CHAPTER 47

JUNE, 2011

Operating Under the Influence

Written by R. Marc Kantrowitz (1st edition)
and Timothy E. Maguire (this revision)

Table of Contents:

Cross-references:
Civil consequences of criminal cases, ch. 43
Confessions, ch. 19
Delayed citations, § 23.1A
Directory of sentencing alternatives, ch. 39
Drug recognition police "experts", §12.11A
Forensic evidence, ch. 12
Roadblocks, § 17.6

§ 47.1 INTRODUCTION

Since the mid-1980s, the Massachusetts Legislature has dramatically raised the stakes for those charged with operating under the influence.[1] Indeed, the OUI law has evolved into a lengthy, detailed, and intricate statutory scheme. The sanctions it provides have become ever harsher and harder to avoid, with automatic pretrial license suspensions, enhanced penalties for operators under the age of twenty-one, substantial fines, and mandatory minimum prison terms.[2] It is essential for counsel to become familiar with the complexities of the statute and applicable administrative regulations in order to properly advise and represent clients charged with operating under the influence of alcohol.[3]

§ 47.2 ELEMENTS OF THE CRIME

In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

[1] The most dramatic changes occurred in 1986, with the adoption of "An Act Relative to Improving Highway Safety on the Highways and Roads of the Commonwealth," otherwise known as the Safe Roads Act. 1986 Mass. Acts c. 620. Further substantial change followed in 1994 with the passage of "An Act Increasing the Penalties of Operating a Motor Vehicle While Under the Influence of Alcohol," 1994 Mass. Acts c. 25, 2003 with "An Act to Protect Federal Transportation Funding and Strengthen Drunk Driving Laws," 2003 Mass. Acts c. 28, and 2005 with "An Act Increasing Penalties for Drunk Drivers in the Commonwealth," more popularly known as "Melanie's Law." 2005 Mass. Acts c. 122.

[2] For a graphic display of dispositional alternatives in OUI cases, *see infra* § 47.10 and the chart, "OUI at a Glance," at the end of the chapter.

[3] This chapter is limited to OUI-related criminal matters and does not address civil motor vehicle infractions. Certain other OUI-related matters, including search and seizure, roadblocks and the standard for the introduction of scientific evidence, are addressed only briefly in this chapter, with references to more detailed discussions elsewhere in this book.

First: That the defendant operated a motor vehicle;

Second: That the defendant did so (on a way) (or) (in place where the public has a right to access) (or) (in a place where members of the public have access as invitees or licensees); and

Third: That while the defendant was operating the vehicle, he (she) either was under the influence of intoxicating liquor or the percent of alcohol in his (her) blood was eight one-hundreths or greater, by weight.[4] This third element provides two alternatives for conviction: (1) the "operating under the influence" alternative; and/or (2) the "per se" alternative.[5]

Other statutes cover aggravated OUI crimes.[6]

§ 47.3 PUBLIC WAY

Proof of public way[7] in OUI cases is shown in one of three manners:

1. A certificate by the proper authority stating that the way is, in fact, public;[8]

2. By testimony, generally offered through a police officer, that the way contained indicia of its being public, such as the way having lights, curbs, crossroads, houses by it, traffic, hydrants, railroad tracks, concrete paving, connecting roads, and the like;[9]

3. By stipulation between the parties.

Perhaps the main reason why defense attorneys often routinely stipulate to public way is the ease of proof. However, before agreeing to a request to stipulate, one might inquire of the assistant district attorney what he or she intends to offer in return.

The following should also be borne in mind:

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[4] District Courts Criminal Model Jury Instructions, Instruction 5.300 (revised May 2011).

[5] G.L. c. 90, § 24(1)(a)(1) (amended by 2003 Mass. Acts c. 28, sec. 1 to create these two alternative theories).

[6] *E.g.,* G.L. c. 90, § 23 (operation of motor vehicle after suspension or revocation due to OUI); G.L. c. 90, § 24L (OUI causing serious injury); G.L. c. 90, § 24(G)(b) (motor vehicle homicide while under influence).

[7] G.L. c. 90, § 1 defines way as "any public highway, private way laid out under authority of statute, way dedicated to public use, or way under the control of park commissioners or body having like powers."

[8] G.L. c. 233, § 79F, which states in full: "A certificate by the secretary of the public works commission in the case of a state highway, or the secretary of the metropolitan district commission in the case of a highway under the control of said commission, or by a city or town clerk in the case of a city or town way, that a particular way is a public way as a matter of record shall be admissible as prima facie evidence that such a way is a public way."

[9] Commonwealth v. Mara, 257 Mass. 198 (1926). *See also* Commonwealth v. Colby, 23 Mass. App. Ct. 1008, 10110 (1987) (the asphalt/concrete way in question had traffic lanes, overhead street lights, and hydrants); Commonwealth v. Hazelton, 11 Mass. App. Ct. 899, 900 (1980) ("No Parking" signs, testimony that the town regularly maintained the road, and documentary evidence allowed the jury to infer public way); Commonwealth v. Charland, 338 Mass. 742, 744 (1959) (rotary had 10-foot sign "Rotary, Keep Right"; curbing with flashing yellow light and five highways ran into it from various directions).

1. If the prosecutor does in fact secure a certificate indicating a way is public in compliance with the relevant statute, G.L. c. 233, § 79F, the attorney should ensure that it encompasses the date of the offense.

2. The attorney should also pay close attention to the evidence tendered at trial, to make certain that it complies with the way stated in the complaint. "The offense must not only be proved as charged, but it must be charged as proved."[10]

If the defendant is charged with operating a motor vehicle on a public way when in fact it was operated "in any place to which members of the public have access as invitees or licensees,"[11] such as a parking lot, then the Commonwealth has not proven its case and the defendant should be found not guilty.[12]

Similarly, if the complaint alleges a way where members of the public have access as invitees, this must be proved.[13] In determining whether the Commonwealth has sustained this burden, the following should be considered:

> It is the status of the way, not the status of the driver, which the statute defines. . . . No specific license or invitation need be granted to the particular driver charged with violating the statute, i.e., it is sufficient if the physical circumstances of the way are such that members of the public may reasonably conclude that it is open for travel to invitees or licensees of the abutters.[14]

The same physical indicia that are considered under the "public way" portion of the statute apply.[15] "If the invitation or license is one that extends (or appears, from the

[10] Commonwealth v. Ancillo, 350 Mass. 427, 430 (1966), citing a litany of cases. However, in Commonwealth v. Geisler, 14 Mass. App. Ct. 268, 275 (1982), the court held that a variance did not require acquittal if the essential elements are correctly stated, unless prejudice has resulted. The name of the way was not found to be an essential element. *See also supra* § 20.7; NOLAN & HENRY, 32 MASSACHUSETTS PRACTICE (CRIMINAL LAW) § 554, at 361 (1988).

[11] G.L. c. 90, § 24(1)(a)(1).

[12] Commonwealth v. Langenfeld, 1 Mass. App. Ct. 813 (1973) ("Private property to which the public has access only by virtue of being invitees is not a place to which the public has a right of access"); NOLAN, 32 MASSACHUSETTS PRACTICE (CRIMINAL LAW) § 554 (1988). *See also* Commonwealth v. George, 406 Mass. 635 (1990) (baseball field not public way).

[13] Commonwealth v. Callahan, 405 Mass. 200 (1989).

[14] Commonwealth v. Hart, 26 Mass. App. Ct. 235, 237-38 (1988). *See also* Commonwealth v. Smithson, 41 Mass. App. Ct. 545, 549 (1996).

[15] *See* Commonwealth v. Hart, 26 Mass. App. Ct. 235, 238 (1988); Commonwealth v. Smithson, 41 Mass. App. Ct. 545, 549–50 (1996). In *Hart*, the court found a private way generally used by the public, bordered by numerous businesses, intersected by side streets, and only occasionally closed off, to be a place to which members of the public have access as invitees or licensees. In contrast, the *Smithson* court held that a dirt road leading into a privately owned sand and gravel business, the entrance to which was marked by a chain link fence, an open gate, and a sign announcing the business hours, and the length of which was lined with telephone poles and fire hydrants, was not a place to which the public could reasonably expect to have access as invitees or licensees on the Memorial Day holiday. *See also* Commonwealth v. Kiss, 59 Mass. App. Ct. 247 (2003) (shopping mall parking lot, even during hours that the mall shops are closed, is a way or place to which members of the public have access as invitees or licensees); Commonwealth v. Brown, 51 Mass. App. Ct. 702 (2001) (finding, based upon a number of "characteristics of the way", that the roads of the Massachusetts Military Reservation on Cape Cod are ways to which members of the public have access as invitees or licensees). *Compare* Commonwealth v. Virgilio, 79 Mass. App. Ct. 570 (2011) ("a private driveway and

character of the way, to extend) to the general public, the way is covered; if instead the license or invitation is privately extended to a limited class, the way is not covered."[16]

A car with two wheels on a public way and two wheels in the sand by the side of the way has been held to be on a "public way" for purposes of the statute.[17] Query whether the same would be true for a car partly on and partly off a place to which the public has access as invitees or licensees.

§ 47.4 OPERATION

This second of three elements is broadly defined. It includes situations "in which a vehicle is caused to move without the power of its engine."[18] A second manner defines operation as "[the intentional act or use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of that vehicle,"[19] or as more recently paraphrased, "starting its engine or . . . making use of the power provided by its engine."[20]

"[A] third situation grows out of cases such as *Commonwealth v. Henry,* 229 Mass. 19 (1918), where the court stated: 'The word "operated" is not . . . limited to a state of motion produced by the mechanism of the car, but includes at least ordinary

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parking area that only serves two residences, containing three dwelling units in total" not a way or place to which members of the public have access as invitees or licensees); Commonwealth v. Stoddard, 74 Mass. App. Ct. 179, rev. denied 454 Mass. 1106 (2009) (roads within gated campground not a way or place to which members of the public have access as invitees or licensees); Commonwealth v. George, 406 Mass. 635 (1990) (baseball field not a place to which public had a right of access as invitees or licensees); Commonwealth v. Callahan, 405 Mass. 200 (1989) ("sandpits"/go-cart lot held, due to facts of the case, not place to which public had access as invitees or licensees).

[16] Commonwealth v. Stoddard, 74 Mass. App. Ct. 179, 182-83, rev. denied 454 Mass. 1106 (2009) (roads within gated campground not a way or place to which members of the public have access as invitees or licensees).

[17] Commonwealth v. Ginnetti, 400 Mass. 181, 184 (1987).

[18] Commonwealth v. Cavallaro, 25 Mass. App. Ct. 605, 609 (1988). This was first established in Commonwealth v. Clark, 254 Mass. 566, 568 (1926), in which the court noted that the mere shifting of gears, causing the car to move, is operation despite the fact that the engine is not on. "To operate a motor vehicle upon a way in violation of the statute, it is not necessary that the engine should be running. The engine of a motor vehicle may cease to run while it is going down a hill, but the vehicle may remain within the control of the driver and he may operate it, under these conditions." *Clark, supra,* 254 Mass. at 568.

[19] Commonwealth v. Uski, 263 Mass. 22, 24 (1928); Commonwealth v. Cavallaro, 25 Mass. App. Ct. 605, 608 (1988). *Cf.* Commonwealth v. Plowman, 28 Mass. App. Ct. 280, 284 (1990) (reversing conviction because, contrary to trial court's instruction, evidence that intoxicated person was . . . sleeping in the driver's seat of a parked vehicle, with keys in the ignition and the engine running, by itself, does not mandate a finding of 'operation'," which is an issue that should have been left to jury).

[20] Commonwealth v. Ginnetti, 400 Mass. 181, 184 (1987) ("a vehicle with a functioning engine is not inoperable . . . merely because it is immovable due to road or other conditions not involving the vehicle itself").

stops upon the highway, and such stops are to be regarded as fairly incidental to its operation.' "[21]

In *Commonwealth v. Cavellaro,*[22] the source of the above quote, the appellate court reversed a conviction as the trial judge failed to instruct the jury along these lines when the facts so warranted it. The court ruled that

> [if the jury] believed the defendant's testimony, it was open for the jury to find that, after purchasing his cigarettes, the defendant remained to visit with the attendant for a period of such duration that at the time of his arrest *the stop* at the [gas] station *was no longer incidental to his operation of the truck.*[23]

So, too, circumstantial evidence may be shown to prove operation. In *Commonwealth v. Wood,*[24] the sole occupant of a car was found immediately after the accident slumped over the driver's seat. The car's engine was not running and the car was not moving. The defendant's conviction was affirmed.[25]

The common theme running throughout the court cases wherein circumstantial evidence is held sufficient is the fact that the defendant was either alone in his car when discovered by the police[26] or had sole control of the motor vehicle during the crucial time period.[27]

Accordingly, if a second individual can be placed in the motor vehicle while it was allegedly being driven by an intoxicated individual, the chances for acquittal rise dramatically. In *Commonwealth v. Mullen,*[28] evidence in the form of ownership and consciousness of guilt could not overcome the presence of two individuals in the car.[29]

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[21] Commonwealth v. Cavallaro, 25 Mass. App. Ct. 605, 609 (1988). In footnote 2, accompanying the quote, the court mentioned two additional cases illustrating this point, Cook v. Crowell, 273 Mass. 356, 358 (1930), and Blair v. Boston Elevated Ry., 310 Mass. 1, 3 (1941).

[22] 25 Mass App. Ct. 605 (1988).

[23] Commonwealth v. Cavallaro, 25 Mass. App. Ct. 605, 610 (1988) (emphasis added).

[24] 261 Mass. 458, 459 (1927).

[25] Commonwealth v. Wood, 261 Mass. 458, 459 (1927). Fifty years after *Wood,* in Commonwealth v. Colby, 23 Mass. App. Ct. 1008 (1987), the appellate court also confirmed a conviction after finding a somewhat similar set of circumstances. "From the fact that the defendant was found alone in the front seat of the automobile with his feet near the driver's side and his head towards the passenger's side, [t]he jury could infer [the defendant] lay down in that position directly from [his] position sitting in the driver's seat." Co*lby, supra,* 23 Mass. App. Ct. at 1011 (quoting Commonwealth v. Hilton, 398 Mass. 63, 67 (1986)). Distinguishing *Colby* from *Wood,* if only in fact and not result, was that the lights were on and the motor was running in *Colby. See also* Commonwealth v. Sudderth, 37 Mass. App. Ct. 317 (1994) (operation inferable where defendant found passed out in driver's seat of vehicle legally parked on public way, with key in ignition and engine running).

[26] Commonwealth v. Hilton, 398 Mass. Ct. 63, 67 (1986).

[27] Commonwealth v. McNelley, 28 Mass. App. Ct. 985, 987 (1990) (rescript) (defendant found standing alone outside vehicle); Commonwealth v. Smith, 368 Mass. 126, 128 (1975); Commonwealth v. Geisler, 14 Mass. App. Ct. 268 (1982); Commonwealth v. Rand, 363 Mass. 554 (1973).

[28] 3 Mass. App. Ct. 25 (1975).

