COMMENTS ON PROPOSED SOAH RULE CHANGES

Lawrence G. Boyd

August 1, 2008

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I have had the privilege of representing defendants in over 2,100 ALR hearings. I have written, and had published, a book describing Texas ALR practice, entitled Administrative License Revocation Manual, Knowles Publishing (2006). I am currently the co-chairman of the Texas Criminal Defense lawyers Association DWI Committee and an Associate Board member, although these Comments are entirely my own and not necessarily the position of TCDLA.

I have spoken at forty-eight (48) continuing legal education seminars regarding ALR practice. I have represented defendants from all walks of life, including physicians, attorneys, a judge, and several police officers, who had been charged with DWI. Significantly, I have never represented a police officer who provided a breath specimen.

I. SOAH

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I. SOAH's Statement of Reasons For or Against Adoption: Following any requested public hearing, SOAH shall provide a "Statement of Reasons" for or against adoption of these rules, which shall include SOAH's reasons for overruling any considerations against adoption, if SOAH does so. Gov't. CODE §2001.030.

As an interested person, under and by virtue of Gov't. CODE §2001.030, in my individual capacity only, I am requesting that SOAH shall file before final adoption of the rules, a statement of the principal reasons for and against the adoption of these rules, including a statement of SOAH's reasons, if any, for overruling the considerations urged against adoption, both expressed herein and at the public hearing.

I am respectfully requesting that SOAH will publish the required "Statement of Reasons for or Against Adoption" prior to, and independently of, its ultimate "State Agency Order Adopting Rules," so that I may possibly address any factual disputes, including the legislative intent of the statute that created the ALR program.

According to Gov't. CODE §2001.033, in the absence of a requested public hearing, SOAH will then have to file a "State Agency Order Adopting the Rules," which could not be filed earlier than August 3, 2008.

I trust that SOAH will provide an agency order that complies with both the letter, and the spirit, of Gov't. CODE §2001.033. As you know, SOAH must include in its Order Adopting the Rules a "reasoned justification for the rule", including a "summary of comments received from parties interested in the rule, a summary of the factual basis for the rule which demonstrates a rational connection between the factual basis for the rule and the rule as adopted, the reasons why SOAH disagrees, if it does, with party submissions and proposals, and a restatement of the particular statutory provisions under which the rule is adopted and how SOAH interprets the provisions as authorizing or requiring the rule." Gov't. CODE §2001.033.

Unless SOAH specifies an effective date in these rules, the "adopted" rules would then become effective on the 20th day after the "adopted" rules are filed with the Secretary of State, which "effective date" would presumably be the earliest possible date of August 23, 2008.

II. Effective Date of the Proposed Rules: As to ALR hearings that are pending prior to the effective date, I have previously brought to SOAH's attention some authority for the argument that the proposed rules should not affect any motorist whose arrest took place before the effective date of the final "adopted" rules, which could not possibly become effective prior to 8-23-08 for the above-stated reasons. See, Kittman v. State Board of Pharmacy of Texas, 607 S.W.2d 26 (Tex. App.--Tyler--1980, no writ). Statutes will not be applied retrospectively unless it was the intent of the legislature (or administrative agency) to make it applicable to both past and future transactions. Merchants Fast Motor Lines, Inc. v. Railroad Commission of Texas, 573 S.W.2d 502 (Tex. 1978).

On the other hand, as to procedural steps, the legislature (or an administrative agency)

may make changes applicable to future steps in pending cases because a litigant has no vested right in a procedural remedy. Texas Department of Health v. Long, 659 S.W.2d 158 (Tex. App. -- Austin 1983, no writ).

If a defendant has a pending ALR hearing that happens to be scheduled after the effective date of the proposed rules, but obtains and serves a subpoena upon, e.g., the arresting officer under the existing rules (i.e., which is the only option until the effective date), but the arresting officer fails to appear at the hearing after the effective date of the proposed rules, which procedure should govern? Would the new rule requiring the filing of the Return at least three (3) calendar days prior to the hearing apply? Would the new, or former, mileage computation apply? Would a defendant's failure to provide the Department with a copy of the "Return", which was not required under the existing rules when the subpoena was served, prevent an ALJ from enforcement of the subpoena by excluding the DIC-23 when the subpoenaed officer fails to appear at a hearing following the effective date of the rule?

