Public Hearing

before

SENATE TASK FORCE ON ALCOHOL RELATED MOTOR VEHICLE ACCIDENTS AND FATALITIES IN NEW JERSEY

"To consider whether current penalties for drunk driving are adequate, including whether criminal penalties should be imposed, and the use and effectiveness of the Breathalyzer"

LOCATION: Medical Science Building University of Medicine and Dentistry of New Jersey

DATE:

September 23, 1997 10:00 a.m.

MEMBERS OF TASK FORCE PRESENT:

Alexander Menza, Esq., Chairman Declan J. O'Scanlon Jr., Vice Chairman Janet G. Alteveer, M.D. Joseph J. Bell Reverend Lonnie Ford Antonio Martinez, Esq.

ALSO PRESENT:

Anne M. Stefane Office of Legislative Services Task Force Aide

> Hearing Recorded and Transcribed by The Office of Legislative Services, Public Information Office, Hearing Unit, State House Annex, PO 068, Trenton, New Jersey



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ALEXANDER MENZA, ESQ., (Chairman): Ladies and gentlemen, we'd like to open the second public hearing of the Senate Task Force on Alcohol Related Motor Vehicle Accidents and Fatalities in New Jersey.

Our third hearing -- and the final hearing -- will be in Camden on October 21, 1997, and we will focus, in that hearing, on rehabilitation, etc.

The persons who are present here today-- To my right is Reverend Lonnie Ford; next to Reverend Ford is attorney Antonio Martinez. We have our two aides with us, Kathy and Anne Stefane -- not Kathy and Anne Stefane, I just don't remember Kathy's last name. (laughter)

Kathy?

MS. ESPIEG (Office of Legislative Services Staff): Espieg. (indicating pronunciation)

MR. MENZA: And Anne Stefane, our legislative aide. To my immediate left is Declan O'Scanlon. He is a businessman and councilman in Little Silver, New Jersey. To my left, also, is Joseph Bell, an attorney in Morris County; and to my far left is Janet Alteveer, a physician -- emergency room physician -- and she is from Moorestown, New Jersey. Paul Cymbaluk, a police officer from Cranford, New Jersey, is also a member of this Task Force but was unable to be with us today.

So with that, why don't we just go ahead and proceed. There are a lot less people here than there were at the last meeting. This hearing, as you know, focuses on the Breathalyzer and the penalties relating to drunk driving. Excuse me just a moment. (confers with aide) There is no shut-off on this. (indicating microphone) And all I can tell you is what I used to tell the jurors, don't listen when I'm talking to people up here.

Please be so kind as not to speak from the audience because we're recording this. It's all going to be transcribed. By the way, the first hearing has been transcribed. I presume it's a public record. It's available to any of you.

With that, our witnesses will be Senator Gordon MacInnes; Trooper Herb Leckie, from the New Jersey State Police, will explain to the Task Force the Breathalyzer; Peter O'Mara, a defense attorney; Chief Dan Colucci, New Jersey Chiefs of Police Association; Joseph Chiappa, Intoxicated Driver Resource Center; Peter Lederman, a defense attorney; the New Jersey Restaurant Association; Donna Frandsen, from MADD; Jack O'Connor, New Jersey Restaurant Association. That's about it. We have a relatively short meeting today, so why don't we just get to it.

Senator Gordon MacInnes will be our first witness.

Senator.

SENATOR GORDON A. MacINNES: I'm supposed to take the podium, is that right? Is that where you want me? (affirmative response)

Thank you, Senator Menza, your Honor, Alex. How are you supposed to refer to a man with so many distinguished--

MR. MENZA: Citizen.

SENATOR MacINNES: Citizen. Citizen Menza. Thank you.

Let me begin by commending the members of the Task Force for devoting your time and your attention to this serious issue. I know the pay is not real good and that does not explain your presence here today, but it's a good example of important contributions that people make, and I appreciate it, for one. I'm going to apologize for not speaking directly on point to the purpose of the hearing today. I am not here as an expert on the physics of Breathalyzers. I'll let the Trooper handle that.

But let me give you my statement. I appreciate this opportunity. I appear as the prime cosponsor of Senate Bill No. 1411 to reduce the legal blood alcohol content from 0.10 to 0.08. Tomorrow at this time I'll be at St. Matthew's parish in Randolph to attend the funeral mass for Bill Wright, a friend and constituent, who died in an incredible freak accident last week. It had nothing to do with alcohol.

Bill Wright was an inspired crusader for the bill to lower the legal BAC from 0.10 to 0.08. He was driven by the fact that his 39-year-old wife and the mother of their three children was killed by a drunk driver in February of 1995. Teri Wright's death led to the introduction and enactment of two bills, called Teri's laws, that toughened the criminal penalties for killing someone as a result of driving drunk and also to increase the effectiveness of license suspensions when the suspension is due to a drunk-driving conviction. It's a law that basically allows us to distinguish people who are on that list for DWI from those who are on the list because they didn't pay their library fine. These bills sailed through the Legislature. Bill Wright and his friends had gathered tens of thousands of signatures across the State to bring pressure on legislators.

But, as it turned out, those who drive while drunk are not well organized politically. They don't hire Trenton lobbyists, and they don't collect PAC funds to distribute at campaign time. But, as we turn to the next step in reducing drunk-driving tragedies in New Jersey, the situation is very different.

The very existence of this Task Force is proof of the difference. You were created because the Senate Committee on Law and Public Safety did not want to face down the restaurant operators, the tavern owners, and the beverage distributors in an election year. Now, all of these interests are major players in campaign finance in lobbying. That's their right; I'm not criticizing them. They represent their interests effectively and legally.

But there is a sharp contrast between these players and Mothers Against Drunk Driving or the Teresa Wright Promise Foundation, which Bill Wright established to try and push for stronger, tougher measures. Neither of these groups make campaign contributions. They rely, as this Task Force relies, on the volunteer efforts of citizens -- ordinary citizens -- to be informed and active on these issues. And in an election year, that's nice, but it's not as good as campaign funding.

The Committee said, basically, "There's just too much conflicting evidence. We need someone else to take a look at it before we act." Now, even the Chairman of the Committee, who is the prime sponsor of S-1411 to adopt the 0.08 standard, backed down. Now, beyond the matters of politics and money, the Task Force has a relatively simple job. Answer this question: Will adoption of the 0.08 standard reduce deaths from drunk driving by 6 percent, or will it reduce them by more than 6 percent?

Even bitter opponents of the measure I sponsor acknowledge that about 6 percent of drunk-driving deaths occur with drivers found to have a blood alcohol content level of between 0.08 and 0.10. Advocates maintain that an even greater reduction is possible, but in the end no one argues with the likely result, lives will be saved.

New Jersey law should send a signal to every driver that our tolerance for drinking and driving together is getting lower, much lower. It's time for our laws to catch up with our neighbors in 15 states and with countries in most of Western Europe which have adopted blood alcohol content standards below 0.10. The research suggests that adoption of 0.08 sends a strong message to social and problem drinkers, both of whom reduce their intake.

By the way, the Task Force might help clear the air on some assertions by my allies who support 0.08. My allies make a case that a 180-pound male -- which I happen to be -- can drink up to four and a half drinks in an hour on an empty stomach before the 0.08 threshold is breached. Now, my experience suggests to me that at four and a half drinks in an hour I would not be able to stand, never mind drive, and there's just something that defies both experience and intuition with these assertions by the proponents. It's like they're saying, "Well, gee, you only have to cut out one drink. You can still have three and a half drinks in an hour on an empty stomach and be okay." And that just doesn't make sense. I hope that maybe the Task Force will look at the evidence that's available on this question, because I don't want to be encouraging people to believe that -- even at 0.08 -- we're encouraging what is basically liberal and legal drinking.

The evidence is convincing that where states or nations reduced the legal blood alcohol content standard, increased penalties, and stepped up enforcement that people cut down on the lethal mixture of driving and drinking and that lives were saved. New Jersey needs to catch up to this simple equation. I hope the Task Force will put its investigation and findings in this context.

Thank you very much, Mr. Chairman.

MR. MENZA: Thank you, Senator.

Do any members have any questions of the Senator? (no response)

Thank you, Senator.

SENATOR MacINNES: Thank you.

MR. MENZA: Is the Trooper all set up? (negative response)

Do you want to set up now? (affirmative response)

Mr. Bell just reminded me and/or advised me that it takes about 20 minutes for the Breathalyzer to warm up. I wonder if it would be too inconvenient for us to just continue on while the Trooper does this.

You're not going to be particularly noisy? (negative response)

So why don't we just move on to the next speaker, Peter O'Mara -who is a defense attorney.

All right, Mr. O'Mara, sir.

PETER M. O'MARA, ESQ.: Thank you, Mr. Chairman.

I just want to explain first, I am a defense attorney. I'm a founding member of the National College for DUI Defense, but prior to defending probably over 600 people charged with DWI in the State of New Jersey, I was an intern at the Staten Island District Attorney's Office, the Harrisburg, Pennsylvania, District Attorney's Office, as well as the Monmouth County Prosecutor's Office. So I became well aware of the different treatments that DWI is given in different states, such as Pennsylvania and New York. The current status of the DWI laws in the State of New Jersey leave New Jersey as one of only two states in our nation that keeps DWI offenses as a motor vehicle offense.

The first thing I just want to address very briefly is the criminality. I would urge the Task Force to consider very strongly criminalizing the offense of DWI. This is for several reasons. This would increase the range of penalties. As it is now, I've handled probably hundreds of people who have been either convicted or charged of their third offense; not one of them has ever gone to jail. Even though the statutes provide for jail time for these people, they simply don't go. They're getting away with going to programs. They go to inpatient programs and people don't send them to jail.

The other important factor of criminalizing this particular crime -or, hopefully, soon-to-be crime -- is that there would be a broader range of discretion. There would be a broader range of things that the prosecutor could do in handling these cases. In New Jersey when you're charged with certain crimes, you're entitled to Pretrial Intervention. In Pennsylvania, they have a similar program -- it's called ARD, or Accelerated Rehabilitative Disposition.

And I have to say, I've defended people who have never committed a motor vehicle violation in their life. Their DMV abstract is completely clean. They're good, solid, taxpaying, family-raising citizens who have never even had a brush with the law, and for some unfortunate reason, they may or may not have known that they were above the legal limit, but they lose their ability -completely lose their ability -- to make a living. For some of these people, losing their license for six months can mean losing their job, and I think the deterrent effect of the 39:4-50 statute is going beyond what's necessary in these cases.

I'll give you an example. In Pennsylvania, if somebody commits a DWI and they've got a clean record and they're otherwise eligible for what would be in New Jersey a Pretrial Intervention, they're given this program. They go into Accelerated Rehabilitative Disposition. They pay thousands of dollars in fines. They'll go to a rehab program, but they either won't lose their license or they'll be given, at least, a license so that they can drive to work. That's also the same in our neighboring state, New York. They have provisional licenses where these people can go to work.

If they do not, within seven years-- If they go for seven years without committing another violation, then this can be taken off their record. However, if within seven years they are charged again with driving while intoxicated, the first-offense and the second-offense penalties would be levied upon that person. So the deterrent effect is great while, again, providing prosecutorial options and also, again, leaving a person who really shouldn't be subject to a complete loss of license to have an option and something that would rehabilitate them, force them to go to an alcohol treatment program.

That's really the only thing I want to discuss regarding the criminality factor that's being considered. New Jersey is one of only two states, again, that still keeps the DWI offense under this code.

Additionally, criminalizing this would allow for jury trials, and while, again, having bench trials of these matters allows for the swift prosecution of these cases, I think there are certain cases where a judge finds himself-- And very respectfully to municipal court judges who do a fantastic job in this State, there are judges who find themselves almost forced -- or I can see political pressure upon them -- to convict people. If these were thrown before a panel of 12 citizens, I think we might get a little bit fairer results, and this is what would occur if it were criminalized. Again, the current status leaves it only to be decided by a municipal court judge who is, in many senses, just an extension of the police department.

I really wanted to address the group, though, regarding the Breathalyzer. Mr. Leckie (*sic*) is here from the New Jersey State Police. He's going to explain the Breathalyzer, I assume, and discuss possibly some of the case law. I do know Mr. Leckie through several cases where we've been involved together, and I must say, I have to commend him as an outstanding officer and just a fine example of the New Jersey State Police, because what I'm going to say goes to the current status of the Breathalyzer and much of it has to do with the New Jersey State Police.

As well as being only one of two states where the statute is not a crime, we are one of only two states that are still utilizing a device called the Breathalyzer 900. Through my studies with the National College of DUI Defense, I have learned of and I've seen operated many different types of devices, and I know Mr. Leckie has, too.

The current device -- and you're going to see it operated -- traps an air sample, bubbles it through a chemical-containing ampoule which changes color, and the result that comes out is on the basis of a comparison between a standard ampoule through which no sample has been bubbled and the ampoule through which the suspect's breath has been bubbled. And this comparison is done through a light analysis, and it translates into an analog result which is, basically, obtained through a police officer turning what's called a balance wheel until a null meter is centered on zero, and then the result is obtained.

The device leaves a lot of room for error in that respect, but one of the important things is that in order to establish the admissibility of the Breathalyzer result, the State needs to prove that the Breathalyzer was in proper working order. The calibration and inspection of the device is left to the New Jersey State Police, and Mr. Leckie, again, can explain this. A member of the Breath Test Unit of the New Jersey State Police comes in, calibrates and inspects the machine, fills out a certification saying that the machine was in proper working order.

Well, ladies and gentlemen, this device is quite antiquated. It was designed in the 1950s by a man named Dr. Borkenstein (phonetic spelling), who has testified in court that he never designed this device for use as evidence in a court of law. He testified to this in a case called *State v. Downey*, which is a New Jersey Supreme Court case.

The current devices are very small. They are infrared devices, which when you turn them on, calibrate and inspect themselves, much like your computer does when you turn it on. It runs diagnostic tests on itself. It can be checked through modem by the New Jersey State Police. Each of these devices can be plugged into a modem which can be checked from a central station. What these do-- Instead of trapping a device (*sic*), bubbling it through a chemical solution and then comparing the change in an analysis, it actually--When you blow a sample through it, it travels right through the machine, and it does an infrared analysis -- an instant infrared analysis -- of the breath sample. This then is printed out to three digits -- digital readout -- and it actually prints out the results. The current machine does not print out the results. It relies strictly on the police officer transposition of the results, and in many cases, they won't even let the suspect see what the result is that's obtained. So I'm stressing, again, that there are devices that are much, much more updated available.

I do understand we do need to rid the roadways of drunk drivers, and I'm just asking that we ensure that the loss of liberty that is experienced by DWI convicts comes about through a fair application of the laws and through the utilization of a fair device.

Again, I've represented scores of people who-- The observations of the police officer, while establishing what's called probable cause to bring them in to subject them to a Breathalyzer test, these observations do not amount to proof beyond a reasonable doubt. What I'm saying is that these people are convicted strictly on the basis of a Breathalyzer. The results of the psychophysical test -- touching your nose, tilting your head, saying the alphabet -- have not been enough to convict these people; however, just on the basis of the Breathalyzer result, they're losing their liberty. They're losing their ability to make a living. Their families might be suffering.

While, of course, the public policy is a sound one, and I do applaud that public policy, I think that we need to have a device that is more accurate and more updated in our enforcement of these laws.

> Thank you very much for allowing me to speak today. Thank you. MR. MENZA: We have some questions. MR. O'MARA: Sure.

MR. O'SCANLON: Pete-- Mr. O'Mara, excuse me. The other devices available that you were talking about -- the infrared -- are there a score of these, are there 10, or is there 1 that's generally accepted in all the other 48 states?

MR. O'MARA: There are different devices that are utilized in different states. One of the concerns that I've heard is that there is a good body of case law which supports the admissibility of the Breathalyzer 900. I would, again, respectfully, assert that this case law has, in many instances, bent the evidence rules to allow for the -- to facilitate the admissibility of the Breathalyzer result.

But there are, in these other states, bodies of case law supporting the admissibility of those devices, and I'm sure that if this device was introduced, our courts would have to consider our sister states' case law in establishing the questions of admissibility of that device. However, I'm aware of about five or six different devices-- Again, I don't mean to throw the onus on Trooper Leckie, but I do know that he's-- He probably knows more than I do even regarding the infrared devices. I've just seen them operated and learned a good deal about them.

