



THE ANATOMY OF A *DUI-OWI CASE

© BY MICHAEL J. (MIKE) NICHOLS

ARREST

You awake in the drunk tank. Your head hurts. You didn't sleep at all. Now what? The first thing to understand is that you are experiencing many emotions and will continue to feel those for a long time regardless of whether this is your first arrest until well after this matter is resolved. The officer's investigation is targeted at trying to convince you that you are guilty. You are not guilty until and unless 1 of 3 things occurs: 1) the jury convicts you; 2) the judge convicts you or 3) you plead guilty/no contest. You are presumed innocent and you should maintain that plea of not guilty until and unless you are able to negotiate a result in the case that you can live with in exchange for giving up your right to a trial.

If you are reading this shortly after you were arrested, the best thing that you can do to help yourself is to retrace your steps on the day of your arrest. Everything that you did, including what you had to eat, any unusual activities in which you engaged, how much you drank if anything and what medicines that you ingested for starters: all of this information may create a trail of breadcrumbs to a defense for you when there seems to be only a path to a guilty plea. If you decide to look for a lawyer to represent you, make sure that DUI-OWI defense is a major portion if not THE major portion of his or her practice.

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*"If you want expert help in finding a defense in your case, call or e-mail the Nichols Law Firm.
Mike Nichols wrote the book on DUI-OWI defense in Michigan."*

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A DUI Charge Can Happen to Anyone...

BEFORE YOU MEET with the lawyer, you should assemble the following information to save some time and some money and it will help the lawyer with his or her analysis:

- A written timeline of the events of the day of your arrest including any medicines taken, food and alcohol consumed with the time that you started and time that you stopped consuming each;
- A complete synopsis of any medical history for you and your family back two generations as applicable;
- Details about your stature and any recent fluctuations in your weight;

Anything unusual about any stage of the three phases of a DUI case. These include the:

Vehicle in Motion: why did the officer stop you? Did he/she say why? Was there any problem with your driving? There are 24 cues of impaired driving according to the National Highway Transportation Safety Administration (NHTSA). Did the officer observe one of the cues? If not, the officer's basis for an arrest must be established by observations during the Personal Contact Phase or the FST/SFST phase.

Personal Contact Phase: were you fumbling your papers? Did you stumble if or as you exited the vehicle or while outside the car? Did you make any admissions about consuming alcohol?

FSTS/SFSTs and PBT: what tests did the officer ask you to do? Did you do them all or did you attempt to decline any tests? How did you perform those that you did take? Did the officer explain to you properly the rules about taking a preliminary breath test? Did you take one? Did the officer observe you for 15 minutes prior to taking the pbt? Was there anything going on that may have called the reliability of the pbt into question such as weather or any items in your mouth?

The officer's observations will be preserved in a police report. If the officer testifies in court to things that he/she did not preserve in this report – the officer's credibility will be shattered by an effective cross examination. Once the officer is pinned down to only the signs of impairment that he/she did preserve in his report, a thorough cross makes the officer the defense attorney's best witness. That is because of all the signs of impairment by alcohol that he/she could have observed, a truly effective cross examination will bring out that the officer observed more signs of sobriety than of impairment.

One more thing: the officer's claim that he/she detected an odor of intoxicants, and that raised his/her suspicion that the person may not be safe to drive home is some of the greatest testimony that I have ever had the pleasure to cross examine an officer about. There is nothing about ethyl alcohol (the active "intoxicating" component of an alcoholic beverage) that carries an odor. Moreover, the odor of "intoxicants" on someone's breath is a sign of "consumption" and nothing else. There are other reasons why this is a claim that can be turned around in favor of the accused citizen very easily. You can discuss this issue with me if we have the privilege of analyzing your case for you. Perhaps I will also have the opportunity to discuss it with the officer while he/she is on the witness stand.

