

A FREE GUIDE FOR DRIVERS

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# DUI in South Carolina

## Piecing It All Together



BY STEPHAN FUTERAL, ESQUIRE & THOMAS NELSON, ESQUIRE  
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**A Free Guide for Drivers in South Carolina**

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# Foreword



Defending DUI's is one of my favorite things to do as a lawyer. Please don't get me wrong - its not my "favorite" because I'm in favor of drunk driving. People shouldn't drive drunk; end of story. I enjoy DUI defense work because it is a complicated area of the law that challenges my abilities as a lawyer.

Of course, there's nothing fun or exciting for my clients when they are facing a DUI. They're anxious about everything that is at stake including the possible jail time, loss of their job, increased insurance costs, problems with family, and other concerns. Like my clients, you may be looking for answers. That's why my law partner Thomas Nelson and I have put together this book to guide and to educate you about DUI's in South Carolina. It's our sincere hope that after you've read it, many of your concerns will be laid to rest and many of your questions will be answered.

*Best wishes,*

*Stephan Futeral, Esq.*

## About the Authors

**Stephan Futeral** has been a DUI defense attorney since 1993. He was a judicial clerk for the Honorable C. Tolbert Goolsby, Jr., Judge of the South Carolina Court of Appeals, and he has been a law professor at the Charleston School of Law. He practices law in Charleston, South Carolina with the law firm of Futeral & Nelson, LLC.

For more information on Stephan Futeral's professional background, please [tap here](#).

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**Thomas Nelson** has been defending DUI's for the past ten years in South Carolina's Lowcountry. He is recognized by Super Lawyers as a "Rising Star" as a General Litigation attorney in 2013 and 2014 and was granted membership to the National Trial Lawyers Top 100 Criminal Trial Lawyers. He is a partner in the law firm of Futeral & Nelson, LLC.

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first seeking the advice of an attorney licensed to practice in your area.

# The Law

In South Carolina, it is illegal to operate a motor vehicle while impaired by alcohol (or drugs). However, it isn't illegal to have a drink and drive in this state.



## South Carolina's DUI statute provides:

*"It is unlawful for a person to drive a motor vehicle within this State while:*

*(1) under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired;*

*(2) under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or*

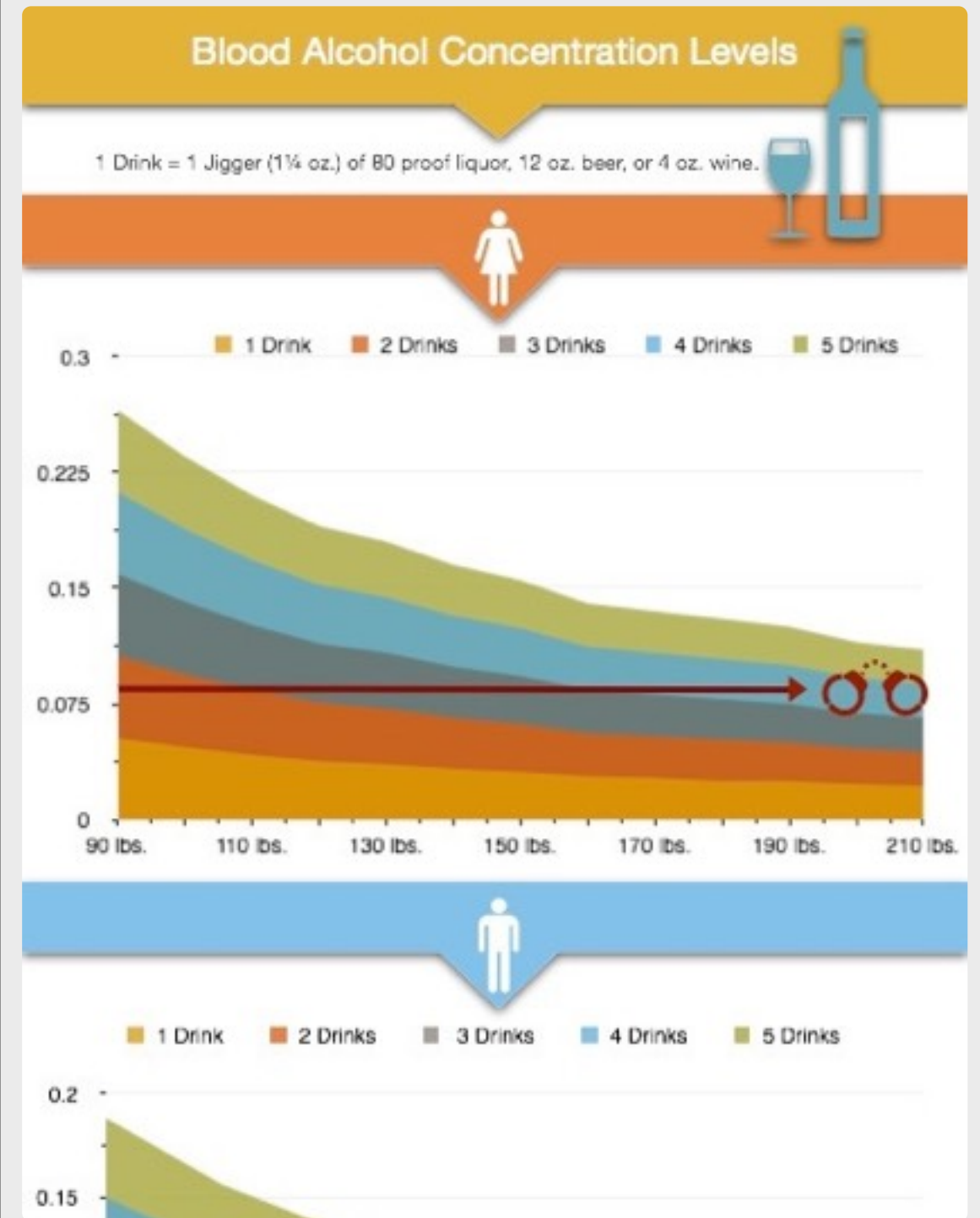
*(3) under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired."*

Under South Carolina law, the legal blood alcohol (BAC) limits are:

**Less than .05** - It is conclusively presumed that the person was not under the influence of alcohol.

**Greater than .05 but less than .08** - No inference whether the person was under the influence of alcohol, but that fact may be considered with other evidence in determining the guilt or innocence of the person.

ILLUSTRATION 1.1 Blood Alcohol Levels & Elimination Rates





(3) **Greater than .08** - It may be inferred that the person was under the influence of alcohol.

### **Proof of Impaired Driving**

Typically, prosecutors prove a DUI by showing, among other things: (1) the driver had observable signs of intoxication such as slurred speech, bloodshot eyes, strong odor of alcohol, staggering, or swaying; (2) the driver failed field sobriety tests (reciting ABC's, standing on one leg and counting, etc.); or (3) the driver could not maintain control of the vehicle (weaving, driving off the shoulder, etc.). Additionally, DUI prosecutors may show evidence that the driver had a BAC (Blood Alcohol Concentration) level above the statutory legal limit.

### **Driving With Unlawful Alcohol Concentration (DUAC)**

Similarly, South Carolina has a statute that makes it illegal to drive a motor vehicle "while [a person's] alcohol concentration is 0.08 percent or more." Unlike a DUI, being "impaired" isn't an element to DUAC which means that although you may be perfectly capable of driving, you are guilty of DUAC if your blood alcohol concentration (BAC) is 08% or more.

The prosecution has the choice of convicting a driver for a DUI (proof of impairment which may include proof of BAC) or a DUAC (proof of BAC .08 or greater and the driver is guilty). A driver can only be prosecuted for a DUAC if the breath (or blood) test is performed within two hours of the

time of arrest and probable cause (a reasonable belief that a person has committed a crime) existed to justify the traffic stop. A driver can't be prosecuted for a DUAC if the driver was stopped at a traffic road block or driver's license check point. Further, a driver can't be prosecuted for both a DUI and a DUAC for the same stop.

### **DUI vs. DUAC**

When defending a DUI, we rarely recommend that our clients plea to a DUAC. The penalties for a DUI or DUAC are virtually identical. For example:

- Neither charge is eligible for expungement from your criminal record.
- The fines and/or jail sentences are identical.
- The charges have the same impact on your driving privileges.
- Both offenses require the offender to complete the Alcohol and Drug Safety Action Program (ADSAP).
- Both offenses require a driver to have SR-22 insurance for 3 years.
- Both charges may enhance a subsequent arrest for either DUAC or DUI to a second offense, causing it to be prosecuted in General Sessions Court.



## **Underage Drinking and Driving - Zero Tolerance**

If the driver is under 21 and law enforcement suspects the driver is under the influence of alcohol or drugs, then the arresting officer can charge the driver under South Carolina's "Zero Tolerance" law. Under the Zero Tolerance Law, the legal limit is 0.02%. For most underage drinkers, one drink will put them over this limit. If the underage driver is suspended under the Zero Tolerance law, there can be no criminal prosecution for DUI.

If the underage driver gives a sample and registers a 0.02 or higher, the person will be suspended for 3 months on a first offense. If the driver has a conviction for DUI or has been suspended for refusing to submit to a breath test or for blowing over a 0.02 within the past 3 years, the person will be suspended from driving for 6 months.

