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NCDD Journal

National College for DUI Defense

Editors: Edward Fiandach and Paul Burglin

Spring 2010

E.D.'S CORNER

Spring has arrived which signals that the Summer Session is just around the corner. It's a little later this year to insure that we have access to Austin Hall for our seminar. Dean Oberman and the Curriculum Committee have created a great program... "The DUI Trial: What You Need to Know to Win!"

MSE was a huge success in New Orleans in April! If you missed it, you need to make plans to attend next year. It will be April 14-16, 2011 so save the date! We are also working with NACDL to put together a great seminar in Vegas October 14-16. Our 2011 Winter Session will be held in Mazatlan, Mexico! What a beautiful venue, especially in January, to hold our winter program! It will be held January 20-21 so start making plans to attend!!

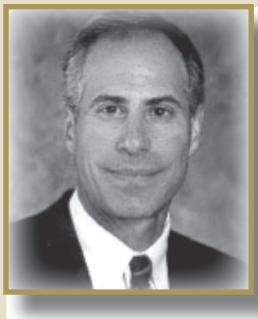
If you are interested in applying for the Certification Examination, the deadline is August 31. The examination will take place in January with more details to come. If you have any questions, please give me a call.

Have a great summer! Look forward to seeing you in Boston!

– ***Rhea***

A MESSAGE FROM THE DEAN

By Steve Oberman



With my term as Dean of NCDD drawing to a close, I can only ponder where the time went. Only a short time ago I was exhilarated to reach the pinnacle of leading this wonderful organization. With the excellent assistance of our Executive Director, Rhea Kirk, and her assistant, Danielle Gaylor, our Board exceeded its goals in obtaining new members, creating innovative seminars and reaching out to better educate lawyers across the country.

The College remains devoted to developing a curriculum for educating attorneys to defend persons charged with DUI and related offenses; to implement the curriculum and courses of study on a national, regional, and local level; to collect, analyze, share, and disseminate information relevant to the defense of those accused of DUI and related offenses; to conduct legal, scientific, and scholarly research on subjects related to the defense of such persons; and to engage in other activities related to developing competence and expertise in defending those accused of DUI and related offenses.

The Board of Regents has worked diligently to accomplish the purposes set forth in our bylaws. Each Regent has devoted many hours writing, lecturing, organizing, reviewing cases and appellate briefs (to determine whether we should intervene as *amici*), and doing what is necessary to educate lawyers so that they may best defend persons accused of these crimes. They, along with our state delegates and many other members, have devoted their time and expertise to make the College the absolute best organization one may join.

Serving as Dean of NCDD has been one of the greatest honors and privileges in my life. During my eleven years on the Board I have had the distinct privilege of serving with, and learning from, some of the most brilliant legal minds in the country. (In fact, I can state without hesitation that all except one member of the Board of Regents is smarter than me.)

Space limitations prevent a thorough listing of all that has been accomplished this year, but allow me to briefly share with you an abbreviated update on the College:

- The College remains in strong financial shape. Membership continues to increase (164 new members in 2009, and 45 to date in 2010), and the future appears bright.
- Our listserver continues to be a tremendous asset.
- Our website has an outstanding library of scientific articles, legal briefs and other resources available to you 24/7.
- The Curriculum Committee continues to fine-tune our sessions to help you get the most out of them. In fact, all Regents once again underwent a special training session this year to learn to become better teachers.
- Our State Delegates (members assigned to each state to act as a liaison between members of that state and the Board) have worked extremely hard this year to populate the library with valuable information.

During the time I have been actively involved with the College, I have learned more about defending DUIs than I could have ever learned on my own. I learned an enormous amount from seminar lectures and workshops, but I learned even more from the hours of socializing with the College members. The opportunity to share strategies, discuss legal issues and learn how to effectively deal with prosecutors and judges in an often emotionally charged environment is the reason the College has grown from the original 100 Founding Members to over 1,000 members. We now have members hailing from every state in the union as well as Canada!

Throughout my career I have belonged to many legal and non-legal organizations, and held leadership roles in perhaps a dozen of them. Never before have I cared so strongly about an organization. Never before have I received such personal and professional benefits from an organization. Perhaps that is why this organization is referred to as a "College." In addition to being an institute of higher learning, the NCDD is a group of lawyers who not only share the same interests within our general profession, but we are also collegial in every sense of the word. It is rare to find a group of lawyers so giving to one another. Almost every day a member requests assistance from others on our list serve, and I am always amazed at how quickly assistance is offered. Attachments are sent, telephone calls are made, and the question or issue is resolved more often than not within a matter of minutes.

Continued on page 2

Perhaps the reason members of the College feel such a strong allegiance to our organization is the fact that membership does not come by payment of dues alone. I am very proud of the fact that during my tenure on the Board we passed a rule requiring members to commit to attending a minimum of one College approved seminar every two years. This requirement helps the public recognize that our members do more than just "dabble" in this very important field of law. Taking this recognition to the next level, I must also state how proud I am that the College is committed to recognizing those who subject themselves to an onerous examination and meet the other qualifications to become Board Certified in the specialty area of DUI Defense Law. Four more lawyers earned this designation in 2010---congratulations to Michael Bowser, Justin McShane, Doug Murphy, and Ryan Russman!

