THE VIRGINIA DWI/DUI STATUTE

As of July 1, 2005, the Virginia "Driving While Intoxicated" statute (§18.2-266) consists of five (5) distinct subsections: (i) through (iv). The first section (i), commonly called the "per se" section, makes it unlawful "to drive or operate a motor vehicle…while such person has a blood alcohol concentration (BAC) of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided (in Article 2)." Taken together with the sub-clauses, the entire section describes a single offense; however, each of the sub-clauses sets forth a separate and independent means by which the overall offense may be proved. Thus one may be convicted of the overall offense under §18.2-266 (i), based solely on the court accepting into evidence the results of a blood or breath test. Alternatively, one may still be convicted of the overall offense under clause (ii), driving under the influence, absent the results of a blood or breath test; nevertheless, the importance of clause (i) cannot be overstressed.

Sub-clause (iii) describes an offense of driving under the influence of any narcotic drug or other self-administered intoxication of whatsoever nature or combinations of same; sub-clause (iv) describes an offense while under the combined influence of alcohol and any drug(s). Both of these sub-clauses require impairment of an ability to drive or operate any motor vehicle, engine or train safely. The key to any defense under these sub-clauses is that there must be proof presented which substantiates that the amount of the drug or intoxicant in the accused's blood would impair the accused's driving or operating ability. There are "per se" amounts under sub-clause (v)as to various drugs or intoxicants, expert testimony may be produced by the prosecution in order to convict under these sub-clauses,: it is up to the defense to rebut such testimony, but when the prosecution cannot establish a connection between the amount of drug or intoxicant in the accused's blood and impairment, the defense should prevail without having to produce any evidence to the contrary. Of course, the prosecution must also demonstrate that the procedures for withdrawal, transmittal, and handling of the blood results conform with those set forth in §18.2-268, *et seq*.

PRESUMPTION OF INTOXICATION (*Per se*)

In every trial under the statute (§18.2-266), or local ordinances incorporating the statute (assuming the local ordinances were validly enacted), the defense attorney should seek to prevent as evidence a certificate of analysis with an alcohol concentration of 0.08 or greater; once the certificate is introduced into evidence, the burden shifts to the defense to negate that rebuttable *presumption.*. Current Virginia case law holds that it is unlawful to *drive* or *operate* a motor vehicle with a blood alcohol concentration (BAC) of 0.08 or greater or specific milligrams of cocaine, phencyclidine or methylenedioxy methamphetamine; the law presumes that a blood concentration (BC) test result is related to the consumption of alcohol, or drugs *before* or *during* the act of operation. If it can be demonstrated, generally by expert testimony, that the BC at the time of operation was *below* 0.08 at the time of driving or operating, then the defense negates the statutory presumption; even if this presumption is negated, the defense practitioner must still contend with §18.2-266 (ii), which offers the prosecution another means of establishing a violation of the statute. Where the Commonwealth offers no chemical test results of an accused's blood or breath, the issue becomes whether the accused is under the influence as determined from all the evidence of his condition at the time of the alleged offense.

ADDITIONAL MEANS OF PROOF OF INTOXICATION

Section 18.2-269 of the Code of Virginia also affords the prosecution the opportunity to admit the results of a blood or breath test in a prosecution under §18.2-266 (ii), "driving under the influence" or for involuntary manslaughter pursuant to §18.2-36.1. Section 18.2-269 sets forth statutory rebuttable presumptions in such prosecutions. If the BAC is 0.05 percent or less by weight by volume of alcohol in the accused's blood, or 0.05 grams or less per 210 liters of breath, it is presumed the accused was not "under the influence" of alcohol intoxicants; if the BAC is in excess of 0.05 percent, but less than 0.08 per cent by weight by volume of alcohol in the accused's blood, or 0.05 grams but less than 0.08 grams per 210 liters of the accused's breath, such facts do not give rise to any presumption that the accused was "under the influence" of alcohol intoxicants at the time of the alleged offense. The court may still consider such facts with other competent evidence in determining the guilt or innocence of the accused.

Section 18.2-269 next reiterates the language of Section 18.2-266 (i), and in a prosecution under §18.2-266 (ii) if the accused's BAC is 0.08 percent or more by weight by volume of alcohol in the accused's blood, or 0.08 grams or more per 210 liters of the accused's breath, it shall be presumed the accused was intoxicated at the time of driving or operating a motor vehicle. Whether proceeding under §18.2-266(i) or (ii) the results of breath tests are admitted pursuant to the provisions of §18.2-268.9, while the results of blood tests are admitted pursuant to the provisions of §18.2-268.5 through §18.2-268.9.

