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Preparing For Cross Examination of the Defense Reconstructionist

by John Kwasnoski

When your accident reconstructionist testified, the defense attorney didn't seem to hurt you too much on cross examination. But the fat lady has yet to sing – the defense expert testifies tomorrow and one thing is certain; s/he isn't coming to court to confirm the state's version of the crash.**A:**

The most important part of preparation is meeting with your own expert. The most important time to meet with your expert is prior to initiating formal discovery. Your expert is the best tool to use to uncover weaknesses and develop areas of attack. Use your expert to assist you in determining what information to request from the defense in order to decipher ahead of time the basis of the defense expert's opinion.

Among other specific discovery requests, always request the worksheets, notes and calculations produced by the defense expert. This is where subtle assumptions appear that support opinions different from your expert's. In addition, establish with the defense that both sides have a continuing duty to disclose any investigation that is conducted after the date the discovery request is filed. You need to know whether the defense has generated new numbers or conducted any extra tests to counter the police investigation at the scene or in response to your expert's reports.

Finally, don't hesitate to get on the phone to find out about previous testimony or bias or just quirks that a particular defense expert may have. Be proactive. Plan a strategy. Pick a few selected areas of attack ahead of time. Don't wait and just react to what is said during the direct examination.

John Kwasnoski, a professor of forensic physics at Western New England College in Springfield, Massachusetts, reconstructs crashes and offers expert testimony.

The Death Penalty for DUI Fatality

Has a victim's family ever said to you, "It doesn't seem fair that after killing my child, the defendant is only going to serve a few years in prison and then he is going to go back to his family and go on with his life. If that all my child's life is worth - a couple of years in prison? He deserves the death penalty!" Most likely your response was: "The defendant cannot get the death penalty for DUI homicide." However, prosecutors in two separate cases, one in North Carolina and one in Kentucky, are currently seeking capital murder charges for impaired driving fatalities.

NTLC is not aware of any other cases in which a defendant accused of an impaired driving fatality was charged with capital murder. If your jurisdiction has charged capital murder in a DUI-related fatality, or you would like to learn more about the North Carolina and Kentucky cases, contact NTLC. We are collecting briefs, motions, research and transcripts on the topic in order to assist prosecutors who are contemplating filing capital murder charges in cases involving DUI fatalities.

Beer Cans That Go Bump In The Night

Have you ever noticed the number of beer cans and bottles lying on the side of the road and wondered what those containers say about drinking drivers? The **Aluminum Anonymous Project (AAP)** asked just those questions and has undertaken to collect and count discarded beer containers at regular intervals along selected roads in an effort to measure the rate of "drinking while driving." According to AAP, in 1996 over 36,300 beer cans were discarded along Maryland and Delaware roadways alone. That amounts to nearly a six-pack of beer cans and beer bottles per mile of road per day. To find out more information about the "beer container breakdown" (Can you guess what the most popular brand was?) or to order your free quarterly newsletter, *Aluminum Anonymous: Beer Cans That Go Bump in the Night*, contact Dennis W. Brezina, P.O. Box 683, Chesapeake City, MD 21915; phone (410) 885-2887.

Meeting DUI Defense Challenges: Reasonable Suspicion - Routine Traffic Stops

In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Supreme Court held that an officer must have reasonable and articulable suspicion of a violation of law before s/he stops and detains a driver. Many DUI drivers are apprehended based on a routine traffic stop and suspicion of impaired driving may not arise until after the officer has made contact with the driver. When the initial stop is based entirely on a traffic violation, a defendant will frequently file a motion to suppress all evidence after the stop based on the officer's lack of reasonable suspicion of impaired driving prior to the stop.

Because the decision to stop the car was based on a traffic violation, the officer may not have observed other driving errors that support the suspicion of impaired driving. However, once the officer has initiated the traffic stop, s/he may make observations about the suspect's driving that will be important. These observations might include:

- failure to respond to the officer's signal to pull over
- parking incorrectly, e.g., hitting the curb

The officer is most likely, however, to develop a suspicion of impaired driving based on personal contact with the driver after the stop. Any or all of the following may be observed:

- difficulty in producing a license and registration
- incoherence or difficulty in understanding the officer's directions or questions
- inappropriate demeanor, e.g., excessively belligerent or abusive
- open containers or drug paraphernalia
- admissions of drinking or drug use
- physical characteristics such as the odor of alcohol, bloodshot eyes and slurred speech

In responding to motions to suppress evidence based on a lack of reasonable suspicion, it is essential to detail each of the officer's observations that support the decision to detain the driver for further investigation of impaired driving. Although the courts have not specified a specific number or type of impairment indicators that an officer must see, decisions to suppress or allow evidence are based on the totality of the circumstances. The greater the number of indicators the officer saw, the more likely the court will deny the motion. Moreover, these observations, both in quantity and type, will be persuasive evidence before the trier of fact when defense counsel argues that the police had no business detaining his client.

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