CHAPTER 10

Successfully Defending an OUI Case

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Scope Note

This chapter offers practical guidance on the defense of an "operating under the influence" (OUI) case. It begins by reviewing the individual elements of the Commonwealth's case—first addressing the defendant's alleged "operation of motor vehicle" on a public "way" and then focusing on the allegation that the defendant was operating under the influence of alcohol or with blood alcohol of .08 percent or greater. The chapter then discusses various aspects of the defense, including expert testimony, cross-examination, motion practice, building the defendant's case, and applicable penalties. Included with the chapter are numerous forms and other exhibits, including responses to questions frequently asked by clients.

§ 10.1 INTRODUCTION

During every legislative session, the General Court considers new bills that severely increase the penalties for operating under the influence. Important legislative enactments have included

- Melanie's Law, which substantially increased the length of suspension for refusing to take a breath test, established the use of interlocking devices by all second and subsequent offenders, and created new offenses, such as manslaughter by motor vehicle;
- a per se law that makes operating a motor vehicle with a .08 percent or greater blood alcohol level a separate crime;
- elimination of the lookback period for considering prior OUIs; and
- creation of new mandatory minimum sentences that carry the possibility of incarceration in state prison for certain OUI offenses.

* A portion of this chapter was adapted from chapter 7 of *Trying OUI Cases in Massachusetts* (MCLE, Inc. 2013 & Supp. 2015, 2018).

- the 2018 criminal justice reform package, which impacted many areas relative to OUI, such as enhancing and adding penalties for fifth and subsequent offenses, allowing the court to waive the OUI program charge if it would create "serious financial hardship," and expanding old language related to "vapors of glue" by changing it to "fumes . . . releasing toxic vapors."

See 2018 Mass. Acts c. 72, 2018 Mass. Acts c. 69, 2005 Mass. Acts c. 122; 2003 Mass. Acts c. 28; 1994 Mass. Acts c. 25.

As a consequence, impaired driver cases dominate the District Court dockets as indictments are brought to take advantage of the enhanced penalties now available for subsequent offenders. Defense counsel must be prepared to fully litigate all aspects of an OUI case, including appropriate pretrial motions.

This chapter focuses on the defense of a defendant charged with OUI and offers some practical advice. **Checklist 10.1** outlines key steps to take in defending against an OUI charge.

§ 10.2 THE OFFENSE

General Laws c. 90, § 24 provides in part as follows:

> Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor . . . shall be punished . . . .

The Commonwealth must, therefore, prove beyond a reasonable doubt three separate and distinct elements:

- operation of the motor vehicle,
- on a public way,
- while under the influence of liquor or with a .08 percent or greater blood alcohol level.

Perhaps the easiest way to understand the elements of operation, public way, and impairment is to study the District Court Model Jury Instructions. See **Exhibits 10A–10D**. Almost every judge will read these instructions verbatim to the jury. The model OUI instruction set forth in the *Criminal Model Jury Instructions for Use in the District Court* (Instruction No. 5.300; see **Exhibit 10C**) incorporates the provisions of the per se law.

§ 10.3 OPERATION

The definition of operation and various defenses based on operation are set forth below.

§ 10.3.1 Definition

Under Instruction 3.200 of the *Criminal Model Jury Instructions for Use in the District Court* (2014 ed.),

> [a] person "operates" a motor vehicle not only while doing all of the well-known things that drivers do as they travel on a street or highway, but also when doing any act which directly tends to set the vehicle in motion. The law is that a person is "operating" a motor vehicle whenever he or she is in the vehicle and intentionally manipulates some mechanical or electrical part of the vehicle—like the gear shift or the ignition—which, alone or in sequence, will set the vehicle in motion.

Instruction 3.200 cites as authority *Commonwealth v. Ginnetti*, 400 Mass. 181, 184 (1987) (automobile with functioning engine not considered inoperable if unable to move due to road or other conditions), and *Commonwealth v. Uski*, 263 Mass. 22, 24 (1928). In *Uski*, the defendant was held to be operating an automobile when he got into the vehicle and "manipulated the machinery of the motor for the purpose of putting the automobile into motion . . . whether the automobile moved or not." *Commonwealth v. Uski*, 263 Mass. at 24. Likewise, the decisions tend to support a liberal interpretation of "operation" that does not require movement of the automobile or for the engine to be on. For example, the courts have held that operating a motor vehicle includes

- shifting into neutral and rolling down an incline without the engine on, *Commonwealth v. Clarke*, 254 Mass. 566, 567 (1926);
- ordinary stops en route, *Commonwealth v. Henry*, 229 Mass. 19, 22 (1918); *Commonwealth v. Cavallaro*, 25 Mass. App. Ct. 605, 607–11 (1988);
- stops for "soliciting trade or in calling for and delivering merchandise," *Cook v. Crowell*, 273 Mass. 356, 358 (1930);
- stops to receive and discharge passengers, *Blair v. Boston Elevated Ry. Co.*, 310 Mass. 1, 3 (1941);
- circumstantial evidence of sole occupant slumped in the driver's seat, *Commonwealth v. Wood*, 261 Mass. 458, 459 (1927); and
- having the key in the ignition and turning on just the electricity without starting the engine, *Commonwealth v. McGillivary*, 78 Mass. App. Ct. 644 (2011).

However, "evidence that an intoxicated person was observed sleeping in the driver's seat of a parked vehicle, with the keys in the ignition and the engine running, by itself, does not mandate a finding of 'operation' under G.L. c. 90, § 24." *Commonwealth v. Plowman*, 28 Mass. App. Ct. 230, 234 (1990); *Commonwealth v. Sudderth*, 37 Mass. App. Ct. 317, 318–21 (1994); *cf. Commonwealth v. McGillivary*, 78 Mass. App. Ct. at 650 (turning key in ignition even though car is not turned on is enough for operation). Unless an officer observes the vehicle in motion, operation may be an issue at trial.

Practice Note

Counsel should take a careful look at the timing involved with any situation where the operator was found sleeping in the driver's seat. The government must prove that the vehicle was being operated "while" the individual was "under the influence" or with ".08% or greater blood alcohol level." G.L. c. 90, § 24.

§ 10.3.2 Defense

A defense predicated upon lack of evidence of operation is obviously not viable in most cases. If the police followed and then stopped the defendant's car while he or she was sitting in the driver's seat, clearly operation is not a "live" issue. Counsel would be well advised to not spend much time challenging the evidence. However, many defense lawyers still will not stipulate to operation until after the Commonwealth has had the defendant identified by the witnesses. Quite often an inexperienced prosecutor will forget to establish operation, thereby giving rise to a motion for a required finding of not guilty.

A defense based on operation is very fact specific. It generally arises when police arrive after an accident and operation by the defendant is not readily apparent. In these cases, the government will have to rely on civilian witnesses to the accident or the defendant's own admissions. The presence of others who may be the operator is certainly important when attempting to rebut circumstantial evidence of operation. *See Commonwealth v. Shea*, 324 Mass. 710 (1949); *Commonwealth v. Plowman*, 28 Mass. App. Ct. 230 (1990); *Commonwealth v. Mullen*, 3 Mass. App. Ct. 25 (1975).

One important case dealing with operation is the case of *Commonwealth v. Leonard*, 401 Mass. 470, 471–73 (1988). In *Leonard*, the Supreme Judicial Court applied to OUI cases the longstanding evidentiary rule that a confession to a crime must be supported with independent corroboration. Although the defendant in *Leonard* was impaired, engaged in an argument with his wife while standing outside the motor vehicle on the side of the road, and admittedly the operator, the court felt the admission was not supported with sufficient corroborative evidence to support the conviction.

In subsequent decisions, the court has more specifically analyzed what is adequate evidence of independent corroboration of an admission. An operator's statements that detail the cause of the accident, ownership of the vehicle, willingness to submit to field sobriety tests, and even the failure of bystanders to dispute the identity of the individual the police are treating as the operator are just a few examples of corroborative evidence. *See Commonwealth v. Adams*, 421 Mass. 289 (1995); *Commonwealth v. O'Connor*, 420 Mass. 630 (1995); *Commonwealth v. Manning*, 41 Mass. App. Ct. 18 (1996).

§ 10.4 PUBLIC WAY

The definition of a public way, stipulations as to proof regarding public ways in OUI cases, and public way as an element of the Commonwealth's proof are discussed below.

§ 10.4.1 Definition

Although a public "way" is defined in G.L. c. 90, § 1 as "any public highway, private way laid out under authority of statute, way dedicated to public use, or way under the control of park commissioners or body having like powers," G.L. c. 90, § 24(1)(a)(1) applies to operation "upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees." *Compare Commonwealth v. Endicott*, 17 Mass. App. Ct. 1025, 1026 (1984) (Brown, J., concurring) (beach property), *with Commonwealth v. George*, 406 Mass. 635, 636 (1990) (ball field). *See also Commonwealth v. Paccia*, 338 Mass. 4 (1958); *Commonwealth v. Hart*, 26 Mass. App. Ct. 235 (1988); *Commonwealth v. Lagenfeld*, 1 Mass. App. Ct. 813 (1973).

When analyzing the definition of "public way" under G.L. c. 90, § 24(1)(a)(1), the court is to examine "the status of the way, not the status of the driver." *Commonwealth v. Smithson*, 41 Mass. App. Ct. 545, 549 (1996) (finding no public way where a sign listing business hours was "clearly visible from the road as one approache[d] the entrance" and physical circumstances did not suggest a public way). "[T]he physical circumstances of the way [must be] such that the members of the public may reasonably conclude that it is open for travel to invitees or licensees of the abutters." *Commonwealth v. Hart*, 26 Mass. App. Ct. 235, 238 (1988) (private way open to invitees where way aligned with businesses). The usual "indicia of accessibility to the public" includes "street lights, paving, curbing, abutting houses or business, crossroads, traffic, street signs or hydrants." *Commonwealth v. George*, 406 Mass. 635, 636 (1990) (baseball field not a public way). "[I]t is the objective appearance of the way that is determinative of its status, rather than the subjective intent of the property owner." *Commonwealth v. Virgilio*, 79 Mass. App. Ct. 570, 573 (2011) (small private driveway not open to invitees); *see also Commonwealth v. Paccia*, 338 Mass. 4 (1958) (private way not contemplated by statute despite regular public use).

§ 10.4.2 Stipulation of Proof

Defense attorneys generally stipulate to the presence of a public way in OUI cases, perhaps due to relative ease of proof. However, before defense counsel agrees to a request to stipulate, he or she should consider whether the assistant district attorney might offer anything in return and whether the element of public way may be open to challenge under the particular facts of the case. Also, keep in mind that an inexperienced prosecutor may neglect to establish operation on a public way, thereby giving rise to a motion for a required finding of not guilty.

If there is no stipulation, the Commonwealth may prove public way by either

- introducing a certificate issued by the appropriate public authority, pursuant to G.L. c. 233, § 79F, stating that the way is, in fact, public or
- introducing testimony, during trial, of a witness—typically the police officer—that the way exhibits sufficient indicators that it is public, such as traffic lights, curbing, crossroads, hydrants, marked traffic lanes, parking signs, regular town maintenance, traffic, and the like, *Commonwealth v. Charland*, 338 Mass. 742 (1959); *Commonwealth v. Mara*, 257 Mass. 198 (1926); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008 (1987); *Commonwealth v. Hazelton*, 11 Mass. App. Ct. 899 (1980).

§ 10.4.3 Defense

The distinction found in G.L. c. 90, § 24(1)(a)(1) becomes important when the Commonwealth must meet its burden of proof as to the elements of an OUI case. That is, to satisfy G.L. c. 90, § 24(1)(a)(1), the Commonwealth must prove that the defendant was operating under the influence

- on a public way,
- in a place open to the general public by motor vehicle, or
- in a place where the public had access as invitees or licensees by motor vehicle, *see Commonwealth v. George*, 406 Mass. 635 (1990); *Commonwealth v. Callahan*, 405 Mass. 200 (1989).

If the complaint alleges only operation of a motor vehicle on a public way, when in fact the offense occurred in "a place to which members of the public have access as invitees or licensees," the Commonwealth has not proven its case—and the defendant should be found not guilty. Therefore, counsel should ensure that any certificate showing public way not only covers the date of the offense but that the "way" stated in the complaint is proven by the evidence.

Whether a particular place or road falls within the statute depends on each individual set of facts. *See Commonwealth v. Smithson*, 41 Mass. App. Ct. 545 (1996) (gated road leading to a commercial gravel pit not a public way). Although it is difficult to counter the Commonwealth's proof of public way, the courts have declined to stretch the scope of public access to areas open to the public, but not to a motor vehicle, to include

- a baseball field, *Commonwealth v. George*, 406 Mass. 635 (1990);
- a gravel haul road, *Commonwealth v. Smithson*, 41 Mass. App. Ct. 545 (1996);
- a local sandpit area used for go-carting, *Commonwealth v. Callahan*, 405 Mass. 200 (1989); or
- a private driveway, *Commonwealth v. Virgilio*, 79 Mass. App. Ct. 570 (2011).

§ 10.5 UNDER THE INFLUENCE

A defendant may be convicted of operating under the influence of alcohol in two ways. *See* 2003 Mass. Acts c. 28. First, the Commonwealth may prove the operator was impaired (the "impairment" theory). Second, the Commonwealth may prove that the operator had a blood alcohol level of .08 percent or greater while driving (the "per se" theory). This second ground has not been constitutionally tested. In the meantime, counsel should, at a minimum, insist on special verdict slips that identify both theories, if applicable. Also, counsel should insist on a specific unanimity instruction that informs the jury that they must be unanimous as to the individual theories. Each of these grounds will be discussed below.

§ 10.5.1 Diminished Capacity

(a) *General Principles*

The most hotly contested issue in the vast majority of OUI cases is whether the defendant's capacity to operate the motor vehicle was diminished as a result of alcohol. *Commonwealth v. Connolly*, 394 Mass. 169 (1985). The jury will be instructed that it is not necessary that the evidence show that the defendant was drunk or even drove in an unsafe manner. Rather, the Commonwealth must prove only that the defendant drank enough alcohol—or consumed enough drugs—to impair his or her ability to operate the vehicle safely. See **Exhibits 10C** and **10D**, Model Jury Instructions 5.300 (Operating Under the Influence of Intoxicating Liquor or with a Blood Alcohol Level of .08% or Greater) and 5.400 (Operating Under the Influence of Drugs). The Commonwealth establishes that the driver was under the influence of alcohol by use of opinion evidence and, if available, a breath or blood test.

Practice Note

In *Commonwealth v. Rocheleau*, 90 Mass. App. Ct. 634, 640 (2016), *review denied*, 476 Mass. 1114 (2017), the court stated that "[w]hile lay opinion on the question whether someone is intoxicated by alcohol is generally admissible because the effects of alcohol intoxication are widely known, *see Commonwealth v. Canty*, 466 Mass. 535, 540 (2013), we are aware of no authority for the proposition that a lay witness may offer an opinion that a person is 'high' on something other than alcohol." *See Commonwealth v. Gerhardt*, 477 Mass. 775, 786–87 (2017) (With respect to marijuana, "[a] lay witness may testify concerning a defendant's observable appearance, behavior, and demeanor, but may not offer an opinion as to the defendant's sobriety or intoxication.") (footnote and citations omitted).

(b) *Opinion Evidence*

Prosecutions for OUI are generally predicated upon the opinions of police and civilian witnesses that the defendant was impaired. The witnesses usually identify "objective" symptoms of impairment to support their opinion. These symptoms usually

include erratic operation of the vehicle, red and glassy eyes, strong odor of alcoholic beverage on the operator's breath, slurred speech, and unsteadiness. Following testimony on these observations, the witness is usually asked to form an opinion on the defendant's sobriety. With a proper foundation, such an opinion is admissible but is objectionable if it encroaches on the ultimate issue. *See Commonwealth v. Saulnier*, 84 Mass. App. Ct. 603, 605–06 (2013) (witness may testify to the defendant's apparent intoxication but may not opine as to the ultimate questions of whether the defendant was operating under the influence and whether his or her ability to safely operate a motor vehicle had been impaired due to his or her consumption of alcohol). In that case, counsel must be alert to object and move to strike the opinion to the extent that it encroaches on the ultimate issue at trial. *Commonwealth v. Canty*, 466 Mass. 535 (2013), prohibits law enforcement from providing an opinion on the ultimate issue. Counsel should always seek a motion in limine instructing the law enforcement witness not to provide any opinion on the "ultimate issue."

Because OUI prosecutions rely so heavily on opinion evidence by nonmedical personnel, they are uniquely vulnerable to a defense challenge. Counsel must carefully examine all the underlying factors relied on by the witness. For example, is there another, perhaps more plausible, explanation for red and glassy eyes that is independent of alcohol or drug impairment (e.g., lack of sleep, cigarette smoking)?

Preexisting medical conditions may also raise questions about the symptoms that gave rise to the opinion. Counsel can introduce past medical records supporting the defense or even have the defendant's doctor write a report opining whether the defendant can do field sobriety tests. *See Commonwealth v. Schutte*, 52 Mass. App. Ct. 796, 799–800 (2001) (medical report from treating physician that defendant has balance problems admissible under G.L. c. 233, § 79G, even if made in anticipation of litigation).

Some possible areas of cross-examination are outlined below.

(c) *Erratic Operation*

Often a police officer will testify to following the defendant and observing the car weaving, failing to obey traffic signals, or speeding. Obviously, the less erratic the operation, the better the argument can be made that the defendant was not impaired. If, for example, the defendant was pulled over for a broken brake light, a compelling argument can be made that his or her capacity to operate the vehicle was not diminished as evidenced by the otherwise flawless operation. Likewise, if the defendant was only speeding, without other erratic operation, his or her ability to control the vehicle is self-evident, thereby undermining the allegation of impairment.

(d) *Odor of Alcohol*

Counsel should keep in mind that pure alcohol is odorless. The additives in alcoholic beverages cause the odor. The weaker the alcoholic beverage (e.g., beer and wine), the greater the odor. Thus, a strong odor may be indicative of someone drinking weaker alcoholic beverages. Additionally, an officer will be unable to testify as to

how much a person drank simply from an odor. Counsel should emphasize on cross-examination that the officer's training specifically states that a "strong" odor of alcohol has nothing to do with the amount someone has consumed.

Counsel should make sure that the jury understands from the outset of the case that it is not illegal to have a drink and drive a car. An odor of alcoholic beverages is, therefore, not dispositive of the case. Rather, it is simply consistent with the defendant having consumed a small amount of alcohol prior to being stopped.

(e) *Red or Glassy Eyes*

First of all, what exactly are glassy eyes? There are many reasons, apart from drinking alcohol, why one's eyes may be red or glassy—the hour of the day or evening, excessive reading, staring at the road for a long period of time, tiredness, a preexisting medical condition, allergies, or similar reasons.

(f) *Slurred Speech*

As with red or glassy eyes, there are a number of reasons why a person may have thick and slurred speech completely independent of intoxication. Is the defendant English-speaking? Does the defendant have a speech impediment? Is it late at night?

Furthermore, this will likely be the first time the officer has any contact with the defendant. The officer will have no point of reference to opine about the defendant's usual speech pattern.

> **Practice Note**
> Prior to undertaking this approach, make sure there have been no prior contacts with or arrests of the defendant by this officer; if so, this line of questioning may open up areas better left closed.

Quite often, a police officer will testify about admissions by the defendant or other conversations. Pretrial discovery should include the booking sheet of the defendant. A defendant who was able to provide detailed information such as his or her Social Security number, phone number, and mother's maiden name could not have had particularly thick or slurred speech.

(g) *Field Sobriety Tests*

Overview

Absent a breath or blood test, the Commonwealth will likely place great weight on the defendant's performance on field sobriety tests. Field sobriety tests are divided-attention tests that are designed to test the operator's condition and ability to do multiple tasks at once.

Most field sobriety tests are considered nontestimonial. They require a driver to exhibit his or her physical coordination (or lack of) but do not require revelation of

subjective knowledge or thoughts concerning any fact. As a result, they have been held to not violate the driver's privilege against self-incrimination under the Fifth Amendment of the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights. *Vanhouton v. Commonwealth*, 424 Mass. 327 (1997); *Commonwealth v. Brennan*, 386 Mass. 772 (1982); *Commonwealth v. Ayre*, 31 Mass. App. Ct. 17 (1991).

It is important to note that any test that requires a driver to reveal subjective thoughts, following an arrest, does implicate the right to remain silent. *See Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (asking arrestee at booking the date of his sixth birthday was testimonial); *cf. Vanhouton v. Commonwealth*, 424 Mass. 327 (1997) (alphabet test, one-legged stand, and heel-to-toe test are nontestimonial). Additionally, a prosecutor may *not* comment at trial on a defendant's refusal to submit to a field sobriety test. *Commonwealth v. McGrail*, 419 Mass. 774 (1995). Any admissions made by the defendant that are part of the refusal to do the test may also be excludible. *Commonwealth v. Grenier*, 45 Mass. App. Ct. 58 (1998). However, in *Commonwealth v. Brown*, 83 Mass. App. Ct. 772 (2013), the court held that evidence is admissible when the defendant does not refuse to perform field sobriety tests but, instead, attempts unsuccessfully to do so. "In such circumstances, the defendant's comment ('I can't do this'), while testimonial, was not the result of governmental compulsion and thus is admissible in evidence." *Commonwealth v. Brown*, 83 Mass. App. Ct. at 779.

The Supreme Judicial Court held in *Commonwealth v. Blais*, 428 Mass. 294 (1998), that the administration of field sobriety tests does not violate a driver's rights under the Fourth Amendment of the U.S. Constitution or Article 14 of the Massachusetts Declaration of Rights, where the officer who stopped the car had probable cause to arrest the operator. Moreover, roadside sobriety tests are appropriate as part of a *Terry* stop, where an officer has reasonable suspicion that the driver is impaired. The court also held the police do not have to give *Miranda*-type warnings regarding consent before administering field sobriety tests. *See also Commonwealth v. Wholley*, 429 Mass. 1010 (1999) (operator detained for suspicion of OUI not in custody, therefore, no *Miranda* warnings required); *VanHouton v. Commonwealth*, 424 Mass. 327 (1997) (no *Miranda* warnings necessary under federal law).

Typically, the police officer conducts the following tests:

- horizontal gaze nystagmus,
- nine-step walk and turn, and
- one-leg stand.

There are a few common points to be raised concerning these tests. First, it should be established that the officer not only gives the test but ultimately decides whether the subject passes or fails. Regardless of how the subject performs on the tests, defense counsel should explore

- whether the officer took into account that the suspect listened to the instructions and did what was asked;

- that many of these tests require a fair degree of coordination and that they may have been performed under conditions the suspect found intimidating;
- whether the subject may have an underlying medical issue or physical disability that interfered with test performance; and
- the credibility of the officer's initial observations.

Horizontal Gaze Nystagmus

Nystagmus is an involuntary, unconscious jerking of the eyeball. Horizontal gaze nystagmus refers to a jerking of the eyes as they gaze to the side. The driver removes his or her glasses (suspects wearing contact lenses cannot be administered the test), stands up straight, and looks directly at the officer, who holds a pen approximately twelve inches from the driver's eyes and moves it slowly to one side at a forty-five-degree angle and then back to the other side at a forty-five-degree angle, without stopping. When giving this test, police officers typically look for three signs of intoxication:

- The suspect cannot follow a slowly moving object with the eyes; his or her eyeballs jerk or bounce as they move left and right in pursuit of the pen.
- The suspect's eyeballs jerk distinctly when they are as far to the side as possible.
- The more intoxicated a person is, the less the eyes have to move toward the side before jerking begins. When a person's blood alcohol content (BAC) is .10 percent or higher, the jerking will usually begin before the eyeball has moved forty-five degrees to the side.

The conditions of a normal field sobriety test at roadside usually offer enough distractions to void the results of this test: a police cruiser with its flashing blue lights, high beams, and perhaps even a spotlight or take-down lights on the suspect; inadequate lighting at the test site; and other vehicles traveling by. Furthermore, police officers often do not even follow the proper form of the test: they may shine a light into the suspect's eyes (to see them better), hold the pen too close or too far away (making it hard for the suspect to properly focus on the pen), or stop the pen during the test (making the suspect's eyes necessarily jerk). Any of these factors makes the test unreliable.

This test should never be allowed into evidence without an adequate evidentiary foundation that the underlying scientific proposition is reliable. *Commonwealth v. Sands*, 424 Mass. 184 (1997). This will require expert testimony that the horizontal gaze nystagmus test has general acceptance in the scientific community, and to explain the results of the test. *See Commonwealth v. Sands*, 424 Mass. 184 (1997).

Counsel should be aware that there are many questionable variables in administering the horizontal gaze nystagmus test. Because this is a neuro-ophthalmological test that is influenced by many factors other than alcohol, a level of expertise in neurology and ophthalmology is required. Most police officers are not in a position to know whether the suspect has any eye troubles—the suspect may not even know that he or she has eye troubles—that could make this test unreliable. Certain medications, the

time of day (studies have shown that tests given after midnight show the onset of nystagmus as much as five degrees prior to normal), tiredness, or the suspect's having done extensive reading can affect the validity of the test. See **Exhibit 10E** for a sample motion in limine to exclude horizontal nystagmus test.

When an officer uses the horizontal gaze nystagmus test in forming his or her opinion, counsel may wish to file not only a motion in limine to exclude the test but also a motion to exclude his or her entire opinion. A persuasive argument can be made that if the officer's opinion is predicated on an invalid field sobriety test, the opinion does not have an adequate evidentiary foundation and should be excluded.

If the test is allowed into evidence, question the police officer about the scientific theory behind the test, what factors other than alcohol can influence the test, and at what angle the onset of nystagmus was observed. Ask similar questions to demonstrate the officer's lack of sufficient expertise and highlight the difficulties with administration and assessment, especially at roadside at the time of arrest.

Nine-Step Walk and Turn

The police usually administer this test at roadside just after the driver has been pulled over. The signs of intoxication the police are looking for include

- not being able to maintain balance while listening to the instructions,
- starting before the instructions are finished,
- stopping while walking to maintain steadiness,
- not touching heel to toe,
- stepping off the line,
- using arms for balance,
- losing balance when turning, and
- taking an incorrect number of steps.

This test requires a hard, dry, nonslippery, level surface with sufficient room to take nine heel-to-toe steps. A straight line must be clearly visible on the surface. The suspect must be in no danger if he or she were to fall. Individuals wearing shoes with heels more than two inches high should be instructed to remove the shoes. People over age sixty, more than fifty pounds overweight, or with physical impairments that affect their ability to balance should not be given this test. Some people, especially those with poor depth perception due to visual impairment in one eye, have difficulty with this test.

It is not unusual for the suspect to start the test before the police officer finishes giving the instructions. This is more a sign of nervousness or anxiousness than of intoxication. Since the reliability of this test rests on other subjective determinations, counsel should be prepared to challenge the officer both on his or her administration of the test and observations. For example, was there an actual line on the pavement

for the suspect to follow? Was the surface uneven or slippery from weather conditions? Was traffic speeding by during the test? Was the test administration flawed in another aspect?

Walking a Straight Line

Similar to the nine-step walk-and-turn, this test should be conducted on a flat, smooth surface away from traffic, and the line should actually exist. Often, if not always, the test is conducted by the side of the road, with the police lights flashing nearby. The line rarely exists. If walking an imaginary line, how wide is that line—an inch, four inches, a foot? If the defendant swayed or stepped in a slightly indirect manner, from an imaginary line six inches wide, did he or she actually step off it?

One-Leg Stand

In this test, the police look for the suspect's

- swaying while balancing,
- using his or her arms for balance,
- hopping, or
- putting the foot down.

> **Practice Note**
> On cross-examination, ask the police officer to repeat the instructions given prior to administering the test. Often the officer cannot recite the instructions properly. If the instructions were not given properly, the test results are unreliable. If the officer physically demonstrated the test to the defendant, defense counsel may wish to ask the officer to repeat the demonstration (which may result in an objection that the officer's ability to perform the test is not relevant). If the officer falters during the test demonstration, the jury will be hard pressed to expect that the defendant could perform the test under even less favorable conditions.

Note that if the officer stands closer than three feet away or moves while observing the test, the validity of the test is undermined. Also, there should be adequate lighting for the defendant to have a visual frame of reference. In darkness, this test is difficult even for sober people. If the test is given at roadside, often the suspect is facing the police cruiser with lights flashing and traffic speeding by. Under these conditions, the test is made even more difficult. As with the other "balance" tests, a hard, level, dry, and nonslippery surface is needed; individuals wearing shoes with heels more than two inches high should remove the shoes; people over age sixty or more than fifty pounds overweight or with physical impairments that affect their ability to balance should not be given this test.

(h) *Nonstandardized Tests*

Reciting the Alphabet

The examining officer asks the OUI suspect to recite the alphabet, presumably on the assumption that this is a relatively simple exercise and any errors in the recitation support an inference of intoxication. However, defense counsel should take care to bring out at trial whether there were other factors bearing on the results, such as nervousness, lack of facility with English, a speech impediment, noise or other distractions at the testing site, or exhaustion.

Often an officer will identify a specific letter missed by the defendant. If he or she previously testified that the defendant's speech was slurred, counsel may wish to examine this apparent contradiction. The defendant's speech could not have been very slurred if the officer was able to clearly distinguish the letters spoken and those missed. It is also highly questionable whether an officer will have a clear recollection, months after an arrest, of specifically missed letters, giving rise to another area of cross-examination.

See **Exhibit 10F** for a sample motion to suppress statements and field sobriety results.

Finger-to-Nose Test

In the finger-to-nose test, the officer asks the OUI suspect to close his or her eyes and, with arms extended up and to the sides, bring his or her index finger in to touch his or her nose. Again, counsel should ask questions designed to highlight both the officer's subjectivity in observing the test and other variables contributing to the subject's performance, such as lack of coordination or concentration.

Preliminary Breath Test (PBT)

Many police departments equip their officers with preliminary breath-test devices. The machines are handheld breath-test machines. They are not infrared, and the results of the tests are, therefore, not admissible. *See* G.L. c. 90, § 24K.

Preliminary breath-test results are often used by officers to form an opinion on the defendant's sobriety. However, counsel may seek to exclude the opinion at trial based on the inadmissibility of the test results. No Massachusetts appellate court has decided the legitimacy of this novel argument.

Practice Note

In certain circumstances the PBT is the only factor utilized in the arrest. In some rare circumstances your client could have passed all the field sobriety tests and have a high PBT result. In these circumstances the practitioner should be aware that the same fifteen-minute observation period applies with the PBT. Generally speaking, law enforcement officers do not wait the required fifteen minutes before administering the PBT. If this is the government's only evidence of probable cause, counsel

should seek the PBT manual of operation and move to suppress or dismiss the entire test based on lack of probable cause.

Videorecording

While field sobriety tests have traditionally taken place at the site where the OUI suspect is stopped for further investigation, some are now being performed and videorecorded at the police station during booking procedures. Such videorecordings do not violate

- Fourth Amendment rights if taken in an open area of the police station where any officer or passerby could observe the defendant;
- Fifth Amendment rights if the video exhibits only field sobriety tests and booking questions and does not reveal defendant's "knowledge and thoughts"; or
- Sixth Amendment rights if there is no "custodial interrogation."

Commonwealth v. Mahoney, 400 Mass. 524 (1987); *Commonwealth v. Ayre*, 31 Mass. App. Ct. 17 (1991). However, if the defendant was not advised that he or she was being recorded, a novel argument can be made for suppression of the audio portion pursuant to the state wiretap statute. See G.L. c. 272, § 99. *But see Commonwealth v. Price*, 408 Mass. 668 (1990); *Commonwealth v. Ashley*, 82 Mass. App. Ct. 748 (2012).

It should be noted that in *United States v. Reyes*, 225 F.3d 71, 77 (1st Cir. 2000), the court prohibited the police from eliciting incriminating statements during the booking procedure without the benefit of a *Miranda* warning. In the right situation, counsel should examine the possibility of suppressing the entire booking procedure and video if the citizen was not properly advised that the procedure was being electronically recorded where the police were deliberately and consciously creating evidence to be used in court. *See also Commonwealth v. Woods*, 419 Mass. 366 (1995).

§ 10.5.2 Breath and Blood Tests Under the Per Se Law

As previously stated, the Massachusetts legislature enacted a per se law. 2003 Mass. Acts c. 28. The law provides an alternative method to convict a defendant of operating under the influence of liquor. Under this provision, the Commonwealth can prove OUI by establishing that the defendant operated the motor vehicle on a public way while having a blood alcohol level of .08 percent or greater. This can be done with a blood test or a breath test.

Although G.L. c. 90, § 24(1)(e) provides for measuring blood alcohol by means of either blood or breath analysis, the breathalyzer has been the commonly used method. It can be performed by a certified operator using infrared equipment and approved methods, G.L. c. 90, § 24K, whereas a blood test requires administration by a physician, a registered nurse, or a certified medical technician at a licensed medical facility, G.L. c. 90, § 24(1)(e)–(f).

Practice Note

While the statute provides for admissibility of test results and the option for independent testing if a test is taken, it does not mandate that an OUI suspect be offered a breathalyzer (or blood) test. G.L. c. 90, § 24(1)(e)–(f).

(a) *The Breath Test*

Refusing the Test

Refusal may be explicit or constructive—as when an uncooperative defendant obstructs the test. *Commonwealth v. Schatvet*, 23 Mass. App. Ct. 130, 137–38 (1986); 501 C.M.R. § 2.16.

A refusal cannot be used at trial—not even indirectly by eliciting police testimony that the defendant was informed of the right to a breathalyzer test, without specifically mentioning the refusal. *Commonwealth v. Zevitas*, 418 Mass. 677 (1994); *Opinion of the Justices*, 412 Mass. 1201 (1992); *Commonwealth v. Conroy*, 396 Mass. 266 (1985); *Commonwealth v. Scott*, 359 Mass. 407 (1971); *see also* G.L. c. 90, § 24(1)(e).

Under G.L. c. 90, § 24(1)(f), the suspect has a right to be warned of the consequences of refusing to take the breathalyzer test, but not to be warned of the consequences of failing to pass it. Nor is there any right to consult an attorney when deciding whether to take the breathalyzer test. *Commonwealth v. Brazelton*, 404 Mass. 783 (1989).

An OUI suspect does have the right to access to a telephone under G.L. c. 276, § 33A, and, if hearing impaired, to have a qualified interpreter under G.L. c. 221, § 92A. If a violation of these rights has a bearing on the defendant's decision whether to refuse the breathalyzer test or affects his or her performance on the test, defense counsel should consider filing a motion to suppress or dismiss.

A driver may refuse to take the breathalyzer test. The refusal automatically results in the Massachusetts Registry of Motor Vehicles suspending his or her driver's license for 180 days for a first offense, three years for a second offense, five years for a third offense, and a lifetime for a fourth or subsequent offense. A driver subsequently acquitted at trial may immediately file a motion to request license reinstatement. G.L. c. 90, § 24(1)(f)(1)(iii); *see Commonwealth v. Richards*, 480 Mass. 413 (2018). If the driver is convicted, the law requires that the suspension for the conviction effectively run on and after the refusal suspension. G.L. c. 90, § 24(1)(e)–(f). The period of suspension is based on prior convictions and does not consider whether the defendant submitted to a test in an earlier case.

Practice Note

Until recently, the registry considered a continuance without a finding (CWOF) to be a "conviction" when determining the length of the refusal suspension. However, in 2012 the Supreme Judicial Court held that a CWOF is not a conviction, thereby reducing the length of refusal suspensions. *Commonwealth v. Souza*, 462 Mass. 227 (2012). This triggered an immediate legislative response that mandated that even if the defendant's

> prior OUI was continued without a finding, it still must be used when calculating the length of the suspension for a breath-test refusal. As a consequence, if a defendant refuses a breath or blood test and has a prior OUI that was continued without a finding, the suspension will be at least three years or greater, depending on how many prior OUIs he or she has.

Upon the defendant's refusal, either the police or the court can trigger suspension. If the police move to suspend the license, they

- physically seize the license on behalf of the registrar and
- issue the defendant a "written notice of intent to suspend."

The suspension for the refusal will be effective immediately. There is no temporary or hardship license available during the period of suspension. The only exceptions are for

- a first offense, following a plea, an admission to sufficient facts, or a conviction; and
- a second offense with one prior OUI more than ten years earlier, applied at the court's discretion (see § 10.9.2, below, for further discussion).

