

The **A****B****C**s
Of
DUI Defense
a guide for those arrested

BY

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**THOSE IN TROUBLE “BEHIND-THE-WHEEL”,
EXPECT TO SEE SAN FRANCISCO ATTORNEY
JAMES FARRAGHER CAMPBELL
BESIDE THEM IN COURT**

San Francisco Attorney James Farragher Campbell is publicly regarded as one of the nation’s most successful DUI defense lawyers. He heads Campbell, DeMetrick & Jacobo. For over 32 years this San Francisco firm has defended some of the most difficult DUI and vehicular homicide cases in the country.

Mr. Campbell was a founding member of the Board of Regents for the National College for DUI Defense and served as its Dean in 2000. He has received the College’s Life Time Achievement Award for establishing the Board Certification program for DUI defense, now recognized by the American Bar Association.

He was President of the American Board of Criminal Lawyers in 2007. Well-known for his commanding courtroom presence, he has delivered extensive lectures throughout the country; authored numerous published articles, including the three-volume work for Matthew Bender, *Defense of Vehicular Homicide Cases*.

Table of Contents

Foreword	4
Introduction	5
Chapter 1. Your Arrest and the Charges	7
Chapter 2. Making the Right Decision	15
Chapter 3. The DMV and What They Can Do To Your License	20
Chapter 4. My Case in Court	23
Chapter 5. How Can I Help Improve My Defense?	37

Foreword

I see my career in DUI defense before my eyes on a daily basis. As I sit behind my desk, I easily recall the many memories of cases and people I have come across in the practice of law. I have mementos of everything significant either hanging on the walls or set about throughout the office. And, as I look around my office, I am visually reminded that I have seen the best of times and the worst of times in criminal defense.

I have represented truly falsely-accused individuals; and, I have represented people who have clearly violated the law. Some of those were found guilty, some were spared a much worse sentence than they might have otherwise received, and some walked away from a conviction. When people find themselves in trouble behind the wheel, our office is usually the firm they hope to retain.

One reason I have written this small book is to properly inform you of what you may expect if you've been arrested for a DUI and what you can do before retaining a lawyer.

You may be asking yourself, "Why would you provide so much valuable information for almost nothing?" The answer is actually quite simple: Trust.

Since 1975 I have attempted to develop and maintain an excellent reputation as a lawyer and, as the head of a law firm that does everything legally possible to win your case, we want to be a law firm that can be trusted both ethically and professionally. I believe this book is a good start to building that trust.

Some law firms or lawyers do not want you to know too much about what they actually do or can do in your defense. By providing this uncensored information now, I believe you will be better-educated about your case and about the lawyers who handle DUI cases. I know that if I give you sound information on what to look for in an attorney as well as how to evaluate your case, you will be in a better position to select the best lawyer for yourself.



INTRODUCTION

If you have been arrested for the first time for DUI (Driving Under the Influence), then this book is intended for you.

In truth, nothing can really prepare you for what you are about to experience because no matter how many times I've gone to criminal court it is never the same twice. There are, however, some constants which can guide you. Armed with this knowledge, you may be better-prepared to cope with potential difficulties and you will also be in a better position to assist the lawyer you retain in defending your case.

Please remember that this is not intended as a legal text on the law of DUI, criminal procedure, or a mini-primer on defending a DUI case. It will not explain all the procedures that may occur in your case. It is intended as a guide for you to understand the basic operations and procedures that you are likely to encounter in the court system. Also, keep in mind that most good lawyers are good because they will be as flexible and creative as possible within the bounds of the law. Therefore, no hard and fast principles that can be explained in detail will be found applicable in all DUI cases.

As you probably already know, there is a lot of information available to you on the Internet. In fact, that is probably how you came to order this book. Anyone arrested for DUI can obtain a wealth of information to assist them in understanding their case and in selecting defense counsel. Indeed, the average person today can make a much more informed decision on their case and on the lawyer they want to retain due to the information available on the Internet.

One major *caveat* should be noted: Information is not knowledge! While a great deal of information is available on the Internet, keep in mind that the “information highway” is, like any other highway, an expedient way of getting to a destination but never the destination itself.

Similarly, while this book endeavors to alert you to the legal basics of DUI defense, **it is not a substitute for the legal advice of competent counsel.** It is my hope that this book will help you understand the nature of a DUI charge and the options available to you as you exercise your Constitutional rights to a competent attorney and a fair trial.

CHAPTER 1

YOUR ARREST And THE CHARGES

It can happen at any time and at any place. You are driving along and, all of a sudden, behind you are blazing red lights from a police car. You stop and the nightmare begins. All of a sudden you are no longer in your world, the cops are now in charge, and it's scary.

If you have been arrested for the first time, I am sure you will admit it was a devastating experience. You were probably treated as a "common criminal". While you certainly don't think of yourself as such, this is the viewpoint of most police officers. It is also likely to be the viewpoint of most prospective jurors. Remember, the police see criminal conduct on a daily basis and, after a while, they become somewhat blasé about the personal experience you have undergone.

The police officer probably came up to your car, asked you some questions and told you why he or she stopped you.

Your lawyer will definitely need to know any statements you made to the police as they will, in all likelihood, be used against you in court to prove the necessary elements of the charges. All of this information is valuable. You should do your best to recall in exact detail everything that took place and try to recall all police contact leading to, during and following your arrest.

After the initial contact with the police officer, you were asked to exit your car and perform what are called "Field Sobriety Tests."

It is important at this point to understand that these supposed tests are actually not "tests" nor do they have anything to do with "sobriety." They are nothing more than exercises that may help the officer determine if, in his opinion, you are under the influence to the extent you cannot safely operate an automobile.

Some states use the Standardized Field Tests adopted under the National Highway Traffic Safety Administration. These tests have been developed to provide the officer with certain scores or cues that they can observe and record to guide them in their determination of whether or not to arrest you. However, these NHTSA tests are not used in California.

When the police officer decides to make an arrest for DUI, he or she is actually saying: “In my opinion, I think this person was driving under the influence.” What will be on trial is the officer’s opinion.

DUI is the only criminal offense since the Salem witch trials which amounts to a crime of “opinion”. All of the evidence which will be used against you in court will be circumstantial evidence; and it will be geared to support the officer’s opinion that you were under the influence.

From a legal standpoint, your lawyer will analyze your detention (the stop) and the arrest to determine whether there was legal probable cause to support either. This is one of the very first legal issues that will be explored by DUI defense counsel. Your contact with the police is of great importance to your lawyer in structuring your defense. The legality of the arrest will also come into play before the DMV as an issue that must be proved in order to sustain a license suspension.

Certain legal rules govern the arrest process and your lawyer will analyze the controlling law to determine if a valid legal arrest has taken place and what remedies exist if you were not legally arrested. Again, this affects both the criminal court case as well as the DMV case. The details of the arrest are important for many different legal reasons; and, your lawyer will be looking to legal defenses which may flow from the arrest process itself, either substantively or procedurally, that will block the prosecution.

In a DUI case, an arrest can be made in one of two ways: 1) an on-view arrest; or 2) after an accident where the police did not actually see the driving. The on-view arrest is how most DUI arrests are made. This occurs when a police officer sees you commit a crime in his or her presence and immediately apprehends you for that offense. The second manner of arrest is an exception to an on-view arrest in California DUI cases. If the police come upon an accident scene, or if other statutory exceptions are met, then they can make an arrest for a DUI even though they did not actually see you driving. Sometimes this same situation of “no observable driving” may occur if you are stopped along the roadside and the police happen to come upon your car. In this situation, there exists a better chance that Vehicle Code Section 40300.5 (the exception to no observable driving) will not apply to aid the police.

