The Washington State

DUI Pocket Handbook

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DUI Pocket Handbook

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For my wife and son

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Preface

Being arrested for DUI in Washington State is an introduction to a world of complex law, demanding Judges, fickle prosecuting attorneys, biased Department of Licensing hearing officers, exaggerating police officers, and a multitude of conditions and expenses that seem to never end. Such punishment and conditions may include jail, probation, fines, court dates, a department of licensing hearing, license suspension, ignition interlock device, SR 22 insurance, alcohol evaluation, alcohol awareness class or treatment, and a DUI victim's panel, among many possible requirements. This is why most people feel overwhelmed after they face the sobering fact that they are in for a long and difficult journey.

It is therefore important that a person who has been arrested for DUI immediately educate themselves about the many requirements demanded of them. The first thing you should do is confirm whether you have been provided a court date. Not every jurisdiction provides an immediate court date but

many do, and in these jurisdictions you will need to appear within a few days of your arrest. As such you must prepare to appear in court so that you do not risk a bench warrant for your arrest. Washington Courts that typically demand you appear in court for an arraignment immediately following your DUI arrest include Seattle, Everett, Lynnwood, Edmonds, Mukilteo, Skagit County and Island County, just to name a few. The next thing you must do following a DUI arrest is to contact a qualified DUI attorney. Such an attorney should be a good sounding board and will be able to advise you about the immediate concerns. This is particularly true if you must immediately appear in Court as there may be a risk of harsh conditions imposed by the Judge.

If you have been arrested you must immediately be aware of the following:

- If there a court date you must immediately make plans to appear in court;
- If you have a prior DUI arrest or the facts of your case are severe you must prepare to bail yourself out from custody at your first court appearance (read the section on bail in the upcoming chapter);
- You must complete and mail (or apply online) the Department of Licensing (DOL) Driver's Hearing Request Form (within 20 days of your arrest) if your BAC was over 0.08 or if you refused the breath or blood test;
- Your DOL Hearing will be set within 60 days of your arrest;
- If your license is suspended you may be eligible for a restrictive license;

- You will be required to undertake an alcohol evaluation;
- You must contact an experienced DUI attorney to discuss your options.

If you have been arrested for DUI in Washington State or know someone who has, it is imperative to become educated about the DUI process quickly. *The Washington State DUI Pocket Handbook* provides the reader all the information on the Washington DUI process in an easy to read, concise yet thorough format. This book "trims the fat" that exists in other DUI guidebooks and gives the reader all of the necessary information immediately. *The Washington State DUI Pocket Handbook* clarifies a difficult legal environment and gives the reader all the information they will need to completely prepare for their legal battle.

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DUI Court Procedures

The most intimidating consequence of being arrested for DUI in Washington State is the court process. Following your arrest you are now a defendant and as such you will be paraded into court before a Judge who will advise you of the consequences of your actions, including time in the gray bar hotel. Standing close by will be the prosecuting attorney who will look at you with distain hoping to eventually hear the words, "guilty," flow from your mouth. Intimidating? Yes. However there are steps you must take to reduce the fear and lessen the threat. The first is knowing as much as you can about the court process and the second is having a good attorney at your side.

Bail

Bail is a process through which you are permitted to pay money in exchange for your release from police custody, usually after booking or sometimes after the arraignment if the

Judge demands that you are taken into custody. As a condition of release, you must promise to appear in court for all scheduled court dates - including arraignment, pre-trial hearings, readiness hearings, motions, and the trial itself.

If you are not allowed to post bail at the police station immediately after booking, a judge may decide later, at a separate hearing or the arraignment, whether to allow release on bail. The bail amount may be predetermined, through a "bail schedule," or the judge may set a monetary figure based on:

- Your DUI record and criminal history;
- Seriousness of the DUI offense, in terms of injury to others;
- Your ties to family, community, and employment.

If bail is imposed you or your friends and family may "post" the full bail amount as set by the court, or a "bond" may be posted in lieu of the full amount. A bond is a written guarantee that the full bail amount will be paid if you fail to appear as promised. Bonds are usually obtained through a bail bond agency that charges a fee for posting of the bond (usually about 10 percent of the bail amount). Bail bond agencies may also demand additional collateral before posting the bond, since the agency will be responsible for paying the full bail amount if the suspect "jumps bail" and fails to appear as promised.

If you are arrested, booked, and granted release on your own "personal recognizance," no bail money needs to be paid to the court, and no bond is posted. You are then released after promising, in writing, to appear in court for all upcoming proceedings. Most state criminal courts impose certain

conditions on personal recognizance release, which include not driving unless you are properly licensed and insured, not consuming alcohol or illegal drugs, and not refusing a breath test if lawfully requested.

If you are released on your own "personal recognizance" and subsequently fail to appear in criminal court as scheduled, you will be subject to immediate arrest.

The Arraignment

The arraignment is your first appearance in court and may occur as soon as the next available court date after your arrest, or in some instances you will be notified by mail (summons) with the arraignment date. In situations when you are notified by mail the date might be within a couple of weeks of your arrest or several months later, depending on the jurisdiction of your DUI. The arraignment is mandatory, hence you must appear. The first appearance is primarily for the advisement of rights and your opportunity to declare "not guilty." If you have an attorney, he will advise you of the proper procedures. You should always request a jury trial (you can change your mind later, if you so wish) and naturally, always plead not guilty.

At the conclusion of the arraignment, the Judge will decide whether any conditions should be imposed on you. For first time offenders with relatively low breath or blood test results, the typical conditions include no driving unless you are licensed and insured, no driving after drinking, or no consumption of alcohol or non-prescribed drugs pending trial. For those with prior offenses, or relatively high breath test results, the conditions can include additional penalties such as the installation of an ignition interlock device, installation of a SCRAM bracelet, the requirement of probation monitoring,

or the burden of significant bail.

It is important to note that there is a risk that you will be taken into custody during your arraignment, particularly if you are a repeat offender. Hence, having a lawyer present will help your cause tremendously. After the arraignment you will be given notice to appear for a pre-trial hearing.

The Pre-trial Hearing

The pre-trial hearing (sometimes referred to as the "readiness hearing") is typically the second scheduled court date, is scheduled at your arraignment and is usually several weeks after your arraignment, depending on the court. The pre-trial is intended to provide an opportunity for your lawyer and the prosecutor to discuss the case (pros and cons), explore plea bargaining options, and to determine whether the parties have exchanged all information required by court rules.

Continuances of the pre-trial hearing are not uncommon. Typically, pre-trials are continued because the defense needs to:

- Obtain court ordered information, such as police radio tapes, toxicology reports, documents relating to the breath test, accident reconstruction reports, missing pages from police reports, etc.;
- Complete witness interviews;
- Complete independent investigations;
- Retain an expert witness;
- Locate missing witnesses;
- Obtain alcohol evaluations;
- Prepare a Deferred Prosecution;
- Conduct additional negotiations with the prosecutor; and/or

- Continue for the presentation of a disposition (the parties may have an agreement but need more time to prepare).

If no continuance is needed and no acceptable plea bargain has been offered, your attorney may note (schedule) various legal motions (to argue the validity of certain evidence – see next paragraph) or confirm a trial date.

The Motion Hearing

The motion (or suppression) hearing can be the most important hearing in your defense because it is at the motions hearing that the judge will hear legal challenges to the admissibility of the State/City's evidence, and a ruling in your favor can result in evidence being suppressed (excluded) from your trial, including evidence of a blood or breath test, the results of some or all of the field sobriety tests, or any adverse statements you may have made. Successful pre-trial motions often compel the prosecutor to make an advantageous plea bargain offer, or on occasion, result in the dismissal of the charge!

Most courts schedule the motion hearing for a date well in advance of the trial. Some courts, however, schedule motions for the morning of trial. Most Judges will rule on motions immediately.

The Trial

The length of a DUI jury trial is typically two days. It may be as short as a day if there is no blood or breath test, and if there are few witnesses, but rarely does it last three days or more.

The Court will first hear preliminary matters (motions in limine) which are followed by the jury selection (called voir

dire). This is the process whereby both sides ask the potential jurors questions to determine their biases, views on police, DUIs, etc., and to enable each to excuse up to three jurors.

Once the jury is selected both your lawyer and the prosecuting attorney give opening statements where they outline for the jury what they expect the evidence to show. The defense attorney may choose to give his or her opening statement after the prosecutor has rested his or her case.

The prosecutor then presents his or her witnesses which typically include:

- Investigating police officers;
- Civilian witnesses or hospital personnel that may be available and favorable to the prosecution;
- "Expert witnesses" from the State Patrol breath test department or the state's toxicology lab, both of whom will testify that the breath testing device was operated and maintained in accordance with all required state statutes and regulations governing breath testing; or
- In a blood draw case, the person who drew the blood and the toxicology lab technician who analyzed the blood will be called.

At the conclusion of the prosecutor's case, the defense may, but is not required to present evidence. In most cases, much of the defense has already been presented through the defense attorney's vigorous cross-examination of the prosecution witnesses.

Typical defense witnesses include:

- People you were with prior to being stopped by the

police who can testify to the amount you had to drink, your apparent state of sobriety, unimpaired coordination, speech and appearance;

- Passengers in your car who can testify to the above plus your driving and performance of the roadside tests;
- People you may have called from your car after the stop or from the police station who can testify to your speech;
- The public defender or other lawyer you called from the station who can testify to your speech, the appropriateness of your questions and your ability to understand and follow instructions;
- Anyone you called or who saw you after release who can testify to your sobriety, coordination, speech and appearance;
- Any experts retained to challenge the accuracy/reliability of the breath or blood test;
- Defense investigators who have interviewed prosecution witnesses, including the arresting officer, photographed or videotaped the road traveled and the scene of the field sobriety tests, or who is an expert on the limitations of "field sobriety testing;" and
- The defendant does have the option to testify, but cannot be required to. Most juries want to hear from the defendant personally, but there may be sound reasons your attorney will recommend against testifying. While the decision rests with the defendant, the defense attorney's advice should be considered very carefully.

After all the evidence is presented, the judge instructs the jury as to what the law is that they are expected to apply

to the facts of the case. Then both lawyers present closing arguments.

Following the closing argument, the jury will have the opportunity to discuss the case (deliberate) and this can last anywhere from 15 minutes to one or more days. Only three outcomes are possible at this juncture:

1. All six jurors can vote to acquit and the case will be over and the matter dismissed;
2. All six jurors can vote to convict and the defendant will be found guilty; or
3. The jurors can deadlock without reaching a unanimous verdict. This is called a "hung" jury and the judge will declare a mistrial. The prosecutor then has the option of re-trying the case at a future date, offering a plea bargain to a reduced charge, or dismissing the case.

Sentencing

If you are convicted for DUI, whether after a guilty plea or a jury verdict, the appropriate legal punishment is determined at the sentencing stage. A number of different kinds of punishment may be imposed on a person convicted of DUI, including:

- Payment of fines and costs (statutory and probation costs)
- Jail
- Probation
- Suspended sentence (for 5 years)
- Suspension of driver's license

- Community service
- Drug/alcohol evaluation and treatment or alcohol/drug information school (ADIS)
- DUI Victim's Panel
- Ignition Interlock Device (may be mandatory)

Sentencing usually takes place almost immediately following a plea to DUI or an amended charge or, following a guilty verdict after trial. The sentencing judge receives input from the prosecutor and the defense. In some instances a judge may give you a new court date for sentencing. There are some judges who demand that you complete an alcohol evaluation prior to the imposition of sentence (another good reason to obtain the evaluation early).

