# FUNDAMENTALS OF
# TRIAL ADVOCACY COURSE

May 13 - 17, 2019
Phoenix, Arizona

# PROSECUTING A DUI CASE

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Distributed by:


ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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# Prosecuting the DUI Case

APAAC Introduction to Trial Advocacy

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## Why So Much Focus?

- Difficult Cases
- Sympathetic Defendants
- Even more sympathetic victims
- Excellent Defense Attorneys (Often Former Prosecutors)
- Very Technical Procedures & Terms
- Constantly Changing Case Law
- High Case Loads
- Media Attention

## Basic DUI Statute 28-1381(A)(1)

It is unlawful for a person to

- drive or be in actual physical control
- a vehicle
- within this state
- while under the influence of intoxicating liquor, any drug, a vapor releasing substance, or any combination thereof.

Impaired to the slightest degree.

## *State V. Miller*

- Only have to prove defendant is impaired
- Not "driving ability"
- Remember for:
  - *Voir dire* & jury instructions
  - Rule 20 motions
  - Objecting to defense arguments

## ARS § 28-1381(A)(2) & 28-1382

Drive or APC, if within 2 hours one's alcohol concentration is:

- .08 or more
- .15 or more
- .20 or more

& the alcohol was consumed before or while driving.

## ARS 28-1381(A)(4)

It is unlawful to

- drive or be in actual physical control
- a commercial vehicle in this state
- with an alcohol concentration of .04 or more

Alcohol Concentration at Time of Driving/APC

*Desmond v. Superior Court*, 151 Ariz. 522 (1989).

## DUI Drugs
## 28-1381(A)(3)

- drive or APC
- while there is any drug defined in 13-3401 or its metabolite in the person's body.

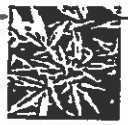
Establish is in 13-3401

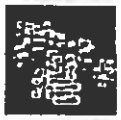
## DUI Drugs
## 28-1381(A)(3)

- *State v. Harris* (*Shilgevorkyan*, RPI)
- Must prove metabolites are capable of impairment.

## *Per se* Laws

- Impairment is NOT required!





## Prescription Drug Defense 28-1381(D)

- Only a defense to (A)(3) charge
- Not a defense to (A)(1) [ARS 28-1381(B)]
- Must be valid on DOV
- Must be U.S. doctor (4 types)
- Defendant's burden to prove

Consider a jury instruction & *voir dire*

## Prescriptions

- Amendment to 28-1381(D)
  - Must take prescription as prescribed

Therapeutic dose does not = "as prescribed"

## A.R.S. § 1387(I)

Except for another violation of this article, the state shall not dismiss a charge of violating any provision of this article unless there is an **insufficient legal or factual basis** to pursue that charge.

## DUI/APC is Strict Liability (move to preclude)

- Intent to drive not required (APC)
- Passive inhalation is not a defense
- Involuntary intoxication is not a defense
- Ignorance of intoxication
- Ignorance of drug effects not a defense

*State v. Parker*, 135 Ariz. 474, (App. 1983); *State v. Zaragoza*, CR-08-0286-PR (Ariz. 2009); *Whisler v. State*, 121 Nev. 401, 116 P.3d 59 (Nev. 2005).

## Read the DR-- What kind of Case is this going to be?

- Driving or APC? (Both?)

## Actual Physical Control (Circumstantial Evidence of Driving)

A person can be convicted for either "driving" or "being in actual physical control".

Driving and APC are not mutually exclusive

The jury does not have to agree on theory, only on verdict.

*State v. Rivera*, 207 Ariz. 69, 72 (App. 2004); *State v. Love*, 182 Ariz. 324, 328, (1995).

