5
Discovery, Defenses, and Pretrial Motions

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I. Overview

§5.1 A successful drunk driving defense does not necessarily mean a dismissal or a not guilty verdict. Often, the most successful defense is one in which the client, while disappointed with the outcome, knows that his or her attorney did everything to protect the client from the inequities that may occur in the judicial system.

A good defense in a drunk driving case begins well before the attorney even meets the client or before the client has been arrested. Becoming an effective and successful drunk driving attorney requires research, study, and preparation. Like any other successful legal specialist, a successful drunk driving defense attorney knows and studies the law. This effort does not start or end with the principal

drunk driving statute, MCL 257.625. The successful advocate reads and knows the Michigan Vehicle Code and the administrative rules pertaining to the Data-Master, blood tests, and urine samples. It is also important to read and follow the caselaw that pertains not only to drunk driving but also to criminal law in general as well as the civil and administrative rulings that can show trends in the appellate courts. A successful practitioner will know the rules of evidence and study proper techniques of voir dire and cross-examination. Most important, the skilled drunk driving attorney conducts thorough investigations, files and argues proper motions, holds hearings, and, when necessary, tries the case before either a judge or a jury. Finally, an effective defense counsel will be a creative thinker who is willing to share and discuss ideas with other attorneys in this common goal.

It is important to understand that while drunk driving is a crime and should be defended like a criminal case, it is also one of the only crimes where the police officer is often the only witness and in most cases there is no discernible victim.

Many attorneys feel that the Michigan courts and legislature have made the defense of drunk drivers an impossibility. This is not true. Some of the most powerful weapons in the defense attorney's arsenal are the protections of state law and the federal and Michigan constitutions.

While some prosecutors and police officers stay current with changes in the laws, many do not. It is up to defense attorneys to make sure that if the police or prosecutor does not follow the law, the defendant can take full advantage of this omission. This often helps to level the playing field.

Many perceive that a drunk driving conviction, particularly a first offense, will have very little impact on a person. Again, this is not true. A conviction takes a tremendous toll on the average person. Most first-offense drunk drivers have never been arrested before, and this will be their first and, it is hoped, last experience with criminal law. There is a great deal of pressure, both emotional and financial, on a person convicted of drunk driving. It is imperative that attorneys not take these cases lightly and defend the rights of the accused to the fullest extent possible.

II. Time Limits and Considerations

A. Misdemeanor Charges

§5.2 MCL 257.625b states that all persons arrested for misdemeanor offenses of operating while intoxicated (OWI), operating while visibly impaired (OWVI), zero tolerance or minor blood alcohol content (BAC) (see §4.20), and operating with the presence of a controlled substance (OWPCS) or other intoxicating substance under MCL 257.625(1), (3), (6), or (8), or local corresponding ordinances, must be arraigned within 14 days, have the pretrial within 35 days (or 42 days in courts with only one judge), and have the matter adjudicated in 77 days. However, the court cannot dismiss or otherwise sanction a party for failure to meet these deadlines. Some courts will still expect a defendant to waive these time lines if the case will extend past 77 days.

MCR 8.110(C)(5) requires that the chief judge of each court file with the State Court Administrator a list of all the felony cases that are over 301 days old,

the reason for the delay, and all misdemeanors that have been delayed more than 126 days. Although these time lines do not appear to carry any sanctions for the court, many judges treat them like actual deadlines with sanctions. The only apparent sanction is that "if a judge does not timely dispose of his or her assigned judicial work," the chief judge must report him or her to the State Court Administrator, who may initiate corrective action. MCR 8.110(C)(4).

B. Felony Charges

§5.3 MCL 766.4(1) requires that the arraigning magistrate set a probable cause conference within 14 days but not less than 7 days after the date of the arraignment. At the arraignment the magistrate must also set the date for a preliminary exam, which must be set no less than 5 days or more than 7 days after the probable cause conference. Adjournments of the examination may be granted on a showing of good cause. MCL 766.7; see also MCR 6.108, which describes the scope and requirements of the conference. A violation of this time limit can result in a dismissal of the charges. However, since jeopardy has not attached, the charge can be rewritten.

C. Motions

§5.4 MCR 8.107 imposes a 35-day deadline for decisions before a court after all documents, arguments, and evidence are presented. The courts must report any determinations not made within 56 days quarterly to the State Court Administrator.

III. Discovery

A. In General

§5.5 The first step in discovery is to file a discovery demand (see forms 5.1 and 5.2). In certain jurisdictions, an order of discovery (form 5.3) must be presented. The purpose of discovery is to discover, to the extent possible, the truth of what occurred. The discovery demand should be filed in initial pleadings with your appearance and jury demand.

Discovery in criminal cases is not the equivalent of civil discovery. Although the prosecutor is not required to turn over every piece of information in his or her possession, a copy of the police report must be provided. *Harbour Springs v McNabb*, 150 Mich App 583, 389 NW2d 135 (1986). Video recordings, photographs, and witness statements are often provided without hesitation. If the evidence is not supplied, the court will usually aid the parties in discovery by signing a discovery order.