# The Legal Process

A DUI can happen to anyone, not just “criminals.” A night on the town can turn into several months of dealing with court, administrative proceedings, lawyers, and more.



In most cases, there are two parts to a DUI: (1) the Administrative Suspension of your driver's license under "Implied Consent" laws and (2) the criminal prosecution of your DUI.

### **The Implied Consent Hearing**

Separate from dealing with the DUI charge, the driver may have an immediate license suspension because the driver either refused to submit a breath sample or gave a sample of 0.15% blood alcohol content (BAC) or higher. We cover implied consent laws in detail in Section 3 of this Chapter.

### **Bench Trial**

The accused will first be scheduled for a bench trial, which means the defendant will go before a judge and either plead guilty or have the judge decide the case. A person accused of a crime has a constitutional right to a jury trial if he or she requests one. We almost never want the case to be decided by a judge. In our law firm, we usually prefer to have six jurors make the decision of guilty or not guilty. So, in most cases, we end up requesting a jury trial. After doing so, the initial court date goes away, and the case is put on the court's jury roster.

### **Background Investigation**

We immediately begin every case with an initial investigation. This investigation includes filing a "Brady Motion," which forces the prosecution to give us everything in their file. We always make sure we obtain the police report, the in-car video

from the police cruiser, and the video from the breath test room. Even if the driver didn't submit a breath sample, their words and actions during the breath sample process constitute valuable evidence. There are various other pieces of information we like to review, including subpoenaing the dispatch records from the time of the arrest and the officers' training records.

In cases with BAC readings, we attack the credentials of the breath test machine, called the DataMaster (DMT). We obtain and review all the pertinent records on the machine to determine whether we can make a case that it malfunctioned at the time of the test. Sometimes, even if we can't prove the machine was faulty, we can at least shift the burden so that the prosecution must prove that it was working properly instead of them simply showing the BAC reading to the jury.

In cases involving blood draws, we investigate the circumstances that led to the blood draw to show the proper procedure wasn't followed. In accident cases, we investigate the circumstances that led to the accident. Just because an accident occurred doesn't mean that it's automatically the fault of the person charged with DUI.

In cases where the person was stopped because of a roadblock, we challenge the constitutionality of the roadblock and try to show that the stop was not lawful.

## **The Pending Charge**

For most DUI cases, there is nothing the client can do while the charge is pending except stay out of trouble. Worrying about the charge has no benefit.

Every court has a different procedure. Some schedule jury docket cases for what is called a “pretrial.” At the pretrial, we have the opportunity to meet face-to-face with the prosecutor. We use this opportunity to try to negotiate a favorable outcome for our client. We emphasize the good things about the client and we try to show the prosecutor some of the problems we’ve found with their case. For courts that don’t schedule pretrials, we simply call the prosecutor to initiate settlement discussions.

In most cases, letting the charge sit is the best course. Sometimes officers or witnesses move away, which means the prosecutor may not be able to prove the case. Also, it allows us time to complete our investigation. Finally, if there were any high emotions from the night of the arrest, they have time to calm down. However, if the charge is having an immediate impact on the client, such as resulting in discipline from an employer or if the client is in the military, we may try to speed the process up. It all depends on the client’s situation and the facts of the case.

## **The Trial**

Ultimately, if the prosecutor doesn’t agree to offer a resolution acceptable to the client, the case will be set for trial. Our trials

usually take one full day. They begin with a combination of motions to dismiss, motions to exclude evidence, and the selection of the jury. Sometimes, a favorable ruling on one of our motions will be just enough leverage to persuade the prosecutor to offer a better deal. If not, we try the case. We make opening statements to the jury. We cross-examine the police officer and any other witnesses the prosecution calls. After all the witnesses have been called, we make closing arguments, the judge instructs the jury on the law, and then the jury deliberates until they reach a verdict. In all, the prosecution has to prove the defendant guilty beyond a reasonable doubt. The defendant doesn’t have to prove a thing.

# Your Rights During & After Arrest

## IN THIS SECTION

1. Initial Stop and Investigation
2. Under What Circumstances Can I Be Arrested?
3. What Should I Do If The Police Stop Me & Ask Me Questions?
4. What Are My Rights If Arrested?
5. Will My Arrest Be Videotaped?
6. If I Am Arrested, What Will The Police Do?
7. What Should I Do If I Am Arrested?

## Initial Stop and Investigation

A stop involves brief questioning in the place where you were detained. If the officer wishes to hold you for a longer period of time or decides to take you elsewhere such as to the police station, he or she is no longer just stopping you. Instead, the officer is arresting you. Because an arrest deprives you of your freedom of movement for an even longer period of time than a stop, the law limits the instances when arrests can be made.

In a DUI, law enforcement has the right to stop you and your vehicle to investigate whether you are under the influence when they observe a traffic violation, an equipment failure of your vehicle, or erratic driving. Because the officer is interfering with your liberty, he or she should first have a reasonable suspicion that you have been involved in a crime. This suspicion would need to be supported later (if the matter should wind up in a court) by the officer's reference to specific facts prompting such a suspicion.

During this stop, the police may ask you questions and ask you to get out of your vehicle to perform field sobriety tasks. Just as when an officer arrests you, you have the right to refuse to answer any questions if the answer would tend to incriminate you. You also have the right to refuse to perform field sobriety tests.

## Under What Circumstances Can I Be Arrested?

You may be arrested by a police officer who personally saw you violate any state statute, city ordinance or federal law. The

law may be a serious crime (a felony) or a lesser offense (a misdemeanor). The important thing is that the officer sees the violation. If the charge is a minor traffic offense, the law requires the officer to just ticket you (that is, give you a citation that orders you to appear in court later) rather than arrest you. However, if you refuse to identify yourself, or if it appears to the officer that you need medical attention, then he or she can arrest you on this minor traffic offense.

You may be arrested for a felony, even if the police officer didn't personally see you commit the felony, so long as the officer has "probable cause" to believe you committed the crime. Later, the court system (not the police) will determine if the officer's belief was reasonable and if you're guilty or innocent.

You may be arrested when there is a warrant for your arrest, whether you are aware of the warrant. The police can't cancel an existing warrant. They must serve it and arrest the person named on the warrant.

An arrest warrant is a legal document, issued by a judge, directing the police or the sheriff to arrest you and to take you into custody. The officer must show the warrant to you within a reasonable time after you are arrested and give you a copy. If the officer fails to do so, tell your attorney later.

Even if you believe the officer has no grounds to arrest you, don't argue with or resist the police. You have no right to argue about why you are being arrested or about your guilt or innocence at the time of the arrest. Arguing or resisting the

police will not help you. It will mean the police can bring additional criminal charges against you, and it may make it harder for you to get out of jail on bail if you're charged.

### **IMPORTANT**

**Never resist your arrest. Do not run away.  
Never resist the arrest of another person.**

### **What Should I Do If The Police Stop Me & Ask Me Questions?**

Cooperate, but don't incriminate yourself! Law enforcement officers have a duty to protect the community they serve, its citizens, and their property. The law in South Carolina gives police certain powers to help them perform that duty. They have the power to approach persons and to ask them questions. Simply because you're questioned by the police doesn't mean you're suspected of having committed a crime. All citizens are encouraged to cooperate with the police to see that those who break the law are brought to justice, and the police rely on law-abiding citizens to do so. But you're not required to incriminate yourself. **YOU MAY REFUSE TO ANSWER ANY QUESTION IF THE ANSWER WOULD TEND TO INCRIMINATE YOU.**

Further, anything you say can be used as evidence against you. Sometimes people think that what they are saying won't

incriminate them, when in fact, what they say provides a link in a chain of information that could incriminate them.

## **What Are My Rights If Arrested?**

**1. You have the right to be told why you are being arrested and the nature of the charges against you.** If you're arrested on a warrant, you have the right to see the warrant within a reasonable time after your arrest, to read it and to make certain your name appears on it, and to see the charge against you.

**2. Miranda Rights.** These constitutional "Miranda" rights are:

- The right to remain silent and not answer any questions at all;
- The right to know that if you waive (give up) your right to remain silent and do answer questions, the police can use your answers against you in a court to get you convicted;
- Even if you begin to answer questions, you have the right to stop answering questions at any time and to speak with an attorney;
- You have the right to speak privately with an attorney before you answer any questions or sign anything; If you can't afford an attorney and if the crime for which you have been arrested has jail time as a possible penalty, you have a right to have an attorney appointed for you (perhaps a public defender) to represent you at no cost to you before being

questioned, and to have that attorney present with you during any questioning to which you may later agree to submit.

**Note:** Unlike what you may see on television or in the movies, a criminal case isn't thrown out of court simply because the police didn't read the suspect his or her "Miranda" rights. In fact, the suspected murderer, Mr. Miranda, of the now famous case, didn't have his case thrown out because his rights were not read to him; rather, he was retried, convicted, and sent to jail.

Miranda doesn't require an oral or written warning that the suspect has the right to terminate an interrogation at any time and to not answer any further questions. So, although an arresting officer isn't required to inform you of this right, if you are ever being questioned while in police custody, you can stop answering questions at any time and demand to speak with an attorney before going any further.

