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Strategies in Handling DUI Cases in Florida

A one-day seminar designed for attorneys including public defenders and other legal staff involved in the defense and prosecution of DUIs.

Jacksonville, FL
March 30, 1999

- Michael J. Barbarette**
- Jeffrey L. Meldon**
Law Offices of Jeffrey L. Meldon
- David M. Robbins**
Epstein & Robbins
- Rick A. Swope**
Swope Reconstruction and DUI Consultants

This program has been approved by The Florida Bar for 7.0 hours of CLE credit, including .00 hours in ethics.

This program has been approved by The Florida Bar for CLE credit under the Certification Plan in the areas of Appellate Practice (3.50 hours); Criminal Appellate (5.00 hours), and Criminal Trial (5.00 hours).

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and a certificate of attendance.

Our Distinguished Faculty

Michael J. Barbarette received his J.D. degree from the University of Florida in 1987. He has practiced criminal defense with the Law Offices of Jeffrey L. Meldon in Gainesville since 1994, and focuses primarily on DUI defense. He is a member of the National Association of Criminal Defense Lawyers, the Florida Association of Criminal Defense Lawyers, the Eighth Judicial Circuit Bar Association.

Jeffrey L. Meldon received his J.D. degree from Case-Western Reserve University in 1969, and was admitted to The Florida Bar in 1971. Mr. Meldon is a member of the National Association of Criminal Defense Lawyers, the Florida Association of Criminal Defense Lawyers and the Eighth Judicial Circuit Criminal Defense Lawyers Association, of which he is Chairman of the DUI Defense Committee. He is also Vice Chairman of The Florida Bar Traffic Court Rules Committee. Mr. Meldon has previously written and lectured on writ of error coram nobis and driver's license suspension issues, as well as being the Chairperson for the 1997 and 1999 Florida Bar DUI seminar. He has a trial practice in Gainesville, consisting of criminal defense and personal injury with a great emphasis in the area of DUI defense.

David M. Robbins specializes in criminal law and for the last 15 years his practice has primarily been in DUI related litigation. He attended the University of Florida for his undergraduate degree and graduated from law school in 1972. Mr. Robbins worked as an Assistant State Attorney in Jacksonville for approximately three years and entered the private practice of law in 1975. He is a member of the Florida Association of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers and has been a frequent lecturer at Florida Bar Seminars on DUI defense.

Rick A. Swope is the owner of Swope Reconstruction and DUI Consultants in Davie. Mr. Swope is a former DUI Task Force Officer and Breath Operator/Instructor. He is a certified NHTSA Instructor for both students and instructors for the Standardized Field Sobriety Test course and holds degrees in Criminal Justice and Technology/Engineering. In addition to working numerous cases involving accident reconstruction, Mr. Swope consults widely in the area of breath testing and field sobriety exercises, and has testified for both the defense and prosecution. Having completed nearly 2,500 hours of law enforcement training, he frequently teaches classes involving breath testing and field exercises. Mr. Swope has taught approximately 4,000 police officers in his career, and is approaching testifying as an Expert Witness in court 1,000 times.

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The Agenda

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the Purpose of Sentencing
evoked Recent Statutory Changes

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A Mistake Will Win a License
ence Will Win a License

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The Benefits For You

This program will benefit attorneys involved in either the prosecution or defense of DUI's. It is important in today's stringent atmosphere of the prosecution of DUI's, whether you are a novice or experienced practitioner in handling DUI's, that you are up to date on the current issues. This course is designed to provide you with the current information necessary to successfully handle DUI's.

This seminar will examine and discuss how to handle a DUI from the initial call from the defendant through the investigation and trial.

Topics will include:

- Intoxilyzer 5000
- Vacating a Prior Conviction
- Suspended or Revoked License
- Review Hearings
- Accident Reconstruction
- Hiring an Expert

Who Should Attend?

This seminar is designed for attorneys including public defenders and other legal staff involved in the defense and prosecution of DUI's.

Written Materials

You will receive a professionally prepared manual at this seminar. This manual has been compiled by the faculty specifically for this seminar.

