

# **Effectively Defending a DWI Charge: DWI Cross Examination Techniques and General Update**

Chuck Alexander II  
&  
John C. Vermitsky

## **Introduction**

The successful defense of those accused of DWI offenses is becoming increasingly difficult. Within the past year North Carolina has seen at least one major newspaper, the Charlotte Observer, publish a series of articles on the topic. Without commenting on the accuracy of published statistics in those articles, it is fair to say that the net effect has been detrimental to an attorney's ability to defend a DWI defendant. As evidence of this conviction rates have risen dramatically across the state, and in one instance, a sitting District Court judge even resigned. The most frightening thing is that potentially, the worst is still yet to come; for as you read this, the Governor's Task Force on DWI enforcement is preparing sweeping changes to the DWI laws as they presently exist.<sup>1</sup>

The main thrust of my comments will be directed towards the steps one should take to investigate a DWI case and the necessary steps one must take to successfully prepare an effective cross examination of the arresting officer in a DWI stop. Overall, the thing to remember is to accentuate the positives during cross examination. This tactic, in conjunction with a thorough questioning of the police officer's familiarity with standard procedures and whether those procedures were followed can help to maximize the results for you and your client.

## **Initial Client Interview**

One of the most critical steps in the proper preparation of a DWI defense is a complete and thorough interview of your new client. It's crucial to remember during that interview that he is scared to death, finding himself caught up in a confusing system that has already summarily revoked his license for 30 days; subjected him to all manner of physical and mental testing, and most likely caused him to spend some time in jail. Now is the time when he needs to feel like someone is listening to him, cares about his problems and is going to help him solve them.

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<sup>1</sup> Attached is a copy of the proposed legislation and an analysis of the same prepared primarily by Durham Attorney Kerry Sutton.

Because your client is in this emotional state you must establish a good rapport with him before you'll be able to get the candid information that you will need for his defense. I like to have our clients fill out a client interview sheet which will initially contain questions designed to elicit the basic information needed to set up the client's file and lay the groundwork for the preparation of limited privileges. The initial interview paperwork asks detailed questions about the incident, including the reason given for the stop, a description of any Field Sobriety Tests performed, whether the police used a mechanical testing device such as the Alcosenser, the Intoxilizer 5000 and whether any blood tests were performed. Following this I discuss my client's use of alcohol both at the time of the incident in question and more generally. If I find that my client has a drinking problem, I often discuss possible treatment options with him. Often this can both help the case and may cause him to open up and confide in you, thereby providing an opportunity for your client to get the help he may badly need. Remember, it is not just about "getting people off."

Armed with the information that you have gleaned from the initial interview, you may wish to give your client additional "homework" by requesting that he take pictures, produce articles of clothing (such as high shoes or sandals), get aerial photographs, diagrams of the scene or a copy of the weather forecast for that day, etc. This serves the dual purpose of keeping your client feeling involved and helping you to get the information that you need to defend him.

Next, you need to get a copy of the officer's report ASAP and make arrangements to visit the scene if possible. No matter how familiar you believe you are with the location, always go to the scene, preferably with your client. After having gathered all the information that is available, arrange for another meeting with your client, and ask him to bring with him any witnesses to the incident in question. At this point you may wish to give an objective evaluation of the case and discuss trial strategy with your client. It is crucial that you strive at all times to be forthright with your client regarding your evaluation of his case. Remember, it's easy to celebrate an unexpected victory and hard to explain an unexpected loss. Never, never, never, make any promises regarding the verdict. With this in mind I will now move through the three phases of DWI detection and give some advice on how to cross examine an officer at each step of the way.

### **Phase I—Vehicle in Motion**

The first phase to cross examine the arresting officer about is Phase I or the "Vehicle in Motion" phase. Most of the time during DWI arrests the officer first encounters your client when your client is operating his motor vehicle. Often times, the officer takes notice of your client because of some behavior such as speeding, weaving between lanes, or the commission of some other traffic violation. At this time the officer is trained to look for one or more of the 24 DWI detection clues set out by NHTSA and incorporated by the courts in State v. Bonds, 139 N.C. App. 627 (2000). These 24 clues are:

