2012 Annual Convention

Ethics, Professionalism, and Substance Abuse for the General Practitioner

1.0 Ethics, 1.0 Professionalism, and .5 Substance Abuse CLE Hours

May 2-4, 2012 ♦ Cincinnati
Patrick J. Garry, JD
Associate Director, Ohio Lawyers Assistance Program, Inc.
Cincinnati, Ohio
Mr. Garry received his BA from Boston College and his JD from the University of Cincinnati College of Law. His professional memberships include the Ohio State Bar Association (Lawyers Assistance Committee) and the Cincinnati Bar Association. Mr. Garry is Associate Director of the Ohio Lawyers Assistance Program, Inc. He maintains a law practice concentrating on criminal defense. Mr. Patrick can be contacted via phone at 513-623-9853 or by e-mail at pgarry@ohiolap.org.

John J. Mueller
John J. Mueller LLC
Cincinnati, Ohio
Mr. Mueller received his BBA from the University of Cincinnati and his JD from Northern Kentucky University Salmon P. Chase College of Law. His professional memberships include the American Bar Association (Litigation and Tort Section; Insurance Practice Section), American Bar Association Center for Professional Responsibility, Ohio State Bar Association (Legal Ethics and Professional Conduct Committee), Cincinnati Bar Association, Association of Professional Responsibility Lawyers, and American Association of Attorney-Certified Public Accountants (Life Member). Mr. Mueller practices in the areas of lawyer malpractice (plaintiff’s) and lawyers’ professional responsibility, including defense of discipline cases, ethics opinions and advice and lawyer-mobility issues, and law-firm break-ups. He is the author of *A Handbook on the Rules Governing the Duties of Lawyers to Account for Client Funds and Property* (Cincinnati Bar Association, 2006).

Charles E. Strain
Attorney at Law
Cincinnati, Ohio
Mr. Strain received his BA from DePauw University and his JD from The Ohio State University Michael E. Moritz College of Law. His professional memberships include the Ohio State Bar Association College, Cincinnati Bar Association (Ethics Committee; Fee Arbitration Committee; Professionalism Committee; CLE Advisory Committee; Administration and Finance Committee; Solo/Small Firm Practice Committee; Court of Appeals Committee), Ohio State Bar Association (Traffic Law Committee), National College for DUI Defense, National Association of Criminal Defense Lawyers, Ohio Association of Criminal Defense Lawyers, Greater Cincinnati Criminal Defense Lawyers Association, Hamilton County Municipal Court Trial Lawyers Committee, Clermont County Bar Association, and Lawyer’s Club of Cincinnati. Mr. Strain is a solo practitioner and focuses his practice on Ohio DUI law. He has practiced exclusively in that area since 1996. Mr. Strain regularly advises other lawyers on traffic law, ethics, and professionalism, subjects he also regularly presents at seminars sponsored by various professional associations. He conceived and has single-handedly taught the Cincinnati Bar Association DUI Academy, a comprehensive course on Ohio DUI law. He has completed two National Highway Transportation Safety Administration-approved courses in standardized field sobriety testing, including the instructor course. Mr. Strain holds certificates in the science, operation, maintenance, and repair of all three breath-testing machines approved in Ohio (the BAC Datamaster, Intoxilyzer 5000, and Intoxilyzer 8000). He has attended every intensive summer session of the National College for DUI Defense at Harvard Law School since 2001, and he regularly attends other advanced DUI seminars across the nation. Mr. Strain earns as much as 10 times the required CLE credits each year. For additional information, please visit www.duiguy.us.
Ethics, Professionalism, and Substance Abuse for the General Practitioner
Session # 803

Chapter 1

Substance Abuse, Chemical Dependency, and Mental Health Concerns in the Legal Profession
Patrick J. Garry, JD

The Organization ......................................................................................................................................... 1.1
The Three Components .............................................................................................................................. 1.1
Key Rules and Statutes .............................................................................................................................. 1.2
Funding and Other Support ...................................................................................................................... 1.2

Chapter 2

Professional Persuasion
Charles E. Strain

I. Professional Persuasion in Dale Carnegie’s How to Win Friends and Influence People .............. 2.1
II. Professional Persuasion in Dealing with the Prosecutor in the Black Robe ............................... 2.2
III. Professional Persuasion in The Rules of Professional Conduct ..................................................... 2.6
IV. Professional Persuasion in Civility—About Diligence, Respect ..................................................... 2.6
V. Professional Persuasion Comparing The Swashbuckling Style versus the Friendly Style of Criminal Defense ....................................................................................................................... 2.7
VI. Professional Persuasion in A Lawyer’s Creed .................................................................................. 2.9
VI. Professional Persuasion in Twenty Golden Rules for Lawyers ...................................................... 2.10

Chapter 3

Pulled Over: Will It Be a DUI?
Charles E. Strain

I. Before the Arrest ...................................................................................................................................... 3.1
II. After the Arrest ...................................................................................................................................... 3.7
III. Epilogue ............................................................................................................................................... 3.10
Substance Abuse, Chemical Dependency, and Mental Health Concerns in the Legal Profession

Scott R. Mote, J.D.
Executive Director, Ohio Lawyers Assistance Program, Inc.
Columbus, Ohio

Paul A. Caimi, J.D., LCDC-III, ICADC
Associate Director, Ohio Lawyers Assistance Program, Inc.
Cleveland, Ohio

Patrick J. Garry, J.D.
Associate Director, Ohio Lawyers Assistance Program, Inc.
Cincinnati, Ohio

Stephanie S. Krznarich, MSW, LISW-S, LCDC-III, ICADC
Clinical Director, Ohio Lawyers Assistance Program, Inc.
Columbus, Ohio

Megan R. Snyder, MSW, LISW
Clinical Associate, Ohio Lawyers Assistance Program, Inc.
Columbus, Ohio

Ohio’s integrated program:
The legal profession’s response to substance abuse, chemical dependency and mental health concerns in Ohio

THE ORGANIZATION

The Ohio Lawyer’s Assistance Program, Inc. (OLAP).

