



# How to Handle Your First DWI/Refusal Case

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AND KATHERINE M. MCGINN, ESQ.

All practice at the Law Offices of Richard S. Humphrey, Tiverton.

You have recently been admitted to the practice of law. Your neighbor has been arrested and charged with Driving While Intoxicated (DWI) – first offense, criminal, and refusal to submit to a chemical test – first offense, civil. The DWI charge will be heard in the Rhode Island District Court. The refusal charge will be heard in the Rhode Island Traffic Tribunal. You are now wondering how you can prepare to accept your new responsibility as defense counsel. First, you should know that the defense bar is a collegial bar and advice is freely and readily given. Therefore, you may want to consider contacting an experienced defense attorney and ask him or her for assistance. At our office, we routinely review police reports for other attorneys and provide advice and suggestions. We are, after all, members of a wonderful profession and we all seek to enhance the professionalism of the bar.

## Discovery

DWI cases often include evidence in the form of witness statements, anonymous tips, camera surveillance, scientific evidence (i.e., chemical, blood and other test results) and opinion evidence. In order to do your job properly, you need to get as much information as quickly as possible.

A sample District Court Demand for Discovery and Inspection (Exhibit A) appears at the end of this article. Although the sample Demand goes beyond the scope of Rule 16, we have found the police and the Court are often receptive to reasonable requests that go beyond the Rule. The Demand should be submitted to the court, the prosecuting attorney and the police department as soon as possible. Upon your first appearance at court (either at the arraignment or at the pre-trial conference), if you have not received the police report, you should immediately move to compel the production of the police report and related papers within five (5) days. Your motion should, preferably, be in writing, but it can be an oral motion. You should have a written order prepared for the Judge's signature. Remember, these are expedited cases and you need information as quickly as possible.

In light of the fact that your client has also been charged with refusal, you will need to file a separate motion for discovery/discovery demand, which is different from the District Court demand. This should be sent to the Rhode Island Traffic Tribunal, the Department of Attorney General's Breathalyzer Refusal Section and the police department. The police and the court are often receptive to reasonable requests that go beyond the information set forth in Rule 11. At your first appearance in court, you should immediately try to get the discovery as quickly as possible. A sample copy of a Rhode Island Traffic Tribunal

Demand for Discovery and Inspection (Exhibit B) appears at the end of this article.

Among the most objective pieces of evidence in all these cases are police audio and visual recordings. The police often utilize dashboard-mounted cameras in their cruisers and also often videotape the motorist while he/she is in the booking room. You should obtain all recordings as soon as possible. A sample demand letter (Exhibit C), including a request for all videotapes, CDs, DVDs, and other recordings appears at the end of this article.

## Your Independent Investigation

Upon receipt of the police reports and recordings, your job is not over. In fact, it has just begun. You now must become familiar with the National Highway Traffic Safety Administration's Student and Instructional manuals on the proper administration of field sobriety tests. Additionally, you should contact the Department of Health's (DOH) Breath Analysis Division to get the certification of the breath testing operator, the breathalyzer machine and any repair records. A sample letter to the DOH (Exhibit D) appears at the end of this article.

Aerial photographs have long been a favorite of our law firm, and now you can obtain them through the Internet. Maps and charts are also helpful.

Please note that under the Rhode Island Traffic Tribunal rules, you can depose the arresting officer. The deposition notice should be sent to the court, to the Department of Attorney General and to the stenographer. A sample Notice of Deposition (Exhibit E) appears at the end of this article.

Because some police reports sound remarkably similar, your office should create a file of all reports prepared by each particular officer.

You should also feel free to contact the police department and ask if you can visit the booking room to determine the location of the breathalyzer machine, the availability of a confidential telephone call and other related evidence.

We hope that you find the following forms helpful. Please call us if we can be of assistance.

*Related forms, listed as Exhibits A-E, appear on following pages.*

**EXHIBIT A**

STATE OF RHODE ISLAND  
PROVIDENCE, SC.

