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Drunk Driving Defense

SEVENTH EDITION

Lawrence Taylor
Steven Oberman



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DRUNK DRIVING DEFENSE

Seventh Edition

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Wolters Kluwer

Law & Business

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To Judy.
—*Lawrence Taylor*

To my parents, Albert and Marian,
to whom I owe my character,
To my wife Evelyn, and my children, Rachael and Benjamin,
to whom I owe my happiness,
To my siblings David and Karen,
to whom I owe my advocacy skills,
To my peers at the National College for DUI Defense,
to whom I owe the motivation to continually improve my skills, and
To my clients,
to whom I owe the gratification I receive from my profession.
—*Steven Oberman*

ABOUT THE AUTHORS

Lawrence Taylor is nationally recognized as one of the foremost authorities on DWI/DUI litigation in the United States. A graduate of the University of California (Berkeley) and UCLA Law School, former prosecutor, and Fulbright Professor of Law, he is the author of the standard textbooks in the field: *Drunk Driving Defense*, 7th ed. (Aspen Publishers), and *California Drunk Driving Defense*, 4th ed. (Thomson-West). He has also written over 30 articles on the subject. His website (www.duicenter.com) is considered the premier drunk driving research source on the Internet.

Over the past 30 years, Mr. Taylor has proven a popular lecturer on DUI trial techniques at over 200 CLE seminars in 38 states. He has appeared on numerous television and radio programs, and has been featured in such publications as *The Wall Street Journal*; *USA Today*; *The National Law Journal*; *Lawyer's Weekly*, USA; *The Los Angeles Times*; and the *American Bar Association Journal*. He was a founder of the National College for DUI Defense, served on its Board of Regents, and was elected dean for the 1995-1996 term.

Mr. Taylor is Board-certified by the National College's specialist program, and continues to limit the practice of his 8-attorney California firm to the defense of drunk driving cases exclusively.

Steven Oberman is nationally recognized as an authority on the intricacies of DUI defense. An adjunct professor at the University of Tennessee Law School since 1993, he has received prestigious awards for his faculty contributions. He is the author of *DUI: The Crime and Consequences in Tennessee* (Thomson-West), and *Drunk Driving Defense*, 7th ed. (Aspen Publishers). Moreover, he has written numerous articles on substantive DUI defense topics and trial techniques for several state and national publications.

Mr. Oberman has been chair or co-chair of the National Association of Criminal Defense Lawyers' DUI Committee since 1995 and has served on the Board of Regents of the National College for DUI Defense since 1999. Mr. Oberman served as Dean of the National College for DUI Defense during the 2009-2010 term.

In 2006, Mr. Oberman was appointed to the Governor's Task Force on DUI Laws in Tennessee. He has been named to Business Tennessee's Best Lawyers List annually since the inception of the list in 2004. It has described him as: "[the] Godfather statewide in the area of DUI"; "Brilliant lawyer, great teacher"; and "Well-regarded trial attorney with 'professorial' demeanor. . . ." He has also been honored as one of the "Best Lawyers in America" by the publication of the same

name; a “Top 100 Trial Lawyer” by the American Trial Lawyers Association; and a “Super Lawyer” by *Mid-South Super Lawyers* magazine.

Mr. Oberman is certified as a DUI Defense Specialist by the Tennessee Commission on Continuing Legal Education and Specialization as well as by the National College for DUI Defense. He is a popular speaker at seminars throughout the United States, educating defense lawyers, the judiciary, and the prosecution on the many issues that arise in DUI cases.

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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. Many jurisdictions now maintain a dedicated “DUI court.” This crime has always been one of the most difficult charges to defend, involving more esoteric areas of science and law than most felonies, while affording increasingly fewer constitutional safeguards. The difficulties, however, have become even 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 over time. At the same time, the stakes for the client have been raised. In fact, the entire DUI scene has undergone a change in recent years that may accurately be described as revolutionary.

These radical changes are attributable to 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 attorneys, of course, to understand and counter these new weapons with weapons of their own.

