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Editor:Paul Burglin

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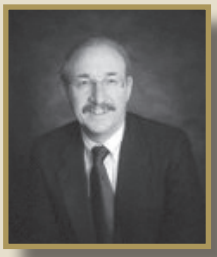
Dean's Message



One of the great things about being a member of the College is being with other members of the College. People who do DUI defense are anything but ordinary. "Normal" people do not choose to daily defend the accused in the stressful confines of a courtroom.

We are interesting because we accept the challenges that most of our colleagues decline. Our clients are among the most unpopular, and our battles are almost always uphill. It is that daily challenge of handling such hard cases that shapes and defines us. Justin McShane's and Josh Lee's do not emerge from the crucible of real estate closings. Could the creativity of a Harley Wagner be inspired by SEC work?

While rarely discussed, courage is an essential element of every trial lawyer's character. Courage is not fearlessness; rather, courage is the ability to perform in the face of nauseating fear.

Courage is inexperienced young lawyers walking into the court room, terrified, knowing how much they don't know; but walking in anyway. Courage is suffering devastating defeat but coming back to fight again. Courage is John Webb overcoming cruel adversity, with good cheer, and concern for others.

We lead lives of stress and drama. We bear the burden of salvaging people from their bad choices. We carry the scars of failure and the heartbreak of client incarceration.

We are idealists; frequently camouflaged in cynicism, but idealists nonetheless. Our members are generous and open hearted in their desire to teach and assist their fellow lawyers. Can you imagine Jamie Balagia going through a day without helping one of us? Our list serve is a daily exposition of generosity and sharing. We are never alone because insight and guidance are only a few keystrokes away.

Our work commands the very best that we have. Our lives are hard, but we live with the intensity of victory and failure that few lawyers experience. It is easy to feel isolated defending unpopular clients against relentless prosecutors. It is at those moments that we mean the most to each other.

I hope that my term as Dean will further the work of support and education envisioned by our founders. I hope that our College will continue to inspire those lawyers who enter the courtroom, and stand for the defense of the accused.

--- Peter Gerstenzang

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E.D.'s Corner

Wow! San Diego in January! We will all be ready for a little warmth and sunshine. Dean Gerstenzang and his Curriculum Committee, headed up by Assistant Dean Steve Jones, have put together a terrific program! Hope you don't miss it!

Our new website is really making progress! You can now pay your 2014 Dues and fill out your Renewal Form on-line! **MEMBERSHIP RENEWAL FORMS AND DUES: DUE JANUARY 31, 2014.**

Please make an effort to add your picture to your Bio on the website. Take a look and see how much that helps the look of the site. You can change your own bios and contact information so make sure you are keeping it up to date.

Our registration forms for the Winter and Summer programs can now be filled out on-line as well! Our MSE and Vegas Seminars registrations will still need to go through TCDLA and NACDL websites. If need any help just give me a call.

May you all have a wonderful and prosperous 2014!

--- Rhea Kirk

McNeely Ideas and Basics

By W. Troy McKinney

In *Missouri v. McNeely*, the United States Supreme Court held that mere dissipation of alcohol is not an exigency permitting a warrantless blood draw and that it is the State's burden to prove the existence of an exigency when obtaining a warrantless search and seizure of body fluids. This has put mandatory blood draw statutes in questionable constitutional territory, if not made them facially meaningless (though they may only be unconstitutional as applied). The one thing the *McNeely* Court made abundantly clear was that every case must be decided on a case-by-case basis: that is, there are no bright line rules for when there is an exigency (and the lack of any bright line prevents a legislature from statutorily drawing bright lines the Supreme Court has found are unconstitutional). Even the facts of *Schmerber* may no longer present an exigency because of changes in practical, technological, statutory, and factual circumstances since it was decided.

In light of *McNeely*, I offer the following three ideas and suggestions. The first suggestion is a list of some important considerations in preparing and analyzing your case for a *McNeely* issue. The second suggestion is that criminal refusal statutes are likely unconstitutional. The third suggestion is that refusal to submit a breath or blood specimen may no longer be admissible if the refusal is an invocation or assertion of the person's Fourth Amendment rights.

Though it may technically and legally be the State's burden to show an exigency, in the real world you had better prove (and make a factual record of) no actual exigency if you want to win in the trial court or on appeal. The following factors are some initial guidelines to consider.

1. Know and be able to prove how many prosecutors were on duty or available during the relevant time frame (people available to aid in drafting the warrant affidavit), keeping in mind that there are often people in the prosecutor's office who could and often do so.

2. Know and be able to prove how many magistrates were on duty (or on-call) during the relevant time frame and their locations and availability relative to your officer (in many places, there are magistrates on duty 24/7 -- in some places phone warrants are available).

Continued on Page 8

Darryl Genis In The Crosshairs

Under Attack and Still Swinging

Criminal defense attorneys have varying styles. Some maintain a cordial relationship with prosecutors and judges, figuring that small favors will be needed down the road and bridges are best left standing. Others are civil but aggressive and uncompromising. Then there are the scorched earth lawyers who rarely waive speedy trial rights, seldom stipulate to facts, object at every turn, and generally treat opposing counsel like the lion does a hyena. Meet California lawyer Darryl Genis.

Genis is indisputably a DUI defense warrior. He frequently has multiple time-not-waived cases set for jury trial on the same day. He infuriates prosecutors with his tactics and makes a habit of getting under their skin. He wins a respectable percentage of his cases while commanding the begrudging respect of many judges, but his emotions have pushed him too far at times and he is now in the crosshairs of prosecutors and the California State Bar (CSB). When he was sanctioned $750.00 for failing to personally appear at several trial readiness conferences, he appealed the order and only made matters worse. Addressing the Santa Barbara Superior Court Appellate Department (a three-judge panel composed of judges that sit on the same Superior Court bench as the trial judge who levied the sanction), Genis unleashed a verbal assault resulting in a published opinion (rare for a California Superior Court Appellate Department) that not only affirmed the sanction but referred him to the CSB for disciplinary action.

"It is not an overstatement to categorize Appellant's oral argument as a parade of insults and affronts. It commenced with his demand that the deputy district attorney be removed from counsel table, and it culminated with his rude insistence that the court `state for the record that this is not a contempt proceeding.' In between, the trial and appellate judges were repeatedly disparaged.

