>>: Good afternoon, everyone. I thank you for your participation in this program. My name is John B. Seed. I'm an attorney in Massachusetts. My office is located in New Bedford, down on the south coast. I've been practicing criminal law for the last 15 years. Today, we're going to talk about representing a client charged with OUI in Massachusetts, and that's Operating Under the Influence. Many of us have these cases in all of the district courts, and some superior courts, depending on the severity. Today, I'm going to walk you through that process from arraignment all the way through a trial, with all the options in between. We'll touch on many different topics today, as we see in the bullet points here, today. Talk about the anatomy of an OUI charge, how that comes about, how that gets to court and how we deal with that with our client. Starting off with arraignment, collateral consequences associated with operating under the influence to include license suspensions, which is always a major, major factor for any of our clients, a change of plea, a plea bargain. What are our options depending on the offense, the number of offenses or any other additional factors in a case that may affect what we're able to do for our clients in terms of a plea bargain. Of course, we have, as in any case, we have motion filings, but there are some very specific to operating under the influence. And then, lastly, we'll touch upon trial and what we look to do when representing a client at trial. The OUI law in Massachusetts comes from our Massachusetts General Laws, Chapter 90, Section 24, as you can see before you, essentially stating that whoever operates a motor vehicle on a way, a public way or a way that the public has a right of access to as invitees or licensees, does operate with a blood alcohol concentration of 0.08% or greater, or while under the influence of an intoxicating liquor or drugs, shall be punished. What's important to note in Massachusetts is we have the per se law, which involves the breath test. That's where we have our blood alcohol concentration of 0.08% or above. That is one theory the case of the district attorney's office can go forward on. The other, and I would say more commonly challenged at trial, theory of a case is impaired ability to operate safely. And that's for cases where we have no breath test or the breath test was suppressed prior to the trial date. Those are the cases that come down to, really, an ability to cross-examine the state police or the local police department on any of the field sobriety testing that they may have conducted, any observations they may have made, and whether or not the government is able to prove, beyond a reasonable doubt, that the Commonwealth has met its burden of proof with respect to that third and final element of an OUI charge. Typically, in most of our district courts - I've given you a sample fact pattern. I would say this is more common in terms of my own case load. But normally, whether it be on a highway or a street, in any city or town in the Commonwealth, our client is typically observed operating the car - in most cases, they're actually driving it. The police, oftentimes, will note some sort of erratic operation, negligent operation or any of the plethora of civil motor vehicle infractions that they're trained to look for, that could be speeding, mark lanes violations, you know, headlight violation, headlight out, seatbelt violation, hands-free law violation. Any of those, and a whole host of others, is going to be enough to warrant a stop by the police of our client's vehicle. At that point, the officer, really, 99 times out of 100 is going to put on their overhead lights, their wigwags, perhaps blast the siren, but certainly throw on the spotlight, which is signaling for a motor vehicle stop. Upon entry to the car, or approach the car, I should say, they're oftentimes first going to have a brief conversation with the defendant and then ask for a license, registration, have some conversations about whether or not the person has been consuming alcohol on that evening, which oftentimes then leads to your next step, which is an exit order. And that is when the police ask our client to step from the vehicle so that they can continue their investigation further to see whether or not this person's ability to operate safely is in jeopardy. That leads, of course, to field sobriety testing, which then leads to an

arrest. There are a whole host of field sobriety tests. We'll go over that later in the program. Oftentimes, after the arrest, the person is placed in that same officer's cruiser and transported back to either the state police barracks or the local police station. They're booked and then they're given their rights. We call that the statutory rights in terms of whether or not they want to take the breath test. A lot of that now, especially now with at least the state police and many of the local police departments, at least for me, Boston South, they do have body cameras. There are a lot of dash cameras now, whereas, you know, five years ago that was very hard to come by. Not many places had that. But all state police now are outfitted with body cameras and dash cameras. Same thing with booking, booking is typically video recorded as well. Now, you'd want to know whether or not your police department that you're dealing with has audio capabilities with that video. There are typically many stations throughout the Commonwealth that do capture the video but do not have audio. And so sometimes that can actually be a huge benefit to our clients that we cannot hear what is being said, for many reasons. After the arrest is typically where we meet our clients for the first time, and that would be at their arraignment. For any of us who are able to get a call over the weekend or the night of the arrest, we at least have some time to prepare, get some facts from our client about what was going on, and then walk them through the process of the arraignment. It's also going to be our first opportunity to get a police report. And in most courts, that's going to be the bulk of the evidence we get for at least a couple of months. So we have to really go through that as best we can. I like to first do that on my own and then sit down with my client and go through it, just to point out any things that I may see relative to the strength of the case for the district attorney. As I've noted, you know, this is typically not a question of bail, especially on a first or second offense. The district attorney's office typically doesn't look for bail. You may have situations where there can be a condition of release that may be related to, you know, randoms screens, alcohol free, and what we see a lot more of now, especially on the higher-level offenses, is a SCRAM, and a SCRAM's an at-home portable breathalyzer that the client has to take however many times a day a judge orders it. The most that I've had is four times a day. They will give a person a certain time throughout the day that they have to blow into the machine and record it. Any issues with that, the monitoring agency would contact probation, they would let probation know that the person has either failed the test, missed the test. And at that point, our client would be getting a call to come into court for potential bail revocation at that time for failing to comply with the pretrial orders of release. One thing I think is worth noting is that most of the people we deal with who are charged with a first offense have never been in court before. They've never dealt with this situation. They have no idea what to expect. They could be thinking the worst. So our first job is to really calm them down, make them feel comfortable, and kind of walk their - walk them through the process. You have to understand that for many people, they've already been through the worst. And that's oftentimes what I remind them of. They were on their own, typically, when they were stopped by the police, arrested, asked to do field sobriety test, asked to submit to a breathalyzer test. It's an embarrassing moment for anyone. And OUI is the one crime that someone can be charged with that does not take any criminal instinct to be accused of. Anybody from any walk of life can be charged with this. And we have to remember that. And something as simple as a first-offense OUI, to us, as experienced attorneys, is the most devastating and important thing in the world in that moment to that client. And it's very important of us to be cognizant of that and to treat that with respect. What I do like to tell my clients is that, you know, as I said, they've been through the worst. They were on their own and went through that whole process with the police. Now they have somebody by their side. Now they don't have to talk anymore. They're just told where to go,

