

## HOW TO WIN A DRUNK DRIVING CASE

### The Seven Key Factors and the Two-Pronged Strategy

By

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Video of an earlier version of  
How To Win a Drunk Driving Case.

## Introduction



If you've been arrested for a OWI DUI in Wisconsin and you don't think it's fair, you need a lawyer who can protect your rights, make sure you're treated fairly and who knows how to get results. I am going to show you how to choose that lawyer and what that lawyer needs to do for you. I understand that you're may be feeling confused, angry, or somewhat fearful about what's happened to you. The process of being arrested, taken to jail, fingerprinted, and photographed can be dehumanizing. A drunk driving arrest does not mean that you are a bad person. In fact, my clients are decent, hardworking, intelligent and creative people – people with good families who need them. (I use the term “DUI” because it is the most commonly used term in America. In Wisconsin, the more commonly used term is “OWI.” For our purposes, these are the same).

That's one of the reasons why I'm proud to be a drunk driving defense lawyer. When it seems as though the weight of the world is on your shoulders, I'm honored to be the one who has your back.

I have been privileged to practice drunk driving and criminal defense since 1981. During that period of time I have worked hard to gain a good reputation, and the respect of prosecutors, judges and other lawyers. I have received honors and accolades. I am the first attorney in the history of the State of Wisconsin to achieve board certification as a specialist in the field of drunk driving defense.

I've won a lot of cases... a lot of drunk driving cases. In this article I'll show you my winning strategies. This report is not meant to provide you with legal advice. Nor, is it meant to be a do-it-yourself manual on how to handle a drunk driving case. This is a manual for the client, the person charged with drunk driving, not for the person who wants to be his own lawyer. You will need a lawyer, and this report will help you to choose one.

Drunk driving law and procedure is different in every state. The law and technology of drunk driving prosecution, like everything else around us, is changing very rapidly. This report is an aid to obtaining and understanding good legal advice, but any specific questions must be directed to your lawyer. This article contains general principles of analysis and defense of the drunk driving case, for the layperson. I hope that you will find it beneficial.

## **Prisons and Checkpoints: What Price Safety in a Free Society?**

America is a land of extreme contradictions: rich and poor, the freest with the most prisoners, and the most committed to liberty with some of the most repressive attitudes. We live in a dangerous society. Handguns are one of the leading causes of death among young men. People are afraid, and politicians prey on that fear. Legislation has been proposed in my state to legalize police highway checkpoints, already legal in forty states (a U.S. Supreme court decision has allowed this). Highway checkpoints! Politicians always look for easy answers; but, they are often unwilling to make hard decisions to protect us. In Wisconsin, the legislature just passed what they call a “sweeping drunk driving reform act.” As usual, however, the politicians did a lot of things to allow themselves the opportunity to pose for pictures and raise funds, but they did very little to actually address the problem of drunk driving in Wisconsin. There is no question but that one of the great sources of danger in our society is the automobile. Most fatal accidents “involve” alcohol (which does NOT mean “caused” by alcohol). But the war on drunken drivers has not dramatically improved highway safety.

Politicians will often take the easy steps of increasing penalties and restricting individual liberty, rather than taking the hard steps of limiting the proliferation and legal immunity of taverns, and funding rehabilitative programs. The society that glorifies alcohol finds it easiest to deal with the damage by imprisoning the drinker.

When the constitutional liberty of a single one of us is trampled in the name of public safety, we all suffer from a loss of freedom. I do not support drunk driving. It is a wrong, just as is murder. But I object to the suspension of basic constitutional rights that has occurred in the name of the unsuccessful war on driving while intoxicated.

In Wisconsin, which is festooned with saloons, a simple dram shop law (requiring tavern keepers to accept their responsibility for pushing alcohol on their drunken patrons) would do more than all the jail cells and highway checkpoints combined. But the legislature lacks the spine to stand up to the special interests.

This handbook on drunk driving defense is, therefore, intended to be my statement in support of the right to be left alone, to be free of unreasonable searches, to a presumption of innocence, to a fair trial, a fair verdict and, yes, if you deserve it, a fair punishment.

## Get Help!

If you've been arrested for drunk driving, especially if it's happened more than once, it probably means that you had an alcoholic beverage and then drove a car. That may have been an error in judgment. Whether or not you believe that you need it, get help! I'm insisting on this even if you are innocent of drunken driving. I don't care if you were sober; it's time to look at your lifestyle. This is the time to improve your knowledge and your judgment. I have represented decent people, who made only one mistake, and it cost a life. So, take this opportunity to learn about yourself and your habits. You do not want to accidentally kill or maim yourself or do the same to someone's son, daughter, mother or father.

Stop and consider the consequences of a drunk driving arrest, which is inconvenient and expensive even if you win the case. Then, consider the price of a taxicab. It's a no-brainer.

You also need to take an honest look in the mirror and ask yourself whether you have a drinking problem. Whether or not you have a drinking problem, you need to get help with your understanding of the problem of alcoholism. Go to an alcohol counselor. If you think that you may be an alcoholic, then go to A. A. Meetings. You may or may not be an alcoholic, but everyone can benefit from the advice and insights available at a twelve-step group. So, even if you don't believe that you need it, get help! Use this challenge as an opportunity to improve your life.

## How to Choose a Lawyer

If you've been arrested for drunk driving in Wisconsin, don't even think about proceeding without, at least, talking to a QUALIFIED lawyer. A person who represents himself or herself in court has a fool for a client.

