>>: Good afternoon. My name's Nicholas Morris. I'm an attorney in Salem, Mass. I'm here today to talk to you about successfully defending an OUI case. One of the first things you're going to do when you get retained to represent somebody on an OUI case is you're going to get a copy of the police report. That's really the start of any case. Once you have that, one of the first things you want to do is go to the trial court website and get a printout of the model jury instructions for the offense. That's going to give you the element of the crimes, and that's going to dictate how you're going to move forward with your case. Now in any OUI case, there's three elements that the Commonwealth must prove - operation, public way and impairment. Each of these in and of themselves can be a defense that you're going to use at trial. So as soon as you get the police report, as soon as you read the jury instructions, you want to start preparing your defense. So I'm going to start with talking about operation. Operation is just driving a motor vehicle. A motor vehicle is defined by statute as anything with an engine greater than 50 ccs. So when we're talking about operation, how that's typically proven in an OUI case is the officer will have seen your client, potentially driving down the street, conducted a motor vehicle stop, had your client get out of the car, he was arrested thereafter. Now, operation's more commonly used as a defense in cases where there's an accident. So if you have a case where the officer arrives on scene after the accident has occurred, nobody's in the car at that point, there's many people on the scene, they have to prove - the Commonwealth, that is - has to prove that somebody was driving the car. Now, they may pick somebody out of the crowd. They may have somebody say your client was driving the car. These are the circumstances in which you'll see a typical operation defense. Now, operation is the act of having the car running when your client is sitting in the car. There's several cases in the materials that talk about what makes that out. Typically, the basis for that is having the key in the ignition, the ignition turned on, the motor does not have to be running, just turning the key on to get electricity into the car to, say, run the radio or the heat is an active operation. Now, when you have newer cars, when we talk about cars with key fobs and pushbuttons, that's something you want to look for as to whether the car was running - the electricity was on - because there's no longer the ignition to be turned. So that's an interesting question that you could use, potentially as a motion to dismiss, or defense at trial to say the motor wasn't running, the electricity wasn't on, or the ignition key wasn't turned, more accurately, if it's a push-start, therefore there was no operation. Now back to the scenario where there's an accident. In an accident, when you have multiple people on the scene and there is no clear operator, one of the things you may want to look at, if your client is charged is the person driving is - was anyone taken to the hospital? Are there ambulance records? You want to look at the medical records, the ambulance records, whatever you can get for your client to see what injuries occurred, and use that to help determine - did the injuries my client incur - is it possible for my client to have been driving the car and had these injuries? So for instance, if there's an accident and the airbag has deployed and your client was taken to the hospital or seen by EMTs, you can get both of those records. And when you look at those records, does your client have injuries to his face? Does your client have injuries to another part of his body because of the airbag going off? - your client would have injuries to the face. So these medical records, EMT records, whatever injuries were on your client - those can be helpful if your defense at trial will be, my client was not operating the motor vehicle, and therefore the Commonwealth can't prove the first element of the offense beyond a reasonable doubt. The second element is public way. And a public way is defined by statute, obviously, as any way in - any way in which the public has a right of access. Public way, generally, is not something you can fight a trial because typically, your client stopped at a parking

lot, on the side of a street, a driveway, all those things would be considered public ways. So if you have a scenario where you think it might not be a public way, look at the statute carefully. I think public way is important for a different reason, though. As I said, it's one of the elements required to be proved by the Commonwealth at trial. Now a lot of times when you get to the morning of trial, you walk in and the prosecutor will say, before the trial starts, before the judge comes on the bench, the prosecutor will say to you, will you stipulate to public way? And that's will you agree that public way - there is a public way in this case, and therefore, I, the prosecutor, don't have to prove it. I would recommend against that for a couple of reasons. You can use these to your advantage. If the Commonwealth, in their opening statement, forgets to say that the car was driven on a public way the night that your client was arrested, that's an element of the crime, and all elements of the crime must be included in the opening statement. So there is a case called Commonwealth v. Lowder at 432 Mass. 92 that says, at the close of the Commonwealth's opening statement, defense counsel can move for a directed verdict of not guilty if the Commonwealth has include - failed to include all the elements of the offense in their opening statement. So if you don't stipulate that your client was on a public way the night he or she was arrested, and the Commonwealth forgets to state in their opening statement that your client was driving on a public way on the night he or she was arrested, you now are in a position where you can ask the judge to give your directed verdict before you even give your own opening, before any witnesses are called. So that would be one reason why I would suggest stipulating to public way would not necessarily be in your client's best interest, although you may want to. The second way is, again, at the close of the Commonwealth's case, after they call the arresting officer most typically, you're have another opportunity move for directed verdict. So if the prosecutor is inexperienced, they may forget to ask the officer whether the road your client was stopped on, or whether the road your client was driving on was a public way. Typically, with OUI cases in the district court, the - those are the first types of cases that a new prosecutor will be allowed to try on their own. So a lot of times when you try a first offense OUI in the district court, the prosecutor you're going against - this may be their first trial, may be right at the very beginning their career, and they may be flustered, forget to ask the arresting officer during their direct examination about whether the road was a public way. Now, you want to be listening very carefully for that because you don't want to accidentally bring it out on cross because you want to save that argument for a directed verdict. So I think by not stipulating to a public way, that gives you two opportunities to move for a directed verdict and try to get the kids - case kicked out of court before your client even testifies. The last element is impairment. This is where 90 percent of the defenses are done at trial on an operating under the influence case. Now obviously, if you read the jury instructions, you'll see that there's two ways the Commonwealth can prove impairment. And impairment is just a diminished ability to operate a motor vehicle by the ingestion of alcohol. So the first is called the per se impairment. And that's, as we all know, the breathalyzer test. And any breathalyzer result of 0.08 or greater for somebody over 21, or 0.02 or greater is per se impairment and enough to prove this third element of the offense. Now a lot of times you'll see a car stop where the officer has seen your client driving, thus proving impairment. The officer says your client was driving on a main road in the town, proving public way. And then your client took the breathalyzer. Now I advise all clients and anyone I meet that they should not take the breathalyzer because that can only work to their detriment. Even if, let's say you take the breathalyzer and you blow either a 0.06 or 0.07 on the breathalyzer, now you're not per se impaired. However, a 0.06 or 0.07 on the breathalyzer, under the statute, can be used as