The obvious potential for unfairness requires that SOAH should make the proposed rules applicable only to, e.g., 1) arrests that occur after the effective date of the final adopted rules; or, 2) as to Notices of Hearing, or Amended Notices of Hearing, dated on or after the effective date of the adopted rules. The latter suggestion would provide certainty, since defendants will know by the date on the original Notice of Hearing that the new rules will apply, since it will be dated on or after the "effective date" of the rules. SOAH must make it clear that the final adopted rules, in whatever form that they may take, do not apply to pending ALR matters.

Gov't. CODE §2001.036(a)(1) specifically allows SOAH to specify an effective date for the final adopted rules. This is clearly the best, and wisest, alternative, since it absolutely eliminates confusion. A choice of January 1, 2009 as an "effective date" would be a reasonable option, since it would give DPS attorneys and field ALJs the opportunity to familiarize themselves with the new rules.

This is an issue that should be addressed by SOAH following any public hearing. A defendant cannot comply with a new procedure until it is effective. Further, a litigant who complies with the procedure that is in effect at the time of, e.g., the issuance and service of a subpoena, should be able to obtain the procedural remedy at the hearing that occurs after the effective date of the newly-adopted rule., e.g., inadmissibility of a non-appearing officer's DIC-23.

SOAH must clearly specify the effective date of these rules in its "State Agency Order" adopting the rules, in their final form. This must not be open to the interpretation of individual ALJs. It should not be an issue that has to be considered in an appeal to a county court. Defendants should not be subjected to any uncertainty whatsoever regarding pending ALR hearings.

III. General Observations Regarding the Proposed Rules: The proposed rules do not appear to comply with Gov't. CODE §2001.024, "Content of Notice". Among other

things, SOAH does not appear to conduct any meaningful analysis of the potential costs of compliance by defendants, particularly indigent defendants, who might wish to obtain the presence of witnesses.

I will not attempt to interpret every individual subpart. I only intend to comment upon the proposed rules which I believe to have the greatest potential impact upon ALR practice. I am furnishing my comments to SOAH in order to insure that any final adopted rules provide at least as much due process in ALR hearings as currently exists.

The legislative history of S.B. 1, the original bill that created ALR, was replete with evidence that the legislature intended that the Texas ALR law would have an abundance of due process, the most of any such system of laws in the country, possibly due to the increased importance of being able to drive in a state as large as Texas, and further due to our historical Texas reverence for principles of individual liberty. Although a drivers license has been interpreted as a "privilege", even a privilege cannot be taken away from an individual without a meaningful opportunity to be heard.

The intent of the legislature that passed S.B. 1 is the relevant intent that should be effectuated by SOAH and not the real, or imagined, intent of some future legislature.

Sec. 159.51. Withdrawal of Counsel.: The sole previous provision governing the appearance and withdrawal of counsel was §155.21(d). This new provision adds substantial burdens to the attorney who wants to withdraw for, e.g. non-payment of a fee. Under this proposed rule, the withdrawing attorney must inform SOAH in the motion to withdraw as to whether the Defendant consents to the withdrawal and, if not, that the withdrawing attorney has informed the defendant as to his or her right to object to the motion.

This provision does not provide much guidance to a judge regarding the criteria for granting a motion to withdraw when, and if, a defendant does object. At times, a client may secure representation, e.g., by providing an insufficient funds check or by making a small down payment with no additional payments. Since this is a civil action that could result in a malpractice action against the attorney, it should be stated in the rule that, e.g., non-payment of a fee shall constitute the type of "good cause" for which a motion to withdraw should be granted.