"The appellate division was referred to as `the fox [watching] the hen house.' Appellant demanded that each appellate judge disclose for the record whether he had discussed the case with the trial court, saying: `But it's common knowledge in the legal community, and you would be insulting me if you suggested otherwise, for us to believe that you judges don't talk like women in a sewing circle about us lawyers. You do. I know you do.'

"In response to questions about the adequacy of the appellate record, and whether the recorded proceedings (which, as stated, had been provided to Appellant by the trial court) had been transcribed, Appellant stated: `I don't need to give you the universe of evidence in these proceedings. . . . You don't need a transcript.' In response to a question regarding a case citation from one of the appellate judges, Appellant retorted: `It must have been a while since you read the brief.'

"In recounting the interactions between the criminal bar and bench, Appellant condescendingly opined: `I see a lot of judges that are really quick to bark at defense attorneys. We're always the fly in the ointment. I don't see judges willing to bark at prosecutors quite so readily. Maybe that's because if you upset them one too many times, they'll get one of their [minions to run against you and unseat you…]'

"In discussing the actions taken in the court below, the trial judge was repeatedly referred to by his first name rather than his title. When admonished not to do so, Appellant responded as follows: `OK. Well, hereinafter, I will honor your request. But before I proceed to honor your request, I'll tell you that in the 33 years that I've practiced law, I've appeared in front of many great men and women judges, including you three. And I've appeared in front of a few who are an embarrassment to our profession and [first and last name of the trial judge] is one of those people.' Throughout, the trial judge was castigated, disparaged and even the subject of a veiled threat: `When I came in and ultimately had a hearing, I had listened to the whole proceeding and I heard everything that [the trial court] had to say, and I addressed that in my arguments prior to his reaching his pre-printed ruling. And he said he didn't care. He was the epitome of the completely sealed and closed shut mind. You know . . . a human mind is a lot like a parachute. If it doesn't open, it will get you killed someday.'"

People v. Whitus, 209 Cal.App.4th Supp. 1 (2012).

Those toiling in the trenches of criminal defense work empathize with Genis's full throttled vent at the *Whitus* panel of judges. Many would commend him for it but few would do it. There are truths in what he said and complained of, but there other ways to make a point without risking one's professional license. Yet that is Genis---he's a missile of energy and zeal with no brakes.

So it was last July that the CSB initiated formal disciplinary charges against Genis based on complaints made by the Santa Barbara District Attorney's Office. The action appears both light on substance and retaliatory---the trigger ironically being a complaint made by Genis himself against a Santa Barbara prosecutor (he filed a formal complaint with the CSB that she had improperly released discovery to a defense attorney who had not yet substituted into a case he was handling).

Receiving a "Notice of Disciplinary Charges" from a State Bar would alarm any lawyer. It threatens one's reputation and livelihood. The Complaint received by Genis listed five different attorneys representing the CSB: Chief Trial Counsel; Deputy Chief Trial Counsel; Assistant Chief Trial Counsel; and two lawyers identified as Deputy Trial Counsel. It leveled four separate charges against Genis but gave him only 20 days to respond on threat of default and disbarment. A lawyer as busy as Genis would have to put almost everything on hold to deal with it effectively and timely. He has reportedly spent in excess of $70,000 on a team of lawyers.

The lawyer who signed the discipline Complaint has only been practicing law since 2008. He filed the following four charges against Genis, and none of them include the Appellate Department referral in the *Whitus* case (that is likely to come in a separate disciplinary action):

I. Making a false and malicious CSB complaint against a Santa Barbara prosecutor;

II. Falsely accusing the same Santa Barbara prosecutor in a written motion to having admitted to committing a misdemeanor by releasing police reports and other confidential information to an unauthorized person;

III. Failing to obey a court order to personally appear at several readiness conferences (this was the subject of the $750 sanction he appealed in *Whitus*);

IV. Failing to Obey a Court Order by introducing excluded evidence at a trial for which he was sanctioned twice for $1,000 each.

As to the first charge, the evidence presented at the CSB trial indicates that Genis's allegation against the prosecutor was technically correct, or that Genis had at least a good faith basis to believe it.

The second charge is equally weak, since the prosecutor admitted in a court hearing to releasing the discovery even though she never admitted to violating the law.

The merit of the third charge is also questionable since Genis was committed to be in other places and had attorneys appearing for him. Moreover, the trial judge sanctioned him less than $1,000 which is a clear indication he did not intend for Genis to be reported to the CSB for it (sanctions under $1,000 do not have to be reported to the CSB). This one reeks of piling on by the CSB at the behest of the Santa Barbara District Attorney's Office.

The fourth charge may be the most challenging one for Genis to prevail on, since the judge sanctioned him two times at $1,000 each. Yet even here, Genis's defense team expresses confidence that they will prevail on the basis that he did not technically violate the exclusion order.

None of the charges involve client neglect or misappropriation of client funds, and only the first two charges (the weakest ones) involve alleged moral turpitude. Moreover, the Santa Barbara prosecutors appear to have acted with the same retaliatory motive and disingenuousness that they accuse Genis of engaging in. It would seem doubtful that Genis will get anything more from this than a public censure, but a suspension looms over him if the CSB acts on his alleged conduct before the *Whitus* appellate panel of judges.

When asked if he was tiring of the battles after 33 years of doing it, Genis vowed that his trial with the CSB has given him a first hand perspective of what it feels like to have the government take aim upon you with all its resources. "That has renewed and invigorated my zeal," he says.

Case Law Roundup

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

Implied Consent Is Not Fourth Amendment Consent

State v. Butler
232 Ariz. 84, 302 P.3d 609

Independent of the implied consent statute, the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw. If the arrestee is a juvenile, the youth's age and a parent's presence are relevant factors for a trial court to consider in evaluating whether consent was voluntary under the totality of circumstances.

Objective Good Faith Exception To Exclusionary Rule

State v. Adkins
___A.3d ___, 2013 WL 6688806 (N.J.Super.A.D.)

Finding of objective good faith reliance on binding New Jersey Supreme Court precedent precludes application of exclusionary rule to suppress blood-alcohol evidence obtained without a warrant pre-*McNeely*.

