

# DUI Manual 2005

# **D.U.I. ENFORCEMENT MANUAL FOR THE STATE OF COLORADO**

Prepared by

**COLORADO OFFICE OF TRANSPORTATION SAFETY**

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**GOVERNOR'S TASK FORCE ON DRUNK DRIVING  
PEACE OFFICERS STANDARDS AND TRAINING BOARD  
COUNTY SHERIFFS OF COLORADO, INC.  
COLORADO ASSOCIATION OF CHIEFS OF POLICES, INC.  
COLORADO DISTRICT ATTORNEY'S COUNCIL**



## INTRODUCTION

Colorado is not unlike the rest of the United States - approximately 50% of all highway fatalities are alcohol related! The number killed on our nation's highways annually is greater than all the Americans killed in Viet Nam in ten years. The National Safety Council conservatively states the economic loss of society for a single highway fatality is more than **\$190,000**. It is clear the economic and human toll involved is catastrophic and affects all of society. The drinking/drugged driver affects everyone through taxes for law enforcement services, ambulance services, medical facilities, costs of incarceration, rehabilitation agencies, social security and welfare costs for survivors, and increased insurance premiums for all.

The law enforcement community must work together to reduce the number of drinking/drugged drivers on our streets and highways - failure to do so, only contributes to the serious problem which currently exists. As law enforcement officers, you are the first line of defense and without you, the rest of the system - prosecutors, judges, probation departments, treatment centers, and other governmental agencies - cannot perform their functions successfully.

This manual was written to complement the "Prosecution Manual" which was produced through the Colorado District Attorneys Council. We wish to state although the pronoun "he" is used throughout this Manual, no sexist inference should be drawn, nor was such implication intended.

The goal of this manual is to aid you, the Colorado peace officer, in detecting, apprehending, processing and testifying about the drinking/drugged driver. The intent is to establish common GUIDELINES throughout the state. If used properly, you should find it a useful tool to clarify and simplify some portions of the enforcement task. This document is not the last nor only word in procedure, and is not intended to dictate policy to any law enforcement agency. However, it is intended to assist all agencies. Since this manual was first introduced in 1977, many Colorado law enforcement agencies have implemented it in its entirety as departmental policy, furthering the goal of statewide uniformity. It is the hope of the authors, your department will do the same if they have not done so already. Lastly, we hope you will find this Manual to be of personal value.



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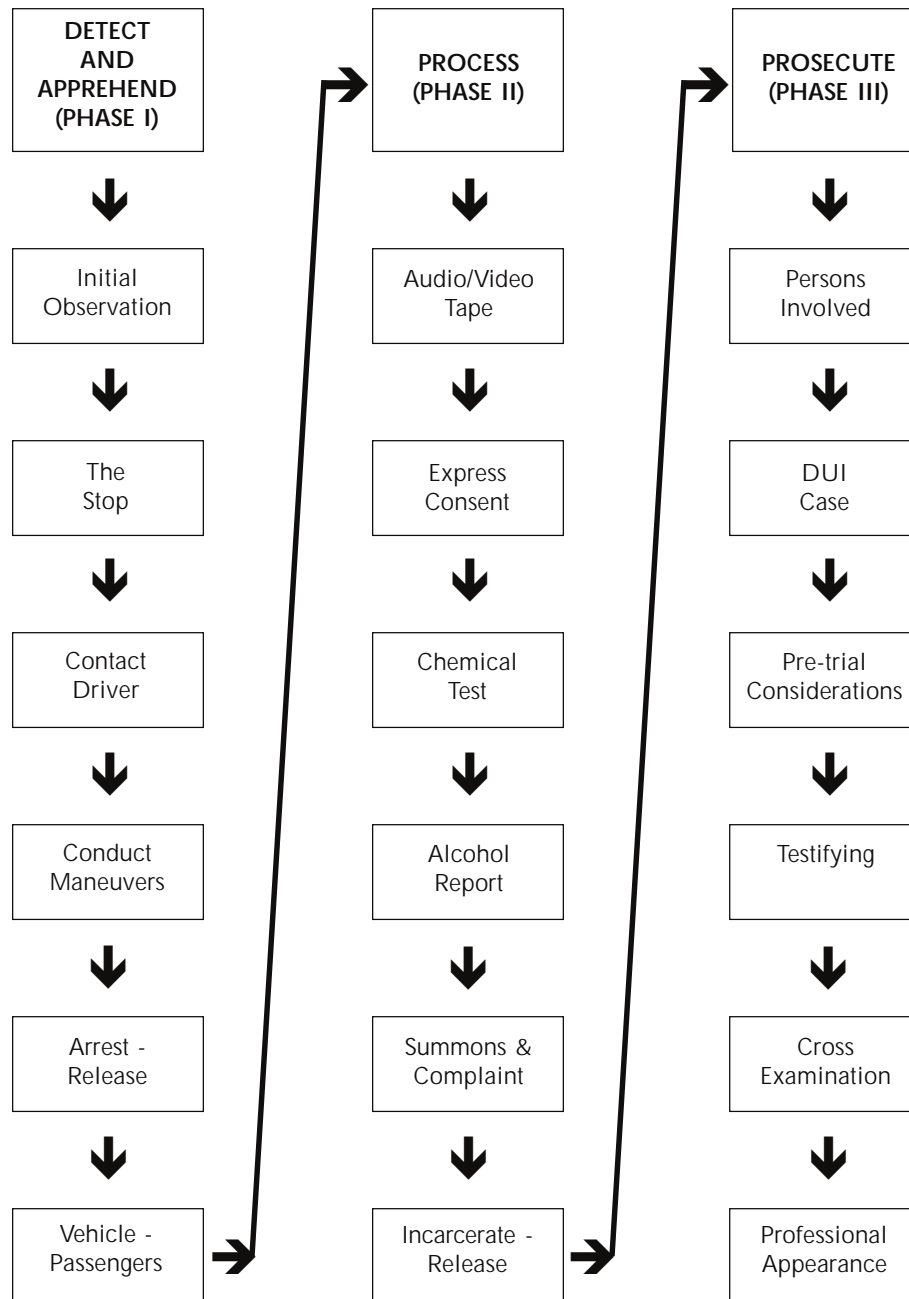
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## DUI DECISION FLOW CHART







# THE DETECTION AND APPREHENSION PHASE

## THE DETECTION AND APPREHENSION PHASE

We define detection and apprehension as the entire process of identifying and gathering evidence to determine whether a suspect should be arrested for a DUI related violation. During this phase you will develop reasonable grounds to stop and probable cause to arrest the violator after observing the physical and mental effects of alcohol or other drugs.

The detection of persons driving under the influence is considered the most important of the three phases. Without good detection, enforcement action cannot be taken. We often think the detection process is easy; however, it is not. Anyone can spot a driver who is obviously under the influence. He may "weave" extremely, drive 10 miles per hour, run red lights - not even knowing they exist, or crash into anything in his path. It becomes an art, though, to spot the majority of drivers who fall into one of the two categories: the impaired driver (DWAI) or the intoxicated driver (DUI) alcohol and/or other drugs.

The driver who operates a vehicle while his ability is impaired can be a real threat for several reasons. Although he feels his driving ability is sound, his reaction time is slowed. He has a false sense of control. Combine his slow reaction time with his feeling of control and he is a very dangerous threat to himself, other motorists, and pedestrians. Often, the impaired driver can be more dangerous than the obviously intoxicated driver. Often, the intoxicated, problem-drinking driver knows he is operating his vehicle below par and drives at slower speeds trying to compensate for his condition. However, the impaired driver feels he is in control of his vehicle and often tries to prove a point by driving at posted speed limits or higher.

The problem-drinking driver, which may include a person referred to as an alcoholic, can be extremely difficult to detect. Often, with many years of drinking experience behind him, he has developed the ability to partially compensate for intoxication. He can often attempt to mask the visual effects of alcohol in such a way as to escape detection by the average person. Even though he appears to compensate well, his perception and awareness is altered to the point that he may run over a pedestrian without even knowing it.

Due to the increased numbers of drivers who are under the influence of intoxicants other than alcohol, it has become necessary for police officers to be alert to the masking techniques employed by the drugged driver. For instance, a driver under the influence of marijuana may drink one beer which leaves the odor of an alcoholic beverage on his breath. This driver, upon being arrested for DUI could request a breath test. The breath alcohol test would determine a BRAC below the presumptive level for DUI. An officer who is not alert to the possibility of a drug induced intoxication might release the driver without proper charges.

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The impaired problem-drinking or drugged driver is not as easy to detect as once thought. However, this driver is the most dangerous.

### MAKING INITIAL OBSERVATIONS

Through several studies we have learned the impaired driver inherently makes certain mistakes while driving. Many of these driver mistakes are predictable. By being alert for these mistakes, the officer may develop reasonable grounds to stop the driver and investigate for DUI.

The following driving mistakes have been assigned a percentage value representing the changes in 100, when observed at night, the driver has a BAC equal to or greater than .08%:

Turning with a wide radius .....	65
Straddling center or lane marker .....	65
Almost striking object or vehicle .....	60
Weaving .....	60
Driving off designated roadway .....	55
Swerving .....	55
Slow speed (more than 10 MPH below the limit) .....	50
Stopping in traffic lane .....	50
Following too closely .....	50
Braking erratically .....	45
Driving in opposing or crossing traffic .....	45
Signaling inconsistent with driving actions .....	40
Slow to respond to traffic signals .....	40
Turning abruptly or illegally .....	35
Accelerating or decelerating rapidly .....	30
Headlights .....	30

If two or more of these mistakes are observed, add 10 points to the larger value.

SOURCE: National Highway Traffic Safety Administration Guide for Detecting Drunk Drivers at Night (DOT HS 805 711)

**OBVIOUS TRAFFIC VIOLATIONS** - Anytime you observe a driver running a red light or a stop sign, traveling at excessive or very slow speeds, especially during late evening or early morning hours, you should be alert to the possibility he is under the influence.

**HEADLIGHTS** - He often fails to turn on his lights, or dim them to oncoming traffic. The DUI could be following you with his bright lights on.

**OVERDRIVING** - The problem-drinking driver will often display this characteristic. He becomes very careful, very slow and deliberate in moving. He often aims rather than drives his vehicle.

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**SITTING AT OR THROUGH GREEN TRAFFIC SIGNALS** - The impaired driver may not even be aware the lights have changed and it is time for him to proceed. Likewise, he may stop for a green light and proceed on a red light.

**PERCEPTION PROBLEM IN STOPPING** - The impaired driver often stops too short or far into the intersection. It is not uncommon for him to jerk excessively when stopping, or to suddenly stop his vehicle when conditions do not call for it.

**WEAVING OR LANE HUGGING** - Drifting from lane to lane, across center lines or even off the roadway is not uncommon. An experienced drinker, while driving, may hug the lines thinking they can follow the lines home. Others think the lines will prevent them from "falling off the edge of the earth".

**TAILGATING** - Perception difficulties often develop when a person is under the influence. The impaired driver often feels he is farther from objects which are considerably closer or do not exist at all.

**DRINKING WHILE DRIVING** - The State of Colorado has adopted laws regulating open alcohol containers in vehicles. Some local municipalities have adopted ordinances making open alcohol containers illegal. Open alcohol containers in vehicles can be circumstantial evidence of drinking. If you observe open containers in a vehicle, you should be alert to the possibility the driver is intoxicated, and begin focusing on possible abnormal behavior.

**EXCESSIVE AND ERRATIC BACKING** - This occurs often in parking lots, especially at or near local bars. Anytime you observe backing movements on a traffic ramp, it is possible you have an intoxicated driver. Impaired drivers often take the wrong exits or entrances onto other traffic arteries.

## STOPPING THE VEHICLE

After you have developed a legal reason to make a valid traffic stop, be alert for the following before and after turning on your emergency lights:

**UNUSUAL REACTION TO EMERGENCY LIGHTS** - Often the impaired driver may not even observe your efforts to stop him. He may continue a considerable distance before he is aware you are behind him. On the other hand, he could make an immediate stop on the road or pull over quickly, making a sudden and hazardous stop.

**UNUSUAL REACTION TO SIREN** - If it becomes necessary to activate your siren because the impaired driver does not react to your emergency lights, then do so with caution. Keep a safe reasonable distance behind him; and if possible, select a safe location where traffic is light. Keep in mind your safety, that of the driver, and the public. You cannot predict his reaction to your siren.

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**SELECTION OF THE LOCATION** - If possible, you should select the location of the traffic stop. Put the advantage on your side, **NOT HIS**, obviously officer safety comes first. In selecting the location, consider the availability of lighting and the volume of traffic. Remember, you may have to conduct roadside maneuvers. You do not want a location where you or the driver could be struck by passing motorists.

**DRIVER BEHAVIOR** - Just prior to and immediately after the stop, watch for suspicious movements on the part of the driver. Likewise, observe suspicious movement of the passengers who may be in the vehicle. Do not rush up to the subject's vehicle after the stop. Sit back and observe for a few seconds before approaching the vehicle. His driving behavior, thus far, is a critical part of establishing your case, so do not think your case starts when you first smell an odor of an alcoholic beverage.

### CONTACTING THE DRIVER

By now, in most cases, you **MAY** have some indication of a possibly **IMPAIRED** driver.

**APPROACH TO THE VEHICLE** - Observe driver's hands as soon as possible and keep them in view. Do not overlook the trunk or back seat when approaching. Keeping safety in mind, get close enough to attempt to smell an odor of an alcoholic beverage on the driver's breath. Often, the car itself may contain a heavy odor of an alcoholic beverage. You may also see containers of intoxicating beverages lying on the floor or on the seat. Don't overlook other evidence which may be in view such as cigarette rolling papers, pipes, or other suspected drug paraphernalia. Be prepared to articulate any observations you make relative to a drugged driving arrest, including the detection of smells which could be associated with drug usage.

**EXPLANATION FOR STOPPING** - Identify yourself, your agency, and why you stopped him. Do not say you suspect him of DUI. This may place him on the defensive. State only the actual reason for the stop such as lane hugging, speeding, etc.

**REQUEST FOR DRIVER'S LICENSE, VEHICLE REGISTRATION AND PROOF OF INSURANCE** - Watch closely how he attempts to search for his driver's license and other documents. He may pass by them several times. If you ask for his license and he gives you a credit card, record it in your reports. At this point, you should begin to notice and mentally record his verbal responses. Note if his speech is slurred. Observe how well he can divide his attention. Ask him a question which required more than a yes or no answer while he is getting his license and other documents. A sober person generally can do two or more simple tasks like these at the same time.

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**PHYSICAL OBSERVATIONS OF DRIVER** - Begin your physical observations of the driver. Note his eyes, speech, clothing, etc. If, at this point, you have detected objective signs such as an odor of an alcoholic beverage on his breath, bloodshot eyes, slurred speech, etc., then you are ready to proceed to the CONDUCTING SOBRIETY EVALUATIONS phase of the process.

### ROADSIDE SOBRIETY EVALUATIONS

#### PURPOSE OF ROADSIDE SOBRIETY EVALUATIONS

Roadside sobriety evaluations allow an officer to evaluate the effects of alcohol or other drugs on a person suspected of being under the influence. This allows the officer to determine if probable cause to arrest the person exists, and also allows the officer to gather evidence of intoxication to present in court and related hearings.

#### LEGAL CONSIDERATIONS

Roadside sobriety evaluations have been defined by the courts as a "search", thus the same considerations must be given to the administration of roadside sobriety evaluations that would be given to any other search. It is not feasible for an officer to obtain a search warrant prior to conducting the maneuvers, the considerations must be those which are given to a warrantless search. One of two circumstances must be present before the maneuvers are conducted:

Probable cause along with exigent circumstances: To meet this requirement, the officer must have reason to believe the person was driving under the influence, and circumstances exist which make the immediate administration of the maneuvers necessary. Since the effects of alcohol and other drugs dissipate with time, exigency exists with any sobriety evaluation.

Consent: If a person consents to perform the maneuvers, it is not necessary for the officer to have probable cause prior to administering the maneuvers.

Since the maneuvers can only be administered with the cooperation of the person being tested, consent is the primary consideration of the administering officer.

#### DECISION TO CONDUCT

Consider the following prior to requesting the maneuvers of the driver: The attitude of the driver, his passengers, the neighborhood, the availability of cover, if the location presents a traffic hazard, adverse terrain or weather conditions. If conducting the evaluations at the scene presents a hazard, and if probable cause to arrest exists based on driving behavior and physical observations, arrest the driver and remove the driver from the scene. Do the maneuvers later in a safer environment. **Always wait for cover when in doubt - your safety is the first priority in any enforcement situation.**

## ASKING THE DRIVER OUT OF HIS VEHICLE

If you feel it is safe and justified to administer the maneuvers, choose a nearby location which affords a hard, level surface, protected from the elements if possible, and **ask** the driver politely to exit his car and walk to the predetermined location. Watch the driver closely as he exits his car. If intoxicated, the driver may stumble or hold on to the car for support. As the driver walks, watch for staggering or unsteadiness. Watch to see if the driver follows your directions and walks directly to the location you have pointed out, or if he becomes confused and has to be redirected.

Have the passengers remain in the vehicle, and conduct the maneuvers in a position which allows you to observe his actions, but still allows you to remain in a safe position should a passenger become a problem.

## ELIMINATION OF MEDICAL CONSIDERATIONS

Before you request he perform the maneuvers, determine if there is anything wrong medically. Ask the driver if he has any illnesses or medical conditions, if he takes medication, and if he is a diabetic. If the driver has a medical condition which may affect his balance, consider administering an alternative maneuver. Ask these questions in a manner which will not give the driver the idea of creating an excuse for his behavior. You want to eliminate all possible medical or physical reasons which could affect his driving behavior **except** alcohol or other drugs.

## ADVISEMENT OR REFUSAL

Roadside sobriety maneuvers may only be conducted when: 1) The driver voluntarily consents to perform the maneuvers; or 2) The law enforcement officer has probable cause to arrest the driver for DUI (People vs. Carlson 667 P. 2d 310 Colo. 1984). When determining whether consent is voluntary, the courts will consider whether the officer had the consent of the driver to perform the maneuvers. Although such advisement is not the only consideration, it is a factor to be considered. Consequently you should develop the habit and advise the driver the roadblocks are voluntary prior to administering the maneuvers.

## PERFORMANCE AND EVALUATION OF THE MANEUVERS

It is important you establish a routine when administering these maneuvers. A well organized routine will allow the process to flow smoothly, and will allow you to testify more effectively at a later date because you will remember exactly how you instructed the driver to perform the maneuvers. Although it is not necessary to word your instructions exactly as shown in this manual, your instructions must be complete and easy for a sober person to understand. Inform the driver he is to perform the maneuvers to the best of his ability, and if he does not understand the instructions, he may ask you to repeat them. Speak slowly and clearly while giving the instructions, and loud enough to be



heard distinctly under the existing conditions. After giving the instructions for each maneuver, ask the driver if he understands your instructions. Remember, you may later be asked to repeat your instructions to a jury, and if they cannot understand your instructions, they won't expect the driver to have understood them. Colorado Department of Transportation and the National Highway Traffic Administration recommend agencies adopt the following maneuvers.

**1. GAZE NYSTAGMUS** - Nystagmus is only to be administered by officers who have successfully completed a NHTSA certified nystagmus course taught by a certified instructor. Officers not certified in nystagmus who insist on utilizing this maneuver as part of their investigation will jeopardize the creditability of their D.U.I. arrests and more importantly jeopardize the creditability of the nystagmus procedure.

Officers who are certified utilizing horizontal gaze nystagmus (HGN) should establish a routine of preliminary questions to check the possibility the suspect is wearing corrective lenses. HGN may be conducted with contacts in place.

