

The American Bar Association Judicial Division's Judicial Outreach Liaison and Judicial Fellows Program is producing another publication: *The Tribal Traffic Safety Bulletin*. This newsletter is shared twice a year, and will feature pieces written by Judicial Outreach Liaisons, Judicial Fellows, judges, and other program stakeholders. The newsletter will be focusing on highway safety matters in native lands. The Judicial Outreach Liaison and Judicial Fellows program is producing this newsletter because of the increased interest in impaired driving, seatbelt use, and motor carrier safety issues on native lands. We are excited to share this publication for our team to communicate news and other information to our valued partners and stakeholders on this topic.

PERSONAL CONTACT: WHAT JUDGES NEED TO KNOW ABOUT THE MOST OVERLOOKED PHASE OF AN IMPAIRED DRIVING INVESTIGATION*

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For judges, understanding the purpose, mechanics, and context of the “Personal Contact” phase of an impaired driving investigation provides important background for evaluating that evidence. Impaired-driving cases rarely turn on a single observation viewed in isolation. Instead, courts are often asked to consider the cumulative significance of numerous facts developed over the course of the encounter. Understanding how those observations arise—and what an officer may be attempting to assess during an otherwise ordinary roadside conversation—can provide useful context when evaluating the totality of the circumstances presented in court. Reviewing impaired-driving cases often focuses substantial attention on field sobriety tests while potentially overlooking some of the most persuasive evidence in the case. Long before a driver performs the Walk-and-Turn or One-Leg Stand, officers may have already observed confusion, memory problems, divided-attention deficits, impaired judgment, coordination difficulties, and other manifestations of impairment. Much of that evidence develops during the Personal Contact phase of the investigation.

As part of the National Highway Traffic Safety Administration (NHTSA) and International Association of Chiefs of Police (IACP) DWI Detection and Standardized Field Sobriety Testing (SFST) curriculum, the impaired-driving investigation is taught to law enforcement officers as a three-phase process, each with a specific investigatory question that must be answered in order to move forward:¹

Phase One—Vehicle in Motion: Is there reasonable and articulable suspicion to stop the vehicle?

Phase Two—Personal Contact: Is there sufficient evidence to continue the impaired-driving investigation?

Phase Three—Arrest Screening: Is there probable cause to arrest?

Of these three phases, Personal Contact frequently receives the least attention despite its substantial evidentiary value. Occurring before SFSTs are administered, this pre-arrest, non-custodial phase often generates some of the most persuasive evidence in an impaired-driving prosecution.

Few forms of evidence are more compelling than a defendant's own words and actions. Jurors may not fully understand the science underlying Horizontal Gaze Nystagmus, but they readily understand a driver who cannot answer simple questions, remember recent events, divide attention between simple tasks, or locate basic documents. Jurors do not need specialized training to recognize ordinary human behavior.

This is not a criticism of SFSTs. Properly administered SFSTs remain scientifically validated and indispensable investigative tools.² The problem arises when prosecutors and investigators focus so heavily on standardized testing that they overlook the valuable impairment evidence developed before the driver ever exits the vehicle.³

For judges, the point is important: SFSTs do not begin the impaired-driving investigation—they continue one that is already well underway.

What Is Actually Being Evaluated?

Personal Contact is more than an opportunity for law enforcement to obtain admissions. Its purpose is to evaluate the faculties necessary for the safe operation of a motor vehicle.

Every interaction provides an opportunity to assess perception, memory, attention, judgment, information processing, communication, coordination, dexterity, and the ability to follow

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instructions. The evidentiary significance lies not only in a driver's answers but also in how those answers are provided.

A delayed response may reflect impaired information processing. Difficulty locating requested documents while maintaining a conversation may demonstrate divided-attention deficits. Confused timelines may reveal impaired memory or orientation. Slurred speech, fumbling movements, or difficulty manipulating a wallet may indicate diminished physical faculties.

Importantly, drivers are being evaluated even when no formal questioning occurs. How they search for documents, follow instructions, maintain a conversation, and react to unexpected questions may be as probative as any admission of alcohol or drug use.

When reviewing a case, judges should consider not only what the driver said, but how the driver responded. Was the answer prompt and logical? Did it actually answer the question? Could the driver converse while performing another task? Did the driver understand and remember instructions?

Building Reasonable and Articulate Suspicion

By the time an officer approaches a driver's window, a pre-contact event has already occurred. That event may be a traffic violation, unusual driving behavior, a crash, a citizen complaint, or information provided by another officer.