[29] In *Mullen,* the defendant survived a car accident wherein his roommate, the second occupant, was killed. The defendant owned the car and admitted driving it some six hours before the accident. When the police discovered him over the side of an embankment, 10 to 15

Even a defendant's uncorroborated admission to operation was insufficient by itself when he and another were found standing outside of the car.[30]

In *Commonwealth v. Shea,*[31] the two main witnesses "could [not] tell who was the operator of the Shea vehicle or how many persons were in that vehicle."[32] Although circumstantial proof of operation in the above quoted case was strong,[33] the court reversed:

> While it is not necessary to prove that the defendant had the exclusive opportunity to commit the crimes, and while the inferences need not be inescapable or necessary, yet the evidence must be such as to convince a jury beyond a reasonable doubt that the defendant, and no one else, committed the offenses charged. When the evidence, as here "tends equally to sustain either of two inconsistent propositions [the guilt or innocence of the defendant], neither of them can be said to have been established by legitimate proof."[34]

§ 47.5 INTOXICATING LIQUOR OR SPECIFIED DRUGS

G.L. c. 90, § 24(1)(a)(1), penalizes driving while influenced by intoxicating liquor; or marijuana, narcotic drugs,[35] depressants, or stimulant substances defined in c.

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feet from the car, semiconscious and bleeding, he denied knowing the deceased and explained that his injuries were caused when he was hit by a car while walking along the side of the road.

The passenger side door was open and the deceased was "in a U-shape, his right foot under the engine." The court, in reversing the conviction, found that "[i]f anything, the fact that the defendant was apparently thrown clear of the automobile through the door on the passenger side while the deceased remained in the automobile is some indication that the defendant was sitting in the passenger seat rather than in the driver's seat." Commonwealth v. Mullen, 3 Mass. App. Ct. 25, 26 (1975).

[30] Commonwealth v. Leonard, 401 Mass. 470 (1988). This is an application of the rule that an uncorroborated confession is insufficient to prove guilt. Commonwealth v. Forde, 392 Mass. 453, 457 (1984). *Compare* Commonwealth v. O'Connor, 420 Mass. App (1995) (admission corroborated by confirmation from witnesses, circumstances surrounding the accident, and "defendant's cooperation with the field sobriety tests") *with* Commonwealth v. McNelley, 28 Mass. App. Ct. 985, 987 (1990) (rescript) (admission corroborated where defendant found at 3:10 A.M. standing alone outside vehicle with two flat tires, and no other persons or vehicles were in vicinity except for police). *See supra* § 19.3F (discussing corroboration of confession requirement).

[31] 324 Mass. 710 (1949).

[32] Commonwealth v. Shea, 324 Mass. 710, 712 (1949).

[33] Not the least of which were the facts that the car, which was registered to Shea's wife, was abandoned one and three-quarter miles from the accident, Shea made a telephone call from a house on a large chicken farm located 300 yards past the point where the car was found and he "was very wet and he had chicken feathers on his trousers." Commonwealth v. Shea, 324 Mass.710, 712 (1949).

[34] Commonwealth v. Shea, 324 Mass. 710, 713 (1949). *See also* Commonwealth v. Leonard, 401 Mass. 470 (1988), (citing Commonwealth v. Forde, 392 Mass. 453, 457 (1984), and holding defendant's admission of drinking is an "uncorroborated confession" insufficient to prove guilt).

[35] *See* Commonwealth v. Green, 408 Mass. 48 (1990) (conviction reversed because no proof, nor was judicial notice taken of fact, that codeine is narcotic drug as defined in statute);

94C;[36] or glue vapors. Although any nonlisted medicine containing enough alcohol to influence a person fits within the definition of "intoxicating liquor,"[37] a defendant who is reasonably unaware of its intoxicating effect is not "voluntarily intoxicated" and therefore does not fulfill the mens rea requirement.[38] However, criminal liability can be imposed under circumstances where the evidence establishes that a defendant had reason to know of a drug's possible effects on his or her driving ability.[39]

Where a nonlisted intoxicating drug was combined with liquor, a defendant may be found guilty of OUI as long as the liquor was *one* of the causes of the diminished capacity.[40]

§ 47.6 "UNDER THE INFLUENCE" *OR* "PER SE"

Previously, the prosecution could satisfy the third element of an OUI offense under 90 G.L. c. 24(1)(a)(1) by only one means; namely, establishing that the defendant operated a motor vehicle "while under the influence of intoxicating liquor." In turn, the prosecution could attempt to make this showing by, among other things, submitting evidence that the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense was eight one-hundreths (.08) or greater. Upon properly establishing a blood-alcohol level of .08 or greater, by either chemical test or analysis of the defendant's blood or breath, a jury was to be instructed that they *could* draw a "permissible inference" that the defendant was under the influence of intoxicating liquor.[41]

Commonwealth v. Finegan, 45 Mass. App. Ct. 921 (1998) (absent evidence that heroin was a narcotic drug, or judicial notice of that fact, essential element was not proven).

[36] *See* Commonwealth v. Ferola, 72 Mass. App. Ct. 170, 173 (2008) ("We reject the Commonwealth's contention that it was sufficient to establish that the defendant was under the influence of depressants without establishing that the depressants in question are drugs containing any substance designated by the United States Attorney General as having a potential for abuse. The Commonwealth's proffered interpretation would read out of the statute the words 'as defined in section one of chapter ninety-four C" as detailed in G.L. c. 90, § 24(1)(*a*)(1)…. Even if Klonopin were a substance so designated in the United States Attorney General's regulations, see 21 C.F.R. § 1308.14 (2006), no such proof was adduced at trial. The Commonwealth neither introduced expert testimony to that effect, offered the regulations in evidence, nor asked the judge to take judicial notice of the regulations so that he might submit them to the jury for determination.").

[37] Commonwealth v. Bridges, 285 Mass. 572, 574 (1934); Commonwealth v. Williams, 19 Mass. App. Ct. 915, 916 (1984) (rescript).

[38] Commonwealth v. Wallace, 14 Mass. App. Ct. 358, 360–65 (1982) (negligent intoxication enough); Commonwealth v. Williams, 19 Mass. App. Ct. 915, 916 (1984) (rescript); Commonwealth v. Dale, 264 Mass. 535, 537 (1928).

[39] Commonwealth v. Reynolds, 67 Mass. App. Ct. 215, 222, *review denied,* 447 Mass. 1112 (2006) ("[T]here was sufficient evidence that the defendant was well aware of the potentially adverse effects of all three scheduled drugs, as evidenced by the written warnings she received with each prescription, her dentist's usual practice of cautioning his patients to avoid driving while taking Percocet, and also from the defendant's own acknowledged previous experience with the sedating effects of her medication.")

[40] Commonwealth v. Stathapoulos, 401 Mass. 453, 456–57 (1988).

[41] The "permissible inference" was set forth in G.L. c. 90, § 24(1)(e).

In 2003, however, the Legislature did away with the "permissible inference" and replaced it with a "per se" rule; namely, that proper evidence that the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense was eight one-hundreths (.08) or greater is sufficient, in and of itself, to satisfy the third element of an OUI offense under 90 G.L. c. 24(1)(a)(1).[42] Accordingly, there are now two alternatives to satisfy the third element: (1) the "operating under the influence" alternative; and (2) the "per se" alternative. "The two alternatives comprise a single offense that may be committed in two different ways. The 'operating under the influence' alternative requires proof of operation with a diminished *capacity* to operate safely, but not proof of any specific blood alcohol level, while the 'per se' alternative requires proof of operation with a blood alcohol level of .08% or greater but not proof of diminished capacity."[43]

"Under the influence": This is the element most commonly and vigorously attacked by the defense. In *Commonwealth v. Connolly*[44] the court shifted "the focus from the subjective feelings of the operator to a proposed objective standard of diminished capacity to operate a motor vehicle safely":[45]

> [I]n the present case the judge correctly instructed the jury that to be driving while under the influence of liquor a person need not be drunk [nor be driving] unskillfully or carelessly, and that "[t]he statute says that the intake of alcohol must adversely affect the person."
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> However, the judge went too far when, following Model Instruction 5.10, he charged the jury that "[b]eing under the influence . . . means that a person . . . was influenced in some perceptible degree by the intake of alcoholic beverages," and he exacerbated that error when he explained his statement by hypothesizing a case in which a person drinks liquor, drives, and as a result of the liquor suddenly feels "slightly lightheaded," "slightly depressed," or "slightly happier" than that person would feel in the absence of liquor. . . . [Rather,] the Commonwealth must prove beyond a reasonable doubt that the defendant's consumption of alcohol diminished the defendant's *ability* to operate a motor vehicle safely. The Commonwealth need not prove that the defendant *actually drove* in an unsafe or erratic manner, but it must prove a diminished *capacity* to operate safely.[46]

How one proves such diminished capacity is the key and difficult question. Typical evidence proffered by the prosecution is the breathalyzer and field sobriety

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[42] G.L. c. 90, § 24(1)(a)(1) and (e), as amended by 2003 Mass. Acts c. 28, secs. 1 and 3-4. *See also* G.L. c. 90, § 24(1)(e) (evidence of a blood alcohol level of .08 or greater "shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor).

[43] District Courts Criminal Model Jury Instructions, Instruction 5.300 n.1 (revised May 2011) (citing and quoting Commonwealth v. Colturi, 448 Mass. 809 (2007) and Commonwealth v. Connolly, 394 Mass. 160, 173 (1985)).

[44] 394 Mass. 169 (1985).

[45] "The Law Applicable to the Trial of Operating under the Influence Cases in the Six Man Jury Act," DEFENDING THE DRINKING DRIVER UNDER THE NEW OUI LAW "SAFE ROADS ACT," 68 (MCLE 1987).

[46] Commonwealth v. Connolly, 394 Mass. 169, 172–73 (1985) (emphasis in the original).

tests.[47] Hospital records of blood tests performed in the course of routine medical treatment are another source,[48] as is the direct testimony of an individual who performed a blood test on the defendant.[49] The Supreme Judicial Court has also affirmed a trial judge's decision to allow the prosecution to present evidence through an expert regarding retrograde extrapolation analysis of a defendant's blood alcohol level.[50] Retrograde extrapolation "is a mathematical calculation used to estimate a person's blood alcohol level at a particular point in time by working backward from the time the blood alcohol test was taken, taking into consideration rates of both absorption and excretion." [51]

§ 47.7 THE BREATHALYZER

§ 47.7A. DEFENDANT MAY REFUSE A BREATHALYZER TEST

[47] In some jurisdictions, police are trained and certified as "drug recognition experts," purportedly qualified in the use of field procedures to assess a suspect's impairment due to use of narcotic drugs. The technique has been called "laughable." *See "Drug Influence Evaluation" Labeled Pseudo Science*, 5 BNA Crim. Prac. Man. 611 (1991). *See generally supra* § 12.3B (competency of experts) and § 12.11A (police as drug recognition experts).

[48] *Compare* Commonwealth v. Dube, 413 Mass. 570 (1992) (records of results of hospital blood test performed "as a routine medical procedure" are admissible under G.L. c. 233, § 79 in the trial judge's discretion) w*ith* Commonwealth v. Sheldon, 423 Mass. 373, 377 (1996) (records of results of hospital blood test *not* performed in course of routine medical practice or "to assist in the achievement of any medical goal" are not admissible under G.L. c. 233, § 79). Interestingly, in *Sheldon* the doctor had performed a blood test merely to prove that the defendant was not intoxicated and not for any medical purpose or pursuant to any hospital protocol. *Sheldon, supra*, 423 Mass. at 375. In Commonwealth v. McLaughlin, 79 Mass. App. Ct. 670, 675 (2011), the Appeals Court neatly summarized what portions of hospital records are and are not admissible:

> Objectively determinable facts resulting from medical tests and procedures conducted for diagnostic and treatment purposes and appearing in hospital records submitted under the statute may obviously bear on the ultimate question of civil or criminal liability but do not constitute improper allegations, opinions, or conclusions about liability. Subjective impressions or expressions about fault or guilt may not come in through such records. Trial judges will typically filter them out of the records. That material constitutes the forbidden reference to the question of liability. By contrast, objective data constitute reliable information helpful to the fact finder upon issues of a technical medical nature. The test is the distinction between a conclusory fact central to the jury's inquiry and physical observations from which inculpatory inferences flow…. The blood alcohol test reading belongs to the latter category of "physical observations." (internal citations and quotation marks omitted).

[49] *See* Commonwealth v. Sheldon, 423 Mass. 373, 377 (1996) (even if records of blood test results do not satisfy standard for admissibility under G.L. c. 233, § 79, the results may still be admitted through the testimony of the person who conducted the test or the attending physician).

[50] Commonwealth v. Senior, 433 Mass. 453 (2001) (finding that the trial judge first properly determined that the prosecution satisfied the standard for the admission of such scientific evidence).

[51] Commonwealth v. Senior, 433 Mass. 453, 459 (2001) (citing R.J. Kenney, Jr.,& T..J. Farris, Motor Vehicle Law and Practice sec. 24.14 (3d ed. 1998)).

Ordinarily, a breath test is used to determine the percentage weight of alcohol in the blood for purposes of establishing a "per se" offense or that the defendnat was operating under the influence of intoxicating liquor. While the length of the pretrial license suspensions imposed for doing so have increased dramatically in recent years (*see infra* § 47.10), a defendant *may refuse* the test[52] explicitly or constructively,[53] but the defendant does not have a right to counsel's assistance in making this decision.[54] The jury may not be informed of the refusal.[55] Nor should the jury be given the statutorily mandated, but unconstitutional, instruction concerning the absence of any evidence concerning the percentage, by weight, of alcohol in the defendant's blood.[56] The Appeals Court, however, has approved of the following instruction given by a trial judge regarding the lack of evidence of a breathalyzer: "You are not to mention or consider in any way whatsoever, either for or against either side, that there is no evidence of a breathalyzer. Do not consider that in any way. Do not mention it. And put it completely out of your mind." [57]

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[52] .L. c. 90, § 24(1)(e).

[53] A noncooperative defendant who obstructs a test at any time may be found to have effectively refused the test. Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 137–38 (1986); 501 C.M.R. 2.51, 2.56(2).

[54] Commonwealth v. Brazelton, 404 Mass. 783, 785 (1989). *But see* Commonwealth v. Mencoboni, 28 Mass. App. Ct. 504, 506-07 & n.2 (1990) (fundamentally unfair for police to interfere with defendant's access to a specific at
prior to decision regarding the test; because no prejudice or improper police motive, dismissal not warranted, but trial court may allow defendant to present evidence at trial of "circumstances attending his failure to take the test to explain the absence of potentially exculpatory evidence," and to exclude Commonwealth evidence of defendant's demeanor while at station). See *also Mencoboni, supra,* 28 Mass. App. Ct. at 508–10 (Brown, J., dissenting) (arguments for dismissal).