THE THREE COMPONENTS

A. Education.
B. Advice and intervention assistance.
C. Treatment and after-care support.
KEY RULES AND STATUTES

A. Gov. Rule I, § 3(E)(2)—one hour of instruction to sit for bar examination.

B. Gov. Rule X, § 3(A)—CLE requirements.

C. Professional Conduct Rule 8.3(c)—confidentiality.


E. Gov. Rule V, § 9(B)—monitoring.

FUNDING AND OTHER SUPPORT

A. The Supreme Court of Ohio.

B. The Ohio State Bar Association.

C. Ohio Bar Liability Insurance Company (OBLIC).

1 Scott R. Mote, J.D.
Executive Director
Ohio Lawyers Assistance Program, Inc.
Columbus, Ohio

Mr. Mote received his B.A. from Wright State University, his M.A. from the University of Dayton, and his J.D. from Capital University Law School. His professional memberships include the American Bar Association (Health Law Section; Legal Education and Admissions to the Bar Section), Ohio State Bar Association (Council of Delegates, District 7; Estate Planning, Trust, and Probate Law Section; Lawyers Assistance Committee), Columbus Bar Association (Admissions Committee; Probate Committee), The Florida Bar (Out-of-State Practitioners Division), Ohio State Bar Foundation, Columbus Bar Foundation, Central Ohio Association for Justice, Central Ohio Association of Criminal Defense Lawyers, and the Federalist Society. Mr. Mote is the Executive Director of the Ohio Lawyers Assistance Program, Inc., which was formed by the Lawyers Assistance Committee of the Ohio State Bar Association. He has been involved with the LAC/OLAP for over 25 years and served as OLAP's first associate director in 1995, and in July 1999, he became the Executive Director. Prior to making OLAP a full-time endeavor, Mr. Mote was a general practice lawyer and civil litigator for over 25 years. He has made over 400 presentations to lawyers, judges, and law students, including the annual conventions of the OSBA, the Ohio Judicial Conference, the American Bar Association Commission on Lawyer Assistance Programs (ABA CoLAP), and the National Organization of Bar Counsel. Mr. Mote has facilitated over 100 interventions and oversees four other chemical dependency and mental health professionals. He was presented with the 2005 Award of Merit for service to the profession by the Columbus Bar Association, the 2006 Ohio Bar Medal by the Ohio State Bar Association, its highest award for service to the profession, and in May 2010, OSBA presented him with the Eugene R. Weir Award for Ethics and Professionalism. Mr. Mote can be contacted via phone at 800-348-4343; fax at 614-586-0633; e-mail at smote@ohiolap.org; or through the Ohio Lawyers Assistance Program Inc.’s website at www.ohiolap.org.
2 Paul A. Caimi, J.D., LCDC-III, ICADC
Associate Director, Ohio Lawyers Assistance Program, Inc.
Cleveland, Ohio
Mr. Caimi received his A.B. from Harvard College and his J.D. from Boston University School of Law. His professional memberships include the Ohio State Bar Association and the Cleveland Metropolitan Bar Association (Lawyers Assistance Committee). Mr. Caimi is a Licensed Chemical Dependency Counselor (LCDC-III, Ohio) and an Internationally Certified Alcohol and Drug Counselor (ICADC). He is Associate Director of the Ohio Lawyers Assistance Program, Inc. He primarily serves lawyers, judges, and law students through OLAP in Northern Ohio. Mr. Caimi also has a law practice concentrating on personal injury, estate planning, and probate law at Paul A. Caimi, Co., LPA in Cleveland, Ohio. Mr. Caimi can be contacted via phone at 800-618-8606 or 440-338-4463; by fax at 440-338-1151; or by e-mail at pcaimi@ohiolap.org.

3 Patrick J. Garry, J.D.
Associate Director, Ohio Lawyers Assistance Program, Inc.
Cincinnati, Ohio
Mr. Garry received his B.A. from Boston College and his J.D. from the University of Cincinnati College of Law. His professional memberships include the Ohio State Bar Association (Lawyers Assistance Committee) and the Cincinnati Bar Association. Mr. Garry is Associate Director of the Ohio Lawyers Assistance Program, Inc. He maintains a law practice concentrating on criminal defense. Mr. Patrick can be contacted via phone at 513-623-9853 or by e-mail at pgarry@ohiolap.org.

4 Stephanie S. Krznarich, MSW, LISW-S, LCDC-III, ICADC
Clinical Director, Ohio Lawyers Assistance Program, Inc.
Columbus, Ohio
Ms. Krznarich received both her B.S. and M.S. from The Ohio State University. She is a Licensed Independent Social Worker-Supervisor (LISW-S), Ohio and Licensed Chemical Dependency Counselor (LCDC-III), Ohio. In addition, Ms. Krznarich is an Internationally Certified Alcohol and Drug Counselor. Her professional experience includes research in both the College of Social Work and the College of Psychiatric Nursing; Clinical Social Worker/Mental Health Therapist at Harding Hospital and The Ohio State University Hospitals East (older adult psychiatric units); Chemical Dependency Counselor, Talbot Hall, at The Ohio State University Hospitals East and Parkside Behavioral Healthcare Center (detox, inpatient and outpatient levels of care); Chemical Dependency Counselor and Driver Intervention Facilitator at The Wellness Center; Clinical Counselor at multiple Nursing Homes in Columbus, Ohio and the surrounding area; Mental Health Therapist/Drug and Alcohol Counselor at three Community Mental Health Centers in Columbus, Ohio; and private practice. Ms. Krznarich can be contacted by phone at 800-348-4343 or 614-586-0621; by fax at 614-586-0633; or by e-mail at skrznarich@ohiolap.org.

5 Megan R. Snyder, MSW, LISW
Clinical Associate
Ohio Lawyer’s Assistance Program, Inc.
Columbus, Ohio
Ms. Snyder received her B.A. from the State University of New York at Albany and her MSW from New York University. While a Medical Social Worker at Beth Abraham Health Services, she specialized in psychosocial assessments and discharge planning. As a Social Worker and Regional Social Work Mentor at VistaCare Hospice, Ms. Snyder developed and conducted company-wide trainings surrounding issues of death and dying. She also worked as a Development Associate at the Columbus Jewish Foundation and assisted with the annual campaign. Ms. Snyder can be contacted by phone at 800-348-4343 or 614-228-0579; by fax at 614-586-0633; or by e-mail at msnyder@ohiolap.org.
Professional Persuasion

Charles E. Strain
Attorney at Law
Cincinnati, Ohio

- Teddy Roosevelt was always fond of the West African proverb, “Speak softly and carry a big stick.”

- War is costly, even when victorious. Diplomacy works.

- Professional persuasion isn’t just the right thing to do; it’s usually the effective thing to do.

- I personally like to eat ice cream, but when I go fishing, I use worms.

I. Professional Persuasion in Dale Carnegie’s *HOW TO WIN FRIENDS AND INFLUENCE PEOPLE*

A. BUILD PERSONAL RELATIONSHIPS
   1. Never criticize, condemn or complain:
      a) Your criticism will not be welcome.
      b) Criticism puts others on the defensive, hurts self-esteem and builds resentment. Criticism is futile.
      c) Positive Reinforcement works better.
   2. Become genuinely interested in other people and talk in terms of their interests.
   3. Be a good listener.
   4. Make the other person feel important.

