#431 - DUI Defense – The First Case

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About the Presenter

Lewis Gainor is a criminal law attorney in Chicago, Illinois and founder of Lewis Gainor & Associates, PC. He has been defending clients accused of driving under the influence in Illinois courts since 2004.

Mr. Gainor received his training as an Assistant Public Defender in Lake County for nearly four years. He has been in private practice since 2008, representing clients in courtrooms throughout the Chicago region. He has individually tried more than 40 juries to verdict and handled more than 1,000 DUIs. His jury trials have been featured in the Daily Herald, Chicago Tribune, and patch.com.

Mr. Gainor received his BA from the University of Missouri and his JD from the University of Minnesota Law School.
I. Introduction

About the Presenter

- I practice in the city and suburbs of Chicago. I’ve personally taken 40 cases to jury verdict, and handled over 1,000 DUIs. I have tried felony DUI cases and also reckless homicide. I have won cases I should have lost, and lost cases I should have won.

II. Client Intake

A. How to Interview Your New Client

- The most important question to ask is, “Is this your first DUI?”
- Almost every state has mandatory minimum penalties for a second offense. A second DUI offense can result in serious jail time.
- Avoid trouble later by disclosing these mandatory minimums to your client.
- The next most important question to ask is, “Can this DUI be upgraded to a felony?” Many state laws provide DUI is a felony where the defendant didn’t have insurance or a driver’s license, or caused an accident.
- If there was a personal injury accident, expect felony charges.

B. Explaining the Process of DUI

- Every DUI has two parts to it: first is the suspension of driving privileges, and second is the criminal charge of DUI.
- Check your statute to determine when the suspension of driving privileges will go into effect. If your client is caught driving during the suspension, he will face additional serious charges. Make sure this is known.

C. How to Charge Attorney's Fees

- Criminal law practitioners don't charge by the hour. The reason is many judges will not allow you to withdraw if your client isn’t paying the bill.
- Charge up front, or at least get a sizable down payment.
- A flat fee is your property. It doesn’t go into the client trust account. It should be non-refundable per a written agreement.
- $750 is the minimum you should ever charge for a DUI in a rural area. Anything less is irresponsible. It is a conflict of interest to allow your interest in profit impact your advice to your client (eg, trial or plead out).

D. Retainer Agreements
Few criminal attorneys use written retainer agreements. This is a mistake. Written agreements protect you from client complaints. And they make your client understand that you are serious about collecting your fee.

Make sure you specify exactly what is included in your fee. Many states have laws allowing the sheriff to seize the vehicle and sell it at auction. If your client believes that you are handling this for him when you’re not, he could lose his vehicle and you’re getting a disciplinary complaint.

E. Malpractice Traps

- Be CAREFUL about time limits for challenging the suspension of driving privileges. In almost every state, the driver’s license suspension is a civil matter. If you don’t file the necessary paperwork in time, you’ve waived your client’s right to fight the suspension, and that could be malpractice.
- Be VIGILANT about vehicle forfeiture issues. If the prosecution is seeking to seize the vehicle and sell it and you fail to file a response or objection, then you have committed malpractice.
- Generally, in criminal cases, it is nearly impossible to commit malpractice. No client is going to sue you saying, “I was innocent and got found guilty because of him,” because they can never prove you were the reason they were found guilty. It could’ve been the jury. But where client money or property is involved (eg, a civil matter), it is much easier to prove the loss was caused by the lawyer.

III. Investigation

A. Video and Audio Recordings: Burden is on You to Request

- Police departments get 1,000s of calls each month and can’t keep track of which calls result in criminal charges. They destroy audio recordings of 911 complaints usually after 30 days. Even if the recording contains evidence that proves there was no probable cause, once it’s gone you can’t complain about a due process violation.
- Video recordings from traffic stops are usually kept because the officer submits them to the prosecutor. But videos from the police station that show your client was sober will be destroyed after 30 days.
- Send out subpoenas by certified mail or seek a court order to preserve this evidence.