The withdrawing attorney must provide the defendant's last-known address to SOAH. Even after the motion is granted, this rule requires the withdrawing attorney to notify the defendant of any additional settings or deadlines. Since DPS is not subjected to the burden or expense of serving a Notice of Hearing on a defendant or the defense attorney by certified mail, the rule should specify that notice by the withdrawing attorney to the former client by regular first-class mail will be sufficient.

Although this new rule creates significant burdens to defense counsel who seek to withdraw from an ALR matter, this seems to be a fair rule, with suggested modifications, to address the perceived problem of attorneys who demand hearings and then who simply

default. However, I am warning attorneys that, before they demand an ALR hearing for a prospective client who has not yet paid a fee and may still be "shopping," that attorney should consider that (s)he will continue to have a substantial obligation to that defendant, both in the withdrawal process and even after the motion to withdraw is granted.

Sec. 159.101, This section seems to eliminate the former rule §159.15(a) that required defense attorneys to file with SOAH a copy of their written request to DPS to compel the presence of the Breath Test Operator and Technical Supervisor. Although I have no problem with the elimination of unnecessarily providing documentation to SOAH, is this the true intent of SOAH or are you relying on some other arcane provision in the rules to continue the requirement or did you actually intend to eliminate needless paper work? Please address this concern in your ultimate "State Agency Order Adopting the Rules."

Sec. 159.207: This provision eliminates as a ground for a continuance the bona fide medical condition of the defendant's attorney. Only the defendant's illness may be a ground for a continuance. SOAH's current rule provides that a continuance could be granted for defense counsel's illness. Current Rule §159.11(c). The general SOAH rules provide that an individual may appear exclusively by counsel throughout the ALR process. Rule §155.21(a). Since most defense attorneys do not even have their client's present at the ALR hearing, this appears to eliminate a continuance for the illness of the most critical person to the defense, the defendant's attorney. We request that the old rule will be retained.

Sec. 159.103. Subpoenas.: This is probably the most sweeping change under the proposed rules. The proposed rule governing subpoenas is a radical departure from the previous rules.

UNWORKABLE TEN (10) DAY REQUIREMENT WITHIN WHICH TO FILE A SUBPOENA: I object to the unnecessarily-restrictive procedure for filing, serving, and filing a return for a subpoena. No one has ever seemed to have a problem w/the existing procedure. Further, the "10-day" requirement just to file the subpoena seems to run afoul of the law in that defendants are only actually entitled to "11 Days Notice" prior to the hearing. See, Sec. 524.032(a); 724.041(b); see, e.g., Texas DPS v. Stanley, 982 S.W. 2d 36 (Tex.App.--Houston [1st Dist.] 1998, no pet.). It seems to me that the existing subpoena rules were developed in light of the originally-intended "expedited" nature of an ALR hearing. If DPS chose to start setting hearings within the strict letter of the Notice of Hearing requirements, and defendants receive only "5-day" continuances and no more, we might be unable to obtain a subpoena at all in many cases due to the tight time requirements. Please address this issue in the final rules and in your "Final Agency Order Adopting the Rules."

STRINGENT TIME LIMITS ON THE TIME FOR SERVICE OF A SUBPOENA: Regardless of the type of subpoena, defense-issued or SOAH- issued, under the proposed rule, a subpoena must be served at least five (5) calendar days prior to the scheduled hearing. Proposed Rule §159.103(f)(2). This is an unfair burden on defendants.

There should be a good cause exception to the deadlines since we often have no control over an officer's availability for service and there are any number of situations where there is true good cause, such as willful dodging and repeated attempts to misdirect the process server. To the extent that the hard deadline prevents a meaningful challenge to the issues to be proven by the Department, it likely has Due Process issues.

This proposed rule will encourage officers to "hide out," direct their personnel to mislead process servers, and otherwise make themselves unavailable until the "coast is clear" less than five days prior to the scheduled hearing. This proposed rule contains no provision for a defense continuance in just such a situation, although we are provided no access in most instances to officers' home addresses, schedules, etc. We defense attorneys cannot require a police department to adopt "alternative methods for acceptance of service." We cannot require the cooperation of a witness in getting served.

