

 **MISSOURI DWI
& CRIMINAL LAW CENTER**
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DWI DISCOVERY REVIEW FORM & CHECKLIST:

Name _____ DOA _____ Time _____

Agency(ies) _____ LEOs _____

DL: Mo / Ks / _____ / CDL

DWI alcohol / DUID drug?

VIDEOS: Dash cam PHOTOS

Other charges:

Body cam

AH / CR / BA _____

BA room cam

Blood / Lab _____

any other video

QUICK VIEW: ISSUES

Location(s) to investigate & what to look for

PRIORS:

Issues with priors?

TIMELINE:

Stop/ Contact		Atty request?		Q&A	
Arrest		Mouth check		Breath/ blood test(s)	
IC		15 min obs pd			
Consent/ref use		MW – stn / scene			

Compliance with the Regs?

Mouth check by _____ Permit? _____ Exp _____

15 min pd by _____ Permit? _____ Exp _____

Breath by _____ Permit? _____ Exp _____

Blood draw by _____ Dr / RN / trained med tech - how obtained?

BA ADMISSIBILITY / RELIABILITY ISSUES

BrAC Result _____

BrAC ISSUES:

All boxes checked?

Mouth check & 15 mins by Type 2 or 3?

of attempts to blow _____

Issues w/ attempts?

Signed?

Mouth check done?

Details of how mouth check done & possible issues:

15 mins continuous observation period?

Which BrAC machine? AS4 / Datamaster / EC/IR-II / Intox 5000 / 8000

Serial # _____

Same as on MR? _____

DOA _____

MR date _____ by _____

DOH permit _____ exp _____

MR ISSUES:

DOH permit good on DOA?

All boxes checked?

RFI checked?

w/in .005%?

COA exp date good?

MR for same device used on client?

MR w/in 35 days?

MR filed at DOH? (TIP: collect many MRs for this device at DOH website to look for patterns & problems)

all boxes checked? Signed?

SIM SOL – Alc Countermeasure Sys / Guth / RepCo / Draeger NIST? _____

GAS – Intoximeters / CMI / Draeger / ILMO

Expiration date _____

Blood / Urine Result _____ # of draws _____ times of draws _____

19CSR25-30.080 (drugs)

COLLECTION: Who drew? _____ How obtained (details of draw) _____

STORAGE/refrigeration / proof of calibration _____

TESTING Lab _____ Chemist _____ Type 1 proof? _____

If drugs, confirmation by MS? _____

577.029 & .037 & 19CSR25-30.011, .021, .070 (alcohol) &

unused & sterile needle & sterile vessel

sufficient volume of blood drawn for duplicate testing

commercially manufactured tubes

with sodium fluoride or equivalent preservative +

potassium oxalate, sodium citrate or equivalent anti-coagulant

19CSR 25-30.080(4)

Labs shall have national accreditation through

CAP (College of Amer Pathologists),

ABFT (Amer Board of Forensic Toxicologists), or

ASCLD/Lab (Amer Soc of Crime Lab Directors/Lab

Accreditation Board)

& shall have annual proficiency tests on blood

& copy of accreditation provided to DOH upon request

BLOOD TEST CHECKLIST: (TIP: use expert Janine Arvizu to beat every blood test case)

___ is certification section completed?

___ do all portions of the certification section appear to be filled out by same person?

___ was sufficient volume collected to provide for duplicate testing?

___ was it collected in commercially-manufactured tube?

___ does the drawer see anything inside the tube before blood collected?

___ does the tube contain Sodium Flouride or an equivalent preservative?

___ does the tube contain Potassium Oxalate, Sodium Citrate, or an equivalent anticoagulant?

___ does the drawer know whether the tube was expired?

___ are commonly accepted medical practices implemented?

___ was proper triage of patient completed PRIOR to blood draw? (vitals, medical hx, conditions, prescriptions, etc)

___ can a proper chain of custody be established beginning with time/location of draw?

___ how long was blood left out of refrigerator/freezer?

___ do you have records of the calibration of temperature for refrigerator(s) used to hold blood? (tip: if not, get Janine Arvizu)

