

◆ **FREE DWI training** ◆

Meeting the Defense in Impaired Driving Cases

**Texas District and County Attorneys Association (TDCAA) Statewide DWI Training
in cooperation with the Texas Department of Transportation**

This course is designed for prosecutors only and is specially developed for both DWI prosecutors and those trying felony impaired driving cases. If intoxication is one of the elements in your cases, you need this course. We will explore defenses great and small. We will go from nullification and the disconnect between our BAC and video, right down to defending the multitudes of little errors in SFSTs. We will cover defending our labs and blood testing right down to rotating and refrigerating blood tubes. The format is fast and interactive. This program provides 4 hours of free CLE. However, there will be no TCOLE credit provided for this course.

Today's Schedule

8:30 a.m.–9:15 a.m.	Registration
9:15–10:15 a.m.	The Big Defenses
10:15–10:30 a.m.	Break
10:30–11:30 a.m.	The Small Defenses
11:30 a.m.–1:00 p.m.	Lunch (on your own)
1:00–2:00 p.m.	The Big Blood Defense
2:00–2:15 p.m.	Break
2:15–3:15 p.m.	The Small Blood Defense
3:15 p.m.	Adjourn



In addition to this excellent free training, every attendee will receive two TDCAA publications: *DWI Investigation & Prosecution* and *Traffic Stops*. These books give attendees resources in many areas not covered by this conference.



Meeting the Defense in Impaired Driving Cases

The Big Defenses (60 minutes) DWI is an offense committed by “nice people”. Jurors, or at least their family and friends have committed it. Prosecutors must find and eliminate jurors prone to nullification. After finding jurors that care about DWI, prosecutors must reinforce that position. BAC and impairment don’t always line up nicely, addressing this at jury selection and trial is necessary to overcome the “disconnect defense”. While blood search warrants are a welcome advancement, prosecutors must win DWI cases before the blood results are introduced, and even if they are suppressed.

Learning Objectives

By the end of this session students will be able to:

1. *Question the panel on nullification, disconnect and a lack of blood evidence.*
2. *Present evidence and arguments about why DWI matters.*
3. *Present a winning case before blood evidence is introduced, or even if it is suppressed.*

The Small Defenses (60 minutes)

The defense will always go after officer’s SFST administration, prosecutors need to both put the field back in Standardized Field Sobriety Test and relate the clues directly to impaired ability to operate a motor vehicle. Common fourth and fifth amendment objections will also be explored.

Learning Objectives

By the end of this session students will be able to:

1. *Question officers about the difficulty of administering SFSTs in the field..*
2. *Use the SFST manual preface in redirect.*
3. *Link each SFST standardized clue to specific physical and mental impairments related to driving.*
4. *Defend against “arrest creep” and defend SFSTs as non-interrogation.*

The Big Blood Defense (60 minutes)

The defense will attempt to undercut Lab quality, with the help of a Forensic Toxicologist prosecutors will better learn to use their expert witness. Experts and the rule will be explained as well as common attacks on labs and lab SOPs. The nature of Quality Incidents and Quality Action Plans will also be discussed..

Learning Objectives

By the end of this session students will be able to:

1. *Question a Forensic Toxicologist about lab quality assurance and quality control.*
2. *Explain and argue “the Rule” related to expert witnesses.*
3. *Define and explain Qis and QAPs.*

The Small Blood Defense (60 minutes)

If it bleeds it pleads. Well at least it used to. Now the defense has lots of little issues like how the blood is drawn, transported, stored and handled. The swab, the tube, rotations, needles, refrigeration, vacuum, yeast, sample size and more will all be explored legally and scientifically.

Learning Objectives

By the end of this session students will be able to:

- 1. Question a Forensic Toxicologist about common draw, tube and storage issues.*
- 2. Question officers about those same issues.*
- 3. Present testimony in Court to the fact a warrant affidavit was “sworn”.*

Meeting the Defense in Impaired Driving Cases

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The Big Defenses

- I. Nullification
 - (1) Why DWI Matters
 - (a) Death
 - (b) The difference between a DWI defendant and an Intoxication Manslaughter defendant is...?
 - (c) Rehabilitation requires accountability.
 - (2) Why Juries Nullify
 - (a) There but for the grace of God go I.
 - (b) We don't like "our" vices preached about.
 - (c) Drugs and alcohol.
 - (d) Strict liability crimes.
 - (e) Consequences and public shaming.
- II. Find Your Why
 - (1) True in every case we try.
 - (2) Faking sincerity is hard.
 - (3) If you don't care, they won't care.
- III. Before You Persuade, Expose
 - (1) Strikes first, then use your jury to persuade.
 - (2) Consider scaled questions.
 - (3) Believe your jurors.
 - (4) Loop negative and loop positive.
- IV. video
- V. What does a .16 look like? The Disconnect Defense.

- (1) No two people respond to alcohol or drugs exactly the same way (behavior not biology).
- (2) Even kids can mask, drug users and alcoholics are masters at it.
- (3) We underutilize mental impairment.
- (4) Again you better address this in Jury Selection.