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ARRAIGNMENT

The arraignment is the first step in the state's effort to prosecute you. The arraignment is really just a formality during which the court reads the charges to you in open court, advises you of your rights and asks you if you want to enter a plea of any sort. My opinion is that you should assert your right to remain silent or "stand mute." A plea of not guilty will be entered for you. People sacrificed their lives, blood and property over 230 years ago so that each of us has the right to require the government to prove allegations against us beyond a reasonable doubt in open court. If you want to simply plead guilty because you want to get the case over with or maybe the officer's investigation convinced you that you are guilty, then you might as well do that yourself.

However, if you want to really investigate whether the government can prove the case beyond a reasonable doubt you should start by investigating who is the best lawyer to handle your DUI-OWI case. There are many and I mean many, lawyers who take cases in which a citizen is charged with DUI-OWI. Many lawyers dabble in this area of practice. There are few who make it the only part of his or her practice or make it the major focus of his or her practice. If you hire a general practice lawyer who includes DUI-OWI in his or her caseload you might as well flip a coin to determine whether you have a valid defense that will be successful.

If you retain a lawyer, the first step to take is to attempt to waive the arraignment. The arraignment is a formality. Nothing good comes from an arraignment. The problem with appearing for the arraignment is that the judge may decide to impose restrictive bond conditions on you like daily breathalyzer tests. Once the arraignment happens or is waived, the matter will be set for a pre-trial conference at which time your lawyer and the prosecutor will meet to discuss the case. By this time, your lawyer should have conducted some investigation into the facts and begin looking for a defense. The time to prepare your case is now. The more prepared you are now, the more prepared you will be at trial and the stronger your negotiating power will be in most situations. Some jurisdictions are totally inflexible when it comes to plea negotiations. Most jurisdictions will show flexibility but only if you show them that you have bullets in your gun and you are not afraid to shoot.

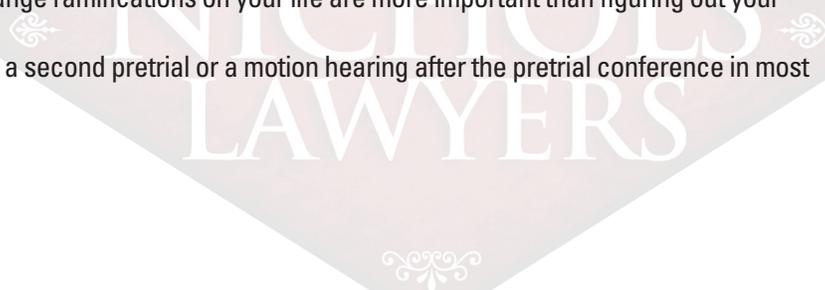
PRETRIAL CONFERENCE

The pretrial conference is the stage at which the prosecuting attorney makes an offer to the defendant through the lawyer. The first offer is not necessarily the best offer. In fact, the first offer, if there is one, is almost always to reduce the more serious charge of operating under the influence to operating while impaired. The differences are minimal. The primary difference is to reduce your license sanction from 6 months to 90 days. Also, you will have restricted driving privileges throughout the whole sanction period. With the more serious OWI charge your privileges are suspended completely for the first 30 days.

The legislators in the State of Michigan created this tiered drunk-driving conviction law to entice people to roll over and plead guilty by offering the prospect of restricted driving privileges at the risk of the complete loss of your license for 30 days. That may be attractive to you in the short-term but when this offer is made to you my advice is that you think about the long-term ramifications. **YOU CANNOT EXPUNGE A DUI-OWI CONVICTION.** Under Michigan's current expungement or set-aside statute, any offense under the Michigan Vehicle Code is ineligible to be set aside or "expunge" from your record. It is there forever.

You should also be thinking about your job or career as well as any insurance issues. Some insurance companies will cancel drivers who are convicted of DUI-OWI. Those who do not cancel the driver will increase the insurance rates. My advice is to walk away from the pretrial and ask the prosecutor to keep the offer open. There is nothing that requires you to accept the offer that day. Give yourself some time to think it over. The long-range ramifications on your life are more important than figuring out your transportation for 30 days.

The matter will be set for jury selection and or trial, a second pretrial or a motion hearing after the pretrial conference in most courts in Michigan.