## Actual Physical Control

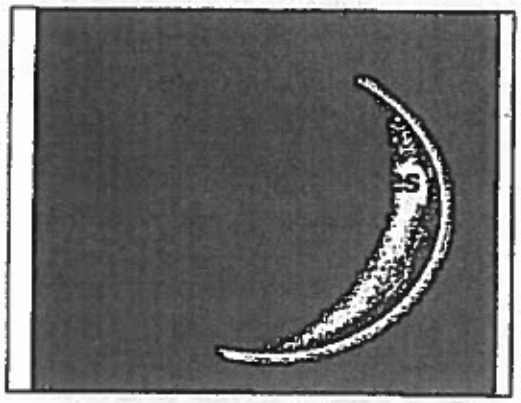
In determining whether the defendant was in actual physical control of the vehicle, you should consider the totality of the circumstances shown by the evidence and whether the defendant's current or imminent control of the vehicle presented a real danger to [himself] [herself] or others at the time alleged. Factors to be considered might include, but are not limited to:

1. Whether the vehicle was running;
2. Whether the ignition was on;
3. Where the ignition key was located;
4. Where and in what position the driver was found in the vehicle;
5. Whether the person was awake or asleep;
6. Whether the vehicle's headlights were on;
7. Where the vehicle was stopped;
8. Whether the driver had voluntarily pulled off the road;
9. Time of day;
10. Weather conditions;
11. Whether the heater or air conditioner was on;
12. Whether the windows were up or down;
13. Any explanation of the circumstances shown by the evidence.

This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired.

## Actual Physical Control

- Demonstrate defendant is in control
- Danger to self or others
  - present or imminent control
- No "safe harbor"
- *Voir Dire*
  - Prepare & educate your jury
- Jury Instructions
  - *State v. Tam*, No. 1 CA-CR 12-0791 says Zaragoza instruction is enough



## NHTSA Driving Clues

- Problems Maintaining Proper Lane Position (p = .50 - .75)
  - Weaving
  - Weaving across lane lines
  - Straddling a lane line
  - Swerving
  - Turning with a wide radius
  - Drifting
  - Almost striking a vehicle or other object

## NHTSA Driving Clues

- Speed & Braking Problems (p = .45 - .70)
  - Stopping problems (too far, too short, too jerky),
  - Accelerating or decelerating for no apparent reason
  - Varying speed
  - Slow speed

## NHTSA Driving Clues

- Vigilance Problems (p = .55 – .65)
  - Driving in opposing lanes or wrong way on one-way street
  - Slow response to traffic signals
  - Slow or failure to respond to officer's signals
  - Stopping in lane for no apparent reason
  - Driving without headlights at night
  - Failure to signal or signal inconsistent with action

## NHTSA Driving Clues

- Judgment Problems (p = .35 – .90)
  - Following too closely
  - Improper or unsafe lane change
  - Illegal or improper turn
  - Driving on other than designated roadway
  - Stopping inappropriately in response to officer
  - Inappropriate or unusual behavior
  - Appearing to be impaired

## Read the DR--

- Driving or APC? (Both?)
- Stop time
- Initial observations of the officer
- Statements of the defendant
- FSTs
- HGN (disclose the HGN log)
- Time of arrest, *Miranda*, & tests

## Alcohol Influence Report

- **Go over in detail, sometimes can give you lots of gems for trial (theme)**
  - Scale of 0 to 10
  - Admissions to drinking – feeling effects
  - Great place to get a theme from defendant
  - Name of drink
  - Defendant's photo
  - Signs & symptoms

## Driving

- Bring out everything
- **Do Not** be afraid to back the officer up
- Bring out that each behavior is a sign or symptom of impairment
- Did officer move the car? (mechanical difficulties)
- Did officer drive same path with no problem?
- Remember totality of the circumstances

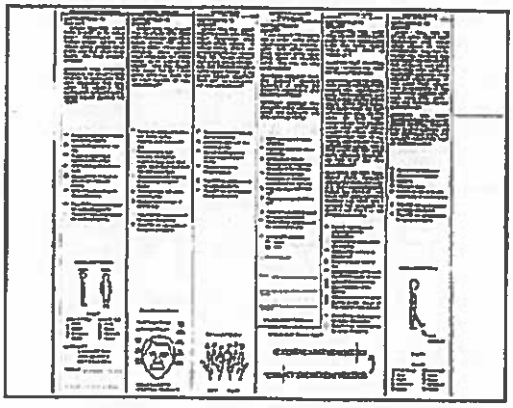
## Divided Attention

- The ability to do more than one task at the same time
- Combination of mental & physical tasks
- Good testimony for SFSTs and driving

