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NCDD Journal

National College for DUI Defense

Editor:Paul Burglin

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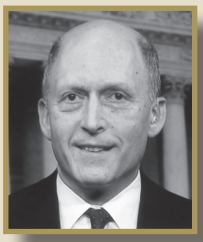
Dean's Message



Lenny Stamm

In the year of NCDD's 20th anniversary I wish to recognize the lawyers who met in Chicago in 1994 to found this College: William C. Head (Atlanta, GA); Douglas Cowan (Seattle, WA); Lawrence Taylor (Los Angeles, CA); John Henry Hingson (Portland, OR); Reese Joye (Charleston, SC); Phil Price (Huntsville, AL); James Farragher Campbell (San Francisco, CA); Gary Trichter (Houston, TX); Flem Whited (Daytona Beach, FL); James Tarantino (Providence, RI) (attended via telephone conference). In addition to these ten, Don Nichols (Minneapolis, MN) and Victor Carmody (Jackson, MS) were on the first Board of Regents. We owe all of them a huge debt of gratitude.

We are so lucky to be in a society that maintains professional muckrakers, protecting our individual clients and society as a whole, and fighting against the excesses of the government, no matter how well intentioned. Society needs us to ensure that the process by which guilt and innocence and punishment is determined is balanced. We are the champions of the underdogs, and the defenders of the Bill of Rights. We are soldiers in the war against junk science, and incompetent, negligent and fraudulent scientific evidence.

When I was a young lawyer, my mentor, Alan Goldstein, told me that this was not a job, it was a career, and how many hours I worked didn't matter. To me this is actually bigger than a job or a career, it is what I do, it is who I am.

Who among us has not experienced winning the case that was impossible to win or conversely losing the case that was impossible to lose? Who among us has not been berated or belittled by judges, law clerks, prosecutors, experts, cops, victims, clients, family members, friends, or colleagues? In all of these situations I try to remember the lessons of a simple book called *The Four Agreements* by Miguel Ruiz:

1. Be impeccable with your word. If you say something, you should be able to take it to the bank. Never ever lie, deceive, or misrepresent.

2. Never take anything personally. In this business sometimes you have to have a thick skin, sometimes a very thick skin. If someone is trying to put you down, it may very well be displaced anger. You

Continued on Page 8

Welcome NCDD Members!

THE BELAGIO – LAS VEGAS

19th Annual "*Defending With Ingenuity*"

October 1–3, 2015

The NCDD's 20th Anniversary Summer Session Got Rave Reviews For Trial Skills Mentoring, And The College Was Pleased To Have So Many Women In Attendance.

TOP ROW: Ellen Cleary; Elizabeth Parker; Amber Cohen; Sylvia Goldman; Michelle "Shellie" Behan; and Regent Virginia Landry

BOTTOM ROW: Regent Mimi Coffey; Diana Salomon; Sonja Porter; Natalie Glaser; and Andrea Amodeo-Vickey

E.D.'s Corner

Rhea Kirk

We had a fantastic time at this year's 20th Anniversary Summer Session. It's hard to believe that 10 people, sharing a common goal, put together this great organization! Now we look forward to another 20 years of educational seminars and strong friendships. Our upcoming seminars: Las Vegas Oct 1-3; Metrology in Atlanta Nov 6-7; and our Winter Session in sunny California Jan 21-22, 2016, at the Ritz Carlton in Marina del Rey!

Make sure to let us know if you are not receiving the Yahoo Groups Listserv and the Virtual Response "Daily DUI News." If you are not getting these communications send me an email and we will make sure to take care of that for you immediately! I really hope you are using the NCDD website. If you are looking for help in a certain state, make sure to click on the NCDD Map for a list of members that can help assist you! Make sure that you have added your picture to your bio on the website, too! The website is also a great tool to use with the Brief Bank and Virtual Library. We have videos on the website that will teach you how to utilize these great resources!

Have a great fall and I look forward to seeing you at one of our NCDD seminars soon!

- Rhea Kirk

TED'S WORLD

Forensic Metrology

True Kung Fu Requires Knowledge of Weapons For and Against

*by Ted Vosk**

Criminal defense attorneys encounter many different types of forensic science evidence in the course of their practice. These include DNA and fingerprint analysis, the identification and measurement of drugs, and the determination of breath and blood alcohol concentrations. To be able to defend against such purportedly scientific tests requires an increasingly sophisticated understanding of the science underlying them.

Despite the prosecution's heavy reliance upon scientific evidence, over the past decade the forensic sciences have come under fire by scientists and legal professionals alike. Lack of competence, burgeoning caseloads, pressure to assist prosecutions and a lack of resources have led to systemic failures to adhere to basic scientific standards, principles and practices. Given the significant role scientific knowledge and evidence plays in the courtroom, these weaknesses threaten the rights of the accused and undermine the integrity of our judicial system.