___ look for any contamination issues

___ look for any fermentation issues

___ accreditation proof

	LEO STORY/narrative/AIR	VIDEO	Client's story & crime scene investigation	ISSUES
DRIVING / OPERATION / STOP Who?				
CONTACT w/ driver & car Who? Issues related to Talking Odor Dexterity Confusion Comprehension Getting out Walking Standing Balance	Note any narrative vs AIR issues for different "observations"			

	LEO STORY/narrative/AIR	VIDEO	Client's story & crime scene investigation	ISSUES
PRE ARREST STATEMENTS	Statements before exit			
To whom?	Statements after exit before arrest			
Any Miranda issues?				
Exiting Car				
Who?				
Walking from car				

	LEO STORY/narrative/AIR	VIDEO	Client's story & crime scene investigation	ISSUES
SFSTs Who?				Age
HGN 8 hours?	Instructions Tracking Pupils equal Resting nyst __Smooth pursuit __Distinct & sustained at max dev __Onset prior to 45	Instructions Details of how done		Weight Weather Clothing Ground traffic Instructions Demo Lights / strobes
VGN				Details of how SFSTs done vs NHTSA Manual Order of tests
LOC	Instructions	Instructions		
WAT	Demo Ask about injuries? Details of Q&A Stance Start early Stops to steady H/T > ½ inch Lose balance/step off line Arms > 6 in for balance Turn issues # of steps Can't perform / refuse	Demo Ask about injuries? Details of Q&A Stance Start early Stops to steady H/T > ½ inch Lose balance/step off line Arms > 6 in for balance Turn issues # of steps Can't perform / refuse		
OLS	Instructions Demo Ask about injuries? Details of Q&A	Instructions Demo		

PBT	<div>Sways</div> <div>Arms > 6 in for balance</div> <div>Hops</div> <div>Puts foot down</div> <div>Can't perform / refuse</div> <div>Model/ Type</div> <div>Result</div> <div>Maintenance</div> <div>Training</div> <div>Last time read the manual</div> <div>Mouth check</div> <div>15 min observation period</div>	<div>Ask about injuries? Details of Q&A</div> <div>Sways</div> <div>Arms > 6 in for balance</div> <div>Hops</div> <div>Puts foot down</div> <div>Can't perform / refuse</div>		
ABCs				
#s				
Romberg Balance				

	LEO STORY/narrative/AIR	VIDEO and/or DEPO	Client's story & crime scene investigation	ISSUES
POST ARREST STMTS To whom? Any Miranda issues?				

	LEO STORY/narrative/AIR	VIDEO	Client's story & crime scene investigation	ISSUES
DRE Who? 1. <i>Why decide to call DRE</i> 2. <i>A/O tells DRE what s/he knows</i> 3. <i>Preliminary Examination + First Pulse -</i>				

<p>Q&A = injury + other health conditions + meds + food + alcohol + drugs & observes attitude + coordination + speech + breath & face + pupils & 1st pulse</p> <p>4. <i>HGN + VGN + LOC</i></p> <p>5. <i>Divided Attention Psychophysical Tests</i> - modified Romberg Balance + WAT + OLS + Finger to Nose</p> <p>6. <i>Vital Signs and Second Pulse</i> - blood pressure + temperature, + pulse</p> <p>7. <i>Dark Room Examinations</i> - pupil size at 3 lighting</p>				
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<p>conditions using pupillometer - dilated or constricted or normal</p> <p>8. <i>Examination for Muscle Tone</i> - rigid or loose or flaccid</p> <p>9. <i>Check for Injection Sites + 3rd Pulse</i></p> <p>10. <i>Subject's Statements and Other Observations</i> - Q&A</p> <p>11. <i>Analysis and Opinions of the Evaluator</i> - opinion if impaired and what drug category(ies)</p> <p>12. <i>Toxicological Examination</i> - blood or urine test</p>				
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	ISSUES	EXPERTS & MOTIONS
ISSUES w/ BA Who? Tobacco/chew Belch / vomit GERD/acid reflux COPD/lung issues Regs 15 min obs pd Coercion/confusion Curve Inadmissible unreliable		
ISSUES w/ CR Who? COPD/lung issues Regs Attorney 20 mins opportunity Coercion/confusion		
ISSUES w/ Blood Who?		