The officer can administer this maneuver with the suspect in a standing, sitting, or lying position (suspect cannot be lying on his back with his head tilted to a side). Typically HGN will be administered when the officer is in an interview position with gunsight away. When checking for end point nystagmus (distinct nystagmus at maximum deviation) it may be necessary for an officer to take a step with either the front or back foot to correctly look for this behavior during HGN maneuvers.

Recommended instructions: "I am going to look at your eyes. Keep your head still and follow this object with your eyes. Keep focusing on this until I tell you to stop. Do you understand?"

**2. RHOMBERG (MODIFIED ATTENTION MANEUVER)** - Traditionally an officer has told a suspect to stand with his feet together, arms to his side, close his eyes and tilt his head back. Then the officer observes the suspect for 12-18 seconds. This maneuver has been modified under NHTSA guidelines. Recommended instructions: "Stand up straight with your arms to your side, put your feet together, your heels touching heels, your toes touching toes. Close your eyes and tilt your head straight back, far enough so I can see your eyes are closed. Maintain this position for 30 seconds until I instruct you to relax. Do you understand my instructions? Please begin."

Research has shown it is best for this maneuver to be performed by the suspect for 30 seconds. It has been found a sober person will demonstrate a slight motion during this maneuver. It can be either front to rear, side to side, circular or any combination. But usually it will be very slight movement. Whereas an intoxicated person may show a more pronounced front to rear, or side to side behavior or may stand erect and rigid without any motion, or a combination of all of the above described behaviors. It is important, for an officer's safety, to

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maintain a good interview stance while checking for side to side swaying. It is helpful to step to one side to check for front to rear sways.

### 3. ALPHABET OR COUNTING MANEUVER - Recommended instructions:

"Would you please recite the English alphabet starting with the letter "A" and end with the letter "Z". Do you understand? Please begin."

- or -

"Would you please count for me. Start with the number "1" and end with the number "10". Then count in reverse order, repeat the number "10" and end with the number "1". Do you understand my instructions? Please begin."

- or -

"Would you please count in reverse order. Start with the number "57" and end with the number "43". What number did I ask you to begin with? What number did I ask you to end with? Do you understand? Please begin."

You must ascertain the suspect is familiar with the English alphabet prior to asking him to perform this maneuver. If the suspect is not familiar with the English alphabet ask him what grade of formal education he has completed, or if he is capable of either counting from "1" to "10" and then "10" to "1" or you may choose to have the suspect perform the later counting task.

### 4. WALK AND TURN (WAT) - Recommended instructions:

"Place your left foot on the line, now place your right foot on the line in front of your left foot, touching heel-to-toe. Keep this position until I tell you to start walking. Do you understand?" (Instruction stage)

"When I tell you, take nine heel-to-toe steps down the line, turn around, and take nine heel-to-toe steps back up the line. (Demonstrate a few steps)

"When you turn, keep your front foot on the line and turn by taking a series of small steps with the other foot." (Demonstrate)

"Don't stop until you have completed this maneuver. While walking, keep your arms at your sides and watch your feet at all times and count your steps out loud."

"Do you understand my instructions?" "You may begin." (Walking stage)

WAT maneuver is a "divided attention" maneuver. In order for the subject to perform this maneuver he must concentrate on performing more than one task at a time. It is important that the instructions be explained clearly and the

subject understands what is expected. This maneuver is divided into two stages. The first stage is the instruction stage. During this stage the subject is required to balance and listen to your instructions. The second stage, walk and turn, the subject is again required to balance himself while walking heel-to-toe, but also, he has to remember your instructions throughout the walking stage.

5. **FINGER-TO-NOSE** - Recommended instructions:

"Stand-up straight, place your feet together, heels touching heels, toes touching toes, tilt your head back just far enough so I can see your eyes are closed. Put your arms to your side and point the index finger on each hand. Touch the **tip** of your left index finger to the **tip** of your nose, return your hand to your side...Right index finger to tip of nose...Repeat, left, right, right, and then left."

There is nothing magical about left, right, left, right, right, left. But it is necessary for you to establish a routine for this maneuver. Your instructions should be given the same way every time. When you routinely use this method it is easier for you to remember how the subject performed when recording this in your police report and recalling this information when you testify to this roadside in court.

To correctly administer the finger-to-nose, the starting position is with the subject's arms next to his side. Watch carefully to make sure the subject touches the **tip** of his finger to the **tip** of his nose. During this maneuver the subject may also sway (front to rear or side to side type movement) which can be evidence of intoxication as well.

6. **ONE LEG STAND (OLS)** - Recommended instructions:

"Please stand heel-to-heel, arms at your sides. Do not start this maneuver until I tell you." "Do you understand my instructions so far?" (pause) "When I tell you, you will stand on one leg holding the other leg straight out in front of you like this." (Demonstrate)

"Keep the raised foot about six inches off the ground, foot pointed forward. While you are standing, you will count aloud like this: one-thousand one, one-thousand two, one- thousand three and so on until I tell you to stop. Keep your arms at your sides and keep watching your raised foot while counting. Do not hop or sway and do not put your foot down until I tell you to stop."

"Do you understand?" (pause) "Begin."

## PRELIMINARY BREATH TESTING (PBT'S)

42-4-1301 Following the lawful contact with a person who has been driving a vehicle, and when a law enforcement officer reasonably suspects that a person was driving a vehicle while under the influence of or while impaired by alcohol, the law enforcement officer may conduct a preliminary screening test using a device approved by the executive director of the department of public health and environment after first advising the driver that the driver may either refuse or agree to provide a sample of the driver's breath for such preliminary test. The results of this preliminary screening test may be used by a law enforcement officer in determining whether probable cause exists to believe such person was driving a vehicle in violation of paragraph (a) or (b) of subsection (1) or subsection (2) of this section and whether to administer a test pursuant to paragraph (h) of subsection (6) of this section. Neither the results of such preliminary screening test nor the fact that the person refused such test shall be used in any court action except in a hearing outside of the presence of a jury, when such hearing is held to determine if a law enforcement officer had probable cause to believe that the driver committed a violation of paragraph (a) or (b) of subsection (1) or subsection (2) of this section. The results of such preliminary screening test shall be made available to the driver or the driver's attorney on request. The preliminary screening test shall not substitute for or qualify as the test or tests required by paragraph (e) or subsection (6) of this section.

## DECIDING TO ARREST OR RELEASE

At this point, you should be able to make a good decision either to arrest or release the driver. You have observed his driving behavior, his physical and mental condition in the vehicle, and observed his performance during the maneuvers. These factors, taken together, constitute probable cause for arrest, or should influence your decision to release him. "In order to find the defendant guilty of the charge of Driving Under the Influence of alcohol, the degree of influence must be substantial, so as to render the defendant incapable of safely operating a vehicle" or, "in order to find the defendant guilty of the charge of Driving While Ability Impaired, you must find that he was less able than he ordinarily would have been, either mentally or physically, to exercise a clear judgement, and lacked the steady hands and nerves necessary to operate a motor vehicle with safety to himself and to the public." (The Thompson Instructions as given to a D.U.I. jury).

**ARRESTING THE SUBJECT** - If you have probable cause to arrest him for driving under the influence, consider the following recommended procedures: If possible, have another officer available at the time you advise the driver he is under arrest. People are very unpredictable when they think they are going to jail. Always frisk and handcuff the arrested drinking driver. By handcuffing him you are preventing him from possibly hurting himself as well as you. DUIs have been known to jump out of moving patrol vehicles when they were not

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handcuffed and fastened securely into the seat by the use of a safety belt. Again, people under the influence are unpredictable.

**RELEASING THE SUBJECT** - If you have not established probable cause to arrest the driver after conducting the physical maneuvers, then the appropriate decision is to release him. Possibly cite him for the original violation. But remember, a great deal rests on your effectiveness in properly detecting the drinking driver. As was stated before, the impaired or problem-drinking driver can be very dangerous, and you will have to be exceptionally alert in detecting him. If you fail in this detecting process and let him go, it could cost someone his life (or possibly involve you in a civil suit).

### **BE COURTEOUS AT ALL TIMES**

Many of the people you contact while under the influence are perfectly pleasant persons when sober, however many personalities change when one is under the influence. If you go out of your way to be courteous and as pleasant as possible under the circumstances, you will save yourself many unnecessary trials. Courteous conduct, even in the face of occasional hostility, will often be appreciated when the defendant has sobered up.

### **DETERMINING DISPOSITION OF PASSENGERS AND VEHICLE**

Anytime you make an arrest where the arrested person was in a vehicle, you must make arrangements for protecting his vehicle and insuring the safety of the passengers while he is in your custody. Departmental policy often gives you direction in this area. If you do not have a departmental policy, then it is recommended the vehicle be towed to a secure location where it will be safe. If there is a sober friend or family member immediately available, he can take custody of the vehicle with the permission of the arrested person. Make sure any passengers in the vehicle are properly taken care of, don't just leave them in a parked vehicle if they can't legally drive. Remember, all passengers in the vehicle are also witnesses. Record their information.



# THE PROCESSING PHASE

Processing (Phase II)

## THE PROCESSING PHASE

The objective of the processing phase is to prepare accurate reports, insuring all pertinent facts and information are recorded properly. We define processing as the period of time commencing with the arrest of the driver and terminating when he has been jailed, released on bond, or released on a summons and complaint to appear at a later date. It is during this stage you fill in the necessary forms required to prosecute the case successfully in a court of law. Note the time carefully on each form!

The number of reports required to process a drinking driver varies from agency to agency. Forms required by state law when processing the drinking driver are (1) the Affidavit of Revocation or Denial form (under circumstances defined by the Affidavit of Revocation and Denial form) and (2) the summons and complaint form. Other forms, not required by law, but equally important, are a permission for a chemical test form, sobriety examination report form, and a chain of custody form. All agencies should examine their DUI reporting system to eliminate any unnecessary forms in order to reduce the processing time. You can do much to expedite the processing phase if you logically and effectively organize your work habits by eliminating the dead time during the processing phase; for example, while sitting in your patrol car waiting for a tow, you could be completing the sobriety examination report form. While the arrestee is calling his attorney or a family member, you could be completing the summons and complaint. The key is to keep the processing phase moving. The following recommended processing procedure is designed to help reduce the number of forms and the time required to process the driver.

## USING VIDEO TAPE

Some jurisdictions may use video tape as part of DUI detection processing, either by means of video camera mounted in a patrol car or one at the station. Juries often give weight to the defendant's performance on such tapes. Therefore, video tape a driver when he is still performing and/or behaving in the same or nearly the same manner he was upon your initial contact. Remember the ultimate issue is whether or not the driver was incapable of safely operating a vehicle due to the consumption of alcohol or drugs. Many law enforcement agencies have gone to the mobile video taping equipment. If this equipment is utilized by your agency, a standard operating procedure should be developed. When there is a camera mounted in the patrol car it is possible to video tape a vehicle in motion. Evidence of this nature can be quite convincing when viewed by a jury, and adds credence to the officer's reasonable suspicion to effect a traffic stop on the suspected violator. When the driver is captured on video tape, many defense issues are eliminated. For instance, identification of the driver, the vehicle identification and license number, the conditions of the stop and the demeanor of the driver and possible witnesses to include the arresting officers.



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The local district attorney should be contacted for input in regard to using video tape. Some district attorneys would prefer to record the driving of the suspect as well as the maneuvers. Others would prefer just the actual roadside maneuvers administered on the video tape. No matter which system is utilized, video tape is evidence for documenting what the suspected driver actually did.

Officers must conduct themselves in a professional manner at all times because the tapes are making an actual record of what occurred. Sometimes the video is not as explicit to the audience as it is to the experienced officer as how the suspect performed the evaluation. Consideration should be given to making comprehensive notes by the officer on what occurred. A review by the district attorney and the officer of the video should also be done prior to the court proceedings so there are no unexpected surprises.

The following considerations should be utilized when using video tapes:

- 1) Be professional and courteous;
- 2) Give clear, simple and specific instructions;
- 3) Speak clearly and in a normal tone of voice;
- 4) Do not block the camera's view of the suspect;
- 5) If audio is utilized, speak loud enough to be recorded;
- 6) If a clock is not shown in the video, indicate the times when you begin and end the maneuvers.

The above guidelines can also be utilized in video recording the suspect at the station. Consider the camera as jury; remember to present the proper impression regarding your attitude toward the subject. Act as you would in the courtroom, testifying at trial. When administering the maneuvers under the watchful eye of the video camera, consider the following:

1. You should control the flow of the video tape;
2. If a clock is not shown in the video, indicate the times when you begin and end the tape. When using a video camera in the patrol unit, give the location;
3. Do not block the camera view, you're not the star;
4. Be professional;
5. Be polite and courteous;
6. Be fair and do not belittle the subject;
7. Speak clearly and in a normal tone of voice; **all** audio/visual is recorded;
8. Give instructions which are simple and specific;
9. Demonstrate how you want the maneuvers performed.

Every officer who comes in view of the camera should be aware of these guidelines.

Agencies utilizing video/audio recordings for DUI processing should consult with their local district attorney's office for guidance in handling and storage of video/audio masters. It is recommended at a minimum, the following

procedures should be employed:

1. Tapes are evidence and should be handled as such;
2. Maintain a filing system of the recordings;
3. Maintain strict control of the tapes and protect their integrity as evidence, under lock key;
4. As evidence, **copies** of the tapes must be released to defense attorneys in a timely manner so as not to violate discovery rules;
5. The tapes should be retained in their original form following department policy.

## USE OF AUDIO TAPE

Describe the actions of the vehicle while it is still moving and how the vehicle comes to a stop. Note the reaction of the driver and the vehicle once your emergency equipment is activated, i.e., "The green car continued two blocks after I activated my lights/siren, and then slammed on his brakes, stopping in the traffic lane before pulling over to the curb to stop." If your recorder is small enough to fit into your pocket, it can be used during the roadside maneuvers to document the driver's speech and initial conversation with you. Once the driver is contacted state your reasonable grounds for the stop and why you suspect him of driving under the influence, i.e., "I stopped you, sir, for weaving down the road. Upon contact with you, I observed several empty beer cans on the floorboard of your car in the front seat. I also smell a strong odor of alcoholic beverage on your breath." It is imperative you remember you are recording this arrest and do not make inappropriate remarks. Nods of the head, facial expressions and hand gestures are not going to be recorded unless you verbally describe the motions for the recorder.

The use of audio equipment can usually bolster your case by recording all of what occurred before and after the arrest. Audio tape is easy to make copies from and relatively inexpensive. Copies should always be distributed and the original kept in evidence. consideration should be given to standardization of using the audio tape, i.e., vehicle in motion, driver contact and roadside maneuvers on side A of the tape, with the DUI arrest, express consent law advisement and responses on side B. This makes it easier for you and the district attorney to locate specific items during the processing phase. Utilizing the above format will also prevent you from running out of tape and breaking your concentration during the investigation. It also will be less distracting and annoying to the driver.

## CONDUCTING A TEST FOR ALCOHOL AND OTHER DRUGS

Under state law, a person who drives a vehicle in Colorado shall be deemed to have expressed his consent to a test of his blood or breath for the purpose of determining the alcohol content of his specimen. A person who drives a

vehicle in Colorado shall be deemed to have expressed his consent to a test of his blood, saliva or urine or any combination for the purpose of determining the drug content, if you have reasonable grounds to believe he has been driving a vehicle while under the influence of, or impaired by alcohol or drugs or a combination of alcohol and drugs. The form consenting to perform a test should be completed before the sample is taken. The form itself may vary from agency to agency but should require the same basic information. The subject is required by law to sign the form giving his consent to a test. If a subject refuses to sign the form, the law states this is a refusal to take the test.

The type of test is specified by state statute. The Rules and Regulations of the Colorado Board of Health, relating to tests for alcohol and other drugs, govern the obtaining of blood, breath, saliva, and urine specimens for the analysis thereof to determine alcohol and/or other drug content by approved methods and procedures pursuant to Colorado revised statutes 2004, 42-4-1301 and 42-4-1304 as amended.

## **BREATH TEST**

Following the Colorado Department of Public Health and Environment (CDPH&E) guidelines, a breath test must be conducted on a certified evidential breath test instrument by a certified operator/instructor and performed following a standard operating procedure. The CDPH&E, Alcohol Test Unit of the Laboratory Division is responsible for the implementation of these requirements as outlined in Appendix B.

The purpose of a breath alcohol test is to determine the actual amount of alcohol contained in the subject's breath. When alcohol is present in a person's blood stream a proportion of alcohol will be imparted to their breath as blood circulates through the lungs. A breath alcohol test is an accurate, reliable and scientifically accepted method for measuring the alcohol content of a person's deep lung air sample when the test is conducted following the prescribed guidelines.

Currently, breath testing instruments measure alcohol present in a breath sample using infrared analytical technology. Infrared light is absorbed by the alcohol molecule, the more alcohol present in the sample chamber the greater the amount of absorption thus resulting in a higher alcohol reading. By statute the results of a breath test are expressed as grams of alcohol per 210 liters of breath.

Whenever a breath alcohol test is conducted a suitable reference sample, known as a standard simulator solution, shall be used with each direct breath test. The results of such a standard, when measured by the instrument, must be within an agreement of plus or minus ten (10) percent of the known reference value. This will establish the accuracy and calibration of the instrument when the test is performed.

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A breath sample is used for the direct breath test for determining alcohol concentration and is also used as a sample for the delayed test. Under Board of Health Rules and Regulations the subject is entitled to a saved breath sample. The same breath sample is captured and preserved using a silica gel tube.

A person must provide an adequate breath sample to fulfill the testing requirements of the breath testing instrument for a completed test. If the subject cannot satisfactorily perform the test after a reasonable amount of time, note his comments and efforts. Such activity is considered a refusal to comply with the express consent law.

## BLOOD TEST

If the subject refuses to submit to a breath test, he will have the option to submit to a blood test for the determination of alcohol concentration. There are several very important steps to follow when obtaining a blood sample. Established procedures must be followed when collecting a blood sample. Medical facilities have established procedures for drawing blood and maintaining custody. In some instances you may have to provide a specimen kit for collection. This specimen kit, as well as the specimen collection, must meet all the specifications as outlined in the Rules and Regulations of the Colorado Board of Health. Each blood alcohol collection kit shall include the following: a chain of custody form, two test tubes containing a 1% sodium fluoride preservative, evidence seals, and a non-alcohol antiseptic towelette. Make certain the person uses a non-alcohol solution for sterilizing the arm before blood withdrawal. The blood sample must be analyzed in accordance with the Colorado Board of Health Rules and Regulations.

### A. WITHDRAWING THE SAMPLE:

Blood samples shall be collected by venipuncture by a physician, registered nurse, certified paramedic, certified medical technologist, or person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse.

Blood samples shall be collected only in an appropriate clinical or public safety facility. (e.g. hospital, medical clinic, police/sheriff's office etc.)

In no event shall the collection of the blood sample interfere with essential medical care or emergency medical services to the public.

The sample must be collected, preserved, stored and maintained under the conditions as set forth in the Colorado Board of Health Rules and Regulations as outlined in Appendix A.

**B. MAINTAINING CUSTODY OF THE BLOOD SAMPLE:**

Maintaining the chain of custody for the blood sample is very important if you expect to have the blood alcohol results admitted into evidence in court. If problems arise as a result of a broken chain of custody or improper procedures, then the sample and the test results may not be admitted into evidence and you have lost a very important asset to your case.

**C. COMPLETING THE CHAIN OF CUSTODY FORM:**

This form is used to record the custody of the blood sample from the time it is withdrawn from the subject until introduced as evidence at a court proceeding. The form should list the following information:

1. Subject's name.
2. Offense charged.
3. Date and time the sample was drawn.
4. Name and title of the person collecting the sample.
5. A peace officer must witness the blood being withdrawn.