VI. video

VII. What Role Does Blood or Breath Evidence Play in Your Case?

(1) Strategy for Blood Evidence

- (a) Try Murder cases like confession will be suppressed.
- (b) Try impaired driving cases like Breath/Blood will be suppressed.
- (c) Just like a confession show corroboration.

(2) Let them hear BAC late!

(3) Jury Selection

- (a) Always Cover Two Definitions of Intoxication
- (b) Always Qualify on Two Definitions of Intoxication
- (c) Billy and Bubba
- (d) "Have you ever seen someone you knew was impaired?"
- (e) "What evidence should an officer gather?"

VIII. video

The Small Defenses

I. Put the "Field" back in SFST

- (1) Cross your officer first....
- (2) But put it in context!
- (3) Like this.

II. HGN Lack of Smooth Pursuit

- (1) Marble on Sand Paper, windshield wipers on dry windshield
- (2) Physical ability to see clearly. Mental ability to process visual cues

- (3) Affects on driving
 - (a) See moving objects clearly
 - (b) See objects while you are in motion
 - (c) Judge distance from objects
 - (d) Calculate speed and direction of objects in motion or objects while in motion
 - (e) Calculate closing speed
- III. Distinct and Sustained Nystagmus at Maximum Deviation
- IV. Onset of Nystagmus Prior to 45 Degrees
- V. Vertical Nystagmus
- VI. Cannot Keep Balance During Instructions
- VII. Starts Too Soon
- VIII. Stops While Walking
- IX. Does not Touch Heel to Toe
- X. Steps Off Line
- XI. Uses Arms for Balance (6 inches)
- XII. Improper Turn (or Loses Balance on Turn)
- XIII. Sways While Balancing
- XIV. Uses Arms for Balance
- XV. Hops
- XVI. Puts Foot Down

The Big Blood Defense

- I. Steps in the Toxicologist Role – For the Analysis of Each Case
 - a. Receive properly submitted evidence from law enforcement into our accredited laboratory.
 - b. Examine all submitted evidence specimens to ensure fitness for testing.
 - c. Analyze specimens, in batch analysis, with scientifically accepted and validated methods.
 - d. Analyze all data, including calibration and quality control analysis.
 - e. Technical review of all data – batch data and specific case data.

- f. Administrative review of all reports.
- II. Additionally – This is Always Going On...
 - a. Maintain a firm understanding of all Standard Operating Procedures.
 - i. Toxicology
 - ii. Crime Laboratory
 - iii. TX DPS General Manual
 - b. Maintain a firm understanding of Laboratory Accreditation requirements and Toxicology Standards and Recommended Practices.
 - c. Maintain a firm understanding of all Quality Assurance and Quality Control practices.
 - i. Laboratory Accreditation
 - ii. Quality Incidents
 - iii. Disclosure Form
 - d. Maintain license and/or certifications.
 - e. Maintain all equipment and instrumentation used in the analyses.
 - f. Continuing Education – drug toxicology is a very FLUID and EVOLVING science.
 - g. Lots and lots of phone calls, emails, communication.
 - h. More testimony than any other forensic discipline.
 - i. How did we get this result?
 - ii. What does it mean???
- III. What does a toxicologist need from the prosecutor?
 - a. Please don't refer to us as "lab techs."
 - i. We are Forensic Scientists/Forensic Toxicologists, and we are Subject Matter Experts.
 - b. Always understand that it is not our job to help you win.
 - i. BUT – we can be used properly in your cases....
 - c. To help us assist you, have a basic understanding of what we do AND what we know!
 - d. We can testify about drug effects.
- IV. We can possibly still testify if the blood evidence is excluded.
 - a. To help us assist you, do not interpret a toxicology report without us.
 - b. Does a positive result mean the drug is impairing the subject?
 - c. What does it mean if a drug is not quantitated?
 - d. What does it mean if a report is negative?
- V. Remember that each toxicologist does not testify the same way.
 - a. Different levels of experience and comfort.
 - b. Different styles of testimony.
 - c. Very, very important PRETRIAL.
- VI. Ask us what we can say and try not to tell us what to say.

- a. Please, please don't tell us:
 - b. "You are the star witness."
 - c. "My case relies on your testimony."
 - d. "Your [correct and professional] testimony
- VII. "Toxicology Interpretation Limitations
- a. Cannot test for every possible drug.
 - b. We use cutoff concentrations - "decision point" – anything under this concentration is reported as negative.
 - c. Some drugs have very low concentrations in the blood that methods may not be able to detect.
 - d. Some drugs degrade in the blood tube after collection.
 - e. Therefore - a negative report does not always mean there was no exposure to a drug.
 - f. Unlike a DRE subjective analysis, we provide an objective analysis.
 - g. Most of us would rather not watch any video of the incident, to stay objective.
 - h. Our analysis/report doesn't:
 - i. prove impairment
 - ii. conclude intoxication
 - iii. indicate which drug was impairing the individual more (if polydrug)
 - i. Many drugs have limited empirical data:
 - j. New drugs
 - k. Dangerous/prohibitive to test many drugs
 - l. In Texas, we have no zero tolerance or per se levels to define drug content intoxication
 - m. Impairment/intoxication is influenced by:
 - i. Tolerance
 - ii. Metabolism – by tolerance OR genetics
 - iii. Polydrug use
 - iv. Health – physical and mental
 - v. Environmental factors

