

USING THEIR TESTS TO PROVE SOBRIETY

Sponsored by

ASSIGNED COUNSEL DEFENDER PLAN OF SUFFOLK COUNTY

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Table of Contents

	<u>Page</u>
I. The NHTSA Manual and the Standardized Field Sobriety Tests.	1
A. Horizontal Gaze Nystagmus, Walk and Turn & One Leg Stand.	2
B. Validation of Tests Depends on Precise Administration.	3
II. Horizontal Gaze Nystagmus.	4
A. Nature of the Test.	4
B. Elements of the Horizontal Gaze Nystagmus Test. . .	6
1. Smooth Pursuit.	7
2. Maximum Deviation.	7
3. Angle of Onset.	8
C. Vertical Gaze Nystagmus.	8
D. Discrediting HGN Test Results.	9
E. Using HGN to Prove Sobriety.	11
III. The Walk and Turn Test.	15
A. Nature of the Test.	15
B. You Must Be Sober and Focused to Understand Instructions.	17
C. Investigative Notes.	19
D. Police Memory.	20
E. Refreshing Recollection.	20
F. Imaginary Line.	24
G. Challenge the Grading System.	26
IV. The One-Leg Stand Test.	26
A. Nature of the Test.	26
B. Impeaching the One-Leg Stand.	29
C. The Instructions.	30
D. Discredit the Grading System.	31
E. Things Done Right.	32
V. Cross-Examination of the Officer - A Different Approach.	33
A. Crediting the Officer.	34
B. If It Wasn't Noted, It Didn't Happen.	35

Table of Contents
(Cont'd)

	<u>Page</u>
V. Cross-Examination of the Officer - A Different Approach (Cont'd)	
C. Topics for Cross-Examination	35
1. Operation of the Vehicle.	36
2. The Stop of the Vehicle.	40
3. Observations Inside the Defendant's Car.	42
4. License and Registration.	43
5. Exiting the Vehicle.	44
VI. Conclusion.	46

I. The NHTSA Manual and the Standardized Field Sobriety Tests

The National Highway Traffic Safety Administration publishes what has come to be known as the NHTSA Manual. The proper title is: "DWI Detection and Standardized Field Sobriety Testing." This manual is used across the country to train police officers in "standardized field sobriety tests.

The NHTSA Manual sets forth the protocol of three standardized field sobriety tests which have been recognized based on research conducted by Dr. Marcelline Burns and Herbert Moskowitz. This research is set forth in "Psycho Physical Tests for DWI;" June 1977 NHTSA Report No. DOT HS-H02 424 (available from National Technical Information Service, Springfield, Virginia 22161). The initial report was followed up by "Development and Field Test of Psycho physical Tests for DWI Arrests," March 1981, NHTSA Report No. DOT HS-805 864 (available from NTIS, Springfield, Virginia 22161), authored by V. Tharp, Dr. Marcelline Burns and Herbert Moskowitz. An overview of these reports and their objective are set forth in Chapter VIII of the SFST student manual.

The result of this research was recognition and validation of three standardized field sobriety tests: (1) horizontal gaze nystagmus, (2) the walk and turn test, and (3) the one-leg stand test. The manual also refers to the "alphabet test"; "the countdown", which consists of counting backwards," and the

"finger count," which consists of having the defendant touch the tip of his thumb, in turn, to the tip of each finger on the same hand while counting up: one, two, three, four, then reversing direction on the fingers while simultaneously counting down: four, three, two, one. The manual states:

These techniques are not as reliable as the standardized field sobriety tests but they can still be useful for obtaining evidence of impairment. THESE TECHNIQUES DO NOT REPLACE THE SFST.

NHTSA Manual, VI-4.

A. Horizontal Gaze Nystagmus, Walk and Turn & One Leg Stand

Insofar as the three tests validated by the government-sponsored studies are concerned:

The three standardized tests were found to be highly reliable in identifying subjects whose BACs were 0.10 or more. Considered independently, the nystagmus test was 77% accurate, the Walk-and-Turn, 68% accurate, and the One-Leg Stand, 65% accurate. However, Horizontal Gaze Nystagmus used in combination with Walk-and-Turn, was 80% accurate.

NHTSA Manual, VIII-19.

It is interesting to note two important things: first, even when these tests are perfectly performed, there is ample room for error. If the combination of tests is 80% accurate, it is also 20% inaccurate.

Second, the NHTSA Manual does not relate these tests to "intoxication." Rather, they speak in terms of the likelihood of the tests indicating a blood alcohol concentration of .10%. Standardized field sobriety tests are not recognized as being

capable of determining blood alcohol concentrations. Succinctly, they are neither a breath test, nor a blood test instrument. Accordingly, conclusions based upon a defendant's performance of these tests should be objected to as speculative and inadmissible.

B. Validation of Tests Depends on Precise Administration

The SFSTs are as much police competency tests as they are a field sobriety test. The validity of the tests depends on being administered exactly as set forth in the manual. Validation of the tests is dependent on precise administration:

This validation applies ONLY WHEN THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER; AND ONLY WHEN THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE; AND ONLY WHEN THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

NHTSA Manual, VIII-12.

This acknowledgment that the tests must be conducted precisely as set forth in the standardized manual provides great material for cross-examination. This is particularly effective when used in conjunction with questions aimed at demonstrating the fundamental lack of fairness in the testing and scoring process.

II. Horizontal Gaze Nystagmus

A. Nature of the Test

The first test in the SFST protocol is the Horizontal Gaze Nystagmus (HGN) test. It is also one of the more interesting developments arising out of the DWI enforcement effort. Essentially, the words "gaze nystagmus," within the law enforcement establishment, refer to a physiological phenomenon arising from the effect of alcohol and drugs on the ability of the eye to focus. It manifests itself by a jerking movement of the eyes as they move from side to side for horizontal gaze nystagmus, or up and down for vertical gaze nystagmus.

The horizontal gaze nystagmus test measures the extent to which a person's eyes jerk as they follow an object moving from one side of the person's field of vision to the other. The test is premised on the understanding that, whereas everyone's eyes exhibit some jerking while turning to the side, when the subject is intoxicated 'the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct.' 1 R. Erwin et al., *Defense of Drunk Driving Cases* §8A.99, pp 8A43-8A45 (1989).

Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).

The test is based on the fovea, which is the portion of the eye that focuses the eye on an object. The "normal" eye will perform this function smoothly without any jerking movement. When the fovea is affected by drugs or alcohol, however, it no longer focuses smoothly, but rather performs a detectable series

of movements which appear as a jerking movement of the eye. This jerking movement is used by police officers to detect the influence of alcohol and certain drugs, including: depressants, inhalants, and PCP.

