



akron bar
association®

CRIMINAL TRIAL TECHNIQUES & OVI DEFENSE

Felony OVI: Trial Tips & Strategies

Richard P. Kutuchief

RICHARD P. KUTUCHIEF

ATTORNEY AND COUNSELOR AT LAW

The Law Building

159 South Main Street

Suite 807

AKRON, OHIO 44308

PHONE 330-762-1134

justuse@aol.com

Fax 330-762-2226

October 5, 2017

FELONY OVI—SOME PRACTICE CONSIDERATIONS

I. What do we call it?

A. OVI, DUI, DRUNKEN DRIVING, IMPAIRED DRIVING

Let's call it a life changing event--cause that is what it is.

Very Serious with life changing effects.

Not like other felonies which can face sealing, or non
enhancements.

**B. The extreme loss of privilege of driving—not found in other felonies, as
suspension is not discretionary.**

II. Penalties— “lookback” periods

A. Four of Five offenses in 10 years

B. Six offenses in 20 years

1. 4th or 5th Offense - Unclassified Felony-44511.19 (A)(1)(a) - (e)

60 days - 30 months

"\$1,350 - \$10,500"

3 Years to Life

Alcohol/Drug Addiction Program Mandatory

Forfeiture if registered to defendant, or fine of vehicle value

2. 4th or 5th Offense High Tier or Refusal — a “Super” .17+

4511.19 (A)(1)(f)-(i) & (A)(2)

120 days - 30 months

"\$800 - \$10,000"

3 Years - Life

Alcohol/Drug Addiction Program Mandatory

3. Second Felony Lifetime--Felony 3

4. Forfeiture if registered to defendant, or fine of vehicle value

5. Restricted Lic. Plates (aka Scarlet Letter) & Ignition Interlock

6. NO PRIVILEGES FOR 3 YEARS!!

C. Needless to say, a conviction will be permanently on your record—increased insurance, if at all, potential professional licensure issues

D. Social Stigma as a drunk

III. Legal Problem?--or Medical Problem. The worst form: It's both.

A. Let's make a conclusion that if a client has 4 or 5 OVI's in 10 years ,he or she has a Medical problem.

B. Alcoholism, drug addiction and mental illness are real medical conditions that can affect anyone. Effective treatments are available and people do recover. One in four families experiences either a mental health or substance abuse problem.

C. Initial assessment: what is the medical condition—chronic alcohol abuse, general questions as to usage—blackouts—frequency—type of alcohol

D. Health Insurance or not?—what treatment is available with the insurance, non insurance, or finances of your client.

IV. BOND ISSUES--Set of Conditions for Release

A. It is imperative to have a discharge plan for release from detention

B. Two goals for Bond consideration: Protection of Society & Appearance in Court.

C. How do we put together a SET OF CONDITIONS to ensure these two goals.

D. So when we address Medical Condition and Legal Condition—aren't we accomplishing two efforts—feeding two birds with one hand of seed?

E. The medical issues are helped by treatment issues immediately

F. The legal issues will be helped by getting your client into treatment immediately. Going to happen anyway so get to it asap

G. CONDITIONS for Court Consideration to persuade bond

1. Identify support system of spouse, adult children, family, friends
2. Identify stable housing
3. Identify how employment will be continued
4. Identify how there will be no driving, and how your client will plan to transport him or herself--what are the transportation plans.
5. Identify how the client will achieve treatment, attend Alcohol Anonymous, work toward sobriety, etc.
6. Alcohol Monitor Systems such as Scram units
7. Counsel client as to Pre Trial Supervision requirements

H. PRE-TRIAL SUPERVISION---Be aware of the Pretrial Supervision so you can monitor your client's compliance.

I. NOTICE OF APPEARANCE---want to be certain your name is on the file in case pretrial supervision needs to contact you if there is pretrial noncompliance with the conditions

J. Identify TREATMENT CENTERS where your client can gain treatment.

1. get to the **ADM** asap. Alcohol--Drugs--Mental Illness

The County of Summit ADM Board is responsible for planning, funding, monitoring and evaluating treatment, prevention and support **services** for people who experience alcoholism, drug addiction and/or mental illness. The ADM Board does not provide any direct service, but contracts with local agencies to provide quality, affordable services for people at critical times in their lives. The ADM Board system of services provides opportunities for recovery and hope for a better life.