B. Brady Material: Discovery in Court

- *Brady* material is any evidence concerning guilt or innocence. You are entitled to this as a matter of due process.
- Check that you have received the police report, alcohol influence report, and any other written statements from the police officer, especially sworn statements on tickets or notices. These
statements can be used to impeach his testimony (eg, prior inconsistent statement) and suggest reasonable doubt.

IV. First Court Date

A. Practice Pointers: Written Motions

• Criminal attorneys don’t use written motions often. This is a volume business, so there are few written motions and most of the work takes place before the judge.
• But papering your client makes you seem professional and protects you from disciplinary complaints.

B. Avoid Mistakes in Court

• Basically, every case proceeds in this way: arraignment, plea of not guilty, and trial (unless there’s a plea).
• Act as-if. Even if you don’t know what you’re doing, the client usually can’t tell the difference. Have your case called after 2-5 lawyers go before you. Imitate what they say.

C. Speedy Trial Overview: Pretrial and Trial Dates

• Civil cases are complicated. Criminal cases are easy.
• Every defendant who pleads not guilty must stand trial. So every court date is either a trial date, or a pre-trial date.
• The US constitution says every defendant has a right to a speedy trial. The prosecution can’t continue the case forever.
• Almost every state has a statute that specifies a time limit in which the prosecution must bring the defendant to trial or else the case is dismissed.
• The defendant’s right to speedy trial is the NUMBER ONE reason the prosecution makes deals. Prosecutors are politicians. They get elected by promising to be tough on crime. The only reason they make deals is that they can’t give everyone a speedy trial.
• Your job is to exploit this imbalance for your client. Sometimes, just demanding trial will give you good results.
V. Search and Seizure

A. Terry Stops

- The US Supreme Court says that a person is seized under the 4\textsuperscript{th} Amendment when an innocent person would not feel free to leave. The police must have reasonable suspicion of criminal activity in order to seize someone. The seizure is called a Terry stop.
- If there is no reasonable suspicion, then all the evidence obtained as a result of seizure is thrown out.
- If you see the words, “SUSPICIOUS VEHICLE,” you have to file a motion to suppress evidence, because the courts have said that this is not sufficient reason to stop a vehicle.
- Malpractice alert: this is one situation in criminal cases where you can commit malpractice. If you fail to pursue a motion to suppress, you could be providing ineffective assistance of counsel. These complaints can be reported to the state bar.

B. Community Caretaking

- A police officer may seize someone without reasonable suspicion of criminal activity only where he is acting in good faith on the belief that he is helping that person. For example, a police officer can curb a vehicle where the driver left her purse on the roof if his intention is to provide assistance.
- If the officer observes something during the stop that leads him to arrest the defendant, generally there is no 4\textsuperscript{th} Amendment challenge.

C. Arrests

- All arrests must be supported by probable cause, which is more than reasonable suspicion. The officer must have evidence that the defendant committed a particular offense.
- If the defendant is arrested without probable cause, the evidence from the arrest (eg, the officer’s observations and the breathalyzer) can’t be used against the defendant.

D. Moving Violations as Basis for Traffic Stop

- A violation of the vehicle code is sufficient reason for an officer to curb a vehicle (eg, to seize the defendant).
- The US Supreme Court says that pretextual stops are OK. As long as the police officer can point to some minor infraction as the reason for the stop, then he can pull over the defendant, even where his true motive was racial profiling.

E. Motorists Asleep at Intersection
An officer can approach your client where he is passed out in his vehicle. This is community caretaking (because the officer doesn’t know whether the driver has a medical condition or is drunk).

Generally, if the officer observes evidence of DUI, there is no 4th Amendment issue.

But where the officer approaches the vehicle believing your client is DUI, then it’s not community caretaking.

F. 911 Calls About Drunk Drivers

There are two types of 911 calls: named citizen callers and anonymous tips.

Anonymous tips need corroboration (eg, the police officer has to observe something consistent with the complaint of a drunk driver such as weaving or swerving). Otherwise, stopping the defendant because of an anonymous tip is a violation of the 4th Amendment.