In *People v. Quinn*, 153 Misc.2d 139, 580 N.Y.S.2d 818 (Suffolk Co. Dist. Ct. 1991), *rev'd on unrelated grounds*, 158 Misc.2d 1015, 607 N.Y.S.2d 534 (1993), Judge Dounias set forth a comprehensive explanation of gaze nystagmus:

Testimony concerning nystagmus was also received from Dr. Peed, an optometrist licensed by the State of Georgia. First, Dr. Peed reviewed the functions of the basic eye structures, including the cornea, iris, crystalline lens, retina and extraocular muscles. Of particular importance with respect to HGN is a structure called the fovea. The fovea, an area comprising 1% of the retina, is that portion responsible for sharp focus, i.e., it is the only portion of the retina capable of 20/20 refraction.

Dr. Peed further explained the functions of the various brain and neurological structures involved in the visual sensory process. He testified in great detail about five separate but integrated eye movement systems, two of which are important in producing nystagmus. "Saccadic" movements are very quick eye movements governed by the saccadic system, and can be either voluntary or involuntary. Such saccadic movements are initiated by some retinal stimulus, in particular an image which does not fall directly upon the fovea. The appearance of a non-foveal image induces an involuntary saccadic movement to bring the fovea into position to receive the image.

The "smooth pursuit" eye movement system, as its name implies, permits the eye to follow a smoothly moving stimulus, that is, to keep the fovea centered on it. It is, in fact, a breakdown in the ability of the smooth pursuit system to maintain the fovea on the object of regard that is responsible for nystagmus. When the smooth pursuit system is no longer able to fix

the fovea on the object, the saccadic system, stimulated by the non-foveal image, produces a quick, overriding eye movement to return it to the object. Nystagmus, then, is the presence of involuntary, saccadic eye movements following a breakdown of the smooth pursuit system.

Dr. Peed gave many examples of what could cause a failure of the smooth pursuit system. Pathological causes could include brain lesions, aneurysms and cerebral vascular accidents, even infections of the central nervous system. Physiological types include rotational and post-rotational nystagmus. Post-rotational nystagmus was the subject of an in-court demonstration by the People wherein Sgt. Page was spun around by Sgt. Studdard. When the spinning was finished, the Court was able to observe a horizontal oscillation of Sgt. Page's eyes which Sgt. Studdard testified was post-rotational HGN. Both Sgt. Studdard and Dr. Peed stressed that post-rotational nystagmus is a fleeting phenomenon and not associated with the ingestion of drugs. In fact, after two or three minutes, the Court could no longer detect movement in Sgt. Page's eyes.

Another type of physiological nystagmus more related to the issues at hand is "gaze invoked" nystagmus. "End point" nystagmus, a type of gaze invoked nystagmus, occurs when the eyes are extended to the maximum angle left or right. No matter how induced, Dr. Peed testified, gaze invoked nystagmus is caused by a disruption in the integration of the eye movement systems, particularly the smooth pursuit system. Disrupt the system with the right substance and HGN is enhanced significantly. End point nystagmus, seen in the normal individual in "minutes" after the eyes are extended, will appear in a greatly reduced interval. The angle of onset as well will be measurably shortened.

Id., 580 N.Y.S.2d at 824-25.

B. Elements of the Horizontal Gaze Nystagmus Test

The test for horizontal gaze nystagmus consists of three distinct examinations performed on both eyes.

1. Smooth Pursuit

The first exam is called smooth pursuit. This is performed by moving an object, usually a pen, from a point near the defendant's nose outward toward the side of the defendant's face. This movement should take approximately 2 seconds. The defendant is asked to follow the movement of the pen with his eyes and to do so without moving his head. The officer starts with the left eye and observes whether the eye moves smoothly or with a jerking motion. A "normal" eye will move smoothly in a manner similar to a marble moving over a hard surface. If the defendant is under the influence of alcohol and/or certain drugs, nystagmus may be observed. Nystagmus refers to a jerking motion which is similar to rolling a marble over sandpaper. The eye does not proceed smoothly, but moves with a jerking motion. The test is then repeated on the right eye.

2. Maximum Deviation

The second part of the horizontal gaze nystagmus test is called maximum deviation. In this part of the test, the defendant is asked to follow the stimulus which is moved to the side of his face. The defendant's left pupil is directed to the corner of the eye and the stimulus is held stationary for a minimum of 4 seconds. While the eye is in this position, it is observed for nystagmus. This process is repeated with the right eye.

3. Angle of Onset

The third part of the horizontal gaze nystagmus test is called angle of onset. This is to determine at what angle with the nose the eye commences to jerk. The exam is performed by placing the pen approximately 12-15 inches from the defendant's nose and slowly moving it (approximately 4 seconds) toward the outer corner of his eye. The officer starts with the left eye and watches it closely for the first sign of jerking. If he observes any jerking, the officer stops moving the pen and holds it steady. The officer makes sure that the eye is jerking. If it is not, the officer is required to start the procedure over again by moving the pen further towards the outer portion of the eye and looking for the onset of jerking. Once the officer determines the point of onset, he estimates the angle.

C. Vertical Gaze Nystagmus

Here, the defendant is asked to, again, follow the movement of a pen. Instead of being held up and down, the pen is held sideways and the defendant is asked to keep his eyes on the middle of the pen. The pen is then moved up to the top of the defendant's eye socket, and the eyes are observed for a minimum of 4 seconds. This test is almost identical to the maximum deviation portion of the Horizontal Gaze Nystagmus test, except the movement is vertical.

D. Discrediting HGN Test Results

It is important to pin down exactly how the officer administered the test to your client. Frequently, officers will misstate how the test is performed and graded. In addition, the lack of specificity of the test renders it highly vulnerable to cross-examination. There is a virtual laundry list of conditions and substances that will cause nystagmus. There are varying kinds of nystagmus. In addition, there is an abundance of literature in regard to nystagmus and a large variety of attacks which can be used effectively. The student manual lists different types of nystagmus.

1. Vestibular Nystagmus is caused by movement or action to the vestibular system.

A. Types of vestibular nystagmus:

- Rotational Nystagmus occurs when the person is spun around or rotated rapidly, causing the fluid in the inner ear to be disturbed. If it were possible to observe the eyes of a rotating person, they would be seen to jerk noticeably.
- Post Rotational Nystagmus is closely related to rotational nystagmus: when the person stops spinning, the fluid in the inner ear remains disturbed for a period of time, and the eyes continue to jerk.
- Caloric Nystagmus occurs when fluid motion in the canals of the vestibular system is stimulated by temperature as by putting warm water in one ear and cold in the other.
- Positional Alcohol Nystagmus (PAN) occurs when a foreign fluid, such as

alcohol, that alters the specific gravity of the blood is in unequal concentrations in the blood and the vestibular system.