But that's all I can tell you, Mr. O'Scanlon.

MR. MENZA: I think the question was: How many new devices are there?

MR. O'MARA: I couldn't tell you for sure, sir. I'm aware of about three or four different devices, because I've seen them operated. Again, I've been to seminars regarding the operation of these devices, but they're all based on infrared technology. MR. MENZA: How many other states utilize the Breathalyzer 900?

MR. O'MARA: I think every state utilizes the Breathalyzer or a breath analysis device. The Breathalyzer 900 is, to my knowledge, only used in two states: New Jersey and Nevada.

MR. O'SCANLON: Was it used in a lot more and was phased out?

MR. O'MARA: It was. It was years ago and then the other states updated technology.

DR. ALTEVEER: We read all the time that our courts are overloaded, that there is a big backlog of jury trials. Is there any data available that would examine the impact of adding the load of DWI into the criminal courts and to how that would play in the delays and how you would handle the license revocation and the temporary license?

MR. O'MARA: The current system-- Actually, there is a mandate by the New Jersey Supreme Court. Former Chief Justice Robert Wilentz handed down a mandate through the Administrative Office of the Courts that these cases must be tried in municipal courts within 60 days. It's commonly referred to as the 60-day rule, and although lawyers are subject to a book of court rules about this thick (indicating), this 60-day rule doesn't exist in the court rules; however, it's pretty strictly enforced.

It would create a situation that would actually ease the load on municipal courts. I'll give you an example. I was in Middletown, New Jersey's municipal court yesterday. There were over 100 cases being handled there, and they're handled like that (gesturing), very quick. They move very quick, and these courts are loaded, too. As well as the Superior Courts, the municipal courts are quite loaded. So it would probably take some of the burden off of the municipal courts and shift it into the Superior Courts and would probably necessitate that the prosecutors' offices and the courts actually adjust to this.

There has been discussion, and there might have to be regional municipal courts or strictly courts that are set up for handling DWI offenses or, again, arms of the prosecutors' offices-- There is definitely a lot of logistical consideration regarding the prosecution of these cases that would have to be considered in criminalizing it.

However, I am confident that -- having been a member, again, of both prosecution offices and as a defense attorney -- the system would be able to handle this. Additionally, there would be a lot more options -- prosecutorial options.

DR. ALTEVEER: Are you aware of any analyses that have been done in states that did this, that examined what the impact was on the different court systems?

MR. O'MARA: No, ma'am, I'm sorry, I'm not aware of any analyses of such.

MR. MENZA: How many drunk-driving cases are there per year in the State of New Jersey?

MR. O'MARA: The last numbers I heard-- Again, Trooper Leckie might know this. But I was aware that in, I believe it was in 1989, there were over 40,000 DWI cases in the State of New Jersey.

MR. MENZA: That would have a heck of an impact on the Superior Court.

MR. O'MARA: It would, but it also-- Now, it's being handled in the municipal courts through the municipal prosecutors, who are kind of under the guise, usually, of the county prosecutor.

MR. MENZA: Except if you criminalize it, you'll have jury trials.

MR. O'MARA: You'll have jury trials, but I think that the penalties would become stiffer as well. I think that you would probably see the same number of cases going to the jury -- going to trial -- same number of guilty pleas, because people, again, would be, I think, facing stiffer penalties.

Because as you know, Judge, the municipal courts can only issue six months in jail. If somebody, for a second or third offense, was looking at a five- or ten-year jail sentence, there is a greater possibility of a guilty plea in that situation.

MR. MENZA: Well, are you suggesting, now, plea bargaining, which I understand does not exist in the municipal court?

MR. O'MARA: No, there is a rule that DWI cases cannot be plea bargained in municipal court.

MR. MENZA: But then there would be plea bargaining in the Superior Court, would there not?

MR. O'MARA: There would, by necessity, be plea bargaining.

MR. MENZA: What degree of crime would you suggest as first, second, third, fourth disorderly--

MR. O'MARA: Disorderly persons through third or second would probably be what it would need to be. I think that in an aggravated situation, it could very easily be considered a second-degree crime. I think that actually in a situation where there was somebody killed or a vehicular homicide that could be a consideration of a first degree.

However, again, Judge, as you know, the law is, intoxication can become a defense to certain offenses by negating scienter.

MR. MENZA: Tony, do you have any questions?

MR. MARTINEZ: Yes.

In Pennsylvania -- and this is to expand on some of the questions -- without the benefit of ARD the DWI statute, to my understanding, carries a mandatory one-year loss of license.

MR. O'MARA: That's correct.

MR. MARTINEZ: And, in addition, to address the point of the impetus for going to trial, if you're eligible for an ARD, as you stated, it's my experience there's always at least a minimum license loss of between 30 to 90 days with the ARD.

MR. O'MARA: That could be, or, again, a provisional license which allows a person just to drive to work. And if they're caught driving beyond what the provisions of the license are, there would be additional penalties for that.

MR. MARTINEZ: But it would appear to me that by the creation of the ARD or PTI in New Jersey, that there would be a disincentive, if you're eligible, for taking that case to trial, because if you lose at trial, you're looking at a mandatory one-year loss of license.

MR. O'MARA: That's correct. I'm not sure if I understand your question, but I believe-- I'd just like to say I think that PTI would only be afforded in very few cases, again, where a person has never had a-- MR. MARTINEZ: First offenders.

MR. O'MARA: First offenders--

MR. MARTINEZ: With clean driving records.

MR. O'MARA: --even then-- Yes, with clean driving records, no prior even brushes with the law. I think it would be used very sparingly, but it would be an option.

MR. MARTINEZ: In your experience, the municipalities in New Jersey-- There's an excess of 500 municipalities and the judges are all political appointees, is that correct?

MR. O'MARA: That's correct.

MR. MARTINEZ: And what you were alluding to earlier -- if I didn't misunderstand you -- is the pressures of reappointment and the pressures that are borne upon the judges even by the local police department that serves that municipality to maintain the rate of convictions on DWIs.

MR. O'MARA: Well, I just feel that a jury trial might afford greater consideration of the facts in the case.

MR. MARTINEZ: Has your Institute studied the issue of regionalized DWI courts with one appointed judge and one appointed prosecutor to actually handle those trials?

MR. O'MARA: If the Institute you're referring to is the National College of DUI Defense, when I'm involved in seminars with this group, they kind of just show pity towards the lawyers from New Jersey who are forced to deal with DWIs in our system, that there are no jury trials. So there isn't much consideration given to New Jersey. Most of the focus is on the other states in this particular Institute. MR. MARTINEZ: The Intoxicolyzer (phonetic spelling) -- I believe you made mention of that -- that gives out a printout reading of the level of alcohol in someone's blood at the time they give a test, is that correct?

MR. O'MARA: That's correct.

MR. MARTINEZ: And how is that, for lack of a better word, tamper proof to make sure that the one sample matches up with that defendant, in terms of the printout? Is there anything that's logged in, such as taking a thumb imprint or something to match up to make sure that the actual sample and the readout that's being given pertains to that one individual?

MR. O'MARA: Well, I think the identification would rely upon the police officer's testimony and his recollection. It's very rare that a police officer is not able to recall this is the person he administered a Breathalyzer to, and in many situations, there is a videotape at the police station which records the person actually performing the test.

Additionally, there are devices that are utilized in certain states. The name of the device is the Data Master (phonetic spelling). When a person is arrested, their name, age, occupation, where they work, and a number of other questions are actually punched into this computer device, and this data is, again, collected by modem, and the state is able to keep track of where people might have been drinking, what they were drinking, occupational trends of DWI, age trends, gender-based trends, and these things are able to be tracked and recorded by the state through the use of this device.

MR. MARTINEZ: But in New Jersey, the State Police aren't required to use videotape, isn't that correct?

MR. O'MARA: They're not required, but in many cases they do.

MR. MARTINEZ: Local police generally do, but the State Police don't.

MR. O'MARA: The State Police generally don't.

MR. MARTINEZ: That's all I have.

MR. MENZA: Mr. Bell.

MR. BELL: Just one, if I may.

You indicated that there was a 60-day rule from the point of arrest to the date of trial.

MR. O'MARA: That's correct.

MR. BELL: Does that create any kind of problem in adequately representing your client?

MR. O'MARA: In many situations it does.

MR. BELL: Could you tell me how?

MR. O'MARA: Well, oftentimes, the defense of somebody accused of DWI -- well, not oftentimes-- If somebody has taken a Breathalyzer, the defense consists of trying to establish whether or not the Breathalyzer result, which is going to be proffered against your client, is accurate and this can take review by experts. Experts that are commonly employed in the State of New Jersey are former Chief Forensic Scientists for the State of New Jersey, former Breath Test Coordinators -- such as Mr. Leckie (*sic*) -- and these gentlemen can review the discovery or the pretrial evidence, which is provided to a defense attorney, to determine whether or not they could be of value in, again, evaluating this case or presenting testimony. To prepare one of these cases-- Generally, when a person is arrested, they don't come the next day to an attorney. Many times, they'll wait until just before their first court date, and this can be a matter of weeks, so an attorney can be faced with four or five weeks (*sic*) in which to prepare a case for trial or less if it's going to come under the 60-day rule. It does create a lot of pressure. It mandates that you do certain things immediately, and if handled properly, it's not that big of a problem, but it does create problems in certain situations, especially if you've got other cases scheduled.

There are questions of priority. I've had to go to the Assignment Judge in my county, who is the head judge in the Superior Court, in order to have him call municipal courts and help me arrange my schedule because I would have two or three cases possibly scheduled on a Monday. They're DWIs, the court knows they're going to get a call from the Administrative Office of the Courts if this case doesn't go or if it's not disposed of within the 60 days, and they're under a lot of pressure. If you ask for an adjournment because you have to be in another town or another court, they're going to say, "No." You have to have very good reasons for any adjournments even within 60 days.

So it does create logistical problems, but, again, I think that it facilitates and promotes the swift enforcement of the DWI laws.

MR. BELL: Thank you.

MR. MENZA: You said-- I'm sorry, Mr. Martinez, go ahead.

MR. MARTINEZ: I just had one question. In Pennsylvania, for certain criminal offenses, they have a statute that certain matters have to be prosecuted within the time span of a year, and if it's not, that makes it a fatal defect in the case and the defense attorney can move for dismissal on that case. Now, I use that as a preface to my next question, which is: The unwritten 60-day rule that was put forth by Judge Wilentz, in my experience, was put forth as a tool to force pleas within a 60-day period. However, when the 60-day period approaches -- and correct me if I'm wrong -- if the State is ill prepared to proceed, they're routinely granted adjournments beyond the 60-day cutoff. Is that your experience as well?

MR. O'MARA: That has been my experience in certain cases, yes, that's true.

MR. MARTINEZ: That's all I have.

MR. MENZA: Sir, you mentioned that New Jersey is the only state to use the Breathalyzer 900.

MR. O'MARA: One other state utilizes the Breathalyzer 900.

MR. MENZA: Are you suggesting that the other 48 states use a more up-to-date version of the Breathalyzer?

MR. O'MARA: Absolutely.

MR. MENZA: Why then do we use the 900?

MR. O'MARA: That's my question and one of the things I wanted to bring before this Task Force in consideration of the Breathalyzer device.

MR. MENZA: What is your opinion?

MR. O'MARA: That an update is definitely long overdue.

MR. MENZA: No, what is your opinion as to why we continue to use the 900?

MR. O'MARA: Well, I believe, again, that there is a strong body of case law through the Appellate Courts and through the New Jersey Supreme Court that supports the admissibility of the current device that's utilized.

MR. MENZA: But, similarly, there is a strong body of law in other states that supports the admissibility of those Breathalyzers.

MR. O'MARA: That's correct. I also-- I know that these devices are expensive, and if you're going to put a new \$5000 or \$10,000 device in 536 municipalities, you're definitely talking about a lot of money.

REVEREND FORD: I have a question.

MR. MENZA: Yes, Reverend.

REVEREND FORD: If you had an update on the Breathalyzer and it proved to be more effective than the one that you're using now, how about the cases that have already been convicted? Would they have time to come back and say, "I was unjustly treated. If I had the benefit of the (indiscernible), I would not have been convicted"? Do you have such cases as that?

MR. O'MARA: That's a very good question, but I don't believe that that would be a problem because it won't take saying that the current Breathalyzer is bad to introduce a new device, and again, the most recent case by the New Jersey State Supreme Court is a case called *State v. Garth* wherein the Supreme Court Justice O'Hern stated that he was confident that New Jersey was going to continue to look into updating their technology regarding these devices. I don't know if he intended the Legislature to read that particular admonition, but it was considered, again, by the Supreme Court that there are updated -- there is updated technology available. REVEREND FORD: But if one has already been convicted, does he have an opportunity to appeal that?

MR. O'MARA: I don't believe that that would be a valid point to appeal, again, because the Breathalyzer is accepted by the Supreme Court.

REVEREND FORD: I'm not arguing about the Breathalyzer is accepted, but if there is one that's better and it shows that it's better than the one that's being used, can a person appeal and say, "Well, bring this new one in and let's take the case from there"?

MR. O'MARA: There could viably be an equal protection argument or something along the lines of due process claims, and I would suspect that attorneys would raise those questions, but I would not anticipate that they would be successful on such a claim, sir.

MR. MENZA: It is, by the way, a very good question, because there is an applied assertion from the fact that one would purchase another machine. It's almost like conduct hearsay or conduct which is not hearsay. It's a clear, distinct, implied assertion that this machine is better than the other machine, therefore, that the other machine, being not as good, has certain possibilities of defect -- defective possibilities.

MR. O'MARA: I think that argument could be raised right now, just by the fact that 48 other states are utilizing updated technology. Again, it is an argument and there are always going to be arguments. As lawyers, we're trained to make as many arguments as possible, but I do--

MR. MENZA: And you would make that argument, would you not?

MR. O'MARA: I don't want to get pinned down, right now, as to whether or not I would make that argument. (laughter) But I can say this, I don't think that would be a successful argument. I just don't think that would be a successful argument. I'm certain that the courts would rule that any convictions or currently pending cases where the Breathalyzer results had been obtained with the Breathalyzer 900, even though technology has been updated, both are equally valid -- both the Breathalyzer 900 and the updated technology device would be equally valid.

MR. O'SCANLON: And I suppose if there are those flaws, our fear that someone might bring those flaws up ought not stop us from mentioning it anyway and going to a better device. A quick question: There are two other devices, the Dominator All Breath and the Alcotester (phonetic spelling), are you familiar with those? Are they used widely or are they--

MR. O'MARA: Not generally used too much. The Dominator is used in a couple of towns. Mr. Leckie is more familiar with where these are used. But, again, they're operated very similarly and on the same premise as--

MR. O'SCANLON: So they have the same defects as the Breathalyzer 900?

MR. O'MARA: I wouldn't call them defects, I just think that they're not as accurate. There are more possibilities of problems with the current device than with the updated devices.

REVEREND FORD: One quick question: Can a person who has been stopped and considered drunk, can that person say "I don't want to take the Breathalyzer. I'm not going to take the Breathalyzer," what happens then? MR. O'MARA: You're immediately charged with refusal, as well as DWI. So if it's your first offense and you're facing a six-month loss of license for DWI, you would also be charged with DWI and a refusal charge, which, in my experience, I've seen maybe -- out of thousands of cases I've seen -- two people beat a refusal charge. Once a person refuses, they're almost guaranteed to lose their license for six months.

REVEREND FORD: Who determines the DWI? The Trooper?

MR. O'MARA: The police officer would-- In order to bring somebody in for an arrest on a DWI, the police officer has already made a determination that he believes that there is at least probable cause and probably proof beyond a reasonable doubt based upon what he has seen through the roadside psychophysical tests that he's going to convict that person just on that basis alone. So he will charge them with a DWI, and then once he asks them to take the Breathalyzer test, if they refuse, they'll be charged with both.

MR. MARTINEZ: For clarification, Paragraph No. 36, which is a standard paragraph, basically tells you that you have to submit, and you have no right to get a lawyer, isn't that true?

MR. O'MARA: That's correct, and when you apply for and sign your license, you imply the consent to take the Breathalyzer test.

