

DEFENDING BWI CASES

THE THIESSEN LAW FIRM

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GENERAL

- ◉ Born on or after 9/1/93 have to take boater education course (15hp, 14ft)
- ◉ Boater Education Card/Cert/ TXDL
- ◉ Must be 13 to operate a boat
- ◉ All children under 13 must wear a lifejacket at all time on the boat

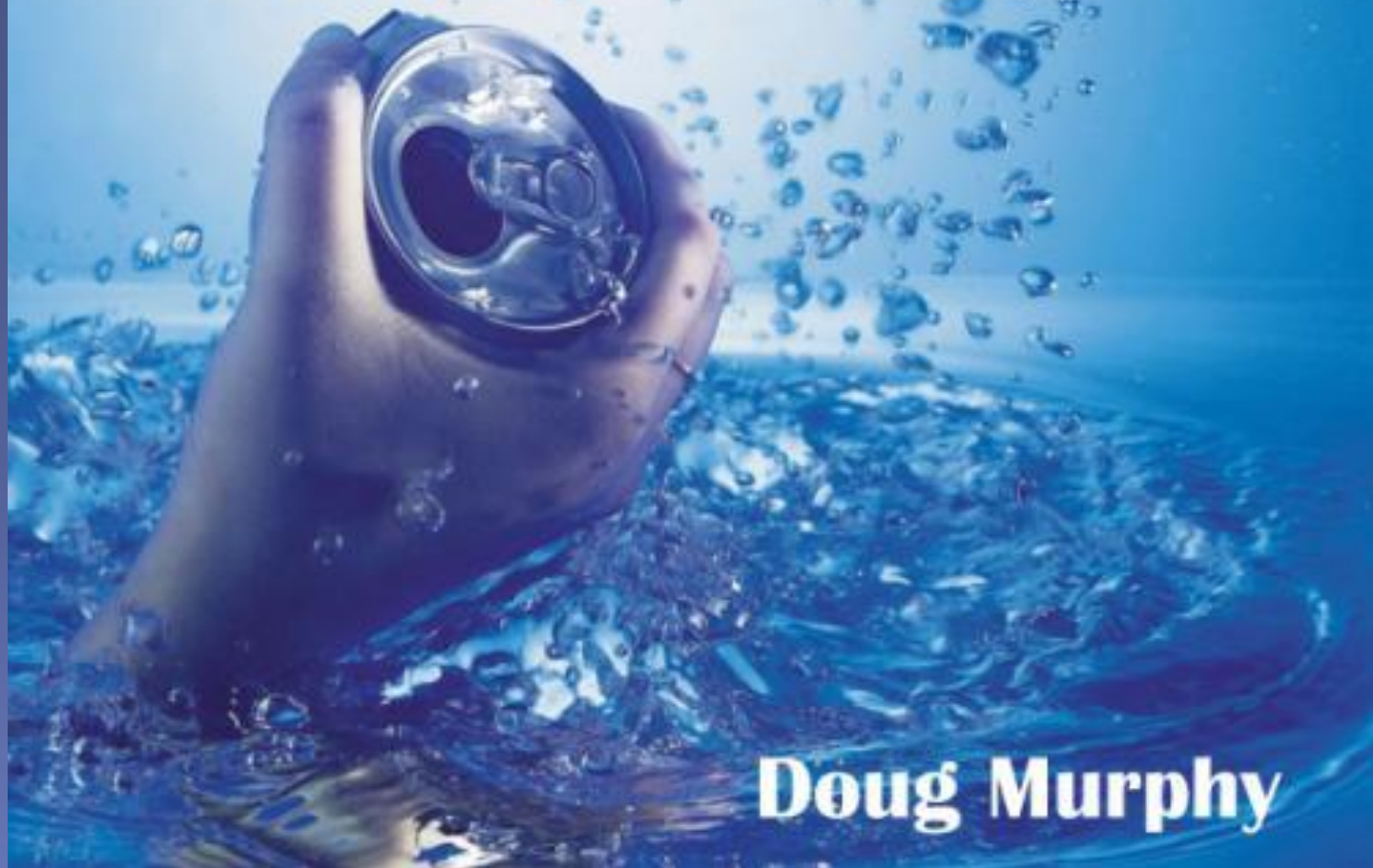
BWI PENAL CODE

- ◉ 49.06 commits an offense if intoxicated while operating a watercraft.
- ◉ 49.01 (4) Watercraft: “vessel, one or more water skis, an aquaplane, or another device used for transporting or carrying a person on water, other than a device propelled only by the current of water.”