DISTRICT COURT  
\_\_\_\_\_ DIVISION

STATE OF RHODE ISLAND  
ex re TOWN OF \_\_\_\_\_

vs.

Criminal No.: 61-2008-0000  
Summons No.: 08 000 000000

ANYONE

**DEFENDANT'S DEMAND FOR DISCOVERY  
AND INSPECTION'**

PLEASE TAKE NOTICE that the above-named defendant demands permission to inspect or listen to, and copy or photograph, any of the following items within the possession, custody, or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the State:

1. All relevant written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions, made by the defendant, or copies thereof.
2. All relevant recorded testimony before a grand jury of the defendant, or in the case of a corporate defendant, of any present or former officer or employee of the defendant corporation concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to his or her employment.
3. All written or recorded statements or confessions which were made by a co-defendant who is to be tried together with the moving defendant and which the State intends to offer in evidence at the trial, and written summaries of oral statements or confessions of such a co-defendant in the event the State intends at the trial to offer evidence of such oral statement or confessions.

4. All books, papers, documents, photographs, sound recordings, or copies thereof, or tangible objects, buildings, or places which are intended for use by the State as evidence at the trial or were obtained from or belong to the defendant.
5. All results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and, subject to an appropriate protective order, any tangible objects still in existence that were the subject of such tests or experiments.
6. A written list of the names and addresses of all persons whom the attorney for the State expects to call as witnesses at the trial in support of the State's direct case.
7. As to those persons whom the State expects to call as witnesses at the trial, all relevant recorded testimony before a grand jury of such persons and all written or recorded verbatim statements, signed or unsigned, of such persons, and, if no such testimony or statement of a witness is in the possession of the State, a summary of the testimony such person is expected to give at trial.
8. All written statements, by potential witnesses, including Victim Impact Statements. **State v. Stravato**, 933 A. 2d 948 (2007).
9. All reports or records of prior convictions of defendant, or of persons whom the attorney for the State expects to call as witnesses at the trial, and within five (5) days after receipt from the defendant of a list produced of persons whom the defendant expects to call as witnesses, all reports or records of prior convictions of such persons.
10. All warrants which have been executed in connection with the particular case and the papers accompanying them, including affidavits, transcripts of oral testimony, returns, and inventories.
11. All Police Reports and all Police E-Mails regarding all Police Reports.
12. All material which is exculpatory in nature. **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).
13. Copies of all calibration records, certification records and any other documents that would indicate whether or not the speedometer and/or the

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(mounted or hand-held) radar device was properly working on the date that the defendant was stopped by the police.

14. All materials that are relevant to the charges brought against the defendant, including copies of all materials, photographs, reports, records or other evidence, including, but not limited to rights given at the scene of the arrest and rights given at the police station, reports, etc., within the possession of the investigating and prosecuting police department(s).

15. If the defendant allegedly refused to submit to a chemical test, copies of all sworn reports and all other documents and materials forwarded to the Rhode Island Traffic Tribunal regarding the defendant's alleged refusal to take a chemical test.

16. All persons including, but not limited to, police officers, who advised the defendant of his **Miranda** rights, including the location and time that said rights were given to the defendant.

17. All persons, including, but not limited to, police officers, who advised the defendant of his **Constitutional** rights, including the location and time that said rights were given to the defendant.

18. All persons, including, but not limited to, police officers, who advised the defendant of his **R.I. Gen. Laws 31-27-3 rights**, including the location and time that said rights were given to the defendant.

19. All persons, including, but not limited to, police officers, who advised the defendant of his **rights for use at scene**, including the location and time that said rights were given to the defendant.

20. The certifications of any Preliminary Breath Test (PBT) equipment used in conjunction with the above captioned case and the certificate(s) from the Department of Health for any and all breath testing equipment (i.e. the Intoxilizer 5000, etc.), as well as the certifications of the breath test operator who administered any and all chemical tests to the Defendant, and further for any and all repair records of the PBT used and/or any and all repair records of any breath testing equipment used in the above-captioned matter.

