

Table of Contents

CHAPTER 1. OFFENSES

A. OPERATING UNDER THE INFLUENCE OF ALCOHOL/DRUGS

- § 1:1 Introduction
- § 1:2 Statute of limitations
- § 1:3 Elements—Operation of a motor vehicle
- § 1:4 Operation of a motor vehicle—Major case summaries
- § 1:5 Elements—Public way
- § 1:6 Public way—Major case summaries
- § 1:7 Elements—Under the influence of alcohol
- § 1:8 Impaired Theory—Diminished capacity
- § 1:9 Per se theory—08% or greater
- § 1:10 Elements—Under the influence of drugs
- § 1:11 —Under the influence of marijuana
- § 1:12 Drug Recognition Experts—History and purpose
- § 1:13 —DRE validation studies
- § 1:14 —Training and recertification
- § 1:15 —Impairment and drug classification
- § 1:16 —DRE Evaluation (overview)
- § 1:17 —Expert testimony and Daubert challenge
- § 1:18 —Discovery requests
- § 1:19 Presence of illicit or prescription drugs in blood or urine
- § 1:20 Combined effect of alcohol and drugs
- § 1:21 Judicial notice
- § 1:22 Defenses—Necessity
- § 1:23 —Involuntary intoxication
- § 1:24 Related offenses
- § 1:25 Minor motor vehicle infractions

B. CRIMINAL MOTOR VEHICLE CHARGES (NON-OUI)

- § 1:26 Negligent/reckless operation of a motor vehicle—In general
- § 1:27 —Negligent operation
- § 1:28 —Reckless operation
- § 1:29 Leaving the scene of property damage/personal injury/death

- § 1:30 —Elements
- § 1:31 —Penalty
- § 1:32 Leaving the scene of property damage/personal injury—License implications
- § 1:33 Operating after suspension/revocation
- § 1:34 —Elements
- § 1:35 —License suspension or revocation
- § 1:36 —Element of notice
- § 1:37 —Penalties
- § 1:38 —Operating after suspension as a result of a prior operating under the influence charge

C. THE MAJOR OFFENSES

- § 1:39 Second or subsequent offenses
- § 1:40 —Procedure
- § 1:41 —Discovery
- § 1:42 —Burden of proof
- § 1:43 —Prior juvenile offenses
- § 1:44 —Prior out of state offenses
- § 1:45 Operating under the influence/serious bodily injury
- § 1:46 —Elements
- § 1:47 —Penalties
- § 1:48 —License implications
- § 1:49 Motor vehicle homicide—In general
- § 1:50 Felony motor vehicle homicide
- § 1:51 —Penalty
- § 1:52 —Parole eligibility
- § 1:53 Misdemeanor motor vehicle homicide
- § 1:54 —Penalty
- § 1:55 Effect of conviction of motor vehicle homicide on lesser included offenses
- § 1:56 Motor vehicle homicide—Registry of motor vehicle suspension upon being charged
- § 1:57 —Registry of motor vehicle suspension upon conviction
- § 1:58 —Proximate cause
- § 1:59 —Multiple deaths
- § 1:60 —Viable fetus
- § 1:61 —Admissibility of gruesome photos

D. MISCELLANEOUS OFFENSES

- § 1:62 Introduction
- § 1:63 M.G.L.A. c. 90, § 12, Employing unlicensed motor vehicle operator; permitting person with suspended or revoked license to operate motor vehicle; permitting

TABLE OF CONTENTS

- person with ignition interlock device license
restriction to operate motor vehicle without device
(Misdemeanor)
- § 1:64 M.G.L.A. c. 90, § 23, Operating under the influence
after suspension as a result of an OUI (Misdemeanor)
- § 1:65 M.G.L.A. c. 90, § 24S(a), Driving without an ignition
interlock device when required to by law (Felony)
- § 1:66 M.G.L.A. c. 90, § 24T, Tampering with an ignition
interlock device (Felony)
- § 1:67 M.G.L.A. c. 90, § 24U, Starting an ignition interlock
device for a restricted person
- § 1:68 M.G.L.A. c. 90, § 24V, Child endangerment
- § 1:69 M.G.L.A. c. 265 § 131/2, Manslaughter by motor
vehicle (Felony)