**FIELD SOBRIETY TESTS**

## FIELD SOBRIETY TESTS

- Horizontal Gaze Nystagmus
- Walk & Turn
- One Leg Stand
- Rhomberg-Modified
- Finger to Nose
- Finger Count
- Alphabet
- Hand Trace



## HGN is the Most Reliable Field Sobriety Test

- Involuntary
- Coordination does not influence
- Tolerance does not influence
- Shoes & ground surface do not influence
- Highest validation

## HGN Testimony - with a breath/blood test

- May testify
  - based on training & experience, 4 or more clues on HGN = BAC of .08 or more
  - may testify how accuracy rating is determined

*State v. Superior Court (Blake*, RPI) -1986; *State ex rel. McDougal v. Ricke* -1989

## HGN Testimony – without a breath/blood test

- May not testify
  - based on training and experience, 4 or more clues on HGN = BAC of .08 or more
  - how accuracy rating is determined
- May testify
  - "neurological impairment one cause of which might be alcohol impairment"
  - each clue is a sign or symptom of impairment
  - HGN is the most accurate of the FSTs

• *State ex rel. Hamilton v. City Court (Lapreitt*, RPI) -1990

## What If There Are No FSTs?

- Defendant refused = consciousness of guilt
- FSTs not given - bring out why
  - Officer safety
  - Safety of the defendant
  - Bad location
  - Language barrier

## Breath Test Statutory Method

28-1323(A)

1) DHS/DPS Approved Device
2) Certified Operator
3) Duplicate Tests (includes deprivation period)
4) DHS/DPS Approved Checklist
5) Device in Proper Operating Condition (calibrations are enough)

28-1323(B) - these are the <u>only</u> requirements for admissibility

## Blood Draw Testimony

- Training & Experience
  - Emphasize course & clinical work
- Process
- Chain of custody
- Be proactive re: defense ploys
  - tube contained white powder
    - purpose
  - inverted tube 8 - 10 times
  - non-alcoholic swab

## *Daubert!*
(Rule 702)

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

## *Daubert!*
(Rule 702)

- Qualify witness as an expert
- Chain of custody (prove it was defendant's blood)
- What method was used
  - establish scientific reliability
- What did he/she do?
- Emphasize quality assurance/rel ability

## Key Language Judge May Look For:

- Was the method used accepted in the relevant scientific community ?
- Was the accepted technique properly used?
- Are the readings an accurate measurement & recording of defendant's alcohol concentration (or presence of drugs)?
- (Would the test results be accepted in relevant scientific community as valid test results?)

## DUI Don'ts

- *#1 Fuenning:*
  - "Defendant was impaired to the slightest degree"
  - Defendant was Drunk
- But READ *Fuenning* & case law

## DUI Don'ts

- PBT
- Quantify with general FSTs
- HGN – *Lopresti*
- 2,000 lb death machine arguments
- Invoked *Miranda*
- Asked for attorney
- Vouching

**QUESTIONS?**

# How To Admit Toxicology Results

Many DUI cases involve collecting a specimen from the defendant and then having it analyzed by the forensic scientist. The prosecutor will need to admit the toxicology (tox) results at trial. The steps for successfully admitting blood or urine test results in a DUI drug case are basically the same as those for alcohol cases.

## I. SAMPLE COLLECTION.

Admitting the tox results at trial begins well before you call an expert to testify. It starts with the person who collected the sample. During the trial, you will need to establish when, where, and by whom the defendant's sample was collected.

The easiest way to accomplish this is through the testimony of the person who collected the sample. Simply call that person to the stand and have him or her testify about the procedure used. (The defense may stipulate to these facts, especially if the only thing the witness did in the case was collect the specimen.)