Thanks to the work of many former and current Regents, the College is now acknowledged in national circles as a leader in Board Certification. We are the only organization recognized by the American Bar Association to grant this certification in the area of DUI Defense Law. We hope to continue our progress in maintaining this national program designed to distinguish those who demonstrate an exemplary knowledge of the science, ethics, and trial skills necessary to defend citizens accused of this DUI and related crimes.

One of my few regrets during my term on the Board of Regents is the inability to have shared more time with our members. I share this same regret with every other member of the Board. I therefore encourage each of you to introduce yourself to as many Board members as you can at our seminars. I believe this collegiality is the main reason our summer session fills up so quickly each year. In fact, we intentionally limit the number of attendees at the summer session so that the Board members and other faculty can spend quality time with the attendees. If you have never been to a summer session, you should make a special effort to attend. You will never regret spending three days in Cambridge with 120 of your current and future friends. I am proud to state that a large majority of my closest friends are College members. We share legal and personal experiences together that make us better lawyers and our lives more pleasant. I know that by attending one of our many sessions, you too will develop the closest friendships you will ever have. The College has truly been a life changing experience for me and for that I thank all of you.

Please let the Board members know if there is anything further we can do to assist you in your goal to become a better lawyer. I have the utmost confidence that George Bianchi, your next Dean, will succeed in making the College even better next year. (P.S. I am not smarter than George.) Please give the entire Board your input and support during the next year.

Please note that I have intentionally not personally recognized the individuals who have worked so hard to make the College a better organization (except our staff – for fear of horrible retaliation). To do so would detract from the fellowship of the College and I fear that I would unintentionally neglect to acknowledge the work of someone. Nonetheless, please note my very deep and sincere appreciation to our Executive Director, Rhea Kirk, her assistant, Danielle Gaylor, all of the Regents, the Fellows (former Deans) who continue to guide the College, the state delegates, and the many members who make us what we are. I also request that you consider becoming more active in this wonderful organization. Just ask a Board member or our Executive Director how you can help. Please take a moment to thank them for their efforts when you meet them. Allow me to close by extending all members my very best wishes of success and happiness in your personal and professional lives.

– Steve Oberman

Flem's Case Law Update

by Flem K. Whited III, Fellow

Probable Cause

Checkpoint To Investigate General Criminal Activity Violates Fourth Amendment

Lujan v. State
2009 WL 4673798 (Tex.App.El Paso) (unpublished)

A stationary checkpoint normally limited to targeting uninsured motorists and unlicensed drivers violated the Fourth Amendment where a criminal interdiction unit handling racing, DWI, narcotics, and other particular tasks with a K-9 dog commenced searching for any evidence of criminal wrongdoing. Citing *City of Indianapolis*, 531 U.S. at 39.

***FST* Refusal Is Relevant To Assess Probable Cause To Arrest, But Unlike Flight Or False Statements, It Does Not Show A Consciousness of Guilt.**

Jones v. Commonwealth
2010 WL 143787 (Va.)

"Unlike instances of flight, the use of a false name, or other acts of deception, a driver refusing to submit to a field sobriety test has not undertaken affirmative action to deceive or to evade the police. Moreover, there are numerous innocent reasons why a person may refuse to engage in tests that are not required by law, including that a person may be tired, may lack physical dexterity, may have a limited ability to speak the English language, or simply may be reluctant to submit to subjective assessments by a police officer. Therefore, we conclude that a defendant's refusal to submit to field sobriety tests is not evidence of "consciousness of guilt," and that the Court of Appeals erred in applying this principle in reviewing the evidence of probable cause in the present case.

"[H]owever, in determining whether a police officer had probable cause to arrest a defendant for driving under the influence of alcohol, a court may consider the driver's refusal to perform field sobriety tests when such refusal is accompanied by evidence of the driver's alcohol consumption and its discernable effect on the driver's mental or physical state."

70 In A 55 Zone, Riding Against A Fog Line, Odor Of alcohol, Bloodshot And Glassy Eyes, And FST Refusal, Do Not Add Up To Probable Cause Absent Additional Signs Driver Is Too Impaired To Safely Drive.

State v. Encinas,
2010 WL 481357 (Ga.App.)

Defendant was observed driving 70 mph in a 55 mph zone and riding against (but not on or over) a fog line. He denied drinking but had an odor of alcohol and red/glassy eyes. He refused the FST's except for the HGN, but the HGN was not properly administered. In all other respects, he showed no sign of impairment.

"[T]he presence of alcohol in a defendant's body, by itself, does *not* support an inference that the defendant was an impaired driver."

Anonymous Tip That Driver Dumped Beer Out of Car At Drive-Through Restaurant, Coupled With Police Observation of Driving 20 in a 25 While Riding Lane Divider Line, Insufficient to Justify Stop.

State v. Tischer
2010 WL 144873 (Wis.App.)

