



Driving Under the Influence Information:

### **1. What do police officers look for when searching for drunk drivers on the highways?**

The following is a list of symptoms in descending order of probability that the person observed is driving while intoxicated. The list is based upon research conducted by the National Highway Traffic Administration:

- (1) Turning with a wide radius
- (2) Straddling center of lane marker
- (3) "Appearing to be drunk"
- (4) Almost striking object or vehicle
- (5) Weaving
- (6) Driving on other than designated highway
- (7) Swerving
- (8) Speed more than 10 mph below limit
- (9) Stopping without cause in traffic lane
- (10) Following too closely
- (11) Drifting
- (12) Tires on center or lane marker
- (13) Braking erratically
- (14) Driving into opposing or crossing traffic
- (15) Signalling inconsistent with driving actions
- (16) Slow response to traffic signals
- (17) Stopping inappropriately (other than in lane)
- (18) Turning abruptly or illegally
- (19) Accelerating or decelerating rapidly
- (20) Headlights off

Speeding, incidentally, is not a symptom of DUI; because of quicker judgment and reflexes, it may indicate sobriety.

### **2. If I'm stopped by a police officer and he asks me if I've been drinking, what should I say?**

You are not required to answer potentially incriminating questions. A polite "I would like to speak with an attorney before I answer any questions" is a good reply. On the other hand, saying that you had one or two beers is not incriminating: it is not sufficient to cause intoxication -- and it may explain the odor of alcohol on the breath.

### **3. Do I have a right to an attorney when I'm stopped by an officer and asked to take a field sobriety test?**

The law on this varies from state to state. As a general rule, however, there is no right to an attorney until you have submitted to (or refused) blood, breath or urine testing. In some states, there is a right to consult with counsel upon being arrested or before deciding whether to submit to chemical testing. Of course, this does not mean that you cannot ask for one.

### **4. What is the officer looking for during the initial detention at the scene?**

The traditional symptoms of intoxication taught at the police academies are:

- (1) Flushed face
- (2) Red, watery, glassy and/or bloodshot eyes
- (3) Odor of alcohol on breath
- (4) Slurred speech
- (5) Fumbling with wallet trying to get license
- (6) Failure to comprehend the officer's questions
- (7) Staggering when exiting vehicle
- (8) Swaying/instability on feet
- (9) Leaning on car for support
- (10) Combative, argumentative, jovial or other "inappropriate" attitude
- (11) Soiled, rumpled, disorderly clothing
- (12) Stumbling while walking
- (13) Disorientation as to time and place
- (14) Inability to follow directions

#### **5. What should I do if I'm asked to take field sobriety tests?**

There are a wide range of field sobriety tests (FSTs), including heel-to-toe, finger-to-nose, one-leg stand, horizontal gaze nystagmus, alphabet recitation, modified position of attention (Rhomberg), fingers-to-thumb, hand pat, etc. Most officers will use a set battery of three to five such tests.

Unlike the chemical test, where refusal to submit may have serious consequences, you are not legally required to take any FSTs. The reality is that officers have usually made up their minds to arrest when they give the FSTs; the tests are simply additional evidence which the suspect inevitably "fails". Thus, in most cases a polite refusal may be appropriate.

#### **6. Why did the officer make me follow a penlight with my eyes to the left and right?**

This is the "horizontal gaze nystagmus" test, a relatively recent development in DUI investigation. The officer attempts to estimate the angle at which the eye begins to jerk ("nystagmus" is medical jargon for a distinctive eye oscillation); if this occurs sooner than 45 degrees, it theoretically indicates a blood-alcohol concentration over .05%. The smoothness of the eye's tracking the penlight (or finger or pencil) is also a factor, as is the type of jerking when the eye is as far to the side as it can go.

This field sobriety test has proven to be subject to a number of different problems, not the least of which is the non-medically trained officer's ability to recognize nystagmus and estimate the angle of onset. Because of this, and the fact that the test is not accepted by the medical community, it is not admissible as evidence in many states; it continues, however, to be widely used by law enforcement.

#### **7. Should I agree to take a chemical test? What happens if I don't?**

The consequences of refusing to submit to a blood, breath or urine test varies according to the state. Generally, there are three adverse results:

- (1) Your driver's license will be suspended for a period of time, commonly three, six or twelve months. This may be true even if you are found not guilty of the DUI charge.
- (2) In some states, refusal is a separate crime; in others, it adds jail time to the sentence for the DUI offense.
- (3) The fact of refusal can be introduced into evidence as "consciousness of guilt". Of course, the defense is free to offer other reasons for the refusal.

Thus, the decision is one of weighing the likelihood of a high blood-alcohol reading against the consequences for refusing.

### **8. Do I have a choice of chemical tests? Which should I choose?**

In most states, you have a choice -- of breath, blood or urine (most states, however, do not offer urinalysis). If you choose breath, many jurisdictions permit you to have a second test of blood or urine; this is because a breath sample is not saved and so cannot later be re-analyzed by the defense.

