

DWI

BY STEPHEN L. JONES

To DUI or not to DUI, that is the Question

A new client enters your office. He tells you he has been charged with his first DUI. The client reveals to you that on the night in question he was out with friends, had six mixed drinks, fell asleep behind the wheel, and crashed into a tree. The police responded to the scene and found the client stumbling around the vehicle. They administered three field sobriety tests — the nystagmus eye test, the one-leg stand test, and the walk and turn test. The client could not perform any of the tests. After his arrest, the client was taken to the police station where he took a breath test with a reading of 0.13%. The police reports confirm that the client's memory is accurate. The client asks your advice on what to do. If your answer is that the case is bad, the chance of winning remote and he should plead, you might be right — and you might be wrong.

In a time when the practice of law is becoming more and more specialized¹, is it possible that a criminal practitioner should be hesitant to accept representation in some or all driving under the influence cases? The answer is yes, unless you have a detailed working knowledge of the type of issues and evidence common to a DUI practice. By doing otherwise you may be doing your client a disservice.

Rule 1.1 of the Model Rules of Professional Conduct states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The comment that follows the rule gives a practitioner some more detailed direction as to what the rule may require:

Legal Knowledge and Skill

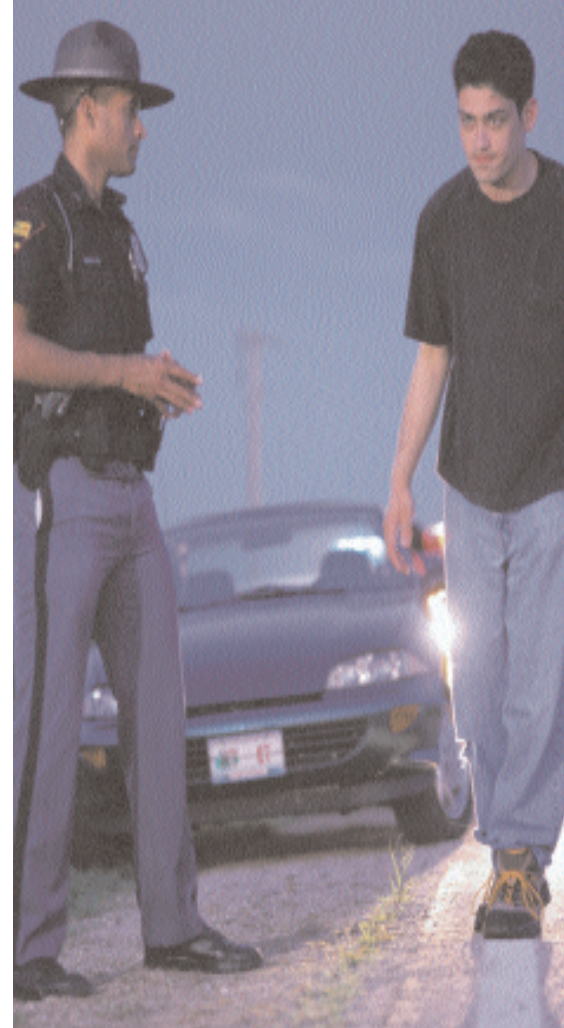
[1] In determining whether a lawyer employs the requisite knowledge and skill in a partic-

ular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

To properly evaluate the above factual scenario, at a bare minimum a lawyer must possess knowledge concerning:

- What constitutes "operation" of a motor vehicle;
- The standardized field sobriety tests, including how they



are administered and "graded" as well as how accurate they are (individually and collectively);

- How the breath test machine works and the scientific theory behind its operation; and
- How, when and why alcohol is absorbed into the body, and how it is metabolized.

In the above factual scenario you must know the questions to ask during the client interview to ensure that you are properly evaluating the case. We were all trained to spot issues in law school. After a semester-long course on an area of the law, we were tested on what issues we could "see" and why they were issues. We studied for hours upon hours. Before evaluating the above facts, or the facts in any other DUI case, doesn't the client deserve that same knowledge and preparation?

In the above case the field sobriety tests included the Walk and Turn test, the One-Leg Stand test, and the Horizontal Gaze Nystagmus test. The arresting officer's narrative report details the observations the officer made during the tests.