1. Weaving
2. Weaving across lanes
3. Straddling a lane line
4. Drifting
5. Swerving
6. Almost striking a vehicle or object
7. Turning with a wide radius, or drifting during a curve
8. Stopping problems (to far, to short, too jerky)
9. Accelerating for no reason
10. Varying speed
11. Slow Speed
12. Driving with no headlights on at night
13. Failure to signal a turn or lane change, or signaling inconsistently with actions
14. Driving in opposing lane or wrong way on one way street
15. Slow response to traffic signals
16. Slow or failure to respond to officer's signals
17. Stopping in the lane for no apparent reason
18. Following too closely
19. Improper or unsafe lane change
20. Illegal or improper turn (too fast, jerky, sharp, etc.)
21. Driving on other than the designated roadway
22. Stopping inappropriately in response to an officer
23. Inappropriate or unusual behavior
24. Appearing to be impaired

Additionally, there are five Cues that reinforce an officer's DWI suspicion. These are:

1. Attempting to flee
2. no response to light siren
3. abrupt swerve
4. sudden stop
5. striking a curb or an object

At the first stage of the cross examination of the officer it is important to elicit the reason why the police officer stopped your client's vehicle. Remember, a police officer may only conduct a brief investigatory stop of a vehicle without probable cause when that stop is "justified by specific, articulable facts, which would lead a police officer reasonably to conclude in light of his experience that criminal activity may be afoot" State v. Battle, 109 N.C. App. 367 (1993). This means that the officer on the stand must set out the specific facts that he relied on to make the stop of your client. These facts must be clearly articulable (e.g. the officer cannot simply say that the driver appeared to be driving poorly without more) and must support a reasonable inference of criminal activity (in this case intoxication) in light of the officer's experience. Furthermore, these reasonable inferences must show that there is a substantial possibility that criminal conduct (driving while intoxicated) has occurred or is occurring. It is essential that you

never forget that if you can show through cross examination that any part of this test is not met (i.e. that the officer is unable to clearly articulate specific facts which would support a reasonable inference that it was substantially possible that your client was driving while intoxicated) then the stop is unconstitutional and the evidence seized (including the results of performance tests and any intoxilizer results) will be excluded. State v. Carter, 322 N.C. 709 (1988).

The most important thing to remember during the cross examination of an officer in general is to accentuate the positives of your client's conduct. This is true for all three phases and can be accomplished methodically to build your client up in front of the jury. For example, the following would be one way of accentuating your client's positives using the 24 NHTSA clues.

Q: Officer you are aware with the 24 NHTSA clues for impairment aren't you?

A: Yes I am

Q: And you stated that the only clue you observed was "swerving" correct?

A: Yes

Q: So Mr. X did not at any time accelerate without reason did he?

A: No not that I saw

Q: And Mr. X didn't weave or drift?

A: No

Q: Mr. X at all times maintained a safe speed within the speed limit?

A: Yes

Etc.

By using this tactic you can make paint the picture for the jury of a client who carefully observed the traffic regulations in contrast to the officer's testimony. Plus, you can do it in a non confrontational way without looking like you are beating up on the police officer for doing his job.

Also, when questioning the police officer on the facts justifying the stop it is useful to ask him or her if he encounters the same behavior in people who are not drunk. For example, you could ask an officer who had remarked that your client was weaving within his lane if he or she often encounters sober drivers who commit the same traffic infractions. If the officer responds that he or she often sees the same behavior in sober drivers you can argue that the behavior that the officer points to as the specific facts that justify the stop are within the "broad range of normal driving behavior" and therefore fail to justify the stop. State v. Robertson, 163 N.C. App. 129 (2004); citing State v. Emory, 119 Idaho 661 (1991).

The final way to cross examine an officer on phase I happens less frequently. This scenario is applicable when the officer in question has little or no familiarity with the NHTSA clues to DWI. Remember in State v. Bonds the court specifically stated that officers should be trained on the 24 DWI clues. If an officer doesn't have a familiarity with these clues, a savvy defense attorney can ask about each one in detail to drive the point home regarding the officer's inexperience. Bear in mind that the constitution

requires a stop to be “justified by specific, articulable facts, which would lead a police officer reasonably to conclude **in light of his experience** that criminal activity may be afoot.” If an officer has little or no experience you can show that the facts that they saw would not allow them to be substantially certain that the driver that they were observing was committing a criminal act.