where to be, what time to be there, and that we will be there with them. And it's our job to speak to the district attorney. It's our job to advocate on their behalf to a judge. And it's our job to keep them apprised of the situation so that they understand all of their options throughout the entire process. I can tell you in my own personal practice, for many individuals who are dealing with a first offense, prior to even asking anything about what they may want to do with the case in terms of a plea, in terms of the trial, I ask them how important their license is to them. Because that, oftentimes, is the most important question they want to ask me. They refused a breath test, so they're dealing with the administrative suspension from the Registry of Motor Vehicles. If they can't go without their license, their rights are pretty limited. There's an opportunity to appeal to the headquarters of the registry up in Boston. You have 15 days to appeal the breathalyzer refusal suspension. But that's very, very limited in scope. And in terms of that ever happening, the registry is rarely ever going to return a license on a refusal like that. It would take the attorney to actually file a civil suit against the Registry of Motor Vehicles in district court in an attempt to overturn that first suspension. So most common, the issue becomes, do I plead? Do I get a hardship as quick as I can? And so if that's what a person is thinking about, it's important for us to at least make them aware of the strength of the case either way, whether or not, you know, they have a triable case, a winnable case, or whether, in fact, pleading is their best option. But we want to make sure we keep them updated and informed and educated as much as we can so that they make the best decision for themselves. Because a plea to a first offense, although it's quick and easy, certainly sets someone up down the road for a potential subsequent offense should they ever be charged again. This is important, obviously, for us to educate our clients with the implied consent law, and that is the breath test. When we get our license, we are giving consent that, should we ever be asked by the police to provide a breath or blood sample, we will comply. We have the absolute right in Massachusetts not to, but there is a penalty for that. There is a license suspension associated with that. In other states such as Rhode Island, it's actually a crime to refuse a breathalyzer test. In Massachusetts, not the case. And in fact, their refusal, should they choose to refuse a breath test, cannot be used against them in court at trial. So the big difference in the law is from state to state. But important to note, that refusal cannot be used against them by the government in trial. As we see the offenses, obviously, the suspension goes up and up with the more offenses we have. First offense for anyone - and again, this is dealing with adults over the age of 21 - 180 days. Six months suspension for a first offense OUI. Second offense, so someone who has been charged again, who has a previous co-op or conviction, they are faced with - they're not faced with, they're getting a three-year suspension for the breath test refusal. A third offense, so somebody who has been convicted twice before, is five years. Fourth or greater? Lifetime. I've also talked about, at the bottom here you see the immediate threat suspension. And that's something that we are seeing more and more of, especially down here on the south coast of Massachusetts, not only with the state police, but with many local departments. That typically comes about only in the instance where the defendant was not placed under arrest. And those situations are typically medical. Medically related, right? A person has been in an accident and is unable to be arrested on scene, has to be transported to the hospital. Typically, that person is given a citation at the hospital listing what the offenses are and then later summons them to court down the road. So the police have no choice there. There is no mechanism for them to suspend a person's license under the implied consent law because they're not able to offer them a breath test. There is a rare occasion that I've had where the police have actually gone and sought out a blood test at the hospital. That's treated a little differently because, again, if a person does consent, it takes time for that sample to be sent to the lab, sent back to the

police. If, in fact, it is - the alcohol amount is over the legal limit, the police have to give the form to the district attorney. The district attorney can then file that form with the court asking the court to order a 30-day license suspension for the per se violation. So in the cases where I have had that, the district attorney has actually not followed through to suspend the person's license for that. But I have seen that in my discovery package that the blood alcohol level has come in over the 0.08 threshold. With the immediate threat suspension, the police simply have to fill out a one-page form. Typically, they attach that to the police report and send that to the registry. The registry then, without hesitation, will issue the immediate threat suspension, which is indefinite. There is no - as they've noted - no R&B action until the matter is resolved. That can be difficult for many of our clients, especially those afforded a magistrate's hearing as a result of going to the hospital. Because typically, even if the court magistrate doesn't issue the charge and perhaps continues the matter for a period of time, the client is not going to be able to get the license back until that period of time has passed, or really not even go to the registry until that period time has passed. Once at the registry, essentially the client is at the mercy of the registry, who oftentimes will give a conditional reinstatement of that license, related to either completing the 24D program or providing three months of clean urine samples, medical affidavits that have to be filled out and proof of sobriety. So there are many conditions that a person has to meet when they are treating it as an immediate threat. Most commonly, we see that with OUI drug offenses where someone has overdosed at the wheel, that is typically the most difficult to overturn down the road even after the case is resolved, because the client is going to be required to prove at least three months of clean screens to the registry. Oftentimes we will hear questions about a Cinderella license, a hardship license. As you can see, with the hardship license the easiest way and the quickest way to get that back is on a first offense. Again with that 180-day suspension for a breath test refusal, people are often faced with the reality that they're not going to be able to drive for