

## Ten Things Prosecutors Can Do for Stronger DUI Cases

1. *Visit the scene.* You are the only one who hasn't been there. Do you really want the defendant to know more about the scene than you do?
2. *Get booking photos.* Often they are in stark contrast to the defendant's sober appearance in court. Also, compare the defendant's drunken scrawl on the booking log with his straight, sober signature on his driver's license.
3. *Take the same field sobriety training as officers.* To explain standardized field sobriety tests (SFSTS) to a jury, you had better know them inside and out. For the latest on SFSTS, see the newly released CD-ROM from the National Highway Traffic Safety Administration (NHTSA), complete with instructions, validation studies and digital video suitable for demonstrative purposes in court. To order a copy, contact us or visit [www.nhtsa.dot.gov](http://www.nhtsa.dot.gov).
4. *Spend time with your toxicologist.* More prosecutors need to understand retrograde extrapolation of blood alcohol tests. Can you explain the difference between a medical blood sample versus a forensic sample? Learn the reach and limits of toxicology and what you can reasonably expect from a toxicologist. Check out *Alcohol Toxicology for Prosecutors* from APRI's Special Topic Series, [available on-line](#).
5. *Review police agency checkpoint policies.* NHTSA is leading a national push for increased sobriety checkpoints. Are your local agencies complying with state and federal constitutional requirements? Are they informing you of mobilizations? Are you ready?
6. *Take a breathalyzer test.* Take a field trip to your local jail's booking facility and spend 20 seconds blowing into the machine. What you learn will help you dispatch a number of defenses in lightning speed.
7. *Know your procedures regarding medical records.* Some states allow medical records to be obtained through subpoena or warrant. Also, many hospitals are slow to release records while they struggle to interpret the new Health Insurance Portability & Accountability Act (HIPAA). Avoid the medical records issue altogether by assisting officers in securing a search warrant to obtain a blood draw from a defendant or to obtain the medical sample from the hospital. The medical sample is subject to seizure; after all, it is material evidence of a crime.
8. *Develop strong visuals.* Seeing is believing. If you don't use visual aids, juries will only retain 20% of what you say. PowerPoint templates for impaired driving trials are available from APRI's National Traffic Law Center.
9. *Build a strong relationship with law enforcement agencies.* Do ride-a-longs. Understand how your cases originate on the road and move into court. Offer to conduct roll-call trainings. Invite officers to observe a DUI trial from jury selection to verdict. As in most things, a team approach makes everyone's job easier.
10. *Remember, you are not alone.* While a cadre of defense attorneys may await your next visit to court, you are not outnumbered. A strong national, state and local community of prosecutors and other professionals is waiting to help you in any possible way. For more information on any of these topics, contact [APRI's National Traffic Law Center](#).

### Go-To Sites for Crash Reconstruction

Resources for law enforcement [www.legalsciences.com](http://www.legalsciences.com)

Vehicle specifications [www.applied-kinematics.com/CVSinfo.htm](http://www.applied-kinematics.com/CVSinfo.htm)

Accident reconstruction network [www.accidentreconstruction.com](http://www.accidentreconstruction.com)

Weather info for specific cities [www.wunderground.com](http://www.wunderground.com)

Sunrise/sunset times, moon phases <http://aa.usno.navy.mil>

Recall information [www.consumerreports.org](http://www.consumerreports.org)

Crush coefficients, vehicle specifications [www.neptuneeng.com](http://www.neptuneeng.com)

American Prosecutors Research Institute [www.ndaa-apri.org](http://www.ndaa-apri.org)

### Personal Alcohol Tests Ripe for Abuse by Defendants

Picture this scenario. A clean-cut, professionally dressed defendant sits in the witness box, holding up a commercial alcohol test strip for the jury to see:

*"If I thought I was too drunk to drive, I never would have gotten behind the wheel. That's why I took this test that said my alcohol content was low! So, you can imagine my shock when the Officer said my BAC was 0.08. One reason I was so surprised is that the test strip was given to me by a sheriff's deputy during a DUI awareness seminar at the University where I work. See, the package even has the Sheriff Department's logo. "*

Jurors may easily overlook the fact that the defendant did not follow the warnings on the test strip packaging not to drive, as well as the language which clearly states that this alcohol test is not an exact measurement--only an estimate. Yet, the defendant made an effort to be responsible by relying on the test--one he got from the police! So, despite a blood alcohol test of 0.08, the jury acquits the defendant. This is not an atypical reaction.

Personal alcohol test strips are designed to educate drivers, encourage personal responsibility and enable drivers to make an informed decision of whether to drive after drinking. Many law enforcement agencies across the country endorse the use of test strips and distribute them as part of their impaired driving education campaigns. However, these strips are ripe for abuse in the courtroom for several reasons:

- **To falsely claim they used the strip is too easy for defendants.** Sold at convenience stores and pharmacies for as little as \$2.00, the strips are widely accessible. Defendants can claim later that they used the strips pre-arrest. A wise practice for officers is to ask defendants if they used the strip before driving and to note in their report if test packaging was found in the car or on the person of the defendant. Booking records may also reveal if the strip was on their person.
- **To incorrectly administer the test is too easy for defendants.** Did they not eat or drink for 10 minutes before the test as the manufacturer recommended? Did they keep the strip in their mouth for the appropriate amount of time? Were they too drunk to distinguish between the colors on the strip test key? And, who will be their witness to swear that they followed all the procedures correctly? Someone more sober than they were? So, why didn't that witness drive?
- **"This test is not evidence and cannot be used as a defense in court."** Just because this is printed on material when distributed by a law enforcement agency does not mean that it is true. Admissibility is a question for the judge to decide, and most judges liberally allow defendants to assert their defenses.
- **At the time the defendant took the test, his blood alcohol concentration may have been rising.** Therefore, the defendant's test did read lower when he began driving, and he truly may have believed that he was not driving while impaired. Prosecutors must be prepared to educate

the jury that in impaired driving cases the state never has to prove the defendant *intended* to drive while impaired.

- **The test strips may be wrong.** Manufacturers say the product's reliability has been proven in laboratory tests, and a number of law enforcement agencies also find the strips reliable against their own equipment.<sup>1</sup> But, manufacturers are concerned that the test may be portrayed incorrectly as a *pocket breathalyzer* rather than *pocket education*. Some manufacturers also provide a toll free number for customers to locate the closest local cab company.

While a valuable tool for encouraging responsible decision making by drivers, the test strips present prosecutors with unique challenges that may have some sticking power with juries. Be ready on the issues before the defense appears in the courtroom, and be sure to add a request for information about test strips to your boilerplate discovery motions. For more information, please contact APRI's [National Traffic Law Center](#).

<sup>1</sup> North Miami Beach Police Department, Colorado Department of Public Safety and the Metropolitan Police Department of the District of Columbia. Not all agency testing reflects similar findings. See *A Test Strip Comparison*; Prepared by Sgt. T.R. Dioquino, Pinellas County Sheriff's Office, 2002.