If SOAH really wants to "expedite the hearings process", then it should, e.g., 1) itself establish an "alternative method for acceptance of service" by, e.g., establishing that service upon the officer's, e.g., duty sergeant would suffice; 2) upon a showing of repeated service attempts made in vain, the allowance of service by certified mail, with return receipt requested, to anyone who signs the certified mail return receipt at that officer's duty station; 3) upon a showing of apparent willful "dodging" or misdirection, allow one or more defense continuances until the police agencies, and certain individual officers, simply start accepting process without resorting to such childish behavior.

Next to the untimely furnishing of discovery by DPS, the "dodging" of service by police officers is the main reason for delays in the hearing process in my practice. This proposed rule puts the burden of "expediting the hearings process" on the person who is least-equipped to do it, the defendant. SOAH should provide us with the tools to do it. I advocate a rule that provides the ALJ with the power to allow substitute service upon an apparently willfully-dodging officer by certified mail service upon whomsoever signs for the certified letter at the officer's duty station.

Under proposed §159.151(1), DPS's "timely" response to a request for discovery (e.g., within eight (8) days prior to the hearing), would not allow a defendant to comply with the proposed 10-day rule for requesting a subpoena from SOAH. It is a basic tenet of the existing, as well as the proposed rules, that DPS shall be allowed sufficient time in which to respond to the discovery requests from defense attorneys. Once we finally receive discovery from DPS, however, we should be given at least five (5) days from our receipt of discovery from DPS in order to decide if the subpoena is necessary, and it should override the 10-day requirement and require a defense continuance.

DPS's late furnishing of discovery is my most frequent cause for late-issuance of a subpoena, although I realize that DPS could not furnish discovery that they did not have. I have always argued that the arresting officer's duty to send his or her report to DPS before the end of the 5th business day following the arrest under Trans. Code §§524.011 (b)-(e); 724.032 (a-c) should be interpreted as being more than "house-keeping" requirements. If the arresting officer's failure to perform his duty prevents DPS from

furnishing discovery in an actually timely manner (i.e., within five (5) days following a defendant's request), then why should this prevent a defendant from obtaining a subpoena?

In addition to compliance with the deadline, proposed §159.103 (i) provides that DPS may move to quash our subpoena. SOAH should be made aware of the potential for abuse should DPS attorneys, who are of a mind to do so, seek to quash or move for a protective order as to each and every subpoena that we may issue. DPS should be required to demonstrate good cause for a motion to quash or for a protective order that is case-specific and not some form motion that some may file in every case.

Clearly, no "deadline" should be imposed at all for service of the subpoena. If the witness gets served on the night before the hearing, then the ALJ may grant a continuance under §159.207 (b). In practice, no hardships or difficulties have arisen from late-service of a subpoena. Further, most of the late-service issues have arisen from the actions of the officers themselves in dodging our process servers.

Further, the entirely-new rule §159.103(g)(3), requiring service of the "return" for the served subpoena on DPS at least three (3) calendar days prior to the hearing, seems to be an unnecessary "gotcha" requirement. Since the defense attorney had to provide either the request or the defense-issued subpoena to DPS in the first instance, the requirement to provide the return is just another procedural hurdle to enforcement of the subpoena.

Defense-Attorney-Issued Subpoenas: §159.103(b) creates the new "attorney-issued" subpoenas.

A defense attorney may issue up to two (2) subpoenas, one for the officer who was primarily responsible for the defendant's stop or initial detention [i.e., "Probable Cause to stop"], and the other for the officer who was primarily responsible for finding probable cause to arrest the defendant.

A new rule that specifically allows for two (2) subpoenas for these two (2) different types of officers is potentially an improvement over the existing rule.

After the Balkum opinion was published, many ALJs, particularly in Dallas, would only give defendants one subpoena for the "affiant"–-period!, although this practice apparently differed between SOAH offices and even between ALJs in the same office. See, Balkum v. Texas DPS, 33 S.W. 3d 263 (Tex.App.–El Paso 2000, no pet.).