If you're facing jail, you need a lawyer, even if you're guilty.

First, even if you believe that you're guilty, you're still legally presumed innocent. A qualified lawyer can evaluate the strength of the proof against you in ways that you cannot do yourself.

Second, a major issue in every case is whether the police overstepped their bounds and unlawfully stopped, arrested, tested and charged you. A good lawyer will evaluate whether you were treated properly. If your rights were violated, there may be no case against you. A good lawyer knows how to challenge the use of prior convictions, and so on.

Third, a qualified lawyer may be necessary to evaluate your prior record and other legal issues, to determine if it can really be used against you. I recently represented a fellow in the Waukesha County circuit court who had hired a lawyer and plead guilty to third offense drunk driving. He came to me after serving twenty-two days of his sentence. I

took one look at it and saw that the two prior offenses could not be used against him. The case was amended to a non-criminal, first offense charge that carried no jail time. So, do not assume that you are guilty without a qualified evaluation of your case.

Fourth, even if there is a chemical test result that shows that you were over the legal limit, even far over the legal limit, these tests are often flawed. If you feel that the test result is not accurate, you may be right. It takes a well-trained lawyer to identify the scientific issues in the testing process, to know when to consult an expert and to know whom to consult.

Finally, the help of a good lawyer is critical in limiting the damage that an OWI DUI case can have on your family, your life and your livelihood. A good lawyer will direct you to the help and counseling that you may need to rebuild and restore your life after the damage of alcohol and an OWI case. Of course a good lawyer can minimize the penalties such as jail and revocation.

Never choose a lawyer, however, thinking that you just want to plead guilty. Most people do plead guilty, and knowing the ropes of a plea is an important part of a good lawyer's job. Some lawyers, however, do not have skill and experience in fighting cases – which is necessary in determining whether a guilty plea is appropriate.

Of course, the hard part is figuring out whether or not a lawyer actually IS qualified.

Choose a lawyer experienced in fighting OWI DUI cases. Start out by asking how many OWI DUI jury trials the lawyer has fought and won, how many cases have been won on motions and so on. Is the lawyer certified in NHTSA field sobriety testing? Has the lawyer trained extensively at the National College for DUI Defense? Has the lawyer taught other lawyers at such conferences? Is the lawyer endorsed by other lawyers? What about client testimonials? Is the lawyer rated by Avvo ([www.Avvo.com](http://www.Avvo.com)) or other similar organizations?

There are different kinds of lawyers out there, and you will need to know how to choose. In general, you will find the following:

- public defenders
- discount lawyers
- general practitioners
- extremely expensive criminal and OWI lawyers
- Board Certified DUI defense specialists (also expensive).

### **What to Pay a Lawyer**

A word on the Office of the Wisconsin State Public Defender: When I started out in 1981, the Wisconsin Public Defender's Office was the envy of the America. It was a group of dedicated, motivated and skilled lawyers, who believed in their mission – and they were provided the resources to fight and win cases. The dedication and motivation are still there. Over the years, however, I believe that budget cuts and politics have

weakened the Public Defender's ability to provide first-rate representation. They have large caseloads and little of the resources necessary to put up a hard fight on a misdemeanor drunk driving case, even though they have the skill and dedication necessary to do so. I admire and respect the public defenders. You need not fear that a staff public defender will be a bad lawyer. Be aware, though, that your phone calls may not be returned as you would like, and so on. They do not always have the resources to put the necessary expertise into a case. They will do their best with what they have.

I urge caution when considering a discount lawyer. I have no firm definition of "discount lawyer," as that will vary from case to case and place to place. In general, I mean a lawyer who charges too little for a case. There is some truth to the old saying that you will get only what you pay for. Some discount lawyers make their money by a handling high volume of cases as quickly as possible. Some of these lawyers are not skilled in analyzing and defending cases. Rather, they are skilled in quickly disposing of cases by guilty plea, to maintain their profit margin. I advise being skeptical of any lawyer who charges too small a fee.

Of course, there are less expensive young lawyers out there who have a lot of fight in them, and who will give their all to win your case. Being young lawyers, though, they may lack the experience, skill and training that it takes to handle or even recognize a complex defense. Remember my Waukesha client who spent twenty-two days in jail after pleading guilty to a third offense drunk driving when it was really a first offense? He was represented by a fine young lawyer; a very good criminal defense lawyer, who simply lacked the level of training necessary to recognize legal issues involved.

It takes not only **legal knowledge** to be a good drunk driving defense lawyer, it also takes **knowledge of the science (and phony science) of field sobriety testing, breath and blood testing**. It takes time, effort and money for a lawyer to acquire these skills. The very best lawyers will have over one-hundred OWI jury trials under their belt, but this is quite rare. Training is also critical. For example, even though I am considered one of the most experienced drunk driving defense lawyers in America, I still spend about three full weeks every year in professional training (even though the lawyer's rules only require about two and one-half days per year). So, while a zealous young lawyer may be a good choice in some circumstances, training, skill and experience count for a lot.

Of course, I make these statements about lawyers handling cases that ought to be or need to be fought. You may feel that your case does not need to be fought, and that you really want to just minimize the consequences, deal with it and get on with your life. That is a valid point of view. You should, however, not decide to plead guilty unless a qualified lawyer reviews your case.