This places a large burden on the lawyers who encounter forensic science evidence in the courtroom to develop their scientific knowledge. Many of these professionals expend great effort to understand and critically assess forensic science practices. Unfortunately, many do not. Frequent is the refrain that the reason one went to law school was so that they wouldn't have to do science or math anymore. Of those lawyers who do endeavor to gain an understanding of the forensic matters they encounter, many become overwhelmed by perceived complexities and the inability to determine where to even begin. Uncritical acceptance, "science-phobia," and even lethargy result in frequent acquiescence to "scientific" evidence that isn't even good enough to be called wrong.

No field of practice is forced to confront forensic science evidence more frequently, or of greater diversity, than DUI defense. Almost every case involves evidence having, or claiming to have, been derived by scientific means ranging from physics, chemistry and engineering to toxicology, psychology and medicine. The technologies encountered include Infra-red spectroscopy and/or electrochemical energy conversion for purposes of breath alcohol concentration, gas chromatography and GC/MS for blood alcohol and drug concentrations, physio-cognitive divided attention performance for impairment, and light detection and ranging for speed, amongst others. It is easy to understand how even the most dedicated professional could become overwhelmed trying to learn these varied technologies spanning diverse fields.

But what if there existed a packet of scientific principles that were required for the generation of reliable results regardless of application or technology? Such a quiver would provide tools for the critical evaluation of certain aspects of *all* scientific claims, even absent expertise in the specific areas under consideration.

In this context, scientific activities can generally be grouped into two categories based upon the type of information sought: measurement and observation. Measurement is relied upon to determine the numerical value attributable to some property of a physical entity or phenomenon. A breath test is a measurement that seeks to determine the value that can be attributed to an individual's BrAC. An observation, on the other hand, is meant to collect qualitative information concerning an entity or phenomenon such as its identity or the presence of a characteristic. Field sobriety tests are a group of observations intended to determine whether an individual displays the characteristic of being impaired.

Metrology, the science of measurement, provides the necessary principles and tools for the critical evaluation of any measurement. It applies to all measurements made in every lab anywhere on the planet. Quite literally, "…if science is measurement, then without metrology there can be no science."[1] Forensic metrology is simply the application of metrology and measurement to the investigation and prosecution of crime.

Given a basic understanding of metrological principles, even a nonscientist can begin to engage in the critical analysis of forensic claims across the full spectrum of scientific measurement to determine whether the evidence being presented is scientifically sound. Thus, instead of engaging in the study of multiple disciplines, where measurement is concerned, the practitioner need only focus on one: metrology. This significantly cuts down on the volume of information a practitioner must learn to be able to evaluate the results of alcohol, drug, speed and other measurements offered by the state against the Citizen accused.[2]

The skeptical reader will rightly challenge such a claim without some offer of proof. And so I will supply one. Over the years in Washington State, my ideas and challenges have led to the suppression of tens of thousands of forensic alcohol tests prior to trial. Yet I am not an expert in breath or blood alcohol testing nor have I ever strived to be so. My success has been based upon my knowledge of metrology and its elements. Nor am I the only one who has experienced success with this tool. Joe St. Louis in Arizona, Mike Nichols in Michigan, Justin McShane in Pennsylvania and others have employed metrology to combat the bad scientific practices being engaged in by labs and testing programs in their states.

Despite the universal applicability of metrology to all measurements, forensic scientists sometimes claim that their disciplines are exempt from its principles, as if the laws of nature behave differently in a forensic lab than they do elsewhere on the planet. The standard upon which scientific evidence is considered is not restricted to the specific forensic discipline under consideration, though. If this were the case, all manner of sins would be acceptable as long as the entire forensic community under consideration sinned uniformly. Rather, because the universe operates based on universal laws, the standard must be science as a whole. The scientific community as a whole relies upon metrology for the measurements it performs. If the citizens are to have any confidence in their state's breath or blood alcohol measurements, then those measurements must have some credence in the metrological/scientific community as a whole.[3]

There are several metrological components that must be considered whenever performing or evaluating a measurement. Absent attention to each, the reliability of any conclusions based on a measured result is drawn into question. The issues underlying the most successful challenges to date include traceability, calibration and uncertainty.

Traceability is the property of a measurement result whereby the result can be related to a reference, thru a documented and unbroken chain of comparisons. The primary purpose of traceability is to anchor the quantity value reported to a known reference establishing an objectively understood and commonly accepted scale. This is a critical in assuring that the meaning attributed to a measurement result is what it purports to be. Absent traceability, no matter how good a measurement may have been, we simply cannot place any confidence in the correctness of the quantity value reported because we cannot know what it represents. Neither breath nor blood test results can be considered reliable if their traceability is not established. Unfortunately, this is ignored by many breath and blood test programs. Failure to establish traceability in accordance with state regulations served as the basis for suppressing breath tests across Washington over a decade ago.[4]

Calibration is the process by which we determine how our measuring system responds to quantities with different values so that responses generated during subsequent measurements can be mapped into correct quantity values. For example, by determining how a breath test machine responds to varying alcohol concentrations, one can map the instrument's response to an unknown concentration to the values most likely attributable to the true concentration. Absent proper

calibration, there can be little confidence that the values obtained by a measurement correspond to those that could reasonably be attributed to a measurand. Every measuring device must be calibrated prior to use, over the intended range of measurement and recalibrated on a periodic basis. Despite the importance of calibration, most state breath test programs never calibrate the instruments they use. Even when they do, they seldom do so correctly. Failure to properly calibrate breath test instruments served as the basis for suppressing breath tests in jurisdictions around Washington almost a decade ago.[5]