### A. Qualified Person (Blood).

If a blood sample is drawn, not only must you verify that the sample is the defendants; you must also establish that the sample was collected by a qualified person. Note: the statute provides that the qualifications of the individual who drew the blood are not foundational prerequisites. Accordingly, if the defense is going to challenge to the qualifications of the phlebotomist, the defense should be required to file a motion to suppress at least 20 days prior to trial. 16A A.R.S. *Rules of Crim. Proc.*, Rule 16.1(b).

Arizona Revised Statute § 28-1388(A) provides:

> [i]f blood is drawn under § 28-1321, only a physician, a registered nurse or another qualified person may withdraw blood for the purpose of determining the alcohol concentration or drug content in the blood. The qualifications of the individual withdrawing the blood and the method used to withdraw the blood are not foundational prerequisites for the admissibility of a blood alcohol content determination made pursuant to this subsection.

**Quick case law reference** – Officers (*State v. May*, 210 Ariz. 452, 112 P.3d 39 (App. 2005); *State v. Noceo*, 223 Ariz. 222, 221 P.3d 1036 (App. 2009)); contract phlebotomists (*State v. Olcavage*, 200 Ariz. 582, 588, 30 P.3d 649, 655 (App. 2001)) and medical assistants (*State v. Carrasco*, 203 Ariz. 44, 49 P.3d 1140 (App. 2002)) have all been found to be qualified persons under ARS § 28-1388(A).

### B. <u>What if the Person Who Collected the Sample is Unavailable</u>?

If the person who collected the sample is no longer available to testify, it is not necessarily fatal to your case. If the sample is a urine sample, review your facts and determine if you can still establish, with relative certainty, that the sample tested was the defendants and that it was not tampered with. For example, Officer A observes the defendant and Officer B enter the restroom with an empty specimen cup. The defendant and Officer B were the only two people in the restroom. Officer A sees them exit with a sample that is labeled with the defendant's name, date of birth, and police report number. Officer A can testify to what he observed, to the protocols of the DRE program, and can circumstantially establish that the urine is in fact the defendants.

**Quick case law reference** - "The probative value of evidence is not reduced simply because it is circumstantial." *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981) (citing *Justice v. City of Casa Grande*, 116 Ariz. 66, 567 P.2d 1195 (App. 1977)). In fact, it is well settled that even a criminal conviction may be proved by circumstantial evidence alone. *State v. Burton*, 144 Ariz. 248, 697 P.2d 331 (1985). *See, State v. Superior Court* (*Weant*, Real Party in Interest), 172 Ariz. 153, 835 P.2d 485 (App. 1992) (Question of whether defendant's girlfriend provided defendant with alcohol during the short time she was left alone with him prior to the blood draw was for the jury to decide. Defendant's motion to suppress was properly denied.)

If a blood sample was collected at the hospital, by hospital personnel, you should be able to admit the test results without the person who drew the blood as long as the officer observed the blood draw or can otherwise establish the chain of custody (*see*, Section II below). This is because there is a presumption that hospital personnel are qualified to draw blood.

**Quick case law reference** - There is a presumption that hospitals are not in the business of allowing unqualified persons to draw blood. *State v. Nihiser*, 191 Ariz. 199, 953 P.2d 1252 (1997). An emergency room nurse employed by the hospital is presumed to be qualified. The individual's qualifications and the validity of the method used are presumed. *Id.*

## II. CHAIN OF CUSTODY

Once you have established when, where, and by whom the sample was collected, you will need to prove that the blood or urine sample that was tested at the lab, by the forensic scientist, is indeed the same sample that was collected from the defendant on the date of violation and that it was not tampered with. This is generally referred to as the "chain of custody."

When introducing a tox sample, it is not always necessary to have testimony from each person who handled the specimen. You must, however, prove to the trier of fact that the tox results are from the defendant's sample.