For sentencing purposes a judge may consider the following:

- Your criminal history and any prior convictions for DUI
- Level of intoxication and your behavior
- Impact of the DUI on any victims (i.e. whether injuries or passengers)
- Your personal, economic, and social circumstances
- Your regret or remorse that you express
- The agreement between you and the prosecuting attorney

Probation

A consequence of a criminal conviction, for DUI or some other crime is probation. The purpose of probation is to monitor the individual to ensure compliance with the sentencing conditions, such as completion of an alcohol evaluation, alcohol treatment, payment of fines, and maintaining lawful conduct.

If you fail to comply with the conditions imposed at sentencing the court may summons you to appear to explain your failure to comply. There are some instances when the failure to comply is relatively minimal and can be corrected prior to your court appearance. In other instances the failure to comply may be severe (i.e. new DUI arrest) and the punishment that results may be harsh (i.e. 30 days or more of jail).

Probation can be supervised or unsupervised, with the former demanding monthly meetings with a probation officer. The other disadvantage of supervised probation is that you'll pay far more money for the privilege, typically $50 to $65 per month for the duration of the supervised period. The way to avoid lengthy supervised probation is to have the alcohol/drug evaluation and the alcohol drug information school or treatment completed prior to sentencing. This leaves probation very little to supervise.

DUI Appeals

If you have been convicted of a DUI you may "appeal" your case and request that a higher court review certain aspects of the case for legal error, as to either the conviction itself or the sentence imposed. Importantly, you must initiate the appeal within 30 days of the finding of guilt. If you plead to a DUI (or any other offense) you will waive your right to appeal.

In an appeal, you argue that there were key legal mistakes which affected the jury's decision and/or the sentence imposed and that the case should be dismissed or that you should be re-tried or re-sentenced.

In considering an appeal, the court reviewing the case looks only at the "record" of the proceedings in the lower court and does not consider any new evidence. The record is made up of the court reporter's transcripts (or court recordings) of everything said in court, whether by the judge, the attorneys, or witnesses. Anything else admitted into evidence, such as documents or objects, also becomes part of the record. This is why it is critical that your attorney present a solid case and a sound record for later review.

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DUI Penalties & Conditions

Penalties (minimum)

[<.15/>.15 or Refusal]	**1st DUI**	**2nd DUI**	**3rd DUI**
Jail	1 day/2 days	30 days/45 days	90 days/120 days
EHM		60 days /90 days	120 days/150 days
Fine	$866/$1121	$1121/$1503	$1928/$2778
License Suspension	90 days/1 year	2 year s/3 years	3 years/4 years
SR 22 Insurance	3 years	3 years	3 years
Ignition Interlock	1 year	1-5 years	1-10 years
Alcohol/Drug Eval	Yes	Yes	Yes
DUI Victim's Panel	Yes	Yes	Yes
Probation	5 years	5 years	5 years

Jail

Criminal penalties for a Washington State DUI depend on a BAC reading (or refusal to provide a breath sample) and

whether you have any prior DUI convictions within a seven year period. The mandatory minimum penalties for DUIs are prescribed by the State Legislature and prohibit judges from going lower than the predetermined penalties.

Regardless of the mandatory minimum penalties you should not assume that the judge will necessarily sentence you to these minimum penalties. A judge always has the discretion to impose up to the maximum penalty permitted by law. You may be sentenced to more than the mandatory minimums if there are factors in your case that would warrant a judge to impose a greater penalty. These factors include, but are not limited to, having passengers in the car (it is worse if the passengers are minors), if you have prior DUIs but they occurred more than seven years ago, if there was an accident, if you were highly belligerent to the police officer, and so on. Importantly, if you were incarcerated after you were arrested for the DUI you may be given credit for time served, assuming you served more than 24 hours in jail.

Sentencing Enhancements

A sentencing enhancement refers to a situation or fact in your case that the prosecutor and/or judge will potentially use against you to increase the penalties if you are convicted. Facts that could be considered to enhance your punishment (meaning, more jail to serve) would include:

- a child (or any passenger) in the vehicle;
- excessive speed;
- an exceptionally high BAC reading (over 0.15);
- refusing the submit to a blood or breath test;

- an accident, property damage, or injury arising out of the DUI;
- prior related offenses.

Work Release

Work release is an alternative to jail that permits you to work during the day and then return to jail in the evening. You must get permission from the judge and then must be approved by the local corrections facility (or probation department) to participate in the work release program. You will be charged by the day for this privilege. The catch is that typically you must be sentenced to at least 10 days in jail (15 days in jail in some jurisdictions) before you become eligible to apply for work release. This may not be an option in some courts so discuss this option with your attorney prior to sentencing.

Electronic Home Monitoring

Electronic home monitoring (EHM) is "electronic jail" that is served in your home and is imposed at the discretion of the Judge if you are convicted of DUI. If EHM is granted by the judge, you must still "qualify" for it by means of an application through the jail where it is ordered to be served. Generally, the jail administrators screen out persons they feel pose "problems" or "risks."

The availability of EHM as an alternative to jail is dependent on jurisdiction, so it's important that your attorney be familiar with the court and the prosecuting attorney and their practice when it comes to EHM. If EHM is not permitted as an alternative to jail as an option for the court there may be another way to petition the court to grant EHM. A judge may grant EHM as an alternative to jail if the defendant has medi-

cal needs that make jail time impractical (for the defendant and jail staff) or medically harmful. In Washington State EHM is mandatory in addition to jail time when the DUI is the second or third in a seven year period.

EHM uses a computerized box which is attached to your telephone (so you need a land line phone) which establishes a radio link with an electronic ankle bracelet you are required to wear while in detention. Some EHM devices are more sophisticated than others and also may require alcohol breath testing without notice. The most sophisticated devices have the capability to use voice recognition technology and Global Positioning Satellites (GPS) to constantly track, record and report your location. All EHM devices monitor your movements and if you walk beyond a prescribed distance, the computer calls the central monitoring computer and "reports" a violation. EHM is not free and if permitted you will pay for such a "privilege." There is a cost for EHM so please consult with your attorney.

It is likely that EHM will likely continue to grow in use as the technology increases in sophistication, decreases in price and the cost of confinement in jail continues to rise, and the punishment continues to increase for a conviction for DUI. Additionally, the number of people filling the jails continues to increase and jurisdictions are eager to find alternatives to filling the jails.

Community Service

Community service for DUI offenders was developed in the 1980s as an alternative to jail because of high jail costs and limited available space. Whether community service is permitted is ultimately up to the presiding judge.

Once you qualify for community service and it has been approved by the judge, you will be provided a jail commitment date and the opportunity to complete the community service prior to the commitment. If you successfully complete the community service you will not need to appear for your jail commitment. On the other hand, if you do not complete the community service you will still need to appear.

Community service involves working at a not-for-profit organization. Depending on the court, you may be limited to specific organizations to serve your community service. Be sure to check with the court, or better yet, have your attorney check into this. Typically, organizations that would be approved include the Salvation Army, Food Banks, Food Kitchens, City Parks and Recreation, Library's, and so on. You will need to provide proof of your service to the court after you complete the hours. Proof should be on the not-for-profit's letterhead and signed by an executive of the organization.

You should be warned that many judges (particularly those in King County) will not permit you to perform community service in lieu of jail. It is important to know your judge.

Work Crew

Work crew is an alternative sentencing program that is designed to reduce jail overcrowding by providing minimum risk offenders a work option to meet court obligations. If the jurisdiction in which you are charged permits work crew, you must first qualify and be referred to the work crew program from the court. To qualify for the program you will be screened first to ensure that you qualify. Once you qualify you will be assigned work and your work will be monitored to ensure that you complete all of the assigned tasks.

It is important to know the jurisdiction where your DUI occurred as some offer work crew in lieu of jail while others do not. Such jurisdictions that generally permit the work crew option in lieu of jail are King and Snohomish Counties (King County more than others). Be advised though that work crew does not replace mandatory jail and can be used when the DUI is amended to a lesser offense where jail is not mandatory.

DUI Victim Impact Panel

Another requirement of probation that is generally imposed at sentencing is a DUI victim impact panel. While this is not a mandatory requirement, practically speaking every judge imposes this sanction. The DUI victim impact panel is a community meeting where volunteers who have been victims, offenders, and witnesses of DUIs give testimonies regarding their experiences they have endured due to the actions of drivers under the influence. The panel's focus is to encourage people to be responsible for their choices. It goes without saying, but it still must be said, you must be completely sober when attending.

Ignition Interlock Device

The ignition interlock device (IID), or breath alcohol ignition interlock device (BIID)), is gaining popularity in governmental circles, court systems, and advocates against the crime of driving under the influence. The device is a breath test type apparatus that is connected to the vehicle's dashboard, or more correctly to its ignition mechanism. The instrument requires the driver to provide a breath sample before allowing the vehicle to start. If the breath sample renders a clean result (i.e. a blood alcohol concentration reading below the permit-

ted amount (usually, 0.00, 0.02, or 0.04 per cent) the vehicle's engine will start. Alternatively, if the driver provides a breath sample that is over the required amount then the vehicle will not turn over and the failed attempt will be reported to the governing agency.

While the vehicle is in motion (or the engine is turned on) the IID will randomly require the driver to provide another breath sample. The time between required breath samples is dependent on the calibration of the unit, however typically random breath samples are required every 10 to 20 minutes while the vehicle is in operation. The purpose behind the random breath sample is to prevent a driver from having a "sober" friend blow into the device starting the vehicle. If the requested breath sample is not provided or exceeds the required limit, the device will record the incident, warn the driver and then start up an alarm (e.g., lights flashing, horn honking, etc.) until the ignition is turned off, or a clean breath sample has been provided.

A common, but inaccurate belief is that interlock devices will turn off the vehicle's engine if alcohol is detected. Due to the fact that this would then create an unsafe or dangerous driving situation that would expose interlock manufacturers to substantial liability, a vehicle's engine does not turn off if a breath sample detects too much alcohol on a driver's breath. It is physically impossible for an interlock device to turn off a running vehicle.

The devices keep a running record of the activity on the unit and this record, or log, is printed out or downloaded each time the device's sensors are calibrated, commonly at 30, 60, or 90-day intervals. In the DUI realm these records are provided to the courts for probation review and to the

Department of Licensing in some instances. If the court still has jurisdiction and a violation is detected the court may require the driver to re-appear and possibly face addition sanctions.

Secure Continuous Remote Alcohol Monitor (SCRAM)

The "Secure Continuous Remote Alcohol Monitor system," or more commonly known as SCRAM, is a water and tamper-resistant Bracelet that collects, stores and transmits measurements of an individual's blood alcohol content (BAC). The SCRAM device is made by a company named AMS, was developed in 1991, first introduced in 2003, and now is used in more than forty states.

The device is considered a transdermal alcohol sensor and measures alcohol that is lost through the skin from sweat. The device utilizes three technologies that work simultaneously, yet separately, namely the transdermal Alcohol Content (TAC) for alcohol detection, as mentioned, thermometer for determination of body temperature of the subject, and infrared signal system for detection of distance from the skin to the SCRAM unit. The gadget, worn as an ankle Bracelet, "sniffs" every 30 minutes and transfers data via a wireless connection to a probation officer or other law-enforcement official. The device can also detect tampering. This device is used frequently in courts where Judges impose conditions of release after an arraignment or preliminary hearing or by probation departments after sentencing.