An important provision of this section is the availability of a remedy to restore the defendant's license following a refusal. G.L. c. 90, § 24(1)(g). The statute requires that, upon request, a defendant shall receive a hearing before the registrar within fifteen days of suspension. The hearing must be recorded and available for judicial review. At the hearing, the following issues must be litigated:

- Did the police officer have reasonable grounds to believe that this person had been OUI on a public way?
- Was the person placed under arrest?
- Did the person refuse to submit to a breath test or analysis?

Following the hearing, a person aggrieved by the findings of the registrar may appeal within thirty days to the District Court where the offense is pending. The court must review the record and determine, among other things, whether the registrar's findings are unsupported by the evidence in the record or if he or she acted in an arbitrary and capricious manner.

If the police fail to seize the license following a refusal, the Commonwealth can move at the arraignment for revocation. *See* G.L. c. 90, § 24N. If the prosecutor makes a prima facie showing at arraignment that the defendant was arrested for OUI and refused the test, the court physically seizes the license. The court then suspends the defendant's license for the appropriate period of time, depending on prior convictions. The defendant is not issued a fifteen-day temporary driver's license when the revocation occurs at arraignment.

At arraignment, when the court revokes the license for a refusal, the defendant may request a hearing before the court within ten days. At the hearing, the court will

consider whether there were reasonable grounds to believe that the defendant was OUI and whether the defendant refused to submit to a breath test or analysis.

It should be noted that a defendant is not entitled to a hardship license during the period of suspension for a refusal. However, if the defendant is found not guilty or the case is dismissed, the defendant can move for restoration of the license. There is a rebuttable presumption in favor of restoration, unless the Commonwealth establishes by a fair preponderance of the evidence that restoration would "likely endanger the public safety." G.L. c. 90, § 24(1)(f)(1)(iii).

Practice Note

The suspension for the refusal and the suspension following a plea, an admission, or a conviction will run consecutively under Melanie's Law.

Taking the Test

An infrared breathalyzer tests deep lung air for the presence of alcohol. The arrestee breathes through a breath tube into the machine. An infrared light is then projected through the breath sample and the level of light absorbed by the alcohol is measured. The breath-test result is then translated into a blood alcohol level and printed on a ticket.

Once the arrestee's breath has been tested, the machine then tests a known alcohol solution or gas, which is either a .155 percent (± .005 percent) alcohol liquid calibration standard or a .08 percent (± .005 percent) alcohol gas calibration standard, depending on the type of machine. 501 C.M.R. § 2.11. The breathalyzer should accurately test the simulator solution within the ranges set forth in 501 C.M.R. § 2.11 (.140–.169 percent and .074–.086 percent, respectively). If the result is outside these limits, the entire test is invalid and cannot be admitted into evidence or used for a pretrial license suspension. The Office of Alcohol Testing is slowly converting most police departments to breath-testing equipment that uses gas rather than a liquid simulator solution. A major reason for the change is that the gas simulator does not wear out as quickly as the liquid simulator solution.

Finally, the arrestee again blows deep lung air into the machine. The new test result should be within .02 percent of the first result for the test to be considered valid (e.g., if the first test was .11 percent, the second test should be neither greater than .13 percent nor less than .09 percent). If the two results are outside these limits, then the entire test is invalid. If the two results are within .02 percent of each other, the lower of the two readings must be taken as the defendant's blood alcohol level. *See Commonwealth v. Steele*, 455 Mass. 209, 212–14 (2009) (upholding the trial court's application of provisions now set forth at 501 C.M.R. § 2.15); *Commonwealth v. Hourican*, 55 Mass. App. Ct. 408 (2014) (requiring suppression of breath-test results under 501 C.M.R. § 214(4) in cases where the differential between the tests is outside the .02 percent standard and the breath-test machine uses a third decimal place).

If a defendant takes a breath or a blood test with a result of less than .05 percent, the defendant must be released from the OUI charge. A test of .05 percent to .07 percent

results in no permissible inference of impairment, although it establishes that some alcohol was consumed. Under the per se law, a result of .08 percent or greater can result in conviction, regardless of whether the jury believes the defendant was actually impaired.

A valid test result of .08 percent or greater also results in a pretrial suspension of the defendant's license for thirty days or until the case is disposed of, whichever occurs first.

Similar to the provisions for revocation upon a refusal, the police or the court may trigger a suspension on a .08 percent or greater test result. If the police move for suspension, they follow the same procedure previously detailed for refusals. Specifically, they seize the license and issue a written notice of intent to suspend. The officer must submit a report to the registrar setting forth the following information:

- grounds for the officer's belief that the person was OUI and had a blood alcohol level of .08 percent or greater;
- the person administering the test was properly certified and trained;
- the test was performed in accordance with appropriate regulations and standards;
- the machine was regularly serviced and maintained; and
- the person performing the test believed that the machine was working properly.

> **Practice Note**
> When the police seize a license due to the results of a breath or blood test, the defendant petitions the court directly. This procedure differs from the one for police seizure due to a refusal, whereby the registrar conducts the initial hearing.

The court will consider only whether a subsequent test performed within a reasonable time following the arrest shows a blood alcohol level below .08 percent. However, if investigation or discovery uncovers an invalid test result, it would appear appropriate to seek reinstatement.

If the police fail to move for a revocation following the arrest, the prosecutor may move the court at arraignment to suspend the license pursuant to G.L. c. 90, § 24N.

Attacking the Test Results

The defendant may wish to challenge the admissibility of the results of the breathalyzer at trial by motion in limine or, for tactical reasons, before the jury. The breathalyzer test can be attacked for failure to comply with requirements of G.L. c. 90, § 24(1)(e), or the many limitations and regulations found in 501 C.M.R. §§ 2.01–.20.

Under G.L. c. 90, § 24(1)(e),

- the defendant must have given his or her consent to the breathalyzer test;
- the test results must be made available to the defendant; and

- the defendant, at his or her request, must have been given a reasonable opportunity to undergo an independent test.

In addition, G.L. c. 90, § 24K requires a breathalyzer test to be performed

- by a certified operator,
- using infrared breath-testing equipment, and
- following methods approved by the secretary of public safety.

The regulations found in 501 C.M.R. §§ 2.01–.20 set forth testing criteria as required by G.L. c. 90, § 24K. If a test was not performed in accordance with these established criteria, counsel may assert that

- the test was not performed by a certified breath-test operator;
- the breathalyzer was not certified;
- the test results were not recorded in the maintenance and use log;
- the defendant was not observed for fifteen minutes before the test was administered, *see Commonwealth v. Pierre*, 72 Mass. App. Ct. 230 (2008);
- the machine was not properly calibrated;
- the simulator solution had expired;
- the simulator solution had not been replaced after three consecutive low readings;
- subsequent repairs were made to the machine; or
- the test was not administered under the conditions recommended.

Practice Note

To discern whether it is possible to exclude the breathalyzer test results because of noncompliance with 501 C.M.R. §§ 2.01–.20, it is crucial to file a thorough discovery motion requesting all appropriate data concerning the breathalyzer and the breathalyzer test (or obtain the information informally by getting access to the records). The Office of Alcohol Testing, within the Department of Public Safety, maintains most of these records. Consult with an expert to find out specifically what documentation is needed to challenge the results.

See **Exhibit 10H** for a sample motion to inspect evidence and reports, and **Exhibit 10I** for a sample motion in limine to exclude breath-test results.

Prior to 2007, several Massachusetts courts would routinely exclude breath-test results on the basis that the results did not reflect the operator's blood alcohol level at the time of operation. Under the per se law, Massachusetts is sometimes referred to as a "time of operation" state, as opposed to a "time of test" state. Because the breath test is generally not administered until forty-five to ninety minutes after the arrest, the courts reasoned that the result did not properly reflect the operator's blood alcohol level during the period when he or she was actually driving. Blood alcohol levels

will rise and fall based on many factors, including the time of the last drink. Therefore, it follows that retrograde extrapolation is essential to determine with any accuracy what the level was at the time of operation. *Cf. Commonwealth v. Senior*, 433 Mass. 453 (2001).

However, the case of *Commonwealth v. Colturi*, 448 Mass. 809 (2007), held that as long as the test was performed within a "reasonable time" after operation, the test will be admissible without the necessity of retrograde extrapolation. A reasonable amount of time is generally considered to be three hours after operation.

Notwithstanding the admissibility of the test, counsel can still challenge the reliability of the test before the jury. The argument to the fact finder is the same as it would be to the court when the admissibility of the test was still a live issue. More specifically, when the test was administered a long time (or even a short time) after the operation, it does not truly reflect the defendant's blood alcohol level when he or she drove the vehicle. Due to the way alcohol is metabolized, it is certain that a test administered sometime after operation of the vehicle will not accurately reflect the blood alcohol level at the time of operation. The defendant's BAC level may have been higher or may have been lower, but the result, almost certainly, is not what it was when the defendant was actually driving.

This argument is extraordinarily compelling in cases where the defendant's breath-test result is close to .08 percent. In these cases, even a slight delay may undermine a conclusion that the defendant's blood alcohol level was at .08 percent or greater at the time of operation. Additionally, while some argue that a breath test is a fairly accurate measure of a person's blood alcohol level, even the most strident advocates of the technology concede that there is a reasonable margin of error. Most will concede a margin of error of plus or minus .02 percent. Therefore, a result of .08 percent could conceivably be as low as a .06 percent. Some judges will allow a motion for a required finding of not guilty as to the per se theory when the results are close to the .08 percent threshold.

If the court allows a required finding as to the per se theory, the next question is whether the result is still admissible as to the "impairment" theory. In *Commonwealth v. Hubert*, 71 Mass. App. Ct. 661 (2008), the Appeals Court extended the Supreme Judicial Court decision in *Commonwealth v. Colturi*, 448 Mass. 809 (2007), and held that a breath test (or a blood test) is not admissible without expert testimony when the Commonwealth is proceeding only under the impairment theory. The logic of *Hubert* is that a jury does not have a common understanding of the significance of a certain breath or blood result without the benefit of expert testimony. Without this testimony, or without the statutory inference that was struck when the per se statute was promulgated, a jury is left to speculate on the meaning of a particular result.

This issue is extremely problematic when the Commonwealth has been "directed out" on the per se theory after the breath-test result was introduced. If the Commonwealth did not offer expert testimony, the court must somehow purge the jury's knowledge of the breath-test result. A mistrial is likely the only method to cure this problem.

In any event, even if the facts are not sufficient to get the breathalyzer test results excluded as evidence, a litany of operator violations or substandard conditions may make a powerful impression on the jury. Remember that filing a motion alerts the prosecution; consider forgoing a motion in limine in favor of a more powerful and unexpected cross-examination.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the U.S. Supreme Court gave new life to the Confrontation Clause of the U.S. Constitution. While the decision's full ramifications are still unclear, defense counsel should, at a minimum, object to any admission of breath-test records that deprives the defendant of the right to confront the chemist who was responsible for the testing of the breath-test machine, the simulator, and the simulator solution. However, the Supreme Judicial Court has held that breath-test records do not violate the Confrontation Clause and are admissible. *Commonwealth v. Zeininger*, 459 Mass. 775 (2011). Nevertheless, counsel should examine each record and determine whether it is admissible under *Zeininger*. *See Commonwealth v. Irene*, 462 Mass. 600 (2012) (as a matter of first impression, hospital and medical records are not admissible under the business records statute; see discussion relating to differences between G.L. c. 233, § 78 and G.L. c. 233, §§ 79 and 79G).

The reliability of breath test machines was addressed in *Commonwealth v. Camblin*, 478 Mass. 469 (2015), where the Supreme Judicial Court held that breath-test results must be established prior to their admission into evidence. Based on *Camblin*, the reliability of the Draeger Alcotest 9510, the breath-test machine currently utilized in Massachusetts, was challenged in *Ananias I*. See **Exhibit 10N**, Memorandum of Decision on Consolidated Defendants' Motion to Exclude Breath Alcohol Content Percentage Results Using the Alcotest 9510 and Any Opinion Testimony, *Commonwealth v. Ananias*, No. 1248CR1075, at 30–31 (Mass. Dist. Ct., Boston Municipal Ct. Feb. 16, 2017) (*Ananias I*). There, critical issues with the programming of the Draeger Alcotest 9510 came to light, triggering questions of the machine's reliability. Notably, the machines were calibrated in a manner that was not in compliance with the narrow range required by the Code of Massachusetts Regulations. After extensive litigation that was consolidated within the District Court upon order of the Supreme Judicial Court, the court held that BAC results derived from a Draeger Alcotest 9510 machine last calibrated and certified between June 2012 and September 2014 were "presumptively excluded as evidence" because the Office of Alcohol Testing (OAT) had not maintained a standardized written calibration protocol. *Ananias I*. Subsequent to the court's decision, it was discovered that the OAT had withheld exculpatory evidence of failed calibration testing. As a result, the class of presumptively excluded breath-test results was expanded, dating from June 2011 through April 18, 2019. See **Exhibit 10O**, Memorandum of Decision on Consolidated Defendants' Motion to Compel and Impose Sanctions, *Commonwealth v. Ananias*, No. 1248CR1075 (Mass. Dist. Ct., Boston Municipal Ct. Jan. 9, 2019); **Exhibit 10P**, Memorandum of Decision on Commonwealth's Motion to Admit Breath Test Results, *Commonwealth v. Ananias*, No. 1248CR1075 (Mass. Dist. Ct., Boston Municipal Ct. Jul. 29, 2019).

Practice Note

Counsel should pay close attention to the certification and calibration dates of the breath-test machines used in each case. Additionally, if a client has a previous offense where a breath-test result was used in the prosecution, counsel should consider filing a motion to vacate the plea or move for a new trial based on newly discovered evidence. Overturning the earlier result could assist the client in the current case. See § 10.7.5, below.

Expert Testimony

Jurors tend to give great weight to breath-test results. It is often the only "objectively reliable" evidence available when determining sobriety. As a result, the services of an expert may be necessary for defense counsel to have a full and complete understanding of the operation of the device and its results. Further, counsel will probably want to exercise his or her client's right to have an expert testify at trial on the reliability of the test results. *Commonwealth v. Smythe*, 23 Mass. App. Ct. 348 (1987). If counsel accepts the client's reading of .08 percent, there will be a pretrial loss of license. Could the machine have been in error? If a client's test results register "deficient sample," does it mean that he or she failed to cooperate with the police by exhaling sufficient amounts of deep lung air or could other factors have caused the result? Did the calibration check indicate discrepancies in readings?

It is certainly unrealistic to expect that the police officers being examined by defense counsel at trial will admit that the machine results are defective in any way. Nor is the court likely to permit counsel to cross-examine an officer about the technical and scientific details of the breathalyzer. Instead, the jury will be instructed that a police officer is not an "expert" but rather a nontechnical person who has received some training in the operation of the machine. Given these limitations, it is crucial to obtain the testimony of a person who is qualified to explain to the jury why the machine results are open to question. In fact, some attorneys believe that it is imperative to hire an expert to explain any breathalyzer reading.

If the client has funds, or funds can be secured for an indigent client, and a breathalyzer test was taken with a result of .08 percent or higher, counsel should seriously consider hiring an expert. Do not wait until the last minute. If the defendant is scheduled for trial in a week and counsel has not yet secured an expert, it is probably too late.

Be careful to retain an expert who is actually qualified to testify in the areas that need to be explored. *See Commonwealth v. Ranahan*, 23 Mass. App. Ct. 201, 204 (1986). Always obtain a copy of the expert's curriculum vitae. Use a checklist when questioning the expert in the preparation of the case. See **Checklist 10.2** for a sample expert qualification checklist.

Before filing a discovery motion for information on the breathalyzer and the circumstances under which the test was conducted, consult with an expert to determine what specific items (such as the maintenance and repair log or the breath-test log) should be included. Arrange to send copies of all discovered documents, the police report, and a confidential narrative concerning the client's version of events to the expert.

For a modest fee, compared with the fee for trial testimony, the expert can review the data and offer an opinion. Determine whether the expert agrees or disagrees with your theory of defense. If it is a novel one, ask the expert if it is tenable from the data submitted or the facts that will be brought out at trial. See **Exhibit 10J** for a list of areas of breathalyzer expert testimony. Otherwise, leave it to the expert to say whether he or she can help. Perhaps the expert can suggest another expert who can offer testimony helpful to the client.

Counsel should also be familiar with *Commonwealth v. Lezynski*, 466 Mass. 115 (2013). If the Commonwealth calls an expert witness to testify to the results of a blood test taken at the hospital, defense counsel may have a viable objection, under *Melendez-Diaz* and its progeny, if the expert witness did not draw the blood, or test the blood, and the evidence was not independently admitted on other grounds. *Commonwealth v. Lezynski*, 466 Mass. at 117–18. The Supreme Judicial Court noted that the Appeals Court erred by concluding that the expert could recite in his direct testimony the results of the drug screen performed by the laboratory, since he did not supervise the test. *Commonwealth v. Lezynski*, 466 Mass. at 116 n.4. The expert did not perform the drug screen, and the fact that the expert was responsible for the technical oversight of the lab was not a substitute for performing the test. *Commonwealth v. Lezynski*, 466 Mass. at 116 n.4. *But cf. Commonwealth v. McLaughlin*, 79 Mass. App. Ct. 670 (2011) (where the Appeals Court allowed a toxicologist to testify as to the defendant's blood alcohol level from the unobjected-to admission of the hospital records).

(b) *The Blood Test*

There is a constitutional right to privacy in blood, *Schmerber v. California*, 384 U.S. 757 (1966), and therefore law enforcement is required to have either consent or a warrant to obtain a blood draw or the results therefrom. *But see Commonwealth v. Bohigian*, No. SJC-12858 (Mass. argued Feb. 10, 2020). Just as with breath testing, an individual has the right of refusal. G.L. c. 90, § 24(f)(1); *Commonwealth v. Dennis*, 96 Mass. App. Ct. 528, 533–36 (2019) (overturning *Commonwealth v. Davidson*, 27 Mass. App. Ct. 846 (1989), which held that a defendant had no constitutional right to refuse to submit to a blood test). Consent must be voluntarily and freely given. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016); *Commonwealth v. Dennis*, 96 Mass. App. Ct. at 536. If the individual does not consent or is unable to consent, law enforcement must have a warrant.

The Supreme Court has examined the issue of whether the natural dissipation of alcohol in the blood qualified as an exigency per se so as to justify an exception to the warrant requirement. *See Missouri v. McNeely*, 569 U.S. 141, 147 (2013). The court declined to adopt a per se rule and instead applied a totality of the circumstances test to determine that an officer who can reasonably obtain a warrant for the blood draw is constitutionally required to do so. *Missouri v. McNeely*, 569 U.S. at 152–53.

In the hospital setting, enzymatic testing is used to detect the presence of alcohol in an individual's blood. Enzymatic testing is used as a screening tool to make medical treatment decisions. However, these results are often used by the Commonwealth as

forensic evidence to determine blood alcohol percentage and prosecute for per se violation of Chapter 90, § 24. Because of the potentially serious consequences resulting from criminal prosecution, it is imperative that the evidence against a defendant be generally accepted with the forensic scientific community.

Enzymatic testing is a preliminary screening tool and is not intended to accurately quantify the amount of alcohol in the blood. Testing is not done using whole blood; rather, it measures serum or plasma, only indirectly measuring the amount of ethyl alcohol. There is no agreed-on accurate formula for making this conversion. Furthermore, experts generally agree that hospital blood draws tend to overstate the amount of alcohol in the blood. *See* Matthew Barnhill, Jr. et al., "Comparison of Hospital Laboratory Serum Alcohol Levels Obtained by an Enzymatic Method with Whole Blood Levels Forensically Determined by Gas Chromatography," 31 *J. Analytical Toxicology* (Jan./Feb. 2007).

Overall, enzymatic testing is not accepted in the forensic community as scientifically reliable; confirmatory testing is needed. The Supreme Judicial Court has stated that the presumption of reliability that typically attaches to medical records is all but defeated when "the record explicitly indicates that the results of a toxicology screen are 'presumptive based on screening methods and have not been confirmed by a second independent chemical method.'" *Commonwealth v. Wall*, 649 Mass. 652, 668 (2014).

Finally, the reliability of the hospital blood test depends on the machine used and its calibration. Counsel should request records from the hospital regarding the machine, including protocols for calibration and maintenance, documentation of compliance with those protocols, and machine-specific information regarding interferents.

Practice Note

Counsel should consider requesting a *Daubert* hearing to establish the reliability of the machine before the blood-test evidence is admitted into evidence.

§ 10.6 MULTIPLE OFFENSES—PRIOR CONVICTIONS

In addition to the discovery requested on the underlying OUI charges, counsel should request and review the records related to prior convictions forming the basis of any "subsequent offense" portion of the complaint. These records may include docket entries, probation records, or registry of motor vehicles records.

Whether or not the underlying OUI charge is triable, counsel should take the time to make an independent review of the documents that make up the subsequent offense portion of the complaint in order to determine whether the Commonwealth can sustain its burden of proof on this element of the offense. If not, counsel should discuss with his or her client the pros and cons of litigating the case on that issue alone to avoid any mandatory minimum sentence that may result from a conviction. Often a review of these records may also lead to evidence that would allow for a successful collateral attack on the prior convictions by way of a motion for new trial or a motion to vacate/revoke plea. *See Trying OUI Cases in Massachusetts* ch. 11, "Posttrial Relief"

(MCLE, Inc. 2d ed. 2013 & Supp. 2015). See also § 10.7.5. A successful attack on the prior convictions may well allow the client to avoid sentencing enhancement as a multiple offender.

In the event that a multiple offense OUI charge goes forward, counsel should be prepared to request that the complaint be properly sanitized before starting the jury trial. *See Commonwealth v. Williams*, 19 Mass. App. Ct. 915 (1984).

In any subsequent offense OUI case, counsel should be prepared to proceed, with or without a jury, following a conviction on the underlying charge. The Commonwealth has the burden of establishing beyond a reasonable doubt that the defendant is in fact the person named in the prior offense record. Mere identity of name is not sufficient to establish that fact. *Commonwealth v. Koney*, 421 Mass. 295, 301–02 (1995). The statute allows the Commonwealth to use records from the probation department, registry of motor vehicles, or a jail or house of correction, assuming they are properly certified, in order to prove that the defendant had been previously assigned to an alcohol program. G.L. c. 90, § 24(1)(c); *see Commonwealth v. Bigley*, 85 Mass. App. Ct. 507, 516 (2014) (rejecting a *Melendez-Diaz* claim as it related to RMV and probation records). If these records were not previously provided to counsel during discovery or were not adequately certified, counsel should object to their use during the trial.

§ 10.7 MOTION PRACTICE

As previously stated, counsel must vigorously pursue pretrial motions that may result in dismissal of the case or suppression of evidence. Some ideas for motions are discussed below.

§ 10.7.1 Independent Blood Alcohol Test and Independent Medical Examination

Immediately after being booked, a defendant has the right to an independent blood alcohol test, at his or her own expense, if the defendant took the police-administered test, G.L. c. 90, § 24(1)(e), and to be examined by an independent physician of his or her choice at his or her expense. G.L. c. 263, § 5A; *Commonwealth v. Finelli*, 422 Mass. 860 (1996); *Commonwealth v. Tessier*, 371 Mass. 828, 831 (1977). There is no affirmative duty to help an OUI suspect obtain a test or an independent medical examination. *Commonwealth v. Lindner*, 395 Mass. 144, 146–47 (1985); *Commonwealth v. Alano*, 388 Mass. 871, 879–80 (1983). Additionally, law enforcement is required to either provide the defendant with a copy of the law or point them to a posted copy in the police station.

Although there is no affirmative duty, police cannot interfere with an arrestee's right to an independent medical exam. *Commonwealth v. Lindner*, 395 Mass. 144, 147 (1985); *Commonwealth v. Alano*, 388 Mass. 871, 879–80 (1983). If police interference is deliberate, dismissal may be warranted. *Commonwealth v. Andrade*, 389 Mass. 874 (1983).

A line of cases has reaffirmed the right to an independent medical exam. *See Commonwealth v. King*, 429 Mass. 169 (1999); *Commonwealth v. Priestly*, 419 Mass. 678 (1995); *Commonwealth v. Hampe*, 419 Mass. 514 (1995); *Commonwealth v. Chistolini*, 38 Mass. App. Ct. 966 (1995), *aff'd*, 422 Mass. 854 (1996). In *Hampe*, the Supreme Judicial Court held that a policy that prevented an OUI arrestee's release on bail was a deliberate interference with his Section 5A right to an independent medical exam and warranted dismissal.

In determining whether dismissal under Section 5A is an appropriate remedy when there was a substantial delay in bailing the defendant, a critical factor is whether the defendant actually requested an independent medical exam. *See Commonwealth v. King*, 429 Mass. 169 (1999) (defendant requested exam); *cf. Commonwealth v. Finelli*, 422 Mass. 860 (1996) (exam not requested); *Commonwealth v. Falco*, 43 Mass. App. Ct. 253 (1997) (exam not requested).

Even if there was deliberate interference to an independent medical exam by police or a bail commissioner, dismissal is not automatic. The court must also determine whether there is overwhelming evidence of intoxication, so that an independent exam would not have resulted in exculpatory evidence. *See Commonwealth v. King*, 429 Mass. 169 (1999); *Commonwealth v. Andrade*, 389 Mass. 874 (1983). The court may also fashion a remedy short of dismissal (e.g., exclude breath-test results).

As part of any pretrial preparation, counsel should examine whether the police appropriately advised the defendant of all his or her rights and whether the defendant attempted to exercise the right to an independent examination but was frustrated by police conduct.

If a defendant did not seek an independent medical examination but did take a breath test, the implied consent form must be redacted to remove any references to the examination rights before it can be introduced into evidence. *Commonwealth v. Lopes*, 459 Mass. 165 (2011).

As stated above, law enforcement is also required to provide a copy of the law or point the defendant to a posted copy within the police station. It is important to note that this is required even, and especially, where a language barrier exists. *See Commonwealth v. Andrade*, 89 Mass. 874, 876 (1983); *see also Commonwealth v. Vuthy Seng*, 436 Mass. 537, 544 (2002) (*Miranda* requires "meaningful advice to the unlettered and unlearned in language which [a defendant] can comprehend and on which [a defendant] can knowingly act"). The right to an independent medical examination cannot be explained in a language the defendant is unable to understand. Law enforcement is obligated to obtain an interpreter and to provide a copy of the law in the appropriate language. Failure to make the necessary arrangements is prima facie evidence that the defendant was denied the opportunity to obtain potentially exculpatory evidence, and dismissal may be an appropriate remedy. *See Commonwealth v. King*, 429 Mass. 169, 181 (1999).

§ 10.7.2 Motion to Suppress Evidence/Statements Under the Fifth Amendment and Article 12

The Fifth Amendment to the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights protect against self-incrimination. This protection is triggered when an OUI suspect makes inculpatory statements at the time of a traffic stop. Presumably if the defendant is arrested for OUI, the officer believes that the defendant was impaired at the time the statements were made. This creates an untenable position for the Commonwealth. On one hand, the Commonwealth must prove at trial that the defendant was impaired, yet at a hearing on a motion to suppress statements, the government must prove that the defendant was not so impaired that the statements were involuntary. *See Commonwealth v. Hosey*, 368 Mass. 571, 577–79 (1975) (intoxication relevant to considerations of involuntariness). The prosecution must, therefore, minimize the defendant's lack of sobriety or risk losing the statements. Obviously, this will be helpful to the defendant at trial. At a minimum, defense counsel has had a "dry run" of the trial evidence as the issue of sobriety, including evidence of the defendant's operation and performance on field sobriety tests, is relevant at the motion to suppress.

§ 10.7.3 Motion to Suppress Evidence/Statements Under the Fourth Amendment and Article 14

In *Vanhouton v. Commonwealth*, 424 Mass. 327 (1997), the Supreme Judicial Court held that the right against self-incrimination did not extend to nontestimonial field sobriety tests. The court did not consider whether the "nonconsensual" submission to an order of the police to perform sobriety testimony violates constitutional protections against unreasonable search and seizure. This issue, therefore, remains unanswered. *But cf. Commonwealth v. Cameron*, 44 Mass. App. Ct. 912, 913 n.2 (1998).

§ 10.7.4 Double Jeopardy

Some creative defense lawyers across the country have brought motions to dismiss OUI cases, alleging double jeopardy grounds. They rely on the U.S. Supreme Court case of *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), in which the Court held that a forfeiture action was punitive and, therefore, precluded a subsequent criminal prosecution on the same underlying facts. The lawyers reason that the pretrial license suspensions for either refusing the breath test or registering a reading of .08 percent or greater are punitive. The double jeopardy clause thereby prohibits prosecution of the underlying OUI charge.

However, the Supreme Judicial Court has addressed these issues and rejected the double jeopardy claims. *Luk v. Commonwealth*, 421 Mass. 415 (1995); *Leduc v. Commonwealth*, 421 Mass. 433 (1995); *see also Powers v. Commonwealth*, 426 Mass. 534 (1998). It remains to be seen how the federal courts will deal with the issue.

To preserve the double jeopardy issue, it is imperative that the defendant challenge the pretrial suspension with either the registry or the court. This challenge will place

the defendant "in jeopardy" thereby perfecting the "double jeopardy" claim on the substantive charge.

§ 10.7.5 Motion to Vacate or for New Trial of Prior Offense

Due to the outcome of *Ananias*, see § 10.5.2(a), above, counsel should evaluate cases where breath-test results used in a prior prosecution are part of the presumptively excluded class to determine whether to file a motion to vacate or a motion for new trial pursuant to Mass. R. Crim. P. 30(b). This may affect the defendant's current case or be used to challenge a prior offense and thus impact the defendant's current case. The basis for the motions is newly discovered evidence that casts doubt on the defendant's conviction and creates a substantial risk that a jury would have reached a different conclusion. *See Commonwealth v. Pike*, 431 Mass. 212, 218 (2000). This is not to say that every such motion will be successful. Counsel must consider whether the Commonwealth prosecuted on "per se" theory, as these cases are more likely to be prejudiced by the newly discovered evidence. Without the breath-test result—in many cases the Commonwealth's only evidence of impairment—it is probable that the jury would have decided the case differently. Cases prosecuted under the "impairment" theory are less likely to be prejudiced by the breath-test result, especially where there is "overwhelming evidence of intoxication." *See Commonwealth v. Scott*, 467 Mass. 336, 346 (2014).

Additionally, counsel can base a motion to vacate on the fact that a plea was involuntarily induced by government misconduct. The defendant must show that the conduct was egregious and that it had a material influence on the defendant's decision to enter the plea. *See Commonwealth v. Scott*, 467 Mass. at 346.

§ 10.7.6 Miscellaneous Motions

Counsel should carefully analyze each case for possible constitutional violations. For example, a warrantless entry into a defendant's home after he or she allegedly left the scene of an accident may be improper and suppression of evidence warranted. *Commonwealth v. DiGeronimo*, 38 Mass. App. Ct. 714 (1995). If the basis for the stop was that the police believed the operator was lost, the stop is unlawful as well. *Commonwealth v. Canavan*, 40 Mass. App. Ct. 642 (1996); *cf. Commonwealth v. Leonard*, 422 Mass. 504 (1996) (where driver unresponsive, warrantless entry into car not illegal under community caretaking exception); *see also Commonwealth v. Murdough*, 44 Mass. App. Ct. 736 (1998).

There may be relevant and material evidence that is not in your possession or in the possession of the Commonwealth but is necessary to your defense. In order to obtain this material, the defendant will need to file a motion that complies with Mass. R. Crim. P. 17(a)(2). To fully understand the application of Rule 17(a)(2), counsel should be familiar with *Commonwealth v. Lampron*, 65 Mass. App. Ct. 340 (2005), and *Commonwealth v. Lam*, 444 Mass. 224 (2005).

Often this will occur when the Commonwealth is seeking to obtain the defendant's medical records in the event he or she was taken to the hospital following the arrest,

or when it is seeking the medical records of a person injured in a motor vehicle accident in connection with your client's arrest. These records would likely be admissible in order to prove, for example, the element of "serious bodily harm" in an accident where the defendant is charged with OUI causing serious bodily harm under G.L. c. 24, § 24I.

If the stop was based on an anonymous tip, all the evidence gathered as a result of the stop (i.e., observations relating to sobriety) may be suppressed as a fruit of the illegal stop. *See Commonwealth v. Lubiejewski*, 49 Mass. App. Ct. 212, 214–17 (2000); *cf. Commonwealth v. DePiero*, 87 Mass. App. Ct. 105 (2015) (sufficient evidence presented at motion hearing regarding stop of motor vehicle); *Commonwealth v. Love*, 56 Mass. App. Ct. 229, 231–35 (2002) (unidentified citizen's tip adequate to justify investigatory stop); *see also Commonwealth v. Lyons*, 409 Mass. 16, 19–22 (1990) (anonymous call provided insufficient articulable facts to justify investigatory stop). An extraterritorial stop of a defendant's vehicle may also be grounds for dismissal. *Commonwealth v. LeBlanc*, 407 Mass. 70 (1990); *see also Commonwealth v. Bartlett*, 465 Mass. 112 (2013) (officers' stop of motorist authorized as an extraterritorial traffic stop under mutual aid agreement with neighboring city); *Commonwealth v. Trudel*, 42 Mass. App. Ct. 903 (1997); *cf. Commonwealth v. Limone*, 460 Mass. 1019 (2011) (court found that an off-duty police officer was not entitled to make a citizen's arrest in a neighboring city but inexplicably found that the stop was not an arrest and therefore affirmed the defendant's seventh-offense OUI conviction); *Commonwealth v. Lahey*, 80 Mass. App. Ct. 406 (2011) (inevitable discovery rule as applied to extraterritorial arrests; conviction affirmed).

When a defendant is not arrested for OUI, police must issue a citation under the provisions of G.L. c. 90C, § 2. Failure to issue the citation may be grounds for dismissal. *See Commonwealth v. Riley*, 41 Mass. App. Ct. 234 (1996); *see also Commonwealth v. Correia*, 83 Mass. App. Ct. 780 (2013) (no violation of "no fix" law where off-duty officer delivered citation to motorist following his return to work, but after motorist was informed that citation would issue).

If the Commonwealth intends to rely on a hospital medical record that contains a blood alcohol test, it must establish that the test was related to the defendant's medical history and treatment under G.L. c. 233, § 79. *Commonwealth v. Sheldon*, 423 Mass. 373 (1996). However, Section 79 bars evidence contained in hospital records that has reference to the question of liability. Counsel should consider whether to file a motion to suppress the test result in cases where the testing may not have been for a medically related purpose. Counsel should also be familiar with G.L. c. 233, § 79G in cases where a medical opinion is necessary to explain a medical condition or diagnosis that may be relevant to the defendant's case. *See Commonwealth v. Shutte*, 52 Mass. App. Ct. 796 (2001) (physician's narrative report is admissible under Section 79G to explain defendant's inability to perform physical tasks in OUI case).

In *Commonwealth v. Palacios*, 90 Mass. App. Ct. 722, 724–27 (2016), *review denied*, 75 N.E.3d 1130 (2017), the Appeals Court concluded that the records of emergency medical technicians who accompanied the defendant in an ambulance were admissible as the records of "other medical personnel" under G.L. c. 233, § 79G. The court

also noted that these records "had all the hallmarks of a call summary" and, if provided by the hospital, would have been admissible under G.L. c. 233, § 79. In *Commonwealth v. Ackerman*, 476 Mass. 1033, 1034 (2017) (per curiam), the court upheld the admission of blood alcohol test results under G.L. c. 233, § 79 where the test "was merely one of a number of tests conducted as a part of assessing the condition of and treating the patient" and it was logical to assume that the hospital's medical personnel would need to know whether the defendant was intoxicated prior to administering a sedative to her.

§ 10.8 BUILDING THE CASE

§ 10.8.1 Using Demonstrative Evidence

Demonstrative evidence can be a powerful tool in an OUI case. The most common type of demonstrative evidence used in OUI defenses is photographs. You should consider documenting the conditions of the road where the defendant performed field sobriety tests. Photographs showing that the defendant was physically impaired or disabled when performing the tests would also be beneficial to your case. Photographs should be taken as soon as possible following the defendant's arrest. File a motion for the defendant's booking photos.