Elicit testimony from either the person who collected the sample or the officer who observed the sample being collected establishing: the time the sample was collected, what the sample was collected in, how the sample was labeled, the protocols set up for ensuring the sample is not tampered with and for delivering the sample to the lab, etc. For example, if an officer collected the sample, it will likely be labeled with the defendant's name, date of birth, and police report number. If the sample came from a hospital, the hospital personnel will likely label the sample with either a number or word that is used for hospital records the officer may or may not add additional labeling. In both cases, it will be sealed prior to delivery to the property room. When the forensic scientist testifies, bring out testimony demonstrating that the sample he or she tested was sealed and has the same labeling. Also have the expert testify to the protocols set up in the lab that ensure the correct samples are tested and reported and are not tampered with.

If multiple people handled the sample, you will need to decide whether to call all of them or only a portion of them. Key personnel should testify. (You may want to ask the defense attorney, prior to trial, if chain of custody is an issue. If it is not, you can likely call fewer witnesses.)

> **Quick case law reference** - Flaws in the chain of custody go to the weight of the evidence, not its admissibility. *State v. Morales*, 170 Ariz. 360, 365 824 P.2d 756, 761 (App. 1991). Not every person in the chain of custody of an evidence item need testify for the item to be admissible. *Id.; State v. Moreno*, 26 Ariz.App. 178, 184-85, 547 P.2d 30, 36-37 (1976). The defendant must make some showing that the evidence has been tampered with. *State v. Hurles*, 185 Ariz. 199, 914 P.2d 1291 (1996).

## III. THE RULES OF EVIDENCE

To admit the toxicology results in a DUI trial, one must proceed, with an expert witness, utilizing the rules of evidence. In Arizona, admitting test results under

the rules of evidence is often referred to as the "*Deason* method" (*State ex rel. Collins v. Seidel* (*Deason*, Real Party in Interest), 142 Ariz. 587, 691 P.2d 678 (1984)). It is also called the "expert witness method."

Rule 702 of the *Rules of Evidence* is the appropriate rule to proceed under. It states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

The first paragraph of the rule requires the proponent of the evidence to qualify the witness as an expert. Subsection (a) is merely relevance. The tox results are relevant to a DUI drugs case. For subsection (b) establish that the expert made sufficient observations and collected sufficient evidence to form his/her opinion(s). The multitude of scientific studies, case law, lab protocols, lab certifications and the lab's quality assurance all assist in demonstrating expert's testimony is the product of reliable principles and methods under subsection (c) and finally, the expert's testimony, calibration and controls, and test records will establish that the expert has reliably applied the principles and methods to the facts of the case.

*See*, list of predicate questions for admitting tox results for assistance in developing questions. *Also see*, the *Daubert* materials and contact the Arizona Traffic Safety Resource Prosecutor for further assistance in this area - especially if the defense files a pre-trial motion.

Note: though more is required under the new rule 702, the guidance provided by the *Deason* opinion is still helpful. When proffered evidence is based upon scientific, technical or specialized knowledge, such as the tox results, the *Deason* Court held that the proponent of the evidence must make a showing, through a qualified expert, of general acceptance under the rule of *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923). *Deason*, 142 Ariz. at 590, 691 P.2d at 681. The proponent must also establish through "a qualified expert that the accepted

technique was properly used and the results accurately measured and recorded." *Id.*

Thus, to admit the toxicology results at trial, through the rules of evidence, the proponent had to offer testimony from a qualified expert that:

1) the method used to obtain the scientific result is generally accepted in the relevant scientific community;

2) the accepted technique was properly used; and

3) the results were accurately measured and recorded

*State ex rel. McDougall v. Johnson* (*Foster*, Real Party in Interest), 181 Ariz. 404, 407, 891 P.2d 871, 874 (App. 1994) (Citing *Deason* at 590, 691 P.2d at 681). .

The prosecutor may still want to elicit this evidence under the new Rule as it would go far for establishing that (b) the testimony is based on sufficient facts or data (the accepted technique was properly used); (c) the testimony is the product of reliable principles and methods (the method used is generally accepted in the relevant scientific community; and (d) the expert has reliably applied the principles and methods to the facts of the case (the accepted technique was properly used and the results were accurately measured and recorded.).

