

# ***SPECIAL REPORT***

## **“How To Fight Your DUI License Suspension”**

*BY*

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*“Specializing in DUI Defense”*

Legal Disclaimer:

The information in this Special Report is not intended to be legal advice. Your DUI case has specific facts that can affect the defense and strategy of your case. Please seek the advice of a competent DUI defense lawyer to discuss the facts of your case. The purchase of this Special Report does not create any type of attorney - client relationship.

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# ***SPECIAL REPORT***

## ***“How to Fight Your DUI License Suspension”***

### **INTRODUCTION**

Thank you for your purchase of this special report. In the following pages you will learn the process and procedures that the DMV employs during the DUI administrative hearing. This information is not intended to be legal advice and no attorney-client relationship is formed by the purchase of this Special Report. This Special Report is not intended to be legal advice. I recommend you seek the counsel of a competent DUI defense attorney in order to examine the facts and possible defenses to your case.

### **OVERVIEW**

Once you have been arrested for a DUI your legal rights to an administrative hearing are established. Think of a DUI as 2 separate procedures. In the court process the State of California is trying to “Punish” you for allegedly driving under the influence, while in the DMV process the Department of Motor Vehicles is trying to take away your license for the same allegations.

These 2 separate processes have 2 separate levels of proof. In court, in order for you to be convicted during a trial, the level of proof is called “beyond a reasonable doubt.” This is a very high standard, you can think of this as a 95% level or more required proof.

At the DMV, the level of proof is called “preponderance of the evidence.” This can be thought of as “more likely than not” or around a 50% level of required proof. The hearing at the DMV is called an “Administrative Per Se” hearing, I will refer to the hearing as an APS from this point forward.

### **HISTORY of the DMV Hearing**

The APS hearing became effective in July 1990 to determine if a person was over the legal limit of a .08% blood alcohol content, herein BAC, at the time of driving.

Then in 1994 the DMV added the “Zero Tolerance” laws for a person under 21 who had a .01% or greater BAC.

In 2007, the law was amended to include “commercial drivers”, usually truck drivers, who had a .04% or greater BAC at the time of driving a commercial vehicle.

Again in 2004, the law was amended to include DUI probation violation under California Vehicle Code Section 23154. This means if you are currently on probation for a prior DUI offense and you are subsequently arrested for another DUI, then the DMV can proceed against you on a theory of .01% or greater BAC while on DUI probation, which could result in a 12 month suspension of your license.

**As you can see the DMV control’s all aspects of your driver’s license.**

### **10 DAY RULE**

You have 10 days from the date of the arrest to call the DMV “Drivers Safety Office” to request an APS hearing. Don’t confuse the Drivers Safety Office with a DMV “Field Office” where you usually go to register a car or renew your license. You can make the request by telephone or in writing. We have provided the telephone numbers at the bottom of this section.

### **DMV Driver Safety Office Phone Numbers**

Based on the location of the arrest, call the closest Drivers Safety Office to schedule an appointment.

City of Commerce:	(323) 724-4000
City of Orange:	(714) 703-2511
Covina:	(626) 974-7137
El Segundo:	(310) 615-3500
San Bernardino:	(909) 383-7413
San Diego:	(619) 220-5300
Van Nuys:	(818) 376-4217
Bakersfield:	(661) 833-2103
Oxnard:	(805) 988-3050
Stockton:	(209) 948-7715

## **HOW CAN REQUESTING AN APS HEARING BENEFIT YOU?**

Once you request an APS hearing within the 10 day rule your temporary license will be extended until after the Hearing Officer makes a final ruling. As a general rule a license suspension, if you lost the hearing, will begin 9-15 days after the Hearing Officer makes their decision.

In addition, the Driver Safety Office will mail you a copy of the DS-367 form and usually, but not always, a copy of the police report.

## **WHAT TO SAY WHEN YOU CALL THE DMV**

1. Ask to schedule a DUI Admin Per Se Hearing.
2. Ask that it be conducted in person rather than over the phone.
3. Ask that a "Stay" be put on your license suspension. "Stay" is a fancy word for extending the pink temporary license you already have in your possession.
4. Ask for "Discovery." This is another fancy word for getting a copy of the DS-367 and any police report.