Walk and Turn. The police report reveals that the client stepped off the designated line on 12 of the 18 steps and raised both of his arms approximately five inches from his side for balance. Sounds pretty bad? Actually, the client passed the test.² The client only exhibited one of the possible eight clues by stepping off the line. The number of times he stepped off the line does not count as an additional clue or a failure. As for raising his arms, the client was within the allowable six inches.

One-Leg Stand. The client failed to count out loud as instructed and put his foot down two times during the test. He put his foot down at the count of three and then at the count of 19. According to the officer, the client also failed this test. However, the *DWI Detection & Standardized Field Sobriety Testing Student Manual* disagrees.³ According to the prosecution's "bible" on field sobriety tests, the client also passed by exhibiting only one clue. Counting out loud is not part of the evaluation criteria on this test.

Horizontal Gaze Nystagmus. For those of you unfamiliar with nystagmus, it is an involuntary jerking of the eye. The officer noted that the client exhibited four of six clues and therefore failed this test. The clues exhibited were a

"lack of smooth pursuit" (two clues — one for each eye) and "distinct nystagmus at maximum deviation" (two clues — one for each eye). The officer correctly evaluated the client on this test. However, the fact that the client did not exhibit the third clue, "onset of nystagmus prior to 45 degrees," would be significant in all cases and extremely significant in the above case. According to the *Student Manual*, a lack of nystagmus prior to 45 degrees would indicate a blood alcohol level of at or below 0.08%.⁴ In actuality, the absence of nystagmus prior to 45 degrees likely indicates a blood alcohol level of 0.05% or less. This test result cannot be reconciled with the breath test result of 0.13%.

If investigation reveals that the tests were not administered properly, they are invalid. The *Student Manual* states the following in bold letters:

It Is Necessary To Emphasize This Validation Applies Only When:

- **The Tests Are Administered In The Prescribed Standardized Manner**
- **The Standardized Clues Are Used To Assess The Suspect's Performance**
- **The Standardized Criteria**

Are Employed To Interpret The Performance

If Any One Of The Standardized Field Sobriety Test Elements Is Changed, The Validity Is Compromised.⁵

Without even examining any issues regarding the administration of the field sobriety tests, the administration of the breath test or the issue of operation, the state's entire case has been compromised through a cursory look at the police officer's version of the results of the field sobriety tests.

Other thoughts on the facts:

- Even if the client was alone next to the vehicle after the crash and made a statement that he was driving, there may be insufficient evidence of operation for the government to meet its burden.
- Expert testimony would likely discount the reliability of the field sobriety tests because the recent accident may disqualify the client as a candidate for these tests.
- Unless the police can establish the time of the crash, the

DWI MANUALS FOR SALE FROM NACDL					Qty	CD	Qty	Hard Copy	Total \$
DWI Detection and Standardized Field Sobriety Testing- Student Manual (revised 2004)						\$50		\$135	
DWI Detection and Standardized Field Sobriety Testing-Instructor Manual (revised 2004)						\$50		\$220	
Digest of State Alcohol-Highway Safety Related Legislation (Rev. 2002)						\$35		\$85	
Preliminary Training for Drug Evaluation and Classification. The Pre-School Instructor Manual/Administrator's Guide - (1999 Edition)						\$35		\$60	
Preliminary Training for Drug Evaluation and Classification. The Pre-School Student Manual - (2002 Edition)						\$25		\$45	
Drug Evaluation and Classification Training - The Drug Recognition Expert School Instructor Manual/Administrator's Guide (1999 Edition)						\$50		\$170	
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Sentencing and Dispositions of Youth DUI and Other Alcohol Offenses: A Guide for Judges and Prosecutors						\$20		\$30	
Guide to Sentencing DUI Offenders						\$20		\$29	
DWI Detection and Standardized Field Sobriety Testing-Training Videos (Rev. 2002)						VHS		DVD	

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results of the field sobriety tests and breath test may be irrelevant as to the client's sobriety at the time of driving.