evidence of your impairment. So blowing under 0.08 isn't going to save you if you're close at 0.06 or 0.07. Anything below a 0.06 can be considered as evidence of you being not impaired, but it's - why take the risk? And this is evidence that can be conclusive against you if the breathalyzer is admissible at trial. Now, even if your client has taken the breathalyzer, one thing you may consider, after reviewing all the evidence, is whether or not your client should plea, and we'll get to 24D dispositions and sentencings later. But you need to look very carefully at many things regarding the breathalyzer before you make that decision or you speak to your client about whether or not they should plead or continue to fight the case. So when you have a case where your client has taken the breathalyzer, one of the things you always want to request in discovery is the so-called BT ticket. Now the BT ticket is two pages. They call it different things in different courts, but the first page of the BT ticket will show the actual breathalyzer results from your client, and it's going to have six readings on there. It'll have - the first reading you'll have is the air test, which is just the air blowing out the breathalyzer to clear it from the person who used it before your client. The second reading will be your client's first breathalyzer. Then there'll be another air blank to clear it out again. Then there'll be a calibration. Another air blank. Your client's second breathalyzer reading. And then another air blank to clean it out. So when you look at this, there's a couple of things you want to look for. When you're looking at the actual results of the breathalyzer, one of the things you're going to want to read ahead of time is the code of Massachusetts regulations that deals with breathalyzer results. And I believe those are cited materials, it's 501 CMR Section 2. And that deals with what makes it so a breathalyzer can be introduced in court, for lack of a better phrase. So one of the things that needs to be done is when they do a calibration, they have a gas cylinder in every machine, and it has a standardized amount of alcohol in that gas cylinder. And when they do the calibration, it has to read 0.80, plus or minus 0.06. So it's 0.86 or 0.74. If it's outside that sort of range, then the breathalyzer machine was not working properly, and you can use that as a basis to exclude the use of the breathalyzer result against your client down the line at trial. Again, I'd implore you to read the Mass. regulation that deals with the breathalyzer results. There's a lot of helpful information in there. And you want to compare the BT ticket - the first page of the BT ticket to the CMR to make sure everything lines up because, again, that can be aware that you can get rid of the breathalyzer result and then go forward at trial. Now you also want to look at the duration of the blow, so to speak. So one of the pieces of information you'll get on the BT ticket is the duration, and that duration can range from anywhere - I've seen from three seconds up to 10 or 12 seconds. Now the police officers are trained to blow with these new machines for about three to five seconds. The problem can become if your client continues to blow into the machine, he continued to put breath in there that may have alcohol on it, which could potentially increase the result of the breathalyzer and make it appear as though your client was more impaired than he or she actually was because the officer has requested your client to blow into that breathalyzer machine for too long. So that's why you want to be careful and look at the duration when you're looking at the BT ticket. Now, when you're looking at these - the calibration, when you're looking at the results of your client's breathalyzer test on the BT ticket, when you're looking at the duration of the blow, these can be important issues that you may need to retain an expert on. So if, when comparing the BT ticket, in your case, to the CMRs, you see that there may be an issue there. You may want to look for an expert to help you interpret these results and to hope you try to get these results excluded down the line at trial. So that's a piece - a strong piece of evidence the Commonwealth will not be able to use against your client. I know there are several in Massachusetts. You can find them

on Google. So if you get in that position, that's something you may want to consider. Now, the second page of the BT ticket has some important information on it as well. The most important thing is it should say on there whether or not the officer who administered the breathalyzer observed your client for 15 minutes uninterrupted prior to administering the breathalyzer result. And that's important because it would - they want to watch and make sure your client doesn't put gum in his mouth, your client doesn't put pennies in his mouth, your client doesn't put anything in his mouth in between that time the observation starts and in between the time that the breathalyzer is administered. And, again, under the Code of Mass. Regulations dealing with breathalyzer, not watching your client for 15 minutes could be a basis for you to ask to exclude the breathalyzer, again, down the line at trial. So that's something you want to look for, again, when you get the second page of the BT ticket. And that's something you should request in every OUI case, even if you think it's hopeless because you never know what the actual BT ticket will show, whether or not they match up with the Code of Mass. Regulations and whether or not you have a basis to potentially exclude this evidence against your client. The other thing you should be aware of is there's been recent litigation in Massachusetts about the overall use of breathalyzers in the year 2015 for about a seven-month span. And a judge in a consolidated case in Ayer District Court has found that from a certain period of time in 2014, all breathalyzer results are per se excluded. So if you're in the position where you have a old case for whatever reason, you want to look at this and see if that's another basis to exclude the breathalyzer results. And I think a Google search will help you easily find these line of cases that deal with that. The other thing on the second page of the breathalyzer ticket you want to look at is the officer actually - puts in his observations there, observations that he's going to say lead to his conclusion that your client was impaired. So to explain this further, let me back up. When you get a police report, that's just the narrative that the officer wrote about his observations, his investigation or lack thereof when he was on the scene, prior to arresting your client. And he's going to write a narrative of what he saw, what he did, what your client did, how your client responded. Now, in almost every OUI