REVEREND FORD: Well, I don't drink.

MR. O'MARA: Very good. That's definitely recommended.

MR. MARTINEZ: I just have one last question now. The experts on the defense side, as well as even on the State Police to my knowledge, concede that the present Breathalyzer in its optimal form has a variable of at least 0.0125 per reading in terms of a drop-off. Can you elaborate on that?

MR. O'MARA: That's correct. There has been testimony -- and this regards the inspection procedures that are utilized by the New Jersey State Police-- Current inspection procedures utilize a device which is called a similator. This is kind of a jar of a known solution of alcohol and water which is heated to a certain temperature, and what's called a gas headspace forms at the top of this liquid. It's much more technical than I'm explaining to you right now. This gas headspace is designed to assimilate a 0.10 breath reading. The member of the New Jersey State Police utilizes this, blows it through the device, and runs the test six times to ensure that that device is coming up with a 0.10 reading.

The testimony that has come out is because of the nature of the solvent in the similator device. Each time a gas headspace is formed, each time it's utilized -- and it's at least six times on each Breathalyzer that they test -- every time the alcohol vapor comes to the top and is blown through, it dissipates, and this is called similator solution depletion. The current procedures allow a New Jersey State Police officer to utilize this or blow the gas headspace off 50 times.

And the testimony, through experiments that have been conducted both by the New Jersey State Police and independently, has shown that a depletion in that similator can occur. This can create a situation where a depleted similator solution is utilized in calibrating the machine to the extent where a person -- and this is all theoretical, it's very difficult to prove given the current standards of reporting-- But, theoretically, somebody with a 0.09 could come in and register a 0.10 or greater, and it's based on theory, but this is one of the arguments that's currently being utilized in the courts of New Jersey in defense of people with these lower readings, such as a 0.10 or a 0.11.

MR. O'SCANLON: One last one for me, too, please. Have you ever defended anyone who was charged with DUI below 0.01? (*sic*)

MR. O'MARA: Yes. Below 0.10, yes.

MR. O'SCANLON: I'm sorry. And how does that work? You haven't met the per se limit, but due to the physical tests and the officer's testimony then the person was charged. Is it hard to prove that?

MR. O'MARA: Well, there have been two different situations that I can explain. One is where a person is under 21 and they have such a reading. They're guilty of 39:4-50.14, our newest statute under the 39:4-50 DWI laws, where anyone with over 0.10-- If you're under 21 and have had any amount to drink and you're operating a car, you're guilty of that violation.

MR. O'SCANLON: So, again, in you're dealing with a per se, essentially a per se conviction there.

MR. O'MARA: Other situations? I've never had to take a case to trial where a person was under 0.10. I have seen cases tried where people have had 0.06, 0.07, 0.08, but generally if somebody isn't in that per se range and the person hasn't committed acts which are so egregious to prove beyond a reasonable doubt on the basis of the observations, then sometimes the DWI charge is dismissed by motion of the prosecutor. It's not a plea bargain, but the prosecutor concedes that he can't establish his case beyond a reasonable doubt, and, again, that's a very rare situation, but it does occur. Because, again, there are two avenues of proof: there is the per se violation, which is that the person has a Breathalyzer reading of 0.10 or greater, and there's the observations portion. Okay? There are two ways that the State will attempt to prove somebody guilty of driving while intoxicated. It's on two bases.

MR. O'SCANLON: But they do have that option now?

MR. O'MARA: Yes, they definitely have the option to take it to trial.

MR. O'SCANLON: Okay.

MR. MENZA: Are there any other questions? (no response)

Thank you very much, sir.

MR. O'MARA: Thank you.

MR. MENZA: Trooper, are you ready? (affirmative response) (witness sets up display and distributes material to Task Force)

Officer, you will also show us the Breathalyzer itself and how it operates?

TROOPER HERBERT H. LECKIE: Correct.

I don't know how I'm going to handle this with the mike, but we'll try. (referring to recording microphone)

Good morning, sir, and Task Force. My name is Trooper Herbert H. Leckie. I'm assigned as a member of the Alcohol-Drug Test Unit, Division Headquarters in West Trenton. First, I'll give you a little overview of the function of our particular unit.

The New Jersey Administrative Code, Title XIII, is what dictates breath testing in the State of New Jersey, and the Administrative Code is what gives the New Jersey State Police authority and its responsibility for maintaining Breathalyzer instruments in the State of New Jersey. It is our function to train Breathalyzer operators in the proper operation of breath test instruments for use in prosecution of DWI cases. It is also our responsibility to inspect those instruments and ensure that those instruments are functioning properly and that they are accurate to be used to evidential purposes for DWI cases in the State of New Jersey. We are also responsible for, as I said, the training of Breathalyzer operators. We also train police officers in the apprehension and detection of those individuals operating motor vehicles while under the influence.

My particular function within that unit is -- I am entitled a Breath Test Coordinator-Instructor. What I do is certify Breathalyzer instruments to their accuracy for various municipal and State Police departments in a specific geographic area within the State of New Jersey. Currently, I'm responsible for departments in Somerset County, Union County, Essex County, and Hudson County.

Along with that capacity, I also testify as an expert witness on the Breathalyzer. So where those cases go to court and the defense chooses to get the services of a defense expert to contradict the viability or the accuracy of that reading, then I would be responsible for testifying for the State of New Jersey as an expert on the Breathalyzer and rebut the testimony of those particular experts that would testify for the defense.

I've been asked to appear before you today to demonstrate the proper operation of the Breathalyzer and also explain to you how the Breathalyzer itself functions -- to give you a quick, thumbnail description, if you will, of actually how the Breathalyzer functions in theory. I'll try and keep it as brief as I possibly can, and I'll try and keep it as easy and simple as I possibly can. Although it could get very complicated, I'll try and make it as simple as I can to simply explain to you how the instrument works. If you have any questions as I'm going along, I'd appreciate it if you would ask. I would rather have the give and take. Rather than, at the end of it, go back and try and explain something, I'd rather have you understand it right from the start. It will make things a lot easier.

I'd like to ask first, how many people actually have seen a Breathalyzer? (show of hands) Okay. This is the Breathalyzer, for those who haven't seen it. (uses overhead projector) It's something that everybody has heard the term, everybody has heard the numbers -- the 0.10 and lower and higher -- but unfortunately, a lot of people have never even seen the instrument. It's just something that is out there in their mind, and they have no idea what it even looks like. This is the instrument.

When a police officer, or a Breathalyzer operator who is certified to be an operator, conducts a breath test, what they're actually doing is conducting a simple scientific experiment. It goes back to-- If you can think back to high school chemistry or college, what you're doing is a comparison of two different things. You're doing a light comparison of one ampoule against another.

By an ampoule, I mean this little vial which contains chemicals. (indicates) These are Breathalyzer ampoules. The chemicals that are composed inside the ampoule are sulfuric acid, potassium dichromate, silver nitrate, and distilled water. The most important chemical that is contained inside the ampoule is what gives it the yellow color, and that's the potassium dichromate. That is the color change that we're measuring, and that's all we're simply doing when we conduct a breath test, looking at a color change that takes place inside one of these ampoules and comparing it to another ampoule where no color change is going to take place. The amount of color change that takes place inside the ampoule is what dictates or transfers into the reading that is obtained on the instrument.

So we start out with the ampoule with a certain amount of fluid contained inside of it. The standard that has to be in there is 3 milliliters of solution. The ampoules are purchased from an outside laboratory, and they're utilized for breath testing in the State of New Jersey.

The instrument -- the model that I have before you -- is a Model 900. As Mr. O'Mara pointed out, in New Jersey, the Administrative Code is what dictates what instrument can or cannot be used. An instrument has to be approved and placed on the Administrative Code before it can be utilized in the State of New Jersey.

At this time, we have the Model 900 Breathalyzer, the 900-A, the Dominator, and the Alcotester. Those are the only instruments that are approved for evidentiary use in the State of New Jersey. The ones that are out there that are utilized the most are the 900 and the 900-A Model Breathalyzer. I have a 900 here before me.

The only difference between the 900 and the 900-A is that the 900-A has an additional timing device that is added to the instrument so that it alleviates a timing sequence that the Breathalyzer operator would have to time him or herself. That instrument has a built-in timing device that times a minute and a half time sequence that is part of the testing procedure. It just eliminates the operator from having to do that timing sequence, and it adds an additional light on the faceplate of the instrument, which tells that operator that that minute and a half timing sequence has been completed. That's the only true difference between the 900 and the 900-A. The slight difference between a galvanometer and a null meter -- both function the same way, do the same thing, it's just a different term and a different part based on when it was manufactured. Those are the two instruments that are out there that are being used.

There are two departments in the State that still use a Dominator All Breath. Mount Olive Police Department and West Caldwell Police Department are the two departments that still use the Dominator. It's still an approved instrument, and it works, basically, the same as the 900 and the 900-A, just a little bit different in its shape and configuration, but basically the same science that the Breathalyzer works on is the science that that instrument works upon.

Now, I'll get into the science behind the Breathalyzer and how it actually works. As I stated earlier, we're simply doing a light comparison and a color-change comparison. If you can look up at the overhead (indicating), that is what the instrument looks like inside the instrument if you were looking at it from the front -- this section (indicating) -- looking into the instrument. There is a lightbulb in the center. As you can see, it says 12-volt light. That's called a balance light.

The outside -- the right and left of that -- is where the ampoules are placed inside the well. You can see-- As I'm looking at it from here, on the left-hand side, that is called your reference ampoule. As I said earlier, you're conducting a scientific experiment and a quite simple one at that, but in any scientific experiment, you're going to have a reference or a standard, something that remains the same that does not change. In this case, that's your reference ampoule which is located on the left-hand side of that light source which is in the center.

On the right-hand side, you have your test ampoule, and that's the one with the top of it broken off in the picture up on the overhead on the right. (indicating) That is the ampoule that the individual's -- your defendant in most cases -- breath is going to be introduced into, and that's where a color change is going to take place if there is alcohol present in the individual's system.

What happens with the potassium dichromate that's contained inside the ampoule that gives it the yellow color? Potassium dichromate, when alcohol is introduced into this mixture, the potassium dichromate oxidizes. What that simply means is that when those two chemicals come together, a reaction takes place and the potassium dichromate dissipates -- it disappears. So the most alcohol that's introduced into that open test ampoule, the more oxidation takes place, in turn, causing that particular ampoule to become lighter in color.

So we start out with an ampoule that is yellow in color, and then, depending on the degree of alcohol that's introduced into that ampoule, we get an oxidation of the potassium dichromate and that ampoule becomes lighter in color. The degree of the amount of alcohol in the person's system is directly in proportion to the amount of potassium dichromate that is going to be burned off, or oxidized, and that's the measurement that we're seeking to determine.
So what happens in the breath-testing process is: The ampoules are placed into the Breathalyzer -- reference ampoule, test ampoule -- the instrument is balanced, and by balanced I mean the light is turned on, the same amount of light is passing through the reference ampoule as is passing through the test ampoule.

On the outside of those two ampoules are photoelectric cells. The photoelectric cell simply measures how much light is striking it. So the light passes through the window before the ampoule, passes through the ampoule, through the solution, out the window on the opposite side of it, and strikes the photoelectric cell. The photoelectric cell simply says *X* amount of light is hitting me at this point in time.

That measurement is sent up to the null meter up at the top in the left-hand corner. The null meter simply transfers that amount of light energy into electrical energy. So now the null meter is getting a signal from this left-hand side saying this is how much energy is coming from the left side. The same thing is happening on the right side. The light is passing through the windows, passed through the test ampoule, through the solution, and striking another photoelectric cell on the right side. That photoelectric cell, again, is saying *X* amount of light is striking me, turning that light energy into electrical energy up at the null meter.

So now what the operator does is he seeks a balance in the amount of light that is passing through each instrument. By turning a balance wheel the operator moves that light source either closer to the reference ampoule or closer to the test ampoule to gain a balance in the instrument. To gain the balance the operator simply looks at the null meter up at the top in the left-hand corner, and when there is one, single line portrayed there, that means the same amount of light is passing through both of the ampoules. That's how you know you have a balanced system, and that's where we begin.

So now we know that the system is balanced. We have the same amount of light passing through the reference as the test ampoule. Now, the defendant gives us a breath sample -- provides a breath sample -- the subject's breath is introduced into that open test ampoule, and as soon as that breath strikes the open test ampoule and it hits that potassium dichromate, the oxidation process begins.

It takes two minutes for total oxidation of the potassium dichromate. Then, after that two-minute period of time has elapsed, the Breathalyzer operator goes to the balance light again, turns on the switch, turns the light on, and now, if there was alcohol in the individual's system, in his or her breath, that oxidation has taken place in that test ampoule. So now, when the Breathalyzer operator turns the light on again, more light is going to be passing through that solution in the test ampoule because it's now lighter in color.

Then, in order to bring the instrument back into balance, the Breathalyzer operator has to move that light source away from that open test ampoule that is lighter in color so that an even amount of light, again, is passing through both of the ampoules. The Breathalyzer operator turns the balance wheel, moving that light source closer to the reference ampoule -evening out, again, the amount of light that is passing between both ampoules -- and when that state of balance is achieved, it's indicated up on the null meter. When the operator realizes that balance has taken place, he stops moving that balance wheel and that, in turn, has moved the blood alcohol pointer on this faceplate of the Breathalyzer (indicating) and that blood alcohol pointer falls on the scale and that, in turn, gives us our reading.

As the Breathalyzer operator turns the balance wheel, the blood alcohol pointer is also moving up the scale. So wherever the instrument ends up being in balance, that's where the blood alcohol pointer stops. The Breathalyzer operator pushes down on this plastic shield (indicating) on the faceplate of the Breathalyzer and looks at the reading that has been obtained and records that reading on his operational checklist, and that's how the reading is obtained.

Are there any questions so far about operation -- how it works? (no response)

This (indicating), so you know, is the sample chamber. This is located inside the instrument. This is the amount of air that is trapped by the Breathalyzer operator when he or she obtains a breath sample from the individual. It's one of the abstract things that are talked about in court -- the amount of air that has to be blown into the instrument. We've had cases that have been adjudicated where individuals have had emphysema in one lung and their defense was that they couldn't possibly provide an adequate sample. Well, this is all that has to be provided. It is 52.5 milliliters of air.

There are two holes at the top of the sample chamber. Those are vent holes. So the portion that we're actually trapping and testing is from these vent holes down and that's it -- 52.5 milliliters of air. You can fill it with the puff of air that's in your mouth cavity, but that would not give a true indicator of what your true BAC would be. It would indicate something lower than your actual blood alcohol concentration.

What we're looking for is deep-lung air -- alveolar breath. We're looking for the last portion of air that's expired when the person blows into the instrument and that's trapped in the sample chamber, and then that air is delivered to that open test ampoule to begin that oxidation process.

MR. MENZA: Where are the ampoules? Inside? How do you get them inside the machine?

TROOPER LECKIE: What I'll do, sir, is I'll run through a test that you can see that process. I don't know if maybe I should--

MR. MENZA: How often do you change the standard out?

TROOPER LECKIE: The reference ampoule can remain in for both tests. Two tests are conducted when we run a test on a individual for prosecution purposes. The reference ampoule can remain in because nothing happens to it. It's simply used as a comparison.

MR. MENZA: Is it used again after that?

TROOPER LECKIE: Yes. The reference ampoule can be used again. The test ampoule is utilized once per test, it's disposed of, and a new test ampoule is put in place for the second test.

MR. MENZA: The reference ampoule is used on more than one occasion?

TROOPER LECKIE: It can be, yes, sir.

MR. MENZA: Can it affect the function of the machine?

TROOPER LECKIE: No, sir. The light is not going to have an effect on it -- the light passing through it. It can be utilized over and over and

over again -- the reference ampoule. The test ampoule is utilized one time. There is actually enough potassium dichromate contained in each ampoule to measure upwards of a 0.70. So, in actuality, you could use a test ampoule again. If the person blew a 0.10, you can go six more tests, but we don't take that chance. One test is conducted utilizing one test ampoule, it's disposed of, and a new test ampoule is put back in place.

I'll run through the checklist that you have before you so you can follow along with me if you want. It's probably a good idea to get this off of here so you can see. (indicating)

Question?