BWI TX TRANSP. CODE

- ◉ License Consequences ONLY
- ◉ 724.002 apply to suspension of a license for refusal to submit to the taking of a specimen apply only to a person arrested for an offense involving the operation of a MV or a watercraft powered with an engine having a manufacturer's rating of 50hp or above.

Defending Boating While Intoxicated Cases



Doug Murphy

JULY 2014 Voice for the Defense

STUDIES AND VALIDATION

◉ 1990 USCG

- > Environmental Factors: heat, spray, boat motion, vibration, and glare
- > HGN, OLS, WAT, F-N, FC, ALPHA, HAND PAT
- > 97 military men (21-40)
- > 2 Maryland Natural Resources/4 Ohio Water
- > 90 min boat ride
- > 15 MIN WAITING PERIOD – genesis
- > PBT – Seimens Alcomat
- > .10

STUDIES AND VALIDATION

- 2010 Validation of Sobriety Test for Marine Environment (Fiorentino, D.D., Accid. Anal. Prev.)
 - > SCRI and NASBLA
 - > HGN/ FTN/ PP/ HC
 - > AlcoSensor PBT
 - > Lake of The Ozarks
 - > Stopped Boaters Suspected of BWI
 - > White Males (18-80)

BUI Seated Battery Transition Training Course Manual

- > Created by IACP**

(Int'l Assoc of Chiefs of Police)

- > Curriculum for NASBLA**

(National Assoc of State Boating Law Administrators)

- > 1 day, 8 hour training course**

NASBLA MANUAL

- ◉ Starts with SFSTs in 1975
 - > CO 95/ FLA 97/ CA 98
- ◉ HGN / WAT/ OLS
- ◉ NOT VALIDATED:
 - > Finger to Nose, Hand Clap, Finger Touch
 - > Hand Coordination? Palm Pat?

VALIDATION APPLIES

- “The four standardized tests were found to be highly reliable in identifying subjects with a BAC at or above 0.08.”
- VALIDATION APPLIES ONLY WHEN:
 - > The tests are administered in the prescribed, standardized manner.
 - > IF ANY OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED. (NASBLA 3.9)

BUI Seated Battery Transition Training Course Manual

- > “When marine activities disrupt a person’s equilibrium; balance is potentially affected for a period of time following the activity. A common phenomenon occurs, commonly referred to as ‘sea legs’ where a person feels unsure of their balance on shore, especially after riding on a boat for long periods.” (NASBLA p. 3.4)

BUI Seated Battery Transition Training Course Manual

- > USCG recommends 15 minute waiting period onshore before SFSTs.
- > “There needs to be additional research performed to thoroughly evaluate and quantify the effects of ‘sea legs’ on a person’s equilibrium.” (NASBLA p. 3.4)

BUI Seated Battery Transition Training Course Manual

- Prior to seated battery, it is required that subject “must be seated” and is “properly positioned and stable.”

BUI Seated Battery Transition Training Course Manual

- > Sit straight at front edge of seat**
- > Arms down to sides**
- > Feet shoulder width apart. Are you stable?**
- > Do not move feet until test are over. Understand? Stay in position do not do anything until I tell you to.**
- > Do you understand?**

HGN

- ◉ TRAINING

- ◉ No Definition of How Far (mm)
- ◉ No Definition of How Many Times (#)
- ◉ Never Stated Clues
- ◉ Wrote Down Clues After Arrest

- ◉ TRUST ME

HGN

- ◉ TIMING
- ◉ HGN DEMO
- ◉ TRUST ME (“6/6”)

FINGER to NOSE

- “Make a fist with both hands, extend your index fingers and turn your palms forward.” (Demonstrate.)
- “Remain in this position while I explain the test. Do you understand?” (Wait for response.)
- “When I say BEGIN, tilt your head back to about a 45-degree angle and close your eyes.” (Demonstrate how the subject is supposed to move the arm up directly in front of the subject and how to properly touch the tip of the nose with the tip of the index finger.)
NOTE: Show the tip of the index finger as the area immediately below fingernail tip, not the fingerprint pad area or the side of the index finger, and demonstrate touching the tip of the nose (about a dime-sized portion at the very end of the nose).
- “When I say RIGHT, you must touch your right index finger to your nose; when I say LEFT, you must touch your left index finger to your nose.”
- “Do you understand?” (Get acknowledgement of understanding.)
- “BEGIN.”
NOTE: Ensure that the subject tilts the head back and closes the eyes. Do not start to give the commands until the subject is in compliance. If necessary, emphasize to the subject that he must keep the eyes closed until you say to open them.
- “**LEFT, RIGHT, LEFT, RIGHT, RIGHT, LEFT.**” (Give the commands in exactly this order.)
NOTE: Make sure the subject returns the arm to the side immediately after each attempt. Pause two or three seconds between commands to both evaluate a proper return and to allow time for you to document observations.
- “Open your eyes and straighten your head” (after the sixth attempt).