Summit County residents have a rich array of services and supports available to them through the ADM Board system.

The ADM Board of Directors is comprised of 14 community volunteers who provide leadership in policy formation and fund allocation. They, along with ADM Board staff, assess community needs, plan, and manage public resources in order to provide essential services. The 2016-2017 Community Plan may be found [here](#).

GO TO WEBSITE FOR INFO

2. Address:

County of Summit Alcohol, Drug Addiction & Mental Health Services Board

1867 W. Market Street, Ste. B2
Akron, OH 44313-6914

3. Services

ADM Crisis Center
Akron UMADAOP, Inc.
Community Health Center
Edwin Shaw Rehab
Oriana House Inc.
IBH Addiction Recovery Center
Mature Services Inc.
Summit County Public Health
Summa Health System
Greenleaf Family Center

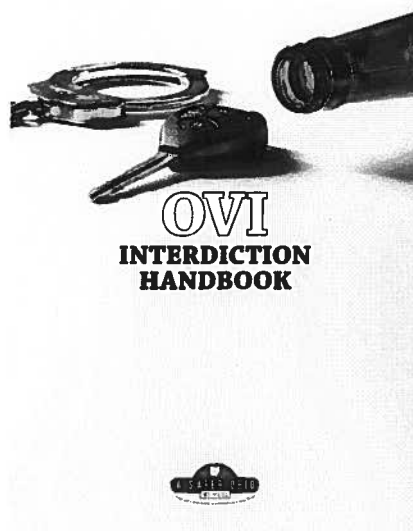
4. HOOK UP SERVICES ASAP—Judges will like this

V. Assessment for Constitutional Issues—the Motion to Suppress

1. Typical felony suppression considerations
2. Never file Motion which doesn't have basis
3. Motion content as you know--clearly identify the Constitutional Issues subject of the Motion to Suppress--Notice Required
4. Provide basic case law

5. Reserve right to file a post hearing memorandum
 - a. Get Transcript
 - b. Make Argument with detail case law based on testimony and exhibits

6. Look at the Department of Public Safety OVI Interdiction Handbook of 2014 Has insightful stuff



7. Assessment of the value of a Hearing
 - a. Is there value in hearing the witness testimony and obtaining the transcript for trial impeachment/examination
 - b. Will the prosecutor get upset and not negotiate

VI. Gathering Evidence in FELONY OVI -- Blow or no BLOW

A. Is this a "BAC" "strict liability" case — Got .08? Can't drive with BAC over .08. Period.

OR

- B.** Is this a behavior case with no scientific or chemical analysis.
- C.** IMPAIRED DRIVING—Is a behavioral case—not about blood
- D.** Ohio Jury Instructions CR 711.19

The defendant is charged with operating a vehicle while **under the influence of alcohol**, (the influence of a drug of abuse) (the combined influence of alcohol and a drug of abuse). Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 5th Day of October, 2017, in Coventry Township, Ohio, and in Summit County, Ohio, the defendant operated a vehicle while under the influence of alcohol.

UNDER THE INFLUENCE. What does it mean? Behavioral centered

“Under the influence” means that the defendant consumed some (alcohol) (drug of abuse) (combination of alcohol and a drug of abuse), whether mild or potent, in such a quantity, whether small or great, that it

--adversely affected and noticeably impaired the defendant's actions, reaction, or mental processes

--under the circumstances then existing

--and deprived the defendant of that clearness of intellect and control of himself/herself which he/she would otherwise have possessed. The question is not how much (alcohol) (drug of abuse) (alcohol and a drug of abuse) would affect an ordinary person. The question is what effect did any (alcohol) (drug of abuse) (alcohol and a drug of abuse), consumed by the defendant, have on him/her at the time and place involved. If the consumption of (alcohol) (drug of abuse) (alcohol and a drug of abuse) so affected the nervous system, brain, or muscles of the defendant so as to impair, to a noticeable degree, his/her ability to operate the vehicle, then the defendant was under the influence.

