R.S., is to allow admission of evidence of refusal in every case without a judicial determination of relevancy on a case-by-case basis. The weight to be given the evidence of a refusal is for the jury to determine. Cox, 735 P.2d at 159.

C. OBJECTION BASED ON THE CLAIM THAT THERE WAS NO PROBABLE CAUSE TO ARREST AT THE TIME OF THE REQUEST TO TAKE A TEST

For offenses committed prior to July 1, 1989 the defendant had to have been arrested before the officer could ask him to take a test. Under current law, as mentioned in the introduction, an officer merely needs probable cause to believe a driver drove while either impaired by or under the influence of alcohol or drugs in order to ask the driver to submit to testing. 42-4-1301(7)(a)(II)(A), C.R.S. In practice, this distinction should not matter as an officer will arrest a driver once the officer has probable cause to believe the driver was driving while impaired or under the influence and then request that the suspect submit to testing.

D. OBJECTION BASED ON FAILURE OF OFFICER TO ADVISE DRIVER PURSUANT TO EXPRESS CONSENT LAW

This objection is non-existent as a basis for excluding evidence of a defendant's refusal to take a test, or as grounds for exclusion of a test result. When Colorado changed from the Implied Consent law to the Express Consent law in July 1983, the requirement that a driver be advised of his obligation to take a test was discarded. The officer has no obligation to advise the driver that he is required to take a test or the consequences of a refusal. Cox v. People, 735 P.2d 153 (Colo. 1987); Dikeman v. Charnes, 739 P.2d 870 (Colo. App. 1987). The reasoning behind these holdings is that drivers

are presumed to know the law regarding the operation of motor vehicles.

E. OBJECTION BASED ON OFFICER'S FAILURE TO ALLOW DRIVER TO SELECT TYPE OF TEST

Upon contacting a driver suspected of DUI/DWAI, an officer can request that the driver submit to testing. The express consent law allows the driver to choose either a blood test or a breath test. Colorado case law holds that an officer must allow the suspect to choose even if the suspect appears so intoxicated as to be physically capable of performing the test. Sedlmayer v. Charnes, 767 P.2d 754 (Colo. App. 1988). Only when a driver attempts and is unable to complete the testing or is at a facility lacking a breath testing device does the statute state that "the test shall be of such person's blood." 42-4-1301(7)(a)(II)(B).

Drivers who are under 21 have the same choice unless the officer believes the driver has been drinking but does not show signs of impairment. Such a driver has committed a class A traffic infraction. 42-4-1301(7)(a)(II)(A), C.R.S. When a driver who is under 21 is contacted by a police officer, the driver gets the regular choice of tests if the officer suspects the driver is actually impaired or under the influence. If the officer believes the driver has been drinking but is not impaired, the driver's only option is the breath test.

A driver suspected of being under the influence of drugs does not have the option of choosing the means of testing and must cooperate in testing their blood, saliva and urine. 42-4-1301(a)(III), C.R.S. See also Stanger v. Department of Revenue, 780 P.2d 64 (Colo. App. 1989).

Further, if the driver is given an option, once he elects he may not change his mind as to which type of test to take. 42-4-1301(7)(a)(II)(B), C.R.S.; Gonzales v. Colorado Department of Revenue, 728 P.2d 754 (Colo. App 1986).

F. OBJECTION BASED ON INTERPRETATION OF DRIVER'S ACTIONS AS A REFUSAL

The statute provides that if a driver fails to "take and complete, and to cooperate in the completion of" the testing, his actions can be deemed a refusal for which he faces the mandatory revocation. 42-4-1301(7)(a)(II)(B), C.R.S. Additionally, once a driver elects a means of testing he or she cannot change his or her mind. Id. However, case law provides that a driver can retract his refusal and may have up to two and one-half hours after driving within which to do so. Pierson v. Colorado Dept. of Rev., 923 P.2d 371 (Colo. App. 1992).

Colorado courts have held that a driver's actions may be deemed to be a refusal to cooperate in testing. Such situations include requesting to speak to an attorney prior to testing, (Dikeman v. Charnes, 739 P.2d 870 (Colo. App. 1987)), inability to decide to submit to a test (Stephens v. State Dept. of Rev., 671 P.2d 1348 (Colo. App. 1983)), and silence in response to the request to take a test (Poe v. Department of Revenue, 859 P.2d 906 (Colo. App. 1993)). In making this determination, it is the driver's external manifestations of unwillingness or outright refusal that are relevant and not the driver's subjective intent. Boom v. Charnes, 739 P.2d 868 (Colo. App. 1987) rev'd on other grounds.

I. INTRODUCTION

The area of evidentiary objections is probably the source of more anxiety and confusion among beginning lawyers than any other area of trial work.

- When do I raise an objection?
- What grounds should I state?
- How do I make an objection?
- Will I be too late with my objection?
- Will the jury think I am trying to hide something?

Even thoroughly experienced trial lawyers will admit difficulty in defining the thought processes that cause them to object in response to something happening in the courtroom. On the surface, they speak of being thoroughly conversant with the law. They know the rules of evidence and how they apply. They know the limits of relevancy, they are alert to what is going on in the courtroom, and they tactically raise an objection when they believe an improper question is asked or answered. Much of this comes from personal experience as a trial lawyer.

However, beyond such knowledge experienced trial lawyer also admit that they "just know" an objectionable question or portion of testimony "when they hear it". Some have called their response a kind of "gut level" response, or an intuitive sort of reaction. Some hear an opportunity for an objection and describe it as a mental red flag going up or a danger alarm sounding off. Almost instantly they are on their feet raising their objection.

Often, the newcomer will recognize opportunity for raising an objection only after the damage has been done. That is, after the jury has been permitted to hear some piece of testimony or the answer to a question that should not have been allowed. For example some defense attorneys will skillfully pursue a line of unimportant but relevant questioning in an effort to lull you to complacency only to surprise you suddenly with an improperly leading question of their own witness during direct examination. If you are too slow to object, the bulk of the question will be asked and the jury will hear whatever point the attorney is trying to make. This can be just as damaging as allowing the witness to answer the improper question. Leading questions can be one of the most difficult practices to control yet they are frequently encountered and often very damaging in their ability to present improper information to the jury and the witness.

Uninterrupted concentration is necessary to be ready for such tactics. If you are talking to your advisory witness while the defense attorney is examining one of his or her witnesses, the defense attorney may notice this and seize the opportunity to ask an improper question about an important issue while you are distracted. When the defense attorney is on his or her feet asking questions (or arguing), your attention must be undivided.

Sometimes, a less experienced trial lawyer can get good help from a more seasoned colleague by going over the trial transcript after-the-fact and looking for those points on the record that should have been eliminated through objections. Sometimes, on rare occasions, a judge may step into the proceedings in the heat of the battle and deny a question or line of inquiry as inappropriate -- much to the discomfort of counsel who may have been napping and who should have been the first to object.

It is sometimes said: "never object and then hope for time to think of your grounds". This is not entirely correct. Occasionally a prosecutor will object and the Judge will rule without waiting for any grounds to be given when the issue is obvious. Sometimes a prosecutor will object and give partially correct or incorrect grounds. While the defense attorney is responding, the prosecutor may realize what the proper grounds for the objection are and argue them in the alternative.

In deciding when to object, the prosecutor must consider the potential impact of the improper question or testimony. The prosecutor must also consider the potential impact of the objection. Issues to consider are listed below. The prosecutor must have a feel for how the trial is going and balance those issues when deciding whether or not to object. Ultimately, they are resolved as a matter of instinct.

To be most effective, an objection must be raised immediately. Timing is crucial. While the newcomer will eventually develop an "instinct" for objections, this is achieved only through practice. This "practice" includes pre-trial preparation, concentration during trial, and knowledge of law (both case law and rules) governing the admission of evidence.

Much has been written about objections; there are multi-volume sets devoted to the area. The purpose of this brief chapter is only to review the basics and offer some guidance to the use of objections in trial.

II. THE PURPOSE OF OBJECTIONS

The ultimate purpose for the rules of evidence and hence to objections during trial is to provide for a fair presentation of relevant evidence to the trier of fact. Objections accomplish this goal by:

- excluding improper evidence;
- preventing your opponent from asking improper questions;
- preserving a record for appeal; and
- controlling the trial.

The lawyer who knows how and when to object keeps the trial narrowed to the factual matters at issue. A circus-like atmosphere can be prevented and the trial can move forward in a logical and controlled manner.

III. WHEN TO OBJECT

Proper objections help prevent a jury from being exposed to improper evidence. However, juries do not appreciate an advocate who is constantly interrupting the trial with objection after objection. Consider the following when trying to decide what approach to take to objections in a given trial:

- Just how potentially damaging to your case is the improper question or testimony -- are you better off saving your objections for when it matters?
- Does it appear that opposing counsel does not feel constrained by the rule of evidence? Is it time to clarify that misperception?
- Do you have arguable grounds for your objection in mind or are you just "fishing"? (If you object several times and are overruled by the court, your credibility with the jury will be adversely affected. On the other hand, you do not necessarily need absolute certainty of your grounds if you are confident that the objection is valid and you are able to argue in support of your objection.)

- Will your objection high-light the evidence? (Objections can cause a jury to focus attention on the evidence being presented, or at least raise their level of curiosity. Your objection may serve only to make the members of the jury to wonder why you do not want them to hear the evidence. Jurors are just like the rest of us: they may begin speculating about the evidence rather than simply hearing it and accepting it. The speculation about the evidence may be more harmful to your case than the evidence itself.)

Remember that each time your objection is sustained, the credibility of your opponent may be dented. Likewise, each time your objection is overruled your own credibility may be damaged.

IV. TACTICS

Beware of pettiness before objecting, consider the impact your objection will have on the jury, knowing that most people react negatively to an advocate who tries to delay or hide evidence. A sustained objection may win a juror's gratitude in that you have prevented opposing counsel from "getting away with" a question or line of inquiry that would have been unfair; a sustained objection may also be viewed as your attempt to "hide the ball" and keep evidence from the jury.

A. TIMELINESS

Make your objection promptly. An objection serves little purpose if the jury has already heard the answer to the objectionable question. If the witness is already answering the question, interrupt loudly, but politely, in order to keep the witness either from responding or from being heard. Don't let the witness answer until the objection has been ruled upon by the court.

B. BE POSITIVE

Try to state your objections to the Court in a positive, self-assured manner. Although deep down you may feel a bit awkward and perhaps even unsure, your outward appearance and apparent command of the situation and of yourself could persuade the court to your position. This is particularly true when the judge knows that you are right most of the time.

C. BE POLITE AND RESPECTFUL

Always try to be courteous to the court, the jury, and your opposing counsel. Being respectful and thoughtful is always to your credit with a jury. Remember, you are selling your case and it is partly through your demeanor that the court or jury will decide the outcome.

V. GENERAL OBJECTIONS

The general objection serves to reach the obviously improper question or matter to be introduced. It is phrased, "I object," "Objection!"

If you make this type of objection be prepared to follow it up with specific grounds. Remember C.R.E. 103 (a)(1) requires a specific objection if the grounds for the objection are not apparent from the context.

See: C.R.E. 103.

VI. SPECIFIC OBJECTIONS

A specific objection points out the reasons why your objection should be sustained. If a specific objection is called for and a general objection is made, it may be overruled. If a specific objection is called for and the wrong basis is given, the objection may also be overruled. Also, and perhaps even more damaging, is the rule that if the wrong specific objection is made you have waived appellate rights as to the correct one (unless you are subsequently sustained on the proper grounds).

Examples:

- The answer is not responsive;
- The question calls for a hearsay response;
- The question is leading (direct examination only);
- Irrelevant;
- The question has been asked and answered;
- The question calls for speculation;

- The question is argumentative; or
- No foundation (or an insufficient foundation) has been laid for the admission of (books, opinions, pictures, expert testimony, etc . . .).

VII. OBJECTION TO THE FORM OF QUESTIONS

A. AMBIGUOUS

The question may not be specific as to its meaning and therefore can easily be misunderstood by the witness.

B. ASSUMING FACTS NOT IN EVIDENCE

Questions which include facts which are not properly in evidence.

When the light turned green . . .? When there has been no evidence of what color the light was or that the witness saw the light change color.

C. CONFUSING

Questions not capable of being understood in any manner and therefore likely to elicit any number of different answers.

Example: "Isn't it true that if you had been under a different impression about what you think you saw that your response to Officer Jones may not have been different?"

D. BEYOND THE SCOPE OF . . .

(Direct, Redirect or Cross-Examination)
The question covers ground that was not asked about or included in the previous examination. Be aware that this rule is not very carefully adhered to in many courts, particularly during cross-examination. Every judge is different however, and the rule can be a method of controlling the course of the trial.

Example: "Officer, please tell us about the procedure for collecting a second sample of breath?" Where your direct only covered the stop of the defendant and the request for a DUI officer.

E. ARGUMENTATIVE

The question does not seek information but rather asks the witness to assume the conclusion implicit in the question.

Example: "Officer, how long did you lay-in-wait for my client to come out of the bar?" The question assumes that the officer was laying-in-wait, or out to get the defendant. If the officer says "20 minutes", he has implicitly agreed that he was laying-in-wait.

F. COMPOUND QUESTION

A question which contains more than one question. See also "confusing" questions.

Example " Officer didn't my client agree to take the roadside test and tell you he was not drunk?"

G. HEARSAY

This is a question which asks the witness to restate an assertion made out-of-court which is offered for the truth of the matter asserted.

Example: "What did your husband say when you told him you had been arrested?"

SEE: C.R.E. 801 through 806.

H. LEADING

The question suggests the answer sought from the witness. Leading questions are generally permissible during cross-examination and for connecting introductory matters, or matters which are not critical issues in the case during direct examination.

Leading questions are also permissible in attacking the credibility of witnesses.

Example: My client didn't stumble did he? Improper if asked during direct examination.

SEE: C.R.E. 611 (c); McCormick on Evidence, Chapter 2, Section 6. (2d Edition, 1972).

I. SPECULATIVE

A question which by its form asks the witness to guess or to give opinions beyond his particular knowledge.

Example: "Isn't it possible, Officer Jones, that a middle ear defect could affect the defendant's ability to perform the roadside sobriety test?"

J. IRRELEVANT

An irrelevant question is one which asks for evidence that has no tendency to prove or disprove any issue in the case. Whether is a question call for relevant or irrelevant information always depends on the context in which the question is asked.

Example: Where the witness has been called to describe the defendant's driving actions the question "How long have you been driving?", may be relevant. Where the witness is called to testify as to the defendant's statements at the scene of an accident, the same question does not seem to pertain to any material issue and deserves and objection.

SEE: C.R.E. 401 and 404.

K. MISSTATEMENT OF EVIDENCE

A question which misstates evidence or which is misleading in its characterization of evidence which has previously be introduced at trial is objectionable. Such misstatements often take the form of exaggeration or minimization. Both are frequently used tactics to confuse the jury.

Example: Where a witness has estimated the defendant's speed as between 40 and 50 m.p.h., a question, (even to the same witness) such as "Your speed estimate of 40 m.p.h. is simply your best guess correct?" is a misstatement of the evidence.

L. REPETITIOUS

A repetitious question is one that has already been asked and answered.

VIII. OBJECTIONS TO THE ANSWER SOUGHT BY THE QUESTION

A. HEARSAY

The hearsay objection should be raised whenever a question is posed the answer to which would include what someone said out-of-court and which would be offered for the truth of the matter asserted. If it is not offered for the truth of the matter asserted, then it is not hearsay. If you still want to exclude the testimony, you may be more successful by applying other reasons for objecting such as relevancy, lack of foundation, privilege, or other grounds.

SEE: C.R.E. 801 through 806.

B. OPINION/LACK OF FOUNDATION

An objection to a question calling for an opinion may be raised whenever the question calls for an opinion of the witness without a proper foundation laid or calls for information or knowledge beyond the witness's knowledge or expertise.

Example: Where a defense witness is asked her opinion of another witness's ability to see the events at issue, the question is objectionable unless such an opinion will be helpful to the jury's understanding of the case or other testimony. The question is also objectionable unless a proper foundation for the opinion has been laid.

SEE: C.R.E. 701 through 704.

C. SPECULATION

Objection should always be made when questions are asked that call for the witness to speculate about facts or material evidence.

Example: "Isn't it possible, Officer Smith, that the defendant might have refused the tests because of what he had been told to do by his friends if he was ever asked to take a blood or breath test?"

D. CONFIDENTIAL OR PRIVILEGE COMMUNICATIONS

Any question which seeks to penetrate privileged areas should draw an objection.

SEE: Section 13-90-107, C.R.S. Privileged relationships include husband/wife, attorney/client and physician/patient.

E. NARRATIVE ANSWER

Any question which invites an answer from the witness that is too broad, general, or indefinite falls in the narrative category and may be objected to as improper. Questions should limit the witness to specific points of inquiry and not give rise to essay type responses.

Example: "Please tell the jury what occurred on July 4, 2000?"

A narrative answer is not objectionable if the question posed has identified the specific area of inquiry.

Example: "Please tell the jury what you saw on the night of July 4, 2000 at the intersection of 17th and Broadway?"

F. IRRELEVANT

Any response that will not go to any issue of the case, or which is not probative, is irrelevant.

See examples above.

SEE: C.R.E. 401, 402 and 403.

IX. OBJECTION WHEN ANSWERS HAVE BEEN GIVEN

Remedy: Motion to Strike and to Instruct the Jury to Disregard the Answer.

A. NOT RESPONSIVE

The witness has given an answer which does not address the question asked or which attempts to volunteer information.

Example: Where the question is what time of day was it? And the response is "I've never trusted cops."

B. UNINTELLIGIBLE

Object when the witness' response is not understood or when it cannot be adequately heard in the courtroom.

C. TESTIMONY AIDED BY MEMORANDA

Object when a witness begins to read from a report or notes or other writings unless the reports, notes, or writing has already been introduced as evidence. Be sure that if a witness is using a writing to refresh their recollection one a proper foundation for refreshing recollection has been laid, and that the witness does not simply read the writing out loud.

SEE: C.R.E. 602.

X. STATING THE OBJECTION

- Objection! _____
- Objection, your honor, _____

- I object, your honor. The question calls for _____.

The purpose of any objection you make should be to exclude improper and irrelevant evidence. Some attorneys regard objections as an opportunity to mislead or distract the jury. Do not fall into the trap of making objections simply to delay or prevent the presentation of evidence which should properly be considered by the jury. Do not make objections just because you can. Use objections to facilitate the fair presentation of evidence in an understandable fashion.

Your intelligence tells you if an objection can be made. Your intelligence tempered by experience tells you whether you should object. As a beginning trial lawyer first work on recognizing when you have an objection to make. This requires more than a passing familiarity the rules of evidence. Know the rules. Once you know the rules of evidence you can work on learning to recognize when to make the objection and when to let the opportunity pass.

I. GENERAL DISCUSSION

Cross-examination generally yields the best evidence when it seeks to reinforce the strong points of your own case. Therefore, whether the witness is the defendant or his friends or an expert, you will help your case the most by asking questions with which the witness will agree and which produce testimony which can be effectively used in closing argument. Obviously if you can show the witness is lying, mistaken, forgetful or hopelessly prejudiced then do so, but that will be the unusual case.

Tailor your questions to the type of witness you face. The jury expects you to be firm, if not tough, on the defendant. They understand that you are adversaries. While you must never appear to be unfair to anyone, you certainly can convey to the jury by your questioning that the defendant's version is incredible and self-serving. Consider using the preface "Are you telling the jury . . .?"

When your witness is the defendant's expert, seek to bolster your evidence by getting the expert to agree on the objective signs of intoxication as well as the inability of anyone to drive safely above a certain level of alcohol consumption. You should be able to get him or her to agree that the intoxilyzer or gas chromatograph is a reliable scientific instrument. They may also acknowledge your expert to be competent and respected in the field. Avoid questions which remind the jury of the expert's damaging testimony during direct examination. Call the defense attorney before trial and ask for permission to speak to the defense expert before trial. (Hopefully the defense expert talk to you without charge.) If you get permission try to take an investigator with you to the interview so you can impeach the expert if his testimony varies from what he told you.

Listen to the defense lawyer's cross-examination of your witnesses -- then seek to use any effective points to your advantage. For instance, if he attacks your expert as biased because of the existence of a contract with law enforcement to analyze blood or urine samples, establish that his expert is also being paid for his testimony. Establish through the defendant's expert that each lab uses the same methods, i.e., gas chromatography, to quantify the alcohol content of blood and urine. Show that the same agency, the Colorado Department of Health, certifies each lab using the same rules, standards and methods of verification. (See also Chapter 8, IV.) If the defendant calls a friend or other lay witness, you may get an opportunity to establish a fact that you could not get through your own witnesses. For instance, establish the witness's familiarity with the defendant's reactions to consuming alcohol. By establishing what the

defendant is like when he has consumed alcohol, you will be able to compare or contrast that behavior to that manifested at the time of the offense. If the witness says the defendant does not drink much, you can argue later that he obviously could not "hold" his liquor. If the witness indicates that the defendant drinks regularly but did not appear intoxicated at the incident, you can later argue that the defendant was an experienced drinker who masked the signs.

