

"Two Lawyers Walk into a Bar..."

DUI defense is the specialty people love to hate—but dare not drive without.

by TOM McNICHOL



who represent DUI defendants routinely face two questions from the people they meet. The first is often asked angrily: How can you defend *those* people? The second is usually posed in a lower voice, almost a stage whisper: What should I do if I've been drinking and get pulled over?

"DUI has gotten to be like child molesting, the way it's treated by society," says Los Angeles attorney Lawrence Taylor, a former Marine who with nearly three decades of practice has come to be known in California as the dean of DUI defense. "I used to try to explain to people at cocktail parties what I do," he adds, "but now I usually just try to avoid it. The thing is, though, the same guy who is so self-righteous about drunk driving sometimes ends up being my client. And suddenly he can't believe what the system is doing to him."

Of course, drunken drivers generate no shortage of grim statistics. According to the National Highway Traffic Safety Administration, in 2007 they caused nearly 13,000 deaths in the United States, including 1,155 in California. The same year, police made more than 1.4 million DUI arrests—more than for

Tom McNichol is a contributing writer to California Lawyer.

illustration by ASAF HANUKA



robbery, burglary, motor vehicle theft, and arson *combined*.

Such numbers strongly argue for stricter laws. And in January, California indeed toughened up one statute by lowering the threshold blood-alcohol content (BAC) for drivers who have already been convicted of a DUI offense. Now, anyone on probation for driving under the influence can be judged as a repeat offender if found to be behind the wheel with *any* measurable alcohol on his or her breath. (Normally, a BAC of at least .08 percent is needed to establish intoxication.)

To be sure, along with their hoped-for deterrent value, stricter DUI laws tend to generate more legal work as well. "I expect to see a lot more people" as a result of the new law, says Bruce Kapsack, a veteran DUI attorney and author of *Innovative DUI Trial Tools*, a handbook for defense lawyers. "There's also going to be a lot more clogging up of the courts."

DUI defense is an attractive specialty for several reasons. First of all, the work is not only recession-proof, but it actually tends to be *more* lucrative during tough economic times, a circumstance that often heightens the appeal of a good, stiff drink. Also, DUI clients as a group, when compared to other criminal defendants, are a lot more likely to pay their legal bills.

"Ninety-five percent of my clients are soccer moms and Little League dads," says Kapsack, whose firm has offices located throughout Northern California.

DUI defense lawyers, however, aren't nearly as easy to pigeonhole. At one end of the spectrum are the specialists

who've spent much of their professional lives mastering arcane technical issues such as blood and breath partition ratios, microbial contamination in urinalysis, and the perils of retrograde extrapolation in roadside chemical tests. These attorneys typically charge anywhere from \$3,500 to \$10,000 to defend a first offender, not including the expert witness fees or lab tests that may be required. Top expert witnesses with national reputations can easily push the total cost closer to \$20,000.

At the other end of the spectrum are cut-rate practitioners with no particular expertise, who charge as little as \$1,000 per case. These include "dump truck" lawyers, who sign up as many clients as possible and then dump them all on the guilty-plea docket; and "escort" lawyers, who escort clients up to the judge like a high-paid call girl, plead them guilty, and then disappear with the money.

These DUI mills typically offer a low-ball rate to clients, and they tend to give commensurate service. One California attorney who advertises his "cheap DUI defense" widely on the Internet pitches prospective clients: "We do the same thing over and over again. There is simply no reason to spend thousands of dollars on your defense. We charge about half of the going rate." Another posts

stirring online testimonials from clients. One client gushes: "I was sitting behind the wheel of my truck with the engine running in the middle of an intersection. I had a .25 alcohol level and I threw up in front of the cop. I bombed the field sobriety tests. The Marin County jury hated my guts but they found me 'not guilty' on all charges."

Some attorneys troll for DUI clients by buying up Google keywords such as *cheap dui lawyer* so that their ad will appear prominently in search results when potential clients cruise the Internet. Or they'll sign up with an online aggregator service that matches people searching for a DUI lawyer with subscribing attorneys. As one lawyer who subscribes to DUI Defenders (dui1.com) enthuses: "This thing already paid for itself. I picked up three new clients during the first week. This is the best DUI advertising I was ever involved in."

Another marketing approach is to send out what's known as "jail mail." Third-party services such as United Reporting Publishing Corporation (jailmail.com) provide attorneys with local arrest reports listing the names of people picked up on DUI charges. Attorneys then thoughtfully send the accused a letter offering their services.