This was partially because the existing rule provided a means of enforcement, to-wit: exclusion of a report, only for the author of a report. Current Rule §159.23(c)(7). A defendant had no means to enforce a subpoena against a non-"affiant", unless the ALJ permitted an indefinite continuance for the defense to seek district court enforcement of the subpoena, which was a rare occurrence. It seemed to me that at least one city police agency adopted an unwritten rule to have one (1) officer with no knowledge of any case become the "ALR Officer", so that no defense attorney could question an officer who had any real knowledge of the case in order to take advantage of this policy. Fortunately, that

practice seems to have ended.

Under the current 1999 rule, a subpoena is actually only enforceable against an "affiant" [i.e., reporting officer] because the only remedy available to a defendant is the exclusion of that officer's report under current Rule §159.23(c)(7). When I have been able to obtain a subpoena for a non-affiant officer [i.e., most commonly, the officer who initiated the stop and then called for an "SFST" officer], or other witness [e.g., the "civilian-informant"], who then did not appear, I had no real remedy under the current rules for excluding that person's observations from the DIC-23, as long as the reporting officer appeared.

The new rules appear to provide just such a remedy for the non-appearing, non-affiant officer. Proposed Rule §159.211(c)(2) provides that, "if the defendant timely subpoenas an officer and the officer fails to appear without good cause, information obtained from that officer shall not be admissible." This proposed rule is actually an improvement over the existing rule, which I favor. However, I am hereby asking SOAH to change the rule slightly so that it provides that "information provided by that individual shall not be admissible," in order to make it clear that the exclusionary rule would also apply to civilians, in the occasional ALR hearing where a "CI" provided the entire basis for the stop.

Since DPS has the right to receive a copy of a defense-issued subpoena when it is issued, I believe that SOAH should reasonably impose a duty upon DPS to provide to the defense its version of a subpoena (e.g., a "routing slip") on the date that such an item is issued, as a form of reciprocal discovery, so that we are made aware that we might expect to see the arresting officer at the hearing when we are otherwise satisfied that the DIC-23 is defective.

SOAH-Issued Subpoenas: With modifications, this rule continues in practice a procedure for obtaining a subpoena from SOAH. With this proposed rule, SOAH seeks to eliminate the "procrastinating lawyer's" ability to seek a subpoena by filing a request for same "at least five days prior to the scheduled hearing." Current Rule §159.17(a). Under the proposed rule, defense counsel would have to file a subpoena request "no later than ten (10) days prior to the hearing." Proposed Rule §159.103 (c).

This will require the formerly-procrastinating lawyer to obtain, and view, the video more quickly, and to generally get "up-to-speed" on the case at a much-earlier stage than before. This is assuming the immediate availability of the video, which varies from jurisdiction-to-jurisdiction. Shouldn't the unavailability of an "in-car" video, merit a continuance?

Since all subpoenas must be served at least five (5) days prior to the scheduled hearing, as set forth above, waiting ten (10) days to even apply for a subpoena would seem to be extremely unrealistic. I routinely apply for my subpoenas over a month prior to the hearing under the existing rules.

Witness Fee Check: The proposed rule allowing mileage reimbursements based on travel from the witness' office or residence may generate unnecessary confusion , since it is not entirely clear who will make the decision as to what place of origin will be used. Proposed Rule §159.110 (f)(3).

"More Than Two Officers": The defendant will also have to use the SOAH-issued subpoena procedure when (s)he wants to call "more than two (2) peace officers or even a non-peace officer (i.e., a "civilian-informant"?) to testify as witnesses. Proposed Rule §159.103(c)(1). Again, this proposed rule is acceptable to the defense, in theory, since it somewhat abrogates the manner in which some ALJs have interpreted Balkum, supra, which could be beneficial to defendants who were accosted by several peace officers or whose stops were initiated by a civilian.