CHAPTER 2. THE STOP

- § 2:1 Validity of the stop—In general
- § 2:2 —Vehicle in Motion
- § 2:3 —Objective reasonable suspicion of criminal activity
- § 2:4 —Community caretaking function
- § 2:5 —Civilian callers
- § 2:6 —The emergency doctrine
- § 2:7 —Random checks of license plates
- § 2:8 —Automatic License Plates Readers
- § 2:9 —Roadblocks
- § 2:10 —Extraterritorial stops
- § 2:11 —Warrantless entry into a home
- § 2:12 Addressing the stop at trial
- § 2:13 —Sample cross-examination (observations of operation)
- § 2:14 —Sample cross-examination (stopping sequence)
- § 2:15 —Sample cross-examination (investigation)

CHAPTER 3. THE ENCOUNTER

- § 3:1 Introduction

A. CONSTITUTIONAL ISSUES DURING PERSONAL CONTACT AND PRE-ARREST SCREENING

- § 3:2 In general
- § 3:3 Federal issues
- § 3:4 State issues
- § 3:5 Initial questioning
- § 3:6 Field sobriety testing

B. PHASE TWO: PERSONAL CONTACT

- § 3:7 Introduction

- § 3:8 Driver Interview
- § 3:9 Sample cross-examination (initial confrontation)
- § 3:10 Sample cross-examination (alcohol consumption)
- § 3:11 Investigative Clues from Driver Interview
- § 3:12 Smell
- § 3:13 Sample cross-examination (odor of alcohol)
- § 3:14 Sight
- § 3:15 Sample cross-examination (bloodshot eyes)
- § 3:16 Sample cross-examination (bruises, bumps or scratches)
- § 3:17 Speech
- § 3:18 Sample cross-examination (speech)
- § 3:19 Request for license and registration
- § 3:20 Sample cross-examination (request for license and registration)
- § 3:21 Pre-exit screening
- § 3:22 Decision and Exit Sequence
- § 3:23 Sample cross-examination (exit sequence)

C. PHASE THREE: PRE-ARREST SCREENING

- § 3:24 Introduction—Field Sobriety Tests
- § 3:25 Governmental basis of reliability
- § 3:26 Court review of reliability
- § 3:27 Refusal to perform field sobriety tests
- § 3:28 Admissibility of the refusal to perform the tests
- § 3:29 Admissibility of the client's statement that he cannot perform the tests
- § 3:30 Evaluating the technical administration of the tests
- § 3:31 —No test administered
- § 3:32 Challenging the fairness of the roadside tests

1. THE STANDARDIZED FIELD SOBRIETY TESTS

- § 3:33 Introduction
- § 3:34 The walk and turn test—Introduction
- § 3:35 —Instructions stage
- § 3:36 —Sample cross-examination (ability to follow instructions)
- § 3:37 —Sample cross-examination (instructions stage performance)
- § 3:38 —The walking stage—Test interpretation
- § 3:39 —Sample cross-examination
- § 3:40 —Sample cross-examination (Imaginary Line)
- § 3:41 The one leg stand—Introduction
- § 3:42 —Instruction stage

TABLE OF CONTENTS

- § 3:43 —Sample cross-examination
- § 3:44 The horizontal gaze nystagmus test—Introduction
- § 3:45 —Admissibility
- § 3:46 —Nystagmus
- § 3:47 —Administration of the test according to NHTSA
- § 3:48 —Problems with the test as administered under
NHTSA guidelines
- § 3:49 —Other types of nystagmus

2. NON-STANDARDIZED TESTS

- § 3:50 Introduction
- § 3:51 Alphabet
- § 3:52 Counting backwards
- § 3:53 Finger count
- § 3:54 Modified Romberg Balance test
- § 3:55 Finger to nose test