Also, in a first offense charge, if it should and will be a guilty plea, you may not need a lawyer at all. You should, however, talk to a qualified lawyer to see if you fit into that category.

If you need to fight your case, I advise you to be cautious about retaining a general

practitioner, that is, the lawyer who does some criminal work but also handles real estate, probate, divorce, wills, etc. Such a lawyer may be reasonably priced (with fees in the \$1500-\$2000 range). You should find out whether the lawyer has the special knowledge and skill necessary to defend a drunk driving case. **Even** lawyer who handle a number of drunk driving cases sometimes rarely fight them. Remember, a **lawyer who has a reputation as a fighter tends to be able to negotiate the better plea bargains**, when necessary.

Be very cautious if you wish to hire the most pre-eminent criminal defense lawyer you can find. It is true that with a little research, you will be able to find the Johnny Cochran or F. Lee Bailey of your city. If you live in a smaller community, it makes sense to go to the nearest large city. Expect these kinds of lawyers to charge large retainers with substantial additional fees for trial, and more if it is for a repeat offense with a substantially enhanced penalty. Be aware, however, that some of the more prominent criminal lawyers may not be experienced in drunk driving cases. **Drunk driving defense is now officially recognized as a separate specialty from criminal defense.** So, make sure that you **get a lawyer who understands the intricacies of a drunk driving case.** A criminal defense lawyer may know how to defend a murder case, **but some general criminal defense lawyers may be unlikely to know how the details of how to defend a drunk driving case.**

As I said, drunk driving defense is now recognized as a separate specialty from general criminal defense. The American Bar Association has accredited the National College for DUI Defense ( [www.ncdd.com](http://www.ncdd.com) ) as the organization that may **board certify specialists** in this field. In Wisconsin, only an attorney that is certified by an ABA accredited board may lawfully call himself a specialist. If you are planning to fight your case, always choose a lawyer that is active in the NCDD and, if you are able, **choose a board certified NCDD specialist.** NCDD certified specialists will generally charge retainer fees in the area of \$6500.00 up to \$10,000.00, depending on the case, with much higher fees for felony cases.

Choose a lawyer with **extensive experience in defending OWI DUI cases at jury trial.** Be careful, because we have seen an ex-prosecutor claim to have extensive OWI DUI jury trial experience, which was almost all as a prosecutor (a fact that he neglected to mention). Make sure that the lawyer is experienced in defending and winning these cases at jury trial. You would be wise to avoid the low-priced, high volume lawyer. Avoid the lawyer who immediately assumes that you have no defense and cannot win the case. These lawyers may sincerely believe that you cannot win, but that may simply be because they do not know how to win. **Get the best lawyer that you can afford,** not the cheapest one that you can find.

An example of an eminent OWI DUI specialist is California Attorney Lawrence Taylor, who literally wrote the book on drunk driving defense. His website [www.DUIcentral.com](http://www.DUIcentral.com) is a valuable resource.

Another valuable resource is the lawyer-rating website AVVO. Look at the lawyer's

rating at [www.AVVO.com](http://www.AVVO.com). You should also check the national website: [www.NCDD.com](http://www.NCDD.com) .

You should be able to schedule a free initial consultation, where the lawyer should spend about an hour with you discussing your case. The discussion should include a consideration of the factors involved in drunk driving defense (that I call the seven key factors) You may also start with the kind of online case evaluation offered on this website.

Because of the seriousness of OWI DUI in Wisconsin, it's important for you to know about the seven key factors in a drunk driving case.

## **THE SEVEN KEY FACTORS IN A DRUNK DRIVING CASE**

Most people, including some lawyers who should know better, believe that if you are stopped for drunk driving and fail a breath or blood test, that you don't have a chance to win. Certainly, drunk driving cases are difficult to win. In my three decades as a trial lawyer I have fought and won many of them (and lost a few, too), including cases with very high blood or breath test results. Winning a drunk driving case requires a careful investigation of all of the facts, not just the facts that the police have reported. In order to analyze a case, I have developed what I call the seven key factors in a drunk driving case. These are the factors that I consider in fighting a drunk driving case. These factors cover the actual facts, not just the facts in the police reports. When a policeman makes a drunk driving (or any) arrest, he is required to fill out various reports detailing his observations. In drunk driving cases these forms may be fill-in-the-blank, or they may be in the form of a narrative. In almost all cases, the officers focus a few facts and ignore the rest. For example, they may note that you stumbled in the "heel-to-toe" test, but they will fail to mention that you had no other difficulties in your balance. A good lawyer does not merely review the police reports in order to analyze the case. A good lawyer investigates and knows that what is in the reports and what might be said in the courtroom are two very different things.

So, winning a drunk driving case requires a careful review of the seven factors.

- Factor one: You, or your "image"!
- Factor two: The story of your day or your "theme."
- Factor three: The Police – did they follow the rules?
- Factor four: Your driving – did it really show impairment?
- Factor five: Your appearance and behavior – did it really show impairment?
- Factor six: The chemical test – was it reliable, accurate and precise?
- Factor seven: The law - What legal issues regarding the evidence, your record and the facts of the case exist?