In some situations, you may have come upon a sobriety check point, or “roadblock.” Here, very strict constitutional rules apply as to the legal validity of

the check point. Your lawyer will carefully analyze the conditions and implementation to determine whether or not a constitutional challenge to the roadblock exists.

WHAT IS THE CHARGE?

A Complaint will later be filed by the district attorney's office and the Complaint will state in legal language the exact charges you face in court. The Complaint is the name given to the paper setting out the alleged violations of law. The Complaint is the legal document that brings you to court and starts the legal process against you.

Usually in a DUI case, you will be charged with two separate criminal offenses: *Section 23152 (a)* of the California Vehicle Code, driving under the influence; and, *Section 23152 (b)* of the California Vehicle Code, driving with a blood alcohol level of .08% or higher.

Let's look at both of these charges because they will most likely be the criminal charges you will have to face and defend against in court.

Section 23152 (a) is driving under the influence. The offense is basically defined under California law as "driving a vehicle while you are under the influence of any alcoholic beverage and/or a drug." The essence of the offense is that you were unable to safely operate your vehicle because you were impaired due to alcohol and/or drugs. Please keep in mind that a charge of "driving under the influence" is not the same thing as "drunk driving." You do not have to be drunk in order to be convicted of driving under the influence.

Section 23152 (b) is defined as "driving at or above the legal blood alcohol limit of 0.08%." This offense is different than the (a) count above in that it does not matter how well or poorly you were driving the vehicle, just that you were at or above the limit.

If you are found guilty of both charges, you can only be punished for one of the crimes because your actions only constituted one continuous act. But, to get out from under the DUI consequences, you have to beat both of these charges.

If you were at a high blood alcohol level (0.15% or higher) the DA could also file an enhancement to the above charges which could result in a harsher sentence, if convicted.

Other enhancements are also likely if you have prior convictions; if you were driving in excess of 100 mph; if you had young children in the car under 14 years old; or if, you refused to take a chemical test to determine your blood alcohol level.

A typical criminal complaint looks something like the following:

KAMALA D. HARRIS, SB#146672
District Attorney
San Francisco District Attorney's Office
850 Bryant Street, 3rd Floor
San Francisco, CA 94103
Telephone: (415) 553-1752

10/9

ATTORNEYS FOR THE PEOPLE

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,

v.

Defendant.

MISDEMEANOR COMPLAINT

CASE NUMBER:

The Undersigned, being sworn says, on information and belief, that:

COUNT: I

The said defendant, _____, did in the City and County of San Francisco, State of California, on or about the 24th day of _____, commit the crime of DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, to wit: Violating Section 23152(a) of the California Vehicle Code, a Misdemeanor, in that the said defendant did then and there drive a vehicle while under the influence of an alcoholic beverage, under the influence of a drug and under the combined influence of an alcoholic beverage and a drug.

COUNT: II

The said defendant, _____, did in the City and County of San Francisco, State of California, on or about the _____, commit the crime of DRIVING WHILE HAVING A 0.08% OR HIGHER BLOOD ALCOHOL, to wit: Violating Section 23152(b) of the California Vehicle Code, a Misdemeanor, in that the said defendant did then and there drive a vehicle upon a highway and upon other than a highway in an area which was open to the general public with 0.08 percent or more, by weight, of alcohol in his/her blood.

Page 1 of 2

What are the elements that the prosecutor must prove as defined under law?

Count 1 – a violation of Section 23152 (a) of the California Vehicle Code.

Section 23152 (a) driving under the influence has two components: 1.) Driving; and, 2.) Being under the influence.

1.) DRIVING

On most occasions, you are pulled over by the police after he has followed you and observed how you were driving. However, in other situations, the element of driving becomes a much bigger issue from a legal standpoint. You may have been in an accident. You may have been stopped at the side of the road or even in a parking lot. You also may have been stopped at a roadblock. Maybe you were not even the driver of the automobile. All of these facts will need to be legally researched by a DUI lawyer because you may have some good legal defenses to assert in your case.

2.) UNDER THE INFLUENCE

The biggest problem you will have in the case are the results of the chemical tests. If you have a blood alcohol concentration, usually referred to as BAC, of 0.08% or more, then the prosecutor is going to try to use that test result as circumstantial evidence that you were at or above the legal limit when you drove the vehicle. In other words, they will try to be using this evidence to show you were impaired.

The law in California allows the prosecutor to rely upon a rebuttable presumption that if you were at or above the legal limit of 0.08%, at the time of your chemical test and, if that test was taken within 3 hours of your arrest, you were driving under the influence. For purposes of arguing your guilt to jurors on this count, the prosecution will also seek to introduce into evidence the quality of your driving – e.g., “weaving”, “speeding”, “going the wrong way on a one-way-street”, etc.

You can still present evidence to show that you were not under the influence, despite the test evidence, to rebut the presumption. And, you can still present evidence to show that the test evidence may not be accurate or reliable. There is also the possibility that your lawyer may be able to block the test evidence from being admitted into evidence altogether, thus weakening the prosecution’s case completely.

Count 2 – a violation of Section 23152 (b) of the California Vehicle Code.

Section 23152 (b) driving with a blood alcohol level of .08% or higher, has two elements of proof as well: 1) Driving; and 2) being at 0.08% or higher at the time of driving.

1.) DRIVING

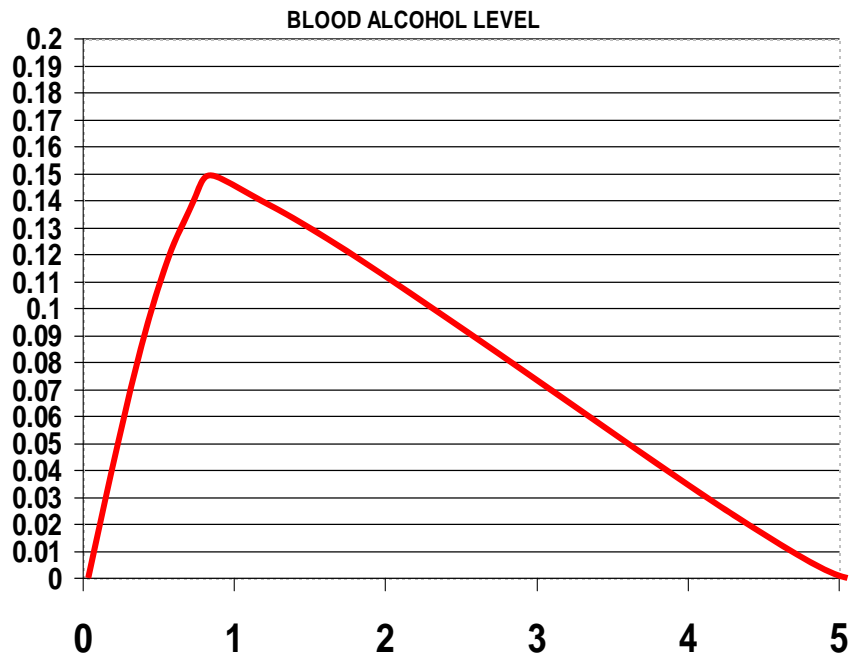
The driving element is the same as above in 23152(a) driving under the influence.