B. ESTABLISH COOPERATION
   1. Avoid arguments: you can only lose.
      a) Most arguments end with heels dug in deeper.
      b) A Guide to avoiding arguments:
         1) Welcome disagreements.
         2) Stay calm.
         3) Listen first. Hear others out.
         4) Identify areas of agreement.
5) Admit your errors to make it easier for others to admit theirs.
6) If no there is resolution to be found, delay action and promise to explore the alternative perspective further.

2. Begin in a friendly way.
   a) Opening conversations with sincere praise, appreciation and/or sympathy will disarm your conversation partner.
   b) Beginning with a friendly tone will free others to be more open-minded.

3. Let the other person do a great deal of the talking.
   a) Allow others to talk themselves out, especially when they’re angry.
   b) Don’t interrupt. Others won’t pay attention to you until they’ve had their own say.

4. Respect others’ opinions. Never say, "You're wrong."
   a) People don’t like to admit even to themselves that may be wrong, but when handled gently, they can overcome that hesitancy.

5. If you are wrong, admit it quickly and dramatically.

6. Try to honestly see things from the other person's point of view.

7. Frame requests in terms of what others find motivating.
   a) “If there is any one secret to success, it lies in the ability to get the other person’s point of view and see things from that person’s angle as well as your own.” – Henry Ford
   b) I like ice cream, but when I go fishing, I use worms!

C. CLOSE THE DEAL
   1. Let the other person feel that the idea is his or hers.
   2. Talk about your own mistakes before criticizing the other person.
   3. Call attention to people's mistakes indirectly.
   4. Let the other person save face.

II. Professional Persuasion in DEALING WITH THE PROSECUTOR IN THE BLACK ROBE

New York lawyer Peter Gerstenzang presented a paper at Harvard Law School for the 2008 Summer Session of the National College for DUI Defense entitled, Dealing with the Prosecutor in the Black Robe. Here are some quotes from it, used by permission.

• Dealing with the prosecutor in the black robe involves a lot more than motion tactics and maneuvers. It requires a thorough understanding of the judge and his or her orientation to the Criminal Justice System, and more importantly, your own. How we view the judge and the prosecutor shapes and dramatically impacts how they view us. One of the most popular perceptions of the criminal defense attorney is that of the valiant adversary battling the forces of evil and darkness. It is a very emotionally appealing image to which many of us subscribe. Of course, if we are engaged in storming the castle, it is a safe bet that the people in the castle will consider themselves under siege. An adversarial approach stimulates an adversarial response in even the most reasonable of opponents.
For many lawyers, it is necessary to demonize their opponents including the “prosecutor in the black robe.” From childhood, sports such as Little League Baseball and soccer, encourage adversarial behavior. We are taught to choose up sides and to play hard and be loyal to the side that we are on. We are the good guys and they are the bad guys. Both prosecutors and defense counsel see each other as adversaries in a contest where truth and virtue are always on their side.

Succinctly, in war and litigation, people need the comfort of being on the “right” side. The reality is that neither side has a monopoly on virtue. All of us swear the same oath to support the Constitution. We serve the same system, playing our chosen or assigned roles to the best of our ability.

The “prosecutor in the black robe” can be effectively dealt with if the attorney is balanced and objective in his or her approach to the problem.

Regardless, the job of the advocate is to figure out the judge’s orientation and then frame your case in terms that will produce a favorable result. This type of analysis requires clear understanding. Clear understanding requires a perspective that is not tinged with adversarial emotion.

First of all, he or she thinks that they are right, or wants to think that they are right. Accordingly, a calm, competent and well-prepared lawyer is an object of respect, grudging or otherwise.

Good-natured patience is far more effective than an emotional reaction or antagonism. A good-natured, prepared and competent lawyer is the best antidote to prosecutorial and judicial abuse.

Litigation is very costly and frustrating when “everyone knows” that the defendant did it and you are just trying to get him or her off. People admire an attorney who tries to avoid incurring expense for his client.

You really want to be seen as a solid citizen by court clerks and the judges they work for. Never forget that the clerks, judges and prosecutors all have their own associations. You and your fellow attorneys are the subject of constant discussion.

Judges, both part-time and full time, rarely feel adequately compensated. Most are underpaid and most remain on the bench because they enjoy being a judge. Their compensation comes from the honor and respect that our society routinely pays to even the worst of judges. A lawyer that treats the court with less than the utmost of respect cheats the judge of his or her compensation. Regardless of how you feel about the person wearing the robe, the court is entitled to respect.

We take good judges for granted. We are relaxed when we come into their courtroom. We enjoy talking to them in chambers. We admire them and they know that they have our admiration. We spend little time thinking about or discussing them. We dwell on bad judges.
We replay our unpleasant encounters, and invest tremendous emotional capital in thinking about their injustices. These judges are the enemy and our in-court demeanor broadcasts our attitude, which only fuels more abusive behavior on their part. Our clients deserve better and more effective approaches than this.

Unless you are a very good actor, it is hard to project an attitude that you do not feel. People can tell whether they are liked or not. If you think of the judge as your enemy, the chances are that he or she will reciprocate. If you cannot bring yourself to like the judge, you can at least work on attaining an emotional neutrality.

We commiserate with each other and detail the latest story of incompetence. Talking about judges, however, is dangerous. People love to gossip and the stories and opinions get back.

Sharp exchanges alienate the judge in regard to the particular case you are arguing, and diminish your effectiveness in future encounters.

Theodore Roosevelt’s maxim of “speak softly and carry a big stick” is very much applicable to practicing before bad judges.

Judges hate to be appealed and become very careful when a good lawyer makes it clear that they are making a record for appeal. A professional attitude that is calm, deliberate and intent upon making that record is quite intimidating. Even if the judge rules against you on the particular issue at hand, he or she will endeavor to obtain a negotiated disposition in order to avoid your appeal.

If hurling invective at your opponent is effective in advancing your client’s interests, then have at it. In New York, we are frequently able to negotiate dispositions of DWI cases to reckless driving, speeding, and/or parked on pavement. All those negotiations require the consent of the prosecution. Effective defense requires a calm, unemotional prosecutor, who can trust and rely on your representations in regard to the law as well as your assertions of fact. Save the loaded language for the jury or for those situations where it will have the desired effect.