## **3. You also have the following rights:**

- The right to contact, by telephone or otherwise, a responsible person, to tell them you have been arrested and what the charges are. You are not limited to one telephone call if more are needed to contact such a person;
- The right to refuse any physical or chemical test (such as a polygraph "lie detector," field sobriety tests or physical performance tests such as walking a straight line or making



other movements, or mental ability tests like reciting the alphabet or doing math), until you can talk to your lawyer;

- The right to have your attorney present at any lineup or other identification procedure in which you are viewed by possible eyewitnesses to a crime;
- The right to reasonable bail or to bond to secure your release from jail unless you are charged with a capital crime. Usually a judge sets the bail or conditions of your release. If you are charged with a misdemeanor, and if no judge is available, the police may, at police headquarters, accept bail according to rules established by the judge;
- The right to be brought before a court as soon as is reasonably practicable after your arrest so that you can request a preliminary hearing to test the basis of your arrest and/or trial to determine your guilt or innocence.

### **Will My Arrest Be Videotaped?**

South Carolina law requires officers making DUI arrests to videotape the subject's conduct at the scene of the stop, including any field sobriety tests administered. The one exception to this rule is when the arresting officer submits a sworn affidavit certifying that the video recording equipment was inoperable condition and that reasonable efforts were made to maintain the equipment.

### **If I Am Arrested, What Will The Police Do?**

If you're arrested, the police will search you for weapons, handcuff you, transport you to jail, and photograph and fingerprint you for identification.

If they don't have a search warrant (a court order allowing them to search), they may ask you to allow them to search your car, your home and/or your other possessions. You can refuse to consent to these searches.

You have a right to be free from unreasonable searches and seizures. Most of the searches for which an officer might ask your consent would require the officer to first obtain a warrant from a judge — unless you consent and give up this right.

You have the right to have a judge decide whether a search is proper before that search is conducted. There is no penalty for exercising your right to have the judge decide whether to allow the search. Your refusal to consent to a search can't be used against you.

If you are uncertain about how to respond to any request made by an officer, assert your right to counsel and discuss it with your attorney first before taking further action on the officer's request.

### **What Should I Do If I Am Arrested?**

**Don't argue with the police.** You can't talk your way out of being investigated, arrested or prosecuted. Don't try. Any

explanation you give the police may give them more information than they already have, so it's often wise to save your explanation and defenses for court.

**Avoid conversing with the police.** If you have been arrested, the police believe you committed a crime. Their job is to investigate and gather evidence. Telling the police your side without a lawyer present is usually a bad idea, even if you believe you have done nothing wrong. Only your attorney and the judge have the power to make things easier for you.

**Pay attention to what happens when you first come across the police and afterwards.** Try to memorize who was there to see and hear what happened. Sometimes the court needs to look into what happened to you while you were in custody. It will help you if you can later fully inform your counsel about these events, so be observant.

**Don't tell your family and friends all about it or ask non-lawyers for legal advice.** It is possible they may be ordered to appear at trial to repeat what you said.

**Tell your attorney the whole truth.** Your lawyer will advise and defend you no matter what you did or did not do.

# What Happens After Arrest

## IN THIS SECTION

1. Your License May Be Suspended
2. Your Vehicle May Be Impounded
3. Your Court Date
4. You May Have Other Charges
5. The Conditions of Your Bond
6. Your Criminal Record Will Show An “Arrest” For DUI
7. You Don’t Need Any Special Insurance At This Time

Being arrested for DUI in South Carolina can be an intimidating experience leaving you with much uncertainty about what happens next. If you’ve been arrested for a DUI 1st in South Carolina, here are some of the main things you should know:

### **Your License May Be Suspended**

After the arrest, you will likely offered a breath or blood test. If you refuse the test, your license will be suspended for 6 months, and you will have to enroll in the Alcohol and Drug Safety Action Program (called “ADSAP”). Otherwise, if you take the test and your blood-alcohol concentration (called “BAC”) was 0.15% or higher, then your license will be suspended and you will have to enroll in ADSAP. However, you can challenge any suspension if you request an “implied consent” hearing within 30 days.

Importantly, while you wait on the hearing, you will be able to obtain a Temporary Alcohol License and to drive. This Temporary Alcohol License isn’t a route restricted license. In fact, assuming you intend on challenging the hearing, you shouldn’t apply for a route restricted license at this time. Instead, you should get your hearing request out immediately so that you can obtain your Temporary Alcohol License as soon as possible.

Remember, you can’t obtain your Temporary Alcohol License until the DMV has notice that your hearing is requested, and this normally takes 2 – 7 days. Every day that you wait is a day that you may have a suspended license unnecessarily. In the



is made and you don't show up when you should have, the court could try your case in your absence and convict you of DUI.

Another box to review is the one at the bottom right. This box indicates what your BAC was. If you refused, the police officer likely indicated such in this box.

### **You May Have Other Charges**

Go through every page of the paperwork that the police officer gave you. Make sure that there are no other tickets and that you do not have any other arrest warrants within. Other charges could be criminal charges, either misdemeanor or felony, or they could be simple traffic or vehicle violations.

### **The Conditions of Your Bond**

Also, look at the bottom of your Bail Proceeding Form, it may indicate whether you need to appear in General Sessions Court, Municipal/Magistrate Court, or both. Documents such as these indicate whether other charges may be pending. Your attorney will ultimately identify whether any other charges are pending, but this is information that you should be aware of now.

Nearly every bail/bond proceeding in South Carolina is going to use the form shown in Image 2.1. Paragraph 1 of this form reads: "THEREFORE, IT IS HEREBY ORDERED: 1. That the above named defendant be released from custody on the condition that he will personally appear before the designated

court at the place, date and time required to answer the charge made against him and do what shall be ordered by the court and not depart the State without permission of the court and be of good behavior."

There may be other special conditions of your bond. Check the reverse side or page 2 of your Bail Proceeding Form, specifically paragraphs A-D in the section entitled "SPECIAL CONDITIONS OF RELEASE." If there are any other conditions of your bond, they should be listed here.

### **Your Criminal Record Will Show An "Arrest" For DUI**

Because you were booked and fingerprinted, the State Law Enforcement Division (SLED) will keep a record of the arrest. This does not mean you are convicted. Remember, DUI and DUAC convictions can't be expunged from your record. To learn more about expungements in South Carolina, [click here](#).

### **You Don't Need Any Special Insurance At This Time**

Some people have come to our office believing that they needed to get SR-22 insurance, which can be much more expensive than regular automobile insurance. Do not worry about your insurance company at this time. SR-22 will only be required if you are convicted of DUI or DUAC.



# Implied Consent

## IN THIS SECTION

1. Refusing the Breath or Blood Test
2. Taking the Breath Test
3. Inability to Take the Test
4. Urine Sample
5. Independent Tests
6. Challenging a Driver's License Suspension
7. The Implied Consent Hearing
8. Driving While Waiting on an Implied Consent Hearing

Driving in South Carolina is a privilege, not a right. By driving on the roads of South Carolina, a person has impliedly given consent to submit to breath, blood, or urine testing for the purpose of determining the presence of alcohol, drugs, or both if the person is arrested for DUI or DUAC. A driver has the right to refuse this test. However, if the person is charged with felony DUI, which means the impaired driving allegedly caused death or great bodily injury to someone else, the person may not refuse the tests, and the police officers can force the person to give a blood sample if they don't blow into the breath test machine.

## **Refusing the Breath or Blood Test**

If you refuse the breath test, your license will be immediately suspended for at least 6 months. You will also have to enroll in and complete the Alcohol & Drug Safety Action Program (ADSAP). You may be eligible to receive a route-restricted license during this 6-month period to enable you to go to work and school, to your ADSAP classes, and to any other court-ordered alcohol programs.

Your refusal may be used against you in court. If you've had a previous conviction for DUI or DUAC within the past 10 years, the suspension period will be 9 months. If you've had more than one conviction within the past 10 years, the suspension period will be even longer. You will receive from the officer a Notice of Suspension form, and the arresting officer probably will take your driver's license.

## **Taking the Breath Test**

If you take the test, the breath test machine will give you a written report showing your blood alcohol content (BAC). The reading is admissible as evidence at your DUI or DUAC trial. If your blood alcohol content is less than 0.15%, then there is no immediate suspension of your driver's license. If your BAC is 0.15% or greater, then you will be immediately suspended for at least 30 days, and you will have to enroll in and complete ADSAP. If your reading is 0.05% or less, then for purposes of a criminal trial, it is conclusively presumed that you weren't under the influence of alcohol. If your reading is 0.08% or higher, then it may be inferred by the judge or jury that you were under the influence of alcohol, but the judge or jury may consider other evidence when making a final verdict.

## **Inability to Take the Test**

If you are physically unable to provide a breath sample because you had an injured mouth, you were unconscious, or for any other reason considered acceptable by licensed medical personnel, the police officer may request that you provide a blood sample. Refusing a blood sample has the same consequences as refusing a breath test. If none of these circumstances apply, and you attempted to take the breath test but don't blow enough air into the machine for it to make a reading, then you will be considered to have refused the test.