2.) 0.08% OR HIGHER

AT THE TIME OF DRIVING

Now, this element is a little different than the other presumption used in the 23152(a) standard. Here, the prosecution must prove that at the actual time of driving you were at or above the legal limit. The prosecution may still use the rebuttable presumption of a chemical test within 3 hours of driving. However, if that test was not taken within the 3 hours, then this chemical test evidence is excluded and cannot be used against you for this statutory offense.

Also, though the test result may indicate you were above the legal limit, expert testimony may show that your BAC (blood alcohol level) was rising; therefore, at the actual time of driving you were below the legal limit. The chart below depicts a normal blood alcohol rise and fall (burn off). In essence, if you were tested before you peaked, i.e., while your BAC was continuing to go up, then you certainly would be at a lower BAC at the actual time of driving. If, on the other hand, you were tested long after you peaked, then you would be eliminating alcohol, indicating your BAC was actually higher at the time of driving.



In California, if you are arrested for a DUI, you are required to submit to a chemical test to determine your blood alcohol level. This is known as the “implied consent law.” In other words, when you were issued your driver’s license from the DMV, you agreed to submit to a chemical test if arrested for a DUI.

The chemical test consists of either a blood or a breath test. The arresting officer must give you the choice of blood or breath; you decide which of the two tests you want to take. If you were involved in an accident, the officer could limit your choice to only a blood test. This is usually done when the accident involves an injury.

If the arresting officer thinks you may be under the influence of a drug, then your choices may be limited to blood or urine. Urine tests are no longer used in California for alcohol testing.

The procedure leading up to the implied consent test is, again, an area of legal concern for your lawyer to examine. The procedural issues at play here can sometimes weaken the D.A.’s case even if the chemical tests results come into evidence. Other times, the chemical tests results may be blocked from evidence.

The DUI defense lawyer is basically trying to do one or both of the following: challenge the factual validity of the test results; and/or, attempt to prevent those test results from coming into evidence on legal grounds.

The law favors the prosecution with reference to the chemical test results because of the legal presumption that allows the prosecution to ask the jury to presume that you were under the influence at the time of driving if you have a blood alcohol concentration (BAC) of 0.08% or higher as shown by a chemical tests taken within 3 hours of your driving.

Obviously, your lawyer will be examining all aspects of the chemical test results. First, are they factually accurate? Can there be an interpretation of those results in your favor, for example a rising blood alcohol defense (you may be over the legal limit at the time of the test but not at the time of your driving). Secondly, the lawyer will look at all of your procedural defenses which relate to the admissibility of the test results. Was the test taken within the 3 hour time limit? Did the police follow to the letter all of the evidentiary steps for admissibility under Title 17? (Title 17 is the California Administrative Code that sets out the proper procedure to be followed in collecting chemical samples for admission into evidence in a court proceeding.) Was the operator qualified and certified to use the breath device? Was the breath device properly calibrated? Were there any maintenance problems prior to or just after your test? Did the blood sample have the proper preservative level? Was a non-alcohol swab used? And the list goes on and on.

Remember, the presumption goes both to the 23152 (a) count [driving under the influence] as well as to the 23152 (b) count [driving at or above 0.08%]. However, keep in mind that if any of the foundational requirements for the chemical test are challengeable and keep that result from being introduced as evidence, then the entire charge of driving at 0.08% or more may get dismissed. Even if not dismissed, a jury may choose to give the test result little if any weight in assessing the case against you. In other words, if the police did not follow the proper procedure, how then can we accept the test's reliability?

Also, don't forget you will also most likely have a license suspension matter before the DMV. This is not a criminal offense. It is a civil proceeding before an administrative agency, the California DMV. The matter before the DMV will be brought under the Administrative *per se* suspension law. This is almost identical to

the *per se* criminal charge, 23152 (b) driving with a blood alcohol level of .08% or higher, which you will also be facing in the criminal case.

CHAPTER 2

MAKING THE RIGHT DECISION

O.K. you have been arrested. Now it is time to get it together and figure out the best thing to do. The first thing you should definitely do is set up a consultation with a DUI defense attorney. If you woke up with severe chest pains you would see a doctor! Well this is much the same – see a lawyer. But by all means, see a DUI defense lawyer! If you had chest pains would you see a podiatrist?

The big surprise is that if you went to see a doctor to determine what might be wrong with you, you would pay. To see the best DUI defense lawyers in the country will not cost you a dime. All you are spending is your time. Don't be a fool, talk to a lawyer.

When you do arrange for a consultation, be sure that you are going to interview with the actual lawyer who you are considering for representation. As I said, you usually can speak with some of the top DUI defense lawyers in the country without having to pay a consultation fee. So, why not start at the top. Go see the best. My advice, of course, is to speak with a DUI defense lawyer and not a general criminal lawyer. When I first started practice as a criminal defense lawyer in 1975, DUI cases were handled by general practitioners because, for the most part, the cases could easily be negotiated. With the advent of no plea bargaining positions, new statutory crimes and advancements in chemical testing, avenues of defense were blocked. Now this area of criminal defense (DUI defense) has become so complicated that it is now recognized as a “specialty” by the American Bar Association. Today DUI defense is one of the most difficult areas of criminal law. Public sentiment has moved the courts and the legislature to impose much stricter laws and penalties for DUI. Trial has become much more difficult due to the public initial emotional mind set against those accused of a DUI, an offense the average juror today often perceives as “Drinking and Driving,” not “Drunk Driving.”

Any lawyer who undertakes the defense of a DUI case today does not have an easy task. We all hope that our courts apply the law even-handedly to all citizens accused of a crime in all types of criminal cases. But, in a DUI case, there are many exceptions that do not exist in any other type of criminal case. Usually, the arrested person gets to call a lawyer after an arrest – not in a DUI case. Usually, an arrested

person gets to speak with a lawyer if they want – not in a DUI case. Usually, the prosecution has to prove beyond a reasonable doubt each and every element of a crime before the person can be convicted – not in a DUI case. There are many judicial and legislative exceptions that apply to virtually all phases of substantive and procedural law in DUI cases which does not make the defender’s job easy. The defense of a drinking driver is one of the most difficult tasks in criminal law. The general public perception, stiffer penalties, relaxed constitutional safeguards and an attitude adjustment in both the legislature and the courts has caused the DUI trial to evolve into an area suited only to those well-versed and well-trained in the complexities of alcohol related criminal litigation. These complexities involve an array of physiological, biological, pharmacological and legal issues which the average criminal defense lawyer may be ill-suited to handle.

The task of DUI defense today requires a lawyer not only with extensive legal skills, but also with a solid understanding and knowledge of the scientific and technical aspects which will be encountered in the DUI case. Any lawyer today who views the DUI case as a routine traffic offense is either ill-prepared, naïve, or both. No longer is their client merely facing a fine or a short license suspension if the case is not handled properly. Today, a convicted drunk driver faces mandatory incarceration, a substantial fine, a lengthy license suspension, community service, a criminal record and a whole litany of collateral consequences that impact employment and travel.