D. OVERALL

- § 3:56 Medical conditions affecting results

E. ADDITIONAL SAMPLE CROSS-EXAMINATIONS

- § 3:57 Introduction
- § 3:58 Cross-examining the arresting officer—Part I
- § 3:59 —Part II: *The Trojan Horse*
- § 3:60 Case Summaries

CHAPTER 4. ARREST AND BOOKING

- § 4:1 Arrest—In general
- § 4:2 —Seizure
- § 4:3 Vehicle and other searches—Introduction
- § 4:4 —Plain view
- § 4:5 —Search of vehicle subsequent to arrest
- § 4:6 —Inventory searches of impounded vehicles
- § 4:7 Questioning during booking
- § 4:8 Right to use the telephone
- § 4:9 Right to an independent medical examination
- § 4:10 —Invoking the right
- § 4:11 —Remedy
- § 4:12 Protective custody
- § 4:13 Police use of protective custody in operating under the
influence cases

CHAPTER 5. THE CHEMICAL TEST

- § 5:1 Introduction

- § 5:2 Basic facts about alcohol and the human body
- § 5:3 Ingestion of Alcohol
- § 5:4 Measuring chemical concentrations in the lungs
- § 5:5 Calculation of blood alcohol level based upon consumption
- § 5:6 Blood alcohol level—Expert testimony

A. BREATH TESTING

- § 5:7 How a breath machine works—The principle
- § 5:8 —The machine
- § 5:9 Defenses to the accuracy of the machine—Introduction
- § 5:10 —Blood breath ratio
- § 5:11 Alcohol Exchanges in the Airways—Consequence on the alcohol breath test
- § 5:12 Defenses to the accuracy of the machine—Temperature
- § 5:13 Defenses to the accuracy of the breath sample—Breathing patterns
- § 5:14 —Respired Air Volume and Lung Size
- § 5:15 *[Reserved]*
- § 5:16 Retrograde extrapolation—The time of testing defense
- § 5:17 Defenses based upon failure to follow Massachusetts regulations—The Office of Alcohol Testing and the regulation of breath and blood testing
- § 5:18 —General admissibility
- § 5:19 —Challenges to operator certification
- § 5:20 —Challenges to machine certification
- § 5:21 —Challenges to the client's test
- § 5:22 Challenges to the quality or accuracy of the breath sample—Mouth contamination
- § 5:23 —Breath contamination—Exposure to industrial compounds
- § 5:24 — —Gastro esophageal reflux disorder (G.E.R.D.)
- § 5:25 — —Diet
- § 5:26 — —Diabetes

B. BLOOD TESTING

- § 5:27 Introduction
- § 5:28 Blood testing by the state
- § 5:29 Blood testing by a hospital—Introduction
- § 5:30 —Method of analysis
- § 5:31 —Defense access to client medical records
- § 5:32 —Governmental access to client medical records
- § 5:33 —Admissibility of the contents of the medical records
- § 5:34 —Issues regarding blood if admitted—What is the evidentiary blood alcohol level?

TABLE OF CONTENTS

- § 5:35 — —How reliable is the hospital's test?
- § 5:36 Alcohol exchange in the airways—Consequence on the alcohol breath test

CHAPTER 6. CITATION ISSUES

- § 6:1 Introduction
- § 6:2 Purpose of the statute
- § 6:3 The issuance of citations and citation books to police officers
- § 6:4 Notification of the registrar of motor vehicles or the district court
- § 6:5 Notification to the motorist
- § 6:6 Requesting a hearing
- § 6:7 Discovery prior to the hearing
- § 6:8 Conduct of the hearing
- § 6:9 Standard of proof
- § 6:10 Appealing the denial or issuance of a complaint
- § 6:11 Motion to produce audit sheets
- § 6:12 Memoranda in support of defendant's motion to dismiss
- § 6:13 Motion to dismiss and remand case for clerk magistrate's hearing
- § 6:14 Motion to dismiss based upon insufficient evidence to issue a complaint