## **Urine Sample**

If the police officer has reasonable suspicion that you are under the influence of drugs other than alcohol or under the influence of drugs and alcohol, the officer may order that a urine sample be taken.

## **Independent Tests**

If you submit to a test, you have the right to have a qualified person of your choosing conduct additional tests at your expense on the night of the arrest. The arresting officer must provide you affirmative assistance if you request additional tests. "Affirmative assistance" at least requires the officer to drive you to the nearest medical facility which performs blood tests to determine a person's alcohol concentration. If you requested your own test, and the police didn't provide you affirmative assistance, then your BAC reading may be excluded from evidence at the DUI trial.

## **Challenging a Driver's License Suspension**

If your license is suspended because you refused a test or because your reading was 0.15% BAC or greater, you may request an Implied Consent Hearing (sometimes referred to as an Administrative Hearing) within 30 days. If you miss the 30-day deadline, you lose the right to challenge your suspension. There is a \$200 filing fee for requesting a hearing.



This hearing is completely independent of your DUI or DUAC charge. In other words, whether you win this hearing will have no bearing on whether you get convicted of DUI or DUAC. Ultimately, you could have to serve the 6-month suspension for the refusal and have to deal with the driving consequences if later convicted of DUI or DUAC.

### **The Implied Consent Hearing**

The hearing is held before an Administrative Hearing Officer who isn't a judge but still presides over the hearing in the same manner as a judge would. The police officer who made the arrest must be present. If a different officer administered the breath test, that officer must also be present. The officers give testimony and present evidence, and your lawyer has the opportunity to cross-examine the officers. Depending on the unique facts of your case, you may also testify at the hearing. Regardless, the burden of proof is on the police to show that your license should be suspended.

At the implied consent hearing, the Administrative Hearing Officer doesn't decide whether you are guilty of DUI. Instead, the Hearing Officer only decides whether your license should be suspended.

At the administrative hearing, you can challenge whether the arrest was lawful. This is usually done by arguing that the arresting officer didn't have probable cause to make the arrest or was not within his jurisdiction at the time of the arrest. You can also challenge whether you were adequately warned of the consequences of taking or refusing the breath test. Although

officers generally read your implied consent rights from an advisement form, they sometimes make mistakes in doing so or they make other comments that invalidate the advisement. Finally, if your BAC reading was 0.15% or greater, you can challenge whether the DMT DataMaster machine was working properly.

### **Driving While Waiting on an Implied Consent Hearing**

Usually within a week or so of requesting a hearing, you will receive from the DMV paperwork permitting you to obtain a Temporary Alcohol License. This license costs \$100 and will allow you to drive in South Carolina without restrictions for six months. After six months, the Temporary Alcohol License expires.

# Pleas

## IN THIS SECTION

1. Not Guilty Plea
2. Guilty Plea
3. No Contest (Nolo Contendere)
4. Alford Plea
5. Plea Bargaining
6. Pleading to Reckless Driving

Our clients have been offered many different types of pleas by prosecutors. For any criminal defendant, including a person facing a DUI charge, it is very important to understand the different types of pleas in South Carolina and how each type of plea may impact your future such as finding a job, entering college, and staying out of jail. The types of pleas that may be offered by a criminal prosecution to a defendant can be a bit confusing. So, we've laid out the five (5) basic types of pleas in South Carolina with a brief explanation of each:

### **Not Guilty Plea**

A defendant may plead "not guilty" to the charge. When this occurs, the accused has an absolute right to a trial by jury. However, the accused can choose to have the case decided by a judge instead of a jury. During the trial, the police officer or prosecutor will present the case through one or more witnesses and possibly introduce other evidence such as documents or video. The defendant or defendant's lawyer will be able to cross-examine the witnesses. After the prosecution rests their case, the defendant will decide whether to present a case, which includes the decision of whether to testify or remain silent. The burden of proof falls on the prosecution, so the defendant is not required to present a case if he or she feels the prosecution did not meet its burden.

### **Guilty Plea**

A defendant may plead "guilty" to the charge. When this occurs, the defendant gives up his or her right to a trial, the right to cross-examine witnesses, the right to require the

prosecution to prove its case, and the right to present evidence. If the judge accepts the guilty plea, then the judge will issue a sentence which may include fines, jail, or both, depending on the charge.

### **No Contest (Nolo Contendere)**

A defendant may plead “no contest,” also known as “nolo contendere,” if the defendant does not want to contest the charges but, instead, refuses to admit guilt. What many people don’t realize is that a no contest plea is essentially the same as pleading guilty. It doesn’t effect the sentencing the judge is allowed to impose, and it will still show as a guilty plea on the defendant’s criminal record. A no contest plea is often made when there is also a possible lawsuit for damages by a person injured by the criminal conduct because the plea can’t be used in the civil lawsuit as an admission of fault. However, a no contest plea may be used as a conviction for impeachment purposes in a civil lawsuit. A defendant wishing to plead “no contest” should be aware that it isn’t automatic, and a judge can reject the plea.

### **Alford Plea**

Alford pleas and “no contest” pleas are very similar. An Alford plea carries the same sentencing and consequences as a guilty plea. The difference is that by making an Alford plea, the defendant proclaims that he or she is innocent but does not want a trial because the prosecution has evidence that the defendant believes will result in a conviction. A judge is less likely to accept an Alford plea for various reasons, but they

might be used in certain cases. For all practical purposes, an Alford plea is equivalent to a guilty plea. A defendant who gives an Alford plea and is later sued in civil court over the same incident cannot challenge the issue of guilt in the civil case. The only real benefit we find in an Alford plea in South Carolina is that the defendant may save some humiliation from publicly admitting guilt.

### **Plea Bargaining**

A plea bargain may occur where the defendant pleads guilty to a lesser charge in exchange for the original charge to be dismissed or agrees to plead guilty to one or more charges to have other charges dismissed, “nolle prossed,” or deferred:

- **Dismissal** - Occasionally, if the prosecutor is not stuck on convicting the defendant, then prosecutor may agree to dismiss the charge outright.
- **Nolle Prose** - Similar to a dismissal, the prosecutor may “nolle prose” the charge. In this situation, the charge is dropped and the defendant can have their record expunged. However, unlike an outright dismissal, if the prosecutor nolle prose’s the charge, the prosecutor can reopen the charges anytime later if he or she wishes to do so. Importantly, there is no statute of limitation on crimes in South Carolina.
- **Deferral (Conditional Discharge)** - Also, the prosecutor may “defer” the charge under certain conditions that will ultimately result in a dismissal. One example of a deferral is

where the defense lawyer and the prosecutor agree that if the defendant is not arrested again for a certain period of time, then the prosecutor will dismiss the charge.

If you are offered a plea bargain by the prosecution, the way that offer is presented by the prosecution can have a big impact on the outcome of your plea. Specifically, if your case is resolved by a plea bargain, the sentencing can be with a “recommendation,” by “negotiation,” or neither.

- **Recommendation** - A recommendation means that the prosecutor will recommend a sentence to the judge, but the judge is not required to follow the recommendation and may give more or less time in the judge’s discretion.
- **Negotiated Plea** - A “negotiated” plea means that the plea, along with the proposed sentence, is presented by the prosecution to the judge who will either accept the plea and issue the negotiated sentence or the judge will simply reject the plea because the judge does not agree with the sentence. If the judge rejects the negotiated plea, then the defendant can withdraw the plea and start all over without giving up the right to a jury trial.
- **Neither** - Finally, there might be no recommendation or negotiation, and both sides argue what they feel is a fair sentence, but the judge ultimately decides.

## Pleading to Reckless Driving

A common DUI or DUAC negotiation in South Carolina results in the defendant to plead to reckless driving, along with some other stipulations such as alcohol classes. What some people, and even some lawyers, don’t know, is that a reckless driving plea can result in serious consequences against the person’s driver’s license.

If a South Carolina driver receives two reckless driving convictions in a 5-year span, that driver will receive a 90-day suspension of his driving privileges. The driver will not be eligible for a route-restricted or provisional license. Also, the driver will have to carry SR-22 insurance for 3 years to drive after the suspension is over. Therefore, a person charged with DUI should be sure his lawyer knows of any previous criminal convictions or traffic offenses he received in the past 5 years. While most experienced DUI lawyers will catch this, it doesn’t hurt to send a quick email or make a quick phone call to be sure the lawyer knows. When comparing two reckless driving offenses, the DMV looks to see whether the offense dates (date of arrest) are within 5 years. The conviction dates are immaterial. This is important because a lawyer can’t stall a reckless driving plea to get past the 5-year mark.