Even if the result of a blood test is not admitted pursuant to the provisions of §18.2-268.5 through §18.2-268.9, the result of a chemical blood test still may be admissible, provided it is based on a properly established foundation ensuring the reliability of the equipment used for testing, establishing a chain of custody, and establishing the technical competence of the individual administering the test. However this evidence even though probative, raises no legal presumption of intoxication since it was not obtained in accordance with the provisions of §18.2-268.1 *et. seq.* Under §18.2-266 (ii), even in the absence of any breath or blood tests, the offense may be proven based on witness testimony (usually from the arresting officer) taking into account the demeanor of the defendant (§4.1-100) and the circumstances concerning the operation of the motor vehicle.

EVIDENCE PURSUANT TO "STOPS"

At some point, every DWI involves contact between the accused and a law enforcement officer. Aside from "consensual encounters," where the accused's vehicle is already stopped, an accused is usually stopped by law enforcement while "driving" or "operating" a motor vehicle. In this regard there is a distinction between "consensual encounters," which do not implicate the Fourth Amendment to the United States Constitution, and the stopping of vehicles resulting in seizures such as brief detentions for investigative purposes and arrests, which require probable cause. The attorney needs to be keenly aware of the standards which do not rise to the level of probable cause for a "reasonable articulable suspicion" to stop a vehicle. The test as to whether a "reasonable articulable suspicion" exists depends upon "the totality of circumstances", which is a less stringent test than probable cause; it involves consideration of many factors including some of the following: (1) characteristics of the area, (2) the location of the stop, (3) the time of the stop, (4) the conduct of the person stopped, (5) proximity to the scene of a recently committed crime, and (6) racial identity.

It is well established that stopping a vehicle, either at a specified sobriety checkpoint or generally due to the driving conduct, constitutes a seizure. Other then sobriety checkpoints, to

sustain a stop as constitutionally valid there must be articulable suspicion to do so based upon articulable facts. Absent a consensual encounter, a sobriety checkpoint, or articulable facts (including anonymous "tips") which support a reasonable articulable suspicion to stop, the stop is constitutionally infirm and under well established principles evidence obtained subsequent thereto is not admissible at trial. The court must weigh the officer's articulation of his or her suspicion leading to the stop and determine the reasonableness of that articulation. Attorneys need to be well versed in both federal and state case law concerning stops based upon such a "reasonable articulable suspicion." There are numerous cases which elucidate this important concept and which address the many nuances which may arise in the establishment of a reasonable articulable suspicion to stop in any given case.

OPERATION OF THE VEHICLE

Section 18.2-266 addresses the acts of "driving" or "operating" a motor vehicle. An "operator" is one who produces a physical effect or engages in a mechanical aspect of any process. In this regard, it has been held that, although the key was in the ignition of a motor vehicle, the defendant was not an "operator" because there was no evidence the ignition was on, thus the driver did not engage the mechanical equipment. In Virginia there is no "bright line" rule that a vehicle must have the engine running for "operation". Subsequent to the Virginia Supreme Court holding in *Stevenson v. City of Falls Church*, the Court of Appeals opined it may not be required in establishing "operation" that an ignition switch be in the "on" position; however, that holding appears to be in conflict with the holding in *Stevenson* on this point.

Although a blood or breath certificate under "implied consent" (§18.2-268.2) may not be admissible because the driving or operation did not occur on a "public highway" as defined in §46.2-100; nevertheless, absent such a certificate, it is clear one may still be convicted of a violation under §18.2-266 while *driving* or *operating* on or off a public highway under §18.2-266 (ii) by other evidence such as witness testimony.

PROBABLE CAUSE TO ARREST

In order to establish probable cause to arrest subsequent to a consensual encounters, there are three elements with which the prosecution must contend. The first of these elements is the operator's driving behavior. Absent cases where the vehicle is stopped before the police encounter the driver, the driving behavior used to support the articulable suspicion to stop is the same driving behavior, including the driver's demeanor, which provide probable cause to arrest.

There are circumstances where the police may encounter a motorist who they deem in need of police assistance. These "community caretaker" cases follow a line of cases beginning with *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 706 (1973). Suffice it to say the Virginia Supreme Court held in *Barrett v. Commonwealth*, 250 Va. 243, 462 S.E. 2d 109 (1995), that it has not yet decided whether the so called "community caretaker functions" doctrine applies when the evidence is sufficient to show that the detained person required police assistance. In sum, the "odd" conduct of the accused was insufficient to show that the detained person required police assistance.