## ***DIFFERENT TYPES OF DMV HEARINGS***

The most common type of an APS hearing is an "Age 21 or older .08% or more BAC." However, I will list some other types of APS hearings and their "MAIN ISSUES." Please note there are many Sub-Issues that may arise during the hearing.

### **A) Age 21 or older .08% or more BAC**

#### Issues:

- 1) Did the Peace Officer have reasonable cause to believe the driver was driving a motor vehicle in violation of CVC 23152 or 23153?
- 2) Was the driver lawfully arrested?
- 3) Was the driver driving a motor vehicle with a .08%

BAC or more by weight of alcohol?

*(This type of hearing usually applies to a person over 21 who was arrested for a DUI)*

**B) Age 21 or older operating a commercial motor vehicle .04% or more BAC**

Issues:

- 1) Did the Peace Officer have reasonable cause to believe the driver was driving a motor vehicle in violation of CVC 23152 or 23153
- 2) Was the driver lawfully arrested?
- 3) Was the driver driving a motor vehicle with .04% BAC or more, by weight of alcohol while driving a commercial vehicle.

*(This type of hearing applies to a commercial drivers, usually a truck driver, who was driving a commercial vehicle, usually a big rig, with .04% or more BAC)*

**IMPORTANT!**

If you have a class "A" or class "B" license and you lose the APS hearing you will have your class "A" or "B" suspended for 1 year on a 1<sup>st</sup> time DUI and revoked for life on a 2<sup>nd</sup> time DUI, if, the first conviction was after 9/2005.

**C) .01 or more BAC while on a DUI Probation**

Issues:

- 1) Did the Peace Officer have reasonable cause to believe the driver was driving a motor vehicle in violation of CVC 23154?
- 2) Was the driver lawfully detained and/or arrested?
- 3) Was the driver driving a motor vehicle with a .01 BAC by weight of alcohol while on DUI probation?

*(This type of hearing applies to a person who is on DUI probation for a prior DUI and they subsequently are arrested for another DUI. Beware, the DMV may “stack” the hearings and conduct a regular over the legal limit .08% BAC hearing AND an over a .01% BAC while on DUI probation.)*

*(The problem associated with this type of hearing is that the Peace Officer did not state on the DS-367 form “how” he knew you were on DUI probation.)*

#### **D) Under age 21 APS Hearing**

##### Issues:

- 1) Did the Peace Officer have reasonable cause to believe the driver was driving a motor vehicle in violation of 23136 CVC? (*Over .01*)
- 2) Was the driver lawfully arrested and/or detained?
- 3) Was the driver driving a motor vehicle while under 21 years of age with a blood alcohol concentration of .01% or more, as measured by preliminary alcohol screening device or other chemical test?

*(The scientific reliability of the breath machine is called into question when the “PAS” read is a .02 or under)*

#### **E) Refusal Issues Age 21 or older**

##### Issues:

- 1) Did the Peace Officer have reasonable cause to believe the driver was driving a motor vehicle in violation of 23152 or 23153 CVC?
- 2) Was the driver lawfully arrested and/or detained?
- 3) Was the driver told his or her driving privilege would be suspended or revoked for one, two, or three years if he or she refused to submit to or fail to complete a chemical test?

4) Did the driver refuse to submit or fail to complete a chemical test after being requested to do so by a Peace Officer?

*(The main problem the DMV may have in this type of hearing is that the Peace Officer did not “read” the “driver” the “refusal” admonition on the back of the DS-367 form. Many times the best way to attack this is to subpoena the Peace Officer to the hearing and cross examine him on the issue.)*

**F) Other types of hearing**

- 1) Refusal- under the age of 21
- 2) Refusal- while on DUI probation
- 3) Drug Test Refusal

***OTHER WAYS TO ATTACK THE HEARING***

**A) The DS-367 Must be Signed**

In order for the DS-367 form to be used in satisfying the DMV’s burden it must be signed by the Peace Officer at the bottom of the form. The document must be signed “under penalty of perjury” and without a signature the document is inadmissible. Most times, the DMV Hearing Officer will subpoena the Peace Officer in order to “clear up” the non-signed document with live testimony.

A proper objection would be Evidence Code Section 1280(c), the document lacks trust worthiness.

