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, 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.

See 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.

§ 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. Lagenfield*, 1 Mass. App. Ct. 813 (1973).

§ 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. Second, the operator may be convicted if he or she had a blood alcohol level of .08 percent or greater while driving. 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).

> **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."

The Commonwealth establishes that a driver was under the influence of alcohol by use of opinion evidence and, if available, a breath or blood test.

(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.

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 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).

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 three of the following tests:

- horizontal gaze nystagmus,
- nine-step heel-to-toe and turn,
- walking a straight line,
- standing on one foot and counting,
- reciting the alphabet, or
- touching a finger to the nose.

There are a few common points to be raised concerning all of 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; 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 Heel-to-Toe 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 even when sober.

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?

Standing on One Foot and Counting

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

- inability to follow directions,
- swaying while balancing,
- using his or her arms for balance,
- hopping,
- putting the foot down, or
- not counting in order.

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.

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.

Videorecorded Test

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).

Many police stations have ceased videorecording suspects performing field sobriety tests. While citing budgetary concerns for this new policy, the police, in fact, are videorecording less because so many suspects perform well. Counsel may wish to address these points on cross-examination.

§ 10.5.2 Cross-Examination of Arresting Officer Regarding Diminished Capacity

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 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 his or her judgment has been clouded by alcohol, that he or she is not committing a crime.

Exacerbating the difficulty in ascertaining whether the crime has been committed 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). It is easy to envision the difficult task the government has in order 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 to claim that he or she is simply mistaken in his or her final conclusions about the defendant's sobriety.

Establishing that an officer is lying is usually difficult and often risky. Jurors are often 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 the officer is lying outright.

(c) *Cross-Examination Techniques*

There are numerous techniques available when cross-examining an officer who opines 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's memory of the incident is unclear and that he or she 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 officer may not have needed the report to refresh his or her 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 will often include a battery of standardized field sobriety tests such as raising one leg or walking a straight line. An officer who is cross-examined about how his or her opinion was formed 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 was obviously impaired and would hurt himself or herself by attempting to perform field sobriety tests. It also may occur when the operator was belligerent or refused to submit to field sobriety tests or when the officer did 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.

When cross-examining the officer about the failure to conduct certain tests, the witness should be asked about his or her training and experience. Most jurors recognize field sobriety tests as a standard investigatory tool and expect an officer to be versed in its 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 the arrest of the impaired driver. Generally, the report will recite 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 he or she did all the other steps 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 testify that he or she followed the defendant for a considerable distance before pulling the car over. If the defendant allegedly weaved two or three times, then 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 he or she testifies only to 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, his or her report that 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 keep his or her balance while listening to the officer's instructions,
- starts before the instructions are finished,
- stops while walking to steady himself or herself,
- does not touch heel-to-toe,
- steps off the line,

- uses his or her arms to balance,
- 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 his or her 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 he or she correctly completed the other sixteen steps. 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, when the officer is forming an opinion about sobriety, he or she 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.

§ 10.5.3 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) *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 have his or her license reinstated. 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. See **Exhibit 10G** (chart showing suspensions and penalties in effect following enactment of Melanie's Law).

> **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 § 10.8.2, 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. 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, § 24N.

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.

(b) *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.

(c) *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. For additional illustrations of OUI motions, see 42 R. Marc Kantrowitz & Roger Witkin, *Criminal Defense Motions, in Massachusetts Practice Series* ch. 11, at 280–306 (West 1991).

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).

(d) *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).

§ 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). 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).

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).

§ 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 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 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.

§ 10.8.1 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).

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.

§ 10.8.2 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.

§ 10.8.3 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 § 10.8.2, above, regarding conditions requiring use of an ignition-interlocking device.

§ 10.8.4 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 § 10.8.2, above, regarding conditions requiring use of an ignition-interlocking device.

§ 10.8.5 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.

§ 10.9 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.

§ 10.10 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. 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 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 Randy S. Chapman, Esq., and the Honorable R. Marc Kantrowitz 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.
- 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?

- With regard to your specialty, did you attend any seminars or conferences?
- Did you graduate? When did you graduate?
- What degree did you receive?
- What honors, if any, did you receive? (or, Did you graduate with any honors? Would you please describe them for us?)
- 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?
- Did you receive any scholarships, assistantships, or grants while you were attending _____? Would you please name them and describe them?
- 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

- What, if any, experience have you had teaching others? (or, Have you taught _____ to others?)
- What was the name of the school? Where?
- What years did you teach at _____? (or, When did you teach at _____?)
- What were the names of the courses, if you recall? (or, What courses did you teach, if you recall?)
- Please describe course _____.
- Approximately how many students did you have in each of your classes?
- Was this course a graduate level course or undergraduate level course?
- 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?)
- What were the general backgrounds and interests of your students, if you know?
- 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, © 1988–2014.