DWI Issues Checklist

Stop (basis of)

Detention (basis of)

- Ohio v. Robinette, 419 US 33 (1996) - Lawfulness of detention depends on the OBJECTIVE reasonable suspicion, not on the SUBJECTIVE motivation.
- Stolle v. DOR, 179 S.W.3d 470 (Mo App 2005) - Stolle court said LEO didn't even have enough info to continue to detain driver to investigate the DWI
- NHTSA Manual – after contact with driver, then the decision is “*should* the drive be asked to exit the vehicle and undergo SFST and PBT”

PC to arrest (basis of arrest) - Driving + Personal contact/observations + Exiting sequence + Pre-arrest Observations + SFSTs + PBT + Pre-arrest Statements

- PC = fair probability or substantial chance that a crime has been committed
 - Ill. v. Gates, 462 US 213 (1983)
- What is “intoxication”?
 - must view situation as it would have appeared to “prudent, cautious & trained LEO” - Mayberry v. DOR, 983 SW2d 628 (Mo App 1999)
 - Objective standard – doesn't matter if LEO thought he had PC
 - Intoxication = a physical condition usually evidenced by unsteadiness on the feet, slurring of speech, lack of body coordination & an impairment of motor reflexes - State v. Blumer, 546 SW2d 790 (Mo App 1977)
- What did LEO know at the moment of the arrest & reasonable inferences drawn therefrom – State v. Stokes, 710 SW2d 424, 426 (Mo App 1986)
- Cannot bootstrap facts learned after arrest to make PC to arrest - Domsch v. DOR, 767 SW2d 121, 123 (Mo App 1989)
- Court may disregard improperly administered FSTs on determining PC to arrest –
 - o Brown v. DOR 85 S.W.3d 1 (Mo 2002)
 - b/c prudent, cautious & trained LEOs would know how to properly administer, interpret & score the FSTs &
 - would not rely on the results of improperly administered tests
 - o York v. DOR 186 S.W.3d 267 (Mo. 2006)
 - Trial court can disregard all FSTs & PBT when improperly administered &/or unreliable
- Odor + admission w/o the WHEN is not enough
 - o Stolle v. DOR, 179 S.W.3d 470 (Mo App 2005) – mere **odor** of alcohol & **admission** to consumption at some **undetermined point in time** cannot give rise to PC to arrest for DWI
 - o Stolle court said LEO didn't even have enough info to continue to detain driver to investigate the DWI
- PC is based on how a “prudent, cautious & trained” LEO would act.
 - o LEOs should not “bury their heads in the sand like an ostrich, shut their eyes to that which they can readily see & shut their minds to that which they should & easily COULD know” – State v. Burton, 349 SW2d 228, 229 (Mo 1961)
 - So look at EVIDENCE OF SOBRIETY
 - Look at POOR INVESTIGATION & LACK OF QUESTIONING
 - o Prudent/cautious /trained LEO should know how to properly administer/interpret/score the SFSTs
 - o P/C/T LEO would NOT rely upon the results of improperly administered FSTs when making PC determination
 - o P/C/T LEOs properly maintain their PBTs
 - Have read the operator's manual
 - Understand how the device works
 - Follow the manufacturer's operating procedures
 - o P/C/T LEOs stay current in their training
 - o P/C/T LEOs properly document &/or remember the details of their observations
 - o P/C/T LEOs are able to state something other than bare conclusions
- NO PC cases:
 - o York v. DOR, 186 SW3d 267 (Mo 2006) – mere fact that person admitted to consumption of couple of drinks, bloodshot, watery & glassy eyes & strong smell of alcohol on breath did NOT require finding of PC (also PBT issue, see below)
 - o Stolle v. DOR, 179 SW3d 470, 472 (ED 2005) – mere fact that person has consumed alcohol at some undetermined point in time cannot give rise to PC that person is intoxicated.