When you think about selecting a DUI defense lawyer, be careful. There are some law firms that claim to provide representation all over the state. Do you really think one lawyer is going to be all over the State of California handling DUI cases? In these situations, it is likely that you will be assigned to another lawyer who has an office in the area where your case is located. The referring lawyer will then probably take some kind of a referral fee to turn your case over. There are a few firms that spend a great deal of money on advertising and have a standing relationship with local lawyers who, in turn, are assigned your case. You can easily spot these lawyers and firms in that they each advertise separately and jointly. In other words, lawyer X is listed as a member of law firm Y, but you see lawyer X’s advertisements for his own office standing separate and apart from law firm Y. You are probably paying more for the referral from law firm Y to lawyer X, than if you hired lawyer X directly.

When you have your interview, the interviewing lawyer should be able to give you a case evaluation and intelligently explain how she would go about defending your case. Any lawyer who spends time telling you how good they are is not telling you how they would go about trying to win your case. Get information on what he perceives to be the issues in your case and what chances you have in either winning the case or getting a favorable settlement away from a DUI conviction.

Also, if you are interviewing a prominent DUI defense lawyer, ask what his actual legal involvement in your defense case will be? Is she just overseeing the case? Is she available to you for ongoing case consultations during the litigation? And, the big question, will she actually go to court on your case and be personally available for trial? What is the benefit of a “big name” if that individual is not there at your side? What is the benefit of an excellently-skilled lawyer if he is going to have an associate try your case?

You should also be sure to ask about the firm’s procedure on how you will be kept informed about the status of the case. Will you be receiving letters and copies of all motions filed in your defense, copies of all police reports and DMV reports? You want to be sure that you will be kept well-informed on the progress and developments in your case at all times. These are difficult cases and, as the case proceeds, decisions will have to be made. You cannot make an informed decision if you are not properly informed.

Also, once retained, most DUI defense lawyers will automatically contact the DMV within the ten (10) day time limit and will represent you at the DMV hearing. Most times, you will not have to attend this hearing; however, each case is different and the lawyer will advise you if your appearance will be necessary well in advance of the scheduled hearing. This time limit for a requested DMV hearing is limited to ten (10) days. If you do not make your request within the ten (10) day period you are not entitled to a hearing. It is best to have the lawyer who is going to represent you make the request for the hearing; but, if you do not get a lawyer within the ten day time limit then, by all means, you must call the DMV yourself and request the hearing. More information on the DMV will be found in Chapter 3.

THIS IS IMPORTANT. You simply must set aside some time to undertake this task. The lawyer you hire will have a large part to play in determining the outcome of your case. The outcome of your case can and will impact you for many years to come. **IT IS IMPORTANT!**

Traditionally, you might ask friends, relatives, business associates and or other lawyers you might know for the name of a good DUI defense lawyer. This, however, also reveals to others that you have been arrested and many people do not want this known. This is certainly not unusual, but it is more important to get good representation than to worry about your embarrassment. However, you do have a great research tool available to you – the Internet!

Remember, anyone can put up an Internet web site. It can say almost anything and the lawyer certainly wants you to think that they are great. Look to the lawyer's reputation and standing in the DUI defense bar. That is what should be on the web site, not a lot of self promotion and TV appearances. There is absolutely no substitute for experience and reputation. A lawyer's knowledge and reputation is really all that they have to sell. Naturally, those lawyers with the best track record, experience and reputation will end up costing the most, but not always. Think about the value you are getting versus the costs.

Legal Fees and Costs

Again, no surprise, you will usually get what you pay for just like any other service. The biggest names in the business will charge the most. But be careful; be sure those lawyers will actually be the lawyers working on your case. Unfortunately, there are a few-well known lawyers that attract clients but then have other associates do the actual legal work. Be sure you speak with the lawyer you want and make sure that lawyer will be available to you for trial. There are some well-known lawyers who never even interview a prospective client. They have a law clerk, an investigator, or a paralegal do it. That's like a nurse interviewing you for open heart surgery. Why would you settle for that?

A Word of Caution on Low-Fee Lawyers

There are lawyers who can quote you a low fee, a very low fee in some cases. But you should know what you are getting for the fee. Are you going to get the quality and time commitments that are needed to be taken in your defense? They may be doing that because they have no intention of spending the proper amount of time defending your case in court. Such an attorney may have a strong financial incentive to avoid a number of court appearances and/or conduct the proper case preparation. These types of attorneys rarely, if ever, go to trial.

Favorable pretrial settlements come about through a strong advocate. A strong advocate is one that knows how to successfully try a DUI case. To successfully try a DUI case, you must have tried a great many. This is the great strength, the professional standing and reputation of good lawyers.

Again, be careful. A large fee does not necessarily guarantee a good lawyer. There are some bad apples out there just waiting for you. Always check the lawyer's standing in Martindale-Hubble. It is the oldest directory of lawyer's standing and reputations in the legal community. It is voted upon by other lawyers. So you have, in essence, lawyers ranking other lawyers. Some cities also have magazines, such as "San Francisco Magazine", "Los Angeles Magazine", etc. which from time to time, publish a "Super Lawyers" section. Here, again, this is a survey of lawyers judging or recommending other lawyers that they would choose for a particular legal problem.

Search the listing of legal organizations such as the National College for DUI Defense www.ncdd.com. This is an excellent resource for DUI lawyers. But you should be careful of commercial sites that simply list lawyers. These lawyers usually pay a fee to be listed and it really does not provide any guide to their abilities except that this is an area of law in which they want to get cases. The commercial lists are the equivalent to a yellow page ad in the phone book; it gives you a starting point.

Chapter 3

THE DMV AND WHAT THEY CAN DO TO YOUR LICENSE

If the police officer took your driver's license at the time of arrest and you received a pink Temporary License/Notice of Suspension, then you only have ten (10) days to contact the DMV and request a hearing; otherwise, your driving privilege will be lost at the end of thirty (30) days.

If you are an out-of-state driver, and the arresting officer let you keep your license but gave you a pink Temporary License/Notice of Suspension, then you only have ten (10) days to contact the DMV and request a hearing; otherwise, your driving privilege in the State of California will be lost at the end of thirty (30) days.

One of the most important issues to address in your case will be your attempt to keep and maintain your driving privilege. To most individuals, this is looked upon as an absolute necessity and often may very well directly relate to their ability to make a living.

It is always a good idea to contact a DUI defense attorney prior to contacting the DMV so that you can be advised on the type of hearing to request as well as the timing of such a hearing request. You may also be advised that it may be better for the attorney to contact DMV for you.

You have 10 days to contact the DMV, which is plenty of time to get in touch with a lawyer. Some lawyers may tell you that they will contact DMV for you, even though you have not retained them. This is not always in your best interest. You may end up retaining another lawyer to represent you and then the DMV hearing will have to be changed. You may be giving up or using a continuance request for no reason. If, for some reason, you do not hire a lawyer before your 10 days is up then you must contact DMV yourself and request a hearing.

As you have already been informed, you only have 10 days from the date of arrest to request a hearing before the DMV. If you do make that request then a stay of the driving license suspension will be issued. You will maintain full and

complete driving privileges while the stay is in effect; and, the stay of suspension will continue until DMV's ruling following the hearing.

If you do not request a hearing, your driving privileges will be suspended as follows:

- 1) First time offender – 4 months;
- 2) First time offender who refused a chemical test – 1 year;
- 3) Second time or subsequent offender – 1 year;
- 4) Second time offender who refused a chemical test – 2 years;
- 5) Third time offender – 3 years.

