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KNOW WHEN TO SAY NO

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When one of your clients calls to ask if you can represent him, or a family member, in a drunk driving case, you may be tempted to say yes, even though your practice is estate planning and business litigation. The client obviously feels comfortable with you, and you don't want to say no and cause the client to look elsewhere for legal advice. After all, it is only a drunk driving ticket. Isn't that simply a step above a speeding ticket? So, even though you haven't seen the inside of a criminal courtroom for a very long time, perhaps never, and that criminal casebook from your first year in law school lies gathering dust on your shelf, you say you will handle it. You have stepped into the lion's den, and Leo is hungry.

One of the fundamental tenets of the law is that you must zealously represent your client. How can you do that if you are deficient, lacking both the skills and the knowledge to play the game? You would probably refer out a complex anti-trust case or a suit sounding in admiralty to the appropriate specialist. Why would drunk driving be any different? There are firms, some of them quite large, that do nothing else but drunk driving defense. Maybe there is more to this than you originally thought?

To accept any matter where you initially lack competence does not require that you constantly refer business to your competitors. The canons of ethics acknowledge that you can gain the expertise by research and study. But it is a wise lawyer indeed who is able to recognize when to say yes and when to say no. A yes today may translate into a malpractice suit tomorrow. At a very minimum a client on the losing end of what was a winnable drunk driving ticket will not think fondly of his counsel, particularly when he loses his license for six months, has to attend sobriety classes and pays insurance premiums for the next five years that are triple the present rate. The social stigma associated with a DUI lingers for years.

Just in case you are still vacillating over this issue, take the following test which consists of 20 questions common to many drunk driving charges, and see how you score. Following the test is an explanation of each question.

1. The ideal witness you would want in a DUI case is
 - A. A passenger in the car
 - B. An unbiased passerby who saw everything
 - C. The bartender who sold the drinks
 - D. Someone at the police station who witnessed the testing
2. The most accurate test for blood alcohol is ¹
 - A. Urinalysis
 - B. Breath, using scientific equipment
 - C. Blood, analyzed in the lab
 - D. DNA fragmentation (RFLP or PCR)
3. If you drink 10 cans of beer on an empty stomach in 2 hours, you will probably ²
 - A. Have a blood alcohol level over 0.1%
 - B. Be feeling no pain
 - C. Have a blood alcohol level over 1.0%
 - D. Be OK to drive
4. The regimen of testing currently in use assumes an "average" person who ³
 - A. For males, weighs 175 lbs.; for females weighs 150 lbs.
 - B. Drinks on an empty stomach
 - C. Is healthy and on no medications
 - D. There is no such person as this "average" person
5. If you are deemed to be inebriated at the police station or emergency room, is this a crime? ⁴
 - A. Yes
 - B. No
 - C. No; but experts will extrapolate backwards to determine if you were inebriated while driving
 - D. Yes; you are presumed inebriated while driving if you are inebriated at the station or emergency room.
6. When you drink a lot of alcohol ⁵
 - A. The alcohol shows up in the blood immediately
 - B. It takes anywhere from ¼ hour to 3 hours to be absorbed.
 - C. Alcohol is eliminated through the pores of the skin – hence the distinctive odor
 - D. Only when the alcohol reaches the lungs are you impaired
7. Nystagmus (HGN) means ⁶
 - A. In geometry, the point at which an arc meets a tangent

Say No, cont.