General Rules (but remember, for every rule there is an exception):

1. Fish on the South Platte -- not in the courtroom. (However do not hesitate to break this rule if the witness is unpredictable and your case is such that you have nothing to lose by taking a chance.)

2. Ask questions on cross-examination only if you are certain the answer will help your case.

3. Never ask a witness on cross-examination "Why?" You can give an explanation in your closing which conforms to your theory of the case, not theirs.

4. Use leading questions. Practice phrasing your questions so that they call for non-narrative answers, i.e., avoid giving the witness a chance to explain his answer.

5. Control the witness but do not appear unfair.

6. Quit while you are ahead. Make your points, then sit down.

7. Limit your topics to preclude a redirect examination which allows the defense to go over its favorable testimony again.

8. Listen to the witness -- do not get distracted by making notes. If you get a great answer that you wish to copy verbatim, ask the Court for a moment.

9. To the extent possible prepare your cross-examination before trial. Refine it based on what the witness says on direct.

10. Do not argue or point out inconsistencies to the witness -- save it for closing.

II. SAMPLE QUESTIONS

A. CROSS-EXAMINATION OF THE DEFENDANT

Remember, while the scope of cross-examination is determined by the scope of the direct examination, the defendant while on the witness stand is treated no differently than any other witness. People v. Sallis, 857 P.2d 572, (Colo. App. 1993). (Note: of course 5th Amendment protections will preclude inquiry into certain areas, such as post-arrest, post-Miranda silence, see Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), People v. Quintana, 665 P.2d 605 (Colo. 1983), People v. Quintana, P.2d (Colo. App 1998).

1. Intoxication Generally

   a. Wouldn't you agree that too much alcohol affects a person's ability to drive safely?

   b. Wouldn't you agree that alcohol creates certain physical and mental changes in everyone?

   c. Wouldn't you agree that the symptoms or signs of alcohol consumption may sometimes vary from person to person?

   d. Isn't it true that intoxicated persons often have slurred speech?

   e. Isn't it true that intoxicated persons often lose their coordination?

   f. Don't intoxicated persons often have an odor of the alcoholic drink on their breath?

   g. Wouldn't you agree that a person who has had too much to drink will be unable to think clearly or follow directions?

h. Don't people who have had too much to drink often violate traffic laws? For instance, by forgetting to turn on their lights, by running stop signs, by weaving, etc.?

i. Red, bloodshot or watery eyes often go with drinking, don't they?

j. Wouldn't you agree that a person who has been drinking may be unable to drive safely even though he or she isn't falling down drunk?

k. Wouldn't you agree that the judgment of a person who has been drinking may be effected by the alcohol?

2. Reasonableness of the Officer

a. You heard the officer testify as to why he felt you were driving under the influence of alcohol, correct?

b. You heard him say that (give all indicators of the defendant's intoxication that the officer related) which he felt indicated that you were intoxicated, right?

c. Wouldn't you agree that if someone had displayed all the symptoms of intoxication that the officer described, then the officer would be reasonable in concluding that that person was under the influence?

3. Refusal of Test

a. Officer Johnson asked you to take a blood/breath test didn't he?

b. The officer explained to you that the purpose of the test was to determine the amount of alcohol in your system, correct?

c. The officer explained the Express Consent law of Colorado to you, correct?

d. She told you that if you refused to take a test that your driving privilege would be revoked for one year, correct?

e. And you refused to take either a blood or breath test, correct?

4. Reinforce Observations of the Officer -- (Use Noncontested Facts)

a. Officer Mobley was correct when he said this stop took place at 11:30 p.m. o'clock in the party lot of Shotgun Willy's right?

b. Officer Stevens was correct when she said that you were with your brother in the car, right?

c. Officer Ox was right when he said you were traveling at approximately 15 m.p.h. miles per hour, right?

d. The officer was correct when she testified that your breath smelled like you had been drinking?

5. Additional Areas of Inquiry

a. Drinking by defendant's other witnesses.

b. Time spent drinking and amount consumed.

c. Defendant's familiarity with the area if a traffic violation occurred (e.g. wrong way on one-way, red light, right-of-way, etc.).

d. Defendant's discussion of the case with his witnesses prior to trial.

6. Impeachment of Defendant and Defense Witnesses with Felony Conviction

a. See, generally, section 13-90-101,C.R.S.; C.R.E. 608, F.R.E. 609, Hampton v. People, 146 Colo. 570, 362 P.2d 864 (1961), and People v. Renstrom, 657

P.2d 461 (Colo. App. 1982). The prosecution must have a good faith basis for inquiring into a witness's prior felony convictions. Renstrom, supra at 163.

b. Questions:

(1) Have you ever been convicted of a felony?

(2) When?

(3) Where?

(4) What was the crime?

(5) Were you found guilty or did you plead guilty?

c. If the defendant or witness admits the conviction, you must stop there.

d. If the defendant or witness denies the conviction, you may introduce extrinsic evidence of the conviction (e.g., the mittimus).

e. If you impeach the defendant with a prior felony conviction, have the Court instruct the jury that the evidence may only be used to assess the defendant's credibility. This instruction should be given both when the evidence is introduced and in the final instructions.

People v. Goldsberry, 181 Colo. 406, 509 P.2d 801 (1973).

7. Impeachment with Prior Inconsistent Statement

When the defendant or other witness testifies contrary to their earlier statement, you may impeach the defendant or witness with their prior in or out of court statements.

See part C.2. below

B. CROSS-EXAMINATION OF LAY WITNESSES

1. Witnesses with the defendant when defendant was arrested:

   a. Were you subpoenaed to testify here today?

      (1) (If subpoenaed) You would have testified regardless of whether you were subpoenaed, right?

      (2) (If not subpoenaed) You are testifying because you are the defendant's friend, (cousin, father, etc.) right?

   b. You agree that the defendant was driving and did smell as if he had been drinking, correct?

   c. You had been drinking with the defendant, correct?

   d. Additional areas:

      (1) Reinforce observations of officer -- get witness to agree on uncontested observations of the defendant.

      (2) Test witness's memory -- ability to recall other events as clearly as they do the events or observations which are favorable to the defendant.

C. PRIOR INCONSISTENT STATEMENTS

CAVEAT: If the statement is the defendant's, and was made to a law enforcement official, you must show first that it was voluntary. This must be done out of the presence of the jury and optimally before the jury is sworn.

See also C.R.E. 410. The prior inconsistent statement comes in as non-hearsay, under C.R.E. 801(d)(1). Under C.R.E. 613 the statement comes in for impeachment only. However, section 16-10-201, C.R.S. provides the statutory authority for the admission of prior inconsistent statements as substantive evidence. See also,

People v. Madril, 746 P.2d 1329 (Colo. 1987), People v. Fischer, 904 P.2d 1326 (Colo. App. 1994).

1. Prior Inconsistent Statement, Impeachment Only

   a. Foundation required: Direct the witness's attention to:

      (1) Time of prior statement;

      (2) Occasion of prior statement;

      (3) Place of prior statement; and

      (4) Person to whom prior statement was made.

   b. If the witness either denies or can't recall the prior statement, you may introduce extrinsic evidence of the prior statement.

   c. If the witness recalls or admits the prior statement, you must stop with that acknowledgment.

   d. It is permissible to read the prior statement to the witness.

   e. The Court should instruct the jury on the limited purpose of the evidence.

   f. Examples: Statement taken in violation of Miranda; statement made in connection with a guilty plea while on the record, in court even though the plea is later withdrawn. See, C.R.E. 410.

2. Prior Inconsistent Statement as Both Impeachment and Substantive Evidence.

   a. Section 16-10-201, C.R.S., allows the jury to consider the prior statement as substantive evidence as well as for impeachment purposes. Extrinsic evidence of the prior statement may be offered regardless of the witness's denial or recall of it. Montoya v. People, 740 P.2d 992 (Colo. 1987).

b. Foundation

(1) Witness is either:

(i) Given opportunity on the stand to explain or deny the prior statement;

OR

(ii) Is still available at trial to give further testimony,

AND

(2) Prior statement concerned matters purportedly within witness's personal knowledge.

D. CROSS-EXAMINATION OF THE DEFENDANT'S EXPERT (FORENSIC TOXICOLOGIST WHO TESTED SECOND SAMPLE). SEE ALSO CHAPTER 8.

1. Consensus of Forensic Scientists

a. Would you agree that the consensus among forensic toxicologists is that at an alcohol level of .08, a person is unable to operate a car safely?

b. In fact, the inference that a person is incapable of driving safely at .10 already gives the defendant a 20% benefit of the doubt, correct?

2. Symptoms of Intoxication

a. You would agree, wouldn't you, that alcohol causes certain common physical and mental effects in people?

b. The common effects include (list the effects the defendant displayed, e.g. slurred speech, etc., or the common indicia of intoxication if the defendant did

not display any outward signs of being drunk), correct?

If the defendant displayed few of the more common indicia of intoxication, ask:

c. Not all people display each and every one of the effects of alcohol consumption, right?

d. In fact, drinkers who have developed a tolerance to alcohol over time are often able to mask some of the outward signs of intoxication, right?

e. Isn't it true that while the outward signs of intoxication may vary from person to person, everyone whose blood alcohol level is above .10 or even .08 is incapable of driving safely?

3. Intoxilyzers -- Certifications

a. Isn't it true that before the Intoxilyzer (identify model at issue) was put into service, the Colorado Board of Health conducted scientific tests to determine its accuracy and reliability?

b. Isn't it true that the Colorado Department of Health certifies each police department and its intoxilyzer only after the police department demonstrates that its procedures comply with the Department of Health's requirements?

c. Each officer who runs a test must be a certified operator, correct?

d. The Colorado Department of Health is the same board which certifies your lab, right?

4. Breath Test -- Department of Health Study

a. Are you familiar with the scientific study regarding the accuracy of intoxilyzers which the Department of Health conducted along with the Colorado Department of Highway Safety on September 20, 1988?

b. Isn't it true that the results of that study were that the Intoxilyzer 5000 and the 4011AS were found to be accurate and reliable?

5. Breath Test -- Tampering with Second Sample

Demonstrate with an exhibit how the second sample is packaged.

a. Isn't it true that the stoppers on the end of tubes can be removed without breaking the plastic bag open?

b. Isn't it true that if person removed the stoppers and then allowed the bag and the tube to warm, some or all of the alcohol will be lost?

III. MAKING AND MEETING OBJECTIONS RE: CROSS-EXAMINATION

A. RULES

C.R.E. 611, 402 and 403.

B. CASE LAW

1. The right to cross-examine is not absolute or unlimited. People v. Cole 654 P.2d 830 (Colo. 1982); People v. District Court, 719 P.2d 722 (Colo. 1986), People v. Griffin, 867 P.2d 27 (Colo. App. 1993).

2. The court has discretion to balance the defendant's right of confrontation against other interests (e.g., prevention of prejudice, promotion of judicial economy). People v. Edwards, 198 Colo. 52, 598 P.2d 126 (1979); People v. Hinchman 196 Colo. 526, 589 P.2d 917 (1978), cert. denied, Hinchman v. Colorado, 442 U.S. 941 (1979).

3. The court may prohibit cross-examination about irrelevant matters. (e.g., possible penalties witness could have received in plea agreement with prosecution, where agreement itself was admitted). People v. Loscutoff, 661 P.2d 274 (Colo. 1983); C.R.E. 403.

4. Cross-examination may not seek to impugn moral character of witness. (e.g., by showing that witness is homosexual). People v. Couch, 179 Colo. 324, 500 P.2d 967 (1972); People v. Diaz, 644 P.2d 71 (Colo.App. 1981); C.R.E. 402.

5. Court may limit repetitive interrogation. People v. Bowman, 669 P.2d 1369 (Colo. 1983); People v. Schwartz, 678 P.2d 1000 (Colo. 1984).

6. Generally the Court may prohibit evidence or cross-examination regarding pending charges and misdemeanor convictions of the witness. However, the Court may allow it where it is relevant to show motive, bias, prejudice or interest in the outcome of the trial. People v. King, 179 Colo. 94, 498 P.2d 1142 (1972); People v. Bowman, supra; People v. Peterson, 633 P.2d 1088 (Colo.App. 1981), aff'd in part, rev'd in part 656 P.2d 1301 (Colo. 1983).

7. When the door has been opened on direct, the matter may be inquired into on cross even if it would not be admissible otherwise. (e.g., where the defendant opens door by discussing his drinking habits or his character). People v. Lucero, 677 P.2d 370 (Colo. App. 1983).

8. Court may prohibit cross-examination which is harassing, annoying, humiliating, or would endanger the witness. People ex rel Dunbar v. District Court, 177 Colo. 429, 494 P.2d 841 (1972); C.R.E. 611(a).

9. The memory loss (real or feigned) of a witness does not deny a defendant his right to confront and cross-examine. People v. Pepper, 193 Colo. 505, 568 P.2d 446 (1977).

10. The Court may prohibit cross-examination questions which call for a hearsay response. People v. Schuemann, 190 Colo. 474, 548 P.2d 911 (1976).

11. Court may limit cross-examination questions which call for an answer which would violate a privilege. People v. District Court, 719 P.2d 722 (Colo. 1986); People v. Williams, 40 Colo. App. 30, 569 P.2d 339 (1977).

12. Court may prohibit cross-examination of a police officer as to his disciplinary record unless it can be shown to affect the officer's bias, motive, memory, etc. People v. Atencio, 193 Colo. 184, 565 P.2d 921 (1977).

13. Court may prohibit cross-examination as to alleged misdeeds (except felony convictions) of witness unless probative of witness's character for truthfulness. People v. Saldana, 670 P.2d 14 (Colo.App. 1983); C.R.E. 608(b).

14. Cross-examination may properly inquire into both whether a witness is biased or motivated and why he is so. People v. Trujillo, 40 Colo. App. 220, 577 P.2d 297 (1977).

15. Either party may impeach a witness, including the party who called the witness. C.R.E. 607.

16. Either party may use leading questions if the witness is hostile or adverse, regardless of whose witness it is. C.R.E. 611(c).

17. Before the defendant testifies it is required for the Court to advise him of his rights pursuant to People v. Curtis, 681 P.2d 504 (Colo. 1984).

18. Suppressed evidence may be used to impeach the defendant so long as the suppressed evidence directly contradicts the direct testimony. LeMasters v. People, 678 P.2d 538 (Colo. 1984); Oregon v. Hass 420 U.S. 714 (1975). If the suppressed evidence is a statement of the defendant, the court must have found the statement to be voluntary.

I. CHECKLIST

A. Do's

1. Tell the jury how your evidence proved all the elements of each offense charged.
2. Review instructions which are helpful to your case.
3. Explain how your evidence met the expectations the jurors expressed in voir dire.
4. Demonstrate how you kept the promises you made in your opening statement.
5. Contrast inconsistencies between the defendant's opening statement and the evidence.
6. Review all documentary or real evidence.
7. Discuss how the officer treated the defendant fairly by offering tests which demonstrated the defendant's state of intoxication.
8. Emphasize the common sense nature of proof beyond a reasonable doubt.
9. Discuss all reasonable inferences that may be drawn from the evidence.
10. If the defendant put on evidence, ask the jury to consider both what they heard and did not hear (but do not comment on the defendant's silence if he did not testify).
11. Be yourself.
12. Tie together your theory of the case.
13. Emphasize the officer's training and experience.

14. Remind the jury that the defendant is on trial -- not the officer or the state.

15. Be positive, confident, and thorough.

16. Briefly thank the jurors for their service.

17. Make your argument interesting -- use colorful (but not inflammatory) language.

18. Repeat as often as possible the positive evidence.

19. Emphasize the responsibility of the defendant.

20. Use exact quotes from the evidence.

21. Use an outline to avoid reading your closing.

22. Think like a juror.

23. Know where you are going with your argument.

24. Emphasize that you do not have to prove unsafe driving but simply an inability to drive safely.

25. Emphasize how just a little alcohol-induced inattention can have disastrous consequences, but do not attempt to inflame the jury.

26. Remind jurors how experienced drinkers can cover up outward symptoms of intoxication.

27. Use rhetorical questions to keep the jurors interested and attentive.

28. Ask jurors to recall their own experiences with intoxicated people. And how alcohol interferes with those individual's ability to function mentally and physically.

B. DON'TS

1. Comment on the defendant's failure to testify or to produce evidence.

2. Interject your personal opinion.

3. Mistate the evidence or comment on evidence not admitted.

4. Interject inflammatory, sympathetic, or prejudicial issues.

5. Shift the burden of proof to the defendant.

6. Attack the defendant's or his attorney's personal characteristics.

7. Apologize for case weaknesses.

8. Repeat devastating points made by your opponent.

9. Assume the jury has heard all the evidence or understood the necessary connections. Explain everything.

II. MEETING AND MAKING OBJECTIONS

A. PROPER ARGUMENT

1. If the defendant puts on evidence

   Prosecutor may comment on the defendant's failure to present other evidence which supports his theory of the case. People v. Medina, 190 Colo. 225, 545 P.2d 702 (1976); People v. Martinez, 652 P.2d 174 (Colo. App. 1981).

2. Reasonable inferences

   Either side may draw reasonable inferences from the evidence as to the facts and the credibility of witnesses. Leick v. People, 136 Colo. 535, 322 P.2d 674 (1958), cert. denied, 357 U.S. 922 (1958).

3. Demeanor of witnesses

Either side may comment on the demeanor of a witness (including the defendant) as it affects his or her credibility. People v. Constant, 645 P.2d 843 (Colo. 1982), cert. denied, 459 U.S. 832 (1982). (Prefacing your remarks with "I submit" avoids personalizing your opinion).

4. Provoked reply

If opposing counsel has opened the door by an improper comment, the court may permit a response. Use caution. First object to the initial improper comment and then seek leave of the court to respond. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

5. Prior felony convictions

A prior felony conviction may be used to argue the credibility of the witness (including the defendant) -- but not for other purposes. Section 13-90-101, C.R.S.; People v. Valdez, 725 P.2d 29 (Colo. App. 1986).

B. IMPROPER ARGUMENT

1. Defendant's failure to testify or produce evidence

Unless the defendant "opens the door", the prosecutor can not use the defendant's failure to testify or to produce evidence as evidence of guilt. People v. Todd, 189 Colo. 117, 538 P.2d 433 (1975). However, the prosecution has the right to respond to the arguments and evidence of the defendant. United States v. Robinson, 485 U. S. 25 (1988). When the prosecution's comment on the defendant's failure to testify is a fair response to a claim of the defendant that he did not have a chance to "tell his side of the story", the comment does not violate the defendant's Fifth Amendment privilege. Robinson. The prosecution may not use the defendant's silence as substantive evidence, of guilt, Griffin v. California, 380 U. S. 609 (1965), but that does not mean that the prosecution may not refer to a defendant's failure to testify in response to an argument of defense counsel. Robinson. Each case must be assessed on a case-by-case basis to determine whether prosecutorial comment on the

defendant's silence constitutes fair response, or an attempt to use the silence as substantive evidence of guilt.

2. Defendant's silence at time of arrest

A prosecutor may not comment on the defendant's silence at the time of arrest. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965) People v. Mozee, 723 P.2d 117 (Colo. 1986). But fair responsive comment should be allowed even if the defendant's pre- or post-arrest silence is addressed by the defendant. See 1 above.

3. Personal opinion

Neither side may offer their personal opinion of the evidence or the credibility of witnesses. People v. Loscutoff, 661 P.2d 274 (Colo. 1983); Wilson v. People, 743 P.2d 415 (Colo. 1987); American Bar Association, Standards Relating to the Prosecution Function and the Defense Function, Sections 5.8 (Prosecution) and 7.8 (Defense).

4. Issues not in evidence

Neither side may discuss evidence or make inferences not supported by the record. People v. Burress, 183 Colo. 146, 515 P.2d 460 (1973); People v. Lundy, 188 Colo. 194, 533 P.2d 920 (1975).

5. Calling the witness or defendant a liar

Neither side may state that the witness is lying if it amounts to an expression of a personal opinion. Wilson v. People, 743 P.2d 415 (Colo. 1987); People v. Swanson, 638 P.2d 45 (Colo. 1981).