21. The results of all chemical, field, and station house tests administered to defendant, **whether or not the results have been recorded,**

together with the name and qualifications of the person who administered the tests and the time, location, and circumstances under which the tests were given, as well as the certifications and repair records for the chemical test instrument (breath, blood or urine).

22. The defendant requests the following information relative to the RIGHTS FOR USE AT STATION allegedly read to the defendant:

- (a) Whether or not the RIGHTS FOR USE AT STATION form was read in its entirety to the defendant, the name of the person who read said rights, and if the defendant appeared to understand the rights as read,
- (b) Whether or not the defendant was allowed to read the RIGHTS FOR USE AT STATION form,
- (c) Whether or not the police or anyone else offered an explanation to the defendant regarding the RIGHTS FOR USE AT STATION form,
- (d) If the defendant did not read, speak and/or understand English, whether or not the RIGHTS FOR USE AT STATION was given in a foreign language.

23. Whether any inducements, promises or other statements were made to induce the defendant to submit to the chemical test.

24. Whether the arresting officers of any other police personnel gave the defendant an opportunity to make a confidential telephone call immediately after his detention, and if so, when (i.e. date/time) the call was allowed and to whom and for what purposes.

25. Whether the defendant was afforded an opportunity to secure his release from jail on the night in question. If not, why not? If the defendant was released, who was he released to?

26. If the defendant requested either an additional chemical test pursuant to R.I. Gen. Laws 31-27-2(c)(6) or physical examination pursuant to R.I. Gen. Laws 31-27-3, whether or not the defendant was precluded from obtaining those test results/physical examination by any action or inaction by the police.

27. If the defendant stated that he wanted an additional chemical test administered, please:

- (a) Identify who this request was directed to,

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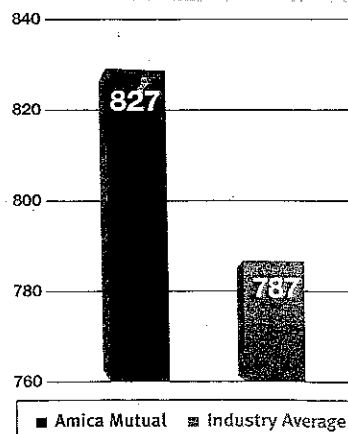
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- (b) State whether defendant was afforded the opportunity for the additional chemical test and,
- (c) State the result of the additional chemical test(s).
- 28. If the defendant indicated a desire to have an immediate physical examination as provided by R.I. Gen. Laws 31-27-3 please:
  - (a) Indicate when he made his desire known,
  - (b) If the defendant was afforded an opportunity for said physical examination,
  - (c) The results of said physical examination,
  - (d) The name of the physician administering said examination.
- 29. If the defendant's blood or urine was tested, please identify:
  - (a) Whether blood or urine was tested,
  - (b) The name, address and qualifications of the person who administered the test,
  - (c) The location, date, and time of the test,
  - (d) Any information in regards to any waiver form allegedly allowing the result of the test to be released to the police or any representative of the State,
  - (e) Whether any other substances were added to the blood or urine, and if so, the name of the substance, the amount added, by whom it was added and the time it was added, and
  - (f) The chain of custody for the blood or urine sample.
- 30. The names and addresses of all persons who were in the presence of defendant during his period of detention.
- 31. If photographs, sound recordings, or video recordings were taken of defendant, please advise as to the present location of any photographs, sound or video recordings and if you will provide said photographs, sound or video recordings without a without a motion to compel or a request for production.
- 32. The day sheet or daily time log for the period beginning eight (8) hours before the defendant's apprehension and ending eight (8) hours after the defendant's release from custody.