Upon being retained by your client, you should immediately visit the scene and observe the road conditions where the field sobriety tests were administered. It is better practice to hire a private investigator to take photos of the scene. The investigator would then be available to testify as to the date, time, and location where the photos were taken and to provide testimony of the physical conditions of the location. Since you are obligated to provide the Commonwealth with copies of these photos as reciprocal discovery, ask the prosecutor for a stipulation, through the arresting officer, that they are fair and accurate representations of the road conditions as they existed when the field sobriety tests were performed. Many times, the prosecutor will agree to have these photos introduced into evidence without the need for testimony from the person who took them. Photographs may also be used to explain the defendant's apparently impaired operation of the vehicle.

(a) *The Use of Videorecordings*

Since the advent of camcorders, the use of videorecordings has become much more pronounced in OUI trials. Showing the jurors a video of the road the defendant traveled immediately before arrest would allow the jury to see that the defendant was able to safely navigate a road that was hilly, curvy, narrow, bumpy, or snowy. A video can also be used to prove that the officer's observation of the defendant driving erratically was merely due to the defendant swerving to avoid severe potholes, road debris, or snow or ice hazards. The video could also show that, because of ongoing road construction, your client had to reduce speed, change lanes, or swerve. As stated above, videos should be taken by private investigators. Make sure to prepare these witnesses to testify as to the time and date the video was taken. You must provide the prosecutor with a copy of your videorecording prior to trial.

(b) *Booking Video of the Defendant*

You must determine whether the police department in the town or city where your client was arrested videorecorded the stop or the booking procedure. If so, obtain a copy of the video as soon as possible. If it is beneficial to your case, have the video edited, omitting the defendant's refusal to perform field sobriety tests at the scene or station or refusal to submit to a breathalyzer test at the station. *Commonwealth v. McGrail*, 419 Mass. 774, 778–79 (1995); *Commonwealth v. Maylott*, 43 Mass. App. Ct. 516 (1997); *Commonwealth v. Carey*, 26 Mass. App. Ct. 339 (1988). There are many private investigators or individuals that have the capability to edit police booking videorecordings. You must provide a copy of the edited video recording to the prosecution.

Additionally, there is a fifteen-minute observation period required under 501 C.M.R. § 2.13(3). Counsel should always review the booking video to determine whether the required observation period was maintained. Look for any touching of the mouth or face, belching, burping, or vomiting, as these could introduce alcohol into the mouth. *Commonwealth v. Pierre*, 72 Mass. App. Ct. 230 (2008). Also, look for any unusual events that relate to an electronic device in the room, such as cell phones, police radios, or anything else that could suggest radio frequency interference. Finally, look for the presence of chemicals that could possibly contain alcohol, such as hand sanitizer, in the vicinity of the breath-testing machine.

If no booking video is provided or exists, counsel should consider requesting a jury instruction. *See Commonwealth v. Bowden*, 379 Mass. 472 (1980); *Commonwealth v. Heath*, 89 Mass. App. Ct. 328, 338–40 (2016) ("[T]he absence of the video denied the defendant the most concrete evidence . . . to impeach [the officer]," permitting an instruction that the fact finder can make a "negative inference" against the government.).

(c) *Other Demonstrative Evidence*

The amount of demonstrative evidence that you may generate and use in a trial is virtually limitless. Many defense attorneys have used figurines showing the defendant surrounded by police officers, with miniature cars designed as police cruisers, complete with flashing lights. Defense counsel may request the court to darken the courtroom to simulate the conditions that existed when the defendant was arrested. Enlarged pictures of a breathalyzer's inner workings have been used to demonstrate the machine's complexity. A copy of the breathalyzer machine instruction manual may also be helpful. Utilize a whiteboard to draw a diagram of an intersection or the area where your client was stopped by the police.

§ 10.8.2 Witness as to Sobriety

In many cases, the defendant will have the opportunity to present percipient witnesses who observed the defendant prior to, during, or after the arrest. These persons will very rarely, if ever, be ideal witnesses. Therefore, it is critical that you judge each

potential witness's value to your case and spend adequate time in preparing them to testify.

It is imperative that you interview percipient witnesses as soon as possible and that you commit their observations to writing. Their written statements can be used to refresh their memories at trial. They might also qualify for past recollection recorded exceptions to the hearsay rule. When interviewing percipient witnesses, be sure to inquire about their criminal backgrounds, if any. Someone who has been convicted of OUI should probably not be called as a witness. Question them about their experience with alcohol, how much they had consumed on the day in question, their relationship to the defendant, their observations of the defendant, how much time they spent together, and whether they had any concerns about the defendant's driving. A word of caution: the prosecutor may establish that these witnesses were the defendant's drinking buddies, not only on the day in question, but on several prior occasions, thereby impeaching the credibility of these witnesses' testimony.

Calling a bartender or a server who waited on the defendant might be helpful if the witness remembers the defendant, how many drinks were consumed, and if the witness has a copy of the defendant's bill showing what the defendant or the defendant's friends had to drink before the arrest. A credit card receipt would be similarly beneficial. If the bartender completed a drinking program, such as TIPS (Training for Intervention Procedures), which provides training in the detection and effects of alcohol, bring this out. Ask the bartender to bring the TIPS certificate and training materials to court. You may be able to introduce the certificate showing that the witness completed the course, and you may be successful in introducing the training manual. Once again, a word of caution: under cross-examination a bartender could testify that the defendant was a regular who came in four or five times per week and consumed five or six drinks each night on a regular basis. This testimony could be devastating to the defendant. Carefully consider all the positives and negatives before placing the bartender on your witness list.

§ 10.8.3 Using the Police Officer as Defense Witness

The testimony of a police officer or any person with significant training and experience in field sobriety and breathalyzer testing is useful in proving that the tests were improperly administered. If possible, use a police officer who was an instructor in administering field sobriety tests or breathalyzer tests. You are more likely to find a retired police officer willing to testify.

§ 10.8.4 The Defense Attorney as a Potential Sobriety Witness

If you go to the police station following your client's arrest, you become a potential witness to your client's sobriety. Rule 3.7 of the Massachusetts Rules of Professional Conduct expressly prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. If you do go to the station, you must decide whether your testimony will be more beneficial to your client than your continuing legal representation.

§ 10.8.5 Should the Defendant Testify?

If you call your client to testify, the jury will have the unique opportunity to hear from the one person who was present during all relevant events of the case. The defendant can testify as to what the police officer did or did not do, how the defendant drove prior to the arrest, the condition of the road, and how much the defendant had to drink. In essence, the defendant can offer testimony on virtually every relevant fact in the case. Often, the defendant is your only witness. It is therefore important for you to make a reasoned judgment as to whether to call the defendant to testify. This decision, which ultimately rests with the defendant, will be based on numerous factors. But remember, if you call your client to testify, jurors will be scrutinizing every response, gesture, and physical manifestation.

An experienced prosecutor will shake up any witness. The opportunity for the defendant's testimony to go awry is almost limitless. In deciding whether to call the defendant as a witness, you must assess the likelihood that the witness will make a fatal misstatement on cross-examination.

Because the potential for self-inflicted harm is so much greater when a defendant testifies, you should put your client on the witness stand only when you have compelling reasons to do so. This issue should be discussed thoroughly with your client. The best defense begins with a sound cross-examination supplemented with the testimony of eyewitnesses and credible demonstrative evidence, such as booking videos and photographs. If, upon consideration of all relevant factors that go into making such a decision, you decide to call your client to testify, take exceptional care in preparing your client for court.

§ 10.8.6 Cross-examination of Arresting Police Officer

Cross-examination of an arresting officer is universally recognized as the pivotal point of any OUI case. It is critically important to highlight weaknesses, demonstrate inconsistencies, and establish bias. Examined below are various cross-examination techniques commonly used in defending a person accused of impaired driving.

(a) *Opinion Evidence*

To conduct an effective cross-examination in an OUI case, defense counsel should first understand the fundamental nature of the offense. Operating under the influence is a unique crime. It is often difficult to detect and even harder to prove. While the commission of most criminal offenses is objectively clear, operating under the influence is not nearly as obvious. For example, when someone robs a store, there is no question a crime has been committed. Both the victim and the perpetrator understand what has occurred. However, for a variety of reasons, it is not always apparent when someone is operating under the influence of liquor.

First, the impaired driver cannot be arrested until the police complete the investigation and determine that probable cause exists to believe that the operator is under the influence. Therefore, by definition, the crime does not legally exist unless and until

an officer opines that the operator is impaired. Even then, the officer's opinion is subjective, and other witnesses will not always agree that a crime has occurred.

Additionally, the commission of the offense may not even be apparent to the operator. The driver may believe, in good faith or because the driver's judgment has been clouded by alcohol, that a crime is not being committed.

Exacerbating the difficulty in ascertaining whether there has been a crime is the challenge of establishing guilt when the only evidence is the opinion of a police officer. *Webster's Dictionary* defines "opinion" as a "belief stronger than impression and less strong than positive knowledge." Compare this with the definition of reasonable doubt, which instructs that "[i]t is not enough for the [government] to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850). The government will be challenged to prove guilt beyond a reasonable doubt when the only evidence is what a police officer "thinks" about the operator's sobriety.

Therefore, the inherent nature of OUI directs the attention of the defense attorney to the most vulnerable aspect of the government's case—the opinion of the arresting officer. Is it sound? Is it based on adequate observations? Does the officer have any demonstrable bias or motive that raises doubts about the validity of the opinion?

(b) *Basic Approach*

Customarily, counsel can approach the cross-examination of an arresting officer in an OUI case from two directions. One approach is to establish that the officer is lying. The other is to acknowledge that the officer acted in good faith but is simply mistaken in concluding that the defendant was intoxicated.

Establishing that an officer is lying is usually difficult and often risky. Jurors may be reluctant to believe that an officer on routine traffic patrol dealing with an unknown operator simply fabricated the evidence. Generally, to be successful with a direct attack on the officer's credibility, counsel must be armed with evidence that the officer had a motive to fabricate. For example, if the defendant is charged with assaulting the officer or resisting arrest or was otherwise belligerent, there may be some motive, bias, or prejudice that will support a direct attack on credibility.

The most common approach when cross-examining the arresting officer is a straightforward challenge to the opinion as simply mistaken. This manner of cross-examination is relatively simple to execute, easy to understand, and often successful. A skilled cross-examiner can flush out salient facts from the officer and raise doubts about the basis for the witness's opinion. Jurors will also find it easier to reconcile conflicting evidence about the defendant's sobriety without necessarily finding that the officer is lying outright.

(c) *Cross-Examination Techniques*

There are numerous techniques available when cross-examining an officer who opines that the defendant was impaired. These techniques, developed and applied by many practitioners, have stood the test of time. Additionally, they are not mutually exclusive—some may be utilized in the course of the same cross-examination. The choice and application of these techniques will be dictated by the circumstances of the particular case.

Unclear Recollection

Police officers make routine OUI arrests on a regular basis. When the case comes to trial, the officer's recollection about the incident will likely be eroded by time. The facts of other arrests will be almost indistinguishable from the defendant's case.

Counsel should carefully explore the officer's present recollection of the incident. Quite often the officer is simply reciting the details of a report that was read just moments before. Certainly, if the officer's memory is unclear about specific details of the incident, a jury can question the value of the testimony. Cross-examination of an officer's recollection may be conducted as follows:

> Officer, you testified about the details of my client's arrest?
>
> Is it your testimony you have a clear recollection about the stop and arrest?
>
> You stopped and arrested my client over one year ago?
>
> Since that date you have been involved in many investigations?
>
> Since that date you have made many motor vehicle stops?
>
> Since that date you have made many arrests as a result of those stops?
>
> Some of those arrests have been for OUI?
>
> Can you identify the person you stopped for a motor vehicle offense immediately prior to my client?
>
> Can you identify the person you arrested for OUI immediately prior to my client?
>
> Before testifying today, you reviewed your police report about the arrest?
>
> This was because when you came to court today the details of the arrest were somewhat vague in your mind?
>
> It was only after reviewing the report that you remembered any of the details of the arrest of my client?

This line of cross-examination will establish that the officer has an unclear memory of the incident and is simply regurgitating the details of the police report to the jury.

Be careful, however, if the particular facts of the offense are unusual. Under these circumstances, the officer is more likely to have a clear memory of the incident, and this type of questioning may be counterproductive. For example, if the defendant was abusive or was involved in a serious accident, the report may not be necessary to refresh the officer's recollection.

Too Slow to Judgment

The average person generally forms an opinion about someone's sobriety within a matter of a few moments. Most jurors, relying on their own experiences, recognize that it does not take ten to fifteen minutes to decide if someone is impaired.

Police, however, are trained to reserve all opinions until they have completed their investigation. This investigation often includes a battery of standardized field sobriety tests such as raising one leg or walking a straight line. An officer who is cross-examined about their investigation will usually concede that the opinion was not reached for several minutes.

The contradiction between the juror's common sense and the officer's testimony will likely raise serious doubts. Jurors will question why, if the defendant was as impaired or drunk as the Commonwealth alleges, it took so long for the officer to form the opinion.

When utilizing this technique, counsel simply asks the officer periodically throughout the examination whether the opinion was formed at a given point of the investigation, as illustrated by the following example:

> Officer, you have testified after you stopped my client that you made certain observations?
>
> These included glassy eyes, slurred speech, and a strong odor of alcoholic beverages?
>
> At this point, based on your observations of his operation of the motor vehicle and other observations, did you form an opinion about the defendant's sobriety?

Inevitably, the answer will be no. Counsel should continue to press throughout the cross-examination in asking at what point the opinion was formed. Generally, the officer will acknowledge forming an opinion only after completing the final sobriety test. This will have taken an average of five to fifteen minutes from the first observation of erratic operation to arrest.

During closing arguments, an effective argument can be made that the extended delay in forming an opinion was because the officer had doubts about whether the defendant was impaired. If the officer had such a hard time forming the opinion on a probable cause standard for arrest, the jurors should have an even harder time being satisfied beyond a reasonable doubt.

Rush to Judgment

Occasionally, an officer will arrest an operator without conducting a full investigation. This may occur when the operator is obviously impaired and may be injured in attempting to perform field sobriety tests. It also may occur when the operator is belligerent or refuses to submit to field sobriety tests or when the officer does not take the time to conduct a thorough investigation. In examining the officer, counsel may wish to develop an argument that there was a rush to judgment. In this regard, cross-examination about the failure to follow the recognized protocol for investigating an OUI case is highly appropriate.

An officer being cross-examined about failure to conduct certain tests, the witness should be asked about training and experience. Most jurors recognize field sobriety tests as a standard investigatory tool and expect an officer to be versed in their use.

One caveat when following this line of examination is that the Commonwealth will likely be prepared to respond. Your questioning may also open the door for damaging evidence that would not otherwise be admissible. For example, if the defendant refused to submit to sobriety testing, pursuing this type of questioning will probably permit the government to introduce the defendant's refusal.

Reading Between the Lines

Police officers write reports that memorialize the probable cause for arresting the impaired driver. Generally, the report recites only what the defendant did improperly while operating the motor vehicle, talking with the officer, or performing field sobriety tests.

Cross-examination is the prime opportunity to demonstrate to the fact finder everything the defendant did correctly and why the evidence is equally consistent with the defendant's sobriety.

For example, if the officer alleges that the defendant stepped off the line twice during the walk-and-turn test, it is reasonable to assume that all the other steps were performed correctly. Similarly, if it is alleged that the defendant weaved twice while driving, there was probably nothing else erratic about the operation unless otherwise noted in the report.

For example, often the officer will describe following the defendant for a considerable distance before pulling the car over. If the defendant allegedly weaved two or three times, there is a considerable amount of favorable evidence to develop on cross-examination. It is important to keep in mind what the officer does not say about the operation. If the officer testifies only to the weaving, it is reasonable to infer that the defendant's operation was otherwise reasonable and proper. Ask the officer questions such as the following:

Was the defendant speeding?

Did the operator obey all other traffic signals?

Did the defendant pull over immediately when the officer activated the lights or siren?

Did the defendant pull over safely and parallel to the curb?

Almost every time, the answers will be favorable. In the rare case that the officer tries to embellish, the officer's report, which discussed only the weaving, will give ample grounds for impeachment.

The key to this type of examination is attention to detail and patience. Counsel must fully understand how field sobriety testing is conducted and what is being scored by the officer. For example, in the nine-step walk-and-turn test, the officer is looking for eight separate clues—instances where the operator

- is unable to maintain balance while listening to the officer's instructions,
- starts before the instructions are finished,
- stops while walking to keep steady,
- does not touch heel to toe,
- steps off the line,
- uses arms for balancing,
- makes an improper turn, and
- takes an incorrect number of steps.

See Massachusetts Department of State Police, *Standardized Field Sobriety Testing* (effective Dec. 16, 1992).

If the officer notes in the report one clue (for example, stepping off the line), it is reasonable to conclude the other clues were not present. Additionally, if the officer testifies that the defendant stepped off the line twice, it is reasonable to conclude that the other sixteen steps were correctly completed. Absent evidence of total inebriation, there is almost always something the defendant did correctly. A methodical examination should successfully highlight these exculpatory facts.

When police make a motor vehicle stop, they are usually meeting the operator for the first time. They know nothing about the operator's background or physical history. Therefore, an officer forming an opinion about sobriety is working with very limited information. On the other hand, defense counsel will have the opportunity to fully develop historical evidence about the defendant. This may uncover legitimate explanations for what the officer mistakenly concluded was intoxication. Fatigue, balance problems, prior leg injuries, and excessive weight are just a few reasonable explanations for the inability of an operator to satisfactorily complete sobriety tests.

A typical cross-examination may include the following questions:

Officer, you conducted a series of standardized field sobriety tests?

These tests are physical performance tests?

There are many reasons why a person cannot perform these tests that have nothing to do with his or her sobriety?

For example, if a person is substantially overweight, it may interfere with his or her ability to perform these tests?

If a person has a balance or inner ear problem, that condition could also create a difficulty?

A prior leg injury may also cause problems?

Prior to conducting these tests, you asked my client certain questions?

One reason for the questions was to determine if he had any physical problems that would interfere with his performance?

He told you at that time he had a prior leg injury?

Specifically, he told you he had broken his leg last year?

Obviously, if intending to pursue this line of examination, counsel should be prepared to back it up with witnesses or medical records. Similarly, an argument that fatigue caused poor performance on the sobriety tests should be supported by appropriate evidence, such as the operator's work records.

§ 10.8.7 Preparation of Expert Witness

(a) *Selection of Expert Witness*

In formulating your defense strategy, you will want to consider using an expert either to challenge the Commonwealth's proof or to establish an important technical fact. The automatic discovery procedures under Mass. R. Crim. P. 14 require that the Commonwealth disclose its intended expert opinion evidence. If the Commonwealth intends to present expert testimony that the defendant's blood alcohol content was at a certain level at a particular time and place, you will need to review the expert's field of expertise, as well as training and experience. Once you have reviewed the basis of the Commonwealth's expert testimony, you must then consider retaining the services of your own expert to review and then challenge the opposing expert's opinion.

An expert witness can be used to explain a technical basis of your defense. For example, assume that your client claims to have consumed one bottle of beer before being arrested. Your client further claims to have taken medication for acid reflux disease before being stopped by the police. You may find an expert witness who will opine that a false positive breathalyzer test resulted from your client's one beer.

(b) *Legal Analysis*

The admissibility of expert testimony is determined under the test set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (expanding *Daubert* test to include all forms of expert testimony); and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (establishing that the standard for reviewing a judge's decision to admit or exclude expert testimony is "abuse of discretion"). *See also Commonwealth v. Sok*, 425 Mass. 787 (1997), *standard abrogated by Canavan's Case*, 432 Mass. 304 (2000); *Commonwealth v. Sands*, 424 Mass. 184 (1997) ("a party seeking to introduce scientific evidence may lay a foundation either by showing that the underlying scientific theory is generally accepted with the relevant scientific community, or by showing that the theory is reliable or valid through other means"); *Commonwealth v. Lanigan*, 419 Mass. 15 (1994) (adopting *Daubert* in part and holding "that a proponent of scientific opinion evidence may demonstrate the reliability or validity of the underlying scientific theory or process by some other means, that is, without establishing general acceptance"); *Commonwealth v. Zimmermann*, 70 Mass. App. Ct. 357 (2007) (party seeking to introduce scientific evidence may lay a foundation by establishing acceptance in scientific community).

In a *Daubert-Lanigan* hearing you may challenge an expert's qualification and, if possible, the scientific reliability of the theory or methodology underlying the expert's expected testimony. In some instances, you may be able to directly challenge the qualification of the Commonwealth's expert witness, such as a drug recognition expert in an OUI or drug case. You may be able to exclude the expert's testimony. Experts called to testify on behalf of the Commonwealth may be required to have a valid certification to provide the foundation for certain types of evidence, such as a certificate for blood alcohol analysis. The Commonwealth also bears the burden of proving that the underlying theory or methodology of the expert's expected testimony is scientifically reliable. Be sure to examine the method used to produce a blood-test result from a hospital or a crime laboratory and determine, perhaps with the use of an expert, whether there is a challenge to the scientific method of testing or if the results are scientifically invalid for other reasons.

(c) *Possible Areas of Expert Opinion*

Listed below are some of the areas on which an expert would testify on behalf of the defendant by either challenging the testimony of the Commonwealth's witnesses or affirmatively introducing evidence favorable to the defendant's case:

- police officer—performance on field sobriety tests;
- police officer—breathalyzer test results or blood alcohol content of breathalyzer test;
- blood alcohol expert—scientific reliability of blood tests;
- forensic toxicologist—scientific reliability of blood and urine tests;

- pharmacology—scientific reliability of blood tests, qualification of drug recognition expert, and scientific reliability of drug recognition evaluation;
- defense physician expert—scientific reliability of blood tests, qualification of drug recognition expert, and scientific reliability of drug recognition evaluation;
- breathalyzer-test machine expert—scientific reliability of the machine and the test result;
- accident reconstruction expert—accident reconstruction; and
- other medical experts—the connection between a defendant's medical disease, disability, or medical impairment, such as a concussion, and a police officer's general observations and description of the defendant's performance of field sobriety tests.

§ 10.8.8 Preparing the Defense Expert for Direct and Cross Examination

Your expert witness should be completely familiar with both the defendant's and the Commonwealth's case theories.

Well in advance of trial, provide the expert with copies of the Commonwealth's discovery, including police reports, breathalyzer test results, photographs, and videos, along with the Commonwealth's witness list. Then thoroughly review the expert's upcoming testimony with the expert. Be sure to serve notice on the prosecution of your intention to call an expert witness. Your notice should contain the expert's name, address, and curriculum vitae. Failure to notify the prosecution in a timely manner could result in exclusion of the expert's testimony. Sometimes it is impossible to make the necessary determinations regarding expert testimony until just before the trial. To be safe, give the Commonwealth notice of your intention to call the expert and provide it with the expert's curriculum vitae well in advance of making your final decision on whether to put the expert on the witness stand.

If you are forced to make the decision to retain the services of an expert just prior to trial, immediately notify the prosecutor and file a motion in limine requesting the court's leave to present the expert testimony. Your attached affidavit should describe in detail the reasons for your late request.

§ 10.8.9 Stipulations

As a general rule, defense counsel should rarely stipulate to any element of proof, if only because it is always possible that the Commonwealth may not introduce the evidence necessary to prove that particular element.

However, it often makes sense to stipulate to matters that do not in themselves prove an element if, in your view, the stipulated fact is easily proven and if doing so helps to keep the jury focused on the material elements of the case without getting sidetracked on nonessential issues.

Example
The booking video is a fair and accurate portrayal of the defendant being booked on the day in question.

Example
Frequently, defense counsel will stipulate prior to trial that the government observed all the defendant's rights, such as the right to a telephone call or the right to be examined by a physician of the defendant's own choosing pursuant to G.L. c. 263, § 5A, and request that the Commonwealth not question the police officer about what rights were given to the defendant. This helps avoid the problem of having the jury speculate as to why the defendant did not request to be examined by a physician.

If you decide that a stipulation is appropriate in a given case, be sure to place the stipulation on the record with the court prior to trial. If it is a stipulation to an essential element, the agreement must be in writing and signed by the prosecutor, the defendant, and defense counsel. It is required to be read to the jury before the close of the Commonwealth's case and may be introduced into evidence. If the stipulation is to any other fact, it is not required to be in writing but must be placed on the record before the close of evidence and communicated to the jury. *See* Mass. R. Crim. P. 23; *Commonwealth v. Ortiz*, 466 Mass. 475 (2013).

§ 10.9 PENALTIES

Variations in penalties are based on the number of prior offenses committed. In addition to penalties listed below, the court is statutorily obligated to impose fees, which may include an OUI fee, a head injury fee, a victim-witness fee, and a monthly probation sentence fee.

§ 10.9.1 First Offense

If convicted, first-time offenders face potential penalties of

- a fine of not less than $500 nor more than $5,000 plus, or alternatively, imprisonment of not more than two and one-half years, which may be served on selected weekends, evenings, or holidays, G.L. c. 90, § 24(1)(a)(1) and (3); and
- a one-year loss of license, G.L. c. 90, § 24(1)(c)(1), with a hardship license available after three months or six months.

A first offender, however, may be sentenced under Section 24D and 24E. A sentence under Section 24D includes

- placement on probation for not more than two years;
- assignment to a driver alcohol education program (usually sixteen weeks, one night per week) as a condition of probation; and
- loss of license for forty-five to ninety days (180 days if under the age of twenty-one).

Generally, a first-time offender's primary concern is minimizing his or her loss of license. The benefit of a 24D program is that the defendant's license is taken only for forty-five to ninety days, compared to the one-year loss associated with the nonprogram disposition.

Upon a showing of need, a first-time offender sentenced to the 24D program is entitled to a hardship license. 2003 Mass. Acts c. 28, § 13 (amending G.L. c. 90, § 24D). This license is effective for an identical twelve-hour period, seven days per week. This hardship license will also trump any suspension related to the refusal of the breath test resulting from the arrest. To obtain the hardship license, the defendant should go to the registry no sooner than three days after the plea or trial along with proof of enrollment in the 24D program and any evidence of hardship. Defendants should consult with their probation departments regarding 24D programs in their area. Note that at the time of enrollment the program will demand a fee of approximately $400.

Counsel should be aware that the OUI statute provides that, when a defendant is convicted following trial on the merits, there is a statutory presumption that the defendant is a suitable candidate for the 24D program. If a judge deems the defendant is not suitable, he or she must make written findings. This legislative provision was clearly designed to curtail the practice of punishing defendants who seek a trial by revoking their license for one year following a conviction.

§ 10.9.2 Second Offense

A second offender is anyone who has been previously convicted of operating under the influence in the Commonwealth or of a like offense in any other state. G.L. c. 90, § 24(1)(a)(1).

A second offender faces the following penalties:

- imprisonment for a mandatory minimum of thirty days but not more than two and one-half years, G.L. c. 90, § 24(1)(a)(1);
- a fine of not less than $600 nor more than $10,000; and
- a two-year loss of license with a hardship license available after one year or eighteen months.

A condition of a hardship license is that the operator have an ignition-interlocking device on his or her car. The device, which requires the operator to blow into it prior to and periodically during operation, prevents the car from operating if the operator has a blood alcohol level of .02 percent or greater. It is a condition of full license reinstatement that the operator have an ignition-interlocking device on his or her vehicle for a period of two years.

A second offender may be able to avoid the thirty-day mandatory minimum sentence by being placed on probation for two years and, as a condition of probation, entering into a fourteen-day residential treatment program designated by the state.

As previously stated, the legislature has eliminated the so-called lookback period when calculating prior OUI convictions. Currently, the law will look back to the beginning of the defendant's criminal history in determining whether his or her OUI is a subsequent offense. Notwithstanding this provision, the OUI statute provides that a judge has the discretion to treat a second offense as a first offense under some circumstances. Specifically, if the defendant has committed only one prior OUI and the conviction occurred more than ten years ago, the judge may sentence the defendant to a disposition pursuant to Section 24D. This may be done only once in a defendant's lifetime. If such a sentence is imposed, the defendant may be entitled to an immediate hardship license as with a "true" first offender.

§ 10.9.3 Third Offense

A third offender is anyone who has been previously convicted two times of operating under the influence in the Commonwealth or of any like offense in any other state. G.L. c. 90, § 24(1)(a)(1).

A third offense is now considered a felony, and the penalties increase significantly, including

- imprisonment for a mandatory minimum of 150 days, with a maximum penalty of up to five years in state prison, G.L. c. 90, § 24(1)(a)(1);
- a fine of not less than $1,000 nor more than $15,000; and
- an eight-year loss of license with a hardship license available at two- and four-year intervals.

See § 10.9.2, above, regarding conditions requiring use of an ignition-interlocking device.

§ 10.9.4 Fourth Offense

A fourth offender is anyone who has been previously convicted three times of operating under the influence in the Commonwealth or of a like offense in any other state. G.L. c. 90, § 24(1)(a)(1).

A fourth offense is punishable by

- imprisonment for a mandatory minimum of one year, with a maximum penalty of up to five years in the state prison, G.L. c. 90, § 24(10)(a)(1);
- a fine of not less than $1,500 nor more than $25,000; and
- a ten-year loss of license, with a hardship license available after five and eight years of suspension.

See § 10.9.2, above, regarding conditions requiring use of an ignition-interlocking device.

§ 10.9.5 Fifth and Subsequent Offense

A fifth offender is anyone who has been previously convicted four times of operating under the influence in the Commonwealth or of a like offense in any other state. G.L. c. 90, § 24(1)(a)(1).

A fifth offense is punishable by

- imprisonment for a mandatory minimum of two years, with a maximum penalty of up to five years in state prison, G.L. c. 90, § 24(1)(a)(1);
- a fine of not less than $2,000 nor more than $50,000; and
- a loss of license for life, with no possibility of hardship license.

§ 10.10 PRESERVING ISSUES FOR APPEAL

It is important to remember that the only way to preserve issues for further appellate review is to make a motion for required finding of not guilty at the close of the Commonwealth's case, to remember to renew it at the close of the defendant's case, and to renew it again after the return of a jury verdict, if necessary. *See* Mass. R. Crim. P. 25.

Equally important is requesting appropriate jury instructions. Obviously, timely objections to improper instructions must be made in order to properly preserve that issue for appeal. See **Exhibit 10K** for sample defendant's proposed jury instructions.

§ 10.11 LICENSE REINSTATEMENT

A defendant whose license has been suspended for refusing the breath test should move for reinstatement of his or her license if the case is dismissed or if the defendant is acquitted following trial. *See Commonwealth v. Richards*, 480 Mass. 413 (2018). General Laws c. 90, § 24(f)(1)(iii) provides that a defendant under these circumstances is entitled to reinstatement absent a showing by the Commonwealth that the restoration would endanger the public safety.

Counsel should immediately file a motion with a court order. See **Exhibit 10L**. The registry will immediately reinstate the defendant's license once presented with a certified copy of the court order and a registry abstract, which can be obtained from the clerk's office.

MCLE gratefully acknowledges the Honorable Randy S. Chapman, the Honorable R. Marc Kantrowitz, and the Honorable David P. Sorrenti for their earlier contributions to this chapter.

ü CHECKLIST 10.1

Successfully Defending an OUI Case

Prior to Pretrial Conference:

q Have you formalized your fee agreement with your client?

q Have you conducted an initial review of the arrest report?

q Have you reviewed the complaint and familiarized yourself with the charges, and possible sentences and license loss with regard to each charge?

q Have you conducted a detailed client interview and discussed with the client his or her criminal history, the range of options available, and possible dispositions in the case?

- Provided the client with your view of the case?
- Discussed with the client his or her expectations?
- Made an initial decision whether the case should proceed by way of plea or trial?

q **If proceeding by plea,** have you discussed with the client the likely sentence and license loss associated with the charges?

q Procedurally, if the client is eligible for a hardship license, have you advanced the pretrial conference date for disposition in order to limit pretrial license loss?

q Have you taken the client through the plea colloquy?

q Have you advised the client as to the likely conditions associated with the sentencing?

q **If going to trial,** have you advised the client as to the likely course the case will follow, including a time table for its resolution?

q Have you prepared the client so that he or she understands the necessity of the multiple court dates needed to resolve the case?

q Have you filed any necessary discovery motions for matters that may not be covered by the automatic discovery rules and marked them for hearing on the pretrial conference date?

q Have you conducted a detailed client interview, including events relating to the night of the arrest and any potential witnesses to be interviewed and any investigation that may need to be conducted?

Pretrial Conference:

- q Have you obtained all necessary discovery or is a court compliance date necessary?
- q Do you have all arrest reports, accident reports, right forms, citations, and 911/ turret tape recordings?
- q Was there a breath test? If so, file a motion to obtain the necessary records or check the OAT eDiscovery Portal online.
- q Does the arresting police department have videorecordings related to the arrest or booking and, if so, do you have those recordings?
- q Is there a need for third-party records, such as medical records? If so, a Rule 17 request will be necessary to obtain these records prior to trial.
- q Is there a need for an evidentiary motion date? If so, do you have sufficient discovery to pick such a motion hearing date prior to discovery compliance?
- q Do you need to obtain (or do you already have) a copy of the police policy and field sobriety testing manual?
- q In the event that the charge is a multiple offense OUI, do you have all records relating to the prior convictions?
  - Are the records admissible at trial?
  - Have the records been properly certified?
  - Is there sufficient evidence to identify your client from the records?

Motion Hearing Date:

- q Is discovery complete?
- q Assuming discovery is complete, is there a need to file an evidentiary motion?
- q Is a motion to suppress necessary?
  - Warrantless search of an automobile?
  - Testimonial statements made as a result of a custodial interrogation?
- q Is a motion to dismiss necessary?
  - Reasonable suspicion to stop?
  - Probable cause to arrest?
  - Prosecutorial misconduct?
  - Noncompliance with discovery order?
  - Violation of G.L. c. 263, § 5A?

- Violation of the bail statute?
- Citation violation pursuant to G.L. c. 90C, § 2?

q Is there a need to file an evidentiary motion in order to suppress breath-test results?

Trial Preparation:

q Have all pretrial motion issues been resolved?

q Has discovery been completed?

q Have you met with and interviewed all potential witnesses?

q Do you need to summons the witnesses for trial?

q Have you decided on whether your case requires expert witness testimony?

q Have you decided on and gathered all G.L. c. 233, § 79G narrative reports that you intend to use at trial?

q Have you given the prosecutor ten days' notice, by certified mailing, of your intent on using the narrative report?

q Have you complied with your discovery requirements, including advising the prosecutor of your list of witnesses and any exhibits you may be offering at trial?

- Narrative reports?
- Photographs of the scene?
- Medical records?
- Maps?

q Have you familiarized yourself with the area of the arrest, roadways, road markings, and the like? Are photographs or video of the area necessary?

q Are you fully familiar with the arrest or booking videorecordings in the case?

q Have you filed a motion to redact the booking video so as to exclude any discussion regarding breath-test refusal, prior offenses, or other incriminating information?

q Have you prepared your client to testify and discussed with the client the pros and cons of testifying on his or her own behalf?

- How will your client appear before a jury?
- How will he or she react when being cross-examined?
- How much will he or she admit to drinking?
- Are there any prior criminal convictions that can be used to impeach him or her at trial?

- Has your client made a choice, with your input, on whether to testify?

q Have you discussed with your client whether the case should be a jury trial or a jury-waived trial, and discussed the pros and cons of each?

q Have you prepared your case for trial?

- Have you developed a trial strategy?
- Have you reviewed and prepared your cross-examination of the Commonwealth's witnesses?
- Have you obtained and reviewed the police field sobriety testing material for cross-examination purposes?
- Have you prepared your witnesses sufficiently for testimony at trial?
- Have you prepared your opening statement and closing argument?
- Have you prepared your motions in limine?
- Have you prepared your proposed jury instructions, proposed questions to the jury, and motion for required finding of not guilty?
- Have you prepared a motion and order for return of license (to be filed when your client wins his or her case)?
- In the event your client is convicted, have you reviewed and are you prepared to defend the "prior" convictions for OUI?

Trial:

q Be prepared to decide whether to proceed by way of a jury trial or nonjury trial, once you learn which judge has been assigned for trial.

q Be prepared to argue your motions in limine.

q Answer ready for trial.

ü CHECKLIST 10.2

Expert Qualification—Establishing Expertise*

* Reprinted from Michael A. Collora & Ingrid S. Martin, "Witness Competency and Qualifications," *in A Practical Guide to Introducing Evidence in Massachusetts* (MCLE, Inc. 4th ed. 2015 & Supp. 2015).