**D. MAILING THE BLOOD SAMPLE:**

If it is your agency's policy to mail the blood sample to the laboratory for analysis, then it is important the steps listed below be followed:

1. Make sure the chain of custody form is correctly completed.
2. Place the evidence seals around the top of the vacutainer tubes.
3. Place the chain of custody form inside the protective case which contains the blood samples.
4. Place the secured protective case containing the blood samples and chain of custody form in the mailing package, along with the permission for chemical test form, and seal both ends with evidence seals.
5. The mailing package should already have affixed to it the name and address of the laboratory. If it does not, make sure you correctly address it before mailing. Place your agency's return address on the package and check for proper postage.

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6. Refrigerate the specimen in a secure location if there will be a delay exceeding 72 hours in the mailing of the package.
7. Take the package to your local post office and place it in an inside mail depository. If placed in an outside mail drop during cold weather, the sample could freeze and break, thus destroying blood sample.

## ISSUING THE SUMMONS AND COMPLAINT

Certain information is required when issuing a summons and complaint. If information is not accurate or is left off by mistake, the charge may be dismissed. The following is essential information when issuing the summons and complaint:

**NAME** - Make sure you use the first, middle, and last name of the subject and the name is spelled correctly.

**LOCATION OF OFFENSE** - If subject was observed over an extended distance, the entire description should be entered, e.g., 100 - 700 South Main St.

**DATE** - Write in the date on which the offense occurred.

**STATUTE NUMBER AND DESCRIPTION** - The following is one way your Summons and Complaint can be filled out. You should consult with your District Attorney as to how it should be written in your jurisdiction.

**DUI** - 42-4-1301(1)(a) C.R.S. Drove a vehicle under the influence of alcohol or drugs or both.

**DWAI** - 42-4-1301(1)(b) C.R.S. Drove a vehicle while impaired by alcohol or drugs or both.

**DUI Per Se** - 42-4-1301(2)(a) C.R.S. Drove a vehicle with excessive alcoholic content in breath or blood.

**Underage Drinking and Driving** - 42-4-1301(2)(a.5) C.R.S. Person under 21 drove vehicle with BAC of 0.02 but less than 0.05.

The issuance of the summons and complaint is probably the last step that you will complete prior to the incarceration or the release of a DUI subject. The summons and complaint must be served within 18 months after date of offense. However, it is recommended it be served as soon as possible.

**DUI PRIOR CONVICTION** - Always note with special attention in your report, any information you obtain that suggests your DUI subject has a prior DUI conviction within five years (date of offense to date of offense). If necessary

court records are adequate and available, the prosecutor may file a second, separate charge dealing with prior conviction.

Upon a second or subsequent conviction within five years (date of offense to date of offense) the party shall be punished by a fine of not less than 500 dollars nor more than 1500 dollars, or by imprisonment in the county jail for not less than ninety days nor more than one year, or by both such fine and imprisonment.

**ENDORSING WITNESSES** - Some jurisdictions require endorsements of witnesses on the summons and complaint form. These witnesses will include persons at the scene, the instrument operator or any person administering a chemical test, vehicle passengers, and any expert required to testify as to the effects of alcohol on the individual.

## **COMPLETING THE AFFIDAVIT OF REVOCATION OR DENIAL FORM**

Under state law, a person who drives a vehicle in Colorado shall be deemed to have expressed his consent to a chemical test of his blood, breath, urine, or saliva for the purpose of determining the alcohol or drug content of his blood if you have reasonable grounds to believe he has been driving a vehicle while under the influence of or impaired by alcohol or drugs. If he refuses to submit to a chemical test after a valid request has been made, his driving privilege will be revoked for a period of twelve months. This will be in addition to any action taken in the criminal process. If he submits to a blood or breath test within two hours of driving and the results are .08% or higher, his license will be revoked for three months unless he has a prior express consent revocation, in which case the revocation will be one year. However, a person who holds a commercial driver's license is subject to license revocation for driving a commercial motor vehicle with a blood alcohol content of .04 and, a driver under 21 years of age is subject to license revocation (Underage Drinking and Driving) for driving with a blood alcohol content greater than 0.02.

The Affidavit of Revocation or Denial form shall be completed when the subject submits to a chemical test to determine his alcohol content and the results are .08% or higher (.04 or higher for commercial driver driving a commercial motor vehicle), if the test was administered within two hours of driving or actual physical control, or if the subject refused to submit to blood or breath testing. This will initiate the administrative revocation process in the Department of Revenue.

**DATE OF NOTICE** - The Affidavit of Revocation or Denial form defines date of notice as the date on which the driver was "asked to submit to a test(s) to determine the alcohol or drug concentration" within his system. In cases where you do not personally serve the notice (i.e., delayed blood test results), print "Notice Not Served" on the top of the form. When the department receives the notice, it will then serve the notice upon the driver by certified mail.

**NAME AND DESCRIPTION** - Fill in all the blanks. 1. If the person has no license, write "NONE," but fill in the rest.

**PROBABLE CAUSE** - The Notice of Revocation or Denial contains space for you to describe your probable cause to believe a person was driving a vehicle under the influence of, or impaired by alcohol or drugs or with a blood or breath alcohol content of 0.08% or more. The following information should be included:

1. The Element of "Driving" - Your own observations will usually be sufficient to establish a subject was "driving" a vehicle. However, further investigation is required when you have not made such observations, as when you are dispatched to the scene of a collision or a single car off the road. In such situations, your initial investigation should include the question, "Who was driving this vehicle?" to all those at the scene. Always ask for witnesses who can establish the subject was driving and note how each witness knows the subject was driving, i.e., he saw the subject driving his vehicle, he found the subject behind the steering wheel with the lights on and engine running, and/or the subject told him he had been driving.

Particularly in single vehicle situations, with only one party present when you arrive, look for evidence this party had been in actual physical control of the vehicle. Colorado law treats "actual physical control" as the equivalent of driving under the Express Consent and Per Se laws. Therefore, always note situations such as an individual passed out behind the steering wheel and the location of the vehicle, lights on, transmission in gear, the keys in the "on" position in the ignition, or the subject trying to put the vehicle into gear. Be alert for any evidence that demonstrates the subject was in a position to either move or restrain the movement of the vehicle.

2. Reasonable Suspicion of a Traffic Violation or other Lawful Reason for Making Contact - Note you or another party observed the subject operating a vehicle, and indicate your reason for stopping him, i.e., speeding or driving considerably below the posted speed limit, failure to use turn signals, involved in a traffic collision, etc. Note the location and direction of travel of the vehicle and the location of the actual traffic stop. When you have arrived at a collision situation and have not observed the driving, locate possible witnesses and obtain verbal statements. The statements can be used in recording the reasonable grounds for this element. When a citizen advises you of a drinking driver, obtain the citizen's name and address and why they felt the subject was intoxicated. It is also important to interview passengers in the arrested subject's vehicle, as statements made by them might become critical at trial. Report them accurately, quoting whenever possible. If the reason for contact was not based on reasonable suspicion of a traffic violation (domestic disturbance, sobriety checkpoint), simply state the reason for contacting the driver.

3. Probable Cause to Request a Test(s) - In addition to any erratic driving, include other information supporting your decision to request a test such as odor



of an alcoholic beverage on the driver's breath, physical appearance and actions and a general description of performance on any roadside sobriety tests.

4. Results of any blood or breath test or a statement the driver refused the test(s).

You are not limited at an Express Consent or Per Se license revocation hearing to the probably cause observations listed on the form. However, good practice dictates you be as complete and concise as reasonably possible in preparing the form.

The Notice of Revocation or Denial has boxes for you, the officer, to check depending on whether a test was taken with results over 0.08% or whether a test was refused.

**TEMPORARY PERMIT** - Issue a temporary driving permit to only those persons who surrender to you a valid license from Colorado or another state and sign the form (Signature of Respondent).

**OTHER DOCUMENTS TO BE FILED WITH THE NOTICE OF REVOCATION OR DENIAL** - In a Per Se case you are required to forward to the department a "verified report of all information relevant to the enforcement action...a report of the results of any tests which were conducted, and a copy of the citation and complaint filed with the ." (C.R.S. Section 42-2-126. In a refusal case, the requirement is "a verified report of all relevant information, "...C.R.S. Section 42-2-126.

The statute does not further define "all information relevant to the enforcement action" or "all relevant information." Good police practice would include filing any written police reports including roadside sobriety test results, accident reports, notes of interviews of witnesses and information concerning certification of the breath testing instrument, operator, blood testing laboratory and confirmation concerning qualifications of any person drawing blood. If a refusal to submit to blood testing is based on failure to sign a consent form, the form should be included in the report.

**VERIFICATION** - There are two methods of verification available. The first is standard notarization in which you attach all documents to be filed with the Notice of Revocation or Denial and take the entire set of documents to a notary, raise your right hand and swear the information is true and correct and sign the form. The notary should then complete the process by signing and attaching the notary seal.

The second does not require notarization. It requires you swear to the accuracy of the material in the Notice of Revocation or Denial. To do so, add the words "under penalty of perjury" before the words "I affirm that the documents..." in the Verification Section on the reverse side of the Notice of Revocation or Denial and then sign on the Officer's Signature line.

# THE PROSECUTION PHASE

Prosecution (Phase III)

## THE PROSECUTION PHASE

We define the prosecution phase as the period of time commencing with the filing of a Summons and Complaint form for DUI until final adjudication is arrived through court processes. If you followed the recommended procedure as described in the first two phases, you will have put together a solid case. You may be convinced the defendant is guilty; so why have a trial? The answer lies in our American system of criminal justice. It is the defendant's constitutional right to request a trial. Therefore, if he does not plead guilty, it is the prosecutor's job to convince members of a jury or the judge the defendant was driving under the influence beyond a reasonable doubt.

The issue at the trial is whether the defendant was:

1. Driving Under the Influence "...the degree of influence must be substantial so as to render the defendant incapable of safely operating a vehicle."\* or,
2. Driving While Ability Impaired "...he was less able, to even the slightest degree, than he ordinarily would have been, either mentally or physically, or both, to exercise a clear judgement, and lacked the steady hands and nerves to operate a vehicle with safety to himself and to the public."\* or,
3. DUI Per Se "...the person drive a vehicle when the person's blood alcohol level is 0.08% or higher."\* or,
4. Not guilty.

## PERSONS INVOLVED IN PROSECUTION

The following persons may participate in a DUI trial:

**JUDGE** - Determines the admissibility of evidence, oversees the conduct of the trial, instructs the jury as to the law that will govern the case, and ultimately, upon conviction, imposes sentence. In a trial to the court, the judge will also determine guilt or innocence.

**JURY** - Based upon what it concludes the facts to have been from the evidence presented and the believability of the witnesses, it applies those facts to the law and unanimously returns a verdict of "guilty" or "not guilty." In order to return a "guilty" finding, the jury must believe in the defendant's guilt "beyond a reasonable doubt." If the jury has such a "reasonable doubt," it MUST find the defendant not guilty.

**PROSECUTOR** - Presents all available evidence in the light most favorable to the People, with the additional obligation of insuring the defendant a fair trial.

**DEFENSE ATTORNEY** - To represent the best interest of his client.

**DEFENDANT** - Answers the formal charges brought against him.

\*Taken from the Thompson Instruction as given to a DUI jury.

**ARRESTING OFFICER** - Testifies to the initial observation of erratic driving, the physical appearance of the defendant, observations of the scene and vehicle, the performance of "roadside maneuvers," any voluntary statements, arrest of the defendant, administration of the chemical test, and statements made by the defendant.

**CIVILIAN WITNESS** - Testifies to the observation of defendant's driving, drinking or physical condition either just before or after the stop, and any statements made by the defendant. A civilian witness can be a passenger in the defendant's car, an observer, or a victim of a collision.

**INSTRUMENT OPERATOR** - Testifies to the storage of the standard solution, describes the instrument and the operation checklist used to take the breath sample, and may give the results of such test. In order to allow the jury to hear the results of a breath test, the prosecutor must present a foundation showing the test was done properly by an officer who was qualified to do so and the test was performed on an instrument which was in proper working order. Five documents are routinely used to accomplish this task. The prosecutor will usually try to admit copies of the intoxilyzer certificate, the standard solution label, the operator checklist, the intoxilyzer log sheet or the test card for the individual defendant.

**MEDICAL PERSONNEL** - Testifies to the method of withdrawing defendant's blood where a blood test is used. May be a nurse, doctor, or other person authorized to withdraw blood.

**TOXICOLOGIST** - Analyzes and testifies to the results of the test given, effects of alcohol and or drugs on a person's ability to operate a vehicle safely, the reliability of the instrument used, the accuracy of the test results, and the amount of alcohol consumed based on the test results.

**OTHER WITNESS** - Other testimony that may be relevant to the case.

## CHARACTERISTICS OF A DUI CASE

Most DUI cases involve the following:

**OPINION OF ANOTHER** - A person can be convicted of DUI based solely on the opinion of another as to his degree of intoxication. However, because most jurors would find a reasonable doubt based on the opinion of a single person, additional evidence is necessary.

**CIRCUMSTANTIAL EVIDENCE** - Generally, proof of a DUI case is based upon circumstantial evidence. Such evidence is defined as "that proof of facts or circumstances from which the existence or non-existence of other facts may reasonably be inferred." While direct or eye witness evidence may be viewed as stronger evidence by some jurors, a jury can return a verdict of "guilty" based solely upon circumstantial evidence.

**ADDITIONAL EVIDENCE** - The use of audio and video tapes, chemical tests and expert witnesses make proving this misdemeanor as complicated as any felony.

## CONSIDERATIONS BEFORE TRIAL

Trial and/or suppression hearing dates are set by the court, usually without the knowledge of the prosecutor. Conflicts such as out-of-town training or a vacation should be brought to the prosecutor's attention as soon as you are made aware of them. Communication is the key. While the prosecutor can never guarantee he can arrange for another court date, the earlier you advise him of your conflict and the fewer conflicts you have, the more likely prosecutors and judges will accommodate you.

**PLEA BARGAINING** - The rules of criminal procedure allow people with similar offenses and records to plead to similar lesser charges, if allowed to plead to lesser charges at all.

Where the defendant was combative it will be considered by the prosecutor but will not be determinative of the disposition. If the defendant physically resists, charge him with either resisting arrest, 2nd degree assault, or any other appropriate charge. The prosecutor bases his plea bargain offer on a variety of factors, e.g., the sum total of offenses charged, defendant's prior record, any aggravated facts such as a collision and the degree of injury including damage, the defendant's attitude, the quality and quantity of evidence, number and availability of witnesses, provability of the case, possible defenses, and your feelings about the case. It is the prosecutor's function, and the decision is his responsibility alone.

## YOUR TESTIMONY

The jury will be instructed to consider certain factors when determining the credibility of all witnesses. There are four areas which can make you a believable witness.

**KNOWLEDGE OF THE CASE** - Be thoroughly familiar with the facts and all the evidence. Bring only original documents, when possible. Bring all other evidence to court without being asked. Disclose possible weaknesses and strengths of the case to the prosecutor prior to the trial. Do not take offense at questions put to you by the prosecutor prior to the trial; he is trying to help. Ask

what to expect from him and from the defense attorney. A trial is a team effort. If you have played any part, however slight, you may be called to testify.

**RECOLLECTION OF THAT KNOWLEDGE** - Make notes and reports thorough enough to recall facts clearly and accurately at the subsequent trial, which may not take place for months.

Thoroughly review your notes and the entire case file. Try to picture the scene by forming a mental image of what happened. As a general rule, you may ask to refer to notes or reports made at or near the time of the offense to refresh your recollection. "May I refer to my notes?" you ask. "Did you make them in the course of your duties at or near the time of the offense?" asks the prosecutor. "Yes," you respond. The judge should then allow time for you to refresh your memory. If you remember something not in your reports, it is still evidence, and you may testify about it. Avoid testifying to and statements made to you by the defendant unless specifically asked. However, be certain to inform the prosecutor prior to trial of any statements made by the defendant not recorded in the reports. The prosecutor may not use statements which he has not disclosed to the defense or which the court has suppressed. Before testimony may be admitted regarding the defendant's statements, a legal determination of admissibility may be made by the judge, outside the presence of the jury.

**COMMUNICATION OF THE KNOWLEDGE** - Information is generally obtained through one's eyes and ears. Oral testimony, however is an inefficient method of communicating a complicated situation to someone who has never heard it before.

A. Project your own story - Try to paint a word picture. Be descriptive. Be accurate. Convey and project your story, remembering you are selling yourself as well as your testimony. Relax. If you are prepared, you will undoubtedly be a convincing witness. Be professional. Detach yourself from a case and relate what happened as if you were merely a bystander and not an officer.

B. Relate the facts - Do not display to the jury the "us against them" attitude. Let the prosecutor present and argue the case. You simply relate the facts. Never answer a question you do not understand. If you cannot understand it, how can the jury? Answer directly and simply only the question asked of you. Give only short, direct answers unless asked a question calling for a narrative answer. Help the jury to understand, use simple words: Car not vehicle; man, woman, child or person not male, female, juvenile or subject; go or arrive not respond; saw or met not contacted; red lights and siren not emergency equipment, etc. In so doing, the jury understands what you mean and can relate to your presentation. If they don't know what you mean, they worry; if they worry, they don't listen, and when they don't listen, they acquit.

C. Let the prosecutor maintain control - The prosecutor must control the tempo with his questions to avoid opening the door to some matters better left alone and to avoid mistrials.

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**BE POSITIVE** - Talk to the members of the jury frankly, and openly, maintaining eye contact, as you would to a friend or neighbor. Listen to the questions put forth by the prosecutor or defense attorney, but talk to the jury, not the attorney. The following words should be avoided: a little, sort of, kind of, somewhat, impaired or it's possible. You arrested the defendant because, in your professional judgement, you would have been derelict in your duty as a peace officer if you had let him back in his vehicle to drive. You determined he could not drive with safety to himself and others. If you thought someone was under the influence and you issued a citation, stand on your word. Let the defense attorney make his points, don't do it for him.

**OPINION OF INTOXICATION** - You have reached the point in your testimony where you will state your conclusions regarding the sobriety of the subject. These conclusions are based on erratic driving, bloodshot, water eyes, smell of an alcoholic beverage on the breath, inability to satisfactorily perform the maneuvers, previous training and experience with drinkers and drinking drivers, etc. "Do you have an opinion with respect to the defendant's sobriety?" asks the prosecutor. "Yes, I do," you reply in your own words, your opinion of the state of sobriety of said subject.

## CROSS EXAMINATION

Seemingly, the area most feared by you is the time when the defense attorney has the opportunity to ask you questions. Remember it is his job on cross-examination to put words in your mouth. Do not take it personally and become angry. If he is hard on you, chances are the jury will be sympathetic toward you. Hard questioning and arguments do not set well with a jury. If you reported a fact, stick to it. You were there, not the defense attorney.

Think before you answer. Be on your guard for questions which attempt to discredit you regardless of your answer, such as: "You thought my client was under the influence as soon as you stopped him, didn't you?" A simple "yes" casts doubt on why you "investigated" further with such things as the maneuvers. A simple "no" suggest his driving wasn't really bad. Don't be lead, explain your actions. Never hesitate to ask for clarification or for the question to be repeated. Remember, an answer given in haste or based upon a question you misunderstood is still evidence for the jury to consider.

Don't fight the obvious. If the defense attorney catches a mistake you made on direct examination, admit it. Do not argue, no matter how absurd the questions are, e.g., if you did not see the defendant drinking, or you do not know whether polio would affect a person's results on the evaluations; just answer "no." You control the manner in which you testify; do not let the defense attorney upset you. When the defense attorney is shouting, keep talking to the jury in a pleasant conversational tone.

## PROFESSIONAL APPEARANCE

Be neat in your appearance with proper dress. Avoid distracting mannerisms, such as gum chewing or holding a toothpick in your mouth. Do not give snap answers without thinking them out. Be courteous at all times. Do not exaggerate. Avoid looking at the prosecutor or judge for answers. When in the courthouse, be on guard. You never know when jurors may be observing your actions. Avoid the appearance of being cocky. Project confidence and professionalism.