six months and or we are trying to get the case to trial and beat it and have a judge restore the license within six months, which also is very difficult to do. It's very rare. You need a lot of cooperation from the court in able - in order to be able to expedite a case that quickly through the system. Typically, I will tell people - although it's changed a little bit since COVID - but prior to COVID, 6 to 9 months was a pretty good estimate on how long it would typically take, depending on the court. There were certainly instances where I was able to do it before a six-month mark and get a motion to restore the person's license. However, we're usually right around that mark, especially if we are exploring all of our options and our defenses prior to trial. It does take a bit of time to just gather everything from the prosecutor, and we're also, you know, a victim of the trial court's calendar, depending on the court. Your busier courts are going to be much harder to get short dates, of course, unless the person's in custody. And if they're in custody, that may be a completely different conversation that you're having with your client at that point. In terms of the hardship license. You can see on the slide before you that in order to do so, we have to resolve the matter in court. Sometimes that's as quick as doing it at arraignment, although most judges would want to make sure that the person has had enough time to speak with us so that they are completely sure that this is what they want to do. Assuming they have resolved the matter under the 24D disposition - which is Chapter 90 Section 24D of our general laws - that forces them to enroll in the first offender program. That program is 16 weeks - excuse me - 16 weeks long. It's once a week. Most places are doing it over Zoom still. But the enrollment in that program is one of the requirements. And you can see that about midway down the slide. The client has to have documented entry or enrollment on the program letterhead verifying that they are enrolled in the 24D program. In that situation, there are - people often

ask me, well, I Googled first defense programs and I see that I can do one online, and it's only 12 hours long. Please let them know that is not acceptable. It's not acceptable for the registry, and it's not acceptable for the court. There are only so many state-approved programs within Massachusetts, the probation department that we are dealing with, whatever court we are dealing with, will ask the client where they want to do it. Typically, it's based on where the person resides. They could be arraigned and pled out in Chelsea District Court but live in Framingham. Framingham is going to be a better suit for them to complete that 24D program as opposed to using the one in Chelsea. Either way, the first step after completing the probation intake is to contact whatever program probation has referred you to in order to set up an intake. At that intake, the defendant is required to make at least a down payment. There are three options for most of these programs that a person can pay in full, which is approximately $910 now, for this program. They can claim a down payment in five installments, a down payment in ten or 11 installments. Typically, I tell my clients to choose the last option, which calls for the largest number of installment payments. If at any point they want to pay it all off, they are not going to turn down their money. But with the amount of moneys that are due in a situation like this, I often advise people to take advantage of any program that's going to allow for a payment plan, because the Registry of Motor Vehicles is not. And that's going to cost between $500 and $1,000 just for them to get their license back. So they're going to need that money up front. So the enrollment form is the first requirement. The second most commonly - and there are others that you can find on the on the mass.gov website, or the R&B website - the other is documented hardship. So our client has to have a job. They have to provide a letter from their employer that needs to be on the employer's letterhead, cannot be more than 30 days old, and must state that the client has a need for hardship, what it is and what hours they work. If it's granted, the client is allowed to choose that 12-hour period that they can drive. That's the window for them to drive for the life of that hardship license. Sometimes that's 45 days, sometimes that's 180 days. It's whatever the suspension is total from court and the implied consent. That is the entire amount of the suspension. And so that's what the hardship would cover. Once the suspension is over, people often make the mistake of just driving again, at any point they want. There is still a final step once the suspension period is ended. The client must go back to the registry, must go back to a hearings officer, which is where we have the hardship come in, in the first place and pay a reinstatement. So that's typically $50. So that's going to be a much easier hit. However, that is what's required to restore somebody's full rights to operate within the state of Massachusetts. That's the one other thing that we want to be aware of. Although, there are many, many RMV branches throughout the Commonwealth, there are only a limited number that have hearing's officers. Since COVID, they have allowed people to reserve spots online, make an appointment online. Oftentimes what happens in that situation, is the client would receive an email the day or two prior to their scheduled hearing, giving them a link to upload any documents that they want to provide to a hearing's officer. On the day that they are supposed to have a hearing, most often it is a phone call from the Registry of Motor Vehicles, from a hearing's officer, and it's done over the phone. So not many are actually done in person anymore, since COVID took place. Standard pleas, standard dispositions and OUI cases, as you can see before you, again, really just dealing with - the first two are more common in our practice. What we see most of is first and second offenses. Those are both misdemeanors. Both the first and second offense is a misdemeanor in Massachusetts. Oftentimes, what we are trying to achieve for our client in a plea situation, especially on a first offense, is a continuance without a finding. You may hear that term often as a quaff. The law states that under that alternative disposition with the 24D program, a person cannot

be on probation for more than two years. Typically, it is a one-year probationary period. They are ordered to enter and complete that 24D program, the 16-week program. A software license loss of not less than 45 days, not more than 90. It's a consecutive suspension. Oftentimes, the court will note to a defendant that suspension begins today. That's not entirely accurate. If a person is still doing a CTR suspension for refusing a breath test, that is the suspension that's in effect at that point. The 45 to 90 begins once that 180 ends. However, this is creating hardship eligibility for them to get that Cinderella license. We also have $600 in OUI fines. Oftentimes, you'll hear that read off by the clerk magistrate at the end of the plea. There are two, $50 fees and two, $250 fees. Just recently, the law has changed, with respect to probation service fees. Those are no longer assessed. That's saving a client, on a one-year probation, $780, as that used to be $65 a month for supervised probation. The minimum was $50 a month on an administrative supervision. One other thing to note is that many courts, it's not automatic that the travel restriction is waived. The OUI probation does fall into the risk-need category for probation, so I make it a practice of mine to speak with my client about their ability to leave the Commonwealth without