MR. MARTINEZ: The only question I had -- having seen it before and the benefit of it -- is that if somehow we could actually see what you're doing closer up, I think we would get more of an understanding than just from back here.

MR. MENZA: Can you put it on a table?

TROOPER LECKIE: Sure.

MR. MENZA: Where I'm sitting, right in the middle. (witness complies)

How's that, okay?

MR. MARTINEZ: It's fine.

MR. MENZA: Members of the Task Force can get up. (Task Force encircles Breathalyzer on table; all speaking off microphone)

TROOPER LECKIE: I just don't know if I'm going to be picked up by the microphone. (referring to recording microphone) (no microphone) Okay, now to run the breath test itself, the operator would first turn the instrument to the on position, and that would be this switch here. (demonstrating) The instrument is turned on, and as you can see, the Breathalyzer operator is trained during our course of instruction to only run a Breathalyzer test utilizing the Breathalyzer operational checklist, which is what I have before me. (indicating)

The operator is trained to read the step, do exactly what the step says, check off the box when that step is taken, read it, and then move to the next step, to ensure that no mistakes are made, to ensure the test is run properly and accurately. This is the way Breathalyzer operators are trained to conduct breath tests. And even though I've run thousands of tests and I'm considered, and have been qualified as, an expert in the operation, function, the workings, and all of the components of the instrument, I still don't run a Breathalyzer test without utilizing the checklist. That's the way I was trained, that's the habit that I have, and it's a good habit to have, and that's the way we run breath tests in this State.

So the first thing is to throw--

MR. MENZA: Excuse me. Can anyone else do--

TROOPER LECKIE: The first thing that's done is to turn the instrument to the on position, as it says in Step No. 1, but it also says to wait until the thermometer shows 50 degrees plus or minus 3 degrees centigrade, which is indicated here on the thermometer. The purpose for that heating of the instrument is, as I showed you earlier, the sample chamber is made of stainless steel. If the instrument is not heated to that temperature, when the breath is blown into the instrument, condensation is going to form and cling

to the inside of the sample chamber. The breath is going to form a vapor, the liquid is going to form, and then it's going to cling to the inside of it so you're going to get a less-than-accurate reading of what the individual's true BAC would be, because some of those alcohol molecules are going to cling to the inside of the sample chamber and not be delivered into the test ampoule. So that's the reason -- one of the reasons -- for the instrument being heated to a certain temperature.

So when the operator is satisfied that that temperature is proper -and it simply has to be somewhere within that range, 50 degrees plus or minus 3 degrees centigrade-- So as the operator checks the thermometer to ensure that it's proper, then that box would be checked off on the operational checklist, and then the operator moves on to Step No. 2, which says gauge the reference ampoule and insert it in the left-hand holder. The gauging process is an important process, and what the operator is checking for is to ensure that there are three milliliters of solution contained inside the ampoule.

This is the gauge that is utilized to do that. (indicating) It is a component of the Breathalyzer. It comes with the Breathalyzer. It is manufactured by the makers of the Breathalyzer. It's tooled-- It's hand and die tooled by a machine to ensure that it's of the proper specifications. The operator places the ampoule inside one end of the gauge, and it should fit into that end. Then the operator holds the ampoule up to eye level to ensure that the fluid level is above the top edge of the gauge, which you can clearly see.

MR. BELL: Or the line of meniscus.

TROOPER LECKIE: The line of meniscus, exactly.

So you're looking at it to ensure that it's above it. Now, the ampoule should not fit into the other side. What you're testing for here are two things: You're checking for size and volume. Volume being the amount of solution contained inside the ampoule, and size, the outside diameter of the glass to ensure that that's proper. When you're satisfied that those two things are done and it's proper, then that reference ampoule is inserted into the left-hand holder.

UNIDENTIFIED MEMBER OF TASK FORCE: That answers your question.

TROOPER LECKIE: If you look inside there when I turn the light on, you can see the windows that I was talking about. Everything is painted flat black, and then there are windows on the inside and windows on the outside. The light source that I talked about on the board is directly under that hole right there now (indicating), and it shines through the window on the inside, through the solution, and then through the window on the outside. One of the reasons why you're concerned about three milliliters of solution is that if there are not three milliliters of solution, it won't cover those windows. So now the light is going over top of the solution rather than through the solution and you're not going to obtain an accurate result. So you're satisfied that that ampoule is proper, you check off Step No. 2.

Step No. 3 deals with gauging of the test ampoule. This one has to be opened. (indicating) This one is the one that the breath is going to be introduced into. This is simply a rubber hose that's used as a vessel to help that solution -- breath -- to get inside that ampoule. Again, same process, hold it up at eye level, check to ensure that the line of meniscus is above the top edge of the gauge, turn it over, ensure that it doesn't fit in the other side.

Now, this one has to be opened. So, as you can see, it's already scored at the portion where it's going to be cracked open. (indicating) There is a score mark that's put on there by a machine at the factory so that it's ready to be opened. One of the bones of contention was that, well, maybe when the operator opened the Breathalyzer -- the ampoule, I'm sorry -- maybe he spilled some of that solution out of there. But, as you can see, the solution is not even near the top. It's all the way down here. (indicating) The score mark where it's going to be broken is up there.

(opens ampoule) And as a precaution to that what we do is regauge the ampoule, take a second look at it after you've opened it to ensure that the fluid level is still proper so that you don't have to be concerned with any spillage. And, as an aside to that, there's also sulfuric acid in there. So, if you did spill it, you're going to die.

MR. BELL: You're going to burn.

TROOPER LECKIE: I have clothes and other things to attest to that fact, when people got careless and knocked it over on me when I was making arrests. That's one of the problems with someone who is under the influence. You sit in there with them and put the ampoule down, and they end up knocking it over and there's acid in there. So it can be dangerous -- the sulfuric acid that's contained inside there.

That ampoule goes into the right-hand holder, and then you have to connect a bubbler -- which is simply a glass tube -- which is going to act as the vessel to deliver that air sample into that solution. So you simply open up the plastic bag, take your rubber hose, get the short portion protruding through, attach the rubber hose -- so that you don't have to touch that long portion of the bubbler, insert that into it. So now that's down inside the solution, that's contained inside the ampoule, attach it, and now that's how your air sample is going to end up inside that open test ampoule.

MR. MENZA: That rubber hose is used more than once?

TROOPER LECKIE: Correct. That's part of the instrument. When I conduct an inspection, other Troopers conduct inspections on instruments, that's one of the things we check.

First--

MR. MENZA: How come that's--

MR. BELL: Do you replace it often?

TROOPER LECKIE: Yes, yes, only because of wear. It depends on the use of the particular instrument and that particular department. The higher the volume, obviously, you're going to get more wear and tear.

MR. MENZA: Could that not affect the reading -- the rubber hose?

TROOPER LECKIE: Correct, and it would lessen the reading.

One of the good things about the Breathalyzer, from our perspective, from the prosecution perspective -- and from the defense perspective, I would take it -- is that most of the malfunctions or problems that could occur with this instrument are going to go the benefit of the defendant. Because in that scenario, if this hose gets worn or if it gets frayed, if there is a hole in it, what's going to happen? Some of that sample that's provided is going to be vented out into the air rather than ending up where it should. So it's going to lower the result that's produced rather than what the actual BAC of the defendant is.

MR. BELL: But how about if they gave a test immediately prior to the subject-defendant being examined? Could there be any residue in the hose that could also affect, in an elevated BAC?

TROOPER LECKIE: I'm ready, Mr. Bell. (laughter)

That's taken care of in the purge phase. I'll get to that step further down the line, but the instrument is purged out so that any alcohol residue that could have been in there from a previous test is taken care of. That step was actually added in 1986 because of the RFI problem -- radio frequency interference concern. That step was added because of that, but it also benefits that particular argument that you just proffered, in that maybe there is some residual alcohol in there. We purge the instrument to take care of that. We get a zero-zero reading, a blank air sample of zero-zero, so that we know there is no outside contaminant either from RFI or from residual alcohol before the test of the defendant, so that's taken care of.

MR. MENZA: But the other machines, newer versions all come with rubber hoses.

TROOPER LECKIE: No, sir.

MR. MENZA: It does not?

TROOPER LECKIE: No. The newer instrumentation that Mr. O'Mara was speaking of is not a wet chemical system. There are no chemicals involved in that particular system. There are no ampoules. It's strictly done with infrared light and fuel cell technology, which does not deal with the chemicals that we see here, so there is no need for the hose. Okay? Once that ampoule is in place, we can go check off Step No. 3, and Step No. 4 says to turn on the light balance and set the blood alcohol pointer on the start line. Now, this is what I was talking about when I talked about balancing the instrument. The light is turned on and immediately you see that galvanometer needle skew to the left-hand side. See it ping, as soon as I turn it? What that means is there is an imbalance in the system. There is more light passing through one of those ampoules than the other. So to correct that, I turn this balance wheel. If it doesn't correct it, I go back and keep going up scale until it does.

Now, you see the instrument being balanced. Now, the same amount of light is passing through this ampoule as this ampoule, and the instrument is balanced. So once I have achieved balance, I place the blood alcohol pointer back on the start line. You do that by pulling back on the base of the blood alcohol pointer. There is a clutch mechanism inside there that releases the tension. It's placed on the start line, press check -- by that I mean you push down on this plastic shield, which in turn pushes down on the blood alcohol pointer, which presses it flush against the scale so you can determine exactly where that blood alcohol pointer lies.

The start line is the longer of the lines to the left of the double zero. We start on the start line, giving the defendant the benefit of the doubt in the event that his body or her body is producing something indigenous or indigenous alcohol, which is alcohol that can be produced normally in the body. The most that that has been measured at is a 0.003 level, and that's the distance between that start line and the zero-zero line, and that's the reason for that start line as opposed to starting on the zero-zero line. Once the blood alcohol pointer is placed on the start line, Step No. 4 has been completed.

We can go to Step No. 5 which says "turn to take." It simply means turn the control knob to the take position. What that just did was--There are hoses inside the instrument that are being pinched off or allowed to be open by a clamp system. When the control knob is in the take position, it's clamping off one hose and allowing another hose to be open. The hose that is open is going to allow air to be introduced into the breath tube, and then it will pass into the sample chamber and will stop in the sample chamber.

When I turn the control knob from the take to the analyze position, it will pinch off that hose and open another hose which allows that air sample to pass into the open test ampoule. So right now, we have it closed off so that the air will go to the sample chamber and be trapped in the sample chamber.

Now, this is the purge phase that I was talking about with Mr. Bell's question about residual alcohol. What we're doing is taking an atomizer, which is another component of the instrument -- simply just a rubber ball with an opening in the end to allow room air to seep into it -- and you're just taking room air and introducing it into the Breathalyzer. What I just did by squeezing that is I introduced air into the base of the sample chamber. There is a piston inside here. (indicating) The air comes up through the bottom, forces that piston up, it goes above these vent holes, and the second that I stop squeezing, that piston drops down an eighth of an inch and covers up these vent holes and is held up in place by a magnet. So now that air that I just entered into the sample chamber is trapped in there. Right now, it's inside the sample chamber, inside the instrument, and it's being held inside there --52.5 milliliters of air.

The next part of this step says "turn to analyze." Now, when I turn to analyze, you'll see the green light go out, which means the sample chamber's piston is no longer at the top, and you'll see the bubbling start to take place inside the open test ampoule. What's happening now is that piston that I just spoke of has been released. The magnets are disaligned. So now, through gravity, the piston starts to descend, and it forces that air sample that was trapped in there out of the hoses and into the open test ampoule, and it's delivering that sample to the test ampoule. When the red light comes on, that means the piston is at the bottom of its stroke. It's at the bottom of the sample chamber, and the sample has been completely delivered.

Now, what happens, as the checklist dictates, is we wait a minute and a half after that red light has appeared. As I stated earlier, it takes two minutes for total oxidation. So, as soon as that sample starts to hit that solution with the first bubble, that's the beginning of oxidation, because it's immediate, as soon as it hits. It takes approximately 30 seconds for that piston to descend to the bottom of the sample chamber. That 30 seconds, in addition to the minute and a half that you wait after the red light comes on, gives us the two minutes of total oxidation.

Now, when introducing just the room air from the room that we're in, we would expect what as a reading? Zero-zero.

MR. BELL: Zero-zero.

TROOPER LECKIE: That's the purge phase. If you get something other than the zero-zero, in excess of a 0.01, then it's coming from

somewhere, either RFI or residual or some other problem with the instrument or the components of it that are causing that problem. So that purge phase was added to alleviate the defense of, maybe it was residual alcohol, possibly it was RFI -- radio frequency interference -- or any other contaminants in the air.

MR. MENZA: Is there anything in the air that could, in fact, contaminant that?

TROOPER LECKIE: It would have to be--

MR. MENZA: Affect the ampoule in some way or another--

TROOPER LECKIE: There has been-- Defense has proffered that, suppose we were at a station where we had five drunks waiting in line to be tested -- five individuals that were arrested--

MR. MARTINEZ: The room air. (laughter)

TROOPER LECKIE: Right. Now they're breathing-- That was the defense that was brought forth. Now they're breathing alcohol vapors into the air, and that test ampoule is open. Is it possible that those vapors can seep down inside there and now be adding to the person's -- who is actually being tested -- result? Well, we've done studies on that, and it's shown that it doesn't occur, and that's one of the reasons why we do the purge phase, to eliminate that particular argument so that can't be an argument.

MR. MENZA: Doesn't odor come about as a result of particles being in the air? I mean, I think some different formation of the gases in the air, could they not have an effect on the ampoule?

TROOPER LECKIE: If it could, that would be determined by this phase of the checklist. That's one of the reasons why we do it.

MR. MENZA: Where would you notice that?

TROOPER LECKIE: The next phase -- the next step -- that I'm getting to. We just purged the instrument and now we should expect--

REVEREND FORD: Wouldn't that be eliminated because you have to actually blow into it?

TROOPER LECKIE: Well, the argument is coming from, this is open here (indicating)--

REVEREND FORD: Oh.

TROOPER LECKIE: --and maybe some of it, some how, could seep down inside there and cause a problem because it's in the open air. But this phase is one of the ways that we're eliminating that.

Now, you can see we're getting some movement there when I first turn the light on it. You wait for a second to allow it to settle, and then there is no movement. So now that tells me that nothing in the air has affected the composition of that particular ampoule because I just tested it. That's one of the things that we added in 1986. That step was added to the checklist. It wasn't in there at that time.

MR. MARTINEZ: Prior to 1986, how did radio frequency interference actually affect that?

TROOPER LECKIE: It actually came about through *Romano v. Kimmelman.* I'm sure you're familiar with that case. That was the case that dealt with the radio frequency interference issue, and that was talking about Model 900-A, which is different than this one. I talked about that a little bit before. It has a timing device that adds -- that times the minute and a half for you.

MR. MARTINEZ: That's what I wanted to get at. Is that just because of that timing device?

TROOPER LECKIE: Right. That instrument is slightly different than this because they've added that timing device and it has a null meter as opposed to a galvanometer, and that has been shown in very extreme instances to be susceptible to radio frequency interference. So part of the inspection procedure that we conduct, when we inspect those particular instruments, is an RFI check. When we do the inspection on the instrument, we actually take that base station radio at the location that the instrument is housed and we test the instrument during conditions when that instrument is being transmitted upon. That's what was found to affect the instrument in some extreme cases.

Model 900 Breathalyzers, I've tested these particular instruments where you could line up portable radios all the way around this thing and key them all up at the exact time that you're trying to balance the instrument, and it will not have an effect. Model 900-A, some in extreme, extreme conditions it can, but what happens in those cases is you would have to be balancing the instrument, keying the portable radio, and pointing the antenna of the portable radio directly here (indicating)--

MR. MARTINEZ: So you can still balance it.

TROOPER LECKIE: --and the operator would be able to see it. First of all, you'd have to have a third hand in order to press the microphone in order to do it, and it would be extremely obvious to the operator that that's taking place. Every time he or she attempted to balance the instrument by turning this wheel, this needle would keep on skewing off to the side because of the radio frequency interference. *Romano v. Kimmelman* addressed that issue in that if you get two readings within 0.01 of one another, that's not a problem--

MR. MARTINEZ: That's fine. Anything more than 0.01--

TROOPER LECKIE: --because it's not something that's going to be duplicated. The amount of radio frequency interference in the setting that this test is conducted is going to change each time that that radio is keyed simply by the movement of the people in the room or objects in the room so that you can't reproduce readings one right after the other within 0.01 of one another and that's what *Romano v. Kimmelman* spoke to.