report, you're going to see sort of three things. You're going to see the officer saying your client has glassy, bloodshot eyes. You're going to see the officer saying your client's speech was slurred or thick tongue. You're going to see the officer say that your client was unsteady on your feet. So those are the - kind of the three things you see in every single case. And the officer writes that in his actual narrative, the police report. Now, the second page of the BT ticket has a section with the arresting officer - the arresting officer's - I'm sorry - observations. And for instance, in one of my cases, I have one where it says public way, observed driving, glassy eyes, portable breathalyzer, alcohol arrest, unsteady on his feet, bloodshot eyes, crash, slurred speech, odor of alcohol. OK, so this is another example where the officers writing in his observations of your client. And sometimes, for instance, I've had cases where when the officer wrote slurred speech, no, he wrote that on the BT ticket when he filled out his observations of your client. Now, that's important because when you look at the narrative that the officer wrote, you need to make sure the narrative matches up with the observations on the BT ticket. In some cases, they do not match up. And that would be great grounds for impeachment at trial, when you're trying to question the officer's observations in whether or not your client's impaired. So you always want to look at that portion of the breathalyzer ticket and compare that to what the officer actually wrote in his narrative. So that's per se impairment. That deals with when the breathalyser's 0.08 or greater. These are some of the ways that you can move to try to exclude that breathalyzer at trial. Now, the other way the Commonwealth can prove it is just proving that your client was impaired on

alcohol and his ability to do - drive in a motor vehicle was diminished. Now, that would be a situation where either you've successfully moved to exclude the breathalyzer results based off problems with the breathalyzer or other grounds or in a case where your client refused a breathalyzer. And as I said, my advice to typically everybody is to refuse the breathalyzer because you have a lot to work with. If your client hasn't take the breathalyzer, there's no BT result. You have a lot to work with if the Commonwealth's going to go forward just on impairment with the sole grounds of that generally being just the officer's observations of your client. So there's sort of three things the officer's write in all their narratives, and three things they testify about at trial. The first is the - if they saw your client drive, the observations of his driving, the field sobriety tests and just general observations of your client, either before or after the field sobriety tests are completed. And again, either on the scene, on the side of the road where your client was arrested, or back at the police station. So I'm going to talk about this in the context of things that you need to request on discovery because when you're challenging just the impairment portion of the charge, the third element, without a breathalyzer, what you're challenging is, basically, the officer's recollection of events, or whether he was mistaken about your client being impaired, or whether he just rushed through judgment. So there's a lot to work with when you prepare your cross-examination of the officer on this ground. And in order to do that effectively, you need to request certain discovery ahead of time because the officers, many officers, they've done hundreds of OUI arrests. They're going to know what they shouldn't give you because it's going to help your client, and they're going to know the areas that are going to hurt you. And you can try to force the officer's hand, make him testify about what you need him to say if you request the correct discovery ahead of time. The number one thing you should get at any test - any - any OUI case - I'm sorry - where field sobriety tests are completed is the field sobriety training manual that the arresting officer, or the officer who administered the field sobriety test in your case, was trained on when he or she went to the police academy. Now, every officer in Massachusetts is either trained at the Municipal Justice Training Committee facility, and there's multiple of those, or by the state police. So if you have a municipal police officer, say an officer from Lynn, he's going to be - have - be trained at the Municipal Justice Training Committee at whatever location - doesn't matter. What you need to do - knowing that you have a municipal officer, not a state police officer - is you would go to the Municipal Justice Training Committee website. On that website on the right hand side, or you can search for this on that website, is the public records request. That's an online form. It's pretty self-explanatory how to fill out. And what you're going to do, you're going to fill out that form, and you need to write a letter directed to the public records officer at the Municipal Justice Training Committee requesting the officer's training manual. And all you need to get that training manual, generally, is the officer's first and last name and the police department in which he's currently employed. The Municipal Justice Training Committee should have the remaining records in order to give you the correct training manual. What'll happen is, you submit this request online, they generally email you back with a one-page letter and a one-page information sheet. That one-page letter is going to say Officer so-and-so of the Lynn police department, let's say, graduated from this municipal justice training academy on such and such a date, and he was trained using this manual. Then, the second page you're going to get is instructions on how you can go online onto their website and download all of the municipal justice field sobriety test training manuals. And then you download the one for the officer in your case. In my office, I know, I have them all printed out. I have them all bound in three-ring binders so I can bring them to trial - because you're going to need these. Now the

other way, if you have a state trooper, what you're going to need to do is go to the state police academy website - there's a phone number on there, you call up, ask for the records officer, and they should be held - be able to instruct you how to get a copy or how to identify which manual the state trooper in your case was trained. Now, the state troopers typically use the same manuals as the municipal police officers. So all you need to find out is which one the trooper in your case was trained on. And then, again, you can download these as PDFs off the municipal justice training committee website, and then I would recommend you print it out, put it in a three-ring binder so you're ready to bring it with you to trial. Now - now that you've had this training manual, you want to go through it very carefully because it talks at length about what the officers are trained to look for, what actually constitutes the failure of the training - of the field sobriety test, and you can use that in order to structure your cross. Now, what - that will help you later on when the officer tries to say, for instance, your client failed a field sobriety test. So an example of that would be - most cases, the officers ask that your client do the 9-step walk and turn test. Now in the field sobriety manual, part of what the officer is trained - is he's trained to start observing your client - the moment he tells your client he's going to do the 9-step walk and turn, the officer's are already looking for signs of impairment. He's looking to see how your client's standing there listening