Measurement uncertainty provides the values that can reasonably be attributed to a measured quantity based upon the results obtained. It is critical because no measurement can ever tell us what a quantity's true value is. The best that it can do is provide a range of values that has a known probability of containing the quantity's value. Absent uncertainty, any conclusion based upon a measured result is a matter of speculation because there is no way to understand what the result represents. In fact, a result reported without its uncertainty can be worse than no result at all as it can mislead those relying upon it to believe that it means something other than it does. Failure to provide the uncertainty of results served as the basis for suppressing breath tests in several jurisdictions around Washington half a decade ago.[6]

Armed with a basic understanding of metrology, lawyers can engage in critical analysis of forensic measurements across a broad spectrum without having to develop a separate expertise in several distinct disciplines. It enables legal professionals to: better understand evidence from forensic measurements; better prepare and present cases that involve such evidence; and gives them the ability to recognize poor measurement practices and play their necessary role in preventing bad science from depriving the Citizen accused of their liberty.

For those who wish to learn more about metrology and how to use it in the courtroom, the NCDD offers a two day advanced seminar solely on this subject, *Science as Your Best Defense II: Learning to Teach Judges and Juries the Science and Law of Blood and Breath Alcohol Testing*. The focus of this seminar are the universally accepted scientific requirements for producing reliable and accurate measurement results and how to use the State's failure to meet those requirements to challenge blood and breath evidence. Attendees are first taught the metrological principles that apply to blood and breath testing in one hour blocks. Each block is then immediately followed by a one hour block demonstrating how to use them in direct and/or cross-examination or argument to the court. For more information or to register, go to www.ncdd.com and select the link for seminars.

** Ted Vosk is a criminal defense attorney and legal/forensic consultant. Ted Vosk graduated with honors in Theoretical Physics and Mathematics from Eastern Michigan University, and later studied in the PhD program for physics at Cornell University before obtaining his J.D. from Harvard Law School. He is member of the American Academy of Forensic Sciences.*

1. William Thompson (Lord Kelvin), *Lecture to the Institution of Civil Engineers,* May 3, 1883.
2. Ted Vosk & Ashley Emery, Forensic Metrology: Scientific Measurement and Inference for Lawyers, Judges, and Criminalists (CRC/Taylor Francis Group, 2014).
3. See, e.g., *City of Seattle v. Clark-Munoz,* 152 Wn.2d 39 (2004).
4. *City of Seattle v. Clark-Munoz,* 152 Wn.2d 39 (2004).
5. *State v. Ahmach,* No. C00627921 (King Co. Dist. Ct. – 1/30/08).
6. *State v. Fausto,* No. C076949 (King Co. Dist. Ct. WA – 9/20/10).

Scotus Radar

Pending before the high Court is a petition for review raising the following two issues:

(1) Whether, after lawfully obtaining a suspect's ID to verify his age, briefly retaining and running the ID through dispatch to check its validity and for warrants transforms an otherwise lawful encounter into an unlawful seizure under the Fourth Amendment; and

(2) Whether evidence seized incident to a lawful arrest based on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop, part of which was later found unlawful.

Respondent was detained for a possible curfew violation and asked to produce identification. He handed the officer a California Identification Card showing him to be 29-years-old and therefore not subject to the curfew law. Instead of letting him go, the officer retained his identification card while he running a warrant check and purported verification of the identification. Upon determining the existence of outstanding warrants, Respondent was arrested and a concealed gun was found pursuant to a search.

An amicus brief has been filed by the Michigan Attorney General, and joined by 20 other states hoping SCOTUS will grant review and hold that a detention lawful at its inception includes the right to prolong detentions to run a warrant check and verify identification.

Stanford Law Professor Jeffrey L. Fisher joined the Public Defender in filing a written response on behalf of Respondent.

Nevada v. Torres (Docket No. 15-5)

Case Law Roundup

Case Highlights from Donald Ramsell (Illinois) and Paul Burglin (California)

Eighth Circuit Affirms Summary Judgment In 1983 Civil Rights Class Action, Holding Minnesota Criminal Refusal Statute Does Not Vitiate Fourth Amendment Consent To Chemical Testing.

Wall v. Stanek
___ F.3d. ___ , 2015 WL 4430495 (July 21, 2015)

Plaintiffs sought damages against Defendants (Sheriff and County) for allegedly coercing consent for chemical test samples by threatening criminal prosecution for any refusal.

Citing *South Dakota v. Neville*, 459 U.S. 553 (1983) for its approval of using refusals to prove guilt, and the plurality opinion in *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013) for its approval of "a broad range of tools" to secure BAC evidence, the Court held criminal sanctions are permissible for chemical test refusals in DUI cases and affirmed the trial court's grant of a summary judgment motion against Plaintiffs.