Audiotapes

The seminar will be audiotaped. If you cannot attend, you may order a set of the audiotapes from this program and the accompanying manual by using the registration form. Please allow four to six weeks after the date of the seminar for delivery.

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CPE Credit: Maximum Credit Hours: 7.0 each session (based on a 50 minute credit hour) Field of Study: Personal Development. Prerequisite: None. Level of Knowledge: Intermediate. Teaching Method: Seminar/Lecture. Advance Preparation: None. Please refer to the information in this brochure for outline, course content and objectives. Upon completion of this course, you will receive a certificate of attendance.

Critical Issues On The Agenda

9:00 a.m. - 9:45 a.m.

I. **May I See Your License and Registration, Please?**

— *Michael J. Barbarete*

- A. Stop Issues in DUI Cases

9:45 a.m. - 11:00 a.m.

II. **The Intoxilyzer 5000**

— *Rick A. Swope*

- A. Maintenance and Procedural Matters
B. Demonstrations

11:00 a.m. - 11:15 a.m.

Break

11:15 a.m. - 12:00 p.m.

III. **How to Vacate a Prior Conviction**

— *Jeffrey L. Meldon*

- A. Writ of Error Coram Nobis
B. Setting Aside a Prior Conviction for the Purpose of Sentencing

IV. **Driving While License Suspended or Revoked Recent Statutory Changes**

— *Jeffrey L. Meldon*

- A. 1995 Statutory Changes
B. 1997 Statutory Changes
 1. Non-Criminal Violations
 2. Criminal Violations
C. DWLSR Defenses

12:00 p.m. - 1:00 p.m.

Lunch (On Your Own)

1:00 p.m.-2:15 p.m.

V. **Administrative Formal Review Hearings**

— *David M. Robbins*

- A. Scope of the Hearing and Burden of Proof
B. Getting Ready for the Hearing
C. To Testify or Not to Testify, That is the Question
D. Paperwork, Paperwork, Paperwork - A Mistake Will Win a License
E. Witness, Witness, Witness - An Absence Will Win a License
F. What Works and What Doesn't

VI. **Petitions for Writ of Certiorari**

— *David M. Robbins*

- A. Pros and Cons of Appealing
B. Standard of Review
C. If You Win in Circuit Court, They Will Appeal
D. Sample Petition Reviewed
E. Recent Success Stories in the First DCA

2:15 p.m. - 2:30 p.m.

Break

2:30 p.m.-4:15 p.m.

VII. **Accident Reconstruction/Vehicular Homicide/DUI Manslaughter**

— *Rick A. Swope*

- A. What is Accident Reconstruction?
B. Visiting the Accident Site
C. Charges Involving Alcohol

VIII. **Formulas in Accident Reconstruction**

— *Rick A. Swope*

- A. Time and Distance
B. Viewing Reports, Photographs, etc.
C. Identifying the Driver/Passenger Through Kinematics

IX. **Hiring an Expert**

— *Rick A. Swope*

- A. Do I Hire an Expert?
B. When Do You Need an Expert?
C. Qualifications and Knowledge
D. Testimony Relating to Your Case
E. Exhibits, Costs, Trial Information

4:15 p.m. - 4:30 p.m.

Question and Answer

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STRATEGIES
IN HANDLING
D.U.I. CASES IN FLORIDA

SPEAKER: RICK A. SWOPE

1 This afternoon we're going to actually
2 cover a couple of things. I don't know what
3 the exact schedule says we're supposed to
4 have -- go right from accident reconstruction
5 into formulas and hire an expert and those
6 kind of things, but I'm still going to take a
7 short break, maybe ten minutes in between
8 there so I can have time to set up a little
9 bit. We will finish up this afternoon.

10 One of the things I've had a lot of
11 information about and I get a lot of calls on
12 speaking about is accident reconstruction,
13 and very seldom do you get to get some
14 information on accident reconstruction. So
15 they want me to put that in a format today
16 and I kind of went through a few things that
17 I'm going to bring out to you guys about as
18 far as going through the information and
19 seeing exactly what to do and what is
20 accident reconstruction.