## SUMMARY

Many thousands of hours have been spent in completing and revising this manual. Experts in the area of DUI enforcement has been consulted and have greatly assisted in establishing the GUIDELINES as set forth in this document. Although there are other publications in existence, this manual is believed to be one of the best of its kind. It specifically addresses Colorado's problems, laws, and suggested procedures in dealing with the DUI enforcement. By stimulating your thinking, you can gain a more positive approach towards DUI enforcement. You alone are the key. Without your initial contact of the suspected intoxicated driver and the decision to arrest, the identification and reduction of alcohol-related incidents cannot take place. Looking for reasons not to arrest is justifying lack of responsibility on your part, and amounts to contributing to a serious social problem - the intoxicated driver.

The following sections of this manual are designed to give you additional information on situations and processes related to DUI enforcement. It is strongly suggested you become familiar with them. There are sections which are sure to contain answers to questions you may still have. By becoming thoroughly familiar with the manual and its appendices, you will also be enhancing your image as a professional peace officer.



# APPENDIX A

## ALCOHOL AND ITS EFFECTS

Appendix A: Alcohol  
and its Effects

## ALCOHOL AND ITS EFFECTS

**PROPERTIES OF ALCOHOL** - although there are numerous types of alcohol, "Ethyl alcohol" or "ethanol" is the type found in alcoholic beverages. Other types of alcohol are generally toxic to the human body, ethanol is the least toxic. **All alcohols are toxic, including ethanol, if consumed in sufficient quantities and will result in physical injury or death.**

Ethanol, in its purest form is a clear, colorless liquid which is practically odorless and causes a burning sensation when ingested. Ethanol will readily mix with water and evaporates very quickly.

Ethanol is produced by the process of natural fermentation when an alcoholic beverage is manufactured. The concentration of alcohol varies in the type of beverage that is produced (beer contains 4%, wine 12%, 43% in hard liquor). One drink is considered as one ounce of 86 proof liquor, or one twelve ounce can of beer, or one four ounce glass of wine. Beverages also contain congeners as a flavoring agent. Congeners do not contribute to the depressant affect of the alcohol but can be detected on a person's breath after a beverage has been consumed.

### ALCOHOL IN THE BODY -

(1) **Absorption Phase:** Once alcohol is ingested it is absorbed directly into the blood stream through the cell membranes of the digestive tract. Alcohol requires no digestion before it is absorbed. As the alcohol passes through the digestive tract 5% will be absorbed by the mouth, 25% will be absorbed from the stomach and the remainder, 70%, will be absorbed from the first eight to ten inches of the small intestine. A factor which influences the rate of absorption is the amount of food in the stomach. The average rate of absorption for the body is 30 minutes on an empty stomach up to 60 minutes or longer on a full stomach. The rate of absorption varies slightly from person to person, and for the same person at different times. Some alcohol passes into the blood stream, within minutes of consumption and most (90%) is absorbed within an hour.

(2) **Distribution Phase:** When the alcohol is absorbed by the circulatory system it is then distributed to all parts of the body. Some organs, such as the brain, liver and kidneys, receive a larger amount of blood supply than others and consequently will receive a greater amount of alcohol. Alcohol is also distributed proportionally to parts of the body depending on the water content of the tissues.

(3) **Metabolism Phase:** As the alcohol is being distributed in the circulatory system, the liver will excrete an enzyme (alcohol dehydrogenase, ADH) which

will metabolize the alcohol. This enzyme will oxidize or break down the alcohol molecule to be used as a food source for the body. The average rate of metabolism for an individual is 0.015% or about one drink per hour. The rate of metabolism will vary among individuals based on the body's ability to metabolize alcohol.

There is no known method of significantly increasing the rate at which alcohol is oxidized. Neither hot coffee, cold showers, or exercise speed up the process. Only time can sober the intoxicated person. Approximately 90% of the ingested alcohol is eliminated through the liver. The other 10% of the alcohol is eliminated through the breath, urine, tears, saliva, and perspiration.

**EFFECTS OF ALCOHOL ON BEHAVIOR** - Alcohol is a central nervous system depressant, not a stimulant. The higher the concentration of alcohol, the greater the influence on a person's physical as well as mental abilities. Alcohol attacks the central nervous system. The major activity of alcohol is to numb, depress, and finally paralyze nerve activity. The brain is the organ which is principally affected by alcohol. The first step of impairment is on the part of the brain which controls a person's judgement, reasoning, morals, and power of divided attention. If alcohol is ingested in sufficient quantities, functioning of the part of the brain which automatically controls a person's body functions can be affected. A person can lose complete control of himself, pass into a coma, and ultimately die when the respiratory center of the brain is depressed. Between the mild effects and severe effects of alcohol, there is a progression of deterioration in performance.

It is impossible to state all people will exhibit the same outward signs of intoxication at the same blood alcohol concentration. Some of the notable signs of intoxication are an odor of an alcoholic beverage on the breath, swaying, staggering, poor muscular coordination, inability to divide one's attention (do two or more simple tasks at the same time), confusion, speech difficulty, sleepiness, dizziness, nausea, glassy watery eyes, flushed face, inability to understand instructions, and gaze nystagmus.

DUI subjects may exhibit all or part of these notable signs. The degree with which some signs are exhibited depends on the drinking experience of the subject.

Tolerance and compensation can affect a DUI subject's performance. Tolerance is defined as the capacity to adapt physiologically to alcohol. Compensation is merely the body's way to mask the visible signs of alcohol. An example is when the DUI subject talks slowly to avoid slurring his speech, or he sings the alphabet so he won't become confused.

The above signs may or may not indicate intoxication, (see "Medical Considerations" for details), but when enough signs are observed, it will take you to the next step of requesting an evidentiary test or tests.

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Colorado law presumes a person is under the influence if his BAC is 0.08% or greater. Experts agree no one can safely operate a vehicle when a person's blood alcohol concentration is 0.08% or greater.

Remember people react differently to the effects of alcohol. It is up to the courts to decide if their behavior and performance are indicative of drunk driving. You could obtain a DUI conviction for a subject who has a BAC of less than 0.08%.



# APPENDIX B

## DRIVING UNDER THE INFLUENCE OF DRUGS

## DRIVING UNDER THE INFLUENCE OF DRUGS

The problem of drugged drivers does exist and there is no reason to believe a driver under the influence of drugs is any less dangerous than someone driving under the influences of alcohol. Best estimates indicate, of all impaired driving arrests made each year, up to 15% involve drug impaired drivers.

The express consent law does address the problem of persons who drive under the influence of or impaired by drugs. It is a violation of law to be driving under the influence of any controlled substance (as defined in 12-22-303 (7) C.R.S.) or any other drug which renders a person incapable of safely operating a vehicle. Included within this definition are both illegal and legal drugs, whether prescription or non-prescription. Also included are toxic vapors such as glue and paint sniffing and aerosol inhalation.

There are many similarities between establishing a good DUI drug case and a good DUI alcohol case. One main difference is the chemical test and its interpretation. There are no presumed levels of intoxication resulting from a chemical test of a suspected drugged driver. The chemical test results will indicate the presence or absences of a chemical, and occasionally will also state the measured quantity of the chemical/drug. But since a measured level does not equate to presumed intoxication by drugs, the observations, statements obtained and ability of the officer to articulate the suspects impaired condition are important.

To increase the number of arrests for driving under the influence of drugs, police officers have been trained and certified as Drug Recognition Experts (DREs). DREs are trained to recognize the signs and symptoms of drug intoxication and to systematically evaluate motorists believed to be under the influence of drugs. This evaluation, performed in an indoor controlled environment, is done in addition to and not in lieu of, the initial arresting officer's street sobriety evaluations and observations.

An initial drugged driving violation can begin much like an alcohol driving violation. First, you may observe the vehicle weave or commit a traffic violation. When contacting the driver and conducting a sobriety evaluation, you usually observe many of the physical and mental effects of alcohol, except there may be no odor of an alcoholic beverage. It is obvious, though, the driver is not normal and is under the influence of something. Prior to the roadside sobriety evaluation, the officer must be alert to the possibility the driver is suffering from a medical condition which is the reason for suspected impairment. Ask the driver if they are experiencing medical problems and be aware conditions such as a head injury, stroke, diabetes and speech disorders can mimic an intoxicated appearance.

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The roadside sobriety evaluation for a potentially drug impaired driver should be the same as one used for a potentially alcohol impaired driver. Remember, the issue is whether or not the driver, in their present condition, can safely operate a vehicle.

During your initial contact and your roadside sobriety evaluations, be especially alert for evidence of recent or current drug usage. Closely examine the subject's vehicle in an attempt to observe possible drugs or drug paraphernalia in plain view. If the drug is marijuana, you should be able to detect its odor in the vehicle and on the subject if it was used recently. Be alert to the subjects statements, especially those involving slang or street terms associated with drugs.

If, following the roadside sobriety exam, you believe the driver is under the influence, arrest him and make sure you search him thoroughly for your own protection and note any evidence including drugs or medication. If applicable, search the interior of the driver's car within the permitted scope of search incident to a lawful arrest.

If the suspect has an odor of an alcoholic beverage, however slight, the express consent procedure for alcohol should be followed, even if you suspect the driver has also taken drugs. Remember, alcohol and other drugs are frequently taken together. If a breath test is given, indicating results of less than .08%, and the officer has reason to believe the suspect has been using drugs, including behavior suggesting impairment greater than this level, ask the suspect to submit to a chemical test for drugs. Refusal to submit to a chemical test for those suspected of driving while under the influence of drugs is a violation of the express consent law and a notice of revocation should be completed. The arresting officer will choose which type of test (blood, urine, or saliva) is to be given, it is not the driver's choice.

If a breath test is given and the results indicate a level of alcohol .08% or greater, charge the driver with DUI. Alcohol at concentrations greater than .08% can mask the signs and symptoms of drug intoxication but a DRE may still want to do an evaluation. Higher alcohol concentrations should not preclude charging the driver with and requesting an additional evidentiary tests for driving under the influence of drugs where there is a clear indication of drug usage.

When evidentiary test results are not readily available from a suspected driver under the influence of alcohol and there is a clear indication the driver is also under the influence of drugs, request an additional chemical test for drugs. If an officer requests a suspect take more than one type of chemical test for drugs (example: blood and urine), a refusal to take any one or all of these tests constitutes a refusal and the suspect's driver's license may be revoked.

It is highly recommended to utilize the abilities of a DRE whenever possible. A suspect has the right to refuse a DRE exam in which case an officer must make a decision to arrest based on available evidence and information. A DRE would



normally be contacted after the arresting officer administers a breath test to a suspect and the results (usually less than .08%) suggest the suspect's actions and behavior indicate greater impairment. The DRE will administer, with the arresting officer or other witness present, a series of evaluations designed to form an opinion as to whether or not drug impairment is present. These evaluations can also discover people who are medically ill and in need of assistance. The DRE will contact the arresting officer to obtain information about the suspect. This includes the officer's observations and any statements made by the suspect. Following an initial preliminary check of the suspect by the DRE, the evaluation will then consist of checks of the suspect's vital signs, including pulse rate, blood pressure and temperature. The suspect's eyes are also examined, including darkroom checks of pupil size under varying light conditions. Inspection for horizontal and vertical nystagmus, eye convergence, and reaction of the eyes to light complete the eye exams. Also evaluated are the suspect's performance during several "divided attention" (roadside type) maneuvers. Although very similar to the standard roadside sobriety maneuvers, they are not designed for street use by non-DRE personnel. The DRE evaluation, which uses a standardized and systematic procedure is designed not to vary among DREs and lasts less than one hour. The evaluation concludes with the DRE's opinion as to the existence of drug impairment, followed by a chemical test.

Blood and urine tests are the most common forms of chemical testing administered to determine drug content. To a much lesser extent, saliva (swab) tests are also utilized. It should be noted certain drugs are not easily identified under certain types of evidentiary tests. For example, urine samples are usually preferred over blood samples for simple marijuana detection. Chain of custody format and consent form procedures will vary according to the department and laboratory testing facility. Refer to the evidentiary test section in this manual and contact your local laboratory for more information on evidentiary test procedures.

Seven general categories of drugs are recognized by DREs when evaluating drug influence. These categories, listed below, are followed by possible effects commonly observed in persons found to be under the influence of drugs in these categories. This list by no means includes all effects, nor are all of these effects always seen. This list is intended only for general comparison and identification purposes.

<b>Drug Category</b>	<b>Some Common Effects</b>
Stimulants	Talkativeness, loss of appetite, anxiety, dry mouth, grinding teeth, restlessness, rigid muscles, dilated pupils, tachycardia, elevated blood pressure, perspiration or chills, nausea or vomiting, evidence of weight loss, psychomotor agitation or retardation, muscular weakness, respiratory depression, chest pain or cardiac

arrhythmias and confusion, seizures, dyskinesias, dystonias or coma..

Phencyclidine (PCP)	Perspiring, uncommunicative, cyclic behavior, possible combativeness, disorientation, rigid muscles, blank stare, horizontal and vertical nystagmus, hypertension or tachycardia, numbness or diminished responsiveness to pain, ataxia, dysarthria, seizures or coma and hyperacusis.
Hallucinogens	Perspiring, paranoia, nausea, hallucinations, "lost" or dazed appearance, rigid muscles, tremors, loss of memory, dilated pupils, blurring of vision, tachycardia and incoordination.
Cannabis	Bloodshot eyes, odor of burnt material, increased appetite, relaxed inhibitions, paranoid, body tremors, possibly dilated pupils and tachycardia.
Inhalants	Paint/chemical odor, possible residue on hands or face, slurred speech, possible nystagmus, incoordination, unsteady gait, lethargy, depressed reflexes, psychomotor retardation, tremors, generalized muscle weakness, blurred vision, stupor or coma and euphoria.
Narcotics	Droopy eyelids, dry mouth, on the nod, drowsiness, needlemarks, facial itching, low raspy voice, constricted pupils slurred speech, and impairment in attention or memory.
Depressants	Droopy eyelids, drowsiness, uncoordinated, drunken appearance, nystagmus, unsteady gait, impairment in attention or memory and stupor or coma.

# APPENDIX C

## DRUG TESTING CONSIDERATIONS FOR DUID CASES

## DRUG TESTING CONSIDERATIONS FOR DUID CASES

Building a good DUID case involves two phases. The first phase is a solid drug or roadside evaluation. DUID evaluations must accomplish two things. They must establish the existence of impairment and attempt to link impairment to the usage of some drug or drugs. The second phase is corroboration of the evaluation results with toxicological analysis of blood, urine, or saliva.

After an evaluation has been done the decision may be made to conduct a toxicological test on the subject. The next logical question is, "What specimen or specimens should be collected?" In general, either urine or blood are adequate for the purpose of testing for drugs. Saliva is used mainly for the testing of recent marijuana usage.

Both urine and blood have various advantages over one another. Urinary drug and metabolite levels are higher than blood levels. This makes the analysis easier to do and, therefore, less expensive. Also, urine as a matrix is easier to deal with than blood, contributing to the ease of testing. The advantage of blood is the ingested drug will be at its highest blood concentration when the person is impaired. This makes blood the most direct measure of what is going on in a person's body at a specific time. Depending on the submitting agency's policies and testing arrangements with the toxicology lab, urine and/or blood may be collected.

In Colorado regulations for the collection of urine and blood specimens are promulgated by the Department of Public Health and Environment under C.R.S. 42-4-1301. These regulations appear in 5-CCR-1005-2 and are contained in Appendix K. The Department of Health regulations address specimen collection practices in great detail. One aspect of specimen collection requires special emphasis: strong chain of custody must be maintained by both the submitting department and the testing laboratory.

After testing of the specimen(s) is complete, the results are returned to the submitting department. The significance of toxicological results may be best thought of as identifying the presence of a drug and bracketing the probable time when the drug was taken. For various reasons, toxicological results cannot pinpoint the time a person was under the influence or impairment of a drug. One reason for this is little research in this area has been done on most drugs as they relate to driving a vehicle; another is there is a wide range of drug tolerance among individuals. There are no established levels for drugs (other than alcohol) in blood or urine which indicate legal influence or impairment.

Because of the toxicological uncertainties involved, the officer's drug evaluation becomes crucial. If, for example, a subject is arrested for DUID and the testing lab is unable to detect the presence of a drug(s) the emphasis in the case will shift to the officer's evaluation. This situation could arise if the drug used by the subject is not covered by the testing lab or an inappropriate specimen type is submitted and tested. For example, urine is the specimen of choice for the detection of LSD; LSD levels in the blood are too low for practical detection methods. Another source for not detecting drug(s) is the level of a drug may be too low in the specimen. This could happen if the subject is tested either before the drug gets into the urine or after the drug is out of the blood. One strategy which helps eliminate the uncertainty of what type of sample is to collect both urine and blood in all cases.

Another consideration which impacts the significance of toxicological results is the bracketing of the probable time of usage of a drug. As the probable time bracket of usage narrows, the probability of the person being under the influence increases. In general, blood will give the narrowest time brackets.

In conclusion, drug testing for DUID cases functions as a corroborative tool supporting a strong drug evaluation. Toxicological results give valuable, but limited, information which may assist in the outcome of a DUID case. In the absence of positive toxicological results, the DUID case is not lost, rather, emphasis shifts to the outcome of the drug evaluation.

# APPENDIX D

## MEDICAL CONSIDERATIONS

Appendix D: Medical  
Considerations

## MEDICAL CONSIDERATIONS

In recent years the media has made public the rare instances when a subject who was arrested for DUI required medical attention due to medical conditions other than alcohol. These medical conditions may manifest themselves either alone or they may be magnified by the consumption of small or large amounts of alcohol or other drugs.

During the course of a DUI investigation, you may become concerned for the welfare of the subject because something just does not seem right. You may feel he is just too intoxicated or maybe he is exhibiting symptoms other than those of a DUI driver. In either case, you have an obligation to protect and safeguard the individual while he is in your custody. More importantly, if his condition is not caused by alcohol or drug intoxication, other actions are immediately called for.

The first situation involves either the problem drinking driver or a person who has simply consumed large amounts of alcohol. In either case, a high BAC will be a good indicator of this, which should also alert you to the fact immediate medical attention may be necessary. If a person is arrested and you get immediate breath test results of a 0.30% BAC or higher, he should be seen by medical personnel, or, at the very least, closely monitored. His BAC could be rising and possibly result in his death. As in the case of any substance to which the problem drinker may become addicted, there are certain physiological effects which occur when the substance is withdrawn. This condition is known as delirium tremens or more commonly referred to as the D.T.'s. If the driver is an alcoholic, he may need medical attention once the withdrawal symptoms begin.

Some guidelines to follow to insure your subject will be cared for properly are as follows:

- A. Anyone with a BAC of 0.250% or higher should be lodged at a detox center until his BAC level comes down to a safe level. The personnel at the detox center will be able to monitor the subject should his condition become worse.
- B. Anyone with a BAC of 0.300% or higher should be medically cleared.

These are only guidelines. Depending on the arrestee's drinking experience, these levels may or may not apply. For example, someone who has very little drinking experience may have a BAC of 0.125% and he may be at the same risk as a conditioned drinker at 0.250%.

The second situation involves the fact many so-called "alcohol" symptoms could be associated with other illnesses. You should examine and question the subject carefully so his need for medical attention will not be overlooked. A low BAC or

evidence of no alcohol may indicate the driver's abnormal behavior is due to a medical condition. Some of the various signs used to support your basis for believing the driver is intoxicated are as follows:

Odor of the breath, flushed appearance, lack of muscular coordination, speech difficulties, disorderly or unusual conduct, mental disturbance, visual disorders, sleepiness, muscular tremors, dizziness, nausea, and divided attention impairment.

Physicians recognize each of the accepted signs or symptoms of intoxication might well be a symptom of disease or a condition entirely unrelated to the ingestion of alcohol. Following are descriptions of some pathological conditions having symptoms in common with those of alcohol influence.