In *State v. Velasco* (*Alday*, Real Party in Interest), 165 Ariz. 480, 486, 799 P.2d 821, 827 (1990) the Arizona Supreme Court summarized the admissibility standards under the former expert witness method of *Frye*. The Court noted:

> "General acceptance" does not necessitate a showing of universal or unanimous acceptance . . . No requirement exists that the scientific principle or process produce invariably accurate, perfect results . . . The question is not whether the scientific community has concluded that the scientific principle or process is absolutely perfect, but whether the principle or process is generally accepted to be capable of doing what it purports to do. Any lack of perfection affects the weight the jury may wish to accord the evidence . . . not its admissibility.

*Id.* (Citations omitted). The comments to Rule 702 recognize that these types of issues do go to the weight, not the admissibility of evidence.

**Quick case law reference** – The person objecting to lack of foundation, must state what is lacking. *See, Packard v. Reidhead*, 22 Ariz.App. 420, 423, 528 P.2d 171, 174 (1974).

## IV. THE DEFENSE MUST MEET THE SAME STANDARDS

At times, the defense will either have a specimen of their own collected on the date of violation by an independent medical entity and then have it analyzed, or obtain a portion of the State's sample and have it independently tested. If the defense attempts to introduce these test results at trial, they are held to the same standard as the State and are required to lay the proper foundation at trial.

> **Quick case law reference** - The rules of admissibility for scientific evidence apply equally to both parties. *State ex rel. McDougall v. Johnson* (*Foster*, Real Party in Interest), 181 Ariz. 404, 891 P.2d 871 (App. 1994) (The Arizona Court of Appeals ruled that the defendant could not admit the results of a breath test sample analyzed by an independent expert without having the expert testify.) This standard will apply equally to blood and urine samples.

## V. WHAT IF THE CRIMINALIST WHO TESTED THE SAMPLE IS NOT AVAILABLE?

Occasionally, the State's forensic scientist who tested the defendant's sample may not be available to testify. If the criminalist is only temporarily unavailable, a motion to continue may suffice. If, however, the witness will never appear, you will need to decide how to proceed.

### A. Reanalysis.

If there is time, and if enough of the sample remains, the easiest way to proceed is to contact the crime lab and request to have the sample reanalyzed. You can then call the criminalist who conducted the second analysis to testify. Be sure to disclose this witness and his or her reports. Also be prepared for extra chain of custody questions such as: "wasn't the seal on the sample broken when you retrieved the sample for testing?" "Why?" NOTE: for alcohol samples, the reported alcohol concentration of the second analysis may be less than that reported in the original. This is because the alcohol dissipates as the blood sample is stored.

### B. *Rogovich*.

If it is not possible to have the sample analyzed again, you may be able to proceed under the *Rogovich* line of cases with another expert who can form his or her own opinion after reviewing the test records. *State v. Rogovich*, 188 Ariz. 38, 932 P.2d 794 (1997). The *Rogovich* line of cases allows an expert to give his or her opinion regarding test results using a non-testifying witness' notes, reports, *etc.* as a basis for that opinion. *State v. Karp* (*Voris*, Real Party in Interest) 697

Ariz.Adv.Rep. 17 (App. 2014) is on point for blood testing. Be sure to disclose the testifying expert and all records that he or she is relying on.

> **Practice pointer** – be sure to disclose the forensic scientist you will call and his/her opinion(s). *State v. Roque,* 213 Ariz. 193, 141 P.3d 368 (2006).

1. The testifying witness must give his or her <u>own</u> opinion.

Expert testimony that reviews and discusses the reports, notes, and/or opinions of another expert is admissible if the testifying expert reasonably relies on the other expert's materials in reaching <u>**his or her own opinion**</u>. The testifying expert, however, may not merely act as a conduit for the previous non-testifying expert's opinion. The key to this type of testimony is that <u>the testifying expert must be able to reach his or her own opinion by reviewing the reports, notes, and test results that were prepared by the testing expert. The testifying witness must then testify to his or her own opinion, not merely read the conclusions reached by the previous expert</u>. The testifying expert's ultimate conclusions must be independent of those of the non-testifying expert.