6. Inflammatory Comments

Neither side may appeal to the jurors' fear, sympathy, prejudice or bigotry. People v. DeHerrera, 697 P.2d 734 (Colo. 1985).

7. Comment on unavailable evidence

Neither side may ask the jury to consider why certain evidence was not admitted when it is known that it is unavailable or suppressed. Rizzo v. United States, 304 F.2d 810 (8th Cir. 1962); American Bar Association, Standards Relating to the Prosecution Function and the Defense Function, Section 7.9.

8. Personal attack on counsel or the defendant

An argument not about the evidence of the case is improper and misleading to the jury. State v. Simpson, 247 La. 883, 175 So. 2d 255 (1965), cert. denied, 384 U.S. 1014 (1966).

9. Effect of the verdict

It is improper to ask the jury to consider what a verdict's effect might be on the defendant, the victim or the community. People v. Adams, 708 P.2d 813 (Colo. App. 1985).

III. GENERAL DISCUSSION

Closing argument is your chance to put the best possible light on the evidence. It is your chance both to remind the jurors what they heard (thereby reinforcing it by repetition) and to interpret it so as to draw all reasonable conclusions in your favor. Since it is unlikely that the jurors understood or viewed the evidence in exactly the same way that you did, you now have the opportunity to tell them in your words what it all means.

Do not be timid. Tell the jurors in a positive, forceful, and interesting manner that you have proven your case. So long as your argument is based on the evidence, reasonable inferences and matters which are so common as to be subject to judicial notice (such as the effect of alcohol on a person), your argument is proper. Most of the errors which occur during closing argument relate to: improperly commenting on the defendant's silence or failure to present evidence, personal attacks on the defendant or his or her lawyer, expressing a personal opinion, commenting on the verdict's effect and commenting on matters not in evidence. The exercise of common sense will usually prevent this type of mistake and will allow you to concentrate on making an effective closing.

The prosecutor has several difficulties to overcome in a DUI trial. Most jurors will want to see a test of the defendant's blood or breath. Some jurors will not consider DUI a crime. Some jurors will themselves have driven after having had too much to drink. Many jurors will feel that unless the defendant was knee-walking drunk then he or she was okay to drive. Often jurors will confuse the lack of a collision or bad driving with the ability to drive safely. Some jurors will feel that a DUI is no different than any other traffic charge. Most often the defendant is an ordinary person, a non-criminal type that the jury may identify with or at least not dislike or fear as in most other criminal trials. Some trials involve just the officer's word against the defendant's, and sometimes the defendant's friends. Sometimes you will have a defendant with a high BA and few outward physical symptoms.

If you have no blood or breath test -- remind the jury who refused the test and ask them to consider why. It is certainly fair to argue that the jury may infer that the defendant was fearful of the results. Cox v. People, 735 P.2d 153 (Colo. 1987). Explain how painless the intoxilyzer is and how common the drawing of blood by nurses in hospitals. Do likewise with a refusal to do the roadsides, (if the officer had probable cause to believe the defendant was DUI or DWAI. McGuire v. People, 749 P.2d 960 (Colo. 1988).

If you got the impression in voir dire that your jurors do not consider DUI a crime, then emphasize the defendant's accountability or responsibility for his or her acts, rather than guilt. And if you get the "There, but for the grace of God, go I" argument, remind the jurors of their obligation as representatives of the community and their oath. Respond also that "two wrongs do not make a right". That is, finding the defendant not guilty despite the evidence of his or her guilt would not change the misconduct of someone else who was not caught. Also remember that the "grace of God" argument is objectionable in the first place as a call to sympathy.

When you have a defendant who was not exhibiting all the typical signs of intoxication, urge the jurors to consider their own experience with intoxicated people and to ask themselves if each such intoxicated person reacted exactly the same way to alcohol. Ask them too if they aren't familiar with examples of people who can drink a lot and not look intoxicated, but who were never-the-less clumsy in performing certain tasks. Then emphasize that driving is no simple task but requires concentration, split-second reactions, and a clear head -- abilities which are always affected by alcohol.

If there is no bad driving, remind the jurors of their agreement in voir dire that the ability to drive defensively is included in safe driving. Emphasize all the factors that surrounded the defendant's driving at the time of the offense -- e.g., limited vision due to darkness, heavy traffic, children or pedestrians, narrow lanes, rain or bad weather, etc. Point out that it is the inability to drive safely which constitutes the offense.

While it is improper to attack the defendant, there is nothing improper in pointing out to the jury just how different the defendant looks and acts at trial, if he testified, in comparison to the witnesses' accounts of the defendant during the incident. Seek to show the jury during closing any pictures or other evidence that will make the contrast real. Remember you must overcome the jurors' possibly favorable impression of the defendant since it is unlikely that he was drunk or had his fly open during trial. Be colorful (not inflammatory) and thorough.

When your only witness is the arresting officer, and the defendant argues that the defendant's testimony must be considered just like the officer's, read the credibility instruction to the jurors to remind them that they should consider the witness' "knowledge, . . . means of knowledge, . . . and ability to observe." It is helpful to emphasize the officer's specialized DUI training, the number of his or her DUI contacts and arrests, the length of time spent processing the defendant, the corroborating circumstances observed (such as lack of skid marks in a collision), and the contrast between the defendant's appearance and behavior at the time of the incident and in the courtroom. Point out that the officer is not just a witness like any other but that he has very specialized knowledge and abilities in detecting a DUI driver. Compare it to the situation in which a person who has been raised on a ranch and a city person each look at a horse. While each can say it is a horse, the rancher is the one who knows what to look for and can explain its breed, age, abilities, health and value.

The obligations and limits on closing arguments are nearly the same for the prosecutor as for the defense lawyer. Each may argue credibility of witnesses and inferences based on the evidence. Neither may argue about evidence not admitted, inferences not supported by the evidence, consequences of conviction or acquittal, issues of sympathy or prejudice, abilities or conduct of counsel, definitions or instructions not pertinent, or personal opinions of the lawyers. The prosecutor must be cautious to not improperly comment on the defendant's failure to testify or present evidence.

It is beyond the scope of this book to include suggestions on argument style and theory. A well prepared prosecutor should read and take to heart the following materials:

1. Trial Techniques, A Compendium of Course Materials, Chapter 8, Closing Arguments, published by National College of District Attorneys, 6th Edition (1988).

2. American Bar Association, Standards Relating to the Prosecution Function and the Defense Function, Sections 5.8, 7.8, and 7.9 (1971).

3. Walking a Tightrope, A Survey of the Limitations of the Prosecutor's Closing Argument by Henry Blaine Vess, Journal of Criminal Law and Criminology, Vol. 64, No. 1, published by Northwestern University School of Law (1973).

4. Colorado Rules of Professional Condcut: 34. Fairness to Opposing Party and Counsel; 3.8 Special Responsibilities of a Prosecutor

5. Wharton's Criminal Procedure, Sections 527, 532, 12th Ed. (1973).

I. INTRODUCTION

The prosecutor should take special care in establishing a record for the providency of the plea. Although Crim.P. 11(c), provides a shorthand method for acceptance of the plea of guilty in misdemeanor cases, it is unwise to rely completely on such a procedure.

Pleas may be attacked collaterally are subject to time limits. See section 42-4-1702, C.R.S. (six months for DUI/DWAI convictions). Often a defendant facing a charge of DUI/DWAI -- Second Offense, or the possibility of being classified a Habitual Traffic Offender will attempt to have a previous conviction vacated on the grounds that the plea was not voluntarily and knowingly made. To avoid this maneuver, help the court establish a clear record at the time a plea it is taken.

II. EXAMPLE OF A SUFFICIENT ADVISEMENT

The trial court, (or the prosecutor if the court refuses), should ask the defendant each of the following questions:

- Are you presently under the influence of drugs or alcohol?
- Do you have any mental or emotional disability which would affect your understanding of this proceeding?
- Do you now waive your right to have counsel of your choice, or if you cannot afford counsel, the right to have counsel appointed to represent you free of charge?

  (OR)

- Have you discussed this matter fully with your attorney and are you satisfied with his or her advice?
- Do you understand that by pleading guilty, you admit the charge?
- Do you understand that you are admitting the elements of the charge, which are:
  - That you were driving a motor vehicle,

- while you were under the influence of alcohol (and/or drugs) to a degree that you were substantially incapable, either mentally or physically or both mentally and physically, to exercise clear judgement, sufficient physical control, or due care,

- in the safe operation of your vehicle.

- Do you understand these elements?

- Do you understand that the possible range of penalties for this charge is as follows: (court should fill in all applicable sentencing possibilities).

- Have you been promised any leniency or special consideration for entering this plea?

- Do you understand that the Court will not be bound by any representations made to you by anyone concerning the penalty to be imposed or the granting or denial of probation?

- Do you understand that by pleading guilty, you are waiving your right to a trial by jury, your right to confront the witnesses against you, your right to present evidence in your defense, your right to compel the attendance of witnesses, your right to appeal, and your right to require the prosecution to prove your guilt beyond a reasonable doubt?

- Do you understand that you will be required to undergo an alcohol evaluation and that a total of twelve (12) points will be assessed against your driving privilege, making it likely that your driving privilege will be suspended in this state? (Eight points for DWAI)

- Is there a plea agreement in this case?

  - If so, do you understand it?

  - What is the plea agreement?

- Has anyone coerced, threatened or pressured you into pleading guilty?

- Are you pleading guilty voluntarily?

- How do you plead, guilty or not guilty?
- State in your own words what you did that makes you guilty?

The prosecutor should ask the court to determine that there is a factual basis for the underlying charge or the defendant's plea, or that the defendant waives the establishment of a factual basis.

The court should ask the defendant whether he or she agrees with each of the statements made by the prosecutor.

Always request that the trial court make a finding as to whether or not the plea was voluntary and whether the defendant understood the nature of the charge and possible consequences of his or her guilty plea.

Once the court has determined that the plea is voluntary, that the defendant understands the nature and elements of the charge, and the possible penalties, the court may accept the plea of guilty.

III. THE USE OF FORMS TO SUPPLEMENT THE COURT'S ADVISEMENT

Ideally, the trial court's advisement and findings regarding the defendant's plea should be both oral and in writing. Unfortunately, crowded trial dockets often prevent the county court judges from conducting anything but a cursory providency hearing.

Reliance solely upon a printed form and nothing more is insufficient to establish the constitutional validity of a guilty plea or compliance with Crim.P. 11, but it is a relevant factor a court will look at. An appellate court will look to the totality of the circumstances in determining the validity of a plea. The prosecutor should therefore urge the trial court, at a minimum, to ascertain that the defendant understands the nature of the charges, the possible penalties, and that the defendant enters the plea voluntarily.

The following is an example of a guilty plea form that you may use and/or modify for application in your jurisdiction:

ATTACHMENT 1

_____COUNTY COURT
STATE OF COLORADO
PEOPLE OF THE STATE OF COLORADO
v.
_____
Court _____

ADVISEMENT PER CRIM.P. 11 and PLEA OF GUILTY
ALCOHOL/DRUG DRIVING OFFENSE

Case No. _____

I. The undersigned acknowledges that he/she is the defendant in this case and that his/her true name is a stated above.

II. The following is a statement of the rights which you, the defendant, have in this case:

A. You have the right to enter a plea of not guilty and have a trial in this case either to the Court or to a jury.

B. You have the right to be represented by your attorney throughout the trial and at all proceedings related to this case.

C. If you cannot afford to hire an attorney, you can ask the Court to appoint one for you without cost to you and one will be appointed if you qualify.

D. You are presumed innocent of the charges pending against you. The presumption of innocence will remain with you throughout trial unless and until the prosecution presents evidence to prove you guilty beyond a reasonable doubt.

E. You have the right to confront the witnesses called to testify against you and to cross-examine those witnesses.

F. You have the right to present evidence in your own defense and to compel the attendance of witnesses by subpoenas issued by the Court or by your attorney.

G. You have the right to remain silent or testify in your defense as you choose. If you choose to remain silent, your silence cannot be used against you.

H. If you are found guilty, you have the right to appeal to a higher Court to review the judgment of the Court.

III. The defendant acknowledges the following:

A. I acknowledge that I have read and understand the elements of, and the penalty for the offense stated in Section_____on the reverse of this form. I understand that the prosecution would have to prove each element of the offense beyond a reasonable doubt before I could be convicted of the offense at a trial. I am entering a plea of guilty to that offense.

B. I am entering my plea of guilty voluntarily and not as a result of coercion or undue influence on the part of anyone. There has been no force, threats or promises made to me to cause me to enter this plea.

C. I understand that the Court will not be bound by any representations made by anyone to me concerning the penalty to be imposed or the granting or denial of probation unless such representations are included in a formal plea agreement approved by the Court.

D. I acknowledge that there is a factual basis for this plea or, if this plea is the result of a plea bargain, I waive the establishment of a factual basis for the charge.

E. I understand that my plea of guilty to the offense stated in Section_____on the reverse of this form may result in the immediate loss of my driver's license or driving privilege in this State.

F. At this time I am not under the influence of any drugs, intoxicants, or medication nor do I have any physical or mental problems which would interfere with my ability to understand the advisement given in this form.

IV. I acknowledge that I have read and understand the advisement of rights in section II above, and I understand that by entering my plea of guilty to the charge, I am waiving and giving up all the rights set forth in section II above. I also acknowledge that I have read and understand the statements in section I and III above and those statements are true and correct. I also

acknowledge that I have read and understand the offense, elements of the offense, and possible penalties as set forth on the back of this form.

V. I consent to the _____ County, County Court judge or referee hearing this matter.

NOTE:DEFENDANTS MAY BE REQUIRED TO PAY AT LEAST $447.00 ON THE DAY OF SENTENCING TOWARD THE PAYMENT OF FINES AND COSTS FOR THE OFFENSES SET FORTH ON THE REVERSE OF THIS FORM.

Signed this
(date)_____

Defendant's Signature

VI. I acknowledge that I have reviewed this advisement with the defendant and I believe that he/she understands his/her rights, the nature of the offense and the possible penalties and is entering his/her plea voluntarily and knowingly.

Signed this
(date)_____

Print Name

_____ _____

Attorney's Signature Registration Number

ORDER

This Court finds that the defendant has entered his/her guilty plea to the offense(s) voluntarily with the full understanding of his/her rights, the nature of the offense and the possible penalties. The Court therefore accepts the Defendant's plea of guilty.

Signed this (date)_____

_____
Judge

IV. PLEA BARGAINING

In the DUI case, prosecutorial discretion in plea bargaining is limited by section 42-4-1202(3.7), C.R.S. That section prohibits a court from accepting a plea of guilty to a non-alcohol or non-drug related traffic offense from a person who has been charged with a violation of that nature unless the prosecutor makes a good faith representation that he or she could not establish a prima facie case if the defendant were brought to trial on the original alcohol or drug related offense.

Further, the prosecutor's agreement to make sentencing "recommendations" is in fact sentence a "concession" under Crim.P. 32(d), and a defendant must be permitted to withdraw his or her guilty plea if the trial court chooses not to follow the prosecutor's agreed upon sentence "recommendation", regardless of whether the prosecutor has promised that the court will or will not follow the recommendation.

SEE: People v. Wright, 194 Colo. 448, 573 P.2d 551 (1978). But see Young v. People, 00SC2401 (Colo. July 2, 2001) and Dawson v. People, 99SC995 (Colo. July 2, 2001) (there may be an exception if the trial judge specifically tells the defendant he won't be allowed to withdraw his plea).

V. WITHDRAWAL OR SUPPRESSION OF PLEAS

A comprehensive examination of the various issues, tactics and considerations that should be considered when a defendant seeks to attack a previous guilty plea is beyond the scope of this manual. See Crim.P. 32(d) and 35(c). However, a prosecutor should keep in mind a few critical points:

1. "A defendant attacking the constitutionality of a prior conviction . . . must make a prima facie showing that the guilty plea was unconstitutionally obtained. A prima facie showing means evidence that, when considered in a light most favorable to the defendant, will permit the court to conclude that the conviction failed to meet relevant constitutional standards." Lacy v. People, 775 P.2d 1 (1989), cert. denied, Colorado v. Lacy, 493 U.S. 944, 110 S.Ct. 350 (1989). Once a prima facie showing is made, the burden shifts to the prosecution to demonstrate, by a

preponderance of the evidence, that the conviction was constitutionally obtained. Lacy.

2. As previously discussed, there are times and other limitations on a defendant's right to collaterally attack a prior conviction. Section 16-5-402, C.R.S. imposes an eighteen month time limit on a collateral attack in a misdemeanor case. DUI and DWAI convictions are subject to a special six month collateral attack limitation. See section 42-4-1702, C.R.S.

3. A final consideration for the prosecutor in the taking of guilty pleas:

   A defendant may not, as a matter of right, withdraw his or her plea of guilt prior to the imposition of sentence under Crim.P. 32(d).

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This chapter is a collection of suggestions and ideas on various topics relating to DUI prosecution. It is offered first to assist the prosecutor in the basic areas of DUI trial preparation. It is also offered to help stimulate his or her thinking on how to approach not just the basic science, but also the evolving art of the DUI trial.

I. GENERAL PREPARATION AS A DUI PROSECUTOR

A substantial part of the development of a DUI prosecutorial philosophy comes from basic background preparation and viewing the mechanics of the DUI case from the "inside" -- which means from personal experiences.

A. THINGS TO DO:

1. Ride with police officers 20-40 hours on different days of the week and at different times -- include a "swing shift"; observe aspects of the DUI case from the driving infraction through the roadside sobriety tests, transportation of the suspect, and the events in the station house. This should include the breath and blood tests, and observations on when and how police officers prepare their written reports;

2. Be certain to talk with the officers about their perceptions of a DUI investigation, report preparation, and their fears and concerns which arise when they take the stand at trial;

3. Invite an expert from the Colorado Department of Health and/or an independent testing laboratory to discuss standard defense issues raised in trial relating to breath, blood and urine tests and how to effectively present their testimony in your case in chief (and how to effectively cross-examine a defense expert witness);

4. If time permits, visit the scene of the DUI arrest, with the officer, in order to crystallize the scene and the facts in your mind;

5. Observe top prosecuting attorneys and top defense attorneys in trial. Ask your more experienced colleagues questions about any issues, theories, concepts, arguments, or tactics you want to learn or understand better. You will find most of

them willing to share their experience with you. Even if they do not know the answer to a specific question, the very process of formulating the question may give you a better understanding of the issue;

6. Talk with jurors after trial whenever possible; resist the temptation to reargue the facts of the case you just tried. Instead ask them what types of evidence and which kinds of argument they found persuasive; make notes of these points for future reference;

7. Review the DUI statute, the case law and rules of evidence whenever possible. Compare notes with other prosecutors; keep a notebook of relevant new statutes and case law handy for ready reference;

8. Develop your own trial notebook of the law, strategies, tactics and issues in a DUI trial for your regular and continuing use;

9. Do not be bashful in requesting assistance from your victim-witness coordinator and district attorney investigator whenever appropriate or give them a stake in the outcome of your case;

10. Try to make a habit of looking at your trial files as early as possible before trial. This can give you needed time to correct defects, prepare motions in limine, plea-bargain and discover possible defenses;

11. Befriend the court staff in a professional manner, and find out how you can assist in reducing court staff pressures and frustrations; the effort is usually well-received and often returned in kind.

B. MATERIALS TO REVIEW GENERALLY:

1. This volume of the CDAC DUI/DWAI Manual;

2. Department of Highways DUI Enforcement Manual;

3. CDAC Evidence Manual - 2001 Ed.;

4. Trial Techniques - A Compendium of Course Materials;

5. Colorado Peace Officers' Legal Source Book;

6. Erwin, Defense of Drunk Driving Cases (3 volumes);

7. ABA Standards on the Prosecution Function;

8. Department of Health regulations relating to testing for alcohol in breath, blood and urine;

9. Rules of Professional Conduct

II. SOME ETHICAL CONSIDERATIONS IN PLEA BARGAINING AND TRIAL

The prosecutor has ethical obligations that go beyond those of private attorney's. Those obligations are identified in the following sources: Title 20, Article 1, C.R.S.; The American Bar Association's Standards for Criminal Justice; The Rules of Professional Conduct; the current Bar-Press Compact of Understanding; and individual office policy manuals. It is helpful to have a copy of all of these materials collated, organized and readily available when problems arise before and during trial. See for example:

1. Colorado Revised Statutes:
   District Attorneys
   Section 20-1-101 through 20-1-308;

2. Rules of Professional Conduct:
   3.8 Special Responsibilities of a Prosecutor
   4.2 Communication with a Person Represented by Counsel
   4.3 Deal with an Unrepresented Person

3. ABA Standards for Criminal Justice:
   3-1.1 (Prosecutor functions);
   3-4.1 (Plea-bargaining availability);
   3-4.2 (Fulfilling plea-bargaining);

4. Colorado Revised Statutes on Plea-Bargaining:
   16-7-301 (District attorney's opportunities);
   16-7-302 (Trial judge responsibilities).