EDITOR'S NOTE: The New Jersey Court cited *Davis v. United States* for the objective good faith exception to the exclusionary rule. Had there only been intermediate appellate court precedent the exception might not be applicable since the *Davis* Court refers to binding precedent from state courts of last resort.

Blood Draws At Jail Facility By Non-Physician/Non-Nurse Found Reasonable

People v. Cuevas
___Cal.App.4th ___ (2013) (California First District Court of Appeal, Div. 1 – Docket No. A138062)
2013 WL 3963601

The Court reviewed seven consolidated cases involving DUI arrests where the subjects opted for blood testing under California's implied consent law and six were done at a jail facility. The blood draws were each performed by a trained phlebotomist or blood technician. Police officers testified to observing the blood draw site being cleaned and a needle being used from a sealed package. No evidence of pain or discomfort was presented, and in five of the cases there was testimony that the area was bandaged following the blood draw.

The Court rejected defense contentions that the blood draws failed to meet the constitutional standard of reasonableness because police officers arguably lacked the medical training necessary to testify whether the blood draws were performed in a medically approved manner and were done in a jail facility rather than a hospital.

The Court did note, however, that mere consent to a blood draw does not make the manner of drawing blood reasonable *per se*. It is but one factor to be considered in conjunction with the totality of circumstances.

EDITOR'S NOTE: The California Supreme Court denied petitions for review and for de-publication.

Are Statutes Criminalizing or Enhancing Sentences Based on Chemical Test Refusals Constitutional?

HOOVER v. State of OHIO (6th Cir. 2013)
No. 13–3330.
Unpublished Per Curiam
2013 WL 6284256

Hoover was arrested for drunk driving and refused to take a breathalyzer test. He was charged with driving under the influence under an Ohio statute which doubles the punishment if a breath test is refused and the suspect has a prior conviction. (Ohio Rev. Code 4511.19(A)(2)).

Hoover moved to dismiss the charge against him, arguing that the statute was unconstitutional because it penalized him for invoking his Fourth Amendment rights. The trial court denied the motion to dismiss and Hoover appealed.

The Ohio Court of Appeals agreed with Hoover's argument that he should not be subject to increased criminal penalties for refusing to take a breathalyzer test, and it vacated his sentence. *State v. Hoover*, 878 N.E.2d 1116 (Ohio Ct.App. 2007). The Supreme Court of Ohio, in a four-to-three decision, reversed the decision of the Court of Appeals and reinstated Hoover's sentence. *State v. Hoover*, 916 N.E.2d 1056 (Ohio 2009).

The Ohio Supreme Court's decision was pre-*McNeely*, and like a number of other jurisdictions, it read *Schmerber* too broadly and concluded that exigent circumstances for a warrantless chemical test exist anytime an officer has probable cause to believe a suspect has been driving under the influence.

The United States Supreme Court denied certiorari. *Hoover v. Ohio*, 559 U.S. 1093 (2010). Hoover then filed a petition for federal habeas corpus relief. A magistrate judge recommended that the petition be denied, and the district court adopted this recommendation over Hoover's objections, but granted Hoover a certificate of appealability.

In order to be entitled to federal habeas corpus relief, Hoover was required to show that the Ohio Supreme Court's decision was contrary to or an unreasonable application of federal law clearly established by the Supreme Court. *See Slagle v. Bagley,* 457 F.3d 501, 513 (6th Cir. 2006). Unfortunately for Hoover, the Supreme Court has not spoken directly on this issue. As did the dissent in the Ohio Supreme Court opinion, he cited *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967) for the proposition that he could not constitutionally be convicted for refusing to consent to a warrantless search. That case involved a property owner who was faced with criminal charges for refusing to allow an inspection of his property. The Supreme Court noted that there was no probable cause to believe that the property owner had violated any law, and that there were no exigent circumstances that prevented the government from obtaining a warrant. *Id*., at 539. In Hoover's case, there was probable cause to believe that he was guilty of driving under the influence, and he had already been arrested on that charge. The Supreme Court has also held that under exigent circumstances, even the more invasive blood test without a warrant to determine intoxication incident to an arrest for drunk driving is not an unreasonable search under the Fourth Amendment. [Citing *Missouri v. McNeely*, 133 S.Ct. 1552, 1556, and *Schmerber v. California*, 384 U.S. 757, 771 (1966). Therefore, Hoover's reliance on *Camara* is unavailing, as it is distinguishable from his case. The property owner in *Camara* had the right to insist on a warrant, and Hoover did not.

Because Hoover has not established that the Ohio Supreme Court's rejection of his claim is contrary to or an unreasonable application of federal law clearly established by the Supreme Court, the denial of his petition for a writ of habeas corpus is affirmed.

EDITOR'S NOTE: The Sixth Circuit obviously misinterpreted both *McNeely* and *Schmerber* when it declared Hoover had no right to insist upon a warrant. See Concurring opinion below.

STRANCH, Circuit Judge, concurring:

The statute at issue in this case is unusual: It criminalizes the refusal to submit to a breathalyzer test. Such laws, which are not common, raise unanswered questions regarding the limits of implied consent statutes and the imposition of criminal penalties for refusing a warrantless search. See Note, Taryn Alexandra Locke, Don't Hold Your Breath: Kansas's Criminal Refusal Law is on a Collision Course with the U.S. Constitution, 52 Washburn L.J. 289 (2013); D. Bernard Zaleha, Alaska's Criminalization of Refusal to Take a Breath Test: Is it a Permissible Warrantless Search Under the Fourth Amendment, 5 Alaska L.Rev. 263 (1988). The Supreme Court has not yet addressed this kind of statute. But as we stated in Slagle, "a state court ... does not act contrary to clearly established law when the precedent of the Supreme Court is ambiguous or nonexistent." 457 F.3d at 514.

I concur, therefore, only because Hoover has not satisfied AEDPA's strict requirement that his conviction is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d).

State v. Berg (2013)
District Court Tenth Judicial District
County of Anoka (Docket No. 02-CR-13-4444)

DUI suspects have a constitutional right to refuse consent to chemical testing absent a warrant or sufficient exigent circumstances, and the exercise of that right cannot be criminalized. See *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 540 (1967).