(The following should be modified as the case requires.)

Basic Facts

- q What is your name? (or, Please state your name.)
- q Where do you live? (or, What is your address?)
- q What is your business? (or, What is your occupation?, Where are you employed? and What are your duties at your place of employment?)
- q How long have you been a _____? (or, How long have you practiced as a _____? or, How long have you been employed as a _____?)
- q Sir or Madam, do you understand that it is necessary to ask a number of questions relating to your knowledge, skill, experience, training, and education so that the jury will be in a better position to appreciate your qualifications as a witness and then to evaluate any testimony you might give? (Obviously, this question will depend on the witness's background. For example, if the witness's expertise is based solely on experience, the examiner should not refer to education.)

Education

- q What is your educational background? (or, Where did you go to college? or, Did you attend college? and Where?)
- q What were the years of your attendance at _____? (or, When did you attend college?)
- q What was your major course of study? (or, Did you have a major in college? and What was it?)
- q What was your specialty? (or, Did you have a specialty? and What was it?)
- q What courses did you take? (or, Would you please describe for us the courses that you took?)
- q Who were your teachers?
- q Did you have a minor course of study? What was it?

- q With regard to your specialty, did you attend any seminars or conferences?
- q Did you graduate? When did you graduate?
- q What degree did you receive?
- q What honors, if any, did you receive? (or, Did you graduate with any honors? Would you please describe them for us?)
- q Were you a member of any scholastic societies? Please name them. Did you have to be elected to become a member of the _____ scholastic society? What criteria were there for election, if you know?
- q Did you receive any scholarships, assistantships, or grants while you were attending _____? Would you please name them and describe them?
- q What, if any, elective offices did you hold while attending _____?

These questions should be repeated for each level of graduate and postgraduate work the witness has had.

Teaching Experience

- q What, if any, experience have you had teaching others? (or, Have you taught _____ to others?)
- q What was the name of the school? Where?
- q What years did you teach at _____? (or, When did you teach at _____?)
- q What were the names of the courses, if you recall? (or, What courses did you teach, if you recall?)
- q Please describe course _____.
- q Approximately how many students did you have in each of your classes?
- q Was this course a graduate level course or undergraduate level course?
- q How often did this class meet and for how long a period of time? (or, How often did the class meet each week? How long did the class meet when it met?)
- q What were the general backgrounds and interests of your students, if you know?
- q Have you had experience teaching anywhere else?

The previous series of questions should be repeated for each teaching experience that the witness has had.

Work Experience

- q How long have you been employed by your present employer?
- q Before that, by whom were you employed?
- q How many years have you been working as a _____?
- q Did you intern following your graduation from medical school? Where?
- q Following your internship, did you have occasion to take a residency, doctor? What is a residency?
- q In what branch of medicine did you specialize?
- q How long were you a resident in _____? Where did you take your residency?
- q Did you complete your residency?
- q Following your residency, did you continue to specialize in the field of _____?
- q What is the American Board of _____?
- q Are all of the doctors who specialize in _____ members of the American Board of _____?
- q Are you certified by the American Board of _____?
- q Are you a staff member of any hospitals?
- q Have you been steadily employed as a _____ without interruption?
- q Did you serve an apprenticeship?
- q Where was the apprenticeship?
- q What levels of experience are there within the trade of _____?
- q How long did you serve as an apprentice?
- q What training did you receive as an apprentice?
- q How long did you serve as a journeyman?
- q Within your trade, is there any level above the one you currently occupy?

Licenses

- q Are you licensed to practice _____ in the Commonwealth of Massachusetts?
- q When were you so licensed?

q Have you been continuously licensed since that date?

q Are you a licensed _____ in the Commonwealth of Massachusetts?

Organizations Within a Trade or Profession

q Have you ever had occasion to become a member of any organization relating to your occupation/profession? (or, Are you a member of any organization relating to your occupation/profession?)

q Please describe the organization.

q How long have you been a member?

q Have you held any offices in _____ (the organization)?

q When did you hold that position?

q Was that an elective position?

q Have you received any awards from any organization for contributions to your occupation/profession?

q What were the awards?

q When did you receive them?

Consulting Experience

q Have you ever had occasion to serve as a consultant to private industry or to any governmental agency?

q Where and when?

q What was the nature of your consulting work?

Publications

q Are you the author of any books? (or, Have you written any books?)

q What are the titles?

q Would you please describe the subject matter of _____ (title of book).

q When was this book published?

q In what country was it published?

q Have you, on occasion, contributed articles to professional/occupational journals?

- q Please name the journals.
- q What was the title of the article that you wrote in _____ (journal)?
- q Please describe in a general way the subject matter of that article.
- q Have you ever had occasion to collaborate with anyone in seeking to publish books or articles in any professional/occupational or popular journals or magazines?
- q With whom do you collaborate?
- q What was the title of the article you wrote together?
- q Was it published?
- q Where was it published?
- q When was it published?
- q What was the subject matter of the article?

Prior Testimony as an Expert

- q Have you ever testified as a witness in a court of law?
- q Would you please name the courts?
- q When did you testify in _____ (court)?
- q What type of case was involved in that testimony?
- q What court?
- q If the court pleases, I wish to submit the witness as an expert. I further ask that the court recognize the witness as an expert in the field of _____.

EXHIBIT 10A—Model Jury Instruction 3.200, Operation of a Motor Vehicle*

* This instruction was published by the Administrative Office of the District Court, © 1988–2020.

A person "operates" a motor vehicle not only while doing all of the well-known things that drivers do as they travel on a street or highway, but also when doing any act which directly tends to set the vehicle in motion. The law is that a person is "operating" a motor vehicle whenever he or she is in the vehicle and intentionally manipulates some mechanical or electrical part of the vehicle—like the gear shift or the ignition—which, alone or in sequence, will set the vehicle in motion.

Commonwealth v. Ginnetti, 400 Mass. 181, 184, 508 N.E.2d 603, 605 (1987); *Commonwealth v. Uski*, 263 Mass. 22, 24, 160 N.E. 305, 306 (1928).

An intoxicated defendant found asleep behind the wheel of a vehicle parked on a public way, with the key in the ignition and the engine on, may be found to have "operated" the vehicle; the Commonwealth need not prove that the vehicle was driven before being parked nor prove the defendant's intention after occupying the driver's seat. *Commonwealth v. Sudderth*, 37 Mass. App. Ct. 317, 319–320, 640 N.E.2d 481, 482–483 (1994). However, the judge may not charge that such circumstances constitute operation as a matter of law. *Commonwealth v. Plowman*, 28 Mass. App. Ct. 230, 233–234, 548 N.E.2d 1278, 1280 (1990). *See Commonwealth v. Platt*, 57 Mass. App. Ct. 264, 267 nn. 5 & 6, 782 N.E.2d 542, 544 n.5 & 545 n.6 (2003) (collecting cases with sufficient and insufficient circumstantial evidence of operation).

SUPPLEMENTAL INSTRUCTIONS

1 "Motor vehicle." **The law defines what a "motor vehicle" is as follows: "all vehicles constructed and designed for propulsion by power other than muscular power," with certain exceptions that are not relevant here.**

G.L. c. 90, § 1. The jury may be given more of the statutory definition where appropriate to indicate that the term "motor vehicle" includes vehicles being pulled or towed, but excludes railroad, railway, trolley and other vehicles on tracks, highway construction and maintenance equipment incapable of more than 12 m.p.h., invalid wheelchairs, vehicles operated or guided by pedestrians, and mopeds. Trackless trolleys are included in the statutory definition, but only for certain purposes.

2. Stopped engine. **To "operate" a motor vehicle within the meaning of the law, it is not necessary that the engine be running. A driver continues to operate his or her motor vehicle when it is stopped in the ordinary course of its operation for some reason that is fairly incidental to the vehicle's operation. A person is also considered to be "operating" a stationary vehicle when he or she manipulates some part of it, like the gear shift, so that it moves forward of its own weight.**

Commonwealth v. McGillivary, 78 Mass. App. Ct. 644, 940 N.E.2d 506 (2011), *rev. denied* 459 Mass. 1107, 944 N.E.2d 1043 (2011); *Commonwealth v. Clarke*, 254 Mass. 566, 568, 150 N.E. 829, 830 (1926); *Commonwealth v. Henry*, 229 Mass. 19, 22, 118 N.E. 224, 225 (1918); *Commonwealth v. Cavallaro*, 25 Mass. App. Ct. 605, 607–611, 521 N.E.2d 420, 421–424 (1988).

3. Circumstantial evidence. **You may find that the defendant was the operator of the motor vehicle even if no witness saw him (her) driving the vehicle, if there is enough circumstantial evidence to prove to you beyond a reasonable doubt that the vehicle was operated and that the defendant, and no one else, was the operator of that vehicle.**

Here instruct on Direct and Circumstantial Evidence (Instruction 2.06).

Commonwealth v. Otmishi, 398 Mass. 69, 70–71, 494 N.E.2d 1350, 1351–1352 (1986); *Commonwealth v. Hilton*, 398 Mass. 63, 66–68, 494 N.E.2d 1347, 1349–1350 (1986); *Commonwealth v. Smith*, 368 Mass. 126, 330 N.E.2d 197 (1975); *Commonwealth v. Rand*, 363 Mass. 554, 561–563, 296 N.E.2d 200, 205–206 (1973); *Commonwealth v. Wood*, 261 Mass. 458, 459, 158 N.E. 834, 834 (1927); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 1010–1011, 505 N.E.2d 218, 220–221 (1987); *Commonwealth v. Balestra*, 18 Mass. App. Ct. 969, 969–970, 469 N.E.2d 1299, 1300 (1984); *Commonwealth v. Geisler*, 14 Mass. App. Ct. 268, 272–273, 438 N.E.2d 375, 378–379 (1982); *Commonwealth v. Doyle*, 12 Mass. App. Ct. 786, 787–789, 429 N.E.2d 346, 347–348 (1981). For cases where the circumstantial evidence was held insufficient, see *Commonwealth v. Shea*, 324 Mass. 710, 712–714, 88 N.E.2d 645, 646–647 (1949); *Commonwealth v. Mullen*, 3 Mass. App. Ct. 25, 322 N.E.2d 195 (1975).

NOTE:

Uncorroborated confession insufficient. A defendant cannot be convicted solely on his or her uncorroborated confession that he or she was the operator of the motor vehicle, *Commonwealth v. Leonard*, 401 Mass. 470, 517 N.E.2d 157 (1988) (circumstantial evidence pointed equally to defendant and his wife as probable operator), but such corroboration can be furnished by circumstantial evidence, *Commonwealth v. McNelley*, 28 Mass. App. Ct. 985, 987, 554 N.E.2d 37, 39–40 (1990).

EXHIBIT 10B—Model Jury Instruction 3.280, Public Way*

* This instruction was published by the Administrative Office of the District Court, © 1988–2020.

I. SHORT-FORM INSTRUCTION

This short-form instruction may be used where the evidence involves only a public street or highway, and does not raise any issue of the statutory alternatives.

The Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle on a public way.

Any street or highway that is open to the public and is controlled and maintained by some level of government is a "public way." This would include, for example, interstate and state highways as well as municipal streets and roads.

In determining whether any particular street is a public way, you may consider whether it has some of the usual indications of a public way—for example, whether it is paved, whether it has street lights, street signs, curbing and fire hydrants, whether there are buildings along the street, whether it has any cross-roads intersecting it, and whether it is publicly maintained.

II. FULL INSTRUCTION

The Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle in one of three places: on a public way, *or* in a place to which the public has a right of access, *or* in a place to which members of the public have access as invitees or licensees.

You will note that the statute treats these three types of places as alternatives. If any one of the alternatives is proved, then this element of the offense is satisfied. Let me discuss the three alternatives one at a time.

Our law defines a public "way" as:

> **"any public highway,**

> **[or a] private way [that is] laid out under authority of [a] statute,**
>
> **[or a] way dedicated to public use,**
>
> **or [a] way [that is] under [the] control of park commissioners or [a] body having [similar] powers."**

G.L. c. 90, § 1.

Interstate and state highways, as well as municipal streets and roads, would all be included in this definition. In determining whether a road is a public way, you may consider whether it has some of the usual indications of a public way—for example, whether it is paved, whether it has street lights, street signs, traffic signals, curbing and fire hydrants, whether there are abutting houses or businesses, whether it has any crossroads intersecting it, whether it is publicly maintained, and whether there is an absence of signs prohibiting public access.

Commonwealth v. Charland, 338 Mass. 742, 744, 157 N.E.2d 538, 539 (1959) (signs, signals, curbing, crossroads); *Commonwealth v. Mara*, 257 Mass. 198, 208–210, 153 N.E. 793, 795 (1926) (street lights, paving, curbing, houses, crossroads, traffic); *Danforth v. Durell*, 8 Allen 242, 244 (1864) (paved roads, no sign that anyone excluded); *Commonwealth v. Muise*, 28 Mass. App. Ct. 964, 551 N.E.2d 1224 (1990) (usual indicia of public way include paved roads, absence of signs prohibiting access, street lights, curbing, abutting houses or businesses, crossroads, traffic, signs, signals, lighting and hydrants; unnamed, paved private way into trailer park with abutting residential trailers, and no signs prohibiting access, was public way); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 1010, 505 N.E.2d 218, 219–220 (1987) (paved road, lighting, hydrants); *Commonwealth v. Hazelton*, 11 Mass. App. Ct. 899, 900, 413 N.E.2d 1144, 1145 (1980) (regularly patrolled by police, "no parking" signs, municipally paved and plowed; photo of way admissible).

The second alternative under the statute is a place that is not a "way," but where the general public still has a right of access by motor vehicle. This might include, for example, a parking lot that is adjacent to city hall, or the parking area of a public park.

The third alternative is a place to which members of the public have access as invitees or licensees. The difference between invitees and licensees is not important here. Both are persons who

are lawfully in a place at the invitation of the owner, or at least with the owner's tolerance. Some examples of locations where the public has access as invitees or licensees include shopping centers, roadside fuel stops, parking lots, and restaurant parking lots.

Bruggeman v. McMullen, 26 Mass. App. Ct. 963, 964, 526 N.E.2d 1338, 1339 (1988) (private way may be open to the public at large for ordinary travel even though there is somewhat less than the broad travel easement that the public enjoys on public ways); *Commonwealth v. Hart*, 26 Mass. App. Ct. 235, 525 N.E.2d 1345 (1988) (private way regularly used to access commercial abutters by employees, customers and vendors is a "place to which members of the public have access as invitees or licensees"); *State v. Brusseau*, 33 Or. App. 501, 577 P.2d 529 (1978) (reckless operation statute "modeled in part after a similar Massachusetts statute" and covering "premises open to the public" is applicable to private road in private apartment complex frequently used as thru street by general public). See *Commonwealth v. Venceslau C. Pires*, 44 Mass. App. Ct. 1101, 687 N.E.2d 651 (No. 97-P-79, Nov. 21, 1997) (unpublished opinion under Appeals Court Rule 1:28) (public park's parking lot remains "a way to which the public had access as invitees or licensees" even when parking is no longer permitted after sunset).

So, if it is proved beyond a reasonable doubt that the defendant operated a motor vehicle in any of these areas, then this element of the offense has been proved.

SUPPLEMENTAL INSTRUCTIONS

1. Prima facie certificate. **The law provides that a certificate from the (Secretary of the State Public Works Commission) (Secretary of the M.D.C.) (city or town clerk) is evidence that a particular (state highway) (M.D.C. highway) (city or town way) is a public way.**

G.L. c. 233, § 79F. See Instruction 3.260 (Prima Facie Evidence).

Other official documents, while not prima facie evidence, are admissible as evidence tending to show that a particular road is a public way. *Hazelton*, *supra* (conveying deed, certificate of municipal acceptance, certificate that in municipal road directory).

2. Stipulation. **In this case, the parties have agreed that _____ is a public way, and therefore it is not necessary that you have any evidence on that issue.**

3. Distinction between invitees and licensees. **An "invitee" is a person who is at a place, usually a business establishment, at the request**

or invitation of the owner and for the mutual benefit of both—for example, a potential customer or restaurant patron. A "licensee" is a person who is at a place with only the passive permission of the owner and usually for the licensee's benefit—for example, a person driving on a private way that is commonly used by the public without the owner's objection.

Brosnan v. Koufman, 294 Mass. 495, 499, 2 N.E.2d 441, 443 (1936); *Browler v. Pacific Mills*, 200 Mass. 364, 86 N.E. 767 (1909); *Moffatt v. Kenny*, 174 Mass. 311, 54 N.E. 850 (1899). See *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973) (abolishing distinction in negligence law).

NOTES:

1. **"Way".** General Laws c. 90, § 1 contains a four-part definition of "way" because not all roads open to public use were historically considered "public ways"—i.e., those which some governmental entity has a duty to maintain free from defects. See G.L. cc. 81–82; G.L. c. 84, §§ 1–11A, 15–22; *Fenn v. Middleborough*, 7 Mass. App. Ct. 80, 83–84, 386 N.E.2d 740, 742 (1983). Roads subject to a public right of access but not considered "public ways" included: (a) formally-accepted "statutory private ways," whether privately- or publicly-owned, see G.L. c. 82, § 21; G.L. c. 84, §§ 23–25; *Casagrande v. Town Clerk of Harvard*, 377 Mass. 703, 707, 387 N.E.2d 571, 574 (1979); *Schulze v. Huntington*, 24 Mass. App. Ct. 416, 418 n.1, 509 N.E.2d 927, 929 n.1 (1987); (b) private ways that were "open and dedicated to the public use" by a private owner's unequivocal dedication of the land to public use and surrender of private control, see *Uliasz v. Gillette*, 357 Mass. 96, 104, 256 N.E.2d 290, 296 (1970); and (c) park roads that were erected under the general authority of park commissioners, see *Burke v. Metropolitan Dist. Comm'n*, 262 Mass. 70, 73, 159 N.E. 739, 740 (1928) (sections of Memorial Drive adjoining an M.D.C. park); *Gero v. Metropolitan Park Comm'rs*, 232 Mass. 389, 392, 122 N.E. 415, 416 (1919) (Revere Beach Blvd.); *Jones v. Boston*, 201 Mass. 267, 268–269, 87 N.E. 589, 590 (1909) (Back Bay Fens traverse road); *McKay v. Reading*, 184 Mass. 140, 143–144, 68 N.E. 43, 44–45 (1903) (walkway/drive across municipal common); *Fox v. Planning Bd. of Milton*, 24 Mass. App. Ct. 572, 573–574, 511 N.E.2d 30, 31–32 (1987).

2. **"Place to which the public has a right of access".** The phrase "a place to which the public has a right of access," as it appears in motor vehicle statutes, refers to property subject to a general public easement as of right. See *Commonwealth v. Paccia*, 338 Mass. 4, 6, 163 N.E.2d 664, 666 (1958). The phrase is limited to places to which the public has a right of access *by motor vehicle*. *Commonwealth v. George*, 406 Mass. 635, 550 N.E.2d 138 (1990) (phrase does not extend to a baseball field which is not open to the public for travel in motor vehicles). The park example in the model instruction was suggested by *Farrell v. Branconmier*, 337 Mass. 366, 367–368, 149 N.E.2d 363, 364 (1958) (unpaved parking lot in public park is not a "way" as defined in G.L. c. 90, § 1). See *Parcia, supra* ("unnecessary for us to decide . . . whether a public property like that considered in the *Branconmier* case would be . . . a 'place to which the public has a right of access'").

3. **"Place to which members of the public have access as invitees or licensees".** This language was apparently intended to cover locations such as public parking lots or chain store parking lots. *Commonwealth v. Callahan*, 405 Mass. 200, 205, 539 N.E.2d 533, 536 (1989) (privately-owned parcel of land commonly used by recreational vehicles, and which had no barriers to access but was posted with an old "no trespassing" sign and which police had agreed to patrol for trespassers, was not such). See *Commonwealth v. Langenfeld*, 1 Mass. App. Ct. 813, 294 N.E.2d 457 (1973) (prior to 1961 statutory amendment, statute inapplicable to shopping center parking lot). The defendant need not personally qualify as either an "invitee" or a "licensee." *Callahan*, 405 Mass. at 205–206, 539 N.E.2d at 537 (statute defines the status of the way, not the status of the driver).

4. **Judicial notice.** Whether a street is a public way is an issue of fact and not a subject of judicial notice. *Commonwealth v. Hayden*, 354 Mass. 727, 728, 242 N.E.2d 431, 432 (1968).

EXHIBIT 10C—Model Jury Instruction 5.300, Operating with a Blood Alcohol Level of .08 Percent or Greater*

* This instruction was published by the Administrative Office of the District Court, © 1988–2020.

The defendant is charged with operating a motor vehicle while having a blood alcohol level of .08 percent or greater (and with operating a motor vehicle while under the influence of alcohol).

In order to prove the defendant guilty of operating a motor vehicle while having a blood alcohol level of .08 percent or greater, the Commonwealth must prove three things beyond a reasonable doubt:

First: **That the defendant operated a motor vehicle;**

Second: **That the defendant did so (on a public way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That at the time of operation, the percent of alcohol in the defendant's blood was .08 or greater.**

> *At this point, the jury must be instructed on the definitions of "Operation of a Motor Vehicle" (Instruction 3.200), "Public Way" (Instruction 3.280), and percentage of alcohol in the defendant's blood (which follows), unless these are stipulated. See instruction below regarding stipulations.*

The third element that the Commonwealth must prove beyond a reasonable doubt is that at the time of operation the percent of alcohol in the defendant's (breath) (blood) was .08 or greater. The law allows a defendant's blood alcohol level to be shown by a chemical test or analysis of (his) (her) breath or blood.

In deciding whether the Commonwealth has proved the defendant's blood alcohol level beyond a reasonable doubt, you may consider evidence, if any, about:

- **whether the test was administered within a reasonable time of operation;**

- **whether the person who gave the test was properly certified, and your assessment of (his) (her) credibility;**
- **the pre-test procedures that were employed;**
- **whether the testing device was in good working order at the time the test was administered;**
- **whether the test was administered properly;**
- **and any other evidence pertaining to the administration of the test.**

If there is a challenge whether the breath test was administered within a reasonable time, see Supplemental Instruction 1.

> ***If any elements are stipulated.*** **Because the parties have stipulated (that the defendant was operating a motor vehicle) (and) (that the location was a public way) (that the location was one to which the public had a right of access) (and) (that the percent of alcohol in the defendant's blood was .08 or greater), the only element(s) the Commonwealth must prove beyond a reasonable doubt (is) (are) that the defendant *[elements]*. If the Commonwealth has proved (that) (those) element(s) beyond a reasonable doubt, you should return a verdict of guilty. If it has not, you must find the defendant not guilty.**

If there are no stipulations. So there are three things that the Commonwealth must prove beyond a reasonable doubt:

First: **That the defendant operated a motor vehicle;**

Second: **That the defendant did so (on a public way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That at the time (he) (she) operated the vehicle, the percent of alcohol in the defendant's blood was .08 or greater.**

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, you must return a verdict of not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. If there is an issue regarding any delay in testing. **A passage of up to three hours between testing and the time of operation may be reasonable, however the facts and circumstances of the case may suggest that a greater or lesser time period might apply. Ultimately it is up to you to decide what is reasonable.**

2. If the defendant is permitted to introduce additional test samples. **(You have heard testimony) (A document has been introduced in evidence reporting) that the defendant gave more than one breath sample, and that the results were *[results of each sample]*. By regulation, the result of the defendant's test is the lower reading. You may consider the additional sample(s) only on the issue of whether the test result was accurate.**

The Commonwealth may not introduce more than one test result. *Commonwealth v. Steele*, 455 Mass. 209, 213–14 (2009); *see* 501 C.M.R. § 2.15(2)(b).

NOTES:

1. **Statute now bifurcated.** Statute 2003, c. 28, § 1 (effective June 30, 2003) amended G.L. c. 90, § 24(1) so that it now punishes anyone who "operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor" or specified drugs. The two alternatives comprise a single offense that may be committed in two different ways. *Commonwealth v. Colturi*, 448 Mass. 809, 810 (2007). The "operating under the influence" alternative requires proof of operation "with a diminished *capacity* to operate safely," *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985) (emphasis in the original), but not proof of any specific blood alcohol level, while the "per se" alternative requires proof of operation with a blood alcohol level of .08% or greater but not proof of diminished capacity. Consequently, evidence pertaining to impairment is not relevant to the offense of operating a motor vehicle with a blood alcohol level of .08 or greater.

2. **Model instruction.** The model instruction is based on *Commonwealth v. Colturi*, 448 Mass. 809, 816–17(2007), and *Commonwealth v. Zeininger*, 459 Mass. 775, 778–81, *cert. denied*, 132 S. Ct. 462 (2011).

3. **Evidence in a per se case.** If the Commonwealth proceeds only on the per se offense, evidence about the defendant's behavior and appearance may not be relevant. The legislature has defined the crime in terms of the alcohol content of one's blood.

4. **Breath tests: challenges to particular test result.** Before the result of a breath test may be admitted, the Commonwealth must establish the existence of and compliance with the requirements of a periodic testing program for breath testing machines in accordance with G.L. c. 90, § 24K and regulations promulgated thereunder. *Commonwealth v. Barbeau*, 411 Mass. 782, 784–86 (1992). Those requirements of § 24K are met by the provisions of 501 C.M.R. § 2.00 et seq.

A breath test result is admissible only if the Commonwealth has introduced evidence that the machine was working properly. *Commonwealth v. Cochran*, 25 Mass. App. Ct. 260, 264 (1988). Beyond that minimum level, generally any delay in administering a blood alcohol test, *Commonwealth v. Marley*, 396 Mass. 433, 438–39 (1985), any weaknesses in the test operator's knowledge and skill, *Commonwealth v. Shea*, 356 Mass. 358, 361 (1969), or any procedural weaknesses in the administration of a particular test, *Commonwealth v. Malloy*, 15 Mass. App. Ct. 958, 958, *rev. denied*, 389 Mass. 1101 (1983); *Commonwealth v. Hazelton*, 11 Mass. App. Ct. 899, 900 (1980), are matters of weight for the jury and do not affect the admissibility of the test result.

The requirement that the breath test operator "shall observe the arrestee for no less than 15 minutes immediately prior to the administration of the breath test," 501 C.M.R. § 2.13(3), does not require that such observation be done at the testing location or room. If the arresting officer is also the breathalyzer operator, the requirement could be satisfied by the officer's being continuously with the arrestee from the traffic stop until the test provided there is actual observation consistent with the regulation. Normally, compliance issues go to weight rather than admissibility, but if the prosecution fails to make a sufficient showing of compliance with the letter and purpose of the regulation, the test results must be suppressed. *Commonwealth v. Pierre*, 72 Mass. App. Ct. 230, 232–35 (2008).

5. **Breath tests: expert testimony.** The Commonwealth may introduce a breath or blood test result to establish the level of alcohol in the defendant's blood at the time of operation without offering expert testimony to provide "retrograde extrapolation" (calculating what the defendant's blood alcohol level must have been at the time of the offense based on his or her subsequent blood alcohol level), provided the test was taken within a "reasonable time" after operation. This is usually up to three hours, although particular facts and circumstances may establish that a greater or lesser time period should be applied by the judge in his or her discretion. *Commonwealth v. Colturi*, 448 Mass. 809, 816–17 (2007). If expert testimony on retrograde extrapolation is proffered, it should be evaluated by the usual criteria of whether its methodology is scientifically valid, in general, and in the particular instance. *Commonwealth v. Senior*, 433 Mass. 453, 458–62 (2001); *Commonwealth v. Smith*, 35 Mass. App. Ct. 655, 662–64 (1993), *rev. denied*, 416 Mass. 1111 (1994).

The defendant has the right to present a qualified expert to challenge the accuracy of the breath test result in the defendant's particular case. *Commonwealth v. Connolly*, 394 Mass. 169, 175 (1985); *Commonwealth v. Smythe*, 23 Mass. App. Ct. 348, 351–55 (1987). If there is expert testimony, see Instruction 3.640 ("Expert Witness").

6. **§ 24O notice.** Although the requirement of G.L. c. 90, § 24O that defendants convicted of motor vehicle offenses should be given a written statement of the statutory provisions applicable to any subsequent violation "should be observed by the District Courts," failure to give a defendant such notice is not a defense against a subsequent charge as a second offender. *Commonwealth v. Dowler,* 414 Mass. 212, 216 (1993).

7. **Admissibility of breathalyzer records.** Certified copies of breathalyzer records are admissible under the business records exception to the hearsay rule. *Commonwealth v. Zeininger*, 459 Mass. 775, 781–89, *cert. denied*, 132 S. Ct. 462 (2011).

8. **Possible effect on breath test results of a required finding.** If the Commonwealth initially proceeds under both portions of the statute and the judge subsequently allows a motion for directed verdict on the per-se portion of the offense, the judge must determine whether or not to strike any breath test evidence, absent expert testimony. See *Commonwealth v. Colturi*, 448 Mass. 809, 817 (2007) ("if the per se and impaired ability theories of criminal liability are charged in the alternative . . . and so tried, we see no prejudice in the admission of breathalyzer test results without expert testimony . . . . If, however, the Commonwealth were to proceed only on a theory of impaired operation and offered a breathalyzer test result of .08 or greater, . . . it must present expert testimony establishing a relationship between the test results and intoxication as a foundational requirement of the admissibility of such tests" as otherwise "the jury would be left to guess at its meaning"). If the breath test results are allowed to remain in evidence, the box entitled "Limited use of a breath test result of .08 or greater" in Instruction 5.310 ("Operating Under the Influence of Intoxicating Liquor") should be incorporated at the point indicated.

EXHIBIT 10D—Model Jury Instruction 5.400, Operating Under the Influence of Drugs[*1]

[*] This instruction was published by the Administrative Office of the District Court, © 1988–2020.

[1] If the Commonwealth intends to proceed both upon a charge of OUI-alcohol and OUI-drugs, the Court should order that "sobriety tests" be referred to in both cases as "roadside assessments."

G.L. c. 90, § 24

The defendant is charged with operating a motor vehicle under the influence of [marihuana] [narcotics drugs] [depressants] [stimulant substances]

If the alleged act was committed before April 13, 2018:

[the vapors of glue].

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors].[2]

[2] See Note 6, *infra*.

In order to prove the defendant guilty of this offense, the Commonwealth must prove the following three things beyond a reasonable doubt.

First: **That the defendant operated a motor vehicle;**

Second: **That he (she) operated it (on a way) (or) (in a place where the public has right of access) (or) (in a place where members of the public have access as invitees or licensees); and**

Third: **That while the defendant was operating the vehicle, he (she) was under the influence of: [marihuana] [a narcotic drug, as I will define for you in a moment] [a depressant, as I will define for you in a moment] [a stimulant substance, as I will define for you in a moment]**

If the alleged act was committed before April 13, 2018:

[the vapors of glue].

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors that are smelled or inhaled for the purposes of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system].

> *At this point, the jury must be instructed on what the Commonwealth must prove to satisfy the first and second elements. Refer to the definitions of "Operation of a Motor Vehicle" (Instruction 3.22) and "Public Way" (Instruction 3.280).*

In order to prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant was under the influence of: [marihuana] [a narcotic drug] [a depressant] [a stimulant substance], namely: _____.

If the alleged act was committed before April 13, 2018:

[the vapors of glue].

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors that are smelled or inhaled for the purposes of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system].

In determining whether the Commonwealth has done so, you may consider all the relevant evidence.

When the substance is alleged to be (narcotic drug) (depressant) (stimulant):

If the facts permit the taking of judicial notice that the particular substance meets the definition of narcotic drug, depressant or stimulant substance as provided by G.L. c. 94C, § 1:

I instruct as a matter of law that _____ is a [narcotic drug] [depressant] [stimulant].

If the facts do not permit the taking of judicial notice that the particular substance meets the definition of narcotic drug, depressant or stimulant substance as provided by G.L. c. 94C, § 1:

Section 1 of chapter 94C of our General Laws defines:

Narcotic Drug; **"Narcotic drug" as any of the following, whether produced directly or indirectly by extraction and chemical synthesis: (a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate; (b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (a), but not including the isoquinoline alkaloids of opium; (c) Opium poppy and poppy straw; (d) coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine;**

Depressant or stimulant substance: **"Depressant or stimulant substance" as a (a) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designed as habit forming; or (b) a drug which contains any quantity of amphetamine or any of its optical isomers; any salt of amphetamine or any salt of an optical isomer of amphetamine; or any substance which the United States Attorney General has by regulation designated as habit forming because of its stimulant effect on the central nervous system; or (c) lysergic acid diethylamide; or (d) any drug except marihuana which contains any quantity of a substance which the United States Attorney General has by regulation designated as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.**

What does it mean to be "under the influence" of [marihuana] [narcotic drugs] [depressants] [stimulant substances]?

If the alleged act was committed before April 13, 2018:

[(the vapors of glue].

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors]?

Someone is "under the influence" of such a substance whenever he (she) has consumed enough of it to reduce his (her) ability to operate a motor vehicle safely by diminishing his (her) alertness, judgment, and ability to respond promptly.

This would include anyone who has consumed enough [marihuana] [narcotic drugs] [depressants] [stimulant substances]

If the alleged act was committed before April 13, 2018:

[the vapors of glue]

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors]

to reduce his (her) mental clarity, self-control and reflexes, and thereby left him (her) with a reduced ability to drive safely.

The Commonwealth is not required to prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove that the defendant had a diminished *capacity* or *ability* to drive safely.

You are to decide this from all the believable evidence in this case, together with any reasonable inferences that you draw from the evidence. You may consider evidence about the defendant's appearance, condition, and behavior at the time, in order to determine whether the defendant's ability to drive safely was impaired.

So there are three things the Commonwealth must prove beyond a reasonable doubt: *First,* that the defendant operated a motor vehicle; *Second,* that he (she) operated it (on a way) (in a place where the public has a right of access) (in a place where members of the public have access as invitees or licensees); and

Third, **that he (she) operated it while under the influence of one of the drugs I have described to you.**

If there are stipulations. **The parties have stipulated that (the defendant was operating a motor vehicle) (the vehicle was [on a public way] (or) [in a place where the public has a right of access] (or) [in a place where members of the public have access as invitees or licensees]) (was under the influence of _____). Therefore, you are to deliberate only as to whether the Commonwealth proved beyond a reasonable doubt that (the defendant was operating a motor vehicle) (the vehicle was [on a public way] (or) [in a place where the public has a right of access] (or) [in a place where members of the public have access as invitees or licensees]) (was under the influence of [marihuana] [narcotic drugs] [depressants] [stimulant substances]**

If the alleged act was committed before April 13, 2018:

[the vapors of glue].

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors]

If the Commonwealth has proved (that) (those) element(s) beyond a reasonable doubt, you should return a verdict of guilty. If it has not, you must find the defendant not guilty.

If there are no stipulations. **If any one of those three things has not been proved beyond a reasonable doubt, then you must find the defendant not guilty.**

SUPPLEMENTAL INSTRUCTIONS

1 Roadside Assessments. **You heard testimony in this case that the defendant, at the request of a police officer, performed or attempted to perform various roadside assessments, such as** [*Here, outline the nature of the evidence, e.g., walking a straight line, balancing on one foot.*]**. These roadside assessments are not scientific tests of impairment by** [*name of drug*] **use. A person may have dif-**

ficulty performing these tasks for many reasons unrelated to the consumption of [*name of drug*]**.**

It is for you to decide if the defendant's performance on these roadside assessments indicate that his (her) ability to operate a motor vehicle safely was impaired by [marihuana] [narcotic drugs] [depressants] [stimulant substances]

If the alleged act was committed before April 13, 2018:

[the vapors of glue]

If the alleged act was committed on or after April 13, 2018:

[the fumes of any substance having the property of releasing toxic vapors].

You may consider this evidence solely as it relates to the defendant's balance, coordination, mental clarity, ability to retain and follow directions, ability to perform tasks requiring divided attention, and other skills you may find are relevant to the safe operation of a motor vehicle.

It is for you to determine how much, if any, weight to give the roadside assessments. In making your determination, you may consider what the officer asked the defendant to do, the circumstances under which they were given and performed, and all of the other evidence in this case.