permission. And if there are issues, if they work out of state, if they travel out of state, or if they have trips coming up, it's never a bad thing to write in our side of the plea form travel restriction waived. Most judges don't have an issue with that. They will order that a person is allowed to leave the state without any permission. Some judges may want to know why. Some may have an issue with it. Be able to answer the question, but I always make it a practice to ask for it just to kind of save the client any headache down the road if they wanted to travel and to alleviate any issues, that if something happened out of state, not only are they in trouble for that, but they're violating probation, as well, for leaving the state without permission. So one thing to think about, you know, we can put whatever we want in our side of the plea form. It's a defendant capped plea. The judge doesn't agree with anything, we have the right to look at it again and withdraw it or accept it. So ask for everything you'd want in that situation. Second offense, as I stated, also still a misdemeanor. This is the first time we see any sort of minimum jail sentence, and that's 60 days. However, the second offense does have an alternative program, just like the first offense has an alternative program. This one's a little more in depth, though. This is typically a two-year probation. It's typically a suspended sentence. As I've given you an example, 60 days in the house of correction, suspended for two years. Enter and complete the 14-day, in-patient program. That program is done in Tewksbury. There's only one facility in the state. That's where the client would go. They would enroll in that, do an intake. They would have to pass a breathalyzer and some physical conditions prior to actually entering it. But once in, they would enter on a Sunday and leave two Sundays later. There's also one year of aftercare that's mandatory. That's typically done through many of the facilities that offer the first-offense program. The aftercare program requires weekly meetings. That's typically true for 26 weeks, half the year. At that half time, client would be re-evaluated, and often times reduced to once a month for the remainder of the six months that would be left on the aftercare. One thing I would encourage people to think about, with respect to the 14-day program is that many probation departments are going to try to set that up for your client at the intake, after you've walked out of court, from the plea. For many people, they just don't have two weeks available in the next couple of months, with their work schedule, with life, with any of the things that they may be going through. Learn that about your client. Understand their situation. Understand their ability to get two consecutive weeks off. And ask the judge for a time frame. Again, what I normally would do in these situations is ask that the judge allow my client up to one year to enter and complete the 14-day program. Now, that puts the onus on the client to stay up-to-date with that, to keep track of

the times and work with probation in order to effectuate entering into the program. But oftentimes what people overlook is that the defendant can start the aftercare program right away. It's a bit of a misnomer, because you think that you have to complete the 14 days first and then do the aftercare. But that is not the case. A person can enter into that program, get through as much of it as they can prior to doing the 14 days, and then come back out and finish whatever is left of the program. There are also some fines associated with the second offense plea, as well. It used to be more, again, because you'd have a two-year probationary period, so you'd have double the amount of probation service fees. But that is no longer the case. Once we hit a third offense, we are dealing with a felony. And when we are dealing with a felony, we are dealing with minimum, mandatory jail sentences. This is also true when we're dealing with a serious bodily injury OUIs. So someone who has no record, who gets charged with an OUI serious bodily injury, there are two portions of that statute, one misdemeanor, one felony. The felony is an equivalent of a third offense, in terms of the penalty, which you see before you here, minimum mandatory sentence of 180 days in jail. There's parole eligibility after 150 days has been served. The license suspension associated with that is eight years. On the second offense, it's two years. I don't think I hit on that. Fourth offense, again, you're dealing with now a minimum mandatory of two years in jail, parole eligibility after one, license suspension being ten years. Fifth offense, felony is all or nothing, two and a half years in jail, lifetime suspension of a license. Those are upon conviction. That's in addition to whatever suspension the person received in the first place, either for failing a breath test or refusing the breath test. Of note, no matter what the offense is, even if it's a fifth offense, if a person takes and fails a breathalyzer, they have a 30-day suspension of their license. So I've had it in the past, somebody facing a fifth offense, driving after 30 days. That's what the law allows for, which if you look at everything else that we talked about, a license suspension doesn't make a whole lot of sense. But that is the law. Once you get to the fourth or fifth offense, and even in some third offenses that are severe, a felony does allow for the district attorney to indict to superior court if they want to. In those cases, the person is facing more time than you see before you, and that time in state prison versus house of correction. In terms of defending an OUI, now that we're aware of the options and the penalties that we want to be able to discuss with our clients, we also want to be prepared to defend it, because either the client wants to or because the client has no choice. And in those situations, that's typically when you're dealing with your felonies. Many people are reluctant to take a plea, just going into jail. If they're going to go to jail, most people want that to be as a result of losing a trial and not taking a plea and willingly going in. That can change, obviously, from time to time. Again, based on the client, based on the history, based on what that person is going through. Touched upon earlier in the presentation, the evidence that we're looking for, at least in the police report, that's our first bit of evidence. What's the motor vehicle stop? What's the field sobriety testing? Was there a breath test? Is there a booking video? Is there a body-cam, dash-cam video? What is available to us? There are many unique defenses. There are many unique situations regarding, you know, where the person was, you know, a public way defense? Was the person operating under the meaning of the law? And, of course, were they intoxicated? Most of the time what you see is the sample I gave you above. There are always going to be unique situations, but there is usually case law related to every one of those unique situations. It's important to stay abreast of that and, as always, reach out to somebody like me or any other attorney that concentrates in this area for advice. We're always willing to help, always willing to listen and give advice, in terms of how we should be looking at these cases. In terms of the motor vehicle stop, again, in a normal fashion, for a normal example, client is operating on a public way. I put operating in quotes because, again, that's the