- n. No forensic scientist in our section will ever testify that any given subject is definitively intoxicated based on only a drug content result (without any combined alcohol).
- o. Depending on analyst experience, we can testify on the likelihood of impairment based on certain factors
- p. Drug used illegally increases likelihood of intoxication.
- q. Poly-drug use increases likelihood of intoxication.
- r. If prescription drug:
 - i. Recreational use increases likelihood of intoxication
 - ii. New to the prescription increases likelihood of intoxication
 - iii. In combination with other drugs increases likelihood of intoxication
 - iv. In combination with alcohol increases likelihood of intoxication
 - v. In concentrations above published therapeutic values increases likelihood of intoxication
- s. This can also *indicate* that a person may not be taking the drug as prescribed, but we can't know for certain Questions we like to be asked during testimony...
- t. Ask us if we do/can test for every possible drug.
- u. Ask us general questions about each drug: history, prescription uses and doses, how it enters and leaves the body.
- v. Ask us the possible effects of each reported drug separately, then in combination.
- w. Ask us to describe therapeutic ranges, including how these ranges are obtained.
- x. Ask us a lot of “hypotheticals” in questions during testimony..
 - i. This is where our objectivity can meet the subjectivity of this specific case!
 - ii. Ask us our opinion on intoxication – but be prepared to hear “possible” or “likely” and not a certainty. (unless an intoxicating concentration of alcohol is involved)
- y. .If it seems appropriate for the case – ask us if we would get in the car with this driver.....

VIII. In other words, PLEASE EXPAND ON THE PREDICATE QUESTIONS!

IX. Quality Assurance and Quality Control

X. How do we make sure it is this defendant's blood in this analytical report?

XI. Tell me about QI's and what happens to them?

The Small Blood Defense

I. Gut Brewing

- a. Holy Cow! I am my own brewmaster!
- b. One Recorded Case
- c. From medical web site:
 - i. Therefore, he would have needed to produce more than 24 g of ethanol per hour to achieve that BAC level. If you take into account that the average person passes about 0.5 L of gas a day, this individual would have to pass approximately 24 L in that 2-hour span.
- d. 1152 times average gas production
- e. Did they explode? No? Then they drank the alcohol.
- f. Oh and without treatment it does not go away.

II. Grey Top

- a. Did the person doing the draw observe powder in the tube?
- b. Tubes are inspected by manufacturer prior to shipping. Lack of preservative and anticoagulant is nearly impossible. There is no way to validate the preservative by simply looking at it. Testing the blood for preservative/anticoagulant is time consuming and expensive.
- c. Studies have shown that there is no statistical difference in BAC between preserved, unpreserved, refrigerated, unrefrigerated samples within at least 14 days.

III. Expiration

- a. The Vacuum Expires
- b. If there is no Vacuum, no blood will go in.
- c. Did blood go in? Then there was Vacuum.

d. How much oxidation occurs in a vacuum?

IV. Rotations

a. Inversions (8)

b. Defense experts will argue that inverting vial too little will cause improper mixing of preservative and allow EtOH production.

c. *Studies have shown no BAC generation even in unpreserved ante-mortem samples*

d. *Did the tube explode? Where did CO₂ go?*

e. Defense will argue that too much (or too vigorous) inverting will ‘*disrupt cellular membranes*’ and create artificially high BAC.

f. *Blood is literally cooked during testing. EtOH is volatilized into headspace.*

g. Ok Simpler Still

h. Was Blood Chunky?

i. If not inversions were sufficient.

V. Refrigeration

a. Studies have shown;

b. No significant difference in ante-mortem measured BAC levels refrigerated, unrefrigerated, preserved, or unpreserved up to 14 days from draw.

c. No production of EtOH in human blood refrigerated, unrefrigerated, preserved, or unpreserved up to 42 days from draw.

d. Why is it kept in fridge if it doesn’t affect BAC?

e. We recommend keeping blood samples in refrigerated storage for two reasons, 1) it keeps potential biohazards separate and refrigerated (safest storage possible) and helps prevent LOSS of BAC.

f. Ok Simpler Still

g. Was Blood Chunky?

h. If not refrigeration sufficient.

VI. Chain of Custody

a. Weight Not Admissibility

b. A General Paranoid Suggestion of Tampering Does Not Raise the Issue

VII. Non-alcohol swabs

- a. Not using the proper swab
- b. Some betadyne swabs and some isopropyl alcohol swabs. Isopropyl alcohol does not affect a BAC lab test.
- c. Most 'alcohol' swabs are non-EtOH swabs. While it is best practice to avoid using a swab that contains any alcohol, remember that there are many types of alcohol and only EtOH has the potential to interfere with the lab test for EtOH.
- d. Isopropyl Shows on Blood Test