The most noticeable element in the prosecution’s new arsenal is the “per se” law. All states have now enacted statutes that created a new offense: driving with a blood-alcohol level of .08 percent or higher. This crime, which is usually charged along with the traditional impaired driving offense, is completely unconcerned with whether the driver was intoxicated or not: The crime is a biological one. Thus, the prosecutor’s job is 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 instruments have taken over the field, with such units as the Intoxilyzer 8000 offering multi-band analysis, internal computerization, acetone detection, and radio frequency interference options. Draeger has offered its Alcotest 7110, combining fuel cell technology with an improved infrared wavelength.

The defense attorney must be able to expose the weaknesses of the computer programming in the newest breath machines, such as the “assumed” alveolar air ratio used in computing blood-alcohol levels. These instruments are also 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. New models of handheld preliminary breath-testing devices, each with their own deficiencies, are becoming increasingly common among patrol officers.

Blood and urine samples are analyzed less commonly with enzymatic assay methods and more frequently with headspace gas chromatography. But as methods of analyses become more complex, the possibilities for error grow — and the problem becomes more complicated 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 as well as potential defects, such 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 blood-alcohol analysis in states concerned with blood alcohol levels at the time of driving. Quite simply, the defense attorney who does not familiarize himself with recent developments in blood-alcohol analysis, whether by breath or blood, 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, can be devastating evidence — if defense counsel is unprepared to expose its foundational and physiological defects. As new laws, procedures, and forms of evidence have been introduced, even the highest court in the land has kept pace with a seemingly unending stream of decisions impacting DUI cases. Recently, the defendant’s right to confront certain prosecution witnesses, such as laboratory technicians, has been addressed by the court.

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, right to counsel, admissibility of refusal evidence, and double jeopardy in administrative license suspension cases.

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,” the offender is now increasingly faced with loss of his driver’s license and mandatory jail sentences — and, in case of repeat offenders, with long terms of imprisonment or even felony status. Ignition interlock devices and alcohol monitoring devices are being considered as mandatory conditions of pretrial release and/or probation. In Canada, DUI is considered so heinous a crime one is prohibited from visiting the country for a minimum of five years of a conviction without special permission.

Underlying this 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 sentencing standards, standardized field sobriety tests, “zero tolerance” laws for drivers

under 21, etc. As federal involvement continues, the laws, evidence, and procedures throughout 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. At the same time, the damage that can be suffered by the client has 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 of DUI 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. Unfortunately, the result is too often predictable.

In 2004, the American Bar Association formally distinguished this area of practice from all others by approving the National College for DUI Defense (NCDD) as the certifying body to test and certify lawyers as specialists in the field of DUI Defense Law. Lawyers who are certified as specialists in this field are to be given high recognition for their exhibited proficiency in this complicated field of practice. The members of the NCDD and certified specialists are the lawyers questioning every new technology, revealing the fallacies of each new prosecutorial technique, and protecting our civil liberties from further degradation. Thus, as in any legal field, it is important to study the intricacies of this area of law, confer with peers from all over the country, and redouble our efforts to fight for the best possible result for our clients.

This text offers, in as compact a format as possible, the material necessary to prepare counsel for effectively defending the drunk driving case. It deals with, among many other subjects: the corpus delicti; lawyer/client relationships; 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 experts; field sobriety tests; urine, blood, and breath analyses; 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 Seventh 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 tests, and specific flaws in various methods of breath and 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 direct of the various witnesses with whom counsel will be confronted in trial—as well as specific suggestions for use in jury voir dire, opening statement, and closing argument.

The substantive and procedural details of a drunk driving charge, of course, vary slightly from state to state. However, the general principles remain the same: the breath testing device used in one state is the same instrument used in another; 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 to represent a drunk driving client anywhere in the United States.

Drunk driving is a deceptively difficult type of case with which to deal, and the risks to the client are much higher than generally appreciated. This text provides counsel extensive material with which to hone the knowledge and skills necessary to competently defend against such a charge. Armed with such, counsel will often find himself the only person in the courthouse who fully understands the vast complexities of the drunk driving case. That translates into reaching the goal of every DUI defense lawyer—obtaining the best possible result for the client.

May 2010

Lawrence Taylor
Steven Oberman

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