FINGER to NOSE

- 13 clues
- 2 phases
- 9 or more clues “suggest” BAC above .08%
- Instruction phase
 1. Unable to follow directions – explained more than twice, or did not remain in instruction phase
 2. Started at wrong time – began tilting head, closing eyes or raising a finger before told

FINGER to NOSE

● Performance

3. Did not close eyes
4. Did not tilt head back
5. Opened eyes during test
6. Moved head during test (1" any way)
7. Wrong hand
8. Wrong finger
9. Hesitated (no time provided, subjective)
10. Searched (any distinct H or V movement)
11. Not fingertip (not finger pad)
12. Missed tip of nose (dime sized end of nose)
13. Did not bring hand down (>1 sec)

PALM PAT

- “Place your hands palm to palm with one hand up and one hand down, like this.” (Demonstrate.)
NOTE: Start by demonstrating to put one hand out in front with the open palm facing upward. The opposite hand is then placed on top of the first hand with the open palm facing downward with hands/fingers parallel. The demonstration will show that the hand with the palm facing upward is held in a stationary position. The hand on top with the palm facing downward will be the only hand moving.
- “Remain in this position while I explain the test. Do you understand?” (Wait for response.)
- “When I say tell you to begin, turn the top hand over and count out loud ‘one,’ then turn the hand back over and count out loud ‘two,’ counting only when your hands make contact, like this.” (Demonstrate at least two sets at a moderate pace.)
NOTE: To begin, the subject will rotate the top hand 180 degrees and pat the back of the top hand to the palm of the bottom hand simultaneously counting out loud, “One.” The top hand then rotates 180 degrees so the palm of the top hand pats the palm of the bottom hand, simultaneously counting out loud, “Two.” Be sure to exaggerate the palm pat sequence using adequate height between claps.
- “Repeat this, speed up as you go, and do not stop until told.”
NOTE: The process then repeats. The subjects should start at a slower speed then gradually increase the speed until a relatively rapid pace is reached.
- “Make sure to keep your hands and fingers parallel during each pat, like this.” (Demonstrate.)
- “Do you understand?” (Get acknowledgement of understanding.)
- “BEGIN.”
NOTE: The subject should perform this test for a minimum of 10 seconds but no more than 15 seconds. If the speed has not noticeably increased within 4 or 5 seconds, prompt the subject to increase speed. The goal is to reach a relatively rapid pace.

PALM PAT

- 10 clues
- 2 phases
- 2 or more clues “suggest” BAC 0.08% or higher
- 10 second timed test (but no more than 15 seconds)
- Instruction phase
 1. Unable to follow instructions (or > twice)
 2. Started at wrong time

PALM PAT

● Performance phase

3. Did not count as instructed (1=back 2=palm)
4. Rolled hands
5. Double pat
6. Chopped pat
7. Other improper pat (any other)
8. Did not increase speed (first 4-5 seconds)
9. Rotated hands (distinct from parallel)
10. Stopped before being told

HAND COORDINATION

- “Make fists with both hands. Place your left fist at the center of your chest and your right fist against your left fist, like this.” (Demonstrate.)
NOTE: Place your left thumb against the sternum and the thumb side of the right fist against the fleshy side of the left fist.
- “Remain in this position while I explain the test. Do you understand?” (Wait for response.)
- “When I say BEGIN, you must perform four tasks.”
- “The first task is to count out loud from one to four while you move your fists in a step-like fashion, making contact between your fists at each step.” (Demonstrate while counting out loud “1, 2, 3, 4.”)
- “The second task is to memorize the position of your fists after you have counted to four, clap your hands three times and return your fists to the memorized position.” (Demonstrate.)
NOTE: No verbalized count is required.
- “The third task is to move your fists in a step-like fashion in reverse order, counting out loud from five to eight and returning your left fist to your chest.” (Demonstrate while counting out loud “5, 6, 7, 8.”)
- “The fourth task is to open your hands with palms down and place them in your lap.” (Demonstrate.)
- “Do you understand?” (Get acknowledgement of understanding.)