The prosecutor and the judge wield power that is not intimidated by emotional confrontations with defense attorneys. Putting an emotional defense attorney in his or her place has a much higher priority for a bad judge than either equity or justice.

On the other hand, disciplined, professional courtesy in the face of judicial bullying becomes embarrassing. It makes the judge look bad and judges do not want to look bad. Your steadfast adherence to a calm, professional demeanor makes it hard for a judge to maintain an abusive posture.

Criminal defense requires us to both fight and influence our adversaries. That requires a delicate balance of solid lawyering and emotional balance.
• The judge is listening to somebody and that somebody is the prosecutor. If you cannot make your case to the judge, get the prosecutor to do it for you. If you are geared to litigate and you conduct significant pretrial practice, the prosecutor’s cost for a conviction is pretty high.

• In that regard, you owe all of your clients the obligation of fighting each of your cases with diligence, hard work and single minded dedication. The prosecution and the court need to know why compromise is preferable to confrontation.

• The abusive judge and the prosecution like to see themselves as allied against the forces of evil with you playing the role of the prince of darkness. Both the prosecution and the court need to be constantly reminded that the role that we play is as great and even more sacred than their own within the American constitutional framework. We are the ultimate insiders. We are liberty’s champion and the ultimate refuge for the wrongfully accused.

• In DWI cases, prosecutors and judges share a common nightmare of reading about a Vehicular Homicide committed by someone they let go. They can put your client in jail, but they can’t prevent him from drinking and driving once he gets out. The judge or probation officer can force the person to temporarily stop drinking. The defense attorney is in a position to make the person want to stop drinking.

• When people are first confronted with a criminal charge, they are very receptive to whatever their lawyer has to say. If you are proactive in getting a client into treatment and sincerely involved in helping him or her gain their sobriety, you will very quickly gain a reputation as an attorney who sincerely cares about his clients. This is noted by alcohol treatment providers and probation officers who pass the information on to prosecutors and judges. You are still the opposition in the courtroom, but you are also part of a solution and dispositions will come easier when prosecutors and judges know that you understand and are attempting to deal with the problem confronting them.

• You can never win an open confrontation with a Judge. At best, you will get a draw, and at worst, a complaint of professional misconduct.

• You have to think long term with each case being a battle and each battle being a part of a larger war to win the respect if not the heart and mind of the judge in question. Everybody respects a good lawyer. No matter how badly they treat you on that particular day, you will later hear how much they respected the way you handled yourself. That will be reflected in comments they make to other people or in referrals they make to your office. Never get emotional. Never harden their position. Always leave the door open for a motion to reconsider. Don’t allow the Judge to become emotionally committed to a particular position by over arguing.

• The practice of Criminal Defense is the art of the possible. We owe our clients the best that we have, and the best that we have is dependent upon the honor, reputation and esteem, which we are accorded by the legal community. Win or lose, it is the quality of our advocacy and our character by which we are judged.
III. Professional Persuasion in *THE RULES OF PROFESSIONAL CONDUCT*

- Zealous representation is a standard of behavior that was intentionally left out of the new disciplinary rules, effective 2-1-07.

- Here’s the old rule under Canon 7, Ethical Consideration 7-1, and Disciplinary Rule 7-101, entitled “Representing a Client Zealously:” “A lawyer should represent a client zealously within the bounds of the law.”

- Here’s the new Rule of Professional Conduct 1.3, entitled “Diligence:” “A lawyer shall act with reasonable diligence and promptness in representing a client.” The new rule is further explained under Comment 1: “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. A lawyer also must act with commitment and dedication to the interests of the client.”

- The Ohio Supreme Court’s Task Force on Rules of Professional Conduct specifically deleted references to “zeal” in the rule and in the comment because “[z]ealous advocacy is often invoked as an excuse for unprofessional behavior.”

IV. Professional Persuasion in *CIVILITY—ABOUT DILIGENCE, RESPECT*

Cincinnati lawyer James R. Adams was honored with the 2008 John P. Kiely Professionalism Award for the highest degree of professionalism. He wrote an article in the November 2008 *Cincinnati Bar Association Report* titled, *Civility—About Diligence, Respect*. Here are some thoughtful quotes, used by permission.

- “[A] ‘zealous’ standard of representation—if it ever was a standard—became for some the justification to engage in Rambo-like practices manifested most egregiously in litigation . . .”
- “In civility adds to higher stress levels among lawyers and contributes to their disenchantment with the practice.”
- “[The] playground bully [is likely to view] sanctions and admonishments, and particularly newspaper profiles about the newest junkyard dog-litigator, as badges of honor to be used as marketing tools.”
- “Some clients hire only scorched earth litigators, the self-described ‘meanest lawyer in town’.”
- “[R]emember that the basic purpose of a lawyer is to solve problems by representing clients in a professional manner, not by creating problems.”
- “[C]all the incivil lawyers on their actions . . . or our clients will continue to suffer adverse consequences and the perceptions of the judicial system will continue to erode.”
V. Professional Persuasion comparing THE SWASHBUCKLING STYLE VERSUS THE FRIENDLY STYLE OF CRIMINAL DEFENSE

A. Swashbuckling Style

What’s the swashbuckling style of criminal defense? Alliteratively, it’s Swaggering, Swearing, and Swampming with motions and demands.

Swaggering in this context means acting like a bully, a gunslinger, a junkyard dog. It’s your most important marketing tool. It means always bragging about how hard you fought this or how you won that. You never talk to friends, clients, or other lawyers about settling a losing case or employing diplomatic techniques. You don’t want to be known as someone who ever settles. Every case is a war with obligatory battles. True negotiation is for sissies. Your view of negotiation is to act like you’re a professional wrestler in a mock interview about the upcoming match. Your stage persona requires tough talk, the more dramatic and forceful the better. Some clients like seeing that and are willing to pay for it.

Swearing in this context is bad-mouthing the prosecutors and judges. But showing disrespect to them can also be in actions. The system isn’t just stacked against the defendant; it’s corrupt. To combat that, you have to be loud, mean, and you have to play dirty. Literally using foul language to reinforce your anger against the system fires up the timid client and lets him know he’s hired a mad dog. And if he’s the sort who regularly talks like that, it makes you brothers.

Swamping in this context means pressing the print button on your word processor for unnecessary boilerplate pleadings. It includes sending prosecutors on make-work scavenger hunts and placing needless hurdles in their path. Besides not taking much thought or effort, you may feel that if you file the same voluminous pleadings in every case, they won’t get read, which can place you at an advantage. You can later say, “Gotcha! Tricked you! There’s something you didn’t respond to!” And sometimes you need to file things just to cover yourself.