While it is true that all courts have the ability to impose a SCRAM bracelet, some courts utilize this option more than others. Such courts include Seattle Municipal Court, Lynnwood

Municipal Court, Marysville Municipal Court, Skagit County District Court and Island County District Court.

Restitution

Restitution is money that you would pay if there was any physical damage that resulted from your arrest and charge for DUI. For example, if there was an accident you must provide proof that you paid for all the damages that you were liable for (or the insurance deductible). If there is a plea agreement that results in a criminal conviction, whether it be the original charge of DUI or a lesser offense, or if you enter into a deferred prosecution, the court will have the ability to order that you pay restitution. If the amount of restitution is known, you must pay this amount within a prescribed period of time (typically 30 to 90 days). If the amount of restitution is not known, the court will request that the prosecuting attorney contact the victim and request an amount (with supporting evidence) to be forwarded to the court. The court will demand that the amount of restitution is provided to the court within a certain amount of time, typically within 30 to 90 days of the order. If the prosecutor fails to provide the court with this information you will not have to pay the restitution. On the other hand, if the amount of restitution provided appears to be too much and you dispute the amount, you will be afforded the ability to request a "restitution hearing" to argue the validity of the amount.

Insurance

If you are convicted of a DUI (or your license was suspended in the administrative hearing) you will be required to obtain SR-22 automobile liability insurance for a period of at least three years.

When you are eligible to have your license reinstated you must go to the Department of Licensing and make an application for reinstatement. The SR-22 form must be taken to your insurance company who then completes the form and mails it directly to the Department of Licensing. The insurance company acknowledges responsibility for reporting any lapse in insurance coverage directly to the Department of Licensing, which may result in an additional suspension of your driver's license.

There are restrictions that coincide with this type of insurance. Such restrictions include the ability to drive only specific cars that are actually included in the policy. Practically speaking however, the biggest effect that SR-22 insurance has is increased insurance costs. How much more expensive is dependent on your age, the type of car being insured, driving record, type of coverage, limits of coverage, and the insurance company itself. The higher risk, and therefore higher cost, refers to the fact that the insurance is covering a convicted DUI driver. The requirement of having high-risk insurance for a period of at least three years is one of the harshest economic consequences of being arrested for DUI.

Costs

The fines that you are required to pay for a DUI or a lesser offense are, unfortunately, only part of the story. You may also potentially be responsible for the BAC Fee (now $200); an emergency response fee; filing and conviction fees; overtime for officers (this unseemly practice occurs in the cities of Lynnwood, Edmonds, Mukilteo, Snohomish, Mountlake Terrace, Lake Stevens and Mill Creek) and finally, there will be probation costs that can be extraordinarily expensive.

3

Washington State Law and Statutes

Driving Under the Influence (DUI)

RCW 46.61.502

Unfortunately we cannot avoid looking at the statute for the explanation of a DUI. This is the case because a DUI is the creation of the Legislature who decided what the definition of a DUI was and what the blood alcohol content limit would be. As a result, it is the statute in each state that defines what a DUI is and it is this definition that the prosecutor must prove beyond a reasonable doubt.

In Washington State a person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within the state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or
(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

Looking at the statute it is clear that it is not only the excessive consumption of alcohol that can place the driver in fear of being arrested for a DUI, but also the use of drugs, legal or illegal, that can put in criminal jeopardy a driver of a motor vehicle. Further, lawful use of a prescription drug is not a defense to a charge of DUI.

Physical Control

RCW 46.61.504

The law states that you are in physical control of a motor vehicle if you are in a position to physically operate and control a motor vehicle. You do not need to be moving the car or even have moved the car to be properly charged with the offense. Over the years this law has been somewhat refined and now there is a requirement that you not only be in a position to physically operate a motor vehicle but also have the means to do so. Typically this involves having the ignition keys in close proximity or in the ignition switch.

The statute for Physical Control, RCW 46.61.504, reads as follows:

(1) A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if the person has actual physical control of a vehicle within this state:
(a) And the person has, within two hours after be-

ing in actual physical control of the vehicle, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or

(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

The statute for this offense is not very helpful in defining the element of "physical control." However, case law helps to a degree as it is defines being in "actual physical control of a motor vehicle" as having the authority to manage a reasonably operable vehicle or is in a position to regulate movement of the vehicle. *State v. Smelter*, 36 Wn. App. 439, 674 P.2d 690 (1984).

In a practical setting, if you are "drunk" and in your car with the engine running to warm your vehicle while you sober up you have committed a crime. Therefore, even though you have made the correct decision not to drive, you can be charged with physical control. Sounds harsh and perhaps it is.

The statute does help in defining the defense to this crime. The statute states specifically that being "safely off the roadway" is a defense to the crime. A regular DUI is not afforded such a defense. *State v. Hazzard*, 43 Wn. App. 335, 717 P.2d 282 (1986), *State v. Beck*, 42 Wn. App. 12, 707 P.2d 1380 (1985), review denied, 105 Wn.2d 1004 (1986). Because this particular defense is so valuable there are many instances where officers actually charge a DUI rather than physical control to eliminate the possibility of this defense. To do so

the driver must actually be seen driving prior to pulling off the roadway.

In utilizing the defense of safely off the roadway you must remember the definition of "roadway," as it is rather broad. "Roadway" is defined as "that portion of a highway improved, designed, or used for vehicular travel exclusive of the sidewalk or shoulder." RCW 46.04.600. Interestingly, a private parking lot may be considered a roadway, if there is a threat posed to the public. *Edmonds v. Ostby*, 48 Wn. App. 867, 740 P.2d 916, review denied, 109 Wn.2d 1016 (1987).

Juvenile DUI (Minor DUI)

RCW 46.61.503

Under Washington law, it is a crime for a person under the age of 21 to drive or to be in physical control of a vehicle after consuming alcohol with an alcohol concentration over 0.02. This is a strict standard and is treated with zero tolerance. The amount of alcohol required to get to a level of 0.02 is minimal, less than one beer or a glass of wine. Such a violation has grave consequences and may result in a criminal charge, an arrest, license suspension, and possibly jail.

The statute for a juvenile DUI, RCW 46.61.503, reads as follows:

> (1) Notwithstanding any other provision of this title, a person is guilty of driving or being in physical control of a motor vehicle after consuming alcohol if the person operates or is in physical control of a motor vehicle within this state and the person:
>
> (a) Is under the age of twenty-one;
>
> (b) Has, within two hours after operating or being in

> physical control of the motor vehicle, an alcohol concentration of at least 0.02 but less than the concentration specified in RCW 46.61.502, as shown by analysis of the person's breath or blood made under RCW 46.61.506.

A "minor DUI" is a misdemeanor and has a maximum penalty of 90 days in jail and a $1,000 fine. Additionally, in all likelihood there will be probation for up to two years and the conditions imposed by the court at sentencing will certainly include an alcohol assessment and follow up (an 8 hour alcohol awareness class or lengthy alcohol treatment), the attendance at a DUI victim's panel, and possibly community service or jail time.

Additionally there is also the possibility of a 90 day license suspension imposed by the Department of Licensing for those arrested for a minor DUI. This suspension occurs irrespective of the outcome in the criminal case.

Finally, if you are a minor and have a breath rest result of .08 or greater, or if the prosecutor can prove that you were impaired at the time of driving, you can also be prosecuted for an adult DUI and be facing the same consequences, including mandatory jail.

Reducing the DUI Charge

The objective of any DUI attorney is to ensure that their client does not end up with a DUI on their record. Clearly the hope is that the DUI is dismissed and that all related charges disappear. While this does occur from time to time, the reality is that most cases with a qualified DUI attorney are disposed of with the amendment of the DUI charge to a lesser offense.

Equally as true is that occasionally DUI cases present very few defenses and have circumstances that do not lend themselves to an amendment and then the job of the attorney is to mitigate the damage that has already been done.

The facts of the DUI usually dictate what will ultimately happen with the charge. If you have a BAC reading of more than twice the limit and all available defenses cannot be successfully challenged, or all challenges have failed, the chance of having the DUI charge amended to a lesser offense becomes a difficult proposition. Further, if there is an accident or there are passengers in the vehicle who are minor children, it becomes an even more difficult proposition to have the DUI charges amended to a lesser offense. At times when all legal defenses have been challenged but have failed your attorney has to be adept at mitigating the damage. In other words, worst case scenario your attorney has to ensure that your DUI case doesn't go from bad to worse with the addition of greater penalties, including more jail. In cases with high BAC readings (over 0.15), when an amendment to a lesser offense is not an option, your attorney may be able to work an offer of "no BAC reading," which may help with a license suspension and will lower mandatory jail and fines.

Reckless Driving

RCW 46.61.500

Reckless driving is a crime in Washington State and is a "gross-misdemeanor" and punishable by up to 364 days in jail and a fine of $5000. Unlike DUIs there is no mandatory penalty sentence and therefore no mandatory jail. Another significant difference is that probation is 2 years in length,

not 5 years as it is in a DUI. Lastly, reckless driving is a non-alcohol related crime.

If convicted of reckless driving there is an automatic license suspension of 30 days. This suspension will not take effect immediately but you will receive notice from the DOL after the court approves of the plea. The court then forwards the plea of Reckless Driving to the DOL and the DOL then issues the suspension. The suspension will result in the requirement of SR-22 insurance for 3 years.

If you are not a citizen of the United States you should be careful when considering a plea to Reckless Driving. While immigration laws are evolving and Reckless Driving no longer appears to equal an immediate deportation ticket, it still is dangerous territory so if you are not an American citizen be certain that you consult with an immigration attorney prior to accepting an offer of Reckless Driving.

The statutory definition of Reckless Driving is:

(1) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving. Violation of the provisions of this section is a gross misdemeanor punishable by imprisonment of not more than one year and by a fine of not more than five thousand dollars.

(2) The license or permit to drive or any nonresident privilege of any person convicted of reckless driving shall be suspended by the department for not less than thirty days.

Reckless Endangerment

RCW 9A.36.050

It is not uncommon to see the charge of Reckless Endangerment charged along with a DUI or, have the threat of a charge of Reckless Endangerment being added to your DUI charge. Typically this charge is considered if you have passengers in your vehicle. Additionally, in some instances your DUI charge may be amended to Reckless Endangerment. Such an amendment may occur when Reckless Driving is not acceptable due to the required 30 day license suspension. Reckless Endangerment does not have a mandatory driver's license suspension.

The statutory definition for Reckless Endangerment, RCW 9A.36.050, reads as follows:

> A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.

Negligent Driving in the First Degree

RCW 46.61.5249

Negligent Driving in the First Degree is a Misdemeanor and has a maximum penalty of 90 days in jail and a $1,000.00 fine. Additionally, like Reckless Driving, there are no mandatory penalties with this charge and subsequent conviction. There is no driver license suspension, no mandatory jail, and no mandatory requirement to carry SR-22 high risk insurance.

It is important to remember that unlike a DUI you do not need to be impaired to be convicted of Negligent Driving in the First Degree. Technically, if you have a sip of beer and

drive in a negligent manner you can be arrested for Negligent Driving in the First Degree.