2. Nystagmus can also result directly from neural activity:

- Optokinetic Nystagmus occurs when the eyes fixate on an object that suddenly moves out of sight, or when the eyes watch sharply contrasting moving images.

Examples of optokinetic nystagmus include watching strobe lights, rotating lights, or rapidly moving traffic in close proximity. The Horizontal Gaze Nystagmus test will not be influenced by optokinetic nystagmus when administered properly.

- 185 F.Supp.2d 530, 533 (D. Md. 2002) Physiological Nystagmus is a natural nystagmus that keeps the sensory cells of the eye from tiring. It is the most common type of nystagmus. It happens to all of us, all the time. This type of nystagmus produces extremely minor tremors or jerks of the eyes. These tremors are generally too small to be seen with the naked eye. Physiological nystagmus will have no impact on our Standardized Field Sobriety Tests, because its tremors are generally invisible.

NHTSA Manual, VIII-3-4.

There are a multitude of substances and conditions that can cause Horizontal Gaze Nystagmus. In U.S. v. Horn, 185 F.Supp.2d 530, 533 (D. Md. 2002), the United States District Court, citing Schultz v. State, 106 Md.App. 145, 664 A.2d 60 (1995) set forth the following at footnote 45:

The court recognized the following causes or possible causes of nystagmus: problems with the inner ear labyrinth; irrigating the ears with warm or cold water; influenza; streptococcus infection; vertigo; measles; syphilis; arteriosclerosis; Korshaff's syndrome; brain hemorrhage; epilepsy; hypertension; motion sickness; sunstroke; eye strain; eye muscle fatigue; glaucoma;

changes in atmospheric pressure; consumption of excessive amounts of caffeine; excessive exposure to nicotine; aspirin; circadian rhythms; acute head trauma; chronic head trauma; some prescription drugs; tranquilizers, pain medication, and anti-convulsant medicine; barbiturates; disorders of the vestibular apparatus and brain stem; cerebellum dysfunction; heredity; diet; toxins; exposure to solvents; extreme chilling; eye muscle imbalance; lesions; continuous movement of the visual field past the eyes; and antihistamine use. The fact that there are many other causes of nystagmus in the human eye also is the type of adjudicative fact that may be judicially noticed under Rule 201. Thus, the defendant in a DWI/DUI case may ask the court to judicially notice this fact, once the government has proved the causal connection between alcohol ingestion and exaggerated nystagmus. Alternatively, the defendant may seek to prove the non-alcohol related causes of nystagmus by other means, such as the testimony of an expert witness, cross examination of any such witness called by the government or through a properly admitted learned treatise. (Fed. Rule of Evid. Rule 803(18)).

Id. at 556 n.45 (citation omitted).

E. Using HGN to Prove Sobriety

While most cross-examinations of Horizontal Gaze Nystagmus focus on whether the officer performed the test properly, and what the jerking of the eye means, there is another area that should be explored. The HGN test is an excellent coordination test. It requires that your allegedly intoxicated client stand with her feet together, and her arms at her side. It requires the client to tilt her head up, maintain her balance, and follow the instruction "not to move her head" while following the moving pen.

It is a natural instinct for a person to move their head in conjunction with their eyes. The fact that a client is able to

follow that instruction, and to maintain their balance while standing with their feet together and their hands at their sides are indicators of sobriety.

The HGN test cannot be performed if the client does not follow the instructions. Accordingly, the witness will almost always agree that your client followed their instructions in regard to this test.

The key to this is to make the most out of these facts:

Q: This test requires that the person being tested stand still?

A: Yes.

Q: This test requires that the person being tested stand with his/her feet together?

A: Yes.

Q: This test requires that the person being tested stand with his/her arms at his/her side?

A: Yes.

Q: This test requires that the person being tested tilt his/her head when instructed?

A: Yes.

Q: This test requires that the person being tested follow the stimulus (usually a pen) with his/her eyes?

A: Yes.

Q: This test requires that the person being tested not move his/her head, but follow the stimulus only with his/her eyes.

A: Yes.

Q: You instructed Sally as to how she was to do the HGN test?

A: Yes.

Q: You gave her the instructions just once?

A: Yes.

Q: She followed your instruction?

A: Yes.

Q: You told her to stand up straight?

A: Yes.

Q: She complied with your instruction?

A: Yes.

Q: You told her to stand with her feet together and she did that?

A: Yes.

Q: You told her to keep her arms at her sides?

A: Yes.

Q: She did that?

A: Yes.

Q: You told her to follow your pen with her eyes?

A: Yes.

Q: She did that?

A: Yes.

Q: You checked her eyes for equal tracking?

A: Yes.

Q: She complied with your instructions?

A: Yes.

Q: Her eyes tracked evenly?

A: Yes.

Q: You checked her eyes to see if the pupils were of equal size?

A: Yes.

Q: The pupils were equal in size?

A: Yes.

Q: You checked her eyes for smooth pursuit?

A: Yes.

Q: She complied with your instruction on that portion of the test?

A: Yes.

Q: She followed the pen with her eyes?

A: Yes.

Q: She kept her head still?

A: Yes.

Q: You checked her eyes for maximum deviation?
A: Yes.

Q: You asked her to move her left eye to the outside corner of her eye?
A: Yes.

Q: You asked her to hold it there?
A: Yes.

Q: You told her that just once?
A: Yes.

Q: She followed that instruction?
A: Yes.

Q: She held her eye in the outside corner in exact compliance with your instruction?
A: Yes.

Q: You then had her do the same thing with her right eye?
A: Yes.

Q: She followed that instruction?
A: Yes.

Q: You tested her eyes for angle of onset?
A: Yes.

Q: She followed your instruction and moved her eyes pursuant to your direction?
A: Yes.

Q: You were able to administer this test to Sally without any problem?
A: Yes.

Q: You made no note of any swaying during the performance of this test?
A: Correct.

Q: You made no note of any loss of balance?
A: Correct.

Q: You did not record any observation of her feet breaking apart?
A: Correct.

Q: Your notes have no entry of her arms leaving her side?
A: Correct.

Q: You did not note her moving her head at any time during all the phases of the HGN test?

A: Correct.

Q: There is no indication that she failed to comply with any of your instructions in regard to this test?

A: Correct.

The great thing about the HGN test is that in order to flunk the test, you have to have the requisite physical coordination and mental alertness required to take the test in the first instance.