# Habitual Offender

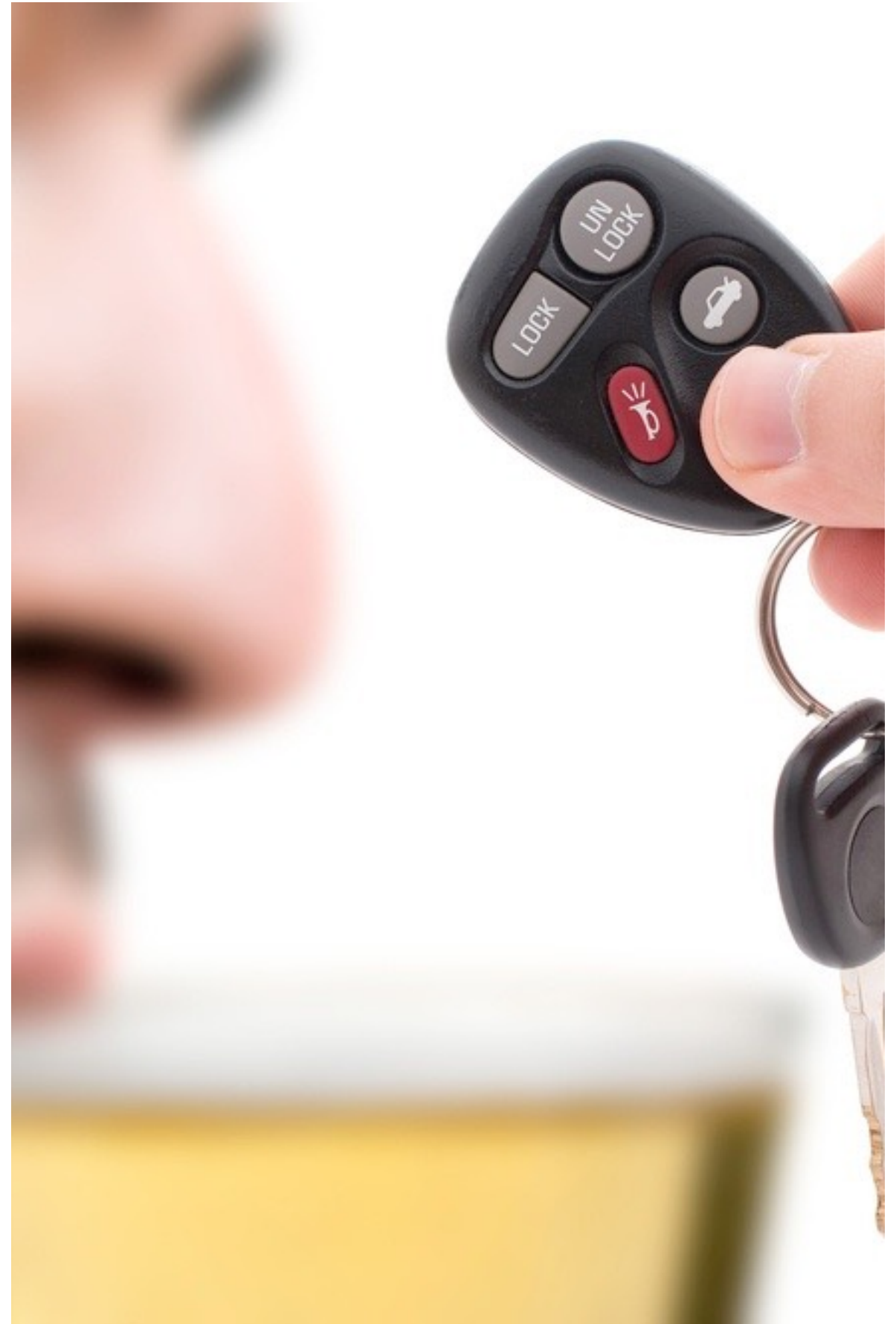
Being declared a “habitual offender” in South Carolina can be devastating. It begins as a 5-year driving suspension with no possibility of a route restricted or provisional license. After the first 2 years, a habitual offender can try to have the suspension reduced or terminated, but there is no guarantee. If there are no arrests or driving violations, the chances of getting the suspension improves greatly, but it is still 2 years of catching rides with taxis and friends. A driver may qualify for a moped, but not too many drivers find this to be a great situation, especially when it rains or when they have longer distances to travel.

A person will be declared a habitual offender if that person is convicted of three major offenses within a 3-year period or receives 10 minor infractions within a 3-year period. Like reckless driving, these offenses are reviewed using their arrest dates, not conviction dates. The offenses that are considered “major infractions” for purposes of habitual offender laws are:

(1) offenses resulting in someone’s death; (2) driving under the influence (DUI); (3) driving with an unlawful alcohol concentration (DUAC); (4) reckless driving; (5) driving under suspension (DUS); (6) motor vehicle law felonies; and (7) leaving the scene of an accident resulting in death or injury. Two convictions from the same arrest are only counted as one. For example, if a person has a previous reckless driving conviction and a separate conviction for DUS arising from a different incident and is arrested again for DUI, then a plea to reckless driving will result in the driver being declared a habitual offender.

# In the Field

In most DUI or DUAC cases, observations about the driver and Field Sobriety Testing (FST) are the primary methods a police officer uses to establish probable cause to make an arrest.



# Bloodshot Eyes, Slurred Speech, & Odor of Alcohol

In all the years we've read officers' reports and heard their courtroom testimony, we have NEVER come across a situation where the officer didn't observe the follow three so-called "objective symptoms" of intoxication: (1) bloodshot eyes; (2) slurred speech; and (3) strong odor of alcohol. After all, without these "objective symptoms," the officer wouldn't have a reason to investigate a driver for DUI. But are these "symptoms" really objective indicators of intoxication?

## **Bloodshot Eyes**

Could bloodshot eyes really be a sign of intoxication? Considering how many other explanations there are for that condition, the answer is probably not. Drivers have bloodshot eyes for all sorts of reasons eye irritation such as contacts, viewing oncoming traffic headlights at night, allergies, dry eyes, staring at a computer screen for long periods, exposure to cigarette smoke, lack of sleep, or any eye condition.

## **Slurred Speech**

Like bloodshot eyes, there are many other reasons for slurred speech besides intoxication. Slurred speech can be caused by dry mouth, anxiety, a stroke, speech impediments, and many medical conditions such as dysarthria.

## **Odor of Alcohol**

For starters, its important to remember that it is not illegal to have a drink and drive in South Carolina. It is only illegal to be intoxicated while driving. So, can a police officer tell how much you've had to drink based on how your breath smells? The answer is no. If you think about it, it makes little sense for an officer to claim that he or she detected the "strong" odor of alcohol when: (1) whether you had one drink or several drinks, your breath smells like alcohol either way; and (2) those drinks that have the least amount of alcohol content (such as beer or wine) have a stronger odor than those drinks that have a higher alcohol content (such as vodka or gin). Therefore, it is not surprising that a 1999 study, "Police Officers' Detection of Breath Odors From Alcohol Ingestion," found that experienced officers could neither identify which type of alcohol subjects drank based on smell nor estimate the subject's BAC levels (how much they drank) based on smell.

## **Not Truly Symptoms of Intoxication**

In the end, it always sounds bad when officers testify before juries regarding bloodshot eyes, slurred speech, and the odor of alcohol. However, through cross-examination, an



experienced DUI attorney can educate jurors that these “objective symptoms” of intoxication are neither objective nor actual symptoms of DUI.

# Field Sobriety Tests

## IN THIS SECTION

1. Horizontal Gaze Nystagmus (HGN)
2. Walk & Turn
3. One-Leg Stand
4. Alternative Tests
5. Why Sober Drivers Fail FST's

The Standardized Field Sobriety Test (SFST) is a series of three tests administered and evaluated in a standardized manner to obtain valid indicators of impairment and establish probable cause for arrest. These tests were developed as a result of research sponsored by the National Highway Traffic Safety Administration (NHTSA). A formal program of training was developed and is available through NHTSA to help police officers become more skillful at detecting DUI suspects, describing the behavior of these suspects and presenting effective testimony in court.

To administer these FST's, the officers are provided extensive training. However, more often than not, the officers don't follow their training and they deviate from NHTSA standards in the administration of these tests.

The three tests are:

1. Horizontal gaze nystagmus (HGN)
2. Walk-and-turn
3. One-leg stand

### 1. HORIZONTAL GAZE NYSTAGMUS (HGN)

Horizontal gaze nystagmus (HGN) is an involuntary jerking of the eyeball which occurs naturally as the eyes gaze to the side. Under normal circumstances, nystagmus occurs when the eyes are rotated at high peripheral angles. However, when a person is impaired by alcohol, nystagmus is exaggerated and may occur at lesser angles. An alcohol-impaired person will

also often have difficulty smoothly tracking a moving object. In the HGN test, the officer observes the eyes of a suspect as the suspect follows a slowly moving object such as a pen or small flashlight, horizontally with his eyes.

The examiner looks for three indicators of impairment in each eye: 1) if the eye cannot follow a moving object smoothly, 2) if jerking is distinct when the eye is at maximum deviation, and 3) if the angle of onset of jerking is within 45 degrees of center. If, between the two eyes, four or more clues appear, the suspect likely has a BAC of 0.10 or greater. NHTSA research indicates that this test allows proper classification of approximately 77 percent of suspects. HGN may also indicate consumption of seizure medications, phencyclidine and a variety of inhalants, barbiturates and other depressants.

The HGN test requires the officer to move the pen at an approximate speed. However, police officers regularly move the pen at a faster rate than as provided for in their training. This deviation by the officer, among others, allows DUI defense attorney's to challenge this test in court.