Defendant was stopped for having an obstructed license plate. A video taped showed him answering all questions promptly and that his speech was clear. His gait was steady and normal, and though his eyes were bloodshot and watery, there was no evidence they were glassy or unfocused. The only evidence of potential impairment was Defendant's admission to having consumed a beer earlier in the evening, the appearance of his eyes, and an alco-sensor test that showed the presence of alcohol.

The Court reversed the denial of his motion to suppress evidence, holding that the aforementioned evidence was insufficient as a matter of law to constitute probable cause to arrest.

Editor's Note: The Court made a point of describing the favorable evidence depicted on the video tape, so one has to wonder if the same result would have been reached absent the exculpatory video tape evidence and just the officer testifying to Defendant driving, his admission to drinking, the presence of alcohol in his system, and bloodshot/watery eyes. Either way, the opinion may be cited for the proposition that these things alone do not amount to probable cause for arrest.

Submission To Chemical Testing Under Implied Consent Statute Does Not Establish *Per Se* Fourth Amendment Consent, But The Threat of Criminal Prosecution for Refusing Is Also Not Unduly Coercive *Per Se*.

State v. Modlin
291 Neb. 660, ___ N.W.2d ___ (August 21, 2015)

Defendant was admonished by the arresting officer that he was required to submit to a chemical test or tests of blood, breath, and/or urine. The officer showed him the implied consent form which also stated that the choice of test or tests was the officer's and that he could be charged with a crime for refusing. Defendant signed the form which indicated the officer's choice of a blood draw. Defendant made no protest and submitted.

While the Court acknowledged that submission under the implied consent statute does not necessarily equate to Fourth Amendment consent (it being just one factor in the totality of the circumstances), it did conclude that the choice between submission or facing a criminal charge for refusing is not unduly coercive *per se*.

Warrant Authorizing Blood Draw Impliedly Authorizes Analysis Of Sample For Both Alcohol and Drugs

State v. Martines
Washington State Supreme Court (August 27, 2015) - Docket No. 90926-1

The Court of Appeals reasoned that drawing blood and testing blood constitutes separate searches and there must be particular authorization for each.

The Washington State Supreme Court unanimously reversed, holding that a warrant authorizing a blood draw in a DUI case necessarily authorizes an analysis of the blood sample in addition to the draw. Furthermore, the sample may be analyzed for both alcohol and drugs where the probable cause affidavit alleges suspected impairment from an intoxicant but does not specifically mention drugs.

Single Breath Test Valid In Illinois And Defense Counsel Foreclosed From Arguing It is Insufficient To Prove Guilt Beyond A Reasonable Doubt.

People v. Collins
2015 Il App (1st) 140063-U (July 24, 2015) - Unpublished

The Illinois Vehicle Code specifies that only a single breath-alcohol test result is required for a valid chemical test. Defense counsel contended in closing argument that a single breath-alcohol test result is a non-scientific method for alcohol testing and insufficient to prove Defendant's guilt beyond a reasonable doubt. Objections to this line of argument were sustained and the conviction on the *per se* count was affirmed on appeal. The appellate court held that the Court properly sustained the objections and correctly instructed the jury that only a single test was required to prove guilt.

Editor's Note: The Court noted that defense counsel did not call an expert witness to opine that a single breath test was insufficient to prove guilt, suggesting that this might have led to a different ruling. However, such an opinion would likely have been barred given the Court's reliance on the statute. Was it proper to preclude the argument simply because no evidence had been presented in support of the contention?

Detention Based On Pine-Tree-Shaped Air Freshener Hanging on Rear View Mirror Ruled Constitutional, But Only Because The Officer's Mistake Was Reasonable.

State v. Hurley
2015 WL 1186088 (Vermont Supreme Court – No. 2014-032) (March 6, 2015)

The issue presented was whether a statute prohibiting the hanging of any item on the inside of a windshield includes a pine-tree-shaped air freshener. The Court reasoned that the State's interpretation of the statute was overly broad since the express purpose of the statute is to prohibit objects that obstruct the driver's view.

Nevertheless, in light of a split of authority on the issue in the lower courts, the Court upheld the detention in reliance on *Heien v. North Carolina* (2014) ___ U.S. ___ (Docket No. 13-604), 134 S.Ct. 1872 (an officer's reasonable, but mistaken, interpretation of the law does not amount to a Fourth Amendment violation). *Heien* also involved an ambiguous vehicle-equipment statute).

Editor's Note: NCDD member Manny Daskal once won a similar case by bringing in a civil engineer to opine that the subject air freshener covered less than .05 percent of the windshield's total surface. *People v. White* (2003) 107 Cal.App.4th 636. That's what we call good lawyering!

Exigent Circumstances Justified Warrantless Entry Into Home

State v. Ritz
205 WL 1349816 (Oregon Ct. of Appeals – No. A152111)(March 25, 2015)

Trial court's finding of exigent circumstances held sufficient to justify warrantless entry into home to arrest DUI suspect. Police responded to call of a domestic dispute in a driveway following a car accident. Defendant retreated into home before police arrived. Officer testified it would have taken at least 45 minutes to procure a telephonic warrant, that he was concerned about the loss of blood-alcohol evidence, and that some of the officers securing the residence needed to return to their normal duties.