CHAPTER 7. RELEASE ON BAIL

- § 7:1 Introduction
- § 7:2 Bail and Initial Appearance
- § 7:3 Appeal to the superior court
- § 7:4 Release on conditions
- § 7:5 —SCRAM monitoring devices
- § 7:6 Pre-trial detention
- § 7:7 —Procedure
- § 7:8 —Acceptable conditions for release
- § 7:9 —Memorandum in opposition to detention
- § 7:10 Revocation of release and detention following conditional release
- § 7:11 Diversion for OUI Drug Charge Pursuant to M.G.L. c. 111E, § 10

CHAPTER 8. DRIVER'S LICENSE IMPLICATIONS

- § 8:1 Introduction
- § 8:2 Pre-trial license suspensions—Double jeopardy

DRUNK DRIVING DEFENSE

- § 8:3 Chemical test refusal—Introduction
- § 8:4 —Confiscation of the driver’s license
- § 8:5 —Notice of the suspension to the accused
- § 8:6 —Police notification to the registry of motor vehicles
- § 8:7 —License loss periods for operators 21 years of age or older
- § 8:8 —Hardship/restricted license eligibility
- § 8:9 —Appeal process for license suspension
- § 8:10 —Appeal to the district court
- § 8:11 —Appeal to the superior court
- § 8:12 License suspension for .08 or higher—Introduction
- § 8:13 —Notice of suspension
- § 8:14 —Transmission of information to registry of motor vehicles
- § 8:15 —License loss
- § 8:16 —Appeal process
- § 8:17 —Hardship/restricted license eligibility
- § 8:18 Effect of not guilty findings/dismissal—Chemical test refusal
- § 8:19 —Per se
- § 8:20 Effect of plea/guilty finding
- § 8:21 —Concurrent license losses
- § 8:22 Hardship licenses and requirements—First offenses (dispositions pursuant to M.G.L.A. c. 90, § 24D)
- § 8:23 —All other offenses
- § 8:24 —Appealing the denial of a hardship license to the board of appeals
- § 8:25 — —Form
- § 8:26 Effects of prior driving history in combination with an operating under the influence conviction or plea
- § 8:27 The effect of interstate compacts
- § 8:28 In-state consequences of out-of-state convictions
- § 8:29 Under 21 license issues—Introduction
- § 8:30 —Chemical test refusals
- § 8:31 —Sample Motion to Permit MIDP Enrollment
- § 8:32 —Effect of guilty finding or continued without a finding
- § 8:33 —Effect of a not guilty finding or dismissal
- § 8:34 —Chemical test result of .02 or greater
- § 8:35 License reinstatement fees
- § 8:36 Immediate threat suspension
- § 8:37 —RMV Removal and appeal to board of appeals
- § 8:38 Immediate suspension due to an accident resulting in death
- § 8:39 Registry of motor vehicles locations and what each location handles

TABLE OF CONTENTS

- § 8:40 Ignition interlock devices
- § 8:41 Commercial Driver's Licenses—Impact of an OUI offense

CHAPTER 9. CLIENT INTERVIEW/ INVESTIGATION

- § 9:1 Initial contact
- § 9:2 Initial meeting
- § 9:3 Client's investigation—The client's knowledge of the area/stop
- § 9:4 Attorney's investigation
- § 9:5 Witnesses
- § 9:6 Missing witnesses
- § 9:7 Client intake questionnaire
- § 9:8 Client questionnaire
- § 9:9 Fees—Introduction
- § 9:10 —Choosing the type of fee
- § 9:11 —Excessive fees in a standard operating under the influence case
- § 9:12 —Sample fee letter—Flat fee
- § 9:13 — —Short version
- § 9:14 —Sample fee agreement (hourly)
- § 9:15 Explanation of the process
- § 9:16 Keeping the client informed
- § 9:17 Client information sheet
- § 9:18 New client file checklist
- § 9:19 Case progression form
- § 9:20 Artificial intelligence