Named citizen complaints need less corroboration because the courts say that these people are believable. They could be prosecuted for making a false report.

G. Privilege Against Self-Incrimination and DUI Stops

Answers to questioning during a custodial arrest are not admissible unless the defendant was warned that he has the right to remain silent (eg, Miranda warnings).

Traffic stops are not considered custodial arrests. But after the defendant is placed in custody, you can seek to exclude statements made in the squad where the questions were reasonably likely to elicit incriminating responses.

The 5th Amendment privilege does not prohibit use of field sobriety testing (because FSTs are not testimonial).

There is no 5th Amendment privilege protecting the results of blood, breath or urine testing (because they are non-testimonial).

H. Federal Privacy Laws and Disclosure of Blood Alcohol

HIPPA says that hospitals can disclose medical records to law enforcement where the police are investigating a crime committed by the patient.
VI. Field Sobriety Testing

A. Standardized and Non-Standardized Testing

- Field sobriety tests are standardized if approved by the National Highway Traffic & Safety Administration (NHTSA). They are standardized in the respect that if they are performed according to standards, they should produce the same result each time.
- The only NHTSA-approved tests are the horizontal gaze nystagmus (HGN), one-legged stand (OLS), and walk-and-turn (WAT).
- All other tests, such as the alphabet test, touch finger-to-thumb, finger-to-nose, counting test, pick-up a coin, etc. are not approved by any national government agency (after standardized testing). You should object to the court admitting them into evidence and argue against their weight.

B. NHTSA-Approved Sobriety Testing

- You should obtain the NHTSA field sobriety testing manual. Police officers are trained according to the manual.
- The book says that if the HGN, WAT, and OLS tests aren’t performed according to procedure, then they aren’t scientifically valid. This means their accuracy is questionable, and there is reasonable doubt that your client was impaired.

C. Horizontal Gaze Nystagmus

- HGN is the involuntary jerking of the eyeball. It is caused by alcohol, but also occurs as a result of disease, head trauma, astigmatism, etc.
- You need the officer to admit that there are other causes of HGN that could explain the presence of HGN with your client.

D. Walk and Turn

- Basically the WAT is looking for the defendant’s inability to walk an imaginary line.
- Injuries to your client’s back, hips, knees, and ankles will affect his/her ability to perform the test.
- People who are older than 60 or who are 50 pounds overweight will have difficulty performing the test.
- Your client’s footwear (eg, heels over 2 inches) can impair his/her ability to perform the test.

E. One Leg Stand

- The OLS is looking for your client’s inability to hold his/her foot off the ground for 30 seconds.
- Injuries to your client’s back, hips, knees, and ankles will affect his/her ability to perform the test.
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- People who are older than 60 or who are 50 pounds overweight will have difficulty performing the test.
- Your client's footwear (eg, heels over 2 inches) can impair his/her ability to perform the test.

F. Three Stages of a DUI Stop

- Vehicle in Motion. The officer is looking for weaving, swerving, or inability to hold a lane.
- Personal Contact. The officer is looking for an odor of alcohol, slurred speech, bloodshot eyes, and disorientation.
- Pre-Arrest Screening. The officer has the suspect perform field sobriety tests to determine if there is probable cause to arrest for DUI.

G. Cross Examination Techniques Overview

- The general approach is to proceed through all three stages of a DUI stop and emphasize that all the things the officer was looking for that suggest the defendant was impaired were NOT present.
- For instance, “Officer, one of the things you’re looking for is the driver’s inability to drive within his own lane, correct?” [“Yes.”]
- “That would suggest the driver may be impaired?” [“Yes.”]
- “But in this case, my client never drifted out of his lane, did he?” [“No.”]
- The other method is to emphasize all the things your client did right during field sobriety testing.
  - For example, “Officer, you testified that my client stepped off the line on step nine of the first nine steps during the WAT, correct?” [“Yes.”]
  - “But that means that she walked the first eight steps on the line perfectly, doesn’t it?”