In addition, the DS-367 must be signed “at or near” the date of incident. A proper objection would be Evidence Code Section 1280(b), the document lacks timeliness under *Downer v. Zolin (1995) 34 Cal. App. 4<sup>th</sup> 578*. You should be looking for a gap of 5 days or more between the “date of incident” and the “date of signature.”

## **B) Time Frames**

In order for the DMV to comply with CVC 23152(b), they must show that the time of driving and the time of the blood or breath test were within 3 hours of each other. The time of driving and time of the test can be established by the DS-367 or by supporting documents such as a police report.

If a timeline cannot be established by the documents then the DMV Hearing Officer will have to subpoena the Peace Officer for live testimony. (*This problem occurs when the "time of driving" or the "time of the evidentiary test" are left "blank" on the DS-367 form.*)

If the timeline cannot be established by the documents or live testimony then the "3 hour presumption" cannot be satisfied and a set-aside is in order. *Santos v. DMV, (1192) 5 Cal. App. 4<sup>th</sup> 537.*

## **C) Breath Test Results Must be Within .02 of Each Other**

Title 17, 1221.4 (a) (1) states:

"For each person tested, breath alcohol analysis shall include analysis of 2 separate breath samples which result in determination of Blood Alcohol Concentration which do not differ from each other by more the 0.02 grams per 100 milliliter."

For example; if your samples were a .17 and .14, then the Peace Officer would need to give you a 3<sup>rd</sup> breath test and that result must be within .02 of either of your first 2 tests. *Robertson v. Zolin, (1996) 44 Cal. App. 4<sup>th</sup> 147*

## **D) Breath Test 15 minute Observation**

\_\_\_\_\_ Title 17 Section 1219.3 states:

"the breath samples shall be collected only after the subject has been under continuous observation for at least 15 minutes prior to the collection of the breath sample, during which time the subject must not have ingested alcohol

beverages or other fluids, regurgitated, vomited, eaten, or smoked.”

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*Manriquez v. Gourley*, (2003) 105 Cal. App. 4<sup>th</sup> 1227, dealt with the question as to what is the continuous observation requirement.

Did the Peace Officer leave the breath test room? Did he leave your presence at anytime during the 15 minutes immediately before the breath test? Did you micro burp? Did the Peace Officer wait 15 minutes after he stopped you before he gave you a roadside breath test?

#### **\_\_\_\_\_ E) Brenner Issue- A Breath Test with a .08 Result**

*Brenner v. DMV* (2010) Cal. App. 4<sup>th</sup> 365, dealt with a breath reading of .08. The defense attorney subpoenaed the (PDOA) Periodic Determination of Accuracy check documents. These showed that the machine Brenner blew into was .002 too high during the accuracy check. This meant that Brenner could have been a .078, which is NOT over the legal limit. Thus, the department could not prove he was over .08 at the time of driving.

It is noted that in Brenner a DMV Subpoena was issued by the driver in order to get the Periodic Determination of Accuracy check documents into evidence.

#### **\_\_\_\_\_ F) Conclusive Probable Cause Statement**

One of the sub-elements of proof is that the Peace Officer had probable cause to stop your car. Vehicle code 13380 requires that the Peace Officer articulate facts onto the DS-367 which would allow the DMV Hearing Officer to make his/her independent judgement as to the validity of the stop.

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*Solivij v. Gourley* (2001) 87 Cal. App. 4<sup>th</sup> 1229 states:  
“In order to justify a stop or detention the officer must have specific and articulable facts causing him to suspect that some activity relating to a crime has taken place, is

occurring or is about to occur, and that the person detained is involved in that activity.”

Some examples of conclusive statements on the DS-367 would include: fail to stop, weaving, unsafe lane change, illegal turn, improper lane change or use.

The probable cause statement is on page 3 of the DS-367. Read what the Peace Officer wrote and determine if he described in “detail” “why” he stopped you.

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### **G) Proof of Driving**

The act of driving must be proven by the DMV. Further, the act of driving and the chemical test must be within 3 hours of each other. Some fact patterns might include: the driver was parked for over 3 hours before the cops arrived and awoke the driver, the driver’s car was abandoned and the accused was walking down the road when the Peace Officer detained him. The hood was cold which leads to a reasonable inference that the car was parked a long time. The position of the driver’s seat would indicate that someone other than the accused was really driving. For example, the car runs out of gas which the 5'2" girlfriend was driving, boyfriend decided to stay with the car and falls asleep in the passenger seat. And he is 6'4". The position of the car seat would indicate a person of smaller stature was actually driving the car and NOT the boyfriend.