### **Factor One: You, or Your Image:**

Your lawyer, more than any other skill that he must have, needs to be able to show the

jury, the prosecutor and the judge that you are a decent, productive, likeable human being. Think about the last election. Did you vote? If so, isn't it true that you trusted or related to the person you voted for? You see, we all relate to situations on a personal level. Before we decide whether something is believable, we decide whether the person saying it is believable. While the technical issues in your case are critical, you need to first get to the point where the technical arguments get a fair hearing. In order to get a fair hearing, to be listened to, you and your lawyer need to present a trustworthy image. Since you've been charged with drunk driving, you must be an antisocial, sloppy, mean, nasty drunkard, right? That's what the prosecution wants the judge and jury to believe. And, from a practical point of view, that's what they will believe unless you negate that impression by showing them that you are decent, hard-working, family-oriented person that you actually are. Your lawyer must let them know that you are not a criminal, you are a good person.

We choose the image that we convey to the world. Our clothes, hairstyle, speech patterns, gait, etc., reveal the choices we have made in cultural identification. We may be artistic individualists, and choose to appear that way, with tattoos, body piercing, iconoclastic hairstyles, etc. There is certainly nothing wrong with this; but we must be aware that the jury who will judge us will also judge the message we convey by our appearance. Whatever our path in life, our appearance will convey a message. But, in a court case, it is important that the positive aspects of that message be emphasized. It doesn't matter whether you dig ditches, play hard rock music, sell computers or do brain surgery; you have an important positive creative, productive life. You have family that relies on you and needs you. You give of yourself to society and your family. Your lawyer needs the talent, skill and experience to be able to communicate these things in court.

How? This is done with your appearance, your posture, and every aspect of the way that your lawyer treats you, relates to you and speaks to you in court. It is also done by the story of your life that your lawyer conveys on your behalf. This is an important reason why the talent of your lawyer is so important, and why some lawyers are winners and other lawyers are not. If the judge or jury likes you, they will give you the benefit of the doubt; but if they dislike you, they will simply find you guilty. Juries are intelligent; they have a way of being able to smell deception. I'm not saying that you should flimflam them with a false image. You don't need a false image. The real you must shine through.

I once represented a decent, hard-working middle-aged client who was arrested while coming home from a memorial service for his late wife. The jury gave him the benefit of the doubt. The verdict was not guilty. Another example of a great client was the only woman in our state to own an automobile body shop. She was a no smooth and slick type of lady; she was just a working-class woman who had made herself a success in a man's world by her simple hard work. The jury believed her even though she had a breath test result of .17 (which was explained by organic solvent contamination of her blood through long-term exposure to industrial chemicals and paint; and, there was also a police videotape showing her sober demeanor). The verdict was not guilty. Another example, though, is the pretty young wife well into her eighth month of pregnancy at the

time of trial. The verdict was not guilty. One last example is the eighty-three year retiree, who spent his days taking care of his invalid seventy-nine year-old wife. The prosecutor had a difficult time explaining the field sobriety testing procedure for a gentleman who used a walker to get to the witness stand. This case was dismissed. I could give dozens of examples, and you may look at the public client reviews on [www.Avvo.com](http://www.Avvo.com).

You don't need to be a special case like these examples in order to be successful. Be yourself and be the kind of person that ordinary average people will want to believe. I am a firm believer in the truth. In order to win it is possible that you may have to testify (and only the most talented, qualified attorneys are expert in advising you on that decision). You will have to look the jurors in the eye and swear to them that you are innocent. If you are lying, they will see it. But, if you are honest your words will ring true, and they will see that, too.

### **Factor Two: The Story of Your Day, or Your Theme.**

Obviously, whether or not you are intoxicated depends on whether or not you have consumed an excessive amount of alcohol. Therefore, the story of your day is very important, because it includes your alcohol consumption. The details are important because the truth often lies in the smallest fact. Also, it is necessary to develop a theme for your case, based on your story. Your theme may be that you were not drunk, you were ill. Or, your theme may be that the police were overzealous. In all cases, it takes a talented and experienced lawyer to tell your story and develop your theme.

What did you eat? Where did you go? Where were you coming from? Who were you with? And yes, what did you have to drink? This information is necessary to determine whether you were intoxicated, whether there are witnesses to support you or whether the chemical test result may be flawed. Remember the client who was arrested coming from his wife's memorial service? He had crossed the centerline slightly while driving on a curve in a two lane country road, and was stopped. The police report contained the usual recitations: bloodshot eyes, slurred speech, poor balance, etc. The story of my client's day became critical. He had been to the cemetery, and then to a memorial reception for his late wife. He had eaten and drunk wine at the reception with his friends and relatives. These people were available to testify that at no time did he appear to be intoxicated during the entire day and evening. They were able to corroborate his moderate alcohol consumption, food intake and sobriety. My client not only became credible, but he became human and sympathetic.

Too often, decent people are portrayed in the courtroom as antisocial monsters, and a humanizing touch can be very helpful to level the playing field. Obviously, if you were at a drunken biker's party, you may not want to advertise those facts. But, even if you were socializing at a tavern, the people you were with, including the bartender, can be important witnesses. Chemical tests of breath and blood can be flawed and unreliable. So if possible, it is important to locate any credible witnesses to document your actual alcohol consumption. Be aware that this may be possible using charge card records, as well. Likewise, alcohol hits harder on an empty

stomach. So if possible, it is important to document what you had to eat.

Your story or your theme may be that you ran into an overzealous police officer. This is where it really takes a talented lawyer to make the case. The officer is not about to get on the witness stand and admit any mistake. His report probably portrays you as a stumbling, slurring drunk. Most of all, he is a police officer, and that uniform carries with it a tremendous amount of weight and respect. So, how does a good lawyer establish a theme that the officer was mistaken? The first step is to show that the officer, like all people, sees what he is looking for. The next step is to show that the officer is a human being, who made simple mistakes and exaggerated his case.