21 Well, there is one thing before I
22 actually get started that they asked me to
23 make sure that you have your evaluations done
24 and, when you turn in your evaluations after
25 class today, they will give you your

1 certificate. So you have to have an
2 evaluation in before you get a certificate to
3 get your points or whatever it is you guys
4 get. So make sure you turn that in before
5 you leave today.

6 One of the cases that you generally
7 deal with that you don't have specifically a
8 lot of practice on per se is accident
9 reconstruction with a D.U.I. manslaughter. I
10 work -- there are a lot of reconstructionists
11 in the state, but there are very few that
12 work criminal cases involving accident
13 reconstruction, and I'll get into that a
14 little bit more as I go on.

15 But the few experts that you find that
16 work accident reconstruction for criminal
17 cases is kind of unique. And I'm not just
18 saying that because I work it, but it is more
19 of a unique situation to work that particular
20 kind of case.

21 One of the main things that you have
22 when you work this type of case is that most
23 attorneys are not entirely familiar with all
24 of the engineering aspects of an accident
25 reconstruction and they are not familiar with

1 a lot of the unique things that occur during
2 an accident reconstruction. Many of you, in
3 your practices, work a variety of things. A
4 lot of you work D.U.I. You deal with the
5 Intoxalyzer and you deal with basically a
6 limited amount of information.

7 For the most part the cases you deal
8 with are pretty much the same. You have a
9 breath test. You deal with the Intoxalyzer.
10 You deal with one machine. Sometimes you
11 deal with blood tests on a serious injury
12 accident, but for the most part the documents
13 you see, the depos you take, the officers you
14 deal with are pretty much the same ones all
15 of the time, for the most part.

16 So it is kind of like once you get into
17 this mode, you know what this officer is
18 going to say. You know what this guy is
19 going to say. You know what the maintenance
20 is going to be. So those are the things you
21 deal with all of the time.

22 On a serious injury case or a D.U.I
23 manslaughter case, not only are the stakes
24 higher for you and, of course, the fees are
25 higher, obviously, because you spend a lot

1 more time on it, but it is an area that many
2 of you don't go into, and it's an area that
3 you go into not very often. And when you do,
4 you can be sort of overwhelmed with all of
5 the evidence available.

6 There is a book -- and actually I'm
7 going to tell you about two books, and one is
8 I think Mike mentioned today something about
9 an article that was written by Robert Reed.

10 He also wrote a book "Drunk Driving and
11 Related Vehicular Offenses." That came out
12 by, I call it Michi, but I think it is Micki
13 Corporation last year and I wrote the chapter
14 in it for it -- you'll see it in the front of
15 the book -- I wrote the chapter for accident
16 reconstruction involving vehicular homicide.
17 And I wrote that chapter because Bobby wanted
18 it in the book.

19 again, he knew that many attorneys are
20 not familiar with that particular line of
21 questioning and the reconstruction analysis.
22 So he asked me to write that chapter and we
23 actually wrote it from about a hundred pages
24 down to maybe 20, 25 pages in the book and it
25 is actually a pretty good chapter, give you

1 an idea kind of what to do and I'm going to
2 talk about some of that today.

3 When you get an accident reconstruction
4 involving a D.U.I manslaughter, again, not
5 only are the things different for you, but
6 normally you run into things that, again,
7 that you don't run into in a lot of
8 misdemeanor D.U.I. cases.

9 First of all, the prosecutors have
10 generally been around for awhile. They are
11 not somebody that's just out of law school
12 and they've been in practice for a couple of
13 days trying their first case. Generally most
14 of them are pretty good. They know the law
15 well. They know a lot about the accident
16 cases. They work very closely with the
17 officers.

18 The officers on the other hand are
19 usually better trained, generally. I'm
20 giving a general term. But usually the
21 officers that do this type of case, they have
22 been around for awhile. They have done a lot
23 of cases. They know a little bit more than
24 the average officers. They deal with a lot
25 of accidents. They have had more training.

1 They've probably drawn blood from your client
2 at some point or ordered blood to be drawn.
3 So the stakes are a little bit higher and
4 you're dealing with people who are generally
5 more prepared or better prepared than the
6 average officer or average case that you
7 have.