During Personal Contact, the question is whether the facts developed during the roadside encounter establish reasonable and articulable suspicion sufficient to justify continuing the impaired-driving investigation.

Reasonable and articulable suspicion requires specific and articulable facts, considered together with rational inferences from those facts, that would cause a reasonable officer to suspect criminal activity.⁴ Some investigations begin with substantial evidence of impairment; others begin with very little.

For judges, the important question is often how the evidence developed. What did the officer know before the stop? What observations emerged during Personal Contact? When did the facts collectively justify continuing the investigation? Were innocent explanations or medical causes considered?

A sound investigation should be capable of confirming or dispelling the initial suspicion. Evidence inconsistent with impairment should not be ignored, and the acknowledgement by a prosecutor or law enforcement officer of innocent explanations can enhance their credibility with the factfinder.

Establishing the Conversation

Officers use a variety of techniques to initiate contact with drivers. Whether employing a traditional greeting-identify-reason approach, verbal judo, de-escalation techniques, or another professional method, the objective is the same: establish professional communication while assessing the driver.

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The ABA Judicial Outreach Liaison (JOL) Program

The ABA Judicial Outreach Liaison (JOL) Program The JOL program began in 1998 as part of the ABA Judicial Division's outreach efforts to provide trial judges with access to current and evidence-based practices that would assist them in their work on the bench. The program now consists of three National Judicial Fellows and Regional and State Judicial Outreach Liaisons (JOLs) throughout the country. Judicial Fellows and JOLs are active or retired judges who work to improve the administration of justice in impaired driving and other traffic safety matters through education, communication, community outreach activities and collegial and ethical collaboration with judges, and traffic safety stakeholders, locally, regionally, and nationally. While remaining independent and impartial, the JOLs and Judicial Fellows serve as a resource for the judiciary and other members of the highway safety community. This assistance takes the form of peer-to-peer judicial education, court case interpretations, guidance, and acting as a liaison between the judiciary and the highway safety community. The JOLs and Judicial Fellows help supplement and support on-going efforts by judicial educators around the country to provide essential information to judges in a number of important areas including evidence based sentencing practices for at-risk populations, DUI Treatment Courts, and reliable substance use and mental health assessments. Through the work of the American Bar Association JOL Program, judges throughout the country can gain a broader foundational understanding of the issues that they face in handling their fast-paced traffic related dockets. Currently 36 active and retired judges serve as JOLs and Judicial Fellows around the country, covering 47 of the 50 States, the District of Columbia, Native Nations, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa and the Commonwealth of the North Mariana Islands. This program is supported by a grant from the National Highway Traffic Safety Administration.



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How that interaction unfolds can significantly affect the presentation of the case to the court. Professionalism can impact credibility and often encourages spontaneous responses that more accurately reflect a driver's current condition.

Personal Contact is not merely an opportunity to obtain admissions—it is an opportunity to observe. Every question and answer may reveal information about memory, judgment, attention, speech, perception, or information processing.⁵ Early responses can be particularly probative because the driver may not yet appreciate the direction of the investigation or have had time to reconcile inconsistencies or tailor explanations.

Although a traffic stop is an investigative detention, voluntary roadside statements generally do not constitute custodial interrogation for *Miranda* purposes.⁶ Courts should nevertheless evaluate the circumstances of questioning, particularly as an encounter progresses toward arrest.

When reviewing body-worn camera or cruiser video, factfinders should look beyond the content of the answers themselves and consider:

- How quickly did the driver respond?
- Were the answers logical and responsive?
- Did the driver remain focused?
- Were instructions understood?
- Could the driver converse while searching for documents?
- Did the driver forget questions or abandon tasks?

For example, a driver stopped at 2:00 a.m. who claims to be coming from work but identifies the workplace as a library invites an obvious follow-up: "Is the library open until 2:00 a.m.?" The significance may lie not only in the inconsistency itself, but also in the driver's explanation—or inability to provide one.

Written reports necessarily summarize events, and details that appeared insignificant at the time may become important once the complete evidentiary picture emerges. Video frequently preserves details that may receive only abbreviated treatment in written reports. Those details may prove invaluable during case review by the prosecutor and defense, motion practice, and trial because they allow counsel and the factfinder to evaluate the driver's conduct directly.

Roadside Questions as Cognitive Assessment Tools

Most officers develop a collection of roadside questions they routinely use during impaired-driving investigations. There is no magic script, however. The precise wording of a question is generally less important than the mental or physical faculty it is designed to evaluate.⁷

Common roadside questions typically fall into several categories:

Orientation Questions assess awareness of person, place, time, and circumstances. Questions such as "Where are you coming from?" or "Why do you think you were stopped?" may reveal confusion, disorientation, or impaired information processing.