To the swashbuckler, professionalism is for sissies. He’s the maverick brandishing a big gun with the hair trigger. Shoot now and ask questions later. There’s no need to carefully choose battles. Any battle you can get the client to pay for is worth fighting.

The swashbuckler might say, “No way will I do that framing kind of crap! We're in an adversarial system, right? Bluster and a bullying attitude is what gets the job done, or at least it makes me feel better in the short run. And if it doesn't work at the arraignment or pre-trial, all the better. Then we can amp it up to motions and trials, our bread and butter, plus bragging rights that we're fighters. Almost all prosecutors and judges are stupid assholes, so why be nice to them? They won't respect you unless you show them who's boss. In this war, it's the butt-heads approach for us real lawyers!”

B. Friendly Style

Of course, there are times when I strategically want to bury a point within a long document or series of documents. But I generally want what I write to be read and I want it to be respected. I don’t want to be the boy who cried wolf. I want prosecutors to think, “Chuck wrote this; it must
be important and it must be good.” I want judges to think, “Chuck wrote this; it’ll probably help me make a just decision or at least make me jump through—or dodge—intellectual hoops as I try to rationalize the law enforcement position.”

Keep in mind, too, that filing motions and demands—or filing them too early—can stop the speedy trial clock and give advantages to the state. Filing a jury demand may remove a case from a more favorable mayor’s court. Resist the temptation to justify a higher fee by showing the client all the documents you’ve filed. Shooting a shotgun into the dark forest might strike some game, but it doesn’t make you a good marksman. I like being thought of as a careful sniper rather than a gangster with a Tommie gun. I almost always prefer using a scalpel to a machete.

I particularly enjoy the excitement and adrenaline of trials, especially juries. I even enjoy writing appellate briefs and doing oral argument. And I like showing judges and prosecutors that I’m smart, creative, and prepared (in the limited situations when that’s true). And beyond my personal, selfish pride and stimulation from these activities, I usually get paid for them. We are truly blessed!

But the client’s goal generally is the opposite of providing me with that kind of income, stimulation, and excitement. It’s not about me. It’s about the client. And I think it’s largely about helping the client to choose battles wisely.

Maybe your clients walk in the door saying, "Let's have several motion hearings, hire an expert, and take it to a three-day jury trial. I don’t mind the stress, the time, the cost, the potential trial tax, or the notoriety of having my name on an appellate case for posterity." Or maybe your clients come to want those things after you’ve convinced them they’re best for them (as they may be). I say that clients should get motions, experts, trials, and appeals if they want them and want to pay for them. They should even get "swearing, swaggering, and swamping with motions and demands" if they want them and want to pay for them. The magic comes when the client is matched with the right attorney to give the client exactly what the client wants or thinks he wants.

Most of my clients want it over quickly, quietly, and cheaply. Even where it's a no-brainer that we should try the case, the client all-too-often says that he can’t wait for it or can't afford it. The client-centered lawyer will look for every opportunity to achieve the best results at each point along the way. To the extent I don’t achieve the client's goals at the first milestone, that’s a failure, and the race continues. Every motion hearing, every trial, every appeal means I’ve failed to negotiate an acceptable plea prior to that point. Most times our country goes to war, we’ve failed at diplomatic solutions. War is costly, even if we win.

My clients sometimes even seem to appreciate my efforts and (limited) talents even when we’ve lost. But my pride in knowing that I’ve fought a good fight, is more reward for me than for the client.

Just because some doctors are surgeons, doesn't mean that internists or psychiatrists have no place. If all you want to do is surgery, go for it! If cancer can legitimately be treated by surgery, radiation, chemotherapy, or even alternative therapies, let the patient decide after full and fair
Although surgeons tend to think surgery is the answer most of the time and oncologists may opt for other therapies first, the important thing is dealing with the patient honestly. *He* gets to decide.

I suppose there are lawyers out there who could honestly level with a client at the first meeting and say, “You know, I’m great at trial, but my persuasive abilities don’t really lie in negotiating.” And there could be others who might honestly say, “Well, I’m not really so good at trial, but I can negotiate my way out of a lion’s den.” Of course, the ideal situation is a well-rounded lawyer, good at everything and balanced in approach. We all have our strengths, which we should use, within ethical and professional bounds, to the benefit of our clients. Honesty and diligence are the keys.

Zealous representation of clients is no longer a requirement of the Rules of Professional Conduct. But even zealous representation shouldn’t require yelling or swearing (or swaggering or swamping). It should require courage, honesty, hard work, and even fighting and arguing (within limits of propriety and professionalism).

Now everyone's style of fighting is different. I might prefer a scalpel, while you might prefer a blunt instrument. Please don't be narrow-minded and say that only your style is right.

Yes, I sometimes get a bit emotional and may be heard telling my wife that I’d kicked a prosecutor’s ass today. Some people live to say those words every day. Maybe you’re one of them. I’d rather quietly drift off to sleep thinking back on my day, knowing I’ve done the right thing, often using framing and negotiation techniques, being nice, helpful, personable, and persuasive to economically achieve the client’s goals.

**VI. Professional Persuasion in A LAWYER’S CREED** (Issued by the Supreme Court of Ohio, 2-3-97)

**To my clients,** I offer loyalty, confidentiality, competence, diligence, and my best judgment. I shall represent you as I should want to be represented and be worthy of your trust. I shall counsel you with respect to alternative methods to resolve disputes. I shall endeavor to achieve your lawful objectives as expeditiously and economically as possible.

**To the opposing parties and their counsel,** I offer fairness, integrity, and civility. I shall not knowingly make misleading or untrue statements of fact or law. I shall endeavor to consult with and cooperate with you in scheduling meetings, depositions, and hearings. I shall avoid excessive and abusive discovery. I shall attempt to resolve differences and, if we fail, I shall strive to make our dispute a dignified one.

**To the courts and other tribunals, and to those who assist them,** I offer respect, candor, and courtesy. Where consistent with my client’s interests, I shall communicate with opposing counsel in an effort to avoid or resolve litigation. I shall attempt to agree with other counsel on a voluntary exchange of information and on a plan for discovery. I shall do honor to the search for justice.
To my colleagues in the practice of law, I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor, and dignity that I expect to be extended to me.

To the profession, I offer assistance in keeping it a calling in the spirit of public service, and in promoting its understanding and an appreciation for it by the public. I recognize that my actions and demeanor reflect upon our system of justice and our profession, and I shall conduct myself accordingly.