E. Assessment of Behavioral Evidence

- Scrutinize Field Sobriety Tests
- Driving behavior
- Conversation and language
- Demeanor
- cognitive replies
- Does the person “seem” drunk

--Notwithstanding, does his BEHAVIOR support "Under the Influence"

F. Still or Video Imaging—Pictures or Movies

1. Visiting the site of field tests is critical. If there is any ability to work with,
2. Photograph or Video the scene with detailed inspection.

G. Detail analysis of the mechanics of the field test. How does the physical condition of your client meet with the field tests Next to the layout of the scene.

H. WHAT DOES THIS TRANSLATE INTO? Production of Reasonable Doubt

1. How do we produce Reasonable Doubt with the photos and mechanics of the scene. Is the Jury going to question the validity of the behavior produced in the field tests with the condition of your client next to the layout of the scene.

PICTURE DEMONSTRATION

G. How do we demonstrate a client who "seems intoxicated" in his or her normal state.

1. If they can not--will not testify, can you use collateral evidence of a person's way of talking or expressing themselves. A wife or sister—"my husband always talks like that".
2. The Behavior of the defendant--as the officer or trooper sees it must be tested and questioned to show reasonable doubt as to the behavior.

VII. SENTENCING

A. Sentencing Memo—YES--is essential

1. Typical sentencing process—but in this case, we are dealing with recidivism by history, danger to society, and the impression that the client will do it again.

B. Sentencing Memo Content:

1. The Person

Family, friends, clergy—but with a prepared content as to how they will help through intervention and attention to the defendant

2. The Treatment Game Plan

What treatment plan do you have lined up

Insurance?: IBH

3. The Transportation Plan

What is the method the client will commit to for transportation to avoid the need to drive: Friends, Public, UBER, pooling

4. The Plan for Success

AA Sponsor and friends

Physician exams

community involvement

Religious affiliation to assist in spiritual introspection

C. The use of Video or Stills to Produce Empathy at the Sentencing

1. Not that hard to make a video. We all have our moving cameras in our “phones”.

2. Tell a story which makes the judge *feel* something. Thus the video must evoke emotion.

3. The video is to provide and produce mitigation of sentence.
4. Is the client's sentencing story better *shown* to the judge, rather than just told.
5. Want a solid story, connective characters, and emotionally evocative images.
6. Details for this plan is found at the National Association of Criminal defense Lawyers Website. www.nacdl.org. Go to Search at the top menu and search for "using moving pictures" to draw up article.

D. Obtain Letters or live presence of treaters if your client is in treatment

VIII. Area treatment centers to consider

1. St. Thomas Hospital
2. Edwin Shaw--AGMC, Dobkin Center for the Treatment of Addiction, 330.436.0950
3. IBH, Coventry Township, Ohio 330-644-4095

IBH uses individualized, abstinence-based and holistic processes that include clinical and educational treatment, spiritual care, sober housing, employment, training and transportation. Our clients come from all walks of life, cultures, backgrounds and ages. We address the physical, mental, emotional, social and spiritual aspects of recovery.

4. Glenbeigh, Niles, Ohio (800) 506-5834 –

An affiliate of Cleveland Clinic, Glenbeigh is an alcohol and drug addiction treatment center staffed by licensed independent social workers, physicians, nurses, psychiatrists, certified chemical dependency counselors and clergy. Their programs and services reflect their holistic approach to addiction care and seek to address the body, mind and spirit.

5. Greenleaf Family Center--580 Grant Street, Akron, Ohio

Greenleaf is a non-profit organization that strengthens families in our community through counseling, education and support.

6. Is your client a Veteran?

Explore VA benefits

CONCLUSION

Make the end, the beginning. Find the silver lining, one way or another. Be the Lawyer--but the social worker, care coordinator, empathizer.

This is the nature of the unique charge of OVI

Advocate--treat the whole client--Strive for the highest of Professionalism

Richard P. Rutuchief



OVI

INTERDICTION HANDBOOK

Available on www.akronbar.org
CLE - Seminar Materials