MR. MENZA: A lot of this depends upon the credibility of the police officer.

TROOPER LECKIE: Who is operating the instrument, correct.

MR. BELL: And there is no videotape while this test is being conducted to ensure that the lines meet up and that you performed -- that it's set at the zero-zero?

TROOPER LECKIE: No, sir.

MR. BELL: There's nothing over--

TROOPER LECKIE: No, sir. Most departments that I've had contacts with, that do have videotape operations set up-- Because of the logistics, basically, of the room, the camera would be set up in a corner, mounted in the ceiling out of the way, and the instrument is, you know, across the room or down on the table. Oftentimes, the operator is standing in front of the instrument and the camera is behind or to the side. So you're not going to see exactly what's taking place on the faceplate of the instrument. MR. BELL: Well, there is no other requirement that somebody else--

UNIDENTIFIED MEMBER OF TASK FORCE: Watch it.

MR. BELL: Like you said, a scientific experiment, with somebody standing over your shoulder to make sure that you have prepared the machine appropriately--

TROOPER LECKIE: No. Just following the checklist, that's the only check to that.

REVEREND FORD: I want to put you back on what the judge said about credibility of the officer. First of all, is there a printout other than--

TROOPER LECKIE: No, sir.

REVEREND FORD: No printout?

TROOPER LECKIE: Not with this instrument, no, sir. What happened-- This instrument actually has-- It's not a digital printout. It's not an analog printout. This instrument, if you look here at these two pins (indicating) -- let me see if you can see it -- these two metal pins-- The manufacturer, way back when, when they manufactured the instrument, actually made a little green piece of paper that simulated this scale on a piece of paper. It had two holes in that piece of paper. What the operator was to do, before he or she started, was to place that scale over top of the actual scale on here and then this little pad (indicating) was an inkwell. Ink would be placed on here, the operator would press this pointer down in the inkwell, and then begin the test. Then, wherever the blood alcohol pointer fell during the course of the test, they would push down on it and it would leave an imprint

on that little piece of paper, and that would be your written record, if you will, of the result.

But the defense bar argued against that saying that "How do we know that that little piece of paper is a true alignment and a true depiction of what's actually on the scale? Maybe those holes weren't punched in the proper place so now it's off kilter." How do we know--

MR. MENZA: Sometimes it was blurred, also.

TROOPER LECKIE: Correct. It wasn't clear. So that became a defense contention, so then that was removed from the use of the instrument because it became a lot more trouble than it was worth, because that was the argument that was proffered from the defense.

MR. MENZA: But there are three ways, right off the bat, that you can affect this Breathalyzer. You cannot really put it in there as you should. You can start over here and you can balance it incorrectly.

TROOPER LECKIE: Correct. All of that--

MR. MENZA: How about the new machines?

REVEREND FORD: Good question.

MR. MENZA: Would any of them rely on the credibility of the

officer?

TROOPER LECKIE: New machines are completely automated. REVEREND FORD: That's what I wanted. That's what I wanted.

(laughter) Is it a printout?

TROOPER LECKIE: Yes, they have a printout. REVEREND FORD: That's what I wanted. MR. MENZA: So they're completely automated, which means that they're--

TROOPER LECKIE: I shouldn't say completely. There is some necessity, obviously, for an operator to do something to the machine, but it really comes down to the operator pushing the button, and then the instrument takes over from that point forward--

REVEREND FORD: And gives a printout.

TROOPER LECKIE: -- and produces a printout.

MR. MENZA: I should add-- I should note that the Trooper is here just to demonstrate--

MR. BELL: Right.

REVEREND FORD: Right.

MR. BELL: Not for cross-examination purposes.

MR. MENZA: -- and specifically asked not to give his opinion.

MR. BELL: Although I'm dying for his opinion. (laughter)

TROOPER LECKIE: I should point out, because it's been brought

up over and over again, that we, as an organization, have evaluated, tested numerous other instruments -- as the instruments that have been referred to as infrared instruments, and we are now moving forward with a pilot program to put those instruments in place.

REVEREND FORD: I want to ask just one question.

TROOPER LECKIE: We've chosen a particular instrument and that's about to come forward.

REVEREND FORD: The State Trooper and his car have -- all the cars have this instrument in it?

TROOPER LECKIE: All the cars? No. These instruments are housed at either a local police headquarters--

REVEREND FORD: You have to call for it. TROOPER LECKIE: No, you bring the defendant to the station. REVEREND FORD: Oh, okay.

TROOPER LECKIE: This particular instrument-- That's another difference between the 900, which is what this instrument is, and the 900-A. This is considered portable, in that you could run this instrument in any location where you could plug into electricity. Whereas, with the 900-A, you cannot do that because it has to be tested by us in the location where it's being utilized because of the RFI potential problem.

REVEREND FORD: They have trained officers to do that, though.

TROOPER LECKIE: Correct. All Breathalyzer operators are trained by the New Jersey State Police by my particular unit. The first course, the initial course for Breathalyzer operators to be certified is a five-day course. The operators come for five days in a row. They're trained by members of my unit on the proper operation of the Breathalyzer. They conduct numerous actual tests during that week. We actually have a drinking session where people actually come in and drink to a certain degree, and then they're placed on the instrument so that an actual live test is conducted on an individual during that week.

REVEREND FORD: One other question, sir. What's the time frame on the time the officer--

MR. MENZA: You should have been a lawyer, Reverend. (laughter)

REVEREND FORD: --stops the driver and then gets to the headquarters, or wherever it is to--

TROOPER LECKIE: Well, there is a minimum time that the operator has to wait before the individual is put on the Breathalyzer and that's 20 minutes. The reason for that is to allow raw alcohol to dissipate. In the event that the individual just walked out of a bar, had a shot right before he left -- one for the road, so to speak -- and now he gets locked up right in front of the bar, and it just so happens that headquarters is right next door, in theory, he could be on the instrument within 5, 6, 10 minutes. What would happen in that instance is that you'd be testing the raw alcohol that could still be in the individual's mouth rather than what's truly affecting his system. So the operators are trained that they have to wait a minimum of 20 minutes to allow that alcohol to dissipate before they put them on the instrument.

REVEREND FORD: Is it hypothetical to think that medicine could cause a person to appear intoxicated?

TROOPER LECKIE: Medicines?

MR. MARTINEZ: Cough syrup.

TROOPER LECKIE: Certain types of medication-- I'm not an expert or a doctor, but I'm sure there are medications that could affect a person's ability to do psychophysical evaluations.

REVEREND FORD: Officer, the reason I asked that question is if a person appears to be drunk, that person can be hauled 20 miles, his day messed up and everything, only to find out when he's at the other end getting the test, is the cough syrup--

MR. MENZA: You can get high on-- (indiscernible)

TROOPER LECKIE: Exactly. The statute itself 39:4-50, the drunk-driving statute is alcohol and/or drugs. So the person can be charged with operating a motor vehicle under the influence of cough medicine or a prescription medication or whatever the drug may be.

REVEREND FORD: He can't win then, can he?

MR. MENZA: Doctor?

DR. ALTEVEER: Well, but should he have been in the car?MR. MARTINEZ: Insulin also has a way of affecting reading.MR. MENZA: I think the doctor is better--

Go ahead.

DR. ALTEVEER: Have you done cost analyses? I mean it costs a lot of money to purchase new machines for 536 departments, but there must be a maintenance cost associated with this also.

TROOPER LECKIE: Maintenance--

DR. ALTEVEER: Are the other ones lower maintenance?

TROOPER LECKIE: Maintenance on this is extremely minimal. They're unbelievable. You know, as much as everybody will say that it's antiquated technology, and it's 1954 technology, and, yes, it was invented in 1954, but it works. It has science behind it. The chemistry, the physics behind it don't change. That's why it still works today as it did in 1954, and it's still as accurate as it was in 1954, and the maintenance on these instruments is extremely low. MR. MENZA: But, Trooper, you would save a lot of money with them because you won't have to train anybody. The training, instead of being three or four days, would be an hour. You could train me.

TROOPER LECKIE: The training session would probably--

MR. MENZA: I got a *D* in physics.

MR. O'SCANLON: Let's not get carried away. (laughter)

TROOPER LECKIE: The training session, I would assume, would be a lot less for the newer type of instruments as opposed to this, what--

MR. MENZA: As a matter of fact, there would be a lot less administration costs, would there not?

TROOPER LECKIE: I don't know if I can answer that. I really don't know.

UNIDENTIFIED MEMBER OF TASK FORCE: It would be speculative at this point.

TROOPER LECKIE: Yes.

MR. MENZA: Are you sure you don't want to answer, or is that the answer?

MR. BELL: That's our answer. It would be speculative.

TROOPER LECKIE: We really don't know.

MR. MARTINEZ: With regard to the new infrared systems, is there any possibility with them of, for lack of a better word, misuse, or are you guaranteed the reading when you give it to the individual? Is there anything with the newer models that can be manipulated by an officer conducting a study that could adversely affect a reading? TROOPER LECKIE: Well, I think a lot depends on which model you're talking about. There are several on the market.

MR. MENZA: The best model.

MR. O'SCANLON: That's a very important question.

MR. MARTINEZ: Which is, to the best of your knowledge, most tamper proof?

TROOPER LECKIE: A lot of them are, if you want to call it, tamper proof, for lack of a better term -- a lot of them.

MR. MARTINEZ: Right. I'm not saying it to--

TROOPER LECKIE: Right, but there are others out there that aren't as good as some of the leading ones. That's why I wouldn't make a blanket statement and say that the infrared machines are tamper proof, because there are some that are not--

MR. MARTINEZ: That are tamper proof.

TROOPER LECKIE: --that have to be manipulated by an operator.

MR. MARTINEZ: But it might be a better reading.

TROOPER LECKIE: The one that we like, the one that we've evaluated and found to be the one that we like is completely--

MR. BELL: Sealed.

TROOPER LECKIE: Sealed.

MR. MENZA: Which one is that, officer?

TROOPER LECKIE: It's manufactured by National Draeger and called the 7110.

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MR. MENZA: And to answer Mr. Martinez's question, would that be subject to being tampered?

TROOPER LECKIE: That instrument? No, sir.

MR. BELL: It's a sealed instrument.

TROOPER LECKIE: Correct.

MR. MENZA: It could not be.

TROOPER LECKIE: What happens with that particular--

MR. MENZA: Wouldn't-- Well, I don't want to ask you that.

TROOPER LECKIE: That instrument consists of dual technology.

It's not only infrared, but it's also fuel cell. What happens with that instrument is the sample is introduced into the instrument, it's split in half. Half of the sample is tested by infrared technology and half is tested by fuel cell technology, and both of those results are recorded on a printed receipt that comes out of the instrument. The operator simply pushes a button and the instrument takes over, and the instrument does the work and produces the result. If there is a problem anywhere along the way with the instrument, during the course of the test, it will abort the test and will not allow the test to be completed.

MR. BELL: I'm not here to cross-examine him, but I know with the ampoules--

TROOPER LECKIE: Thank you. Thank you. I've been there before, Mr. Bell.

MR. BELL: Yes, I know.

MR. MENZA: But you can't help yourself.

MR. BELL: With the ampoules-- I think that's part of our charge, to look at the machine. The ampoules are also subject to chemical--

MR. O'SCANLON: Fluctuation.

MR. BELL: Fluctuation, in that if they're stored in light, that can have an effect upon the chemical composition of the ampoule. I think heat or cold-- And I know that there is probably a procedure that they should be stored in a cabinet--

TROOPER LECKIE: In the box.

MR. BELL: In a box. But that's the State Police. You can't talk about a police department--

TROOPER LECKIE: Then, obviously, we instruct them how to take care of those things during the course, and I can only assume that they're doing what they're told to do with those particular components.

MR. MARTINEZ: Since the State Police has studied the Draeger 7110, in your studies, what is the cost of the 7110?

TROOPER LECKIE: I don't think I can answer that.

MR. MARTINEZ: You don't know? I mean, I'm just asking.

TROOPER LECKIE: No. But I can say it's considerably more than this, that's for sure.

MR. MENZA: I would presume that the State Police would prefer the 7110, is that it?

TROOPER LECKIE: I can't make that statement.

MR. BELL: But there is--

MR. MENZA: Wouldn't it be kind of a wise thing for the State Police to have a-- TROOPER LECKIE: Well, obviously--

MR. MENZA: -- Task Force organized by the Legislature--

TROOPER LECKIE: Obviously, we've looked into moving forward and, as I stated, we're on the forefront of doing that. So you can make whatever conclusion you would deem to make from that statement.

MR. MENZA: And this Task Force could help considerably in that.

TROOPER LECKIE: Certainly.

MR. O'SCANLON: So we could make the conclusion that the State Police felt there might be, for whatever reason, some need to investigate that technology, to decide--

MR. BELL: Well, he can't comment on that.

MR. MARTINEZ: No, they're not going to comment on that. Don't put him there.

MR. MENZA: All right. Why don't you just finish up? The person comes in, he blows into something--

TROOPER LECKIE: Okay. So now we have the instrument-- Let me make sure, after I manipulated it here--

MR. O'SCANLON: After you manipulated-- (laughter)

TROOPER LECKIE: Yes, because everybody was asking questions. Okay. We're satisfied now that we--

MR. MENZA: You understand you encouraged him. (laughter) TROOPER LECKIE: Yes, I did.

Turn the instrument to the tape, we flushed it out, we turn to analyze where the (indiscernible) signal appears, we waited a minute and a half, turned on the light and balanced, and now, the instrument is balanced. We record the result. In this case, zero-zero, because we didn't see any movement from the room air. That result would be recorded down here. (indicating)

The blood alcohol pointer is again checked to make sure that it's on the start line before the actual test on the defendant is taken, and then Step No. 9 says to turn the control knob to the take position. Now, you're readying the instrument to accept the sample from the defendant. A sterile mouthpiece is used for each test that is conducted on a defendant, and then the defendant would provide the breath sample.

If anybody wants to--

MR. BELL: Lonnie, you want to take it? You want blow into it? You don't drink.

TROOPER LECKIE: Just so that you can get a feel for it.

MR. MARTINEZ: You absolutely don't drink.

MR. MENZA: I don't drink either.

TROOPER LECKIE: If anybody wants to see what--

MR. MENZA: I don't drink. Let me try it.

REVEREND FORD: Communion wine. (laughter)

TROOPER LECKIE: What I need for you to do, sir, is first of all, it only comes up this far. (indicating) This is as far-- So you can't pull it up to you. You have to bend over to it. What I need you to do is just put your lips over the end of the mouthpiece, blow into the instrument until I tell you to stop. MR. MARTINEZ: While he's doing that, Trooper, I had one question. Oh, you already--

TROOPER LECKIE: That's fine. Now, see, that's a misnomer. What happened-- That's why you give instructions to the defendant when they're about to blow into the instrument, because they start blowing into the instrument, they see the green light come on, and they think they're done. That's now what we're looking for, because, as I said before, that's 52.5, but that you could do with just what's in your mouth. It wasn't that difficult to fill that. What you're looking for is the deep-lung air to get a true reading of what their actual BAC is.

MR. MENZA: Could I affect it by breathing just slightly?

TROOPER LECKIE: Sure. The Breathalyzer operator is trained to determine whether or not you provide a proper sample or not.

REVEREND FORD: I'm anxious to know if the judge is drunk. (laughter)

TROOPER LECKIE: We'll all turn to analyze it when we start the process.

MR. MENZA: If I am, there is something really wrong with it. MR. MARTINEZ: That was my entire question there. TROOPER LECKIE: How do I know that he gave a good sample? MR. MARTINEZ: Right.

TROOPER LECKIE: First of all, what you're looking for is condensation here. (indicating) That's why this is made of clear plastic and not black, blue, green, or whatever, because people who have been down this road before, for lack of a better phrase-- Well, I don't want to-- We have to wait to see what the judge's reading is going to be.

MR. MARTINEZ: No, I just want to see what the difference of the two looks like now -- afterwards.