For the *per se* suspension periods, a previous DMV administrative *per se* suspension will be counted against you, even if you didn't end up with a DUI conviction in the previous case.

If you have not retained counsel, then you must contact the DMV for a hearing; otherwise, as stated above, you will lose your driving privilege.

If you have to contact the DMV yourself, the following information may be of help:

You must make a request for a hearing **within ten days of the date you were given the Notice of Suspension**. Most often, the Notice of Suspension will be given to you at the exact same time you were arrested. The ten days are calculated by counting the first day as the first day after your arrest. As an example, if you were arrested on the 15th of the month, start counting on the 16th of the month as the first day, and the tenth day would then be the 25th of the month.

The information set out below supplies the Department of Motor Vehicles with the information legally necessary to obtain a hearing. You do not have to supply any other information at the time you make the request in order to receive a hearing date or the stay of your license suspension.

You must provide the DMV, at the time you make your request for hearing, with the following information:

- * Your name and driver's license number.
- * The date of arrest or notice of suspension, which you will find on the Notice of Suspension itself. It will also contain information regarding the county where you were arrested.
- * Request either an in person or a telephonic hearing.

The telephone numbers for the DMV *per se* hearings are listed below.

City of Commerce	(323) 724-4000
El Segundo	(310) 615-3500
Fresno	(559) 488-4292
Irvine	(949) 440-4416
Oakland	(510) 563-8900
Oxnard	(805) 488-0863
Sacramento	(916) 227-2970
San Bernardino	(909) 383-7413
San Diego	(619) 627-3901
San Francisco	(415) 557-1170
San Jose	(408) 277-1314

CHAPTER

4

YOUR CASE IN COURT

The citation you signed when you were released from jail, or your bail bond notice, requires that you appear in court for your arraignment. At the arraignment, the judge advises you of the charges that have been filed against you by the prosecution and informs you of your rights.

Your Rights in a DUI Case

Your rights in a DUI case are much the same as they would be in any criminal case in the State of California.

RIGHT TO AN ATTORNEY

You have the right to be represented by an attorney at all stages of the criminal proceedings. If you cannot afford an attorney, the court will appoint one for you; usually this will be a public defender. However, a public defender will not represent you before the DMV, only “court” proceedings. A private attorney will almost always include the DMV representation as part of the criminal case representation.

RIGHT TO A TRIAL

You have the right to a trial on the charge against you. This also includes the right to trial on any alleged prior conviction or other enhancements that may be charged against you as well. The right to a trial is the right to a trial by a jury of twelve people from your community, all of whom must agree to a verdict before you may be found guilty. (Note: If you have been arrested on Federal land and charged with a federal DUI offense, you do not have the right to a jury on a first offense.)

RIGHT TO OBTAIN EVIDENCE

You have the right to subpoena into Court evidence and witnesses on your behalf. You also have the right to testify on your own behalf if you want to do so.

RIGHT TO CONFRONTATION

You have the right to cross-examine and challenge any witnesses against you.

RIGHT AGAINST SELF-INCRIMINATION

You have the right against self-incrimination, which means the right to remain silent and the right not to testify against yourself. The prosecutor cannot call you to testify against yourself in court.

Be aware that these rights can be little more than platitudes unless you have a dedicated and resolved advocate at your side to properly guide you in their skillful use and exercise. They are there for your protection as well as for the protection of the collective members of our society.

Many times, DUI attorneys will waive your personal appearance at the arraignment under Penal Code Section 977. This allows you to appear before the court through your lawyer only, saving you the time and trouble of having to come to court. The case is then set down for further proceeding, usually a pre-trial conference date for several weeks later.

Once the court process begins, you will be before the court, which means your case will be in front of a judge. The judge is of critical importance to your case. The power that the judge has over your case is considerable. In the federal court that power is almost absolute.

The judge's role in the case is to decide questions of law and to apply the law as fairly as possible to your case.

At the arraignment, the judge will take a plea, either from you or through your lawyer, of "not guilty." If you do not have a lawyer at the arraignment, the judge more than likely will not ask you for a plea until you have had an opportunity to consult with and retain counsel.

The only things the judge can do at the arraignment are accept your plea, set bail and continue the case for further proceedings. The judge will not entertain any discussions as to the merits of your defense to the charges; those issues will be taken up at a later date in the litigation.

Later in the course of the case, the judge will hear all pretrial motions that will be filed by your lawyer. The lawyer will conduct legal research and determine what are the appropriate motions to file that best serve your defense. These may include motions to limit or exclude certain evidence and to discover the evidence that the prosecutor intends to offer against you at trial. If there are such motions, and usually there are, these will be later argued by counsel and ruled upon by the judge.

The success or failure of these various motions will, in large part, determine the legal strength or weakness of your case. The judge will then be in a position later, at the pre-trial conference, to attempt to settle the case by discussion with both the prosecutor and your lawyer. This is when plea bargaining and/or sentencing bargaining usually starts to take place. The judge presides over the trial ruling on legal questions, while leaving questions of fact to be determined by the jury.

Plea-bargaining is a compromise between the parties, the prosecution and the defense, on what plea you agree to enter in exchange for charges being dismissed. A plea bargain also usually involves a sentence bargain as well. Sentence bargaining is an indication from the judge as to the sentence which would be imposed if you agreed to plead guilty to a certain charge. Even if you agree to a "deal" with the prosecutor, the plea and/or sentence will still have to be approved by the judge. The judge has the final word on sentencing unless the prosecutor is going to dismiss the case in its entirety.

If your case is not settled or dismissed, then you will probably be going to jury trial. The judge presides over the trial by ruling on legal questions, while leaving questions of fact to be determined by the jury. If your case is in federal court, there is not a jury and so the judge becomes the final arbiter of both legal and factual issues. This is perhaps the area where the judge has the most power over your case. By the time the trial begins, the judge has determined how the trial will be conducted and what evidence will be received based on pretrial rulings.

The trial judge may be the same judge you appeared before for the pretrial proceedings, or it may be a different judge who has never participated in the case before. In some courts, the judge handles the case all the way through from start to finish; while in other counties, the court has set up specialized departments, with each having a part of the case's procedure to handle. In those courts, certain judges

are assigned to preside over the trial of the case with different judges conducting the pretrial proceedings.

As electrifying and exciting as a jury trial may be, a good criminal defense lawyer wants to keep his or her client out of court as much as possible. But, sometimes a DUI case will have to go to trial simply because there is no other way to win except trial. If a trial is requested by you, then you will, of course, have to personally attend. A DUI trial in most of the Bay Area courts takes about 3 to 4 days.

PRETRIAL PROCEEDINGS

The next subject I want to cover is “pretrial proceedings”; in other words, all the court proceedings that take place prior to the actual trial of your case.

Pretrial procedures most often relate to the filing of motions that can dispose of the case without the necessity of a trial. However, there are other pretrial motions used for purposes of preparing the defense that do not go directly to a dismissal of the case. An example of this is the motion for pretrial discovery. Here, the lawyer seeks to ensure that you are in possession of all of the evidence that exists in the case which the prosecution has in its possession. If a discovery order is violated, some sanction may be imposed by the court but, in all probability, it will not result in a dismissal of the case. However, a violation of discovery rules may place the prosecution in a tactically-poor position which sometimes can lead to a favorable settlement.