A symptom similar to alcohol influence is an acetone odor on the breath of the subject. This is a fruity odor, which can be mistaken for the odor of an alcoholic beverage on a person's breath. The most common pathological conditions causing an acetone odor are diabetes, vomiting, and stomach ulcer.

In the course of a DUI investigation, you may determine the subject has experienced full or partial loss of memory (amnesia). This may occur by consuming alcohol or by conditions such as epilepsy or traumatic injury of the brain (such as in a traffic collision). People suffering from Alzheimer's disease frequently exhibit signs of memory loss. A stroke victim or a diabetic may also exhibit a sense of disorientation or total memory loss.

Ataxia, or lack of muscle coordination, is given considerable weight as a measure of alcoholic influence. However, it may be caused by chemicals such as lead, drugs such as antihistamines, barbiturates and other sedatives, and gases such as carbon monoxide. It may also be due to injuries commonly sustained in traffic collisions (traumatic ataxia).

Individuals with a physical disability may perform poorly on roadside maneuvers. If the subject has sustained any recent injuries to his legs or back, it could affect his performance.

An individual with one leg notably shorter than the other may also exhibit poor performance.

The DUI subject may be in a stupor, lapsing into a coma (unnatural, heavy, deep sleep, sometimes ending in death). Such a coma may be a diabetic coma, or on the contrary, insulin shock due to an overdose of insulin. It may well be a coma brought on by head injuries such as a concussion or a skull fracture.

Cases may be encountered when mental confusion is present. It may consist of hallucinations, incoherence, illusions, etc. Of course, it may result from alcoholic influence, but you should not overlook the possibility it may stem from diabetes, the stopping of a drug habit, or the use of legitimate and illegitimate



drugs such as marijuana, cocaine, and opium derivatives. Injections of horse serum and penicillin may also cause mental confusion.

Drowsiness is a symptom frequently noted. It may stem from the liberal consumption of alcoholic beverages coupled with the late hour during which most drinking driver contacts are made. However, such drowsiness may be associated with a brain concussion (a common injury in traffic collisions), diabetes, or the use of many prescription and non-prescription drugs.

The subject may have bloodshot eyes, dilated or constricted pupils, or sleepy looking eyes. The general effect of alcohol may slow the pupils reaction to light. This occurs as part of the general depressant effect alcohol pathological conditions which may similarly affect the eyes. Those most frequently found include glaucoma, hay fever and other allergic disorders, farsightedness, nearsightedness, use of opium derivatives, concussion, and fright.

A flushed face is often interpreted as a sign of alcoholic influence. Indeed, it may be caused by alcohol, but there are numerous body conditions which also produce a flushed face. They include chronic inflammations of the face, arteriosclerosis (hardening of the arteries), diabetes, emotions (blushing), high fever, and chemical or drug poisoning (e.g., carbon monoxide).

Shock and collapse may be caused by such things as heart trouble, skull fracture, insulin shock, and stroke.

Speech disorders are a clue you may consider to be significant in the identification of DUI subjects. You may certainly be correct in recognizing that speech is affected by alcohol, but you should keep in mind facial paralysis, mental deficiencies, and Parkinson disease (shaking palsy) can be the cause of speech disorders as well. A stroke victim may lose all or part of his speech.

On occasion you may observe tremors or muscular twitching in DUI subjects. This can stem from numerous causes including senility, brain tumor, chemical or drug poisoning (e.g., narcotics, tobacco), and general pareses (softening of the brain), usually in older people.

Finally, vertigo or dizziness may be noted in the course of your DUI contact. This symptom can be caused by alcohol, but may stem from any one of the host of other causes as well. Some of these might be motion sickness, injuries to the brain, use of barbiturates, marijuana or opium, and Meniere's disease (congestion of the inner ear). A severe inflammation to the inner ear may cause the subject to lose his balance.

Two of the more serious and more common medical conditions you may come upon are a stroke and a diabetic reaction.

A stroke occurs when the blood supply is cut off to the brain. This blood loss

results in damage to specific brain cells. When this happens, the part of the body controlled by those cells stops functioning.

Some of the common signs of a stroke are headache, slurred speech, blurred vision, sudden collapse, unconsciousness, vomiting, shock, and convulsions. A partial or complete paralysis to the legs or arms may occur. This condition requires immediate medical attention. If the subject does not get the needed attention, he could die. Most stroke victims survive and lead normal lives if they receive the proper medical attention.

Diabetics, when in distress, suffer from either hypoglycemia or hyperglycemia. Hypoglycemia occurs when a diabetics insulin intake doesn't match his blood sugar. The condition manifests itself when the diabetic's blood sugar is low and his insulin is high. Symptoms of hypoglycemia are sweating, dizziness, palpitations, shallow breathing, trembling, mental confusion, and loss of consciousness.

Hyperglycemia occurs when there is excess sugar in the blood from insufficient insulin use. If the situation continues, diabetic coma occurs. A person in this condition needs an insulin injection. If diabetic coma occurs, this person needs immediate medical attention. The treatment for a diabetic coma requires regulated insulin injections. Symptoms of hyperglycemia are excessive urination, thirst, dry and hot skin, drowsiness, and coma.

If you find a diabetic in a coma, and you do not know if it's insulin shock or diabetic coma, treat the subject with sugar. The sugar will give immediate relief to a subject suffering from insulin shock, but it will not affect a person in a diabetic coma. If the subject is unconscious, place the sugar between the cheek and teeth so choking won't occur.

If during the breath testing process you encounter an interferant display on the Model 5000 EN Intoxilyzer, you should have your subject medically checked. A diabetic with acetone on his breath could have some severe medical problems if he goes untreated. He could lapse into diabetic coma.

Officers should make it part of their DUI procedure to question the subject with regards to his medical conditions. Ask the subject if he is on any medications. Ask him if he has any medical problems, or physical disabilities which would affect his roadside maneuvers.

Always be aware of things such as medical alert bracelets and neck chains. Check the subject's wallet for medical I.D. cards. These cards will give you information on medical problems your subject may have. These tags and cards will be very helpful if your subject is unconscious or unable to talk to you.

If a subject informs you of a medical problem, take appropriate action. The appropriate action may or may not require immediate medical attention. For example, if he tells you he is a diabetic, watch for the signs. The subject would

need immediate medical attention if he was suffering from insulin shock or diabetic coma. On the other hand, the subject may inform you all he would require is an insulin injection or a form of sugar to ingest to bring his body back into equilibrium.

In summary, with so many conditions or symptoms resembling alcoholic influence, it could easily discourage you from placing much weight on your own observations. After all, some of these symptoms have been known to fool physicians. All of this is true and can be used as an excuse for not performing drinking driver enforcement since, if you don't make contacts of DUI subject, you are not faced with having to recognize those symptoms and determine their true cause. The vast majority of DUI arrests do not involve such medical problems. Such cases are in the minority, but the possible consequences dictate you know how to recognize basic symptoms of medical problems, problems which require some form of follow-up to protect the DUI subject and you.



# APPENDIX E

## DUI/DUID CRASH INVESTIGATIONS

Appendix E: DUI/DUID  
Accident Investigations

## DUI/DUID CRASH INVESTIGATIONS

The handling of crashes involving DUI drivers is not significantly different from other crash investigations. If possible, finish dealing with all other drivers before attempting to process the suspected DUI driver. Attempt to keep the subject under constant observation. Ideally, if assistance is available, allow one officer to investigate the crash and another to handle the DUI driver.

### CHECKLIST FOR DUI/DUID CRASH INVESTIGATION

The following is a suggested checklist of tasks to perform for a DUI/DUID crash investigation.

- A. Respond quickly and safely to the scene.
- B. Check for injured parties and assist them until medical aid arrives. Protect all relevant evidence. (You may have a felony situation.)
- C. Determine who was driving the vehicle. Determine the time of the crash.
- D. Check the driver for any signs of DUI or DUID.
  - 1. As soon as possible assign an officer to be with the suspected driver at all times.
  - 2. Obtain a chemical test from the suspected driver as soon as constraints permit.
  - 3. If a felony is suspected, contact the District Attorney's Office.
- E. Locate all possible witnesses.
  - 1. Interview and obtain written statements. Ensure their information is complete; remember to include phone numbers, addresses, etc.
- F. Take photographs as soon as possible. Photographs should include the following items:
  - 1. vehicle damage;
  - 2. skid marks;

3. obstructions, if any;
  4. position of vehicles;
  5. initial point of impact;
  6. weather and lighting conditions;
  7. road conditions;
  8. injured parties and their position at the scene;  
and,
  9. pieces of wreckage.
- G. Use a tape or wheel to obtain measurements of the following items:
1. position of vehicles at point of impact;
  2. length of all skid marks (you may want skid tests);
  3. street widths;
  4. distance traveled after impact;
  5. distance of bodies from vehicles;  
and,
  6. location of any object relevant to the crash.
- H. Draw a diagram of the scene with as much accuracy and detail as possible.

# APPENDIX F

## EXPRESS CONSENT AND PER SE HEARINGS

Appendix F: Express  
Consent and Per Se  
Hearings



## EXPRESS CONSENT AND PER SE HEARINGS

### EXPRESS CONSENT (Refusal)

A person will have his driver's license revoked or if a non-resident, his privilege to operate a motor vehicle within Colorado revoked, for refusing to submit to an evidentiary test for intoxication by alcohol or other drugs. This authorization is established in the Express Consent law set forth in Section 42-4-1301 (1)(a) C.R.S. which states:

(II) "Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to take and complete, and to cooperate in the taking and completing of any test or tests of such person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of subsection (1) or (2) of this section..."

(III) "Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to submit to and complete, and to cooperate in the completing of a test or tests of such person's blood, saliva, and urine for the purpose of determining the drug content within the person's system when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of paragraph (a), (b), or (c) of subsection (1) of this section.

The Express Consent law, however, does not force a person to take the test, but rather makes him obligated to take the test or tests.

Upon refusal, the driver may request a hearing which must be filed within seven days with the Motor Vehicle Division, Colorado Department of Revenue. This hearing is an administrative proceeding held pursuant to the Colorado Administrative Procedures Act. This hearing is unlike the criminal action brought against the person. The two are separate and independent of each other, and the result of one does not depend on nor affect the result in the other. In the criminal action the burden of proof is beyond a reasonable doubt. However, in an Express Consent hearing, the burden of proof is by a preponderance of the evidence. The administrative hearing affects only the driver's license or driving privilege in Colorado.

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Hearings will be held at the district offices of the Department of Revenue nearest the jurisdiction wherein the person was arrested. Those present will be you, the hearing officer, the person who refused the chemical test, that person's attorney (if desired), and any witnesses pertinent to the incident. Section 42-2-126(9)(c)(I) C.R.S. explains what is to take place at hearing.

"The sole issue at the hearing shall be whether by a preponderance of the evidence the person refused to take or to complete or to cooperate in the completing of any test or tests of his blood, breath, saliva, or urine as required by section 42-4-1301(6)."

However, the incorporation of 42-4-1307 into 42-2-126(9)(c) and judicial decisions indicate the issues at an Express Consent hearing are:

1. Driving (including "actual physical control").
2. Lawful contact of the driver (reasonable suspicion of a traffic violation or other proper reason for contact such as investigation of a domestic disturbance or a valid roadside sobriety checkpoint).
3. Reasonable grounds to request a test.
4. An arrest of the DUI driver is required before requesting a test for alcohol or other drug content. The standard for determining whether a person is under arrest is whether a reasonable person under the circumstances would understand that he was not free to leave. There are no magic words required. However, "You are under arrest" for DUI serves to eliminate any question on this issue.
5. Request for a test within a "reasonable time" of driving and a refusal. The request for a test should be made as soon as possible. However, the expiration of two hours from the time of driving does not automatically mean the request was not made within a reasonable time. If there are factors which made it impossible to request a test earlier (e.g., a traffic accident was not discovered until two hours after it occurred or the driver was receiving medical attention) a request may be within a "reasonable time" even if it occurs more than two hours after driving.

## PER SE

A person may have his driver's license revoked or if a non-resident, his privilege to operate a vehicle within Colorado revoked, for driving a vehicle with a blood alcohol level of 0.08% (.04 for a commercial driver in a commercial motor vehicle and 0.02 for Underage Drinking and Driving) or greater. This authorization is established in the Per Se law as set forth in 42-2-126 C.R.S. which states the department shall revoke the license of any person upon its determination that the person:

"Drove a vehicle in this state when the amount of alcohol, as shown by analysis of the person's blood or breath, in such person's blood was 0.08 or more grams of alcohol per hundred milliliters of blood or 0.08 or more grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving. If the preponderance of the evidence establishes that person consumed alcohol between the time that such person stopped driving and the time that testing occurred, the preponderance of the evidence must also establish that the minimum 0.08 blood or breath alcohol content required in subparagraph (I) of subsection (2) of this section was reached as a result of alcohol consumed before the person stopped driving..."

The law prohibits a driver's change of mind from one test to the other after electing a test. 42-4-1301(6) provides:

"If such person elects either a blood test or a breath, such person shall not be permitted to change such election, and if such person fails to take and complete, and to cooperate in the completing of, test elected, such failure shall be deemed to be a refusal to submit to testing..."

Notwithstanding the above language, no appellate court has ruled a revocation invalid where a person was allowed to change from the test originally selected to the other test and actually took the test not originally selected.

The driver may, in the following circumstances, be required to take a blood test:

"If such person is unable to take, or to complete, or to cooperate in the completing of a breath test because of injuries, illness, disease, physical infirmity, or physical incapacity, or if such person is receiving medical treatment at a location at which a breath testing instrument certified by the Department of Public Health and Environment is not available, the text shall be of such person's blood..." Section 42-4-1301(6)

Upon a Per Se violation the driver must request a hearing within seven days. The request is made to the Motor Vehicle Division, Colorado Department of Revenue. This hearing is an administrative proceeding held pursuant to the Colorado Administrative Procedures Act. This hearing is unlike the criminal action brought against the person. The two are separate and independent of each other, and the result of one does not depend on nor affect the result in the other. In the criminal action the burden of proof is beyond a reasonable doubt. However, in a Per Se hearing, the burden of proof is be a preponderance of the evidence. The administrative hearing affects only the driver's license or driving privilege in Colorado.

Hearings will be held at the district offices of the Department of Revenue nearest the jurisdiction wherein the person was arrested. Those present will be you, the hearing officer, the person who took the chemical test, that person's attorney (if desired), and any witnesses pertinent to the incident. Section 42-4-1301(9)(c)(III)

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C.R.S. explains what is to take place at the hearing.

"The sole issue at the hearing shall be whether by a preponderance of the evidence the person drove a vehicle in this state when the amount of alcohol, as shown by analysis of the person's blood or breath, in such person's blood was 0.08 or more grams of alcohol per hundred milliliters of blood or 0.08 or more grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving. If the preponderance of the evidence establishes that such person consumed alcohol between the time that such person stopped driving and the time that testing occurred, the preponderance of the evidence must also establish that the minimum 0.08 blood or breath alcohol content required in subparagraph (l) of paragraph (a) of subsection 2 of this section was reached because of alcohol consumed before the person stopped driving.

However, the judicial decisions indicate the issues at a Per Se hearing include:

1. Driving (including "actual physical control")
2. Lawful contact of the driver (reasonable suspicion of a traffic violation or other proper reason for contact such as investigation of a domestic disturbance of a valid roadside sobriety checkpoint).
3. An arrest for DUI before requesting an evidentiary test for alcohol content. The standard for determining whether a person is under arrest is whether a reasonable person under the circumstances would understand that he was not free to leave. There are no magic words required. However, "You are under arrest for DUI" serves to eliminate any question on this issue.
4. A blood or breath test given within two hours of driving with results greater than or equal to 0.08.
5. Sufficient compliance with the Department of Public Health and Environment to establish the accuracy of the test. The most important matters for a breath test include the administration of the test by a person certified or qualified to do so, use of certified and/or properly operating Intoxilyzer and following the checklist for operation of the Intoxilyzer. For a blood test the most important matters are drawing of blood by a person qualified to do so and testing by a certified laboratory.
6. Alcohol consumption after driving stopped must be proven by the driver before it becomes an issue. If proven, the issue then is whether the blood alcohol content of 0.08 or greater was reached because of alcohol consumed before the person the person stopped driving. Concerning this issue, you may testify as to your observations and investigation concerning alcohol consumption after driving. The best practice is to simply ask the driver if he consumed alcohol after

driving, and if so, what, how much, and when.

### **Officer Attendance at Express Consent or Per Se Hearings**

The arresting officer who files the notice of revocation or denial form with the Department of Revenue is not automatically required to appear at the license revocation hearing. There are three ways in which the officer may be required to appear. First, at the time the driver requests a hearing, the driver may also request the officer to appear. Second, if the driver does not request the officer to appear, a review of the documents is made by the hearings section to determine if it is appropriate to require the officer to appear. In either case, the department shall send a notice requiring the officer's appearance. Third, the officer can be required to appear at the hearing if subpoenaed by the driver or his attorney at least five days prior to the hearing. The law also allows the officer to request the hearing to be rescheduled for a good cause.

## **DEPARTMENT OF REVENUE HEARING PROCEDURES CHECKLIST**

- 1) State that you prepared the "Affidavit and Notice of Revocation," signed the oath on the reverse side and sent it with accompanying documents to Th Department of Revenue.
- 2) State the name of the defendant and identify which person was driving the vehicle and later arrested for Driving Under the Influence of Alcohol.
- 3) State the probable cause for the traffic stop. Go into detail about the traffic violation which the defendant was stopped for.
- 4) State where the traffic stop took place and the time and date the traffic violation occurred.
- 5) State the traffic violation took place within your jurisdiction and you were on duty, in standard police uniform, driving a police car.
- 6) Upon contact with the defendant, you observed a (strong, moderate, slight) odor of an unknown alcoholic beverage on the breath, bloodshot watery eyes, slurred speech and that the defendant consumed no alcoholic beverages from the time of the stop until release.
- 7) You offered the defendant standardized field sobriety maneuvers.
- 8) The defendant did or did not satisfactorily complete the voluntary field sobriety maneuvers, or the defendant refused the voluntary field sobriety maneuvers.
- 9) You then advised the defendant of arrest for Driving Under the Influence of Alcohol. **Do Not Say DUI!**

10) You then explained the Colorado Expressed Consent Law to the defendant, including that you requested the defendant take a breath test or blood test or that the defendant could refuse a tests but could lose driving privileges for one year for refusing to take a chemical test.

11) You then transported the defendant to the place where the evidentiary test was to be conducted. If there was a traffic accident describe what ambulance transported, names of ambulance crew and what hospital defendant went to.

12) Breath Test

a) The breath testing instrument is certified by the Department of Public Health and Environment and certification was current at time of test.

b) Operator is certified by Department of Public Health and Environment to administer the test on that instrument and certification was current at time of test.

c) Calibration within Department of Public Health and Environment rules and regulations (.090 - .110).

d) You observed the defendant for the required 20 minute observation time. Defendant okay to take test.

e) You observed the defendant blow into the instrument and noted the results.

f) You then informed the defendant of test results.

g) Time of test and within two hours of violation.

h) Test results over .080 grams of alcohol per 210 liters of breath.

i) Followed the operational checklist and department procedures for the breath testing instrument.

13) Blood Test

a) You transported the defendant to a facility for a blood test.

b) You observed blood being drawn from defendant and time blood was drawn.

c) The person who withdrew the blood is qualified to do so as

stated by statute.

- d) The lab is certified to analyze the blood for alcohol content and the lab's certification is current.

14) Refusal of Chemical Test

- a) The defendant refused or refused to cooperate to take a breath test or blood test and was informed of the consequences of a refusal.
- b) How defendant refused chemical test:
  - 1. Stated, "No, I'm not taking a breath or blood test".
  - 2. Would not answer you.
  - 3. Stated, "I want to talk to my lawyer". Inform the defendant this is a refusal. You should make it clear there is no right to talk to a lawyer before taking a blood or breath test.