## **2. WALK-AND-TURN TEST**

The walk-and-turn test (and one-leg stand test) is a "divided attention" test that is easily performed by most sober people. The test require a suspect to listen to and follow instructions while performing simple physical movements. This test is based on the fact that impaired persons have difficulty with

tasks requiring their attention to be divided between simple mental and physical exercises.

In the walk-and-turn test, the subject is directed to take nine steps, heel-to-toe, along a straight line in one direction, turn making a series of small steps in a circle, and walk 9 steps back in the same manner. The examiner looks for seven indicators of impairment: 1) if the suspect cannot keep balance while listening to the instructions, 2) begins before the instructions are finished, 3) stops while walking to regain balance, 4) does not touch heel-to-toe, 5) uses arms to balance, 6) loses balance while turning, or 7) takes an incorrect number of steps. NHTSA research indicates that 68 percent of individuals who exhibit two or more indicators in the performance of the test will have a BAC of 0.10 or greater.

These instructions are a lot to take in, even for drivers who are completely sober. In addition, the test requires the suspect to engage in non-natural body movements in that the human skeleton is not designed to walk with one foot in front of the other.

Officers are encouraged to use actual lines, such as painted lines in a parking lot, when possible, although many officer ignore this suggestion. Notably, some of the clues officers look for when grading a suspect's performance include the suspect's failure to follow all the instructions with exact precision. Ironically, the officers do not follow the instructions from their training, despite being formally trained and despite

having administered these tests dozens, if not hundreds, of times.

The officers do not give the suspect credit for slight mishaps, despite the suspect being extremely nervous and hearing a series of confusing instructions quickly before the test.

Also, NHTSA standards require the officer to “limit [his or her] movement which may distract the suspect during the test.” Officers regularly ignore this instruction and walk alongside the suspect, in the suspect’s periphery.

### **3. ONE-LEG STAND TEST**

In the one-leg stand test, the suspect is instructed to stand with one foot approximately six inches off the ground and count aloud by thousands (One thousand-one, one thousand-two, etc.) until told to put the foot down. The officer times the subject for 30 seconds. The officer looks for four indicators of impairment, including 1) swaying while balancing, 2) using arms to balance, 3) hopping to maintain balance and 4) putting their foot down. NHTSA research indicates that 65 percent of individuals who exhibit two or more such indicators in the performance of the test will have a BAC of 0.10 or greater.

Little does the suspect know that the officer is actually looking to see if the suspect can hold his foot up for thirty whole seconds. If the suspect knew of the thirty-second requirement, the suspect may be able to prepare his balance better or may wish to refuse the test altogether. On top of

that, police officers often deviate from the protocol and do not give the suspect all the benefits to which the suspect is entitled. For example, sometimes the police do not advise the suspect to “keep his feet together,” which could actually make the test a little easier.

Notably, the officers’ training manual expressly states that “validation [of the FST’s] applies only when the tests are administered in the prescribed standardized manner.” The manual further states that “if any one of the standard field sobriety test elements is changed, the validity is compromised.” Still, the officers often change the elements and deviate from the prescribed standardized manner, and nonetheless, they still arrest drivers investigated for DUI based upon the results of these tests.

### **4. ALTERNATIVE TESTING METHODS**

Occasionally, certain suspects such as physically disabled persons are unable to perform the SFST and alternative testing methods must be employed. In such cases, some other battery of tests such as counting aloud, reciting the alphabet or finger dexterity tests may be administered. Several appellate court decisions have indicated that, if you administer a test that requires the subject to respond orally in other than a routine information-giving fashion, such as requiring them to indicate the date of their sixth birthday, and if they are in custody at the time, you should administer the Miranda warning first, because the officer is seeking information that is testimonial in nature.

## 5. WHY SOBER DRIVERS FAIL FST'S

For many years, field sobriety “tests” (FST’s) have been used by South Carolina law enforcement officers to identify drivers who are impaired by alcohol. Yet, in a study conducted several years ago by two scientists at Clemson University, officers misidentified 32% of individuals in a laboratory setting as being above the “legal limit” when these individuals actually were sober!

In this study, two groups of seven law enforcement officers watched videotapes of 21 (sober) individuals performing a variety of field sobriety tests. The 14 police officers had from 1 to 17 years of law enforcement experience and they had all completed DUI detection training at the South Carolina Criminal Justice Academy. The individuals were 10 males (7 Caucasian and three African-American), and 11 Caucasian females. They ranged between 21 and 55 years old, they weren’t overweight, and none of them had any physical disabilities. Again, NONE of the participants consumed any alcohol.

The field sobriety tests including the walk-and-turn test, the one-leg-stand test, and reciting the alphabet. The walk-and-turn test requires a person to stand on a line in a heel-to-toe position while listening to instructions and then to take nine steps in a heel-to-toe fashion, pivot, and take nine more steps along a straight line. The one-leg stand requires an individual to stand with their arms at their side and extend one foot six inches off the ground and maintain that position while

counting for 30 seconds without extending the arms or losing balance.

If these are supposed to be actual “tests,” then why were these police officers mistaken 32% of the time? Essentially, the “tests” are unfamiliar and they aren’t easy to do without practice. To a police officer who has demonstrated the tests many times before, the tests may seem easy to do. Likewise, to a casual observer, the tests may seem straightforward. However, when a sober, untrained person performs the tests, they often discover that the tests aren’t as easy as they look and that an untrained person doesn’t always have the motor skills to perform the tests properly.

Although this study is several years old, the circumstances haven’t changed. Police officers still perform these tests, and therefore a percentage of innocent people are still placed under arrest for DUI.

# DUI Checkpoints

## IN THIS SECTION

1. Are License or DUI Checkpoints Legal in South Carolina?
2. The Legal Requirements for Setting Up a License or DUI Checkpoint
3. The Legal Requirements for Conducting a License or DUI Checkpoint
4. 4. What To Do If You're Stopped at a Checkpoint

In South Carolina, law enforcement may briefly stop drivers at a checkpoint or a roadblock for the limited purpose of verifying a driver's license, vehicle registration, and proof of insurance. Also, authorities may set up checkpoints to detect drunk drivers. However, in every case involving an arrest for a DUI at a checkpoint, the prosecution must first show that the checkpoint didn't violate the driver's rights under the Fourth Amendment of the U.S. Constitution.

## 1. ARE LICENSE OR DUI CHECKPOINTS LEGAL IN SOUTH CAROLINA?

The Fourth Amendment of the U.S. Constitution guarantees that all persons have a right to be free from unreasonable searches and seizures. Although a license or DUI checkpoint is the equivalent of a "seizure," the United States Supreme Court has upheld the constitutionality of using a brief stop to check licenses or to detect drunk drivers. However, not all checkpoints are legal unless they meet some basic requirements. Whether a checkpoint was legal largely depends on exactly how law enforcement set up the checkpoint, how they ran the checkpoint, and a showing of evidence that the checkpoint was "successful."

## 2. THE LEGAL REQUIREMENTS FOR SETTING UP A LICENSE OR DUI CHECKPOINT

**Law Enforcement Must Have a Valid Reason for the Checkpoint** – Law enforcement must have a valid reason for

the checkpoint's location, such as an increased DUI rate in a certain area.

**Supervisory Approval is Needed** – In South Carolina, a couple of officers can't just decide to set up a license or DUI checkpoint whenever or wherever they like. Instead, supervisory law enforcement personnel must approve: (1) the decision to establish a checkpoint; (2) the selection of the checkpoint site, and (3) the procedures for the checkpoint's operation. Also, the checkpoint must be overseen by a supervising, uniformed law enforcement officer.

**Law Enforcement Must Publicize the Checkpoint** – Law enforcement must announce the date and the location of any potential checkpoint.

### **3. THE LEGAL REQUIREMENTS FOR CONDUCTING A LICENSE OR DUI CHECKPOINT**

**Cars Must Be Stopped in a Predictable Pattern** – When conducting a checkpoint in South Carolina, law enforcement can't stop vehicles randomly. Instead, law enforcement can only stop motorists according to a neutral formula. For example, may stop cars by pulling over every second or third vehicle.

**The Site Must Be Safe and Identifiable** – Law enforcement must take safety precautions such as proper lighting, warning signs, and signals. Also, law enforcement must use clearly identifiable official vehicles and be in

uniform. Lastly, the checkpoint must exhibit be clearly identified as a license or a DUI checkpoint. In other words, the checkpoint can't be used randomly for anything the officers feel like investigating. Further, the checkpoint must also provide sufficient warning to allow motorists to stop safely at the checkpoint.

**The Stop Must Be Brief** – Under South Carolina law, there is no set time limit during which law enforcement can detain a driver at a checkpoint. Having said that, law enforcement must set up procedures to make sure that they aren't holding drivers longer than needed. Whether the period of the stop was reasonable depends on the circumstances in each case.

**The Checkpoint Must Be Effective** – In cases involving an arrest at a checkpoint, the prosecution must show evidence that the checkpoint "served the public's interest." Typically, the prosecution can prove effectiveness by showing that the traffic stops actually resulted in uncovering traffic violations (such as driving without a license) or criminal violations (such as drunk driving).