Defendant,  
By His Attorneys,

LAW OFFICES RICHARD S. HUMPHREY

Richard S. Humphrey, Esq. #2920  
Stefanie A. Murphy, Esq. #7252  
Katherine M. McGinn, Esq. #7701  
3852 Main Road  
Tiverton, RI 02878  
Tel. 401-624-6152

**CERTIFICATION**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2008,  
I mailed, by regular mail, postage prepaid, a true copy of the within  
Demand for Discovery and Inspection to:

Prosecuting Officer  
\_\_\_\_\_ Police Department

\_\_\_\_\_  
\_\_\_\_\_

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**EXHIBIT B**

STATE OF RHODE ISLAND  
PROVIDENCE, SC.

TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND  
ex rel TOWN OF \_\_\_\_\_

vs.

Summons No.: 08-000-000000

ANYONE

**DEFENDANT'S DEMAND FOR DISCOVERY  
AND INSPECTION<sup>2</sup>**

PLEASE TAKE NOTICE that the above-named defendant demands permission to inspect or listen to, and copy or photograph, any of the following items within the possession, custody, or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the State:

1. All relevant written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions, made by the defendant, or copies thereof.
2. All relevant recorded testimony before a grand jury of the defendant, or in the case of a corporate defendant, of any present or former officer or employee of the defendant corporation concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to his or her employment.
3. All written or recorded statements or confessions which were made by a co-defendant who is to be tried together with the moving defendant and which the State intends to offer in evidence at the trial, and written summaries of oral statements or confessions of such a co-defendant in the event the State intends at the trial to offer evidence of such oral statement or confessions.

4. All books, papers, documents, photographs, sound recordings, or copies thereof, or tangible objects, buildings, or places which are intended for use by the State as evidence at the trial or were obtained from or belong to the defendant.
5. All results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and, subject to an appropriate protective order, any tangible objects still in existence that were the subject of such tests or experiments.
6. A written list of the names and addresses of all persons whom the attorney for the State expects to call as witnesses at the trial in support of the State's direct case.
7. As to those persons whom the State expects to call as witnesses at the trial, all relevant recorded testimony before a grand jury of such persons and all written or recorded verbatim statements, signed or unsigned, of such persons, and, if no such testimony or statement of a witness is in the possession of the State, a summary of the testimony such person is expected to give at trial.
8. All written statements, by potential witnesses, including Victim Impact Statements. **State v. Stravato**, 933 A.2d 948 (2007).
9. All reports or records of prior convictions of defendant, or of persons whom the attorney for the State expects to call as witnesses at the trial, and within five (5) days after receipt from the defendant of a list produced of persons whom the defendant expects to call as witnesses, all reports or records of prior convictions of such persons.
10. All warrants which have been executed in connection with the particular case and the papers accompanying them, including affidavits, transcripts of oral testimony, returns, and inventories.
11. All Police Reports and all Police E-mails regarding all Police Reports.
12. All material which is exculpatory in nature. **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).
13. All materials that are relevant to the charges brought against the

*Continued on page 49*



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## How to Handle Your First DWI/Refusal Case

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defendant, including copies of all materials, photographs, reports, records or other evidence, including, but not limited to rights given at the scene of the arrest and rights given at the police station, reports, etc., within the possession of the investigating and prosecuting police department(s).

14. Any field notes utilized by the investigating officers.

15. Copies of all calibration records, certification records and any other documents that would indicate whether or not the speedometer and/or the (mounted or hand-held) radar device was properly working on the date that the defendant was stopped by the police.

16. All persons including, but not limited to, police officers, who advised the defendant of his/her Miranda rights, including the location and time that said rights were given to the defendant.

17. All persons, including, but not limited to, police officers, who advised the defendant of his/her **Constitutional rights**, including the location and time that said rights were given to the defendant.

18. All persons, including, but not limited to, police officers, who advised the defendant of his/her **R.I. Gen. Laws 31-27-3 rights**, including the location and time that said rights were given to the defendant.