Editor's Note: This opinion demonstrates the importance of trying to secure procedural information in advance of a suppression of evidence hearing concerning the time it should take to get a warrant. Otherwise, you are left to whatever the officer testifies to and that is not normally going to be helpful. The officer in this case additionally testified that it would have taken him at least 90 minutes to prepare a warrant application, and that does not seem credible since templates could have been prepared in advance with easy "fill in the blanks" and "check the boxes" applications.

State Bears The Burden of Showing There Was Insufficient Time To Procure A Warrant

State v. Rice
2015 WL 1348411 (Oregon Ct. of Appeals – No. A1511640)(May 20, 2014)

Here, the Oregon Court of Appeals rejected as insufficient an officer's conclusory statements that it would have taken too long to get a warrant. It held the State has the burden of proving the blood-alcohol evidence would have been lost by reason of how long it would actually take to get a warrant.

Just because the Defendant said "F*#k you" and closed his door did not give the officer the right to forcibly enter his home without at least attempting to get a warrant.

Chemical Test Submission Following Implied Consent Admonition Does Not Necessarily Establish Free And Voluntary Fourth Amendment Consent

Williams v. The State
296 Ga. 817 (Georgia Supreme Court – Docket No. S14A1625) (March 17, 2015)

Following a statutory implied consent admonition the Defendant was told by the arresting officer that "it's a yes or no question." He said "yes" and blood and urine samples were taken from him in this vanilla DUI arrest.

The case was remanded back to the trial court to determine if Fourth Amendment consent was freely and voluntarily given, since mere submission under the implied consent law does not satisfy the State's burden of establishing consent as an exception to the warrant requirement.

Editor's Note: Congratulations to NCDD member Lance Tyler for this appellate victory!

Failure To Establish Checkpoint Had Valid Purpose Other Than General Crime Control Results In Suppression Of Evidence

Armentrout v. The State
(Georgia Ct. of Appeals – No. A15A0093) (May 15, 2015)

As testified to, the "primary purpose of the [checkpoint in this case was] to conduct a check of driver's licenses, and to identify drivers who are under the influence of drugs and/or alcohol."

Because *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, held the primary purpose of checkpoint roadblocks cannot be for general crime control, the policy purpose of a checkpoint must be examined to ensure it is established for "a lawful and focused purpose like traffic safety rather than to detect evidence of ordinary criminal wrongdoing."

The government failed to offer testimony or written evidence regarding the checkpoint policy or program as a whole, and therefore failed to meet its burden of establishing that this checkpoint operation had a valid primarily purpose.

Evidence of Prior DUI Offenses Admissible To Prove Knowledge In Refusal Case Under Georgia Statute

State v. Frost
Georgia Supreme Court – Docket No. S14G1767 (June 15, 2015)

A Georgia statute, OCGA § 24–4–417, mandates admissibility of a prior DUI violation where the accused refused a chemical test in the current case and such evidence is found relevant to prove knowledge, plan, or absence of mistake or accident.

Since DUI is a general intent crime, it is difficult to fathom how "knowledge, plan, or absence of mistake or accident" might be relevant to prove the DUI charge. However, the Court held two prior offenses were admissible to prove Defendant had knowledge that his chemical test refusal would make it more difficult to prove he had an intoxicant in his system that impaired him.

The Court rejected the proposition that such evidence is only admissible if the Defendant claims he did not know, or was confused, about the obligation to submit to chemical testing. It observed that the permissible inference that Defendant knew a chemical test would prove his guilt was made stronger by knowledge from a prior DUI offense, and as such was relevant and admissible to prove knowledge.

Editor's Note: The Court failed to address the fact that suspects have a Fourth Amendment right to refuse chemical testing. Should a prior criminal offense be admissible to prove Defendant's knowledge that his post-arrest silence would make it more difficult for the State to prove its case? Can a state statute trump the Court's ability to exclude evidence on the basis that its relevance is outweighed by the potential for undue prejudice?

Momentary Deviation From Center of Unmarked Residential Street And A Wave To Passing Police Cruiser Not Grounds For An Enforcement Stop.

State v. Hudgins
2015 WL 4040256 (Delaware Superior Court – No. 1405009437) (July 1, 2015) (Unpublished)

Defendant drove down a narrow residential road with no center line marking as a police cruiser approached in the opposite direction. The officer testified that a portion of Defendant's car was initially left of the center but that Defendant corrected his vehicle position without danger of a collision and waved as he passed by.

Unintentional Loss Of Audio-Video Tape Not *Per Se* Grounds For Dismissal Of Charges.

State v. Barlett
2015 WL 4381352 (Court of Criminal Appeals of Tennessee – No. M2014-01530-CCA-R3-CD)(July 17, 2015)

Where the loss of an audio-video recording is unintentional, there is no *per se* rule mandating dismissal of charges. The Court considered the fact that there was evidence independent of whatever was lost on the tape recording including radar evidence of speeding, an odor of alcohol and bloodshot/watery eyes, a chemical test refusal, and incriminating statements that may not have even been captured on the audio tape.