Providing a vehicle description and license plate number, an anonymous tipster reported a driver dumping beer out of his car at an Arby's drive-through restaurant. An officer testified that upon seeing the subject vehicle three blocks away, he observed it going 20 mph in a 25 mph zone while riding a land divider. He added that another motorist applied its brakes and move slightly away as the subject vehicle drove on the lane divider.

"These observations, however, did not bolster the reliability of the tip that Tischer had poured beer out of his car in the Arby's parking lot, as they did not corroborate any information received in the tip. Thus, under White and J.L., the tip was not sufficiently reliable to support reasonable suspicion." The Court failed to discuss why the police observations were not, independent of the tipster report, sufficient to warrant a stop.

Brief Stop For No Apparent Reason, Plus Rolling Stop at Flashing Yellow Light, Did Not Furnish Probable Cause For Detention.

State v. Hatch
2010 WL 99265 (Ohio App. 9 Dist.)

Observation of motorist briefly stopping his car on the road for no apparent reason, and them making a rolling stop at a flashing yellow light, was insufficient basis for enforcement stop.

"Unusual driving does not necessarily give a law enforcement officer a reasonable, articulable suspicion that the driver is engaged in criminal activity.

"While Mr. Hatch's first unexplained stop may have given him a reason to pay closer attention to Mr. Hatch's driving, the stop did not violate any traffic laws and was not accompanied by any other indications of erratic driving. Regarding Mr. Hatch's actions at the flashing yellow light, under Section 4511.15(B) of the Ohio Revised Code, when a driver approaches a `[f]lashing yellow caution signal,' he `may proceed through the intersection or past such signal only with caution.' Although Mr. Hatch may have used more caution than necessary, his decision to bring his car to an almost complete stop also did not violate any traffic laws."

Citizen Report Of "Possibly Intoxicated Driver" In A "Grey Passenger" Car, Coupled With Police Observation Of Matching Car Going 10-15 mph In a 35 mph Zone During Pouring Rain, Insufficient Basis For Enforcement Stop.

Waller v. State
2009 WL 4642850 (Tex.App.-Dallas)

A citizen called police to report "a possible intoxicated driver." The caller gave a general location of the vehicle and described it only as a "gray passenger" car. No other facts or details were provided other than the caller's name and phone number. Moments later an officer spotted a vehicle matching this description. The vehicle turned around into a lot and then commenced driving in the opposite direction of the officer going 10-15 mph in a 35 mph zone while it was pouring down rain. The officer acknowledged that it would be normal for people to drive under the limit in such conditions, but not that slow.

"The tip, though reliable to the extent dispatch had the caller's contact information and the caller was put in the position of accountability, lacked any facts. The record is silent as to the basis for the caller's suspicion; and no evidence exists corroborating the tip or identifying a traffic violation. On this record, we conclude the State failed to satisfy its burden of demonstrating reasonable suspicion [for the detention]."

Prior Convictions

Bresten v. Board of Appeal
2010 WL 445666 (Mass.App.Ct.)

Finding Colorado's "Driving While Ability Impaired" (DWAI) statute to be substantially similar to its own "Operating Under The Influence" (OUI) statute, the Massachusetts registrar properly suspended Petitioner's MA license when the Colorado conviction was reported to it under the Interstate Compact statute.

"[B]oth statutes require proof that the motor vehicle operator's ability for clear judgment, physical control, or due care is affected even slightly by alcohol."

Defendant's Failure To Challenge The Use Of A Prior Conviction For Sentencing Enhancement Purposes In A Previous Action, Precludes Him From Challenging Its Use In A Subsequent Action.

Commonwealth v. Lamberson
2010 WL 134063 (Ky.App.)

Defendant had three prior DUI convictions in 2000, 2001, and 2002. In pleading guilty to his second and third convictions he did not challenge the use of the 2000 conviction for sentencing enhancement purposes. Upon being charged with his fourth DUI he challenged use of the 2000 conviction for sentencing enhancement purposes.

"[A] challenge to the validity of a prior conviction offered for enhancement purposes…must be made before the prior offense is successfully used to enhance a conviction. Having failed to attack his 2000 conviction in 2001, prior to pleading guilty to DUI, second offense, [Defendant] may not launch such an attack now."

Relevance And Admissibility

Chemical Test Sample Obtained 80 Minutes After Driving Is Admissible Without Retrograde Extrapolation Testimony If There Is "Other Evidence Of Intoxication" To Support Inference Of Intoxication At Time Of Driving.

Kirsch v. State
2010 WL 447437 (Tex.Crim.App.)

"BAC-test results, even absent expert retrograde extrapolation testimony, are often highly probative to prove both per se and impairment intoxication. However, a BAC-test result, by itself, is not sufficient to prove intoxication at the time of driving. There must be other evidence in the record that would support an inference that the defendant was intoxicated at the time of driving as well as at the time of taking the test.

"Evidence is sufficient to support a jury charge on the per se theory of intoxication if it includes either (1) expert testimony of retrograde extrapolation, or (2) "other evidence of intoxication" that would support an inference that the defendant was intoxicated at the time of driving as well as at the time of taking the test."

Margin of Error/Variance Evidence Not To Be Viewed In Isolation At Administrative Hearing.