The statutory definition of Negligent Driving in the First Degree, RCW 46.61.5259, reads as follows:

> A person is guilty of negligent driving in the first degree if he or she operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property, and exhibits the effects of having consumed liquor or an illegal drug.

Negligent Driving in the Second Degree

RCW 46.61.525

With the exception of a dismissal, the amendment of a DUI charge to Negligent Driving in the Second Degree is regarded the best possible result possible. Negligent Driving in the Second Degree is not a criminal offense but a civil traffic infraction. Therefore this offense does not result in a criminal conviction and hence there is no jail.

The statutory definition of Negligent Driving in the Second Degree, RCW 46.61.525, reads as follows:

> (1)(a) A person is guilty of negligent driving in the second degree if, under circumstances not constituting negligent driving in the first degree, he or she operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property.

Pre-Trial Diversion Agreement

The Pre-Trial Diversion Agreement, also known as a "Stipulated Order of Continuance" is perhaps a dying breed. The agreement is between you and the City or State and in essence puts you on "probation" for a set period of time with certain conditions, such as lawful behavior, an alcohol/drug evaluation and follow up (treatment or ADIS), DUI Victim's Panel, and a fine. In exchange, at the end of the agreement your case will be either dismissed or amended to a lesser charge. On the other hand, if you do not follow through with the conditions the agreement will be revoked, there will be no trial, and the judge will simply read the police report and almost certainly find you guilty of the charge or charges. There is much at stake but in many instances this type of agreement works well for both those charged with a crime and the jurisdiction.

Unfortunately in Washington State, the Supreme Court has questioned the validity of these agreements. As a result most State courts are now not offering these agreements although there are a few municipal courts that still do. Examples of courts that still permit the pre-trail diversion agreement include Lynnwood, Everett, Edmonds and Island County District Court.

Penalties

The penalty phase has been addressed elsewhere in the book and the specific penalties for Washington State are at the beginning of this chapter. However, mandatory electronic home monitoring (EHM) for repeat DUI offenders must be readdressed. Although EHM is mandatory if the defendant has a prior offense within 7 years, under certain conditions EHM

may be waived by the Judge.

If you have a prior DUI offense within 7 years (or the DUI was amended to another criminal charge), EHM is mandatory and in addition to actual jail. In cases where EHM is mandatory it may not be waived by the court except under limited circumstances as detailed in RCW 46.61.5055(10):

A court may waive the electronic home monitoring requirements chapter when:

(a) The offender does not have a dwelling, telephone service, or any other necessity to operate an electronic home monitoring system;
(b) The offender does not reside in the state of Washington;
(c) The court determines that there is reason to believe that the offender would violate the conditions of the electronic home monitoring penalty.

4

The DUI Stop and Contact

The first indicator that a driver may be under the influence usually comes from an officer's observation of the individual's driving (or phone calls from citizens to 911). Moreover, with limited exceptions an officer must observe driving that creates reasonable suspicion of criminal activity or otherwise violates the traffic code before making any contact with the driver. Specifically, the Supreme Court in the seminal case *Terry v. Ohio,* 392 US 1 (1968) stated that a Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect and has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime. Moreover, this reasonable suspicion must be based on "specific and articulable facts" and not merely upon an officer's hunch. To that end, and again, with limited exceptions, officer's must observe specific facts that they can articulate in order to validate a stop.

The first phase of DUI detection, according to NHTSA, is

observing the vehicle in motion. It is this first phase that the officer is trained to observe initial cues of a possible DUI driver. The officer is looking for the vehicle to display maneuvers or human behaviors that may be associated with impairment. Such observations may cause the officer to develop an initial suspicion of DUI.

NHTSA states that an officer's attention may be drawn to the vehicle by such things as:

- a moving traffic violation;
- an equipment violation;
- an expired registration or inspection sticker;
- unusual driving actions, such as weaving within a lane or moving at slower than normal speed; or
- "Evidence of drinking" or drugs in vehicle.

In addition to observations made by an officer that rise to reasonable suspicion of criminal activity, an officer may also validate a stop of a vehicle if he observes a simple traffic violation. The following is a list of the traffic violations and their related indicia of intoxication. The corresponding number is the percentage that the driver has a blood-alcohol concentration of 0.10 percent or higher. *(note: NHTSA supports these findings with their own validation studies although these studies should be viewed with caution as they are not accepted by all in the scientific community)*

Turning with Wide Radius	65 %
Straddling Center or Lane Marker	65 %
Appearing to be Drunk	60 %
Almost Striking Object or Vehicle	60 %

Weaving	60 %
Driving on Other Than Designated Roadway	55 %
Swerving	55 %
Slow Speed (more than 10 mph below limit)	50 %
Stopping (without cause) in Traffic Lane	50 %
Drifting	50 %
Following too closely	45 %
Tires on Center or Lane Marker	45 %
Braking Erratically	45 %
Driving Into Opposing or Crossing Traffic	45 %
Signaling Inconsistent with Driving Actions	40 %
Stopping Inappropriately (other than in lane)	35 %
Turning Abruptly or Illegally	35 %
Accelerating or Decelerating Rapidly	30 %
Headlights Off	30 %

In addition to observing behavior that gives rise to the suspicion of possible criminal activity and/or observing a traffic violation, there is a third way in which an officer can lawfully stop or contact a driver. This falls under the general heading of "community caretaking." The idea behind this principal is that law enforcement is permitted to stop or contact a driver when the officer "wishes to warn a driver about some impending peril," *State v. Chisolm,* 39 Wn. App. 864 (1985) or if the driver is in need of assistance (ie. was in a motor vehicle accident and is injured). However, the community caretaking role is ripe for abuse and when the "officer's concerns have ended, the officer has no further reason to proceed with any additional investigative efforts and the community caretaking function ends." *State v. DeArman*, 54 Wn. App. 621 (1989); *Barrett v. Comm.,* 435 S.E.2d 902 (Va. App. 1993); *State v.*

Cryan, 727 A.2d 93 (N.J. Super. 1999)

Based upon the initial observations of the vehicle in motion, the officer must then decide whether there is reasonable suspicion to stop the vehicle. At this point the officer has three choices:

- stop the vehicle;
- continue to observe the vehicle; or
- disregard the vehicle.

NHTSA, U.S. Department of Transportation, *DWI Detection and Standardized Field Sobriety Testing, Student Manual*. HS 178 R8/06, V-1. (2006)

For more detailed information about DUI investigations refer to *The DUI Investigation Handbook*. Jolly, David N. *The Drug Investigation Handbook*. Outskirts Press (2011)

5
Field Sobriety Tests

Phase Three of the pre-arrest screening in the DUI investigation process has two major evidence gathering tasks and one major decision, according to NHTSA. The officer's first task in Phase Three is to administer three psychophysical (field) sobriety tests. NHTSA declares that these tests are "scientifically validated" however, this assertion is not universally accepted and will be detailed later in the chapter. Importantly these tests are voluntary and the officer must inform the driver of this fact. NHTSA states that based on these tests and on all other evidence gathered from Phase One and Two, the officer must decide whether there is sufficient probable cause to arrest the driver for DUI.

Following the three standardized field sobriety tests the second task the officer has at his/her option is to administer a preliminary breath test (PBT) to confirm the chemical basis of the driver's impairment. Like the field sobriety tests, the PBT is completely voluntary and the driver may refuse to provide

a breath sample. NHTSA does advise the officer that "PBT results cannot be introduced as evidence against the driver in court," although it "can help to corroborate all other evidence and to confirm" the officer's judgment of the driver's impairment. NHTSA, U.S. Department of Transportation. *DWI Detection and Standardized Field Sobriety Testing, Student Manual*. HS 178 R8/06, Page VII-7-8 (2006)

Following this second task (and in some cases prior to this second task) the officer must decide whether to arrest the driver for suspicion of DUI. The decision to arrest the driver for DUI is based on all of the evidence the officer has obtained during all three detection phases, namely the observations of the vehicle in motion, face to face observations and the interview of the driver, performance on field sobriety tests and the PBT. According to NHTSA the DUI "detection process concludes with the arrest decision. NHTSA, U.S. Department of Transportation. *DWI Detection and Standardized Field Sobriety Testing, Student Manual*. HS 178 R8/06 (2006)

PERFORMANCE

Once the driver has been detained and there is suspicion of possible intoxication, the officer must then utilize tools at his/her disposal to further detect indicators of impairment. Field sobriety tests have been used throughout the past century in one form or another by police officers to help them assess whether an individual is too impaired to drive an automobile. These tests were initially not very sophisticated and included the smell of alcohol on the breath, the ability of a person to walk a chalk line, and various behavioral signs and symptoms of inebriation. Prior to NHTSA standardizing field sobriety tests in the 1980s, such tests in the United States had

little consistency, no standardization, and as a result questionable reliability: "[b]ecause of the inconsistencies in the experimental procedures and approaches used by investigators, few generalizations regarding the influence of alcohol on performance can be advanced." *The Effect of Alcohol on Human Performance: A Classification and Integration of Research Findings*. American Institutes for Research. Page iv. (May 1973)

STANDARDIZED FIELD SOBRIETY TESTS

Horizontal Gaze Nystagmus (HGN)

The technical definition of nystagmus is the rhythmic back and forth oscillation of the eyeball that occurs when there is a disturbance of the vestibular (inner ear) system or the oculomotor control of the eye. There are two major types of eye movements: pendular and jerk. Pendular nystagmus is where the oscillation speed is the same in both directions. Jerk nystagmus is where the eye moves slowly in one direction and then returns rapidly. Most types of nystagmus have the fast and slow phase (jerk nystagmus). Horizontal Gaze Nystagmus (HGN), which is the type of nystagmus used in DUI investigations, is a type of jerk nystagmus with the jerky movement toward the direction of the gaze. Adams, Raymond D. & Victor, Maurice. *Disorders of Ocular Movement and Pupillary Function*. Principles of Neurology. Ch.13, 117 (4th ed. 1991)

The Horizontal Gaze Nystagmus test in the DUI investigation process involves the officer looking for up to six clues in the driver's eyes. These six clues consist of three maximum clues that can be observed in each eye. According to NHTSA studies if the driver exhibits four or more clues the officer can

consider the driver to be under the influence of alcohol.

Vertical Gaze Nystagmus

The Vertical Gaze Nystagmus (VGN) is not officially a "standardized" field sobriety test although NHTSA does group it in with the HGN in their student manual. Therefore all officers are taught how to administer it and the great majority of officers do administer this test immediately following the HGN.

Administering the VGN is very much like the HGN except that the stimulus is moving vertical, not horizontal. During the VGN test the officer is looking for jerking in the subject's eyes as the stimulus is moved up and held for approximately four seconds at maximum elevation.

Walk and Turn

The walk and turn test is a "divided attention" test that is designed to determine the subject's balance, listening skills, and ability to follow instructions. In this test the participant stands in a heel-to-toe fashion with arms at their sides while a series of instructions are given by the officer. Following the instructional phase the suspect must then take nine heel-to-toe steps along a line, turn in a prescribed manner, and then take another nine heel-to-toe steps back along the line. All of this must be done while counting the steps aloud and keeping the arms at the sides. The individual is informed not to stop walking until the test is completed.