Six-Month Suspension For Virginia Lawyer Drunk And Disruptive At CLE Seminar

A Virginia lawyer with two previous reprimands by the Virginia State Bar (VSB) has been suspended for six months and ordered to complete a two-year treatment and monitoring program by the VSB. The ruling was handed down after the lawyer reportedly fell asleep and was snoring in the seminar, only to wake up and curse the power point screen. He smelled of alcohol and was found to have a bottle of it in his possession.

Rather ironic since he was apparently attempting to improve his skills by attending the seminar, but the decision demonstrates that action may be taken against a lawyer even where no client is threatened with harm and the conduct occurred outside of a courtroom or legal proceeding.

Editor's Note: The Journal chooses not to publish the lawyer's name but shares this information for the edification of our members. If you need help ask for it---please don't wait for the shoe to drop!

lid here.

Editor's Message: Contributions to the NCDD Journal are welcome. Articles should be about 1200-1500 words and relate to DUI/DWI defense. Trial Tips should be 200-300 words. Please prepare in Word and submit as an attachment to burglin@msn.com. The NCDD reserves the right to edit or decline publication. Thank you.

Trial Tip Treasure

The Strangest Things Can Happen

by Paul Burglin

Trial work causes insomnia because our brain gets hyperactive and it's hard to turn it off. We not only have to prepare pretrial motions, an opening statement, witness examinations, jury instructions, and a closing argument, but we must be ever vigilant and attentive to nuances and surprises that course through a trial.

When the inevitable curve balls come, and they almost always do, we must make instantaneous decisions on how to handle them. We can ignore them or swing at them, and we can do it in front of the jury or seek remedies outside the jury's presence. Whatever we choose, we often have little time for reflection.

In just the last few months I experienced the following things for the first time after 30 years of practicing law:

Trial I

A video of Defendant's driving was admitted into evidence. I presented a rising blood-alcohol defense and the trial evidence came in about as good as we could hope for. The jury was instructed that if they wanted to view the video during deliberations the equipment would be made available to them. Unbeknownst to me, a couple of hours into deliberations the jury sent a note out requesting the equipment. An hour later we were summoned back to Court because the jury had sent out a note with a couple of questions, the nature of which suggested a healthy debate was taking place in the jury room. The prosecutor then disclosed that she had personally gone into the jury room to set up the equipment, telling the judge that she felt obliged to report this to the Court but that she had said no more than "hi and thank you" to the jurors. Better to beg for forgiveness than ask for permission?

"*Mr. Burglin*," intoned the judge, "*Do you wish to be heard on this?"*

Alan Dershowitz, *the retired Felix Frankfurter Professor of Law at Harvard Law School and renowned Constitutional and Criminal law scholar, gave the keynote speech for NCDD's 20th Anniversary Summer Session in Austin Hall this past July. Dershowitz opined that criminal offenses for refusing a chemical test without a warrant are unconstitutional.*

I could have immediately moved for a mistrial and I believe there was a compelling basis for it. However, this was a young prosecutor and I felt certain that a new trial would not have been barred under *Kennedy v. Oregon* (intentional provocation of a mistrial by prosecutor may be grounds to bar a new trial). We were getting good questions from the jury and they were still locked in deliberations. Had I successfully moved for a mistrial the Defendant would have been stuck with new trial fees, the prosecutor would have been more prepared for our strategy, and there was no telling what the second jury panel would look like.

Unfortunately, they returned a guilty verdict at the end of the day on the *per se* count and hung on the "under the influence' charge. In retrospect, I wish I had moved for the mistrial.

Trial II

The jury was empanelled for Defendant's retrial (the first one hung) and the jurors were handed what were supposed to be blank notebooks. Two jurors commented that their respective notebooks had notes in them! The judge instructed them to place the notebooks under their respective chairs and not look at them. At the first break, I asked that the clerk retrieve the note books and retain them for examination by the Court and counsel so we could determine if the jurors were exposed to any improper material (I was chiefly concerned that they may have come from a previous DUI trial and contain notes about expert witness testimony or legal arguments). The particular judge is very controlling in trial and does not permit speaking objections or sidebars. He refused my request to examine the notebooks and said he would take the matter up again later on.

Our motion *in limine* to bifurcate Defendant's prior conviction for driving under the influence had been granted on the basis that any relevance would be substantially outweighed by the potential for undue prejudice.

On direct examination, the arresting officer was asked if he had given Defendant the statutorily required chemical test admonition (this was a refusal case). He was given a written copy of the admonition to refresh his recollection about what he specifically told Defendant, but before informing the jury what he told Defendant he prefaced his comments by telling the jury that he omitted certain things from the admonition that were not relevant (e.g., the suspension period for persons under the age of 21 and a segment pertaining to persons who have a commercial license). I looked up at the judge and I could see he wasn't paying attention---he was looking at what had been written in the jury notebooks!

Me: "*Objection, may we approach your Honor?*"
Judge: "*No. What is your objection?*"

[This was not an objection I could explain in front of the jury. What the officer was about to read to the jury was a part of the admonition relevant to a second offender. Having just told the jury that he omitted things from the admonition that were not relevant, he was implying---whether intentionally or not---that Defendant had a prior conviction for DUI!]