TROOPER LECKIE: All right. You can see the fog in there, the condensation.

MR. MARTINEZ: Okay, so there is a fog here.

TROOPER LECKIE: Okay. Now, I'm not going to--

MR. MENZA: Is this the one I blew in?

TROOPER LECKIE: Yes.

MR. MARTINEZ: Right.

MR. BELL: You see, this is the thing that bothers me.

TROOPER LECKIE: See, now, turn it on, no movement whatsoever, zero-zero.

MR. MENZA: But there could be if you just moved it. All you have to do is go like this--

MR. MARTINEZ: No.

TROOPER LECKIE: (indiscernible) --like this.

MR. BELL: Go ahead. Now, how about the other way?

TROOPER LECKIE: See, then that's out of skew, and that's not what we're looking for.

MR. MARTINEZ: You're looking for that to stay the same and not to move.

TROOPER LECKIE: We're looking for that one line.

MR. BELL: You're looking for it to be lined up.

TROOPER LECKIE: Lined up in one line.

MR. MENZA: Oh, I see. But could you move this without--

TROOPER LECKIE: No. If this moves, (indicating) that moves. They move in conjunction, in unison with one another.

MR. O'SCANLON: Could it-- If the police officer wanted to, he could.

TROOPER LECKIE: If no one was looking at it--

MR. O'SCANLON: And the person who is getting the test wouldn't know really to know that that's--

TROOPER LECKIE: Now, to your question of: What is or is not a proper sample? The first thing you look for is condensation here. (indicating) And then the next thing that you're going to see is the green full light come on, which means that the sample chamber has been filled, but that's not what we're looking for. The last thing is you listen for the air escaping through those vent holes. When you hear the air escaping through the vent holes--

MR. MARTINEZ: He mentioned something and I just want to confirm it with you.

TROOPER LECKIE: Sure.

MR. MARTINEZ: When you heard that drop, that meant that you had a sufficient amount of air in there?

TROOPER LECKIE: When I heard the drop?

MR. MARTINEZ: The piston.

TROOPER LECKIE: No. That's just the piston slapping at the top and those magnets attempting to grab.

MR. MARTINEZ: So that doesn't mean you have a good sample.

TROOPER LECKIE: No, what you're listening for is the air escaping through the vent holes, and I'll show you. People will do this. (demonstrating) You get, like I said, the people who have been down the road before, and they're trying not to provide that proper sample. They're trying to give you that mouth air rather than the deep-lung air because they know that's going to be a lesser result. They'll do this. (demonstrating) "I'm done. I gave you my sample," that's it.

MR. MARTINEZ: Oh, and it clicked, but he didn't do anything.

TROOPER LECKIE: That's not enough. They see that light come on or they know that they should be giving more, but that's all they're going to give. That's not what we're looking for. You're looking for the deep-- Or they'll do this, (demonstrates) "I'm blowing."

MR. MARTINEZ: They didn't give enough.

TROOPER LECKIE: They're not blowing.

MR. MARTINEZ: They just shut their--

TROOPER LECKIE: They put their tongue over this opening. There is no condensation in here--

MR. MARTINEZ: Right, right, right.

TROOPER LECKIE: --which tells me they didn't even put any air into the mouthpiece. They're faking, and then that would end up in a refusal charge after they were given instructions that "Hey, I know what you're doing. You're not going to fool me. Blow."

MR. MARTINEZ: Do it again, or--

TROOPER LECKIE: If they don't, then it's a refusal. But what you're looking for is -- and you can hear it-- If you listen, you'll hear the air escaping through the vent holes when I do provide a proper sample. (demonstrates) Hear that hissing?

MR. MARTINEZ: Okay. You mean that hissing.

TROOPER LECKIE: Because what's happening there is I'm blowing, I continue to blow, the piston reaches the top, and it goes above those vent holes.

MR. MARTINEZ: So it's going to the sides.

TROOPER LECKIE: So now that excess air is coming out. The second that I stop, that piston descends an eighth of an inch and it covers those vent holes, and now you've trapped what's in there, and that's what you're looking for, the last portion of air or deep-lung air.

MR. MARTINEZ: No, that helped.

MR. O'SCANLON: Can we analyze that sample that you just gave?

TROOPER LECKIE: Sure. He's got to check me now. (laughter)

MR. O'SCANLON: Well, no, I just want to see, when you flip the machine on again, if there's any movement in the needle. I wasn't watching before.

TROOPER LECKIE: To be honest with you, I don't even know if I had it balanced before I started.

MR. O'SCANLON: I looked and it did seem to be. I did look over before.

TROOPER LECKIE: But now after-- Once again, the bubbling takes place, the sample is being introduced into that test ampoule, the red light will come on, and then we were to time a minute and a half after that red light comes on to allow the sample to completely oxidize.

Then we would be down in Step No. 9. As soon as the person blows in and gives the sample, we would record the time that the person gave the sample, which becomes very important -- the Reverend's question about how long before you put them on the instrument.

Then, Step No. 10, when the red empty signal appears, wait a minute and a half, turn on light, and balance. So after a minute and a half is up, then we go to the balance light again, and then we see what happens -- whether there has to be an adjustment or not.

MR. MARTINEZ: To also expand on that, though, I think you have to wait at least 20 minutes, but up to four hours has been deemed that it's fine by case law.

TROOPER LECKIE: Reasonable. You know the case law has always said what's a reasonable time, because you're looking at the other end of it. Is the person on the way up or on the way down?

MR. MARTINEZ: Okay, because it's not--

TROOPER LECKIE: So are they waiting, delaying giving of the sample, hoping that they're going to get their reading to come down, or, on the other side of it is, if being delayed so that their reading goes up.

MR. MARTINEZ: Right.

MR. MENZA: Excuse me. This balance is the light? Is that it? Is that what you-- (indiscernible)
TROOPER LECKIE: This is the switch for the balance light, which is contained inside here. This wheel (indicating)--

MR. MENZA: Did you explain this before?

TROOPER LECKIE: This wheel is simply attached to this light source, so there is a piece of threaded rod that runs across the inside of here with the half nut. As I turn this knob, that piece of threaded rod is turning. The half nut is riding along that piece of threaded rod.

MR. MENZA: So you can turn it here or here, either one?

TROOPER LECKIE: No, I can only turn it here to move the light source. As I turn this, the half nut is moving, and it's moving that light source either closer to this ampoule or that one.

MR. MENZA: Into the light source.

TROOPER LECKIE: Right. It moves the lightbulb itself back and forth so that you can create a condition of balance.

Now, I moved it.

MR. MENZA: Okay. Are you finished there, Trooper?

TROOPER LECKIE: Unless anybody has any other questions.

MR. MARTINEZ: Thank you very much.

TROOPER LECKIE: You're welcome.

REVEREND FORD: Very good, Officer.

TROOPER LECKIE: Thank you, sir.

UNIDENTIFIED MEMBER OF TASK FORCE: I've done that and I've blown a 0.40.

UNIDENTIFIED MEMBER OF TASK FORCE: With the Binaca, right?

UNIDENTIFIED MEMBER OF TASK FORCE: It's about 70 percent concentration.

MR. MENZA: Are there any other questions for the Trooper? Anyone? (no response)

Trooper, thank you so very much.

TROOPER LECKIE: Thank you, sir.

MR. BELL: Thank you.

MR. MENZA: Why don't we take another person and take a break? Okay?

MR. MARTINEZ: I think there was a question from the--

REVEREND FORD: A question from the floor--

MR. MENZA: Peter Lederman from the Bar Association.

MR. MARTINEZ: Judge, I think there's a question from one of the gentlemen -- with the gray hair--

UNIDENTIFIED SPEAKER FROM AUDIENCE: Mr. Chairman, I just want to ask one question. Is a Breathalyzer reading and a blood test reading--

MS. STEFANE (Task Force Aide): You can't be heard.

MR. MENZA: No, no. We can't pick it up.

MS. STEFANE: You can't be heard. You have to speak into the mike. We can't hear you from back there.

HEARING REPORTER: You have to talk from here.

MS. STEFANE: You have to come down.

MR. MENZA: We're making a transcript.

UNIDENTIFIED SPEAKER FROM AUDIENCE: Well, can one of you ask the question?

MR. BELL: I can ask the question.

He's saying: Is a blood reading the same as a Breathalyzer reading?

TROOPER LECKIE: (no microphone) Normally, what would occur in that case is the blood reading is going to be slighter higher than the Breathalyzer reading, because you're going directly to the source where the alcohol is going to be the strongest, if you will. So comparative studies have been done, as far as the Breathalyzer and blood tests, and the Breathalyzer will be slighter lower than blood tests.

MR. MARTINEZ: There is a conversion ratio that you put the blood to get it to the proper BAC that you would equate as with the Breathalyzer. Is that correct?

TROOPER LECKIE: That's if a hospital uses a different method of recording or reporting their BAC result. It depends on whether they're testing venous blood or arterial blood, and depending on whether they use gas chromatography and what method of gas chromatography they utilize, the result will be reported in a different way. So if you see a blood result that's like a 3.5--

MR. MARTINEZ: Three hundred.

TROOPER LECKIE: --that may not equate to a 0.35 on the Breathalyzer. You would have to do a conversion depending on which method they utilized to do the test on that particular sample.

MR. MARTINEZ: So for blood there is not one conversion rate.

TROOPER LECKIE: It depends on what method of test. I'm sure the doctor could probably answer that better than I could, but it depends on what system they're utilizing to test the blood and then it may have to be converted.

MR. MARTINEZ: Thank you.

TROOPER LECKIE: Certainly.

MR. MENZA: By the way, is the Prosecutors Association here? (no response) How about the Transportation Board, are they here? (no response) Has everyone who wishes to speak signed up? (affirmative response) Is MADD here? MADD? (affirmative response) New Jersey Restaurant Association? (affirmative response) Joseph Chiappa? (affirmative response) Chief Dan Colucci? (no response) Anyone else? (no response)

I thought we were going to have Peter Lederman?

PETER H. LEDERMAN, ESQ.: I'm right here.

MR. MENZA: Oh, yes, I'm sorry. I didn't have my glasses on.

Now, Mr. Lederman, you testified last time we had a public hearing, did you not?

MR. LEDERMAN: That is correct.

MR. MENZA: And at that time, if I'm not mistaken, you specifically stated that you were testifying as an individual--

MR. LEDERMAN: That is correct.

MR. MENZA: -- and not on behalf of the Bar Association.

MR. LEDERMAN: That is correct.

MR. MENZA: Are you testifying now as a representative of the Bar Association?

MR. LEDERMAN: That is correct.

MR. MENZA: What Committee, specifically?

MR. LEDERMAN: I'm, at this point in time, the Vice Chairman of the Municipal Court Committee.

MR. MENZA: Okay.

MR. LEDERMAN: I'm also here speaking on behalf of the State Bar Association. The Board of Trustees of the Bar Association has considered proposals and reviews of proposed statutes that were considered by the Municipal Court Committee. The Bar Association met last Friday. I'm here with Sharon Balsamo from the Bar Association -- Legislative Aide. The Bar Association has asked me to present the Bar Association's position as adopted by the Board of Trustees of the Bar Association.

MR. MENZA: Okay. Do you wish to proceed, sir?

MR. LEDERMAN: Yes. I'm going to-- I have a prepared statement which I will read, which you may have in front of you. I just wanted to make one comment at the outset.

Trooper Leckie is an outstanding Trooper. I had the good fortune of working with him, when I was a prosecutor, for a period of time in DWI cases. He is outstanding because he understands the use of the Breathalyzer machine, and he explained it to you with a great deal of clarity.

A point I would like to make just having heard what Trooper Leckie said is that he is the top of the pyramid. He is the best of the best. You saw all of the detail that was required in the operation of the breath test machine. As you get farther down in the pyramid, I would submit to you, the skill and the ability to perform that test correctly correspondingly decreases. Now, everybody has been trained in the operation of that machine, everybody has been certified, but Trooper Leckie is the best. I submit to you, if you will recall all the questions that you had, all the steps that had to be taken with regard to making that machine work properly, you may want to consider what a proper test would look like if the test was given by someone who had less training, less ability, and less skill than Trooper Leckie.

The other point that I wanted to make to you was that there was a question involving the cost of the new machine. It appears from my conversation with Trooper Leckie prior to testifying today that the State Police has zeroed in on the machine that they want. A question was raised as to whether or not it was feasible to put this new machine into use. I would submit to you that not only is it feasible, but the situation cries out for the use of this new machine. The question is: Is there enough money?

At one point in time, I did an examination on my own of the various scheme of fines that were imposed as a result of the DWI conviction. Not only are there fines, but there are various surcharges that are imposed, the VCCB, the DWI surcharge, if you would take the time to examine how much money is raised as a result of these surcharges. There is a fund in the millions that is administered by the State of New Jersey just for the DWI surcharges, no less the safe communities surcharge, the VCCB surcharge. This money then is sent back to the towns, as I understand it, corresponding to the amount of money that each town raises as a result of convictions. I submit to you that there would be an ample fund of money to allow towns to purchase these machines so that they can have the most modern equipment.

The other thing that I wanted to point out to you was, there was a question that was raised before about videotapes. I want to point out to you something that's very important. Many towns have videotape equipment. Many towns do not use videotape equipment. The equipment is there, they paid the money, it's installed, it's in the rooms. The question was asked of Trooper Leckie: Can you videotape a test to make sure that the test is performed correctly? I will tell you of two situations which I think you should be alarmed about.

Situation No. 1 is the machine is there, all the equipment is there, the money has been purchased (*sic*), but the township, the police department, or whoever is in charge of this equipment has made a policy decision not to use the equipment. So any evidence that could be produced later at trial to show that the test was not given correctly or was given correctly simply is not produced, and our courts have said, in their wisdom, "Well, you don't have to make a tape, it's not an issue that can affect whether or not the DWI conviction is upheld or not." There is an Appellate Division opinion, that I'm aware of, that says it doesn't matter if they had the equipment or not.

The second situation, which I think is even more alarming, and I think you should also consider, is the situation where the videotape is in place, the equipment is there, the machine is turned on, the videotape equipment is used to record the psychophysical tests and then, before the breath test is given, the machine is turned off. Now, you consider the policy decision why a police department that has the equipment, that desires to turn the machine on, and makes a policy decision to turn the machine off so it does not record the videotape. What is going on in their thought processes as far as the fair administration of justice is concerned? I just want to make those points made known to you.

Now I will review the formal position of the New Jersey State Bar Association. As you know, my name is Peter Lederman. I am here today on behalf of the New Jersey State Bar Association, an organization representing over 18,000 attorneys in the State of New Jersey.

I am Vice Chairman of the Bar Association's Municipal Court Practice Committee, which is charged with enforcement of the professionalism of the municipal court through identification of and recommendations for resolution of issues arising from the operation of and practice in municipal courts.

At the outset, let me say that the Municipal Court Practice Committee has undertaken an extensive study of Title 39 statutes, which contain the motor vehicle laws. That study will contain more specific recommendations for improvements in New Jersey laws. Once it is complete and our Board of Trustees approves it, we will be happy to provide copies to this Task Force.

And, parenthetically, I will add, I am the Chairman -- I am the Cochairman of that Committee, and hopefully, we will be able to provide you with opinions and thoughts that are those of our Municipal Court Committee and the State Bar Association Board of Trustees. I would also note, parenthetically, that that Board is comprised of not defense attorneys, but defense attorneys, prosecutors, judges, and other people in the State who are interested in the issue. We have heard from people who have different interests, who come to our meetings and explain their views. But this is not a defense attorney association. This is the State Bar Association, which cuts across the board as far as our State is concerned with regard to this issue.

The New Jersey State Bar Association, of course, agrees that driving while intoxicated is a societal problem that needs to be discouraged. Drunk drivers pose a risk to everyone, and we commend the Legislature for studying the issues to ensure that we are doing everything that we can to reduce the risk in our State. We believe that goal, however, must be balanced, and the key word is balance. That goal must be balanced against a defendant's right to fair treatment and adequate, but not excessive, punishment.

One topic being considered by this Task Force today is whether the penalties for a DWI conviction should be increased. The New Jersey State Bar Association believes that they should not be increased for a number of reasons.