"If the exercise of a constitutional right is criminalized the rights afforded United States citizens loses all meaning. The officer, upon learning Defendant was invoking her right to refuse a search had the ability to request a warrant and force Defendant to submit to testing. The officer chose not to get a warrant. The state's right to test Defendant was lost at that point. Therefore, this Court grants Defendant's motion and will dismiss County [sic] I of the complaint."

EDITOR'S NOTE: This was a win by NCDD member Charles Ramsay at the trial court level.

Admissibility of Declaration Against Penal Interest By Third Party Claiming To Be Driver

People v. Soto

___ N.Y.S.2d ___, 2013 WL 6418291 (N.Y.A.D. 1 Dept.), 2013 N.Y. Slip Op. 08217 (*Supreme Court, Appellate Division, First Department, New York)*

A prosecution witness testified that he observed defendant driving and that he was the only person in the car. Defendant contended that he was a mere passenger. The defense sought to introduce an out-of-court statement made to a defense investigator by a 19–year–old woman indicating that she, and not defendant, was driving defendant's car at the time it collided with a parked car. She refused to testify at trial on Fifth Amendment grounds and the prosecution refused to grant her immunity. A separate defense witness testified that he observed a young lady driving the car.

Held: The statement was a declaration against penal interest and the trial court erred in keeping the statement out. The Court noted the four-prong test for admissibility of the statement under the "declaration against penal interest" exception:

(1) the declarant must be unavailable to testify by reason of death, absence

from the jurisdiction, or refusal to testify on constitutional grounds;

(2) the declarant must be aware at the time of its making that the statement was contrary to his penal interest;

(3) the declarant must have competent knowledge of the underlying facts; and

(4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability"

As to the fourth prong, the Court noted that declarations which exculpate a defendant are subject to a more lenient standard, and will be found sufficient if they establish a reasonable possibility that the statement might be true. "Depriving a defendant of the opportunity to offer into evidence another person's admission to the crime with which he or she has been charged, even though that admission may only be offered as a hearsay statement, may deny a defendant his or her fundamental right to present a defense" [cite omitted].

Prolonged Detentions

Heard v. State

Georgia Court of Appeals - A13A0853

Defendant stopped for expired registration tab. Once the basis of the detention was resolved, the officer commenced questioning the driver about whether he was transporting drugs. Though only about four minutes elapsed between the time of the stop and the ultimate search of defendant's car, the Court found the detention to be impermissibly prolonged and suppressed the evidence of contraband found in the car.

State v. Peterson
Oregon Court of Appeals
___ P.3d ___, 2013 WL 5935366 (Or.App.)

When a police officer has all of the information necessary to complete a traffic infraction investigation but, instead of ending the encounter, launches an investigation into a matter unrelated to the infraction and for which there is no reasonable suspicion, the officer has unlawfully extended the stop. (As in the *Heard* case (above), the detention here was prolonged based on a hunch about drugs.)

License Suspension Upheld Where Driver's Refusal Based on Location of Blood Draw

McLinden v. Commonwealth, Dept. of Transportation, Bureau of Driver Licensing
Commonwealth Court of Pennsylvania
Unpublished; 2013 WL 5973940

Driver's conditional consent to blood testing constituted a refusal where he insisted upon the blood draw being at a location other than a police trailer next to a DUI checkpoint that was staffed with a phlebotomist.

Officer's Opinion That Defendant's Ability to Drive Was Diminished by Alcohol Impairment Should Have Been Excluded on Basis It Expressed Ultimate Opinion of Guilt

Commonwealth v. Canty
___ N.E.2d ___, Mass. , 2013 WL 5912050 (Mass.) No SJC-11315

This case involves the limitation of lay witnesses (including police officers) concerning opinions about the ultimate question of guilt. Though they may testify as to a defendant's apparent intoxication, they may not express an opinion as to whether the accused was operating under the influence.

"[A] lay witness in a case charging operation of a motor vehicle while under the influence of alcohol may offer his opinion regarding a defendant's level of sobriety or intoxication but may not opine whether a defendant operated a motor vehicle while under the influence of alcohol or whether the defendant's consumption of alcohol diminished his ability to operate a motor vehicle safely…

"[W]e conclude that the judge erred in admitting Officer Bulman's opinion that the defendant's "ability to drive was diminished" by his consumption of alcohol. We also conclude that the judge did not err in admitting Officer Tarentino's opinion that the defendant was "probably impaired."

Attorney Advertising Held Unethical (And Subject To State Bar Discipline) Where Competitor's Name Used As A Keyword

2010 Formal Ethics Opinion 14
(NC April 27, 2012).

Opinion of North Carolina State Bar Ethics Committee rules that it is a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in an Internet search engine company's search-based advertising program. Inquiry: Attorney A participates in an Internet search engine company's search-based advertising program. The program allows advertisers to select specific words or phrases that should trigger their advertisements. An advertiser does not purchase the exclusive rights to specific words or phrases. Specific words or phrases can be selected by any number of advertisers. One of the keywords selected by Attorney A for use in the search-based advertising program was the name of Attorney B, a competing lawyer in Attorney A's town with a similar practice. Attorney A's keyword advertisement caused a link to his website to be displayed on the search engine's search results page any time an Internet user searched for the term "Attorney B" using the search engine. Attorney A's advertisement may appear to the side of or above the unpaid search results, in an area designated for "ads" or "sponsored links." Attorney B never authorized Attorney A's use of his name in connection with Attorney A's keyword advertisement, and the two lawyers have never formed any type of partnership or engaged in joint representation in any case. Does Attorney A's selection of a competitor's name as a keyword for use in a search engine company's search-based advertising program violate the Rules of Professional Conduct? Opinion: Yes. It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). Dishonest conduct includes conduct that shows a lack of fairness or straightforwardness. See In the Matter of Shorter, 570 A.2d 760, 767-68 (DC App. 1990). The intentional purchase of the recognition associated with one lawyer's name to direct consumers to a competing lawyer's website is neither fair nor straightforward. Therefore, it is a violation of Rule 8.4(c) for a lawyer to select another lawyer's name to be used in his own keyword advertising.