5. "Free Press and Fair Trial in Colorado", a Compact of Understanding of the Bar and Press

6. Your Office Policy Manual

7. Deferred Prosecutions
Section 16-7-401, C.R.S.;
Deferred Judgment and Sentencing
Section 16-7-403, C.R.S.

Honoring plea agreements is an integral part of the prosecutor's statutory and ethical duties. This includes honoring properly bargained-for plea agreements recorded on files you are currently handling. As a practical matter, two of the best ways to avoid misunderstandings concerning a plea-bargain are:

A. Record in writing on the file the specific offer, parties to it, all terms, time limitations, and conditions precedent or subsequent, followed by the initials and date of both counsel; or

B. Memorialize the specific agreement in letter form sent to the opposing attorney, with a copy for your file.

SEE: Santobello v. New York, 404 U.S. 257 (1971); People v. McClellan, 183 Colo. 176, 515 P.2d 1127 (1973); and People v. Macrander, 756 P.2d 356 (Colo. 1988).

III. PLEA-BARGAINING AND PRETRIAL TACTICS

The practice of plea-bargaining is an art which must take into account formalized rules, statutes, ethical standards, and your own personal style of head-to-head negotiation. Some suggestions:

A. Think about what you are trying to accomplish; accountability of course, but what else? Is it appropriate that the defendant serve some time in jail? Should the defendant lose his license? Are there extenuating circumstances which merit a unique disposition;

B. In negotiation, evaluate the merits and actual facts of the case from all the evidence, not just what will be legally admissible in evidence;

C. Use negotiation as a discovery tool for your case. Take notes. If the defense wants a special deal based upon the merits of the case, have him specifically identify the weaknesses he claims;

D. It is very important that you be consistent with all similarly situated defendants and their attorneys, including "pro se" defendants;

E. Have logical arguments and articulable reasons to back up all decisions and policies. This makes offers more palatable to defendants and their attorneys. It will make you feel more comfortable as well;

F. Be sure to consider the competence of the defense attorney; help the attorney sell the offer to the defendant, and make sure the defendant, whether represented or not, personally knows the offer that is outstanding as well as any time limitations on acceptance;

G. Know all available information about the case and the defendant's background before proposing the first offer. This should include any personal facts offered by the defendant, your inquiries about other charges currently pending, and other alcohol convictions not on the record, current probation if any, and the defendant's alcohol and non-alcohol convictions in other states;

H. Make all pleas contingent upon the truth and accuracy of the defendant's and the defense attorney's representations. Put the burden on the defense attorney to check out and accurately represent the personal facts of his client and his history -- if necessary, reschedule a pre-trial conference so that the attorney can confirm the accuracy of his client's statements;

I. Understand the negotiation ritual from the other side -- that is, from the defense perspective. What does the defense want in resolving the case? What are they willing to accept?;

J. Do not fear (or discourage) defense attorneys reviewing their case with your supervisor if requested -- they want to do the best job they can for their clients;

K. Set early cut-off dates for outstanding plea offers in order to advance defense decisions and reduce your own office paper work on motions to amend, motions to add counts and subpoena preparation;

L. Clearly advise defendants and their attorneys that the court need not accept the plea agreement or your sentence "recommendations" (which are now legally recognized as "concessions");

SEE: See Young v. People, 00SC240; Dawson v. People, 99SC995 (July 2, 2001).

M. Make sure you can justify your offer to the arresting officer. You must make the final decision in the case, but it is nevertheless important that you not be viewed as a prosecutor who is willing to "give away the farm" just to get rid of a case; it is also important to discuss any proposed offer with the victims, if any. Discuss restitution, the defendant's accountability, punishment and rehabilitation issues;

N. It is very helpful in selling your plea offer to be able to articulate all possible penalties and their component parts, as well as the statutory scheme of penalties, probation criteria and probation conditions;

SEE:
a. DUI Penalties
Section 42-4-1301(9), C.R.S.

b. Purposes of Sentencing
Sections 18-1-102 and 102.5, C.R.S.

c. Probationary Power of the Court
Sections 16-11-201 et seq., C.R.S.

d. Probation Criteria
Section 16-11-203, C.R.S.

e. Conditions of Probation
Sections 16-11-204 and 204.5, C.R.S.

O. Regarding pretrial disclosure and discovery obligations, note how it is desirable and possible to shift the burden of taking action on discovery and meeting specific defense requests back to the defense. This occurs when the defense files standard "all purpose" or "shotgun" discovery motions. Respond with a "come and get it" letter;

P. Scrupulously honor all agreements and maintain personal consistency and integrity, both of which are essential to your successful practice as a prosecutor in negotiations and in trial.

However, do not hesitate to withdraw from an agreement which is based upon misrepresentations by the defendant or his attorney.

Because plea-bargaining is an individual art, there is no single ritual or formula that can adequately prepare you to decide what to do in any given case. Nevertheless, the decision to plea-bargain a case, the type of offer to be tendered, and possible sentence concessions should take into account at least the following criteria:

1. The factual merits of the charge or charges actually filed or fileable by the police or district attorney, including any possible sentence "enhancers" for repeat offenders under the DUI law;

2. The full range of sentence options and possible effects on driver's license privileges, for each such charge upon conviction;

3. The "offered" and "proven" background, personal facts, and record of the defendant (including whether other cases are pending);

4. All strengths, weaknesses, and the availability of your essential witnesses;

5. Consider whether your case is only "prima facie", clearly provable, or "jury-persuasive";

6. All matters in aggravation (legal and equitable);

7. All matters in mitigation (legal and equitable);

8. Docket problems and other cases with "trial priority";

9. Offers made to other defendants similarly situated;

10. Legislative intent in plea-bargaining and sentencing alternatives;

11. Individual office policy considerations;

12. The best interests of your client, the People of the State of Colorado.

IV. FUNDAMENTALS OF EFFECTIVE PERSUASION

It is not possible to consider here all of the different theories and advanced scientific explanations offered when one considers the art of persuasion. It may however, be helpful to set forth for your consideration a few of the basic mechanics or principles of effective trial advocacy.

A. MULTIPLE UTILIZATION OF THE SENSES

The receipt of information and its retention in the mind of a juror is enhanced when information is received through more than one of the juror's five senses. One hundred percent of learning by the senses can be broken down to these revealing percentages:

Sight:	Constitutes 75-85% of all sensory impact on the mind.
Hearing:	Constitutes 10-15% of all sensory impact on the mind.
Touch:	Constitutes 5-6% of all sensory impact on the mind.
Taste:	Constitutes 1-3% of all sensory impact on the mind.
Smell:	Constitutes 1-3% of all sensory impact on the mind.

These figures suggest two important ideas: First, by plugging into two or more juror senses you will enhance and strengthen juror recall; second, use all possible demonstrative evidence (sight) and all physical evidence (sight and touch) to make more vivid the testimony (hearing) presented. This will help keep jurors focused on the key facts of your case.

B. USE OF IMAGES IN TESTIMONY

Because people think in terms of images and series of images, instead of words, it is very helpful to develop testimony around, and use, a vocabulary of emotive, graphic words and phrases that evoke strong and lasting images in the jurors' minds'-eye. For example: "The auto hurtled through the intersection . . .", "it was a monumental task for the defendant just to . . .", "the strong odor of alcohol wafted

out from the defendant's breath into the cold night air . . .", "the defendant stumbled into the invisible barrier of intoxication . . .". Further, any uncontested or unrebutted facts which are important to your case should be repeatedly and regularly referred to as one of the "Undeniable Truths . . ." of your case, etc. Finally, because DUI defendants are not generally "criminals", but rather persons who have made a "mistake" in most jurors' minds, a prosecutor may not want to refer to the "guilt" of the defendant but to the need for "accountability" by the defendant for his actions.

C. ADULT ATTENTION SPANS ARE CONSISTENT, IDENTIFIABLE AND LIMITED

Do not fight with jurors' tired minds; if possible save the best points of your case for that time when the jurors' minds are fresh and attentive. It is advisable to time the flow of important points in approximately 20-minute segments, with short breaks in between for the jurors to comfortably follow this ebb and flow.

D. TIMING AND ORDER OF PRESENTING WITNESSES

The timing and order of presenting witnesses can be as important as timing the information being offered. It is often advisable to begin your case with your strongest witnesses, just as it is advisable to begin and end your direct and cross-examination with your most telling points. It is also effective to time your witnesses' direct testimony to conclude just at or near the noon hour or at the close of the day, so as to allow the favorable and as yet unchallenged facts to sit with the jurors as long as possible (over the noon hour or perhaps all night).

E. ESTABLISHING CREDIBILITY WITH THE JURORS

Personal appearance, warmth, eye contact with jurors, self control and courtroom leadership are all very important in establishing credibility with the jurors. Juror confidence in your good character, professionalism and competence is essential in having the jury believe the positions you take and argue on the issues of your case.

F. PRIMACY-RECENCY-REPETITION-ASSOCIATION-VIVIDNESS

More than one time-tested trial advocate claims the above series of words fully outlines all of the essential mechanics of effective courtroom persuasion. Attorney Ted Warshafsky of Milwaukee, Wisconsin, suggests these five words and the meaning behind them can dictate a smooth and effective court-room performance:

1. **PRIMACY**
   The first impression you and your evidence make is always the BEST;

2. **RECENCY**
   The last impression made is always the SECOND BEST;

3. **REPETITION**
   Memory is strengthened by saying the same important things again and again in different ways, and by appealing to different juror senses which overlap and integrate different types of evidence;

4. **ASSOCIATION**
   This suggests the use of simple metaphors and analogies to make a point stick -- concentrate on appealing to well known and understood human experiences; possibly those suggested by the jurors in voir dire: their work, their residence, their habits and hobbies, their values, and other points they discussed with you;

5. **VIVIDNESS**
   Prosecutors need not try to create excitement in the courtroom but need only understand and use the natural drama of the courtroom; identify the real issue or "theme" of the case and discuss that "theme" of the case with the jury constantly. Use graphic words and phrases to capture the jurors' attention and keep their thoughts organized and focused on the "theme" of the case as you identify it.

G. OTHER SIGNIFICANT FACTORS

Other significant factors which may affect jurors' sensibilities, and hence their receptiveness to your case:

1. Juror appreciation for your knowledge, and presence in the courtroom (i.e., handling physical evidence; admitting exhibits; explaining diagrams; addressing the judge; court personnel, defendants, and defense attorneys; use of courtroom furniture; and interaction with your colleagues and witnesses);

2. Effective voice control and variation (range, pitch, dramatic pause, rhythm, emotive appeal) can help sustain juror attention;

3. Your proximity to your "audience", the jury (2-3 feet away is too close and uncomfortable, 5-10 feet away is about right and permits a conversational tone with the jury, 15 feet away or more is too far away to be friendly and intimate with the jury). Do not create a barrier between you and the jury. Use the podium as a prop, not a wall;

4. Appropriate humor can be effective in the courtroom; simple, non-complex language is effective;

H. TRUMP CARD OF PERSUASION

The undeniable trump card of persuasion for every prosecutor is his display of integrity and sense of basic fairness throughout the trial.

V. COMMONLY CITED RULES OF EVIDENCE IN TRIAL

The following is list of commonly cited rules of evidence in a DUI trial. This section should not be a substitute, however, for your own carefully prepared trial evidence notebook.

A. "RELEVANCY CONDITIONED ON FACT" ("TYING IT UP LATER")

C.R.E. 104(b) - Admission of evidence possible, prior to necessary relevancy being established, if counsel advises the court he will "tie it up" or establish relevance through subsequent testimony of this or additional witnesses;

B. "OFFER OF PROOF"

C.R.E. 103(a)(2), (b) and (c) - This should take the form of questions and answers with the witness, out of the presence of the jury, to preserve the best possible appellate record; an attorney's statement of what the evidence is expected to show, although permitted, may be insufficient for an appellate record;

C. "LIMITED ADMISSIBILITY"

C.R.E. 105 - Where evidence is admitted for a limited purpose, the court is required to actually limit the scope, and must instruct the jury accordingly; the evidence may be of a type (i.e. prior acts evidence), which requires both an oral limiting instruction at the time of such testimony and a written limiting instruction at the close of the case;

D. "BEST EVIDENCE"

C.R.E. 1002 and 1003 - Does not apply to testimonial or physical evidence -- it is limited to requiring production of original writings when documents are admitted into evidence for proof of their contents;

SEE: People v. Williams, 654 P.2d 319 (Colo.App. 1982);

E. "OFFERING HABIT AND ROUTINE PRACTICE"

C.R.E. 406 - Evidence of habit and routine practice is relevant to demonstrate that a person's conduct on a particular occasion was in conformity with the habit or practice;

F. "CHARACTER EVIDENCE"

C.R.E. 404, 608, and section 13-90-101, C.R.S. - Generally not allowed to demonstrate that a person acted similarly on a particular occasion. Exceptions to the general rule of exclusion are listed in C.R.E. 404(a) and 608. Use of prior instances of conduct for purposes other than proving character is addressed in C.R.E. 404(b). Impeachment by proof of a prior felony conviction is addressed in

section 13-90-101, C.R.S. The manner and method of proving character evidence are set forth within the rules and statute cited and C.R.E. 405;

G. "OBJECTIONS AND MOTIONS TO STRIKE"

C.R.E. 103(a)(1) - This rule discusses the necessity of "timeliness" and "specificity" in making objections; procedures for "in camera hearings" and "motions in limine" are discussed; "offers of proof" are also discussed;

SEE: Jamison and Multz, "Courtroom Objections", September, 1980, Colorado Lawyer, September 1980, at 1769;

H. "LEADING QUESTIONS PERMITTED"

On direct: During preliminary questions, C.R.E. 104(a); when impeaching a witness, C.R.E. 607; where necessary to develop testimony and where a party calls a hostile or adverse witness, C.R.E. 611(c). On cross-examination generally, C.R.E. 611(c);

I. "WRITING USED TO REFRESH MEMORY"

C.R.E. 612 - Refreshing memory is clearly distinguishable from a recorded recollection and is not hearsay. Under the refreshing memory procedure, the witness uses an appropriate document (or object) to recall facts forgotten. Evidence consists solely of the witness' testimony with the document laid aside. The writing utilized to refresh recollection is not admitted into evidence unless offered by the adverse party;

J. "RECORDED RECOLLECTION"

C.R.E. 803(5) - This is a hearsay exception rule. It permits the introduction and reading of a document which is a memorialization or recordation of an event as substantive evidence of the event. Lack of memory is not necessarily a precondition to use of this procedure. However, a proper foundation does require (1) a showing that the witness once had knowledge concerning the matter, (2) memo

identification, (3) memo accuracy, and (4) that the memo was made at or about the time of the event;

K. "BUSINESS RECORDS EXCEPTION"

C.R.E. 803(6) - Useful as an additional method for the introduction of hearsay documents. It saves unnecessary witness and trial time. The foundation includes the following:

1. Document made at or near time of the event;

2. Created by a person with personal knowledge or from information transmitted by a person with a personal knowledge of the event;

3. Document is kept in the course of regularly conducted business activity;

4. It was the practice of that business activity to make the document;

Foundation testimony must be from a records custodian or other "qualified witness". Be wary of a defense challenge that the "method or circumstances of preparation indicate lack of trustworthiness";

M. "TAKING JUDICIAL NOTICE"

C.R.E. 201 - This rule discusses the kinds of facts which are judicially noticeable. It includes procedures to determine the propriety of taking judicial notice of a given fact;

N. "LAY AND EXPERT OPINIONS"

C.R.E. 701 through 706 - Review the discussion in the CDAC Evidence Manual, 1986 Ed. pages O-4 through O-19. This section discusses lay witness opinion generally, admissibility standards and appropriate subjects for lay opinion, lay opinion on ultimate questions and lay opinion examples. It also discusses expert testimony, foundation and admissibility of expert testimony, expert qualifications, appropriate subject matter for experts, impeachment

of experts, use of hypothetical questions with experts, and other related issues;

O. "IMPEACHMENT" AND "PRIOR CONSISTENT/INCONSISTENT STATEMENTS"

C.R.E. 607 - Who May Impeach; C.R.E. 613, Prior Statements of Witnesses; C.R.E. 806, Attacking and Supporting Credibility of Declarant after Hearsay is Admitted; section 16-10-201, C.R.S., re: purpose and procedure of impeachment of prior inconsistent statements; C.R.E. 801(d)(1), re: statements admissible for impeachment and substantive evidence;

SEE: People v. Pepper, 568 P.2d 446 (Colo. 1977); People v. Stewart, 39 Colo. App. 142, 568 P.2d 65 (1977); and CDAC Evidence Manual, 2001 Ed.

VI. OTHER HELPFUL HINTS

A. When opening cases for trial, do more than merely list witnesses. File a motion to add appropriate charges, a motion to dismiss charges, a motion to amend charges defective in any respect, and/or a motion to endorse additional witnesses not listed by law enforcement agencies (such as medical and emergency personnel, passengers in defendant's vehicle, by-standers, etc).

B. Always double check speedy trial dates at the time of trial settings; (arraignment date or in-court plea date may be preceded by earlier written Entry of Plea which effectively commences speedy trial); review the speedy trial statute, section 18-1-405, C.R.S., and the speedy trial rule, Crim.P. 48; also consider the separate constitutional aspect of speedy trial, Barker v. Wingo, 407 U.S. 514 (1972).

C. Utilize a checklist of DUI case documents to help prepare for trial and insure that full disclosure is provided to the defendant.

D. Conduct police officer interviews and police officer trial preparation to educate on types of investigative evidence which is most "jury-persuasive;" discuss complete report writing, all expected areas of officer cross-examination, and foundational facts for officer's opinion on the defendant's intoxication.

E. Consider dismissing minor traffic charges grafted on to weak or barely provable DUI/DWAI charges prior to trial. This may preclude the occasional jury "compromise" verdict on a minor offense instead of an alcohol related offense.

F. Consider having all lay, expert, and advisory witnesses out of the courtroom during opening statements, so as to preclude the later juror impression that witnesses are knowingly conforming their testimony to what you expect evidence to show from your opening statement;

G. In any criminal case, the prosecutor has the responsibility of making certain that the jury instructions are accurate and complete. Even if the judge in your particular court takes on the job of providing most of the instructions, you need to make sure that none of the mandatory instructions are left out. The prosecutor should always provide the court and the defense counsel with a full set of instructions in order to preserve a proper appellate record for each instruction.

If, for example, both the defense attorney and the judge neglect to include the instruction on presumption of innocence, the prosecutor risks reversal on appeal for plain error. It is essential that the prosecutor make certain that all mandatory instructions appear, regardless of whether or not they might be considered "defense-oriented" instructions.

Instructions may be divided into two broad categories:

1. Mandatory stock instructions for all cases;

2. Specific instructions applicable to particular charges involved, defenses and facts of the case.

--- Every case going to a jury has certain "stock" instructions. Prepare a standard set that you can use to cover most of the major items needed;

--- Do not rely on defense counsel, or even on the court to provide instructions. Even an inadvertent omission can cost you a reversal in the appellate court;

--- Prepare your instructions in advance of trial, but be alert during the trial for opportunities for other

instructions as the law requires and/or as the facts or fairness dictates;

--- Do not label your instructions or the individual pages for the jury. The judge will number the instruction pages prior to giving them to the jury;

--- BASIC JURY INSTRUCTION SUBJECT AREAS:

- --- Arguments are not evidence
- --- Burden of Proof
- --- Reasonable Doubt
- --- Presumption of Innocence
- --- Mere Accusation
- --- Credibility of Witnesses
- --- Defendant testifies
- --- Defendant does not testify
- --- Expert testimony
- --- Elements of the offense

Before making your record regarding instructions, be sure that stock instructions such as those in the above list are included. Check the "Colorado Pattern Jury Instructions" for extensive definitions as well as the "notes on use" on stock instructions if you have any further questions relating to them.

It may be advisable to check with the court well before your first trial in that courtroom to determine which stock instructions the court usually gives.

42-4-1301 DRIVING UNDER THE INFLUENCE – DRIVING WHILE IMPAIRED – DRIVING WITH EXCESSIVE ALCOHOLIC CONTENT – TESTS – PENALTIES – USEFUL PUBLIC SERVICE PROGRAM – ALCOHOL AND DRUG DRIVING SAFETY PROGRAM

(1) (a) It is a misdemeanor for any person who is under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, to drive any vehicle in this state.