"Civilian Witnesses": Prior to Balkum, I regularly requested subpoenas for "civilian-informants" ["CIs"]. Proposed rule §159.103 (c)(2) may breathe some new life into my former practice. "CIs" are particularly good candidates for cross-examination, that is until they are effectively "wood-shedded." ALR hearings were once a very effective forum for eliciting the unvarnished truth from "CIs".

Sec. 159.211. Hearing: If a conflict arises between the SOAH rules and the Trans. Code, the Trans. Code governs, and these rules cannot be harmonized with those chapters. Proposed rule §159.211(a)(1).

The proposed SOAH rule provides that an officer's "sworn report" shall be admissible. It does not provide that evidence of an unsworn report shall likewise be admissible. Proposed rule §159.211(c)(2).

A recent case had held, obiter dicta, that the DIC-23 in a TRANS. CODE Ch. 724 "Refusal" case did not need to be sworn, since TRANS. CODE §724.032(a)(4) required only that the report shall be a "written" report. Texas DPS v. Pruitt, 75 S.W.3d 634 (Tex.App.-–San Antonio 2002, no pet.). It appears that Proposed Rule §159.21(c)(2) may be drafted with the intent to administratively overrule Pruitt, for which SOAH should be commended. It does not seem to be fair to allow the suspension of a drivers license to be based upon an unsworn report. Please address my observation here in your "Final Agency Order Adopting the Rules."

Proposed Rule §159.211 (c)(2) provides that, "if the defendant timely subpoenas an officer and the officer fails to appear without good cause, information obtained from that officer shall not be admissible." As stated earlier, this language should be broadened to pertain to any individual. This proposed rule also speaks to the "right" of a defendant to subpoena an officer, which is the kind of emphatic language that I admire. Id.

Sec. 159.213. Failure to Attend Hearing and Default: Many busy lawyers will be happy to note that the time for filing a motion to set aside a default order has been expanded from five business, to ten business days. Current Rule §159.27(b). Proposed Rule

§159.213(b). I agree with this revision.

Sec. 159.251. Hearing Disposition: This eliminates the current SOAH rule, 1 TAC §159.19(a)(1) (B)(iv)(eff. 3/2/99), that requires DPS to prove that a "refusal" under Ch. 724 will merit a suspension only after a defendant is provided with "proper" warnings, both written and oral. I recall that we had a major fight over such a proposed change at the previous rule-making hearing in 1999.

SOAH should continue to require that the DPS should have to provide "proper" written warnings in order to warrant a suspension in an ALR hearing. In Taylor, the Fort Worth Court of Appeals made it quite clear that the providing of proper written warnings is the sine qua non for a license suspension under Ch. 724 proceedings. It should further be noted that Taylor is actually a drivers license suspension case. Taylor v. Texas DPS, 754 S.W.2d 464,466 (Tex.App.--Fort Worth 1988, writ den.).

Because a defendant's response to a "properly" requested specimen is of the essence to the license suspension procedure, weight must be given to all aspects of TRANS. CODE §724.015. Unlike the criminal line of cases, DPS must affirmatively prove the existence of a "proper" request for a specimen in order to be entitled to suspend a drivers license.

In the Rolfe case, an arresting officer testified that he would have told the defendant, if she had asked, that her refusal to take the test would have resulted in her being booked into jail. The appellant argued that this was a "classic" Erdman situation. Rather than focusing on the fact that the "AO" had responded to a hypothetical question, the court went on to rule that a defendant invoking Erdman must show a "causal connection" between an "improper" warning and the decision to submit to a breath test, that is that (s)he would have refused to take the test but for the "improper" warning. Texas DPS v. Rolfe, 986 S.W.2d 823 (Tex. App.–Austin 1999, no pet.).

In the Sandoval case, an officer told a defendant that if he passed the breath test, he could go home. The Austin Court of Appeals found that this was not coercive in nature, That court interpreted Erdman as focusing only on the extra-statutory consequences of refusing a breath test, whereas the facts in Sandoval revolved more around the possible benefit to the defendant of taking, and passing, the breath test. The court held that it was not enough to simply show that extra-statutory warnings of any kind were given to a person in order to show that consent was involuntary. In the absence of an extra-statutory warning that is inherently and necessarily coercive, a defendant must show a "causal connection" between the "improper" warning and the decision to submit to a breath test to establish coercion. Sandoval v. State, 17 S.W.3d 792 (Tex. App.–Austin 2000, pet. ref'd.).