Finally, evidence of how a defendant performed in roadside assessments, standing alone, is never enough to convict a defendant of operating under the influence of [*name of drug*]**.**

2. If there is evidence of drugs and other substances. **If the Commonwealth has proved beyond a reasonable doubt that the defendant's ability to operate safely was diminished by** [*name of drug*]**, then he (she) has violated the law even if some other factor tended to magnify the effect of the** [*name of drug*] **or contributed to his (her) diminished capacity to operate safely.** [*Name of drug*] **need not be the only or exclusive cause. It is not a defense that there was a second contributing cause so long as the** [*name of*

drug] **was one of the causes of the defendant's diminished capacity to operate safely.**

See *Commonwealth v. Bishop*, 78 Mass. App. Ct. 70, 74–75 (2010).

NOTES (See also the citations and notes for Instructions 5.300 and 5.310 (OUI-Liquor or .08% Blood Alcohol):

1. **DPH, State Police or U. Mass. Medical School certificate of analysis.** Although G.L. c. 94C, § 47A, provides for the introduction of a certificate of analysis to prove "the composition and quality of such controlled substances or narcotic drugs," it is only admissible in conjunction with live testimony from the analyst who performed the underlying analysis. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009) (admission of certificate of drug analysis violates Sixth Amendment confrontation rights as such evidence is testimonial).

"Proof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." *Commonwealth v. Dawson*, 399 Mass. 465, 467 (1987) (acknowledging that witness such as an experienced drug-user or experienced police officer may be qualified to give an opinion as to what drug a particular substance was but noted it "would be a rare case in which a witness's statement that a particular substance looked like a controlled substance alone would be sufficient to support a conviction"). See also *Commonwealth v. MacDonald*, 459 Mass. 148, 156–57 (2011) (permissible for experienced law enforcement officer to testify to opinion that substance was marijuana).

Similarly, proof that a particular drug impaired the defendant's ability to drive can be made out by circumstantial evidence. e.g., *Commonwealth v. Johnson*, 59 Mass. App. Ct. 164, 172 (2003) (defendant's erratic behavior and appearance, the facts surrounding the accident itself, and the discovery of cocaine and other controlled substances inside the vehicle permitted the inference that the defendant's capacity to operate was impaired by a narcotic drug). An expert opinion that a person's symptoms are the result of a particular drug, however, must rest on the requisite foundation. See *Commonwealth v. Bouley*, 93 Mass. App. Ct. 709, 714-15 (2018) (emergency medical technician qualified to provide expert opinion that defendant was overdosing on narcotics at the scene of the accident).

2. Proving that heroin, codeine or cocaine are narcotic drugs. The definition of "narcotic drug" in G.L. c. 94C, § 1 includes "opium and opiate" and "coca leaves" and refers generally to their derivatives, but does not expressly list heroin, codeine or cocaine. The Commonwealth may prove that heroin or codeine are derivatives of opium, or that cocaine is a derivative of coca leaves, either: (1) by presenting expert testimony, or (2) by asking the trial judge to take judicial notice of the fact. If the Commonwealth fails to do either, the defendant must be acquitted. *Commonwealth v. Green*, 408 Mass. 48, 50 (1990) (codeine); *Commonwealth v. Finegan*, 45 Mass. App. Ct. 921, 923 (1998) (heroin). See *Commonwealth v. Thomas G. Hickey*, 48 Mass. App. Ct. 1112, (No. 98-P-2154, Dec. 20, 1999) (unpublished) (cocaine).

3. **Proving non-barbiturate depressants and non-amphetamine stimulants.** The definition of this offense in G.L. c. 90, § 24 prohibits operation of a vehicle "while under the influence of . . . marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue." The definition of "depressant" in G.L. c. 94C, § 1 includes barbiturates as well as drugs "which contain[ ] . . . any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming." The definition of "stimulant substance" in § 1 includes amphetamines and also drugs "which contain[ ] . . . any substance which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming because of its stimulant effect on the central nervous system or its hallucinogenic effect."

When a prosecution rests on ingestion of a non-barbiturate depressant or a non-amphetamine stimulant, the Commonwealth must prove that it contains a substance that has been so designated by the U.S. Attorney General. The Commonwealth may do this by offering expert testimony to that effect, offering the regulations in evidence, or asking the judge to take judicial notice of the regulations and to submit them to the jury. *Commonwealth v. Ferola*, 72 Mass. App. Ct. 170, 174 (2008).

4. **Voluntary intoxication by both illegal drugs and alcohol.** Supplemental Instruction 2, *supra*, is closely modeled on the language of, and the recommended instruction in, *Commonwealth v. Stathopoulos*, 401 Mass. 453, 456–57 & n.4 (1988) and *Commonwealth v. Bishop*, 78 Mass. App. Ct. 70 (2010).

5. **Involuntary intoxication by legal medication**. The OUI statute punishes only "the voluntary consumption of alcohol or drugs whose consequences are known or should be known to the user," although "[i]n the case of alcohol . . . the effects of liquor upon the mind and actions . . . are well known to everybody . . . The same assumption applies where there is a voluntary consumption (usually illicit) of statutorily defined drugs obtained other than through a physician's prescription." *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 360–61 & n.7, 439 N.E.2d 848, 850–851 & n.7 (1982).

A defendant is entitled to be acquitted if his or her intoxication was caused by involuntary intoxication by legal prescription medication. This requires that the defendant had not received warnings as to its use, had no reason to anticipate the intoxicating effects of the medication, and had no reason to inquire of his or her physician concerning the possible effects of the medication. *Id.*, 14 Mass. App. Ct. at 365 & n.15. *See also Bishop*, 78 Mass. App. Ct. 70. Evidence of voluntary consumption of legal drugs should be admitted only after it is established on voir dire that the medication could in fact have so affected the vehicle's operation and that the *Wallace* standards are satisfied. *Commonwealth v. Williams*, 19 Mass. App. Ct. 915, 916 (1984). If, however, illegal drugs contributed to a defendant's diminished ability to operate a motor vehicle safely, the defendant is not entitled to an instruction that she should be acquitted if she did not know of the potential effects of mixing her medication with illegal drugs. *Bishop*, 78 Mass. App. Ct. at 74-75. It is not clear whether the same rule applies to legal but non-prescription drugs; the *Williams* case does not indicate

whether prescription medicine was involved and there have been no subsequent decisions involving non-prescription drugs.

Dispensing pharmacists are required to label prescription medications with any directions for use or cautions contained in the prescription or in the current United States Pharmacopeia or other accepted authoritative source. G.L. c. 94C, § 21; 247 Code Mass. Regs. § 7.00(20).

For an instruction on the effect of illegal or prescription medication on a defendant's criminal responsibility, see *Commonwealth v. Darch*, 54 Mass. App. Ct. 713, 715–16 (2002) (discussing interaction of prescription medication and alcohol on a person with a mental disease or defect).

6. **"Field sobriety tests" must be referred to as "roadside assessments."** In a prosecution for operating under the influence, an officer may testify to a defendant's performance on "field sobriety tests," but must refer to them only as "roadside assessments." The officer may not testify that the defendant passed or failed nor offer an opinion as to whether the driver was under the influence of a drug. *Commonwealth v. Gerhardt*, 477 Mass 775 (2017).

7. **2018 Amendment to G.L. c. 90, § 24.** On April 13, 2018, G.L. c. 90, § 24 was amended by St. 2018 c. 69, § 32, so as to replace "vapors of glue" with "smelling or inhaling the fumes of any substance having the property of releasing toxic vapors as defined in section 18 of chapter 270." G.L. c. 270, § 18, defines substances having property of releasing toxic vapors as "any substance having the property of releasing toxic vapors, [which are intentionally smelled or inhaled] for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses or nervous system". See *Commonwealth v. Sousa*, 88 Mass. App. Ct. 47, 48–51 (2015), interpreting "vapors of glue" prior to the 2018 amendment.

EXHIBIT 10E—Motion in Limine to Exclude Horizontal Nystagmus Test

COMMONWEALTH OF MASSACHUSETTS

[County], ss.		TRIAL COURT DEPT. DOCKET NO.
	)	
COMMONWEALTH,	)	
Plaintiff	)	MOTION IN LIMINE
	)	TO EXCLUDE
v.	)	HORIZONTAL
	)	GAZE NYSTAGMUS TEST
[NAME],	)	
Defendant	)	
	)	

Now comes the defendant and moves this Honorable Court to exclude all testimony from any police officer regarding the defendant's performance of the Horizontal Gaze Nystagmus Test.

In support of this motion, the defendant states:

1. That such a test is designed to determine the extent of impairment of the nervous system by alcohol and whether it is medical in nature;

2. Therefore, a police officer is generally unqualified to render an opinion regarding such a test; and

3. That the alleged test performed is a scientifically based examination necessitating expert testimony. *See Commonwealth v. Sands*, 424 Mass. 184 (1997).

4. Absent said expert testimony, the Commonwealth is unable to meets its burden that the test is admissible.

Respectfully submitted:

[DEFENDANT]
by his attorney,

[ATTORNEY]
[ADDRESS]

EXHIBIT 10F—Consolidated Motion to Suppress Warrantless Stop and Statements

COMMONWEALTH OF MASSACHUSETTS

[County], ss.	TRIAL COURT DEPT. DOCKET NO. 000000
COMMONWEALTH, Plaintiff v. [NAME], Defendant	CONSOLIDATED MOTION TO SUPPRESS WARRANTLESS STOP AND STATEMENTS

Now comes the defendant in the above entitled matter and respectfully moves this Honorable court suppress any and all evidence seized and statements made by the defendant at the scene of the stop and, subsequently, at the [police dept.].

In support thereof, the defendant states said statements were obtained in violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution as well as Article XII, and Article XIV of the Massachusetts Declaration of Rights. The defendant directs the Court's attention to the Memorandum of Law and Affidavit attached hereto.

Respectfully submitted:

[DEFENDANT]
by his attorney,

[ATTORNEY]
[ADDRESS]

COMMONWEALTH OF MASSACHUSETTS

[County], ss.		TRIAL COURT DEPT. DOCKET NO. 000000
COMMONWEALTH, Plaintiff v. [NAME], Defendant	)	MEMORANDUM IN SUPPORT OF CONSOLIDATED MOTION TO SUPPRESS WARRANTEES STOP AND STATEMENTS

Statement of the Facts

[Insert Facts]

Statement of the Case

The defendant moves to suppress any and all evidence seized as well as statements made to the police at the scene of the stop and at the station. He alleges the police did not have a warrant to conduct the stop and search, nor did they have legal excuse or justification. Additionally, he alleges all statements were not made voluntarily or with a knowing and intelligent waiver of his *Miranda* rights. As required by Mass.R. Crim.P. 13(a)(4) the defendant files this memorandum of law in support of his *Motion to Suppress Statements*.

Argument

I. THE DEFENDANT'S STATEMENTS AND PERFORMANCE ON FIELD SOBRIETY TESTS WERE NOT VOLUNTARY.

Voluntariness of statements and waiver of *Miranda* rights are distinct issues. The Commonwealth must prove beyond a reasonable doubt that a defendant knowingly, intelligently and voluntarily waived his Constitutional rights, and also that the defendant's statements were made voluntarily as tested by due process. *Commonwealth v. Dyke*, 394 Mass. 32, 35 (1985).

Due process and the venerable "humane practice" of this Commonwealth requires a demonstration, beyond a reasonable doubt, that the statement was a "free and voluntary act," *Commonwealth v. Mahnke*, 368 Mass. 662, 680 (1975), and the "product of a rational intellect," *Commonwealth v. Davis*, 403 Mass. 575, 581 (1988). *See also Commonwealth v. Chung*, 378 Mass. 451, 457 (1979). The conclusion that the Commonwealth has met its burden of showing voluntariness beyond a reasonable doubt must appear on the record with "unmistakable clarity." *Commonwealth v. Tavares*, 385 Mass. 140 (1982). (emphasis supplied).

The inquiry focuses on the totality of the relevant circumstances to determine if and what coercion was applied to overbear the suspect's will. *Commonwealth v. Selby*, 420 Mass. 656, 662–63 (1995); *Commonwealth v. Parham*, 390 Mass. 833, 840 (1984). Under the "totality of the circumstances" test, the court must consider all relevant circumstances surrounding the interrogation and the individual characteristics and conduct of the defendant. *Commonwealth v. Parham*, 390 Mass. 833, 840. *See also Commonwealth v. Parker*, 402 Mass. 333, 340 (1988). Relevant factors include, but are not limited to the defendant's age, education, intelligence, experience with the criminal justice system, and the physical and mental condition of the defendant. *Commonwealth v. Parker*, 402 Mass. 333, 340 (1988). Statements made while under the influence of alcohol or drugs have been held to be involuntary. *Commonwealth v. Paszko*, 391 Mass. 164 (1984); *Commonwealth v. Lapka*, 13 Mass. App. Ct. 24 (1982).

In the case at bar, the defendant was reportedly highly intoxicated. As a consequence, the statements were not made voluntarily and must be suppressed.

II. THE DEFENDANT'S STATEMENTS WERE NOT MADE FOLLOWING A KNOWING AND INTELLIGENT WAIVER OF THE DEFENDANT'S *MIRANDA* RIGHTS.

A. The defendant was 'in custody' following the stop.

The requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966) apply to investigations conducted at the scene of motor vehicle violations. *Commonwealth v. Brennan*, 386 Mass. 772 (1982); *Commonwealth v. Merritt*, 14 Mass. App. Ct. 601 (1982). The mandates of *Miranda* are triggered by a custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 444. The definition of custodial interrogation is not limited to questioning following formal arrest. *Miranda v. Arizona*, 384 U.S. 436. Rather, it includes questioning of a person whose personal freedom has been restricted, thereby rendering him in custody. *Miranda v. Arizona*, 384 U.S. at 444. The applicability of *Miranda* to a particular case "must be determined after an objective review of all circumstances with consideration given to such factors as the nature of the crime, the place where the questioning takes place, the status of the investigation at the time of the questioning, the conduct of the police toward the defendant, the defendant's reasonable belief as to [his] freedom of action, and the ability of the defendant to voluntarily leave the place of questioning." *Commonwealth v. Merritt*, 14 Mass. App. Ct. 601, 603, 604 (1982), relying upon *Commonwealth v. Cruz*, 373 Mass. 676, 683 (1997).

In the case at bar, the defendant submits that an objective review of the evidence reveals he was 'in custody' at the time of the stop. Clearly, his ability to leave was restricted by the police officer. Had the defendant tried to leave, he would not have been permitted.

If the officer formed an opinion about the defendant's sobriety following the stop, and prior to any questioning, the officer had objective probable cause to arrest the defendant. He was, therefore, in custody and the requirements of *Miranda* are mandated before any interrogation.

B. Interrogation was conducted without advising the defendant of *Miranda* warnings.

When the officer approached the defendant and formed his opinion, he was obligated to advise the defendant of the *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The officer failed to do so. This irreparably tainted any information gained through his interrogation, including admissions and observations triggered by the admissions. (e.g. slurred speech). *See Wong Sun v. United States*, 321 U.S. 471 (1963) (establishing 'fruit of the poisonous tree doctrine'). The defendant submits any and all evidence obtained as a result of the *Miranda* violation must be suppressed.

Conclusion

Based upon the foregoing reasons, the defendant submits his *Consolidated Motion to Suppress Stop and Statements* should be allowed.

Respectfully submitted:

[DEFENDANT]
by [his/her] attorney,

[ATTORNEY]
[ADDRESS]

COMMONWEALTH OF MASSACHUSETTS

[County], ss.	TRIAL COURT DEPT. DOCKET NO.
COMMONWEALTH, Plaintiff v. [NAME], Defendant	AFFIDAVIT IN SUPPORT OF CONSOLIDATED MOTION TO SUPPRESS WARRANTEES STOP AND STATEMENTS

I, [defendant], do hereby depose and state as follows:

1. I am the defendant in the above-entitled matter.
2. On [date], I was stopped by an officer(s) of the [police dept.].
3. I did not consent to the stop, nor did I believe the police had a legal excuse or justification for the stop.
4. Thereafter the officer asked me questions.
5. I did not feel I was free to leave and felt that I had to answer the questions.
6. The officer ordered me out of the car and had me perform some physical coordination tests.
7. The officer alleges I was highly intoxicated.
8. The officer searched my car and allegedly found controlled substances.
9. I did not consent to the search, nor do I believe the officer had a warrant or legal excuse or justification to conduct the search.
10. Following my formal arrest, I was transported to the [police department].
11. Again, I was questioned about my whereabouts prior to the stop and about my consumption of alcohol.
12. I felt compelled to answer all the questions and was not advised I did not have to speak to the police.

Signed under the penalties of perjury this [day] day of [month], [year].

[defendant]

EXHIBIT 10G—

(Exhibit 10G reserved for future content.)

EXHIBIT 10H—Motion to Inspect Evidence and Reports

COMMONWEALTH OF MASSACHUSETTS

[County], ss.		DISTRICT COURT DEPT. DOCKET NO.
COMMONWEALTH, Plaintiff	)	MOTION TO INSPECT EVIDENCE AND REPORTS
v.	)	
[NAME], Defendant	)	

The Defendant, [Name], respectfully moves this Honorable Court to direct the Commonwealth to permit Defendant to inspect and/or copy the following evidence, if any, in the possession, custody or control of the prosecuting attorney, the Massachusetts State Police Department or any other division or agency of the Commonwealth, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Commonwealth:

1. Any and all photographs (including videotapes) taken of the Defendant, including any portion of his or her body.

2. Any and all photographs taken at the scene of the arrest or otherwise relating to this case.

3. Any handwritten notes relating to this case taken by the police or other investigating officers prior to, during, or subsequent to the Defendant's arrest, including without limitation any notes of conversations with the Defendant.

4. A copy of each and every document that the Commonwealth intends to introduce as evidence at the trial of the above-captioned matter.

5. A copy of all police reports, including without limitation reports of the arresting officer and reports written by investigating officers.

6. A copy of all written reports or notes of any examining expert or laboratory used by the police department, directly or indirectly concerning an examination made by examiner, expert, or laboratory of any physical, photographic or written evidence connected with the investigation and/or prosecution of this action.

7. A copy of any and all police logs and/or other records indicating which officers were assigned to the cruiser or cruisers that at any point stopped to facilitate, assist or observe the arrest of the Defendant; any and all police logs and/or records that indicate which officer or officers arrested the defendant, which officer or officers made any radio dispatches concerning the defendant and any notes or records of any sort regarding statements of the Defendant and/or officers attending or participating in the arrest.

8. A copy of all police logs, including radio call logs or administrative journals, alcohol influence reports, notes taken, or recordings made by the police of any conversations with prosecution witnesses, and notes made by a police officer to be used at trial.

9. Any observations reduced to writing made by police officers involved that the prosecution intends to use at trial but that were not part of any police reports furnished to the defense.

10. The names of the officers or other witnesses who were with the Defendant prior to his or her arrest who had the opportunity to observe the appearance and behavior of the Defendant.

11. The results of all field sobriety tests given to the Defendant along with the name of the officer who administered the tests, and the times and places of those tests.

12. A copy of any and all protocols, standards, guidelines, directives and/or policies that are recommended, required, offered and/or available to the police officers of the police department involved in the Defendant's arrest with regard to steps to be taken by said police officers in cases of suspected and/or actual driving under the influence, and this shall include those that relate to the administering of field sobriety tests.

13. With regard to any officer who gave a field sobriety test, the training materials that the officer used as part of his or her training for field sobriety testing, including but not limited to those materials disseminated by the Criminal Justice Training Council.

14. The time and place of and the name of the officer or officers who gave the Defendant a *Miranda* warning.

15. Any document containing the circumstance surrounding the Defendant's right to make a phone call, including the time of the call, to whom it was made and the purpose of the call. If such document does not exist, Defendant requests the Commonwealth to provide such information in writing.

16. All written statements made by the Defendant or other witnesses, whether or not they are going to testify at the trial of the above-captioned matter.

17. Any notes the police may have taken during the conversations with the Defendant, before, during and after the arrest.

18. Any transcripts containing any statements made by the Defendant.

19. Any tape recordings of the Defendant's statements.

20. Any booking slips or other documents relative to the booking process;

21. The name and address of the following persons:

    a. All witnesses having knowledge of the Defendant's offense;

    b. All persons interviewed by the district attorney's office and its agents, the police department or any other law enforcement agency in relation to this case;

    c. All witnesses whom the prosecution expects to call to testify.

22. All books, papers, documents, recordings or tangible objects that might be used by the prosecutor as evidence at the trial.

23. Any fact known to the prosecutor that would assist the defense in locating a witness who may give testimony to exonerate the defendant.

24. Any other available evidence that would tend to either negate the Defendant's guilt or reduce the degree of the offense despite the fact that such evidence might damage the prosecutor's case.

25. Provide the following information regarding the person or persons who administered the Defendant's breath test:

    a. The person's name and the name of his or her employer;

    b. Written proof submitted by the chief of police or chief executive officer of the police department involved that the testing officer was presently employed by the department and was authorized to administer breath tests.

26. The three-year certification or re-certification of the testing officer pursuant to 501 C.M.R. § 2.07.

27. The Infrared Breath Testing Operator's Manual prepared by the Office of Alcohol Testing, as it relates to the officer who gave the test.

28. The name of the breath-test instructor who instructed the breath-test operator and his or her certification documents pursuant to 501 C.M.R. § 2.07.

29. With regard to the breath-testing device and simulator used on Defendant, provide the following:

    a. The list of approved infrared breath-testing device from the Office of Alcohol Testing pursuant to 501 C.M.R. § 2.05;

b. The certification of the breath-testing device and simulator from the Office of Alcohol Testing pursuant to 501 C.M.R. § 2.06;

c. Documents relating to the periodic testing and inspection of the breath-testing device and simulator pursuant to 501 C.M.R. §§ 2.11 and 2.12;

d. Any notices of decertification or revocations of certification of said breath testing device or simulator;

e. The maintenance and use logs for a period of one year prior to the date of Defendant's arrest and the maintenance log for a period of one month after Defendant's arrest;

f. A description of the condition under which the breath-testing device was used in the Defendant's test, including whether it was stored and maintained free of dust, moisture or other substances or forces that may adversely affect its accurate operation;

g. A copy of the maintenance manual and operation or instruction manual supplied with the breath-testing device and simulator in question, together with copies of all other manuals subsequently supplied by the manufacturer, the Attorney General, the Department of Public Safety, the Municipal Police Training Committee or any other source; and the model number, date of manufacture and date of delivery to the police department involved in Defendant's arrest of the breath-test device in question;

h. The full corporate name and address of the manufacturer of said breath-testing device;

i. (a) All printed/written test and research data submitted by the manufacturer of the breath-testing device to the police department involved in the Defendant's arrest or any other division or agency of the Commonwealth that pertain to the workings, specificity, selectivity, or accuracy of the machine in question, including but not limited to scientific and mechanical data;

(b) All information similar to that specified in i(a) that was not submitted by the manufacturer but was independently gathered by the police department involved in the Defendant's arrest or any other division of the Commonwealth or that was submitted by parties other than the manufacturer;

j. A complete text of any directive, notice or bulletin, or item of similar type issued to the police department involved in the Defendant's arrest or received by it from any other division or agency of the Commonwealth by any of the manufacturers of the breath-testing device in question or by any other source;

k. A copy of the results of any comparative tests between the breath-testing device used for the Defendant's test and any other breath-testing device or breath test and all supporting data related thereto that is in the possession,

custody or control of the police department involved in the Defendant's arrest or any other agency or division of the Commonwealth;

l. A complete list of the dates received, dates changed, time period used, certificate or lot number and manufacturer of all the simulator solutions used to conduct the calibration standard analysis on the breath-testing device in question;

m. The serial number, model and manufacturer of the simulator used with the breath-test device in question;

n. Any document setting forth the rules, policies or procedures used by the police department involved in the Defendant's test in taking breath tests, checking the breath-testing device in question for accuracy, and qualifying persons to operate and repair the breath-test device in question;

o. Any documents, books, texts or similar materials used in or otherwise referencing the training received by the police officer who administered the test to the Defendant, and specifically a copy of the training manual used at the course of training at which such officer was certified;

p. Any log or document referencing the occasions when and number of times such officer administered breath tests, tests for accuracy, or repairs on the breath-testing device in question or any other breath-testing device for the period of one year prior to and one month after the date of Defendant's arrest.

30. Records of the police department involved in Defendant's arrest that indicate that the Defendant was observed for at least 15 minutes before the administration of the test pursuant to 501 C.M.R. § 2.13.

31. All documentary evidence that the Defendant delivered two adequate breath samples pursuant to 501 C.M.R. § 2.14.

32. All maintenance records and related documents for the breath-testing device and simulator used for the Defendant's test for a period of time of one year prior to the date of the test.

33. Any checklist to be used by the operator of the breath-testing device on the Defendant.

34. All other training materials and manuals used to train the officer who gave the Defendant the test.

35. The names, addresses and statement of all witnesses whom the Commonwealth intends or proposes to call in support of the averments contained in the Complaint brought against the Defendant.

36. As to the tests given Defendant, all documents from the Office of Alcohol Testing relating to the manufacture of the simulator solution used in Defendant's

breath test, including all documents confirming the assay of the solution used in Defendant's breath test as well as all documents concerning all tests performed on said solution all pursuant to 501 C.M.R. § 2.04 and 2.11.

Respectfully submitted,

[DEFENDANT]
By [his/her] attorney,

[ATTORNEY]
[ADDRESS]

EXHIBIT 10I—Motion in Limine to Exclude Breath Test Results

COMMONWEALTH OF MASSACHUSETTS

[County], ss. TRIAL COURT DEPT.
DOCKET NO.

COMMONWEALTH

vs.

DEFENDANT

MOTION IN LIMINE TO EXCLUDE BREATH TEST RESULTS (ADMISSIBILITY OF RECORDS)

Now comes the defendant in the above-entitled matter and respectfully moves this Honorable Court to exclude the results of the breath test administered to the defendant. In support thereof, the defendant states that the results of said test are not admissible until the Commonwealth establishes the following evidentiary and constitutional foundations;

1. The admission of the test and supporting documentation will not violate the defendant's right to confrontation. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009);

2. The test was performed by a certified breath test operator, as defined in 501 C.M.R. 2.02 and 2.07;

3. The test was administered on a properly recognized and certified instrument, pursuant to 501 C.M.R. 2.05 and 2.06;

4. The simulator was properly certified, pursuant to 501 C.M.R. 2.11 and 2.12;

5. The procedures for administering a breath test were followed pursuant to 501 C.M.R. 2.13;

6. The reading on the calibration standard analysis check performed at the time of the defendant's breath test was consistent with the requirements of 501 C.M.R. 2.11;

7. The simulator solution used in the defendant's breath test was properly certified, tested and replaced, pursuant to 501 C.M.R. 2.11–.14;

8. The defendant was observed for a period of at least fifteen (15) minutes, prior to the administration of the test pursuant to 501 C.M.R. 2.13;

9. The alleged business records of the Office of Alcohol Testing are not properly certified as required by G.L. c. 233 § 76 ("genuineness of the signature of such officer **shall** be attested by the secretary of the Commonwealth under its seal" (emphasis added));

10. The alleged business records of the Office of Alcohol Testing, in particular the test results in the instant case, do not qualify as business records pursuant to G.L. c. 233 § 78 as they were not made before the action was commenced.

Respectfully submitted,

DEFENDANT,
By [his/her] attorney,

[ATTORNEY]
[ADDRESS}

EXHIBIT 10J—Areas of Breathalyzer Expert Testimony

1. Maintenance errors from the log;
2. Repair errors;
3. Radio frequency interference;
4. Videotape disclosures;
5. The effect that gum chewing, burping, smoking or coughing has on the test;
6. Inherent error factor;
7. False teeth effects;
8. Time between operation and the test;
9. Other hydrocarbon molecular presence from ambient air, vehicle fumes, paint or other fume absorption;
10. Lip balm effect;
11. Field sobriety test procedures/score sheet;
12. Program built into infrared testing machine;
13. Average person factor;
14. Machine filters;
15. Effect of food consumption, medications, injuries or diseases;
16. Effects from specific amount and kind of alcoholic beverage;
17. Ambient air errors;
18. Rounding off calibration check (three versus two decimals);
19. “Seaman’s legs”;
20. The 2,100:1 ratio.

EXHIBIT 10K—Proposed Jury Instructions of Defendant

COMMONWEALTH OF MASSACHUSETTS

[County], ss.		TRIAL COURT DEPT. DOCKET NO.
COMMONWEALTH, Plaintiff	)	PROPOSED JURY INSTRUCTIONS
v.	)	OF DEFENDANT
[NAME], Defendant	)	

Now comes the defendant in the above-captioned matter and proposes that the Court instruct the jury as follows:

1. It is not a crime in this state to consume alcohol and operate a motor vehicle. The conduct becomes criminal and someone is "under the influence" whenever he or she has consumed enough alcohol to diminish his or her capacity to operate a motor vehicle safely.

2. You are instructed that standing alone, the testimony of witnesses that they smelled alcohol on the breath of the defendant or an admission by the defendant that he or she had consumed alcohol before operating a motor vehicle is not sufficient to prove that the defendant operated a motor vehicle while under the influence of alcohol.

3. If after hearing all the evidence, a factual situation gives rise to two equally reasonable inferences, one favorable to the Commonwealth and one favorable to the defendant, then you are required to give the defendant the benefit of the inference favorable to him or her. *Commonwealth v. Croft*, 345 Mass. 143 (1962).

4. In this case, there has been testimony that the defendant was asked, and did agree, to perform certain tests called "sobriety" tests. It is up to you to decide if those tests are a reliable indication of whether the defendant's capacity to operate a motor vehicle safely was diminished or whether the sobriety tests have any rational connection to operating a motor vehicle safely.

5. In judging the defendant's performance on those sobriety tests, you may consider the circumstances under which they were given and the defendant's physical condition, including his or her size and weight, physical defects,

the place where the tests were given, the defendant's state of mind, and any other factors you deem relevant.

6. The defendant's admission that he or she drank an alcoholic beverage some time prior to operating his or her motor vehicle is not in itself sufficient to prove beyond a reasonable doubt that he or she was under the influence of intoxicating liquor. No offense is committed if a person consumes an alcoholic beverage and then operates a motor vehicle unless the beverage he or she consumed appreciably diminished his or her ability to operate the vehicle safely.

7. In determining the weight to be given to a chemical test, you must first consider all of the evidence about whether it was administered utilizing the proper procedures to render an accurate result. You may disregard the result entirely if you are so inclined. You may give it the weight, if any, to which you find it entitled.

8. In determining the weight to be given to a chemical test, you must consider all of the evidence about whether the test is scientifically accurate. You may disregard the result entirely if you are so inclined. You may give it the weight, if any, to which you find it entitled.

9. In determining the weight to be given to the result of a chemical test, you should consider whether the test was performed in accordance with the proper procedures or whether the testing equipment was in proper working order. You may disregard the result entirely if you are so inclined. You may give it the weight, if any, to which you find it entitled.

10. If you are convinced beyond a reasonable doubt that the breath test administered to the defendant was properly and competently administered and was otherwise accurate, you may consider the tests results in determining the defendant's guilt or innocence. But if you entertain a reasonable doubt as to the accuracy of the chemical test results, because it was improperly administered or the results inaccurate, then you should disregard the test and find the defendant innocent or guilty based on other evidence presented in this case. *Commonwealth v. Moreira*, 385 Mass. 792 (1982).

11. For the government to prove its case based solely on circumstantial evidence, the circumstances must be such as to produce a moral certainty of guilt and to exclude any other reasonable theory of innocence. The circumstances, taken together, should be of an inclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing a reasonable and moral certainty that the accused committed the crime. *Commonwealth v. Burke*, 335 Mass. 521 (1959).

12. It will be your duty to decide any disputed questions of fact. You will have to determine the truthfulness and credibility of each witness and the weight to be given their testimony. You should give the testimony of each witness

such weight as in your judgment it is fairly entitled to receive. You are the sole judges of the credibility of the witnesses and if there is any conflict in the testimony, it is your function to resolve the conflict and determine the truth. In determining the credibility of a witness and in determining the weight to be given his or her testimony, you should consider the conduct and demeanor of the witness while testifying, the frankness or lack of frankness while testifying, the reasonableness or unreasonableness of the testimony, the probability or improbability of the testimony, the opportunity or lack of opportunity of the witness to see and to know the facts concerning which he or she is testifying, the accuracy of the witness's recollection and the degree of intelligence shown by the witness. You may also consider the witness's motive for testifying and, of course, the interest or lack of interest the witness may have in the outcome of the case. You should take into consideration the character and appearance of the witness at the trial and any bias he or she has shown in determining the credit to be given to his or her testimony. *See Commonwealth v. Medeiros*, 354 Mass. 193 (1968); *Commonwealth v. Sabean*, 275 Mass. 546 (1931).

13. Proof beyond a reasonable doubt is proof beyond suspicion or hunch or guess. If you find that there are two equally believable versions and you find yourself equally persuaded of two different points of view or two different versions, that is not proof beyond a reasonable doubt and you find the defendant not guilty.

14. In this case, you have heard a police officer's opinion that the defendant was under the influence of liquor. You are not bound to accept that opinion. A police officer's testimony, including his opinion of the defendant's condition, does not carry any more weight than any other piece of evidence to be considered by you. You are the sole and exclusive deciders of the facts in this case, and it is your opinion of the defendant's capacity to operate safely that will determine his or her innocence or guilt and no other.

15. What is reasonable doubt? It is a term often used, probably fairly well understood, but not easily defined. It is not mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case that after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence, and every person is presumed to be innocent until he or she is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously

upon it. This we take to be proof beyond reasonable doubt because if the law, which mostly depends upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether. *Commonwealth v. Webster*, 5 Cush. 295, 320 (1850). (*See Commonwealth v. Therrien*, 371 Mass. 203, 209 (1976); *Commonwealth v. Ferreira*, 373 Mass. 116, 130 n.12 (1977); *Commonwealth v. Wood*, 380 Mass. 545, 551 (1980) for right to this instruction.)

Respectfully submitted:

[DEFENDANT]
by [his/her] attorney,

[ATTORNEY]
[ADDRESS]

Date:

EXHIBIT 10L—Motion and Order for Return of License Following a Finding of Not Guilty

COMMONWEALTH OF MASSACHUSETTS

[County], ss.	TRIAL COURT DEPT. DOCKET NO.
COMMONWEALTH, Plaintiff v. [NAME], Defendant	MOTION FOR RETURN OF LICENSE FOLLOWING A FINDING OF NOT GUILTY

Now comes the defendant in the above-entitled matter and respectfully moves, pursuant to Massachusetts General Laws c. 90, § 24(f)(1)(iii) that his license be restored. In support thereof, the defendant states as follows:

1. The defendant was found not guilty of operating under the influence of liquor.

2. Restoration will not endanger the public safety.

Respectfully submitted:

[DEFENDANT]
by [his/her] attorney,

[ATTORNEY]
[ADDRESS]

COMMONWEALTH OF MASSACHUSETTS

[County], ss.		TRIAL COURT DEPT. DOCKET NO.
COMMONWEALTH, Plaintiff	)	
v.	)	COURT ORDER
[NAME], Defendant	)	

After a hearing on the defendant's *Motion for Restoration of License Following a Finding of Not Guilty*, I hereby make the following findings of fact and rulings of law.

Findings of Fact

1. [Defendant] was found not guilty of operating under the influence of liquor in the [Court].

2. The defendant moved for restoration of his license pursuant to G.L. c. 90, § 24(f)(1)(iii).

3. The Commonwealth offered no evidence indicating restoration of license would endanger public safety.

Rulings of Law

Based upon the foregoing, it is hereby *ordered* that the defendant's license to operate a motor vehicle be restored forthwith by the Registry of Motor Vehicles.

[Justice]
[Court]

Date:

EXHIBIT 10M—Ten Frequently Asked Questions

1. If a police officer stops me for operating under the influence (OUI), what must I do?

You must give your license and registration to the officer. You need not submit to any field sobriety tests or take the breathalyzer or blood test. Chances are great, however, that if you refuse to take any field sobriety tests, you will be arrested for OUI. On the other hand, the Commonwealth will have a more difficult time at trial proving your guilt if you have not taken any of the tests.

2. When a police officer stops me, what initial observations will be made?

Inevitably a police officer will testify to observing that the defendant had red, glassy eyes and was unsteady on his or her feet; that there was a strong odor of alcoholic beverages; and that the defendant's speech was thick and slurred.