19. All persons, including, but not limited to, police officers, who advised the defendant of his/her **rights for use at scene**, including the location and time that said rights were given to the defendant.

20. All photographs, sound recordings, and/or video recordings depicting the defendant while driving; at the scene of the traffic stop, during road side questioning by the police, during road side field sobriety testing, at the police station (or barracks) and at all other times during police custody.

21. The certification of any Preliminary Breath Test (PBT) equipment used in conjunction with the above captioned case and the certifications from the Department of Health for any and all breath testing equipment (i.e. the Intoxilizer 5000, etc.), as well as the certifications of the breath test operator who administered any and all chemical tests to the Defendant, and further for any and all repair records of the PBT used and/or any and all repair records of any breath testing equipment used in the above-captioned matter.

PLEASE BE FURTHER ADVISED THAT THIS DEMAND IS GOVERNED BY RHODE ISLAND TRAFFIC RULE 11 WHICH STATES:

### 11. Discovery and inspection. --

(a) *Defendant's statements.* Reports of Examinations and tests: Police reports and statements showing a person has been advised of his or her rights shall be made available to the defendant upon written request by the defendant; the Attorney for the state, city, town or agency shall permit the defendant to inspect and copy of photograph said statements and reports.

(b) *Other books, papers, documents, tangible objects or places.* Upon motion of a defendant the court may order the attorney for the State to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof which are within the possession, custody or control of the State, upon a showing of materiality to the preparation of the defendant's defense and that the request is reasonable.

(c) *Discovery by the State.* If the court grants relief sought by the defendant under subdivision (b) of this rule, it may upon motion of the State condition its order by requiring that the defendant permit the State to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within the defendant's possession, custody or control, upon a showing of materiality to the preparation of the State's case and the request is reasonable.

(d) *Protective orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred or make such other order as is appropriate.

(e) *Time of motions.* A motion or written request under this rule may be

made only within seven (7) days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(f) *Continuing duty to disclose; Failure to comply.* If subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, the party shall promptly notify the other party's attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery and inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

Defendant,  
By His Attorneys,

LAW OFFICES RICHARD S. HUMPHREY

Richard S. Humphrey, Esq. #2920  
Stefanie A. Murphy, Esq. #7252  
Katherine M. McGinn, Esq. #7701  
3852 Main Road  
Tiverton, RI 02878  
Tel. 401-624-6152

### CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2008, I mailed a true copy of the within Motion by regular mail, postage prepaid, to:

Prosecuting Officer

\_\_\_\_\_ Police Department

\_\_\_\_\_  
\_\_\_\_\_

### EXHIBIT C

\_\_\_\_\_, 2008

Prosecuting Officer

\_\_\_\_\_ Police Department

\_\_\_\_\_, RI \_\_\_\_\_

Re: My client: \_\_\_\_\_

Date of Arrest: \_\_\_\_\_

Summons No.: \_\_\_\_\_

**Request for Production and Preservation of all videotapes/audiotapes/CDs/DVDs**

Dear Sir/Madam:

We represent \_\_\_\_\_. Please provide us with copies of all videotapes/audiotapes/CDs and/or DVDs depicting our client while:

- Operating a motor vehicle;
- During initial contact/field sobriety testing on the roadside;
- In the police cruiser;
- In the station/barracks; and/or

- All other times while our client was in police custody.

We have enclosed a blank videotape. In the event that you need additional blank videotapes, audiotapes, CDs and/or DVDs, please let us know immediately and we will supply them to you.

We believe all audiotapes/videotapes/CDs and/or DVDs to be materially exculpatory. Therefore, we move for the immediate production of said videotapes/audiotapes/CDs/DVDs. **Please also preserve all original videotapes/audiotapes/CDs and/or DVDs and do not destroy them.**

Prosecutions Officer  
 \_\_\_\_\_ Police Department

March 6, 2009  
 Page #15

In the event that you will not produce the requested videotapes/ audiotapes/CDs and/or DVDs, please notify this office, in writing, within five (5) days of the date of this letter. In the event that you will not preserve all original videotapes/audiotapes/CDs and/or DVDs, please notify this office, in writing, within five days of the date of this letter.