This leads us to the next critical factor in drunk driving defense.

### **Factor Three: The Police - Did They Follow the Rules?**

A good lawyer is skilled and experienced in shifting the focus of the case from you to the police. The prosecutor wants to put you under the microscope and magnify every single little imperfection in your behavior. Your lawyer needs to be able to shift that microscope so the focus is not on your imperfections but on the mistakes of the police.

There are three reasons why police mistakes are so critical to your defense. First, showing police mistakes establishes the general theme that the police were wrong when they thought you were drunk – they made mistakes that led them to a mistaken belief about you. Second, specific police mistakes will negate specific pieces of the prosecution's case. For example, if a field sobriety test was improperly scored by the police, it may have shown you to be sober, not drunk. Third, whether or not you are guilty may be one of the least important factors in your case. That's because of the exclusionary rule, a rule of law designed to protect the most important and precious of our civil liberties: the right to be free from unreasonable detention, seizure, search and arrest. In a free society the police must operate under strict rules that prevent them from stopping and arresting you without a proper legal basis. Too often, the police act on a mere hunch or suspicion, without adequate evidence. When that happens, the evidence they get as a result of their unlawful behavior may not be used in court, even if it shows that you are guilty.

So, a good lawyer will do is a careful analysis of all of the facts that went into the police officer's decision to stop, question, test and arrest you. A good lawyer will always take any opportunity to challenge the legality of the police decision to pull you over, make you do field sobriety tests, arrest you or make you take a chemical test.

Here's a quick example. I recently represented a young man in Marinette County who was stopped for a speeding violation and wound up with a drunk driving charge. The policeman said that he "paced" my client speeding, doing 55 mph in a 40 zone. He had a squad car video that showed the incident. The prosecutor showed the video using Windows Media Player, and the judge seemed convinced. I knew, however, that

embedded in the video was squad car speed data that would not show up with Windows software. Using proprietary police software, I showed that the squad car and my client were actually going only 35 mph in the video. The case was dismissed.

Do not assume that just because you "flunked" a breath test, that the test result can be used against you; because, a good lawyer may be able to keep it out. The federal government has established a set of drunk driving investigation procedures called "national highway traffic safety administration standardized field sobriety testing." Many, but not all police officers are trained in this procedure. This requires a three day course, with proficiency testing. A good OWI DUI defense lawyer will also be certified in standardized field sobriety testing. In this way, he will be best able to pick apart the manner in which your case was investigated by the police.

A good lawyer will know the rules of drunk driving investigation better than the police, the prosecutor or the judge - from the moment that the police focused their attention on you through the moment that you were released from custody. There are important rights, rules and procedures that apply to every stage of your interaction with the police. If you were unlawfully stopped, unlawfully detained, unlawfully breath-tested at the roadside, unlawfully arrested, unlawfully questioned, unlawfully subjected to breath or blood testing or subjected to improper testing, a good lawyer will see it and make the appropriate challenge in court.

#### **Factor Four: Your Driving – Did It Really Show Impairment?**

The prosecutor will argue that any observed traffic violations are evidence of the impaired judgment and coordination of intoxication. Of course, that is often not the case. The police will often stop cars for slight or invalid cause. Police will write reports on the driving violations that led to the initial stop of your vehicle. Sometimes, but not always, these reports will be detailed. The details that are missing are just as important, if not more important, than the details that are contained in the report.

The police reports frequently exaggerate the bad driving or fail to mention the good driving. A slight drift within your own lane that does not go into another lane may be called "swerving" by the police. The police may follow you for miles and yet only report a slight lane deviation that took place over a distance of ten feet.

Why were you stopped? What was it about your driving or car that drew the attention of the police? Was it a burnt out license plate light? Was it speeding, three miles per hour over the limit? Was it swerving and severe unsafe lane deviations? Was there an accident? Many times, people are arrested for drunk driving, when the initial stop was due to some factor unrelated to alcohol consumption. Often a stop occurs on some pretext, which has nothing to do with impaired driving.

Unfortunately, it is undeniably true that racial minorities are stopped far more often on such pretexts (Emergent Magazine has called this "dwb," or driving while black). It can

also be said that an old rusty car is a far more likely target of an unreasonable stop (this might be called “dwb,” or driving while broke).

Sometimes the police report may portray driving to be erratic, when in fact it is not. For example, police like to stop people for “weaving within the lane.” What does that mean? As long as you stay in your lane, you are not weaving, right? Another, similar pretext is for an unduly wide exit to a turn. In many situations, however, a wide exit from a turn is the only proper or safe maneuver, even if it crosses traffic lanes. Every person who drives a car knows that most people drive about five miles per hour over the speed limit. Low level speeding, or a similar traffic violation, may give the police the right to stop you, but it is definitely not evidence of intoxication. Similarly, if you were in an accident, was it your fault? It is critical to show that whatever driving errors you made were not the result of alcohol-related impairment. When the prosecutor tries to paint you as a menace to every one on the road, a good lawyer will have the talent, skill and experience to show that even if your driving was, technically, illegal, it was not impaired.