"I tell my clients if they don't want their wives or husbands to know about their DUI arrest, they should keep an eye on the mail," says Paul Burglin, "because they're going to get a dozen solicitations from lawyers after they get arrested." A San Francisco defense specialist, Burglin admits to having

"I tell my clients if they don't want their wives or husbands to know about their DUI arrest, they should keep an eye on the mail, because they're going to get a dozen solicitations from lawyers."

PAUL BURGLIN, attorney

STAGGERING STATISTICS

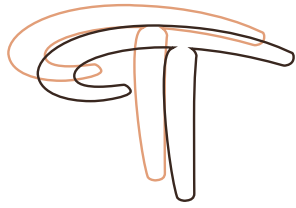
Data are nationwide for 2007, except as noted.

- Deaths involving alcohol-impaired driving: **12,998**
- California deaths involving alcohol-impaired driving: **1,155**
- U.S. traffic fatalities that were DUI-related: **31.7%**
- Decrease in DUI-related deaths, compared to previous year: **3.7%**
- Increase in alcohol-impaired motorcycle riders involved in fatal crashes, compared to previous year: **10.2%**
- Time of day with most fatal crashes involving legally drunk drivers: **midnight to 3 a.m.**
- Time of day with fewest fatal crashes involving legally drunk drivers: **9 a.m. to noon**
- Share of fatal crashes involving legally drunk drivers where no other vehicle was involved: **68%**
- Arrests for DUI nationwide: **1.4 million**
- Arrests in California: **204,015**
- Americans who will be involved in a DUI-related crash sometime in their lives: **30%**



Sources: National Highway Traffic Safety Administration; arrest figures from FBI

fought his own battles with alcohol before giving it up in 1990. And apparently, in his line of work, that's not uncommon. "It's kind of like doctors who gravitate to anesthesiology or pharmacology so they can be near the drugs," he says. "In this business, you see a lot of DUI lawyers who pick up clients while they're drinking at the bar."



he legal and social history of drinking and driving in America reached a turning point in 1980 when a Sacramento County real estate agent named Candice Lightner cofounded Mothers

Against Drunk Driving (MADD) after a drunken driver killed her 13-year-old daughter. The group quickly became a powerful lobbying force, and in 1984 its efforts were rewarded with a federal law that reduced highway subsidies to states that failed to raise the minimum drinking age to 21. In the same spirit, the states then began to lower the blood-alcohol level that motorists could legally drive with. In fact, by 2005 MADD had successfully lobbied the legislatures of all 50 states to set the legal limit at .08 percent, just over half the level that most permitted a generation ago.

But it's not just lower BAC limits that work against DUI defendants. As Burglin observes, "Juries in DUI cases have a tendency to apply a standard of proof that is lower than 'beyond a reasonable doubt.' They figure if a guy got stopped by the police for drunk driving he must be guilty, and why is he wasting our time?"

In addition, the U.S. Supreme Court has weighed in on how DUI defendants should be treated, upholding even the most aggressive law enforcement practices. In *South Dakota v. Neville* (459 U.S. 553 (1983)), for example, the high court ruled that Fifth Amendment protections against self-incrimination did not apply to roadside sobriety tests; therefore, drivers have no right to refuse a chemical test, and at trial the prosecution can comment freely upon such refusal. The next year, the justices ruled that roadside questioning of a motorist does not constitute "custodial interrogation" for the purposes of the Miranda rule (*Berkemer v. McCarty*, 468 U.S. 420 (1984)). It also found that police sobriety checkpoints did not meet the Fourth Amendment standard for unreasonable search and seizure (*Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990)).

"The constitutional aspects of DUI laws are frightening," says attorney Taylor, who writes a fiery DUI law blog called "Bad Drunk Driving Laws, False Evidence, and a Fading Constitution." "It's what I call the DUI exception to the Constitution. There are few if any Fourth Amendment protections. There's no due process. In the DUI arena, there's a presumption of guilt. You have unfair procedures. You have wholesale erosion of rights. Truth and justice is an afterthought."

Like most states, California routinely charges DUI suspects with two offenses. The first is the standard misdemeanor of driving under the influence (Cal. Veh. Code § 23152(a)); the second is the per se offense of driving with a blood-alcohol concentration above .08 percent (Cal. Veh. Code § 23152(b)). For prosecutors, the beauty of this approach is that if one charge doesn't stick, the other may.

"The prosecutor essentially gets two bites out of the apple," says Burglin. "You can have a BAC of under .08 and still be found guilty of DUI if the prosecutor can prove that by reason of having consumed alcohol you no longer have the ability to drive with the caution and care of a sober person. Conversely, you can be someone with a very high tolerance for alcohol and be able to drive with the caution and care of a sober person, but if you're .08 or higher, you're guilty. So it's two ways of getting the person."