- o Engelage v. DOR, 197 SW3d 197 (Mo App 2006) – odor from car & person, watery, bloodshot, face being very flushed; discrepancies b/w LEO testimony & the PRs; credibility issue of LEO (driver didn't seem intoxicated on video)
- o Flaiz v. DOR, 182 SW3d 244 (Mo App 2005) – video shows client not look or sound intoxicated; unlike the PR or LEO testimony
- Law on PBTs
 - o To be admissible FOUNDATION requires evidence of
 - LEO trained on how to properly administer the PBT, including that he has read the operator's manual
 - PBT properly calibrated
 - PBT properly maintained
 - o York v. DOR, 186 S.W.3d 267 (Mo 2006) – trial court properly found PBT to be unreliable & not credible when no evidence that PBT was properly calibrated, maintained or even working
 - o Paty v. DOR, 168 S.W.3d 625 (ED 2005) – PBT inadmissible b/c a prudent, cautious, & trained LEO knows how the PBT works, will properly maintain it, read the operator's manual & will follow the operating guidelines when using it
 - o Brown v. DOR, 85 SW3d 1 (Mo. 2002) - extends the rule that inadmissible if *unreliable* PBT test
 - o Letterman v. DOR, 412 S.W.3d 459 (Mo App 2013) – ATV crash + PBT was LEO's PC to arrest; PBT found not credible b/c
 - No 15 mins observation period before blow
 - Not properly calibrated
 - Not properly maintained
 - Test not performed per the manufacturer's recommendation
 - o State v. Robertson, 328 S.W.3d 745 (Mo App 2010) – PBT inadmissible because **no record of calibration** hx – no PC to arrest b/c HP relied almost exclusively on PBT for arrest
 - o NHTSA Manual (2013) -
 - PBT is used to verify the CAUSE of impairment and should be done after SFSTs b/c FSTs determine if impairment, then PBT is used to verify the cause may be alcohol
 - PBT should rarely be the only factor in deciding to arrest
 - o NHTSA Manual - 2 common factors that produce high # on PBT
 - Residual mouth alcohol – takes 15 mins for mouth alcohol to eliminate
 - Breath contaminants -some PBTs may react to substances other than alcohol (tobacco, gum, ether, chloroform, acetone, acetaldehyde, cigarette smoke, food in mouth like meat or bread in teeth)
 - o PBT always inadmissible in TRIAL as evidence of intoxication (but admissible as PC to arrest)
 - Section 577.021
 - State v. Duncan, 27 SW3d 486 (Mo App 2000)-can't say he "failed" the PBT
 - State v. Morgenroth, 227 SW3d 517 (Mo App 2007) – cant say "positive" on the PBT

Operation

Operation "while" intoxicated vs intoxication after driving – State v Hatfield – state's BOP to prove BRD driver did NOT consume after driving

NHTSA trained observations:

- driving - vehicle in motion
- stopping - vehicle in motion
- personal contact
- divided attention tasks
 - alphabet
 - numbers
 - romberg
 - finger to nose
- finger dexterity

- SFSTs
 - HGN
 - WAT
 - OLS
 - PBT - goes to PC to arrest only - can be a # now

Breath/blood test

Inadmissible vs unreliable

Coercion to provide sample / confusion

Injured

Language

Deaf

Do this or _____

Failure to comply with DOH Regulations

- General provisions - strict compliance
- Type I, II, and III permits
- Approved BA machines
- BA Calibration & Accuracy Verification Standards
- Operating Procedures for BA Machines
- Approval methods for BAC in blood, saliva, urine
- Approval methods for Drugs in blood, saliva, urine

