



Filling the investigative void for DUI collisions

Collecting all of the available evidence to make your case for punitive damages

BY DAN SCHNEIDERMAN

Whether a District Attorney or plaintiff’s attorney, the primary function of a trial lawyer is to collect and convey facts. Although the evidentiary threshold required in personal injury cases is lower than “beyond a reasonable doubt,” a savvy plaintiff’s attorney strives for the highest standards of advocacy. With that in mind, even when confronted with a clear liability DUI case, a plaintiff attorney’s failure to utilize all of the investigative data can be a missed opportunity to present persuasive facts to the jury in a cogent and straight-forward manner.

Data to be reviewed

- (1) Investigative Agency Reports
 - CHP DUI Arrest – Investigation Report (CHP 202)
 - CHP DUI Field Evaluation
 - CHP DRE Evaluation
 - Arresting Agency’s DUI Intoxication Form

- (2) Intoxilyzer Data Printout, BAC Analysis, and Toxicology Reports
- (3) The Lab Technician / Criminalist
- (4) Blood Kit / Chain of Custody
- (5) In Car Camera Footage (MVARs)
- (6) Other Items
 - DMV Records of the DUI Driver
 - 911 Tapes
 - CAD Logs
 - Preliminary Hearing Transcripts
 - Certified Convictions

[1] Investigative agency reports

It is not uncommon for the criminal prosecution of a DUI offense to proceed at the same time as the corresponding civil lawsuit. When this is the case, county and state agencies may be hesitant to produce their files while the criminal proceedings continue. Unfortunately, this leaves the plaintiff’s attorney at a



disadvantage, as significant information is not included in the initial traffic collision report.

For that reason, it is essential that the plaintiff's attorney proactively subpoenas investigative reports and materials from the arresting agency. In addition to any media that may be available, the subpoena language should include a request for the CHP DUI Arrest – Investigation Report (CHP 202), CHP DUI Field Evaluation, CHP DRE Evaluation, or the arresting agency's DUI Intoxication/Arrest Form if a non-CHP agency arrested the DUI driver.

Each of these items can potentially bring a wealth of information. For example, the CHP DUI Arrest – Investigation Report (CHP 202) often lists a DUI suspect's answers to "pre-field sobriety test" questions. The purpose of these questions is to elicit pre-collision facts, such as the DUI driver's origin, destination, drinking pattern, type and amount of alcohol consumed, signs of intoxication, what the driver ate, and how much he or she slept near the time of arrest.

The CHP DUI Field Evaluation, CHP DRE Evaluation, or DUI Intoxication/Arrest Form identifies each field sobriety test administered to the DUI suspect prior to his or her arrest. In the event the driver agreed to submit to a breathalyzer, these forms will also reference the DUI suspect's blood alcohol content (BAC) at the scene of the collision. Using this information to corner the DUI driver into admissions over the course of discovery can be vital to prevailing on punitive damages and other issues later at trial.

[2] Intoxilyzer data printout, BAC Analysis, and Toxicology Reports

The BAC Analysis (Breath or Blood) and/or Toxicology Report make up the foundation of the District Attorney's evidence and can usually be found in the county's District Attorney file. Again, there may be some resistance from the

District Attorney's office to providing these materials as the criminal case is pending. Therefore, if you cannot get these items from the District Attorney, you will need to subpoena them directly from the respective agency that conducted the analysis.

The BAC Analysis can take on different forms. If the arresting agency administered a breath test, you will need to subpoena the intoxilyzer data printout. The intoxilyzer is the device used by law enforcement to gauge a DUI suspect's BAC by analyzing a breath sample at the station. The data printout will tell you when the breath test occurred, who administered the test, and how many samples were provided.

If a blood sample was taken, you must subpoena the public or private lab that conducted the BAC Analysis (alcohol) and/or Toxicology Report (drugs). The lab report will tell you the name of the technician that ran the sample and the level of drugs or alcohol found in the DUI driver's blood. Unless otherwise noted on the Blood Kit/Chain of Custody Form, you will need to contact the county District Attorney to determine the name of the lab that tested the blood sample. (See *infra* Section IV, "Blood Kit and Chain of Custody Form.") Depending on the county where the collision took place, the County D.A. Forensic Crime Lab, California Department of Justice Crime Lab, or a local private lab is usually responsible for conducting the BAC Analysis or Toxicology Report.

[3] The lab technician/criminalist

Identifying at the beginning of your case the technician/criminalist that conducted the DUI driver's lab analysis can be invaluable. Not only is it important for the eventual presentation of expert testimony at trial, but doing this may allow you to develop the "pattern of consumption" early on in discovery. The pattern of consumption is essentially the theory of the DUI driver's impairment, which includes the following pieces of information:

the identity of the substance(s) consumed, the timeline of consumption, and the quantity of substance(s) consumed.