- Six drinks ingested by a 200-pound male during the five hours prior to the breath test would place his blood alcohol content at approximately .04%, which is consistent with the results of the Horizontal Gaze Nystagmus test.
- If the client weighed 140 pounds and had two 12-ounce beers within one-half hour before the motor vehicle stop, his blood alcohol level may have been under 0.08% at the time of the stop.

Not surprisingly, the average criminal lawyer who has not had specialized training in DUI defense evaluation of the field sobriety tests may have recommended a guilty plea to the client after reading the police report. Such advice without further investigation would have been a mistake professionally and ethically. If you wish to educate yourself, the resources below will be a great place to start.

Various manuals include:

- *DWI Detection and Standardized Field Sobriety Testing*, National Highway Traffic Safety Administration (1995 - 2006).
- Stuster, J.W., *The Detection of DWI Motorcyclists*, U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-807-839, Washington, D.C. (1993).

In addition to the various manuals there are many written sources of information on these subjects that are not state-specific. They include:

- Lawrence E. Taylor & Steven Oberman, *Drunk Driving Defense*, 6th Edition, Aspen Publishers (800-638-8437) (supplemented annually) \$160
- James C. Garriott, editor, *Medical-Legal Aspects of Alcohol*, 4th Ed. (2003),

Lawyers & Judges Publishing Co. (800-209-7109) \$129

- Donald H. Nichols & Flem K. Whited, *Drinking/Driving Litigation: Criminal and Civil Trial Notebook*, Thomson-West Publishing Co. (800-328-4880) (Five-Volume Set) (supplemented annually) \$550
- Edward L. Fiandach, *Handling Drunk Driving Cases, 2d* (1995), Thomson-West Publishing Co. (800-328-4880) (supplemented annually) \$298
- Edward F. Fitzgerald, *Intoxication Test Evidence, 2d Ed.* (1995), Thomson-West Publishing Co. (800-328-4880) (supplemented annually) \$316

NACDL members can order these publications at <http://west.thomson.com>. Use offer #512988 and receive a 20% discount.

There are also numerous state-specific and general seminars offered around the country, including those co-sponsored by NACDL and the National College for DUI Defense (NCDD). These more intensive seminars include:

- ***DWI Means Defend with Ingenuity: Making Over Your DUI Practice***, Las Vegas, Nev., October 12-14, 2006 at Caesar's Palace (three half-day sessions on various topics including field sobriety testing, breath and blood testing, crossing the officer and much more; co-sponsored by NACDL and NCDD) <http://www.nacdl.org/public.nsf/Events/DUIMeeting?OpenDocument>

- *NCDD Winter Session*, Tucson, Ariz., January 18-20, 2007 (sessions from 8 a.m. to 1:30 p.m.)
- *Mastering Scientific Evidence*, April 2007, Dallas, Texas
- *NCDD Summer Session*, July 2007 (three full days of intensive training with hands-on breakout sessions; seating is limited so it is best to register by January 2007)

To competently represent a client charged with DUI you must learn the new techniques and current technologies unique to this area of criminal defense. DUI defense involves a complex combination of science and law that should not be initiated by those unwilling to treat the defense of this serious crime with the respect that it deserves.

Notes

1. In 2004, the National College for DUI Defense, Inc. Specialty Certification Program was approved by the American Bar Association to certify lawyers as specialists in the area of DUI Defense. Currently, DUI specialization is recognized in at least 8 states, with several others pending approval. For more information, see http://www.ncdd.com/dsp_certification.cfm.

2. U.S. Department of Transportation, National Highway Traffic Safety Administration, *DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING, STUDENT MANUAL, VIII-11* (2004).

3. Id. at VIII-13 - 14.

4. Id. at VIII-5.

5. Id. at VIII-19. ■

About the Author

Stephen L. Jones, a former prosecutor, is



the managing partner of the law firm of Jones, Milligan & Geraghty. Now a nationally recognized defense attorney, his practice is concentrated in the defense of individuals

charged with Operating under the Influence (OUI, DUI, DWI) and related matters. He authored the Massachusetts Practice Series volume on Drunk Driving Defense for Thomson-West Publishing, and lectures nationally for both NACDL and the National College for DUI Defense (NCDD). He was elected to NCDD's Board of Regents in 2003; he is the only Board Certified DUI Defense Specialist in Massachusetts.

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