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, © 1988–2014.

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, © 1988–2014.

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 instructions 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.

If there is a challenge whether the breath test was properly administered, see Supplemental Instruction 2.

> ***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 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 (2009). See 501 CMR 2.15(2)(b).

2. If there is a challenge regarding the administration of the breath test. **In deciding whether the Commonwealth has proved the defendant's blood alcohol level beyond a reasonable doubt, you may consider evidence, if any, about:**

- **when the test was given;**
- **the qualifications of the person who gave the test, 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.**

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 (2007). The "operating under the influence" alternative requires proof of operation "with a diminished *capacity* to operate safely," *Commonwealth v. Connolly*, 394 Mass. 160, 173 (1985), 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 *Colturi*, *supra* and *Commonwealth v. Zeininger*, 459 Mass. 775 (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, 784–786 (1992). Those requirements of § 24K are met by the provision of 501 Code Mass. Regs. § 2.00 et seq. (effective April 30, 2010).

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. at 438–439 (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 (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 an arrestee "should be observed by the breath testing operator for at least 15 minutes prior to the administration of the test" (501 Code Mass. Regs. § 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 (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. at 816–817. If expert testimony on retrograde extrapolation is proffered, it should to 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, 458–462 (2001); *Commonwealth v. Smith*, 35 Mass. App. Ct. 655, 662–664 (1993).

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. *Connolly*, 394 Mass. at 175; *Marley*, *supra*; *Smythe*, 23 Mass. App. Ct. at 351–355. If there is expert testimony, see Instruction 3.640 ("Expert Witness").

6. **§ 24O notice.** While 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 (1993).

7. **Admissibility of Breathalyzer records.** Certified copies of breathalyzer records are admissible under the business records exception to the hearsay rule. *Zeininger*, supra.

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 *Colturi*, *supra* ("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 result and intoxication as a foundational requirement of the admissibility of such tests" since 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*

* This instruction was published by the Administrative Office of the District Court, © 1988–2014.

G.L. c. 90, § 24

The defendant is charged with operating a motor vehicle while under the influence of (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue).

In order to prove the defendant guilty of this offense, the Commonwealth must prove 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 a 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 it for you in a moment) (a depressant, as I will define it for you in a moment) (a stimulant substance, as I will define it for you in a moment) (the vapors of glue).**

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 the relevant drug, see G.L. c. 90C, § 1 ("Marihuana," "Narcotic Drug," "Depressant or Stimulant Substance").

What does it mean to be "under the influence" of (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue)? Someone is "under the influence" of such a drug 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) (the vapors of glue) 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 (marihuana) (narcotic drugs) (depressants) (stimulant substances) (the vapors of glue).

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 drugs). 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]) (the defendant was under the influence of [marijuana] [narcotic drugs] [depressants] [stimulant substances] [the vapors of glue]). 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.**

See the citations and notes under Instruction 5.300 (OUI-Liquor or .08% Blood Alcohol).

NOTES:

1. **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, 556 N.E.2d 387, 389 (1990) (codeine); *Commonwealth v. Finegan*, 45 Mass. App. Ct. 921, 923, 699 N.E.2d 1228, 1229 (1998) (heroin). See *Commonwealth v. Thomas G. Hickey*, 48 Mass. App. Ct. 1112, 721 N.E.2d 15 (No. 98-P-2154, December 20, 1999) (unpublished opinion under Appeals Court Rule 1:28) (cocaine).

2. **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, 889 N.E.2d 436 (2008).

3. **Voluntary intoxication by both liquor and illegal drugs.** Where the defendant has ingested both alcohol and illegal drugs, see Supplemental Instruction 11 to Instruction 5.300 (OUI-Liquor or .08% Blood Alcohol), which is based on the recommended instruction in *Commonwealth v. Stathopoulos*, 401 Mass. 453, 456–457 & n.4, 517 N.E.2d 450, 452–453 & n.4 (1988).