### **Factor Five: Your Appearance and Behavior – Did It Really Show Impairment?**

Your appearance, demeanor and behavior are crucial. This includes your behavior from the moment you are stopped and first observed by the police, to the moment when the observations stop, usually when you leave the police station. Police are trained to observe. Yet in most drunk driving cases, their observations are limited to your driving and the field sobriety tests. To properly analyze a drunk driving case, all of your behavior should be considered, from the first moment you were stopped. Again, the details missing from the police report may be more important than those that are included.

The field sobriety tests, to put it bluntly, are unfair. A very high percentage of stone-cold sober people cannot successfully perform the field sobriety tests. Many trained police officers, when asked to demonstrate the tests in front of a jury, will fail (or cheat, e.g. Keep their eyes open on the finger-to-nose test). Jurors who attempt to do these tests during deliberation will often fail. So, it is important to consider all of your behavior, not just your field sobriety tests.

I will mention the most common field sobriety tests. The so-called “standardized” tests are the horizontal gaze nystagmus test, the walk and turn test and the one leg stand test. There are other non-standardized tests such as the finger-to-nose and alphabet tests. The United States Department of Transportation publishes various manuals on how the standardized tests should be performed, as do many state and local police departments. Many police officers take a three-day class in field sobriety testing and become “certified.” Qualified DUI defense lawyers are also field sobriety testing “certified,” as these classes are available to lawyers. When choosing a lawyer, you should ask whether the lawyer is actually certified in standardized field sobriety testing – the same certification that is held by the police.

Standardized field sobriety testing requires specific tests, with standardized instructions,

demonstrations and scoring. Nevertheless, it is common for the police to depart from proper test format, or to grade on irrelevant factors. This is even more of a problem with the non-standardized tests. For example, a subject will be told to recite the alphabet clearly, with no mention made of speed of recitation, but will be marked as failing if the recitation is slow. Another example would be to fail a subject who sways when performing the finger-to-nose test, even though the fingertip is touched correctly to the nose. These tests are usually performed under the worst of circumstances: in poor lighting, uneven pavement, poor weather, in improper clothing, etc. Further, a subject may be arrested for failing a single field sobriety test, after having passed a series of previous tests. A skilled lawyer will be able to show the unfairness of the field sobriety tests and direct the jury's attention to all of the defendant's behavior consistent with sobriety.

The other standard observations that are made in virtually all drunk driving cases are bloodshot eyes, slurred speech and odor of alcohol. Again, a skilled lawyer understands how to show a jury that these observations are often fabricated, exaggerated, inconclusive and taken out of context. Bloodshot eyes, for example, may be due to contact lenses, cigarette fumes, fatigue or may be the subject's normal appearance. The police have usually no prior experience with a subject or a subject's voice, so the subject's normal tone or accent (especially in the Milwaukee or Chicago area) may sound slurred. Similarly, the odor of alcohol may indicate recent alcohol consumption, but cannot indicate the amount consumed.

It is necessary to show the jury the entire picture of your behavior, not just the police observations which are taken out of context. Did you pull over promptly, safely and in a controlled manner when the police activated their lights and siren? Were you able to produce your driver's license without fumbling? Were you able to get out of your car without difficulty? Were you able to walk to the area where the field sobriety tests were performed without difficulty? What were the weather and lighting conditions? What were you wearing? What was the state of the pavement? Were you able to communicate your name, etc. without stumbling on your words? Were you able to get in and out of the squad car without difficulty? Were you able to walk into the police station without stumbling? Most of the time, police reports are silent on all observations except for the field sobriety tests. Since police are trained to write all relevant facts in their reports, their credibility will be subject to devastating challenge if they add facts to their testimony, which is not in their reports. So, if the reports are silent, it is safe to say that none of your behavior except for the (unfair) field sobriety tests evidenced any intoxication. A good lawyer knows how to persuasively show the whole picture of your behavior, not just the unfair field sobriety tests.

### **Factor Six: The Chemical Test – Was It Reliable, Accurate and Precise?**

This article is not intended to be an in-depth manual of how to handle a drunk driving case, much less a manual on the technology and pitfalls of breath and blood tests. The technology has improved dramatically in the last few years. But like all technology, it is only as good as the people who operate it. The most famous breath test machine, the

“Breathalyzer,” is obsolete. In Wisconsin, all “evidentiary” (tests that can be used in court to show that you were drunk) breath tests are done on a machine called the Intoximeter EC/IR II. So, any good lawyer who does drunk driving defense in Wisconsin will have detailed knowledge about the workings of this machine, including how to obtain and analyze all of its maintenance and calibration history. This should be done in virtually every breath test case. These machines are subject to error if not properly operated.

One of the most common errors is mouth alcohol contamination (sometimes called belch contamination, giving rise to the term, “belch defense”). These machines are designed to test the air in a subject’s lungs. However, before the air can be tested, it must pass through the subject’s mouth. And who knows what is in the subject’s mouth? If the subject belched before the test, which can be a silent process, the mouth may contain relatively undiluted alcohol from the stomach. Hence the breath sample will be contaminated and the machine will give a false high reading. These machines are designed to detect mouth alcohol contamination: but the detection devices are fallible, and the manufacturers warn police to not rely on the machine to detect mouth alcohol contamination. To protect against mouth alcohol contamination, the police are required by law to perform a twenty-minute observation of the subject prior to the test, to certify that the subject did not smoke, drink, belch, etc. Needless to say, these observation periods are often very lax, if they occur at all. A skilled attorney can often demonstrate the failure of the police to perform a proper observation period, by making the police testify as to the exact timing all the completion of their various tasks, including the police reports, setting up the breath test machine, communications with other officers, etc. Mouth alcohol contamination is just one example of the many different kinds of errors to which breath, blood and urine testing are subject. The important thing is to realize that these tests are flawed and fallible. If you believe you were sober, but failed the test, there is a strong possibility that the test was false.