[55] G.L. c. 90, § 24(1)(e) ("Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding"); Opinion of Justices, 412 Mass. 1201, 1209–11 (1992). In 1983, the U.S. Supreme Court held that statutes, like that in Massachusetts, that give an OUI suspect the option of either taking a breath analysis test or suffering some form of penalty do not compel but rather encourage the person to take the test and thus do not run afoul of the Fifth Amendment. South Dakota v. Neville, 459 U.S. 553, 564 (1983). In *Opinion of the Justices*, the S.J.C. rejected this reasoning, holding that refusal of a breathalyzer test amounts to "compelled" testimonial evidence that runs afoul of the Mass. Const. Declaration of Rights art. 12 and is thus inadmissible. Opinion of Justices, *supra,* 412 Mass. at 1209–11. *See also* Commonwealth v. Seymour, 39 Mass. App. Ct. 672, 675 (1996) (reversible error for prosecutor to ask defendant on cross-examination whether she had taken breathalyzer test); Commonwealth v. Yameen, 401 Mass. 331 (1987) (while no error where prosecution introduced evidence of refusal suspension after defendant opened door by claiming that taking test showed consciousness of innocence, entire subject of refusal to take blood test should be avoided).

[56] Commonwealth v. Zevitas, 418 Mass. 677 (1994) (jury instruction required by G.L. c. 90, § 24(1)(e), implying that defendant had refused to consent to test for blood alcohol level, violated defendant's art. 12 rights); Comm
Zevitas retroactively where defendant properly preserved issue at trial); Commonwealth v. D'Agostino, 421 Mass. 281 (1995) (applying Zevitas *vitas* retroactively where "clairvoyance exception" excused counsel's failure to object at tri
289 (1995) (*Zevitas* not retroactive; defendant inexcusably failed to preserve issue at trial).

[57] Commonwealth v. Downs, 53 Mass. App. Ct. 195, 198 (2001) ("We cannot close our eyes to the fact that there is widespread public information and common knowledge about breathalyzer testing .. . . It was, therefore, not incorrect for the trial judge to conclude that he

§ 47.7B. NEED FOR EXPERT TESTIMONY REGARDING RETROGRADE EXTRAPOLATION

Prior to 2003, Massachusetts courts "had not required expert testimony on retrograde extrapolation as a prerequisite to the admissibility of breathalyzer test results, and consistently ruled that any delay in the administration of the breathalyzer test goes to the weight of the evidence, not its admissibility."[58] In 2007, however, the Supreme Judicial Court considered whether the amendments to G.L. c. 90, § 24 enacted in 2003 required it to reconsider that longstanding position? The court responded in the negative:

> We conclude that expert testimony on the subject of retrograde extrapolation, which was not a prerequisite to the admission of the results of a properly administered breathalyzer test prior to the 2003 amendments, has not become such as a consequence of the amendments, so long as the test is conducted within a reasonable period of time after the driver's last operation of the vehicle. We also conclude that if the Commonwealth chooses to proceed only on an impaired ability theory [as opposed to a "per se" theory] and intends to offer evidence of a breathalyzer result of .08 or above, it must offer expert testimony on the significance of that level as it pertains to impairment.[59]

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should give some instruction to the jury about the absence of evidence of breathalyzer test results .. . . Unlike the impermissible instruction mandated by sec. 24(1)(e), the limiting instruction delivered in the instant case made no mention either of the defendant's legal right to refuse to take the breathalyzer or the possible reasons for any refusal. It is this difference which leads us to conclude that the instruction did not violate the defendant's art. 12 rights.")

[58] Commonwealth v. Colturi, 448 Mass. 809, 813-14 (2007) (citing Commonwealth v. Durning, 406 Mass. 485, 494 (1990)).

[59] Commonwealth v. Colturi, 448 Mass. 809, 811 (2007). The Supreme Judicial Court elaborated on the latter point as follows:

> [I]f the per se and impaired ability theories of criminal liability are charged in the alternative (as they were here) and so tried, we see no prejudice in the admission of breathalyzer test results without expert testimony establishing the significance of the test level to the degree of intoxication or impairment of the defendant. In such a case, the jury presumably would be instructed that if they find the defendant operated her motor vehicle with a blood alcohol content of .08 or greater, she is guilty of violating the OUI statute, and if they do not so find, they may still consider whether she violated the statute by operating while under the influence of intoxicating liquor. Relevant to this determination would be the statutory provision creating a permissible inference that the defendant was not operating while under the influence if the test results were .05 or less, and the lack of any permissible inference if the results were greater than .05 and less than .08.
>
> If, however, the Commonwealth were to proceed only on a theory of impaired operation and offered a breathalyzer test result of .08 or greater, without evidence of its relationship to intoxication or impairment and without the statutorily permissible inference of intoxication eliminated by the 2003 amendments, the jury would be left to guess at its meaning. We agree with the District Court judge that in such circumstances, the "prejudicial effect of such evidence [would outweigh] any possible probative value." While it is difficult to envision a situation in which the Commonwealth would proceed in this fashion, if it chooses to do so, it must present expert testimony establishing a

As to what amounts to a "reasonable" period of time, the Supreme Judicial Court has held that three hours between testing and operation is reasonable, but that "[t]he facts and circumstances in particular cases may establish that a lesser or greater time period ought to be applied. Such determinations fall within the sound discretion of the trial judge."[60]

§ 47.7C. BASES OF EXCLUSION OR CROSS-EXAMINATION

Breathalyzer instruments have historically been found to satisfy the Commonwealth's old "general acceptance" standard for admissibility of scientific evidence."[61] A recent attempt to attack the reliability of a specific breathalyzer instrutment under the more modern *Daubert* and *Lanigan* standards did not meet with success at the District Court level,[62] but the fight is ongoing and counsel are encouraged to continue to explore that avenue for suppressing breathalyzer results. In any event, the following requirements, if not complied with, may lead to suppression of the breathalyzer evidence or dismissal:[63]

1. Immediately after booking, notice of the right to an independent blood-alcohol test[64] at the defendant's expense.[65] Failure to observe this right may require dismissal in

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relationship between the test results and intoxication as a foundational requirement of the admissibility of such results.

448 Mass. at 817-18.

[60] Commonwealth v. Colturi, 448 Mass. 809, 816-17 (2007).

[61] Commonwealth v. Neal, 392 Mass. 1, 17 (1984). The "general acceptance" (or "*Frye*") test is discussed *supra* § 12.3A.

[62] In February 2011, District Court Judge Mark Sullivan issued an opinion in Commonwealth v. Daens, et al., a consolidated case wherein 61 defendants charged with OUI challenged the reliability of the Draeger Alcotest 7110 breathalyzer instrument, claiming that the source code within the instrument was not generally accepted within the scientific community. Judge Sullivan declined to hold a hearing, finding that the *Daubert* and *Lanigan* standards do not apply because the Legislature has expressly made breath test evidence admissible.

[63] For a detailed examination of the statutory and constitutional safeguards relating to the breathalyzer, see Murphy, The Role of Massachusetts State Constitutional Law in Litigation Strategies for the Trial of Drunk Driving Cases Under the "Safe Roads Act" of 1986, 72 MASS. L. REV. 120 (Winter 1987).

[64] G.L. c. 263, § 5A says that one has the right "at his request and at his expense, to be examined immediately by a physician selected by him." *See also* Commonwealth v. Gruska, 30 Mass. App. Ct. 940, 941–42 (1991) (rescript) (absent exceptional circumstances, strict compliance with statutory requirement that defendant be given a copy of the statute, unless a copy is conspicuously posted at the station, "should be the unaltered practice"); Commonwealth v. Carey, 26 Mass. App. Ct. 339, *rev. denied*, 403 Mass. 1102 (1988); Commonwealth v. Marley, 396 Mass. 433, 440–41 (1985) (notice not required where directly hospitalized since "no booking"). The statute further requires that the defendant have a reasonable opportunity to exercise this right, which may include more than one telephone call (Commonwealth v. Alano, 388 Mass. 871, 879-80 (1983)), but does not create an affirmative duty to help the accused obtain a test. Commonwealth v. Falco, 43 Mass. App. Ct. 253, 256 (1997) (citation omitted) (onus on arrestee to arrange for test); Commonwealth v. McIntyre, 36 Mass. App. Ct. 193, 203–04 (1994) (no duty to join defendant at nearby hospital, despite hospital's refusal to test without police present); Commonwealth v. Lindner, 395 Mass. 144 (1985). In order to provide that opportunity, the police must not obstruct the defendant's release on bail. C*ompare* Commonwealth v. Hampe, 419 Mass. 514, 520–21 (1995) (police are required to advise

some circumstances since the loss of evidence is irreplaceable, and suppression of the police test will not always be a sufficient remedy.[66] In a case where the defendant concedes the voluntariness of consent to the administration of the breathalyzer, evidence that the defendant was advised of his rights attendant to § 5A to an independent blood-alcohol test should not be made known to the jury.[67]

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defendant of the right to bail at the time of booking, and telephone a bail commissioner or allow defendant to do so in a timely fashion) *with* Commonwealth v. Troy, 38 Mass. App. Ct. 969 (1995) (even if police deliberately delayed calling bail commissioner, no violation unless they prevented defendant from seeking bail on his own). A defendant who fails to request an independent examination may be held to have waived his right to claim interference with the right. Commonwealth v. Chistolini, 422 Mass. 854 (1996); Commonwealth v. Finelli, 422 Mass. 860, 862 (1996) (G.L. c. 263, § 5A requires "some affirmative assertion of the right by the arrestee"); Commonwealth v. Falco, 43 Mass. App. Ct. 253, 256 (1997). On the intersection between the right to bail and the right to an independent examination, *see generally supra* § 9.6 and note 27.5 (pretrial release).

If no breathalyzer test is given, "no right to an independent test [under G.L. c. 90, § 24 comes] into being" (Commonwealth v. Kelley, 404 Mass. 459, 465 (1989)), but the right to an examination under G.L. c. 263, § 5A is separate . . . and does not depend on the defendant's acceptance or rejection of a police-administered test." Commonwealth v. McIntyre, 36 Mass. App. Ct. 193, 201 at n.4 (1994).

The notice of the right to an independent medical exam required under G.L. c. 263, § 5A does not extend to an individual charged with operating under the influence of drugs. Commonwealth v. Mandell, 61 Mass. App. Ct. 526 (2004) (rejecting equal protection and due process arguments under Article 12 of the Massachusetts Declaration of Rights and the 6th and 14th Amendments to the United States Consitution).

[65] Commonwealth v. Tessier, 371 Mass. 828, 831 (1977) (no constitutional right to have state pay); Commonwealth v. Alano, 388 Mass. 871, 878 (1983).

[66] Commonwealth v. Hampe, 419 Mass. 514, 522–24 (1995) (factors include conduct of police, exigent circumstances of case, and other admissible evidence of guilt; remedy may include suppression of all police testimony) (citing Commonwealth v. Andrade, 389 Mass. 874, 877–82 (1983)). *Andrade* further holds that the burden of demonstrating lack of prejudice from the violation falls on the Commonwealth, which might do so by producing overwhelming evidence of intoxication. *Andrade, supra,* 389 Mass. at 879–80, 882. *See* Commonwealth v. Priestly, 419 Mass. 678 (1995) (assuming that police hampered defendant's right to seek release on bail, thereby violating his right under G.L. c. 263, § 5A, dismissal inappropriate because evidence of guilt was overwhelming); Commonwealth v. McIntyre, 36 Mass. App. Ct. 193, 202–03 (1994) (no dismissal where defendant, an attorney, was aware of his right to an independent examination); Commonwealth v. Ames, 410 Mass. 603, 607–08 (1991) (no prejudice where police transported defendant to a hospital in the middle of the night, where he refused to submit to a blood alcohol content test by neutral health care provider). The Commonwealth can require that booking procedures be completed before a defendant is afforded statutory rights, including right to independent blood alcohol test. Commonwealth v. Maylott, 43 Mass. App. Ct. 516, 518 (1997). *See also supra* § 16.6B (lost or destroyed evidence).

[67] Commonwealth v. Lopes, 459 Mass. 165, 173-74 (2011) ("In this case, the jury found Lopes guilty of OUI, based on the per se prong. The consent form, including the section detailing the suspect's right to an independent medical examination under § 5A, was admitted in evidence over the objection of Lopes's attorney. Lopes argues that this was error because the question whether the statutory predicates to admissibility were met, including whether he was informed of his § 5A right to a medical examination, was a foundational inquiry for the judge to consider, see G.L. c. 90, § 24 (1) (*e*), (*f*); G.L. c. 90, § 24K; G.L. c. 263, § 5A, and not an issue within the province of the jury's fact-finding duties. We agree.").

2. The police test must have been conducted with the defendant's consent after notice of the right to refuse.[68] "[A] a defendant's actual consent to breath and blood testing as a condition of admissibility of the results in evidence. The consent required is not the 'knowing, voluntary and intelligent' consent required for waiver of constitutional rights, but the consent of customary usage indicated by criteria such as verbal agreement to undergo, lack of objection to, or cooperation in the performance of, the [breath] testing."[69] Whether a defendant consented is a question of fact.[70]

3. The results were made available to the defendant on her request.[71]

4. The defendant was notified of her right to a telephone call "forthwith on arrival" at the station.[72]

5. Preservation of exculpatory evidence: Police are not required to provide a blood or breathalyzer test,[73] or preserve the breath sample or ampoules, *provided* that they are in good faith and that the defendant has been notified of the right to arrange her own test[74] and had practical access to one.[75] A break in the chain of custody will generally go to weight rather than admissibility.[76] Negligently misplaced videotapes, however, are grounds for cross-examination and may require dismissal.[77]

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[68] G.L. c. 90, § 24(1)(f) (notice of refusal; must include notice of 180-day licence revocation); G.L. c. 90, § 24(1)(e) (must be with consent of defendant).

[69] Commonwealth v. Carson, 72 Mass. App. Ct. 368, 370 (2008) (citations omitted).

[70] Commonwealth v. Carson, 72 Mass. App. Ct. 368, 371 (2008).

[71] G.L. c. 90, § 24(1)(e).

[72] G.L. c. 276, § 33A. In Commonwealth v. Bouchard, 347 Mass. 418, 420–21 (1964), the court stated that dismissal is not warranted under this section but suppression of resulting evidence may be required in particular circumstances. *See also* Commonwealth v. LeBeau, 451 Mass. 244, 257 (2008) ("It is settled that suppression is only an appropriate remedy for a violation of §33A when the evdience demonstrates that law enforcement officers intentionally withheld the defendant's telephone right in order to coerce the defendant or gain an advantage in the investigation."); Commonwealth v. Kelley, 404 Mass. 459, 461–63 (1989) (deaf defendant entitled to an interpreter pursuant to G.L. c. 221, § 92A to explain this right); Commonwealth v. Carey, 26 Mass. App. Ct. 339, *rev. denied,* 403 Mass. 1102 (1988) (if notice forthwith and call permitted within one hour, may complete booking or videotape before call). The Commonwealth can require that booking procedures be completed before a defendant is afforded statutory rights, including right to make a telephone call. Commonwealth v. Maylott, 43 Mass. App. Ct. 516, 518 (1997).

[73] Commonwealth v. Alano, 388 Mass. 871, 875–78 (1983); Commonwealth v. Andrade, 389 Mass. 874, 876 (1983). However, *Alano* might distinguish a good-faith reason, such as a machine's unavailability, from a deliberate attempt to deprive the defendant of evidence. *Andrade, supra,* 389 Mass. at 877.

[74] Commonwealth v. Neal, 392 Mass. 1, 7–14 (1984); Commonwealth v. Alano, 388 Mass. 871, 878 (1983).