This situation, where both alcohol and drugs are concurrent causes of the defendant's *voluntary* intoxication, must be distinguished from that where a legally prescribed drug may have been the cause of the defendant's *involuntary* intoxication (see note 4, *infra*). "[Where a defendant suffers intoxicating effects from prescription medication used as instructed . . . , if the defendant had reason to know that her use of alcohol

might combine with her prescription medications to impair her mental faculties, and such a combined effect was in fact the cause of her diminished abilities, she would be deemed criminally responsible for her actions. If, on the other hand, she had no such foreknowledge, or if her mental defect existed wholly apart from any use of alcohol, the defense [of involuntary intoxication] would be available . . . . [T]he Commonwealth bears the burden of proving that the defendant's intoxication was voluntary." *Commonwealth v. Darch*, 54 Mass. App. Ct. 713, 715–716, 767 N.E.2d 1096, 1098–1099 (2002).

4. **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, 360–361 & 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 licit 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, 439 N.E.2d at 852–853 & n.15. Evidence of voluntary consumption of licit 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, 471 N.E.2d 394, 395 (1984). It is not clear whether the same rule applies to licit 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).

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

COMMONWEALTH OF MASSACHUSETTS

[County], ss.	TRIAL COURT DEPT. DOCKET NO. 000000
COMMONWEALTH, Plaintiff v. [NAME], Defendant	MOTION IN LIMINE TO EXCLUDE HORIZONTAL GAZE NYSTAGMUS TEST

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 Chelsea Police Station.

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 attorney,

_____

[ATTORNEY]
[ADDRESS]

COMMONWEALTH OF MASSACHUSETTS

[County], ss.	TRIAL COURT DEPT. DOCKET NO. 000000
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—Chart Showing Consequences of Melanie's Law*

* Prepared by Kevin Mitchell, Esq., and edited by Randy S. Chapman, Esq.

I. BREATH TESTS

A. Failure (blows .08 or greater)

- 30-day loss of license (LOL).
- Terminates on plea/trial/dismissal.
- *No* 15-day temporary license.

B. Refusals

- Length of suspension is based on the number of prior convictions. *See* G.L. c. 90, § 24(1)(f) (details below).
- **No hardship licenses** available for period of suspension as result of refusal to take breath unless have received a 24D disposition.
- Refusal suspension shall run consecutively with any other suspensions related to conviction or with assignment to program (unclear which suspension should run first).
- Judge may reinstate license after acquittal, dismissal, or nolle prosequi.
- *No* 15-day temporary license after refusal.
- After driver's refusal, vehicle being driven impounded for 12 hours.

Convictions at Time of Refusal	Loss of License
0 prior convictions	**180 days**. (Cases continued without a finding—CWOF—should not count as prior convictions when calculating the length of the suspension for a refusal. Nevertheless, the Registry is apparently going to count them until instructed otherwise.)
Under 21 or 1 prior conviction	**3 years** when there is 1 prior conviction (CWOF cases should not count as prior convictions, but see note above) *or* defendant is under 21 years old.
2 prior convictions	**5 years**.
3 prior convictions	**Lifetime**.

Convictions at Time of Refusal	Loss of License
Prior conviction OUI w/ serious bodily injury (90:24L)	**10 years**. (Note that there is an internal inconsistency as to the length of this suspension, though it is assumed the Registry will apply the harsher suspension. *See* G.L. c. 90, § 24(1)(f).)
Prior conviction of OUI motor vehicle homicide or manslaughter by motor vehicle (90:24G(a) or (b); 265:13½)	**Lifetime**. (Note that there is an internal inconsistency as to the length of this suspension, though it is assumed the Registry will apply the harsher suspension. *See* G.L. c. 90, § 24(1)(f).)

II. PENALTIES

(Note that other than hardship license issues, all penalties are unchanged except as to persons under twenty-one years old.)

A. 1st Offense or Prior OUI > 10 Years—Alternative Program—Misdemeanor

24D Program (unchanged except if <21 years old and blows >.20)

- Probation not more than 2 years.
- Assigned treatment program.
- LOL 45–90 days.
- If under 21 years old, LOL 210 days and specified designed program.
- If under 21 years old, LOL 210 days and specified designed program. If breath test (BT) >.20 assigned to special 14-day in-home (sic) program (new section).
- Available after trial conviction.
- Available to those with one prior conviction/assignment greater than 10 years from date of event.
- Not available in cases of death/serious injury.
- Hardship available after 3 business days.
- *No* interlocking device required unless prior OUI, then must have interlocking device for at least 2 years (*see* G.L. c. 90, § 24½).

B. 1st Offense—*No* Alternative Program—Misdemeanor

Fine	Prison Terms	Hardship License
$500.00 - $5,000.00	Up to 2.5 years house of correction (HoC). May serve weekends/evenings/holidays.	3 months–6 months. Eligible for 24D.