to instructions. He's looking to see if your client starts too early. He's looking for all these things before the test even starts. And also, for instance, with the 9-step walk and turn test, in many OUI police reports, you'll see the officer said the defendant failed to touch heel-to-toe on steps 5, 6 and 7. But if you read almost all the training manuals, you'll say that your client, when conducting a field sobriety test, is not required to touch heel-to-toe. Usually, they're given about a 1-inch buffer between their heel and their toe. As long as your client has their heel and toe about one inch apart, they don't have to touch, and it's not considered a failure to touch, and therefore, it shouldn't be considered that your client failed the field sobriety test because his foot may have been less than an inch apart. Now that's something you want to ask the officer about when you're cross-examining him is exactly how far apart your client's feet were because he's not required to touch them heel-and-toe. And if the officer denies that then luckily, you've printed out the field sobriety training manual. You have it with you on the day of trial in a binder. And you can reference - give it to the officer. Have him read it. Show him that on page so-and-so in this manual, the client is not required to touch heel and toe. And so if you were to ask the officer that question, officer, my client is not required to touch heel and toe, isn't that correct? Now, the officer is going to say, no, that's not correct. He's required to touch heel and toe. Then you have the field sobriety manual, the one that he was trained on, that says the officer just didn't tell the truth. And you want to use that manual again and again and again to help your client out in any way possible and to bring the officer back away from trying to say things that hurt your client. The other thing I would say about the field sobriety manual is there's a lot of stuff in there that aren't field sobriety tests, that the lay person wouldn't know that the officer's doing a field sobriety test. So all these manuals talk at great length about what's called divided attention tests. For instance, everybody knows you get stopped by the police officer. He walks up to your car. And he says to you, can I have your license and registration, please. What most people don't know and what the field sobriety manuals will tell you is that at that moment when the officer asked for those two documents, he's already conducting a field sobriety test. The officers are trained to ask you for two things at once. And the reason they do that is a person who is impaired by alcohol will have trouble doing two tasks simultaneously. And therefore it would show the officer that you're impaired. So when he asks you for a license and

registration, he's asking you to remember to get two documents. And he's asking you to remember which two documents you need to get. And he's also asking you to remember where those documents are. So he's asking you to do multiple things at once, just by asking for your license and registration. And the officers are already watching at that point to see how your client or the driver reacts to that question, to see if he remembers where the license is, to see if he remembers where the registration is. Now, the officers also watching for the manner in which your client hands the - those documents over. He's watching to see if your client has trouble getting the license out of his wallet. If your client takes out a credit or debit card by mistake and hands it to the officer. He's watching to see if your client drops his wallet trying to get the license and registration out. He's watching to see if he can even remember where the registration is. So you can ask the officer, officer, you're watching to see if my client knew whether registration was, correct? And if the officer says no, well, then you have the field sobriety manual right there with you to impeach him with it. If the officer says yes, so you say to the officer, officer, you're watching to see if my client remembered where he keeps his registration? And the officer says, yes, I am. And my client remembered where he kept the registration because he picked it up and handed it to you, right? And my client didn't have any trouble handing it to you, did he? No because if he did, that's something you would have written your police report, right? Yes. So just by using the manual, you're able to develop other areas of cross-examination that may not be obvious to you that will help show all the good things your client did, things that would tend to suggest he was not impaired by the use of alcohol and things to suggest the officer's conclusion that your client was impaired by the use of alcohol is wrong. So the field sobriety manuals, I think, are the most important thing that you can request in discovery. And the best part of that is it something you don't even need to ask the prosecutor for. It's something you can do completely on your own getting ready for trial. You don't need to rely on the prosecutor. And that's something that you should get in every single case. Now, more and more in OUI police reports, you're seeing officers being trained to do the horizontal gaze nystagmus test. The materials talk a little bit about this. There's a couple of things from my experience I want to point out so you're not surprised at this down the line at trial. Now, there's a case, Commonwealth v. Sands. That's cited in the materials. I suggest that you read that. The short version is that in order to introduce the results of a horizontal gaze nystagmus test against your client, the Commonwealth would need to put on an expert to explain that test and explain to the jury how the results of that test would tend to show impairment. I've never even heard of a case where the Commonwealth's gone through the lengths to get that done. And the arresting officer, the officer who performed the test the night your client was arrested, is not going to be an expert. He's not going to be allowed to testify to a result of the horizontal gaze nystagmus test. And that's basically what Sands says. But what's happening a lot of times is the prosecutor, knowing they can't get in the results of each HGN test, the horizontal gaze nystagmus test, they'll ask the judge to allow them to question the officer about your client's ability to follow instructions, your client's ability to listen to the officer while he was having your client perform the horizontal gaze nystagmus test. So what they're actually asking to do is they're not asking the judge, allow the officer to be able to testify that your client failed the HGN test because the officer can't testify to do that. They need an expert for that. They're asking the judge to allow them to question the officer about whether or not your - how your client completed the test without getting into the opinion of whether or not your client pass or failed the test. The problem with that is you're putting yourself in a different, difficult position. If the officer is allowed to testify, I asked your client, for instance, to tilt his