The second element establishing probable cause to arrest is field sobriety tests which are generally divided into two categories: "standardized field sobriety tests," and "unstandardized." The only "standardized" tests are those which have been subject to "laboratory-like" conditions to scientifically examine their reliability. These "standardized tests" are the "heel to toe" or "walk and turn," "one leg stand," and horizontal gaze nystagmus (HGN). These tests have been

reviewed by the National Highway Traffic and Safety Administration (NHSTA). All other forms of field tests do not have the imprimatur of NHTSA, and have no scientific basis for reliability or standard procedures. An excellent resource for the practitioner is the NHTSA Student Instruction Manual: *Principles and Techniques of Training in Standardized Field Sobriety Testing;* another excellent resource for reviewing the scientific reliability of the tests is *Drunk Driving Defense*, by Lawrence Taylor. DWI attorneys must be familiar with the multiple issues surrounding "standardized" and "unstandardized" tests and their appropriate or inappropriate use at trial in establishing probable cause to arrest.

With regard to the "totality of evidence" required to establish both probable cause to arrest and to prove guilt beyond a reasonable doubt, the attorneys should be reminded of the statement of the Court of Appeals in the 1989 case: *Davis v. Commonwealth*, (page 295), cited in full at the outset.

> "It is a matter of common knowledge based on human experience that outward manifestations of intoxication will vary from individual to individual. While an highly intoxicated individual may exhibit few, if any, outward manifestations of intoxication, another individual may appear to be intoxicated after consuming a small quantity of alcohol. Thus, a determination whether a person was "under the influence of alcohol", even when aided by statutory presumptions, cannot be reduced to a readily usable mathematical or objective formula. Rather, that determination must be based upon the totality of the evidence. Under such circumstance the difficulty of establishing proof beyond a reasonable doubt that a person was under the influence of alcohol, and conversely, the difficulty of defending against an unwarranted charge, are readily apparent."

The third element in establishing probable cause to arrest is Virginia Code Section 18.2-267. This test is a preliminary breath analysis to determine the "probable' alcoholic content of the blood of the accused. Statutorily, all that is required for the officer to determine probable cause for arrest is if that test indicates "alcohol is present". There is no "magic" number indicated by this device at which the officer is authorized to arrest without a warrant; the only requirement is that "alcohol is present". Clearly, this determination by the officer does not bind any court, since the "mere presence" of alcohol is insufficient to establish probable cause to arrest, but it is a factor. Nor does lack of a preliminary test being offered rise to a constitutional dimension. The results are inadmissible in any prosecution, and are intended instead to resolve disputes at the scene regarding probable cause to arrest. There is a cautionary note here for the practitioner. In the setting of a Circuit Court case in which there is a preliminary suppression motion for a lack of probable cause, it has been held that since a preliminary motion pursuant to §19.2-266.2 is not an integral part of the trial itself, it is not part of the prosecution and thus the results were allowed on the issue of probable cause. *Arguendo*, in the arena of a General District Court case, §19.2-266.2 is inapplicable.

"ADMINISTRATIVE" SUSPENSIONS

Arrest for a Driving while Intoxicated violation under §18.2-266 or the issuance of a summons or petition under §18.2-266.1, for driving under the age of 21 (including juveniles) after illegally consuming alcohol triggers temporary loss of license provisions under §46.2-391.2. This statutory period of suspension of an accused's license or privilege to drive shall be for seven days, unless the petition, summons or warrant issued charges the person with a second or subsequent offense; in that event, the suspension shall be for 60 days. Expiration of this suspension shall expire on the day and time set for trial if not prior thereto, but in no event shall

the suspension expire during the first seven days of the suspension. Third or subsequent offense license suspension provisions expire on the day and time set for trial.

During the period of license suspension under §46.2-391.2 an accused may request a court hearing to review that suspension, to prove by a preponderance of the evidence that the arresting officer or the magistrate did not have probable cause for the arrest. Pursuant to the statute, the suspension period may be otherwise suspended or revoked as a result of this "probable cause" hearing. There also may be another reason to request such a "probable cause" hearing. Because the license suspension for a second offense is for 60 days and in some instances onerous, defense counsel might consider among various options requesting an immediate probable cause hearing, and subpoena the arresting officer; if circumstances warrant. At that hearing the defense might enter a plea of guilty. While a second offense within 10 years does carry a loss of license of four months to one year, at least this initial loss of license period be obviated, and the accused may be able to obtain a restricted license sooner than would be the case otherwise. Obviously, counsel should discuss these and other options with the accused as soon as possible in preparation for trial, proceeding on a case by case basis, depending on the needs of each client.