[75] Commonwealth v. Alano, 388 Mass. 871, 878 (1983) (might be right to police test if defendant cannot afford independent test). *See also* Commonwealth v. Neal, 392 Mass. 1, 9 (1984) (insufficient evidence of lack of access to test). The Commonwealth can require that booking procedures be completed before a defendant is availed of statutory rights, including right to a breathalyzer test. Commonwealth v. Maylott, 43 Mass. App. Ct. 516, 518 (1997).

[76] Commonwealth v. Howe, 405 Mass. 332, 335 (1989) (blood sample).

[77] Commonwealth v. Cameron, 25 Mass. App. Ct. 538, 545–49 (1988). *See also supra* § 16.6B. *Cf.* Commonwealth v. Holman, 27 Mass. App. Ct. 830 (1989) (police negligently erased videotape; no dismissal as not wilful and no unfair prejudice).

6. Testing procedure: Obviously, the machine must be working properly.[78] The Commonwealth has the burden of establishing the admissibility of test results.[79] However, in light of the general acceptance of breathalyzer evidence (*see supra* text at note 52?), a defendant wishing to attack the reliability of a particular instrument or model previously considered reliable, must present evidence of unreliability in order to shift the burden of providing admissibility back to the Commonwealth.[80] Furthermore, under the Safe Roads Act as of July 1987, the test is invalid unless (a) an infrared-type breathalyzer was used,[81] (b) a confirmatory second test was given,[82] (c) the operator and the machine were certified, and (d) the test was conducted according to certain methods approved by the Secretary of Public Safety.[83] Also, breathalyzer results may not be introduced as evidence unless the Commonwealth proves that the device used has been periodically tested in accordance with a program for the periodic testing of certified breath-testing devices.[84] The standards required by this section may be found at 501 C.M.R. 2.01 et seq. The regulations underwent signficant revision (and truncation) in 2010. Nonetheless, the regulations still serve, at a minimum, as an essential starting point for defense counsel in preparing discovery requests and arguments to exclude or attack the reliability of breathalyzer test results and the law enforcement officers who administer them.

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[78] Commonwealth v. Cochran, 25 Mass. App. Ct. 260, 264 (1988).

[79] Commonwealth v. Marley, 396 Mass. 433, 439 (1985); Commonwealth v. Neal, 392 Mass. 1, 20, n.20 (1984); Commonwealth v. Durning, 406 Mass. 485 (1990).

[80] Commonwealth v. Neal, 392 Mass. 1, 20 n.20 (1984).

[81] G.L. c. 90, § 24K. *See also* Commonwealth v. Smythe, 23 Mass. App. Ct. 348, 349–51 (1987).

[82] G.L. c. 90, § 24K; 501 C.M.R. 2.14.

[83] G.L. c. 90, § 24K, reads in pertinent part:

"Chemical analysis of the breath of a person charged with a violation of this chapter shall not be considered valid under the provisions of this chapter, unless such analysis has been performed by a certified operator, using infrared breath-testing devices according to methods approved by the secretary of public safety. The secretary of public safety shall promulgate rules and regulations regarding satisfactory methods, techniques and criteria for the conduct of such test, and shall establish a statewide training and certification program for all operators of such devices and a periodic certification program for such breath testing devices; provided however, that the secretary may terminate or revoke such certification at his discretion.

"Said regulations shall include, but shall not be limited to the following: (a) that the chemical analysis of the breath of a person charged he performed by a certified operator using a certified infrared breath-testing device in the following sequence: (1) one adequate breath sample analysis; (2) one calibration standard analysis; (3) a second adequate breath sample analysis, (b) that no person shall perform such a test unless certified by the secretary of public safety; (c) that no breath-testing device, mouthpiece or tube shall be cleaned with any substance containing alcohol."

[84] Commonwealth v. Livers, 420 Mass. 556 (1995) (G.L. c. 90, § 24K requires only that the testing program be carried out in accordance with methods approved by the Secretary; the program may be expressed in regulations, but need not be) (citing Commonwealth v. Barbeau, 411 Mass. 782 (1992)). In response to *Barbeau*, the secretary of public safety established guidelines for a periodic testing program. *See* 501 Code Mass. Regs. § 2.41, as amended Feb. 13, 1992. *See Testing the Breath-Analysis Devices*, 20 M.L.W. 1058 (1992). The new policy prescribes detailed procedures for changing the simulator solution, calibrating the device afterwards, and documenting compliance with the policy. *See* Morris v. Commonwealth, 412 Mass. 861 (1992) (upholding the regulations).

Defense counsel should also thoroughly review all documents issued through the Office of Alcohol Training ("OAT"), an office within the Executive Office of Public Safety and Massachusetts Department of State Police Laboratory that, according to its own website, "oversees the breath test program for the state of Massachusetts. The OAT establishes and maintains lists of approved breath test devices in accordance with the Massachusetts General Laws (MGL) and the National Highway Traffic Safety Administration's (NHTSA) list of conforming products. The OAT also annually certifies all breath test equipment utilized in Massachusetts, approves and distributes all calibration standards used with breath test devices and establishes the standards for training and certification relative to breath testing." Was the breath testing device properly and timely certified?[85] Was the breath testing device properly calibrated? Was the law enforcement officer who administered the breath test properly trained and certified?[86] Was the breath test administered properly, including in an appropriate environment?[87] The regulations and OAT publications, guidleines, etc., are chock full of potential fodder for defense counsel.

"OAT certification records are nontestimonial, and their admission without the live testimony of the technician who prepared them [does[not violate the confrontation clause of the Sixth Amendment."[88]

The regulations provide that two breath tests must be administered to a suspect, the results of which are within +/-.02 blood alcohol content units of one another, or the a new test sequence must begin.[89] According to the regulations, the lower of the two breath sample results, truncated to two decimal places, is to be reported as the arrestee's

[85] For example, every breath test device must be certified by the OTA annually. 501 C.M.R. 2.06.

[86] Prior to the promulgation of G.L. c. 90, § 24s stringent requirements, it had been held that: "If the breathalyzer operator was minimally qualified to administer the test, any weaknesses in his or her knowledge and skill are matters of weight for the jury." Commonwealth v. Shea, 356 Mass. 358, 361, 252 N.E.2d 336, 338 (1969). The same rule applies to the administration of any particular test: if it was administered with at least minimal competence, any procedural weaknesses are matters of weight for the jury. Commonwealth v. Malloy, 15 Mass. App. Ct. 958, 446 N.E.2d 126 (1983) (rescript); Commonwealth v. Hazelton, 11 Mass. App. Ct. 899, 900 (1980) (rescript). Delays between the time of arrest and the giving of the breath test are also generally matters of weight, not of admissibility. Commonwealth v. Marley, 396 Mass. 433, 438–39, 486 N.E.2d 715, 718–19 (1985). JURY TRIAL MANUAL FOR CRIMINAL OFFENSES TRIED IN THE DISTRICT COURT § 4.04 (4th ed.) (1987) (available through MCLE, 20 West Street, Boston).

[87] 501 C.M.R. 2.13 sets forth certain requirements for the administration of a breather test, including that the breath test operator "observe the arrestee for no less than 15 minutes immediately prior to the administration of the breath test."

[88] Commonwealth v. Zeininger, 459 Mass. 775, 779, 789 (2011).

[89] 501 C.M.R. 2.14, which provides, in part, as follows:

(3) The breath test shall consist of a multipart sequence consisting of:

(a) one adequate breath sample analysis;

(b) one calibration standard analysis; and

(c) a second adequate breath sample analysis.

(4) If the sequence described in 501 CMR 2.14(3) does not result in breath samples that are within ± 0.02 blood alcohol content units, a new breath test sequence shall begin.

blood alcohol content level.[90] The prosecution can only introduce the lower of the two breath sample results at trial.[91]

It is imperative that counsel also know the exact breathalyzer device used and research that specific model. No two models are exactly alike. An effort should be made, through discovery or otherwise, to secure the manufacturer's specifications for the particular device at issue. Did the police follow the manufacturer's specifications for calibration, operation, storage, etc.? Once again, potential grounds for exclusion of the breath test results[92] and fodder for cross-examination can be found in these documents.

§ 47.7D. PREPARING THROUGH DISCOVERY AND EXPERT ASSISTANCE

As is readily apparent, a single and thorough discovery motion covering all of these areas should be filed.[93] Once armed with all of the documentation, battle may be waged. An important ally to have, if one can be afforded, is an expert. Not only will she be informative, but she will allow the attorney to examine and possibly challenge the actual workings of the machine itself.

Commonwealth v. Smythe[94] holds that, on the proper foundation, a defendant is entitled to have an expert testify that the test results were not reliable.[95] She may

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[90] 501 C.M.R. 2.15:

(1) The results of the analysis of each breath sample and calibration standard shall be reported to at least two decimal places if the test was administered using a liquid calibration standard. The results of the analysis of each breath sample and calibration standard shall be reported in three decimals places, if the calibration standard is gas.

(2) For the purpose of determining the arrestee's BAC pursuant to M.G.L. c. 90, § 24:

(a) if the two breath sample results are the same, that result shall be truncated to two decimal places and reported as the arrestee's BAC; otherwise,

(b) the lower of the two breath sample results shall be truncated to two decimal places and reported as the arrestee's BAC.

[91] Commonwealth v. Steele, 455 Mass. 209, 210 (2009).

[92] The decision whether to move to suppress the breathalyzer results is a difficult one. Indeed, sometimes it may be preferable to forego an unlikely suppression motion in favor of a more powerful and unexpected cross-examination. If the attorney files the motion, the Commonwealth will be forewarned and the Commonwealth witness(es) will be given a test run through his (their) testimony. Learning about the views of the judge in advance, by speaking with fellow attorneys, court and probation officers and even the assistant district attorney, may make this decision somewhat easier.

[93] An excellent example of such a motion, written by attorney Richard L. Zisson, may be found in PRACTICAL TECHNIQUES FOR LITIGATING THE DRUNK DRIVING CASE 4–11 (Suffolk University Law School, Center for Continuing Professional Development, 1988). Other than the typical discovery requests, the motion asks for, among other things, a copy of any handwritten notes of the police officer(s) involved with the case, police logs, training materials used to train the officer who conducted the field sobriety test and administered the breathalyzer test, certifications involving the breathalyzer and its operator, the maintenance and use log, the conditions under which the breathalyzer was stored, and its maintenance manual.

[94] 23 Mass. App. Ct. 348 (1987).

arguably testify to much more. For example, in *Smythe,* the expert was prepared to testify

> (a) that the particular intoxilyzer 5000 machine used for the defendant's breath analysis was not properly installed, maintained, tested, calibrated, or operated; (b) that the defendant, as observed by the witness on the videotape, did not display the clinically observable signs expected of an individual with a .17 percent blood alcohol content; (c) the amount of alcohol a person of the defendant's size would need to consume during the relevant time period in order to obtain a .17 percent blood alcohol content; and (d) what the defendant's blood alcohol content would have been if he had consumed only the amount of alcohol the defendant said he consumed.[96]

The Commonwealth successfully objected to the testimony of the expert on the grounds that he was not a physician and did not own an Intoxilyzer 5000, a machine on which "he had received no specific training or licensing."[97] The ADA also disagreed with the substance of the expert's opinion and that his examination of the videotape "was an insufficient basis for the conclusions he reached about the extent of the defendant's intoxication."[98]

The Appeals Court rejected this position, reasoning that discretion is not without limits and here the qualifications of the expert appeared substantial.[99]

He had sufficient familiarity with the subject matter. An expert need not be personally familiar with every aspect of a question at issue. "The [expert] witness . . . may base his opinion upon facts observed by himself or within his own knowledge and testified to by himself, or upon facts assumed in the questions put to him and supported either by admitted facts or by the testimony of other witnesses already given at the trial, or upon facts derived partly from one source and partly from the other." *Commonwealth v. Russ,* 232 Mass. 58, 73 (1919).[100]

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[95] Commonwealth v. Smythe, 23 Mass. App. Ct. 348, 353–54 (1987). "Compare Commonwealth v. Connolly, 394 Mass, at 175, in which the expert opinion offered was held to be inadmissible because the defendant had refused to have his breath tested." *Smythe, supra,* 23 Mass. App. Ct. at 354. *See also* Commonwealth v. Ranahan, 23 Mass. App. Ct. 201, 204 (1986) (upholding judge's exclusion of expert te
qualifications in certain areas of asserted expertise, the proposed testimony of the expert regarding the potential unreliability of the breathalyzer was in some respects cumulative"); Commonwealth v. Mendrala, 20 Mass. App. Ct. 398, 405–06 (1985) (judge's discretion whether expert testimony on effects of alcohol assists jury).

[96] Commonwealth v. Smythe, 23 Mass. App. Ct. 348, 352 (1987). *See also* Commonwealth v. Howe, 405 Mass. 332, 335–36 (1989) (proper for prosecutor to argue 0.18 breathalyzer reading is inconsistent with defendant's testimony of consuming thr

[97] Commonwealth v. Smythe, 23 Mass. App. Ct. 348 (1987).

[98] Commonwealth v. Smythe, 23 Mass. App. Ct. 348, 352–53 (1987).

[99] Commonwealth v. Smythe, 23 Mass. App. Ct. 348, 352 (1987). The court was also bothered by the fact that the trial judge made no findings of fact. Rather, after argument, the judge merely said "I'm going to exclude the
judge making specific findings indicating why he regarded the expert as unqualified. *Smythe, supra,* 23 Mass. App. Ct. at 355.

[100] Commonwealth v. Smythe, 23 Mass. App. Ct. 348, 354 (1987). *See also* Department of Youth Servs. v. A Juvenile, 398 Mass. 516 (1986), a significant case concerning expert testimony, wherein the S.J.C., while not adopting Proposed Mass. R. Evid. 703 (which was taken verbatim from Fed. R. 703), took "a modest step by permitting an expert to base an opinion on facts or data not in evidence if the facts or data are independently admissible and are

It is true that due to economic realities, in the vast number of OUI cases an expert is not retained. This clearly should not translate to surrendering the attack on either the breathalyzer or its operator.

While an expert would clearly assist in this area, there is a wealth of written materials on the subject matter. In the end, the well-read attorney may become nearly as knowledgeable about the breathalyzer as the expert she contemplates hiring.

§ 47.8 FIELD SOBRIETY TESTS

Ordinarily, the arresting officer will testify that he conducted a series of (generally three) field sobriety tests, which the defendant failed. In some cases, the police may also conduct a sobriety test at the police station before video cameras, which may then be introduced at trial.[101] The police need not recite *Miranda* or *Miranda*-like warnings to an individual before conducting these tests.[102] An individual who is lawfully arrested or detained does not have a right to refuse to take these field sobriety tests.[103] If an individual does refuse, however, it is not completely clear what, if anything, can be done to compel compliance.[104] What is clear is that compliance

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a permissible basis for an expert to consider in formulating an opinion. Such a change will eliminate the necessity of producing exhibits and witnesses whose sole function is to construct a proper foundation for the expert's opinion." D*epartment of Youth Servs. v. A Juvenile, supra,* 398 Mass. at 531.