(b) It is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, to drive any vehicle in this state.

(c) It is a misdemeanor for any person who is an habitual user of any controlled substance defined in section 12-22-303 (7), C.R.S., to drive any vehicle in this state.

(d) For the purposes of this subsection (1), one or more drugs shall mean all substances defined as a drug in section 12-22-303 (13), C.R.S., and all controlled substances defined in section 12-22-203 (7), C.R.S., and glue-sniffing, aerosol inhalation, and the inhalation of any other toxic vapor or vapors.

(e) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state shall not constitute a defense against any charge of violating this subsection (1).

(f) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs alone, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(g) "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or

physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(h) Pursuant to section 16-2-106, C.R.S., in charging a violation of paragraph (a) of this subsection (1), it shall be sufficient to describe the offense charged as "drove a vehicle under the influence of alcohol or drugs or both".

(i) Pursuant to section 16-2-106, C.R.S., in charging a violation of paragraph (b) of this subsection (1), it shall be sufficient to describe the offense charged as "drove a vehicle while impaired by alcohol or drugs or both".

(2) (a) It is a misdemeanor for any person to drive any vehicle in this state when the amount of alcohol, as shown by analysis of the person's blood or breath, in such person's blood is 0.10 or more grams of alcohol per hundred milliliters of blood or 0.10 or more grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving. During a trial, if the state's evidence raises the issue, or if a defendant presents some credible evidence, that the defendant consumed alcohol between the time that the defendant stopped driving and the time testing occurred, such issue shall be an affirmative defense, and the prosecution must establish beyond a reasonable doubt that the minimum 0.10 blood or breath alcohol content required in this paragraph (a) was reached as a result of alcohol consumed by the defendant before the defendant stopped driving.

(a.5) It is a class A traffic infraction for any person under twenty-two years of age to drive any vehicle in this state when the amount of alcohol, as shown by analysis of the person's breath subject to subsection (7) of this section, is at least 0.02 but not more than 0.05 grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving.

(b) In any prosecution for a violation of this subsection (2), the defendant shall be entitled to offer direct and circumstantial evidence to show that there is a disparity between what the tests show and other facts so that the trier of fact could infer that the tests were in some way defective or inaccurate. Such evidence may include testimony of nonexpert witnesses relating to the absence of any or all of the common symptoms or signs of intoxication for the purpose of impeachment of the accuracy of the analysis of the person's blood or breath.

(c) Pursuant to section 16-2-106, C.R.S., in charging a violation of this subsection (2), it shall be sufficient to describe the offense charged as "drove a vehicle with excessive alcohol content".

(3) The offenses described in subsections (1) and (2) of this section are strict liability offenses.

(4) Notwithstanding the provisions of section 18-1-408, C.R.S., during a trial of any person accused of violating paragraph (a) of subsection (1) and subsections (2) of this section, the court shall not require the prosecution to elect between the two violations. The court or a jury may consider and convict the person of either paragraph (a) or paragraph (b) of subsection (1) or subsection (2), or both paragraph (a) of subsection (1) and subsection (2), or both paragraph (b) of subsection (1) and subsection (2) of this section. If the person is convicted of more than one violation, the sentences imposed shall run concurrently.

(5) In any prosecution for a violation of paragraph (a) or (b) of subsection (1) of this section, the amount of alcohol in the defendant's blood or breath at the time of the commission of the alleged offense or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, shall give rise to the following presumptions:

(a) If there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood as shown by analysis of such person's blood or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath as shown by analysis of such person's breath, it shall be presumed that the defendant was not under the influence of alcohol and that the defendant's ability to operate a vehicle was not impaired by the consumption of alcohol.

(b) If there was at such time in excel of 0.05 but less than 0.10 grams of alcohol per one hundred milliliters of blood as shown by analysis of such person's blood or if there was at such time in excess of 0.05 but less than 0.10 grams of alcohol per two hundred ten liters of breath as shown by analysis of such person's breath, such fact shall give rise to the presumption that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) If there was at such time 0.10 or more grams of alcohol per one hundred milliliters of blood as shown by analysis of such person's blood or if there was at such time 0.10 or

more grams of alcohol per two hundred ten liters of breath as shown by analysis of such person's breath, it shall be presumed that the defendant was under the influence of alcohol.

(d) The limitations of this subsection (5) shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol or whether or not the defendant's ability to operate a vehicle was impaired by the consumption of alcohol.

(6) Following the lawful contact with a person who has been driving a vehicle, and when a law enforcement officer reasonably suspects that a person was driving a vehicle while under the influence of or while impaired by alcohol, the law enforcement officer may conduct a preliminary screening test using a device approved by the executive director of the department of public health and environment after first advising the driver that the driver may either refuse or agree to provide a sample of the driver's breath for such preliminary test; except that, if the driver is under twenty-one years of age, the law enforcement officer may, after providing such advisement to the person, conduct such preliminary screening test if the officer reasonably suspects that the person has consumed any alcohol. The results of this preliminary screening test may be used by a law enforcement officer in determining whether probably cause exists to believe such person was driving a vehicle in violation of paragraph (a) or (b) of subsection (1) or subsection (2) of this section and whether to administer a test pursuant to paragraph (a) of subsection (7) of this section. Neither the results of such preliminary screening test nor the fact that the person refused such test shall be used in any court action except in a hearing outside of the presence of a jury, when such hearing is held to determine if a law enforcement officer had probable cause to believe that the driver committed a violation of paragraph (a) or (b) of subsection (1) or subsection (2) of this section. The results of such preliminary screening test shall be made available to the driver or the driver's attorney on request. The preliminary screening test shall not substitute for or qualify as the test or tests required by paragraph (a) of subsection (7) of this section.

(7) (a) (I) On and after July 1, 1983, any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be deemed to have expressed such person's consent to the provisions of this paragraph (a).

(II) (A) Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to take and complete, and to cooperate in the taking and completing of, any test or tests of such person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of subsection (1) or (2) of this section. Except as otherwise provided in this section, if a person who is twenty-one years of age or older requests that said test be a blood test, then the test shall be of his or her blood; but, if such person requests that a specimen of his or her blood not be drawn, then a specimen of such person's breath shall be obtained and tested. A person who is under twenty-one years of age shall be entitled to request a blood test unless the alleged violation is a class A traffic infraction, in which case a specimen of such person's breath shall be obtained and tested, except as provided in sub-subparagraph (B) of this subparagraph (II).

(B) If a person elects either a blood test or a breath test, such person shall not be permitted to change such election, and, if such person fails to take and complete, and to cooperate in the completing of, the test elected, such failure shall be deemed to be a refusal to submit to testing. If such person is unable to take, or to complete, or to cooperate in the completing of a breath test because of injuries, illness, disease, physical infirmity, or physical incapacity, or if such person is receiving medical treatment at a location at which a breath testing instrument certified by the department of public health and environment is not available, the test shall be of such person's blood.

(III) Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to submit to and to complete, and to cooperate in the completing of, a test or tests of such person's blood, saliva, and urine for the purpose of determining the drug content within the person's system when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of paragraph (a), (b), or (c) of subsection (1) of this section and when it is reasonable to require such testing of blood, saliva, and urine to determine whether such person was under the influence of, or impaired by, one or more drugs, or one or more controlled substances, or a combination of both alcohol and one or more drugs, or a combination of both alcohol and one or more controlled substances.

(IV) Any person who is required to take and to complete, and to cooperate in the completing of, any test or tests shall cooperate with the person authorized to obtain specimens of such person's blood, breath, saliva, or urine, including the signing of any release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing. No law enforcement officer shall physically restrain any person for the purpose of obtaining a specimen of such person's blood, breath, saliva, or urine for testing except when the officer has probable cause to believe that the person has committed a violation of section 18-3-105, 18-3-106 (1)(b), 18-3-204, or 18-3-205 (1)(b), C.R.S., and the person is refusing to take or to complete, or to cooperate in the completing of, any test or tests, then, in such event, the law enforcement officer may require a blood test. Evidence acquired through such involuntary blood test shall be admissible in any prosecution for a violation of subsection (1) or (2) of this section and for a

violation of section 18-3-105, 18-3-106 (1)(b), 18-3-204, or 18-3-205 (1)(b), C.R.S.

(V) Any driver of a commercial motor vehicle requested to submit to a test as provided in subparagraph (II) of this paragraph (a) shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test shall result in an out-of-service order as defined under section 42-2-402 (8) for a period of twenty-four hours and a revocation of the privilege to operate a commercial motor vehicle for one year as provided under section 42-2-126.

(b) (I) The tests shall be administered at the direction of a law enforcement officer having probable cause to believe that the person had been driving a motor vehicle in violation of subsection (1) or (2) of this section and in accordance with rules and regulations prescribed by the state board of health concerning the health of the person being tested and the accuracy of such testing. Strict compliance with such rules and regulations shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results. It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.

(II) No person except a physician, a registered nurse, a paramedic, as certified in part 2 of article 3.5 of title

25, C.R.S., an emergency medical technician, as defined in part 1 of article 3.5 of title 25, C.R.S., or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse shall be entitled to withdraw blood for the purpose of determining the alcoholic or drug content therein. In any trial for a violation of subsection (1) or (2) of this section, the testimony of a law enforcement officer that he or she witnessed the taking of a blood specimen by a person who the law enforcement officer reasonably believed was authorized to withdraw blood specimens shall be sufficient evidence that such person was so authorized, and testimony from the person who obtained the blood specimens concerning such person's authorization to obtain blood specimens shall not be a prerequisite to the admissibility of test results concerning the blood specimens obtained. No civil liability shall attach to any person authorized to obtain blood, breath, saliva, or urine specimens or to any hospital, clinic, or association in or for which such specimens are obtained as provided in this subsection (7) as a result of the act of obtaining such specimens from any person submitting thereto if such specimens were obtained according to the rules and regulations prescribed by the state board of health; except that this provision shall not relieve any such person from liability for negligence in the obtaining of any specimen sample.

(c) Any person who is dead or unconscious shall be tested to determine the alcohol or drug content of the person's blood or any drug content within such person's system as provided in this subsection (7). If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency shall be allowed to test any blood, urine, or saliva which was obtained and not utilized by a health care provider and shall have access to that portion of the analysis and results of any tests administered by such provider which shows the alcohol or drug content of the person's blood, urine, or saliva or any drug content within the person's system. Such test results shall not be

considered privileged communications, and the provisions of section 13-90-107, C.R.S. relating to the physician-patient privilege shall not apply. Any person who is dead, in addition to the tests prescribed, shall also have the person's blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of public health and environment. Such information obtained shall be made a part of the accident report.

(d) If a person refuses to take, or to complete, or to cooperate with the completing of any test or tests as provided in this subsection (7), the person shall be subject to license revocation pursuant to the provisions of section 42-2-126. Such revocation shall take effect prior to and shall stay the remainder of any previous suspension, or denial in lieu of suspension, and shall not run concurrently, in whole or in part, with any previous or subsequent suspensions, revocations, or denials which may be provided for by law, including any suspension, revocation, or denial which results from a conviction of criminal charges arising out of the same occurrence for a violation of subsection (1) or (2) of this section. The remainder of any suspension, or denial in lieu of suspension, stayed pursuant to the provisions of this paragraph (d) shall be reinstated following the completion of any revocation provided for in section 42-2-126. Any revocation taken under said section shall not preclude other actions which the department is required to take in the administration of the provisions of this title.

(e) If a person refuses to take or to complete, or to cooperate with the completing of, any test or tests as provided in this subsection (7) and such person subsequently stands trial for a violation of subsection (1) of this section, the refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to admission of refusal to take or to complete, or to cooperate with the completing of, any test or tests.

(8) No court shall accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or guilty to an offense under paragraph (a.5) of subsection (2) of this section from a person charged with a violation of subsection (1) or (2) of this section; except that the court may accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or to an offense under paragraph (a.5) of subsection (2) of this section upon a good faith

representation by the prosecuting attorney that the attorney could not establish a prima facie case if the defendant were brought to trial on the original alcohol-related or drug-related offense.

(9) For the penalty provisions contained in subsection (9) see Senate Bill 01S2-008 in the appendix.

(10) (a) The judicial department shall administer in each judicial district an alcohol and drug driving safety program that provides presentence and postsentence alcohol and drug evaluations on all persons convicted of a violation of subsection (1) or (2) of this section. The alcohol and drug driving safety program shall further provide supervision and monitoring of all such persons whose sentences or terms of probation require completion of a program of alcohol and drug driving safety education or treatment.

(b) The presentence and postsentence alcohol and drug evaluations shall be conducted by such persons determined by the judicial department to be qualified to provide evaluation and supervision services as described in paragraph (c) of this subsection (1).

(c) An alcohol and drug evaluation shall be conducted on all persons convicted of a violation of subsection (1) or (2) of this section, and a copy of the report of the evaluation shall be provided to such person. The report shall be made available to and shall be considered by the court prior to sentencing unless the court proceeds to immediate

sentencing pursuant to the provisions of paragraph (e) of subsection (9) of this section. The report shall contain the defendant's prior traffic record, characteristics and history of alcohol or drug problems, and amenability to rehabilitation. The report shall include a recommendation as to alcohol and drug driving safety education or treatment for the defendant. The alcohol evaluation shall be conducted and the report prepared by a person who si trained and knowledgeable in the diagnosis of chemical dependency. Such person's duties may also include appearing at sentencing and probation hearings as required, referring defendants to education and treatment agencies in accordance with orders of the court, monitoring defendants in education and treatment programs, notifying the probation department and the court of any defendant failing to meet the conditions of probation or referral to education or treatment, appearing at revocation hearings as required, and providing assistance in data reporting and program evaluation. For the purpose of this subsection (10), "alcohol and drug driving safety education or treatment" means either level I or level II education or treatment programs that are approved by the division of alcohol and drug abuse. Level I programs are to be short-term, didactic education programs. Level II programs are to be therapeutically oriented education, long-term outpatient, and comprehensive residential programs. Any defendant sentenced to level I or level II programs shall be instructed by the court to meet all financial obligations of such programs. If such financial obligations are not met, the sentencing court shall be notified for the purpose of collection or review and further action on the defendant's sentence. Nothing in this section shall prohibit treatment agencies form applying to the state for funds to recover the costs of level II treatment for defendants determined to be indigent by the court.

(d) There is hereby created an alcohol and drug driving safety program fund in the office of the state treasurer to the credit of which shall be deposited all moneys as directed by this paragraph (d). In addition to any fines, fees, or costs levied against a person convicted of a violation of subsection (1) or (2) of this section, the judge shall assess each such person for the cost of the presentence or postsentence alcohol and drug evaluation and supervision services. The assessment in effect on July 1, 1998, shall remain in effect

unless the judicial department and the division of alcohol and drug abuse have provided to the general assembly a statement of the cost of the program, including costs of administration for the past and current fiscal year to include a proposed change in the assessment. The general assembly shall then consider the proposed new assessment and approve the amount to be assessed against each person during the following fiscal year in order to ensure that the alcohol and drug driving safety program established in this subsection (10) shall be financially self-supporting. Any adjustment in the amount to be assessed shall be no noted in the appropriation to the judicial department and the division of alcohol and drug abuse as a footnote or line item related to this program in the general appropriation bill. The state auditor shall periodically audit the costs of the programs to determine that they are reasonable and that the rate charged is accurate based on these costs. Any other fines, fees, or costs levied against such person shall not be part of the program fund. The amount assessed for the alcohol and drug evaluation shall be transmitted by the court to the state treasurer to be credited to the alcohol and drug driving safety program fund. Fees charged under sections 25-1-306 (1), C.R.S., and 25-1-1102 (1), C.R.S., to approved alcohol and drug treatment facilities that provide level I and level II programs as provided in paragraph (c) of this subsection (10) shall be transmitted to the state treasurer, who shall credit the fees to the alcohol and drug driving safety program fund. Upon appropriation by the general assembly, these funds shall be expended by the judicial department and the division of alcohol and drug abuse for the administration of the alcohol and drug driving safety program. In administering the alcohol and drug driving safety program, the judicial department is authorized to contract with any agency for such services as the judicial department deems necessary. Moneys deposited in the alcohol and drug driving safety program fund shall remain in said fund to be used for the purposes set forth in this subsection (10) and shall not revert or transfer to the general fund except by further act of the general assembly.

(e) The judicial department shall ensure that qualified personnel are placed in the judicial districts. The judicial department shall ensure that qualified personnel are placed in the judicial districts. The judicial department and the

division of alcohol and drug abuse shall jointly develop and maintain criteria for evaluation techniques, treatment referral, data reporting, and program evaluation.

(f) The alcohol and drug driving safety program shall cooperate in providing services to a defendant who resides in a judicial district other than the one in which the arrest was made. Alcohol and drug driving safety programs may cooperate in providing services to any defendant who resides at a location closer to another judicial district's program. The requirements oft his subsection (10) shall not apply to persons who are not residents of Colorado at the time of sentencing.

(g) The provisions of this subsection (10) are also applicable to any defendant who receives a deferred prosecution in accordance with section 16-7-401, C.R.S., or who receives a deferred sentence in accordance with section 16-7-403, C.R.S., and the completion of any stipulated alcohol evaluation, level I or level II education program, or level I or level II treatment program to be completed by the defendant shall be ordered by the court in accordance with the conditions of such deferred prosecution or deferred sentence as stipulated to by the prosecution and the defendant.

(11) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine such person's alcohol or drug level. This subsection (11) shall not prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this subsection (11) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

(12) (Deleted by amendment, L. 95, p. 315, § 3, effective July 1, 1995.)

(13) As used in this section, "convicted" includes a plea of no contest accepted by the court.

42-4-1302 STOPPING OF SUSPECT

A law enforcement officer may stop any person who the officer reasonably suspects is committing or has committed a violation of section 42-4-1301 (1) or (2) and may require the person to give such person's name, address, and an explanation of his or her actions. The stopping shall not constitute an arrest.

42-2-138 DRIVING UNDER RESTRAINT – PENALTY

(1) (a) Any person who drives a motor vehicle or off-highway vehicle upon any highway of this state with knowledge that such person's license or privilege to drive, either as a resident or a nonresident, is under restraint for any reason other than conviction of an alcohol-related driving offense pursuant to section 42-4-1301 (1) or (2) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than five days nor more than six months, and, in the discretion of the court, a fine of not less than fifty dollars nor more than five hundred dollars may be imposed. The minimum sentence imposed by this paragraph (a) shall be mandatory, and the court shall not grant probation or a suspended sentence, in whole or in part, or reduce or suspend the fine under this paragraph (a); but, in a case where the defendant is convicted although the defendant established that he or she had to drive the motor vehicle in violation of this paragraph (a) because of an emergency, the mandatory jail sentence or the fine, if any, shall not apply, and the court may impose a sentence of imprisonment in the county jail for a period of not more than six months a fine of not more than five hundred dollars. Such minimum sentence need not be five consecutive days but may be served during any thirty-day period.

(b) Upon a second or subsequent conviction under paragraph (a) of this subsection (1) within five years after the first conviction thereunder, in addition to the penalty prescribed in said paragraph (a) of this subsection (1), except as may be permitted by section 42-2-132.5, the defendant shall not be eligible to be issued a driver's or minor driver's license

or extended any driving privilege in this state for a period of three years after such second or subsequent conviction.

(c) This subsection (1) shall apply only to violations committed on or after July 1, 1974.

(d) (I) Any person who drives a motor vehicle or off-highway vehicle upon any highway of this state with knowledge that such person's license or privilege to drive, either as a resident or nonresident, is restrained under section 42-2-126 (2)(a) or is restrained solely or partially because of a conviction of a driving offense pursuant to section 42-4-1301 (1) or (2) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than thirty days nor more than one year and, in the discretion of the court, by a fine of not less than five hundred dollars nor more than one thousand dollars. Upon a second or subsequent conviction, such person shall be punished by imprisonment in the county jail for not less than ninety days nor more that two years and, in the discretion of the court, by a fine of not less than five hundred dollars nor more than three thousand dollars. The minimum county jail sentence imposed by this subparagraph (I) shall be mandatory, and the court shall not grant probation or a suspended sentence thereof; but, in a case where the defendant is convicted although the defendant established that he or she had to drive the motor vehicle in violation of this subparagraph (I) because of an emergency, the mandatory jail sentence, if any, shall not apply, and, for a first conviction, the court may impose a sentence of imprisonment in the county jail for a period of not more than one year and, in the discretion of the court, a fine of not more than one thousand dollars, and, for a second or subsequent conviction, the court may impose a sentence of imprisonment in the county jail for a period of not more than two years and, in the discretion of the court, a fine of not more than three thousand dollars.