YOU ARE WELCOME TO READ BOTH SECTIONS ON MISDEMEANORS AS WELL AS FELONY CHARGES WHICH FOLLOW; BUT YOU WILL PROBABLY ONLY BE INTERESTED IN THE CHARGE WHICH YOU ARE PRESENTLY FACING.

IF YOU ARE CHARGED WITH A FIRST-TIME DUI, A SECOND-TIME DUI OR A THIRD-TIME DUI, YOU HAVE MISDEMEANOR CHARGES, AND SO SHOULD READ THAT SECTION.

IF YOU ARE CHARGED WITH A FOURTH OR SUBSEQUENT DUI OFFENSE, A DUI WITH INJURY OR DEATH, OR A VEHICULAR HOMICIDE, THEN YOU SHOULD READ THE FELONY SECTION.

IF YOU ARE CHARGED WITH A FEDERAL DUI, READ BOTH THE MISDEMEANOR AND FEDERAL SECTIONS THAT FOLLOW.

MISDEMEANOR DUI

IF YOU HAVE BEEN ARRESTED FOR A DUI FOR THE FIRST TIME, SECOND TIME OR THIRD TIME, AND IF THERE ARE NO INJURIES CONNECTED TO THE CASE, THEN YOU MAY BE CHARGED WITH A MISDEMEANOR DUI OFFENSE.

After you were arrested, the police booked you into custody. Typically, you were released on a citation release, without having to post bail. A citation release is just like you posting bail. Your signature on the citation operates as a promise for you to appear on the date indicated on the citation. If you fail to appear as promised, this, in and of itself, is a separate offense apart from the DUI charges.

The other way you could have been released is through a bail bondsman or by you yourself posting bail. If you make all your required court appearances, the bail bond will be exonerated, e.g., set aside, at the end of the case.

If you posted your own bail directly with the clerk of the court, or did so through a friend or relative, then at the end of the case, and assuming you have not failed to appear, you will receive the entire amount of the bail back. If you posted a bond using a bondsman, then you will not receive any refund because the premium you paid was for the cost of the bond.

Your first appearance before the court will be the arraignment. As stated earlier, the arraignment is when the judge informs you of what offenses you are specifically charged with, and you inform the judge how you are going to plead. The court will not hear any defenses to the case at this time. If you already have a lawyer, then a plea of “not guilty” will probably be entered. If you do not have a lawyer by the time of the arraignment, you can ask the judge for a continuance to obtain the services of an attorney. The judge will generally not ask you to enter a plea at this time without counsel and will generally give you reasonable time to secure the services of an attorney.

If you cannot afford to hire a private attorney, then you can request that a public defender be appointed to represent you. Keep in mind that the public defender can only represent you in court; they can not represent you before the DMV.

Arraignment procedures can vary from county to county. For example, in some counties, the court will set the matter for a pretrial conference as well as a jury trial date right at the arraignment. Other courts may set a date for a pretrial conference to explore the possibility of disposition and settlement before setting a jury trial date. Whatever the local court practice, the matter is going to be continued for the

possibility of a disposition short of trial. Generally, the courts hearing DUI cases are the busiest of all the trial courts in the county, so both the judge and prosecutor will want to see if a settlement can be reached in your case.

After the arraignment, the attorney will be pursuing discovery. The discovery process is available for you to determine what evidence the prosecutor has to prove the charges. Your lawyer will want to see if the prosecutor can prove all of the elements of the crimes you are charged with committing. Information turned over by the prosecution on discovery enables your attorney to explore any and all legal claims which may prevent evidence from being used at the trial.

Sometimes the evidence may have been obtained in violation of your right to privacy; your rights to be free from unreasonable search and/or seizure. Statements may have been obtained against your right against self-incrimination, or your right to counsel. There are many other areas of protection that your defense lawyer will want to litigate and determine before you are asked to stand trial. The determination of these issues may affect the outcome of the case and possibly lead to a more favorable settlement. If this is the case, then these points will be the subject of certain motions to exclude or limit evidence at trial. These motions, in turn, will then be the motions which will comprise your pretrial motions. These will then almost always be heard prior to trial and, sometimes, even prior to a pretrial conference. In some situations, defense counsel may want to have the pretrial conference heard first to discuss these motions with the prosecutor and the court in hopes of reaching a settlement offer. Local rules of court may dictate when such motions can be made and this will factor into counsel's decision of which motions to file.

Even if the pretrial motions do not totally dispose of the case by a dismissal, the motions can still have a possible favorable impact by limiting certain evidence or strengthening a position which will come up at jury trial. Sometimes a motion may "lock-in" certain testimony, which later becomes invaluable at trial.

Once the pretrial motions are heard and ruled upon by the judge, the case should be ready to proceed to trial. Sometimes the court, or your attorney, will want to set a further date for the purpose of one last pretrial conference. This period of time between the hearing on the motions and the setting date can give the parties one last chance to re-evaluate their positions and decide whether or not to run the risk of trial.

This is probably a good place to talk about the prospect of trial and what risks and consequences are attached to a decision to proceed to trial.

Factored into this decision are the following considerations: Will a pretrial disposition involve jail time? Will the disposition result in you having a criminal record? Could the disposition expose you to civil damages? (If you were charged with an offense which was in any way connected to an accident where people were injured or property damage occurred, you might escape jail, but end up paying a lot of money for the damages from a civil suit or claim). Also, a major concern to most people is the impact a disposition will have on their driver's license. You should take all of these factors into consideration in deciding whether or not the pretrial offer is a good one.

A plea bargain is an offer extended by the prosecutor to settle the case for a negotiated disposition. The prosecutor may be willing to drop certain charges if you plead guilty to other charges. The prosecutor can recommend a certain sentence if you plead, but the ultimate sentence imposed is always up to the judge.

The judge, of course, must sentence you within the bounds of the law; i.e., the judge cannot give you a greater sentence than allowed under the statute, nor can the judge give you a lesser sentence than the statutory minimum. As an example, certain driving offenses require that you spend a minimum amount of time in jail. The judge cannot sentence you to less than the amount of time set by statute.

Any plea bargain that the prosecutor extends ultimately will have to be accepted or approved by the judge. In most DUI cases the prosecutor is familiar with the particular judge and knows what he or she will usually impose as a DUI sentence. Almost routinely, the judge will approve such a misdemeanor disposition unless he or she feels it is very much out of line with the facts surrounding the offense. For first time offenses, the court, depending upon the county where they are charged, almost always gives defendants some uniform sentence. Repeat offenders, or a situation that is out of the ordinary, may see a different proposed sentence.

The concept of plea-bargaining comes in two forms. The first, as discussed above, is that you will accept a plea to a charge, and in return, other charges will be dismissed. For example, in exchange for a plea to "reckless driving", the DUI

charges would be dismissed. You could thereby avoid the mandatory consequences attached to the DUI charges.

There is another aspect to plea bargaining: Sentence bargaining. Only the judge has control over the exact sentence imposed. The prosecutor cannot control the sentence, only the charge to which you agree to plead. Occasionally, the judge will impose a sentence different from what the prosecutor seeks. If this situation occurs, you will, of course, consult with your lawyer as to your options. It may be that such action by the judge will alter your decision about pleading guilty.

The dynamics of plea-bargaining, in both forms of a plea and a sentence, take place throughout the case. Usually, offers to settle are freely discussed as the case proceeds through litigation.