[101] Commonwealth v. Carey, 26 Mass. App. Ct. 339, 340–41, *rev. denied,* 403 Mass. 1102 (1988); Commonwealth v. Mahoney, 400 Mass. 524, 527–29 (1987) (video booking is not unlawful search or self-incrimination and need not be preceded by *Miranda* warnings). The court should redact any irrelevant, prejudicial portion of the videotape. Commonwealth v. Harvey, 397 Mass. 351, 357–59 (1986). A missing tape may require dismissal in some cases. *See* Commonwealth v. Cameron, 25 Mass. App. Ct. 538, 545–49 (1988) (right to cross-examine on missing tape but no dismissal under circumstances here), Commonwealth v. Holman, 27 Mass. App. Ct. 830 (1989).

[102] Courts have reached this conclusion under both federal (Fifth Amendment) and state (art. 12) constitutional analysis, rationalizing that an individual asked to undergo road-side field sobriety tests is not (1) in "custody," *see, e.g.,* Pennsylvania v. Bruder, 488 U.S. 9, 11 (1988) (citing Berkemer v. McCarty, 468 U.S. 420 (1984), Vanhouton v. Commonwealth, 424 Mass. 327, 334 (1997), Commonwealth v. Ayre, 31 Mass. App. Ct. 17, 20–21 (1991), and Commonwealth v. McNelley, 28 Mass. App. Ct. 985, 986 (1990)), and/or (2) being compelled to produce testimonial or communicative evidence. *See, e.g.,* Vanhouton v. Commonwealth, 424 Mass. 327, 332–37 (1997) (heel-to-toe, leg-standing, and alphabet recitation tests do not result in disclosure of testimonial or communicative evidence); Commonwealth v. Brennan, 386 Mass. 772, 779–83 (1982) (upholding finger-to-nose, straight-line walk, and coin pickup tests). For a more in-depth discussion of the privilege against self-incrimination as it bears on field sobriety tests, *see supra* §§ 19.4D(1)(a), (b)(4) (*Miranda* warnings) and 33.3 paragraph 3 (self-incrimination).

[103] Commonwealth v. Blais, 428 Mass. 294, 299–302 (1998). The Supreme Judicial Court reached this decision by implication, after having declared that the police need not advise an OUI suspect that he or she has the right to refuse to take field sobriety tests. *Id*.

[104] In *Blais,* the Supreme Judicial Court stated that "because a person is under an obligation to perform the tests . . . does not necessarily imply that he may be forced to comply. Whether and what steps may be taken to compel compliance will depend on the circumstances." Commonwealth v. Blais, 428 Mass. 294, 301 (1998). The Court did indicate that the Legislature is free to pass a law suspending an individual's license for refusing to
tests. *Id.* at 301–02 n.6. In so stating, the Court noted that the Legislature had already enacted

cannot be compelled at gunpoint or by use or threats of force.[105] Evidence of refusal is not admissible at trial.[106]

In the rare instance where no tests were given, the defense may argue that the police did not conduct available probative tests.[107]

If tests were given, the skilled attorney can undermine the credibility of what is clearly a highly subjective test. It must also be stressed to the jury that some of the tests require a fair amount of coordination and that they are conducted with an upset and frightened individual typically at the scene of the stop where the lighting and road conditions are poor.[108]

The National Highway Traffic Safety Administration published a manual entitled *Improved Sobriety Testing*[109] whose purpose is to acquaint

> [police officers] with the most effective procedures for testing drivers at roadside to determine whether or not they are intoxicated. Police officers generally evaluate a driver's physical appearance and condition while he is still seated in the vehicle. This evaluation typically includes: 1) breath odor; 2) condition of the eyes; 3) demeanor; 4) color of the face; 5) dexterity; 6) speech; and 7) clothing. Further testing is usually given only if these preliminary evaluations cause the officer to be suspicious.[110]

The manual addresses three tests: (1) the walk-and-turn test, (2) the lone-leg stand test, and (3) the horizontal gaze nystagmus test. As described *infra,* other tests are often used as well.

§ 47.8A. THE WALK-AND-TURN TEST[111]

This test involves the subject taking nine steps heel-to-toe down a line, turning around and repeating the process. The manual assigns nine points of error, one for each of the following observations:

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such a provision in connection with a refusal to take a breathalyzer test. *Id.* (referring to G.L. c. 90, § 24(1)(f). *See supra* § 47.7B and *infra* § 47.9.

[105] Commonwealth v. Blais, 428 Mass. 294, 301–02 and n.6 (1998).

[106] Vanhouton v. Commonwealth, 424 Mass. 327, 334 (1997) (citing Commonwealth v. McGrail, 419 Mass. 774, 779–80 (1995)). *See also supra* § 47.7B at note 49 (inadmissibility of refusal to take tests). In Commonwealth v. Beaulieu, 79 Mass. App. Ct. 100, 104-05 (2011), the Appeals Court found no error in the trial court's admission of testimony regarding the defendant's refusal to submit to field sobriety tests where the defendant had "opened the door opened the door to the admission of the refusal evidence by raising the issue during his cross-examination of the arresting officer."

[107] Commonwealth v. Gilmore, 399 Mass. 741, 745 (1987); Commonwealth v. Rodriguez, 378 Mass. 296, 308 (1979).

[108] J. TARANTINO, DEFENDING DRINKING DRIVERS § 631, at 6-10 (2d ed. 1988).

[109] Published by the U.S. Department of Transportation, DOT HS 806512 (Jan. 1984). A copy is contained in PRACTICAL TECHNIQUES FOR LITIGATING THE DRUNK DRIVING CASE, Suffolk University Law School Center for Continuing Professional Development 23–33 (1988). Cites in this chapter to materials contained in that volume are to the page numbers in the Practical Techniques book.

[110] PRACTICAL TECHNIQUES, *supra,* note 104, at 25.

[111] PRACTICAL TECHNIQUES, *supra,* note 104, at 28–29.

1. Cannot keep balance while listening to the instructions,
2. Starts before the instructions are finished,
3. Stops while walking to steady self,
4. Does not touch heel-to-toe,
5. Steps off the line,
6. Uses arms to balance,
7. Loses balance while turning,
8. Incorrect number of steps,
9. Cannot do the test (automatic failure).

The subject who scores two or more points is considered to be legally intoxicated.[112]

The officer himself must "[o]bserve the suspect from three or four feet away and remain motionless while he performs the test. Being too close or excessive motion on [the part of the officer] will make it more difficult for the suspect to perform, even if he is sober."[113]

The test should be conducted in the following manner:

1. The ground must be level, hard, dry. and nonslippery.
2. The area must be a safe one, one in which the subject would not injure himself if he were to fall while performing the test.
3. Those over sixty years of age or fifty pounds overweight or with a physical impairment should not be given the test. Also those who cannot see out of one eye may also fail the test due solely to poor depth perception.
4. Those wearing heels two inches or higher should be allowed to remove their shoes.
5. Adequate lighting must be available.

Interestingly, the manual states that this test has an accuracy rate of 68 percent. In other words, nearly one-third of those who take the test will fail it, notwithstanding the fact that they are sober.

§ 47.8B. THE ONE-LEG-STAND TEST[114]

This test involves the subject raising his leg about six inches off of the ground and counting rapidly from 1001 to 1030. The manual assigns one point for each of the following observations:

1. The suspect sways while balancing.
2. He uses arms for balance.
3. He hops.
4. He puts his foot down.
5. He cannot do the test (automatic failure).

Two points translates into a BAC of 0.10 or higher.

The test conditions and the position of the officer are the same as in the walk-and-turn test.

Once again, the test has an extremely low accuracy rate of 65 percent.

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[112] Having a BAC of 0.10 or higher.

[113] PRACTICAL TECHNIQUES, *supra* note 104, at 29.

[114] PRACTICAL TECHNIQUES, *supra* note 104, at 30.

§ 47.8C. THE GAZE NYSTAGMUS TEST[115]

This test is the most difficult for the officer to perform. Nystagmus means a jerking of the eyes. The horizontal test used here involves the eyes gazing to the side. Although most people show some jerking if the eyes move far enough to the side, intoxicated individuals show these three signs:

1. The jerking of the eyes occur much sooner. That is, the more intoxicated a person becomes, the less he has to move his eyes to the side in order for the jerking to occur.

2. If you have a suspect move his eyes as far to the side as possible, you can estimate in a general way the extent of intoxication. The greater the alcohol impairment, the more distinct the nystagmus will be in the extreme gaze position.

3. If the suspect is intoxicated, he cannot follow a slowly moving object smoothly with his eyes.[116]

For the test to be conducted properly, the police officer must be able to estimate a forty-five–degree angle. He must also be able to characterize eye movement as either smooth or jerky.

The test is conducted in this fashion. First the officer instructs the subject to remove his glasses or hard contact lenses. Then he is told to keep his head still and to follow with his eyes some object the officer holds in his hand. The subject is also told not to move his eyes back to center until he is so instructed.

Check the suspect's right eye by moving the object to the subject's right. Have the suspect follow the object until the eyes cannot move further to the side. Make this movement in about two seconds, and observe, (I) whether the suspect was able to follow the object smoothly or whether the motion was quite jerky; and (2) how distinct the nystagmus is at the maximum deviation.

Estimate where a 45-degree angle would be. . . .

Move the object a second time to the 45-degree angle of gaze, taking about four seconds. As the eye follows the object, watch for it to start jerking back and forth. If you think you see nystagmus, stop the movement to see if the jerking continues. If it does, this point is the angle of onset. If it does not, keep moving the object until the movement does occur or until you reach the imaginary 45-degree line. Note whether or not the onset occurs *before* the 45-degree angle of gaze. (The onset point at a BAC of 0.10 percent is about 40 degrees).

If the suspect's eyes start jerking before they reach 45 degrees, check to see that some white of the eye is still showing on the side closest to the ear. . . . If no white of the eye is showing, you either have taken the eye too far to the side (that is, more than 45 degrees) or the person has unusual eyes that will not deviate very far to the side. Use the criteria of onset before 45 degrees only if you can see some white at the outside of the eye.

An eye deviated to 40 degrees — note the amount of white showing on the outside (closest to the ear) of the eye.

Repeat this entire procedure for the left eye. When observing the left eye at 45 degrees of gaze, some white of the eye again should be visible at the outside (closest to the ear) of the eye.[117]

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[115] PRACTICAL TECHNIQUES, *supra* note 104, at 26–27.

[116] PRACTICAL TECHNIQUES, *supra* note 104, at 26.

[117] PRACTICAL TECHNIQUES, *supra* note 104, at 26–27.

Scoring is accomplished by looking for three signs of intoxication in each eye, making a maximum score of six possible. One point is awarded for each of the following observations:

1. Onset of alcohol gaze nystagmus in the right eye occurs before forty-five degrees.
2. Nystagmus in the right eye when moved as far as possible to the right is moderate or distinct (as opposed to faint jerking at the onset point).
3. The right eye cannot follow a moving object smoothly (the officer must ensure that the jerkiness was not caused by his jerky movement of the object).
4. Onset of alcohol gaze nystagmus in the left eye occurs before forty-five degrees.
5. Nystagmus in the left eye when it is moved as far as possible to the left is moderate or distinct.
6. The left eye cannot follow a moving object smoothly.

A score of four or more points on the test allows the officer to classify the suspect's BAC as above 0.10 percent.

"Using this criterion [the police officer] will be able to correctly classify about 77 percent of [his] suspects with respect to whether they are drunk or sober."[118]

The Supreme Judicial Court has concluded that, because the HGN test relies on an underlying scientific principal that is not within the common experience of jurors, the Commonwealth must satisfy the standard for the admissibility of scientific evidence before HGN test results may be offered at trial.[119] Specifically, the Commonwealth must present expert testimony to establish that the theory that there is a strong correlation between intoxication and nystagmus is either generally accepted within the relevant scientific community or is otherwise reliable or valid.[120] Counsel should be prepared to hold the Commonwealth to this burden and to attack the general acceptance, reliability and validity of the HGN test both at the hearing and, if necessary, at trial.[121]

In addition, the trial judge must make a determination as to the qualifications of the individual who administered the HGN test to the defendant.[122] Once again, therefore, counsel should be prepared to challenge the testing officer's qualifications both at the hearing and, if necessary, trial. Given the extremely technical and involved nature of the testing procedures as outlined above, counsel should be able, at the qualifications hearing and/or trial, to thoroughly confuse not only the testing officer, but the judge, assistant district attorney, and jury.

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[118] PRACTICAL TECHNIQUES, *supra* note 104, at 27.

[119] Commonwealth v. Sands, 424 Mass. 184, 185–88 (1997). As discussed in *Sands*, the standard that must be satisfied in Massachusetts to introduce scientific evidence was most recently addressed and crystallized in the case of Commonwealth v. Lanigan, 419 Mass. 15 (1994). For a detailed discussion of *Lanigan* and the admission of scientific evidence, *see supra* § 12.3A.

[120] Commonwealth v. Sands, 424 Mass. 184, 185–88 (1997).

[121] One issue that counsel should consider exploring, both for purposes of attacking the admissibility of the HGN test and the weight it should be given if admitted, is the non–alcohol related causes of nystagmus. Fatigue and certain neurological deficits may cause an individual to fail the HGN test. *See* TARRANTINO, DEFENDING DRUNK DRIVERS § 632, at 6–18 (2d ed. 1990).

[122] Commonwealth v. Sands, 424 Mass. 184, 188 (1997).

Still further, the trial judge must establish the appropriate procedure if the test results are to be admitted.[123] In this regard, counsel should consider seeking an instruction limiting the purposes for which HGN test results may be utilized by the finder of fact.[124]

§ 47.8D. OTHER FIELD SOBRIETY TESTS

Although not covered in the IMPROVED SOBRIETY TESTING MANUAL, there are other field sobriety tests that the police often routinely have a suspect perform. Such tests include reciting the alphabet, walking a straight line, the finger-to-nose test, and picking up a coin.

Once again, counsel must establish the highly subjective nature of these tests and highlight any unfairness and/or difficulty with the tests.

The *coin pickup test* involves a police officer placing a coin at the feet of the suspect and asking him to pick it up. The attorney should ascertain what the coin was. A dime is more difficult to pick up than a quarter. What were the lighting conditions? Clearly, counsel should know in advance what the answers to these questions are.[125]

As for the *alphabet test,* wherein the police officer asks the suspect to recite the alphabet, discover at what letter the defendant misspoke. Does the defendant have any difficulty understanding English? Is his grammar and/or diction poor?[126] Perhaps the test was conducted by the highway where the defendant was stopped or in any other noisy environment and the officer misheard the suspect. Lastly, consider asking the officer himself to demonstrate the test for the jury. Not infrequently, when the officer is halfway through, he'll pause and inquire whether you wish him to continue. Respond by asking him whether, using his grading criterion (which should have already been established), he has just failed the test.

The *finger-to-nose test* involves the suspect closing his eyes, extending his arms outward and touching the tip of his nose with his outstretched index fingers. Emphasize that this is a test of coordination and that even some sober people might encounter problems with it. Question the officer on how one passes or fails the test. For example, if the subject fails to touch the very tip of his nose but touches an area one-quarter inch away, is that considered failing? half-an-inch? three-quarters of an inch?[127] If that is a failure, consider inviting the jury to conduct the test themselves while deliberating.

If the test is one of coordination and a car accident was involved, even a relatively minor one, question whether the suspect struck his head prior to the test.