III. The Walk and Turn Test

A. Nature of the Test

The walk and turn test is a good subject for cross-examination because it is so hard to do even when completely sober. In addition, the specificity of the test makes it difficult for an officer to administer the test exactly as required. The test requires a person to assume a heel-to-toe position, placing his right heel against his left toe. The initial instructions call for the person to stand in that position while he receives instructions about how to perform the test. He must stand with his arms down at his side and must wait for the officer to finish his instructions before commencing the test. After the person being tested is placed in this heel-to-toe position, he is given the following instructions:

1. Instructions Stage: Initial Positioning and Verbal Instructions

For standardization in the performance of this test, have the suspect assume the heel-to-toe

stance by giving the following verbal instructions, accompanied by demonstrations:

- "Place your left foot on the line" (real or imaginary). Demonstrate.
- "Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot." Demonstrate.
- "Place your arms down at your sides." Demonstrate.
- "Maintain this position until I have completed the instructions. Do not start to walk until told to do so."
- "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Walking Stage

Explain the test requirements, using the following verbal instructions accompanied by demonstrations:

- When I tell you to start, take nine heel-to-toe steps down the line, turn around, and take nine heel-to-toe steps back up the line. (Demonstrate 2 or 3 heel-to-toe steps.)
- When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this. (Demonstrate).
- While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud.
- Once you start walking, don't stop until you have completed the test.
- Do you understand the instructions? (Make sure suspect understands.)
- Begin, and count your first step from the heel-to-toe position as "One".

The test interpretation portion of the manual lists behaviors which are most likely to be observed in someone with a .10 or more blood alcohol concentration. These behaviors are:

- A. Cannot keep balance while listening to the instructions. (Manual states that this clue should not be recorded unless the defendant fails to maintain the heel-to-toe position throughout the instructions. The clue should not be recorded if the suspect merely sways or uses his or her arms to balance, but maintains the heel-to-toe position.)
- B. Starts before the instructions are finished.
- C. Stops while walking.
- D. Does not touch heel-to-toe.
- E. Steps off the line.
- F. Uses arms to balance.
- G. Improper turn.
- H. Incorrect number of steps.

NHTSA Manual, VIII-10-11.

The officer is taught that "[i]f the suspect exhibits two or more distinct clues on this test or fails to complete it, classify the suspect's BAC as above 0.10. Using this criterion, you will be able to correctly classify about 68% of your suspects." NHTSA Manual, VIII-11.

B. You Must Be Sober and Focused to Understand Instructions

Breaking down the instructions from the manual reveals a lengthy and complex set of directions that the motorist must absorb prior to commencing the test:

1. Stand in a heel-to-toe position on a real or imaginary line.
2. Place your arms down at your sides.
3. Maintain position until instructions completed.
4. Do not start to walk until told to do so.
5. When told to start, take 9 heel-to-toe steps down line.
6. Turn around, keeping front foot on line and turn by taking a series of small steps with the other foot.
7. Take 9 heel-to-toe steps back up the line.
8. Keep arms at sides while walking.
9. Watch your feet at all times.
10. Count your steps out loud.
11. Once you start walking, don't stop until you have completed test.

Cross-examination in this regard can be very effective.

1. Officer, you administered the walk and turn test to Sally.
2. You had her stand in a heel to toe position while you gave her the instructions.
3. You gave her the instructions.
4. You gave her the instructions once.
5. You asked her if she understood the instructions.
6. She stated that she did.
7. She gave you no reason to believe that she did not understand the instructions.
8. When she performed the test, she exhibited clues which you used to grade the test?
9. Failure to understand one of the instructions was not one of those clues?

10. These instructions were given to her at roadside.
11. They were given to her after she had been stopped by a police car with flashing lights.
12. They were given to her while she was standing on the road with other cars going by. (Fill in any other distractions or stress-creating conditions.)

It seems impossible that someone who is supposedly intoxicated could remember such complex instructions and perform this test under such stressful conditions.

C. Investigative Notes

Most law enforcement agencies use the suggested forms from the NHTSA Manual to grade the standardized field sobriety tests. For example, the walk and turn portion of the form is set forth below:

WALK AND TURN TEST	
	<p>CANNOT KEEP BALANCE <input checked="" type="checkbox"/></p> <p>STARTS TOO SOON <input type="checkbox"/></p> <p>STOPS WALKING <input type="checkbox"/></p> <p>MISSES HEEL-TOE <input checked="" type="checkbox"/> <input checked="" type="checkbox"/></p> <p>STEPS OFF LINE <input checked="" type="checkbox"/> <input checked="" type="checkbox"/></p> <p>RAISES ARMS <input type="checkbox"/> <input checked="" type="checkbox"/></p> <p>ACTUAL STEPS TAKEN <input type="text" value="9"/> <input type="text" value="9"/></p>
<p>DESCRIBE TURN</p> <p>ABOUT FAULT</p> <p>NOT AS DESCRIBED</p>	<p>CANNOT DO TEST (EXPLAIN)</p>

In this case, the defendant failed the test exhibiting 5 out of 8 possible clues. That seems pretty bad until you look at it from the perspective of the things that the client did right. In pursuing the "things the client did right" cross-examination, it

is important to realize that most of the time the officer does not have a clear memory of your client's performance of that test.

D. Police Memory

For example, when the district attorney asks the police officer to detail the instructions that were given to the client on the date and time they were administered, most officers will proceed to answer by detailing what they do in administering the test, rather than what they did in administering it to this client on that particular date and time. Their typical answer will start with: "I have the defendant stand in a heel-to-toe position, and then I give them the following instructions...."

Police officers will rarely start off detailing what they did in your case. They are far more comfortable saying what they do in every case as opposed to saying what they did in your case. If you ask detailed questions, they will respond by requesting to see their paperwork for the purpose of refreshing their recollection.

E. Refreshing Recollection

Refreshing a witness's recollection is one of the great frauds of the Criminal Justice System. While it is true that on some occasions a witness's recollection is refreshed and he/she does have an independent recollection of the events, the vast majority of the time the witness is merely reciting what his/her notes say and have no such independent recollection.

In this manner, inadmissible hearsay is routinely introduced into evidence under the fraudulent guise of "refreshing recollection." This can be effectively used to benefit the defense. The key to it is asking highly detailed questions prior to getting to your cross of the field sobriety tests.

You need to ask very specific and very detailed questions about the observations of the vehicle prior to the stop, the manner in which the vehicle stopped, etc. These questions are important because they can pin down what happened and set up a series of questions about all of the things that didn't happen, but which are associated with impaired driving.

Of equal significance, however, is the fact that these questions will force the witness to say that he or she does not remember some of the details elicited by your questions. When that happens, the cross-examiner should make it clear that it is "okay" for the witness not to remember. That it would be unreasonable to expect the witness to remember all the details. That the reason the witness took notes was because time would pass and they would not be able to remember.