HAND COORDINATION

- 4 tasks are being performed
(adapted from WAT in standing position)
- 15 total clues
- 3 clues or more “suggest” BAC
.08% or higher

HAND COORDINATION

⦿ Instruction stage

1. Unable to follow instructions (> twice)
2. Started at wrong time

⦿ Performance - Task 1 – Steps forward

3. Improper count (1234, not out loud, too many or few)
4. Improper touch (drags first or top/bottom contact)
5. Did not perform

HAND COORDINATION

● Task 2 – Hand clapping

6. Improper count - too few or too many clap
7. Improper touch – must be palm to palm
8. Improper return – memorized position
9. Did not perform – forgets 3 hand claps

HAND COORDINATION

● Task 3 – Return steps

10. Improper count - 5,6,7,8

11. Improper touch – drags fists

12. Did not return left fist to chest– memorized position

➤ Note: If subject corrects position to return left hand to chest and counts steps and touch, no clue is assessed

13. Did not perform

HAND COORDINATION

● Task 4 – End position

14. Improper position – anywhere but lap

15. Did not perform

BOATING ACCIDENTS

- ◉ Intox Manslaughter/Assault
- ◉ Alcohol played at roll in 70% of Deaths

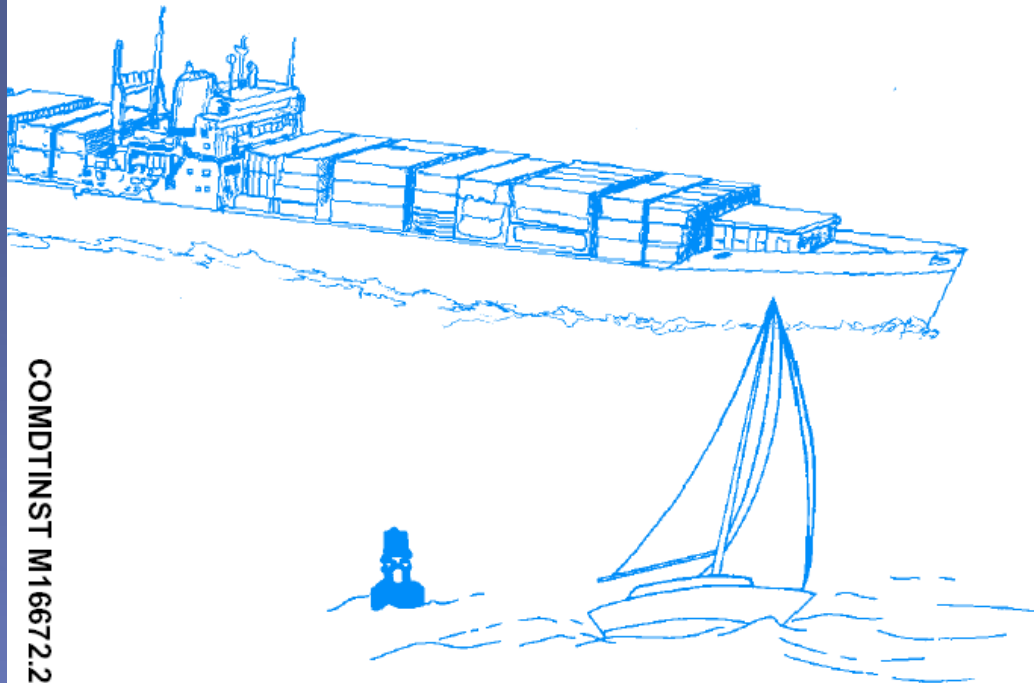
NAVIGATION RULES

U.S. Department
of Transportation
**United States
Coast Guard**



NAVIGATION RULES

INTERNATIONAL—INLAND



COMDTINST M16672.2D

RULE 14

Head-on Situation

- (a) When two power-driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision each shall alter her course to starboard so that each shall pass on the port side of the other.
- (b) Such a situation shall be deemed to exist when a vessel sees the other ahead or nearly ahead and by night she could see the masthead lights of the other in a line or nearly in a line and/or both sidelights and by day she observes the corresponding aspect of the other vessel.
- (c) When a vessel is in any doubt as to whether such a situation exists she shall assume that it does exist and act accordingly.

RULE 15

Crossing Situation

When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.



CROSSING SITUATION

GIVE-WAY VESSEL

STAND-ON VESSEL

DANGER ZONE
112.5 DEGREES



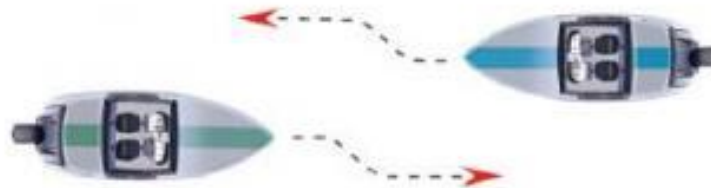
The diagram illustrates a crossing situation between two vessels on a teal background. A white vessel, labeled 'GIVE-WAY VESSEL', is in the lower-left corner, moving towards the upper-right. A dashed white line indicates its intended path, which is deflected by a curved white arrow to avoid a collision. A grey vessel, labeled 'STAND-ON VESSEL', is in the upper-right corner, moving towards the lower-left. A white arrow points from the 'STAND-ON VESSEL' towards the 'GIVE-WAY VESSEL'. A dashed white arc centered on the 'STAND-ON VESSEL' indicates a 'DANGER ZONE' of 112.5 degrees.