Detailed analysis and study of the testing process are a necessity in each individual case. Many lawyers talk about something called the “blood alcohol curve” defense. This is a defense that admits that the chemical test was accurate at the time of testing, but that the alcohol level was lower at the time of driving. Technically, this may be a viable defense in many cases. But technicalities do not often win cases. Lawyers often overuse the blood alcohol curve defense, simply because they do not have the knowledge, skill and experience to challenge the chemical test head-on. There are some instances when the blood alcohol curve defense is appropriate. Beware, however, the lawyer who is simply wants to argue that you were not guilty yet.

Most people believe that, unlike breath testing, blood testing is a super accurate, super precise, reliable and scientific method; you might be able to beat a breath test but not a blood test. This idea is false, because blood tests can also be false! If it is done properly, blood testing can be highly accurate, precise and reliable. That’s why so many people, and unfortunately even many lawyers who should know better, simply believe the one-page blood test report as though it were gospel. The fact is that blood tests can also be wrong! So, make sure that you choose a lawyer who understands the entire

blood testing process from beginning to end – and who knows how to obtain and evaluate blood testing records.

The vast majority of forensic blood ethanol tests in Wisconsin are performed at the Wisconsin State Laboratory of Hygiene (the Lab), which processes in excess of twenty thousand samples per year. There are, however, tests performed by other agencies, such as the Wisconsin State Crime Laboratory. Although these agencies all use a process called gas chromatography, there are significant differences in the methods used at different laboratories.

A DUI lawyer who knows his business will start the investigation of the blood test right at the beginning: the blood test kit. For example, many people, do not know that the blood test tubes have an expiration date. It is almost never recorded in a Wisconsin case. In some circumstances, this can lead to a false high test result. The test tubes are also supposed to contain two chemicals in powder form: a preservative and an anti-coagulant. Both of these substances are critical to the accuracy and reliability of the blood ethanol analysis. Incredibly, Wisconsin performs absolutely no independent quality control testing or inspection of the test tubes (vacu-tainers) for the presence of the preservative and anti-coagulant. The preservative, sodium fluoride is absolutely necessary because the blood sample almost always endures a long period (sometimes several days or longer) of non-refrigeration before analysis. In most cases, the sample is transported to the Lab by simple United States Mail. Like any other biological material, blood will decompose or ferment at room temperature, often producing ethanol as a bi-product of these chemical processes.

In other words, **EVEN IF THE BLOOD TEST IS PERFORMEED PERFECTLY BY THE LAB, THERE MAY STILL BE A FALSE HIGH TEST RESULT, BECAUSE THE BLOOD FERMENTED BEFORE IT WAS TESTED!** The preservative will not prevent this unless the sample is sterile or refrigerated.

Also, if the test tube is not completely filled with blood, that can also lead to a false high test result, because too much of the preservative change the chemistry of the blood and can cause a higher. So, if your test tube was not completely filled when it was drawn, there is a problem. This is called “salting out.”

What if there is not enough anticoagulant in the test tube, or if it is not thoroughly mixed? This is another way that there can be a **FALSE HIGH TEST RESULT!** Forensic blood tests results are reported as a portion of whole blood. If the liquid portion of a clotted sample is tested, the ethanol percentage of the liquid will be more concentrated than that of the whole blood, yielding a false high test result.

So, we have identified several possible causes of a false high blood test result, and we haven't even started talking about the blood draw itself! As you can see, this is a complex process, and only a knowledgeable lawyer should even attempt to get into a blood test case.

Let's talk for a minute about the person who draws the blood. In many cases, the prosecutor and the judge try to get the defense lawyer to "stipulate to the blood draw." In other words, they try to get the defense to agree that the blood was drawn properly. Sadly, many lawyers actually do this, because they do not understand blood testing. The medical technician who draws the defendant's blood performs several critical functions in a drunk driving case. There are a number of potential errors in the medical technician's duties that can cause a false high test result. Medical technicians are generally well trained for their duties relating to the medical treatment of patients; but they are frequently poorly trained to handle a drunk driving forensic blood draw, which must be done differently. The medical technician is responsible for inspecting the test kit, to make sure that the test tubes are in proper condition and fresh. The next step after inspecting the equipment used in a forensic blood draw is to choose and cleanse a puncture site. Obviously, a swab containing ethanol should never be used to cleanse the site. In fact, there is a legal rule on that subject. This is a significant issue. Ethanol swabs are very frequently used in non-forensic medical blood draws, and may be used mistakenly by the medical technician. In Wisconsin, a benzylclonium chloride swab is included in the state blood draw kits and this is usually the swab used by the medical technician. It is not well known, but indisputable that benzylclonium chloride swabs contain ethanol. The Lab violates its own written policies by distributing ethanol-containing swabs in its kits. This is another possible source of a FALSE HIGH TEST RESULT. The medical technician is also responsible for initial sealing, labeling and what is called "chain-of-custody" responsibilities. This simply is the process of keeping track of the blood so that we can know that the blood testing actually is the same blood that was drawn from your arm. There are specific procedures for this that may also be screwed up by the med tech or the police. In one recent case, the Wisconsin lab MIXED UP TWO SAMPLES OF BLOOD!