NHTSA warns the officer that this test requires a "designated straight line and should be conducted on a reasonably dry, hard, level, non-slippery surface." *DWI Detection and Standardized Field Sobriety Testing, Student Manual*. NHTSA;

U.S. Department of Transportation. HS 178 R8/06, Page VIII-11 (2006) Additionally, the officer is informed in the manual that original research indicated that individuals over the age of 65, and those with back, leg or middle ear problems had difficulty performing the test. Subjects wearing heels more than 2 inches high should be given the opportunity to remove their shoes. *Id.* Over the years however, some of the original instructions and provided information has been deleted from subsequent student manuals.

The walk and turn test has a maximum of eight observable clues in the DUI investigation context. The officer is also trained to observe and note any other noteworthy evidence while the driver is performing the test. Additionally the officers are advised to note how many times each of the eight clues appears, even though a clue may only be counted once despite it appearing more than one time.

NHTSA advises that if the driver exhibits at least two clues on the walk and turn test it should be considered evidence that they may be under the influence of alcohol or drugs.

One Leg Stand

The one leg stand test, like the walk and turn field sobriety test, is a divided attention test that is designed to determine the subject's balance, listening skills, and ability to follow instructions. In this test the participant is required to stand on one leg while the other leg is extended in front of the person in a "stiff-leg" manner. This extended foot is to be held approximately six inches above and parallel with the ground. While this is occurring the person is instructed to stare at the elevated foot and count aloud until told to stop, by counting "one thousand and one, one thousand and two, one thousand

and three," and so on.

Also like the walk and turn test this test requires a "reasonably dry, hard, level, and non-slippery surface." NHTSA; U.S. Department of Transportation. *DWI Detection and Standardized Field Sobriety Testing, Student Manual*. HS 178 R8/06, Page VIII-11 (2006) Further, the officer has knowledge that original research indicated that individuals over the age of 65, and those with back, leg or middle ear problems had difficulty performing the test. Subjects wearing heels more than 2 inches high should be given the opportunity to remove their shoes. *Id*.

NON-STANDARDIZED FIELD SOBRIETY TESTS

While the standardized field sobriety tests are now common place and regularly practiced by law enforcement when investigating a possible DUI driver, the non-standardized field sobriety tests are still used on a regular basis. Obviously the validity of these tests remains questionable. Of the non-standardized field sobriety tests the most common include the Romberg balance (standing with feet together, hands at his side, head tilted back, and eyes closed), finger to nose, the alphabet, count down, and finger count tests.

> For more detailed information about field sobriety tests refer to *The DUI Investigation Handbook* and *The Field Sobriety Test Handbook*. Jolly, David N. *The DUI Investigation Handbook*. Outskirts Press (2011); Jolly, David N. *The Field Sobriety Test Handbook*. Outskirts Press (2012)

6

Breath/Blood Testing

Once you have been arrested for DUI you must immediately be notified of your constitutional rights. It is at this time the next phase of the DUI investigation begins, namely the gathering of "scientific" evidence to prove your level of impairment. However, before the officer can begin the breath or blood testing process he must follow specific protocol to obtain a valid breath or blood test.

Constitutional Rights (*aka* Miranda Rights)

If the officer has sufficient facts that would justify a reasonable suspicion that you have been driving under the influence of alcohol, he will arrest you, handcuff you and transport you to the police station for a breath test. At the police station you will be requested to provide a sample of your breath, blood, or urine (in some states). While being transported, the officer may advise you of your Constitutional Rights (*Miranda* rights).

Some of the most damaging evidence in a DUI case, as in most criminal cases, often comes from the defendant's own mouth: admissions. Although the statements may be spontaneous and therefore unable to be suppressed based on Miranda, they usually come in reply to questions asked by the arresting officer. These questions tend to follow routine and are generally designed to determine what and how much you had to drink.

Typically, the admissions made in a DUI case occur close to when you should be given your Miranda advisements and therefore warned of the danger of making statements. The usual prosecution argument is that although the defendant was not free to leave (which should trigger Miranda), the questioning was part of a preliminary investigation, conducted before the individual had been placed in custody, and thus the advisements were not yet required. In reality the officer usually decides at a very early stage that the suspect was intoxicated and will be arrested, even prior to the preliminary investigation. Prior to the questioning the officer usually has observed such signs of intoxication as erratic driving, alcoholic breath, bloodshot eyes, thick and slurred speech, and staggering out of the car. Even if you choose to say nothing, it is very likely that the officer will arrest you anyway. Many of my clients tell me that they make statements hoping to talk their way out of the arrest. This never happens so don't make that mistake.

Implied Consent Warnings (ICW)

The law demands that you be read the implied consent warnings or are advised of the implied consent warnings prior to the administration of a breath or blood test. The implied

consent statute provides that any person who operates a motor vehicle is deemed to have given consent to a test or tests of breath or blood (and urine in some states) if arrested for any offense where the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of liquor or drugs.

To be valid the warnings must be timely and to be timely, the warnings must be given in advance of the time you are asked to provide a breath sample. For you to properly decide whether to submit to a breath test, the officer must accurately advise you of the right to refuse the test as well as the consequences of such a refusal. The law states that an implied consent warning is sufficient if it permits "a person of normal intelligence" to understand the consequences of his actions. The warning must only permit the opportunity to make a knowing and voluntary decision.

If the warnings confuse you about your rights under the implied consent statute, you may claim that you had no reasonable opportunity to make an informed decision about whether to take the test. However, you must communicate this confusion to the officer in order to later make such an argument.

Breath Testing (BrAC)

Breath testing in the DUI context has remained the work horse over the years in providing law enforcement with scientific evidence of impairment. Law enforcement has advocated that breath testing remains a relatively reliable form of obtaining the BAC from an individual and furthermore, it remains a relatively inexpensive manner of evidentiary testing. Naturally

there is also much criticism regarding the reliability of breath testing. *Note: technically a breath test sample uses the acronym BrAC (a blood test sample is a BAC), but courts, police officers, prosecutors and defense attorneys most often refer to breath testing evidences as BAC, and for consistency I shall do the same in this book.*

There is little debate in the DUI community that breath testing is an inferior method of testing an individual's blood alcohol concentration in comparison to blood. However, it is equally agreed that breath testing does have some advantages over a blood draw, those primarily being that it is cheaper, faster, gives immediate results, and is less invasive. The biggest problem with a breath test compared with a blood test is reliability. The primary factors that can potentially affect the accuracy of a breath testing machine include physiological factors, machine characteristics, and administrative practices.

Blood Testing

A blood draw in lieu of a breath test is an option available in many states. Blood draws, when performed properly, are generally more accurate. However, even if the blood draw is an "option," it may not be *your option*!

In many states, including the State of Washington, a blood draw is an alternative to a breath test if you are under arrest for vehicular homicide, vehicular assault, if you are unconscious (and were arrested for DUI, physical control, or minor under the influence), or a DUI arrest resulting from an accident with serious bodily injury. The other way that a blood draw may be administered is if you are physically unable to provide a breath sample (ie. asthma, emphysema).

Washington States requires that no person other than a physician, registered nurse or a phlebotomist qualified by the state can draw the blood for purposes of determining the alcohol concentration. Further, specific guidelines stating how these tests are to be taken, transported, preserved, secured, and analyzed must be strictly adhered to.

7

Alcohol/Drug Evaluations, Classes And Treatment

In the context of driving under the influence, alcohol and drug use is front and center. While the great majority of DUI offenders are not substance abusers who require treatment, for those who are there exists another very real dilemma, re-offending. As a result most courts will order the defendant charged with DUI to undergo an alcohol/drug evaluation to determine whether they suffer from substance dependency. Moreover, advocates such as MADD vigorously campaign for mandatory alcohol or drug evaluations in the court environment.

Mandatory Alcohol/Drug Evaluations

Mandatory alcohol/drug evaluations and treatment of DUI offenders to address potential substance abuse problems has support in law enforcement, in the judiciary, and organizations such as MADD. The idea is that if the offender is

evaluated, found in need of treatment, and thereafter is treated for substance abuse issues then the chance of repeating the crime of DUI is diminished. Wells-Parker, E., Bangert-Drowns, B., McMillen, R. & Williams, M. *Final results from a meta-analysis of remedial interventions with DUI Offenders*. Addiction. 90:907-926 (1995)

Completing an alcohol/drug evaluation may be compulsory for you if you have been arrested for DUI, regardless of the eventual outcome. It is essential that you do not randomly choose a treatment center. This is an area where direction from your attorney is critical.

Regardless of whether the evaluation is court ordered or if you do it on your own you must be evaluated by a certified counselor in an alcohol program approved by the department of social and health sciences. The evaluation is typically two hours in length and involves your participation in the self reporting questionnaires (MAST and DAST) and an interview with the alcohol/drug counselor. The face to face interview may involve the counselor asking you follow up questions from the questionnaires or alternatively asking you questions about your family history (regarding relatives you may have had substance abuse problems) and your general drinking (or drug use) patterns.

As mentioned, you must get the evaluation from a certified facility. There is no list of approved agencies in this book because the list is voluminous. Also, it is best to get a referral from your attorney because there are some treatment agencies that are better than others. It is important to remember that these agencies are businesses and they make most of their money from treatment, hence there is a willingness by many to quickly recommend treatment when perhaps it is

not necessary. Also, your attorney can recommend certified treatment agencies so you do not waste your time and money attending a non-certified treatment facility

When you go to the evaluation you will be required to bring the following information:

- A copy of your five-year driving abstract or record, which is available at your nearest state patrol or department of licensing office;
- A copy of your police report and BAC ticket (Describes the "what, why, when, and where's" of your arrest); and
- A copy of any court orders or citations.

The alcohol evaluation is to determine whether you are alcohol dependent and whether you should receive alcohol treatment. The alcohol treatment facility will then prepare a treatment recommendation for the court. If you sign a release form giving permission for the treatment provider to release a copy of the evaluation, a copy will be provided to your attorney, the court and the Department of Licensing (if applicable). It is my firm recommendation that you only sign a release to your attorney who can first review the evaluation to confirm that it is accurate and reflects your combined expectations. Based on this diagnoses and recommendation, the court must order an offender to complete either an approved alcohol drug information school (ADIS) or a more intensive treatment program. See below for more details on ADIS.

If you are evaluated you must be evaluated in accordance with the criteria that has been outlined by the bureau of alcohol and substance abuse within the department of social and

health services. There are three categories of evaluation and corresponding treatment:

1. No significant problem (NSP);
2. Significant problem level 1 (SP1); or
3. Significant problem level 2 (SP2).

SP1 indicates a finding of alcohol abuse, while SP2 is a finding of alcoholism. For a defendant evaluated as NSP, alcohol information school will be recommended. For a defendant evaluated as SP1, a treatment program up to one-year in length will be recommended, and for the defendant evaluated as SP2, a treatment program up to two-years in length will be recommended.

It is very important to remember that if convicted of a DUI (or related offense) the court will order that you follow whatever the treatment facility recommends. In other words, even if you are diagnosed as NSP, you must nevertheless complete at least the alcohol school (this is a minimum requirement).

The costs for treatment vary and some insurance companies will pay for a portion of the treatment. Other insurance plans may not cover any of the treatment while a few will pay for the entire treatment plan.