- B. A coordination test, eg. finger to nose
C. Involuntary movement of the eyeball
D. Inability to focus the eye without rapid blinking
8. **The breath analyzer tests for alcohol in breath. But, the crime involves your blood alcohol level. How is this determined?** ⁷
- A. There is an accurate, scientific correlation between the two
B. The breath and blood alcohol levels are inversely proportional over time
C. There are microscopic blood cells in all deep lung samples (alveolar) and thus Blood Alcohol Content can be measured in a breath test
D. There is a relationship between breath alcohol level and Blood Alcohol Content but it is more qualitative than quantitative
9. **The landmark study in Germany in the 1930's by Prof. Widmark demonstrated** ⁸
- A. The rates of absorption and elimination of alcohol are constant and do not vary from person to person.
B. The "r" factor projects your Blood Alcohol Content at a future point in time based on your weight, sex and consumption.
C. Women usually have a lower "r" factor than men.
D. Twenty people in the Widmark study group was a sufficient number to generalize the results.
10. **Retrograde Extrapolation** ⁹
- A. Is an estimate of Blood Alcohol Content at a prior time
B. Is an educated guess
C. Uses assumptions about average people
D. All of the above
11. **Which drinker will have the highest Blood Alcohol Content 1 hour after being stopped?** ¹⁰
- A. A 300 lb. alcoholic who drank 8 beers in 2 hours.
B. A social drinker who drank 4 beers in 2 hours.
C. A female who got tipsy after 1 drink, then had 4 more.
D. Not enough information here to determine.
12. **Radio waves can interfere with electronic equipment.** ¹¹
- A. You may argue, in defense, that radio waves in the police station interfered with the breath machine and threw its results into question.
B. No – all machines are equipped with filters to preclude interference.
C. No – there are radio waves at all times from police radios, etc., but scientists have debunked the interference theory and it is good only in defense counsel's mind.
D. No – breath machines use a narrow band width, and frequencies outside the Kz. range being used are immaterial.
13. **Since all breath tests assume an "average" person is being tested, you can successfully argue**
- A. My client isn't "average".
B. Averages are misleading – my client could be at the high or low end of the range used in computing the mean.
C. The average person has 2.3 children – my client doesn't.
D. My client is on trial, not the average person.
E. All of the above.
14. **Women, who consume the same amount of alcohol as men, may show a higher Blood Alcohol Content because** ¹²
- A. Women usually weigh less than men.
B. Women lack certain enzymes in the GI tract that break down alcohol.
C. Oral contraceptives can produce formaldehyde in the blood and elevate Blood Alcohol Content
D. Women usually metabolize all drugs at a slower rate than men.
15. **Hematocrit levels are important in blood analysis because** ¹³
- A. The average hematocrit level is about 45 and a higher result will tend to increase Blood Alcohol Content.
B. Hematocrit levels are inversely proportional to Blood Alcohol Content.
C. Hematocrit is irrelevant to Blood Alcohol Content.
D. Hematocrit levels are usually inadmissible because of the collateral matter rule.
16. **Which of the following elements can affect Blood Alcohol Content results?** ¹⁴
- A. Oxygen (from fresh air) can oxidize alcohol
B. A zinc deficiency (eg. from eating a diet low in zinc) can dramatically impact Blood Alcohol Content.
C. Fluoride compounds (from toothpaste) can lower Blood Alcohol Content.
D. Gamma rays (from X Rays) break down white blood cells and cause alcohol subsequently consumed to be rapidly absorbed in the plasma.
17. **The equipment used to test you can be faulty, or the**

operator can make mistakes, but this is difficult to prove because

- A. Calibration of the equipment within the last six months is critical.
 - B. The standard reference vials are URL certified.
 - C. No breath sample is retained for further testing.
 - D. Machine warranties are usually 2 years or 500 tests, whichever comes first.
18. The prosecution's evidence is best attacked by
- A. Cross-Examination of the arresting officer.
 - B. Discrediting the accuracy of the equipment used and the results obtained.
 - C. Introducing your own eye witnesses.
 - D. Putting your client on the stand.
19. A DUI ticket is usually a misdemeanor, but can be a felony if
- A. There is a child in the car.
 - B. You refuse to test.
 - C. You have a prior DUI within 10 years.
 - D. You injure someone in an accident.
20. Can DUI evidence be suppressed if the defendant's constitutional rights under the 4th, 5th or 6th Amendments were violated?¹⁵
- A. No – DUI is a misdemeanor, not a felony.
 - B. Yes – unless Miranda warnings were timely given.
 - C. No – test results are non-testimonial (Schmerber).
 - D. Yes – the officer needs suspicion to stop and probable cause to arrest. Miranda warnings must be given.

Answers to the Questions:

1. A. A passenger in the car can testify firsthand as to the stop, what the officer said, did, and how the defendant responded. The same passenger may also speak about how much alcohol had been consumed.

Eyewitnesses (answer B) are sometimes unreliable, bartenders (answer C) are busy people and don't see the arrest, and witnesses at the police station (answer D) are usually other law enforcement personnel or fellow arrestees.