Brooks v. Department of Motor Vehicles
2009 WL 4807317 (Cal.App. 5 Dist.)

Defendant blew two breath test results of .08 percent. A defense expert opined in the DMV administrative hearing that (a) there is a plus or minus .02 percent margin of error or variance on the breath testing instrument; and (b) a breath sample higher than 34 degrees centigrade will result in an overestimate of the test result.

In affirming the DMV's suspension order, the California Court of Appeal determined that "margin-of-error evidence should not be considered in isolation from all the facts and circumstances of the case." This includes the manner of driving, the field sobriety tests, and symptoms of intoxication.

***HGN* Evidence Is Admissible To Show A Defendant Has Likely Consumed Alcohol And May Be Impaired, Provided The Testing Is Performed According To**

The NHTSA Protocol By A Properly Trained Officer.

People v. McKown
2010 572082 (Ill.)

Following an extensive *Frye* hearing, the Illinois Supreme Court held that Horizontal Gaze Nystagmus (HGN) evidence may be admitted to show the consumption of alcohol and possible impairment from it, where the testing is performed by a properly trained officer in accordance with the NHTSA protocol.

The State presented the testimony of Dr. Carl Citek, Master Sergeant Antonio Lebron, Dr. Zenon Zuk, and Thomas Page. Defendant presented the testimony of Dr. Joseph Citron, Dr. Ronald Henson, and Dr. Steven Reubenzner. Numerous journal articles and other writings were submitted by the respective parties.

Dr. Joseph Citron testified that he is a board-certified ophthalmologist who received his clinical training at the Mayo Clinic in Rochester, Minnesota. He practices in Atlanta, Georgia, and has over 30 years experience in emergency medical care, including the care of intoxicated patients. In 1999, he completed the National Highway Transportation Safety Administration (NHTSA) training course in field-sobriety testing, which included training in the HGN test. He has 10 years of experience as an instructor on field-sobriety testing for the Atlanta police department and other agencies. He also holds a law degree.

Citron explained the differences in education and training between an ophthalmologist and an optometrist, as well as the fact that an optometrist does not perform surgery or medical diagnosis. He also explained the meaning of the term "nystagmus," which he described as a condition that is "usually pathologic in origin" and "not part of the normal findings in an individual." Nystagmus itself is not a diagnosis; it is merely a description of a certain type of eye movement that may be caused by many conditions. He was unable to give a specific number of recognized causes, but agreed with the statement that the number is at least 39. Citron further testified that once an individual had consumed sufficient alcohol to "reach the threshold of central nervous system depression," he could display nystagmus.

With regard to the HGN test performed by law enforcement officers, Citron explained that the test is not performed in the same manner as the test a physician would perform during the examination of a patient. He then explained that the NHTSA, which is a division of the United States Department of Transportation, has promulgated standards for performing the HGN test as a field-sobriety test. These standards must be observed "in the same fashion every time by everybody" and individual test results would be invalid if the test were not performed in the "prescribed standardized fashion." He then made a presentation regarding the proper procedure for performing the HGN test.

Citron testified that based on a "failed" HGN test alone, one could not form an opinion that the cause of the failure was alcohol. The test is a "preliminary test." It is "the beginning of an evaluation, not the conclusion." Further, if one offered an opinion that the failure of the test was caused by alcohol, that opinion would be conjecture or speculation. Finally, Citron testified that a failed HGN test is a sign that the subject's central nervous system (CNS) is depressed. While the cause of CNS depression might be recent consumption of alcohol, the failed test is not an indicator of actual impairment due to alcohol.

On cross-examination by the State, Citron reiterated that HGN can be an indicator of alcohol consumption and that an officer who observes a failed HGN test can "put the presence of alcohol as a central nervous system depressant on a list of possible causes for these findings."

Master Sergeant Lebron of the Illinois State Police testified that he holds a bachelor's degree in law enforcement administration and, as part of his training to become a state trooper, he received training in the administration of standardized field-sobriety tests. He testified that he spent 16 years as a patrol officer. Lebron estimated that over the course of his career, he has conducted close to 500 DUI investigations. Prior to taking his current supervisory position, Lebron served as the breath-alcohol section supervisor at the State Police Academy. In this capacity, he was responsible for training new recruits in standardized field-sobriety testing, including administration of the HGN test using the NHTSA manual. A copy of the manual was introduced into evidence.

Lebron described conducting workshops at the Academy during which some volunteers would consume differing amounts of alcohol and others would be given a placebo as a control. The volunteers would take Breathalyzer tests to measure their blood-alcohol levels. Then the trainees would perform field-sobriety tests on the volunteers. During theses workshops, he observed that volunteers who had consumed a sufficient amount of alcohol displayed HGN as well as a degree of reduced motor skills. He has observed 400 to 500 volunteers being examined in such workshops.

He then testified that the HGN test, if performed according to the standardized protocol, is generally accepted in the law enforcement community as a reliable indicator of impairment due to alcohol. After a defense objection, he clarified this statement to say that, in his opinion, a failed HGN test is an indicator that the person has consumed alcohol.