3. What are field sobriety tests and what do they measure?

Field sobriety tests are divided attention tests of coordination. Allegedly, they measure one's sobriety. In reality, they truly measure one's physical dexterity. Persons fifty or more pounds overweight or wearing high heels or having suffered a leg injury often cannot pass such tests regardless of their alcoholic intake, if any. Indeed, many people who are not overweight or have not suffered any injury whatsoever cannot successfully perform the tests.

4. What are the common field sobriety tests I will be asked to perform?

A police officer will typically ask the defendant to perform three tests. The more common tests include reciting the alphabet, the nine-step walk-and-turn test and standing on one foot and counting. Other tests include walking a straight line, the finger-to-nose test and the horizontal gaze nystagmus test.

5. Should I take the breathalyzer?

This is the subject of a continuing debate among the defense bar. Many advise to never take the breathalyzer. Others say doing so is fine if you have had one or two drinks. Bear in mind the following generalizations: one twelve-ounce beer equals 1.25 ounces of hard liquor equals one four-ounce serving of wine. One's blood alcohol level generally increases .02 percent for each serving. Over an hour, your body clears the alcohol, through metabolism and excretion, at a typical rate of .015 percent for males (the rate for women is 1.25 times greater). However, many factors—e.g., what you had to eat, your basic body makeup, height, weight, state of health—affect the rate of alcoholic elimination. *See* John Tarantino, *Defending Drunk Drivers*, § 200 et seq.

If you take the breathalyzer and the reading is less than .05 percent, you will be released from the charge of OUI. If the reading is .05 percent or above, you will be

charged. If the reading is .05–.07 percent, there is no inference of intoxication, one way or the other. Rather, it is simply evidence that some alcohol was imbibed. Under the per se law enacted in 2003, if the reading is .08 percent or above and determined to be accurate, you may be convicted on that evidence alone. Absent a breath or blood test, the government would have to demonstrate from witnesses and other evidence that you were impaired while operating your car.

Many in the defense bar believe that breathalyzers are inherently incapable of properly discerning one's true alcoholic blood level. The doubt exists not only because of flaws in the basic assumption of calculating alcoholic levels—the 2,100:1 ratio (that a person has 2,100 times as much alcohol in his or her blood as in his or her breath)—but also in the belief that breathalyzers, like all machines, often break down.

6. What happens if I do not take the breathalyzer? Conversely, what happens if I do and flunk?

If you do not take the breathalyzer, the Massachusetts Registry of Motor Vehicles will suspend your license for 180 days for a first offense, three years for a second offense, five years for a third offense, and a lifetime for a fourth and subsequent offense. If you are subsequently acquitted at trial, you may have your license reinstated. If you are convicted, the law requires that the suspension for the conviction will effectively run on and after the refusal suspension.

If you do take the breathalyzer test and "flunk" it—that is, you have a reading of .08 percent or higher—your license will be taken by the police. Your license will be taken "until the disposition of the offense . . . but in no event shall such suspension . . . exceed thirty days." G.L. c. 90, § 24N. The suspension for blowing over a .08 percent will terminate on disposition, either by trial or plea.

7. What does the Commonwealth have to prove? Does it have to prove that I was drunk?

The Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle on a public way (or a way to which the public has a right of access) while under the influence of intoxicating liquor or operated a motor vehicle on a public way while his or her blood alcohol level was .08 percent or greater (this is the so-called per se law). The Commonwealth does *not* have to prove that you were drunk. Rather, they must show, once again beyond a reasonable doubt, that you possessed a diminished capacity to operate your car or had a .08 percent blood alcohol level, regardless of evidence of impairment. According to Instruction 5.10 of the District Court Model Jury Instructions,

> a driver is "under the influence" if that driver's alertness, judgment and ability to respond promptly have been lessened by alcohol. This would include someone who is drunk, but it would also include anyone who has consumed enough alcohol to reduce his [or her] mental clarity, self-control and reflexes, and thereby left him or her with a reduced ability to drive safely.

> The amount of alcohol necessary to do this may vary from person to person.
>
> The Commonwealth is not required to prove the defendant *actually drove* in an unsafe or erratic manner, but it must prove that alcohol had diminished the defendant's *capacity* or *ability* to drive safely.

As might be imagined, public way and operation are typically not seriously contested. The case usually comes down to whether the defendant was "under the influence," the defendant's "capacity to operate," and, if there is a breath or blood test, the accuracy of the test. Be aware that if there is a breath or blood test result of .08 percent or greater, the defendant can be convicted of OUI even if all the other evidence shows the defendant was not manifesting any symptoms of impairment.

8. If I am a first-time offender, what punishment can I expect?

The so-called 24D disposition, so named as it refers to G.L. c. 90, § 24D, is typically imposed upon first-time offenders. It calls for a loss of license from forty-five to ninety days (unless the defendant is under age twenty-one, in which case the loss of license is for 210 days); fines, fees, and costs (some of which may be waived if there is a finding of indigence or inability to pay); and assignment to an alcoholic rehabilitation/treatment program. During the loss-of-license period, a defendant may be eligible for a hardship license, which permits operation during a specifically defined twelve-hour period, seven days per week.

9. What must my attorney know to successfully defend me?

Your attorney must be thoroughly familiar with G.L. c. 90, § 24 et seq. and 501 C.M.R. § 2.00 et seq. The regulations were written in response to G.L. c. 90, § 24K. They contain a cornucopia of helpful and essential information for your lawyer.

10. If I had just a drink after work, there should not be any worry, right?

No. Given the great damages to persons and property caused by drunk drivers; the days of the police officer letting you sleep it off without charging you are over; and the fact that even if you are ultimately found not guilty, the costs—financial and psychological—are so great, the best course of action, even if you plan on having a single drink, is to have a designated driver or take a cab. By having one drink after a long workday, traveling ten miles an hour over the speed limit and being stopped by a police officer, you still run the risk of being arrested. Consider the following: It is late, and you spent a good part of the day reading before going into a smoke-filled room. Hence, your eyes are bloodshot and glassy. Because you finished the drink a few minutes before getting behind the wheel of your car, the odor of alcohol is strong. You are one of the nearly 30 percent of sober people who cannot successfully perform field sobriety tests. You take the breathalyzer—a machine as reliable as your car, washing machine and computer—and an ever-so-slightly false reading results. The outcome is an arrest and charge of OUI. It's not worth it.

EXHIBIT 10N—Memorandum of Decision on Consolidated Defendants' Motion to Exclude Breath Alcohol Content Percentage Results Using the Alcotest 9510 and Any Opinion Testimony, *Commonwealth v. Ananias*, No. 1248CR1075, at 30-31 (Mass. Dist. Ct., Boston Mun. Ct. Feb. 16, 2017) (*Ananias I*)

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. **BOSTON MUNICIPAL AND DISTRICT COURT DEPARTMENTS**

DOCKET NOS. 1248 CR 1075, 1201 CR 3898, and others

COMMONWEALTH

v.

EVANDO ANANIAS, CHRISTIAN FIGUEROA, AND OTHERS

MEMORANDUM OF DECISION ON CONSOLIDATED DEFENDANTS' MOTION TO EXCLUDE BREATH ALCOHOL CONTENT PERCENTAGE RESULTS USING THE ALCOTEST 9510 AND ANY OPINION TESTIMONY

In a consolidated litigation, defendants of the Boston Municipal Court and District Court Departments charged with Operating a Motor Vehicle while Under the Influence of Intoxicating Liquor (G.L. c. 90, § 24) seek, in limine, to exclude breath test results produced by the Alcotest 9510, a breathalyzer instrument developed by Draeger Safety Diagnostics, Inc. (Draeger). For the reasons set forth below, this motion is **DENIED in part** and **ALLOWED in part**.

I. Procedural Background

On August 3, 2015, the Chief Justice of the District Court issued an order of special assignment consolidating 531 cases in which defendants charged with Operating a Motor Vehicle while Under the Influence of Liquor challenged the scientific reliability of the Alcotest 9510, the breathalyzer device currently used throughout the Commonwealth. A hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Commonwealth v. Lanigan*, 419 Mass. 15 (1994) was scheduled to commence on January 25, 2016 as part of a scheduling order issued October 5, 2015. After a series of discovery motions, the Court determined that the hearing on this issue as it related to the Alcotest 9510 source code would be confined to a static analysis.[1] On November 9, 2015, the Chief Justice of the Boston Municipal Court likewise consolidated 64 cases raising the same issue. The Court (McManus,

J.) in that litigation permitted a defense request for dynamic as well as static analysis of the Alcotest 9510 source code.[2] As a result of these and various other rulings, both the Commonwealth and the defendants in these parallel litigations sought appellate review before a Single Justice of the Supreme Judicial Court. On June 6, 2016, the Single Justice (Botsford, J.) issued an order joining both sets of cases into a single consolidation and permitting the defendants to perform dynamic testing on the Alcotest 9510. The order required that the Massachusetts State Police Office of Alcohol Testing ("OAT") make two Alcotest 9510 breathalyzers and ancillary components available to the defendants. On June 13, 2016, the Chief Justice of the Trial Court assigned these further consolidated matters to this Court. After a series of additional delays due to discovery conflicts, issues concerning a protective order for the confidential Alcotest 9510 source code, and appeals to the Single Justice regarding the schedule set by the Court, the Daubert-*Lanigan* hearing commenced on January 18, 2017, in the Concord District Court. The Court heard testimony over ten days. Although there are 535 cases formally consolidated, it is estimated that an additional two to three thousand cases are stayed pending the outcome of this litigation.

[1] "Static analysis" involves analyzing the efficacy of software by a review of the source code. Generally, a static analysis involves the use of software tools to review source code in much the same manner that spellcheck or grammar check analyzes ordinary prose. Proper static analysis must be accompanied by a manual review of the code itself.

[2] "Dynamic analysis" is testing that involves running a program on a device to observe its functionality.

II. Legal Standard

The defendants move to exclude the results of their breath tests pursuant to *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993) and *Commonwealth v. Lanigan*, 419 Mass. 15 (1994). When a party challenges the admissibility of scientific or technical evidence, a trial "judge . . . has a gatekeeper role," *Lanigan*, 419 Mass. 15, 26 (1994), "to protect fact finders from exposure to expert testimony 'that is not based on reliable methodology.'" *Peterson v. Bd. of Assessors of Boston*, 62 Mass. App. Ct. 428, 433 (2004) (quoting *Canavan's Case*, 432 Mass. 304, 315 (2000)). More broadly, this "gatekeeper role" extends to situations in which any "'evidence produced by a scientific theory or process' is at issue." *Commonwealth v. Camblin*, 471 Mass. 639, 648 (2015) (quoting *Commonwealth v. Curnin*, 409 Mass. 218, 222 (1991)).

The burden of persuasion as to the reliability of a particular scientific theory or process rests with its proponent. *See Palandjian v. Foster*, 446 Mass. 100, 112 n.17 (2006). This burden is satisfied "either by establishing general acceptance in the scientific community or by showing that the evidence is reliable or valid through an alternate means." *Canavan's Case*, 432 Mass. at 310. Factors a court may consider in determining reliability include: "whether the scientific theory or process (1) has been generally accepted in the relevant scientific community; (2) has been, or can be, subjected to testing; (3) has been subjected to peer review and publication; (4) has an unacceptably high known or potential rate of error; and (5) is governed by recognized standards." *Commonwealth v. Powell*, 450 Mass. 229, 238 (2007) (citing *Daubert*, 509 U.S. at 593-94). However, because "[a]pplication of the *Lanigan* test requires flexibility" and "[d]iffering types of methodology may require judges to

apply differing evaluative criteria to determine whether scientific methodology is reliable," *Canavan's Case*, 432 Mass. at 314 n.5, "[n]ot all of the factors identified in Daubert will be applicable in every case." *Palandjian*, 446 Mass. at 111.

The test of reliability is a flexible one, and "a trial judge has broad discretion in determining which factors to apply to assess the reliability of proffered expert testimony." *Palandjian*, 446 Mass. at 107. A trial judge's decision in this regard will be reviewed only for an abuse of discretion. *Commonwealth v. Shanley*, 455 Mass. 752, 762 (2010). It is also within the trial judge's discretion to determine whether to hold an evidentiary hearing at all. *Palandjian*, 446 Mass. at 111; *Commonwealth v.Addy*, 79 Mass. App. Ct. 835, 838 (2011) (judge may, but is not required to hold an evidentiary hearing on a *Daubert* challenge).

III. Scope of Hearing

It is well established in Massachusetts that breath test evidence is admissible in criminal prosecutions. *See Commonwealth v. Barbeau*, 411 Mass. 782 (1992). However, in *Commonwealth v. Camblin*, 471 Mass. 639 (2015), the Supreme Judicial Court held that the scientific reliability of a particular breathalyzer instrument, there the Alcotest 7110,[3] may be tested by defendants as to whether "the source code and other challenged features of the Alcotest functioned in a manner that reliably produced accurate breath test results." Id. at 650. The Supreme Judicial Court rejected the Camblin motion judge's conclusion that our Legislature's specific provision for the admissibility of breath test results in OUIL cases combined with the New Jersey Supreme Court's full vetting of issues relating to the reliability of the Alcotest 7110, *see State v. Chun*, 194 N.J. 54 (2008), established reliability and obviated the need for a hearing.

[3] The Alcotest 7110 is the immediate predecessor to the Alcotest 9510. According to expert testimony from Draeger representatives, which the Court credits, the analytical systems employed by the two machines with respect to measuring alcohol are virtually identical. The calibration system, on the other hand, is substantially different, as the Alcotest 9510 uses a more reliable dry gas standard.

In the current consolidation, the defendants sought to expand the scope of the reliability challenge permitted in *Camblin*, arguing that the Alcotest 9510 presents different analytical issues than the Alcotest 7110. Although the defendants' motion is divided into sixteen individual challenges, these can be reduced to four categories: (1) whether the source code, as developed and implemented in the Alcotest 9510, reliably produces accurate results; (2) whether the Alcotest 9510 relies on flawed scientific theories regarding blood-to-breath ratio; (3) whether Office of Alcohol Testing ("OAT") methodology relating to the Alcotest 9510 produces unreliable results; and (4) whether the Alcotest 9510 source code contains security vulnerabilities that make it susceptible to intentional manipulation that could produce unreliable results.

The Commonwealth countered that this hearing should have been limited to source code issues. It argued that the Alcotest 9510 and 7110 are practically identical analytically, and that the other issues regarding the device are not "novel," because they were addressed in the Camblin litigation. The Commonwealth objected to extending the scope of this hearing to include the validity of theory of blood-to-breath ratio

used by the Alcotest 9510, based on the Supreme Judicial Court's longstanding recognition of "the reliability of the scientific principles underlying the use of breathalyzer evidence." *Commonwealth v. Durning*, 406 Mass. 485, 490 (1990). The Commonwealth further suggested that OAT practices and purported source code security weaknesses are issues of evidentiary weight rather than of admissibility based upon scientific reliability. More generally, the Commonwealth objected to this Court hearing any issues that overlapped with *Camblin*, reasoning that it would be an unwarranted duplication of effort.

Upon consideration of arguments by the parties, the Court agreed to extend the scope of the hearing beyond source code issues to include the defendants' challenge to the blood-to-breath ratio as derived from "Henry's Law"[4] and applied in the Alcotest 9510, as well as to OAT's methods and protocols for preparing the breathalyzer instruments prior to their deployment. As to the underlying scientific principles utilized by the Alcotest 9510, the defendants' claim, supported by expert affidavits, that the evolving understanding of chemical engineering of the human lung renders the long accepted formula obsolete sufficiently raised the issue for the purpose of this hearing. Regarding OAT protocols and methodology, after hearing from the parties, it became clear that the Alcotest 9510 is sent to the various police departments in a different condition than as received by OAT from Draeger. Additionally, the calibration of an instrument performed by OAT prior to its initial deployment and during its annual certification raises scientific methodology concerns that fall under the umbrella of *Daubert-Lanigan*. To the extent that there is an overlap in issues addressed by the *Camblin* litigation, this Court fundamentally disagrees with the Commonwealth's position. Although the decision rendered on remand in the *Camblin* case is clearly exceptionally thorough and well-reasoned, *see Court's Ruling on Defendant's Motion* in limine *to Exclude Alcotest Results as Scientifically Unreliable Following Remand by the Supreme Judicial Court*, dated May 11, 2016 (Sullivan, J.), the fact remains that the issues as resolved there have not been considered by a Massachusetts appellate court. Moreover, however analytically similar the Alcotest 9510 and Alcotest 7110 may be, the individual defendants in this consolidation are different from those in *Camblin*, with different attorneys, different witnesses, and individual due process and witness confrontation rights. In considering whether to expand the scope of the hearing, the Court recognized that claims based upon alleged human error or those pertaining to an individual breathalyzer machine as used in a particular police department are issues of evidentiary weight rather than admissibility based on the reliability of scientific principles or methodology. The Court was also mindful of the extraordinary public resources expended in this litigation and the concomitant obligation to resolve any issues that appear to be common to all potential defendants who submit to an Alcotest 9510 breathalyzer test so that they need not be repeated in individual cases.[5] Yet, even with this broad view, this Court declined to consider the defendants' fourth category of challenges given the hypothetical nature of potential intentional manipulation of the code by some mythical, third-party malfeasant. To the extent there is evidence that any particular Alcotest 9510 instrument was hacked, the defendants may advance those claims in a particular case. The mere theoretical possibility that an Alcotest 9510 device, like any technology, may be hacked is insufficient to require its global exclusion.

[4] Henry's Law states that, at a constant temperature, the amount of a given gas dissolved in a given type and volume of liquid is directly proportional to the partial pressure of that gas in equilibrium with that liquid. A different ratio applies to each type of gas and liquid. As such, Henry's Law governs the solubility of gasses in water. It is the theoretical basis for describing the behavior of liquid solutions in wet simulators, and describes the effect of blood alcohol on human breath.

[5] The parties in this consolidated litigation are represented by fourteen lead attorneys, six for the Commonwealth and eight for the consolidated defendants. To date, the Court has approved public funds upon motions for the consolidated defense totaling $351,597.47. During the hearing, counsel indicated that one of the Commonwealth's experts was paid $125,000. Witnesses called to testify have traveled from as far as Germany and Sweden.

IV. Discussion

The Alcotest 9510 breathalyzer instrument uses "dual sensor" technology to determine the quantity of alcohol in a breath sample. One sensor uses infrared (IR) spectography to analyze the sample, while the other sensor employs electric chemical (EC) fuel cell oxidation. IR spectography measures the degree to which a substance absorbs infrared light at various wavelength frequencies. Both technologies have been used in evidential breath testing since the 1970s. The Alcotest 9510 begins its infrared detection of alcohol when a subject blows air into a tube; the expelled breath passes through a heated cuvette into an infrared chamber, where an infrared detector examines the absorption of infrared light at 9.5 microns. Measurement at the 9.5 micron wavelength range is designed to avoid other chemical substances, in particular acetone, accidentally being read and calculated. The EC fuel cell sits on top of the IR chamber, and part of the breath sample is funneled into it as the subject blows into the tube. The fuel cell passes electricity through the sample, causing a chemical reaction that releases energy in the form of an electrical current. The fuel cell then measures the level of electrical current, or signal, produced by this chemical reaction, which is proportional to the sample's alcohol content. A single breath blown into the Alcotest 9510 results in 128 IR and EC calculations per second. Although the IR and EC measure a sample simultaneously, they are not interdependent. Rather, the device compares the infrared reading against the fuel cell reading. In Massachusetts, only the IR reading is reported to the operator; the EC reading is intended to verify the IR result and to detect any interfering substances in the breath sample. The results must agree within specified limits, which are preset in the instrument before delivery by Draeger according to local specifications. A result falling outside the locally prescribed threshold of agreement causes an error or "status" reading, which should terminate the test.[6] The Alcotest records and stores all results, both IR and EC, internally, and in Massachusetts the data is transmitted to a central server from which the information can be extracted.

[6] During the hearing, the defendants offered examples of fifteen cases in which the value of the IR and EC readings exceeded the prescribed threshold of agreement, yet the instrument still reported a BAC result. This prompted an investigation by OAT and Draeger and the calling of an additional witness by the Commonwealth. According to this witness, Brian Shaffer, a member of the Draeger management team, the parameter setting for the acceptable difference between IR and EC sensor readings is set by Draeger. OAT has no ability to alter this setting. The correct value of this setting is 38 micrograms/liter, which after certain algorithmic calculations equates to .008 (or a 10% difference at .08% BAC). The fifteen cases identified by the defense were produced by six different devices. Of the six, investigators had inspected two by the time of Mr. Shaffer's testimony, both of which were set incorrectly at 60 micrograms/liter. This wider tolerance range does not directly impact the subject BAC result, but it does permit results to be re-

ported when the tolerance level for detecting interferents is outside the acceptable range. In other words, it makes the device less sensitive to interferents. The BAC results in these instances should not have been reported, since the instrument should have reported an error and, if set correctly, shut down. All Massachusetts Alcotest 9510 machines were called into OAT for similar inspection. At the time of Mr. Shaffer's testimony, ninety of the approximately 350 Massachusetts Alcotest 9510 devices had been inspected, and not one was set correctly according to Draeger specifications. Some of the devices were set so that they would be less sensitive to interferents, while others were set to lower than 38 micrograms/liter, making them more sensitive than prescribed. Draeger's explanation for this mystifying and disturbing situation is human error on the part of the Draeger programmers setting parameters. The Commonwealth points out that the fifteen "problem" cases identified by the defense were among 93,000 on the database provided to the consolidated defendants. It is not clear to the Court whether the fifteen cases are the product of an exhaustive search of the materials provided to the defense. In any event, the Court allowed the defendants' oral motion to be provided with any reports and notes from the investigation. Although the Court finds that this issue does not impact the scientific *reliability* of the Alcotest 9510 or the science underlying it, the situation certainly requires swift remediation.

It is important to note, at the outset, that all scientific measuring devices have generally accepted levels of uncertainty. No scientific measuring device could ever return exactly the same result twice; indeed, lack of variations would be suspect. Breathalyzer devices generally are to be expected to be within the greater of .005 or 5% of the "true" value. Known solutions obtained from laboratories are certified to be within .002 of the "true" value. Accordingly, an accurate and precise measurement, within the scientific meaning of that term, will still vary a small amount from the "true" value.

A. Black Box Testing of the Alcotest 9510

In determining whether the Alcotest 9510 produces reliable breath test results, one factor the Court may consider is the extent to which the instrument has been subjected to testing and the results of any such tests. "Black Box" testing is a method that involves examining the functionality of an instrument by running it and subjecting it to tests without accessing its internal components or operating system. In the United States, all evidential breath testing devices must meet certain specifications and be approved by the National Highway Traffic Safety Administration (NHTSA). This testing is performed in the Alcohol Countermeasure Laboratory at the Volpe Center, a Massachusetts-based government "think-tank." Edward Conde, a chemical engineer with thirty years of experience at the Volpe Center, has tested approximately 800 breathalyzer machines over his career, including the Alcotest 9510 on three occasions. He has never worked for Draeger nor for any other company that manufactures evidential breath testing devices. He has no incentive to approve devices, and to the contrary looks for reasons to fail them. Most breathalyzers he tests, in fact, do fail, at least initially. Regardless of the results, once he completes his testing, Mr. Conde submits a report to NHTSA. If a breathalyzer machine passes muster, it may be listed on NHTSA's conforming products list and used by law enforcement agencies.

Mr. Conde's prime directive in his work is to answer the question "does the machine reliably measure alcohol?" In order to reach this conclusion, he tests for the following: (1) precision (whether the device hits the same spot every time) and accuracy (whether it hits the spot for which it is aiming every time) using solutions with a known alcohol percentage; (2) acetone interference (whether acetone injected into the simulator is appropriately detected); (3) alcohol free simulation (whether the de-

vice ever registers alcohol when measuring an alcohol free solution); (4) breath sample (whether results remain the same regardless of the length or intensity of a blow); (5) input power (whether results vary depending on the voltage used to operate the device); (6) ambient air (whether the temperature of the air outside the device impacts results); (7) vibration stability (whether shaking of the instrument in three dimensions at various amplitudes and frequencies impacts results); and (8) electrical safety (whether the device has any electrical connections that might endanger its user). As reported by Mr. Conde, the Alcotest 9510 passed all eight tests, and accordingly is included on the NHTSA conforming products list. Mr. Conde opined that the Alcotest 9510 consistently operates in a manner that reliably measures alcohol.[7] Based upon his extensive experience testing breathalyzer machines, his relative objectivity, and the exhaustive tests he performed, the Court credits Mr. Conde's conclusion.[8]

[7] In Camblin, the Supreme Judicial Court noted that the reliability of a breathalyzer is not established simply by virtue of the fact that it appears on the NHTSA list of conforming products. 471 Mass. At 650 n. 24. Here, however, the Court heard live testimony regarding the particulars of the instrument being subjected to actual testing, which is one of the factors a court may consider in a Daubert-Lanigan analysis. As with Camblin, Mr. Conde tested a generic Alcotest 9510, not one loaded with Massachusetts-specific software.

[8] In addition to passing NHTSA standards in the United States, the Alcotest 9510 was approved by the International Organization of Legal Metrology (OIML), and has satisfied rigorous testing standards in Australia, France, Germany, and the Netherlands. It is currently used for evidential breath testing in twenty countries.

B. The Alcotest 9510 Source Code

Although it is evident that the Alcotest 9510 consistently operates as designed in producing verifiable breath test results in a laboratory setting, this does not end the discussion. The Alcotest 9510 is dependent on its computer to control and report its measurements. Its functions are directed by two microprocessors that work in tandem: one operates the system itself, performing such tasks as clicking on the screen or printing hard copies of results; the other causes the device to measure alcohol concentration based on certain algorithms. The instrument's capabilities are defined and directed by binary code in the microprocessors rather than by ordinary prose. For example, using the phrase "now measure alcohol" does not work; instead, the programmer must use programming words, i.e., source code, that are then converted into binary language by a compiler, and thus direct the device to perform a specific operation. The Commonwealth maintains that the Alcotest 9510 source code was developed and implemented in a manner that produces accurate and reliable results. The consolidated defendants contend that the source code utilized in the Alcotest 9510 fails to meet industry standards in several ways and that it contains a variety of flaws that result in its overall unreliability.

The Commonwealth presented testimony regarding the Alcotest 9510 source code from three Draeger representatives: (1) Dr. Burkhardt Stock, who holds a Ph.D in physics and who developed procedures underpinning both the Alcotest 9510 and the Alcotest 7110; (2) Soenke Fischer, a software programmer who worked on the Alcotest 9510 source code; and (3) Hansueli Ryser, Draeger's Vice President of Government Affairs, who has extensive technical experience in evidential breath testing

machines and currently oversees Draeger's contracts, compliance verifications, and approvals. Andrew McKenna, a source code analyst employed by Security Innovations, Inc., reviewed the Alcotest 9510 source code on behalf of the Commonwealth. The consolidated defendants proffered the testimony of Evan Kovanis, a computer hardware and software research engineer employed by Zeidman Consulting, a California based company that specializes in high-tech consulting and litigation support. The Court received and considered reports and/or affidavits from each of these expert witnesses.[9] All of these witnesses demonstrated a breadth of knowledge, a depth of understanding, and an ability to translate complex engineering and computer coding concepts into relatively digestible descriptions for their largely lay audience. Remarkably, there were many areas in which the Commonwealth and defense experts agreed regarding the source code. Ultimately, however, they disagreed as to whether it was written in a manner that causes the Alcotest 9510 to produces reliable breath test results.

[9] The Court approved a request for public funds for dynamic testing and the defendants retained an expert in dynamic analysis of source code; however, the defendants elected not to call the witness nor was his report entered as an exhibit.

Experts for both parties agree that perfect source code does not exist. Nor is perfection the standard under *Daubert-Lanigan*. Many of the flaws in the code identified by Mr. Kovanis were seen by Mr. McKenna as well. In general, the Court found Mr. Kovanis to be an informative and credible witness. He performed a relatively thorough analysis of the source code and identified numerous areas of concern. Ultimately, however, the Court agrees with Mr. McKenna's assessment that Mr. Kovanis' concerns are misplaced, at least so far as the overall reliability of the instrument is concerned. In some instances, Mr. Kovanis pinpointed code errors that exist, but do not impact the operation of the device. In others, he identified apparent coding "problems" that, in context, were simply alternative paths to the same end. A couple of the issues raised by Mr. Kovanis were the product of his not fully reading the code, and thereby missing programming language that appeared a line or two before or after the apparent "error" he detected. Although Mr. McKenna also noted ways in which the Alcotest 9510 source code "misbehaves," his overall conclusion was that it will produce accurate and reliable results. The Court credits this opinion. After weighing the testimony of each witness and considering the nature and context of the particular issues raised by the consolidated defendants, the Court is satisfied that the Alcotest 9510 source code is written and executed in such a manner that the device produces accurate and reliable results. The Court discusses the defendants' specific concerns with respect to the source code below.[10]

[10] Although the consolidated defendants' pleading enumerates challenges to the results of the Alcotest 9510 in sixteen numbered paragraphs, several of these challenges became merged during the hearing and others not pressed sufficiently to require a specific ruling by the Court.

1. Industry Standards and Programming Best Practices

The defendants contend that Draeger did not meet generally accepted industry standards in its development and production of the Alcotest 9510 source code. Dr. Burkhardt Stock, a Draeger employee for over thirty years, was a pivotal player in creating procedures for the company's breath testing machines. Over his career, Dr. Stock has authored a number of papers in the field, the principles of which he incor-

porated into the development of both the Alcotest 9510 and the Alcotest 7110. As explained by Draeger's Soenke Fischer, the Alcotest 9510 source code was written as a component of the five phase "waterfall" model of software design and development. He describes this process as follows: (1) "Definition" (Phase1) – the development team gathers requirements from the customer; (2) "System Design" (Phase 2) – the software team determines how to accomplish the defined goals; (3) "Programming" (Phase 3) – the computer code is written by software programmers; (4) "Integration/Validation" (Phase 4) – different aspects of the software (in the Alcotest 9510, for example, the system microprocessor and the alcohol measuring microprocessor) are integrated and programmers test to insure that the instrument operates according to the customer's specifications; and (5) "Maintenance" (Phase 5) – the device is modified, as necessary, based upon customer change requests. In his critique of the Draeger operating model, Evan Kovanis suggests that an additional step that he called an "implementation period" should be inserted between the Programming and the Integration/Validation phases. In considering Mr. Kovanis' testimony, the Court finds that the distinction he draws is really one of semantics, and cannot discern a meaningful difference between his approach and Draeger's. The Court credits Mr. Fischer's testimony that Draeger's approach is consistent with the operating standard in the software industry.

The defendants also argue that the Alcotest 9510 source code does not adhere to "programming best practices." During his testimony, Mr. Kovanis characterized Draeger's efforts as "sloppy programming that makes the code hard to understand." Yet, he based his opinion largely on his own education and experience, rather than on any established written industry guidelines set forth by a governing body or association of software developers. Thus, despite his extensive credentials, the discussion does not end with Mr. Kovanis' opinion. According to Andrew McKenna, no such universal standard of "programming best practices" exists. He asserts that, contrary to such disciplines as engineering or medicine, the software development community is a "meritocracy," in which general acceptance is based upon use and functionality of the particular source code. Mr. McKenna recognized many of the same programming idiosyncrasies identified by Mr. Kovanis, and indicated that he too might have written the source code differently in various places. Yet, he likens these differences to architectural design variations, rather than a departure from established programming practices. After weighing all of the testimony on this issue, the Court is persuaded that computer source code programming, while at its core a scientific endeavor, in practice has an inherent element of artistic expression; different programmers will write code differently to achieve the same result. The choices of the Draeger programmers in writing the Alcotest 9510 source code do not offend an established set of "best practices."

More importantly, despite the defendants' criticisms, they do not identify specific adverse manifestations of Draeger programming choices for Alcotest 9510 source code. The role of the Court in this litigation is to determine whether the source code produces reliable blood alcohol results, not whether the software is efficient, elegant, or easy to understand and debug. Accordingly, the Court finds that this argument does not raise concerns regarding the reliability of the Alcotest 9510 breath test results.

2. Unchecked Return Values

The defendants assert that the source code "returns values" from functions that are "unchecked," rendering the software unreliable. As explained by Mr. Kovanis, when the source code "calls a function," it tells the instrument to perform a task. The code should check to confirm that the function has actually occurred or if there were errors, and then react, or "return a value," accordingly. For example, if a program calls a function that adds two numbers, it should verify that the function actually returns a number and report an error if the function fails. The Alcotest 9510 does not do so in certain places, such as in the function that coordinates the alcohol measurement taken by the IR and EC sensors. At first glance, this appears to be a critical shortcoming. Yet, as explained by Soenke Fischer, it merely represents a different software design choice. Instead of relying on return values, the Alcotest 9510 source code contains a "Global Error Variable" as an alternative means of checking for errors. The Global Error Variable is a program that runs continuously in the background of the software to check for function errors. It is set to make the software aware of when an error occurs, and to stop the device from working when such an error message appears. Mr. McKenna initially shared Mr. Kovanis' concerns, because he too was unaware of the source code's Global Error Variable. When informed of this programming device, Mr. McKenna concluded that it renders the absence of checks on certain return values in the Alcotest 9510 source code immaterial to the reliability of its results; he characterized it as just a different way of doing the same thing. The Court credits this explanation, and finds that unchecked return values do not impact the reliability of the Alcotest 9510.

3. Electrochemical Sensor Bit Location in Hardware Configuration

The defendants next cite the setting of the "bit"[11] in the EC sensor to the "off" position as undermining the system accuracy of the Alcotest 9510. In short, the source code sets a particular bit to 0, which tells the program that no EC sensor is available. Once again, Mr. McKenna was concerned with this portion of the source code as well until he heard Soenke Fischer's explanation. Mr. Fischer testified that, before the Alcotest 9510 source code can be run by the user, it must be loaded with a configuration file, which varies from jurisdiction to jurisdiction. Mr. Kovanis acknowledged that he was unaware that the sensor bit setting is modified by the loading of a configuration file. The Massachusetts configuration file, as explained by Mr. Fischer, turns the setting of the EC fuel cell sensor bit to "on" and thereby permits the device to utilize the EC sensor. The Court credits Mr. Fischer's testimony that designing source code in a manner that requires subsequent configuration is a very common practice, and is satisfied that the EC sensor bit location in the source code does not present a problem. In the Massachusetts version of the configuration file added to the Alcotest 9510, the bit for the EC sensor is set to "yes," meaning that it is in the "on" position.

[11] A "bit" is the smallest unit of computer information, registering a single 1 ("yes") or 0 ("no"). A "byte" consists of eight bits, and thus can express exponentially larger values. A megabyte refers to 1,048,576 bytes.

4. Uninitialized Variables

In the context of computer programming, a "variable" is a space in the memory of the software used to store data. A variable is "initialized" in the source code when the programmer assigns it a value prior to its first use. For example, if a program wanted to count the number of times an operator pressed a key, it would assign a variable (here "K") and add 1 to K every time the operator pressed the key. The defendants assert, and Mr. Kovanis testified, that a variable must be initialized to a specific value in order to guarantee accurate operation of the software. He likened it to setting an odometer to zero before starting a trip so that miles traveled can accurately be calculated. The defendants argue that the Alcotest 9510's use of uninitialized variables causes unreliable breath tests. Their contention fails for several reasons. First, as Mr. McKenna noted, contrary to Mr. Kovanis' analogy, an odometer need not be set at zero to provide accurate information; as long as there is a starting point noted, the distance to the end point can be calculated using simple math. Second, the Court credits Mr. Fischer's testimony that uninitialized variables are not used in any mathematical equations or decisional logic performed by the Alcotest 9510; the defendants offered nothing to counter that assertion. Third, the uninitialized variables discovered by the defendants were known to Draeger, because they used a static analysis tool to identify such issues when first developing the Alcotest 9510 source code. Draeger declined to take corrective action in the form of writing new code lines because they determined that the variables lacking initialization bore no consequences with respect to the function of the device. Fourth, Mr. McKenna located several of the same uninitialized variables as Mr. Kovanis, but also pointed to several variables identified by Mr. Kovanis as uninitialized that, in fact, were initialized.[12] To the extent variables were uninitialized, Mr. McKenna categorized the findings as "low severity." He pointed to the context, and opined that they did not impact the Alcotest 9510's ability to produce reliable results. The Court credits this opinion, in large part because uninitialized variables in the Alcotest 9510 source code are overwritten with known, initialized variables after approximately eight milliseconds, or less than a ½ second. Since the breath test itself may not be administered for at least fifteen minutes, and administrative tasks performed by the breath test operator could not humanly be executed in less than a ½ second, there is no practical ramification to this initialization delay. Finally, as it relates to the specific concerns cited by the defendants, the absence of initialized variables actually would result in the earlier recognition of potential errors in the running of the program. The Court is satisfied that if such an error were to occur, it would be detected by the global error safeguard built into the Alcotest 9510 source code.