CHAPTER 10. PRETRIAL CONFERENCE/ PRETRIAL MOTIONS/PLEAS

- § 10:1 Pretrial conference
- § 10:2 Pretrial conference report and certificates of discovery compliance
- § 10:3 Pretrial conference—Presence of the defendant
- § 10:4 Amendment of the complaint
- § 10:5 Pretrial motions—Introduction
- § 10:6 —Filing of motions
- § 10:7 —Discovery motions
- § 10:8 —Motion for Breath Test Training
- § 10:9 —Discovery motions—Third Party Discovery
- § 10:10 — —DRE information
- § 10:11 Pretrial Motions—Discovery motions—Breath Test Discovery Requests

- § 10:12 Video and Audio Recordings
- § 10:13 Pretrial motions—Discovery motions—Automatic License Plate Readers (ALPR)
- § 10:14 — —Other motions
- § 10:15 —Other non-substantive motions
- § 10:16 —Motion to preserve evidence
- § 10:17 —Substantive motions
- § 10:18 — —Motions to dismiss
- § 10:19 — —Motion to dismiss (extra-territorial stop)
- § 10:20 — — —Memorandum
- § 10:21 — —Motion to dismiss (failure to provide ordered discovery)
- § 10:22 — —Motion to dismiss (want of prosecution)
- § 10:23 — —Motion to dismiss (Violation of M.G.L. c.263 section 5A)
- § 10:24 — —Motion to dismiss (Citation Issue)
- § 10:25 — —Motion to dismiss (Lost or destroyed evidence)
- § 10:26 — —Motion to dismiss (Rule 36—speedy trial)
- § 10:27 — —Motion to suppress
- § 10:28 — — —Statements (*Miranda*)
- § 10:29 — — —Motor vehicle stop
- § 10:30 — — —Warrantless entry into a home/residence
- § 10:31 — — —Breath Test (15-minute observation period)
- § 10:32 Dispositions
- § 10:33 —Agreed Recommendation
- § 10:34 —Unagreed Plea
- § 10:35 —Conditional plea-preservation of appellate issue.
- § 10:36 —Alcohol or drug assessment—M.G.L. c. 90, § 24Q
- § 10:37 —Brave Act Diversion
- § 10:38 —Virtual Pleas
- § 10:39 —Change of Plea
- § 10:40 —OUI Offenses and Immigration Status
- § 10:41 —OUI Offenses and Immigration Status
- § 10:42 —Immigration and State Law
- § 10:43 —Immigration and Federal Law

CHAPTER 11. THE TRIAL

- § 11:1 Introduction

A. PRE-JURY SELECTION ISSUES AND MOTIONS

1. COMMON EVIDENTIARY ISSUES

- § 11:2 Introduction
- § 11:3 Videotape evidence

TABLE OF CONTENTS

§ 11:4	Photographs
§ 11:5	Maps and plans
§ 11:6	Chalks
§ 11:7	Police reports (admissibility)
§ 11:8	Police reports (use for impeachment)
§ 11:9	Records of governmental departments
§ 11:10	Medical and hospital records—Introduction of client medical records
§ 11:11	—Business records—M.G.L.A. c. 233, § 78
§ 11:12	—M.G.L.A. c. 233, § 79
§ 11:13	—M.G.L.A. c. 233, § 79G
§ 11:14	—Sample certification
§ 11:15	Expert witnesses
§ 11:16	Impeachment with prior convictions
§ 11:17	The accused's right to remain silent
§ 11:18	Use of the defendant's silence—Substantive use
§ 11:19	—Use for impeachment
§ 11:20	Statements of defendant
§ 11:21	Use of defendant's previous testimony
§ 11:22	Testimony as to a breath or blood test refusal
§ 11:23	Evidence of injuries to others
§ 11:24	Intoxication of passengers
§ 11:25	Motions in limine—In general
§ 11:26	Motions in limine
§ 11:27	Motions for voir dire—Qualifications as an expert as to accident cause