2. C. Blood analysis is superior. It takes time and you need to go to a medical facility, but it is the best. DNA is not affected by alcohol.

3. A. This much alcohol on an empty stomach will probably cause your Blood Alcohol Content to exceed 0.1%. But each case will be different.

If your Blood Alcohol Content exceeds 0.6% or so, you may be dead or dying; 1% is unheard of (among the living).

4. D. All the testing techniques assume an 'average' person. This is the person who fits the arithmetic average of the particular study group in question. The word average impliedly says there is a range, and your client may be at the high end of the range or the low end. Or, off the charts. Don't let the prosecution convict your client using a bell curve.

5. C. It is not a crime to be under the influence at a police station. Many states (like California) have a per se statute – if you are drunk at the station you are presumed to be DUI for the three hours prior. The presumption is rebuttable.

6. B. Impairment occurs when alcohol reaches the brain, and that takes time depending on the individual.

7. C. Horizontal gaze nystagmus is a field test used by police to see if drugs or alcohol is involved. The eyeball will involuntarily jerk when moved from side to side, and the more alcohol consumed, the earlier it will occur. Beware the officer who opines on this medical test conducted often right by the side of the road at night under less than optimum conditions.

8. D. The breath machine measures alcohol in breath, and then converts that to a Blood Alcohol Content (using an average gained from group studies.)

The range varies from one person to the next by as much as 40% however; this can translate to +/- 0.03% on a Blood Alcohol Test. If the legal limit in your state is .1% and your client was .12%, there could very well be an arithmetic explanation.

9. C. Women do have a lower 'r' factor, on average. The factor is used to establish your Blood Alcohol Content at a prior point in time. Note that much of the early research used small groups – 20 was typical. Nowadays most groups are much larger and the averages obtained more predictable of individual behavior.

Say No, cont.

10. **D.** Since it is not a crime to be under the influence at a station or hospital, the question of whether this person was driving under the influence is answered by extrapolating backwards in time. The 'average' person comes into play again, as does food and time of consumption. At best it is an educated guess.
11. **D.** People are unique. The way they are affected by alcohol will vary depending on, among other things, their weight, sex, body fat, drinking patterns, stomach contents, rates of absorption and elimination, etc. So the alcoholic, the social drinker and the 'tipsy' female are all going to react differently and the outcome is anyone's guess.
12. **A.** If you don't believe this, ask yourself why restaurants display "MICROWAVE IN USE" signs or hospitals ask you not to use cell phones while on the premises. Similarly, airlines ask you to turn off all electronic equipment at takeoff and landing. Why? Relate your defense argument to something the jury can understand.
13. **E.** This is a gift – but your ability to portray your client as unique and not average will go a long way in his or her defense.
14. **B.** Women do lack an enzyme, gastric alcohol dehydrogenase, that breaks down alcohol – thus more alcohol is absorbed into the blood than for their male counterparts. Oral contraceptives can elevate Blood Alcohol Content because they produce acetaldehyde. Formaldehyde is used to embalm corpses.
15. **A.** Hematocrit levels compare the amount of particulate matter in blood (red cells, white cells and platelets) to liquid (plasma) by volume. Since alcohol is soluble in water and plasma is mainly water, a high hematocrit (ie. more solids than usual and less plasma) means that what alcohol there is will be absorbed in less water than 'normal' or 'average' and thus elevate the Blood Alcohol Content. You need to independently determine your client's hematocrit level.
16. **B.** The absence of Zinc is a major culprit in elevating Blood Alcohol Content. The other answers are junk science. Test your client's blood for zinc.
17. **C.** Ideally you would like to do your own analysis, but the breath machines do not retain a sample for further

independent testing. You are at the mercy of the machine and its operator.

Calibration is required much more often than every 6 months. The vials aren't certified, but the chemicals that go in them are. Warranties vary, but 90 days is typical.