[12] Mr. Kovanis acknowledged during cross-examination that several places in the source code where he believed variables were uninitialized actually were initialized. The initialization occurred a few lines above those on the code he checked, and he simply missed them.

5. Data Integrity and Management

Many of the concerns expressed by the defendants regarding data integrity and management stem from the issues surrounding uninitialized variables. For the same reasons as discussed above, the Court rejects these concerns. The defendants also suggest that the Global Error Variable "may" get overwritten when program flow is interrupted in certain routines; however, Mr. Kovanis cites no specific example of how this possibility would result in erroneous breath sample results. The Court credits Mr.

Fischer's testimony that Global Error Variables in the Alcotest 9510 source code are not overwritten.

6. Clipping of Sensor Measurements

The defendants' motion asserts that the source code directs that negative values from the IR and EC sensor measurements be rounded up to zero. The assertion, however, is accompanied by no evidence from an expert with sufficient background to support it. The Court declined to permit the defendants to raise this issue through the testimony of Mr. Kovanis, whose academic background and experience are in computer engineering. While the defendants present this claim as a source code issue, it actually relates to the underlying physics and chemistry that the source code is implementing, not the design of the code itself. Mr. Kovanis is neither a physicist nor a chemist, and thus was not qualified to opine on this issue. To the extent the issue was raised during the testimony of Dr. Stock, who as a physicist has the requisite expertise, the Court is satisfied with his opinion that such rounding, or "clipping," does not impact the reliability of Alcotest 9510 breath test results.

7. Hardware Error Check Programming

This argument is based upon the findings in Mr. Kovanis' report that the portion of the source code that checks for hardware errors in the Alcotest 9510 uses uninitialized variables. During his testimony, Mr. Kovanis acknowledged that if such an error occurred it would stop the instrument from executing the code and report an error; it would not produce an actual result that is unreliable. He also conceded that he did not review an area of code one line above the location he believed was uninitialized at which the function actually was set. Accordingly, the Court rejects this challenge.

C. Interfering Substances

The defendants argue that the Alcotest 9510 fails to detect and accurately report substances other than ethanol that may interfere with a breath sample, thereby producing unreliable test results. In support of this contention, the defendants offered the testimony of two witnesses. Dr. Andreas Stolz is a professor at the National Superconductivity Laboratory at Michigan State University. He holds Ph.D and Master's degrees in Physics. Dr. Stolz specializes in infrared spectrometry and evidential breath testing, and has testified on these subjects in numerous cases in several jurisdictions. Dr. Joseph Anderson, is a biomedical consultant and professor of bioengineering at University of Washington. He holds Ph.D and Master's degrees in Chemical Engineering. Dr. Anderson has testified approximately 175 times as an expert in eight states as well as in federal court. The defendants do not press the issue of interferents as it relates to acetone, since the IR detector's ability to eliminate acetone interference by taking measurements at a micron level different from acetone's wavelength is well established.

Using Massachusetts Alcotest 9510 breathalyzers, Dr. Stolz experimented with several chemicals to determine whether they could be measured and reported by the device without triggering its alcohol interferent detection system. While most of the chemicals failed to register at all on the Alcotest 9510, there were a couple of sub-

stances that raised questions. Dr. Stolz first ran a series of tests with these chemicals added to water to create solutions of varying concentrations in order to see whether the machine would register a blood alcohol content (BAC) result. In one instance, the machine showed a sample without ethanol measuring as high as .02% BAC with no interference detected. Dr. Stolz then repeated the tests, this time combining the chemicals with a .076% ethanol solution in an attempt to artificially raise the BAC reading. His results included one combination that raised the BAC result to .08% without reporting interference. Although all of these tests were conducted in-vitro, Dr. Anderson testified that all of the chemicals, at least theoretically, could enter the human body by swallowing, breathing, or through the skin. He further explained that most of the chemicals used by Dr. Stolz are found in products with which humans frequently come into contact. The defendants argue that such failures to detect interferents by the Alcotest 9510 critically undermine its reliablility.

The Commonwealth counters this argument by identifying a number of flaws in Dr. Stolz's experiments and conclusions, as well as in Dr. Anderson's reasoning. In support of its position, the Commonwealth offered the testimony of Dr. Alan Wayne Jones. Dr. Jones earned a Ph.D in Chemistry and Pharmacology in 1974. He was the head of the National Laboratory of Forensic Toxicology for Sweden from 1985 to 2013. He currently lectures at the University Hospital in Stolkholm, Sweden. Dr. Jones has engaged in extensive research and written over 400 papers in more than 100 different scientific journals on the effects of alcohol on the human body. He has peer-reviewed other scientists' research for over forty years, appraising the merits of various articles in over fifty different scientific journals. Dr. Jones has lectured on subjects relating to forensic toxicology and testified in courts in many countries hundreds of times over his career. He is recognized by those in the community, including Dr. Anderson, as the world's foremost expert on forensic toxicology, particularly as it relates to blood and breath alcohol. In addition, Dr. Jones has specific expertise in breath testing devices. He has published over ten papers on the issue of interferents and breathalyzers. Based upon this extraordinary resume, as well as the manner in which the training and experience it reflects was manifest in his courtroom presentation in both form and content, the Court fully credits Dr. Jones' testimony.

Although generally respectful of Dr. Stolz's scientific process, at least in the abstract, Dr. Jones cast serious doubt on the applicability of his experiments to human subjects. Dr. Jones reminded the Court that all of Dr. Stolz's results were the product of tests performed using inanimate containers. He testified, in essence, that none of the chemicals used would have practical applications to human interaction with the Alcotest 9510. In support of this conclusion, Dr. Jones explained that potential exposure through contact with chemicals found in ordinary household items as posited by the defense experts cannot possibly present practical problems for the use of evidential breath testing, since massive dilution with total body water would make these chemicals undetectable. This is consistent with Dr. Stolz's results showing the majority of such chemicals not registering on the Alcotest 9510 at all. Dr. Jones also described how, once inside the human body, one of the chemicals would metabolize into acetone, while another would dissipate too rapidly to be absorbed into the blood. Dr. Stolz and Dr. Anderson agree that the Alcotest 9510 reliably detects acetone interference. Dr. Jones testified that if consumed by a human in the quantity and con-

centration necessary to produce a response in the Alcotest 9510 as reported in Dr. Stolz's tests, several of the chemicals used in the experiments would cause physical reactions requiring emergency medical care, if not incapacity or fatality.[13] Ultimately, Dr. Jones opined that Alcotest 9510 reliably detects interferents, and that none of the chemicals cited by Dr. Stolz and Dr. Anderson present issues that undermine its ability to generate ethanolspecific blood alcohol content (BAC) results.[14]

[13] Although Dr. Anderson did cite a few examples of studies in which subjects actually had ingested chemicals at concentration levels within the range used by Dr. Stolz, the Court finds that these represent outliers on the extreme margins. One of the studies was authored by Dr. Jones, who testified that Dr. Anderson had taken the data out of context.

[14] The Commonwealth also submitted into evidence a number of articles and studies that discuss the extreme unlikelihood of interfering substances causing issues for evidential breathalyzers. Although none specifically address the Alcotest 9510, the Court finds the principles underlying the articles persuasive

Based upon all of the evidence presented on this issue, the Court is satisfied that the Alcotest 9510 distinguishes ethanol from other substances potentially found in human breath, and therefore returns reliable BAC results based solely on ethanol measurements. To the extent a defendant breath test comes from an extreme outlier who ingests another chemical intoxicant in an amount sufficient to register a BAC without being detected and without severe medical consequences that render the subject unable to provide a test sample, the potential failure of the Alcotest 9510 to detect the contributing substance while marginally raising the BAC result is an issue of evidentiary weight or affirmative defense as opposed to admissibility based upon scientific reliability of the instrument.

D. Blood-to-Breath Ratio Theory

The scientific principles underlying evidential breath testing have long been accepted in Massachusetts and throughout the country. See Camblin, 471 Mass. at 651-55; Chun, 194 N.J. at 95-96; Fisher v. City of Europa, 587 So. 2d 878, 887 (Miss. 1991); People v. Nieves, 143 Misc. 2d 734, 738 (N.Y. City Crim. Ct. 1989); State v. Johnson, 717 S.W.2d 298, 304 (Tenn. Crim. App. 1986); Pruitt v. State, 216 Tenn. 686, 691-92 (1965). Nevertheless, the consolidated defendants in this litigation claim that science is evolving with respect to the physiology of breathing, and consequently argue that all breath test results, including those produced by the Alcotest 9510, are fundamentally flawed and scientifically unreliable.

In support of this position, the defendants presented further testimony from Dr. Joseph Anderson. Dr. Anderson is a colleague and protégé of Michael Hlastala, who first posited this "new paradigm" of breathing many years ago. During a fascinating presentation, Dr. Anderson testified about the chemical engineering processes of the lung as they relate to the expulsion of alcohol in the breath. He elaborated on the Hlastala theory that ethanol delivered in a breath test sample originates from the lining of the bronchi and not the alveolar space. This "airway exchange model" fundamentally alters the analysis of breath alcohol. As relevant here, all evidential breathalyzer devices, and indeed the Code of Massachusetts Regulations (CMR) that pertain to breath testing, rely on the understanding that alcohol is best measured in "deep lung" or "end-expired" aveolar air. Dr. Anderson contends that no such air exists. He

testified that the physiological model on which the Alcotest 9510 is based is not in step with current research in the field regarding alcohol exhalation. Ultimately, Dr. Anderson opined that the proper understanding of human breathing patterns using the Airway Exchange Model translates into a blood-to-breath ratio of 1800:1, as opposed to the 2100:1 that has been followed since the 1950s.[15] This, he claims, leads to incorrect and unreliable BAC results being produced by the Alcotest 9510.

[15] The blood-breath ratio, based on Henry's Law, is the ratio between the amount of alcohol in the blood and the amount of alcohol in the breath. The amount of alcohol detected in the breath must be multiplied by the bloodbreath ratio to obtain the amount of alcohol in the blood.

Although intrigued by Dr. Anderson's presentation, the Court is not convinced that he is correct. His theory still appears to lack sufficient documentation. See Chun, Special Master's Report at 222 (September 2005); Chun, 194 N.J. at 50-52. Dr. Jones, whose credentials were discussed in detail in the previous section, strongly disagrees with the Hlastala/Anderson paradigm. So, apparently, do the vast majority of forensic toxicologists.[16] In Dr. Jones' opinion, the 2100:1 ratio may actually result in a breath testing device underestimating a subject's blood alcohol content. All breath testing machines in the United States and Canada use the 2100:1 ratio, as do several in Europe. Some countries in Europe use a 2400:1 ratio (which would result in higher blood-alcohol content results) in their evidential breathalyzers.

16 The Commonmwealth's argument on this point is compelling: "It is also worth noting that far from being accepted in the scientific community, many of his peers have disputed Mr. Hlastala's claims. For example, Theodore J. Siek, a forensic toxicologist, strongly disagreed with Mr. Hlastala's "new paradigm" in a commentary published in the Journal of Forensic Sciences after the publication of Mr. Hlastala's article, cited to by the defense. See Siek, Theodore J., *Commentary on Hlastala MP. Paradigm Shift for the Alcohol Breath Test*, J. Forensic Sci.,Vol. 55, No. 6 (2010), attached as Exhibit . . . Dr. Siek believes that the paper should have been published as an opinion piece, not an experimental paper because it was not supported by any studies done by the author, and pointed out that "no toxicologist in recent years has advocated a change in the standard ratio, because the ratio used today, 2100:1, matches up with reality." *Id*. . . . James G. Wigmore, widely known and respected expert in the field of breath testing, also submitted commentary refuting Mr. Hlastala's claims, referring to his "paradigm" as "myopic" and criticizing the selective and misleading citations to the literature in this area employed by Mr. Hlastala. See Wigmore, James G., *Commentary on MP. Paradigm Shift for the Alcohol Breath Test*, J. Forensic Sci., Vol. 56, No. 1 (2011) . . . Further undermining the defendants' claims regarding the underlying physiology of breath testing are several large scale, peer reviewed studies in which researchers in the United States and abroad have compared breath test results against blood test results obtained from the same individuals, demonstrating that breath testing accurately measures blood alcohol levels. See Stowell, A.R. et al., *New Zealand's Breath and Blood Alcohol Testing Programs: Further data analysis and forensic implications*, 178 Forensic Science International 83 (2008); Taylor, M.D. and Hodgson, B.T., *Blood/Breath Correlations: Intoxilyzer 5000C, Alcotest 7110, and Breathalyzer 900A Breath Alcohol Analyzers*, Can. Soc. Forens. Sci. J., Vol. 28, No. 2 (1995); Harding, Patrick M. et al., *Field Performance of the Intoxilyzer 5000: A Comparison of Blood and Breath Alcohol Results in*

Wisconsin Drivers, 35 J. Forensic Sciences1022 (1990), attached collectively as Exhibit . . . These studies show that for approximately 95 percent of people, breath tests will measure blood alcohol as lower than or equal to the actual amount of alcohol in the blood. See Harding et al. at 1024; Alan Wayne Jones & Lars Andersson, *Variability of the Blood/Breath Alcohol Ratio in Drinking Drivers*, 41 J. Forensic Sciences 916, 916 (1996); Stowell et al. at 83, all attached as Exhibit . . ."

Given the weight of the evidence and the near universality of opinion, the Court is convinced that the blood-to-breath ratio theory on which the Alcotest 9510 relies is generally accepted in the relevant scientific community and remains sound science.

E. OAT Methodology and Procedures

The Massachusetts State Police Office of Alcohol Testing is a calibration laboratory. Among its functions are the configuration, deployment, annual calibration, and maintenance of all Alcotest 9510 breathalyzer devices currently in use throughout the Commonwealth of Massachusetts. OAT oversees the certification and training of the Massachusetts breath alcohol testing program. It does not perform any repairs or maintenance on the internal operations of the Alcotest 9510.

Melissa O'Meara, the Technical Leader of OAT, is responsible for the day to day operation of the laboratory, as well as for establishing policies and procedures for breath test administration and training. She supervises the scientific process and the scientists who are tasked with ensuring that all Alcotest 9510 breathalyzers used by Massachusetts law enforcement agencies are functioning properly and set within parameters as required by Massachusetts regulations. Her educational background includes a Bachelor of Science degree in Chemistry, with a minor in Biology from the University of Massachusetts at Lowell. She has been a scientist in the Massachusetts State Police Crime Laboratory for over twenty-four years, serving in a variety of capacities before becoming the supervising scientist at OAT in June of 2011 and its Technical Director in December of 2013. Ms. O'Meara currently works with three other scientists at OAT.

The consolidated defendants raise an array of issues pertaining to OAT's practices, ultimately arguing that the laboratory's deficiencies impact the reliability of Massachusetts Alcotest 9510 test results to the point that they should be deemed inadmissible. Janine Arvizu, a certified laboratory quality auditor, testified on behalf of the defendants. Ms. Arvizu received her Bachelor of Science degree in Chemistry from California Polytechnical Institute at San Luis Obispo and worked at the U.S. Department of Energy for ten years before starting her own Quality Assurance firm. Although she never visited OAT, Ms. Arvizu fully reviewed all written protocols and other documents relating to OAT's compliance with scientific standards. Upon consideration of her testimony, the Court credits Ms. Arvizu's opinions in certain areas, but finds that her standards of scientific review might be so high as to be unattainable. In keeping with her role, Ms. Arvizu looked for problems anywhere she could find them at OAT; the Court certainly takes no issue with that approach. Yet, the Court must consider her assessment of OAT in light of her own tacit acknowledgement that she has never audited a laboratory that she found fully satisfactory. Ms. Arvizu also conceded that her testimony in over 150 cases, all for criminal defend-

ants challenging the reliability of breath test results, has sounded the same themes in criticizing laboratory procedures.

Although numerous sub-issues were discussed, Ms. Arvizu's chief criticisms of OAT can be reduced to four main areas: accreditation, measurement uncertainty, lack of traceability, and absence of protocols. The Commonwealth contends that these challenges pertain to the weight of the evidence rather than its admissibility. As to the first three, the Commonwealth may be correct; however, since they apply to laboratory practices that potentially impact all Massachusetts Alcotest 9510 devices, the Court felt it was prudent to address them in this litigation, as previously discussed. On the question of OAT protocols, the Court is convinced firmly that the existence, sufficiency, and standardization of laboratory procedures reflect scientific methodology, which squarely raises gatekeeper issues of reliability under a Daubert-Lanigan analysis.

The OAT laboratory's lack of accreditation is not disputed by the Commonwealth. It is the significance of this fact upon which the parties disagree. Ms. Arvizu indicated in her testimony that adhering to a standard generated by an authoritative scientific body as reflected in accreditation is a minimum requirement for reliable laboratory work. She pointed out that accreditation does exist for laboratories that perform breath alcohol calibrations. Ms. O'Meara certainly recognizes the importance of laboratory accreditation as well. Since assuming stewardship of OAT, she has steadily made improvements to its operating procedures in an effort to obtain accreditation from the American Society of Crime Lab Directors (ASCLD). Currently, according to Ms. O'Meara, only twenty-two calibration labs in the United States are accredited; only a few of those are state laboratories. Although accreditation is a laudable goal, the Court is not convinced that its absence inherently undermines the reliability of OAT's work.

The concerns regarding "measurement uncertainty" and "traceability" are largely interwoven. Measurement uncertainty relates to the margin of error created by the measurement process, whereas traceability refers to the ability to relate a measurement to an original reference point through an unbroken chain of calibrations. Each of these concerns was addressed to the Court's satisfaction by Ms. O'Meara. Regarding measurement uncertainty, the Court accepts the Commonwealth's argument that the concept has only recently been applied to breathalyzer testing. Still, according to Ms. O'Meara, OAT actually does calculate a measurement uncertainty regarding its calibrations of 7% by drawing on historical OAT data regarding system error (5%) and adding it to the dry gas manufacturer's margin of error as reported on its certificates of analysis (2%).17 She also credibly testified that "traceability" has different meanings depending on the scientific application, and that OAT traces such materials as the dry gas it uses through manufacturer information on the cylinder. The manufacturer maintains further records that make the substance traceable to its origins. Neither of these issues causes the Court particular concern with respect to OAT's procedures and any impact they may have on the reliability of Alcotest 9510 results.

The Court is not as sanguine with respect to OAT protocols. The defendants contend that OAT protocols, to the extent they exist, do not comport with scientific standards.

Ms. Arvizu credibly testified as to the reasons why scientific results generated in a setting that has no documented, validated, standardized procedures cannot be considered reliable. Ms. O'Meara agreed in substance, testifying that "reliability of lab results depends on policies and procedures."

When Ms. O'Meara became the supervising scientist at OAT, there were no formal, written policies in place covering the duties and responsibilities of OAT scientists or the management of the equipment and materials under OAT care. Nor were there written protocols formally standardizing testing and calibration procedures to be followed by the lab's scientists. Under her leadership, the laboratory began to establish written policies to formally direct and document operational procedures. From September 12, 2012 to May 18, 2016, the following protocols were promulgated: Simulator Testing Protocol, Version 1.0 (September 12, 2012), Solution Protocol, Version 1.0 (September 12, 2012), Protocol for testing Dry Gas Standards Version 1.0 (September 12, 2012), Initial Set-Up Procedures for the Draeger Alcotest 9510, Version 1.0 (November 12, 2012), Solution Protocol, Version 2.0 (November 4, 2013), Dry Gas Standards Verification, Version 2.0 (November 4, 2013), Certificate of Calibration Procedure for the Alcotest 9510, Version 1.0 (September 15, 2014), Office of Alcohol Testing Administrative Manual, Version 1.0 (May 25, 2014), Certificate of Calibration Procedure for the Alcotest 9510, Version 2.0 (May 18, 2016). Each of these protocols sets forth, with varying degrees of specificity, a standardized, step-by-step approach to the topic it covers.

According to Ms. O'Meara, prior to these written guidelines, OAT protocols consisted of worksheets with checkboxes used by scientists for particular tasks. The worksheets typically had additional data reflecting a scientist's work stapled or paper clipped to it. An example of such a worksheet is part of the record evidence (a silhouette of a paper clip is visible on the copy marked as an Exhibit 88). Absent from these forms, however, is a variety of important items, such as the permissible tolerance range of the IR and EC sensors for the annual calibration check. Ms. O'Meara testified that this type of information was made known through "word of mouth around the lab." She testified that procedures with respect to preparing breathalyzer devices for deployment into the field, testing of solutions and dry gases, verification of standards received from outside suppliers, annual certification, administrative procedures, and quality control were all informally shared in undocumented meetings of scientists assigned to the laboratory. The Court credits Ms. Arvizu's testimony that, during the relevant time period, the scientific community required written protocols for accepting the presumptive reliability of calibration laboratories. This standard clearly was not met. Despite Ms. O'Meara's attempt to impute some sense of orderliness and consistency to the manner in which the worksheets were created and catalogued, the Court does not accept the proposition that they functionally equated to written protocols. In the absence of written protocols, it cannot be assumed that any particular calibrator understood or routinely applied the proper standards in calibrating a device. Based upon the evidence presented, the Court finds that, although the necessary pieces were gradually falling into place as protocols steadily were developed, the Commonwealth has not shown that OAT had a scientifically reliable methodology for calibrating the Alcotest 9510 prior to the promulgation of the Certificate of Calibration Procedures for the Alcotest 9510 on September 14, 2014.

The deployment of the Alcotest 9510 breathalyzer to Massachusetts law enforcement agencies began in June, 2012. OAT completed roll-out of the device in August, 2012. Currently, there are approximately 350 Alcotest 9510 breathalyzer machines in the field. Each of these devices was calibrated by OAT according to Massachusetts specifications before its delivery to a local police department and requires calibration certification annually. According to Draeger representative Burkhard Stock's testimony, "if an instrument is not calibrated correctly annually, it will not work in the field." Without demonstrating a scientifically sound methodology, the Commonwealth cannot convince the Court that Alcotest 9510 devices deployed or last certified by OAT prior to September 14, 2014 were calibrated routinely in a manner that would produce scientifically reliable results. Accordingly, any Alcotest 9510 BAC result from a device calibrated and last certified by OAT between June, 2012 and September 14, 2014 presumptively is excluded from use by the Commonwealth in any criminal prosecution. That is not to say that the Commonwealth is precluded from presenting witnesses, presumably calibrating scientists from OAT, on a case-by-case basis, to demonstrate to a trial judge that the BAC result in a particular case is the product of a properly calibrated instrument. As to any Alcotest 9510 calibrated and certified after September 14, 2014, the Court finds that OAT's protocols, while remaining a work in progress, were sufficiently documented, validated, and standardized such that any results produced by those devices were the product of scientifically reliable methodology.

V. Conclusion

After weighing all of the credible evidence presented during the Daubert-Lanigan hearing and considering the applicable law, the Court finds as follows:

1. the Alcotest 9510 breathalyzer device operates in a manner that produces scientifically reliable BAC results;

2. the source code underlying the Alcotest 9510 breathalyzer device was developed and implemented in a manner that produces scientifically reliable BAC results;

3. the theory of blood-to-breath ratio underlying the algorithmic functions used by the Alcotest 9510 to produce BAC results remains sound science;

4. the methodology employed by OAT from September 14, 2014 to the present produces scientifically reliable BAC results;

5. the annual certification methodology employed by OAT from June, 2012 to September 14, 2014, based upon the evidence presented, did not produce scientifically reliable BAC results; however, the Commonwealth may demonstrate to the trial judge, on a case-by-case basis, that a particular Alcotest 9510 was calibrated and certified using scientifically reliable methodology, and thus that a particular BAC result is scientifically reliable.

Accordingly, the Court **DENIES** the consolidated defendants' Motion to Exclude Breath Alcohol Content Percentage Results Using the Alcotest 9510 and Any Opinion Testimony for any breathalyzer results from a machine calibrated and certified

after September 14, 2014, but **ALLOWS** the motion as to any results produced by a device calibrated and certified between June of 2012 and September 14, 2014, subject to the possibility of a case-by-case demonstration of the reliability of OAT's calibration of a particular device to a trial judge in the court in which the Commonwealth seeks to offer the result as evidence.

February 16, 2017

So Ordered,

Robert A. Brennan
Justice of the District Court

EXHIBIT 10O—Memorandum of Decision on Consolidated Defendants' Motion to Compel and Impose Sanctions, *Commonwealth v. Ananias*, No. 1248CR1075 (Mass. Dist. Ct., Boston Mun. Ct. Jan. 9, 2019) (*Ananias II*)

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

BOSTON MUNICIPAL AND DISTRICT COURT DEPARTMENTS
DOCKET NOS. 1248 CR 1075, 1201 CR 3898, and others

COMMONWEALTH

v.

EVANDO ANANIAS, CHRISTIAN FIGUEROA, AND OTHERS

MEMORANDUM OF DECISION ON CONSOLIDATED DEFENDANTS' MOTION TO COMPEL AND IMPOSE SANCTIONS

On February 16, 2017, this Court issued a Memorandum of Decision denying in part and allowing in part a motion filed by defendants of the Boston Municipal Court and District Court Departments charged with Operating a Motor Vehicle while Under the Influence of Intoxicating Liquor seeking, in limine, to exclude breath test results produced by the Alcotest 9510, a breathalyzer instrument developed by Draeger Safety Diagnostics, Inc. (Draeger). In sum, the Court determined that (1) the Alcotest 9510 breathalyzer device operates in a manner that produces scientifically reliable blood alcohol content (BAC) results; (2) the source code underlying the Alcotest 9510 breathalyzer device was developed and implemented in a manner that produces scientifically reliable BAC results; (3) the theory of blood-to-breath ratio underlying the algorithmic functions used by the Alcotest 9510 to produce BAC results remains sound science; (4) the methodology employed by the Massachusetts State Police Office of Alcohol Testing (OAT) from September 14, 2014 to the present produces scientifically reliable BAC results; and (5) the annual calibration and certification methodology employed by OAT from June 2011 to September 14, 2014 did not produce scientifically reliable BAC results, but the Commonwealth could demonstrate to the trial judge, on a case-by-case basis, that a particular Alcotest 9510 was calibrated and certified using scientifically reliable methodology, and thus that a particular BAC result is scientifically reliable. *Commonwealth v. Ananias, et. al,* 1248 CR 1075 (February 16, 2017). Following this decision, District and Boston Municipal Court trial judges held hearings with respect to the calibration and certification methodology employed by OAT where the Commonwealth sought to introduce evidence of breath test results that were produced between June 2011 and September 14, 2014. On August 2, 2017, during one such hearing at Taunton District Court, the Court (Brennan,

M., J.) determined that OAT had failed to disclose exculpatory worksheets demonstrating that the particular Alcotest 9510 at issue had failed certain calibration tests. *Commonwealth v. Harvey* (1431 CR 2259); *Commonwealth v. Derochers* (1431 CR 1085); and *Commonwealth v. Simmons* (1431 CR 2722). This confirmed the consolidated defendants' suspicion, based upon their comparison of the number of worksheets produced during the *Ananias* litigation to the significantly larger number of the same type of documents provided in response to a subsequent Freedom of Information Act (FOIA) request, that OAT had failed to produce hundreds of similar exculpatory documents.

On August 19, 2017, the consolidated defendants filed this Motion to Compel and Impose Sanctions. The Commonwealth filed a Notice of Discovery on August 31, 2018, and produced the materials identified by the defendants as having been withheld. In a series of additional filings, the Commonwealth asserted that OAT had not made them aware of these documents, despite prosecutors' best efforts to obtain all required discovery. On August 31, 2017, Secretary of Public Safety Daniel J. Bennett directed the Executive Office of Public Safety and Security (EOPSS) to investigate OAT's discovery practices. In an extensive report dated October 16, 2017, EOPSS identified various instances of intentional withholding of exculpatory evidence, blatant disregard of court orders, and other errors, all underscored by "a longstanding and insular institutional culture that was reflexively guarded" at OAT. *Exhibit 28*. In conjunction with this report, by letter to Colonel Richard McKeon of the Massachusetts State Police, Secretary Bennett directed the State Police to take certain actions with respect to the management and operation of OAT, with particular focus on its discovery practices. Meanwhile, and over the course of the ensuing year, tens of thousands of documents not previously provided to the consolidated defendants were turned over by prosecutors. During this time, the parties also engaged in negotiations to resolve the issues raised by the defendants' Motion for Sanctions. The parties reached a tentative agreement on the majority of these issues, and on August 14, 2018 presented a Joint Stipulation of Facts and Recommended Resolution to the Defendants' Motion for Sanctions for the Court's approval. As part of this Stipulation, the parties agreed (1) to expand the period for which Alcotest 9510 BAC results are presumptively excluded from use by the Commonwealth at trial; (2) that the Commonwealth will not seek to admit such results at trial for this enlarged period in any offense alleging a violation of G.L. c. 90 or 90B, except in cases alleging motor vehicle homicide by operation under the influence, operating under the influence causing serious bodily injury, and operating under the influence of liquor, 5th offense or greater; and (3) that the period of presumptive exclusion would be enlarged, dating back to June 2011, when the Alcotest 9510 was first introduced in Massachusetts. The parties could not agree on the end-date of this enlarged period: the Commonwealth contends that it should correspond with the defendants' receipt of all failed or incomplete worksheets on August 31, 2017, whereas the defendants assert that it should extend until OAT obtains accreditation from the ANSI-ASQ National Accreditation Board (ANAB). To resolve this dispute, the parties agreed to submit the issue to the Court and to be bound by its decision.

As part of this agreement, the parties also sought to notify any person who may have received an adverse criminal disposition as a result of a breath test administered on

the Alcotest 9510 during the applicable time period. Although the proposed Stipulation was widely reported and available on both print and electronic media, this formal notification process proved to be more complicated than anticipated. Ultimately, all consolidated defendants who were represented by counsel with valid email addresses were afforded an opportunity to comment on the Stipulation. The Court received two responses. *Exhibits 2 and 3*. On November 5, 2018, the Court formally approved the parties' Joint Stipulation of Facts and Recommended Resolution to the Defendants' Motion for Sanctions. On the unresolved issue, the Court heard testimony and received thirty-two exhibits into evidence during a three day hearing in November 2018 at the Salem District Court. The Court also was given access to view OAT's eDiscovery portal. The hearing concluded on November 26, 2018. At the defendants' request, the parties were given until December 10, 2018 to file additional memoranda.

Findings of Fact

A. Stipulated Facts

The Parties' Joint Stipulation of Relevant facts and Recommended Resolution to the Defendants' Motion for Sanctions contains the following Stipulation of Relevant Facts, which the Court incorporates into this decision:[1]

[1] For the sake of clarity, the Court has redacted footnotes and exhibit references contained in the original document.

1. The Office of Alcohol Testing (OAT) is a unit within Massachusetts State Police Crime Laboratory.

2. At several hearings, Melissa O'Meara and Kerry Collins represented to the Court that the certification/calibration worksheets were synonymous with the written protocols, prior to the promulgation of version 1.0 of the annual certification/calibration written protocols.

3. The Court ordered OAT to produce a copy of all of the annual certification/calibration worksheets used to perform the annual calibration of 9510 units.

4. The OAT produced 1,976 worksheets as single-page PDF documents, and represented that these were all of the materials that the court ordered produced.

5. The 1,976 worksheets documents included 11 instances of a failed annual calibration, also referred to as "incomplete worksheets".

6. There were an additional 432 worksheets that represented failures of the annual calibration process.

7. The 432 failed worksheet were intentionally withheld by the OAT.

8. The OAT did not inform Ananias prosecutors, the Ananias defense attorneys, or the Court that they were withholding the 432 worksheets.

9. The withheld failing annual calibration worksheets were exculpatory materials.

10. The 432 withheld worksheets were provided to the defendants' counsel on August 31, 2017 – along with approximately 10,000 other documents.

11. In addition, in response to the consolidated defendants' motion, the Commonwealth provided "curve data" on October 24, 2017.

12. The OAT further provided approximately 30,000 additional documents on December 17, 2017.

13. The production of documents on August 31, 2017 included the production of the pages that were attached to each worksheet by either a paper clip or a staple, as was noted in the February 2017 Ananias decision.

14. The technical leader of the OAT, Melissa O'Meara was a witness for the Commonwealth in the Ananias matter, and was terminated by EOPPS in October 2017, within days of the release of the EOPPS report on Discovery irregularities at OAT.

15. The OAT section of the Massachusetts State Police Crime Laboratory will apply for accreditation by the ANSI-ASQ National Accreditation Board (ANAB) by August 1, 2019.

16. OAT has a mechanism to provide some of the information maintained in the OAT 9510 database, and that mechanism is referred to as the eDiscovery Portal.

17. The eDiscovery Portal was first available to the public on August 16, 2016, and notification was made on October 7, 2016 by the State Police Crime Laboratory to the Massachusetts District Attorneys' Association and the Committee for Public Counsel Services.

18. The attorneys for the consolidated defendants maintain that they were unaware of the existence of the portal prior to this Court's February 2017 order.

19. A second generation of the eDiscovery Portal is scheduled for release at the end of the summer, 2018. This version will include the failing worksheets and the 10,000 documents provided to the Ananias defendants in August 31, 2017.

20. From September 2017 to the present, the Ananias prosecutors have been in contact with all of the District Attorneys' offices, through multiple conferences calls. The Ananias prosecutors have the authority to negotiate on behalf of all District Attorneys' Offices throughout the Commonwealth.

21. The Executive Office of Public Safety conducted an investigation into discovery practices at the Office of Alcohol Testing, shortly after filing of the Motion for Sanctions in this matter. The parties agree to stipulate to the facts contained therein. *Exhibit 1* (see Appendix).

B. Additional Findings of Fact

During the November 2018 hearing, the court heard testimony from three witnesses, two on behalf of the consolidated defendants and one for the Commonwealth. Attorney Thomas Workman testified regarding his role as the defense team's computer

forensic expert. His testimony focused on the discovery process and highlighted the difficulty the defendants experienced receiving, locating, and identifying particular documents due to the disorganization at OAT and the dysfunction between OAT and prosecutors. He specifically cited the tens of thousands of documents provided by the Commonwealth at various intervals since August 2017, which he described as being uncatalogued or indexed, and characterized as being produced in a chaotic and confusing manner. Although Mr. Workman must be credited for the persistence and diligence that uncovered OAT's intentional withholding of significant, exculpatory documents, the court does not fully credit his testimony. Mr. Workman's testimony was colored, at least in part, by his obvious disdain and antipathy for OAT, however well-founded it may have been in this instance. Of particular concern was his testimony regarding the OAT eDiscovery portal. Mr. Workman maintained that he was wholly unaware of this portal prior to the January 2107 *Daubert/Lanigan* hearing in this case. Yet, when confronted with evidence that he had accessed the portal months prior to the hearing, Mr. Workman adamantly refused to allow for the simple possibility that he may have been mistaken. Instead, he testified that his wife, secretary, and deceased former secretary had access to his eDiscovery portal password, and intimated that it could have been one of them who accessed OAT's portal using his credentials. The court does not credit this testimony and finds that it substantially undermines Mr. Workman's testimony in this matter. The defendants' second witness, Janine Arvizu, testified via videoconference. She is the same expert on laboratory quality auditing who testified during the original Ananias proceedings. Here, she focused on the accreditation process and testified about various issues at OAT that, she opined, would remain obstacles to accreditation by a national body. As with her presentation in 2017, this Court found Ms. Arvizu's testimony to be credible on the whole. However, consistent with the Court's view at that time, Ms. Arvizu maintains a standard of review that "might be so high as to be unattainable." *Ananias*, 1248 CR 1075 at 26. The Court also views her testimony in this case through the lens of her lack of specific expertise in calibration laboratories as it relates to her assessment of OAT's readiness for accreditation, as well as her substantial reliance on Attorney Workman's reporting rather than her own review of discovery documents to draw her conclusions.