To the public and our system of justice, I offer service. I shall devote some of my time and skills to community, governmental and other activities that promote the common good. I shall strive to improve the law and our legal system and to make the law and our legal system available to all.

VII. Professional Persuasion in TWENTY GOLDEN RULES FOR LAWYERS
(with thanks to the Ohio Lawyers’ Assistance Program and Richard S. Masington, Esq., Miami)

1. Behave yourself.
2. Answer the phone.
3. Return your phone calls.
4. Pay your bills.
5. Keep your hands off your clients’ money.
6. Tell the truth.
7. Admit ignorance.
8. Be honorable.
9. Defend the honor of your fellow attorneys.
10. Be gracious and thoughtful.
11. Value the time of your fellow attorneys.
13. Avoid the need to go to court.
14. Think first.
15. Remember: you are first a professional, then a businessman. If you seek riches, become a businessman and hire an attorney.
16. Remember: there is no such thing as billing 3000 hours a year.
17. Tell your clients how to behave - if they can’t, they don’t deserve you as their attorney.
18. Solve problems - don’t become one.
19. Have ideals you believe in.
20. Don’t do anything you wouldn’t be proud to tell your mother about.
Pulled Over: Will It Be a DUI?

Critical Advice Just Before and After the Arrest

Charles E. Strain
Attorney at Law
Cincinnati, Ohio

1. Before the Arrest

A. You’re driving after drinking and you see strobing blue lights in your mirror.
   1. Be aware that the officer (and maybe the video camera) is watching every move.
   2. Signal and pull over immediately, smoothly, safely, and completely.
   3. Put the transmission in park or neutral and set the brake.
   4. Without excess shuffling (or furtive, suspicious movements), assemble your license, registration, and insurance card in order to have all at the ready.
   5. Keep your seat belt on. Put it back on if you have to remove it to get to your wallet.
   6. Turn the radio off and roll down your window completely.
   7. Place your hands on the upper part of the steering wheel.
   8. Try not to look into the blinding light flooding the rear-view mirrors.
   9. Calm down and get your bearings.
  10. Inserting a mint, using breath sprays, or lighting a cigarette are unlikely to help.
      a) Any alcoholic beverage odor coming from your lungs as you exhale through your nose would bypass mints or breath sprays in your mouth.
      b) Even such odor exiting the mouth isn’t likely masked effectively or for long.
      c) Cover-up attempts are likely to be noted with disapproval in the officer’s report.

B. The officer is at your window.
   1. Some say you should refuse to speak to or look at the officer.
a) Open your window only enough to slide your license through so the officer can't smell your breath?
b) Face forward, away from the officer so he can't see your possibly bloodshot eyes?
c) Immediately demand a lawyer, perhaps on a pre-printed card, before otherwise speaking or cooperating in any way?
d) Refuse to get out of the car unless placed under arrest?

2. Although the officer is probably slightly behind you (giving him a visual advantage over you, and making him a more difficult target), try to turn around to politely look him in the eye, at least at first.

3. Talk to the officer in a very respectful, friendly, business-like fashion, but keep dialogue to the absolute minimum.
   a) Anything you say can be used against you.
   b) He’s looking for slurred, slow, mumbling, stuttering, or confused speech.

4. Assume that every word is being recorded by the officer’s body microphone.

C. The officer asks, “May I see your license, registration, and insurance?”
   1. Hand them all to him immediately.
   2. Be sure not to hand him a credit card by mistake.
   3. If you haven’t already located all three documents by the time he’s at your window, be aware that he’ll be watching your pursuit of them like a hawk.
      a) It’s best to have them always readily available in a place you can remember.
         i) Don’t store your license within a pile of cards or in a sticky pocket of your wallet.
         ii) Don’t store your registration and insurance proof in a pile of papers in the glove box.
         iii) You can practice this retrieval and get it down to a few seconds.
      b) Before reaching into the console or glove box, politely ask permission.
      c) Search quickly and carefully.
      d) He’ll be watching for clumsy fumbling.
      e) He’ll be watching for you to pass up the document you’re looking for.
      f) He may ask you questions during your search just to distract you. If you can’t easily concentrate on both matters, ask him to please wait a moment until you retrieve the document(s).

D. The officer asks, “Do you know why I pulled you over?”
   1. Don’t take a wild guess, e.g., “Because of that kilo of cocaine in the trunk?”
   2. But apologetically admitting the obvious doesn’t cost you anything and may set the stage for you coming off as perceptive and honest to the officer (and later to a jury).
3. Playing dumb won't likely win you points for honesty or sobriety.
4. If you don't have a good answer, try, “Please tell me, sir. I trust you.” That shows a great attitude, without supplying a confession.
5. Arguing with him is futile and counterproductive.

E. The officer asks, “Where are you coming from?”
   1. If you say anything, make it short and true.
   2. The best answer would be, “Church, where I just gave a sermon.”
   3. The worst answer would be, “Joe's Bar, where I've been drinking all day.”
   4. Consider a non-incriminating but honest answer, such as “Downtown” or “A friend’s house.”
   5. Be ready for a follow-up question like, “Where downtown?” or “Was it a big party?”
   6. Consider a cordial, “Please, officer, must I answer that question?”

F. The officer asks, “Where are you headed?”
   1. If you say anything, make it short and true.
   2. The best answer is, “Right down the block to visit my grandmother who's in the hospital.”
   3. Bad answers:
      a) “To the next bar on my list.”
      b) “I’m not sure; I’m lost.”
   4. Be aware that the officer will note in the report if your location and direction of travel don't fit with your travel origin and destination.
   5. Consider a cordial, “Please, officer, must I answer that question?”

G. The officer asks, “Have you been drinking?”
   1. If you say anything, make it short and true.
   2. A total denial won't likely be believable unless it's true.
   3. Consider a cordial, “Please, officer, must I answer that question?”

H. The officer asks, “How much did you have to drink?”
   1. The best answer—if it's true—is, “I had exactly one glass of wine (about four ounces) three hours ago with dinner at my daughter's wedding reception.”
   2. Bad answers:
      a) “Four “40s” of Olde English Malt Liquor and I don't know how many shots of Jaeger Bombs.”
      b) “Two beers,” or the intentionally vague minimization, “A couple drinks.”
         i This is the (usually false) answer given over 90% of the time.
ii The officer will likely believe that:

- You're lying.
- You can't even lie creatively.
- You had three or more times that much (an officer rule of thumb).