Currently, a person convicted of driving while intoxicated is subject to the following penalties:

A first offense involves a fine of at least \$250 to \$500, 12 to 48 hours in the Intoxicated Drivers Resource Program, possible imprisonment of up to 30 days, and six months to one year of license suspension.

For a second offense, the fine is \$500 to \$1000, 30 days community service, 2 days imprisonment or 2 days in IDRC, and a two-year license suspension.

For a third offense, \$1000 fine, six months imprisonment -- which may be cut in half for community service -- and a 10-year license suspension.

In addition to these penalties, which are mandatory penalties over which a judge has little or no discretion, an individual convicted of driving while intoxicated also faces a VCCB surcharge, a Drunk Driving Enforcement Fund surcharge, court costs, fees associated with the IDRC, \$1000-a-year insurance surcharge, the restoration fee that must be paid to get the license back, and also the safe -- again, I don't remember the exact title of the surcharge-- There is a safe communities surcharge.

The New Jersey State Bar Association believes that these penalties are fair and adequate without being oppressive. There is no evidence to suggest that increased penalties, such as those contained in Assembly Bill No. 1010, which would double existing penalties, will act as any more of a deterrent than the current law. On the contrary, we believe that at some point excessive penalties become unenforceable. Furthermore, the New Jersey State Bar Association has traditionally supported the preservation of judicial discretion in sentencing because it is the judge, particularly in the municipal court as the trier of fact, who can weigh all of the circumstances and make informed decisions as to sentencing.

On the other hand, the New Jersey State Bar Association supports Assemblyman Kavanaugh's proposal, A-52, which permits a first offender of the drunken driving law to apply for a restricted-use drivers license, because we believe some relief should be available to first-time offenders who can demonstrate that their driving while intoxicated offense was unusual or aberrant behavior that will not be repeated.

Another practical factor that must be taken into consideration when discussing an increase in penalties for DWI is the availability of existing resources. For example, increased prison terms for DWI means more individuals being thrust into our already overburdened prison population. We urge this Task Force to ensure that adequate resources are available to comply with any recommendations it sets forth.

I wanted to point something out before I proceeded with my written remarks -- my formal remarks, and that was, the question was raised about Pretrial Intervention-- As Judge Menza knows, the purpose of Pretrial Intervention was, in part, to divert from the criminal process and the overburdened courts certain cases which would fit into the philosophy of the program. The idea was to get people out of the common track for criminal prosecution. The purpose of this was to reduce the number of cases which the court would have to consider and, at the same time, allow people to be considered for disposition in a way other than going through the criminal process.

Now, I submit to the Task Force that if a Pretrial or a PTI or an ADR-type program were put into place in New Jersey, we would have faster resolution of issues. We would have better resolution of issues with quality resolutions, with supervision of people in this program with sentences that would let these people know that if they made a mistake again, they would be in much more serious trouble. I think it would be far superior to the program that we have now, where we have a tremendous backlog of cases.

I am a municipal court attorney. I start cases frequently after 10:00 at night, notwithstanding court rules to the contrary. I have tried many DWI cases to 1:00 in the morning and after 1:00 in the morning. The reason is that municipal courts have tremendous calendars. DWI cases are kept for last because they're the longest cases. If those cases were taken earlier, then none of the other cases would be heard. I used to work for a judge, when I was a prosecutor, who said, "The quality of justice decreases as the hour progresses," and he was right.

I submit to you that DWI cases can be adjudicated through a PTI-type, ADR-type program, where the quality of the enforcement, the future-- The quality of the program would be much greater than simply what we have now where people are given these harsh lines and not given an opportunity to redeem themselves.

The New Jersey State Bar Association further believes that in New Jersey repeat offenders are dealt with fairly and adequately under the present DWI laws. We believe there are certain procedural safeguards built into New Jersey's laws that are important to maintain in order to ensure that a defendant's understanding of his or her rights to counsel and the consequences of enhanced penalties associated with a subsequent offense.

Senate Bill No. 1955, sponsored by Senator Bubba, proposes treating DWI convictions in other states as prior convictions in New Jersey for sentencing purposes. The New Jersey State Bar Association is opposed to such a measure unless the conviction is from a state that has substantially similar laws to New Jersey's. By substantially similar we do not just mean requiring a BAC of 0.10 or more, but we believe it's important that other procedural safeguards required in New Jersey are present as well. Those safeguards, as I mentioned, ensure that a defendant understand his or her right to counsel, as well as the consequences and enhanced penalties associated with a subsequent offense.

The second topic being considered by the Task Force today is the adequacy of the Breathalyzer as a means of testing for DWI. While the New

Jersey State Bar Association does not have an official position on the use of the Breathalyzer and whether or not the BAC limit should be 0.10 or 0.08 before there is a per se violation, the New Jersey State Bar Association does believe that whatever standard is utilized, it should be clearly articulated and should be uniform throughout the State. That is why we support Assemblyman Holzapfel's bill, Assembly Bill No. 358, which clarifies that alcohol concentration means grams of alcohol per 100 milliliters of blood if blood is tested or grams of alcohol per 210 liters of breath if breath is tested.

Mr. Chairman, members of the Task Force, I thank you again for allowing me the opportunity to appear before you today on behalf of the State Bar Association. Again, I remind you that we hope to submit to you a detailed report with recommendations concerning the motor vehicle laws, especially involving the question of DWI. If you have any questions, I certainly would be glad to entertain them at this time.

Yes, ma'am?

MR. MENZA: Doctor.

DR. ALTEVEER: I have several questions. Since you appeared before us as a private citizen and now are appearing as a representative of the Bar Association, I'm having a little bit of difficulty separating what -- when you're representing whom. I can see that you provided us with a written thing, which is pretty clear what you're representing. When you said about the advanced tracking, the pre-trial, was that your own opinion, or was that the opinion of the Bar Association?

MR. LEDERMAN: Well, we have to do it by the numbers, and the way this works is the Municipal Court Committee discusses proposed legislation, we debate it, we vote on it. Those findings then go to the State Bar Association Board of Trustees. They debate it. They vote on it. The four issues that are in my prepared remarks are positions that have been adopted in the process that I've just described. The other thoughts that I have presented to you are my personal thoughts.

However, having said that, as I've indicated throughout the written remarks, our Committee and my Subcommittee is in the process of preparing a report to you, which we hope will be adopted both by the Committee as a whole and by the New Jersey State Bar Association. I hope to be able to come back to you before your last hearing and be able to express positions which are not my personal positions, but are positions adopted officially by the New Jersey State Bar Association.

DR. ALTEVEER: Does the Bar-- I have a second question, if that's okay? Does the Bar Association have a position on administrative license revocation? As I've understood it, some states have it where the arresting officer has the authority to take the driver's license and hold it for a period of time. In some states, they may have a work -- they may then get a temporary work license, but I don't know that that is in every case. Then, based on what happens through resolution of the case, they either then get a penalty or they're acquitted.

MR. LEDERMAN: I'm not aware--

DR. ALTEVEER: Has the Bar Association examined that?

MR. LEDERMAN: I'm not aware if the Association has adopted such a position. I would ask Sharon Balsamo, who is here as a Legislative Aide, to, perhaps, answer that question. **SHARON A. BALSAMO, ESQ.:** (speaking from audience) I'm being told I have to go up and use the microphones.

That particular issue has not been discussed and debated within the Bar Association. We do not have an official position on it that we can convey to you today. It may be part of the report that we are undertaking and, hopefully, will be able to convey something to you in a month or so.

DR. ALTEVEER: Thank you.

MR. MENZA: Are there any questions?

MR. MARTINEZ: Yes.

MR. MENZA: Mr. Martinez.

MR. MARTINEZ: Mr. Lederman, I'm just curious, is the State Bar, through the Committee that you Chair, in favor of criminalizing the DWI law or keeping it as a motor vehicle offense?

MR. LEDERMAN: I can't speak on behalf of the Committee because we have not voted to take a formal position. I can only speak on my own behalf until the Committee and the Association take a formal position.

MR. MENZA: Well, we would really like to know what the Bar Association has to say about that, and perhaps, your Committee might want to bring that up to the Bar Association so that we can get their position prior to our final report.

MR. LEDERMAN: I would be pleased-- As a matter of fact, we're going to have a telephone conference this afternoon for the Committee, and then we can raise that issue. But I'll be glad to present that. We also have a meeting on Thursday of this week of the Committee as a whole, and we can present that issue as well. MR. MARTINEZ: One follow-up question. In your remarks I distinctly recall you stating that it's the position of the Bar Association that the penalties as they exist are adequate, and it just dawns on me something that Mr. O'Mara said and my own experience is that I have, in 10 years of practice, relatively never had a second or third offender that actually went to jail. Where is the deterrent effect of the laws as they stand if they're not implemented to the effect to give the deterrent effect that they were meant to have in the first place?

MR. LEDERMAN: I've seen them go to jail. I've represented them. I do represent right now. I represent defendants who have the prospect of spending time in jail. I represented one defendant who spent six months in jail.

MR. O'SCANLON: Of course, we don't want to publicize that.

MR. LEDERMAN: Well, it happens, and that's one problem. Somebody made mention of the possibility of regionalizing municipal courts -- and this is my personal opinion -- with judges who were full-time municipal courts judges. I think that's an outstanding recommendation. I think it's very difficult and problematic having so many different courts with so many different judges and so many different prosecutors, so many different attitudes toward enforcement, severity of enforcement, whether the 28-day cure is appropriate, whether jail is appropriate, and I think, in fairness, to have--

We need uniformity. I think that's something the court has recognized all along, that uniformity in sentencing is important. We don't have that, I think, largely because there are so many personalities in different municipal courts between judges and prosecutors and police departments that sometimes a lot of things come into play that result in what the sentences are. I think this is a very important issue.

But I would submit to you, yes, I have seen defendants go to jail, and again, it's the court, it's the county, it's the way it is in that particular jurisdiction.

MR. MARTINEZ: Well, let me rephrase that. I've had clients who have been charged as an eighth offender on a DWI go to jail for the six months. I have never had one on a purely third offense DWI go to jail.

MR. LEDERMAN: I have. I have.

MR. MARTINEZ: And I'm talking from--

MR. LEDERMAN: And I can think of--

MR. MARTINEZ: --Salem to Bergen.

MR. LEDERMAN: The majority of my practice is municipal court practice, and the majority of that is DWI practice. I have had -- I can think of two people-- One person was a 0.10. It was the personality of the court. It was the personality of the judge. He sent this person for the full six months. It wasn't 90 and 90.

MR. MARTINEZ: But I would pose that to you as the exception rather than the rule.

MR. LEDERMAN: I don't think so. I really don't think so. I think it's just-- There's just no way of knowing. And I will also tell you that I went to court with somebody last night who was a third offender, and he was not sentenced yet, as far as that is concerned -- that issue is concerned -- but he is in fear of that. I also submit--

MR. MENZA: Excuse me, sir. Sorry to interrupt you.

Did I interrupt you, Mr. Martinez?

MR. MARTINEZ: No, that's fine. I'm done.

MR. MENZA: When you're dealing with a third offender -- at least, my experience, when I was practicing law many, many years ago was that -- you're really dealing with someone with an alcohol problem and that the concentration of punishment, toward punishment rather than rehabilitation, I think, is misguided. I've never represented -- at least in the olden days, as the children say, when I was practicing law-- All third offenders I ever represented had serious alcohol problems, and they were facing, primarily, jail rather than long-term rehabilitation. Wouldn't long-term rehabilitation be much more effective on subsequent offenders, repeat offenders, than would jail?

MR. LEDERMAN: Yes, absolutely. I think--

MR. MENZA: Is that your experience?

MR. LEDERMAN: I have represented people, who are multiple offenders, who have gone into programs and have come out of programs and are no better. Some people have tremendous problems with alcohol, and they just cannot deal with it. For other people, the term of imprisonment is something that makes them think twice, but many times it doesn't.

I think-- That's why I strongly suggest alternative ways of dealing with people who have this problem. It is a problem. It is a societal problem. I think, unfortunately, we've taken the easy way out over the past years by simply saying that you're going to go to jail or going to lose your license for 10 years--

I would point something out that, I think, is very important. About 10 years ago -- and I wish I had this with me -- the Legislature adopted a statute, and the statute said, largely, that it recognized alcoholism as a problem. Now, this statute was not adopted in view of the DWI laws and the DWI debate; it involved alcoholism as a whole. It raised a public policy. This is part of our law. The statute said we have to treat people who have an alcohol problem as people with medical problems, and we have to rehabilitate them. We have to solve their problems, because it is truly a societal problem.

I would submit to the Task Force that when it comes to DWI, we have looked the other way, and we have taken the easy way out by simply saying, "We're going to take your license away for 10 years. We're going to put you in jail for 180 days." That's not the issue. Alcoholism is a problem, and we need to solve that problem. It's a serious societal problem. We should deal with it as a societal problem as the Legislature said we should 10 years ago when it adopted that statute.

MR. MENZA: Anyone else? Are there any other questions of Mr. Lederman?

MR. MARTINEZ: Are you a friend of ATRA?

MR. MENZA: Thank you so much, sir.

MR. LEDERMAN: There was one question.

MR. MENZA: Oh, I'm sorry.

MR. MARTINEZ: Are you a friend of ATRA, the Alcohol Treatment Rehabilitation Act?

MR. LEDERMAN: That might be it. I've looked at it recently, but the courts--

MR. MARTINEZ: That's still on the books.

MR. LEDERMAN: It's very much on the books, and it speaks to the importance of rehabilitation when alcohol is involved in antisocial conduct.

MR. MARTINEZ: Right.

MR. MENZA: We'll check that out, Mr. Martinez.

MR. LEDERMAN: Thank you, Judge. Thank you very much. MR. MENZA: Thank you very much.

We're going to take a 35-minute break. We'll be back at 10 to 2:00. No, not 10 to 2:00, whatever 35 minutes is, that's when we're going to be back. (laughter) And then we'll hear from Chief Dan Colucci, Joe Chiappa, New Jersey Restaurant Association, and MADD, and anyone else who wishes to be heard.

All right, thank you very much.

(RECESS)

AFTER RECESS:

MR. MENZA: Is Chief Colucci here? Is Chief Colucci here? (no response) (loud construction noise in background) The representative from MADD, please.

Just give us a couple of seconds to see if Mr. O'Scanlon will be coming in.

The New Jersey Restaurant Association, he left. Joseph Chiappa? (affirmative response) And Chief Colucci, did he decide to leave?

MS. STEFANE: I don't think he ever made it.

MR. MENZA: I thought he was here. I thought I saw him back there. All right.

Yes, ma'am.

DONNA FRANDSEN: Good afternoon, honorable Chairman, and Task Force members. My name is Donna Frandsen. I am Public Policy Director for New Jersey Mothers Against Drunk Driving. I wish to personally thank you for the opportunity to speak to you today.

MR. MENZA: Excuse me, ma'am.

Go outside and do something about the noise. (speaking to Aide) MR. BELL: What is that?

MR. MARTINEZ: Sounds like landscaping to me. A lawn mower?

MR. MENZA: All right, is there volume on your mike? (referring to PA microphone)

HEARING REPORTER: It's on. The only way you can hear it is to get closer to it. Closer to your mouth is better.

MS. FRANDSEN: My mouth? Okay. (witness adjusts microphone)

Good afternoon, honorable Chairman, and Task Force members. I am Donna Frandsen, Public Policy Director for New Jersey State Mothers Against Drunk Driving. I wish to personally thank you for the opportunity to speak with you today. (background noises ends)

New Jersey State Mothers Against Drunk Driving supports any legislation that serves as a general deterrent to drunk driving. While we would not oppose increased penalties for drunk driving, we do not specifically support increased penalties at this time. New Jersey State Mothers Against Drunk Driving's main priority is 0.08. MADD's premise is that 0.08 is the best deterrent. (noise begins again) At this time, they do not have a position on criminalizing DWI, also.

That is my statement for today. Thank you.

MR. MENZA: That's it?

MS. FRANDSEN: That's it. Thank you.

MR. MENZA: So succinctly you have-- You're satisfied with the penalties that are in existence now, and you do not recommend, or you have--

MS. FRANDSEN: Well, at this point, it's not one of their legislative positions.

MR. MENZA: They have no position on whether it should be criminalized or not?