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[123] Commonwealth v. Sands, 424 Mass. 184 (1997).

[124] The Court noted in *Sands* that courts in other jurisdictions that have allowed evidence of HGN testing to be admitted after its general acceptance, reliability, or validity is shown, have restricted the use of the results to establish the threshold condition of intoxication, but not the specific degree of intoxication. Commonwealth v. Sands, 424 Mass. 184, 188 (1997) (citation omitted).

[125] This should be easily ascertainable as the defendant should be able to furnish the pertinent information.

[126] TARANTINO, *supra* note 116, § 311.3. at 3–12 (2d ed. 1990).

[127] "A normal response for the finger-to-nose test is to come within two inches of the nose." TARANTINO, *supra* note 116, § 631, at 6-14.

Many tests of coordination are failed for various reasons other than the suspect's being intoxicated.[128] Question the officer about them.

Booking sheets are routinely filled out for anyone arrested. The information is gathered by the booking office asking the arrestee certain basic questions — such as name, address, telephone number — as well as having him sign for valuables taken and that he understands his rights. In the cross-examination of the officer, show that this information was correctly given and that the officer understood the responses of this supposedly intoxicated individual.[129]

If the officer asked the suspect to perform three tests, question him about all of the other tests that the suspect should have been asked to perform, inferring that the performance of the other tests would have been successfully passed by an individual now a bit more relaxed.[130]

§ 47.9 PROOF OF PRIOR OFFENSES

While the existence of a prior offense (second, third, fourth, etc.) can lead to enhanced punishment, it is not an element of the then-pending charge of operating under the influence. As the Supreme Judicial Court has stated:

> The complaint should set forth any former conviction that may be relied on to justify greater punishment on conviction, but the prior offenses may not be referred to during the trial, except to impeach the defendant if he testifies. The prior offense is not part of the crime charged; it relates only to punishment. A defendant, if convicted of a charge, will be entitled to a separate trial on the issue whether he had been convicted of a prior, like offense.[131]

A defendant is entitled to a jury trial at that second, separate trial, which, at the trial court's discretion, can be held before the same jury impaneled for the first trial or a new jury.[132] The trial is to be conducted "subject to all of the provisions of law governing criminal trials."[133]

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[128] *E.g.,* "neural degeneration, polyneuritis, pernicious anemia, cerebellar thrombosis, multiple sclerosis, Meniere's disease, lack of sleep, or anxiety." TARANTINO, *supra* note 116, § 631, at 6-14.

[129] It should also be noted that many booking sheets indicate whether or not certain basic rights were given the defendant. One such right is enunciated in G.L. c. 263, § 5A (the defendant "shall have the right, at his request and at his expense, to be examined immediately by a physician selected by him"). For an explanation of this statute, *see* Commonwealth v. Alano, 388 Mass. 871 (1983). A second right is that granted in G.L. c. 276, § 33A (the right to use the telephone). *See generally* Commonwealth v. Bryant, 390 Mass. 729, 743 n.17 (1984).

[130] TARANTINO, *supra* note 116, § 631, at 6-13.

[131] Commonwealth v. Murphy, 389 Mass. 316, 320-21 (1983) (internal citations omitted). *See also* G.L. c. 278, § 11A ("If a defendant is charged with a crime for which more severe punishment is provided for second and subsequent offenses, … no part of the complaint or indictment which alleges that the crime charged is a second or subsequent offense shall be read or shown to the jury or referred to in any manner during the trial; provided, however, that if a defendant takes the witness stand to testify, nothing herein contained shall prevent the impeachment of his credibility by evidence of any prior conviction").

[132] G.L. c. 278, § 11A.

[133] G.L. c. 278, § 11A.

The Legislature has provided in the statute for specific ways in which the Commonwealth can establish the existence of the prior offense:

> In any prosecution commenced pursuant to this section, introduction into evidence of a prior conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from records of the department of probation, any jail or house of corrections, the department of correction, or the registry, shall be prima facie evidence that the defendant before the court had been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction. Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior convictions described therein. The commonwealth shall not be required to introduce any additional corrobating evidence, nor live witness testimony to establish the validity of such prior convictions.[134]

Notwithstanding these provisions, "the Commonwealth must produce evidence linking the person named in the conviction record to the defendant."[135] "[R]ecords bearing only a name [are] insufficient as a matter of law to meet the Commonwealth's burden."[136] Of course, "conviction records will often include more identifying information than merely the offenders name, in which case this requirement will be met."[137]

In the wake of the United States Supreme Court's seminal decision in Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S.Ct. 2527 (2009), courts must consider what records can be admitted in the absence of live testimony without violating the confrontation clause of the Sixth Amendment to the United States Constitution. Certified records of conviction have been deemed non-testimonial and, hence, admissible without live testimony.[138] Certain certified probation records, however, have been deemed inadmissible live testimony.[139]

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[134] G.L. c. 90, § 24(1)(c)(4).

[135] Commonwealth v. Maloney, 447 Mass. 577, 588 (2006).

[136] Commonwealth v. Maloney, 447 Mass. 577, 588 (2006) (harmonizing the statutory provisions with its prior decision in Commonwealth v. Koney, 421 Mass. 295 (1995)).

[137] Commonwealth v. Maloney, 447 Mass. 577, 588 (2006).

[138] Commonwealth v. Ellis, 79 Mass. App. Ct. 330, 332-33 (2011) (certified records of conviction admissible under hearsay exception for business records under G.L. c. 233, § 76 and 78 and absent confrontation). As further provided by the Supreme Judicial Court in Commonwealth v. Weeks, 77 Mass. App. Ct. 1, 5-7 (2010):

> Certified records of convictions are created to establish the fact of adjudication, so as to promote accountability to the public regarding official proceedings and public knowledge of the outcomes of those proceedings. They are used for a number of administrative purposes, including background checks and parole records. Unlike drug certificates, docket sheets are not prepared for an upcoming case and are not testimonial since the authors are not witnesses against the criminal defendant. Furthermore, the docket sheets are not testimonial under the two-part inquiry set forth in Commonwealth v.

> Gonsalves, 445 Mass. 1, 3 (2005), *cert. denied*, 548 U.S. 926 (2006). First, the docket sheets are not "testimonial per se" because they are not "made in a formal or solemnized form (such as a deposition, affidavit, confession, or prior testimony) or in response to law enforcement interrogation." *See* Commonwealth v. Simon, 456 Mass. 280, 297 (2010). Second, the docket sheets are not 'testimonial in fact' because, as we have discussed above, given the purposes for which they are created, and in light of the fact that they are not created for the purpose of any pending litigation, it would not reasonably be anticipated that they would be used against an accused. In short, certified docket sheets of conviction are distinguishable from drug certificates (which were at issue in Melendez-Diaz) and do not constitutionally require cross-examination.
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> (internal citations and footnotes omitted).

[139] *See* Commonwealth v. Ellis, 79 Mass. App. Ct. 330, 333-34 (2011), wherein the Appeals Court found as follows:

> [T]here was error under Melendez-Diaz in the admission of the probation certification. This record does not qualify as a nontestimonial business record under Melendez-Diaz. Rather, this record . . . has every appearance of having been prepared in anticipation of litigation -- the litigation being the defendant's criminal trial for OUI as a fourth offense . . . In fact, the certification is addressed, as if it were a memorandum, to the assistant district attorney who would be the prosecutor. A record such as this, even if generated in the ordinary course of probation department business, is "prepared specifically for use at [the defendant's] trial" and is testimonial, "whether or not it qualifies as a business or official record." Melendez-Diaz, 129 S. Ct. at 2540. The testimonial aspects embedded in the probation certification are discernible when it is considered that the certificate was prepared by a person who, in the writing thereof, engaged in certain deliberative decisions, and formulated evaluative statements and opinions in framing answers to the matters appearing on the pre-printed form lines of the probation certification, so that the certification could be used in litigation. . . . The compilation of such information required that the writer of this document review certain other documents (which are not specified in any way), engage in a deliberative process, and enter evaluative and opinion-based responses to the various certification line inquiries. Hence, there is a testimonial component which underlies what the writer did in reviewing documents and answering questions on the probation certification form. These actions and nonactions by the writer were ones that would be subject to interrogation in cross-examination. In sum, the "Certification of Probation Information and Prior OUI Offense" implicates confrontation rights under Melendez-Diaz.
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> (internal citations and footnotes omitted).

§ 47.10 PRETRIAL LICENSE SUSPENSIONS

In addition to the obvious adverse affects of an OUI conviction, there exists the issue of the tremendous hardship caused by the pretrial administrative or judicial seizure of a client's license. While, as a practical matter, it is difficult to get a client's license back prior to trial or the expiration of the pretrial suspension period, counsel should be aware of the available pretrial appellate options and standards and consider pursuing those avenues if the circumstances warrant.

§ 47.10A. ADMINISTRATIVE AND JUDICIAL SUSPENSION PROCESSES

By statute, the process for the automatic suspension of an individual's license will commence on either a refusal to take a breathalyzer test or if the individual's blood alcohol percentage, as typically measured through the administration of a breathalyzer test, is not less than .08 or, for individual's under the age of 21, not les than .02.[140] On either occurrence, the police are required to seize the individual's license and issue a written notice of suspension, which becomes effective immediately.[141] The officer must then fill out a report in a format approved by the registrar of motor vehicles, setting forth certain information specifically called for in the statute, and send it to the registrar along with a copy of the notice of intent to suspend and the seized license.[142] In the rare event that the police fail to so suspend or take custody of an individual's license, the court is required under G.L. c. 90, § 24N to seize the license at arraignment on a prima facie showing by the prosecutor of either a refusal to take the breathalyzer or that the individual's blood alcohol percentage, as shown through a blood or breathalyzer test, is not less than .08 or, for individual's under the age of 21, not less than .02. — this is commonly referred to as a "per se" suspension.[143]

In addition, an individual under the age of 21 who (1) is merely arrested for or charged with an OUI offense and (2) either (a) refuses to take the breathalyzer or (b) has a blood alcohol percentage of not less than .02 is subject to a 180-day suspension regardless of whether a formal charge is ever lodged or conviction obtained.[144] For an individual under the age of 18, such a suspension is for 1 year.[145] The registrar of motor vehicles can waive this additional suspension for qualified first time offenders under the age of 21 but over 18 years of age who consent to being assigned to an underage drinking drivers program.[146] The 180-day suspension is lifted on assignment to, and not completion of, the program and is subject to reinstatement for failure to complete the program.[147]

[140] G.L. c. 90, § 24(1)(f)(1), (f)(2).

[141] G.L. c. 90, § 24(1)(f)(1), (f)(2).

[142] G.L. c. 90, § 24(1)(f)(1), (f)(2).

[143] 20 G.L. c. 90, § 24N. Counsel should review the statute for the specific prima facie showing the prosecutor must make and be prepared to address those factors at arraignment.

[144] G.L. c. 90, § 24(1)(f)(2) and G.L. c. 90, § 24P.

[145] G.L. c. 90, § 24P.

[146] G.L. c. 90, § 24P.

[147] G.L. c. 90, § 24P.

The foregoing administrative and judicial pretrial license suspensions have, to date, survived constitutional scrutiny.[148]

§ 47.10B. PRETRIAL SUSPENSION PERIODS

If no administrative or judicial appellate relief has been obtained,[149] the following suspension periods will automatically commence:

Refusal Under Section 24(1)(f)(1)	
First Offense	180 days
Second Offense	3 years
Under 21	3 years
Third Offense	5 years
Fourth or Greater Offense	Life

Failure Under Section 24(1)(f)(2)	
Any Offense	Until disposition of offense, but no longer than 30 days[150]

Refusal Under Section 24N	
First Offense	180 days
Second Offense	1 year
Under 21	1 year
Third or Greater Offense	18 months[151]

Failure Under Section 24N	
Any Offense	Until disposition of offense, but no longer than 30 days[152]

The Commonwealth gives reciprocal effect to out-of-state OUI convictions.[153] If ultimately found guilty, an individual is not entitled to credit for the pretrial period of suspension.[154]

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[148] Luk v. Commonwealth, 421 Mass. 415 (1995) (suspension under G.L. c. 90, § 24(1)(f)(1) for refusal to take breathalyzer does not amount to punishment; therefore, subsequent OUI prosecution does not run afoul of double jeopardy); Leduc v. Commonwealth, 421 Mass. 433 (1995) (reaching the same result as in *Luk* for suspensions under G.L. c. 90, § 24(1)(f)(2) for failure to pass breathalyzer); Commonwealth v. Crowell, 403 Mass. 381 (1988) (finding G.L. c. 90, § 24N "per se" suspension to withstand certain procedural and substantive due process scrutiny).

[149] *See infra* § 47.9C.

[150] G.L. c. 90, §§ 24(1)(f)(1), (f)(2), and 24N.

[151] G.L. c. 90, § 24N.

[152] G.L. c. 90, § 24N.

[153] G.L. c. 90, § 22(c). On notice of an out-of-state drunk driving conviction, the registrar will suspend an individual's Massachusetts license
the Commonwealth. Out-of-state convictions will also count as prior offenses and thus potentially increase the length of a pretrial suspension.

[154] Commonwealth v. Crowell, 403 Mass. 381, 388 (1988) (citing Commonwealth v. Callen, 26 Mass. App. Ct. 920 (1988)). While *Crowell* addresses a suspension under the pre-

§ 47.10C. APPEALS OF PRETRIAL LICENSE SUSPENSIONS

The exact appeal procedure available for a pretrial license suspension will depend on two separate determinations: (1) whether the license was suspended administratively or judicially ("per se"); and (2) whether the suspension resulted from a refusal to take or failure to pass the breathalyzer.

1. Administrative Suspension After Breathalyzer Test Refusal

An individual whose license is administratively suspended under G.L. c. 90, § 24(1)(f)(1) for refusing to take the breathalyzer, may appeal the suspension to the registry of motor vehicles.[155] The appeal must be taken within fifteen days of the suspension.[156] No restricted or hardship licenses are allowed.[157] Rather, the appeal is limited to the consideration of three specific issues:

(1) Did the police officer have reasonable grounds to believe that the individual had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which members of the public have a right of access or on any way to which members of the public have a right of access as invitees or licensees?

(2) Was the individual placed under arrest?

(3) Did the individual refuse to take the breathalyzer?[158]

If the hearing officer determines that the answer to any one of these three questions is in the negative, the license must be immediately reinstated.[159]

If administrative relief is not obtained, a further appeal may be taken, within thirty days of issuance of the final determination by the registry of motor vehicles, to the district court having jurisdiction over the underlying offense.[160] The district court appeal, in turn, must be heard within thirty days of filing the petition.[161] The suspension, however, is not stayed during the pendency of the appeal.[162] Furthermore, the court's consideration is limited to a review of the record established before the administrative hearing officer, whose decision may be overturned only for:

(1) Exceeding constitutional or statutory authority;

(2) Making an erroneous interpretation of the law;

(3) Acting in an arbitrary and capricious manner; or

(4) Making a determination that is unsupported by the evidence.[163]

1994 version of G.L. c. 90, § 24N, logic suggests that the same result would apply to a suspension under G.L. c. 90, § 24(1)(f)(1) and (f)(2).

[155] G.L. c. 90, § 24(1)(g).

[156] G.L. c. 90, § 24(1)(g).