law in Massachusetts. It's not driving under the influence, it's operating under the influence. Any time a person is in their vehicle with the keys in the ignition, that's operation in the state of Massachusetts. The law requires that anything that would, by itself or in conjunction with any other manner of operations would set the car in motion, is operation in the state of Massachusetts. Again, for the normal fact pattern for us, persons driving on the road - what happens? Right? What causes that police action, that state action, for the client to be pulled over? What we want to look at first is how were they operating? Oftentimes, an OUI has accompanying charges with it, always civil motor vehicle infractions, oftentimes negligent driving, especially if it's they state police, they will often hit a person with both. It's much easier to prove a negligent driving case than it is an OUI. And so they do go hand in hand in are often charged the same. So what I look for is how does a person respond once those lights go on? You'll see situations where a person pulls over appropriately. You'll see situations where a person continues driving in the breakdown lane for half a mile. A person hits a curb, doesn't park right, doesn't stop right, doesn't put the car in park. Those are all things that the officer is looking for. You can be sure that if it's late at night, if it's after midnight and they're pulling you over for some sort of erratic action, they've already formulated the opinion that the person is intoxicated. So for the police, it's just a matter of how strong can I make this case? What can I show that is going to bolster my opinion that this person is operating under the influence? So that's the first thing I'm looking for. How do they respond? Do they pull over safely? Do they pull over appropriately? That officer is making note of their ability to respond appropriately because that's what the field sobriety testing is for. How is the client able to produce the license and registration when asked? That whole conversation that's taking place prior to that request, the officer is just trying to gauge the person's ability to function at that point. Are they impaired or are they not? How are they talking? Are they - is there any slurred speech? Do I smell alcohol? Do I - if I do smell it, where's it coming from? Oftentimes, you'll see, from the interior compartment. Right? That's - from anywhere in the car. It's not necessarily from our client's mouth, but that's enough. Is there an admission of alcohol? And how do the person's eyes look? These issues that I've highlighted appear in just about every police report I've ever read related to OUI, and that's including prosecuting those for three years and defending for the last 12. Every report has some mention of these four indicators. Most of the time, altogether. Any of those is enough for the officer to justify an exit order and ask the person to step out of the vehicle. But what we are looking for, too, is when that person is asked to produce the license and registration, how do they do it? The officer, and good ones, will note an inability to properly produce the license right away, fumbling through a wallet, pulling out the wrong information, the wrong card, unable to produce the registration, can't find it. You know, and later on we find that upon the inventory search of the motor vehicle, that was the only document in the glove box. Right? So that's evidence that becomes difficult to overcome. But these are all the things that we're looking for. Alcohol is going to impair our ability to think and respond appropriately. And so this is the first, to me, real field sobriety test, are these issues. And this is what we want to look for in our first reading of that police report. Once the officer has made his decision to issue an exit order, what's the client's ability to respond to those instructions? Typically, it depends on the officer or the trooper. Some are polite and some are very aggressive and will straight-up tell the person, get out of the car. Others will say, would you please exit the car? I'd like to continue some testing with you to make sure you're safe to drive. That's fine. But what happens when they're given that order? Right? Do they have a seatbelt on still? Do they have any issue getting that off? They have any issue opening the car door? Do they have any issue getting out of the vehicle? Are they using the officer? Are they using the doorjamb, the car, the door to

pull them themselves up? Again, signs of impairment. The officer is trained to look for those. Once they get out of the vehicle, the officer is not going to do the field sobriety testing right there in the middle of the roadway. Oftentimes, they're going to bring them either to the front of their vehicle or to the back of our client's vehicle, which it would be in between the officer - the officer's cruiser and our client's vehicle - probably a little more safe there. And depending on where we are, especially on the highway, they're trying to protect not only the client, but themselves, as well. So oftentimes you'll see that they'll have them escorted either to the front of their vehicle or to the back, but very rarely to the side. What we want to look for in there - in the report is, is there any mention of how the client was able to walk during that time period? Because that's not a standardized test at that point. That's just a normal, day-to-day ability to walk without any issue. Inability to follow instructions - and, again, any unusual or erratic behavior. Is the person belligerent? Is the person aggravated? Are they hysterical? How are they acting in that moment? Anyone who is compliant is going to get the benefit of the doubt in that police report, which in turn helps us, as their attorney, down the road. Once out of the vehicle, we get into the FSTs, the field sobriety testing. These are standardized tests used by law enforcement to determine a person's ability to operate safely. Every officer who goes through the academy typically has a weeklong course dedicated to OUI. They're trained on these field sobriety tests. They bring in people to the training grounds, and they give them liquor. And the the troopers and the police test them at different stages of the night, basically to learn the signs and symptoms of alcohol consumption and inability to complete these tests. The first test we see, which is never used in court, is the HGN, the horizontal gaze nystagmus test. That's the test where the officer has a little flashlight, a pen, and puts that in front of the client, tells the client to not move their head, to just follow the pen with their eyes. And they try to determine by looking into their eyes whether or not there's any signs of alcohol consumption. It's not admissible, because these officers are not trained experts to offer an expert opinion on that test. You'll see, oftentimes, district attorneys will file motions in limine, in order to try to get some variation of that testimony in. And typically, what they are trying to do is show that our client was unable to follow instructions, because instead of following the pen with his or her eyes, their head was moving with the pen. I would always object to that. It's opening up a door that's allowing for testimony related to the HGN tests, and just about every judge would agree with that. So we want to be aware of that. Always have your own motion in limine to exclude any mention of the HGN test. The two most common that we deal with is the nine-step walk and turn and the one-leg stand. Each of these tests has many clues that the officer is trained to look for. And if a person reaches a certain number of clues, then the police are taught that that means that they are impaired and unable to drive safely. What we're looking for in that, with the nine-step walk turn, the officer is going to put a client in the starting position, which is the most abnormal position that stand that I could imagine - one foot in front of the other, hands by your side, head straight ahead, looking at the trooper or officer as he explains how they want you to walk. And that's in nine steps out, and heel-to-toe fashion, heel touching the toe, taking a small series of steps, to turn around after the ninth step and walk back nine in the same way, all while counting out loud. The officer is looking for many clues - an ability to stand there in the starting position without any issue, to wait to start the test until they are told to do so. That is a very common issue that we see, is that as the trooper is demonstrating the test, the client starts practicing, starts trying it themselves. That's a clue that they're looking for. How do they walk this - how do they do the walk? Are they able to touch heel to toe? Are they able to stay on the line? Sometimes it's painted and sometimes it's imaginary. Again, something you're going to look for in a police report. What did they use? Did they use a fog line or did