8 Now in a reconstruction analysis that
9 you're going to find, one of the main things
10 is that the police report is a lot more
11 detailed obviously and they have things in
12 that you don't normally see in other cases.
13 They have measurements, diagrams, charts,
14 witness statements usually, and we're going
15 to talk about identifying the driver; in
16 other words, how you identify sometimes the
17 driver in a car.

18 And of course, if there is a person or
19 two that has been in a motor vehicle
20 collision, and there is two or three people
21 in the car, generally, you know, your client
22 is charged because usually they always charge
23 the guy who's alive with driving the car.
24 They ever charge the dead guy, obviously.
25 They only charge the guy who's alive.

1 So whether he's driving or not, they
2 usually charge him because the victim wants
3 some kind of retribution or something. And,
4 of course, those cases are what I consider to
5 be -- they are popular cases. They are media
6 cases. In many respects the media jumps on
7 them. Victim's families and things like that
8 jump into the fray and they want blood as
9 well,

10 and it's really not a hard case for the
11 State to prosecute, from most respects. It
12 is not hard for them to prosecute. They have
13 a body. They have a dead person. They have
14 your client with drugs or alcohol in his
15 system and that's all they need, for the most
16 part.

17 Usually the E.M.S. people will come and
18 say well somebody had a seat belt on or they
19 didn't and this guy was sitting behind the
20 driver's seat or whatever. And I've had a
21 lot of those cases in the past five years
22 where we have identified -- and I'm going to
23 show you a video tape on a case that was just
24 completed -- which shows that our guy was not
25 the driver of the car, and the State

1 indicated that he was and we proved through
2 physical evidence and through blood stains
3 and blood spatter, things like that, that he
4 was not the driver of the car, and I'll show
5 you that tape a little bit later.

6 Now, when you get a case like this --
7 again, it seems that in the past couple years
8 when I've gotten these cases that the
9 attorneys get hired very early now. They are
10 hiring people pretty quick, quickly. The
11 guys sometimes -- I have cases that the State
12 hasn't even charged them yet, but they have
13 the blood results back and the State is
14 getting everything together before they
15 charge him and the guy retains an attorney.

16 One of the first things you should do
17 is once you get the police report - at least
18 get some kind of idea - is attempt, if you
19 can, to preserve the vehicle. That's like
20 one of the first things you want to do if you
21 can do it.

22 A reconstructionist makes a lot of hay
23 and can go a long way if we can see the
24 vehicle too. Because there is a lot of
25 things that the officers generally don't

1 process that we can process such as brakes,
2 brake lag. We can check the brakes -- the
3 percentage of braking on the car, mechanical
4 defects, those kind of things. We can check
5 a lot of things on a car that normally the
6 police officer is not equipped to check. So
7 we could actually jump on that and kind of
8 check those things.

9 And getting to the scene, I tell every
10 attorney that I work with you must go to the
11 scene. You have to go to the scene. You
12 cannot get an idea of me telling you or
13 explaining to you or looking at pictures of
14 what the guy may have seen or not seen unless
15 you go to the scene.

16 And try to go to the scene at the time
17 of the accident. Most D.U.I. manslaughters
18 for the most part happen at night, two,
19 three, four o'clock in the morning. So
20 you're going to have to be inconvenienced one
21 night. You're going to have to go out there
22 because that's the only way you really get a
23 feel as to what maybe your guy saw or didn't
24 see, or whatever he was looking at. No video
25 tape or anything can actually show you what

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it looks like without you going out there.

One of the things that I talked about, and you'll see in some of these animations I'm going to show you, is depending on -- you know, obviously funds are limited in many cases. Judges don't want to give money to indigent people for reconstructionists. A lot of people don't have the money to front an accident reconstruction involving a D.U.I. manslaughter because the costs can be -- they can be through the roof really.

People ask me all of the time, what is the cost of an accident reconstruction in a D.U.I. manslaughter case? Well, the cost can go from 5,000 to one that I had recently which was 65,000. It just depends. And I know you're looking going 65,000, that's more than the attorney makes. Well yeah, it is, in some cases.