[157] G.L. c. 90, § 24(1)(f)(1).

[158] G.L. c. 90, § 24(1)(g).

[159] G.L. c. 90, § 24(1)(g).

[160] G.L. c. 90, § 24(1)(g).

[161] G.L. c. 90, § 24(1)(g).

[162] G.L. c. 90, § 24(1)(g).

[163] G.L. c. 90, § 24(1)(g). Counsel should be mindful of establishing a full and complete record before the registry of motor vehicles hearing officer, including reducing everything to writing to the extent practicable.

2. Administrative Suspension After Breathalyzer Test Failure

The appeal of a license suspension under G.L. c. 90, § 24(1)(f)(2) for failing to pass a breathalyzer test lies to the district court having jurisdiction over the underlying offense and must be taken within ten days of the suspension.[164] The only issue before the court is whether a blood test administered within a reasonable period of time after the breath analysis test was conducted revealed that the individual's blood-alcohol level was less than .08, or .02 if under the age of twenty-one.[165]

3. Judicial ("Per Se") Suspension After Breathalyzer Test Refusal

An appeal of a "per se" license suspension under G.L. c. 90, § 24N for refusal to take the breathalyzer must be pursued in the court in which the underlying charge is pending.[166] The appeal must be lodged within ten days of the suspension.[167] No restricted or hardship licenses can be issued and the court's consideration is limited to the same factors considered by a registry of motor vehicles hearing officer reviewing an administrative suspension for refusal to take the breathalyzer test.[168]

4. Judicial ("Per Se") Suspension After Breathalyzer Test Failure

In the case of an appeal of a "per se" license suspension under G.L. c. 90, § 24N for failure of the breathalyzer, the appeal must be taken within ten days of suspension to the court in which the underlying charge is pending.[169] As with the court's review of an administrative suspension for failure of the breathalyzer, the only issue is whether a blood test taken within a reasonable time after the breathalyzer revealed a blood-alcohol level below the applicable legal limit of .08 or .02.[170]

§ 47.10D. OBTAINING REINSTATEMENT OF LICENSE AFTER DISMISSAL OR ACQUITTAL

While an individual whose license has been subjected to an administrative or judicial pretrial suspension for failure of a breathalyzer test is entitled to the automatic restoration of said license on dismissal or acquittal of the underlying offense, an individual who refuses to take a breath test is not so fortunate.[171] Rather, on dismissal or acquittal, a request for restoration must be made to the court that took the final action with respect to the underlying offense.[172] On such request, the court must immediately grant a hearing at which there exists a rebuttable presumption that the

[164] G.L. c. 90, § 24(1)(g)..

[165] G.L. c. 90, § 24(1)(g).

[166] G.L. c. 90, § 24N.

[167] G.L. c. 90, § 24N.

[168] G.L. c. 90, § 24N. *See supra* § 47.9C(1).

[169] G.L. c. 90, § 24N.

[170] G.L. c. 90, § 24N. *See supra* § 47.9C(3).

[171] G.L. c. 90, §§ 24(1)(f)(1) and 24N.

[172] G.L. c. 90, §§ 24(1)(f)(1) and 24N.

license is to be restored, unless the Commonwealth can establish, by a fair preponderance of the evidence, that this would likely endanger the public safety.[173]

§ 47.11 PLEA BARGAINS AND SENTENCES

After a thorough pretrial investigation, counsel may conclude that proceeding to trial would be fruitless and that the best course to travel might well be admitting to sufficient facts (to warrant a finding of guilty). However, before one recommends that the client admit, it is important that the ramifications of such an act be understood.

§ 47.11A. FIRST OFFENDERS

The possible penalties for a first-time offender include:

1. A fine of not less than $500 nor more than $5,000 and/or imprisonment for not more than two and one-half years;[174]

2. The case "shall not be placed on file or continued without a finding except for disposition under section twenty-four D";[175]

3. The defendant may serve the sentence on selected weekends, evenings, or holidays;[176]

4. A loss of license for one year;[177]

5. With the defendant's consent, two years probation and confinement for no less than fourteen days to a residential treatment program;[178]

6. The court may consider requiring the defendant to serve a minimum of thirty hours of community work/public service;[179] and

7. Assessment of a mandatory $250 surcharge after conviction, placement on probation, continuance without a finding, guilty plea, or admission to sufficient facts, $150 of which is to be deposited to a head injury treatment fund;[180] and

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[173] G.L. c. 90, §§ 24(1)(f)(1) and 24N. The judge must issue written findings of fact if he determines that the Commonwealth has sustained this burden and the license should not be restored. G.L. c. 90, §§ 24(1)(f)(1) and 24N.

[174] G.L. c. 90, § 24(1)(a)(1), ¶ 1.

[175] G.L. c. 90, § 24(1)(a)(1), ¶ 7. *See also* G.L. c. 90, § 24E. Following a trial on the merits, a first offender is presumed eligible for a G.L. c. 90, § 24D program unless the judge makes written findings to the contrary. G.L. c. 90, § 24D, ¶ 1.

[176] G.L. c. 90, § 24(1)(a)(3).

[177] G.L. c. 90, § 24(1)(c)(1). Any previous suspension under G.L. c. 90, § 24N (a "per se" suspension) cannot be credited against a loss of license sanction following trial. Commonwealth v. Crowell, 403 Mass. 381, 388 (1988) (citing Commonwealth v. Callen, 26 Mass. App. Ct. 920 (1988)). *See also supra* § 47.9B and note 137. Three months after conviction, a day license (good for a 12-hour period each day) may be sought from the registrar of motor vehicles for employment or educational hardship. *Crowell, supra;* G.L. c. 90, § 24(1)(c)(1). Six months after conviction, a new license may be sought on grounds of hardship. *Crowell, supra;* G.L. c. 90, § 24(1)(c)(1).

[178] G.L. c. 90, § 24(1)(a)(4).

[179] G.L. c. 90, § 24D.

[180] G.L. c. 90, § 24(1)(a)(1), ¶ 2. The surcharge may not be reduced or waived for any reason. Id.

8. Assessment of a mandatory $50 surcharge after conviction to be deposited to a drunk driving victim fund.[181]

Despite these penalties, if the defendant is a first-time offender or has not been "convicted or assigned to an alcohol education or rehabilitation program because of a like offense by a court of the commonwealth within a period of ten years preceding the date of the commission of the offense with which he is charged,"[182] then he is typically given a sentence under G.L. c. 90. § 24D[183] and § 24E.[184] Note that a defendant can take advantage of the ten year "look-back provisions" of Section 24D only once in a lifetime.[169.3]

By the terms of § 24D, an individual "may if such person consents be placed on probation for not more than two years[185] and shall, as a condition of probation, be assigned to a driver alcohol education program . . . and, if deemed necessary by the court, to an alcohol treatment or rehabilitation program or to both." The defendant shall also surrender his license to the probation department for not less than forty-five days, nor more than ninety days.[186] If the defendant is under age twenty-one, the suspension is for 210 days.[187] The court has the inherent power to stay revocation of license pending appeal.[188]

Lastly, the defendant must pay a fee of $250.[189] If he is unable to pay, an affidavit of indigency must be filed within ten days.[190]

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[181] G.L. c. 90, § 24(1)(a)(1), ¶ 3.

[182] G.L. c. 90, § 24D.

[183] This section is, by its terms, inapplicable to a case involving "serious personal injury to or the death of another person." Although the section does not define "serious personal injury," one may be guided by the definition of the term in G.L. c. 90, § 24L(3). STEARNS, THE MASSACHUSETTS CRIMINAL LAW: A DISTRICT COURT PROSECUTOR□S GUIDE 370 (1987). The section reads as follows: "For the purposes of this section 'serious bodily injury' shall mean bodily injury which creates a substantial risk of death or which involves either total disability or the loss or substantial impairment of some bodily function for a substantial period of time."

[184] G.L. c. 90, § 24E, permits the case to be continued without a finding and ultimately dismissed.

[169.3] G.L. c. 90, § 24D. For example, if a defendant was convicted or assigned to an alcohol or controlled substance program in 1991, and is subsequently charged for two new offenses, first in 2003 and then again in 2016, he/she will be able to take advantage of the disposition under Sections 24D and 24E for the 2003 offense, but not for the 2016 offense, even though it occurred over ten years after the 2003 conviction or program assignment. Indeed, the defendant will be treated as a third-time offender in connection with the 2016 offense. *See* G.L. c. 90, § 24D.

[185] Many courts place a defendant on probation for one year. *See* G.L. c. 90, § 24E.

[186] G.L. c. 90, § 24D. Most individual district courts have a standard policy concerning the number of days the license will be surrendered. The attorney should inquire about that number prior to admitting the client.

[187] G.L. c. 90, § 24D. The defendant in such a case is also assigned to an alcohol treatment, education, and/or rehabilitation program. G.L. c. 90, § 24D. The program for persons aged 17 to 21 is known as the "14-day second offender in-home program." Id.

[188] Commonwealth v. Yameen, 401 Mass. 331, 333–35 (1987).

[189] G.L. c. 90, § 24D. The fee is paid to the chief probation officer of each court, then deposited with the state treasurer. It is, subject to appropriation, used "for the support of programs operated by the secretary of public safety, the alcohol beverage control commission,

If the defendant successfully completes the terms of probation, the case will be dismissed pursuant to § 24E after one year. If the defendant fails to complete the terms of probation, then the ordinary course of action may be taken by the court for one who violates probation.[191] Furthermore, the defendant's license may be revoked "for the remainder of the [one-year] period from the date of conviction provided in G.L. c. 90, § 24(1)(c)(1)."[192]

Unless the complaint is otherwise legally invalid, a charge of operating while under the influence cannot be dismissed pretrial.[193] The only procedure available for dismissal of such a charge is through the procedure set forth in sec. 24(1)(a)(1) and pursuant to the conditions and terms of secs. 24D and 24E.[194]

A client given any of the above options, whether it be ultimate dismissal under § 24E, or the rather harsh penalties under 24(1)(a)(1), is subject to being treated as a multiple offender (second, third, fourth, etc.) as discussed further in the following sections.[195] This is so even if the prior disposition took place while the defendant was a juvenile.[196]

§ 47.11B. SECOND OFFENDERS

The potential penalties a second offender faces include:[197]

1. A fine of not less than $600, nor more than $10,000 and imprisonment for not less than sixty days (thirty of which are mandatory), nor more than two and one-half years;[198]

2. The case may not be placed on file or continued without a finding;[199]

3. The defendant may not be placed on pretrial probation;[200]

4. The defendant may not serve the sentence on selected weekends, evenings, or holidays,[201] but the sentence may, to the extent such resources are available, be

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and the department of public health for the investigation, enforcement, treatment and rehabilitation" of drunk drivers. G.L. c. 90, § 24D.

[190] G.L. c. 90, § 24D.

[191] *E.g.,* imposition of a sentence.

[192] G.L. c. 90, § 24E.

[193] Commonwealth v. Quispe, 433 Mass. 508, 511-12 (2001).

[194] Commonwealth v. Quispe, 433 Mass. 508, 511 (2001) ("sec. 24(1)(a)(1) permits a judge to continue a case without a finding only if the conditions of sec. 24D are imposed; sec. 24D permits such a defendant to be placed on probation with conditions for alcohol education and, if necessary, alcohol treatment and rehabilitation; and sec. 24E provides that, where the case has been continued without a finding and the defendant placed on probation, a hearing to determine whether dismissal of the charge is warranted shall be held sixty to ninety days after the continuance").

[195] Commonwealth v. Corbett, 422 Mass. 391 (1996) (neither due process nor ex post facto principles violated by statute enhancing punishment for OUI committed after its enactment, based on prior offenses committed before its enactment) (citing Commonwealth v. Murphy, 389 Mass. 316, 321 (1983) (CWOF counts as first offense in a subsequent case)).

[196] Commonwealth v. Valiton, 432 Mass. 647 (2001).

[197] Out-of-state convictions count in calculating a defendant's recidivist status.

[198] G.L. c. 90, § 24(1)(a)(1), ¶ 4.

[199] G.L. c. 90, § 24(1)(a)(1), ¶ 4.

[200] G.L. c. 90, § 24(1)(a)(2).

served in a correction facility specifically designed by the Department of Correction for the incarceration and rehabilitation of drunk drivers;[202]

5. A loss of license for two years, although the defendant may apply for a limited license for education or employment purposes after six months, and a limited, hardship license after one year;[203]

6. Assessment of a mandatory $250 surcharge after conviction, placement on probation, guilty plea, or admission to sufficient facts, $150 of which is to be deposited to a head injury treatment fund;[204]

7. Assessment of a mandatory $50 surcharge after conviction to be deposited to a drunk driving victim fund;[205] and

8. With the defendant's consent, two years of probation and confinement for no less than fourteen days to a residential treatment program.[206]

As is evident, the defendant does not have the option to proceed under the favorable provisions of § 24D and E,[207] unless, as discussed previously in § 47.10A, his/her first conviction or assignment to an alcohol or controlled substance program took place more than ten years prior to the date of the second offense.[208] Typically, however, most clients who find themselves charged and admitting to a second offense, serve their mandatory fourteen days at an approved alcoholic rehabilitation center.

Before admitting, it is essential that the client be made aware of the potential ramifications of the admission. It is especially important that the first time offender be told of what to expect if, within ten years, he is again charged with OUI.[209]

§ 47.11C. THIRD, FOURTH, FIFTH, AND SUBSEQUENT OFFENDERS

Offenders who have committed multiple offenses are subject to the following sanctions that are specific to the number of offenses involved:[210]

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[201] G.L. c. 90, § 24(1)(a)(3).

[202] G.L. c. 90, § 24(1)(a)(1), ¶ 4.

[203] G.L. c. 90, § 24(1)(c)(2). Note that "[a] mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license." Id.

[204] G.L. c. 90, § 24(1)(a)(1), ¶ 2. The surcharge may not be reduced or waived for any reason. Id.

[205] G.L. c. 90, § 24(1)(a)(1), ¶ 3.

[206] G.L. c. 90, § 24(1)(a)(4).

[207] Dunbrack v. Commonwealth, 398 Mass. 502 (1986).

[208] *See* G.L. c. 90, § 24D.

[209] The Safe Roads Act, *see supra* note 1, made it easier for the prosecution to prove second offense.