Analysis of a blood sample is potentially the most accurate. Breath machines are susceptible to a number of problems rendering them often unreliable. The least accurate by far, however, is urinalysis. Thus, if you are confident that you are sober, a blood sample is the wise choice; urine, being least accurate and most easily impeached, is the best option if you believe your blood-alcohol concentration is above the legal limit.

### **9. The officer never gave me a "Miranda" warning: Can I get my case dismissed?**

No. The officer is supposed to give a 5th Amendment warning after he arrests you. Often, however, they do not. The only consequence is that the prosecution cannot use any of your answers to questions asked by the police after the arrest.

Of more consequence in most cases is the failure to advise you of the state's "implied consent" law - that is, your legal obligation to take a chemical test and the results if you refuse. This can effect the suspension of your license.

### **10. Why am I being charged with TWO crimes?**

The traditional offense is "driving under the influence of alcohol" (DUI), or in some states, "operating while intoxicated" (OWI), or "driving while intoxicated" (DWI). In recent years, however, 48 states have also enacted a second, so-called "per se" offense: driving with an excessive blood-alcohol concentration (either .08% or .10%). In those states, BOTH offenses are charged. The defendant can even be convicted of both, but can be punished for only one.

If the case involves a refusal to submit to chemical testing, of course, only the traditional offense will be charged.

11. The officer took my license and served me with a notice of suspension after the breath test: How can he do that if I'm presumed innocent?

Agreed, it is blatantly unfair. But the law in most states having a "per se" statute (see question #10) provides for immediate suspension and confiscation of the license if the breath test result is above the legal limit (or, in the case of a blood or urine test, if the officer reasonably believes the result will be above the limit).

### **12. Can I represent myself? What can a lawyer do for me?**

You can represent yourself -- although it is not a good idea. "Drunk driving" is a very complex field with increasingly harsh consequences. There is a minefield of complicated procedural, evidentiary, constitutional, sentencing and administrative license issues. What can a lawyer do? Nothing (or worse) if he is not qualified in this highly specialized field -- no more than a family doctor could help with brain surgery. A qualified attorney, however, can review the case for defects, suppress evidence, compel

discovery of such things as calibration and maintenance records for the breath machine, have blood samples independently analyzed, negotiate for a lesser charge or reduced sentence, obtain expert witnesses for trial, contest the administrative license suspension, etc.

### **13. How can I find a qualified drunk driving lawyer?**

The best way to find a good DUI/DWI lawyer is by reputation. There are a few attorneys who have national reputations; these, of course, are expensive. Thus, the best approach is to ask other attorneys in the jurisdiction: Who is the best in the area? If you do not know any attorneys, go to the local courthouse and ask bailiffs, clerks and public defenders: Who would THEY go to if arrested for drunk driving? Contrary to popular belief, it is not a wise idea to obtain a referral from the local Bar association or referral service. There are rarely any qualifications required for an attorney to be on a referral list; he usually only has to ask to be placed on it. When you call, you are simply given the next name on that list.

An excellent indication of quality and experience is membership in the National College for DUI Defense. Completion of that organization's intensive three-day seminar presented at Harvard Law School every year is another clear sign of expertise. Board-certification by the College, however, is the highest level of recognition.

When you meet with the attorney, make sure of three things:

- (1) He has extensive experience in DUI/DWI litigation;
- (2) He has a reputation for going to trial in appropriate cases, rather than just "copping out" his clients; and
- (3) The financial terms of representation are clear.

Caution: Beware of lawyers claiming to be experts in the field who simply refer you to other "top DUI lawyers" for a fee.

### **14. What will it cost to get a lawyer?**

This varies, of course, by the reputation and experience of the lawyer and by the geographic location. As with doctors, generally, the more skilled the attorney and the larger the city, the higher the fee. A related factor is the amount of time a lawyer devotes to his cases: the better lawyers take fewer clients, spending more hours on each.

The range of fees is huge. A general practitioner in a small community may charge only \$500-1000; a DUI specialist with a national reputation may charge up to \$15,000 or more, depending on the facts. In addition, the fee may vary by such other factors as:

- (1) Is the offense a misdemeanor or felony?
- (2) If prior convictions are alleged, the procedures for attacking them may add to the cost.
- (3) The fee may or may not include trial or appeals.
- (4) Administrative license suspension procedures may also be extra.
- (5) The lawyer may charge a comprehensive fixed fee, or he may ask for a retainer in advance -- to be applied against hourly charges.
- (6) Costs such as expert witness fees, independent blood analysis, service of subpoenas, etc., may be extra.

Whatever the fee quoted, you can ask for a written agreement. And make sure you understand all the terms.

### **15. What is the punishment for drunk driving?**

Again, this varies according to the laws of the state and the customs of the local jurisdiction. Generally speaking, a conviction for a first offense may involve a fine, a license suspension or restriction, attendance at a DUI education course for a period of time, and probation for perhaps three years. A short jail sentence may or may not be required; for a second offense, it almost certainly will. Additional punishment may involve community service, ignition interlock devices, AA meetings, and/or impounding of the vehicle.