### **H) Rising Blood Alcohol**

The law requires that the driver have a .08 or greater BAC at the time of driving. Let’s say the driver was stopped at 8:10 pm, he admits to drinking a 6 pack from 7:30 pm to 8:00 pm, his breath alcohol at 8:40 pm is a .08 and at 9:15 pm it is a .11.

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The rise of alcohol in the body may indicate that the driver was actually “below” an .08 BAC at the time of driving. He

might be in the .06 to .07 range. In order to establish this type of defense the testimony of a forensic toxicologist must be presented.

## \_\_\_\_\_ I) Reasonable Cause

Issue 1:

Did the officer have reasonable cause to believe the person had been driving a motor vehicle in violation of CVC 23152, 23153, 23136, 23154

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1) Some of the sub-issues that must be proven are that the person was:

- Driving
- A motor vehicle
- While under the influence of alcohol
- And/or drugs
- Driving while under the influence

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2) Peace Officer 1 hands off to Peace Officer 2

When Peace Officer 1 stops a driver and then hands off to Peace Officer 2 to complete arrest, Peace Officer 1 must articulate to Peace Officer 2 why he stopped the driver, the driving observation, and objective signs of intoxication. Then Peace Officer 2 must write all that information in his report and the DS-367. *Freeman v. DMV (1969) 70 Cal. 3d 235*

3) Private Property

What if the driving only occurred on private property? As in a backyard? A ranch? Well, if the cops first observed the driving on a public road and then onto private property then the Peace Officer will be able to legally stop you.

This argument gets a little trickier when the driving occurred in parking lots, off-road areas, etc.

As long as these areas have public access the

contact will be valid. In these types of cases the area needs to be viewed extremely carefully.

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Issue 2:

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The 2<sup>nd</sup> sub-issue of reasonable cause is whether the driver was actually under the influence of alcohol at the time of driving.

The DS-367 contains check boxes on the form for the Peace Officer to establish the objective symptoms were observed:

- 1) Blood shot watery eyes
- 2) Odor of alcohol beverage
- 3) Unsteady gait
- 4) Slurred speech

The Hearing Officer might also look at the police report to establish these elements.

You can argue or provide your own evidence on the following points:

- The driver has very little or no objective signs.
- The driver passed or nearly passed all of the field sobriety test.
- The driver was injured or sick and the Peace Officer knew about it.

## **J) Drinking after Driving**

Sometimes a driver will have a solo-accident then continue to drive home and upon arrival drink some type of alcoholic beverage to steady the nerves.

Then the cops show up ½ hour later because someone reported the accident and gave a license plate number.

The problem? The driver was not intoxicated at the time of driving. In fact, he/she had absolutely no alcohol in their system.

However, the cop will assume the driver drank before the accident and an arrest will be concluded.

## **THE HEARING PROCESS**

When you arrive at the DMV Drivers Safety Office the 1<sup>st</sup> thing you will do is sign-in or check-in with the receptionist. Bring a copy of your “Notice of Hearing” to help the receptionist find you on their schedule.

Now comes the fun part, sit and wait for the Hearing Officer to call your case. Eventually, the Hearing Officer will come and take you to their office. Their office will be a small room, usually 15x15 square feet.

At this point the only people in the room will be the HO and you. The Peace Officer will not be present unless the HO needs live testimony to clear up a deficiency on the D367 form.

At this point the HO will mark the documents as exhibits and ask if you have any objections to the documents. You will make your legal objections to the documents. Usually Evidence Code 1280(b), 1280 (C), hearsay, multiple hearsay, secondary evidence, lack of foundation, *People v. Adams* lack of foundation, Vehicle Code 13380, Title 17 violations, *Downer v. Zolin*, and/or *McDonald v. Gutierrez*.

The Hearing Officer will most likely overrule your objections and admit the documents into evidence. At this point the department will rest and ask if you have any evidence to present.

This is the point in time when you can give testimony. Your goal in testimony should be to show any violations of title 17 that may have occurred and/or testimony related to any of the multiple issues discussed in this report.