15) The test was administered within two hours of the traffic violation or time of the traffic accident. If refused, the test was requested within a reasonable time after driving stopped.

16) You then filled out the summons and complaints and "Affidavit and Notice of Revocation or Denial":

- a) You then explained both the summons and complaint, and "Affidavit and Notice of Revocation or Denial" to the defendant.
- b) You then served both the summons and complaint, and "Affidavit and Notice of Revocation or Denial" to the defendant.

17) State all important times:

- a) Time of driving violation.
- b) Time the defendant was arrested.
- c) Time the defendant took the evidentiary test or refused all testing.

Don't forget the fellow officer rule applies at D.O.R. hearings. You may testify as to statements made to you by another police officer on the conduct of his duties as a police officer.





# APPENDIX G

## THE LAW

## THE LAW

**42-4-1301. Driving under the influence - driving while impaired - driving with excessive alcoholic content - penalties.** (1) (a) It is a misdemeanor for any person who is under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, to drive any vehicle in this state.

(b) It is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, to drive any vehicle in this state.

(c) It is a misdemeanor for any person who is an habitual user of any controlled substance defined in section 12-22-303 (7), C.R.S., to drive any vehicle in this state.

(d) For the purposes of this subsection (1), one or more drugs shall mean all substances defined as a drug in section 12-22-303 (13), C.R.S., and all controlled substances defined in section 12-22-303 (7), C.R.S., and glue-sniffing, aerosol inhalation, and the inhalation of any other toxic vapor or vapors.

(e) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state, including, but not limited to, the medical use of marijuana pursuant to section 18-18-406.3, C.R.S., shall not constitute a defense against any charge of violating this subsection (1).

(f) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(g) "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

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(h) Pursuant to section 16-2-106, C.R.S., in charging the offense of DUI, it shall be sufficient to describe the offense charged as "drove a vehicle under the influence of alcohol or drugs or both".

(i) Pursuant to section 16-2-106, C.R.S., in charging the offense of DWAI, it shall be sufficient to describe the offense charged as "drove a vehicle while impaired by alcohol or drugs or both".

(2) (a) It is a misdemeanor for any person to drive any vehicle in this state when the person's BAC is 0.08 or more at the time of driving or within two hours after driving. During a trial, if the state's evidence raises the issue, or if a defendant presents some credible evidence, that the defendant consumed alcohol between the time that the defendant stopped driving and the time that testing occurred, such issue shall be an affirmative defense, and the prosecution must establish beyond a reasonable doubt that the minimum 0.08 blood or breath alcohol content required in this paragraph (a) was reached as a result of alcohol consumed by the defendant before the defendant stopped driving.

(a.5) (I) It is a class A traffic infraction for any person under twenty-one years of age to drive any vehicle in this state when the person's BAC, as shown by analysis of the person's breath, is at least 0.02 but not more than 0.05 at the time of driving or within two hours after driving. The court, upon sentencing a defendant pursuant to this subparagraph (I), may, in addition to any penalty imposed under a class A traffic infraction, order that the defendant perform up to twenty-four hours of useful public service, subject to the conditions and restrictions of section 18-1.3-507, C.R.S., and may further order that the defendant submit to and complete an alcohol evaluation or assessment, an alcohol education program, or an alcohol treatment program at such defendant's own expense.

(II) A second or subsequent violation of this paragraph (a.5) shall be a class 2 traffic misdemeanor.

(b) In any prosecution for the offense of DUI per se, the defendant shall be entitled to offer direct and circumstantial evidence to show that there is a disparity between what the tests show and other facts so that the trier of fact could infer that the tests were in some way defective or inaccurate. Such evidence may include testimony of nonexpert witnesses relating to the absence of any or all of the common symptoms or signs of intoxication for the purpose of impeachment of the accuracy of the analysis of the person's blood or breath.

(c) Pursuant to section 16-2-106, C.R.S., in charging the offense of DUI per se, it shall be sufficient to describe the offense charged as "drove a vehicle with excessive alcohol content".

(3) The offenses described in subsections (1) and (2) of this section are strict liability offenses.

(4) No court shall accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or guilty to the offense of UDD from a person charged with DUI, DUI per se, or habitual user; except that the court may accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or to UDD upon a good faith representation by the prosecuting attorney that the attorney could not establish a prima facie case if the defendant were brought to trial on the original alcohol-related or drug-related offense.

(5) Notwithstanding the provisions of section 18-1-408, C.R.S., during a trial of any person accused of both DUI and DUI per se, the court shall not require the prosecution to elect between the two violations. The court or a jury may consider and convict the person of either DUI or DWAI, or DUI per se, or both DUI and DUI per se, or both DWAI and DUI per se. If the person is convicted of more than one violation, the sentences imposed shall run concurrently.

(6) (a) In any prosecution for DUI or DWAI, the defendant's BAC at the time of the commission of the alleged offense or within a reasonable time thereafter gives rise to the following presumptions or inferences:

(I) If at such time the defendant's BAC was 0.05 or less, it shall be presumed that the defendant was not under the influence of alcohol and that the defendant's ability to operate a vehicle was not impaired by the consumption of alcohol.

(II) If at such time the defendant's BAC was in excess of 0.05 but less than 0.08, such fact gives rise to the permissible inference that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(III) If at such time the defendant's BAC was 0.08 or more, such fact gives rise to the permissible inference that the defendant was under the influence of alcohol.

(b) The limitations of this subsection (6) shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol or whether or not the defendant's ability to operate a vehicle was impaired by the consumption of alcohol.

(c) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department

of public health and environment, for testing a person's blood, breath, saliva, or urine to determine such person's alcohol or drug level. The department of public health and environment may, by rule, determine that, because of the reliability of the results from certain devices, the collection or preservation of a second sample of a person's blood, saliva, or urine or the collection and preservation of a delayed breath alcohol specimen is not required. This paragraph (c) shall not prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this paragraph (c) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

(d) If a person refuses to take or to complete, or to cooperate with the completing of, any test or tests as provided in section 42-4-1301.1 and such person subsequently stands trial for DUI or DWAI, the refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to admission of refusal to take or to complete, or to cooperate with the completing of, any test or tests.

(e) **Involuntary blood test - admissibility.** Evidence acquired through an involuntary blood test pursuant to section 42-4-1301.1 (3) shall be admissible in any prosecution for DUI, DUI per se, DWAI, habitual user, or UDD, and in any prosecution for criminally negligent homicide pursuant to section 18-3-105, C.R.S., vehicular homicide pursuant to section 18-3-106 (1) (b), C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b), C.R.S.

(f) **Chemical test - admissibility.** Strict compliance with the rules and regulations prescribed by the department of public health and environment shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results.

(g) It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.

(h) In any trial for a violation of this section, the testimony of a law enforcement officer that he or she witnessed the taking of a blood specimen by a person who the law enforcement officer reasonably believed was authorized to withdraw blood specimens shall be sufficient evidence that such person was so authorized, and testimony from the person who obtained the blood specimens concerning such person's authorization to obtain blood specimens shall not be a prerequisite to the admissibility of test results concerning the blood specimens obtained.

(i) (I) Following the lawful contact with a person who has been driving a vehicle, and when a law enforcement officer reasonably suspects that a person was driving a vehicle while under the influence of or while impaired by alcohol, the law enforcement officer may conduct a preliminary screening test using a device approved by the executive director of the department of public health and environment after first advising the driver that the driver may either refuse or agree to provide a sample of the driver's breath for such preliminary test; except that, if the driver is under twenty-one years of age, the law enforcement officer may, after providing such advisement to the person, conduct such preliminary screening test if the officer reasonably suspects that the person has consumed any alcohol.

(II) The results of this preliminary screening test may be used by a law enforcement officer in determining whether probable cause exists to believe such person was driving a vehicle in violation of this section and whether to administer a test pursuant to section 42-4-1301.1 (2).

(III) Neither the results of such preliminary screening test nor the fact that the person refused such test shall be used in any court action except in a hearing outside of the presence of a jury, when such hearing is held to determine if a law enforcement officer had probable cause to believe that the driver committed a violation of this section. The results of such preliminary screening test shall be made available to the driver or the driver's attorney on request.

(7) **Penalties.** (a) (I) Except as otherwise provided in subparagraphs (II) and (IV) of this paragraph (a), every person who is convicted of DUI, DUI per se, or habitual user shall be punished by:

(A) Imprisonment in the county jail for not less than five days nor more than one year, the minimum period of which shall be mandatory except as otherwise provided in section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than three hundred dollars nor more than one thousand dollars; and

(C) Not less than forty-eight hours nor more than ninety-six hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory

minimum period of performance of such service.

(II) Upon conviction of a violation described in sub-subparagraph (A) or (B) of subparagraph (III) of this paragraph (a), an offender shall be punished by:

(A) Imprisonment in the county jail for not less than ninety days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to eighty days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than five hundred dollars nor more than one thousand five hundred dollars; and

(C) Not less than sixty hours nor more than one hundred twenty hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(III) Subparagraph (II) of this paragraph (a) shall apply to:

(A) A conviction for DUI, DUI per se, or habitual user, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DUI, DUI per se, or habitual user, or for vehicular homicide pursuant to section 18-3-106 (1) (b) (I), C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b) (I), C.R.S., or of driving while such person's driver's license was under restraint pursuant to section 42-2-138 (4) (b); or

(B) A conviction for DUI, DWAI, or DUI per se when the person's BAC was 0.20 or more at the time of driving or within two hours after driving.

(IV) Upon a conviction for DUI, DUI per se, or habitual user, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DWAI, an offender shall be punished by:

(A) Imprisonment in the county jail for not less than seventy days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to sixty-three days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than four hundred fifty dollars nor more than one thousand five hundred dollars; and

(C) Not less than fifty-six hours nor more than one hundred twelve hours of useful public service, the performance of the minimum period of service which shall be mandatory, and the court shall have no discretion to

suspend the mandatory minimum period of performance of such service.

(b) (I) Except as otherwise provided in subparagraphs (II) and (III) of this paragraph (b), every person who is convicted of DWAI shall be punished by:

(A) Imprisonment in the county jail for not less than two days nor more than one hundred eighty days, the minimum period of which shall be mandatory except as provided in section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than one hundred dollars nor more than five hundred dollars; and

(C) Not less than twenty-four hours nor more than forty-eight hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(II) Upon conviction of a second or subsequent offense of DWAI, an offender shall be punished by:

(A) Imprisonment in the county jail for not less than forty-five days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to forty days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

(B) In the court's discretion, a fine of not less than three hundred dollars nor more than one thousand dollars; and

(C) Not less than forty-eight hours nor more than ninety-six hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(III) Upon conviction for DWAI, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DUI, DUI per se, or habitual user, or vehicular homicide pursuant to section 18-3-106 (1) (b) (I), C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b) (I), C.R.S., or of driving while such person's driver's license was under restraint as described in section 42-2-138 (4) (b), an offender shall be punished by:

(A) Imprisonment in the county jail for not less than sixty days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to fifty-four days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and



(B) In the court's discretion, a fine of not less than four hundred dollars nor more than one thousand two hundred dollars; and

(C) Not less than fifty-two hours nor more than one hundred four hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.

(IV) (Deleted by amendment, L. 2002, p. 1898, ' 2, effective July 1, 2002.)

(c) (I) For the purposes of paragraphs (a) and (b) of this subsection (7), a person shall be deemed to have a previous conviction for DUI, DUI per se, DWAI, or habitual user, or vehicular homicide pursuant to section 18-3-106 (1) (b) (I), C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b) (I), C.R.S., if such person has been convicted under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States of an act that, if committed within this state, would constitute the offense of DUI, DUI per se, DWAI, or habitual user, or vehicular homicide pursuant to section 18-3-106 (1) (b) (I), C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b) (I), C.R.S.

(II) For sentencing purposes concerning convictions for second and subsequent offenses, prima facie proof of a defendant's previous convictions shall be established when the prosecuting attorney and the defendant stipulate to the existence of the prior conviction or convictions or the prosecuting attorney presents to the court a copy of the driving record of the defendant provided by the department of revenue of this state, or provided by a similar agency in another state, that contains a reference to such previous conviction or convictions or presents an authenticated copy of the record of the previous conviction or judgment from any court of record of this state or from a court of any other state, the United States, or any territory subject to the jurisdiction of the United States. The court shall not proceed to immediate sentencing when there is not a stipulation to prior convictions or if the prosecution requests an opportunity to obtain a driving record or a copy of a court record. The prosecuting attorney shall not be required to plead or prove any previous convictions at trial, and sentencing concerning convictions for second and subsequent offenses shall be a matter to be determined by the court at sentencing.

(III) As used in this part 13, "convicted" includes a plea of no contest accepted by the court.

(d) In addition to the penalties prescribed in this subsection (7):

(I) Persons convicted of DUI, DUI per se, DWAI, habitual user, and UDD are subject to the costs imposed by section 24-4.1-119 (1) (c), C.R.S., relating to the crime victim compensation fund;

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(II) Persons convicted of DUI, DUI per se, DWAI, and habitual user are subject to an additional penalty surcharge of not less than twenty-five dollars and not more than five hundred dollars for programs to address persistent drunk drivers. Any moneys collected for such surcharge shall be transmitted to the state treasurer, who shall credit the same to the persistent drunk driver cash fund created by section 42-3-130.5.

(III) Persons convicted of DUI, DUI per se, DWAI, habitual user, and UDD are subject to a surcharge of fifteen dollars to be transmitted to the state treasurer who shall deposit said surcharges in the Colorado traumatic brain injury trust fund created pursuant to section 26-1-309, C.R.S.

(e) In addition to any other penalty provided by law, the court may sentence a defendant who is convicted pursuant to this section to a period of probation for purposes of treatment not to exceed two years; in addition, a court may also sentence a defendant who is twice or more convicted pursuant to this section to a period of probation not to exceed two additional years for the purpose of monitoring compliance with court orders. As a condition of probation, the defendant shall be required to make restitution in accordance with the provisions of section 18-1.3-205, C.R.S.

(f) In addition to any other penalty provided by law, the court may sentence a defendant to attend and pay for one appearance at a victim impact panel approved by the court, for which the fee assessed to the defendant shall not exceed twenty-five dollars.

(g) In addition to any fines, fees, or costs levied against a person convicted of DUI, DUI per se, DWAI, habitual user, and UDD, the judge shall assess each such person for the cost of the presentence or postsentence alcohol and drug evaluation and supervision services.

(h) In addition to any other penalties prescribed in this part 13, the court shall assess an amount, not to exceed one hundred twenty dollars, upon any person required to perform useful public service.

(8) A second or subsequent violation of this section committed by a person under eighteen years of age may be filed in juvenile court.



# APPENDIX H

## CASE LAW

## CASE LAW

### EVIDENTIARY TESTS (GENERAL)

The Fourth amendment of the U.S. Constitution and Article II, Section 7 of the Colorado Constitution require normally no searches be conducted except upon a search warrant, after a finding of probable cause by a judge. A search is an invasion without consent, of an individual's reasonable expectation of privacy. [Katz vs. U.S. 389, U.S. 347 (1967)]. It has been held people have an expectation of privacy with respect to their breath, blood and urine. [Rochin vs. California, 342 U.S. 165 (1952)].

However, the warrantless search of a person's blood, breath or urine has been justified on two main grounds:

1. The line of cases following the ruling of *Schmerber vs. California*, 384 U.S. 757 (1966).
2. The Colorado Express Consent Law outlined in statute 42-4-1301 C.R.S.. Any person who drives a motor vehicle while in this state shall be deemed to have expressed his consent to a chemical test.

A person does not have a constitutional right to drive. The condition of this consenting to a evidentiary test to maintain his driving privilege has been held to be a reasonable requirement and not a violation of his constitutional rights. This is due to the policy of helping to reduce collisions, deaths and injuries on our public highways. [People vs. Brown, 174 Colo. 513 (1971)]. The taking of blood, breath and urine samples is also governed by *Schmerber vs. California*. Although the taking of blood is a search within the meaning of the U.S. Constitution, it is not an unreasonable search and therefore does not violate the Constitution. The court recognized the emergency nature of the search in that the delay in obtaining a warrant could result in the "destruction of evidence, " i.e., the dissipation of alcohol by the natural functions of the body. *Schmerber* held as long as the method of taking blood was a reasonable one, performed in a reasonable manner, it was constitutionally permissible. The *Schmerber* line of cases require probable cause that the accused was driving under the influence of alcohol.

Failure to conduct the evidentiary test properly could result in the suppression of the test results.

In the felony situation of a vehicular homicide or assault, a warrantless seizure of the suspect's blood is permissible. However, prior to obtaining such blood, you must have probable cause to believe such a crime occurred and was committed.

Reasonable force may be used to restrain him in order to obtain the blood samples. In any case the Rules and Regulations of the Colorado Department of Public Health and Environment relating to chemical tests for blood alcohol must be followed.

A. Random Stops/License Registration Checks - When first read, 42-2-113 C.R.S. seems to require any citizen to display a driver's license upon demand by any peace officer. 43-5-113 (1) (b) C.R.S. also seems to authorize any officer of the Colorado State Patrol to stop any vehicle and demand from the driver a license and registration. However, the Colorado Supreme court, in *People vs. McPherson*, 550 P2d 311, determined such statutes do not "confer upon a peace officer unlimited discretionary authority to stop any car at any time for any reason as long as he asked contemporaneously for display of a driver's license." The Court concluded the clear intent of 42-2-113 "is simply to permit the officer to demand the license of the driver whose vehicle has been stopped for an otherwise proper purpose." The United States Supreme Court agreed with such reasoning in *Delaware vs. Prouse*, 99 S. Ct. 1391, concluding randomly stopping vehicles to determine if the driver has a valid license and registration, and for no other reason, is unlawful. However, a DUI case which began with a contact at for example, a State Patrol "safety check" station should be lawful.

D. Lawful Contact Unrelated to Traffic Violation - At least for the purposes of the administrative express consent or per se hearing, a lawful contact unrelated to a traffic violation (e.g., investigation of domestic dispute) is sufficient grounds for the stop.

E. Other - When you observe a person getting into a vehicle and driving off, and your observations have given you grounds to believe he is intoxicated, you have reasonable suspicion on the initial stop, to stop for possible DUI. NOTE: It is probably preferable for you to prevent him from driving in the first place, if you can. If you are unable to persuade him from driving, it is arguable you may arrest him for a violation of one of the following statutes, depending on the fact situation:

1. Obedience to Police Officers, C.R.S., 1973, 42-4-105, provides that no one "shall willfully fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control or regulate traffic." Arguably then, you can order an intoxicated person not to drive as a form of controlling or regulating traffic. Willful failure or refusal to comply with your order, when you have probable cause to believe the person is "under the influence," would give you grounds to arrest under the statute.

2. Obstructing a Peace Officer, C.R.S., 1973, 18-8-104, provides if such an intoxicated person, by threatening to use

violence, force, or interference, intentionally obstructs or impairs enforcement of the penal law, he is subject to arrest under the statute.

Such a situation will generally arise when you contact an intoxicated individual on the street under circumstances which make it obvious to you the individual intends to get into a vehicle and drive. You can ask him to perform various maneuvers prior to allowing him to drive. If he is "under the influence," but refuses to find another means of transportation, consider taking him into custody, depending upon your facts, for violating one of the statutes set out above, and holding him on that charge, or until a responsible individual can take charge of him and his vehicle.

F. There are three situations which might be confusing when you conduct the chemical test.

1. Waiver of liability. Some hospitals and medical personnel may attempt to require the subject to sign a form releasing them from any liability arising from the administration of that test. You may have the subject's permission to administer the test but the subject may refuse to sign any waiver of liability. Refusal to sign any release form will be treated by the officer as refusal.