head back at a 45-degree angle. Your client tilted his head back not all the way 45 or too far. Now, they're - the Commonwealth would like to introduce that to show your client was impaired because he couldn't listen to the officer's instructions. But if you start to cross-examine the officer about that, what you're doing is you're going to get into an area where you're going to need the officer to explain why 45 degrees is important for example. And that's something that calls for expert testimony under Sands. So you really handcuffed by testifying - by - I'm sorry - by cross-examining the officer about your client's ability to follow the instructions of the HGN test because you may be opening the door to testimony that's otherwise inadmissible under Sands. So you want to be prepared. If you have a police report that says the officer conducted an HGN test on your client, you want to be prepared to have a motion in limine with you on the day of trial to exclude any reference to the HGN test because to do so would mislead the jury because the officer's testifying about something he's not an expert in. And you can sort of use Sands as a basis to do that by contrasting the language there with what happened in your case. But you definitely want to be prepared for a prosecutor to try to get in not the opinion of the result of whether or not your client pass or failed the HGN test but whether your client could follow the instructions of the officer because that's one in the same. So you want to be prepared with a motion to exclude that on the day of trial and not be surprised by that because it's happening more and more. The other thing the materials talk a little bit about that I'll give you some practical experience about is videotape tests or booking videos. So as you may or may not know, when a client is arrested, he's brought to the police station. They take a mug shot, a booking photo of him. They fingerprint him. They search him for contraband or weapons. And then they put him in a cell until either the bail commissioner comes to post his bail or they hold him until court the next day or over the weekend. Now, booking - now, when your client is in the booking room, typically he's standing up. He's answering questions to the officer. And generally in every police station almost, I think, the booking room at the police station, there's surveillance video of that. Now, what you want to be aware of is typically more and more, the booking-room video is usually taped over by the police department within about two weeks to 10 days. So let's say you have a client who's arraigned on June 1. It's a first offense. He has no record. He's released on his own recognizance. And you're given a pretrial date six weeks later, let's say, June 14, to comeback for a pretrial conference. And you're going to go in. And you're going to have a motion of discovery ready for all these items you're going to need for trial. And you're going to ask the Commonwealth for the booking video. Now, then you get another date 45 days out for the compliance date. So now we're talking about the end of August. You come back on the compliance date now. Now, it's been about two months, three months since your client was arrested. Now, you walk in on compliance day. And the prosecutor will say to you, sorry, the booking room's video has been taped over. Now, there is a way to prevent that from happening. Now, between - I would suggest after the arraignment date, you want to speak to your client as soon as possible, definitely within 10 days, about what's going to be on the booking-room video. If you speak to your client and your client's telling you, look, if you get the booking-room video, I'm standing there straight as an arrow, doing everything the officers want, standing up, sitting down, no problem. I'm not having any issues whatsoever. Then, you want to preserve the booking-room video. But if you talk to your client and he's like, I don't know what's going to be on there. I don't remember. I can't say how well I did in the booking-room video. That may be not something you want to get because that's going to be irrefutable evidence of your client's demeanor that night. It's going to be him on video. So you want to have a long talk with your client

about what's going to be on the booking-room video. Now, if you have reason to believe that your client's going to be standing there sober, straight as an arrow, complying with everything the officers are telling him to do, that's something you're going to want to preserve. So I'd refer you to rule 14. I think it's rule 14(a)(1)(e) that deals with the preservation of evidence. So you want to just do - it just has to be a one-page motion. Cite the rule. Write in there you want to preserve the booking-room video from the police department that arrested your client or the state police barracks where your client was taken. And then, what you're going to want to do because you only have about 10 days, 14 days to act, you're going to need to go in sometime within that 10 - week time. You want to go as quick as possible. Go to the court. Have the case brought forward into one of the sessions. Notify the DA you're bringing the case forward. Give them a copy of your motion to preserve. Bring the - have the case brought into the courtroom when the case is called. File the motion with the court. Tell - explain to the judge. You're asking that the Commonwealth be ordered to preserve the booking-room video from the police department. At that point, the Commonwealth should notify the police prosecutor, the police liaison between that court and the police department where your client was arrested. And they should inform that police prosecutor that the booking-room video for your client is not to be taped over. And it should be retained, put on a CD and given to you. So you just want to ask the prosecutor when you have the case brought forward or after the judge hears the case on the day you bring the - your case forward to file the motion to preserve. You just want to make sure the prosecutor notifies the police liaison that day that the booking-room video gets preserved because this is a very timely thing. And it gets taped over more often than not sort. Sort of a little side note is more and more, for instance, the Methuen police use body cameras. So for instance, I know the Methuen Police Department, every officer there wears a body camera. The Boston Police Department's doing a pilot program where some officers are wearing body cameras. In my experience in large district court, the DAs will readily provide you the body cameras from Methuen. And that's the same situation because these cameras are so new, the retention policy for how long the recordings on the body cameras the officers are wearing isn't very clear. But this is the same conversation you want to have with your client. If your client's telling you, I was out on the side of the road. That officer had a body camera. And you know it's one of the departments that have a body camera. And I was standing there. I did everything perfect. You might want to, again, bring the case forward. File a motion to preserve. Make sure the body camera footage is preserved. So you can get it later on and use it at trial. So just be aware of the time frame with these videos and how easily they may or may not go away. Another thing you're going to want to request in discovery and that's very important is the booking sheet. So the booking sheet typically will have a picture of your client on it. It has a whole lot of demographic information, their name, date of birth, all that sort of stuff. Why this is important is this, again, gives you another opportunity. Typically, the booking officer and the arresting officer are not the same. So it the booking officer's different, by getting the booking sheet, you're going to know who the booking officer was. And these are questions that you're going to be able to use at trial to show your client's speech wasn't slurred. Your client answered all the questions the officers asked for him to be answered. Your client understood the questions the officers were being answered. So when you have the booking sheet on there - there's a lot of information on there that's auto-filled usually, either from the RMV database or if your client has prior arrests, with that department. Some of this information will be auto-filled in. So that's not the information you're looking for. The information you're looking for, for example, that's on most booking sheets is your client's phone number, your