> **Quick case law reference** – Cases to be familiar with when proceeding with a criminalist who did not conduct the analysis include: *State v. Karp* (*Voris*, Real Party in Interest) 697 Ariz.Adv.Rep. 17 (App. 2014); *State v. Rogovich*, 188 Ariz. 38, 932 P.2d 794 (1997); *State v. Smith,* 215 Ariz. 221, 227–230 ¶19–33, 159 P.3d 531, 537-540 (2007); *State v. Tucker*, 215 Ariz. 298, 314–315 ¶52 -60, 160 P.3d 177, 193-194 (2007); *State v. Dixon*, 226 Ariz. 545, 250 P.3d 226 (2011); *State v. Gomez*, 226 Ariz. 165, 244 P.3d 1163 (2010) and *State v. Joseph,* 230 Ariz. 296, 283 P.3d 27 (2012).

2. The rules of evidence.

Two rules of evidence are prevalent when using *Rogovich*. The rule governing the admission of "opinions and expert testimony" is 17A A.R.S. *Rules of Evidence*, Rule 702 discussed above in Section III.

Evidence Rule 703 "Bases of Opinion Testimony by Experts" provides as follows:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data

would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

3. Hearsay is not a problem.

Because the testifying criminalist is testifying to his or her own opinion, the evidence is not hearsay. The information in the reports is not offered for the truth of the matter asserted, but only as the basis for the testifying expert's opinion. If, however, the testifying expert merely acts as a conduit for another non-testifying expert's opinion, then the testimony is hearsay and inadmissible.

**Also note** - the readouts from the instruments are not statements because the instruments are not human declarents. They do not make statements.

**Quick case law reference** - A non-testifying expert's opinion, used as a basis for the testifying expert's opinion, is not hearsay because the data is admitted solely for that purpose, and not to prove the truth of the matter asserted. *Rogovich*, at 42, 932 P.2d at 798; *Smith* at 228, 159 P.3d at 538.

4. The Confrontation Clause is not an issue.

The evidence is not precluded by the Six Amendment's Confrontation Clause for two reasons: 1) the evidence in the reports is not offered for the truth of the matter asserted; and 2) the expert upon whose opinion the State is relying, is present in the courtroom and available for cross-examination by the defense.

**Quick case law reference** – The use of facts or data underlying a testifying witness's expert opinion do not violate the Confrontation Clause because they are admitted for the limited purpose of demonstrating the basis of that opinion, not for the truth of the matter asserted. *State v. Karp* (*Voris*, Real Party in Interest) 697 Ariz.Adv.Rep. 17 (App. 2014); *Rogovich*, at 42, 932 P.2d at 798, *Smith*, at 229 ¶26, 159 P.3d at 539 (analyzing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004)).

[T]he defendant's confrontation right extends to the testifying expert witness, not to those who do not testify but whose findings or research merely form the basis for the witness's testimony .(citations omitted). *Rogovich*, at 42, 932 P.2d at 798.

*See also*, footnote 9 of *Crawford v. Washington, supra;*
*State v. Gomez, 226 Ariz. 165, 244 P.3d 1163 (2010); State v. Joseph*, 230 Ariz. 296, 283 P.3d 27 (2012).

5. US Supreme Court Cases and the Confrontation Clause.

Neither the relatively recent Unite d States Supreme Court cases of *Bullcoming v. Mexico*, 131 S.Ct. 2705 (2011) nor *Melendez-Diaz v. Massachusetts*, 557 U.S.___, 129 S.Ct. 2527 (2009) prohibit the admissibility of a substitute expert's testimony. Both featured the admissibility of lab reports that were prepared by a forensic scientist who did not testify. Here the state will not admit the actual lab report. Instead, the testifying expert will testify to his/her own opinion about the Defendant's tox results that he/she will form as an expert based on his training, knowledge, experience and his review of the data and reports. Moreover, in the most recent U.S. Supreme Court Case on the topic, the court allowed the admissibility of the testimony when the lab report was not also admitted in the *Williams v. Illinois* plurality opinion. Finally, *State v. Karp* (*Voris*, Real Party in Interest) 697 Ariz.Adv.Rep. 17 (App. 2014) discussed these opinions and found they do not prevent the testimony of the substitute criminalist from being admitted.