This leads naturally into the fact that the officer was trained to make observations of signs of impairment and to record those observations. That the witness followed his/her training and used the official form to record his/her observations. It is those investigative notes that the officer is now relying upon. As the witness sits there, they cannot recall every detail of the

walk and turn test, but they did record signs of impairment and intoxication. If they observed it, they recorded it. If they did not observe it, they did not record it.

There are two things that can be developed here. First, you may be able to get the witness to acknowledge that he/she has no independent memory of the manner in which your client did the field sobriety tests. He/she is relying on his/her notes and his/her testimony is not from an independent recollection, but the recitation of what is contained in his/her notes. In other words, his/her recollection is not refreshed and what is being offered into evidence is pure hearsay.

The other goal that can be accomplished is setting up the "all the things the client did right" cross.

Q: Officer, you recorded the clue "cannot keep balance."

A: Yes.

Q: That clue was recorded if Sally's feet broke apart.

A: Yes.

Q: As you sit here, now, you do not remember Sally's feet breaking apart, but you know that you must have observed it, because you recorded the clue?

A: Yes.

Q: It is only when people's feet break apart, in the middle of instructions, that you tell them to get back into the heel-to-toe position?

A: Yes.

Q: As far as we can tell, Sally got back into that position.

A: Yes.

Q: As far as we can tell from the form, you gave her the balance of the instructions?

A: Yes.

Q: With the exception of the clues you recorded, she followed those instructions?
A: Yes.

Q: There was nothing in her performance of the test that indicated to you that she did not understand all the instructions?
A: Yes.

Q: You told her not to start until she was instructed to commence the test?
A: Yes.

Q: Sally followed that instruction.
A: Yes.

Q: She did not start too soon?
A: Correct.

Q: That was one of the clues that you were looking for?
A: Yes.

Q: You told her that once she started the test, she was not to stop walking?
A: Yes.

Q: Sally followed that instruction and did the entire test without stopping?
A: Yes.

Q: You told Sally to walk in a heel to toe position on all 18 steps?
A: Yes.

Q: In order to score the missed heel-to-toe clue, there has to be a separation of heel-to-toe of one-half inch?
A: Yes.

Q: You recorded that she missed between steps 6 and 7.
A: Yes.

Q: You do not recall how far Sally's heel missed her toe between steps 6 and 7?
A: Correct.

Q: That means that there was at least one-half inch between the heel and toe between steps 6 and 7?
A: Yes.

Q: Sally walked the other 8 steps down perfectly insofar

as walking heel-to-toe?
A: Yes.
Q: On the 9 steps back, you recorded Sally missed heel-to-toe between steps 2 and 3?
A: Yes.
Q: Again, that means merely that there was at least a one-half inch separation between her heel and toe?
A: Yes.
Q: The other 8 steps were perfect insofar as heel-to-toe was concerned?
A: Yes.
Q: So of the 18 possible steps, she missed only 2?
A: Yes.

This same line of questioning can be pursued for stepping off the line, and raising the arms.

Insofar as the turn is concerned, officers frequently record conclusions such as, in this case, where the officer wrote "about face" and "not as described." That opens up the door to all of the things that were not written down such as losing balance, staggering, stepping off the line. In fact, with this report, you could make a lot of points about the fact that she did stay on the line during the turn.

F. Imaginary Line

The manual requires that the walk-and-turn test be performed on a "designated straight line." (VIII-11). My clients never seem to get the opportunity to perform this test on a real line. They are asked to walk along an imaginary line. The officer never specifies whether it is the client's imagination, or the officer's which governs. Inevitably, the client is graded off

for stepping off the imaginary line. Unfortunately, the requirement of a "designated straight line" encompasses imaginary lines. The imaginary line, however, should be milked for all that it is worth.

Q: *Officer, in your direct examination you stated that Sally stepped off the imaginary line?*

A: *Yes.*

Q: *Did you show her the imaginary line that you wanted her to follow?*

A: *No, sir, I just asked her to walk a straight line in front of her.*

Q: *So, she was not able to totally stay on the imaginary line that you saw?*

A: *No she was not.*

Q: *Does she have to be under the influence of alcohol to see the imaginary line that you saw?*

A: *No, sir.*

Q: *Did you see the imaginary line that Sally saw?*

A: *No, sir.*

Q: *Did Sally step off your imaginary line or did she step off the imaginary line that she saw?*

A:

Q: *You testified that Sally stepped off the imaginary line once on the 9 steps out and once on the 9 steps back?*

A: *Yes.*

Q: *You recorded Sally as staying on the line for 16 of the possible 18 steps?*

A: *Yes.*

Q: *And that was the line that Sally could not see, but had to imagine?*

A: *Yes.*

Q: *And she had to imagine the same line that you were imagining?*

A: *Yes.*

The training manual states that the test should be performed

on fairly firm, level terrain, free from debris. A visit to the scene, with a camera to photograph the terrain, often provides valuable information that can be effectively used during cross-examination.

Finally, the manual negates the validity of the walk and turn test for certain classes of individuals:

The original research indicated that individuals over 65 years of age, back, leg or inner ear problems had difficulty performing this test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

NHTSA Manual, VIII-11.

G. Challenge the Grading System

The grading system used to score performance on the SFSTs is demonstrably invalid. For example, a client who on step 4 misses heel to toe, and simultaneously, steps off the line, exhibits 2 clues and flunks the test. A different client who misses heel to toe on all 18 steps, but does everything else correctly, passes the test. The reason for this is that each clue can be graded only once no matter how many times it is repeated. That can result in the absurdity of one misstep being a failure, and 18 missteps being a "pass." That makes no sense and offends the jury's fundamental sense of fairness.

IV. The One-Leg Stand Test

A. Nature of the Test

This test requires the suspect to stand on one leg and count in accordance with the instructions of the officer. The suspect

is told to stand with his feet together and arms down at his sides and to listen to the instructions. The protocol from the NHTSA Manual is set forth below:

Procedures for One-Leg Stand Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

Initiate the test by giving the following verbal instructions, accompanied by demonstrations.

- "Please stand with your feet together and your arms down at the sides, like this." (Demonstrate)
- "Do not start to perform the test until I tell you to do so."
- "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Balance and Counting Stage

Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

- "When I tell you to start, raise one leg, either leg, with the foot approximately six inches off the ground, keeping your raised foot parallel to the ground." (Demonstrate one leg stance.)
- "You must keep both legs straight, arms at your side."
- "While holding that position, count out loud in the following manner: "One thousand and one, one thousand and two, one thousand and three, until told to stop." (Demonstrate a count, as follows: "one thousand and one, one thousand and two, one thousand and three, etc." Officer should not look at his foot when conducting the demonstration - OFFICER SAFETY.)
- "Keep your arms at your sides at all times and keep watching the raised foot."