client's occupation, your client's employer, your client's father's name, his mother's name, his mother's maiden name, how many dependents your client has. That - those are all questions that the booking officer's going to ask your client on the night of arrest, shortly after he was brought to the station by the arresting officer. So that's evidence, close in time to when the arresting officer's going to say your client was impaired, that you can use to show that your client was sober. He understood the officer's questions. He answered the officers questions appropriately. He wasn't slurring to the booking officer. So the booking sheet can give you a lot of information that you can ask the officers about at trial that are at least going to be helpful and beneficial to show that your client was not impaired. Again, a lot of times when you get the police report on the day of arraignment, the booking sheet might be stapled on there with the police report. Sometimes it isn't. But again, that's always something you want to ask for in discovery because - again, you're getting ready to trial. And this may - the booking officer may be a witness who will be very beneficial to your client if he were called at trial. Along those same lines - because remember one of the things every officer writes in a police report, on an OUI case, is your client's eyes were glassy and bloodshot. Every client when they're booked at the police station, they take a photograph of him right then. And you can get color copies of that photograph. So you may want to request color copies of the booking photo. Again, this may be a situation, like the booking room video, you want to be a little bit careful because typically when the prosecutor - if it's attached to the police report, the booking sheet's in black and white. So you can't really tell if your client's eyes were glassy and bloodshot. If you have reason to believe your client - your client's eyes are not going to be glassy and bloodshot, you may want to request a color booking photo from the prosecutor. That's something they can absolutely provide to you. However, again, if you have reason to believe your client's eyes might be glassy and bloodshot, you don't want to request the booking video and find out because - or - I'm sorry - the booking photo and find out because once you requested it, the prosecutor has it. And if you get the booking photo and your client's eyes are glassy and bloodshot, the prosecutor is just going to use that against your client. So it may be beneficial in some cases, and that's something you need to discuss with your client before you request it. But it's at least one item of discovery that you need to think about getting when you're preparing for trial. The last discovery topic I kind of want to touch on is discovery that you're going to need to request in a roadblock case. So a roadblock, typically done by the state police, and there are specific protocols, pursuant to the case law, that the state police are required to follow. And the case that you're going to want to read, to know some of the issues you need to spot, is Commonwealth v. McGeoghegan, at 389 Mass. 137. And that sort of lays out the protocol in which the police have to follow if they're going to conduct a sobriety checkpoint or a roadblock - same thing, different name. Now, one of the things you should get in every case, usually automatically - you don't even have to request it from the prosecutor - is what's sometimes called a roadblock packet. It's pretty long, but there's a lot of stuff in there that you're going to want to look at. You're going to want to look at the layout of the actual roadblock. There should be a diagram in there, and that's going to show you how difficult was it for your client to navigate the actual roadblock. And would that tend to show his impairment if it's difficult to navigate? There's going to be a duty roster that's going to show every officer on scene. The two big things you want to look at is, by law, the commonwealth's required to notify - or the police are required to notify the press in advance that a roadblock is going to be conducted and what county it's going to be conducted. And there should be - it's usually a one-page fax the state police send out to various news outlets throughout the

commonwealth. And there's usually, within there, the fax itself as well as a fax confirmation sheet that will show all the news outlets it sent to. And you want to look through that to make sure that the correct news outlets, for the county in which the roadblock was conducted, where your client was stopped and arrested, were notified. So if you have a roadblock in Essex County, but the road block notification was only sent to news outlets in the western part of the state. That may be the basis to file a motion to suppress because the proper protocol for the roadblock wasn't stopped. The other thing you're really going to want to look at is the Commonwealth's required to justify the positioning of the roadblock as a problem area. Typically, in motions to suppress I've done with road blocks - what the code does is they don't get statistics for OUI arrests, OUI accidents, deadly accidents. Those are the statistics they need to justify the placement of an OUI roadblock. What the Commonwealth's doing more and more is just getting, say, all the stats for the town of Saugus. And they're using that and the town of Lynn as well. And then they're using that to place, for instance, a roadblock on 107 and Lynn. But the statistics they have are two towns wide, and they don't tie directly to that road itself. And under the case law, you can make an argument at a a motion to suppress that the Commonwealth hasn't justified the location of the roadblock because the statistics they have aren't particular to the roadblock site. They're particular only to the towns surrounding the roadblock. And that's definitely the basis for a motion to suppress, and that's definitely something you want to look into when you get the roadblock packet - is the underlying statistics used to justify the placement. And that should be an every roadblock packet that you get. If it isn't, that's something you should definitely request in discovery. One other quick discovery thing I'll add on here is when you're challenging the OUI, like I said, the officer - one of the things you want to ask the officers about is if he saw your client driving. How is he driving? How you - what you want to do is you want to do a scene visit in every OUI case. You want to go out, see where the officer stopped your client, see where your officer had your client to the field sobriety test, see if the road's flat, see if there's potholes. If your client watched your - if the officer watched your client dirve for long distance, you want to drive the route the officer drove to see if the road's straight. Is it curved? Did the officer misrepresent the conditions of the roadway in his report? If the roadways covered in potholes, you need to know that because that might explain why the officer saw your client swerve. He was avoiding a pothole. He wasn't drunk. So these are things you need to go out and do yourself. You should go out, investigate the scene and the path your client drove in every OUI case. Take photographs. Google Maps is very good with overhead maps. And those are helpful too because of the cop saying that roadway was perfectly straight. You go to Google Maps, and the road's all curved. That's going to be - help you at trial because it's going to show the officers - it's going to impeach the officer's credibility. I'm sorry. So that stuff you want to do ahead of time as well. A lot of times, the officers - if they're caught in this situation when they've misrepresented the condition of the roadway via the photographs or the Google map that you print out - they're not going to allow you to use that - the officer will fight you if you try to use that officer to authenticate the photographs and introduce them as exhibits at trial. Sort of an easy fix to this is before the trial even starts give the photographs, give the overhead map to the prosecutor. Ask the prosecutor, you know, hey, would you mind go talking to the officer or the trooper and just see if these are fair and accurate representations of the roadway just to save us time at trial. Prosecutors are more often than not perfectly willing to do that and then stipulate to admitting them into evidence. And that's going to save you a ton of fighting with the officer to try to get him to authenticate those photos or maps - if those photos and maps are going to impeach his credibility about the conditions of the