CERTIFICATE OF ANALYSIS

Once the accused is arrested and blood or breath samples have been obtained, the admissibility of "Certificates of Analysis" of breath test results are governed by §18.2-268.9 and by §18.2-2-268.2, the operative "implied consent" statute, provided the accused is "arrested for a violation of §18.2-2-266 or §18.2-266.1 within three hours of the alleged offense." Admissibility of blood test results are governed also by §18.2-268.2, the "implied consent" statute, and by §18.2-268.6, through §18.2-268.9. An excellent resource to review the procedures for breath tests is available from the Breath Alcohol Section of the Virginia Division of Forensic Science, Department of Criminal Justice Services in Richmond: *Breath Test Operators Training Manual Intoxilyzer Model 5000*.

Pursuant to §18.2-268.5, there are statutory qualifications for those who withdraw the blood from an accused in a prosecution brought under §18.2-266 or §18.2-266.1. This statute was amended in 2004 to include three new approved chemicals to the list of cleansing agents. Moreover, since §18.2-268.5 specifies the exact means of cleansing the puncture area, failure to comply with these specific requirements should necessitate that the prosecution be dismissed.

While the general steps set forth in §§ 18.2-268.2 through 18.2-268.9 relating to the taking, handling, identifying and disposing of blood or breath samples are procedural and not substantive, the qualifications of the individual taking the blood or breath sample are substantive and not subject to the "substantial compliance" standard set forth in §18.2-268.11. If the individual taking the blood or breath samples is not licensed and qualified, the sample or samples are inadmissible as evidence on those grounds.[1] It is also a matter of substance if there is a lack of statutorily required evidence of calibration of the test equipment affecting the integrity of test results.

SECTION 19.2-187

This code section governs the pre-trial filing requirements of certificate of analysis, and required language of motions under this section. Strict compliance with this section is mandatory; moreover, once a trial commences, there is no cure for a violation of this statute, including a

[1] *Brooks v. City of Newport News*, 224 Va. 311, 295 S.E. 2d 801 (1982) (decided under prior §18.2-268).

continuance. According to *Allen v. Commonwealth*, 3 Va. App. 657, 353 S.E.2d 162 (1987), this section creates an exception to the hearsay rule and permits the written analysis to be admitted into evidence without requiring the in-court presence of the person who prepared the documents. Once again, in light of the recent United States Supreme Court decision in *Crawford v. Washington, supra*, the practitioner may be able to raise the issue that this hearsay exception directly violates the 6th Amendment Confrontation Clause and arguably the appearance of the person conducting this analysis is required for this "testimony" to be admitted into evidence.

There are circumstances in which the prosecution cannot offer a reasonable explanation as to the unavailability at trial of blood test results. According to a 1991 case, the Court of Appeals held that such cases should be dismissed. In 2003, § 18.2-268.7 was amended to require an accused to motion the court within 90 days of arrest to obtain an independent laboratory to examine the results of the blood taken upon arrest. Assuming the statutory requirements of §18.2-268.7 are met by the accused, it is conceivable that the holding of the court in 1991 still applies since the independent blood sample is potentially exculpatory, and under that rationale in the unexplained absence of the independent results, the case should be dismissed.

DRIVING AFTER ILLEGAL CONSUMPTION

There is a separate statute (§18.2-266.1) for persons under the age of 21 who operate a motor vehicle after consuming alcohol illegally and with a BAC of 0.02 percent or more by weight by volume or 0.02 grams or more per 210 liters of breath but less than 0.08 percent by weight by volume or less than 0.08 grams per 210 liters of breath. The provisions do not authorize the imposition of a jail sentence, but call for forfeiture of the motor vehicle operator's license for 6 months from the date of conviction, and a fine of not more than $500.00. A restricted privilege to operate a motor vehicle is also provided by the statute. In the case of a juvenile adjudged delinquent under this section, the punishment is based solely on the provisions of this section and not under juvenile sentencing statutes. The burden of proof in going forward with evidence raising a reasonable doubt as to the illegality of the alcohol consumption rests with the defense, according to the holding in *Mejia v. Commonwealth*, 23 Va. App. 173, 474 S.E. 2d 866 (1996). For youthful offenders whose BAC is in the proximate range pursuant to §18.2-266.1, defense counsel should attempt to have a Driving while Intoxicated charge amended and plea under this onerous less statute if counsel cannot prevail at trial for a Driving while Intoxicated.

The DWI/DUI attorney also needs to be familiar with the terms of local ordinances under which an accused may be charged. Attention should be given to the wording of the local ordinances adopting or incorporating the language of the state statutes, the date of such adoptions or incorporations, and the procedures for so doing.