### **4. WHAT TO DO IF YOU'RE STOPPED AT A CHECKPOINT**

If you're stopped in South Carolina at a checkpoint or roadblock, here are some basic suggestions on how to handle yourself and your legal rights at a checkpoint:



**Be Calm** – Getting excited, acting out, or being disruptive is the surest way to get yourself singled out at a roadblock!

**Cooperate But Don't Incriminate Yourself** – We're aware of some "viral" videos online suggesting that you don't have to roll your window down or talk to officers at a roadblock. While that may be true in other states, here in South Carolina you are likely to look "suspicious" if you don't cooperate by rolling your window down or politely speaking with the officer. Having said that, you don't have to answer any questions especially those that might incriminate you. For example, if you're stopped at a "license" checkpoint, but the officer starts to ask you questions about where you've been, where you're going, or whether you've been drinking, these questions have nothing to do with whether you have a driver's license. So, you may politely decline to answer these questions by telling the officer that you are exercising your right to remain silent. Even if it is a DUI checkpoint, you still don't have to answer these questions. However, as a practical matter, law enforcement will probably pull you to the side to perform field sobriety tests even if you decline to talk.

If officers ask you to get out of your vehicle, you should cooperate. Otherwise, you may be charged with interfering with an investigation.

Cooperating doesn't mean that you have to perform any field sobriety tests. You should know that police officers have routinely misidentified sober drivers as having failed field sobriety tests, which is a good reason not to do them.

However, if you refuse to perform field sobriety tests, you may be arrested for DUI anyway. Having said that, if you politely declined to answer any questions or perform any field sobriety tests, then law enforcement doesn't have much evidence to prosecute you with after your arrest.

# Penalties & Costs

A DUI conviction carries many penalties including possible jail, fines, driver's license suspension, expensive insurance, and much more.

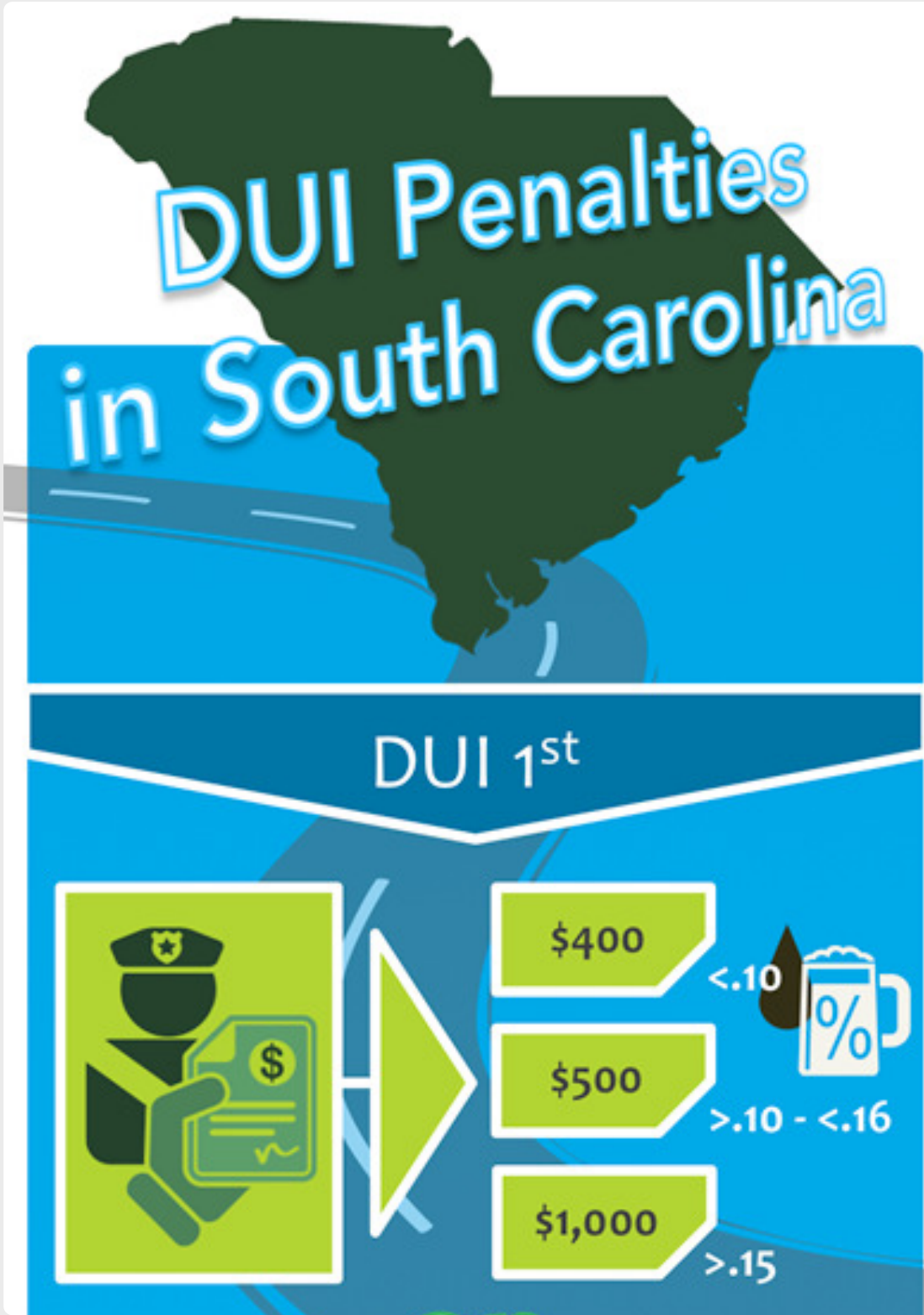


# Penalties for a DUI

**DUI First Offense** – A fine not less \$400 or imprisoned not less than forty-eight hours nor more than 30 days. If your alcohol concentration is at least 0.10% but less than 0.16%, then you will be subject to a higher fine or be imprisoned not less than seventy-two hours nor more than 30 days. If your alcohol concentration is 0.16% or greater, then you will be subject to an even higher fine or be imprisoned not less than 30 days nor more than 90 days. In lieu of the minimum imprisonment requirements, the court may provide for public service employment of equal duration.

**DUI Second Offense** – A fine of not less than \$2,100 nor more than \$5,100 and imprisonment for not less than five days nor more than one year. If your alcohol concentration is at least 0.10% but less than 0.16%, then your fine will be not less than \$2,500 nor more than \$5,500 and imprisonment for not less than 30 days nor more than two years. If your alcohol concentration is 0.16% or greater, then your fine will be not

ILLUSTRATION 4.1 DUI Penalties Info-Graphic



less than \$3,500 nor more than \$6,500 and imprisonment for not less than 90 days nor more than three years.

**DUI Third Offense** – A fine of not less than \$3,800 nor more than \$6,300 and imprisonment for not less than 60 days nor more than three years. If your alcohol concentration is at least 0.10% but less than 0.16%, then your fine will be not less than \$5,000 nor more than \$7,500 and imprisonment for not less than 90 days nor more than four years. If your alcohol concentration is 0.16% or greater, then your fine will be not less than \$7,500 nor more than \$10,000 and imprisonment for not less than six months nor more than five years.

**DUI Fourth Offense or Greater** – Imprisoned for not less than one year nor more than five years. If your alcohol concentration is at least 0.10% but less than 0.16%, then you will be imprisoned for not less than two years nor more than six years. If your alcohol concentration is 0.16% or greater, then you will be imprisoned for not less than three years nor more than seven years.

**Driving With An Unlawful Alcohol Concentration** – Same penalties as DUI above.

Besides the fines and sentences listed above, a DUI, a refusal to submit to tests, or certain BAC levels will result in the suspension of driving privileges for a period of time.

**Conviction for DUI 1st Offense** – Driving privileges are suspended six months. To reinstate driving privileges, the

driver must obtain SR-22 insurance for 3 years (at a substantially higher rate than normal insurance premiums).

**Conviction for DUI 2nd Offense** – Driving privileges are suspended for one year. To reinstate driving privileges, the driver must obtain SR-22 insurance for 3 years (at a substantially higher rate than normal insurance premiums).

**Conviction for DUI 3rd Offense** – Driving privileges are suspended for two years. If the third offense occurs within five years of the first offense, driving privileges are suspended for four years. If the third or subsequent offense occurs within 10 years of the first offense, the vehicle used must be confiscated if the offender is the owner or a resident of the household of the owner.

**Conviction for DUI 4th Offense** – Driving privileges are forever revoked.

**Refusal to Submit to Testing (DUI 1st)** – Six month suspension (regardless whether the driver is convicted of DUI). Driver may challenge the suspension by requesting, within 30 days, an “administrative hearing.” Pending this hearing, the driver may obtain a temporary license. To obtain a temporary license, the driver must, within 30 days, request an administrative hearing (the cost of which is \$150). SR-22 Insurance is not required after suspension.

**Refusal to Submit to Testing (DUI 2nd within 10 years)** – Nine-month suspension (regardless whether the driver is convicted of DUI). Driver may challenge the

suspension by requesting, within 30 days, an “administrative hearing.” SR-22 Insurance is not required after suspension.