The Commonwealth's sole witness was Kristen Sullivan, the Chief Science Officer and Laboratory Director for the Massachusetts State Police Crime Laboratory. She testified in detail regarding the accreditation process, including her own role in ensuring that every unit under the State Police Crime Laboratory umbrella, other than OAT, has achieved accreditation by an outside, nationally recognized body. Director Sullivan outlined the steps OAT has taken to seek accreditation, and she testified about discovery practices at OAT as well as the Crime Lab's response to the 2017 EOPSS investigation into OAT practices. Although this Court fully credits Ms. Sullivan's testimony regarding the facts, it does not equally embrace all of the observations and opinions she proffered. Ms. Sullivan continues to oversee the operations at OAT, even if indirectly. She works with all of the people who were the subject of the EOPSS investigation and was interviewed as part of that probe. Thus, the Court is mindful that, despite her best intentions and efforts, Director Sullivan's analysis is inherently impacted by the fact that she is not a wholly independent witness.

Based upon these credibility determinations and upon consideration of the documentary evidence presented, the Court makes the following additional findings of fact:

22. The consolidated defendants, through their forensic expert, Thomas Workman, were aware of the existence of the OAT eDiscovery portal prior to the January 2017 *Ananias* hearing.

23. At the time of that hearing, the eDiscovery portal did not include any reference to the Massachusetts State Police Quality Assurance (QA) Manual. The QA Manual dictates procedures, instructions, and requirements for calibration and certification of the Alcotest 9510 breathalyzer. *Exhibit 24*. The QA was in existence at the time of the January 2017 *Ananias* hearing, but was not provided to the defendants as part of discovery.

24. The QA Manual contains different information than OAT's Quality Control (QC) Manual, which was furnished to the defendants before the January 2017 Ananias hearing. The QC Manual is a document that provides instructions to OAT employees primarily on topics such as storage and maintenance of various solutions and equipment used at the lab. *Exhibit 26*.

25. The QA Manual contains relevant material that would have assisted the defense in its examination of Melissa O'Meara regarding the reliability of OAT's scientific methodology. Its production was subject to discovery orders issued prior to the January 2017 hearing.

26. Although not specifically listed by the Commonwealth in its Notice of Discovery, the QA Manual was provided to the defendants in the August 31, 2017 discovery documents.

27. OAT's Calibration and Certification Protocols have not been subjected to a validation study. The laboratory has relied on performance checks to validate the protocols. The practice of relying on performance checks to validate results is consistent with the approach followed in other units of the State Police Crime Laboratory, all of which have achieved accreditation. To the extent that these performance checks fall short of external validation studies, the ANAB accreditation process will cure any such deficiencies.

28. Although the investigation into the discovery practices at OAT, and particularly into aspects of the discovery process related to the Ananias hearing and the role of certain OAT employees in intentionally withholding exculpatory information, likely would have benefitted from an outside agency perspective, the EOPSS investigation was thorough, detailed, comprehensive, and credible. It produced a critical analysis of the culture at OAT and uncovered enormously concerning practices that compromised criminal prosecutions and substantially interfered with the liberty interests, driving privileges, and employment opportunities of individual defendants.

29. After this investigation, EOPSS maintained oversight of OAT with respect to the discovery provided to the defendants in this case. To the extent that discovery materials produced on and after August 31, 2017 were voluminous, uncatalogued, unlabeled, or otherwise overwhelming, it was not the product of bad faith on the part of

EOPSS or the prosecutors. If anything, it was the result of EOPSS's effort to over-correct for OAT's prior intentional misconduct. Throughout this process, there remained a level of dysfunction in the communication between OAT and prosecutors with respect to discovery materials. However, the inability of the defendants to locate certain documents contained within the discovery was also a product of Mr. Workman's lack of expertise needed to search the discovery provided by OAT effectively.

30. As a result of the EOPSS investigation, on October 16, 2017, the Secretary of Public Safety directed the State Police to take the following actions: (1) expand the reach of the Crime Laboratory's Case Management Unit (CMU), which adheres to protocols that specifically delineate how to respond to discovery requests, to cover OAT; (2) require OAT to eliminate its longstanding policy of requiring court orders before complying with "non-standard" discovery requests from prosecutors, and instead comply with all document requests from prosecutors' offices; (3) enhance and expand OAT's eDiscovery portal; (4) obtain ANAB accreditation within twelve months; and (5) conduct enhanced training for OAT employees, focusing on identification of and duties regarding exculpatory information.

31. The State Police CMU does not process OAT discovery requests, nor has OAT developed its own discovery protocols. OAT has no formal, uniform policy with respect to discovery requests. OAT's failure to produce 432 incomplete Alcotest 9510 worksheets and the QA Manual prior to the January 2017 hearing was the result of the lack of such a discovery policy. There is nothing currently in place at OAT to ensure that discovery requests are being handled properly and in a uniform fashion.

32. The OAT eDiscovery portal has been expanded significantly in the past year. It is accessible and easily navigated. All of the information contained in the "OAT records" typically found in court case files is available on the eDiscovery portal. The portal allows the user to search for breath test records, breathalyzer certifications, and periodic test records. It has a reference section that includes Alcotest 9510 record information, Officer in Charge guides, Breath Test Operator Training manuals, and OAT protocols. It also has a section that provides updates – the most recent, dated 10/3/18, deals with an update to the "uncertainty of measurement" section of the breath test certification summary.

33. OAT is not ANAB accredited. Currently, twenty-two measurement laboratories in twelve states in the United States are accredited.

34. The ANAB accreditation process involves ten steps: (1) application to ANAB; (2) preparation of a "conformance file" for the lead assessor assigned to review the application; (3) e-dialogue with the lead assessor regarding the conformance file; (4) on-site assessment (once the conformance file is complete); (5) closing report (a "punch list" of non-conformities that must be addressed by the lab); (6) remedial proposals by the lab; (7) objective proof by the lab of remediation; (8) ANAB board review; (9) certificate of accreditation; (10) annual "surveillance" visits.

35. OAT has worked diligently toward applying for accreditation, particularly since the directives issued by the Director of Public Safety. In order to apply for accreditation, OAT must have certain technical and administrative reporting requirements in

place. Preparation of the application involves a standard-by-standard review to ensure that all protocols meet official requirements. At the time of this hearing, all technical components were in place; however, the lab was still addressing administrative aspects of the application. It is expected that its application to ANAB will be finalized by February 2019.

36. Retired Superior Court Justice Jane Haggerty was hired to evaluate OAT's training, particularly as to obligations regarding exculpatory information, and to make recommendations to enhance it. She has completed her assessment and discussed her findings with the Secretary of Public Safety and the Director of the Crime Laboratory.

37. On August 1, 2018, Director Sullivan sent a letter to all District Attorneys, the Boston Bar Association, all Chiefs of Police, and the Committee for Public Counsel Services outlining the activity of OAT over the course of the prior year, particularly in response to the February 16, 2017 *Ananias* decision, the October 2017 EOPSS investigation, and Judge Haggerty's recommendations. *Exhibit 31*.

Applicable Law

Under Mass R. Crim. P. 14(c)(1), in response to noncompliance with a discovery order, "the court may make a further order for discovery, grant a continuance, or enter such orders as it deems just under the circumstances." In general, "(s)anctions are remedial in nature . . . (and) should be tailored appropriately to cure any prejudice resulting from a party's noncompliance and ensure a fair trial." *Commonwealth v. Carney*, 458 Mass. 418, 427 (2010). However, when the noncompliance is intentional and the information withheld exculpatory, a court may also consider fashioning a remedy designed "to discourage government agents from such deliberate and insidious attempts to subvert a defendant's right to a fair trial." *Commonwealth v. Jackson*, 391 Mass. 749, 754 (1984). The remedy must not be punitive, but under certain circumstances may be prophylactic, if narrowly tailored to remedy the particular misconduct. See CPCS v. AG, 480 Mass. 700, 729-33 (2018); *Commonwealth v. Cronk*, 396 Mass 194, 198-99 (1985).

Discussion, Rulings and Orders

It is uncontested that exculpatory materials in the form of 432 failed calibration worksheets were intentionally withheld from the consolidated defendants by OAT. The Court has also determined that the Quality Assurance Manual, which directly addresses calibration procedures and as such was material to the issue of the reliability of OAT's scientific methodology, was not disclosed, despite being subject to discovery orders. The Secretary of Public Safety and the Executive Office of Public Safety and Security found, and the Commonwealth concedes, that "OAT leadership made serious errors of judgment in its responses to court-ordered discovery, errors which were enabled by a longstanding culture that was reflexively guarded . . . and which was inattentive to the legal obligations borne by those whose work facilitates criminal prosecutions." *Exhibit 28, p.1*. The degree to which OAT's misconduct impeded the consolidated defendants' ability to obtain a full, fair, and complete *Daubert/Lanigan* hearing is difficult to quantify. It certainly was not negligible. Similarly,

the extent to which consideration of this withheld evidence in context, during real time cross-examination of Melissa O'Meara, would have impacted this Court's qualitative assessment of OAT's methodology cannot be determined retrospectively. It is noteworthy, however, that the Court fully credited Ms. O'Meara's testimony in its decision of February 16, 2017. Ultimately, OAT's misconduct resulted in a deprivation of the consolidated defendants' due process rights. *See CPCS*, 480 Mass. at 730, *citing Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Commonwealth v. Daniels*, 445 Mass. 392, 401, 407-09 (2005) (Commonwealth's failure to provide exculpatory witness statement violated defendant's right to due process). Moreover, the negative impact of EOPSS's findings regarding OAT's approach to exculpatory information on public trust and confidence in the fairness of the system and the integrity of the process cannot be overstated. It is these harms in the aggregate that this ruling must remedy through the imposition of sanctions. Thus, this Court's mandate, if not simple, is clear: to fashion a remedy that not only addresses the particular wrong in this case, but that also best ensures and restores confidence that OAT's methodology produces scientifically reliable breathalyzer results and that OAT is fully disclosing those instances where its ability to do so may be compromised.

The Commonwealth argues that a fair operative date for the enlarged period of presumptive exclusion of breathalyzer tests in criminal prosecutions coincides with the date that the failed calibration worksheets were disclosed, August 31, 2017. It asserts that the voluntary self-sanction of suppressing the vast majority of evidential breath tests for a six-year period is more than sufficient. I disagree. Indeed, the sanctions contemplated by agreement of the parties already go beyond the most narrowly remedial. In this case, an appropriate remedy must include, at a minimum, substantial compliance by OAT with the directives imposed on it by the Director of Public Safety. The Commonwealth has demonstrated OAT's compliance with only two of these five directives. Nor are these requirements alone, even if fulfilled, sufficient to provide the level of transparency necessary to remedy the harm to the criminal justice system. Where, as here, the details of government misconduct have spread beyond the legal community, "the court must also act, within the bounds of the law, to restore the public's faith in the integrity of the courts." *Bridgeman v. District Attorney of Suffolk County*, 476 Mass. 298, 337 (2017) (Hines, J. dissenting).

The consolidated defendants assert that the misconduct in this case was so egregious that the most just remedy is to exclude breathalyzer results until OAT achieves formal accreditation. They posit that they were denied a full and fair *Daubert/Lanigan* hearing and thus, by definition, a fair trial. From the defendants' perspective, OAT cannot be trusted until fully accredited by a national organization. Although the defendants' position with respect to the substantive impact of OAT's misconduct on the right to a fair hearing is justified, their argument goes too far. In its February 2017 Ananias decision, this Court found that "(a)lthough accreditation is a laudable goal, the Court is not convinced that its absence inherently undermines the reliability of OAT's work." *Ananias*, 1248 CR 1075 at 2. The Court stands by this conclusion, while recognizing that the context is now different.

In order to remedy the prejudice caused by OAT's misconduct against the consolidated defendants and the resulting damage to the criminal justice system, OAT must first

demonstrate that its current methodology will produce scientifically reliable BAC results. Mindful that OAT, by EOPSS's mandate, must ultimately become accredited, the Court is satisfied that this aspect of prejudice can be mitigated by OAT formally filing its application for accreditation, as long as the Commonwealth shows that the application is substantially likely to be approved.[2] *Cf. Commonwealth v. Baldwin*, 385 Mass. 165, 177 (1982) (judge may exclude evidence withheld in violation of discovery obligation as a sanction). The application itself requires OAT to demonstrate that it is comporting with ANAB standards as defined by the ANAB Accreditation Requirements manual. *Exhibit 21*. Yet, this alone is not a sufficient panacea. OAT must also address the discovery practices that contributed to its misconduct. Specifically, OAT must promulgate formal discovery protocols consistent with those employed by the State Police Crime Management Unit. These protocols must include a definition of exculpatory evidence and an explanation of the obligations pursuant to such evidence. *See CPCS*, 480 Mass. at 729-734 (2018). Alternatively, the Court will be satisfied by the Commonwealth's representation that OAT's discovery is being handled by the State Police CMU. Regardless, the Commonwealth must certify that all OAT staff has been trained on the obligations relating to exculpatory evidence. In the interest of transparency and in the spirit of the Director of Public Safety's October 16, 2017 directives, OAT's application for accreditation must be available for viewing on the eDiscovery portal, along with the ANAB Accreditation Requirements manual. At each stage of the accreditation process, updates confirming OAT's compliance must be posted on the portal. In addition, OAT's discovery protocol, once promulgated, must be uploaded onto the eDiscovery portal, along with any discovery training materials. The Court finds that making this information available on an electronic public portal will contribute to the restoration of confidence in the reliability of the scientific results produced by OAT, and thus further remedy the prejudice caused by OAT's violation of its obligations.

[2] For example, the Commonwealth may provide copies of applications filed by already accredited measurement labs that are substantially similar to OAT's application.

Accordingly, the Court orders that the period of presumptive exclusion of Alcotest 9510 breathalyzer results in such criminal prosecutions as have been agreed by the parties shall be extended until the Commonwealth, upon motion to this Court[3], demonstrates:

[3] Unless specifically requested otherwise, the Court will decide this motion on papers submitted by the parties.

1. that OAT has filed an application for accreditation with ANAB that is demonstrably substantially likely to succeed;

2. that OAT's accreditation application has been uploaded onto the eDiscovery portal;

3. that the ANAB Accreditation Requirements manual is available for viewing on the eDiscovery portal;

4. that OAT has promulgated discovery protocols consistent with those employed by the State Police Case Management Unit, including a definition of

exculpatory evidence and an explanation of the obligations pursuant to such evidence; or, in the alternative, that the CMU is responsible for processing OAT's discovery;

5. that OAT's discovery protocol has been uploaded to the eDiscovery portal;

6. that all OAT employees have received training on the meaning of exculpatory information and the obligations relating to it; and

7. that all written materials used to train OAT employees on discovery, and particularly on exculpatory evidence, have been uploaded to the eDiscovery portal.

If all of these requirements have been met, the Court may still, upon motion of the consolidated defendants, reinstate the period of presumptive exclusion if OAT fails to update the progress of its application for accreditation on the eDiscovery portal, or otherwise fails to make good faith efforts to gain accreditation. *See Parties' Joint Stipulation, Exhibit 1, p. 4 ("Accreditation of the Office of Alcohol Testing").*

January 9, 2019

So Ordered,

Robert A. Brennan
Justice of the District Court

APPENDIX

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. **DISTRICT COURT DEPARTMENT**
CONCORD DIVISION
NO. 1248CR001075

COMMONWEALTH

v.

EVANDO ANANIAS AND OTHERS

THE PARTIES' JOINT STIPULATION OF FACTS AND RECOMMENDED RESOLUTION TO THE DEFENDANTS' MOTION FOR SANCTIONS

Now come the parties in the above captioned matter and submit the following resolution to the Defendants' motion for sanctions to the court for its consideration. The parties have diligently conferenced the matter and hereby propose a series of measures which will bring the instant litigation to a close.

I. STIPULATION OF RELEVANT FACTS

1. The Office of Alcohol Testing (OAT) is a unit within the Massachusetts State Police Crime Laboratory.

2. At several hearings, Melissa O'Meara and Kerry Collins represented to the Court that the certification/calibration worksheets[4] were synonymous with the written protocols, prior to the promulgation of version 1.0 of the annual certification/calibration[5] written protocols.

[4] At times these were described as "calibration worksheets", at other times they were described as "certification worksheets", regardless of the nomenclature an exemplar is appended as Exhibit 1.

[5] See FN1.

3. The Court ordered OAT to produce a copy of all of the annual certification/calibration[6] worksheets used to perform the annual calibration of 9510 units.

[6] See FN1.

4. The OAT produced 1,976 worksheets as single-page PDF documents, and represented that these were all of the materials that the court ordered produced.

5. The 1,976 worksheet documents included 11 instances of a failed annual calibration, also referred to as "incomplete worksheets".

6. There were an additional 432 worksheets that represented failures of the annual calibration process.

7. The 432 failed worksheets were intentionally withheld by the OAT.

8. The OAT did not inform the Ananias prosecutors, the Ananias defense attorneys, or the Court that they were withholding the 432 worksheets.

9. The withheld failing annual calibration worksheets were exculpatory materials.

10. The 432 withheld worksheets were provided to the defendants' counsel on August 31, 2017 – along with approximately 10,000 documents.

11. In addition, in response to the consolidated defendant's motion, the Commonwealth provided "curve data" on October 24, 2017.

12. The OAT further provided approximately 30,000 additional documents on December 17, 2017.

13. The production of documents on August 31, 2017 included the production of the pages that were attached to each worksheet by either a paper clip or a staple, as was noted in the February 2017 Ananias decision.[7]

[7] *Ananias* at 29

14. The technical leader of the OAT, Melissa O'Meara, was a witness for the Commonwealth in the Ananias matter, and was terminated by EOPPS in October of 2017, within days of the release of the EOPPS report on Discovery irregularities at OAT.

15. The OAT section of the Massachusetts State Police Crime Laboratory will apply for accreditation by the ANSI-ASQ[8] National Accreditation Board (ANAB) by August 1, 2019.

[8] American National Standards Institute – American Society for Quality (ANSI-ASQ).

16. OAT has a mechanism to provide some of the information maintained in the OAT 9510 database, and that mechanism is referred to as the eDiscovery Portal.

17. The eDiscovery portal was first available to the public on August 16, 2016, and notification was made on October 7, 2016 by the State Police Crime Laboratory to the Massachusetts District Attorneys' Association and the Committee for Public Counsel Services.

18. The attorneys for the consolidated defendants maintain that they were unaware of the existence of the portal prior to this Court's February 2017 order.

19. A second generation of the eDiscovery Portal is scheduled for release at the end of the summer, 2018. This version will include the failing worksheets and the 10,000 documents provided to the Ananias defendants in August 31, 2017.

20. From September 2017 to the present, the Ananias prosecutors have been in contact with all of the District Attorney's offices, through multiple conference calls. The Ananias prosecutors have the authority to negotiate on behalf of all District Attorneys' Offices throughout the Commonwealth.

21. The Executive Office of Public Safety conducted an investigation into discovery practices at the Office of Alcohol Testing, shortly after the filing of the Motion for

Sanctions in this matter. The parties agree to stipulate to the facts contained therein, a copy of which is appended to this pleading as exhibit 2.

II. ACCREDITATION OF THE OFFICE OF ALCOHOL TESTING

The Commonwealth agrees that OAT will apply for ANSI-ASQ National Accreditation Board accreditation by August 1, 2019. Following the application for accreditation, the Commonwealth represents that OAT will diligently pursue the completion of the accreditation process in good faith. OAT will report through the Commonwealth the status of its accreditation process at intervals deemed appropriate by this Court. If this Court finds that OAT's efforts at gaining accreditation are not being made in good faith, the Commonwealth agrees to suspend the use of the 9510 instrument at trial until such time as the Court is satisfied by the progress of OAT.

III. AGREED DISCOVERY PRACTICES

Since the commencement of the instant litigation, OAT has designed and developed an expanded eDiscovery portal which will streamline and improve the provision of discovery materials to the various District Attorneys' Offices. Specifically, the Commonwealth represents that the eDiscovery portal will allow for equal access to the following items for all users, exemplars of each are attached as exhibits:

1. Breath test searches (serial number and location), see Exhibit 3;

2. Certification/calibration[9] records, see Exhibit 4;

[9] See FN1.

3. Test types 1, 2, or 3 for a given 9510 instrument or 9510 location, see Exhibit 5;

4. Complete instrument files, including repair records, calibration documentation and backup documentation within the certification/calibration[10] procedure, which will note when documents are missing, see Exhibit 6;

[10] See FN1.

5. Data dictionaries with an explanation for each column heading, see Exhibit 7;

6. Certificates of analysis for ethanol solutions, see Exhibit 8;

7. Certificates of analysis for dry-gas standards, see Exhibit 9;

8. Message codes; see Exhibit 10;

9. Simulator calibration information, see Exhibit 11;

10. Barometer calibrations, see Exhibit 12;

11. All current and prior versions of laboratory protocols, see Exhibit 13;

12. Breath Test Operator (hereinafter "BTO") training materials and Officer in Charge (hereinafter "OIC") training materials, see Exhibit 14; and

13. A list of report types, generated by the 9510 instrument, see Exhibit 15.

The Commonwealth further agrees to provide the following discovery upon request:

1. Raw data (e.g., curve data, type 4 tests, and mis-try data), available on a quarterly basis, to be disseminated to the various District Attorneys, see Exhibit 16;

2. List of certified BTOs, see Exhibit 17; and

3. BTO online training program, see Exhibit 18.

Lastly, the Commonwealth agrees that the MSP Crime Laboratory will amend the terms of use of its eDiscovery portal to advise the user that records may be amended when errors are discovered.

The Commonwealth agrees not to oppose a discovery motion for the full 9510 database, in backup format as it was supplied on October 24, 2017, provided that an appropriate protective order is filed that prohibits the disclosure of CORI data, passwords, and IP Addresses.

IV. EXPANSION OF THE COURT'S FEBRUARY 2017 ORDER

On February 16, 2017, this Court ordered that the defendants' *Daubert* motion be allowed "as to any results produced by a device calibrated and certified between June of 2011 and September 14, 2014[11], subject to the possibility of a case-by-case demonstration of the reliability of OAT's calibration of a particular device to a trial judge in the court in which the Commonwealth seeks to offer the result as evidence." *Commonwealth v. Ananias, et. al., 1248CR001075, 32 (2017)*. The parties agree to expand the period for which the instrument shall be deemed "presumptively . . . excluded" from use by the Commonwealth. *Id*. at 31. The Commonwealth further agrees not to seek to establish the reliability of OAT's calibration and certification on a case-by-case basis in this enlarged period at trial in any offense alleging a violation of G.L. c. 90, or 90B except in cases alleging motor vehicle homicide by operation under the influence, in violation of G.L. c. 90, § 24G; operating under the influence causing serious bodily injury, in violation of G.L. c. 90, § 24L; and operating under the influence of liquor as a 5th or greater offense, in violation of G.L. c. 90, § 24(1)(a)(1).[12]

[11] The parties have always agreed that, consistent with the reasoning in the Court's Memorandum of Decision the beginning date of this period is June 2011.

[12] The Commonwealth likewise reserves the right to establish the reliability of OAT's calibration and certification in cases alleging Manslaughter by motor vehicle, in violation of G.L. c. 265, § 13½.

The parties have good-faith disagreements as to the date to which this period should be enlarged and agree to submit the question for a hearing. The parties agree to be bound by the decision of this Court. The parties agree that the earliest date at which said period shall end will be August 31, 2017, and the latest date shall be the date at which OAT achieves accreditation.

V. COSTS

The Defendants wish to seek an order of costs as a sanction against OAT. The parties agree that the Defendants should be afforded the opportunity to so petition with ade-

quate notice to the appropriate parties with an opportunity to respond to the petition. A full accounting of the defendant's time will be provided at the conclusion of the litigation.

VI. IDENTIFICATION AND NOTICE

The Commonwealth agrees to provide written notice of the terms of this agreement to defendants who were charged with an operating under the influence offense, submitted to a breath test administered on a Draeger 9510 instrument, and received an adverse disposition between June 1, 2011 and August 31, 2017. Such notice will be drafted by the defense team with the assent of the Commonwealth, and will be mailed to affected defendants at the addresses which they have on file with the registry of motor vehicles for those who had a valid Massachusetts driver's license at the time of their breath-test, and to the address contained in the OAT 9510 database for those without a Massachusetts drivers license or who have an out of state driver's license. Notice will also be provided via electronic mail to the last attorney of record for each such case. Said notice shall not be construed as a concession or admission that any individual is entitled to any relief. The identification and notice provision shall be developed and filed with the Court and is subject to the Court's approval.

VII. APPLICATION OF JUDICIAL ESTOPPEL

All parties agree to be bound by the foregoing proposal and recognize that the doctrine of judicial estoppel binds them to its terms. See *Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634 (2005). All parties rely upon the agreements made herein to their detriment by foregoing an opportunity for a full hearing and adjudication before this Court. The parties further agree that all rights are reserved relative to the filing and argument of all speedy trial motions to dismiss pursuant to Mass. R. Crim. P. 36, our general laws, the Massachusetts Declaration of Rights, or the Constitution of the United States.

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EXHIBIT 10P—Memorandum of Decision on Commonwealth's Motion to Admit Breath Test Results, *Commonwealth v. Ananias*, No. 1248CR1075 (Mass. Dist. Ct., Boston Mun. Ct. July 29, 2019) (*Ananias III*)

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

BOSTON MUNICIPAL AND DISTRICT COURT DEPARTMENTS
DOCKET NOS. 1248 CR 1075, 1201 CR 3898, and others

COMMONWEALTH

v.

EVANDO ANANIAS, CHRISTIAN FIGUEROA, AND OTHERS

MEMORANDUM OF DECISION ON COMMONWEALTH'S MOTION TO ADMIT BREATH TESTS RESULTS

On January 9, 2019, following a three day evidentiary hearing, this court issued a Memorandum of Decision on Consolidated Defendants' Motion to Compel and to Impose Sanctions. The Memorandum of Decision incorporated a Joint Stipulation of Facts and Recommended Resolution (the "settlement agreement"), which the Court had formally approved on November 5, 2018. Pursuant to the settlement agreement, breath tests administered on the Alcotest 9510 breathalyzer are presumptively excluded from use in criminal prosecutions from the time the machine was introduced in Massachusetts in June, 2011, until such time as this Court deems them admissible.[1] The sole issue addressed by the Court during this hearing was the end date of the enlarged period of presumptive exclusion of breath tests. The Commonwealth requested that all breath tests be excluded only through August 31, 2017 (the date on which defendants received all the failed or incomplete calibration worksheets that were intentionally withheld by OAT), whereas the consolidated defendants requested that the period of exclusion continue until OAT receives accreditation. The parties agreed to be bound by the Court's decision.

[1] Under the settlement agreement, the Commonwealth agrees not to seek to establish the reliability of OAT's methodology for the period of presumptive exclusion, except in cases alleging Motor Vehicle Homicide, Operating Under the Influence with Serious Bodily Injury, and Operating Under the Influence, 5th Offense or greater. For cases involving these offenses, although the period of presumptive exclusion of breath tests applies, the Commonwealth may seek to demonstrate the reliability OAT's calibration and certification methodology to a trial judge on a case-by-case basis.

The Court ordered that the period of presumptive exclusion of breath test results be extended until the Commonwealth demonstrates:

1. that OAT has filed an application for accreditation with ANAB that is demonstrably substantially likely to succeed;

2. that OAT's accreditation application has been uploaded onto the eDiscovery portal;

3. that the ANAB Accreditation Requirements manual is available for viewing on the eDiscovery portal;

4. that OAT has promulgated discovery protocols consistent with those employed by the State Police Case Management Unit, including a definition of exculpatory evidence and an explanation of the obligations pursuant to such evidence; or, in the alternative, that the CMU is responsible for processing OAT's discovery;

5. that OAT's discovery protocol has been uploaded to the eDiscovery portal;

6. that all OAT employees have received training on the meaning of exculpatory information and the obligations relating to it; and

7. that all written materials used to train OAT employees on discovery, and particularly on exculpatory evidence, have been uploaded to the eDiscovery portal.[2]

[2] See Memorandum of Decision on Consolidated Defendants' Motion to Compel and Impose Sanctions, 17-18 (January 9, 2019).

Order #1

OAT submitted its application for accreditation to American National Standards Institute (ANSI) National Accreditation Board (ANAB) on February 28, 2019; however, the Court required not simply that an application be filed, rather that it also be demonstrably substantially likely to succeed. The first such demonstration by the Commonwealth to the Court is the letter of accreditation assessment authored by ANAB, dated June 12, 2019. The Commonwealth contends that the accreditation report is retrospective and assesses protocols and procedures already in place at OAT and reflected in its accreditation application, and thus that the operative date for 'demonstrably substantially likely success' of the application should be its filing date. The defendants counter that, despite OAT receiving ANAB's accreditation report in mid-June, neither Commonwealth nor the defendants were provided with it until July 8, 2019. This delay in disclosure, the defendants argue, is symptomatic of the lack of transparency that resulted in the extension of this litigation, contributed to the loss of public confidence in the system, and underscored the need for sanctions to be imposed. Standing alone, the failure to produce the ANAB report until almost a month after it was written certainly inspires little confidence in OAT's ability to conduct itself as a public institution or its willingness to fully embrace a change to its guarded, uncooperative ways. As a result, the concept of a further sanction, i.e., ordering that the operative date to satisfy the Court's January 9, 2019 order be the date of accreditation, holds some appeal. Ultimately, however, the Court's purpose is to determine the point at which the breath tests produced by the Alcotest 9510 subject to the

calibration and certification procedures employed by OAT are reliable and when the public would trust them as reliable. As to the issue of actual reliability, the Court is convinced by the inescapable logic of the Commonwealth's position that success inherently demonstrates likelihood of success. With respect to public perception of reliability, the Court is satisfied that OAT's other efforts to improve responsiveness and transparency (as outlined below) sufficiently offset the delay in disclosure here that no additional sanction is required.

The Commonwealth also argues that, for the purpose of determining admissibility of a particular breath test result, the Court should look to the date the test was administered rather than the date the instrument was certified. As the defendants correctly point out, this approach is inconsistent with the settlement agreement, as well as with previous orders of the Court, which were based upon the date of calibration and certification.

Thus, the Court finds that the Commonwealth satisfied Order # 1 for all Alcotest 9510 breathalyzer machines calibrated and certified on or after **February 28, 2019**.

Order #2

OAT's application for accreditation was uploaded onto the eDiscovery portal (https://oatediscovery.chs.state.ma.us/oatpublic) on **March 8, 2019**. It is located in the Reference Material section under ANAB Accreditation Documentation.

Order #3

Information regarding ANAB accreditation requirements and a link to purchase documentation was published on the eDiscovery portal on **April 18, 2019**.

Order #4

OAT promulgated discovery protocols on **April 5, 2019**.

Order #5

OAT's Discovery Materials policy was uploaded to the eDiscovery portal on **April 5, 2019.**

Order #6

OAT conducted trainings for its employees on **March 1,2019** and **March 28,2019**. The training included issues and obligations relating to exculpatory evidence.

Order #7

Documents from discovery trainings, including attendance sheets, were uploaded onto the Reference Materials section of the eDiscovery portal under "Exculpatory Evidence Training" on **March 15,2019** and **April 4, 2019**.

Based upon the foregoing, the Court finds that the Commonwealth satisfied all of the requirements of the January 9, 2019 Memorandum of Decision on Consolidated Defendants' Motion to Compel and to Impose Sanctions as of April 18, 2019. Accord-

ingly, it is hereby ordered that the Commonwealth's Motion to Admit Breath Tests is **ALLOWED for all Alcotest 9510 machines calibrated and certified on or after April 18, 2019**.

July 29, 2019

So Ordered,

Robert A. Brennan
Justice of the District Court

Representing a Client Charged with OUI (Operating Under the Influence)

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Representing a Client Charged with OUI

- Anatomy of an OUI charge
- Arraignment
- License Suspensions
- Change of Plea
- Motion Filings
- Trial

Anatomy of an OUI charge

M.G.L. c. 90 § . 24

"Whoever, upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle…with a blood alcohol concentration of 0.08% or greater, or while under the influence of intoxicating liquor or drugs…shall be punished…"

Typical fact pattern

- D observed driving
- erratic operation or civil motor vehicle infraction
- officer signals for mv stop
- license/reg. & exit order
- field sobriety tests /arrest
- booking / breath test

Arraignment

- Many clients charged with OUI have little or no criminal history
- Typically not a question of bail
- Attorney's first opportunity to view the police report and discuss potential defenses with client.
- Explain license suspension to client and any possibilities for hardship license

License Suspension

Implied Consent Law – Breath Test

For first offense breath test refusal, RMV suspends license or right to operate in MA for 180 days.

Second offense – 3 years for refusal

Third offense – 5 years

Fourth or greater – Lifetime

"Immediate Threat" Suspension = Indefinite
- no RMV action until underlying matter resolved

HARDSHIP LICENSE
"Cinderella License"

First Offense (24D) OUI Hardship License Criteria (mass.gov)

You qualify for an OUI (24D) disposition. A hardship license is available for "2nd chance" 24D assignments, providing the prior OUI finding (or conviction) is over 10 years from the most recent incident date.

You have documented entry or enrollment, on program letterhead, verifying that you are enrolled in the court-ordered 90 24D Program, also called the Driver Alcohol Education Program.

You have documented a legitimate hardship. You must provide a letter from your employer, on letterhead, which cannot be more than 30 days old. The letter must state your need for a hardship license and the work hours.

Standard Dispositions (Plea)

First Offense: Continued Without a Finding (CWOF)
- 1 year of probation
- Enter and complete 24D program
- 45-90 day loss of license (consecutive to CTR suspension)
- $600 in OUI fines

Second Offense: Guilty – 60 day HOC suspended for 2 years
- enter and complete 14 day inpatient program
- mandatory 1 year of aftercare program
- 2 year license loss
- OUI fines

Third Offense (felony)

Minimum mandatory sentence of 180 days (parole eligible after 150 days)

License suspension – 8 years

Fourth Offense (felony)

Minimum mandatory sentence of 2 years in jail (parole eligible after 1 year)

License suspension – 10 years

Fifth Offense (felony)

Mandatory 2 ½ years in jail

License suspension - Lifetime

Defending an OUI

Evidence

- motor vehicle stop

- field sobriety testing

- breath testing

- booking video

- body/dash camera video

Motor Vehicle Stop

- Client "operating" on public way
- Police action to stop/seize the vehicle
  - If driving, how does Client respond to emergency lights?
  - Pull over safely?
  - Officer making note of ability to respond appropriately
  - Once stopped, ability to produce license and registration
  - Odor of alcohol / admission / bloodshot eyes / slurred speech
  - Officer does not need much to justify the exit order

Exit Order

- Client's ability to respond to instructions
- Exit vehicle without assistance from officer or use door for balance
- Walk to front of vehicle
- Ability to follow instructions
- Any unusual or erratic behavior

Field Sobriety Testing

Standardized tests used by law enforcement to determine a person's ability to operate a MV safely

- HGN Test (not admissible in court without expert)
- 9 Step Walk and Turn
- One Leg Stand

- Other tests commonly used
  - Alphabet
  - Count backwards
  - Finger Dexterity test
  - Portable breath test (not admissible in court)

Motion filings

- Motion to suppress stop of motor vehicle
- Motion to suppress exit order
- Motion to suppress statements
- Motion to dismiss for lack of probable cause (police report fails to establish probable cause for one of the three elements necessary)
- Motion to suppress breath test (*Pierre* Motion – 15 minute rule)
- Motion to exclude blood draw – consent

Importance of Motion hearings

Evidentiary motion hearings allow the attorney to cross examine the arresting officer.

Limited in scope to what the motion is challenging

Allows opportunity to gauge the witness as well as allowing the Client to see first-hand how well the officer testifies.

Trial

Jury v. Jury-waived

Client has the right to choose

Client decides on plea/trial/right to testify

Our job is to advise the Client on the pros and cons of each scenario so that they make the most educated decision for themselves and their situation

Trial Strategies

Multiple charges (ie. Negligent Driving / Open Container / Leaving the Scene)

Theory of the case

Ability to cross examine

Field Sobriety Testing

Our goal is to find what does not exist in the report and use it to show Client was not impaired.

Real FSTs

Client's ability to respond promptly and appropriately to emergency situation

Ability to follow instructions without hesitation

Ability to produce required documents

Polite/Cooperative

Ability to walk to and from area with no issue

Appearance in booking video

THANK YOU FOR VIEWING!

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