DRUNK DRIVING DEFENSE

Second Edition

Lawrence Taylor

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PREFACE

Driving under the influence of alcohol, or "drunk driving," is by far the most commonly encountered offense in the courts today. Yet, it has always been one of the most difficult charges to defend, involving as it does more esoteric areas of science and law than most felonies, while affording fewer constitutional safeguards. The difficulties, however, have become much greater since the first edition of *Drunk Driving Defense* was published in 1981. The substantive, evidentiary, and procedural aspects of DUI litigation have grown immeasurably more complex in this short period of time, while at the same time the stakes for the client have been raised. In fact, the entire DUI scene has undergone a change in the past five years that may accurately be described as revolutionary.

These radical changes are attributable, of course, to a heightened national awareness of the drunk driving problem. Spurred on by constant media attention and such lobbying groups as Mothers Against Drunk Driving (MADD), legislators across the country have stumbled over each other to provide prosecutors with tougher weapons. It falls upon the defense attorney, of course, to understand and counter these new weapons with weapons of his own.

The most noticeable element in the prosecution's new arsenal is the so-called per se law. Since 1982, the vast majority of states have enacted statutes that created a new offense: driving while having an excessive blood-alcohol level (commonly .10 percent or higher). This crime, which is usually charged along with the

traditional DUI offense, is completely unconcerned with whether the driver was intoxicated or not: The crime is a biological one. Thus, the prosecutor's job is made considerably easier — and the defense attorney's considerably more difficult.

New and more sophisticated analytical devices have been introduced to prove the accused's blood-alcohol content. Once considered "state-of-the-art," the Breathalyzer 900 and 900A are now looked on as the simplistic "Model T"s of the breath-testing scene. Infrared spectroscopic and gas chromatographic instruments are taking over the field, with such units as the Intoxilyzer 5000 offering three-band analysis, internal computerization, acetone detection, and radio frequency interference options. Blood and urine samples are analyzed less commonly with traditional methods and more frequently with headspace gas chromatography.

But as the methods of analysis become more complex, the possibilities for error grow — and the problem becomes more difficult for counsel to handle. The phenomenon has created difficulties across the full spectrum of chemical analysis. Thus, for example, the spread of infrared analysis requires counsel to become familiar with lightwave theory and such potential defects as nonspecific analysis and the effects of acetone and acetaldehyde. Similarly, the theory and fallacies of retrograde extrapolation must be understood if counsel expects to effectively attack any method of blood-alcohol analysis. The defense attorney must be able to expose the weaknesses of the computer programming in the newer breath machines, such as the "assumed" alveolar air ratio used in computing blood-alcohol levels. As these instruments become ever more sophisticated, they are also increasingly susceptible to false readings caused by radio frequency interference. Counsel must become familiar with this phenomenon and with the admissions by the federal government and the manufacturers themselves as to its effects. Quite simply, the defense attorney who does not familiarize himself with recent developments in blood-alcohol analysis is lost.

Chemical analysis has not been the only arena to experience radical evidentiary changes. Even traditional "field sobriety

tests" have witnessed innovations. The "horizontal gaze nystagmus" test, for example, has spread rapidly across the country and can be devastating evidence — if defense counsel is unprepared to expose its foundational and physiological defects.

As the new law, procedures, and forms of evidence have been introduced, so the courts have kept pace, with a seemingly unending stream of appellate decisions. In one recent short period, for example, the United States Supreme Court has rendered a series of DUI decisions: self-incrimination was the subject in *Neville v. South Dakota* (1983); blood-alcohol discovery was dealt with in *Trombetta v. California* (1984); the application of *Miranda* in drunk driving was defined in *Berkemer v. McCarty* (1984). At the state level, courts across the country have busily churned out contradictory decisions concerning such diverse subjects as DUI roadblocks, foundational requirements for blood-alcohol analysis, and admissibility of refusal evidence.

Concurrent with these changes is a marked increase in the severity of sentences rendered in drunk driving cases. Whereas in the past an offender could expect a fine, probation, and perhaps attendance at a "drunk driving school," he is now increasingly faced with mandatory jail sentences — and, in cases of repeat offenders, with long terms or even felony status.

Underlying this recent rash of developments has been a growing federal presence in the DUI field. Through a "carrot-and-stick" approach using federal highway funds, and with the ominous threat of the Commerce Clause, federal authorities are successfully bringing pressure on states to meet federal guidelines concerning per se laws, intoxication levels, blood-alcohol analysis, sentencing standards, standardized field sobriety tests, etc. As federal involvement continues, the laws, evidence, and procedures in states across the country will continue to become even more uniform.

What does all of this mean to the attorney representing a client charged with driving under the influence? It means that education and preparation are more important than ever. The field of DUI litigation has always been a difficult one: Its complexity has probably doubled in the past five years. At the same

time, the damage that can be suffered by the client has been increased substantially.

Yet, despite the vastly more sophisticated nature of drunk driving litigation, the client accused of this offense is likely to be defended by counsel who normally does not handle criminal matters; the crime is unique in that it is committed primarily by individuals who are respectable citizens and who often turn to their business or family lawyer for help. As a result, this highly complex case is handled routinely by attorneys with insufficient knowledge of the extensive scientific, evidentiary, procedural, and tactical considerations involved. And the result is too often predictable.

This text offers in as compact a format as possible the material necessary to prepare counsel for effectively defending — or prosecuting — the drunk driving case. It deals with, among many other subjects: the *corpus delicti*; the lawyer-client relationship; chemical evidence presumptions; pre-trial investigation; discovery; obtaining defense analysis of chemical evidence; implied consent laws; plea bargaining techniques; jury selection; cross-examination of the police officer, eyewitness, and chemical expert; field sobriety tests; urine, blood, and breath analysis; constructing a defense; jury instructions; sentencing; probation violations; and license suspension hearings.

In covering these and other aspects of the drunk driving case in this second edition, even greater use is made of practice-oriented materials. Checklists offering quick reference to the most critical aspects of the case (such as examination of the arresting officer, finding fault in the field sobriety test, and specific flaws in various methods of blood-alcohol analysis) are supplied. Forms used by police and other agencies are also provided. These include arrest reports, breath instrument operational instructions, and license suspension notices. Sample legal motions are presented. The book contains examples of motions successfully used by experienced defense counsel for discovery, appointment of chemical experts, suppression of blood-alcohol evidence, etc. Finally the text includes actual examinations to serve as an illustration — verbatim cross and di-

rect of the various witnesses with whom counsel will be confronted in trial.

The substantive and procedural details of a drunk driving charge, of course, vary slightly from state to state. However, the general principals remain the same: The Gas Chromatograph Intoximeter used in Alabama is the same instrument used in Wyoming; the "walk-the-line" test employed by the California Highway Patrol is similar to that administered by the Detroit Police Department; the discovery possibilities in Oregon are substantially the same as in Texas. The knowledge gained from this text will prepare counsel for representing a drunk driving client anywhere in the United States. In fact, most of the evidentiary material is applicable worldwide.

Drunk driving is a deceptively difficult type of case to deal with, and the risks to the client are much higher than are generally appreciated. This text provides the extensive knowledge and skills necessary for counsel to competently defend against such a charge. Armed with that knowledge, counsel will often find himself the only person in the courthouse who fully understands the vast complexities of the drunk driving case. And that translates into obtaining better results for the client.

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PREFATORY NOTE

Please note that use of the male pronoun throughout this book is intended to include the female. The concepts of this book are equally valid for female attorneys, female clients, female experts, etc. No exclusion or offense is intended.

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