2. In *Dolan vs. Rust, Colo.*, 576P.2d560(1978), the Supreme Court held the determination of whether a person refused is to be based on an objective, not a subjective, standard; it is the driver's external manifestations of unwillingness or his outright refusal to take the test which are relevant and not the driver's state of mind or later recollection of events. Rust was vomiting, moaning, unable to walk; although he initially agreed to take a breath test, he later refused to stand up for the test and said "I am too drunk, just throw me in jail." The court held all the circumstances equaled a refusal.

In *People vs. Edwards*, Supreme Court No. 79SD285, March 31, 1980, the court held maneuvers were not the same as a defendant's statement, and therefore the privilege against self-incrimination does not extend to the results obtained from maneuvers. In other words, you must advise a defendant of his Miranda rights before obtaining statements but not before requesting maneuvers.

In *People vs. McGuire* decided February 8, 1988, the Supreme Court held refusal to perform roadside sobriety maneuvers is admissible at trial even though the officer did not advise the driver of the consequences of his refusal. NOTE: Based on prior case law and McGuire, the clear implication is the refusal would not be

admissible if the officer did not have probable cause to believe the driver was DUI.

In *People vs. Carlson*, Supreme Court No. 825C20, January 30, 1984, the court said “a police officer in the course of a valid traffic stop may order the driver to get out of the car and walk to the rear of the vehicle without violating the Federal or State proscription against unconstitutional searches or seizures.” In short, a driver of a vehicle has no legitimate expectation of privacy in his physical traits and demeanor which are in plain sight of an officer during a valid traffic stop. However, the court rules a Roadside Sobriety “test” constitutes a full “search” in the constitutional sense of that term and therefore must be supported by probable cause. In other words the court said the arresting officer must have probable cause before having someone doing roadside or the driver voluntarily consents.

## OBTAINING A CHEMICAL TEST PURSUANT TO THE EXPRESS CONSENT LAW

### A. Express Consent Advisement

“Express Consent” means just that. By virtue of driving a vehicle in the state, an individual has expressly given his consent to take a chemical test upon the request of a law enforcement officer who possesses probable cause to believe the suspect is DUI or DWAI.

There is no statutory requirement that you give a suspect a certain advisement of the express consent provisions of the DUI law. There once was such a requirement under the old Express Consent Law (*Cooper v. Nielsen*, 687 P.2d 541 (Colo. App. 1984). *Dikeman v. Charnes*, 739 P.2d 870 (Colo. App. 1987); *Brewer v. Department of Revenue*, 720 P.2d 564 (Colo. 1986). However, should you choose to give an advisement, you then impose upon yourself additional and significant responsibilities and duties<sup>1</sup>. It is sufficient that the officer’s words fully inform the suspect that the officer wants to have an alcohol or drug test administered and is requesting that the suspect submit to such a test. *Johnson v. Department of Revenue*, 535 P.2d 248 (Colo. App. 1975).

### B. Choice of Test

The DUI statute sets forth certain specific rights of a suspect regarding the taking of a test in C.R.S. 42-4-1301(2)(1)(I). If a suspect specifically requests a blood test, then any test given must be a blood test. If the suspect specifically requests that they **not** have their blood drawn, then any test given must be a breath test. Also, if a suspect is unable to take a breath test for certain reasons discussed in B(2), then any test given must be a blood test. There is no requirement that a certain advisement be given and, subject to the three specific rights of a suspect just mentioned the officer has full discretion as to which test is provided.



You, as the investigating officer, may “choose” the test you wish the suspect to take and ask them to perform that test. It is only if the suspect makes one of the requests discussed above, that you must provide a specific test. If a suspect chooses a particular test (i.e., either blood or breath) then the suspect is by statute not permitted to change his or her election. C.R.S. 42-4-1301(3) (this section enacted into law July 1, 1989). A suspect’s failure to take or to cooperate in the completing of the test that was elected (even if it is the test you choose and which they agreed to take) may be deemed a refusal to submit to testing.

When an officer with probable cause believes that a suspect is DUI or DWAI, and has reasonable grounds to believe that **drugs** (other than alcohol) are involved, the officer may choose to require a blood, saliva, or urine test or any combination of tests in the officer’s discretion. The choice of test or tests does **not** in any way belong to the defendant.

(1) “Request” for Particular Test

Time limits and other legalities regarding the obtaining of tests can be difficult at times to comply with. It is essential to find out early whether the suspect will cooperate early rather than late. After probable cause of DUI or DWAI is established, the process of finding out if the suspect will agree to take a particular test, invoking a legal right to select a certain test once a test has been required, or simply receiving refusal to take a test, should be completed as soon as possible. Therefore, in rural settings, or in situations where contact is made with the suspect a considerable time after the suspect was last driving, time is of the essence if DUI Per Se is to be charged or if the criminal trial requirement that the test be given within a reasonable time after driving is to be satisfied.

(2) Physical inability to take a breath test and hospital settings

Where a suspect is unable to take, or to complete, or to cooperate in the completing of a breath test because of injuries, illness, disease, physical infirmity, or physical incapacity, or if such person is receiving medical treatment at a location at which a breath testing instrument is not available, any test given **must be a blood test**. There is no election of a different test.

C. Refusal to submit to testing

There are many ways a suspect may refuse to take a chemical test. However, because of the evidentiary importance of a chemical test and the fact that many statements or actions of the suspect may be ambiguous on the issue of refusal, a suspect should not be deemed to have refused until you have done everything you can to obtain a test within the two hour time limit required by the Department of Revenue (DOR). Even if a test must be given after the two hour DOR time limit and thus cannot be used for an express consent revocation at DOR, the test may be good evidence in a subsequent criminal trial for DUI or

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DWAI if it is given within a "reasonable time". Also, a refusal to take a test which was requested more than two hours after driving is still a legal "refusal." Request and obtain a test, if possible.

Colorado's DUI law requires a suspect to "take and to complete, and to cooperate in the taking and completing of, any test or tests of his breath or blood...for the purpose of determining alcohol content..." §42-4-1301(3), C.R.S. Such cooperation includes the signing of blood draw consent forms and the following of instructions. In a standard DUI or DWAI case, even where you are not investigating a felony and where the suspect is not dead or unconscious, the only thing within reason that a law enforcement officer cannot do to obtain a test according to the statute is to physically restrain the suspect. The prospect of a one year license revocation for a refusal may be used by an officer, who has probable cause for a DUI or DWAI violation, to "persuade" a suspect to submit to a test before the suspect's actions are deemed to be a refusal.

The express consent provisions of the DUI statute authorize officers to physically compel (without inflicting injuries) the performance of involuntary blood tests of drivers in certain limited circumstances such as when the driver is "dead or unconscious," or when the officer has probable cause to believe that the driver "has committed a violation of C.R.S. section 18-3-105, criminally negligent homicide, 18-3-205(1)(b), vehicular homicide, 18-3-204, assault in the third degree, or 18-3-205(1)(b), vehicular assault. There is nothing in these provisions that authorizes physical compulsion of an involuntary test in any other circumstance, including, absent the previous considerations, when a driver is hospitalized, is undergoing medical treatment, or is unable to complete a breath test. Poe v. Department of Revenue, 859 P.2d 906 (Colo. App. 1993).

The following points of law are provided for your guidance:

(1) A test that is sabotaged by the actions of the person tested is of the same legal effect as no test at all. Conduct constituting less than cooperation by the suspect in taking the test is the same as a refusal, or a revocation of prior consent. Baker v. Department of Revenue, 593 P.2d 1384 ( ).

(2) There is no requirement under the express consent law that a driver be "capable of rationally deciding" whether to submit to testing. Boom v. Charnes, 739 P.2d 868 (Colo. App. 1987), reversed on other grounds, 766 P.2d 665 (Colo. 1988). Rather, the determination by the trier of fact of whether a driver refused testing for the purposes of the DUI statute is based solely on the objective standard of the driver's words and other external manifestations of willingness or unwillingness to take a test, not on a subjective standard, such as the driver's state of mind or his later recollection of events. Dolan v. Rust, 195 Colo. 173, 576 P.2d 560 (Colo. 1978); Alford v. Tipton, 822 P.2d 513 (Colo. App. 1991).

(3) When an arresting officer offers a driver a choice between blood or breath testing, the burden is on the driver to tell the officer which test he

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is willing to take. Where the suspect does not tell the arresting officer which test he is willing to take (I'll take either one") despite an officer's requests and warnings, it is considered a refusal to submit to testing. Shumate v. Department of Revenue, 781 P.2d 181 (Colo. App. 1989).

(4) C.R.S. 42-4-1301(3)(a) does not require an arresting officer to offer an alternate type of test once the driver has consented to but later refused to submit to a test. Gonzales v. Department of Revenue, 728 P.2d 754 (Colo. App. 1986).

(5) If an arresting officer, in his own discretion, allows a suspect to change a previously made election of a type of test and tells the suspect that he may switch tests, the officer must find a way to provide the new type of test. If that alternate form of test does not then turn out to be available, it is not a refusal to submit to testing and the officer has a problem.

(6) Where a suspect either consents to take a test then refuses or simply refuses to take a test, the burden of expressing that one has changed one's mind is on the suspect. If the suspect does express a change of mind and finally consents to a test, and an officer or blood draw nurse is still available, the officer should provide a test unless the delay has made it impossible to complete a test within two hours of the last known point of driving or the delay has been long enough to materially affect the test results. Gonzales v. Department of Revenue, 728 P.2d (Colo. App. 1986); Zahita v. Department of Revenue, 560 P.2d 847 (Colo. App. 1977).

(7) A refusal by a driver to take a test until the driver is allowed to speak to an attorney is a refusal as a matter of law. A suspect has no such right. Dikeman v. Charnes, 739 P.2d 870 (Colo. App. 1987).

<sup>1</sup> For example, if you give a full advisement which advises a suspect that by driving in the State of Colorado they have expressly consented to the taking of a "blood or a breath" test when an officer, who has probable cause to believe they are impaired or under the influence of alcohol or drugs, so requests, and the suspect chooses either a "blood" or a "breath" test, then you must honor either request. In general, if you advise a suspect that they have certain options beyond what is granted in the law, then as far as your case is concerned the suspect now has those additional options. The subject is discussed in more detail later.



# APPENDIX I

## CASE LAW

Appendix I: Case Law  
(Administrative Hearings)

## CASE LAW

(Express Consent and Per Se Administrative Hearings)

1. Actual Physical Control Driving - A person in actual physical control of a motor vehicle seated in the driver's seat with the engine running can be treated the same as if he was driving. *Brewer vs. Motor Vehicle Division*, 720P.2d 564; *Smith vs. Charnes*, 728P.2d 1287; *Colorado Division of Revenue vs. Lounsbury*, 743P.2d 23; *Motor Vehicle Division vs. Warman*, 745P.2d 270. Note: This rule applies whether the driver was on a public highway or private property.
2. Hearsay evidence, if sufficiently reliable and probative may establish any element in a revocation hearing. *Colorado Department of Revenue vs. Kirke*, 743P.2d 16.
3. When a blood or breath test is taken, reasonable grounds to request the test is not an issue at the revocation hearing. *Charnes vs. Lobato*, 743P.2d 27.
4. Reasonable suspicion of any traffic violation justifies initial contact for purposes of the revocation hearing. *Nefzger vs. Colorado Department of Revenue*, 739P.2d 224.
5. Deficiency in evidence of compliance with Department of Health Rules and Regulations does not automatically render the test result inadmissible. *Colorado Department of Revenue vs. McBroom*, 753P.2d 239.
6. In a refusal case, the only time requirement for requesting a test is a reasonable time. *Charnes vs. Boom*, 766P.2d 665.



# APPENDIX J

## HABITUAL TRAFFIC OFFENDER

Appendix J: Habitual  
Traffic Offender



## HABITUAL TRAFFIC OFFENDER

As a routine matter, you should determine whether the driver is driving under suspension, denial, or revocation and, if so, whether he is categorized as revoked as an habitual offender. If he is, charging procedures should be followed, and charges should be filed under Section 42-4-206, C.R.S. The proof of the charge requires only evidence he was under an habitual offender revocation, had notice of such status, and was operating a vehicle. It is not even necessary to prove a specific traffic violation, only he was operating a vehicle.

In this type of situation, you should include in your reports as many details as possible to establish the fact he was driving the vehicle. Lay witnesses to his driving can be very helpful for independent corroboration.

What constitutes an habitual traffic offender is found in Section 42-2-202, C.R.S.. By accumulating convictions for separate and distinct offenses, on separate dates, in the following manner:

A. Within a seven-year period, three or more convictions of any of the following:

1. DUI, DUID, DWAI, DUI Per Se or DWAID.
2. Reckless Driving under state statute.
3. DUS, DUR or DUD.
4. False Affidavit or Swearing.
5. Vehicular Assault or Vehicular Homicide.
6. Manslaughter, Criminally Negligent Homicide or aggravated motor vehicle theft.
7. Hit and Run.

The violations must occur within seven years, not the convictions.

B. Within a five-year period, ten or more convictions involving moving violations which provide for assessment of four or more points each.

C. Within a five-year period, eighteen or more convictions involving moving violations which provide for assessment of three or less points each.

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A person revoked as an habitual offender for five years. (42-2-205, C.R.S.)

Any person found to be an habitual offender, who is thereafter convicted of operating a vehicle in this state while the revocation of the department prohibiting such operation is in effect, is guilty.

# **APPENDIX K**

## **BOARD OF HEALTH RULES AND REGULATIONS\***

Appendix K: Board of  
Health Rules and  
Regulations

\*The Board of Health referred to in the express consent law, 42-4-1202, is more commonly called the Department of Health

# **RULES AND REGULATIONS OF THE COLORADO BOARD OF HEALTH**

## **RELATING TO TESTS FOR ALCOHOL AND OTHER DRUGS**

### **5-CCR-1005-2**

**RULES AND REGULATIONS CONCERNING TESTING FOR ALCOHOL AND  
OTHER DRUGS** This part was effective August 30, 1998, unless otherwise  
noted below

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Revisions subsequent to August 30, 1998

\* Definitions: “appropriate clinical or public safety facility” and “certification” were revised effective 1/30/1999.

\*\*1.7 Violations. Entire section was revised effective 1/30/1999.

\*\*\*1.9 Denial, Suspension or Revocation of Certification: 1.9.1 was

revised effective 1/30/1999.

\*\*\*\*1.10 Injunction. Section was revised effective 1/30/1999.

## **PART 1 TESTING FOR ALCOHOL AND OTHER DRUGS**

### **1.1 Purpose and Scope**

This rule establishes minimum standards for certification and approval of entities and processes utilized for alcohol and drug testing. This rule is applicable to: samples taken while driving under the influence, driving while impaired, driving with excessive alcohol content; vehicular assaults and vehicular homicides involving an operator while under the influence of alcohol or one or more drugs or both; the testing of samples of blood or other bodily substances from the bodies of pilots in command, motorboat or sailboat operators in command, or drivers and pedestrians fifteen years of age or older who die within four hours after involvement in a crash involving a motor vehicle, a motorboat, a sailboat or an aircraft; and consumption of alcohol by underage persons and records related thereto.

### **1.2 Definitions**

"Alcohol Percent (%)" - grams of ethanol per 100 milliliters of blood or grams of ethanol per 210 liters of breath.

"Appropriate clinical or public safety facility" - provides for the health and safety of a person whose blood is collected (subject) and meets the following criteria: 1) provide for the washing or cleansing of hands of the blood collection personnel, 2) provide a comfortable chair for the subject with arm supports to assure the elbow remains straight and both arms are accessible to the blood collection personnel, 3) have precautions to assure the subject does not fall out of the chair, 4) provide for cot or other reclining surfaces for subjects who prefer to lie down or who have adverse response to the blood collection procedures, 5) provide for the adverse response to blood collection by providing procedures and equipment for subjects who become faint, nauseous, vomit, bleed excessively, or convulse including the provision of drinking water, and 6) provide for the cleaning and disinfection of the blood collection area.

"Certification" - the official approval by the Department of an evidential breath alcohol test (EBAT), operator, operator instructor or laboratory to function under these rules and regulations.

"Certified Laboratory" - a laboratory certified by the Department to perform analytical testing of bodily fluids for alcohol or other drugs.

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"Delayed Breath Alcohol Specimens" - the saved ethanol or other analytical components of the EBAT specimen(s).

"Department"- refers to The Colorado Department of Public Health and Environment, Laboratory and Radiation Services Division.

"Evidential Breath Alcohol Test (EBAT)" - is an evidentiary breath alcohol test as described by section 42-4-1301, 11 C.R.S. (1997).

"Evidential Breath Alcohol Test (EBAT) device" - any instrument certified to perform "Evidential" Breath Alcohol Tests.

"Facility" - any location approved by the Department to perform Evidential Breath Alcohol Testing.

"Proficiency Testing" - The evaluation of unknown specimens supplied by a provider which determines target values for those unknown specimens.

### 1.3 Specimen Collection

#### 1.3.1 Blood

##### 1.3.1.1 Living Persons

1.3.1.1.1 Blood specimen(s) must be:

1.3.1.1.1.1 collected in the presence of the arresting officer or other responsible person who can authenticate the specimens.

1.3.1.1.1.2 collected by venipuncture by a physician, nurse, paramedic, emergency medical technician, medical technologist, or a person whose training and normal duties include withdrawing blood specimens under the supervision of a physician or nurse.

1.3.1.1.1.3 collected only in an appropriate clinical or public safety facility (e.g., hospital, medical clinic, ambulance, police station, fire station or approved facility). In no event will the collection of blood specimens interfere with the provision of essential medical care or the ready availability of emergency medical services to the public.

1.3.1.1.1.4 collected using sterile equipment. The skin at the area of puncture must be thoroughly cleansed and disinfected with an aqueous solution of nonvolatile antiseptic. Alcohol or phenolic solutions must not be used as a skin antiseptic.

##### 1.3.1.2 Deceased Persons

1.3.1.2.1 Collection of specimens from deceased persons is

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conducted as per section 42-4.1304, C.R.S. (1997), by a person whose training and normal duties include the collection of blood specimens from deceased persons.

### 1.3.1.3

#### **Living and Deceased Persons**

#### 1.3.1.3.1

After collection, blood specimens must be:

##### 1.3.1.3.1.1

dispensed or collected directly into two sterile tubes resulting in a sodium fluoride concentration greater than 0.90 percent weight.

##### 1.3.1.3.1.2

inverted to properly mix the blood with the sodium fluoride.

##### 1.3.1.3.1.3

affixed with an identification label and evidence seal.

##### 1.3.1.3.1.4

shipped to a certified laboratory. If shipment is delayed for more than 72 hours, the specimens must be placed in secured temporary refrigerated storage at less than 8 degrees Centigrade until shipped but not to exceed 7 days.

#### 1.3.1.3.2

At the Certified Laboratory:

##### 1.3.1.3.2.1

one tube of blood must be used for the State's test(s). The State's test(s) must be completed within 15 days of collection.

##### 1.3.1.3.2.2

the second tube of blood must be refrigerated by the certified laboratory at less than 8 degrees Centigrade for a period of not less than 12 months from the date of collection.

##### 1.3.1.3.3

The second specimen may be released if it is requested and receipted for by defendant's legal counsel or a Certified Laboratory.

##### 1.3.1.3.4

The second specimen must be analyzed within 10 days of its receipt by the defendant's legal counsel or Certified Laboratory.

### 1.3.2 **Breath - Evidential**

#### 1.3.2.1

Evidential breath specimens must be analyzed on EBAT devices approved by the Department. Approval or disapproval of EBAT devices will be based on standards of performance established by the Department.

#### 1.3.2.2

The Department will certify each EBAT device initially and periodically thereafter.

#### 1.3.2.3

The Department will issue a certificate for each certified EBAT device. The certificate will reflect the EBAT device



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facility name, serial number and the inclusive dates for the certification period. The certificate for mobile facilities will also include the vehicle identification number.