But the reconstruction analysis that we did, we had to hire video people to go out. We did photographs and we can actually -- I use companies that can actually go out and give you a photograph at a particular point in time and the guy can come in and testify

1 this is what it looks like to the naked eye
2 or human eye at 2:30 a.m. in the morning, see
3 exactly what it looks like.

4 Because a lot of times you look at a
5 video, you look at a photograph, sometimes it
6 is brighter. Sometimes it is less bright.
7 But the main thing is you want to be able to
8 see what your client saw or what the victim
9 saw or witnesses or whatever, and you can do
10 that through the right condition and through
11 the right photographic equipment, video tape
12 and those kind of things.

13 It is a lot better than going out with
14 a video camera sweeping the area trying to
15 get a video. And it also helps get it into
16 trial as well if you can have that kind of
17 information. You can't do that in a lot of
18 cases, but some cases you can do that. So
19 the amount of the reconstruction, which I get
20 asked all of the time, is just depends.

21 We can do one -- really what costs in a
22 reconstruction is exhibits. That's what
23 costs. There are companies out there that
24 charge a lot of money for exhibits, some kind
25 of mediocre in fees. But that's where the

1 costs can be associated and can go right
2 through the roof ones you start doing trial
3 boards and exhibits and the animations you're
4 going to see today. Most animations run
5 between 5 and \$8,000 now. And animations are
6 very, very difficult to do.

7 Most people, for some reason, are under
8 the impression that computers have come so
9 far that animation, all you have to do is
10 kind of sit down at the computer and five
11 minutes you have an animation. And that's
12 not true. We have to do it step by step,
13 second by second, frame by frame.

14 Each frame has to be put up. We have
15 to go through each frame, you know, and go
16 through it and we have to figure out the
17 movement of the vehicles and we have to all
18 do it to scale to make sure that the State
19 does not have an objection that we can't use
20 the animation. The only way we can do that
21 is by scaling each individual moment in time,
22 so to speak, frame by frame.

23 And some people call it a cartoon and I
24 call it -- I shouldn't say it looks like a
25 cartoon, but it is the same effect. In other

1 words, the coloring is perfect. We can put
2 your person in the car. We can put his body
3 outline by his weight and his height.

4 You'll see the guys that one of the
5 videos I have that gets ejected. Two people
6 get ejected from a car. One has his arm
7 ripped off on the door as he's coming out and
8 the arm flies out and we're doing all of that
9 and all of that is to scale. His height,
10 weight, everything is to scale. His face is
11 just a face. It doesn't match him, but the
12 body outline and everything is the same.

13 The car, we can do the interior. We
14 can do the speedometer on the car. We can do
15 a timeframe. We can do anything with those
16 types of issues. So that's just kind of to
17 let you know basically where we can go with
18 animations.

19 Now on a reconstruction analysis I'm
20 going to show you basically just an animation
21 first and show you a little bit about what
22 we're doing, talk about the exhibits we can
23 do.

24 This particular case is one where we
25 have a client and he is making a left hand

1 turn, and our client is D.U.I. and the car
2 that hit him is D.U.I. So there is two. And
3 the passenger in our car was killed. And so
4 they hit the right door, the guy spun around,
5 hit his head inside, broke his neck. I
6 forget exactly all of the issues now, it's
7 been a couple of years.

8 But anyway, what the State attempted to
9 do at that point is they wanted to charge our
10 guy for the death because he made a left hand
11 turn. We proved that we had the green arrow
12 and, in fact, the other D.U.I. driver came
13 through the intersection on a red light and
14 ended up hitting our car. And you'll see it
15 in this particular animation. And we always
16 show it -- you can show it different ways;
17 the driver's view, you'll see different
18 perspectives in here.

19 This is in Miami, and you see that we
20 only did basically the intersection because
21 that is that's all we're interest in, and you
22 can see we show him -- that's our guy in the
23 white car and you can see that the lane on
24 the bottom, all of the traffic is stopped
25 except the lane to the right. This guy kind