Me: "*Did you catch what the officer just said judge?*" [I did not utter this sarcastically and said it politely; I simply did not know how else to convey the point that he needed to be edified at a side bar so that he would not let the officer continue reading the admonition about second offenders.]

Our eyes met dead on and he knew I caught him not paying attention at a critical point. We have a history, as something similar happened in a previous trial wherein he apologized and said he has to learn to pay attention. Yet his controlling nature would not permit him to allow a sidebar and he likely took offense at my suggestion that he wasn't paying attention.

Judge: "*Overruled counsel.*" [Whereupon the officer read the prejudicial portion of the admonition].

When the jury later retired I was afforded an opportunity to explain the basis for my objection. The judge then understood that he had erred by not paying attention (again!) and asked me what, if anything, I wanted in the way of a remedy. He expressed the opinion that he did not think it was significant enough to warrant a mistrial as the jury likely did not catch the significance of it. We fashioned a jury instruction that conveyed the impression it was a first offense case and I opted for no special instruction about the admonition so as not to call more attention to the issue.

Before deciding what to do I spoke privately to the prosecutor who I deem to be trustworthy and he assured me that he had not counseled the officer to do what he did---I believed him and told him so, and stated that I would not be moving for a mistrial based on that fact. There are no easy answers on these things. By not moving for a mistrial you are generally deemed to have waived the right to one on appeal, so among the other things I had to weigh what our appellate court would do.

It was a strong case for the prosecution and the Defendant was convicted, but I still believe I made the right call.

So 0-2 on these two cases but more lessons learned. This is a tough business but we learn something every time we go to trial.

Do you have a good trial tip or two? Please e-mail it to burglin@msn.com for possible publication in the Journal.

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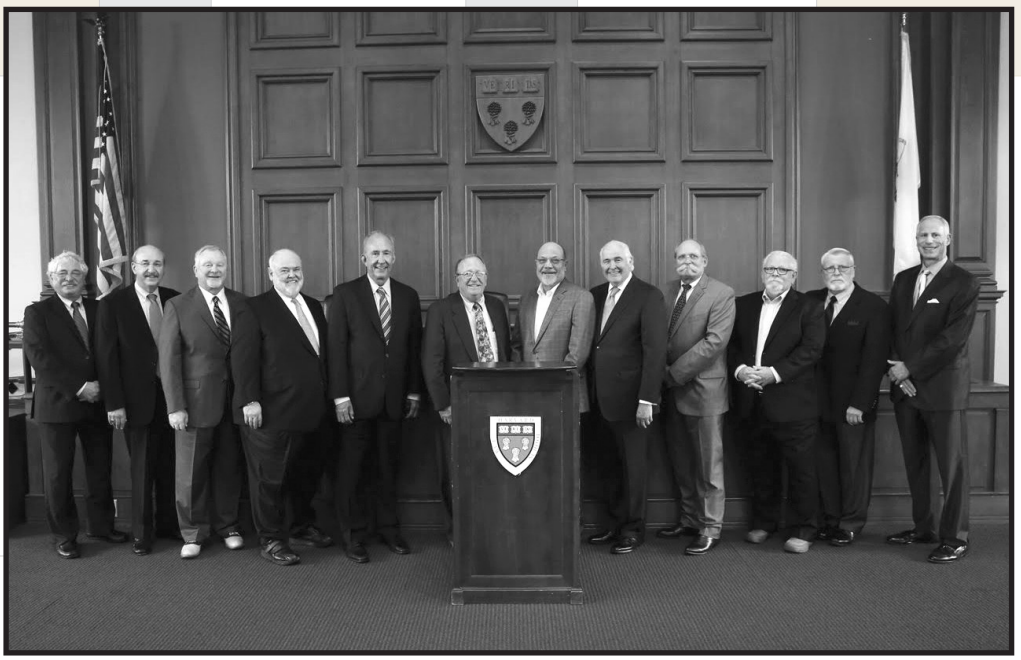
WINTER SESSION

January 20 – 22, 2016

Marina Del Rey, CA

MANY FOUNDERS AND FELLOWS OF NCDD TURNED OUT FOR THE 20TH ANNIVERSARY SUMMER SESSION



Barry Simons; Peter Gerstenzang; Phillip Price; Victor Carmody, Jr.; Lawrence Taylor; Douglas Cowan; J.J. Paul, III; James Campbell; George Bianchi; Flem Whited III; John "Tommy" Kirk; and Steve Oberman

Continued from cover

just happened to step in the way of it. That person is displaying their own insecurity, and weakness, not yours. Hold your tongue. Sleep on a whether a response is even necessary.

3. Don't make assumptions. That is a hard one. We all do this without thinking. But so does the prosecution, in almost every case. Never forget that.

4. Always do your best. What else would you do?

There are very few people that are all good or all bad. There is an awful lot of gray in the law and in life. What we as lawyers are privileged to do is to learn how to take those facts and that law that helps our clients---to see the good in them. If we can do that we can also find a way to see the good in judges, prosecutors, cops, and fellow defense lawyers, our colleagues. We can build on that good to persuade. It is easy to forget this.