Participation in Florida's Discovery Scheme Mandates Defense Disclosure of Independent Blood Analysis Even If Expert Not On Witness List

Kidder v. State
117 So.3d 1166 (2013) (No. 2D12-3535)
Florida District Court of Appeal (2nd District)

In Florida, a defendant's election to participate in statutory discovery (which includes depositions) triggers a reciprocal requirement of disclosure. This includes the blood-alcohol report of a defense expert even if the defense does not intend to call him or her as witness. If the defense does not elect to participate, the only discovery that must be disclosed by the prosecution is *Brady* material (i.e., exculpatory discovery). In that circumstance, the prosecution does not have to send a blood split to a defense expert for independent analysis. Yet the Florida Court, while recognizing that this presents a Hobson's Choice to the defense (have the blood sample retested, but disclose any incriminating result to the prosecution), finds no Fifth or Sixth Amendment problem with the mandatory disclosure and rejects the contention that it's work product.

NOTE: Federal Rule of Criminal Procedure 16(b)(1)(B), and most state discovery statutes, only require disclosure of such a report if the defense intends to call the expert as a witness.

Always Poll The Jury Following A Guilty Verdict!

People v. Jones (2013)
No. 1-11-3586 (Unpublished)
Appellate Court of Illinois,
First District, Second Division.

It often seems like a waste of time and gratuitous torment, but this case demonstrates that polling a jury after a guilty verdict occasionally bears fruit.

A guilty verdict was announced by the foreperson following deliberations. The court told the jurors it was "going to ask each and every one of you whether or not that verdict was your verdict and if it's still your verdict." After polling four jurors, the following exchange occurred:

"THE COURT: Nicholas Mack, was that your verdict and is this now your verdict?

JUROR MACK: No, but yes and no.

THE COURT: Well, your answer can't be yes and no. Is that your verdict

now?

JUROR MACK: Yes.

THE COURT: Okay. And was that your verdict when you signed the verdict paper?
JUROR MACK: No.

THE COURT: Okay, when you signed the verdict, that was not your verdict, a finding of guilty?

JUROR MACK: According—excuse me, according to the law, yes. But, it was other things that I felt that made him not guilty.

THE COURT: Okay. So let me ask you that question again: Was that your verdict and is this now your verdict that he is guilty?

JUROR MACK: Yes."

Defendant appealed the guilty verdict on the ground that the trial judge erred in the way he questioned the juror and that the juror's equivocal responses created doubt about the validity of the verdict.

The appellate court made the following points based on prior case law:

- The purpose of polling a jury is to determine that the verdict accurately reflects each juror's vote and that the vote was not the result of coercion.
- While the trial court should not turn the polling process into an opportunity for further deliberations, the court also must not hinder a juror's expression of dissent.
- If a juror indicates some hesitancy or ambivalence in his or her answer, then the trial judge must determine the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his or her present state of mind.
- If the court determines a juror dissents from the verdict, the proper remedy is for the trial court, on its own motion if necessary, to either direct the jury to retire for further deliberations or to discharge the jury.
- The trial court's determination as to the voluntariness of a juror's assent to a verdict will not be set aside unless the trial court's conclusion is clearly unreasonable.

The Court affirmed the conviction, determining that the juror's response established his agreement that defendant was guilty under the law, and that the jury verdict reflected his intentions. It further determined that the complete colloquy indicated the juror was given the opportunity to dissent and ultimately stated that the guilty verdict reflected his vote. Finally, it found the trial court's determination that the juror voluntarily assented to the verdict was reasonable.

EDITOR'S NOTE: One cannot determine the tone of the judge's questioning from the cold transcript (well, maybe you can!), but that is the key as to whether this juror was bullied by the trial court into capitulating. The defense made a post-trial motion for a new trial, contending that the verdict was not unanimous. However, it does not appear that any objection was made to the judge's manner of questioning as it occurred. One tactic the defense might have considered is to request an immediate recess once the juror responded, "No, but yes and no." What would you have done? Have you ever even prepared for this type of response from a juror being polled? Will you ever pass on the right to poll a jury after reading this case?

Symptoms of Intoxication and Manner of Driving Held Valid And Relevant Basis for Rejecting Rising Blood-alcohol Defense in Administrative License Suspension Action

Coffey v. Shiomoto (Director, Calif. Dept. of Motor Vehicles)
___ Cal.Rptr.3d ___, 2013 WL 4196651 (Cal.App. 4 Dist.)

Non-chemical test circumstantial evidence was properly considered by an administrative hearing officer to reject a defense expert's opinion that driver was under .08 percent at the time of driving notwithstanding his post-driving chemical test results of .08 and .09 (BrAC), followed by blood draw that later showed results of .095 and .096 percent.

Partition Ratio Evidence Admissible To Defend Impairment Charge Even If Prosecution Only Introduces Breath-Alcohol Test Results To Prove The Per Se Offense
State v. Cooperman (2013)
Arizona Supreme Court – Docket No. CV–12–0319–PR

The Arizona Supreme Court holds that partition ratio variability evidence (either in the general population in the individual specifically) is relevant and admissible in prosecutions for driving while impaired even if the state elects to introduce breath test results only to prove the .08 or higher *per se* count. The decision cited and followed Supreme Court decisions from California and Vermont on this issue.

In affirming, the Arizona Supreme Court did not address an important aspect of the Court of Appeal's decision below in *State v. Cooperman* (Ariz.Ct.App. 2012) 282 P.3d 446. The lower Court additionally held that physiological variability (e.g., breathing patterns, body and breath temperatures, hematocrit levels, gender, etc.) in the general population may be admitted to cast doubt on the reliability of breath-alcohol samples in defense against both the impairment and *per se* charges. The California Supreme Court noted this holding in *Vangelder* (see below) but declined to follow it on the *per se* count.

EDITOR'S NOTE: NCDD member Steven Barnard contributed an *amicus* brief on this winning case.

People v. Vangelder (2013)
___ Cal.4th ___ (Calif. Supreme Court – Docket No. S195423)

Expert testimony that properly working and approved breath-alcohol instruments do not sample breath samples as they are designed to, and thus do not produce reliable results, is irrelevant and inadmissible on the *per se* charge. The exclusion extends to physiological variability such as body and breath temperature, hematocrit level, gender, and breathing patterns.