	1 year LOL.	
C. 2nd Offense (1 Prior Conviction or Assignment)—Misdemeanor		
Fine	**Prison Terms**	**Hardship License**
$600.00 - $10,000.00	Not less than 60 days or more than 2.5 years HoC. Mandatory 30 days. May serve at designated facility for alcohol issues. If not 2 convictions or assignments, eligible for 2 years probation and 14-day inpatient residential alcohol treatment. 2-year LOL.	1 year–18 months. Interlocking device. Eligible for 90:24D if prior is over 10 years old, but will need interlocking device during hardship.
D. 3rd Offense (2 Prior Convictions or Assignments)—Felony		
Fine	**Prison Terms**	**Hardship License**
$1,000.00 - $15,000.00	180 days–2.5 years HoC or 2.5 years–5 years state prison. Mandatory 150 days. May serve at designated facility for alcohol issues. 8-year LOL.	2 years–4 years. Interlocking device.
4th Offense (3 Prior Convictions or Assignments)—Felony		
Fine	**Prison Terms**	**Hardship License**
$1,500.00 - $2,500.00	Not less than 2 years—nor more than 2.5 years. *or* Not less than 2.5 years—5 years state prison. Mandatory 1 year. 10-year LOL.	5 years–8 years. Interlocking device.

F. 5th Offense (4 Prior Convictions or Assignments)—Felony		
Fine	**Prison Terms**	**Hardship License**
$2,000.00 - $50,000.00	2.5 years–5 years state prison. Mandatory 2 years. Lifetime LOL.	*No* hardship status.

III. NEW OFFENSES

90:24½	All persons whose license has been suspended because of one or more prior assignments or convictions (offenses) will be reissued a license only if • the person uses an ignition interlock on each vehicle owned, leased, or operated; and • the device is installed for 2 years (unclear when 2 years begins to run). License may be revoked—for up to a lifetime—if person removes, fails to maintain, or manipulates device or exceeds .02 twice during assigned period.
90:24G	LOL 15 years for motor vehicle homicide (all forms).
90:24R	If convicted of 90:24G(a), (b); 90:24L; 90B:8A, 8B; or 265:13½ and has prior conviction/assignment, lifetime LOL [vague language].
90:24Q	If BT is over .20 and prior conviction/assignment, special alcohol/drug assessment required.
90:24S	Operating/Public Way/No Locking device when required. $1,000.00–$15,000.00. 180 days–2.5 years or 2.5–5 years in state prison. Mandatory 150 days—may serve in special facility.
90:24T	Tampering with locking device with intent to disable. 6 months–2.5 years or 3–5 years in state prison.
90:24U	Breathing into locking device for party whose license is restricted. $1,000.00–$5,000.00. 6 months–2.5 years; second offense state prison 3–5 years.

90:24V	OUI with child <14. $1,000.00–$5,000.00. 90 days–2.5 years HoC. If 2nd offense: $5,000.00–$10,000.00. 6 months–2.5 years HoC. 3–5 years state prison. Mandatory 6 months. Consecutive to underlying offense. LOL 1 year (1st offense) or 3 years (2nd or subsequent offense).
90:24W	Forfeiture of motor vehicle if 3 prior convictions/assignments.
90:24X	Registration/plates of a motor vehicle *owned* by a person who has been convicted/assigned 2 prior times. *No* new registration until license renewed.
265:13½	Manslaughter while operating a motor vehicle in violation of 90:24(a)(1) or 90B:8A. 20 years (5-year mandatory minimum).

EXHIBIT 10H—Motion to Inspect Evidence and Reports

COMMONWEALTH OF MASSACHUSETTS

FRAMINGHAM, ss.	DISTRICT COURT DEPT. JURY OF SIX SESSION DOCKET NO. 000000
COMMONWEALTH, Plaintiff v. JOHN DOE, Defendant	MOTION TO INSPECT EVIDENCE AND REPORTS

The Defendant, John Doe, 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,

JOHN DOE,
By his attorney,

John Smith, Esq. BBO 123456
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EXHIBIT 10I—Motion in Limine to Exclude Breath Test Results

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. FITCHBURG DISTRICT COURT
DOCKET NO. 0000CR0007

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 attorney,

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111 Everett Ave., Ste. 2A
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(617) 884-6400
BBO#: 548076

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.	[ ] Dept. Docket No. 000000
COMMONWEALTH, Plaintiff v. [NAME], Defendant	PROPOSED JURY INSTRUCTIONS OF 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 attorney,

_____
[ATTORNEY]
[ADDRESS]

COMMONWEALTH OF MASSACHUSETTS

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

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.