Moreover, the penalty for a first-time DUI offense in California is no mere slap on the wrist. Convicted drivers can expect to pay more than \$5,000 in fines and fees, and they'll spend an hour in cuffs, four hours in jail, two days at the Department of Motor Vehicles, twelve three-hour sessions in a DUI class, four months or more without a license, three years on probation, and seven years with two points on their driving record. In addition, car insurance premiums typically increase significantly after a DUI conviction.

But as DUI laws and the science of accurately measuring blood-alcohol content have gotten more complex, so have DUI defense practices. Taylor describes these in his book *Drunk Driving Defense*, considered the standard text on the subject. When first published in 1983, it was 300 pages long; now in its sixth edition, it's grown to 1,200 pages.

"[Defense lawyers] try to find flaws in the evidence," says Taylor. "There will always be flaws. The question is,

THE BEST (AND WORST) DUI JURORS

Drunk Driving Defense, by Lawrence Taylor and Steven Oberman, lists the types of potential jurors that defense attorneys watch out for in a drunken driving case.

Sympathetic to the Defense

- People who admit to having more than two drinks at one sitting
- Middle- to lower-class people
- Those who appear underdressed for a courtroom
- Blue-collar workers
- Country music fans
- Smokers
- Social, easygoing, happy people
- Individualists
- Those who have contested traffic tickets
- Retired noncommissioned military personnel
- Beer and bourbon drinkers

Unsympathetic to the Defense

- Nondrinkers and recovering alcoholics
- Uptight, judgmental, unhappy people
- Physical fitness buffs
- Computer lovers
- Engineers and technical types
- Medical professionals
- Insurance-industry workers
- Retired military officers
- People who *never* drive after drinking
- Pessimists
- White-wine drinkers

how many and how big are they. Also, it helps to know the prosecutor—and have one that understands the evidence and isn't trying to do a macho thing on you. Then you can plead to a lesser charge with no jail time.”

There are scores of possible defenses even for a seemingly airtight DUI case. For example, drinking isn't the only explanation for a high alcohol reading on a roadside breath test; it can be caused by medical conditions such as heartburn, diabetes, or hypoglycemia. Then again, the breath-test sample may have been contaminated by the presence of mouth alcohol due to burping, belching—or the recent use of cough syrup, cold medicine, mouthwash, lip balm, or breath spray. A blood test can be rendered invalid by an improper draw, an unqualified blood analyst, or a failure to mix the blood sample with anticoagulant and preservative. Moreover, results from either blood- or breath-alcohol-testing devices can be altered by the presence of radio waves in the air—known as radio frequency interference. And beyond questions of evidence, there's also a carefully compiled list of juror types that are likely to be sympathetic to a DUI defendant, as well as those the defense should avoid at all cost. (See “The Best (and Worst) DUI Jurors,” page 35.)

By punching enough holes in the prosecution's case, a good DUI lawyer can, if not exonerate a client, then at least knock the charge down to what's known in the trade as a “wet reckless”—an alcohol-related reckless driving offense.

A wet reckless still counts as a misdemeanor conviction, but there's no jail time.

This is where defendants often get from their lawyers what they pay for. At the Law Offices of Lawrence Taylor, Inc.—where attorneys devoted exclusively to DUI cases charge top dollar—blood and urine samples are routinely reanalyzed; Breathalyzer maintenance, calibration, and administration are investigated; and sometimes even the scene of an arrest is revisited. Taylor's firm also boasts a support staff that includes a forensic toxicologist who once did DUI testing for the Los Angeles County Sheriff's crime lab, a former hearing officer for the DMV, and a former police officer who was on the Santa Ana department's DUI task force. That's a far cry from the firms where lawyers, by their own admission, “do the same thing over and over again.”

“It's really disturbing how many lawyers claim to do DUI defense who couldn't tell you 10 percent of the scientific aspects of DUI,” says attorney Kapsack. “And they're the ones who often end up making bad law by arguing positions that aren't supportable.”

Still, at a time when general practitioners are finding it much harder to make ends meet, it's a good bet that more of them will take on DUI cases, whether or not they know what they're doing. Tough times are also likely to drive more drunks onto the road, leading to more DUI cases—and even more lawyers chasing them. 📍

“Two Lawyers Walk Into a Bar” originally published in the May 2009 issue of *California Lawyer*.
Reprinted with permission. © 2009 Daily Journal Corporation, San Francisco, California.