roadway that's an easy fix to that problem. So now sort of, if after doing this investigation, if after requesting this discovery, if after looking over the breathalyzer documents you've decided or your client's decided that, you know, they don't want to go to trial. They want to resolve this as soon as possible. If it's a first offense, there's a lot of things you need to consider. One, if your client is taking the breathalyzer and is over 21, that's a 45 day loss of license. So a lot of times, they have that 45 days. But if they plea out or they're found guilty, they're going to get another license suspension on top of the failure or the refusal suspension, which is administrative. So sometimes, they want to get this case over with as quick as possible in order to minimize the amount of time the license suspension is. So in a typical first offense OUI case, your client has no prior record. Your client takes the breathalyzer and refuses. Your client's license is now suspended for 45 days for the failure of the breathalyzer. Now if your client pleas out, he's most likely - and I'll talk about more of this in a second - but he's most likely going to get another 45 day suspension as soon as he pleas out to the OUI first. Sometimes, it's beneficial to bring your client in, like, a week after arraignment. Plea him out to the 24(d), the first offender disposition. So that way his license suspension starts on the day the plea runs concurrently with the administrative suspension, and his suspension's as small as possible. So that's something to consider as well. If this is a case where a client was hammered, your client hit a tree, like, there's no defense at all, sometimes, it's good to go in as soon as possible to plea the case out to minimize the license suspension. So for typical first offender disposition - and when you get a typical client with their first offense - more often than not, it's their first entry into the criminal court system. So there's going to be a lot of things they're not aware of. One, there's going to be conditions of probation they're going to have to comply with. So I typically spend a lot of time going over this ahead of time so they're not surprised by anything when you get into court and do the plea in front of the judge. They're going to have to do the 24(d) program. That's a 16-week program. I believe the current cost of that is now north of $800. So they need to know that ahead of time. Most judges I'm in front of in Essex County, they also impose the half-day Brains At Risk program on top of the 2014 program. I think that program is not very expensive, but your client needs to know that's an additional day they're going to have to spend going to a program as a condition of their probation. The loss of license ranges from 45 to 90 days. Typically on a plea, the judge will impose the 45-day suspension. Usually what I see in the district courts is that if your client takes the breathalyzer, let's say, and blows over a .16, which is double the legal limit, that's when the prosecutors will start requesting that the judge impose a 90-day suspension instead of a 45-day suspension. So if you know you're going to go in there and do a plea, and you know the reason you're doing the plea is to get your client's license back as soon as possible - and let's say your client needs his license for work, he needs his license to go to school and you have a really high breathalyzer. One thing that would be good is to bring letters from work, letters from school, letters from whoever that would help to justify why your client needs his license back as soon as possible to give to the judge to sort of counteract the prosecutor's argument that their client should get a longer loss of license because of the high BET, let's say. So if you're going to do a plea, there is still some prep work you need to do in certain circumstances. Because you don't want to walk in there and say, judge, he just need his license back quick. You're much better off going in there and say, judge, I have a letter from his employer that says he needs to drive to work. Or judge, I have a letter from his school which is located far away from his home. This is his class schedule. This is when he needs to go to class. Those are all things that you need to consider when you're doing the 24(d) or the first offender disposition. I also spent a lot of time talking

to my clients about the fees. Currently, if you add up all the fees, it's right around $2,000. That includes the probation supervision fee, all sorts of fines and fees that are imposed by statute and as well as the 24(d) program fee. One thing I think is helpful, if you go to the trial court website - if you go to the model jury instructions which you should anyways because you need to read those as soon as you get the police report for your case, especially all the notes in there. They're extremely helpful. But if you go to the model jury instruction page on the trial court website and search around a little bit, you'll find a chart of all the fines and fees that the court can impose in different cases. And you should go through that, identify which ones will be applicable to your client if you please out to the OUI. Your client knows ahead of time exactly what he's paying. Some of those fees are not waive-able by law, so you need to know that too if you're going to ask a judge to any fees for your client. So I spend a lot of time going over that with my client. Because when you go into court on the day of the plea, they don't have sticker shock at at $2,000. And now I'm going to have to pay over the course of their probation in order to get their case dismissed at, typically, the end of a continuation without a finding. The only other thing I'd be aware of on a plea for this purposes is the 10-year look back. And that's called Commonwealth v. Cahill, 442 Mass. 127. And that's a scenario where your client - more than 10 years has elapsed since your client's prior OUI and the one that he's now being charged with. In those circumstances, you can ask the judge to impose a first offender disposition even though it's a second offense given the time period between the first offense and the, now, second offense. One thing to be careful of is that that's not required. Even if 10 years is past, the judge does not have to go along with that. That's discretionary. So if you're going to go in there, you're going to ask the judge for that. One thing I think to have that's helpful ahead of time is your client's driving record which, again, you can request that from the DA. Or your client or you can even get that yourselves from the Registry of