The Court characterized expert witness Michael Hlastala's proffered testimony as a "regulation-based argument" that improperly seeks to trump legislative determinations concerning alcohol limits in deep lung breath. It specifically declined to address whether the limitation applies to the impairment count (it would appear not to).

EDITOR'S NOTE: The holding does not seem to bar challenges based on mouth alcohol or GERD since these are contamination arguments that have nothing to do with partition ratio variability.

Loss of Pilot and Medical Certificates By FAA For Failure To Disclose Prior DUI Arrest

Taylor v. Huerta
___ F.3d ___, (D.C. Cir. 2013) – Docket No. 12-1140
WL 3762896

Taylor submitted an application for a medical certificate using the FAA's online system, MedXPress. One of the questions asked him about any prior arrests and he answered "no" despite a previous DUI arrest in California (which, ironically, did not even result in a conviction). The FAA discovered the prior arrest on a background check and opened an investigation as to why it was not disclosed. He said he did not read the question carefully, was unaware that prior arrests were now being asked instead of just prior convictions, and that he had just hit a button that put a "no" answer to a number of questions all at once. The answers were submitted under penalty of perjury.

The Court rejected the contention that the omission was inadvertent, holding that "[a] defense of deliberate inattention fails where the applicant is attesting to events about which he has actual knowledge." [cite]. It then slapped him with this rebuke:

"Despite Taylor's melodramatic description of the button's significance, the reality is that it does not limit in any way the ability of applicants to read the questions carefully. The button does not obscure or hide the questions. To the contrary, the questions appear on the same screen as the button, and they can be read by anyone who can see the button. [cite]. The FAA's decision to provide this modest convenience, rather than requiring MedXPress users to click "yes" or "no" for each question individually, does not "entrap" applicants. Nor does MedXPress "downgrade" the questions' importance. It expressly requires the applicant to certify that "all ... answers provided ... on this application form are complete and true to the best of [his or her] knowledge." [cite] And it prominently highlights the possibility that false answers may expose the applicant to substantial criminal liability. [cite]."

EDITOR'S NOTE: This case demonstrates once again that the failure to truthfully answer questions on a professional license application is treated more harshly by licensing boards than disclosure of the underlying offense.

JustIn Science

Why the Number Doesn't Tell the Whole Story

by Justin McShane

Too frequently, in DUI drug cases we focus on the number. But what does the number really tell us about impairment? Nothing.

It is scientifically impossible to determine impairment for any drug (even ethanol) based exclusively on a number from analytical chemistry. This is because of the very interesting world of pharmacokinetics and the multi-variant problem of the human body and the human condition. The analytical chemistry result must be equated not simply to symptomatology, but uniquely to it, meaning that the use of the drug uniquely and to the exclusion of all other reasons produced the observations of the marked diminution of dexterity, cognitive function, or psychomotor function.

In a typical scenario, blood is taken one to two hours after the motor vehicle stop and reveals a "magic number" of 70 ng/mL of Alprazolam (Xanax). No alcohol or illegal drugs were found and the motorist had a valid prescription for Xanax. The prosecution now has this analytical chemistry result, but the ultimate question of impairment is not that easy to divine.

If you knew nothing about the world of pharmacology and you were presented with a seemly large number such as our example from the analytical chemist examining the drug, then you may think this was a Driving Under the Influence of Drug (DUID) case. But is it necessarily so? Is this a fair conclusion based upon this data?

There are limitations to analytical chemistry and what it can tell us. Analytical chemistry inherently does not take into consideration pharmacodynamics (the drug's effect on the human body). It is the end result of a process that depends upon the input it is given. Blood draws do not happen concurrently with driving and therefore at most it is a measure of the drug's presence and amount in the blood at the time of the blood draw and not reflective of the time of driving. Stated differently, the human body itself is unique to its individual owner and variations can impact the value of the analytical chemistry result and its later interpretation as to the drug's effect to this unique human being (pharmacodynamics) that is the citizen accused.

Is the 70ng/ml level low or high. Is it inside or outside therapeutic range? Is this value likely to produce significant impairment? Did the combination of this drug plus others taken from over-the-counter sources produce a synergistic (additive) or antagonistic effect? Analytical chemistry alone cannot answer these questions relevant to impairment.

Each person is different. Mama was right. You are like a snowflake. You are unique pharmacologically and respond to the effects of a drug in a unique pharmacodynamic manner. From a strict analytical chemistry to pharmacology point-of-view, having a "magic number" alone cannot prove impairment in a DUI case. This is where pharmacology comes into play, but there are limitations and conditions precedent even to pharmacology.

Even a trained and clinically experienced pharmacologist has limitations of his or her interpretation of the analytical chemistry result as related to pharmacodynamics. The very minimum information that would need to be known in order for a trained pharmacologist to begin to consider determining the possibility of impairment includes the following:

1. In the case that the police officer made observations of dexterity difficulties, cognitive function issues or psychomotor function dysfunction, or even if he or she attempted to perform or completed a DRE evaluation, the officer or later expert must have information that the motorist is "normal," meaning that the person was free from any medical pre-conditions that could be confused for impairment. As it is the basic assumption of any observation that there is a noticeable change from the person's homeostasis, there must first be a known and established homeostasis to establish deviation. One cannot fairly assume that the person is "normal" and dexterous or cognitively quick or psychomotor coordinated. There are many people in this world who are not.

2. The officer or later expert must be privy to the person's pre-existing physical or mental conditions and then must rule out any and all of them as possible contributors to the perceived observations that are later interpreted as impairment.

3. The officer or later expert must be privy as to what symptoms or diagnosis originally lead the doctor to prescribe the medicine to begin with so as to be aware of the person's un-medicated state. It is an assumption that without the drug that the person would not be impaired. Therefore this data of the person's un-medicated state is necessary to rule out the possibility that the perceived dexterity difficulties, the cognitive function issues or the psychomotor function dysfunction were due to an inappropriately low dosing and therefore that the person appeared impaired when they were not.

4. The officer or later expert must be aware of all medications that the person ingested including the over-the-counter ones so as to be clear that the effect of the analyte of interest and the other medications either over-the-counter or controlled did or did not influence the measured drug in terms of impairment.