In some cases, a Freedom of Information Act (FOIA) request delivered directly to the arresting police department will take the burden off the prosecutor. The FOIA request is usually just a simple letter requesting the information. See form 5.4. Most police departments are very helpful with providing information.

In courts where an adjournment of the pretrial is difficult or rare, it is important to gather as much discovery material as possible on your own before pretrial. This allows for a more effective pretrial and a chance to discuss potential motions

with the prosecutor before filing. In some cases, the prosecutor will stipulate to the motion, saving time for both parties and the court.

MCR 6.201 authorizes discovery by demand by both the defense and the prosecutor in felony cases. The court rule does not authorize reciprocal discovery by demand by the prosecution in misdemeanor cases. AO 1999-3.

MCR 6.201(A)(1) provides that the parties must disclose the names and addresses of all witnesses they may call and make the witness available to the other side. The list can be amended up to 28 days before trial; otherwise, leave of the court is required. The parties must provide any written or recorded statements (including electronic recordings) by lay witnesses the parties may wish to call, but the defendant's own statement is excluded. MCR 6.201(A)(2). The parties must also give a copy of the curriculum vitae of any expert the party may call at trial and either the expert's report or a description of his or her proposed testimony and the bases for his or her opinion. MCR 6.201(A)(3). Also, the parties must, if requested, provide copies of any documents, photographs, or other papers and the opportunity to inspect any tangible physical evidence. MCR 6.201(A)(6). The court may allow nondestructive testing of the tangible evidence. *Id.* The cost of copies of documents, photographs, and other materials is to be borne by the requesting party. If the cost is excessive, the party requesting the evidence can ask for a hearing on the matter. *Id.*

The prosecutor has a duty to provide, *if requested,* any exculpatory information or evidence known to the prosecuting attorney; any police report and interrogation records concerning the case, except as much of a report that concerns a continuing investigation; any written or recorded statements (including electronically recorded statements) by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial; any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and any plea agreement, grant of immunity, or other agreement for testimony in connection with the case. MCR 6.201(B).

Except as otherwise provided by MCR 2.302(B)(6) (which provides that a party need not provide discovery of electronically stored information involving undue burden or cost and that the court may specify conditions for discovery), electronic materials are to be treated the same as nonelectronic ones. MCR 6.201(K).

There is no automatic right to discover information or evidence that is protected by the constitution, statute, or privilege. If there is a good-faith showing by a defendant that there may be exculpatory evidence in the prohibited discovery, the court must conduct an in camera inspection. MCR 6.201(C).

If there is protected and nonprotected information in otherwise discoverable documents, the holding party may excise the nondiscoverable information, subject to court approval. The parties can also excise information to prevent harassment, injury, or embarrassment to any person on a showing of good cause. MCR 6.201(D).

All parties must provide discovery within 21 days of the request unless otherwise ordered. MCR 6.201(F). The duty to disclose is ongoing and must be done without request. MCR 6.201(H).

If the discovery rules are violated, the court may take any action it deems necessary up to and including suppression. See *People v Taylor*, 159 Mich App 468, 487, 406 NW2d 859 (1987), in which the court held that suppression is for only the most egregious discovery violations and that the sanction for noncompliance should not place the party seeking sanctions in a better position than the party would have been in had the discovery order been complied with.

The Michigan Supreme Court has stated that "[t]here is no general constitutional right to discovery in a criminal case." *People v Elston*, 462 Mich 751, 765, 614 NW2d 595 (2000) (citing *People v Stanaway*, 446 Mich 643, 664, 521 NW2d 557 (1994)). A criminal defendant does have a due process right to obtain evidence if it is favorable to him or her and "*material to guilt or punishment.*" *Stanaway,* 446 Mich at 664–666.

B. Police Reports

§5.6 Police reports are usually available through the discovery process. A police report must be carefully analyzed and reviewed in conjunction with any video recordings, your client's statements, and any and all witness statements. A poorly written police report may indicate a poorly investigated crime and may open many doors to the defendant. Although a well-written and thorough investigation may at first seem to limit the defense, it should be carefully read and analyzed to determine if the police officer has followed all procedures. It can also allow the defense attorney to determine if there are potential witnesses who can shed light on the investigation. The report may reveal that there were other police officers on the scene who have not contributed a written report but can be called to the stand. The other officers may also have had video cameras in their vehicles and may show the incident from different angles or clarify garbled speech in the arresting officer's recording.

The police report may also reveal that there are civilian witnesses who may have reported the defendant to the police (see §5.24, discussing 911 calls). Towtruck drivers often become res gestae witnesses for the defense because they may have observed the defendant or heard statements by the police that would tend to contradict the police report or give some insight into the investigation that would be unavailable from any other source.

Police reports may also reveal the names of other officers who have not written reports but may have taken notes or interviewed witnesses. These notes are discoverable. Some police officers carry small tape recorders to augment their memories and to take the place of written notes. These recordings are discoverable as well.

C. Police Videos

§5.7 Videos can often be obtained directly from the police department. Many departments have placed video recorders in cars and in the stations.