6. *State v. Moss* Has Been De-Published.

The defense may attempt to rely on the Arizona Court of Appeals' decision in *State v. Moss*, 215 Ariz. 385, 160 P.3d 1143 (App. 2007) for the proposition that proceeding with an expert, other than the one who conducted the analysis, violates the Confrontation Clause. Such reliance would be misplaced as on November 29, 2007, that opinion was ordered de-published by the Arizona Supreme Court in *State v. Moss*, 217 Ariz. 320, 173 P.3d 1021 (2007).

7. The State is not required to prove the qualifications of the first expert.

When questioning the testifying expert, you may choose to elicit testimony about the qualifications of the person who conducted the analysis and created the report the testifying expert is relying on. This, however, is not required for admissibility of the testifying expert's opinion. The facts or data used as the basis for the opinion do not have to be generated by a qualified testifying expert. *Rogovich, supra.*

## VI. WHAT IF THE TOX RESULTS ARE MORE THAN 2 HOURS AFTER DRIVING OR APC?

Occasionally the DRE officer will collect the toxicology sample more than two hours after the defendant was driving or in APC. This does not create a problem for your DUI case.

**Practice pointer** – be sure to disclose the forensic scientist you will call and his/her opinion re: retrograde. *State v. Roque, 213 Ariz. 193, 141 P.3d 368 (2006)*

### A. Irrelevant to the ARS §§ 28-1381(A)(1) and (A)(3) charges.

Neither the ARS §§ 28-1381(A)(1) or (A)(3) statutes contain a two hour window. Accordingly, if the blood, breath or urine test was collected more than two hours after the time of driving or being in APC, that fact will go to the weight, not the admissibility of the evidence.

**Quick case law reference** - *State v, Guerra,* 191 Ariz. 511, 958 P.2d 42 (App. 1999); *State v. Gallow*, 185 Ariz. 219, 914 P.2d 1311 (App. 1995). *But see, State v. Superior Court* (*Ryberg*, Real Party in Interest), 173 Ariz. 447, 844 P.2d 614 (App. 1992).

### B. ARS §§ 28-1381(A)(2) and ARS § 28-1382(A) charges.

Although it is unusual to have A.R.S. §§ 28-1381(A)(2) and 28-1382(A) charges in DRE cases, it is not unheard of. This most commonly occurs when the defendant's signs and symptoms of impairment far exceed those that would be expected from the breath test results. The *per se* alcohol statutes do not require the State to collect a blood or breath sample within two hours of driving or being in actual physical control. Rather, the State must merely prove that the defendant's alcohol concentration was .08/.15/.20 or above at any time within the two hour window. This is accomplished through retrograde analysis. Call your forensic scientist to ensure that you have enough information to allow him or her to perform a retrograde.

**Quick case law reference** - When the State does not collect the breath or blood test within two hours of driving, the State may still meet its burden of proving that the defendant had a BAC above the legal limit by presenting evidence relating the defendant's alcohol concentration to anytime within the two hour window. *State v. Claybrook*, 193 Ariz. 588, 975 P.2d 1101 (App. 1998).
Arizona courts have long recognized the propriety of expert testimony relating alcohol test results to an earlier time in order to prove a fact of consequence to the proceeding. *Desmond v. Superior Court*, 161 Ariz. 522, 779 P.2d 1261 (1989); *O'Neill v. Superior Court* (*Kankelfritz*, Real Party in Interest), 187 Ariz. 440, 930 P.2d 517 (App. 1996).
Retrogrades may meet the requirements of Rule 702, even when the State has an incomplete drinking history. *State v. Montgomery*, (*Madrid*, RPI) 234 Ariz. 289 (App. 2014).