MS. FRANDSEN: Correct.

MR. MENZA: Okay.

MS. FRANDSEN: Thank you so much.

MR. MENZA: Okay. Now I wonder why we had lunch. (laughter)

Joseph Chiappa.

I see you were quite successful, weren't you? (referring to noise continuing)

MS. ESPIEG: There is construction going on upstairs, and in order to stop it we have to go up to the *C* level to tell them to cut it out.

MR. MENZA: Never mind. Just let's go. We're almost done.MS. ESPIEG: It's the drilling upstairs.

JOSEPH A. CHIAPPA: Mr. Chairman, members of the Task Force, my name is Joseph Chiappa, and I'm the Director of the Camden County Intoxicated Driver Resource Center. Thank you for giving me the opportunity to address you today. The matters before you, as I'm sure you are keenly aware, affect the lives and safety of all those who use our highways.

I am the past Chairman and the current Vice-Chairman of the Intoxicated Driver Resource Center Directors Association of New Jersey. I've been asked by the Association to address you on the adequacy of current DUI penalties and whether criminal sanctions should be imposed. We believe that the drunk-driving problem is both a highway safety problem and also a health problem. We also believe that the current penalty structure is generally adequate to accomplish the State's goals of reducing drunk driving.

Before I address the questions of adequacy and criminality directly, I will briefly describe the IDRCs and address the purpose of the DUI laws; recent history of DUI legislation in New Jersey; current DUI punishment in New Jersey compared to other states; the current law and its accomplishments; proposed legislation; and useful measures.

The Intoxicated Driver Resource Centers were authorized by the State Legislature in 1984 to detain, evaluate, educate, and refer to appropriate treatment convicted drunk drivers. We also monitor treatment participation. The centers regulated by the Intoxicated Driver Program in the New Jersey Department of Health report on whether DUI offenders have satisfied the requirements and help the Division of Motor Vehicles determine their fitness for relicensure. There are 21 county-based first offender programs and 3 regional second offender programs. The legal structure under which we operate is unique in the United States. It is the result of a deliberate strategy to combine appropriate punishment for drunk driving along with rehabilitation. Since 1984, over a quarter of a million drivers have participated in the IDRC programs.

The purpose of the laws: The specific purpose of DUI laws in New Jersey is to deter drivers from operating under the influence of alcohol or drugs and to improve the driving behavior of those convicted of DUI. Deterrence is usually achieved when laws are supported and enforced by the police and the courts and when they are widely known and accepted by the public at large. Some hold that general deterrence is achieved when the public believes that punishment is both swift and sure. We believe that specific deterrence or prevention is also achieved by rehabilitating convicted drivers -- drunk drivers. The two work together.

Determining whether a law is effective means checking to see if the problem has been reduced. When the effectiveness of DUI laws is assessed, evaluators look at alcohol-related fatalities and DUI recidivism.

Alcohol-related highway fatalities have been reduced in New Jersey from 43 percent in 1985 to 26 percent in 1996. These reductions place us among the top states. Measuring DUI recidivism accurately is more difficult because the categorization of repeat offenders is determined by a 10-year statute of limitations and whether they were represented by counsel for a previous offense. DUI recidivism among completers of the IDRC predecessor program, however, has shown to have been reduced over 50 percent compared with noncompleters. DUI recidivism in New Jersey is estimated at approximately 25 percent. Recent history of DUI laws in New Jersey: In New Jersey, we have learned that DUI laws must not only be passed, they must be enforced by the police and supported by the people. Violators must observe the license suspension or revocation penalties.

In the 1960s and early 1970s, when New Jersey also had the most severe drunk-driving laws in the United States, these laws were poorly enforced and generally ignored by the public. DUI fatality rates remained impervious to reduction. In 1977, the laws were streamlined, penalties reduced, and rehabilitation mandated for all offenders. Although this approach resulted in increased enforcement, fatality rates did not begin to fall. In 1984, the law was, again, revised, penalties were increased, mandatory rehabilitation was retained, but another ingredient was added. Spurred on by MADD and RID -- that is, Reducing Intoxicated Drivers -- considerable media attention was paid and broad public support was generated. All across the State prevention activities abounded. Alcohol-related highway fatality rates began to fall in 1985 and have continued to do so through 1996.

Current punishment for DUI in New Jersey compared to other states: I have appended to my prepared statement that you have received a table taken from the most recent National Highway Traffic Safety Administration's *Digest of State Alcohol-Highway Safety Regulated Legislation*, which presents an analysis of what they call "high-interest" legislation. The sanctions analyzed fall into four categories: license suspension or revocation; jail or incarceration; fines, surcharges, and fees; community service in lieu of jail. I won't repeat the sanctions for first, second, and third offenders, since it was given in previous testimony. There are additional fines and fees that increase the pain of conviction for DUI. There is the \$100 Drunk Driving Enforcement Fund payment -- it goes to the local police -- the \$100 Intoxicated Driving Program Administration Fee to the Alcohol and Education Enforcement Fund, the DUI license restoration fee of \$50, the Intoxicated Driver Resource Center per diem fees -- the 12-hour program, \$75 per diem, the 48-hour program, \$100 per diem. There are assessments for the Victims Criminal Compensation Board of \$50 and the Safe Neighborhoods Services Fund of \$75. There are also substantial motor vehicle surcharges of \$1000 per year for three years for first and second offenders and \$1500 per year for three years for third offenders.

Comparisons with other states: The only other jurisdiction, that is Washington, D.C., has a suspension or revocation for first-offense conviction as long as six months. Many jurisdictions have much shorter suspension periods, and many of these suspensions may be undercut by work or conditional licenses. Only one other state, Tennessee, unconditionally revokes licenses for as long as two years on a second conviction. Arkansas is the only other state that revokes the license unconditionally for 10 years for a third or subsequent conviction.

The jail penalties seem consistent with other states. Most states and New Jersey, however, have more severe criminal penalties for vehicular homicide and injury by auto. There are no consistent patterns of community service across the states. The fines are consistent with other states. The fees and surcharges raise costs significantly, however. Does New Jersey need to criminalize drunk driving? The purpose of DUI laws in New Jersey is not only to deter individuals from driving drunk and to punish those who violate the laws, but also to improve the drinking and driving behavior of those convicted. The State already imposes the toughest suspension penalties for DUI in the U.S., even though it is treated as a quasi-criminal traffic offense. In addition, there are equally severe suspension penalties for refusing a breath test and enhanced penalties for violation of a DUI suspension. New Jersey also requires offenders to attend appropriate education or rehabilitation programs at every offense level.

But New Jersey criminalizes and penalizes the consequences of drunk driving. In addition to the DUI statute, which is the traffic code, the criminal code calls for a maximum jail term of 10 years for vehicular homicide and, in cases where high blood alcohol concentrations are involved, the charge may be aggravated manslaughter with a 10-year to 30-year term. We must be on the right track; New Jersey's alcohol-related deaths declined substantially between 1985 and 1996.

Drunk driving is an inherently risky behavior, and by distinguishing in law between the act itself and its bad consequences, the State brings large numbers of offenders into a system combining appropriate punishment with education and treatment if necessary. Balancing the rights of offenders against the State's public health and safety needs has not been easy, but the results have been noticeable in terms of fatality reductions.

Rehabilitation programs at every level, proposed legislation -- that is, lifetime revocation for third offenders: This proposal to impose lifetime revocation in New Jersey corresponds to an amendment to the pending Federal highway bill. In New Jersey, many third or subsequent offenders have been safely relicensed after having suffered full, unconditional punishment under the law and having completed rehabilitation.

Under the proposed amendments, however, there would be virtually no motivation for these offenders to seek treatment, to maintain sobriety, or to improve their driving behavior. Many offenders now delay their participation in our programs because of the extensive suspensions and the financial burdens of the fines and surcharges. The imposition of absolute lifetime revocation may foster unintended consequences of increased noncompliance arising from economic necessity and disregard of the law. Law-abiding road users may be subjected to increased risks borne by unrehabilitated, high-risk violators driving illegally.

We respectfully request that this Task Force consider a different approach, one that metes out appropriate punishment, but also offers motivated multiple offenders an incentive to enter treatment and one that would give them credit for reestablishing sober and productive lives.

Useful measures: New Jersey needs to revitalize its coordinated effort to reduce all highway deaths and alcohol-related deaths in particular. Drunk-driving control efforts succeeded in the 1980s and 1990s because of an effective partnership between government and concerned groups. Specific goals were set. There was strong media attention, in addition to public support and effective leadership.

We would support a recommendation by the Task Force to establish a State-level DUI coordinating body to give direction and coherence to our efforts. We already have the means to enforce the laws on the books. Well-trained State and local police are the most effective weapons in this battle when the vigorously and visibly enforce the laws. Sustained efforts designed to gain the public's attention can reemphasize the State's seriousness in this area. New Breathalyzers would also assist the police.

Strengthened prevention and education efforts are also important since each generation must be educated anew. Prevention work focusing on high-risk populations, such as youth and 21- to 34-year-old males, should be emphasized.

Finally, the control of DUI requires leadership, timely identification of problem areas, better statistics to inform policy, prioritization and coordination of effort. We believe, however, that the current system of DUI laws strongly enforced is, in general, appropriate to New Jersey's needs. By combining progressively severe punishment with mandatory education and rehabilitation at all levels, this system has produced dramatic reductions in alcohol-related fatalities in New Jersey. We are proud to be part of the effort.

I'd be happy to answer any questions you may have.

MR. MENZA: Yes, Doctor.

DR. ALTEVEER: When you said approximately 25 percent recidivism rate, was that an average of first to second offenses, second to third, or more than third, and how does that compare to other states?

MR. CHIAPPA: That is, first to third. It compares generally favorably with other states. This statistic is a very hard one to pin down because of the law. Frequently, a second offender may be convicted as a first offender because the 10-year period of time may have elapsed. When they are evaluated at the IDRC, however, we look at the entire picture of how many offenses a person has had when we are making a referral to treatment. I know that's not an adequate answer to your question. We don't have the hard data to make a specific reply to that. We seem to be in the ballpark in terms of the recidivism rate.

MR. MENZA: Yes, Mr. O'Scanlon.

MR. O'SCANLON: Is your position-- You didn't say specifically about the -- and I know we're not here today specifically on this either, but lowering the BAC from 0.10 to 0.08. Am I to take the implication from your testimony that you would not encourage that move?

MR. CHIAPPA: No. I didn't address that because that was not on the agenda today; however, the IDRC Directors Association has come out publicly in support of 0.08 legislation.

MR. O'SCANLON: Okay.

MR. MENZA: I have a few questions. On Page 4 you state this State already imposes the toughest suspension penalties for DUI in the United States. Is that correct? Is that a correct proposition?

MR. CHIAPPA: I believe it is. On the handout, the analysis by states, that's where I got that information, which was put out by the U.S. Highway Traffic Safety--

MR. MENZA: All right. You also state-- Did you say that fatalities are not affected by penalties?

MR. CHIAPPA: Not penalties alone, sir. I said penalties in conjunction with. That's probably one of the strongest points I think we can emphasize, the need for a combination of efforts of therapy and punishment. I think the IDRC's system tries to balance both. In fact, we're part of the punishment system because we're detainment. However, we do an evaluation, referral, case management, and we will place people to noncompliance if they do not follow through on their treatment plan.

MR. MENZA: Who funds you?

MR. CHIAPPA: The clients do. That is, the drunk drivers, as they come in, must pay a fee to attend the IDRCs.

MR. MENZA: What do you mean by a "State-level DUI coordinating body to give direction and coherence to our efforts," to quote you?

MR. CHIAPPA: There are so many people involved with this whole process, as you've seen with the Task Force, I'm sure, that frequently one hand doesn't know what the other hand is doing. There are many prevention efforts being put forth by either municipal alliances or police departments or even other associations-- There are a lot of things happening in terms of education-prevention kinds of things. There are legislative things happening on several different levels. I think we need to, somehow, coordinate and to be proactive rather than reactive to a lot of the things that happen.

For instance, I think legislatively, especially during election years, all kinds of bills pop up in terms of anti-DUI laws because they gave a lot of people running for office a lot of visibility, but some of them don't make a whole lot of sense. I think there should be someone who is neutral in terms of evaluating pending legislation.

MR. MENZA: Would that be part of government? Part of the--There is an agency on alcoholism and drugs, what-- MR. CHIAPPA: Part of the Department of Health, Division on Alcohol and Drug Abuse?

MR. MENZA: Yes. Would it be part of that?

MR. CHIAPPA: I think somehow-- I would rather see a much more independent kind of approach, which would be across the board with representatives from both the--

MR. MENZA: But a State agency? Not agency, a State Council?

MR. CHIAPPA: I don't think we need another State agency, but something like the Task Force that would be independent.

MR. MENZA: But a permanent one?

MR. CHIAPPA: Yes.

MR. MENZA: Is that what you're talking about?

MR. CHIAPPA: Yes. Similar to a DUI Commission that existed at one time, I believe; although, that was mandated, I think, by the Legislature.

MR. MENZA: Are you going to testify again next month?

MR. CHIAPPA: Yes, I will. I intend to work with--

MR. MENZA: Will you go into more detail with regard to rehabilitation?

MR. CHIAPPA: I will, and I'll also be talking about prevention with the local alliance person.

MR. MENZA: Are there any other questions?

Mr. Martinez.

MR. MARTINEZ: In your experience, over the course of the years that you've been with the IDRC, would you say that there are people who go through the system who are just not rehabilitatable? MR. CHIAPPA: Unfortunately, yes.

MR. MARTINEZ: Now, while the IDRC pertains, on a 12-hour requirement for a first offender and up to a 48-hour requirement for a third offender, the reality is that the emphasis under the current law isn't at dealing with the first offender. Would you disagree with that assessment?

MR. CHIAPPA: I would, because most of our clients are first offenders. Great percentages of our clients are first offenders, and the great portion of what we do is prevention in terms of reeducating the first offenders.

MR. MARTINEZ: Yes. Well, my experience with the IDRC, they go through the referral depending on their reading and their intake interview, they're either determined then that they, for the most part in Mercer County, have to go to AA meetings or they don't.

MR. CHIAPPA: Thirty-eight percent of the people who come through for a first offense are referred for further treatment, further education and treatment.

MR. MARTINEZ: Thirty-eight percent.

MR. CHIAPPA: Thirty-eight percent. It's determined by a series of things, including a testing that's done -- a test that was developed by Rutgers University. Blood alcohol content is certainly part of that, but they also do an autobiographical statement, their approach to what happened. They can tell us if they're taking responsibility for their behavior, that kind of thing.

MR. MARTINEZ: And do you have any statistics on that 61 percent that isn't diagnosed with a significant problem as a first offender, as to how many of them become recidivists?

MR. CHIAPPA: I don't have hard data on that, no.

MR. MARTINEZ: But you're aware of what my question is? MR. CHIAPPA: Yes, yes.

MR. MARTINEZ: And do you-- What's your sense on that?

MR. CHIAPPA: I'd say 80 percent to 90 percent of the first offenders who are episodic drinkers -- it happened because they were at a party or something like that -- do not come back. They don't come back for another \$9000 offense.

MR. MARTINEZ: I agree, it's hefty.

MR. CHIAPPA: But if they're problematic drinkers, then that will override the negative parts.

MR. MARTINEZ: Do you have access to that kind of data for that?

MR. CHIAPPA: I do. I can research that for you.

MR. MARTINEZ: If you could, I'd appreciate that as well. Because that might address one of the aspects which we're looking into as to how to possibly further the efforts to target more than possibly just 38 percent of the people who go through to make sure that whatever the recidivism rate for that 61 percent doesn't get to be that.

MR. CHIAPPA: I understand.

MR. MENZA: We need as much data as you could give us on the subject of rehabilitation. All right?

MR. CHIAPPA: Yes, sir.

MR. MENZA: Thank you very much, sir.

I'm sorry, was there anyone else? (no response)

Thank you very much.

MR. CHIAPPA: Okay.

MR. MENZA: Is there anyone else who wishes to testify? (no response) If not, the hearing is closed. Our next public hearing will be on October 21, 1997 at--

MS. STEFANE: Camden County College in Blackwood. MR. MENZA: Camden County College in Blackwood. Thank you very much.

(HEARING CONCLUDED)