While these long-term treatment plans are generally tailored to the individual's need they are still governed by D.S.H.S. guidelines. The typical 2-year intensive outpatient treatment plan consists of about two to three months of meetings 3-5 times per week. These meetings consist of one-on-one meeting with a counselor, group meetings with other individuals in the treatment facility, attendance at Alcoholics Anonymous, or some other alcohol support group. The intensive two to

three month phase is then followed by approximately six months of once per week meetings. The remainder of the two year program involves once per month meetings.

Alcohol and Drug Information School (ADIS)

Alcohol and Drug Information School (ADIS) is an 8 hour program designed to educate the participants about the dangers of alcohol and drugs. ADIS is typically recommended by a treatment provider for those who are deemed to have no significant problem (NSP) with alcohol or drugs.

ADIS includes the following topics:

- Expectations, Pre-test, Choice
- Blood Alcohol Concentration
- Long Term Affects of Alcohol & Drug Abuse
- Patterns of Use, Nonuse, Social Use, Misuse, Abuse and Addiction
- Underage Drinking and Driving
- Washington Penalties
- Financial and Personal Losses
- Breaking the Family Cycle
- Exploring Values / Making Decisions
- Change Plans and Post-test

8
Deferred Prosecution

Deferred Prosecution

Unique to Washington and allows you to have your DUI dismissed on the condition that you complete a 2 year alcohol/drug treatment program. The program is divided into 3 phases: i) approx 3 months long (3+/week); ii) approx 6 months long (once/week); iii) approx 15 months long (once/month). Participants must also complete 2 AA meetings per week for 2 years.

Pros:

- DUI dismissed (in 5 yrs);
- No loss of license;
- No SR 22 insurance;
- No jail.

Cons:

- 2 years of treatment;
- Considered a "prior" DUI;
- Ignition Interlock Device;
- Only one DP a lifetime;

- Costly unless good insurance.

Washington State offers those who have been charged with a DUI a program that is unique to this state. Deferred prosecution permits those who are alcohol or drug dependent or suffer from mental health issues to enter into a two year treatment program in exchange for a complete dismissal of the charge (or charges) in five years, no jail, and no loss of license. RCW 10.05. This program is a godsend for many but the consequences for failure to strictly adhere to the program can be horrendous.

The Washington legislature has recognized that some people who are charged with criminal offenses are not necessarily criminal by nature but suffer from a problem that needs treatment. The legislature has recognized that the best way to keep an alcoholic (or drug addict) from driving drunk (or affected by drugs) is to get him or her to stop drinking or abusing drugs. From this belief came the deferred prosecution statute.

The deferred prosecution statute allows you to petition (ask) the court for a deferral or postponement of your case for a period of five years while you seek treatment for your dependency problem. If the Petition is granted the advantages are obvious: you keep your license, keep the DUI (and/or other charges that were a product of the DUI) off your record, avoid being fined, and, except for cases where those charged refused the blood or breath test, avoid administrative license suspensions. Importantly, you are given an opportunity to sober up and regain control of your life.

In order to qualify for deferred prosecution, you must ob-

tain an evaluation from a state approved treatment agency. The treatment facility will conduct a detailed assessment and if it concludes that the criminal conduct was the result of alcoholism, drug addiction or mental health problems and that you are amenable to treatment, meaning you are serious about treatment and willing to be treated, you are eligible for deferred prosecution so long as you have never been granted a deferred prosecution before. You are only permitted one per lifetime!

If you are considering entering in the Deferred Prosecution program in Washington it is critical that you and your attorney be familiar with the court where the Petition for Deferred Prosecution will be entered. Every court has its own rules and procedures that you must follow in order to qualify. For example, in Snohomish County District Courts you must submit the Petition for Deferred to the probation department for review more than one week prior to your court date. The paperwork consists of several documents including, but not limited to, the evaluation, a treatment status update, the Petition and Order for Deferred, and a Driving Status Form. Additionally, you must have completed no less than 36 hours of treatment prior to the review of your documents. If any of these documents are not sufficient then the Deferred Prosecution is not approved. In Island County you must meet with a probation officer who reviews the submitted documents and interviews you to ensure that you are a good candidate for the program. In Seattle Municipal Court you must submit the paperwork to the prosecuting attorney in advance of your court date. If the prosecuting attorney approves they will submit their own documentation to the court. Long story short, every court has different procedures and your attorney must know these pro-

cedures and advise you of them.

In DUI cases the most frequent reason an individual wishes to enter into the deferred prosecution program is because of a drinking problem. The program consists of a statutorily required two-year treatment program which is broken down to a demanding three phase schedule. The first phase is typically three or four nights a week (sometimes five nights a week depending on the provider) for the first two or three months (seventy -two hours of treatment in the first 90 days) or can involve an inpatient program. Phase two involves weekly treatment and counseling for six months. Phase three, the least rigorous of the three phases, requires counseling once a month for the balance of the two-year program. Importantly and not to be forgotten, two Alcoholics Anonymous or other self-help meetings per week are required for the full two years.

Those who choose the Deferred Prosecution option are then placed on supervised probation which requires a monthly meeting with a probation officer. The cost for this privilege can vary, but typically it is approximately $50 to $65 per month for the first two years and an annual flat fee for each of the remaining three years. The probation costs vary depending on which jurisdiction you are in, but the numbers quoted are typically what you could expect. Additionally, an ignition interlock device (IID) will be required for at least one year (more than one year if this is not your first offense in seven years).

If you submitted to a blood or breath test, a deferred prosecution will save your license. This is clearly one of the big benefits to the program. However, in the case of a test refusal, you will still face a license suspension unless you prevail at the DOL hearing.

Three years after the completion of the deferred pros-

ecution treatment program (total of 5 years), the charge(s) is dismissed. What you are required to do during the three years after treatment ends and the case is dismissed, is to stay out of criminal trouble and adhere to all of the requirements imposed by the judge. Typically, the judge will require you to continue with AA attendance and maintain law abiding behavior.

If you are considering doing the deferred prosecution program you should do so seriously. This program is not for the faint of heart and failure will bring dire consequences as the court demands strict compliance. I meet with every client who decides to do the program to ensure that they know exactly what they are getting into. The program can be a great way to deal with a serious legal matter, your ability to drive, and a significant health issue.

It is important that you address important key issues prior to entering into the program to limit the risk of failure. These include:

- Do you need treatment?
- Are you amendable and committed to treatment?
- Do you have the support of family and friends?
- Are you willing to change your lifestyle?
- Will your schedule permit the demands of treatment?
- Can you afford treatment?
- Will your insurance pay for treatment (whole or in part)?
- Do you like the treatment agency?
- Do you like the treatment counselor(s)?
- Is the treatment agency's location convenient for you?

If you fail to comply with the deferred prosecution the results are ominous – the charge of a DUI will result in a conviction and any other accompanying charges will result in convictions. Further, if you fail to comply the penalties that would normally be imposed will possibly be harsher than if you had simply plead guilty originally. Judges look at deferred prosecutions as a privilege and are none too impressed if you fail to fulfill your required duties.

As previously indicated you are permitted only one per lifetime. Therefore if you are not completely committed to recovery you would be foolish to enter into a deferred prosecution. Additionally, if you are a first time offender you must carefully consider if you want to use your one deferred prosecution allowance for the first time offense or if you want to reserve it just in case you re-offend.

Critically a deferred prosecution is considered a prior offense if you are subsequently convicted of a DUI within seven years. Therefore, if you are charged (and convicted) of another DUI within seven years the deferred prosecution will be used to substantially enhance the mandatory minimum penalties to be imposed on the subsequent DUI.

If you successfully complete the deferred prosecution you will significantly benefit from the rewards of the program, both legally and personally. Your DUI (and any other charges that were included in the deferred prosecution) will be dismissed and you will have also benefited from the completed treatment and, hopefully, new found sobriety.

As mentioned the deferred prosecution program is statutorily derived. Therefore, although statutes are not particularly exciting to read, in the case of a deferred prosecution they are necessary, hence the inclusion of two of the most impor-

tant components of the deferred prosecution program, RCW 10.05.020 and RCW 10.05.150.

Finally, if you choose to participate in the deferred prosecution program, be sure to save your driver's license. In order to do so you must file the Intent to Seek Deferred Prosecution with the Department of Licensing prior to the DOL hearing. The DOL will then "stay" your license suspension for 150 days (beginning the day of filing the DUI in court) until the deferred prosecution petition is filed in court. Once the deferred prosecution petition is filed the court will forward paperwork to the DOL confirming the deferred prosecution. The DOL will then notify you in writing and advise you to exchange your current license with a "temporary" license. You will be further advised to install an ignition interlock device.

9
Department of Licensing

If you have been arrested for a DUI it is likely that the officer punched a hole in your license. At that point in time you are on notice that the Department of Licensing (DOL) intends to suspend your license just for being arrested on suspicion of DUI. It does not even matter to the DOL that you might eventually be acquitted of the DUI charge or that the DUI charge might be amended to a lesser offense that does not result in a license suspension. If your breath test result is .08 or higher or if you refused to take the breath test (or blood draw), the arresting officer will report you to the DOL.

However, you should not simply let your license be suspended without a fight. You can challenge the suspension or revocation of your license by returning the Hearing Request to the DOL within 20 days of your arrest.

If you decide to take no action or miss the deadline the DOL will suspend or revoke your license. This result will not change even if you have valid legal defenses and even if you

are found innocent of the DUI charge.

If your license is suspended you must then file proof of financial responsibility (high risk insurance, also known as SR-22 insurance) for the next three years, the same as if you had been convicted of the DUI charge.

If you have the hearing and lose based on a decision by a Department of Licensing hearing officer, you may appeal the decision within 30 days of the date of the decision. If you do this in Washington State, for instance, it may void your ability to successfully be granted an Ignition Interlock License, so be careful.

In addition to fighting the potential suspension of your license, the DOL hearing has another potential benefit – evidence gathering. Your attorney has an opportunity to subpoena the arresting officer (or other officers involved) and question him/her regarding the details of your case. This "free deposition" may prove insightful and prepare your attorney for trial, negotiation or lead to new legal defense issues that were otherwise unknown. Do not overlook the value of the Department of Licensing hearings.

Finally, if you do lose the DOL Hearing and have your license suspended you are eligible for a "restrictive license" so that you can drive while your regular license is suspended. Such a license is called an Ignition Interlock License and will be discussed later in this chapter.

License Suspensions

One of the many collateral consequences of being arrested for DUI, as already discussed, is the dreaded, harmful, inconvenient and expensive driver's license suspension. Certain studies have concluded that laws permitting admin-

istrative license suspension (ALS) at the time of an arrest for DUI have been found to reduce both alcohol-related fatality accidents and repeat DUI offenses. Voas, R.B., Tippets, A.S., and Fell, J. *The relationship of alcohol safety laws to drinking drivers in fatal crashes*. Accid Anal Prev 32:483-492 (2000); Voas, R.B., Tippetts, A.S., and Taylor, E.P. *Impact of Ohio administrative license suspension*. *In:* 42nd Annual Proceedings: Association for the Advancement of Automotive Medicine. Des Plaines, IL: AAAM. (1998) A study of an Ohio ALS law found that first-time and repeat DUI offenders who had their licenses immediately confiscated had significantly lower rates of DUI offenses, moving violations, and crashes during the following two years compared with DUI offenders convicted before the ALS law went into effect. *Id*. Although research shows that license suspensions reduce repeat DUI offenses, there is also evidence that up to 75 percent of suspended drivers continue to drive.