This past April I had a six trial winning streak and three of them were with the same prosecutor and judge. After I got the breath test suppressed in the third trial this young prosecutor dropped all the charges. She was pretty upset. I asked her why she gave up and she said, "I'm not going to do it." I said, "What?" She said, "I'm not going to shake your hand." I said, "Okay, I can see that you are upset. But I'm going to offer you some friendly advice, and you can do what you want with it. I've been doing this for a while and I've had my share of getting upset. Don't ever let your emotions interfere with your professionalism."

As Justice Sotomayor observed, lawyering is a gift. It is a privilege and a responsibility and a gift to be able to have an impact, a favorable and positive impact in our clients' lives and in the lives of everyone with whom we come into contact. I occasionally get emails from clients I don't even remember, saying thank you---"I have been sober for 10 years thanks to you."

I tell every prospective client, I am going to defend the heck out of your case, but at the same time I have to be competent at sentencing and I can't do that unless you get the appropriate level of education or treatment. Call me greedy, but I don't want to just win the case or impress the judge at sentencing if we lose. I tell them nothing personal but I don't want to see you every five or ten years. I want this to be the last DUI you ever get.

It's not always about winning or losing the case. Not all cases can be won. The lawyer who boasts "I don't do sentencing" is lying! Sometimes it's about the bigger picture. Impacting your client's lives and their family member's lives in a positive way.

What we do reminds me of the epic arguments on Star Trek between Dr. McCoy – pure emotion and Mr. Spock – pure logic. Learning how to control the emotion so that it doesn't interfere with your ability to defend. Losing the anger over the lying cop, the overzealous prosecutor, or the disingenuous judge. Like Captain Kirk. Passionate but also rational.

I got here through the help of other people who inspired me, taught me, and coached me. And I am deeply indebted to all of them. We are all in this together, struggling with the challenges and contradictions we deal with on a daily basis. What we do can be extremely stressful at times, rewarding and uplifting, or at times extremely depressing. This College brings all of us together as one big family. And we are all in this together here to help each other to confront these challenges and to become the best that we can be.

To the new members and new attendees, I say welcome to the greatest club I have ever been privileged to be a part of. This College has over 1800 members, some of the best lawyers in the world, and the best experts in the world. We have an incredible and active e-mail list. Our four traditional sessions – Summer Session with break outs and lectures, drinks at the Charles, dinners in Cambridge, Las Vegas with NACDL which this year will be at the Bellagio Hotel, our Winter Session that will be in southern California at Marina Del Rey, Mastering Scientific Evidence in New Orleans with the TCDLA and our specialty seminars on metrology in Phoenix and Atlanta, and Serious Science in Colorado. We have volunteered our time to provide public defender training that is the best anywhere.

The Winter Session topic will be "*Cannabis and Cars: What You Need to Know to Defend a Marijuana DUI Case.*" George Bianchi and Manny Daskal will address the legal environment and defenses; Bob LaPier will address DRE and do a live exam; Fran Gengo will explain why DRE is junk science; Michael ("Captain Motion") Kennedy will discuss Fourth Amendment defenses; and three chemists will speak---Ron Moore on testing blood for THC, Hydroxy THC, and Carboxy THC; Heather Harris on the chemical analysis of marijuana; and Janine Arvizu on proper lab practices and what to look for.

We are already working on the 2016 Summer Session and planning to have smaller lecture/seminar/breakouts with greater interaction between students and faculty.

We have fantastic opportunities for participation. You can seek to be a member of our faculty---if you want to teach, we want to know. You can be a state delegate, a sustaining member, or get Board Certified (our Board Certification program is one of the most prestigious certification programs in the country and the only one in DUI defense approved by the American Bar Association.

We have an *amicus* committee that has submitted briefs before the United States Supreme Court on the winning side in *Melendez-Diaz v. Massachusetts* (where we signed on), *Bullcoming v. New Mexico* (where we led the writing and editing), and *Missouri v. McNeely* (where we assisted in the preparation of the brief). Our members have also submitted *amicus* briefs in the Supreme Courts of Pennsylvania, Maryland, Arizona, Ohio, Hawaii, and other states.

We have a long-range planning committee open to all members who want to present ideas for the future and growth of the College and discuss them. We have a diversity committee---the complexion of this College is changing and needs to change more. I am encouraging each of you to actively recruit minority and female members.

We have the NCDD Journal to keep us abreast of the latest developments in the law and you are welcome to submit articles and trial tips for possible publication. We have a website with a virtual library containing an incredible wealth of information and resources. We have a Foundation that offers scholarships to deserving lawyers.

To all of you I say ask questions, give advice, participate as much as you want. Write a blog on our website. Ask a question or give an answer on our list serve. Email us. Call us. We want to hear from you. Give us your ideas. The opportunities are there for all of us. And we are all here to help each other.

Our motto here is "Justice Through Knowledge." We never stop learning about the law and about life. We never stop honing our skills. Teaching, and sharing. Friendship, camaraderie, support. That is what this College means to me.

NCDD BOARD CERTIFICATION EXAM

January 20, 2016

Marina Del Rey, California