Medical Questions help investigators identify drivers who may require medical attention and distinguish impairment from medical conditions that produce similar signs and symptoms. These questions should be asked as early as possible during the encounter because, if a driver is experiencing a medical emergency, appropriate medical care can be provided without delay. Additionally, asking questions related to medical concerns early may encourage more truthful responses from an intoxicated driver before the driver recognizes the focus of the investigation.

Substance Consumption Questions focus on specific information about the form and amount of consumption that may influence impairment. It is no longer sufficient to ask a driver only whether they have "been drinking tonight." Investigators will specifically ask not only about alcohol, but also drugs, cannabis, prescription medications, and other impairing substances. Moreover, in evaluating the evidence, the factfinder should hear not only what substance the driver consumed, but also where it was consumed, when it was consumed, how much was consumed, and over what period of time the consumption occurred.

Subjective Effects Questions ask drivers how they feel and whether they are experiencing effects from a substance. Although drivers rarely admit impairment, they often describe symptoms that corroborate other observations.

Divided-Attention Questions require drivers to perform multiple tasks simultaneously, such as searching for documents while answering unrelated questions. These interactions may reveal attention and information-processing deficits.⁸ Because operating a vehicle, in essence, is a divided-attention task, testing the driver's ability to engage in more than one task at a time can assist in evaluating the ability to safely engage in driving.

Recall Questions evaluate memory and cognitive functioning by asking drivers to describe recent activities, timelines, companions, or consumption patterns.

Collectively, these categories create opportunities to assess the mental and physical faculties necessary for safe driving. Equally important as the answers themselves are the driver's manner of responding, consistency of those responses, and the ability to process the cognitive demands of the encounter in real time. Should the investigator obtain answers that are implausible or furtive, that evidence can aid in evaluating possible impairment or may demonstrate a consciousness of guilt theory.⁹

Plain Sight, Hearing, and Smell: Continuous Observation

During the roadside interview, officers continuously gather information through observation. The driver is being evaluated even when no questions are being asked.

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In considering an impaired driving offense, body-worn camera and cruiser video can be especially valuable for the factfinder. Written reports necessarily summarize events, and details that seemed insignificant at the time may assume greater importance when viewed within the complete evidentiary context.

Anything observed from a lawful vantage point may become relevant evidence.¹⁰ Odors of alcohol or cannabis, masking agents, bloodshot eyes, tremors, open containers, drug paraphernalia, passenger statements, delayed responses, fumbling movements, or difficulty locating documents may all contribute to the evidentiary picture.

No single observation necessarily establishes impairment. The significance lies in the totality of the circumstances.¹¹

Bloodshot eyes may result from fatigue or allergies. Difficulty locating registration documents may reflect nervousness. Slurred speech may have a medical explanation. But when those observations are combined with poor driving, inconsistent answers, delayed responses, and the odor of alcohol or cannabis, their collective evidentiary value becomes substantially greater.

Many of these manifestations require no specialized training to understand. Jurors may not remember the exact number of clues observed on a field sobriety test, but they often remember a driver who repeatedly forgot questions, struggled to locate a license, or appeared unable to perform simple tasks.

Evidence Before the Driver Exits the Vehicle

By the time a driver is asked to step out of the vehicle,¹² an observant investigator may already have developed a substantial picture of the driver's cognitive and physical functioning.

Before the driver exits, the evidence may establish:

- Whether the driver is oriented to person, place, time, and circumstances;
- Whether the driver can follow instructions;
- Whether the driver can divide attention between tasks;
- Whether the driver can recall recent events;
- Whether the driver appears affected by alcohol, cannabis, medication, or another substance;
- Whether a medical condition may be contributing to the presentation; and
- Whether speech, coordination, memory, judgment, or perception appears impaired.

In many cases, substantial evidence of impairment exists before the first field sobriety test is administered.

For both the prosecution and the defense, that means looking beyond the SFST section of the police report. During case review, motion

practice, trial preparation, and witness examination, the chronology of the investigation provides important context for understanding how individual observations developed and how those observations relate to the evidentiary picture as a whole.

The most useful questions are often broader: What did the officer first observe? How did the driver respond to initial contact? What cognitive or physical difficulties became apparent? Were innocent explanations considered? How did each new fact contribute to the totality of the evidence?

The strongest impaired-driving evidence tells that complete story.