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EVIDENCE

There are two basic forms of evidence that are going to be used against you in most situations: 1) chemical analysis and 2) witness testimony about (usually the police officer) observations of your driving and or physical condition. If your attorney is afraid of either form or tells you that there is no possible way that you can win your case then your attorney is not a trial attorney. The way to look at this is simple: all cases have evidence. Some evidence is stronger than other evidence depending on what it is and the facts of the case. Some evidence is so flawed that it should not be admitted. Some evidence is flawed enough that the jury should not consider it to be credible beyond a reasonable doubt. Some evidence was collected or gathered improperly (unconstitutionally) and should not be allowed into the trial at all.

For example, the police officer in Michigan is allowed to arrest you without a warrant if the officer has "probable cause" to believe that you committed a misdemeanor. Probable cause is essentially defined in Michigan as an objective belief based on observations to allow a reasonably cautious person to conclude that a crime was committed. So, the question should be posed this way: what facts did the officer know in order to give him or her objective information that supported his or her decision? Did the officer know what your bodily alcohol content was? Usually, the only way that an officer can have any objective belief about someone's bodily alcohol content is with a pbt. The pbt is the test administered with a hand-held device known as an Alco-Sensor III or IV that gives a preliminary reading. The officer is allowed to make an arrest in Michigan based on the pbt result alone. The question is, why take the pbt? If the officer advised you properly, the officer told you that the pbt is a civil infraction that includes a fine. There are no points assessed against your driving privileges and no criminal ramifications. So why take the pbt? The answer is: do not take the pbt.

If you did take the pbt and the reading exceeded .08 grams of breath the officer may not have administered the test properly because the officer violated the rules for administering a pbt or the officer did not follow the manufacturer's manual or even follow the department's own policy for administering a pbt. You can find a link to the manual for the manufacturer on this web-site because I am one of the few attorneys to be allowed to purchase one.

There is a case that requires the officer to follow the administrative rules that were established in Michigan for administering a pbt. Your lawyer should investigate any and all potential sources of an invalid result and be prepared to present those to the judge. The reason why that is so important is that you may need to file and argue a motion that asks the judge to suppress any and all evidence that the police obtain after you were arrested because the officer's arrest was invalid since it was without a warrant and without probable cause to believe that you committed the crime of DUI-OWI.

CHEMICAL TEST – BREATH

The test that is typically used in trial is by an instrument known as a BAC (Breath Alcohol Content) datamaster. There are two types in Michigan: 1. the datamaster and 2. the datamaster "dmt" – which is an upgraded testing instrument from the older datamaster. Both datamasters are manufactured by National Patent Analytical Systems (NPAS) from Mansfield, Ohio. Both also work on a basic scientific principle. That principle is essentially that energy will cause a reaction when it collides with matter. The specific energy that is used in the datamaster is infrared light. Two beams are aimed from different points (known as microns). The beams are directed through the matter that enters into the datamaster chamber. The number that claims to be the amount of ethanol in your system is the difference between the strength of the signal of the beam at the other end. The second micron is positioned to detect a specific interfering substance.

The principle on which the instrument operates is specifically called "infrared spectroscopy." Very few police officers are familiar with this principle. Moreover, even expert witnesses who testify for the state lack intricate knowledge of the science and can only explain it to a judge or a jury in a very general way. Make sure that the lawyer who represents you understands the datamaster and how the instrument operates.



SOME LIMITATIONS OF THE DATAMASTER

The datamaster has a limited ability to be accurate. It detects alcohol and measures its content by comparing the amount of energy in a breath sample. The datamaster is designed so that if certain measurements are detected it will trigger a message to the operator. For example, if there is contaminated air in the breath room, the datamaster will signal "ambient fail." The operator is required under chapter 10 of the manual to consult with the datamaster supervisor. The contaminated sample should not be used to convict a citizen charged with drinking and driving. The "ambient fail" signal cannot rule out contaminants in the air that caused the reading.