In criminal cases, courts have required defendants to show a "causal connection" between the providing of "improper" warnings and a breath test in order to show harm that will result in the inadmissibility of a breath test result in criminal cases. This rule has been extended to the complete failure by the police to provide written warnings at all. See, Schafer v. State, 95 S.W.3d 452 (Tex.App.-–Houston [1st Dist.] 2002, pet. ref'd.).

In Schafer, the trial attorney put his client on the stand to show the "causal connection". The defendant testified that he would not have taken the breath test if "he had known then what he knows now." The court held that the defendant's testimony at the hearing on his motion to suppress as to what he "would have done" (i.e., refuse) if he had received any written warnings at all, following an afternoon of coaching at his attorney's office, was not persuasive regarding what he actually would have done on the evening of his arrest, considering his youth and high breath test score. The court seemed to be making a rather cynical statement in Schafer regarding their attitude toward the believability of defendants in these situations.

In O'Keefe, a criminal case, after providing only oral warnings to a defendant pursuant to TRANS. CODE §724.015, the defendant refused to provide a specimen. The officer then provided the written warnings to the defendant and the defendant again refused. The court held that the subsequent providing of the written warnings cured the defective initial refusal. O'Keefe v. State, 981 S.W.2d 872 (Tex.App.-–Houston [1st Dist.] 1998, no pet.).

In Woehst, a criminal case, the arresting officer read an outdated DIC-24 to the defendant, incorrectly informing her that her license could only be suspended for ninety (90) days for a refusal under Ch. 724, when it could have actually been suspended for one hundred eighty (180) days. The defense attorney showed a "causal connection" by putting his client on the witness stand to say that she would have been influenced by the longer suspension period to take the breath test. The State was not allowed to elicit evidence of the refusal at trial. State v. Woehst, 175 S.W. 3d 329 (Tex.App.–Houston [1st Dist.] 2004, no pet.).

In Ness, the "AO" told the defendant that he was under arrest for DWI and then said, "pending the outcome [i.e., of the breath test], you're being detained." Although the defendant testified that he understood the "AO's" statement to mean that he would be released if he passed the breath test, the trial court's ruling that the breath test was uncoerced was upheld because the trial court was free to reject the defendant's "understanding," particularly in light of the "AO's" testimony, the videotape, and the unembellished reading of a proper DIC-24. Ness v. State, 152 S.W.3d 759 (Tex. App.–Houston [1st Dist.] 2004, pet. ref'd.).

In Jauregui, the arresting officer read the DIC-24 to the defendant in the squad car, whereupon the defendant refused to provide a specimen. Later, at the jail, the arresting officer provided a DIC-24 to the defendant, who said that he did not need to read it. The appellate court framed the question that had been presented to it as whether the oral and written warnings had to be presented to a defendant simultaneously. Citing Rowland and Jessup, the 1st Court of Appeals held that "the purpose of TRANS. CODE §724.015 had been fulfilled." Although it was completely unnecessary to their decision, completely contradictory to their own discussion of the two cited cases, and complete dicta, the Court went on to state that, "despite the fact that the plain language of the statute appears to require both written and oral warnings before a breath specimen is requested, courts have

interpreted that statute to allow either oral or written warnings and not to require both." Jauregui v. State, 176 S.W.3d 846 (Tex. App.–-Houston [1st Dist.] 2005).

However, in Jauregui, the officer actually provided both oral and written warnings, albeit at different times. The Courts' holding to the effect that both types of warnings would not have to be provided to a defendant in order to merit an ALR suspension are pure dicta.

SOAH should follow the intent of the legislature, as expressed in Taylor, supra, by continuing to require "proper" written and oral warnings.

Respectfully submitted,

Lawrence G. Boyd

LBG/lgb