Conclusion

Personal Contact remains one of the most productive yet underemphasized phases of an impaired-driving investigation. During this stage, investigators evaluate mental and physical faculties, identify possible medical concerns, assess divided attention, gather admissions, and develop evidence that may support—or dispel—suspicions of impairment. For judges, the lesson is straightforward.

Look at *all* of the evidence, even if the purpose for the introduction of the evidence is not readily apparent. Review the evidence chronologically. Study the available video. Listen not only to what the driver said, but how the driver said it. Consider pauses, delays, contradictions, forgotten instructions, divided-attention difficulties, and other indicators that reveal how the driver was functioning cognitively during the encounter.

Standardized field sobriety tests remain an essential and scientifically supported component of impaired-driving enforcement. But they are only part of the evidentiary picture. By the time the first field sobriety test begins, some of the most important evidence in the case likely already exists.

Judges must put aside their personal expectations of what an impaired driving investigation should look like and recognize that conduct that appears innocuous when viewed in isolation may take on different significance when considered with the other facts and circumstances developed during Personal Contact.

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1. Nat'l Highway Traffic Safety Admin. & Int'l Ass'n of Chiefs of Police, *DWI Detection and Standardized Field Sobriety Testing Participant Manual*, Session 4.
2. Jack Stuster & Marcelline Burns, *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent* (Nat'l Highway Traffic Safety Admin. DOT HS 808 839, 1998); Jack Stuster, *The Horizontal Gaze Nystagmus Test: The Use of Scientific Evidence to Improve Highway Safety* (Nat'l Highway Traffic Safety Admin. DOT HS 808 078, 1995).
3. *SFST Participant Manual*, Session 6, Personal Contact.
4. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (requiring specific and articulable facts, together with

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rational inferences from those facts, rather than an officer's unparticularized suspicion or hunch); *United States v. Cortez*, 449 U.S. 411, 417–18 (1981) (explaining that reasonable suspicion is evaluated under the totality of the circumstances and permits officers to draw objective inferences from the facts in light of their training and experience).

5. See *SFST Participant Manual*, Session 6, Personal Contact.
6. *Berkemer v. McCarty*, 468 U.S. 420, 439–40 (1984) (explaining that a typical traffic stop is an investigative detention rather than custodial interrogation, allowing officers to ask ordinary roadside questions without first administering *Miranda* warnings unless the encounter becomes custodial).
7. See *SFST Participant Manual*, Session 6, Personal Contact.
8. *SFST Participant Manual*, Session 6, Personal Contact.
9. See *District of Columbia v. Wesby*, 583 U.S. 48, 56–61 (2018) (considering vague and implausible answers, inconsistent accounts, evasive behavior, and other circumstances in finding probable cause); *Illinois v. Gates*, 462 U.S. 213, 230–39 (1983) (adopting the totality-of-the-circumstances approach); *Maryland v. Pringle*, 540 U.S. 366, 370–72 (2003) (applying a practical, common-sense probable-cause inquiry); cf. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (recognizing nervous, evasive behavior as a pertinent consideration); *United States v. Arvizu*, 534 U.S. 266, 273–75 (2002) (requiring consideration of circumstances collectively rather than in isolation); *Wilson v. United States*, 162 U.S. 613, 620–21 (1896) (recognizing the evidentiary significance of an accused's explanations of incriminating circumstances).
10. See *Texas v. Brown*, 460 U.S. 730, 739–40 (1983) (explaining that an officer's mere observation of an object in plain view from a lawful vantage point generally does not constitute a Fourth Amendment search and that information obtained through such observation may establish reasonable suspicion or probable cause).
11. See *Gates*, 462 U.S. at 238 (rejecting rigid, compartmentalized analysis in favor of a practical assessment of the totality of the circumstances); *Pringle*, 540 U.S. at 370–71 (describing probable cause as a commonsense determination based on the totality of the circumstances); *Wesby*, 583 U.S. at 56–61 (emphasizing that courts must consider the cumulative force of all the circumstances rather than evaluating each fact in isolation); cf. *Arvizu*, 534 U.S. at 273–75 (rejecting a divide-and-conquer analysis and recognizing that facts susceptible to innocent explanations may collectively establish reasonable suspicion).
12. This article assumes no officer-safety concerns or other circumstances warranting an earlier exit order. Readers are reminded that officers generally may direct drivers and passengers to exit a lawfully stopped vehicle as a matter of routine under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), *Maryland v. Wilson*, 519 U.S. 408 (1997), and their progeny. Nothing in this article should be interpreted as suggesting that officer safety should ever be subordinated to evidence gathering.