On cross-examination, Lebron acknowledged that he has seen individuals fail all three of the field-sobriety tests when they had absolutely no alcohol in their systems.

Dr. Karl Citek, a professor of optometry at Pacific University College of Optometry in Forest Grove, Oregon, also testified for the State. He is involved in training police officers to perform standardized field-sobriety tests and has observed these tests being performed in controlled conditions. On one occasion, he accompanied patrol officers and performed an HGN test in the field. On questioning by defense counsel regarding his expert credentials, he acknowledged that as an optometrist, he was not qualified to diagnose or treat any of the several dozen conditions that may cause nystagmus.

After being accepted as an expert witness, Citek testified that optometrists have a "better feel for the test" than ophthalmologists because "when nystagmus occurs because of an outside influence * * * visual function is reduced." He also testified regarding a resolution adopted in 1993 by the American Optometric Association (AOA) House of Delegates endorsing the HGN test as a valid and reliable field-sobriety test. He stated that the resolution was renewed in 2006 and that he agrees with the resolution.

On cross-examination, Citek acknowledged that lack of smooth pursuit could be exhibited by a subject with a blood-alcohol concentration as low as 0.02 and that nystagmus at maximum deviation could be exhibited by a subject with a blood-alcohol concentration as low as 0.04. Thus, a subject could be given a "failing score" on the HGN test with a blood-alcohol concentration at half the statutory limit of 0.08 (625 ILCS 5/11-501(a)(1) (West 2006)). Citek noted, however, that some individuals could be intoxicated at this level.

With regard to officer training, Citek acknowledged that an officer could pass the standard written test following training in field-sobriety testing by answering 16 of 20 questions correctly and that only four of the 20 questions relate to HGN testing. Thus, an officer could answer all questions concerning HGN testing incorrectly and still receive certification in field-sobriety testing. Citek noted that in addition to passing the written test, officers must perform HGN tests at a live workshop to demonstrate proficiency before being certified. He was unable to answer further questions about the test and the testing procedure because, although he had read the NHTSA training manual, he himself had not completed the training.

On the question of the American Optometric Association resolution,

Citek testified that he was not present at the 1993 annual meeting at which the resolution was adopted. He did not know if the resolution was debated prior to being voted upon or how the vote was taken, by head count or by acclamation.

The State next presented the testimony of Dr. Zenon Zuk, medical director of the Los Angeles County/University of Southern California Employee Health Care System. Zuk was previously employed as staff physician at the Los Angeles County jail, where he performed more than 7,000 medical evaluations on arrestees admitted to the jail. These evaluations included an assessment of whether the arrestee was under the influence of alcohol or other drugs.

Zuk testified that, in his opinion, a finding of HGN is generally accepted in the medical community as an indicator of alcohol-induced CNS impairment. If he were to observe HGN during the examination of a patient, he would inquire about the ingestion of drugs and/or alcohol within in the previous 12 to 24 hours. He stated that he could not make a diagnosis solely on the basis of HGN, but that the test is a "linchpin" in determining whether a patient's CNS is impaired.

He also testified that police officers can be trained to administer the test correctly and to observe the presence of HGN. He opined that the HGN test used by law enforcement is "more rigid," "more formal," and "more methodical" than the HGN test used by physicians.

Zuk stated that there are 35 to 40 different forms of nystagmus and explained at length how thescan be distinguished from HGN. On cross-examination, however, he acknowledged that nystagmus might be a symptom of as many as 125 diseases or conditions. He stated on redirect examination that while these conditions could cause nystagmus, it would not manifest "in the exact same way as HGN." Further, many of the diseases or conditions on this list are rare and perhaps 80% of them would not be seen by a practicing physician "in a lifetime of practice."

Finally, Zuk acknowledged that the HGN test was originally validated as a test for estimating a person's blood-alcohol concentration, not as a measure of driving impairment.

Thomas Page testified for the State that he served as a police officer for 22 years in Detroit and Los Angeles. He has administered the HGN test in the field and has observed other officers doing so. He trains police officers and others to perform the test and to interpret the results. He opined that the test is "universally" accepted within the law enforcement community as a reliable indicator of alcohol impairment.

He testified that in his experience, the presence of HGN has corresponded to the presence of an impairing level of alcohol in the subject's system. He did not, however, provide any data in support of this statement. He acknowledged that he could not speak to the question of general acceptance of HGN testing within the scientific or medical communities.

At the conclusion of the State's case, the defendant presented her remaining witnesses.

Dr. Ronald Henson is a former police officer who was among the first officers to receive NHTSA training on HGN testing in Illinois. His doctorate is in the field of applied management and decision sciences. He has been an instructor on field-sobriety testing at the Police Training Institute at the University of Illinois and has taught the physiology and pharmacology of alcohol at Bradley University. He is familiar with HGN research, having collected papers and articles on the subject for over 25 years, and he has written and lectured on the subject.

He testified that the test was designed to estimate the subject's blood-alcohol concentration, not to reveal impairment, and that it has not been accepted in the academic community as a reliable indicator of alcohol impairment because it cannot discriminate between those who have merely consumed alcohol and those who have consumed too much.