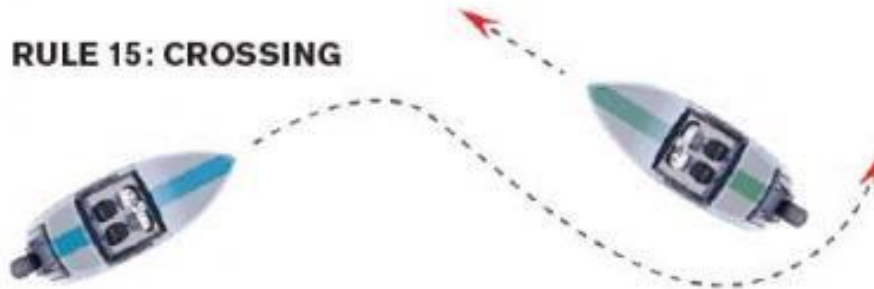
RULE 13: OVERTAKING



RULE 14: MEETING HEAD-ON



RULE 15: CROSSING



DEFENSES - Limits

- People with arm, shoulder, or elbow problems may not be able to perform, or missing index finger should not be given FTN
- If obvious difficulties are observed, it is best not to administer tests in question

DEFENSES – Sea Legs

- Seated battery manual- need for additional research
- Seated battery must be done in reasonably safe and stable environment. Calmer waters, backwaters, bays, coves, or on shoreline or location that minimizes significant boat movement
- 15 MIN – Never Validated!!!

DEFENSES — Safety Check

◉ Legal Challenges

- State statutes allow water safety checks – *search may only be directed at the safety items listed in the statute.*
- Must be certified marine officer

SAFETY CHECK

- > Vessel certificate number
- > I.D. number and validation decal
- > Manufacturer's number
- > Lights
- > Horns
- > Life preserving devices
- > Fire extinguishers
- > Flame arrestor or backtrap on carbs
- > Ventilators on engine bilges
- > Exhaust water manifold or muffler
- > Rearview mirror

USCG

◉ U.S Coast Guard

- > U.S. Coast Guard will not conduct random spot checks, blockades or checkpoints to detect intoxicated operators.
- > ...boater will only be asked to submit to field sobriety or breath analyzer on when he has a reasonable suspicion of intoxication or marine accident occurred.

LEGAL ARGUMENT

◉ **Arkansas Supreme Court** *Arkansas v. Allen*, 2013 Ark. 35 (Ark Supr. Court 2013).

- Officer tried to stop and perform safety checks on as many vessels as he could in a given day.
- No plan to determine which boats he stopped.
- No specific, objective facts about this vessel to indicate that society's legitimate interests required the seizure of this particular vessel.
- Vessel was being legally operated in an unremarkable fashion.

LEGAL ARGUMENT

◉ **Arkansas Supreme Court** *Arkansas v. Allen*, 2013 Ark. 35 (Ark Supr. Court 2013).

- Officer testified that he did not believe that he had “the unfettered discretion to pull over any boat at any time for any reason that [he desired],” but only to perform a safety check.
- Whether the stop is proper depends only on the law-enforcement officer’s subjective assertion of his or her purpose when the Fourth Amendment requires objective fact supporting the stop or a plan embodying explicit, neutral limitations.

PIA MUSTS

- **Public Information Act requests**

- > “certified marine officer”
- > BWI arrest reports
- > Evaluations
- > NASBLA boater examination

VIDEO

◉ Float cameras

- > Obtain in discovery; or
- > Subpoena duces tecum

EMERSON

- ◎ **Seated exercises don't prove impairment**

- > Clues only “suggest” BAC above 0.08%
- > Any evidence proffered from NASBLA methods, procedures, training and scoring is not **RELEVANT** to impairment. Information is only relevant, if any, to BAC concentration.

EMERSON

- **Seated exercises don't prove impairment**
 - > Colorado study (1995) – "...this analysis...is defined strictly in terms of the BAC statute and does not speak to the more difficult question of the individual driver's impairment." at p.3.

QUESTIONS???

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THIESSEN
LAW FIRM

AGGRESSIVE CRIMINAL DEFENSE