18. **B.** A seasoned officer can be tough to discredit. Eyewitnesses are notoriously shaky. Clients do not always do well on the stand. By attacking the equipment and/or the operator you shift the focus from the stop, the field tests, the observations, etc. all of which may be damaging, to a piece of equipment sitting on a desk. And we all know that equipment, like a computer, is fallible. Don't car alarms sometimes go haywire?
19. **D.** Most states elevate to a felony if someone is injured, and require three or more convictions within the prior 7 to 10 years to charge this conviction as a felony. Having a child in the car or refusing to test are usually sentence enhancements, but the case is still charged as a misdemeanor.
20. **D.** DUI is not merely a serious traffic ticket - you are arrested and booked. If the government doesn't follow the long line of Supreme Court precedent, then the fruits of their coercive/illegal conduct can be suppressed.

How Did You Do?

If you scored 0-6 Correct, a lost cause

If you scored 7-12 Correct, stick with estate planning

If you scored 13-17 Correct, there is hope

If you scored 18-20 Correct, ready for prime time

We all leave law school, and, by desire or twist of serendipity, end up doing some things pretty well. There are whole sections of the law that we probably weren't much good at in law school and haven't touched for years, maybe decades. We should stick with our core competencies and if we are tempted to break out into previously uncharted waters, do one of two things. Either resist the temptation and tell the client that it is in his best interests to go elsewhere, or, say yes and bring in someone to look over your shoulder and step in to do the heavy lifting if need be. Going it alone is often a recipe for disaster and malpractice.

Footnotes

1. Accuracy of Blood Alcohol Analysis Using Headspace Gas Chromatography When Performed on Clotted Samples, C. Senkowski and K. Thompson, *Journal of Forensic Sciences* 35:176 (1990).
Assessing Breath Test Estimation of Blood Alcohol Concentration, D. Lucas, *Journal of Analytical Toxicology* 13:241(1989).
 2. Ritchie, The Aliphatic Alcohols, in Goodman and Gilman's *The Pharmacological Basis of Therapeutics* (7th ed., 1985).
Consumption of a Large Dose of Alcohol in a Short Time Span, J. Jakus, N. Shajani and B. Image, *Forensic Science International* 56:113 (1992).
 3. Variation in Blood Alcohol Concentration Following the Last Drink, R. Gullberg, *Journal of Police Science and Administration* 10:289 (1982).
 4. Back Calculation of Blood Alcohol Concentration, K. Lewis, *British Medical Journal* 295:800 (1987).
 5. Blood Alcohol Curve as a Function of Time and Type of Beverage: Methodological Considerations, R. Custafson and H. Kallmen, *Drug and Alcohol Dependence* 21:243 (1988).
 6. Horizontal Gaze Nystagmus Test: The State of the Science in 1995, C. Honts and S. Amato-Henderson, *North Dakota Law Review* 71:671 (1995).
 7. Breath-Alcohol Concentration May Not Always Reflect the Concentration of Alcohol in Blood, D. Trafford and H. Makin, *Journal of Analytical Toxicology* 18:225 (1994).
 8. Uncertain Validity of Widmark Calculations for Estimating Blood Alcohol Concentration (Letter to the Editor), G. Simpson, *Journal of Analytical Toxicology* 13:374 (1989).
- Reinvestigation of Widmark's Method for Quantitative Evaluation

- of Blood-Ethanol Profiles: Influences of Alcohol Dose and Mode of Drinking, A. Jones and A. Neri, *Clin Chem* 33:1469 (1987).
9. Dubowski, 21(1) *Journal of Forensic Sciences* 9 (January 1976).
 10. Sex Differences in the Metabolism of Ethanol and Acetaldehyde in Normal Subjects, M. Arthur, A. Lee, L. Wright, *Clinical Science* 67:397 (1984).
 11. Limited Electromagnetic Interference Testing of Evidential Breath Testers, U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT HS-806-400, May 1983.
 12. Sex Differences in the Metabolism of Ethanol and Acetaldehyde in Normal Subjects, M. Arthur, A. Lee, L. Wright, *Clinical Science* 67:397 (1984).
 13. Comparison of Plasma, Serum, and Whole Blood Ethanol Concentrations, C. Winek and M. Carfagna, *Journal of Analytical Toxicology* 11:267 (1987).
 14. 46 *American Journal of Clinical Nutrition* 668 (1987).
 15. *Miranda v. Arizona*, 384 U.S.436; *Berkemer v. McCarty*, 468 U.S.420.

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