Once the best offer is made and approved by the judge, then you will have to make a decision as to the benefits and disadvantages to the offer to settle the case. This is, by definition, a compromise. In a compromise, both parties get something that they want and lose something they want. The question always is, what are you gaining or losing in the process?

While it is common for a client to ask us what our opinion is on the settlement, it is neither our role nor our proper place to tell you what to do. Whether you accept the deal or not is your decision and your decision alone to make. If you turn down the deal and go to trial and lose, it is you and not the lawyer that will pay the price of that decision. If you take the deal, thereby giving up your right to a trial, it is you, and not your lawyer, who will be wondering whether or not you did the right thing and might have won at trial.

After you have made the decision to go to trial, the pretrial proceedings in a strict legal sense have come to an end. There will still be some motions, referred to as motions *in limine*, which will be heard before trial, but these are motions which can only be heard by the actual judge who presides over the trial. These motions seek to limit or exclude certain evidence before the jury.

Your Attorney will continue with the factual and legal trial preparation of the case as the trial date draws near.

FELONY DUI

IF YOU HAVE BEEN ARRESTED FOR A DUI WITH INJURY, OR IF THIS IS A 4TH DUI ARREST COMMITTED WITH 10 YEARS, THEN YOU MAY BE CHARGED WITH A FELONY DUI OFFENSE.

A crime under California law which carries a minimum sentence of at least one year in the state prison is defined as a felony. Some crimes are defined in the Penal Code as “wobblers.” This means the prosecutor could charge them as misdemeanors or felonies. In a DUI with injury, 23153 (a) and/or (b), the prosecutor can still charge the offense as a misdemeanor if little or no serious injury was involved.

There is little in your life, save a major health problem, that can even come close to destroying your life like a felony charge. Little can prepare you for the anxiety and pressures that you will find yourself under while facing this type of charge. Why? Because if you are convicted, you can be sentenced to state prison. Whether or not you actually serve a prison sentence will be discussed, but the pure pressures of the process is horrific.

After you have been arrested, the police will book you into custody. If you are arrested on a felony, there are several ways in which you can be released. First, you can be released through a bail bondsman or by you posting bail. A bail bondsman usually charges you a premium for posting the bail-bond, and that is generally 10% of the actual amount of the bond. For example if your bail is \$10,000.00 then the bondsman would charge you \$1,000.00 as their fee for posting the \$10,000.00 surety bail bond with the clerk of the court. The bondsman will usually also require some collateral against the remaining amount in case you fail to appear, making the bond subject to forfeiture.

If you make all your required court appearances, the bail bond will be set-aside at the end of the case. You will receive no return of the fee that you paid the bondsman because that is the money the bondsman earned in taking out the surety bond, similar to an insurance policy, on you.

If you post your own bail, or a friend or relative does so, the entire amount must be deposited directly with the clerk of the court. The full amount will be returned to you at the conclusion of the case provided, of course, you have made all court appearances.

You could also be released through your promise to the court that you will return on a given date and time. This is called a court “OR” (a release on your own recognizance). This can be undertaken directly from the court when you first appear in court for arraignment, or from an “OR” project that interviews individuals after arrest who have been unable to make bail. They then complete an “OR” report that will go to the court which can either be approved or rejected by the judge.

In most felony arrests, “OR” is not easy to obtain, but if you are a first offender, have strong family ties to the community, have employment and no prior failures to appear for court, then there is a chance you could get an “OR” release. The type of charge you are facing, as well as the circumstances involved in the case, will be determinative of the judge’s decision to grant or deny an “OR” request.

All felony offenses are first brought before the court for arraignment, pre-preliminary examination motions and preliminary hearing. All felony charges have two levels of proceeding in California. They start in Superior Court where the judge sits as a magistrate to determine whether or not probable cause exists for you to be tried. If the judge finds that probable cause does exist, then you are “held to answer” and arraigned again for trial.

Your first appearance before the court will be the arraignment. The arraignment is the judge informing you of what you are charged with and taking your plea. The court will not hear any defenses to the case at this time.

Once your lawyer appears and the plea of not guilty is entered, the court will then set the matter down for a pre-preliminary examination conference. This procedure, at the arraignment, can vary from county to county. For example, in some counties, the court will set the matter for a pre-preliminary conference as well as a preliminary hearing date right at the arraignment. Other judges will set the date for what is called a superior court review to see if there is a chance of a disposition, and then only later set a future preliminary hearing date if the case cannot be settled.

Following the arraignment, the discovery process is available for you to determine what evidence the prosecution has on you to prove the charges at the preliminary hearing and later at the trial. The defense wants to see if the prosecution can prove all of the elements of the charge against you. If so, then you

have to explore any and all legal claims which may prevent the evidence from being used at the preliminary hearing and/or the trial.

Sometimes, the evidence may have been obtained in violation of your rights to privacy; your rights to be free from unreasonable search and/or seizure; statements may have been obtained against your right against self-incrimination, or your right to counsel. There may be many other areas of protection that your defense lawyer feels should be litigated and determined by the court before you are asked to stand trial. If this is the case, then these points will be the subject of certain motions to exclude or limit this evidence at the preliminary hearing and/or the trial. These motions, in turn, will then be the pretrial motions which your lawyer will want to be heard prior to the preliminary hearing. In some situations, he or she may want to have the preliminary hearing first, then take these motions up for review to the Superior Court. The motions can also be calendared for hearing following the preliminary hearing in the Superior Court. There may be certain tactical decisions which dictate that these motions not be brought at the preliminary hearing. For example, in a motion to suppress evidence, the defendant is usually only allowed to have one evidentiary hearing; in other words, you can only call the searching police officer at one hearing to give testimony on the facts of the search. Your attorney may elect to hold off on this motion until after the preliminary hearing. On other occasions, the motion may be made and heard at the preliminary hearing.

Sometimes, your defense counsel may want to use the motions as a bargaining tool with the prosecutor to see if a more favorable disposition can be reached. Other times, these motions are used to improve the defense's position at trial. This is often the situation in accident cases.

In a felony case, you have the right to a review of the magistrate's ruling holding you to answer under Section 995 of the California Penal Code. Under this section, you have the right to have the magistrate's ruling, as well as other proceedings which took place prior to the holding order, re-examined to determine whether or not the holding order might have been illegal.

Once the pretrial motions are heard and ruled upon by the judge, your case should be ready to proceed to preliminary hearing. In some courts, the judge will want to set a further date for purpose of setting the actual preliminary hearing date. Often, this period of time between the hearing on the motions and the setting date

will give the parties a chance to re-evaluate their respective positions and decide whether or not they should run the risks of proceeding further.

From your perspective, you will want to know if any pretrial disposition will involve county jail time or a commitment to state prison. Secondly, will the disposition result in you having a criminal record? What future consequences would the felony conviction have on your life? Will you lose your civil rights, i.e., will you still be able to vote, hold public office, possess a firearm, and keep any state licenses that you may have? Could the disposition expose you to civil damages? If you were charged with an offense which was in any way connected to an accident, or people were injured, you might end up exposing yourself to damages from a civil suit. You should take all of these factors into consideration when deciding whether or not the offer to plead is a good one for you.

A plea bargain is an offer extended by the prosecutor to settle the case for a negotiated disposition. The prosecutor may be willing to drop certain charges if you agree to plead guilty to certain charges. The prosecutor can recommend a certain sentence if you plead, but the ultimate sentence which will be imposed upon you is within the sole discretion of the judge. The judge, of course, is bound to sentence you within the bounds of the law; i.e., the judge cannot give you a greater sentence than that allowed under the statute you agree you violated, nor can the judge give you a less severe sentence if required by the law.