If we do not hear from you within five (5) days of the date of this letter, we will assume that you will not only produce the requested videotapes/audiotapes/CDs/DVDs, but we will also assume that you will also preserve all original videotapes/audiotapes/CDs/DVDs.

If you have any questions please feel free to contact the undersigned, and/or contact your local prosecutor and/or the Department of Attorney General.

Sincerely,

Richard S. Humphrey

RSH/jad  
 Enclosure

cc: \_\_\_\_\_ (client)  
 Department of Attorney General  
 \_\_\_\_\_, Esquire (District Court Prosecutor)

**EXHIBIT D**

\_\_\_\_\_, 2008

Rhode Island Department of Health  
 3 Capitol Hill  
 Providence, RI 02908

RE: My Client: Anyone  
 Date of Arrest: 0/00/08  
 Testing Officer: Officer Testing You  
 Police Department: \_\_\_\_\_ Police Department

Dear Mr./Ms. \_\_\_\_\_:

I would appreciate it if you would send me copies of the repair records for the breath testing equipment, the breath testing DOH certification, and the officer's DOH breathalyzer certification.

Thank you.  
 Warmest Regards,  
 Richard S. Humphrey

RSH/jad  
 cc: client

**EXHIBIT E**

STATE OF RHODE ISLAND  
 PROVIDENCE, SC.

RHODE ISLAND  
 TRAFFIC TRIBUNAL

STATE OF RHODE ISLAND, :  
 EX REL, TOWN OF \_\_\_\_\_, :  
 Plaintiff :

Vs : C.A. No.:

ANYONE, :  
 Defendant. :

**NOTICE TO TAKE DEPOSITION<sup>3</sup>**

To: \_\_\_\_\_ (Name)  
 \_\_\_\_\_ (Street Address)  
 \_\_\_\_\_ (City, State, Zip)

Please take notice that at 9:00 a.m. on [day], \_\_\_\_\_, 2008, at the Law Offices of Richard S. Humphrey, 3852 Main Road, Tiverton, Rhode Island, the Defendant, by his attorney, will take the deposition upon oral examination of [Deponent] pursuant to the applicable provisions of the Court Rules before a Notary Public or other such officer authorized by law to take oaths. The oral examination will continue from day to day until complete. Interested parties are invited to attend and examine the witness.

Defendant,  
 Anyone,  
 By His Attorneys,

LAW OFFICES RICHARD S. HUMPHREY

Richard S. Humphrey, Esq. #2920  
 Stefanie A. Murphy, Esq. #7252  
 Katherine M. McGinn, Esq. #7701  
 3852 Main Road  
 Tiverton, RI 02878  
 Tel. 401-624-6152

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2008, I mailed a true copy of the within Notice of Deposition by regular mail, postage prepaid to:

All counsel  
 -and -  
 Court Reporter  
 \_\_\_\_\_

**ENDNOTES**

- <sup>1</sup> Paragraphs 1, 2, 3, and 5 are taken directly from Rhode Island District Court Rule 16. Paragraph 4 is taken directly from Rhode Island Traffic Tribunal Rule 11. The remaining paragraphs are based heavily upon Rhode Island District Court Rule 16. The authors of this article makes no claim to authorship of these routine forms.
- <sup>2</sup> Paragraphs 1, 2, 3, and 5 are taken directly from Rhode Island District Court Rule 16. Paragraph 4 is taken directly from Rhode Island Traffic Tribunal Rule 11. The remaining paragraphs are based heavily upon Rhode Island Traffic Tribunal Rule 11. The authors of this article make no claim to authorship of this routine form.
- <sup>3</sup> The authors do not claim any authorship on this form which seems to have existed in the day to day trial practice of many attorneys for many years.