### **Phase II—Personal Observation**

The second phase of the DWI process is the personal observation phase which takes place after an officer has what he believes is reasonable suspicion that the driver is driving while intoxicated and has effectuated a stop. During this phase, NHTSA teaches that the officer should conduct a driver interview and look for the following sensory clues:

1. Sight
  - a. Blood Shot eyes
  - b. Soiled Clothing
  - c. Fumbling fingers
  - d. Alcohol Containers
  - e. Drugs or Drug Paraphernalia
  - f. Bruises, bumps, scratches
2. Hearing
  - a. Slurred Speech
  - b. Admission to Drinking
  - c. Inconsistent responses
  - d. Abusive language
  - e. Unusual Statements
3. Smell
  - a. Alcoholic Beverages
  - b. Marijuana
  - c. Cover up odors/breath sprays
  - d. Unusual Odors.

Again, when cross examining an officer on these procedures it is crucial to point out and accentuate the positives in your client’s behavior. For example, you may ask:

Q: When you saw Mr. X his eyes weren’t bloodshot were they?

A: No

Q: And he didn’t have slurred speech did he?

A: No

Q: His clothes were clean?

A: Yes

Etc.

By using this technique you can point out to the judge or jury that the officer did not observe anything to indicate impairment. Also you help to draw a picture in the individual juror's mind that your client looked clean alert and sober when he was stopped. If the officer states during cross examination that he did not see any of these clues then that can be used to argue that any subsequent search of your client's person or car were not justified by reasonably articulable facts.

In addition to this the officer may use several interview techniques to determine whether the driver is intoxicated. Some of these techniques include:

1. Asking two things at once or divided questioning (like to provide license and registration)
2. Asking interrupting questions
3. Asking unusual questions
4. Asking the defendant to recite the alphabet backwards or forwards
5. Asking the defendant to countdown backwards
6. Asking the defendant to count on his fingers; 1-2-3-4-4-3-2-1

Note, both the NHTSA manual and certain courts warn that the last two of these (the countdown and alphabet test) are non-standardized tests and are not admissible at trial or may have judicial restraints imposed upon them. *See Pennsylvania v. Muniz* 496 U.S. 582 (1990)(excluding evidence under the Miranda protections where a driver was asked to state "the date of his sixth birthday" during a roadside stop.

In cross examination of the officer you need to ask if any of these types of tests were administered to your client and if so if your client did well on them. Especially, if your client did well on the countdown or alphabet test it can be important to have this information come out on cross examination. Jurors often appreciate the difficulty of some of these tasks and getting the officer to admit your client did well on any of these tests accentuates your client's alertness and coherence and undermines the officer's testimony regarding poor performance in another area.

Next the officer may have asked your client to exit his vehicle. This usually happens because the officer has become suspicious that your client is impaired. The NHTSA manual instructs the officer to look for the following clues when a driver is exiting his vehicle:

1. Difficulty with motor vehicle controls
2. Difficulty with exiting the vehicle
3. Fumbling with driver's license or registration
4. Repeating Questions or Comments
5. Swaying, unsteady or balance problems
6. Leaning on the vehicle or another object
7. Slurred Speech

8. Slow to respond to the officer; forcing officer to repeat questions
9. Driver provides incorrect information or changes answers
10. Odor of alcoholic beverages coming from the driver

It is therefore important that you inquire into whether the officer had your client get out of his vehicle and the facts that led him to do so. As with all of these tests you should question the officer's knowledge of the 10 NHTSA clues and try to accentuate how many of these clues your client failed to show. At this point through thorough cross examination you should have built up a list of positive things that your client did (1) while driving, (2) while stopping, (3) when first viewed, (4) when first questioned or examined and now (5) when he was asked to leave the car. In addition to building up the image of your client as conscientious and sober you are also educating the jury as to the large number of "hoops" that your client was put through that night. This can help to make the jury feel sympathetic towards your client or in the alternative can convince a judge that any small mistakes on phase three were justified by the stress and length of the testing process your client was subjected to. Remember, since officers are trained and N.C. courts have held that these post-stop cues constitute evidence of impairment, the absence of these clues should constitute evidence of lack of impairment! Pointing this out can be crucial to your client's case. This brings us to phase III, the final and arguably most important phase of the testing process. This phase includes FST's or Field Sobriety Tests as well as the administration of a preliminary breath test and eventual administration of an intoxilizer test.