Felony sentencing is governed in California under the Determinate Sentencing Act. The sentencing laws call for a predetermined set level of a sentencing range for every felony as defined in the California Penal Code. For example, if you were to plead guilty or be found guilty by a jury of felony DUI, the Code would call for a sentencing range of 16 months, 2 years, or 3 years in state prison. Assuming certain rules of mitigation would apply to your case, the judge could then sentence you to a mitigated term of 16 months. If, on the other hand, the judge found that aggravating circumstance applied to you, then you could be sentenced to the aggravated term of 3 years. Otherwise, the court will always impose the middle term of 2 years.

If you are eligible for probation, the court will still sentence you to the determinate prison term, as set out in the above example, but the court can stay the execution of the sentence and place you on probation. Sometimes, as a condition of probation, the court will impose a county jail commitment, which must be less than 1 year.

Remember, a felony is defined by law as a crime punishable by prison. Prison is an institution where you are kept for more than 1 year; county jail, on the other hand, is a custodial facility where you are kept for 1 year or less.

If applicable, the prosecutor can also allege an “enhancement.”

A sentencing enhancement may mean that more prison time could be added to the final sentence; it could also mean you would not be eligible for probation, even if you are a first offender; it could also mean that your sentence can be doubled in some situations. Sentence enhancements must be stated in the charging document. Your lawyer will advise you whether or not they apply to your case. Enhancements are covered by law and specifically defined in the Penal Code. Your lawyer will discuss these with you if it appears they apply to your case.

The preliminary hearing, sometimes called a preliminary examination, is nothing more than a judge sitting as a magistrate to determine two legal questions: (1.) Is there some reasonable evidence to show that a felony has been committed? (2.) Is there some reasonable evidence that connects you to that crime? If the magistrate finds a “yes” answer to the two questions above, then you will be held to answer on the felony charge for trial.

At the preliminary hearing, the prosecutor must produce the evidence needed to obtain the "holding"; in other words, just some reasonable evidence to connect you to the crime.

Most prosecutors will not put on a complete case at the “PX”; they will just want to show the bare minimum of the elements of the crime.

FEDERAL CHARGES

IF YOU HAVE BEEN ARRESTED FOR A DUI ON FEDERAL PROPERTY OR WITHIN FEDERAL JURISDICTION YOU MAY BE CHARGED WITH A DUI IN FEDERAL COURT

If you have been charged with a federal DUI, and it is a misdemeanor, then you will be notified by the United States Attorney's Office that a complaint will be filed against you. It may also happen that you may be taken right away following your

arrest before a United States Magistrate. A Magistrate functions in a misdemeanor case like a judge. You have the right to have your case tried before the United States District Court before a U.S. District judge, but this is rarely done in most misdemeanor cases. Usually, your case will remain in the Magistrate's Court for all proceedings.

The procedure for a federal misdemeanor is rather straightforward. You will be arraigned, at which time you will be informed of the rights you have before the court as well as the charges which you are accused of committing. The court will ask for a plea, if counsel represents you, or the court will continue the case for a short period of time in order for you to obtain counsel for your defense.

Once a plea is entered, which usually is "not guilty" then the case is continued for a future setting date, at which time the court will be informed by the parties, that is the defense and the prosecution, whether or not there is a settlement or disposition in the case. If this happens, then the case is resolved at that juncture and in accordance with the terms agreed to by the parties and approved by the court.

If, on the other hand, the case is not settled, then you will continue with the litigation. Usually, pretrial motions will be set along the lines of what has been discussed in the preceding misdemeanor section regarding pretrial motions. It is not unusual for some pretrial motions to be brought and heard before substantial settlement talks can take place. If the case still is not resolved, then it will be set for trial.

In a federal misdemeanor, you have the right to a jury trial if your punishment could exceed six months in jail. Otherwise, you only have the right to a court trial; that is, a trial presided over by the federal magistrate who will decide whether or not you are guilty. In the four federal district courts located in California, you will probably not be entitled to a jury trial, only a trial before the U.S. Magistrate.

CHAPTER 5

How Can I Help Improve My Defense?

The fact you retained an excellent DUI defense lawyer does not relieve you of your responsibilities in your defense. Remember, a good lawyer will want you to become actively engaged in your case. Now it is time for you to start.

The first thing to remember is that you are not a lawyer. Do not attempt to acquire a legal education overnight or during the course of your case. You will, no doubt, learn a great deal about the criminal justice system before your case is over, but please do not look upon it as your job to become as knowledgeable about the law of DUI defense as your lawyer. That does not help your defense.

What can, and should you, do?

Since you do not have to worry about working on the legal issues (that's what you hired a lawyer for), you can focus upon being a real ally to your lawyer, and hence, your case. Any and all documents relating to the case which are in your possession should be disclosed to your lawyer. You should be candid with your attorney on all the facts which even potentially may impact your case. If you were involved in an accident and are insured, it may be a good idea for you to inform your lawyer of all the specifics relating to your policy, including your agent's name and contact number.

Always remember to be in court on time. This probably sounds like such a simple thing, but you would be amazed at how many judges get upset when a case is called on the court calendar and the lawyer has to ask that the matter be passed until the client arrives. This may seem to be a minor inconvenience for the court, but some judges will actually issue a bench warrant for your arrest, or the judge can drop you to the end of the calendar call. This means you will not get your case called until close to noon on the morning calendar. Not good.

You should, of course, never miss a court date unless you are informed by your lawyer's office that your appearance is excused.

What should you wear to court? This is a question often asked. The answer is simple. Come to court as you would for any important meeting or event where you want to make a good impression.

Co-operate with your lawyer's office as completely as possible. If you are being kept well-informed by your lawyer, then you know that all that can be done is being done on your behalf.

The psychological impact of being arrested and charged with a DUI can easily lead to depression and confusion. Do not permit this to affect your decision of which attorney to hire, the attorney-client relationship and, most importantly, your defense.

It is important to accept the reality of what has happened to you. Rightly or wrongly, justly or unjustly, you have been arrested and charged with a crime. Clear and calm thinking will help you to take whatever steps are necessary for you to put yourself at ease.

Your lawyer will send you a copy of the complaint, the charging documents, and explain all of the charges against you and what it all means. Anything you do not understand, ask to be explained until you do understand.

The lawyer will also send you copies of all police reports and all DMV reports. You should read and review all of these documents carefully.

Some DUI defense lawyers, such as our firm, will ask you to complete a very extensive case questionnaire which covers all aspects of your case. It is important that you take the time necessary to properly complete the questionnaire as accurately as possible.

Most good DUI defense lawyers will also have a good support staff trained in DUI court and DMV procedures. They can be a great resource to you for daily information and updates on your case; don't be afraid to ask them questions. They are there to assist the attorney in providing you the most efficient defense.

Your willingness to read this book demonstrates your commitment to your defense. You have already taken the first productive step at ensuring successful representation.

Keeping the information that you received in this book in mind; balanced with the totality of circumstances surrounding your case; you should now have a good starting point to select defense counsel. And once you have selected a good DUI defense attorney, you can rely upon their skill and knowledge in raising and litigating all the favorable legal issues in your defense. You are now ready to understand and assist in your defense.

Good luck!