A license suspension received in one state may then be entered into a database called the U.S. Interstate Drivers License Compact. The Drivers License Compact is an agreement between 45 participating states to share information about drivers and their Department of Licensing (DOL/DMV) records that include, but are not limited to, infractions, convictions, driver's license suspensions, license restrictions, revocations, DUI charges, accidents, and eligibility for license reinstatement. Jolly, David N. *The DUI Handbook For The Accused*. Outskirts Press (2007) This information is provided to the National Driver Register (NDR). Both the Drivers License Compact and the Non-Resident Violator Compact are in the process of being merged into one database titled the National Driver Register. *Id*. The main purpose of the NDR

database is to share information on drivers who have committed a serious infraction or violation in a state other than where they are licensed to drive. The five states that are not currently members and do not participate in sharing DUI and licensing record information are Georgia, Massachusetts, Michigan, Tennessee and Wisconsin.

Another collateral consequence of a DUI and a resulting license suspension is additional insurance. This insurance in the United States is termed "SR-22," which is an administrative form that attests to an insurance company's coverage, or the posting of a personal public bond in the amount of the state's minimum liability coverage for the licensed driver or vehicle registration. SR-22s are typically filed with the respective State's Department of Licensing (DOL) / Department of Motor Vehicles (DMV) and in some States must be carried by the licensed driver, or in the registered vehicle (particularly if the licensee has been cited for coverage lapses, DUI or other administrative infractions). SR-22s may attest coverage for a vehicle regardless of operator (owner liability coverage), or cover a specific person regardless of the specific vehicle operated (operator liability coverage).

Deferred Prosecution

If you have chosen to do the deferred prosecution you may be able to keep your license. Such a benefit will obviously save your license but will also avoid the substantial cost of SR 22 insurance. The process is rather simple but requires good timing and knowledge.

If you decide to petition the court for deferred prosecution you must first request a DOL hearing by submitting the driver's hearing request form with the DOL within 20 days

of your arrest. Secondly, complete and file the DOL's form entitled *Intent to Seek Deferred Prosecution*. Once the form is complete and filed with the DOL the DOL will "stay" the suspension of your license until the petition and order for deferred prosecution have been approved by the court. However, the DOL will not "stay" your license suspension forever. They will only "stay" your license suspension for up to 150 days following the filing of the DUI in court. Hence, timing is essential to save your driver's license.

Following the approval of the petition and order for deferred prosecution you will receive a letter from the DOL which directs you to exchange your current license with a "temporary" license and have installed the ignition interlock device. The length of the ignition interlock device (IID) installation mirrors the length that the device is required for a first, second, or third DUI conviction. Hence, if the current DUI is your first DUI arrest in seven years you will be required to have the IID installed in your vehicle for one year. Similarly, if the current DUI is your second DUI arrest in seven years you will be required to have the IID installed in your vehicle for five years, and so on.

Finally, the benefit of keeping your license only applies if you provided a breath test (or blood draw) and does not apply to "refusal" cases. To keep your license in a refusal case means you'll have to prevail at the DOL hearing.

Department of Licensing Hearing

At the Department of Licensing hearing, a Hearing Examiner (employed by the DOL!) will determine whether there was 1) a valid stop/contact by the officer, 2) if there was probable cause to arrest, 3) if the petitioner was properly ad-

vised of his/her implied consent warnings, and 4) if the breath or blood test was properly administered and the results were 0.08 or above or if the refusal was proper.

The hearing is conducted by a telephone call to the petitioner's attorney's office and the petitioner can attend if he/she wishes (we advise that you do). The hearing officer records the hearing stating the issues to be determined and moves to admit the state's exhibits, namely the police and toxicology report (if it is applicable). The petitioner may also submit exhibits. Once the preliminary matters are dealt with live testimony is elicited as either the Officer or the Petitioner, or both, may testify at the hearing. Typically there is no decision rendered on the day of the hearing and a written decision is mailed to the petitioner and his/her attorney in the weeks following the hearing.

Under 21

For those drivers who are under the age of 21 years there is also an automatic 90 day license suspension imposed by the DOL in Washington State if arrested for a minor DUI. Like a regular DUI, the same procedures apply and the driver must apply for the hearing within 30 days of the arrest and pay the $200.

At the hearing, a Hearing Examiner will determine the same issues as a regular DUI except the breath test result must be .02 or more. If the license suspension is sustained at the hearing, the driver's license is suspended for 90 days the first time, or for one year or until the driver turns age 21 the second time, whichever is longer.

If your license is suspended, either because you fail to request a hearing or if you lose the hearing, you will be required

to obtain high-risk insurance (SR-22 insurance) for three years following the suspension period.

Restricted Licenses

Ignition Interlock License

In Washington State a specific license called the Ignition Interlock Driver License (IIL) is offered and allows the suspended driver to drive vehicles equipped with an ignition interlock device, so long as the suspension was the result of an alcohol-related DUI or Physical Control. The requirements are that the driver must have been arrested for, or convicted of, an alcohol-related DUI or Physical Control; must have had a valid driver license; must not have been convicted of vehicular assault or vehicular homicide within 7 years before the incident for which you are requesting an IIL; and the current suspension or revocation isn't for, or doesn't include, Minor in Possession, Reckless Driving reduced from an alcohol-related DUI, Vehicular Assault, Vehicular Homicide, or Habitual Traffic Offender.

Importantly, when driving with an IIL, the driver must maintain an interlock device on all vehicles that are driven, including employer's vehicles you drive during work hours. The driver cannot drive a commercial motor vehicle with an IIL.

At first blush this license seems to be useless if you must driver an employer's vehicle while your license is suspended. However, this requirement may be waived if the employer signs an Employer Declaration for Ignition Interlock Waiver.

The application for the IIL requires the Ignition Interlock to be installed and SR 22 insurance obtained. Proof of both

must be submitted to the DOL prior to the application being approved. Go to www.washdui.com and click on "driver's license" for details and the application for the IIL.

Occupational/Restricted Driver's License

If the original charge of DUI is amended to Reckless Driving and you receive a license suspension of 30 days, you cannot drive unless you apply for and receive an occupational driver's license. The DOL will grant an occupational license only if you work in an occupation that makes it essential that you drive a motor vehicle. The occupational license does not permit you drive to and from school, transport children to child care, do grocery shopping, or even for medical emergencies. It is very limited and the DOL will specify the hours of the day the license may be used (twelve hours maximum) and may even dictate the routes you may travel. If you fail to follow the conditions mandated by the DOL you will have committed a crime that is punishable by jail, fines and further suspension of your license. Therefore, if granted the privilege do not abuse it.

To apply for the occupational driver's license submit proof of SR 22 insurance and file the application with the Department of Licensing with a $100 application fee. Go to www.washdui.com and click on "important links" for details and the application for the Occupational Driver's License.

Commercial Drivers

Governing the Commercial Driver and the privilege to drive is the Commercial Motor Vehicle Safety Act of 1986. The Act continued to give states the right to issue CDLs, but the federal government established minimum requirements

that must be met when issuing a CDL.

For those with a Commercial Driver's License (CDL) and who are stopped for a DUI the consequences of a license suspension can be particularly troublesome. Matters become worse if the holder of the CDL is stopped (and arrested) for DUI while driving a commercial vehicle. When a police officer determines that a commercial driver has any alcohol in his system while driving, the driver will immediately be issued an out of service order valid for twenty four hours which means the driver may not operate any commercial vehicle for a twenty four hour period. The officer may then require the driver to submit to a test of his breath to determine the alcohol content. If the driver has an alcohol concentration of .04 or more, or if the driver refuses to submit to a breath test, the officer will submit a sworn statement reporting these findings to the DOL within 72 hours of the incident.

Once the DOL has received this report and notified the driver, the driver may request a hearing within 20 days. If no hearing was requested or if it is proven at the hearing that the driver had an alcohol concentration of .04 or more, or refused the breath test, the driver will be suspended from driving a commercial vehicle. For a first violation, the driver will be suspended for one year and for a second or subsequent violation the driver will be suspended for life.

Like a regular driver, even if the commercial driver wins the DOL hearing and defeats the administrative suspension, he or she still faces suspensions if convicted of a DUI in the criminal court. In summary, if you are a CDL holder you must be very careful in how you proceed with your DUI. Simply because the DUI is amended to a lesser charge may not have any benefit to your CDL.

Agreements and Compacts between States

There are many different agreements and compacts that the Department of Licensing offices in different states use to exchange information. In the context of this book and DUI law, some are more important than others. Here is a brief overview of the agreements and compacts that most states are members of and of some relevance in the DUI context:

- *Driver License Compact* – not every state participates but those who do voluntarily contribute information to the National Driving Register (NDR) regarding driver license suspensions and revocations.
- *Non-Resident Violator Compact* – similar to the Driver License Compact, not all states participate, but those who do send information (including all traffic offenses) back to your home state.
- *Driver License Reciprocity (DLR)* - provides electronic exchange of driver history data (not all states participate).
- *Driver License Agreement (DLA)* – only some states participate, it is an effort to provide one driver record instead of having different records in each state.

10
Miscellaneous DUI Issues

Travel to Canada

Inadmissible Entry into Canada

If you travel to Canada and are facing a criminal charge, whether it be a more serious felony matter or a "simple" misdemeanor, you must know the implications of a conviction. The Canadian Government has determined that certain persons are "inadmissible" to Canada and therefore are not allowed to enter Canada or remain in Canada. Members of Inadmissible Classes include those persons who have been convicted of certain criminal offenses, which include, but are not limited to:

- Felony convictions
- Possession of illegal substances
- Unauthorized possession of a firearm
- Shoplifting

- Theft
- Assault

The Canadian Government also views a DUI as an extremely serious offense. If you are convicted of a DUI you will not be permitted entry into Canada. That being said, if you wish to travel to Canada there is a means to either remove the status of "inadmissible" or travel into the country while you are "inadmissible" if you follow certain procedures. Click on *www.washdui.com* and go to "important links" for the Government of Canada website for more information and the application.

Inadmissible Status Removal

You can remove the "Inadmissibility Status" by applying for a Minister's Approval of Rehabilitation. You may initiate this process five years after the end of probation.

Entering Canada with an Inadmissible Status

If necessary you may enter Canada during the Inadmissible Status. To do so you must apply for a Temporary Resident Permit. If you are seeking entry for a single or limited period the Temporary Resident Permit application must be completed and the Canadian Government will charge a fee for the Temporary Resident Permit.

Immigration Consequences

For those who are not U.S. Citizens there are bigger consequences that result from a DUI conviction than jail, fines, and a license suspension. Depending on the specific State statutes DUI convictions can be determined to be a "crime

involving moral turpitude" and a "crime of violence" under present US immigration laws. Such a conviction can lead to inadmissibility to or deportation from the U.S., denial of adjustment during the green card process, or a finding of bad moral character at a naturalization interview. *The first bit of advice is that you must consult with an immigration attorney.*

Citizenship

In the event that a non-resident is able to avoid inadmissibility or removal resulting from a DUI conviction, even one such conviction still can affect the alien's naturalization process. The U.S. Citizenship and Immigration Services (USCIS) may consider any criminal conviction in making a determination regarding good moral character for purposes of an application for naturalization.

It is imperative to be honest when considering naturalization and disclose all previous arrests and convictions with an immigration attorney before applying for citizenship. Although one DUI would not automatically disqualify the applicant, one must disclose it and have completed the probation before filing a citizenship application. Also, several DUI convictions can render the applicant a habitual drunkard and result in inadmissibility, and even removal.