REFUSAL

Once the accused has been arrested without a warrant, §19.2-81 directs that he or she is to be transported "forthwith" to a Magistrate, who has the responsibility to determine if probable cause exists to issue a warrant. At this juncture, the accused has two choices: either take a breath and or blood test, or refuse. In the event of a refusal, previous law required the accused to be warned by the officer and warned by a Magistrate; that statutory scheme has now been amended substantially, eliminating the Magistrate warning entirely, and requiring only that the arresting officer inform the arrestee from a form provided by the Office of the Executive Secretary of the Supreme Court and that the officer acknowledge such on the form.

Such evidence of refusal may be admitted at trial. The key word is "unreasonable"; there may be some circumstances allowing for a refusal, for example an inability to take the test due to poor health. If convicted of a first offense refusal, the defendant's privilege to drive is suspended for a period of one year. If convicted of a second refusal within 10 years of a prior offense of §§18.2-266 or 18.2-268.3 or subsection E of §18.2-270 arising out of separate incidents, the accused is guilty of a class 2 misdemeanor, and the court shall suspend the defendant's privilege to drive for three years which is added onto the suspension period provided under §46.2-391.2.

Moreover, a person convicted of a violation of §18.2-268.3 committed within 10 years of any combination of two or more offenses of §§18.2-266, 18.2-268.3, or subsection E of 18.2-270 is now guilty of a Class 1 misdemeanor and the court shall also suspend the defendant's privilege to drive for a period of three years. There is an escape clause from conviction under §§18.2-268.3, 18.2-268.4, providing that if the defendant pleads guilty to §18.2-266 or §18.266.1 the court may dismiss the refusal charge.

Under §46.2-391.2 in the event of a refusal, or in the event that a breath test reveals an alcohol content of .08 or higher, for a first offense the accused loses the privilege to operate a motor vehicle for 7 days; however, for a second offense the license loss is for 60 days, and for a third offense the license loss is until trial. This loss of license is absolute, with no restricted license available. It is important for counsel to be aware that even if an early trial is obtained, the time of absolute license suspension under §46.2-391.2 continues, even should the accused appeal a conviction.

Obviously, under this new statutory scheme, defendants with prior offenses are at great risk of license loss over and above the underlying offense as well as being subject to criminal prosecution as a Class I or Class II misdemeanant. It remains to be seen as to whether such criminal punishments for not providing evidence against oneself is a violation of the Fifth Amendment to the United States Constitution, as well as the Constitution of Virginia. Although in the context of a civil statute, the Commonwealth may appeal an acquittal of a first offense, arguably in a criminal case the Commonwealth should not be allowed to appeal any acquittal where incarceration is a penalty. It is also questionable whether a person may be convicted criminally of a second offense, where the underlying first offense was purely civil in nature. Additional questions also arise. If refusal is a criminal offense, should an accused have a 6th Amendment right to counsel prior to deciding whether or not to refuse? Moreover, if not afforded counsel on request, does such denial prohibit introduction of the Certificate of Analysis? Can one infraction be both civil and criminal? These and other questions now arise in the context of the statutory scheme after July 1, 2005.

Finally, practitioners need to be cognizant that new statutory provisions as a result of the 2004 General Assembly also pertain to the ignition interlock device (now mandatory if the BAC is .15 or above); further new statutes call for the forfeiture of the vehicle in a third or subsequent conviction; also, as a result of 2004 amendments, there is now no presumption for bail for those charged with a 4th offense DWI. Additional mandatory jail sentences in effect prior to the 2004 General Assembly for DWI convictions now apply. A second Driving while Intoxicated offense within five years now carries a mandatory, not subject to suspension jail sentence of 20 days, or if within 10 years of 10 days. Moreover, if the BAC in either case is less than or equal to .15 an additional 10 days in jail, not subject to suspension, is mandatory; if the BAC is less than or equal to.20 that additional, not subject to suspension, jail term is 20 days. A third Driving while Intoxicated offense within 10 years, currently a class VI felony, now carries a minimum mandatory, not subject to suspension, jail time of 90 days. Finally, a 4th offense Driving while Intoxicated, currently a class VI felony, now carries a minimum, not subject to suspension, jail

term of one year. All of the above jail terms are also increased by additional minimum mandatory jail sentences of 5 days if the accused has a passenger 17 years of age or younger in the vehicle at the time of the offense.

Even the most accomplished DWI/DUI attorney must carefully negotiate this new statutory maze. In some instances, these minimum mandatory offenses may be avoided by striking the BAC amount from the charging document and proceeding under §18.2-266 (ii), the driving under the influence sub-section. In any event, counsel will need to tailor substantive, procedural and tactical defenses to meet these new statutory challenges.