The datamaster is also designed to report a "refused" message if it does not read a sufficient breath sample. The officer will often testify that the instrument refused because the citizen did not blow very hard or tried to "trick" the datamaster. There are two problems with this claim. First, in almost every case the officer does not know enough about the datamaster to understand exactly why the instrument indicated a refusal. In fact, the officer almost always fails to follow the instructions in chapter 8 of the BAC Datamaster manual when a refusal occurs. The instructions require the officer to determine whether or not there was a "technical" refusal or an "operator" refusal depending on whether the officer believes the citizen was making a genuine attempt to give a sufficient breath sample.

Second, the datamaster does not require you to "blow hard" in fact a hard blow is not helpful to the datamaster at all. The BAC Datamaster manual states in the basic instruction section on administering a test that the subject should deliver a "long, steady" blow and not a hard, deep blow. Therefore, if an officer claims in your police report or even testifies that you did not blow hard or deeply enough, your attorney will have lots of ammunition to show that the officer simply does not understand what he or she is doing when administering a datamaster test.

The datamaster is also extremely susceptible to temperature changes. The breath sample must be 34 degrees centigrade. According to California attorney Lawrence Taylor, who wrote an extensive treatise along with Robert Tayac, "California Drunk Driving Defense," a decrease of even 1 degree centigrade can cause a decrease of 6.8% in the amount of alcohol. The datamaster is set up to analyze breath based on some critical assumptions: first that the breath is from the deep lung of the body and second that the breath is at a normal core body temperature. Some of the key concepts are the scientific principles known as "Henry's Law" and the proportion of ethanol or other compounds in the breath and blood known as the partition ratio. Henry's Law states that if air and a liquid are in an enclosed container, the components of the liquid will remain in equal proportion to those components in the air above the liquid.

It is believed further that the ratio is 2100 to 1. In other words, 2100 thimbles full of blood will equal 1 thimble full of breath. If the instrument reads a breath sample that is not at the ratio of 2100 to 1, the ethanol content will be read an inaccurately low rate if the partition ratio is smaller. Moreover, if the instrument's program to detect the proper slope of ethanol entering into the chamber does not function properly, the instrument may actually report the alcohol that is in your mouth as opposed to the alcohol in your body.

Other limitations of breath analysis include radio frequency interference, the interference on the instrument by volatile compounds that may be similar in their molecular structure to ethanol but are not ethanol.

CHEMICAL TEST - BLOOD

The other form of chemical testing is blood testing. The State of Michigan uses a procedure that is similar to procedures used in many other forensic labs. The procedure does not test the blood from your body. The procedure analyzes a gas mixture of your blood, mixed with a water-based solution that includes another compound. The procedure is repeated a second time using a different mixture with a different compound. Think of the compound as sort of a measurement tool. That compound is called an "internal standard." The proportion of the time it takes the molecules of suspected ethanol to burn off the gas mixture compared to the time it takes the molecules of the measurement tool is how the test instrument comes up with the number that is reported as your alleged blood alcohol content. The time is measured against a graph that was determined by observing pre-determined mixtures of ethanol that are at various concentrations. These mixtures that are used to "set" the machine are called "calibrators"



SOME LIMITATIONS OF THE BLOOD TEST

There are several sources of potential error. There are some potential errors that seem simple to identify and others that require an in depth knowledge of blood testing. You should discuss the details of your blood draw with your attorney at the very first meeting. Make sure to write down every detail that you can recall about the test, from the color of the stopper tube in the blood vial to whether the person who drew your blood labeled the vial right away.

In 2005, the late attorney/scientist Anne ImObersteg published a comprehensive work on the analysis of blood alcohol concentrations. Ms. ImObersteg cited a number of sources of potential error in the lab that many attorneys use as a source for investigating a case involving blood alcohol analysis.

In short, the only way to truly determine whether a potential error occurred and then establishing that error as a defense is to investigate the case through what is called the discovery process. You may need to retain an expert to testify and interpret documents from the laboratory at which your blood was analyzed. For example, the chromatogram is the document on which the result of your analysis is reported. The chromatogram may reflect that there is a shadow on the line other than the report of the measurement of the alleged ethanol compared to the internal standard. That shadow is critical because the analyst can never say definitively what it is. That shadow could be carryover from other samples in the gas chromatograph. Carryover may cause a falsely high reading.