5. The officer or later expert must be aware of the dosing history of the patient in terms of the supposed impairing drug as the dosing history may profoundly impact the effect of the drug dose on the human.

6. The officer or later expert must be aware of the recent dosing usage of the patient as it too may impact the conclusion of impairment. The myth of the one-size fits all "therapeutic range" is not a valid pharmacological model. It is a convention and a device that is ripe for abuse by the under-trained and under-educated. It is at best a tool to begin to determine the pharmacodynamics effect, but is certainly not conclusive.

The primary purpose of the therapeutic drug level tables is clinical in nature, not forensic. They are to be used to adjust the dosage of a patient into a range that has been shown to be therapeutically effective for a group of experimental subjects. Clinically this is done by taking a blood sample immediately prior to the next dose after obtaining steady-state. The patient's dose would be adjusted either up or down based upon the plasma or serum level (not whole blood). Toxic levels which are often part of such a table are based upon adverse side-effects that have occurred and blood levels determined. The important point is that these levels have not been correlated with any behavioral effects (pharmacodynamics). There are some drugs that have been studied for their behavioral effects and correlated with plasma levels but these are not in published tables. There are tables of drug levels associated with deaths and these are regular used by medical examiners as but one of many possible factors to help assign a cause of death based upon the totality of the circumstances, but they are not used alone to determine cause of death. Too many factors need to be considered, such as:

- Was it a single-dose event?
- Is the person on a maintenance program (e.g., Methadone, Xanax and Lorazepam)?
- Was the person in the absorptive, peak or elimination phase at the time of the measure?
- Was the person in the absorptive phase, peak or elimination phase at the time of the driving?
- What was the potential impact of the drug on the motorist in terms of dexterity, cognitive function or psychomotor function?
- Is the analytical chemistry result at the time of the blood draw even relevant at all?

Most importantly, the complicated question of retrograde extrapolation is even trickier in the case of multiple order kinetic drugs.

Conclusion

There is a limitation to analytical chemistry. The idea of simply and solely using an analytical chemistry result and being able to determine impairment is a dangerous suggestion. The idea of interpreting the analytical chemistry

result with an eye towards opining impairment is a very complicated task that should be reserved to highly trained pharmacologists who have years of clinical experience with that particular drug that is hypothesized in this case to cause impairment and only then with complete and total relevant clinical data to that unique person. To just use a number produced (i.e., the analytical chemistry result) without the entire relevant rich clinical context truly has the overall significance of random numbers chosen in a lottery drawing.

Trial Tip

by Michael J. Nichols

The most important thing in preparing for trial is to make an investment: the investment of time.

I. THEME

The theme of the case starts with reviewing the file, meeting the client and discovering the client's story. Sometimes the client's story is the law enforcement rush to judgment and lack of thorough investigation. Sometimes the client's story is that something confounded the conclusion of a forensic analysis like a chemical test. Sometimes the client's story is as simple as the officer who arrested her never knew when she was operating or what her bodily alcohol content was at the time of the arrest. There are so many different ways to tell a story. Your imagination is your only limit.

If you feel like there is something that you are missing then it is time to reach out. Reach out to the people you know. Notice I am not saying "attorneys" you know. Attorneys are not always the best helpers when it comes to developing a theme when you are stuck. Ultimately, you have only so much time to prepare. At some point you run out of time and you are literally tweaking the theme at 6 am on the morning of trial. That is ok. Pulling together a theme that is cogent and that you develop after thorough analysis and review of everything that you are able to review is trial preparation. It is good trial preparation. It is assimilating everything into a sentence that you can repeat to the jury when you open your mouth in *voir dire* and in closing.

II. FLEXIBILITY

When you walk into the courthouse to meet your jury pool for the first time you are getting a feel for the "mood" of the collective. It sounds odd but one of the most important things is to get to court early. Hang as close to the jury members as you can without appearing to be a stalker. The reason is because no matter how much preparation you do; no matter how much detail you lay out in a closing argument or a cross examination it means nothing if the people who will decide the case go back and are on a totally different wavelength.

Another small but really important aspect of trial strategy is a second set of eyes. It matters not if it is a law clerk, your spouse or another lawyer. Someone who can take notes while you watch the jury is critical. Your focus should be on the jury so you can modify your presentation accordingly. One of the dumbest things I ever did was to put on a case after the prosecutor rested on the first day of trial. The jury was disgusted with the prosecutor's witnesses. I put on a case because I planned to do it. I should have not called any witnesses and let the jury decide the case when it was frustrated and upset at the government employees and their lack of care into maintaining the datamaster that was used to sample the client's breath. The jury is going to find ways to massage, create or rely on facts when they do not like a character in the story. If that character is the prosecutor's witness then the prosecutor's witness is going to be the emotional fulcrum.

III. FIND YOUR CHAMPION THEN DO YOUR BEST TO EMPOWER HER OR HIM IN THE JURY ROOM

If you run out of peremptory challenges and get "stuck" with a juror who concerns you it is no time to panic. It's time too find a champion who can stand up to the bad juror and try to convince the others in the jury room that it's better to come up with no decision than a decision that compromises their individual conscience. How do you do that? Look them in the eye and talk about their power, about how their decision lasts forever and that they only get one opportunity to get it right and if there is any doubt about maintaining the status quo, there are 2 ways to do it: a not guilty verdict or no verdict at all. Not guilty means not proven: no verdict means "we cannot agree" and that is ok too.

Editor's Note: This edition's trial tip treasure comes from attorney Mike Nichols. Mike is an NCDD sustaining member and its state delegate for Michigan. He has been practicing criminal defense work for the past 15 years.

Quote To Remember

"There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it…

"A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence. Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place. This creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice. In the rare event that the suppressed evidence does surface, the consequences usually leave the prosecution no worse than had it complied with *Brady* from the outset. Professional discipline is rare, and violations seldom give rise to liability for money damages. [cite] Criminal liability for causing an innocent man to lose decades of his life behind bars is practically unheard of."

--- *U.S. v. Olsen* (9th Cir. 2013) (Docket No. 10-36064), Chief Judge KOZINSKI, with whom Judges PREGERSON, REINHARDT, THOMAS and WATFORD join, dissenting from the order denying the petition for rehearing en banc.