(II) In any trial for a violation of subparagraph (I) of this paragraph (d), a duly authenticated copy of the record of the defendant's former convictions and judgments for an alcohol-related driving offense

pursuant to section 42-4-1301 (1) or (2) from any court of record or a certified copy of the record of any denial or revocation of the defendant's driving privilege under section 42-2-126 (2) (a) from the department shall be prima facie evidence of such convictions, judgments, denials, or revocations and may be used in evidence against such defendant. Identification photographs and fingerprints that are part of the record of such former convictions, judgments, denials, or revocations and such defendant's incarceration after sentencing for any of such former convictions, judgments, denials, or revocations shall be prima facie evidence of the identify of such defendant and may be used in evidence against the defendant.

(e) Upon a second or subsequent conviction under subparagraph (I) of paragraph (d) of this subsection (1) within five years after the first conviction thereunder, in addition to the penalty prescribed in said subparagraph (I), except as may be permitted by section 42-2-132.5, the defendant shall not be eligible to be issued a driver's or minor driver's license or extended any driving privilege in this state for a period of four years after such second or subsequent conviction.

(f) Upon entry of a plea of guilty or nolo contendere to a violation of paragraph (a) or (d) of this subsection (1), or upon a verdict of judgment of guilt for such violation, the court shall require the offender to immediately surrender his or her driver's license, minor driver's license, provisional driver's license, temporary driver's license, or instruction permit issued by this state, another state, or a foreign country. The court shall forward to the department a notice of the plea, verdict, or judgment on the form prescribed by the department, together with the offender's surrendered license or permit. Any person who violates the provisions of this paragraph (f) by failing to surrender his or her license or permit to the court commits a class 2 misdemeanor traffic offense.

(2) In any prosecution for a violation of this section, the fact of the restraint may be established by certification that a notice was mailed by first-class mail pursuant to section 42-2-119 (2), to the last-known address of the defendant, or by the delivery of such notice to the last-known address of the defendant, or by personal service of such notice upon the defendant.

(3) The department, upon receiving a record of conviction or accident report of any person for an offense committed while operating a motor vehicle, shall immediately examine its files to determine if the license or operating privilege of such person has been suspended or revoked. If it appears that said offense was committed while the license or operating privilege of such person was revoked or suspended, except as permitted by section 42-2-132.5, the department shall not issue a new license or grant any driving privileges for an additional period of one year after the date such person would otherwise have been entitled to apply for a new license or for reinstatement of a suspended license and shall notify the district attorney in the county where such violation occurred and request prosecution of such person under subsection (1) of this section.

(4) For purposes of this section, the following definitions shall apply:

(a) "Knowledge" means actual knowledge of any restraint from whatever source or knowledge of circumstances sufficient to cause a reasonable person to be aware that such person's license or privilege to drive was under restraint. "Knowledge" does not mean knowledge of a particular restraint or knowledge of the duration of restraint.

(b) "Restraint" or "restrained" means any denial, revocation, or suspension of a person's license or privilege to drive a motor vehicle in this state, or any combination of denials, revocations, or suspensions.

16-11-501 JUDGMENT FOR COSTS AND FINES

(1) Where any person, association, or corporation is convicted on an offense, or any juvenile is adjudicated a juvenile delinquent for the commission of an act that would have been a criminal offense if committed by an adult, the court shall give judgment in favor of the state of Colorado, the appropriate prosecuting attorney, or the appropriate law enforcement agency and against the offender or juvenile for the amount of the costs of prosecution, the amount of the costs of care, and any fine imposed. No fine shall be imposed for conviction of a felony except as provided in section 18-1-105, C.R.S. Such judgments shall be enforceable in the same manner as are civil judgments, and, in addition, the provisions of sections 16-11-101.6 and 16-11-502 apply. Any judgments collected pursuant to this section for fees for interpreters appointed pursuant to

section 13-90-204, C.R.S., and reimbursed pursuant to section 13-90-210, C.R.S., shall be remitted to the division of rehabilitation in the department of human services.

(2) The costs assessed pursuant to subsection (1) of this section or section 16-18-101 may include:

(a) Any docket fee required by article 32 of title 13, C.R.S., or any other fee or tax required by statute to be paid to the clerk of the court;

(b) The jury fee required by section 13-71-144, C.R.S.;

(c) Any fees required to be paid to sheriffs pursuant to section 30-1-104, C.R.S.;

(d) Any fees of the court reporter for all or any part of a transcript necessarily obtained for use in the case, including the fees provided for in section 16-18-101 (2);

(e) The witness fees and mileage paid pursuant to article 33 of title 13, C.R.S., and section 16-9-203;

(f) Any fees for exemplification and copies of papers necessarily obtained for use in the case;

(g) Any costs of taking depositions for the perpetuation of testimony, including reporter's fees, witness fees, expert witness fees, mileage for witnesses, and sheriff fees for service of subpoenas;

(h) Any statutory fees for service of process or statutory fees for any required publications;

(h.5) Any fees for interpreters required during depositions or during trials;

(i) Any item specifically authorized by statute to be included as part of the costs;

(j) On proper motion of the prosecuting attorney and at the discretion of the court, any other reasonably and necessary costs incurred by the prosecuting attorney or law enforcement agency which are directly the result of the prosecution of the defendant, including the costs resulting from the collection and analysis of any chemical test upon the defendant pursuant to section 42-4-1301, C.R.S., which costs shall be reimbursed by the defendant directly to the law enforcement agency which performed such chemical tests;

(k) Any costs incurred in obtaining a governor's warrant pursuant to section 16-19-108;

(l) Any costs incurred by the law enforcement agency in photocopying reports, developing film, and purchasing videotape as necessary for use in the case;

(m) Repealed.

(n) Any costs of participation in a diversion program in the offender or juvenile unsuccessfully participated in a diversion program prior to the conviction or adjudication.

(3) Where any person, association, or corporation is granted probation, the court shall order the offender to make such payments toward the cost of care as are appropriate under the circumstances. In setting the amount of such payments, the court shall take into consideration and make allowances for any restitution ordered to the victim or victims of a crime, which shall take priority over any payments ordered pursuant to this article, and for the maintenance and support of the offender's spouse, dependent children, or other persons having a legal right to support and maintenance for the estate of the offender. If the court determines that the offender has a sufficient estate to pay all or part of the cost of care, the court shall determine the amount which shall be paid by the offender for the cost of care, which amount shall in no event be in excess of the per capital cost of supervising an offender on probation.

(4) Where any person is sentences to a term of imprisonment, whether to a county jail or the department of corrections, the court shall order such person to make such payments toward the cost of care as are appropriate under the circumstances. In setting the amount of such payments, the court shall take into consideration and make allowances for any restitution ordered to the victim or victims of a crime, which shall take priority over any payments ordered pursuant to this article, and for the maintenance and support in the inmate's spouse, dependent children, or any other persons having a legal right to support and maintenance out of the offender's estate. The court shall also consider the financial needs of the offender for the six-month period immediation following the offender's release, for the purpose of allowing said offender to seek employment. If the court determines that the person has a sufficient estate to pay all or part of the cost of care, the court shall determine the amount which shall be paid by the offender, which amount in no event shall be in excess of the per capita cost of maintaining prisoners in the institution or facility in which the offender has been residing prior to sentencing for the purpose of reimbursing the appropriate law enforcement agency and the per capita cost of maintaining prisoners in the department of corrections for the purpose of paying the cost of care after sentencing.

(5) As used in this section, unless the context otherwise requires.

(a) "Cost of care" means the cost to the department or the local government charged with the custody of an offender for providing room, board, clothing, medical care, and other normal living expenses for an offender confined to a jail or correctional facility, or any costs associated with maintaining an offender in a home detention program contracted for by the department of public safety, as determined by the executive director of the department of corrections or the executive direction of the department of public safety, whichever is appropriate, or the cost of supervision of probation when the offender is granted probation, or the cost of supervision of parole when the offender is placed on parole by the state board of parole, as determined by the court.

(b) "Estate" means any tangible or intangible properties, real or personal, belonging to or due to an offender, including income or payments to such person received or earned prior to or during incarceration from salary or wages, bonuses, annuities, pensions, or retirement benefits, or any source whatsoever except federal benefits of any kind. Real property that is held in joint ownership or ownership in common with an offender's spouse, while being used and occupied by the spouse as a place of residence, shall not be considered a part of the estate of the offender for the purposes of this section.

(6) After the set-offs for restitution and for maintenance and support as provided in subsection (4) of this section, any amounts recovered pursuant to this section that are available to reimburse the costs of providing medical care shall be used to reimburse the state for the state's financial participation for medical assistance if medical care is provided for the inmate or an infant of a female inmate under the "Colorado Medical Assistance Act", article 4 of title 26, C.R.S.

42-2-126 REVOCATION OF LICENSE BASED ON ADMINISTRATIVE DETERMINATION

(1) The purposes of this section are:

(a) To provide safety for all persons using the highways of this state by quickly revoking the driver's license of any person who has shown himself or herself to be a safety hazard by driving with an excessive amount of alcohol in his or her body and any person who has refused to submit to an analysis as required by section 42-4-1301 (7);

(b) To guard against the potential for any erroneous deprivation of the driving privilege by providing an opportunity for a full hearing;

(c) Following the revocation period, to prevent the relicensing of any person until the department is satisfied that such person's alcohol problem is under control and that such person no longer constitutes a safety hazard to other highway users.

(2) (a) The department shall revoke the license of any person upon its determination that the person:

(I) Drove a vehicle in this state when the amount of alcohol, as sown by analysis of the person's blood or breath, in such person's blood was 0.10 or more grams of alcohol per one hundred milliliters of blood or 0.10 or more grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving. If the preponderance of the evidence establishes that such person consumed alcohol between the time that the person stopped driving and the time of testing, the preponderance of evidence must also establish that the minimum 0.10 blood or breath alcohol content was reached as a result of alcohol consumed before the person stopped driving.

(I.5) Drove a vehicle in this state when such person was under twenty-one years of age and when the amount of alcohol, as shown by analysis of the person's blood or breath, in such person's blood was in excess of 0.05 but less than 0.10 grams of alcohol per one hundred milliliters of blood or in excess of 0.05 but less than 0.10 grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving. If the preponderance of the evidence establishes that such

person consumed alcohol between the time that the person stopped driving and the time of testing, the preponderance of the evidence must also establish that the minimum required blood or breath alcohol content was reached as a result of alcohol consumed before the person stopped driving.

(I.7) Drove a vehicle in this state when such person was under twenty-one years of age and when the amount of alcohol, as shown by analysis of the person's breath, subject to section 42-4-1301 (7), in such person's blood was at least 0.02 but not in excess of 0.05 grams of alcohol per one hundred milliliters of blood at the time of driving or within two hours after driving. If the preponderance of the evidence establishes that such person consumed alcohol between the time that the person stopped driving and the time of testing, the preponderance of the evidence must also establish that the minimum 0.02 breath alcohol content was reached as a result of alcohol consumed before the person stopped driving.

(II) Refused to take or to complete, or to cooperate in the completing of, any test or tests of the person's blood, breath, saliva, or urine as required by section 42-4-1301 (7), 18-3-106 (4), or 18-3-205 (4), C.R.S. If a law enforcement officer requests a test under the provisions of section 42-4-1301 (7)(a)(II), the person must cooperate with the request such that the sample of blood or breath can be obtained within two hours of the person's driving.

(III) Drove a commercial motor vehicle in this state when the amount of alcohol, as shown by analysis of such person's blood or breath, in such person's blood was 0.04 or more grams of alcohol per one hundred milliliters of blood or 0.04 or more grams of alcohol per two hundred ten liters of breath at the time of driving or any time thereafter; or

(IV) Drove a commercial motor vehicle in this state when such person was under twenty-one years of age and when the amount of alcohol in such person's blood, as shown by analysis of such person's breath, subject to section 42-4-1301 (7), was at least 0.02 but less than 0.04 grams of alcohol

per tow hundred ten liters of breath at the time of driving or any time thereafter.

(c) The department shall make a determination of these facts on the basis of the documents and affidavit of a law enforcement officer as specified in subsection (3) of this section, and this determination shall be final unless a hearing is requested and held as provided in subsection (8) of this section.

(d) For purposes of this section, "license" includes driving privilege.

(2.5) If the department revokes a person's license pursuant to subparagraph (I), (II), or (III) of paragraph (a) of subsection (2) of this section, the department shall mail a notice to the owner of the motor vehicle used in the violation informing the owner that:

(a) Such motor vehicle was driven in an alcohol-related driving violation; and

(b) Additional alcohol-related violations involving the motor vehicle by the same driver may result in a requirement that the owner file proof of financial responsibility under the provisions of section 42-7-406 (1.5).

(3) (a) Whenever a law enforcement officer has probable cause to believe that a person has violated section 42-4-1301 (2) or whenever a person refuses to take or to complete, or to cooperate with the completing of any test or tests of such person's blood, breath, saliva, or urine as required by section 42-4-1301 (7), the law enforcement officer having such probable cause or requesting such test or tests shall forward to the department an affidavit containing information relevant to legal issues and facts which must be considered by the department to legally determine if a person's driving privilege should be revoked as provided in subsection (2) of this section. The executive director of the department shall specify to law enforcement agencies the form of the affidavit, the types of information needed in the affidavit, and any additional documents or copies of documents needed by the department to make its determination in addition to the affidavit. The affidavit shall be dated, signed, and sworn to by the law enforcement officer under penalty of perjury, but need not be notarized or sworn to before any other person.

(b) A law enforcement officer who has probable cause to believe that a person was driving a commercial motor vehicle with a blood alcohol concentration of 0.04 or more if the person was twenty-one years of age or older or 0.02

or more if the person was under twenty-one years of age shall forward to the department a verified report of all information relevant to the enforcement action, including information that adequately identifies the person, a statement of the officer's probable cause for belief that the person committed such violation, a report of the results of any tests that were conducted, and a copy of the citation and complaint, if any, filed with the court.

(c) The notice of revocation shall clearly specify the reason and statutory grounds for the revocation, the effective date of the revocation, the right of the person to request a hearing, the procedure for requesting a hearing, ad the date by which that request for a hearing must be made.

(d) If the department determines that the person is not subject to license revocation, the department shall notify the person of its determination and shall rescind any order of revocation served upon the person by the enforcement officer.

(5) (a) (I) Whenever a law enforcement officer requests a person to take any test or tests as required by section 42-4-1301 (7) and such person refuse to take or to complete or to cooperate in the completing of such test or tests or whenever such test results are available to the law enforcement officer and such tests show an alcohol concentration of 0.10 or more grams of alcohol per one hundred milliliters of blood as shown by analysis of such person's blood or 0.10 or more grams of alcohol per two hundred ten liters of breath as shown by analysis of such person's breath if the person is twenty-one years of age or older or, subject to section 42-4-1301 (7), at least 0.02 but not in excess of 0.05 grams of alcohol per two hundred ten liters of breath as shown by analysis of such person's breath if the person is under twenty-one years of age and when the person who is tested or who refuses to take or to complete or to cooperate in the completing of any test or tests is still available to the law enforcement officer, the officer, acting on behalf of the department, shall serve the notice of revocation personally on such person.

(II) Whenever a law enforcement officer requests a person who is under twenty-one years of age to take any test or tests as required by section 42-4-1301

(7) and such person refuse to take or to complete or to cooperate in the completing of such test or tests or whenever such test results are available to the law enforcement officer and such tests show an alcohol concentration of in excess of 0.05 grams of alcohol per one hundred milliliters of blood as shown by analysis of such person's blood or 0.05 grams of alcohol per two hundred ten liters of breath as shown by analysis of such person's breath and when the person who is tested or who refuses to take or to complete or to cooperate in the completing of any test or tests is still available to the law enforcement officer, the officer, acting on behalf of the department, shall serve the notice of revocation personally on such person.

(b) When the law enforcement officer serves the notice of revocation, the officer shall take possession of any driver's license issued by this state or any other state which is held by the person. When the officer takes possession of a valid driver's license issued by this state or any other state, the officer, acting on behalf of the department, shall issue a temporary permit which is valid for seven days after its date of issuance.

(c) A copy of the completed notice of revocation form, a copy of any completed temporary permit form, and any driver's, minor driver's, or temporary driver's license or any instruction permit taken into possession under this section shall be forwarded to the department by the officer along with the affidavit and documents required in subsections (2) and (3) of this section.

(d) The department shall provide forms for notice of revocation and for temporary permits to law enforcement agencies. The department shall establish a format for the affidavits required by this section and shall give notice of such format to all law enforcement agencies which submit affidavits to the department. Such law enforcement agencies shall follow the format determined by the department.

(e) A temporary permit may not be issued to any person who is already driving with a temporary permit issued pursuant to paragraph (b) of this subsection (5).

(6) (a) The license revocation shall become effective seven days after the subject person has receive the notice of revocation as provided in subsection (5) of this section or is deemed to have received the notice of revocation by mail as provided

in subsection (4) of this section. If a written request for a hearing is received by the department within that same seven-day period, the effective date of the revocation shall be stayed until a final order is issued following the hearing; except that any delay in the hearing which is caused or requested by the subject person or counsel representing that person shall not result in a stay of the revocation during the period of delay.

(b) (I) The period of license revocation under subparagraph (I) of paragraph (a) of subsection (2) of this section for a first violation shall be three months.

(II) The period of license revocation under subparagraph (I) of paragraph (a) of subsection (2) of this section for a second or subsequent revocation shall be one year.

(II.5) The period of license revocation under subparagraph (I.5) of paragraph (a) of subsection (2) of this section shall be:

(A) Except as provided in subparagraph (IX) of this paragraph (B), three months for a first violation;

(B) Six months for a second violation; and

(C) One year for a third or subsequent violation.

(III) The period of license revocation under subparagraph (II) of paragraph (a) of subsection (2) of this section or for a first violation under subparagraph (III) of paragraph (a) of subsection (2) of this section shall be one year.

(IV) The period of license revocation under subparagraph (II) or (III) of paragraph (a) of subsection (2) of this section involving a commercial motor vehicle that was transporting hazardous materials as defined in section 42-2-402 (7) shall be no less than three years.

(V) The second or subsequent revocation under subparagraph (II) or (III) of paragraph (a) of subsection (2) of this section involving a commercial motor vehicle shall result in a cancellation or denial as provided for under section 42-2-405 (3).

(VI) The period of license revocation under subparagraph (II) of paragraph (a) of subsection (2)

of this section for a second refusal shall be two years.

(VII) The period of license revocation under subparagraph (II) of paragraph (a) of subsection (2) of this section for a third or subsequent refusal shall be three years.

(VIII) The period of license revocation for a violation under subparagraph (IV) of paragraph (a) of subsection (2) shall be:

(A) Except as provided in subparagraph (IX) of this paragraph (b), three months for a first violation;

(B) Six months for a second violation; and

(C) One year for a third or subsequent violation.

(IX) (A) A person whose license is revoked for a first offense under subparagraph (I.5) of paragraph (a) of subsection (2) of this section and whose blood alcohol content was not more than 0.05 grams of alcohol per one hundred milliliters of blood or not more than 0.05 grams of alcohol per two hundred ten liters of breath may request that, in lieu of the three-month revocation, the person's license be revoked for a period of not less than thirty days, to be followed by a suspension period of such length that the total period of revocation and suspension equals three months. If the hearing officer approves such request, the hearing officer may grant such person a probationary license that may be used only for the reasons provided in section 42-2-127 (14)(a).

(B) The hearing to consider a request under sub-subparagraph (IX) may be held at the same time as the hearing held under subsection (8) of this section; except that a probationary license may not become effective until at least thirty days have elapsed since the beginning of the revocation period.

(C) (I) Where a license is revoked under subparagraph (I), (I.5), (III), or (IV) of paragraph (a) of subsection (2) of this section and the person is also convicted on criminal charges arising out of the same

occurrence for a violation of section 42-4-1301 (1)(a) or (2), both the revocation under this section and any suspension, revocation, cancellation, or denial which results from such conviction shall be imposed, but the periods shall run concurrently, and the total period of revocation, suspension, cancellation, or denial shall not exceed the longer of the two periods.

(II) Any revocation pursuant to this section shall run consecutively and not concurrently with any other revocation pursuant to this section.

(7) (a) The periods of revocation specified by subsection (6) of this section are intended to be minimum periods of revocation for the described conduct. No license shall be restored under any circumstances, and no probationary license shall be issued during the revocation period; except that:

(I) A person whose privilege to drive a commercial motor vehicle has been revoked because the person drove a commercial motor vehicle when the person's blood alcohol content was 0.04 or greater, but less than 0.10, grams of alcohol per one hundred milliliters of blood or per two hundred ten liters of breath and who was twenty-one years of age or older at the time of the offense may apply for a driver's license of another class or type as long as there is no other statutory reason to deny the person a license. Such person may not operate any commercial motor vehicle during the period of revocation of such person's privilege to operate commercial motor vehicles. The department may not issue such person a probationary license that would authorize such person to operate any commercial motor vehicle.