The bottom line, according to Ms. ImObersteg, is that margins of error inherent in the instrument used for analysis means that a 5% to 10% variation should be factored into the results reported. Further, human error at the time that your blood was drawn, labeled, transported, taken from storage, injected into the gas chromatograph and then analyzed, can also cause an unreliable result.

PREPARING FOR TRIAL: A BETTER CHANCE TO WIN OR NEGOTIATE

The preparation for trial should start with the first meeting between the lawyer and the client. The philosophy is pretty simple: if you prepare for trial and you are not satisfied with the plea offers that are made by the prosecuting attorney you are ready no matter what when the case is called for trial. When prosecutors need to make a decision about which cases to take to trial and which cases are appropriate situations to compromise, that decision is usually made very late in the process. Sometimes the decision is not made until after the jury is selected. There are even instances in which the trial starts and the prosecutor decides to compromise once the testimony starts and it appears that reasonable doubt cannot be erased.

The rules of district court do not require that the prosecutor and the defense have to exchange certain information. The rules of felony cases do require both sides to exchange certain information about the case. This mandatory exchange process is called "discovery." So, if you are facing a felony charge the good news is that the prosecutor is required to provide to you certain information even beyond the police report. The failure to provide that information by the prosecutor could result in the court ordering that the prosecutor cannot use certain evidence or information.

If you are facing a felony, there is a two phase process that the case will follow. The first stage is the probable cause stage in district court. During the probable cause stage, the prosecutor has to show at a hearing, called a preliminary examination, that it appears that a crime was committed and that the defendant committed it. It is a very low standard and most cases are sent to trial after the preliminary exam phase. This step is called getting a "bindover" for trial. However, if the prosecutor does not show probable cause through legally admissible evidence and testimony, the court is required to dismiss the case.

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Even though the rules of district court do not require the prosecutor to give your lawyer certain information, you still must investigate your case. The prosecutor is still obligated to give you a police report. The police report will contain the officer's formal recorded recollection of the events of the case. The report can be used to attack the officer's credibility if he testifies to things that never happened or that he did not put in his police report.

You should also be digging for other evidence that may be helpful and that you can obtain through the Freedom of Information Act (FOIA). Under the FOIA you may receive any public record or thing by requesting it in writing. That means that you can obtain everything from the video of the officer's dashboard camera if it was working, to the records for maintenance and calibration of the instrument that was used to try to measure the alcohol content in your system. Looking for and viewing all of this information is critically important because it may show that you appeared to be more sober than impaired. It can be very helpful evidence that you need to find a defense and to obtain the best result possible.

SENTENCING

Ask any judge what matters most to them about imposing a sentence on someone who is convicted of OWI in Michigan and almost every one of them will tell you: "how can I be assured that this person will not do this again." Any person can stand in front of a judge and explain that they do not intend to every violate the law again or drink too much and drive. What can cause you to stand out and really put yourself in a positive light is for you to start treatment of some form and 2) to demonstrate accountability. The first thing that you should do is obtain a substance abuse assessment. The judge is required by law to consider a substance abuse assessment before imposing sentence on someone convicted of OWI. The second thing that you should do is commence following treatment recommendations, whether that means you attend alcohols anonymous (AA) or undertake something more involved, like intensive outpatient psychotherapy (IOP). You should also consider a form of "accountability," whether that means putting yourself on random preliminary breath tests (pbts) or some other way to verify that you are sober while your case is pending. It may not be a requirement to stay sober during the period that your case is pending, but it is a good idea. Make sure that you talk with your lawyer about what you are doing to be proactive. Make sure that you also maintain documentation of everything you do and give an extra copy to your lawyer. Whether it is an AA sheet to verify attendance or a certificate of completion of programming, you are going to look much better to the judge if everything that the court would require you to do as part of your sentence is under your belt already.

*DUI = Driving Under the Influence/OWI = Operating While Impaired