Scotus Radar

Pending before the Court is a petition for writ of certiorari seeking review of a 1st Circuit Court of Appeal ruling which held, absent a warrant or exigent circumstance, that the Fourth Amendment bars police from examining the call log of a defendant's cell phone seized incident to a lawful arrest.

United States v. Wurie (No. 13-212)

SAVE THE DATE!
SUMMER SESSION
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Continued From Cover

3. Know and be able to prove your minimum and maximum relevant time frames. The minimum relevant time frame is from the time of arrest (or the time of probable cause) to the time of the blood draw (if they could have obtained a warrant in that time frame, there is no exigency), and the maximum relevant time frame is from the time of the arrest to the time of delay or circumstance which creates the alleged exigency (which may require an expert); that is, even if the actual blood draw may have been an hour after the arrest or ascertainment of probable cause, an exigency may not have arisen for several hours afterwards;

4. Know and be able to prove whether your specific officer has ever obtained a warrant in prior cases;

5. Know and be able to prove what, if any, forms were available for the warrant affidavit (some prosecutor's offices have forms they routinely use);

6. Know and be able to prove whether there were other (experienced) officers on duty and available who were available to obtain a warrant (there are always cops and government civilians at police stations); and

7. Know and be able to prove how long it would have taken to obtain a warrant based upon how long it typically takes in other cases (this can range from less than an hour to several hours).

There will be other facts and circumstances that vary from case-to-case and this short practice note cannot possibly list them all. The more evidence the state has of significant intoxication, the longer the relevant time period may be: that is, the less dissipation may matter. The closer the pre-draw facts are with respect to showing intoxication, the more exigent the circumstances may become in a shorter period of time. Getting the State to argue that the facts are close is always a good thing for our clients. Though the results of a search should never be part of the analysis for its justification, high blood test results will naturally imply that there was less of an exigency. An officer who describes a less-intoxicated position at a pretrial hearing in an effort to try to save a warrantless blood draw may have to eat his words at trial to the benefit of our clients.

Keep in mind that the State routinely draws blood several hours (2-3 hours is routine and 4-6 hours is not unheard of) post arrest and regularly uses that evidence at trial without any serious problems. Find instances of such cases and use them. Also keep in mind statutes that make draws within some number of hours relevant and admissible to be legislative recognitions of the reasonableness of those time periods when a warrantless blood draw has been obtained in a shorter time but a warrant could have been obtained within the statutory time frame.

There is a lot of room to be imaginative and creative, but whatever you do, do NOT think you can win by just holding the State to their alleged burden (at least absent a totally silent record). It may be technically correct, but will hardly ever be persuasive to a trial court and will matter little to an appellate court judging the reasonableness of the trial court's decision based on the factual record before it. It is almost certain that the State or police officers will state, in conclusory terms, that there was insufficient time to get a warrant under the circumstances. It will be your job to let the real facts tell a far different story. You may get lucky on occasion by just holding the State to their burden, and in some cases it may be the only reasonable strategic choice available, but more often than not, you will lose in the trial court and have a bad record for a meaningful appellate decision unless you make a sufficient factual record factually demonstrating the lack of an exigency.

McNeely may also have made it reasonably possible to challenge the constitutionality both of refusal as a crime and the admissibility in criminal cases of refusal as evidence of guilt. Though it has long been true that seizure of bodily fluids implicated the Fourth Amendment, *McNeely* has brought this issue to the forefront. There appears to be no other instance in which a State has attempted to criminalize the assertion of a constitutional right. No one would seriously think that a State could criminalize the refusal to grant consent to a search of one's home or business simply because the police had probable cause to search. Refusal to consent to a search of one's person is not constitutionally any different. Simply put, it is seriously doubtful that any government entity can constitutionally criminalize the assertion of a constitutional right. In light of *Salinas v. Texas*, (pre arrest silence did not implicate the Fifth Amendment because Salinas never invoked his right to remain silent -- the right is not self invoking), it might be wise for us to start advising people to affirmatively assert and invoke their Fourth Amendment rights (as opposed to simply saying no) when presented with a request to consent to a search of their body for breath or blood. Many citizens have learned how to ask for a lawyer; they also need to learn how to assert and claim the Fourth Amendment and we need to begin to be the ones to begin to teach them.

The same theory and analysis apply to admission in a criminal trial of a refusal to submit a sample of one's breath or blood. A request for counsel, at least when there is such a right, is not admissible because the assertion of a constitutional right cannot be used as evidence of guilt. No less should be true of the assertion of rights under the Fourth Amendment when someone from the government asks a citizen to waive those rights and consent to a search for breath or blood. In this context, it is doubtful that the government can condition the granting of a driver's license on the waiver of constitutional rights.

One last practice point: if you seek to raise these issues, either do it completely right or not at all. Be prepared to make a full and complete factual and legal record and do not just do it "off the cuff," much less raise the issue on appeal as a throw down issue when there is not a complete legal and factual record. We already have too much bad law made by lawyers who were less than fully prepared or who just winged it on the spur of the moment. College members can and will help with these issues -- one of greatest benefits of our listserver.

Vegas Seminar Gets High Marks

The 2013 Las Vegas DUI defense seminar in October featured a lineup of speakers that included Josh Lee, Terry MacCarthy, and the Honorable Joe Johnson from Kansas. "They did a wonder job providing new ideas and techniques in defending those charged with DUI related offenses," said moderator Steve Oberman.

Workshops were again part of the 18th annual "DUI Means Defend With Ingenuity" seminar at Caesar's Palace, and the only problem with them seemed to be that some were still going 90 minutes after the seminar had concluded on the last day.

A networking session for attendees was added for the first time. Topics of discussion included legal developments with business and marketing tips that brought high marks in post-seminar reviews. "Those who participated felt it was a huge benefit and asked that it be repeated next year," said Oberman. "The committee is continuing to develop new ideas and hope to have a few surprises to announce in the next few months. Keep your eyes open and plan to be in Las Vegas September 11–13, 2014."

The annual Vegas seminar is jointly hosted by the NCDD and the National Association of Criminal Defense Lawyers (NACDL).

Attendees at 2013 Las Vegas seminar break for networking

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.