they just say, well, this is a straight line, from point A to point B. You walk that line and I'm going to pretend that I can see a line in front of me that you're stepping off of every second step. Do they use their arms for balance? Although in the in the training manual for these officers, a suspect is allowed a six-inch window to raise their arms. The officer is going to note whether or not somebody has got their arms out in an airplane fashion to maintain their balance, or do they keep them by their sides? They look to see if the person can make the turn correctly. And then, how do they walk on the way back again? Did they count out loud? The one-leg stand - similar situation. Although the starting position is a little different now. It's just feet together, hands by our sides. We're not going one in front of the other on this one. The officer is going to have the, again, demonstrate and tell the client that they can choose whichever leg they like, take that foot, hold it out about six inches from the ground, with the toe pointing up, and count out loud by thousands. They're trained to look for 30 seconds. Most officers will tell them, count to 30. Others will say, you count out loud and I'll tell you when to stop. Again, you're looking at what do they put in their report? What did they say? How did they instruct them? This is where the body-cam issue comes into play, because it is the best evidence for us to see. Sometimes it's good and sometimes it's not. But it allows us to give our client the best advice, in terms of what we may see and how we may either defend it, or it may not be worth their trying - the, you know, the time and effort to go to trial, if it's poor performance on these tests. But again, they are counting by the thousands, they're concentrating on keeping the toll pointed up, keeping their balance and, again, starting at the appropriate time. A couple of things that I'm looking for, though, is just the ability to follow instructions there and how a person sounds and how a person is able to count. Some other tests you may see used are an alphabet. You don't - see, say, the alphabet backwards. However, some officers will just ask them to say the alphabet without singing it. Others will say, start at G, stop at X, you know, or any two letters that they want. They're again, just trying to see if a person is able to do that. Counting backwards, same thing, they'll take a set of numbers and they'll be looking to see if the person stops at the right time, you know, so count backwards from 89 to 73. Finger dexterity, test, again, you know, a person would use their thumb and touch each of their fingers on the same hand. And then, the portable breath test, which is allowed to formulate probable cause, but is not admissible in court. That is not regulated by the Office of Alcohol Testing. It's not calibrated within the standards required here in Massachusetts. So it is a good tool for the police to at least get some idea of a person's BAC, but they're not going to be able to use that in court. Next we have motion filings, and this is, again, in the context of defending a case. What are we looking for? Are we able to suppress any evidence? Are we able to get anything thrown out? The biggest, or I'd say the two biggest, would be the first two that we have here. The stop - if we're able to suppress the stop, we've beaten the OUI. Because none of that evidence after the stop is going to come in. It's thrown out. There may still be a negligent operation issue or a civil motor vehicle issue, but that pales in comparison to the OUI. And so, again, very hard to do, but great practice. The burden of proof is much lower on the government in a motion hearing. They don't have to prove anything beyond a reasonable doubt. And so that plays in their favor. But it's a good chance for us to challenge whether or not the stop of the vehicle was legal or was it an unjustified, unwarranted stop? And if so, then we've made our point and then judge has allowed it. Sometimes the stop is legal. That brings us to our next issue. And that is, is there an exit-order issue? Exit order, as you remember from a couple of slides ago, is when the officer tells the client to step out of the vehicle. And so they do have to have reasonable and articulable suspicion to get the person out. It doesn't take much. I will tell you that. If they can formulate some opinion that there's a reasonable suspicion this person may be impaired,

that's going to be enough. Most even - the most lenient of judges is going to agree that it does not take a lot in the context of an OUI, to get someone out of the car. It's much different if there are no signs of impairment and this becomes, perhaps a weapons issue or a drugs issue type of case down the road. That's a little more burdensome on the government to justify the exit order. But within the context of an OUI, there's great leeway and latitude for the police. So we're looking for, again, what is in the report and later, what is in the officer's testimony, that justifies the exit order? You know, is there an odor of alcohol? Is there an admission to drinking? The bloodshot, glassy eyes, the slurred speech, the inability to comprehend questions or produce documents, any of those things in conjunction with one another, or any combination is going to be enough to get the exit order out. The same thing with statements - again, Miranda is not required in the context of an OUI, roadside, as the officer, again, is allowed more leeway in investigating whether or not the person can safely operate a vehicle. Unfortunately for us, that opens the door to a lot of statements that may be incriminating, including, I've had too much to drink. I know I shouldn't be driving. I'm sorry I made a mistake. Very hard for us to get any of those suppressed. However, look for an opportunity to do so. File a motion to suppress the statements. Sometimes what appears in the police report is not always how the testimony comes out. We won't know that unless we try it. And so when I review a report, one of the first things I'm looking for is what type of motions do I have here? What can I do down the road? And that's the last step of the case before trial, anyway. So you have the arraignment, pretrial hearings, any compliance hearings, any discovery motion hearings. You're having time to kind of develop any type of motion issue that you may want to file down the road. A motion to dismiss, again, now we're looking at whether or not there's probable cause for the arrest or for the charge. And so that's rare, in the context of an OUI, unless the report is glaringly missing one of the elements of the charge. In order to prove the OUI or establish probable cause for the OUI, there has to be operation, public way and then proof of impairment, either by the breath test or, you know, field sobriety testing or opinion evidence that the person is impaired. One