The blood is usually transported to the Lab, by regular United States Mail. They generally do not bother to even use certified mail! More incredibly, they do not even log the blood into the lab when it arrives; it is just put in a cooler, with no record of its arrival.

At some point, the blood is tested by a process called headspace gas chromatography. One analyst will generally test over one hundred samples per day. It is a high volume process, subject to many different kinds of error. Other than a second analyst reviewing the paperwork, there is no other person that supervises the analysis or does any quality control. At the very least, a DUI lawyer should know how to review and analyze ALL of the lab records, to check for error, not just the two-page summary report.

The bottom line is this: never simply assume that the breath or blood test is accurate, precise or reliable. Don't put your case in the hands of an attorney who is quick to make that assumption. Place your case in the hands of a qualified attorney.

### **Factor Seven: The Law - What Are the Legal Issues?**

Remember the poor fellow who came to me after serving twenty-two days of a much longer jail sentence, after pleading guilty to a third offense drunk driving charge? He did

have two prior drunk driving charges on his record, so it appeared to be a third offense. He certainly thought so. Unfortunately, so did his lawyer. I saw that the two prior offenses could not be used against him. I got the judge to sign an emergency order releasing him from jail immediately. Several weeks, the case was reduced to a non-jailable, first offense violation.

I recently won a case because the refusal paperwork was mailed to the defendant, rather than hand-delivered. On another occasion, I won a case because the police officer improperly walked into my client's garage as he was parking his car – in order to investigate his driving. On yet another occasion I was hired to assist a lawyer in a blood test case (something that I enjoy doing). My job was to deal only with the blood test evidence. We were in the middle of the jury trial when we figured out that there had been videotape evidence that was accidentally destroyed by the police, and there was a cover-up of the destruction. After a mistrial and a couple more hearings, this third offense charge was dismissed. I could give a hundred different examples but I will end with just one more. I recently represented a man who was found dead drunk in his running car in the driveway of a neighbor's house. It was uncontested that he had been left there by a driver and had started the car and was attempting to drive away when the police found him. The case was dismissed.

What do these cases have in common? They are all examples of cases where more advanced knowledge of the law led to victory. These were also all cases where other lawyers (sometimes the prosecutor and sometimes a different defense lawyer) had looked at and failed to see the legal issues. It proves this point. Drunk driving defense is technical. It is NOT JUST ANOTHER AREA OF CRIMINAL OR TRAFFIC LAW. Drunk driving defense is recognized as a separate area of specialty for a good reason; it requires, at a minimum, that the defense lawyer be specially trained in the intricacies of the drunk driving defense. Knowing the law is an absolutely necessary prerequisite for the drunk driving defense lawyer. In my opinion, no general practitioner, and really not even a general criminal or traffic defense lawyer, can be educated in the technical aspects of drunk driving defense. I recommend that you choose a lawyer who has credentials that prove that he knows this specialized area of law.

## **The Two-Pronged Strategy of Drunk Driving Defense**

The fact of the matter is that many people who are charged with drunk driving wind up being convicted. Most simply plead guilty in some sort of plea bargain. Some are convicted after a trial. Therefore, in any case, it is important to take a two-pronged approach. Both prongs must be worked at from the beginning. **The first prong is consideration of the seven key factors, so that you can win the case.** The **second prong is preparing for sentencing, in case you cannot or do not win the case.**

If you were really guilty, that does not make you a bad person. It means that you made a mistake. Learn from your mistake! If you are an innocent person who is convicted despite your best efforts, don't be bitter and angry. Use this as an opportunity to learn and grow as a person. Your life will be better and all of our loved ones will be safer. How

do you learn from a drunk driving case? This brings us back to the beginning. Get help! Learn about alcohol abuse, attend A. A. meetings. Get counseling for your personal problems. Get an assessment to determine whether you have an alcohol problem and follow through with treatment recommendations.

Make this an experience that turns you into a better person, not just a person with a conviction.

Here is the most important point. DO IT NOW! Do it before the sentencing hearing. Do it before the trial. Do it right from the beginning of the case. Everyone who appears before a judge at a sentencing hearing says that he is going to change, that he will do the things necessary to become rehabilitated. That is not good enough. **Be the rare person who goes into the sentencing hearing saying that I have already done and will continue to do the things necessary for my rehabilitation.** You will definitely be treated more fairly if you do. But more importantly, you will have taken a tragic difficult event in your life and turned it into a source of change for the better.

## **My Conclusion**

If you've been accused of drunk driving, you will need qualified legal help. I hope that this article has been of some help to you in finding that help. You should also check out the website for the **National College for DUI Defense, [www.NCDD.com](http://www.NCDD.com)**. Remember that **in Wisconsin, only an NCDD certified lawyer may legally claim that he is a specialist in drunk driving defense.** So, choose wisely.

Being arrested is an experience that has probably been frightening and confusing. You may wonder what this will mean to your future and your career. You may feel humiliated at being arrested and treated like a criminal. We are here to help you through this terrible experience and to do everything possible to win your case – and we know how to do it. Your situation may not be as bleak as it feels at this moment. We've got your back!

Please remember - Don't drink and drive. Feel free to contact me for more information, or an online case evaluation.

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