[210] In 2002, the Legislature removed the "look-back" provisions which allowed an offender to avoid having any offenses for which he was convicted or assigned to an alcohol or rehabilitation program more than ten years prior to the present offense counted in determining how many prior offenses he/she had. *See* 2002 Mass. Acts c. 302 (effective November 28, 2002). For example, a defendant charged with committing OUI in 2001 who had previously been convicted or assigned to an alcohol or rehabilitation program in 1995, 1990 and 1988 would have been treated as a second-time offender under the old version of the statute. Now, the defendant would be treated as a fourth-time offender. Note, however, that, as discussed previously, a second-time offender still can take advantage of the more favorable disposition

1. Third-Time Offenders

1. A fine of not less than $1,000 nor more than $15,000 and imprisonment for not less than 180 days nor more than two and one-half years in a house of correction or a fine of not less than $1,000 nor more than $15,000 and imprisonment for not less than two and one-half years nor more than five years in a state prison;[211]

2. Mandatory minimum service of 150 days; and[212]

3. License revocation for eight years, although the defendant may apply for a limited license for education or employment purposes after two years, and a limited, hardship license after four years.[213]

2. Fourth-Time Offenders

1. A fine of not less than $1,500 nor more than $25,000 and imprisonment for not less than two years nor more than two and one-half years in a house of correction or a fine of not less than $1,500 nor more than $25,000 and imprisonment for not less than two and one-half years nor more than five years in a state prison;[214]

2. Mandatory minimum service of one year;[215] and

3. License revocation for ten years, although the defendant may apply for a limited license for education or employment purposes after five years, and a limited, hardship license after eight years.[216]

3. Fifth-Time or Subsequent Offenders

1. A fine of not less than $2,000 nor more than $50,000 and imprisonment for not less than two and one-half years in a house of correction or a fine of not less than $2,000 nor more than $50,000 and imprisonment for not less than two and one-half years nor more than five years in a state prison;[217]

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available under Sections 24D and 24E if the first conviction or assignment to an alcohol or controlled substance program took place more than ten years prior to the date of the second offense. *See* G.L. c. 90, § 24D.

[211] G.L. c. 90, § 24(1)(a)(1), ¶ 5.

[212] G.L. c. 90, § 24(1)(a)(1), ¶ 5. The mandatory minimum cannot be suspended or reduced. *Id*. The sentence, however, may be served in a specific Department of Correction rehabilitation facility. *Id*.

[213] G.L. c. 90, § 24(1)(c)(3). Note that "[a] mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license." Id.

[214] G.L. c. 90, § 24(1)(a)(1), ¶ 6.

[215] G.L. c. 90, § 24(1)(a)(1), ¶ 6. The mandatory minimum cannot be suspended or reduced. *Id*. The sentence, however, may be served in a specific Department of Correction rehabilitation facility. *Id*.

[216] G.L. c. 90, § 24(1)(c)(3½). Note that "[a] mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license." Id.

[217] G.L. c. 90, § 24(1)(a)(1), ¶ 7.

2. Mandatory minimum service of two years;[218] and
3. License revocation for life, with no possibility for reinstatement.[219]

The following sanctions apply to third, fourth, fifth, and subsequent offenders alike:

1. The case may not be placed on file or continued without a finding;[220]
2. The defendant may not be placed on pretrial probation;[221]
3. The defendant may not serve the sentence on selected weekends, evenings, or holidays;[222]
4. Assessment of a mandatory $250 surcharge, $150 of which is to be deposited to a head injury treatment fund;[223] and
5. Assessment of a mandatory $50 surcharge to be deposited to a drunk driving victim fund.[224]

§ 47.11D. IGNITION INTERLOCK DEVICES FOR MULTIPLE OFFENDERS

As part of the enactment of "Melanie's Law" in 2005, individuals who have two or more convictions under G.L. c. 90, § 24(1)(a)(1) (or whose license has previously been suspended due to his or her assignment to an alcohol or controlled substance education, treatment or rehabilitation program) must have a certified ignition interlock device installed on each vehicle that he or she owns, leases or operates for a period of two years as a precondition to the issuance of a new or hardship license.[225] Once the device is installed, an individual is subject to revocation of his license "for an extended period or for life" if the registrar determines, after hearing, that the individual has (1) removed the device, (2) failed to have it inspected, maintained or monitored on at least 2 occasions during the period of the restriction, or (3) operated or attempted to operate a vehicle with a blood alcohol level that caused the device to prohibit a vehicle from starting on at least 2 occasions or that recorded a blood alcohol level in excess of .02 on at least 2 occasions.[226] Moroever, the legislature has enacted wholly separate offenses for anyone who (1) operates a motor vehicle in violation of an ignition interlock device license restriction,[227] (2) tampers with such a device[228] or (3) starts a motor vehicle on behalf of a person who is under an ignition interlock device license

[218] G.L. c. 90, § 24(1)(a)(1), ¶ 7. The mandatory minimum cannot be suspended or reduced. *Id*. The sentence, however, may be served in a specific Department of Correction rehabilitation facility. *Id*.

[219] G.L. c. 90, § 24(1)(c)(3 3/4).

[220] G.L. c. 90, § 24(1)(a)(1), ¶ 8.

[221] G.L. c. 90, § 24(1)(a)(2).

[222] G.L. c. 90, § 24(1)(a)(3).

[223] G.L. c. 90, § 24(1)(a)(1), ¶ 2. The surcharge may not be reduced or waived for any reason. Id.

[224] G.L. c. 90, § 24(1)(a)(1), ¶ 3.

[225] G.L. c. 90, § 241/2.

[226] G.L. c. 90, § 241/2.

[227] G.L. c. 90, § 24S.

[228] G.L. c. 90, § 24T.

rerstriction (i.e., breathes into the device on behalf of another with such a license restriction).[229]

[229] G.L. c. 90, § 24U.

CHART 47A: OUI AT A GLANCE

(G.L. c. 90 sec. 24, 24D, 24G, 24L) [230]

OFFENSE	**FIRST CONVIC.** (or assign. to a rehab pgm) *(Sec. 24(1)(a)(1), ¶ 1)*	**SECOND CONVIC.** (or assign. to a rehab pgm) *(Sec. 24(1)(a)(1), ¶ 4)*	**THIRD CONVIC.** (or assign. to a rehab pgm) *(Sec. 24(1)(a)(1), ¶ 5)*
IMPRISONMENT			
House of Correction	Not more than 2½ yrs HC (and/or fine)	Not less than 60 days HC nor more than 2½ yrs HC (and fine)	Not less than 180 days HC nor more than 2½ yrs HC (and fine)
State Prison	N/A	N/A	2½ to 5 yrs (and fine)
MANDATORY MINIMUM	N/A	30 days	150 days
FINE	$500-5,000	$600-10,000	$1,000-15,000
	<----------Surfine: $250 to Head Injury Trust Fund ----------→ & $50 to Victim Trust Fund *(Sec. 24(1)(a)(1), ¶¶ 2-3)*		
LICENSE LOSS	1 yr loss of lic. *(Sec. 24(1)(c)(1)*)	2 yr loss of lic. (*Sec. 24(1)(c)(2))*	8 yr loss of lic. *(Sec. 24(1)(c)(3))*
(Hardship reinstat. eligibility)	After 6 mos	After 1 yr	After 4 yrs
(Day lic. eligibility)	After 3 mos	After 6 mos	After 2 yrs
ALTERNATIVE DISPOSITIONS	**Alternative Disp. A** *(Sec. 24(1)(a)(4))* **Alternative Disp. B** *(Sec. 24D)* Sentence may be susp. or ordered served on weekends, holidays, or evenings *(Sec. 24(a)(1)(3))*	**Alternative Disp. A** *(Sec. 24(1)(a)(4)* **Alternative Disp. B** *(Sec. 24D)* only 1X in lifetime & only if 1st convic or assignm to prgm more than 10 yrs prior to 2d offense. Sentence may be served in a facility specifically designated by the DOC for the incarc. and rehab. of drinking drivers *(Sec. 24(1)(a)(1), ¶ 4)*	Sentence may be served in a facility specifically designated by the DOC for the incarc. & rehab. of drinking drivers *(Sec. 24(1)(a)(1), ¶ 5)*
RESTRICTIONS	A case may not be placed on file or CWF (except as provided by Alt. Disp. B) *(Sec. 24(1)(a)(1), ¶ 8)*	-A case may not be placed on file or CWF *(Sec. 24(1)(a)(1), ¶ 8)* -The min. 30 days imprison. cannot be susp. or reduced *(Sec. 24(1)(a)(1), ¶ 4)* -The sentence may not be "split" and served on weekends or holidays *(Sec. 24(1)(a)(3))* -The defendant may not be placed on pretrial probation *(Sec. 24(1)(a)(2))* - Ignition interlock device for 2 yrs upon any license reinstatement (Sec. 241/2)	-A case may not be placed on file or CWF *(Sec. 24(1)(a)(1), ¶ 8)* -Min. 150 days imprison. can't be susp. or reduced *(Sec. 24(1)(a)(1), ¶ 5)* -The sentence may not be "split" and served on weekends or holidays *(Sec. 24(1)(a)(3))* -The deft may not be placed on pretrial prob. *(Sec. 24(1)(a)(2))* -Ignition interlock device for 2 yrs upon any license reinstatement (Sec.241/2)

[230] Prepared by Sean Capplis & Gordon Oppenheim (1996) and updated by Timothy Maguire (2011).

OUI at a Glance (Cont'd)
(G.L. c. 90 sec. 24, 24D, 24G, 24L)

OFFENSE	**FOURTH CONVICTION** (or assign. to rehab. pgm) *(Sec. 24(1)(a)(1), ¶ 6)*	**FIFTH or Subsequent CONVICTION** (or assign. to rehab. pgm) *(Sec. 24(1)(a)(1), ¶ 7)*	**HOMICIDE by MV while OUI recklessly or negligently** *(Sec. 24G(a))*
IMPRISONMENT			
House of Correction	Not less than 2 yrs HC nor more than 2½ yrs HC (and fine)	Not less than 2½ yrs HC nor more than 2½ yrs HC	Not less than 1 yr (and fine)
State Prison	2½ to 5 years (and fine)	2½ to 5 yrs (and fine)	2½ to 15 yrs (and fine)
MANDATORY MINIMUM	12 mos	24 mos	1 yr
FINE	$1,500-25,000 -Surfine $250 to head injury trust fund and $50 to victim trust fund *(Sec. 24(1)(a)(1), ¶¶ 2-3)*	$2,000-50,000 -Surfine $250 to head injury trust fund and $50 to victim trust fund *(Sec. 24(1)(a)(1), ¶¶ 2-3)*	Not more than $5,000
LICENSE LOSS	10 yr loss of lic. *(Sec. 24(1)(c)(3½))*	Loss of lic. for life (*Sec. 24(1)(c)(3¾))*	15 yr. loss of lic. *(Sec. 24G(c))*
(Hardship reinstate-ment. eligibility)	After 8 yrs	No possibility for reinstat.	No provision for reinstat.
(Day lic. eligibility)	After 5 yrs		Loss of lic. for life if any subsequent conviction under 24G (a) or (b)
ALTERNATIVE DISPOSITIONS	-Sentence may be served in a facility specifically designated by the DOC for the incarc. and rehab. of drinking drivers *(Sec. 24(1)(a)(1), ¶ 6)*	-Sentence may be served in a facility specifically designated by the DOC for the incarc. and rehab. of drinking drivers *(Sec. 24(1)(a)(1), ¶ 6)*	N/A
RESTRICTIONS	-Case may not be placed on file or CWF *(Sec. 24(1)(a)(1), ¶ 8)* -Min. 12 mo imprison. cannot be susp. or reduced *(Sec. 24(1)(a)(1), ¶ 6)* -The sentence may not be "split" and served on weekends or holidays *(Sec. 24(1)(a)(3))* -The defendant may not be placed on pretrial probation *(Sec. 24(1)(a)(2))* - Ignition interlock device for 2 yrs upon any license reinstatement (Sec. 241/2)	-Case may not be placed on file or CWF *(Sec. 24(1)(a)(1), ¶ 8)* -Min. 24 mo imprison cannot be susp or reduced *(Sec. 24(1)(a)(1), ¶ 7)* -The sentence may not be "split" and served on weekends or holidays (*Sec. 24(1)(a)(3))* -The defendant may not be placed on pretrial probation (*Sec. 24(1)(a)(2))* -Ignition interlock device for 2 yrs upon any license reinstatement (Sec.241/2)	-Case may not be placed on file or CWF (*Sec. 24G(a))* -Min. 1 yr imprison. cannot be susp. or reduced *(Sec. 24G(a))* -The def't may not be placed on pretrial prob. *(Sec. 24G(a), ¶ 2)*

(Table continued on next page.)

OUI at a Glance (Cont')

(G.L. c. 90 sec. 24, 24D, 24G, 24L)

OFFENSE	HOMICIDE by MV WHILE OUI *(Sec. 24G(b))*	SERIOUS BODILY INJURY WHILE OUI RECKLESSLY OR NEGL'Y *(Sec. 24L(1))*	SERIOUS BODILY INJURY WHILE OUI *(Sec. 24L(2))*
IMPRISONMENT			
House of Correction	Not less than 30 days HC nor more than 2½ yrs HC (and/or fine)	Not less than 6 mos HC nor more than 2½ yrs HC (and fine)	Not more than 2½ yrs HC (and/or fine)
State Prison	N/A	2 1/2 to 10 yrs (and fine)	N/A
MANDATORY MINIMUM	N/A	6 mos (*Sec. 24L(1), para. 2)*	N/A
FINE	Not less than $300 nor more than $3,000	Not more than $5,000	Not less than $3,000
LICENSE LOSS	15 yr. loss of lic. *(Sec. 24G(c))*	2 yr. loss of lic. *(Sec. 24L(4))*	2 yr. loss of lic. (*Sec. 24L(4))*
(Hardship reinstat. eligibility)	<---------- -No provision for hardship reinstatement----------→		
(Day lic. eligibility)	-Loss of lic. for life for any subsequent conviction under either 24G (a) or (b)		
ALTERNATIVE DISPOSITIONS	N/A	N/A	N/A
RESTRICTIONS	None	-A case may not be placed on file or CWF *(Sec. 24L(1), ¶ 2)* -The min. 6 mo imprison. cannot be susp. or reduced *(Sec. 24L(1), ¶ 2)* -The defendant may not be placed on pretrial probation *(Sec. 24L(1), ¶ 3)*	None

ALTERNATIVE DISPOSITION A (Sec. 24(1)(a)(4))

If a defendant has not caused serious bodily injury or death, the court may, with the defendant's consent, place the defendant on probation for two years. A condition for such probation shall be confinement for not less than fourteen days in an approved residential alcohol treatment facility. The court must make written findings that such treatment is available and will be of benefit to the defendant, and that no danger to the public will result. The license loss is for one year. (Sec. 24(1)(c)(1)).

ALTERNATIVE DISPOSITION B (Sec. 24D)

A person convicted or charged with a first offense of operating under the influence may with his consent be placed on probation for not more than two years on condition that he participate in an approved alcohol education program or court ordered alcohol treatment or rehabilitation

program, or both. As a condition of probation, the court may order a minimum of 30 hours of community service. The defendant's right to operate must be suspended for not less than forty-five nor more than ninety days. A defendant under the age of twenty-one will have his license suspended for a mandatory 210 days and must also be assigned to a program designed by the department of public health specifically for the treatment of underage drinking drivers. The Alternative B disposition is limited to first offenders and offenders who have not been convicted or assigned to an alcohol education or rehabilitation program because of a like offense within a period of ten years preceding the date of the commission of the offense with which he is charged. The ten year look back provision can only be applied once in a lifetime.. A defendant who has caused serious bodily injury or death to another is ineligible for Alternative Disposition B. The judge must make written findings that the safety of the public will not be endangered by permitting the offender the benefit of an Alternative B disposition. If a defendant is found guilty of a first offense of operating under the influence, a section 24D disposition may be ordered in addition to the penalties provided in section 24(1)(a)(1). A first offender is presumed eligible for an Alternative B disposition unless the judge makes written findings otherwise.