thing that has now come back again, which was more prevalent earlier in my career, was the motion to suppress a breath test. We had a window there where the breathalyzers were out in Massachusetts. They are now back in, in many counties. And so that has kind of breathed new life into the Pierre Motion, which is the 15-minute rule. The officers who are administering the breath test, or having the person sign the statutory rights and consent form to take a breath test, have to observe the defendant for 15 minutes, uninterrupted, immediately prior to that test. And so that is something that has, again, come back into my own practice, in terms of challenging evidence. But that's something that you - you're going to look for in your breath-test packet that you receive as part of the discovery. You'll have the statutory rights and consent form, which will have a handwritten time at the top of it. That's typically when the officer is going over the rights with the defendant. The defendant signs it, agrees to take the test, and then on the actual test ticket, that shows the two samples that the defendant gave. That'll have the times that those tests were taken. So obviously, if you have a situation where it's less than 15 minutes between the signing of the form and that - the test, well you have a live issue there. A lot of times there's a long window. They might have somebody sign the consent form at 1:00 in the morning and then you see the first sample as at 2:15. Well, that's an hour and 15 minutes that's gone by. All that matters to us is what happened from 2 to 2:15, because we need that 15 minutes immediately prior to the administration of that test. One other thing, which is rare, but in some cases we have, is a blood test and the blood draw. You know, we can file motions to exclude that from evidence, based on lack of consent. Again, many judges are - it really depends on what we're dealing

with, but that's a difficult one. Oftentimes, if the blood - the blood draw is done in the normal course of treatment, it's very hard for us to exclude that from evidence. You would find, though, that it's a burden on the district attorney to be able to introduce that into evidence, because the medical records are not going to say what the percentage was. They need an expert to come in and to formulate what - whatever equation would work out to give them a percentage that is .08 or above. But that's what we'd been looking for, and in those situations, it's to try to exclude the blood draw as a consent issue. Another would be when the Commonwealth has filed a rule 17 discovery motion for our client's medical records, is to object. There have been several instances where some judges have agreed with us and kept out the medical records or kept - prevented, I should say, the district attorney from being able to subpoena those medical records. Obviously that would help at trial. Sometimes we may not have much for a motion, but if we have enough to make a good-faith effort and go forward, it's a very important practice, if only for an ability to cross-examine the witness. It puts the burden on the government to produce their witness for the motion hearing. That oftentimes is the arresting officer. And a lot of times in that situation, it's the only witness. Many OUI cases are a one-witness trial. It's the one officer who dealt with the client and no one else. So if that person is subpoenaed to show for the motion, we are allowed to cross-examine them. We're constrained to whatever we have challenged. So, for instance, if we are challenging a stop with a motor vehicle, then that is where the questioning begins and ends. Right? We can't go beyond the scope of the stop of the car, but that allows us to, again, see the trooper or the officer, hear them, cross-examine them, and I think more importantly or just as important, it gives the client an opportunity to be in a quasi-trial setting where they are able to be one on one with that officer, hear them testify, and gauge for themselves if it makes sense to have that next step and go to trial, based on how the officer testifies, how do they look? Are they going to be too believable to a judge or a jury? And so that's, to me, kind of a batting practice situation, where we get a little bit of practice prior to actually playing in the game, which would be the trial. But again, it allows us an opportunity to interact with the police officer, perhaps prior to the motion starting, just to introduce ourselves to have some conversation with them. You know, it helps me to know whether or not, you know, this person may have an ax to grind against my client. If my client was less than pleasant in dealing with - the officer is going to tell me that. Or I'm going to be able to know, based on my own interaction with the cop. If they were a gentleman, if they were a good guy, again, same thing. The officer is usually going to tell me that in the hallway, you know, he's a nice guy. I felt bad for him. You know, I had to do what I had to do. I can get that, a lot of times, prior to the motion hearing. And that's going to help me, going forward. Because that's going to develop how you cross-examine someone, what you're looking for, and ultimately what your advice is to your client, going beyond the motion hearing. Finally we get down to the end in these cases and that's trial. In Massachusetts, we can have a trial in one of two ways. That's either a jury or a jury-waived. In a jury trial, the client helps us pick six members from the jury pool. And those six people listen to the case and have to have a unanimous, six-nothing verdict, that he or she is guilty or not guilty. Client can also waive a jury and go solely with the judge. In that case, the judge is the judge, jury and executioner - they decide everything. It's our client's choice. Right? We have to advise them. We have to give them our best advice. But ultimately, we can't force the issue. It's up to them. They want a jury trial and we think it's better with a jury waived, explain it to them. Tell them why. But in the end, it's their decision, not ours. In fact, that's true with a right to plea, the right to the trial, and a right to testify at trial. Again, all of these things are what we're advising them on. But ultimately, they have to make the choice. What I tell all of my colleagues who might ask is, is our job is to educate them

as best we can so that they feel confident in whatever decision they make, win, lose or draw. Are they confident that they did what was best for them? The result may not be what they wanted it to be, but would they go back and change it? Do they feel confident that, given everything that was presented to them, this is what they should have done? Terms of trial strategies, I touched on this earlier. Very rarely do you have a standalone OUI charge. Typically, it's going to involve two or three additional charges, most commonly is negligent operation. You may have an open container. You may have a leaving the scene of an accident. There are many different things to look at. Those are collateral consequences in and of themselves, too - negligent operation, leaving the scene - convictions to those carry additional license suspensions of at least 60 days, as well. So those are all things that you want to have discussions with your client about, perhaps pleading to some of those charges prior to trial, taking a continuance without a finding, which would avoid any license suspension from those charges, and then having a trial on the OUI. Again, a theory of the case, you know, what is our theory? What is our best strategy, in terms of defending the case at trial? Was it a rush to judgment? Was it, you know, a sloppy investigation? Was it a lack of experience on the officer, in terms of testing, in terms of the opinionated