- "Do you understand?" (Make sure suspect indicates understanding.)
- "Go ahead and perform the test." (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.)

Observe the suspect from a safe distance. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds.

3. Test Interpretation

You may observe a number of different behaviors when a suspect performs this test. The original research found the behaviors listed below are the most likely to be observed in someone with a BAC above 0.10. Look for the following clues each time the One-Leg Stand test is administered.

- A. The suspect sways while balancing. This refers to side-to-side or back-and-forth motion while the suspect maintains the one-leg stand position.
- B. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body in order to keep balance.
- C. Hopping. Suspect is able to keep one foot off the ground, but resorts to hopping in order to maintain balance.
- D. Puts foot down. The suspect is not able to maintain the one-leg stand position, putting the foot down one or more times during the 30-second count.

Note: If suspect can't do the test, record observed clues and document the reason for not completing the test, e.g. suspect's safety.

Remember that time is critical in this test. The original research has shown a person with a BAC above 0.10 can maintain balance for up to 25 seconds, but seldom as long as 30.

Based on original research, if an individual shows two or more clues or fails to complete the One-Leg Stand, there is a good chance the BAC is above .10. Using that criterion, you will accurately classify 65% of the people you test as to whether their BAC's are above 0.10.

Observe the suspect from a safe distance and remain as motionless as possible during the test so as not to interfere. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds.

4. Test Conditions

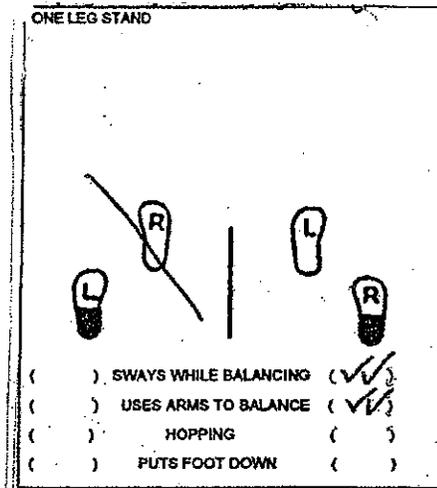
One-Leg Stand requires a reasonably dry, hard, level, and non-slippery surface. Suspect's safety should be considered at all times.

The original research indicated that certain individuals over 65 years of age, back, leg or inner ear problems, or people who are overweight by 50 or more pounds had difficulty performing this test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

NHTSA Manual, VIII-12-14.

B. Impeaching the One-Leg Stand

The one-leg stand is far simpler than the walk and turn test. It is also a more challenging test for the cross-examiner. Instructions are far simpler and the number of grading criteria are one-half those of the walk and turn test. In our case example, the defendant swayed while balancing and used arms to balance; and, therefore, flunked the test based upon two clues constituting failure.



C. The Instructions

Breaking down the instructions of the one-leg stand test is helpful in preparing your cross-examination. The instructions break down as follows:

1. Stand with your feet together.
2. Stand with your arms at your sides.
3. Do not start to perform the test until told to do so.
4. When told to start, raise one leg with the foot approximately 6 inches off the ground.
5. Keep your raised foot parallel to the ground.
6. Keep both legs straight with arms at your sides.
7. Maintain that position and count out loud in the following manner: one thousand and one, one thousand and two, one thousand and three until told to stop.
8. Keep your arms at your sides.
9. Keep watching the raised foot.

Out of all those instructions, only 2 count as clues. Two of those clues are not contained in the instructions. In other

words, the defendant is directed to focus on instructions that do not count and is given no instructions on two parts of the test that do count. Specifically, the instruction that the defendant not sway while balancing; nor hop in order to maintain balance.

In addition, while the defendant is told to keep his/her arms at his/her side, he/she is not told he/she could move his/her arms up to 6 inches from his/her side without being scored as a clue. The only clue that is explained in clear terms is the need to keep the one foot off the ground.

In that regard, there is no instruction as to how long the person has to stand with the one foot raised off the ground. While the NHTSA Manual calls for a period of 30 seconds, no such information is relayed to the defendant who is left with no guidance as to how long the test is to be continued other than waiting for the officer to tell him/her to stop.

D. Discredit the Grading System

Once again, you have the rule that a clue can only be recorded once for purposes of passing or failing the test. Accordingly, a person could put his/her foot down two times and, theoretically, pass the test. On the other hand, the person could be doing the test, sway, and move his/her hand 6 inches or more from his/her side, and be deemed a failure.

E. Things Done Right

One of the most fruitful areas of cross-examination is the establishment of all of the instruction that your client complied with even though he/she were not considered clues. It is inherently unfair to have someone flunk a test based upon instructions that were not given, i.e., swaying or hopping. This is particularly the case where the client is in substantial compliance with all of the instructions that were given.

Accordingly, your questions might go something like this:

Q: You told Sally to stand with her feet together and she did?

A: Yes.

Q: You told her to stand with her arms down at her sides and she did?

A: Yes.

Q: You told her not to start the test until she was told to do so?

A: Yes.

Q: She complied with that instruction?

A: Yes.

Q: You told her to raise one leg approximately 6 inches off the ground?

A: Yes.

Q: She complied with that instruction?

A: Yes.

Q: She accurately estimated the 6 inches?

A: Yes.

Q: She raised her foot so that it was parallel to the ground?

A: Yes.

Q: You told her to keep both legs straight?

A: Yes.

Q: She complied with that instruction?

A: Yes.

Q: You told her to keep her arms at her sides?

A: Yes.

Q: With the exception of two instances, she complied with that instruction?

A: Yes.

Q: One of the clues that you scored was that she swayed while balancing?

A: Yes.

Q: Out of all the instructions that you gave, you never told her that she could not sway while she was standing on one foot?

A: No.

V. Cross-Examination of the Officer - A Different Approach

The typical approach to cross-examination of the police officer is that the officer is the opposition, and the attorney's job is to discredit the testimony that was elicited on direct examination. Accordingly, many lawyers adopt a cynical or even hostile tone in conducting their cross-examination. The fundamental rule of cross-examination is that if it works, continue doing it. If it does not work, do something else.

Instead of considering or dealing with the officer as a "hostile" witness, there are some occasions when the witness can be coopted and turned, unwillingly, into a defense witness. If you look at things from the perspective of the police officer, you realize that the vast majority of his or her cases are plea bargained and that DWI cases generally do not evoke much animosity in the hearts of law enforcement officers. It is unlikely that the officer will lose much sleep if your client is

acquitted. What is far more important to the officer is how their performance is judged.