1.3.2.4 A breath specimen must only be collected by certified evidential breath test operators using certified EBAT devices pursuant to the procedure in Appendix A.

1.3.2.5 Breath specimens consisting of end-expiratory alveolar air are analyzed to determine their ethyl alcohol concentration.

### 1.3.3 Breath - Delayed

1.3.3.1 A delayed breath alcohol specimen must be collected with each evidential breath alcohol test pursuant to Appendix A.

1.3.3.2 Delayed breath alcohol specimens are considered the personal property of the defendant and retained by the facility for 12 months from the date of collection unless requested and receipted for by the defendant's legal counsel or a Department certified laboratory.

### 1.3.4 Urine

#### 1.3.4.1 Living Persons

1.3.4.1.1 Urine specimen(s) must be collected in the presence of collection personnel who can authenticate the specimen(s).

#### 1.3.4.2 Deceased Persons

1.3.4.2.1 Collection of specimens from deceased persons is conducted as per section 42-4-1304, 11 C.R.S. (1997) by a person whose training and normal duties include the collection of urine samples from deceased persons.

#### 1.3.4.3 Living and Deceased Persons

1.3.4.3.1 Urine specimen(s) must be:

1.3.4.3.1.1 collected in a sterile container.

1.3.4.3.1.2 affixed with an identification label and evidence seal.

1.3.4.3.1.3 shipped to a laboratory certified by the Department. If shipment is delayed for more than 72 hours, the specimens must be placed in secured temporary refrigerated storage at less than 8 degrees Centigrade until shipped but not to exceed 7 days.

- 1.3.4.3.2 At the Certified Laboratory:
- 1.3.4.3.2.1 The State's test must be completed within 15 days of collection.
- 1.3.4.3.2.2 Any remaining specimen(s) must be retained by the laboratory in frozen storage for a period of not less than 12 months unless requested and receipted for by defendant or deceased's legal counsel or a Certified Laboratory.
- 1.3.4.3.2.3 The second specimen must be analyzed within 15 days of its receipt by the defendant's legal counsel or Certified Laboratory.

#### 1.4 **Methods of Analysis**

##### 1.4.1 **Alcohol in Evidential Breath Specimens**

- 1.4.1.1 The Standard Operating Procedure for Evidential Breath Alcohol Tests must be followed as found in Appendix A.
- 1.4.1.2 A system blank(s) analysis must be used with each EBAT.
- 1.4.1.3 For each EBAT, a Department certified reference standard(s) of known ethanol concentration must be used.
- 1.4.1.4 A completed EBAT is one in which the Standard Operating Procedure is followed and a printout obtained.

#### 1.5 **Certified Operators of Evidential Breath Alcohol Test Devices**

- 1.5.1 Certification of Operators of Evidential Breath Alcohol Test Devices to Determine Alcohol Concentration of Breath Specimens.
- 1.5.1.1 Certified operators must have a minimum of 8 hours of instruction following a course outline provided by the Department to include a comprehensive practical and written exam. A score of 80% or greater on the written exam is passing. Upon successful completion of the Operator course, a certificate will be issued by the Department indicating the name of the Operator, the Operator Instructor(s), and the initial date of certification.
- 1.5.1.2 To maintain certified status, an Operator must proficiently perform one breath test, following the procedures outlined

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in Appendix A in the presence of an Operator Instructor at least every 6 months.

1.5.1.3 An Operator who does not recertify in the six 6 month period will be decertified by the Operator Instructor(s) and must repeat the eight 8 hours of instruction.

1.5.1.4 A facility must keep records showing each certified operator's date of original certification and all dates of re-certification.

1.5.2 Certification of Operator Instructors of EBAT Devices

1.5.2.1 Certified Operator Instructors must have a minimum of 16 hours of instruction provided by the Department to include a comprehensive practical and written exam. A score of 80% or greater on the written exam is passing. Upon successful completion of the Operator Instructor course, a certificate will be issued by the Department indicating the name of the Operator Instructor, the course Instructor(s), and the date of certification.

1.5.2.2 A certified Operator Instructor is also a certified Operator. Certified Operator Instructors are qualified to train and certify operators of EBAT devices.

1.5.2.3 To maintain certified status an Operator Instructor must annually participate in presenting a certification class to Operators or pass a written recertification examination provided by the Department.

1.5.2.4 An Operator Instructor who does not recertify annually is decertified and must repeat the 16 hours of instruction provided by the Department.

1.5.2.5 A facility must keep records showing each certified Operator Instructor's date of original certification and all dates of classes instructed or written exams taken.

### 1.6 **Laboratory Analysis of Blood, Urine and Delayed Breath Specimens**

1.6.1 Laboratories must be certified to provide analysis.

1.6.2 Laboratories will be certified to perform tests for one or more of the following: blood alcohol, delayed breath alcohol, blood drugs, and urine drugs.

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- 1.6.3 Laboratories must meet standards of performance as established by the Department. Standards of performance will include personnel qualifications, standard operating procedure manual, analytical process, proficiency testing, quality control, security, chain of custody, specimen retention, space, records, and results reporting.
- 1.6.4 Laboratory inspections must be performed prior to initial certification and periodically thereafter by Department staff as established by the Department standards.

### 1.7 Violations

- 1.7.1 It is a violation of these rules and regulations to perform testing without an appropriate certificate.
- 1.7.2 Violation of these rules and regulations may result in denial, suspension or revocation of certification as outlined in part 1.9 of these rules and regulations.
- 1.7.3 Generally, a violation will not be cited if:
  - 1.7.3.1 The violation was unavoidable to prevent loss of life, personal injury or severe property damage or there were no feasible alternatives, and provided that proper notification was given to the Department.
  - 1.7.3.2 The violations resulted from matters beyond the control of the facility or laboratory, such as equipment failures that were unavoidable by reasonable quality assurance measures or management controls.

### 1.8 Notification of Violation, Hearings and Determinations:

- 1.8.1 All parties shall comply with the statutory requirements of section 24-4-105, 7 C.R.S. (1997).

### 1.9 Denial, Suspension or Revocation of Certification:

- 1.9.1 The Department may deny, suspend or revoke the certificate of an EBAT device located in a facility, the certificate of an operator, the certificate of an operator instructor or the certificate of a laboratory for one or more of the following causes:
  - 1.9.1.1 Falsification of data or other deceptive practices including false statements by omission or commission relevant to the certification process.

- 1.9.1.2 Gross incompetence or negligent practice.
- 1.9.1.3 Willful or repeated violation of any lawful rule, regulation or order of the Department or the Board of Health and its officers.
- 1.9.1.4 Inadequate space, equipment, or methods utilized for testing.
- 1.9.1.5 Submission of any test results of another party as those of the party being evaluated.
- 1.9.1.6 For a laboratory, failure to continuously participate in proficiency testing and obtain a successful score at least once each certificate period.
- 1.9.1.7 For a laboratory, contact with another laboratory concerning proficiency test results prior to the due date of those results.

1.10 **Injunction**

- 1.10.1 The Department may seek an injunction against any entity for failure to comply with these rules and regulations.

#### **APPENDIX A**

TITLE: Standard Operating Procedure for Evidential Breath Alcohol Test(s).

1. The subject must remove foreign objects from the nose and mouth to include dentures. The subject must be closely and continuously observed for 20 minutes prior to testing to assure no belching, regurgitation or intake of any foreign material by nose or mouth has occurred. If such occurs, another 20 minutes of close and continuous observation must elapse under the same conditions.
2. Turn power switch on and/or observe the power switch has been activated.
3. Observe the simulator temperature is between 33.8 degrees centigrade and 34.2 degrees centigrade.
4. Activate the Start Test switch.
5. Follow the instructions and sequence of events as they appear on the device display.
6. After the sequence of events has been completed package and seal the Delayed Breath Alcohol specimen.

7. Record the evidential breath alcohol test information on the standard simulator log sheet.

## APPENDIX B

### TITLE: Requirements for Permanent and Mobile Evidential Breath Alcohol Test Facilities

1. Initial Certification Procedure:
  - a. Facilities must submit in writing to the Department a request for approval of an EBAT facility.
  - b. The Department will supply a copy of Appendix B of these Rules and Regulations to the requesting facility.
  - c. Written verification of compliance with the requirements of Appendix B is required from the facility.
  - d. The Department will perform an initial facility inspection to verify compliance with the requirements of Appendix B. Facility inspections will be performed periodically thereafter by Department staff.
  - e. The EBAT device may not be moved from its initial approved facility without authorization from the Department.
2. Requirements:
  - a. Power
    1. Permanent:
      - (A) AC line voltage of 120 volts, 60 Hz with grounded 3 prong outlets and a 20 ampere or less circuit breaker.
      - (B) The power line to the EBAT device must be a dedicated line. Written verification of compliance with this requirement must be provided to the Department by a certified electrician.
      - (C) A surge protection device approved by the Department must be placed between the EBAT device and the power source.
    2. Mobile:
      - (A) Acceptable power sources are:
        - (1) Square wave power inverter capable of generating an AC line voltage of 140volts RMS.

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- (2) Power inverter/sine wave converter combinations that generate 120 volts AC from 14 volts DC.
- (B) Electric motor/generator combinations that use a 12 volt DC motor to run a 120 volt AC 60 Hz generator.
- (C) The power line to the EBAT device must be a dedicated line. This requirement will be verified by the Department.
- (D) Surge protection is required as stated in step a.1.(C) above.

### 3. Environment

- a. The temperature of the EBAT device facility must be maintained between 70 and 80 degrees Fahrenheit.
- b. The facility must have adequate lighting.
- c. The area around and under the EBAT device must be free of dust and dirt. The immediate area around the evidential breath alcohol testing device must be kept orderly.
- d. The EBAT device and breath alcohol simulator must be placed on the organizer stand. The stand will be placed on a solid and adequate work surface.
- e. The EBAT shall be in a smoke free environment.
- f. The facility must be ventilated.
- g. Automobile emissions are not allowed in Mobile EBAT Facilities. A system blank consisting of a delayed breath specimen must be collected every 2 hours during testing. The specimen must be sent to the Department for testing.
- h. The facility must not be used to store any cleaning compounds or volatile organics to include gasoline and petroleum products.

### 4. Documents

- a. The following documents relating to EBAT devices must be posted at the facility:
  - (1) Certificate of Approval for EBAT
  - (2) Standard Operating Procedure
  - (3) No Smoking Sign
  - (4) Error Message Sheet



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- (5) Current list of certified operators and operator instructors including dates of recertification
  - b. The Standard Simulator Log Sheet must be maintained with the EBAT device.
  - c. Records pertaining to EBAT specimens must be retained by the facility for 2 years.

# APPENDIX L

## EDUCATION AND TREATMENT PROGRAMS

## EDUCATION AND TREATMENT PROGRAMS

It is probable a conviction for DUI/DWAI will result in getting a person into an education/treatment program for alcohol or other drug abuse. No single treatment program would be satisfactory for all persons. Therefore, each subject should be evaluated on an individual basis as set forth in criteria established by the Alcohol and Drug Abuse Division, Colorado Department of Human Services. These criteria are presented in the following section and are designed to help the professional determine the fine line between social and problem use. They do not necessarily determine the severity of the alcohol/drug problem, although extreme cases are clearly evident by use of these criteria.

### I. Problem Drinker/Drug User

#### A. A client who exhibits one of the following indicators:

1. Two or more previous alcohol/drug related arrests and/or convictions;
2. BAC of equal to or greater than .25;
3. Loss of control of alcohol/drug use;
4. Self admission of problem drinking/drug use;
5. Prior diagnosis of problem drinking/drug use by a competent authority;
6. Organic brain disease associated with alcohol/drug use.

#### B. A client who exhibits two or more of the following indicators:

1. One prior alcohol/drug related arrest and/or conviction;
2. M-F score equal to or greater than 12;
3. BAC equal to or greater than .15;
4. Employment problems due to alcohol/drug use;
5. Previous contact with social and/or medical facilities for problems associated with alcohol/drug use;
6. Blackouts associated with alcohol/drug use;
7. Passing out associated with alcohol/drug use;
8. Withdrawal symptoms;
  - a. Tremulousness
  - b. Alcoholic Hallucinoses
  - c. Auditory Hallucinations
  - d. Convulsive Seizures

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- e. Delirium Tremens (DT's)
- 9. Medically diagnosed physical complications;
  - a. Alcoholic Liver Disease
    - 1. Fatty Liver
    - 2. Hepatitis
    - 3. Cirrhosis
  - b. Alcoholic Pancreatitis
  - c. Alcoholic Cardiomyopathy
- 10. Psychological dependence on alcohol/drugs;
- 11. Personality changes associated with alcohol/drug use;
- 12. Family and/or social problems associated with alcohol/drug use.

II. Incipient Problem Drinker/Drug User: Client who exhibits just one of the indicators listed under "B" above.

III. Non-problem Social Drinker/Drug User: A client who exhibits none of the above listed indicators.

Traditionally, all DUI/DWAI offenders have been handled by means of punitive sanctions including fines and jail sentences. While sanctions of this variety do provide a deterrent for the social user, there is considerable evidence punitive sanctions have little effect on the problem-drinking/drugging driver. Therefore, it is recognized more positive rehabilitation efforts must be attempted if the driver is to be helped.

It is true the Problem Drinker/Drug User cannot be helped until the individual(s) is ready to do something. However, it is also true the decision may not be made until some kind of crisis is reached.

Problem Drinkers/Drug users are treatable. Their problem should be approached in much the same way as other chronic medical and psychological problems. The goal of treatment is then viewed as one of control rather than absolute cure. Abstinence is often sought as a primary objective, but other considerations such as improved social or job adjustments are often better guides in evaluating the success or failure of therapy. Thus, temporary relapses should not always be termed as failure any more than a diabetic's slip in diet.

Education/Treatment is designed to help the problem drinking or drugging driver find, face up to and understand the problems or influences causing the inappropriate drinking and drug behavior.

### Level I Programs

Level I Programs are short term, didactic alcohol and drug driving education programs. They are not designed to be therapy sessions although they certainly may be therapeutic. It is intended this type of program provide information

about alcohol, drugs and effects on driving so non-problem social drinkers can learn the facts and decide whether they need to make any changes in their drinking patterns. If they should decide to change, they will have some knowledge on which to base a decision.

In most cases, the trauma of being arrested and/or being involved in a crash, along with the possibility of fine, jail sentence, community service and a screening evaluation has provided a learning experience. People will state firmly they have "learned their lesson" and will never drive under the influence or even impaired again. This may be correct, but research shows non-problem social drinkers who successfully complete a program shows better in regard to traffic safety matters than do those who do not attend. We should not cut their lesson by not providing education about drinking, drugs and driving.

Any agency or individual may operate a Level I program after certification by ADAD. In addition to program certification, instructors must have ADAD counselor certification as well as have education, experience and/or training in either social science, psychology, counseling, alcohol/drug rehabilitation, education traffic safety or other related fields. Non certified volunteers may be used if supervised by a certified instructor.

Only the non-problem social drinker, according to ADAD criteria, shall be enrolled in this type of program unless certain procedures involving the referring court are followed and appropriate client file charting is done.

The Level I programs shall range between four and eight sessions in length. Each session should be at least two hours long and total 8-16 hours. While the majority of programs are conducted once a week for 6-8 weeks, it is permissible to have "marathon" on-day programs if there are at least four two-hour sessions in which all content/topic requirements are met. There are other formats which may meet standards.

The content/topic requirements of a Level I program are: 1) an ADAD approved pre-post test; 2) history, use and definition of alcohol, alcohol as a drug; 3) physiological effects of alcohol, other drugs, legal and illegal and their effects on driving; 4) psychological and sociological consequences of use/abuse of alcohol or drugs; 5) blood alcohol concentration and effects on driving performance; 6) court penalties; 7) motor vehicle division laws and penalties; 8) review of treatment approaches; and, 9) various programs and alternatives to drinking and driving.

Level I programs must be conducted in facilities which meet ADAD physical requirements for outpatient programs.

The group size is limited to a maximum of 25 persons and an individual client record has to be maintained on each client. The Level I client record must contain court documents, release(s) of information, pre-post tests results, attendance/completion data and generalized group notes as to content/topic

requirements covered per session.

The Level I program must have a written policy concerning reporting of absences, failure to enroll in and/or complete, failure to meet fiscal obligations, and progress to the courts, ADAD, probation department, ADES and Revenue Department Hearing Section.

### **Level II Programs**

Level II programs are outpatient and/or intensive residential treatment (IRT) programs which have ADAD certification and licensure. They are designed to be used for incipient and problem drinkers/drug abusers.

Counseling staff must meet ADAD counselor certification requirements within the prescribed time frame, and all uncertified counselors must be supervised by a Level III counselor.

Clients must be processed at intake utilizing ADAD client management methodology and a differential diagnostic procedure in a standardized manner.

The educational component consists of therapeutically oriented sessions which simultaneously combine cognitive education on alcohol and driving with group process. This component must range between 8 and 12 sessions in length and be 20-30 hours long. No more than one three-hour session can be conducted within 24 hours and no more than two sessions can be conducted per week. The content/topic requirements which must be combined with group process are: an ADAD approved pre-post test; history, use and definition of alcohol; alcohol as a drug; physiological effects of alcohol; other drugs, legal and illegal and their effects on driving; psychological and sociological consequences of use/abuse of alcohol or drugs; blood alcohol concentration and effects on driving performance; court penalties; motor vehicle division laws and penalties; review of treatment approaches and programs and alternatives to drinking and driving. Research indicates only this type of education has positive impact among incipient and problem drinkers/drug abusers.

Level II groups are limited to 12 clients and each client must have an individual chart. The charts must include: court documents; pre-post test results; evidence of a differential diagnostic test or procedure; attendance and completion data; educational service plans for education clients which must include general problems, educational interventions planned and goals to be achieved; date of group; length and number of hours of group; activity or interaction of group members; analysis of group dynamics and/or theme. Description of client's participation; signed releases of information; copies of all written correspondence and reports to and notes on all phone contacts and other verbally exchanged information with the referring courts, ADES and Revenue Department Hearing Section.

The length of Level II therapy must be a minimum of 26 hours long over 16 weeks for incipients and a minimum of 40 hours over 20 weeks for problem drinkers/drug abusers. With both drinker types, the minimum hourly requirements as well as the minimum length of treatment must be met; and no part of the educational component can be counted as part of the 26 or 40 hours. There are not time frames attached to individual session length, but group therapy sessions cannot be less than 90 minutes long.

The goal of rehabilitation is to reduce the probability of another impaired driving offense. Treatment is not intended to take the place of traditional sanctions, but rather to work in conjunction with them.

### **Detoxification Centers**

As a result of legislation which decriminalized public intoxication, the detox center was instituted. Any person who is in an extremely intoxicated condition may be taken directly to one of these centers. You may encounter such a person either walking in the street or in any public place, possibly causing a disturbance. This individual may be an obvious danger to himself and/or others and should receive professional help immediately.

The detox center is equipped and staffed to monitor and safeguard the problem-drinker through the withdrawal period. Any person brought in is immediately given an in-take evaluation to determine his general health condition and the severity of alcohol dependence. The person may be released after a few hours, if the evaluation shows the present intoxication to be isolated and not indicative of long term alcohol abuse or dependency. If the evaluation does indicate chronic or severe alcoholism, the patient may remain at the center for five full days. The center may then refer the individual to a long term program.

Most drinking drivers encountered will not be in such an intoxicated state that referral to a detox center would be appropriate. However, if the condition does warrant referral, the individual should first be processed as any other person arrested for DUI. You should not only be familiar with those agencies available, but also with their particular procedures as well. There may be an occasion when no arrest will be made. However, that occasion may provide the opportunity for you to give the subject the name and telephone number of a treatment agency if he wishes to seek help on his own.