evidence that they're going to give? And most importantly, it comes down to our ability to cross-examine. That's oftentimes what this is all about. Very rarely would I ever advise a client to testify in this situation. Again, that's their choice. You know, my advice is typically they shouldn't. And I feel that, in most cases, putting the client in that situation is only going to open up evidence that doesn't otherwise exist. And so that's something we have to be very cognizant of, by putting the defendant on the stand, are we adding evidence to the government's case that they can't have or can't get in without our client. What we really want to do in these situations, with cross-examination, is look for what doesn't exist. And that might sound crazy, but we're looking at the report, reading about these field sobriety tests and then talking to our client. What we really need to do is look through it. Look between the lines. What doesn't appear in this police report. There's no mention of the client's, you know, ability to pull over safely. There's no mention of any difficulty providing license and registration. There's no mention of any issue with them getting out of the car, with them walking a straight line to the back of the car, with them getting into the cruiser, getting out of the cruiser, walking through the station. They have no issues. They're handcuffed behind their back. None of that is ever going to appear in the report. We have to be trained and experienced enough to look for that, and then utilize that in our cross-examination. We can't avoid asking questions about the field-sobriety testing because we do have to address that with the officer. But we want to look for things that would bolster our client's appearance that they were not impaired. These are tests that they're taking. What are the other things that they're doing that would tend to show they had an ability to operate safely? They just weren't able to complete your standard tests, based on any number of factors - age, weight, health. Any of these issues may come into play, in terms of why somebody might not pass a test. How about anxiety? How about nervousness? I'm on the side of 95, with cars zooming by, trying to do a one-leg stand. You do that. You know, that's not easy. And so an inability to do that doesn't mean somebody can't drive safely. How do they pull over? How do they interact with you? Did you understand everything they said? When they were counting during these tests, you had no difficulty understanding the numbers as they said them. They didn't slur. They didn't mutter. They didn't stumble. No issues with any of that. The officer, 95% of them, they're going to give you that. They're going to answer the question the way you want, and that's what you're looking for. You want to be in a situation where your cross-examination is leading to the answers that are favorable to us. And so don't ask the open-ended question. Nail down the officer. Ask

them the question that is going to lead to the yes or no answer that we are looking for in that situation. And that's what I have determined here, in this final slide about the real field sobriety tests. Again, those are the things that I am looking for when I read a report, especially if it's something that I know the client is going to want to try at the end of the day, then I have to find their ability to do any number of things that may not appear in the report or are just throwaway statements in the report. Some experienced - examples, excuse me, are their ability to respond promptly and appropriately to an emergency situation. That goes back to the initial slide - we talked about the stop. How do they respond when those emergency lights go on? Do they respond appropriately? Do they slow down and pull over to the right side of the road? That's what we want. We don't want the, you know, an issue where the person just jams on the brakes and parks in the middle of the road. Right? That's not good evidence for us. But if they're able to pull over safely and appropriately, that is. That's what - the first thing the police are looking at. And oftentimes, they'll put it in the report, but it's not obvious. And so we have to kind of look at it and draw it out. The ability to follow instructions without hesitation. Right? Again, there - is there any delayed ability to react here? So any time a person is able to promptly follow those instructions without hesitation, that's good evidence for us. Produce the required documents - same thing. License with no issue. Registration with no issue. Answering the questions appropriately. Giving appropriate answers to whatever questions they're asked without, you know, any issue in their speech. You know, the officer was able to coherently understand what is being said. Are they polite and cooperative? Right? That's a big one. When somebody is, you know, aggressive, belligerent, argumentative, they've got no chance. Right? That's going to be a very tough one to get over. Not that you can't, because we've done it, but it makes our lives a lot more difficult. So any time somebody is polite and cooperative, we really want to draw that out, especially in the testimony. And some officers, to their credit, will put that in the report. You know, so-and-so was a gentleman throughout the whole process. Sometimes that's the only thing I highlight in the report. Because that's all I care about. In the end, that's going to go a long way. Again, as I touched on before, the ability to walk to and from the area with no issue, that's important because, you know, so much is going to be put on the ability to complete the nine-step walk and turn or the one-legged stand, interlocking yet glossed over with somebody's ability to do everything else, walking that's not test related. He had no difficulty keeping his balance. He walked everywhere I told him to go with no issue. And half that time, once you really pick up on it, they're handcuffed behind their back, walking. And so that's huge. That goes a long way with a judge. That goes a long way with a jury. The booking video, or as we talked about earlier, dash cam, body cam, all of that stuff is, you know, if it exists, it's going to get turned over to us. And so once it does, it's not a matter of, you know, getting it. It's how can we utilize it to our advantage? And so as I mentioned, some of them don't have audio. Those are my favorite because you can't hear anything. Because a lot of times, you know, based on who your client is, that whatever they were saying wasn't the best and didn't put them in the best light. But how do they look? How are they sitting there handcuffed to a wall or walking around the booking room answering questions? Are they complying? Are they paying attention? Do they fall asleep during the booking process? Those are all the things that we're looking for when we get those videos. But the best thing that we all can do is, again, pay close attention, right in the beginning, to the police report. That's going to be the first and ultimately the biggest piece of evidence we get. The rest is just kind of building the district attorney's case or it's building our defense. But we're able to gauge most of it just off that first police report. And so that's really where you have to study it and then be able to give your client the best advice, in terms of how to go forward and what makes

sense for them in their situation. I thank you all for your time. It's been a pleasure talking to you today about representing a client charged with an OUI. If anyone has any questions, concerns or would like to discuss anything with me, feel free to reach out. My email is in the slide, jbseed@johnseedlaw.com. Thank you again. I hope you all have a great day and I wish you all continued success in your practice. Thank you.