(II) A person may obtain a probationary license if the person has leased an approved ignition interlock device pursuant to the requirements of section 42-2-126.1.

(b) Upon the expiration of the period of revocation under this section, if the person's license is still suspended or revoked on other grounds, the person may seek a probationary license as authorized by section 42-2-127 (14) subject to the requirements of paragraph (c) of this subsection (7).

(c) Following a license revocation, the department shall not issue a new license or otherwise restore the driving privilege unless it is satisfied, after an investigation of the character, habits, and driving ability of the person, that it will be safe to grant the privilege of driving a motor vehicle on the highways. The department may not require a person to undergo skills or knowledge testing prior to issuance of a new license or restoration of such person's driving privilege if such person's license was revoked for a first violation of driving with excessive alcohol content pursuant to subparagraph (I) of paragraph (b) of subsection (6) of this section.

(8) (a) Any person who has received a notice of revocation may make a written request for a review of the department's determination at a hearing. The request may be made on a form available at each office of the department. If the person's driver's license has not been previously surrendered, it must be surrendered at the time the request for a hearing is made.

(b) The request for a hearing must be made in writing within seven days after the day the person received the notice of revocation as provided in subsection (5) of this section or is deemed to have received the notice by mail as provided in subsection (4) of this section. If written request for a hearing is not received within the seven-day period, the right to a hearing is waived, and the determination of the department which is based upon the documents and affidavit required by subsections (2) and (3) of this section becomes final.

(c) If a written request for a hearing is made after expiration of the seven-day period and if it is accompanied by the applicant's verified statement explaining the failure to make a timely request for a hearing, the department shall receive and consider the request. If the department finds that the person was unable to make a timely request due to lack of actual notice of the revocation or due to factors of physical incapacity such as hospitalization or incarceration, the department shall waive the period of limitation, reopen the matter, and grant the hearing request. In such a case, a stay of the revocation pending issuance of the final order following the hearing shall not be granted.

(d) At the time the request for a hearing is made, if it appears from the record that the person is the holder of a valid driver's or minor driver's license or any instruction permit

issued by this state or temporary permit issued pursuant to subsection (5) of this section and that the license has been surrendered as required pursuant to subsection (5) of this section, the department shall issue a temporary permit which will be valid until the scheduled date for the hearing. If necessary, the department may later issue an additional temporary permit or permits in order to stay the effective date of the revocation until the final order is issued following the hearing, as required by subsection (6) of this section.

(e) (I) The hearing shall be scheduled to be held as quickly as practicable but not more than sixty days after the day that the request for a hearing is received by the department; except that, if a hearing is rescheduled because of the unavailability of a law enforcement officer or the hearing officer in accordance with subparagraph (III) or (IV) of this paragraph (e), the hearing may be rescheduled more than sixty days after the day that the request for the hearing is received by the department, and the department shall continue any temporary driving privileges held by the respondent until the date that such hearing is rescheduled. The department shall provide a written notice of the time and place of the hearing to the party requesting the hearing in the manner provided in section 42-2-119 (2) at least ten days prior to the scheduled or rescheduled hearing, unless the parties agree to waive this requirement. Notwithstanding the provisions of section 42-2-119, the last-known address of the respondent for purposes of notice for any hearing pursuant to this section shall be the address stated on the hearing request form.

(II) The law enforcement officer who submits the documents and affidavit required by subsection (3) of this section need not be present at the hearing unless the presiding hearing officer requires that the law enforcement officer be present and the hearing officer issues a written notice for the law enforcement officer's appearance or unless the respondent or attorney for the respondent determines that the law enforcement officer should be present and serves a timely subpoena upon such officer in accordance with subparagraph (II.5) of

this paragraph (e). If the respondent notifies the department in writing at the time that the hearing is requested that the respondent desires the law enforcement officer's presence at the hearing, the department shall issue a written notice for the officer to appear at the hearing.

(II.5) Any subpoena served upon a law enforcement officer for attendance at a hearing conducted pursuant to this section shall be served at least five calendar days before the day of the hearing.

(III) If a law enforcement officer, after receiving a notice or subpoena to appear from either the department or the respondent, is unable to appear at any original or rescheduled hearing date set by the department due to a reasonable conflict, including but not limited to training, vacation, or personal leave time, the officer or the officer's supervisor shall contact the department not less than forty-eight hours prior to the hearing and reschedule the hearing to a time when the officer will be available. If the law enforcement officer cannot appear at any original or rescheduled hearing because of medical reasons, a law enforcement emergency, another court or administrative hearing, or any other legitimate just cause as determined by the department and the officer or the officer's supervisor gives notice of such officer's inability to appear to the department prior to the dismissal of the revocation proceeding, the department shall reschedule the hearing following consultation with the officer or the officer's supervisor at the earliest possible time when the officer and the hearing officer will be available.

(IV) If a hearing officer cannot appear at any original or rescheduled hearing because of medical reasons, a law enforcement emergency, another court or administrative hearing, or any other legitimate just cause, such hearing officer or the department may reschedule the hearing at the earliest possible time when the law enforcement officer and the hearing officer will be available.

(V) At the time that a respondent requests a hearing, written notice shall be given to the respondent advising such respondent of the right to subpoena

the law enforcement officer for the hearing, that such subpoena must be served upon the officer in accordance with subparagraph (II.5) of this paragraph (e), and of the respondent's right, at the time that the respondent requests the hearing, to notify the department in writing that the respondent desires the officer's presence at the hearing, and that, upon such notification, the department shall issue a written notice for the officer to appear at the hearing. The written notice shall also state that, if the law enforcement officer does not appear at the hearing, documents and an affidavit prepared and submitted by the law enforcement officer will be used at the hearing. The written notice shall further state that the affidavit and documents submitted by the law enforcement officer may be reviewed by the respondent prior to the hearing.

(f) If a hearing is held pursuant to this subsection (8), the department shall review the matter and make a final determination on the basis of the documents and affidavit submitted to the department pursuant to subsections (2) and (3) of this section. Except as provided in paragraph (e) of this subsection (8), the law enforcement officer who submitted the affidavit required by subsection (3) of this section need not be present at the hearing. The department shall consider all other relevant evidence at the hearing, including the testimony of law enforcement officers and the reports of such officers which are submitted to the department. The reports of law enforcement officers shall not be required to be made under oath, but such reports shall identify the officers making the reports. The department may consider evidence contained in affidavits from persons other than the respondent, so long as such affidavits include the affiant's home or work address and phone number and are dated, signed, and sworn to by the affiant under penalty of perjury. The affidavit need not be notarized or sworn to before any other person. The respondent must present evidence in person.

(9) (a) The hearing shall be held in the district office nearest to where the violation occurred, unless the parties agree to a different location. The person requesting the hearing may be referred to as the respondent.

(b) The presiding hearing officer shall be the executive director of the department or an authorized representative

designated by the executive director. The presiding hearing officer shall have authority to administer oaths and affirmations; to consider the affidavit of the law enforcement officer filing such affidavit as specified in subsection (3) of this section; to consider other law enforcement officers' reports which are submitted to the department, which reports need not be under oath but shall identify the officers making the reports; to examine and consider documents and copies of documents containing relevant evidence; to consider other affidavits which are dated, signed, and sworn to by the affiant under penalty of perjury, which affidavits need not be notarized or sworn to before any other person but shall contain the affiant's home or work address and phone number; to take judicial notice as defined by rule 201 of article II of the Colorado rules of evidence, subject to the provisions of section 24-4-105 (8), C.R.S., which shall include judicial notice of general, technical, or scientific facts within the hearing officer's knowledge, judicial notice of appropriate and reliable scientific and medical information contained in studies, articles, books, and treatises, and judicial notice of charts prepared by the department of public health and environment pertaining to the maximum blood or breath alcohol levels that people can obtain through the consumption of alcohol when such charts are based upon the maximum absorption levels possible of determined amounts of alcohol consumed in relationship to the weight and gender of the person consuming such alcohol; to compel witnesses to testify or produce books, records, or other evidence; to examine witnesses and take testimony; to receive and consider any relevant evidence necessary to properly perform the hearing officer's duties as required by this section; to issue subpoenas duces tecum to produce books, documents, records, or other evidence; to issue subpoenas for the attendance of witnesses; to take depositions, or cause depositions or interrogatories to be taken; to regulate the course and conduct of the hearing; and to make a final ruling on the issues.

(c) (I) Where a license is revoked under subparagraph (I), (I.5), or (I.7) of paragraph (a) of subsection (2) of this section, the sole issue at the hearing shall be whether, by a preponderance of the evidence, the person drove a vehicle in this state when the amount of alcohol, as shown by analysis of the person's

blood or breath, in such person's blood was 0.10 or more grams of alcohol per one hundred milliliters of blood or 0.10 or more grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving if the person was twenty-one years of age or older at the time of driving the vehicle or, subject to section 42-4-1301 (7), at least 0.02 but not in excess of 0.05 grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving if the person was under twenty-one years of age at the time of driving the vehicle, or in excess of 0.05 grams of alcohol per one hundred milliliters of blood or in excess of 0.05 grams of alcohol per two hundred ten liters of breath at the time of driving the vehicle. If the preponderance of the evidence establishes that the minimum 0.10 blood or breath alcohol content required in subparagraph (I) of paragraph (a) of subsection (2) of this section, the minimum 0.05 blood or breath alcohol content required in subparagraph (I.5) of paragraph (a) of subsection (2) of this section, or the minimum 0.02 breath alcohol content required in subparagraph (I.7) of paragraph (a) of subsection (2) of this section was reached as a result of alcohol consumed before the person stopped driving; or, where a license is revoked under subparagraph (II) of paragraph (a) of subsection (2) of this section, whether the person refused to take or to complete or to cooperate in the completing of any test or tests of the person's blood, breath, saliva, or urine as required by section 42-4-1301 (7). If the presiding hearing officer finds the affirmative of the issue, the revocation order shall be sustained. If the presiding hearing officer finds the negative of the issue, the revocation order shall be rescinded.

(II) When the determination of the issue pursuant to this paragraph (c) is based upon an analysis of the respondent's blood or breath and evidence is offered by the respondent to show a disparity between the results of the analysis done on behalf of the law enforcement agency and the results of an analysis done on behalf of the respondent, and when a preponderance of the evidence establishes that the

blood analysis conducted on behalf of the law enforcement agency was properly conducted by a qualified person associated with a laboratory certified by the department of public health and environment using properly working testing devices or when a preponderance of the evidence establishes that the law enforcement breath test was administered using a properly working breath testing device certified by the department of public health and environment, which device was properly operated by a qualified operator, there shall be a presumption favoring the accuracy of alcohol in the respondent's blood or breath to be 0.12 or more grams of alcohol per hundred milliliters of blood or 0.12 or more grams of alcohol per two hundred ten liters of breath. If the respondent offers evidence of blood or breath analysis, the respondent shall be required to state under oath the number of analyses done in addition to the one offered as evidence and the names of the laboratories that performed the analyses and results of all analyses.

(III) Where a license is revoked under subparagraph (III) or subparagraph (IV) of paragraph (a) of subsection (2) of this section, the sole issue at the hearing shall be whether, by a preponderance of the evidence, the person drove a commercial motor vehicle in this state when the amount of alcohol, as shown by analysis of the person's blood or breath, in such person's blood was 0.04 or more grams of alcohol per one hundred milliliters of blood or 0.04 or more grams of alcohol per two hundred ten liters of breath at the time of driving or anytime thereafter for a person twenty-one years of age or older or, subject to section 42-4-1301 (7), 0.02 but less than 0.04 grams of alcohol per two hundred ten liters of breath at the time of driving or anytime thereafter for a person under twenty-one years of age, or 0.04 or more grams of alcohol per one hundred milliliters of blood or 0.04 of more grams of alcohol per two hundred ten liters of breath at the time of driving or anytime thereafter for a person under twenty-one years of age, if the preponderance of the evidence establishes that such person did not consume any alcohol between the time of driving and the time of

testing. If the presiding hearing officer finds the affirmative of the issue, the revocation order shall be sustained. If the presiding hearing officer finds the negative of the issue, the revocation order shall be rescinded.

(IV) Under no circumstances shall the presiding hearing officer consider any issue not specified in this paragraph (c).

(d) The hearing shall be recorded. The decision of the presiding hearing officer shall be rendered in writing, and a copy will be provided to the person who requested the hearing.

(e) If the person who requested the hearing fails to appear without just cause, the right to a hearing shall be waived, and the determination of the department which is based upon the documents and affidavit required in subsections (2) and (3) of this section shall become final.

(10) (a) Within thirty days of the issuance of the final determination of the department under this section, a person aggrieved by the determination shall have the right to file a petition for judicial review in the district court in the county of the person's residence.

(b) The review shall be on the record without taking additional testimony. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the department's determination.

(c) The filing of a petition for judicial review shall not result in an automatic stay of the revocation order. The court may grant a stay of the order only upon motion and hearing and upon a finding that there is a reasonable probability that the petitioner will prevail upon the merits and that the petitioner will suffer irreparable harm if the order is not stayed.

(11) The "State Administrative Procedure Act", article 4 of title 24, C.R.S., shall apply to this section to the extent it is consistent with subsections (8), (9), and (1) of this section relating to administrative hearings and judicial review.

42-2-125 MANDATORY REVOCATION OF LICENSE AND PERMIT – REPEAL

(1) The department shall immediately revoke the license or permit of any driver or minor driver upon receiving a record showing that such driver has:

(a) Been convicted of vehicular homicide or vehicular assault as described in sections 18-3-106 and 18-3-205, C.R.S., or of criminally negligent homicide as described in section 18-3-105, C.R.S., while driving a motor vehicle;

(b) Been convicted of driving a motor vehicle while under the influence of a controlled substance, as defined in section 12-22-303 (7), C.R.S., or while an habitual user of such a controlled substance;

(c) Been convicted of any felony in the commission of which a motor vehicle was used;

(d) Been convicted of failing to stop and render aid as required by sections 42-4-1601 and 42-4-1602 in the event of a motor vehicle accident resulting in the death or injury of another;

(e) Been convicted of perjury in the first or second degree or the making of a false affidavit or statement under oath to the department under any law relating to the ownership or operation of a motor vehicle;

(f) Been three times convicted of reckless driving of a motor vehicle for acts committed within a period of two years;

(g) (I) Been twice convicted of any offense provided for in section 42-4-1301 (1) or (2)(a) for acts committed within a period of five years;

(III) In the case of a minor driver, been convicted of an offense under section 42-4-1301 (1) or (2)(a) committed while such driver was under twenty-one years of age;

(g.5) In the case of a minor driver, been convicted of an offense under section 42-4-1301 (2)(a.5) committed when such driver was under twenty-one years of age;

(h) Been determined to be mentally incompetent by a court of competent jurisdiction and for whom a court has entered, pursuant to part 3 or part 4 of article 14 of title 15, C.R.S., or section 27-10-109 (4) or 27-10-125, C.R.S., an order specifically finding that the mental incompetency is of such a degree that the person is incapable of safely operating a motor vehicle.

(i) Been convicted of any offense provided for in section 42-4-1301 (1) or (2)(a) and has two previous convictions of any of such offenses. The license of any driver shall be revoked for an indefinite period and shall only be reissued upon proof to the department that said driver has completed a level II alcohol and drug education and treatment program certified by the division of alcohol and drug abuse pursuant to section 42-4-1301 (10) and that said driver has demonstrated knowledge of the laws and driving ability through the regular motor vehicle testing process. In no event shall such license be reissued in less than two years.

(j) Been required to file and maintain proof of financial responsibility for the future as provided by section 42-4-1410 or article 7 of this title and who, at the time of a violation of any provision of this title, had not filed or was not maintaining such proof;

(k) (I) Been convicted of any felony offense provided for in section 18-18-404, 18-18-405, or 18-18-406, C.R.S., or any attempt, conspiracy, or solicitation to commit any said offense. For purposes of this paragraph (k), a person has been convicted when such person has been found guilty by a court or a jury, entered a plea of guilty or nolo contendere, or received a deferred sentence for an offense.

(II) In the case of a minor driver, been convicted of or adjudicated for any offense provided for in section 18-18-404 (1)(b), 18-18-405 (2)(d)(I), or 18-18-406 (1), (3)(a)(I), or (4)(a)(I), C.R.S. or any comparable municipal charter or ordinance offense.

(l) Been found to have knowingly and willfully left the scene of an accident involving a commercial motor vehicle driven by the person;

(m) Been convicted of violating section 12-47-901 (1)(b) or (1)(c), C.R.S., or section 18-13-122 (2), C.R.S. or any counterpart municipal charter or ordinance offence to such sections.

(n) Been convicted of defacing property in violation of section 18-4-509 (2), C.R.S., or convicted of criminal mischief in violation of section 18-4-501, C.R.S., where the court finds that the underlying factual basis of the offense involves defacing property as described in section 18-4-509 (2), C.R.S., or any counterpart municipal charter or ordinance offense to either of said sections.

(2) The period of revocation based on paragraphs (b), (c), and (k) of subsection (1) of this section shall be one year; except that any violation involving a commercial motor vehicle transporting hazardous materials as defined under section 42-2-402 (7) shall result in a revocation period of three years.

(2.3) The period of revocation under subparagraph (I) of paragraph (g) of subsection (1) of this section shall be for not less than one year.

(2.4) After the expiration of the period of revocation pursuant to this section and any subsequently imposed periods of revocation, any person whose license is revoked under subparagraph (I) of paragraph (g) or paragraph (i) of subsection (1) of this section shall be required to have a restricted license pursuant to the provisions of section 42-2-132.5.

(2.5) The period of revocation under paragraph (g.5) of subsection (1) of this section for a person who is less than twenty-one years of age at the time of the offense and who is convicted of driving with an alcohol content of at least 0.02 but not more than 0.05 under section 42-4-1301 (2)(a.5) is as follows:

(a) Except as provided in subsection (2.7) of this section, three months for a first offense;

(b) Six months for a second offense;

(c) One year for a third or subsequent offense.

(2.7) (a) A person whose license is revoked for a first offense under paragraph (g.5) of subsection (1) of this section may request that, in lieu of the three-month revocation, the person's license be revoked for a period of not less than thirty days, to be followed by a suspension period of such length that the total period of revocation and suspension equals three months. If the hearing officer approves such request, the hearing officer may grant such person a probationary license that may be used only for the reasons provided in section 42-2-127 (14)(a).

(b) The hearing to consider a request under paragraph (a) of this subsection (2.7) may be held at the same time as the hearing held under subsection (4) of this section; except that a probationary license may not become effective until at least thirty days have elapsed since the beginning of the revocation period.

(3) Upon revoking the license of any person as required by this section, the department shall immediately notify the licensee as provided in section 42-2-119 (2). Where a minor driver's license is revoked under paragraph (k)(II), (m), or (n) of subsection (1) of this section, such revocation shall not run concurrently with any

previous or subsequent suspension, revocation, cancellation, or denial that is provided for by law.

(4) Upon receipt of the notice of revocation, the licensee or the licensee's attorney may request a hearing in writing, if the licensee has returned said license to the department in accordance with the provisions of section 42-2-133. The department, upon notice to the licensee, shall hold a hearing at the district office of the department closest to the residence of the licensee not less than thirty days after receiving such license and request through a hearing commissioner appointed by the executive director of the department, which hearing shall be conducted in accordance with the provisions of section 24-4-105, C.R.S. After such hearing, the licensee may appear the decision of the department to the district court as provided in section 42-2-135. Should a driver who has had his or her license revoked under this section be subsequently acquitted of such charge by a court of record, the department shall immediately, in any event not later than ten days after the receipt of such notice of acquittal, reinstate said license to the driver affected.

(5) Except where more than one revocation occurs as a result of the same episode of driving, license revocations made pursuant to this section shall not run concurrently with any previous or subsequent revocation or denial in lieu of revocation which is provided for by law. Any revocation unused pursuant to this section shall not preclude other actions which the department is required to take pursuant to the provisions of this title, and unless otherwise provided by law, this subsection (5) shall not prohibit revocations from being served concurrently with any suspension or denial in lieu of suspension of driving privileges.

(6) (a) Any person under seventeen years of age who has a minor driver's license revoked pursuant to paragraph (k)(II) or (m) of subsection (1) of this section shall be subject to a revocation period that shall continue for a period of time described hereafter:

(I) After one conviction, twenty-four hours of public service if ordered by the court, or three months;

(II) After a second conviction, six months;

(III) After any third or subsequent conviction, one year.