Most witnesses are primarily interested in not looking bad. It is that primal self-interest in looking good which gives rise to an opportunity to obtain favorable testimony from the ostensible adverse witness.

In the typical case, the witness has recorded notes of his/her observations, but has not written down everything that he/she has seen. The witness's training, however, requires that they take notes of observations. Accordingly, a properly trained and proficient officer will, supposedly, have noticed virtually all signs of intoxication. An ordinary or less than proficient officer might not note or remember many of the signs of impairment or intoxication.

A. Crediting the Officer

Under these circumstances, it may well be beneficial to the defense to "credit" the officer. In other words, to establish that the officer did complete SFST training. The officer was trained to make observations of a multitude of things and to note those things that were indicative of impairment or intoxication. The officer followed his/her training in this case and carefully observed the defendant from the first time he/she saw the car in motion. The officer followed his/her training and noted the observations that they made of the defendant.

At this point, the officer is thinking that you're not such

a bad person since you have essentially established that the officer was properly trained and did his/her job in accordance with his/her training.

B. If It Wasn't Noted, It Didn't Happen

An ordinary officer might not note or remember that the defendant weaved within a lane. The fact that the ordinary officer has no recollection of weaving in a lane does not mean that the defendant did not, in fact, weave within the lane.

On the contrary, a highly trained and competent officer, skilled in DWI enforcement, however, would certainly have noted and remembered such a sign, and the fact that it does not appear in his report is proof positive that it did not occur. An officer who has been first credited for being thorough, accurate and highly proficient in DWI enforcement, will be loathe to say that he missed anything, or failed to write anything down--rather the officer will affirmatively agree that there was no weaving.

Once you have credited the officer, you are now ready to establish a laundry list of everything the witness did not observe; and, accordingly, which did not occur.

C. Topics for Cross-Examination

Cross-examination of the arresting officer can be broken down into seven chapters:

1. Operation of the vehicle.
2. The stop of the vehicle.
3. Observations inside the defendant's car.

4. Observations of the defendant getting out of the car and moving to the rear of the vehicle.
5. Field sobriety tests.
6. Observations and conversation in police car en route to the station.
7. Observations at the station.

1. Operation of the Vehicle

Operation of the vehicle is frequently overlooked in the sea of details surrounding the stop and the performance of field sobriety tests. The ability of the driver to operate a motor vehicle is best reflected in the manner the driver did, in fact, operate the vehicle. If the prosecution testimony in this area is sparse (which it frequently is) that should be fully exploited.

Most DWIs start with a traffic infraction unrelated to intoxication. For example, speeding is one of the most common reasons for a traffic stop. It bears no necessary connection to intoxication. It is also a fairly decent field sobriety test. It is easy to establish that driving at higher speeds requires a higher level of coordination, depth perception, and motor skills than operating at a lower speed. What the prosecution sometimes paints as evidence of intoxicated driving can be turned around and presented as evidence of a high level of coordination and, thus, sobriety.

In one case, the officer testified that the defendant pulled within six inches of the side of a bridge. Examination of the

scene revealed that the defendant had to pull that close to the bridge in order to get his car out of the driving lane of the highway. The area was so narrow that only a high degree of coordination and/or dumb luck would have allowed the defendant to have successfully placed his car where he did without hitting the bridge. We, of course, opted to portray this as the former rather than the latter.

If the basis for the stop was an allegation of excessive speed, and no other allegations of aberrant driving were described during direct-examination, you should credit the witness and establish that the answers given to the prosecutor in regard to the operation of the vehicle were accurate and thorough. You should examine the officer's notes and/or other paperwork in regard to the issue of operation.

Establish that the officer was trained in the completion of paperwork; that he was trained that it was important to be accurate and thorough; that he tried to be accurate and thorough; and that in this case he was accurate and thorough. Also establish that he was trained to note conduct indicative of intoxication.

Establish that the paperwork does not indicate any swerving in the lane, any swerving across the dividing line of the highway, nor any swerving across the fog line on the shoulder of the road. Establish that the officer also did not mention any aberrant driving other than speeding on his direct-examination.

Establish that had this trained officer made any such observations, he would have noted them in his paperwork and that he would have mentioned them in response to the prosecutor's questions on direct-examination.

Pin down how far the officer followed the defendant. Pin down the length of time this took and how much opportunity he or she had to observe the vehicle. Pin down the lighting conditions. The idea is to elicit as many facts indicating the absence of aberrant driving as the court will tolerate before you are cut off.

The NHTSA manual is extremely helpful in this area of cross-examination. For example, a selection of appropriate visual cues which were not observed by the officer can be helpful in establishing a lack of intoxication. Obviously, "turning with wide radius" would not be appropriate for someone going straight ahead on a freeway. The absence of an observation of the vehicle "straddling center or lane marker" would be helpful.

The NHTSA manual also provides a category entitled: "Appearing to be Impaired." This is broken down into the following:

- Eye fixation
- Tightly gripping the steering wheel
- Slouching in the seat
- Gesturing erratically or obscenely
- Face close to the windshield
- Driver's head protruding from vehicle

NHTSA Manual, V-7.

While it could be that my clientele are somewhat conservative in their expression of intoxication, it is rare to encounter defendants exhibiting any of these symptoms.

The book also lists other "visual cues descriptions" along with the percentage chance that the person exhibiting these cues has a BAC of .10 or more:

- 65% - Turning with Wide Radius
- 65% - Straddling Center or Lane Marker
- 60% - Almost Striking Object or Vehicle
- 60% - Weaving
- 55% - Driving on Other Than Designated Roadway
- 55% - Swerving
- 50% - Speed Slower than 10 m.p.h. Below Limit
- 50% - Stopping Without Cause in Traffic Lane
- 50% - Following Too Closely
- 50% - Drifting
- 45% - Tires on Center or Lane Marker
- 45% - Braking Erratically
- 45% - Driving Into Opposing or Crossing Traffic
- 40% - Slow Response to Traffic Signals
- 40% - Signaling Inconsistent With Driving Actions
- 35% - Stopping Inappropriately (Other Than in Traffic Lane
- 35% - Turning Abruptly or Illegally
- 30% - Accelerating or Decelerating Rapidly
- 30% - Headlights Off

NHTSA Manual, V-4.

Obviously, you have to avoid overdoing this, but the fact that the speeding defendant is not exhibiting any of the "cues" that the federal government tells officers to look for can be helpful. This is particularly true when the information on page V-8 of the book, which details how complicated driving is, is used:

Driving is a complex task involving a number of subtasks, many of which occur simultaneously. These include:

- steering;
- controlling the accelerator;
- signaling;
- controlling the brake pedal;
- operating the clutch;
- operating the gearshift;
- observing other traffic;
- observing signal lights, stop signs & other traffic control devices; and
- making decisions (whether to stop, turn, speed up, slow down).