He further testified to his opinion that Illinois' training of police officers on the subject of field-sobriety testing is inadequate. While the NHTSA recommends a 24-hour course, Illinois devotes only four to six hours to the entire three-test battery of field-sobriety tests. Only one hour is devoted to HGN. Further, the NHTSA-approved written test contains 20 questions on field-sobriety tests while the Illinois test contains six or fewer such questions. Illinois does not require that officers undergo retraining or recertification in field-sobriety testing. Based on his review of videotapes of actual Illinois arrests, he opined that only 1 in 100 field HGN tests is properly administered.

Dr. Steven Rubenzer testified that he is a board-certified forensic psychologist. He has completed both the NHTSA student course and its instructor course. He has published several peer-reviewed articles relating to HGN testing. Based on a survey of psychologists that he conducted, he testified that HGN testing is not generally accepted in his field as an indicator of intoxication and that there are no academic studies validating the test as a measure of impairment.

He pointed to the lack of peer-reviewed literature on the subject by ophthalmologists and optometrists and to what he described as flaws in the methodology of the original research study on this subject. See M. Burns & H. Moskowitz, *Psychophysical Tests for DWI Arrest,* DOT HS-802 424, June 1977, U.S. Department of Transportation, National Highway Traffic Safety Administration. A later article by Burns stated that a more recent study showed that 20 out of 26 people who failed the test had a blood-alcohol concentration below 0.08, which he described as a false positive error rate of 67%. He also described a 1981 study showing "interrater reliability" of only 0.66. That is, when the subject was examined by two police officers, the officers' judgment of impairment was the same in only two-thirds of cases. He opined that a interrater reliability coefficient of less than 0.80 rendered the test unreliable.

On cross-examination, Rubenzer acknowledged that his peer-reviewed article cited a journal called "Journal of Optometry and the Law," which does not exist. He further acknowledged that he has not conducted any research studies on the HGN test and that he has no medical training. His survey of psychologists was conducted on-line. Of 64 board-certified psychologists who responded to his query, 53 stated that they believed that HGN testing was not generally accepted in their field.

IN AND OUT OF CANADA

By Wayne R. Foote[1]

A few years ago I received a frantic call from the father of a former client. "Michael is in jail in Calgary! They claim he is in Canada illegally! He didn't do anything wrong. What should I do?" After calming the father down I referred him to Canadian immigration counsel. It turned out that Michael met a Canadian girl at school, fell in love, and went to visit her in Calgary for a few weeks. While he was visiting she had a minor fender bender and Michael was a passenger. When the police arrived they obtained ID's and ran a check of the usual suspects. The record check showed that Michael was an inadmissible foreign national based on two prior OUI convictions in Maine. When asked about the convictions by the police, he lied and denied the convictions. He was arrested for illegal entry. Ultimately, Michael sat in jail for two weeks until his Canadian lawyer could negotiate deportation instead of criminal prosecutions for illegal entry and false statements.

After I reviewed the case file I handled for Michael I was relieved to see that I properly advised Michael that he was inadmissible and could not travel to Canada without prior approval from Immigration Canada.

Canada is not the only country that excludes non-citizens for DUI. Some countries specifically exclude visitors who committed DUI or other alcohol-related crimes. Other countries, such as New Zealand, have a catchall exclusion for lack of "good character" under which a DUI can result in exclusion. The difference between Canada and almost all other countries, however, is that the United States shares criminal and motor vehicle databases with Canadian authorities. **A record check in Canada or at the border will likely disclose inadmissibility.** Many of our clients travel to Canada for business or pleasure. Travel can be on short notice and visa applications that might disclose inadmissibility in advance are not required. Eventually every one of us will have a client who will be affected by Canada's DUI exclusion rules. Knowing the basic rules regarding inadmissibility will help properly advise that client.

IMMIGRATION AND REFUGEE PROTECTION ACT

Canadian admissibility is governed by the Immigration and Refugee Protection Act, Chap. 27 (2001) (IRPA). Section 36 of the IRPA deals with "Serious Criminality." It states that a "foreign national" is "inadmissible" if that person "committed" or was "convicted of" a single offense that would constitute an "indictable" offense under an Act of Parliament, or two "summary" offenses not occurring at the same time.[2] If the indictable offense is also one that is punishable by a term of imprisonment of at least ten years, a foreign national is inadmissible and a permanent resident is excludable. § 36(1).[3] Whether the conduct occurred inside or outside of Canada is irrelevant. What matters is that it occurred.

CONVICTIONS FOR INDICTABLE AND SUMMARY OFFENSES

The Criminal Code of Canada (CCC) contains at least three separate indictable offenses involving impaired driving. These offenses apply when a person operates or has care and control of any motor vehicle[4], vessel, aircraft or railway equipment, or assists in the operation of any aircraft or railway equipment.[5] CCC § 253. The first offense is impaired driving which occurs when the person is impaired to any degree, however slight, by alcohol or drugs. § 253(a). The second offense is excessive BAC which occurs when the person has a blood-alcohol concentration of .08% or more. § 253(b)[6]. The third offense is refusing a test which occurs when the person refuses or fails to submit to an alcohol PBT, a breath or blood test for alcohol, or a blood test for drugs. § 254. Any of these offenses is an indictable offense. § 255. A person who has been convicted of any of these offenses in any country is inadmissible under Canadian law. A conviction includes a verdict of guilty, a plea of guilty or no contest, and deferred disposition or deferred sentence where the court enters a finding of guilty. Other common driving offenses that make a person inadmissible are leaving the scene of an accident (CCC § 252) and operating with a license suspension or revocation (CCC § 259(4) - Drive Disqualified.)

