

Tuesday, January 8, 2008

**You want a trial? I'll go to trial/ Plus, beating the Intoxylizer 5000.**

Photo from website of U.S. District Court (W.D. Mi.). When I joined the Maryland Public Defender's Office in 1991, all bright-eyed and bushy-tailed to fight the good fight, it turned out that my survival instincts -- developed all the more since early childhood by growing up among plenty of peers who were more inclined to be nasty than warm (and I spoke my share of verbal taunts, too) -- and sharpened tongue often would serve me better than only relying on my boundless optimism at leaving a corporate law firm to spend my fulltime doing good. Early on in my criminal defense/public defender career, one morning in the courthouse I bumped into an opposing prosecutor, greeted him, and told him I wanted to arrange in advance to see the drugs seized in one of my clients' cases. He went false-ballistic, ranting and raving: "You want a trial? I'll go to trial." So much for having opponents proceed in the spirit of Begin and Sadat in agreeing to disagree. Such silliness, to say the least, does not stop with criminal cases; some of the most petty and unpleasant lawyers I have dealt with have been opponents in civil cases. Sometimes it is because money is at stake; sometimes it is because government lawyers' bosses are breathing down their backs. Sometimes it is habit. In one instance several years back, I represented a car collision victim and objected several times to some fully-objectionable and prejudicial deposition questions. Several times that I did so, my opponent would change from her sweetish-side (off the battlefield, that is) saccharine self to getting all bent out of shape that I would dare to interrupt her with an objection, insisting that I justify my objection. I made clear to her that the purpose of the deposition was not for her to intimidate my client by seeing me and her get into a rumble, and invited her to have closed-door discussions away from my client any time she was inclined to rant rather than simply and diplomatically to ask me the basis for any of my objections. That, for the most part, took the edge off my opponent in front of my client. Then, the silliness sometimes originates not from the opposing lawyer, but from "office policy" Recently, I went to court with a client charged with driving in Virginia with a blood alcohol content (BAC) of 0.16, which carries a mandatory and non-suspendable five days in jail where the BAC when driving is at least 0.15. I suggested to the prosecutor a guilty plea in exchange for removing the allegation of a BAC at 0.15 or over (I would have been less inclined even to advise that type of plea to my client if the law did not have any mandatory minimum jail sentence provision) and to agree to a suspended sentence, seeing that my client was likely going to lose on DWI for his often uncoordinated actions after being stopped for a clear moving violation where I likely would not win a motion to suppress. The prosecutor told me about some "office policy" that made such a plea deal not possible. In this courthouse as in most where I go, trials get called last, and sometimes there seems insufficient rhyme nor reason about which trial gets started before the others scheduled for the same courtroom on the same day. Mine was the last. Not expecting any success in suppressing the stop and arrest of my client, I focused on trying to keep out the breath test results, in part by arguing, unsuccessfully, that the evidence was insufficient to show that the following Virginia Administrative Code provision had been followed: "The person to be tested shall be observed for at least 20 minutes prior to collection of the breath specimen, during which period the person must not have ingested fluids, regurgitated, vomited, eaten, or smoked. Should any of these actions occur, an additional 20-minute observation period must be performed." 6VAC20-190-110. Moving onto plan B, on cross examination I focused the police officer on the positive aspects of my client's behavior, including that he remained standing -- not falling -- at all times after the officer told him to get out of his car, was eventually able to hold his leg up for the one leg stand, and made no unusual actions along the lines of urinating on himself. I then locked in the officer from his criminal summons to admit that he stopped my client more than two hours before his breath test was taken. I also locked him in that he had taken my client's preliminary breath test on the roadside and that he did not record the result ;he was unable to confirm or deny that the PBT was lower than the BAC result at the jail. I argued to the judge in closing that there was reasonable doubt whether my client's BAC at the time of driving was lower than the 0.16 at the time he blew into the Intoxylizer 5000 at the police station, in that perhaps his bloodstream was absorbing the alcohol more during the two-hour gap between the stop of his car and the breath test at the jail. I argued that caselaw shows that the question in DWI cases is about the BAC at the time of driving, not at the time of taking the breathalyzer test. The judge agreed with my reasonable doubt argument about whether the BAC at the time of driving was 0.15 or higher at the time of driving. This argument was hardly a shoe-in. Particularly without an expert witness in the Intoxylizer 5000 (some of my clients invest in one, but most do not, and we had none at this trial), I do not think all judges will accept the concept that the BAC can rise over a two hour period, rather than dissipate. Consequently, instead of getting a five-day mandatory minimum in jail had my client entered a guilty plea, we left the courthouse with a thirty-day suspended sentence. Back to the title of this blog entry: "You want a trial? I'll go to trial." Sometimes prosecutors and cops huff and puff against criminal defense lawyers who advise their clients to go to trial rather than to plead guilty. Such huffing and puffing ignores that it is the prosecutor's exclusive burden to try to prove a defendant guilty beyond a reasonable doubt, and not a defendant's burden to fall on his or her own sword. Moreover, a lawyer has an obligation to assist the defendant in making an informed decision whether to go to trial or not, and then to honor the client's decision. Winning at trial continues to be a rush. Jon Katz.

Posted by Jon Katz in Drunk driving/DWI/DUI at 00:00

Congratulations! You are in Blawg Review #142

[http://susancartierliebel.typepad.com/build\\_a\\_solo\\_practice/2008/01/blawg-review-14.html](http://susancartierliebel.typepad.com/build_a_solo_practice/2008/01/blawg-review-14.html)  
Anonymous on Jan 14 2008, 11:20