NHTSA Manual, V-8.

Once operation has been exhausted, move on to the stopping sequence.

2. The Stop of the Vehicle

Generally, officers do not recall much about the manner in which the defendant pulled over unless it really is unusual or aberrant. Accordingly, the uncredited, normal officer will simply say that he does not recall anything. The credited officer, however, will testify that had there been anything unusual, he would have noted it. You can proceed to establish the items not seen, but referenced in the NHTSA Manual. At page V-10, the manual states:

Cues reinforcing the suspicion of DWI may be found in the stopping sequence. After the command to stop is given, the impaired driver may exhibit additional important evidence of DWI. These cues may include:

- an attempt to flee;
- no response;
- slow response;
- an abrupt swerve;
- sudden stop; and
- striking the curb or another object.

Some of these cues come to light because the stop command places additional demands on the driver's

ability to divide attention. The signal to stop creates a new situation with which the driver must cope. Flashing emergency lights or a siren demand and divert the driver's attention between driving and responding to the stop command. Stopping itself requires the driver simultaneously to turn the steering wheel, put on the brakes, use a turn signal, and so on. Thus the driver's task becomes more complex when the stop command is given. A driver under the influence may not be able to handle this more complex task and additional evidence of impairment may appear.

NHTSA Manual, V-10.

The above quotation turns the simple stop into a complex field sobriety test -- which your client passed! If the officer attempts to wriggle out of this by saying that these things might have been present but he did not observe them, you can point out the next paragraph in the training manual which states:

It is your responsibility to recognize, record and convey the additional evidence of driving impairment that may come to light during the stopping sequences. This task, like Task One, observing the vehicle in operation, requires:

- the ability to recognize evidence of impairment; and
- the ability to describe that evidence clearly and convincingly.

NHTSA Manual, V-10.

Better yet, establish this responsibility before you ask him or her about the stop sequence. He will have a tough time saying that he or she forsook their responsibility to make these observations. It is much easier to assert that something did not happen, than to admit to a failure of professional responsibility. What this boils down to is that the police officer is testing your client for intoxication; and you are

testing the police officer for professional competency. If the officer is given the choice between flunking a competency test, and having your client pass the sobriety test, chances are that the officer will choose the latter over the former. The client benefits.

3. Observations Inside the Defendant's Car

Most commonly, the direct examination of the officer will deal with little detail in regard to observation inside the vehicle, other than testimony about odor of beverage, slurred speech, glassy eyes, and possibly fumbling for the license and registration.

This can be advantageous if the witness commits to having been thorough and accurate in his responses to the prosecutor's examination. Because you will have the officer's notes prior to commencing your cross-examination, you will know what observations were noted. The chances are that the officer will not have an independent recollection beyond the content of his notes. Once the officer is committed to having been thorough and accurate in response to the direct examination, pin down all of the things that were not observed which one would expect to see had the defendant really been intoxicated.

The NHTSA Manual lists the following things as being "describable clues or evidence of alcohol or drug influence."

- bloodshot eyes;
- soiled clothing;
- fumbling fingers;
- alcohol containers;

- drugs or drug paraphernalia;
- bruises, bumps or scratches;
- unusual actions;
- slurred speech;
- admission of drinking;
- inconsistent responses;
- abusive language;
- unusual statements;
- (odor of) alcoholic beverages;
- (odor of) marijuana;
- "cover up" odors like breath sprays;
- unusual odors.

NHTSA Manual, VI-3.

4. License and Registration

Officers routinely request a driver's license, but do not normally note the manner in which a person produces the license and registration--unless there is unusual fumbling or other behavior that indicates intoxication. Most officers do not remember how the defendant produced the license and registration.

A lack of memory is not nearly as helpful as testimony that establishes the officer was trained to look for signs of intoxication; that he would have noted any unusual difficulty or problems in producing a license and registration; that he did not make any notes to that effect; and he has no present recollection of anything to that effect. Accordingly, it is logical to argue that it did not happen because he would have noted it if it did.

Once you have established the absence of any difficulty with the license and registration, you may want to discuss page VI-4 of the NHTSA Manual:

There are a number of techniques you can use while the driver is still behind the wheel. Most of these techniques apply the concept of divided attention.

They require the driver to concentrate on two or more things at the same time. They include both questioning techniques and psycho physical (mind-body) tasks... .

An example of the first technique, asking for two things simultaneously, is requesting that the driver produce both the driver's license and the vehicle registration. Possible evidence of impairment may come to light to as the driver responds to this dual request. Be alert for the driver who:

- forgets to produce both documents;
- produces documents other than the ones requested;
- fails to see the license, registration or both while searching through wallet, purse;
- fumbles or drops wallet, purse, license or registration;
- is unable to retrieve documents using fingertips.

NHTSA Manual, VI-4.

5. Exiting the Vehicle

As with the production of the license and registration, officers generally do not pay much attention to the manner in which the defendant gets out of the car. Police officers focus on performance of field sobriety tests and use that performance for the purpose of establishing probable cause to arrest. Once again you are set to present the manner in which your client got out of his car as the successful completion of a NHTSA sobriety test.

Be careful with the words "nothing unusual." These are used to test the water and to begin to funnel the officer into a firmer piece of testimony which is that the officer did not observe anything in the manner in which your client exited his vehicle which indicated impairment or intoxication. As a boy growing up in a rural community, I learned to warm my hands

before attempting to milk dairy cows.

Cross-examination follows a similar principle in that you ease the witness into the position you desire in gradual increments. Commit the officer to the "nothing unusual" position, and then move to the absence of any sign of intoxication. Once you are there, you can develop the NHTSA exit sequence:

How the driver steps and walks from the vehicle and actions or behavior during the exit sequence may provide important evidence of impairment. Be alert to the driver who:

- shows angry or unusual reactions;
- cannot follow instructions;
- cannot open the door;
- leaves the vehicle in gear;
- "climbs" out of vehicle;
- leans against vehicle;
- keeps hands on vehicle for balance.

NHTSA Manual, VI-6.

Be sure you have eliminated any possibility that the defendant leaned against the vehicle or placed his hands on the vehicle for balance. In other words, thoroughly commit the officer before you move to the impeachment phase.

Once you have the defendant out of the car, you can establish that the defendant did not sway; and that the defendant stood up. The defendant moved to the front of the vehicle without assistance. The defendant did not sway, and that the defendant stood up appropriately.

VI. Conclusion

In every case, you always have to look not just for the things that were there, but the things that were not. Reasonable doubt frequently resides in what was not there, but should have been there if the People's accusation was correct.