(b) Any person seventeen years of age or older who has a minor driver's license revoked pursuant to paragraph (k)(II) or (m) of subsection (1) of this section shall be subject to a revocation period that shall continue for the period of time described hereafter:

(I) After one conviction, twenty-four hours of public service if ordered by the court, or three months;

(II) After a second conviction, six months;

(III) After any third or subsequent conviction, one year.

(c) (I) Any person who has a provisional driver's license revoked pursuant to paragraph (k)(II) or (m) of subsection (1) of this section shall be subject to a revocation period that shall continue for the period of time described hereafter:

(A) After one conviction, twenty-four hours of public service if ordered by the court, or three months;

(B) After a second conviction, six months;

(C) After any third or subsequent conviction, one year.

(II) This paragraph (c) is repealed, effective July 1, 2001.

(7) Any person who has a driver's license, minor driver's license, or instruction permit revoked pursuant to paragraph (n) of subsection (1) of this section shall be subject to a revocation period which shall continue for a period of six months for each conviction.

42-2-124 WHEN COURT TO REPORT CONVICTIONS

(1) (a) Except as otherwise provided, whenever any person is convicted of any offense for which this article makes mandatory the revocation of the driver's or minor driver's license of such person by the department, the court in which such conviction is had shall require the offender to immediately surrender such driver's or minor driver's license or any instruction permit to the court at the time of conviction, and the court shall, not later than ten days after such conviction, forward the license to the department, together with a record of such conviction on the form prescribed by the department. Any person who does not immediately surrender such person's license or permit to the court commits a class 2 misdemeanor traffic offense, unless such person swears or affirms under oath administered by the court and subject to the penalties of perjury, that the license or permit has been lost, destroyed, or is not in said person's immediate possession. Any person who swears or affirms that the license or permit is

not in the immediate possession of said person shall surrender said license or permit to the court within five days of the sworn or affirmed statement, and if not surrendered within such time, said person commits a class 2 misdemeanor traffic offense.

(b) Whenever the driver's history of any person shows that such driver is required to maintain financial responsibility for the future and is unable to show to the court that the driver is maintaining the required financial responsibility for the future, the court shall require the immediate surrender to it of the driver's, minor driver's, or temporary driver's license or any instruction permit held by such person, and the court, within forty-eight hours after receiving the license, shall forward the license to the department with the form prescribed by the department.

(2) Every court having jurisdiction over offenses committed under this article or any other law of this state regulating the operation of motor vehicles on highways and every military authority having jurisdiction over offenses substantially the same as those set forth in section 42-2-127 (5) which occur on a federal military installation in this state shall forward to the department a record of the conviction of any person in said court or by said authority for a violation of any said laws not later than ten days after the day of sentencing for such conviction and may recommend the suspension or retention of the driver's, minor driver's, or temporary driver's license or any instruction permit of the person so convicted.

(3) Except as otherwise provided, the term "convicted" or "conviction" means a sentence imposed following a plea of guilty or nolo contendere or a verdict of guilty by the court or a jury, excluding all stays of sentence. The payment of a penalty assessment under the provisions of section 42-4-1701 shall also be considered a conviction if the summons states clearly the points to be assessed for that offense. Whenever suspension or revocation of a license is authorized or required for conviction of any offense under state law, a final finding of guilty of a violation of a municipal ordinance governing a substantially equivalent offense in a city, town, or city and county shall, for purposes of such suspension or revocation, be deemed and treated as a conviction of the corresponding offense under state law. The department has the authority to suspend a driver's or minor driver's license pending any final determination of a conviction on appeal.

(4) For the purposes of section 42-2-125 (1)(k)(II), (1)(m), (1)(n), an adjudication of delinquency under title 19, C.R.S., for the acts described in such paragraphs (k)(II), (m), and (n) shall be

considered to be a conviction for purposes of this section. However, an expungement of an adjudication of delinquency shall not result in a rescission of the revocation of the driving privilege unless said expungement is a result of a reversal of the adjudication on appeal.

42-4-1302 STOPPING OF SUSPECT

A law enforcement officer may stop any person who the officer reasonably suspects is committing or has committed a violation of section 42-4-1301 (1) or (2) and may require the person to give such person's name, address, and an explanation of his or her actions. The stopping shall not constitute an arrest.

42-4-1202 PARKING OR ABANDONMENT OF VEHICLES

(1) No person shall stop, park, or leave standing any vehicle, either attended or unattended, outside of a business or a residential district, upon the paved or improved and main-traveled part of the highway. Nothing contained in this section shall apply to the driver of any vehicle which is disabled while on the paved or improved and main-traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position, subject, when applicable, to the emergency lighting requirements set forth in section 42-4-230.

APPENDIX

RULES AND REGULATIONS CONCERNING
TESTING FOR ALCOHOL AND OTHER DRUGS

Table of Contents

APPENDIX

PART 1
TESTING FOR ALCOHOL AND OTHER DRUGS
5 CCR 1005-2

[This part was revised in its entirety and was effective August 30, 1998, unless otherwise noted in the left hand margin]

1.1 Purpose and Scope

This rule establishes minimum standards for certification and approval of entities and processes utilized for alcohol and drug testing. This rule is applicable to: samples taken while driving under the influence, driving while impaired, driving with excessive alcohol content; vehicular assaults and vehicular homicides involving an operator while under the influence of alcohol or one or more drugs or both; the testing of samples of blood or other bodily substances from the bodies of pilots in command, motorboat or sailboat operators in command, or drivers and pedestrians fifteen years of age or older who die within four hours after involvement in a crash involving a motor vehicle, a motorboat, a sailboat or an aircraft; and consumption of alcohol by underage persons and records related thereto.

1.2 Definitions

"Alcohol Percent (%)" - grams of ethanol per 100 milliliters of blood or grams of ethanol per 210 liters of breath.

"Appropriate clinical or public safety facility" - provides for the health and safety of a person whose blood is collected (subject) and meets the following criteria: 1) provide for the washing or cleansing of hands of the blood collection personnel, 2) provide a comfortable chair for the subject with arm supports to assure the elbow remains straight and both arms are accessible to the blood collection personnel, 3) have precautions to assure the subject does not fall out of the chair, 4) provide for cot or other reclining surfaces for subjects who prefer to lie down or who have adverse response to the blood collection procedures, 5) provide for the adverse response to blood collection by providing procedures and equipment for subjects who become faint, nauseous, vomit, bleed excessively, or convulse including the provision of drinking water, and 6) provide for the cleaning and disinfection of the blood collection area.

"Certification" - the official approval by the Department of an evidential breath alcohol test (EBAT), operator, operator instructor or laboratory to function under these rules and regulations.

"Certified Laboratory" - a laboratory certified by the Department to perform analytical testing of bodily fluids for alcohol or other drugs.

"Delayed Breath Alcohol Specimens" - the saved ethanol or other analytical components of the EBAT specimen(s).

"Department"- refers to The Colorado Department of Public Health and Environment, Laboratory and Radiation Services Division.

"Evidential Breath Alcohol Test (EBAT)" - is an evidentiary breath alcohol test as described by section 42-4-1301, 11 C.R.S. (1997).

"Evidential Breath Alcohol Test (EBAT) device" - any instrument certified to perform "Evidential" Breath Alcohol Tests.

"Facility" - any location approved by the Department to perform Evidential Breath Alcohol Testing.

"Proficiency Testing" - The evaluation of unknown specimens supplied by a provider which determines target values for those unknown specimens.

1.3 Specimen Collection

1.3.1 Blood

1.3.1.1 Living Persons

1.3.1.1.1 Blood specimen(s) must be:

1.3.1.1.1.1 collected in the presence of the arresting officer or other responsible person who can authenticate the specimens.

1.3.1.1.1.2 collected by venipuncture by a physician, nurse, paramedic, emergency medical technician, medical technologist, or a person whose training and normal duties include withdrawing blood specimens under the supervision of a physician or nurse.

1.3.1.1.1.3 collected only in an appropriate clinical or public safety facility (e.g., hospital, medical clinic, ambulance, police station, fire station or approved facility). In no event will the collection of blood specimens interfere with the provision of essential medical care or the ready availability of emergency medical services to the public.

1.3.1.1.1.4 collected using sterile equipment. The skin at the area of puncture must be thoroughly cleansed and disinfected with an aqueous solution of nonvolatile antiseptic. Alcohol or phenolic solutions must not be used as a skin antiseptic.

1.3.1.2 Deceased Persons

1.3.1.2.1 Collection of specimens from deceased persons is conducted as per section 42-4.1304, C.R.S. (1997), by a person whose training and normal duties include the collection of blood specimens from deceased persons.

1.3.1.3 Living and Deceased Persons

1.3.1.3.1 After collection, blood specimens must be:

1.3.1.3.1.1 dispensed or collected directly into two sterile tubes resulting in a sodium fluoride concentration greater than 0.90 percent weight.

1.3.1.3.1.2 inverted to properly mix the blood with the sodium fluoride.

1.3.1.3.1.3 affixed with an identification label and evidence seal.

1.3.1.3.1.4 shipped to a certified laboratory. If shipment is delayed for more than 72 hours, the specimens must be placed in secured temporary refrigerated storage at less than 8 degrees Centigrade until shipped but not to exceed 7 days..1 - 4 [This part was effective August 30, 1998, unless otherwise noted in the left hand margin]

1.3.1.3.2 At the Certified Laboratory:

1.3.1.3.2.1 one tube of blood must be used for the State's test(s). The State's test(s) must be completed within 15 days of collection.

1.3.1.3.2.2 the second tube of blood must be refrigerated by the certified laboratory at less than 8 degrees Centigrade for a period of not less than 12 months from the date of collection.

1.3.1.3.3 The second specimen may be released if it is requested and receipted for by defendant's legal counsel or a Certified Laboratory.

1.3.1.3.4 The second specimen must be analyzed within 10 days of its receipt by the defendant's legal counsel or Certified Laboratory.

1.3.2 Breath - Evidential

1.3.2.1 Evidential breath specimens must be analyzed on EBAT devices approved by the Department. Approval or disapproval of EBAT devices will be based on standards of performance established by the Department.

1.3.2.2 The Department will certify each EBAT device initially and periodically thereafter.

1.3.2.3 The Department will issue a certificate for each certified EBAT device. The certificate will reflect the EBAT device facility name, serial number and the inclusive dates for the certification period. The certificate for mobile facilities will also include the vehicle identification number.

1.3.2.4 A breath specimen must only be collected by certified evidential breath test operators using certified EBAT devices pursuant to the procedure in Appendix A.

1.3.2.5 Breath specimens consisting of end-expiratory alveolar air are analyzed to determine their ethyl alcohol concentration.

1.3.3 Breath - Delayed

1.3.3.1 A delayed breath alcohol specimen must be collected with each evidential breath alcohol test pursuant to Appendix A.

1.3.3.2 Delayed breath alcohol specimens are considered the personal property of the defendant and retained by the facility for 12 months from the date of collection unless requested and receipted for by the defendant's legal counsel or a Department certified laboratory.

1.3.4 Urine

1.3.4.1 Living Persons

1.3.4.1.1 Urine specimen(s) must be collected in the presence of collection personnel who can authenticate the specimen(s).

1.3.4.2 Deceased Persons

1.3.4.2.1 Collection of specimens from deceased persons is conducted as per section 42-4-1304, 11 C.R.S. (1997) by a person whose training and normal duties include the collection of urine samples from deceased persons.

1.3.4.3 Living and Deceased Persons

1.3.4.3.1 Urine specimen(s) must be:

1.3.4.3.1.1 collected in a sterile container.

1.3.3.1.2 affixed with an identification label and evidence seal.

1.3.4.3.1.3 shipped to a laboratory certified by the Department. If shipment is delayed for more than 72 hours, the specimens must be placed in secured temporary refrigerated storage at less than 8 degrees Centigrade until shipped but not to exceed 7 days.

1.3.4.3.2 At the Certified Laboratory:

1.3.4.3.2.1 The State's test must be completed within 15 days of collection.

1.3.4.3.2.2 Any remaining specimen(s) must be retained by the laboratory in frozen storage for a period of not less than 12 months unless requested and receipted for by defendant or deceased's legal counsel or a Certified Laboratory.

1.3.4.3.2.3 The second specimen must be analyzed within 15 days of its receipt by the defendant's legal counsel or Certified Laboratory.

1.4 Methods of Analysis

1.4.1 Alcohol in Evidential Breath Specimens

1.4.1.1 The Standard Operating Procedure for Evidential Breath Alcohol Tests must be followed as found in Appendix A.

1.4.1.2 A system blank(s) analysis must be used with each EBAT.

1.4.1.3 For each EBAT, a Department certified reference standard(s) of known ethanol concentration must be used.

1.4.1.4 A completed EBAT is one in which the Standard Operating Procedure is followed and a printout obtained.

1.5 Certified Operators of Evidential Breath Alcohol Test Devices

1.5.1 Certification of Operators of Evidential Breath Alcohol Test Devices to Determine Alcohol Concentration of Breath Specimens.

1.5.1.1 Certified operators must have a minimum of 8 hours of instruction following a course outline provided by the Department to include a comprehensive practical and written exam. A score of 80% or greater on the written exam is passing. Upon successful completion of the Operator course, a certificate will be issued by the Department indicating the name of the Operator, the Operator Instructor(s), and the initial date of certification.

1.5.1.2 To maintain certified status, an Operator must proficiently perform one breath test, following the procedures outlined in Appendix A in the presence of an Operator Instructor at least every 6 months.

1.5.1.3 An Operator who does not recertify in the six 6 month period will be decertified by the Operator Instructor(s) and must repeat the eight 8 hours of instruction.

1.5.1.4 A facility must keep records showing each certified operator's date of original certification and all dates of re-certification.

1.5.2 Certification of Operator Instructors of EBAT Devices

1.5.2.1 Certified Operator Instructors must have a minimum of 16 hours of instruction provided by the Department to include a comprehensive practical and written exam. A score of 80% or greater on the written exam is passing. Upon successful completion of the Operator Instructor course, a certificate will be issued by the Department indicating the name of the Operator Instructor, the course Instructor(s), and the date of certification.

1.5.2.2 A certified Operator Instructor is also a certified Operator. Certified Operator Instructors are qualified to train and certify operators of EBAT devices.

1.5.2.3 To maintain certified status an Operator Instructor must annually participate in presenting a certification class to Operators or pass a written recertification examination provided by the Department.

1.5.2.4 An Operator Instructor who does not recertify annually is decertified and must repeat the 16 hours of instruction provided by the Department.

1.5.2.5 A facility must keep records showing each certified Operator Instructor's date of original certification and all dates of classes instructed or written exams taken.

1.6 Laboratory Analysis of Blood, Urine and Delayed Breath Specimens

1.6.1 Laboratories must be certified to provide analysis.

1.6.2 Laboratories will be certified to perform tests for one or more of the following: blood alcohol, delayed breath alcohol, blood drugs, and urine drugs.

1.6.3 Laboratories must meet standards of performance as established by the Department. Standards of performance will include personnel qualifications, standard operating procedure manual, analytical process, proficiency testing, quality control, security, chain of custody, specimen retention, space, records, and results reporting.

1.6.4 Laboratory inspections must be performed prior to initial certification and periodically thereafter by Department staff as established by the Department standards.

1.7 Violations

1.7.1 It is a violation of these rules and regulations to perform testing without an appropriate certificate.

1.7.2 Violation of these rules and regulations may result in denial, suspension or revocation of certification as outlined in part 1.9 of these rules and regulations.

1.7.3 Generally, a violation will not be cited if:

Effective 1/30/99

1.7.3.1 The violation was unavoidable to prevent loss of life, personal injury or severe property damage or there were no feasible alternatives, and provided that proper notification was given to the Department.

1.7.3.2 The violations resulted from matters beyond the control of the facility or laboratory, such as equipment failures that were unavoidable by reasonable quality assurance measures or management controls.

1.8 Notification of Violation, Hearings and Determinations:

1.8.1 All parties shall comply with the statutory requirements of section 24-4-105, 7 C.R.S. (1997).

Effective 1/30/99

1.9 Denial, Suspension or Revocation of Certification:

1.9.1 The Department may deny, suspend or revoke the certificate of an EBAT device located in a facility, the certificate of an operator, the certificate of an operator instructor or the certificate of a laboratory for one or more of the following causes:

1.9.1.1 Falsification of data or other deceptive practices including false statements by omission or commission relevant to the certification process.

1.9.1.2 Gross incompetence or negligent practice.

1.9.1.3 Willful or repeated violation of any lawful rule, regulation or order of the Department or the Board of Health and its officers.

1.9.1.4 Inadequate space, equipment, or methods utilized for testing.

1.9.1.5 Submission of any test results of another party as those of the party being evaluated.

1.9.1.6 For a laboratory, failure to continuously participate in proficiency testing and obtain a successful score at least once each certificate period.

1.9.1.7 For a laboratory, contact with another laboratory concerning proficiency test results prior to the due date of those results.

Effective 1/30/99

1.10 Injunction

1.10.1 The Department may seek an injunction against any entity for failure to comply with these rules and regulations.

APPENDIX

APPENDIX A

TITLE: Standard Operating Procedure for Evidential Breath Alcohol Test(s).

1. The subject must remove foreign objects from the nose and mouth to include dentures. The subject must be closely and continuously observed for 20 minutes prior to testing to assure no belching, regurgitation or intake of any foreign material by nose or mouth has occurred. If such occurs, another 20 minutes of close and continuous observation must elapse under the same conditions.

2. Turn power switch on and/or observe the power switch has been activated.

3. Observe the simulator temperature is between 33.8 degrees centigrade and 34.2 degrees centigrade.

4. Activate the Start Test switch.

5. Follow the instructions and sequence of events as they appear on the device display.

6. After the sequence of events has been completed package and seal the Delayed Breath Alcohol specimen.

7. Record the evidential breath alcohol test information on the standard simulator log sheet.

APPENDIX B

TITLE: Requirements for Permanent and Mobile Evidential Breath Alcohol Test Facilities

1. Initial Certification Procedure:

   a. Facilities must submit in writing to the Department a request for approval of an EBAT facility.

   b. The Department will supply a copy of Appendix B of these Rules and Regulations to the requesting facility.

   c. Written verification of compliance with the requirements of Appendix B is required from the facility.

   d. The Department will perform an initial facility inspection to verify compliance with the requirements of Appendix B. Facility inspections will be performed periodically thereafter by Department staff.

   e. The EBAT device may not be moved from its initial approved facility without authorization from the Department.

2. Requirements:

   a. Power

      1. Permanent:

         (A) AC line voltage of 120 volts, 60 Hz with grounded 3 prong outlets and a 20 ampere or less circuit breaker.

         (B) The power line to the EBAT device must be a dedicated line. Written verification of compliance with this requirement must be provided to the Department by a certified electrician.

         (C) A surge protection device approved by the Department must be placed between the EBAT device and the power source.

      2. Mobile:

         (A) Acceptable power sources are:

            (1) Square wave power inverter capable of generating an AC line voltage of 140 volts RMS.

            (2) (2) Power inverter/sine wave converter combinations that generate 120 volts AC from 14 volts DC.

(B) Electric motor/generator combinations that use a 12 volt DC motor to run a 120 volt AC 60 Hz generator.

(C) The power line to the EBAT device must be a dedicated line. This requirement will be verified by the Department.

(D) Surge protection is required as stated in step a.1.(C) above.

3. Environment:

a. The temperature of the EBAT device facility must be maintained between 70 and 80 degrees Fahrenheit.

b. The facility must have adequate lighting.

c. The area around and under the EBAT device must be free of dust and dirt. The immediate area around the evidential breath alcohol testing device must be kept orderly.

d. The EBAT device and breath alcohol simulator must be placed on the organizer stand. The stand will be placed on a solid and adequate work surface.

e. The EBAT shall be in a smoke free environment.

f. The facility must be ventilated.

g. Automobile emissions are not allowed in Mobile EBAT Facilities. A system blank consisting of a delayed breath specimen must be collected every 2 hours during testing. The specimen must be sent to the Department for testing.

h. The facility must not be used to store any cleaning compounds or volatile organics to include gasoline and petroleum products.

4. Documents:

a. The following documents relating to EBAT devices must be posted at the facility:

(1) Certificate of Approval for EBAT

(2) Standard Operating Procedure

(3) No Smoking Sign

(4) Error Message Sheet

(5) Current list of certified operators and operator instructors including dates of recertification

b. The Standard Simulator Log Sheet must be maintained with the EBAT device.

c. Records pertaining to EBAT specimens must be retained by the facility for 2 years.

CASE INDEX