Car Rentals

A DUI conviction may prevent you from renting a vehicle from a commercial agency. The policies of rental companies vary and you should consult different companies. For instance, some rental companies will rent to individuals who have been convicted of a DUI, but charge the individual a higher rental rate. The problem is even greater if you have been ordered not

to driver unless you have installed an ignition interlock device. Additionally, if you have a restrictive license (such as an Ignition Interlock license of an Occupational License) rental agencies may not honor such a license.

Vacating a DUI Conviction (Expungement)

Many states do permit a person to vacate (expunge) a DUI. Unfortunately Washington State does not permit an individual to vacate a DUI conviction.

Vehicle Impound

Another penalty or sanction that Washington State has at their disposal is to impound the vehicle of the DUI offender. An arrest for DUI (RCW 46.61.506) or Physical Control (RCW 46.61.504) requires a mandatory 12 hour impound at the owner's expense. As a result, charges for the hook-up, tow, and time in the tow yard in the form of storage will be accrued. From experience the costs of this impound is between $200 and $500.

Avoiding A (Another) DUI

If you have a drink with friends, colleagues, clients, or at a sporting event and drive, you are eligible to be stopped and potentially charged with a DUI. Regardless of whether you have only one drink or multiple drinks, you are a candidate to be stopped by a police officer if you chose to drive. I have represented (or prosecuted) too many individuals to mention who have been charged with a DUI with a blood alcohol concentration level of less than 0.080. If you once thought that you were okay to drive with one or two drinks in your system, you were very wrong.

If you have had a couple of drinks (or a couple too many) consider these tips:

- Do not drink and drive
- Avoid driving late at night
- Drive a vehicle that is in proper working order
- Do not drive from a bar (drinking establishment) parking lot
- Turn your head lights on at night
- When you see the officer's lights, pull over immediately
- Make a good impression-be polite
- Be prepared to be stopped
- Remain silent, but if you don't, be honest
- If you had "one for the road," tell the officer
- Politely refuse all field sobriety tests (FSTs)
- If you take the FSTs inform the Officer of any physical impairment
- Do not refuse the BAC (breath test) at the police station
- Request the Administrative License Hearing within the time limit
- Hire an experienced DUI attorney

APPENDIX

Washington State Statutes, Case Law and Links Statutes (RCW & WAC)

Alcohol and Drug Information School (ADIS): RCW 46.61.5056/WAC 388-805

Alcohol Evaluation: RCW 46.61.5056

Alcohol Treatment: RCW 70.96A / RCW 74.50 (ADATSA)

Blood Test Administration: WAC 448-14

Boating Under the Influence (BUI): RCW 79A.60.040

Breath Test Administration: WAC 448-16

Deferred Prosecution: RCW 10.05

Driving Under the Influence (DUI): RCW 46.61.502

DUI Penalties: RCW 46.61.5055

DUI Victim's Panel: RCW 46.61.5152

Electronic Home Monitoring: RCW 9.94A.734

Felony DUI: RCW 46.61.502

Fines: RCW 46.61.5055
Ignition Interlock Device: RCW 46.20.720
Ignition Interlock License: WAC 308-107
Insurance: RCW 46.29
Jail: RCW 46.61.5055
Juvenile DUI (Minor DUI): RCW 46.61.503
Negligent Driving in the First Degree: RCW 46.61.5249
Negligent Driving in the Second Degree: RCW 46.61.525
PBT (Breath Alcohol Screening Test): WAC 448-15
Physical Control: RCW 46.61.504
Reckless Driving: RCW 46.61.500
Reckless Endangerment: RCW 9A.36.050
Rules of the Road: RCW 46.61
State Toxicologist: WAC 448-14
Vehicle Impound: RCW 46.55.113
Work Crew: RCW 9.94A.725
Work Release: RCW 72.65

DUI Case Law

Blood
City of Kent v. Beigh, 145 Wn.2d 33, 32 P.3d 258 (2001)
State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991)
Breath Alcohol Ratio – Constitutionality
State v. Brayman, 110 Wn.2d 183, 751 P.2d 294 (1988)
Chemical Tests – Not Necessary to Prove Intoxication
State v. Woolbright, 57 Wn.App. 697, 789 P.2d 815 (1990)
Citizen Informant
Campbell v. Department of Licensing, 31 Wn.App. 833, 644 P.2d 1219 (1982)

Collateral Estoppel

Thompson v. Department of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999)

Confrontation Right

Lytle v. Department of Licensing, 94 Wn. App. 357, 971 P.2d 969 (1999)

Corpus Delicti

City of Bremeton v. Corbett, 106 Wn.2d 569 (2000)

State v. Flowers, 99 Wn.App. 57, 991 P.2d 1206 (2000)

State v. Sjogren, 71 Wn.App. 779 (1993)

State v. Hamrick, 19 Wn.App. 417, 576 P.2 912 (1978)

Deferred Prosecution

State v. Sell, 110 Wn.App. 741, 43 P.3d 1246 (2002)

City of Walla Walla v. Topel, 104 Wn.App. 816, 17 P.3d 1244 (2001)

City of Kent v. Jenkins, 99 Wn.App. 287, 992 P.2d 1045 (2000)

Alwood v. Harper, 94 Wn.App. 396, 973 P.2d 12 (1999)

State v. Bays, 90 Wn.App. 731, 954 P.2d 301 (1998)

State v. Vinge, 59 Wn.App. 134, 795 P.1199 (1990)

State v. Glasser, 37 Wn.App. 131, 678 P.2d 827 (1984)

Field Sobriety Tests

City of Seattle v. Stalsbroten, 138 Wn.2d 227, 978 P.2d 1059 (1999)

Hienemann v. Whitman, 105 Wn.2d 796, 718 P.2d 789 (1986)

Horizontal Gaze Nystagmus

Frye v. United States, 293 F.1013, 34 A.L.R. 145 (1923)

State v. Baity, 140 Wn.2d 1, 991 P.2d 1151 (2000)

State v. Koch, 126 Wn.App. 589 (2005)

State v. Cissne, 72 Wn.App. 677, 685 P.2d 564 (1994)

Implied Consent Warnings

Department of Licensing v. Grewal, 108 Wn. App. 815, 33 P.3d 94 (2001)

State v. Bostrom, 127 Wn.2d 580, 902 P.2d 157 (1995)

State v. Staeheli, 102 Wn.2d 305, 685 P.2d 591 (1984)

Interrogation

State v. Johnson, 48 Wn. App. 681, 739 P.2d 1209 (1987)

Language – Interpreters

State v. Prok, 107 Wn.2d 153, 727 P.2d 652 (1986)

Negligent Driving 1st Degree

City of Walla Walla v. Greene, 154 Wn.2d 722 (2005)

Operating a Vehicle

City of Sunnyside v. Wendt, 51 Wn.App. 846, 755 P.2d 847 (1988)

Physical Control

State v. Beck, 42 Wn.App. 12, 707 P.2d 1380 (1985)

State v. Smelter, 36 Wn.App. 439, 674 P.2d 690 (1984)

McGuire v. City of Seattle, 31 Wn.App. 438, 642 P.2d 765 (1982)

Physical Control – Safely off the Roadway

State v. Hazzard, 43 Wn.App. 335, 716 P.2d 977 (1986)

Prescription Drugs – Defense to DUI

Kaiser v. Suburban Transp. Sys., 65 Wn.2d 461, 398 P.2d 14 (1965)

Pretext Stops

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999)

Pretrial Conditions (reasonable)

Butler v. Kato, 137 Wn. App. 515, 524 154 P.3d 259 (2007)

Probable Cause

State v. Gillenwater, 96 Wn. App. 667, 980 P.2d 318 (1999)

Bokor v. Department of Licensing, 74 Wn. App. 523, 874 P.2d 168 (1994)

O'Neill v. Department of Licensing, 62 Wn. App. 112, 813 P.2d 166 (1991)

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986)

State v. Terrovona, 105 Wn.2d 632, 716 P.2d 295 (1986)

Reckless Driving

City of Redmond v. Bagby, 155 Wn.2d 59 (2005)

Refusal

Rockwell v. Department of Licensing, 94 Wn. App. 531, 972 P.2d 1276 (1999)

Department of Licensing v. Lax, 125 Wn.2d 818, 888 P.2d 1190 (1995)

State v. Long, 113 Wn.2d 266, 778 P.2d 1027 (1989)

Right to Counsel

State v. Trevino, 127 Wn.2d 735, 903 P.2d 447 (1995)

Roadway – Definition includes Parking Lot

City of Edmonds v. Ostby, 48 Wn.App. 867, 740 P.2d 916 (1987)

Safely Off the Road

State v. Votava, 149 Wn.2d 178, 66 P.3d 1050 (2003)

Sentencing

Walla Walla v. Greene, Docket Number 75108-1 (2005)

Statements

Crawford v. Washington, 541 U.S. 36 (2004)

Two-Hour Rule

State v. Crediford, 130 Wn.2d 747, 927 P.2d 1129 (1996)

Under the Influence – Definition

State v. Hurd, 5 Wn.2d 308, 105 P.2d 59 (1940)

DUI Links

Alcohol Treatment Centers

www.washdui.com (contacts)

Court Directory (Addresses, Telephone Numbers, Names)

http://www.courts.wa.gov/court_dir/

Court Rules

Municipal:

http://www.courts.wa.gov/court_rules/?fa=court_rules.local&group=municipal

District Court:

http://www.courts.wa.gov/court_rules/?fa=court_rules.local&group=district

Court Directory (Addresses, Telephone Numbers, Names)

http://www.courts.wa.gov/court_dir/

Court Forms

http://www.courts.wa.gov/forms/

Department of Licensing

Requesting a Hearing: http://www.dol.wa.gov/driverslicense/hearingsrequest.html

Ignition Interlock License: http://www.dol.wa.gov/driverslicense/iil.html

Occupational Driver's License: http://www.dol.wa.gov/driverslicense/orl.html

DUI Resources (available at www.amazon.com or www.barnesandnoble.com)

DUI/DWI: The History of Driving Under the Influence. Jolly, David N. Outskirts Press (2009)

The Drug DUI Handbook. Jolly, David N. Outskirts Press (2011)

The DUI Handbook for the Accused Vol. II. Jolly, David N. Outskirts Press (2011)

The DUI Investigation Handbook. Jolly, David N. Outskirts Press (2011)

The Traffic Ticket Handbook. Jolly, David N. Outskirts Press (2011)

The Ultimate Washington State DUI Handbook. Jolly, David N. Outskirts Press (2011)

DUI Victim Impact Panel

www.washdui.com (contacts)

General DUI Information

www.washdui.com

Ignition Interlock Device Companies

Affordable Interlock: http://www.affordableignitioninterlock.com/wa.html

Guardian Interlock: http://www.guardianinterlock.com/

Smart Start: http://www.smartstartinc.com/

Name Finder (locate your court date and location)

http://dw.courts.wa.gov/?fa=home.namesearchterms

http://dw.courts.wa.gov/

SR 22 Insurance

Vern Fonk: www.vernfonk.com/

Travel to Canada

Inadmissibility Status & Application for a Temporary Resident Visa:

www.washdui.com

Washington State Bar Association (WSBA)

www.wsba.org