### **Phase III---Pre-Arrest Screening**

There are three standardized Field Sobriety Tests (SFST's). They are the walk and turn test, the one leg stand test, and the horizontal gaze nystagmus test. In addition the driver is often given a preliminary breath test (alcosenser) which is not admissible as substantive evidence and alone is never enough for probable cause. State v. Bartlett, 130 N.C. App. 79 (1998). Also, in North Carolina the horizontal gaze nystagmus test is inadmissible unless a scientific foundation is laid (which rarely occurs). Because of this, the most important thing to do on cross examination is to accentuate the positives of each of these remaining two SFST's. To do this we must look at the instructions for each test and the clues officer's use to determine that such a test was failed.

The instructions for the walk and turn test are:

1. Put your left foot on the line and put your right foot in front of it with your right heel touching your left toe. Keep your hands at your side (officer demonstrates)
2. Do not start until I tell you to
3. Do you understand the directions?
4. When I tell you to begin, take nine heel-to-toe steps on the line, turn around keeping one foot on the line, and return nine heel-to-toe steps. (demonstrate heel to toe steps)

5. On the ninth step, keep the front foot on the line and turn by taking several small steps with the other foot. (demonstrate)
6. While walking, watch your feet at all times, keep arms to the side, count steps out loud. Once you begin, do not stop until the test is completed.
7. Do you understand the instructions?
8. You may begin the test.

The Eight Clues to the Walk and Turn Test are:

1. Can't balance during instruction
2. Starts too soon
3. Stops while walking
4. Does not touch heel to toe
5. Steps off line
6. Uses arms to balance
7. Loses balance on turn or turns incorrectly
8. Takes wrong number of steps

If any two of these clues are present the BAC will be .10 or more 68% of the time, that means two or more of these clues indicate a failure.

When cross examining an officer about the walk and turn test you should first ask them to say the instructions out loud. The length and confusing nature of these instructions can show a jury why your client may have misunderstood them in a stressful situation or failed to follow some of them. Next, if the officer says that your client showed two clues you should ask about each of the other six clues. (Ex. So Mr. X didn't use his arms to balance, took the right number of steps, etc.) You can use this to show that your client did a difficult test mostly right. This may make a jury or judge believe that the client did well on the test. It is crucial that you get the jury or judge thinking of your client's performance as satisfying 6 out of 8 requirements (75%) rather than showing 2 signs of intoxication.

Next you want to do the same with the one leg stand test. The instructions for the one leg stand test are:

1. Stand with your heels together and your arms at your side (demonstrate)
2. Do not begin the test until I tell you to.
3. Do you understand
4. When I tell you to, I want you to raise one leg, either leg, approximately six inches off the ground, foot pointed out. Keep both legs straight and keep your eyes on the elevated foot.
5. While holding that position, count out loud; one thousand and one, one thousand and two, one thousand and three and so forth until told to stop. (demonstrate).
6. Do you understand the instructions?
7. You may begin the test.

The four clues to the One Leg Stand Test are:

1. Sways while balancing
2. Uses arms to balance
3. Hops
4. Puts foot down (three or more times mark subject unable to do the test)

The cross examination to this test should proceed in the same manner. Ask the officer to state the instructions then ask what if any clues your client showed. After that, ask about all of the clues that your client didn't show. Also, on this test if the officer says that your client put his foot down, ask how many seconds the leg was up for. If your client put his foot down after 20 seconds that may make a difference to the jury. Also it can help to confront the officer as to whether your client was allowed to remove any uncomfortable or odd shoes (such as high heels, sandals etc.) before administering the test. If not this can help to show that the test may have been flawed. Either way, you should use the cross examination of this test to stress the difficulty of this test to the jury. By doing so and accentuating areas of the test where your client did well you may be able to convince a jury or judge that your client did not actually fail the test.

Following all of this your client will probably be asked to submit to an intoxilizer. The cross examination of an officer administering an intoxilizer is complicated and presents issues that are beyond the scope of this paper (Crawford v. Washington, sufficiency of testing procedures etc.). However, remember if your client refuses to submit to an intoxilizer your cross examination of phases I, II, and III of the DWI detection process can make the difference between an acquittal and a painful DWI conviction.

### **Conclusion**

I hope that this paper has helped to educate you about some strategies that can be used to effectively cross examine an officer regarding a DWI arrest. By using these tips, you can help to insure that your client receives the best result possible and insure yourself that you did the best that you could to zealously represent your client in his time of need.