Cultivating a relationship and educating the technician/criminalist at the outset of your case can help you map out your discovery strategy on these issues. First, do your research. Where possible, get a copy of the technician's resume. The key information here is whether the technician has previously testified as a criminalist. More specifically, you want to determine whether the technician can provide an opinion on the DUI driver's level of impairment at the time he or she was driving.

If the technician has testified before, contact them and see if he or she would be willing to review the analysis with you. Getting an independent expert motivated to go to bat for your client can prove instrumental at trial, as these individuals will have built in credibility. Get them involved. Start by introducing the technician to the non-economic portion of your case. Bring your client's photograph to the meeting, and educate them about your client's injuries. Discuss the effect those injuries have had on your client's life. Show them photographs depicting the property damage resulting from the collision. Most importantly, define to the technician their role as a key player in getting the DUI victim justice.

Last, although skilled in providing testimony in criminal cases, many technicians have not provided expert opinions in civil trials. For that reason, it is important that you discuss the differences between trial for criminal offenses and that for personal injury. Putting the technician through this process prior to testifying will result in them being a more active and enthusiastic witness later on at trial.

[4] Blood Kit and Chain of Custody Form

Tracking down and calling foundational witnesses for the blood sample and lab analysis can be a waste of time, and



may ultimately distract the jury from the material issues in dispute. Therefore, when you receive the lab analysis, subpoena a copy of the Blood Kit and Chain of Custody Form. These items are used to track the blood sample once taken from the suspected DUI driver at the hospital or police station. They will also identify the phlebotomist that took the blood sample, the time the sample was taken, and the officer that booked the sample into the evidence locker.

In addition to identifying foundational witnesses, use this information to form a concrete theory of the DUI driver's pattern of consumption. Ask opposing counsel to stipulate to the contents of the Blood Kit and Chain of Custody Form. Doing so can help you form a rock-solid pattern of consumption with your expert, and may smooth out the scientific nuances of the consumption timeline that Defense may try to attack later on at trial (e.g., "rising BAC defense").

[5] In Car Camera Footage (MVARs)

It is essential that you request any and all In Car Camera footage associated with the DUI arrest from the arresting agency. The use of ICCs, also known as MVARs ("Mobile Visual Audio Recording systems"), are becoming more and more prevalent, especially with increasing national media attention on police conduct. The importance of this footage cannot be overstated. For example, it is not unusual for an arresting officer to videotape a DUI suspect's performance of field sobriety tests, the DUI interview, and placement in the rear of the officer's vehicle. Showing this video to the jury provides them with a real-time demonstration of

the DUI driver's level of impairment, and the effect that impairment had on the driver's basic motor functions and driving ability.

Furthermore, depending on the content of the footage, a plaintiff's attorney may be able to use the DUI driver's mannerisms, conduct, and speech at the time of the arrest in arguing for punitive damages. Unsurprisingly, it is fairly common for DUI suspects to lie or "short" their alcohol consumption at the time he or she is first being investigated for DUI. For that reason, make sure to compare any statements made by the DUI driver regarding his or her consumption with your criminalist's pattern of consumption. In the event the DUI driver's comments do not align with the pattern of consumption, use this disparity to show the jury that the driver knew he or she was too intoxicated/impaired to drive a motor vehicle, but willingly did so despite that knowledge. This comparison can be very damaging to Defense on a number of issues, particularly when punitive damages are in play.

Note that CHP and police agencies typically destroy ICC/MVARs footage anytime from 6 to 18 months after the date of the arrest, so it is better to make this request sooner than later. Also, if the agency informs you that there is no ICC video from the arresting officer, make sure to ask the clerk whether any other officers listed in the report activated their media system following the stop or collision.

[6] Other items

The plaintiff's attorney should also retrieve the following items during the investigation of a DUI collision. These include the DUI driver's DMV records, 911 tapes, CAD logs, Preliminary Hearing

transcript, and Certified Conviction paperwork. Each of these can provide supplemental and/or foundational information to be used at trial. However, the collection of this evidence can also be important from a non-economic perspective. For example, if a victim or bystander called 911 following the collision, the 911 tape can potentially be used to show the emotional or distressful nature of the collision immediately after it occurred. Again, it is vital that you use these mediums as an opportunity to develop your case in a simple and pragmatic way for the jury.

Conclusion

While we as advocates would like to think that the typical juror can differentiate between "beyond a reasonable doubt" and "preponderance of the evidence," such an expectation ultimately fails on a very basic level. Regardless of the standard, jurors will ultimately pick a side based on what made the most sense and who presented the more persuasive set of facts.



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