If you intend to have a 3<sup>rd</sup> party testify you must have given the DMV proper notice of your intent. An example of a 3<sup>rd</sup> party would be a passenger in the car who witnessed the events of the arrest. This would apply to both lay witnesses and expert witnesses. These should be done in writing and served upon the DMV 15 days before the hearing.

*Here is an example of how you would give proper notice:*

“I intend to call Joe Black to testify on my behalf. His address is \_\_\_\_\_.”

Or

“I intend to call Eddy Expert to testify on my behalf and render an expert opinion. His address is \_\_\_\_\_.”

Please note: if you intend to call an expert witness you must provide a copy of his curriculum vitae (aka resume), and you must lay a proper foundation to qualify him as an expert in the area upon which you expect him to render an expert opinion.

*(Remember, proper notice must be in writing and served upon the DMV Drivers Safety Office at least 15 days before your hearing. If you are in a time crunch call the DSO and ask for their fax number.)*

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## ***IGNITION INTERLOCK DEVICE ( IID )***

An ignition interlock is a device that prevents a driver from starting their vehicle if they have any alcohol on their breath.

In Southern California; if you are convicted for a DUI in Los Angeles County you will be required to install an ignition interlock device on your vehicle even on your 1<sup>st</sup> DUI.

## **THE BEGINNING**

The ignition interlock device program began on July 1, 2010 in 4 California counties; Los Angeles, Alameda, Sacramento, and Tulare County.

Again, if you were convicted in any of these counties of a DUI then you will be required to install an ignition interlock device on your vehicle, even for a 1<sup>st</sup> time DUI.

### **HOW LONG WILL I HAVE IT ON MY CAR?**

1) For a DUI conviction under CVC 23152:

- First offense = 5 months
- Second offense = 12 months
- Third offense = 24 months
- Fourth offense = 36 months

(NOTE) These are the minimum lengths of installation required per California law. Sometimes the District Attorney and/or the Judge will want a longer installation time depending on the facts of the case. This also applies to conviction under 23153 CVC, a DUI causing injury, described below.

2) For a DUI conviction under 23153:

- First offense = 12 months
- Second offense = 24 months
- Third offense = 36 months
- Fourth offense = 48 months

Exemption to the ignition interlock device CVC 23700 (A)(8):

- You don't own a vehicle.
- You don't have access to a vehicle at your residence.
- However, once you own a vehicle, or have access to one at your residence then you must install an ignition interlock device on your car.

### **WHAT IF?**

- I live out of state?

Then you are not required to install an ignition interlock device while in your home state BUT you can't drive in California without one.

- I only drive a motorcycle?

Then you are not required to install an ignition interlock device on your motorcycle BUT you **can't drive** (lawfully) during the ignition interlock device time.

### **SOME COMMON DMV FORM NUMBERS**

- H6 DMV driver's license print out
- SR22 Proof of insurance
- DL40558 Ignition interlock device exemption

### **HOW CAN AN IGNITION INTERLOCK HELP ME?**

On a second time DUI your driver's license will be suspended for a period of 2 years. You can cut down the 2 year suspension **down to 90 days** if you install the ignition interlock device for 12 months, enroll in the SB38 Drinking Driver Program, and obtain your SR22 insurance.

On a third DUI you can reduce the suspension from 3 years down to 6 month if you install the ignition interlock device for 3 years, enroll in the SB38 Drinking Driver Program, and obtain your SR22 insurance.

### **WHAT IF I GET DROPPED FROM THE DUI CLASS**

Lets assume you obtain your license early (only a 30 day hard suspension). Then you get kicked out of the DUI class. The first step the DMV will do is to suspend your license *immediately*. Your license will be suspended for the "FULL" length of the suspension period and you will NOT be able to get your license back early.

So the moral to the story is once you start your DUI class make sure you finish them.

**WHAT IF I FAIL TO INSTALL THE IGNITION INTERLOCK DEVICE OR DEEMED NOT TO BE EXEMPT?**

If you fail to install the ignition interlock device within 30 days or are deemed not to be exempt you are subject to misdemeanor prosecution. This could result in 6 month in jail and up to a \$5,000.00 fine or both. CVC 23573 (l)

**CONCLUSION**

As you can see, the APS hearing can be a quagmire of objections, legal foundations, and/or evidence. I recommend having a competent DUI Attorney represent you during the APS hearing as this will provide you with the best chance at success.