In some cases a DUI prosecution is resolved by a plea to a lesser charge such as careless or reckless driving. Some states have offenses that combine both alcohol and improper driving elements.[7] Whether such an offense will make the defendant inadmissible depends upon the elements of the offense compared to Canadian Law. Under CCC § 249, "Dangerous Driving" is an indictable offense that involves both the element of danger to others and a culpable mental state. A single Dangerous Driving conviction equivalent will make the person inadmissible. "Careless Driving," however, is a summary offense under the various Provinces' traffic codes. One Careless Driving conviction equivalent will not result in inadmissibility. Determining whether a plea-down offense results in inadmissibility requires a comparison of the elements of the offense to Canadian law as interpreted by decisions of the Canadian courts. These cases should be referred to a specialist in Canadian Immigration law.

NON-CONVICTION ACTIONS CAN CAUSE INADMISSIBILITY

The exclusionary sweep of the IRPA is broad. Convictions are not the only official actions that will result in inadmissibility. A person is also inadmissible if that person has "committed" an act outside of Canada that is an offense in the jurisdiction in which it occurred, and the act constitutes a single indictable offense,

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[2] Although the IRPA uses the term "indictable" offense, a Canadian impaired driving offense may be charged by indictment or summary prosecution at the discretion of the Crown prosecutor. Canadian attorneys refer to these offenses as "hybrid" offenses. The term "indictable" is used in this article to refer to both indictable and hybrid offenses.

[3] This article does not cover offenses punishable by a term of imprisonment of ten years or more. A permanent alien or a foreign national who has committed one of those offenses is excludable and inadmissible. § 35. A client with such a conviction seeking to enter Canada should be referred to Canadian Immigration counsel, as should a permanent resident facing such a charge.

[4] A "motor vehicle" includes a snowmobile, ATV or any other vehicle. *R v Baggett*, 26 CCC 2 464.

[5] Thus, boating under the influence can result in exclusion or inadmissibility, regardless of whether the vessel is motorized.

[6] A .08% offense is known as an "80," referring to 80 milligrams of alcohol per 100 milliliters of blood.

[7] California has a "reckless driving" offense without alcohol as an element, but applies a different sentencing statute if the conduct involved alcohol (referred to by California practitioners as a "wet reckless").

or two summary offenses occurring on separate occasions. The term "committed" can involve a lesser level of proof than proof beyond a reasonable doubt, and may be based on an administrative finding alone. For example, a person whose license is suspended administratively for DUI, excessive BAC or a refusal, has been found (or consented to a finding) by a tribunal that the person "committed" the act. Because driving with an excessive BAC is an offense in all states and federal territories, an administrative suspension for excessive BAC renders the person inadmissible. Similarly, a traffic adjudication for impaired driving, such as New York's Driving While Ability Impaired, makes a person inadmissible because it is a finding that the person operated a motor vehicle when that person's mental or physical faculties were impaired to any degree by an intoxicant. In some cases a standard of proof as low as probable cause is a sufficient level of proof to render the person inadmissible. A person facing charges for DUI, excessive BAC or refusing a test is generally inadmissible, at least so long as those charges remain pending. Offenses committed before age eighteen often are not counted.

The extent of admissibility for an administrative suspension based upon a test refusal, however, is not entirely clear. According to IRPA § 36(1)(c), an act committed outside of Canada must be an offense in the jurisdiction in which it was committed, as well as being an indictable offense under Act of Parliament, to trigger inadmissibility. In many jurisdictions a refusal of a test results in a suspension, but is not an "offense" for which "punishment" is imposed. Several courts in the United States have emphasized this distinction in cases where defendants argue double jeopardy as a bar to enhanced penalties or prosecution after imposition of an administrative refusal suspension. In some jurisdictions a refusal is an actual offense for which court-ordered penalties are imposed. Rhode Island and New Jersey are states that separately prosecute refusals. A third situation is those states in which a refusal itself results only in an administrative suspension, without a separate offense having occurred, but that refusal suspension then counts as a prior offense to enhance future DUI charges. Maine is an example of the latter situation. Immigration officers do not normally consider these subtle distinctions and count any adverse action based upon a refusal of any flavor as an act triggering inadmissibility. Canadian immigration counsel may be helpful in resolving refusal issues.