### **16. What is a sentence "enhancement"?**

Most states increase the punishment in drunk driving cases if certain facts exist. The most common of these is an earlier conviction for the same or a similar offense -- usually within five or seven years of the current offense. Other commonly encountered enhancements (which must usually be alleged in the complaint) include:

- (1) A child was in the car at the time.
- (2) The defendant was travelling 20 or 30 miles over the speed limit at the time.
- (3) The blood-alcohol concentration was over .20%.
- (4) The defendant refused to submit to a chemical test.
- (5) There was property damage or injury.
- (6) The defendant was under 21 ("zero tolerance" laws commonly require a much lower blood - alcohol level, and impose longer license suspensions).

In most states, the existence of any personal injury caused by drunk driving elevates the offense to a felony. A death can trigger manslaughter or even, in a few states, murder charges.

### **17. What is a "rising BAC defense"?**

It is unlawful to have an excessive blood-alcohol concentration (BAC) at the time of DRIVING -- not at the time of being TESTED. Since it takes between 30 minutes and 3 hours for alcohol to be absorbed into the system, an individual's BAC may continue to rise for some time after he is stopped and arrested.

Commonly, it is an hour or more after the stop when the blood, breath or urine test is given to the suspect. Assume that the result is .12%. If the suspect has continued to absorb alcohol since he was stopped, his BAC at the time he was driving may have been only .08%. In other words, the test result shows a blood-alcohol concentration above the legal limit -- but his actual BAC AT THE TIME OF DRIVING was below.

### **18. What is "mouth alcohol"?**

"Mouth alcohol" refers to the existence of any alcohol in the mouth or esophagus. If this is present during a breath test, then the results will be falsely high. This is because the breath machine assumes that the breath is from the lungs; for complex physiological reasons, its internal computer multiplies the amount of alcohol by 2100. Thus, even a tiny amount of alcohol breathed directly into the machine from the mouth or throat rather than from the lungs can have a significant impact.

Mouth alcohol can be caused in many ways. Belching, burping, hiccupping or vomiting within 20 minutes before taking the test can bring vapor from alcoholic beverages still in the stomach up into the mouth and throat. Taking a breath freshener can send a machine's reading way up (such products as Binaca and Listerine have alcohol in them); cough syrups and other products also contain alcohol. Dental

bridges and dental caps can trap alcohol. Blood in the mouth from an injury is yet another source of inaccurate breath test results: breathed into the mouthpiece, any alcohol in the blood will be multiplied 2100 times. A chronic "reflux" condition from gastric distress or a hiatal hernia can cause elevated BAC readings.

### **19. What defenses are there in a DUI case?**

Potential defenses in a given drunk driving case are almost limitless due to the complexities of the offense. Roughly speaking, however, the majority can be broken down into the following areas:

- (1) Driving. Intoxication is not enough: the prosecution must also prove that the defendant was driving. This may be difficult if, as in the case of accidents, there are no witnesses to his being the driver of the vehicle.
- (2) Probable cause. Evidence will be suppressed if the officer did not have legal cause to (a) stop, (b) detain, and (c) arrest. Sobriety roadblocks present particularly complex issues.
- (3) Miranda. Incriminating statements may be suppressed if warnings were not given at the appropriate time.
- (4) Implied consent warnings. If the officer did not advise you of the consequences of refusing to take a chemical test, or gave it incorrectly, in some states this may affect admissibility of the test results -- as well as the license suspension imposed by the motor vehicle department.
- (5) "Under the influence". The officer's observations and opinions as to intoxication can be questioned -- the circumstances under which the field sobriety tests were given, for example, or the subjective (and predisposed) nature of what the officer considers as "failing". Too, witnesses can testify that you appeared to be sober.
- (6) Blood-alcohol concentration. There exists a wide range of potential problems with blood, breath or urine testing. "Non-specific" analysis, for example: most breath machines will register many chemical compounds found on the human breath as alcohol. And breath machines assume a 2100-to-1 ratio in converting alcohol in the breath into alcohol in the blood; in fact, this ratio varies widely from person to person (and within a person from one moment to another). Radio frequency interference can result in inaccurate readings. These and other defects in analysis can be brought out in cross-examination of the state's expert witness, and/or the defense can hire its own forensic chemist.
- (7) Testing during the absorptive phase. The blood, breath or urine test will be unreliable if done while you are still actively absorbing alcohol (it takes 30 minutes to three hours to complete absorption; this can be delayed if food is present in the stomach). Thus, drinking "one for the road" can cause inaccurate test results.
- (8) Retrograde extrapolation. This refers to the requirement that the BAC be "related back" in time from the test to the driving (see question #17). Again, a number of complex physiological problems are involved here.
- (9) Regulation of blood-alcohol testing. The prosecution must prove that the blood, breath or urine test complied with state requirements as to calibration, maintenance, etc.
- (10) License suspension hearings. A number of issues can be raised in the context of an administrative hearing before the state's department of motor vehicles.

### **20. I have some questions about my DUI case. Where can I go for answers?**

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