3. Consider a cordial, “Please, officer, must I answer that question?”

I. The officer asks, “Will you please exit the vehicle for me?”
1. The officer (and probably the video camera) is watching your every move.
2. Plan your movements quickly and carefully.
3. Make sure the vehicle is braked and not in gear.
4. Remove the seat belt.
5. Open the door and exit very smoothly, without steadying yourself by hanging on the door or door frame.
6. Stand firmly upright with feet at shoulder-width, facing the officer with hands out of pockets, being careful not to sway.

J. The officer asks, “Will you please step to this spot behind your car?”
1. He may indicate with his flashlight a spot on the pavement for you to stand.
2. The officer (and probably the video camera) is watching your every move.
3. Follow his instructions carefully. Any instruction(s) you miss will likely be apparent in the video and in his written report.
4. Walk normally and very steadily, with confidence and sure-footedness.
5. Stand firmly upright with feet at shoulder-width, facing the officer with hands out of pockets, being careful not to sway.

K. The officer asks, “Will you submit to field sobriety tests?”
1. Some say you should refuse all field sobriety tests. There’s no penalty for doing so, except that your refusal can be used against you in court, suggesting a bad attitude or a desire to hide evidence of your guilt.
2. Resolving this difficult question requires a delicate balancing of your physical coordination and cognitive executive function, with the unknown capabilities of the officer to honestly and properly assess your performance.
3. Ask the officer if there’s a working video camera on you.
   a) If there’s no video—and therefore it would be the officer’s word against yours on how well you had performed the tests—you may be inclined not to do them unless you were extremely confident you’d win over an honest officer.
   b) If there’s a working video camera that will later tell the tale (good or bad), decide by assessing your capabilities.
      i) If you’re confident, have at it.
         • Familiarity with and practice of the tests can properly buoy confidence, as can actual sobriety.
• Beware that liquid courage doesn't equal reliable confidence.
  ii If you’re not confident, seriously consider politely refusing.
4. Whether or not you refuse, affirmatively point out actual physical problems you have, e.g., bad knees or an inner ear problem.
  a) This is more effective if you can (perhaps later) muster medical documentation.
  b) Don’t phrase it, “Heck, with my bum foot, I couldn't even do these tests sober.”
5. A few officers may ask you to do non-standardized field sobriety tests.
  a) These tests, if admissible at all, are less probative than standardized tests.
  b) These tests can include:
     i  Finger count
     ii  Finger-to-nose
     iii Reciting the alphabet, fully or partially
     iv Counting backwards from a specified number to a specified number
6. Most officers will administer the three standardized field sobriety tests developed, starting in 1975, by the National Highway Traffic Safety Administration.
  i  These tests require a very detailed procedure for the officer to administer them properly, including correct conditions, instructions, demonstrations, and assessment.
  ii  These test results are generally admissible if done substantially in compliance with the NHTSA guidelines. RC 4511.19(D)(4)(b).
  iii The NHTSA manual Chapter VIII appears in an Appendix, following page 10, below.
  iv These tests include the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test.
7. The horizontal gaze nystagmus test (Appendix pp. VIII-5 to -8) has three possible clues:
  a) Lack of smooth pursuit
  b) Distinct and sustained nystagmus at maximum deviation
  c) Onset of nystagmus prior to 45 degrees
8. The walk-and-turn test (Appendix pp. VIII.-9 to -11) has eight possible clues:
  a) Cannot keep balance while listening to the instructions
  b) Starts before the instructions are finished
  c) Stops while walking
  d) Does not touch heel-to-toe.
  e) Steps off the line
  f) Uses arms to balance
  g) Improper turn
  h) Incorrect number of steps
9. The one-leg-stand test (Appendix pp. VIII.12 to -14) has four possible clues:
   a) The suspect sways while balancing
   b) Uses arms for balance
   c) Hopping
   d) Puts foot down

L. The officer asks, “Will you submit to this portable (or preliminary) breath test?

1. The hand-held portable breath test (PBT) result is generally not admissible at trial, but there is some division as to whether it can be used in a pre-trial motion to justify an administrative license suspension or the officer’s arrest decision.
   a) It’s considered less accurate than the evidential machines approved by the Ohio Department of Health that are usually found at the police station.
   b) It’s not capable of recalibration, there’s no slope-detector to try to measure mouth alcohol, and its fuel-cell technology can’t distinguish among ethyl alcohol cousins, such as ketones, toluene, and acetone.

2. There’s no penalty for refusing the PBT, except that in some districts, your refusal can be used against you in court, suggesting a bad attitude or a desire to hide evidence of your guilt.

3. The officer may or may not tell you—and will even less likely show you—the results of the PBT.
   a) If you can discern a fairly low score, even if slightly above the legal limit, that may give you more confidence to take the evidential test later at the station.
   b) If you discern a fairly high score, that may give you less confidence to take the evidential test later at the station.
   c) If the results are low enough, the officer may even pass on charging you with a DUI.

4. The PBT results will likely become known to the prosecutor (and probably the judge), even if the jury never hears of it.
   a) This can be a negotiating advantage if the result isn’t very high, even if over the legal limit, especially if there’s no subsequent evidential breath test.
   b) This can be a negotiating disadvantage if the result is very high, as it can corroborate (for the prosecutor) a later evidential breath test, or it can clue-in the prosecutor as to the approximate alcohol level, even if there’s no subsequent evidential test.
   c) In the proper situation, taking the PBT may almost be a way to have your cake and eat it too: A low result can help you negotiate a better plea bargain, while a high result can’t be used at trial.
II. After the Arrest

A. Be aware that a cruiser video camera will almost certainly be recording audio from inside the cruiser, too. This is where arrestees left alone in the back seat sometimes say embarrassing or incriminating things as they watch the officer search their cars, e.g., “No, a--hole, don't search under my f----- back seat!”

B. Time spent with the officer in the cruiser, while filling in paperwork, waiting for a tow truck, or driving back to the station, may be put to good or bad use.
   1. It may be best to take Miranda warnings to heart and not say anything.
   2. Even friendly discussions with the officer could provide recorded evidence of slurred speech, repeated questions, rambling monologues, or inadvertent incriminating disclosures.
   3. But an appropriately open approach demonstrating sobriety may be helpful in the mind of the officer or a later audio listener, such as the prosecutor, judge, or jury.