THE SCOPE OF INADMISSIBILITY

Inadmissibility extends beyond prohibiting driving to or in Canada. A person who is inadmissible is barred from entering Canada by any means: land, sea or air. If an inadmissible person is found in Canada that person is subject to deportation and possible prosecution. The process is not necessarily pleasant. Persons flying to Canada are checked for inadmissibility at the Canadian airport at which they arrive. Persons found to be inadmissible and who are not granted entry are required to leave the country. If that person is fortunate, the immigration agent may allow him to stay in a hotel until it is time for the next flight south. If less fortunate, the stay will be in a detention room or cell.[8] In some circumstances criminal prosecution may result.

RELIEF FROM INADMISSIBLE STATUS

The timing and conditions of relief from inadmissible status will depend upon the nature, number and timing of the person's convictions. For a person who has a conviction for a single, indictable offense punishable by less than ten years (including DUI or test refusal), that person is "deemed" rehabilitated after ten years from the end of the last court-ordered sanction. That sanction may be a license suspension, probation, fine payment schedule or a jail sentence, depending upon timing. For a person who has a two or more convictions for summary offenses occurring on at least two different dates, two or more indictable offenses punishable by less than ten years (including DUI or test refusal) or one indictable offense and one or more summary offenses, that person cannot be "deemed" rehabilitated.

Persons who cannot be deemed rehabilitated by the passage of time may apply for rehabilitation status. This application may be made after five years has passed from the date of the last court-ordered sanction. People who can be rehabilitated by the passage of ten years may also apply for rehabilitation status after five years. Forms to apply for rehabilitation are available online at the Immigration Canada website. Applications require a non-refundable fee (currently $200.00 CDN to $1,000.00 CDN - the higher fee is for more serious offenses) and extensive documentation. Documentation must include references from three prominent community members or clergy attesting to the applicant's good character. Processing may take up to a year. There are companies that, for a fee, will handle the processing.[9]

If the person wants to travel to Canada before either of the deadlines above, application should be made for a Temporary Resident Permit[10]. While a Temporary Resident Permit *can* be issued at the border at major points of entry, leaving for Canada and hoping to be granted a permit is risky. In most cases they are not granted and deportation occurs, so a "let's hope" approach to entry is risky! A Temporary Resident Permit allows entry for up to six months. Application for a Temporary Resident permit should be made through a consulate. The application requires a non-refundable fee of $200.00 to $1,000.00 CDN. The processing time will vary by the application load at a particular consulate. A delay in processing of six or more months is not extraordinary. Again, Canada Border Crossing Services or Canadian Immigration counsel may be helpful in obtaining a permit.

Whether a permit will be granted depends to a large extent upon the purpose of the visit. Permits for pleasure visits such a hunting or tourist trips are the least likely to be approved. Trips that benefit Canada generally, such as business trips, stand a somewhat better chance of being approved. Trips that directly benefit Canadian interests (e.g., applicant studying Atlantic salmon spawning behavior in the Canadian rivers) or humanitarian purposes are the most likely to be approved. In some cases, extended permits are available for people who must travel across the border to reach homes or businesses in the United States or Canada. Places such as portions of Big Twenty Township in extreme northern Maine can only be accessed in the winter by traveling over Canadian roads. Permits are somewhat more available in those circumstances. The

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[8] One client traveling by bus on a college ski trip to Ontario was summarily booted from the bus with all of his gear at the Sandy Bay POE in northwestern Maine. The temperature was -20F. Sandy Bay is located in Township 5, Range 3 NBKP (North of Bingham's Kennebec Purchase of 1793.) It is miles to the nearest town and there are no taxi cabs.

[9] One such company is Canada Border Crossing Services (http://bordercrossing.ca/border/home.html).

[10] According to Canada Border Crossing Services, there were previously two types of permit - a Minister's Permit issued at the border, and a Temporary Resident Permit. The Minister's permit is no longer used. The TRP is now used in all cases.

decision to grant or deny these permits is at the discretion of the local Immigration Canada officer.

THE EFFECT OF A DISMISSAL, PLEA TO A LESSER CHARGE, ACQUITTAL, DEFERRAL OR PARDON

In some cases a dismissal or plea to a lesser charge will cure inadmissibility. The outright dismissal of the DUI charge will terminate inadmissibility based on the pending charge itself. A dismissal (as opposed to an outright acquittal) may not terminate inadmissibility based upon an administrative suspension for excessive blood alcohol levels or refusal. As noted above, a plea to a lesser charge will terminate inadmissibility based upon the DUI charge itself, so long as the lesser charge does not trigger inadmissibility as either an indictable offense or a second summary offense. The plea to a lesser charge, however, may not lift inadmissibility based upon an administrative suspension for excessive blood-alcohol levels or refusal. An acquittal or a pardon removes inadmissibility based on both the pending charge and any associated administrative suspension.

Best To Refer Clients To Canadian Immigration Counsel.

The intricacies of when an offense (conviction or not) is an offense rendering a person inadmissible are generally beyond the expertise of a United States DUI attorney. The risks associated with improperly advising a client regarding inadmissibility are significant. The financial costs of an abruptly interrupted Canadian vacation or business trip can be significant. Detention and possible criminal prosecution are obvioiusly unpleasant. When in doubt, a client should be referred to competent Canadian immigration counsel for an evaluation of the situation and, if necessary, action to lift inadmissible status.