2. SEQUESTRATION OF WITNESSES

§ 11:28	In general
§ 11:29	Motions for sequestration of witnesses

3. WAIVER OF JURY TRIAL

§ 11:30	In general
---------	------------

B. JURY SELECTION AND OTHER JURY ISSUES

§ 11:31	In general
§ 11:32	Challenges for cause
§ 11:33	Peremptory challenges
§ 11:34	Procedure
§ 11:35	Note taking by jurors

C. THE TRIAL

§ 11:36	Opening statements
---------	--------------------

- § 11:37 Motion for a required finding of not guilty
- § 11:38 —After the opening statement of the prosecutor
- § 11:39 —After the prosecution rests
- § 11:40 —At the close of all the evidence
- § 11:41 —After the verdict
- § 11:42 —After a hung jury
- § 11:43 Closing arguments
- § 11:44 —Objections
- § 11:45 Jury instructions
- § 11:46 —Objections
- § 11:47 Jury questions
- § 11:48 Failure to reach a verdict

CHAPTER 12. ACQUITTAL, DISMISSAL AND SENTENCING

A. ACQUITTAL AND DISMISSAL

- § 12:1 Acquittal and dismissal
- § 12:2 Sample motion to restore license

B. SENTENCING

- § 12:3 Introduction
- § 12:4 Sentencing Considerations—Enhanced penalties for subsequent offenses
- § 12:5 Alcohol or drug assessment—Breath test above .20
- § 12:6 Fee schedule
- § 12:7 DUI offender programs
- § 12:8 Sentencing options
- § 12:9 The rights of victims to be heard
- § 12:10 Restitution
- § 12:11 Inquiry as to location of last drink
- § 12:12 Notice of enhanced penalties for subsequent offenses
- § 12:13 Notification of the registry of motor vehicles
- § 12:14 Motion for a stay of execution of sentence
- § 12:15 Immigration consequences

CHAPTER 13. POST-CONVICTION RELIEF

- § 13:1 Introduction

A. PRE-APPEAL MOTIONS

- § 13:2 Motions for relief pursuant to Rule 25
- § 13:3 Motions to revise and revoke

TABLE OF CONTENTS

§ 13:4	Motion for a new trial
§ 13:5	—Newly discovered evidence (in general)
§ 13:6	Motion to vacate/motion for a new trial— <i>Hallinan / Ananias</i> Litigation (Introduction and Background)
§ 13:7	—Newly discovered evidence
§ 13:8	—Egregious government misconduct
§ 13:9	Motion to vacate/motion for new trial—Draeger Alcotest 7110
§ 13:10	Motion for a new trial—Occurrences at motion hearings and trial
§ 13:11	—Matters not raised at trial
§ 13:12	—Ineffective assistance of counsel
§ 13:13	—Procedural aspects of the motion for new trial

CHAPTER 14. OAT EDISCOVERY PORTAL AND DISCOVERY

§ 14:1	Introduction
§ 14:2	OAT eDiscovery Portal
§ 14:3	Breath Test Reports
§ 14:4	Breath Test Certification Reports
§ 14:5	Instrument File History
§ 14:6	OAT Protocols
§ 14:7	Periodic Testing
§ 14:8	OAT and Discovery Beyond the eDiscovery Portal—Discovery Protocols
§ 14:9	OAT and Discovery Beyond the eDiscovery Portal
§ 14:10	—Materials Provided Upon Request

APPENDICES

Appendix A.	Code of Massachusetts Regulations (Chapter 2.00: Safe Roads)
Appendix B.	Breath Test Operator Manual (Original)
Appendix C.	Procedures for Processing the Arrested Person at a Medical Facility Licensed Under M.G.L.A. c. 111, § 51
Appendix D.	Guidelines for Drawing Blood
Appendix E.	Regulations for Blood Analysis
Appendix F.	Model Jury Instructions
Appendix G.	State by State Analysis
Appendix H.	Physiological Responses to Ethanol
Appendix I.	Ignition Interlock Devices (540 CMR 25.00)

Table of Laws and Rules

Table of Cases

Index