C. The officer asks at the station, “Do you want to submit to a breath test?”
   1. The breath test machines approved for evidential use in Ohio courts in traffic cases are the BAC Datamaster, the Intoxilzer 5000, and Intoxilyzer 8000.
   2. Some lawyers simplistically recite that you should always refuse.
   3. But it's actually a very nuanced, delicate choice, difficult to make, even for a sober, awake, engaged, objective lawyer who's practiced in this area for over thirty years.
   4. You should try to weigh:
      a) Your current condition indicated by coordination, speech, attitude, and cognitive ability.
      b) How much you recall you've had to drink and how trustworthy that is (often inaccurate.)
      c) What you calculate your test result would likely be. (See chart on my business card.)
      d) Other evidence the officer may already have.
      e) Your prior offenses, if any.
      f) Your need for driving privileges.
      g) The jurisdiction, including the likely prosecutor.
      h) How likely you could afford or emotionally tolerate going to trial.
   5. Strategic reasons to refuse the evidential breath test:
      a) You have no prior DUI convictions and you'd likely test over the high-tier legal limit of .170.
i The mandatory minimum jail time for a first-offender upon conviction of driving while impaired under RC 4511.19(A)(1)(a), is three days.

ii The mandatory minimum jail time for a first-offender upon conviction of driving with a low-tier prohibited-level, (e.g., of .08 or more) under RC 4511.19(A)(1)(b) through (e) is three days.

iii The mandatory minimum jail time for a first-offender upon conviction of driving with a high-tier prohibited-level, e.g., of .17 or more) under RC 4511.19(A)(1)(f) through (i) is six days, double the amount in i and ii, above.

b) The officer has little or no admissible evidence of your drug or alcohol impairment and you’d likely fail the breath test, which would be necessary to convict you of a prohibited-level DUI.

c) You have the desire, fearlessness (or recklessness), patience, time, emotional stability, and financial wherewithal to go to all the way to trial for a rare all-or-nothing shot at an acquittal, knowing that:

i The refusal administrative license suspension will, by statute, remain in place even if there’s an acquittal, reduction, or dismissal;

ii The court is likely to charge “courtroom rent” in the form of stiffer penalties if found guilty; and

iii Win or lose, your trial would likely be more publicized than a plea bargain, and your name may even appear for posterity on a written decision, even if not appealed.

6. Strategic reasons to submit to the evidential breath test:

a) You’d get much better treatment regarding an administrative license suspension than if you were to refuse.

i You’d have no administrative license suspension if you were to pass the breath test.

ii You’d have a much shorter administrative license suspension (with earlier limited driving privileges during the suspension) if you were to fail the test than if you were to refuse it.

- On a first offense, if you were to test over the legal limit, you’d have only a 90-day suspension with no possible privileges for 15 days.

- If you were to refuse with no prior refusals or suspensions in the last six years, you’d get a one-year suspension, with no possible limited privileges for 30 days.

- If you were to refuse with one prior refusal or conviction in the last six years, you’d get a two-year suspension, with no possible limited privileges for 90 days.

- If you were to refuse with two prior refusals and/or convictions in the last six years, you’d get a three-year suspension, with no possible limited privileges for a year.
• If you were to refuse with three or more prior refusals and/or convictions in the last six years, you’d get a five-year suspension, with no possible limited privileges for three years.

iii A refusal administrative license suspension, by statute, remains in place, even if the DUI charge is ultimately disposed of by amendment to a lesser offense, by dismissal, or by acquittal. So even if you were to win, the refusal has a very high cost.

b) The officer already has plenty of admissible evidence of your alcohol or drug impairment, based on admissions, his direct observations, and/or circumstantial evidence.

i Refusing a breath test here won’t help avoid a conviction for impaired driving.

ii Refusing a breath test here can only hurt, unless it prevents a high-tier prohibited-level result in a first-offense case.

c) You have a prior DUI and don’t want to double the mandatory minimum jail or prison time.

i You have one prior DUI conviction in the last six years and you don’t want to double the mandatory jail time, if convicted, from 10 to 20 days.

ii You have two prior DUI convictions in the last six years and you don’t want to double the mandatory jail time, if convicted, from 30 to 60 days.

iii You have three or more prior DUI convictions in the last six years, you have five or more prior DUI convictions in the last 20 years, or you have a prior felony DUI in your lifetime, and you don’t want to double the mandatory jail/prison time, if convicted, from 60 to 120 days.

d) You have a reasonable hope that the result will be low enough that:

i The officer won’t even charge you with a DUI;

ii The prosecutor will dismiss or reduce the DUI charge;

iii All law enforcement officials will see you as cooperative; and/or

iv The relatively low test result, even if above the legal limit, will demonstrate less culpability, compared to an actual high test or an imagined high test.

e) You don’t want to alienate the officer, who may then decide to tow your car, to lock you up for the night, to request a high bond, to exaggerate the negative details about your impairment or behavior in his report, and/or to try later to nix any favorable deals you’d otherwise be able to work out with the prosecutor.

f) You don’t want to alienate the prosecutor, who:

i Daily enforces his policy of discouraging refusals by not offering favorable plea bargains in refusal cases;

ii May feel that it’s unfair for you to hide incriminating evidence;
iii Without a test result, would be free to imagine that you’d have tested much higher than your actual alcohol level (whatever that was).

g) You don’t want to alienate the judge, the jury, the probation officer, or any accident victim, who may have very similar emotional reactions to those of the prosecutor noted in e) ii and iii, above.

h) You want to make it more likely that the judge, if you’re convicted, will give you a lighter sentence on matters that are within his discretion:
   i) Fewer jail days, a desirable stay date, and/or a possible split sentence (including house arrest with electronic monitoring);
   ii) Lower fines, and/or more time to pay them off;
   iii) A shorter driving suspension, earlier limited driving privileges, fewer time, place, and purpose restrictions, shorter or no requirement for an ignition interlock device, and/or shorter or no requirement for special DUI license plates.
   iv) A shorter and/or less restrictive probation period;

  i) You can almost always get your own hospital blood test later if you distrust the officer’s machine or if you otherwise think that will help your case.

  j) You don’t want to let the prosecutor argue before the jury to this effect: “You’re free to conclude that the defendant’s test refusal implies knowledge of his guilt.”

III. Epilogue

A. The best advice for you and your clients: Drink responsively. And don’t drive after drinking too much. Better yet, don’t drive after drinking even a little.

B. There’s honor in taking responsibility for your actions.

C. While discretion is key (and difficult), lying is never recommended.

D. A lie to the officer will very likely come back to haunt you.

E. Judges, juries, prosecutors, police officers, and probation officers generally don’t like people who lie, who refuse to take field sobriety tests, or who refuse to take breath tests. Such lies and refusals can indicate to them a lack of forthrightness (if not guilt).

F. Somewhere around 99% of DUI cases are resolved without trial, making prosecutors—usually aligned with judges and arresting officers—actors with tremendous power. Their motivational framework must be acknowledged and respected if they’re to be co-opted and won over.