BREATH TESTS:

Curve defense - hire expert if .12 or less

Mouth check

contaminants

Valid 15 minute observation period - uninterrupted, not leave room, not exit car to walk around and let client out of car

Must be Type II or III

Maintenance issues

Incomplete records

Standard Simulator Solutions

NIST

Approved suppliers:

Alcohol Countermeasure Systems, Inc, of Aurora, CO

Guth Labs of Harrisburg, PA

RepCo Marketing of Raleigh, NC

Draeger Safety Inc, of Durango, CO

Compressed gas

Approved suppliers:

Intoximeters Inc, of St Louis

CMI Inc, of Owensboro, KY

Draeger Safety Diagnostics Inc, of Durango, CO

ILMO Products Company Inc, of Jacksonville, FL

Standard simulator solution vs compressed gas

Temperature

Proper manufacturer

Not expired
Valid Type II permit
Radio frequency
of breath attempts
Hand Sanitizer
approved BA DEVICE
AS4 with printer- by Intoximeters, Inc, of StLouis
Auto not manual on BA ticket
Intox EC/IR 2 - “
Datamaster - by Intoximeters or Nat’l Patent Analytical Systems, of Mansfield,OH
Intox DMT - “ “
Intoxilyzer 5000 - by CMI/MPH Operations of MPD, of Owensboro, KY
Intoxilyzer 8000 - “

Sobriety vs intoxication vs impairment

Client behavior
Statements of client
Before arrest - goes to PC to arrest
After arrest

LEO credibility issues

Reports vs Video vs witnesses vs crime scene investigation

Implied Consent issues

Coercive
Confusing
Duress
Attorney request
20 minute opportunity if refusal case
Type of access to phones & phone numbers

ADMINISTRATIVE HEARINGS

1. SUB LEO to AH and have court reporter present. Only do this if you need to fight PC to arrest in this case or the DWI case AND if their presence does not hurt your AH case; ex, you have slam dunk win for technicality on AH, then don’t SUB LEO to hearing. For 15-30 mins max ask questions about how LEO did everything with your client, not how typically does things. This is setting them up for how they did things NOT complying with their NHTSA training which you’ll use in your cross at future hearings.
2. SUB D/T the Custodian of Record or LEO to get the VIDEOS that you otherwise cannot get in discovery bc the DWI hasn’t been filed yet. Either watch the VIDEO before you do your AH hearing, or get case continued to watch it before you do the AH. Do not give the video to the DOR Hrg Ofcr. It is yours bc it’s YOUR SUB D/T.
3. must prove driver was “arrested”
 - Callendar v. DOR, 44 SW3d 866 (Mo App 2001)
4. must prove “actual driving” by preponderance of evidence (only in breath test cases, not refusal cases)
 - Hearsay stmt of witness to LEO is not admissible
 - o Molthan v. DOR, 32 SW3d 643 (WD 2000)

- See also Hinnah v. DOR, 77 SW3d 616 (Mo 2002)
 - See also Scott v. DOR, 755 SW2d 751 (Mo App 1988) – LEO testified Scott admitted driving & then later said wasn't driving
5. must prove "probable cause" to believe driver was "intoxicated"
- Ill. v. Gates, 462 US 213 (1983) - PC = fair probability or substantial chance that a crime has been committed

TDNs & REFUSALS:

1. Consider not having client present bc in civil cases the law/rules allows the OC to call your client to the stand to testify (client can plead the 5th but not good so better not to be present)
2. Ask for and prepare draft of FOF/COL – Rule 73.01 – you prepare draft and submit before or after evidence (it depends on strategy)
 - Must request FOF/COL on record before introduction of evidence at trial unless court allows afterwards
 - Orton v. DOR, 131 SW3d 827 (Mo App 2004) – if you fail to get FOF/COL at trial level, you RISK having your win reversed on appeal