Motor Vehicles. Because if you're going to go in there and ask the client to give your - ask the judge to give your client a first offender disposition on a second offense, you want to have something to say to help justify that. So if you have your client's driving history and you can say, judge, you know, in between the first offense in this second offense, there's been no surchargeable incidents, no speeding tickets, nothing. That's going to go a long way in having the judge exercise his or her discretion to give your client this 10 year lookback first offense disposition. And again, that's another conversation you're going to need to have with your client about what's going to be on the driving history. If you request it, if you request it from the DA and that's bad, the D.A. is going to use that to argue your client should not get the first offender disposition. So you may be better off just requesting that yourself or having your client do it at the registry before he presented in court, before you make your argument to try to get this first offender disposition on a second offense. LB Sort of the last thing is some sort of thoughts on trial. Sometimes, it can be helpful if you call witnesses on your client's behalf. So maybe your client had another passenger in the car with him when he was stopped by the police officer, and that person was sitting in the car watching the field sobriety test the whole time and has a completely different story from what the officer wrote in his report. That's somebody you're going to want to talk to, and that's somebody you may want to call a trial. Or let's say your client was out at a bar, drove home, stopped, got arrested. Maybe there was somebody who we spoke with on his way out the door at the bar - that's going to be a person who may be helpful they say, I was with your client at the bar. He was there for about an hour. He had one or two beers and went home. That may be helpful at trial depending on the specific facts of your case. So you want to evaluate your case see if there's any other potential witnesses out there - the booking officer

would be another example - that may be beneficial for your client. And don't rely solely on cross-examining the arresting officer and challenging the field sobriety test. Another thing you should be aware of is a case Commonwealth v. Canty, 466 Mass. 533. Sort of a short version of that case is the officer cannot testify at trial that your client's ability to operate a motor vehicle was diminished by the ingestion of alcohol. You want to read that case, prepare a motion in limine, in advance of trial, so that the officer cannot testify to that. Effectively, what that precludes is from the officer testifying about the third element, whether your client was impaired. Now, you want to do that as a motion in limine rather than an objection during the case. One, the officer might try to slip in, and you don't hear it. So if you do a motion in limine ahead of time, then the DA's required to go tell the officer, hey, this is what you cannot say. And then if the officer tries to slip it in at trial, well, now, you go to sidebar. And you ask the judge for a mistrial because you filed a motion in limine that should be allowed under the case law. And the officer made that statement that he's precluded from making anyways. And ask the judge for a mistrial at that point. So you want to do it, one, to set that argument up if the officer tries to slip it in, but more generally, to hopefully have the prosecutor tell the officer ahead of time don't say this. Sort of - I mean, a conversation about a trial could take up over an hour itself, but sort of a last point I would make - last two points I would make about a trial are this. One, the most important thing I think that any attorney could do - any attorney that's new to criminal law - any new attorney, if you're going to do trial work, I can't recommend more strongly enough that - go watch other people try cases especially if it's a person you know or a person that people have told you has a good reputation as a trial lawyer, who knows what he's doing when he gets in front of a jury. When you're in court, your case - you have one or two cases on. You get your cases called. You take care of them. You're ready to go. You should walk around the courthouse, see if there's any trials going on, see if there's any trial you can sit there and watch. Now you may sit there and watch it and not like anything that attorney is doing that you're watching. However, that's taught you something in and of itself. It's giving you something that you know now you shouldn't do. Or maybe you see something that you like that the attorney did, and that's something you can take and use for yourself. All the time, I steal bits and pieces of chapters of cross, bits and pieces of an opening, bits and pieces of a closing argument that I see another attorney do at trial that I'm going to then use later on in my case. I don't think there's anything wrong with doing that. I don't think the attorneys who's I've material I've used would see anything wrong with doing that either. So I can't recommend highly enough going, watching people do trials. That's going to help you immensely. The other thing I would say about trials is cross-examination. It's a lot more difficult than it seems. One thing I would recommend is in order to do your cross effectively, you need to ask short questions that call for a yes or no answer. It takes a lot of practice to get to that. Again, watching other attorneys who know how to cross-examine a police officer, that's going to help. The police officers are going to fight you more often than not. Especially if they think you're young or inexperienced, they're going to try to fight you. So you need to be ready to cross them. You need to know how to cross them. There's two resources I would direct you to. I would go on YouTube. I would type in Terry MacCarthy. He has a whole series - I think a 10-part lecture on there. I would watch that. I listen to that. He is the best at this, I would say. The other thing is Terry MacCarthy also wrote a book. It's called "MacCarthy On Cross-Examination." You can get that on amazon. I've read that book cover-to-cover seven or eight times, easily. So I'd go look for Terry MacCarthy on YouTube, watch his lectures, buy his book on Amazon, follow his method because it works, in my experience - or find another method that works. But

you need to prepare when you're going to do a cross-examination. Sort of the last thing I'll touch for the last couple of minutes are OUI drugs cases. These are sort of an animal onto themselves. One thing that I've seen more and more of recently, within the last year or so, are sort of combination cases with alcohol and drugs. So you need to be aware. And there's a case called Commonwealth v. Stathopoulos. It's cited in the jury instructions for operating under the influence - the model instructions. Basically, what that says is alcohol as a contributing cause to impairment is sufficient to find your client guilty of OUI liquor. So what that means is if your client goes to a party, smokes a bunch of marijuana. Now after smoking marijuana, his ability to operate a motor vehicle isn't impaired. He can't be charged with OUI drugs. But let's say he smokes marijuana, drinks one beer then drives home. And that one beer put your client over the edge. The alcohol has then become the contributing cause. And that's going to be sufficient, under the case, in order to find your client guilty of OUI drugs even though it was a combination of drugs and alcohol. So you need to be aware of that when you're preparing to go forward to trial as well. I think that's all that I have, so thank you for your time.