**Refusal to Submit to Testing (DUI 3rd within 10 years)** – Twelve-month suspension (regardless whether the driver is convicted of DUI). Driver may challenge the suspension by requesting, within 30 days, an “administrative hearing.” SR-22 Insurance is not required after suspension.

**Refusal to Submit to Testing (DUI 4th within 10 years)** – Fifteen-month suspension (regardless whether the driver is convicted of DUI). Driver may challenge the suspension by requesting, within 30 days, an “administrative hearing.” SR-22 Insurance is not required after suspension.

**BAC Equal to or Greater than .15 (DUI 1st)** - 30-day suspension (regardless whether the driver is convicted of DUI). Driver may challenge the suspension by requesting, within 30 days, an “administrative hearing.” Pending this hearing, the driver may obtain a temporary license. SR-22 Insurance is not required after suspension.

**BAC Equal to or Greater than .15 (DUI 2nd within 10 years)** – Two month suspension (regardless whether the driver is convicted of DUI). Driver may challenge the suspension by requesting, within 30 days, an “administrative hearing.” Pending this hearing, the driver may obtain a temporary license. SR-22 Insurance is not required after suspension.

**BAC Equal to or Greater than .15 (DUI 3rd within 10 years)** – Three month suspension (regardless whether the driver is convicted of DUI). Driver may challenge the suspension by requesting, within 30 days, an “administrative hearing.” Pending this hearing, the driver may obtain a temporary license. SR-22 Insurance is not required after suspension.

**BAC Equal to or Greater than .15 (DUI 4th within 10 years)** – Four month suspension (regardless whether the driver is convicted of DUI). Driver may challenge the suspension by requesting, within 30 days, an “administrative hearing.” Pending this hearing, the driver may obtain a temporary license. SR-22 Insurance is not required after suspension.

**Temporary and Restricted Licenses** - A temporary alcohol restricted license allows the person to drive pending the outcome of the administrative hearing. To get such a license you must request an administrative hearing from the DMV within 30 days of the notice of suspension. The statute states that such license shall be without any restrictive conditions; however, the Department of Motor Vehicles provides that you may not drive outside of the State of South Carolina.

If the suspension is upheld at the administrative hearing, the temporary alcohol restricted license remains in effect until the Department issues the hearing officer’s decision and sends notice to the person that the license is suspended. Afterward,



the driver may apply for a special restricted driver's license if the driver is employed or enrolled in a college or university. The special restricted license permits driving only to and from work and school and during work or school. To obtain this "route restricted" driver's license, the driver must also show the Department that work or school is further than one mile from the driver's home and that there is no adequate public transportation in between.

If the suspension is overturned at the administrative hearing, the person shall have his driver's license reinstated.

**Emma's Law** - The purpose of Emma's Law, named for a young girl who lost her life in a drunk driving car crash, is to stiffen the consequences of South Carolina's driving under the influence (DUI) laws.

Under Emma's law, first-time DUI offenders who had a blood-alcohol concentration (BAC) of 0.15 or greater will be required to install an ignition interlock device in their vehicles for 6 months. People convicted of a 2nd DUI or DUAC are required to install the device for 2 years. The amount of time required for the device can vary depending on various factors. In some situations where the Ignition Interlock Program is not mandatory, offenders may be able to shorten suspension times if they voluntarily enter the Ignition Interlock Program. If a South Carolina resident is convicted of a DUI-type offense in another state, the South Carolina DMV will require the resident to have an ignition interlock device as well. There is a complicated system in place regarding the monitoring of the

ignition interlock and how violations of the program can result in additional suspensions and penalties.

### **Immobilization of Vehicles of Repeat Offenders**

If a person is convicted of a second or greater DUI or DUAC, and the person does not enter the Ignition Interlock Program, that person's vehicles will be "immobilized," meaning the person will have to surrender the license plates and registrations of any vehicles owned by that person. If a vehicle is titled solely or jointly in the person's name, but the person's spouse is the primary driver of the vehicle and has no other vehicle, the spouse might be able to get the car back after making certain promises to the DMV. Driving an immobilized vehicle, even while sober, constitutes a new crime.

### **Enhanced Suspension for Persons Under 21 Years of Age**

If a person under 21 refuses to give a breath sample, the person will be suspended for 6 months. However, if a person had a conviction for DUI within the previous 5 years, that person's suspension will be for one year. Emma's law shortens the time so that if the person had a conviction for DUI within the previous 3 years, the suspension will be for one year.

# The Cost of a DUI

## IN THIS SECTION

1. The Cost of Bonding Out for a DUI
2. Impounded Vehicle Costs
3. Cost of Refusing to Take a Breath Test
4. Cost of ADSAP
5. Reckless Driving Penalty
6. DUI Fine
7. SR-22 Insurance
8. DUI Legal Defense Costs

We recently saw some billboards around that had a picture of a State Trooper holding a breathalyzer up to a person being arrested for DUI. The billboard read: “You Just Blew \$10,000.” It is not an exaggeration. Driving after drinking, even in cases where you felt OK to drive, can cost much money. Also, if you have a car accident that is not your fault, but you had even a couple of drinks, you can be charged with felony DUI and possibly spend years in jail. Arrange for a designated driver, call a cab, or get a hotel room. These options can help you in the wallet, and they can save a life.

If you’re charged with driving under the influence (DUI), there are numerous costs that you will have to incur, some of which affect you even if you’re found not guilty.

## 1. THE COST OF BONDING OUT FOR A DUI

First, the court will hold a bond hearing. Some people get “PR bonds,” which means they don’t have to pay money to get out. Some receive “surety bonds,” which means they do have to pay money to get out. If your bond is \$1,000, you may end up paying around 10% of that, or \$100, to a bondsman.

## 2. IMPOUNDED VEHICLE COSTS

Unless you were arrested in your driveway, the police will probably impound your car. The fee to the towing company varies, but it can easily be \$150 when you try to get your car out. For every extra day it is left there, the cost goes up.



### **3. COST OF REFUSING TO TAKE A BREATH TEST**

You may have refused to blow into the breathalyzer, which results in your license being suspended. You may challenge this suspension, but it will cost you \$200 to file for the “implied consent hearing.” You will also obtain a Temporary Alcohol License while you wait on the hearing, which costs \$100, and then when you finally get your license back, it will cost another \$100. Also, if you do blow and the reading 0.15 or higher, then you’ll have to deal with a suspension and possible implied consent hearing as well.

### **4. COST OF ADSAP**

If you lose the implied consent hearing, or if you’re ultimately convicted of DUI or driving with an unlawful alcohol content (DUAC), then you’ll have to enroll in and complete the Alcohol and Drug Safety Action Program (ADSAP). This program costs around \$500.

### **5. RECKLESS DRIVING PENALTY**

Some DUI’s end up with the person pleading guilty to reckless driving in exchange for a dismissal of the DUI. The fine for reckless driving is \$445 and will likely cause your insurance rates to increase.

### **6. DUI FINE**

If convicted of DUI, and you refused the breathalyzer, if you don’t receive jail time, the fine will \$997. The fine goes up if you blew a 0.10 or greater. If it is a DUI 2nd offense, the fine is between \$2,100 and \$5,100. If it is a third offense or greater, the fine keeps going up.

### **7. SR-22 INSURANCE**

If you’re convicted of DUI, you will have to carry SR-22 driving insurance for three years. The cost of SR-22 varies from insurance company to insurance company and from driver to driver, so you will likely call around and get several quotes to pick the cheapest one. Be prepared for SR-22 to increase your rates at least \$100 per month, which comes out to \$3,600 over the three years.

### **8. DUI LEGAL DEFENSE COSTS**

You may wish to fight the DUI, which will result in you calling around to different law offices to pick the best lawyer for you. In South Carolina, you will generally hear of attorney’s fee ranging from \$2,500 to \$7,000, but there are some even cheaper or more expensive depending on your lawyer’s experience.

Also, there may be costs involved in your case for numerous reasons. Your lawyer may want to order your official driving record, which costs \$25. Your lawyer may advise you that it

would be beneficial to hire an expert witness of some sort to testify on your behalf. An expert can cost over \$5000.

# Ignition Interlock Program

## IN THIS SECTION

1. Who MUST Enroll in the Ignition Interlock Program in South Carolina?
2. Who CAN Enroll in the Ignition Interlock Program in South Carolina?
3. How Long Do I Have to Use the Ignition Interlock Device?
4. How Does the Ignition Interlock Program Work?
5. What Happens if I Violate the Ignition Interlock Device Program?
6. Can I Drive a Work Vehicle if I'm in the IID Program?

## 1. WHO MUST ENROLL IN THE IGNITION INTERLOCK PROGRAM?

Just about anyone convicted of a DUI-type crime EXCEPT for those convicted of driving under the influence (DUI) 1st offense or driving with an unlawful alcohol concentration (DUAC) 1st offense who took the breathalyzer test and blew LESS than a 0.15%.

So, if you're convicted of DUI or DUAC and blew over a 0.15% or refused the breath test, you must enroll in the program. Also, if you're convicted of DUI/DUAC 2nd offense or greater, felony DUI, or child endangerment, you must enroll in the program.

You can apply for a medical waiver if you have a medical condition that makes you incapable of properly operating the ignition interlock device, but your license will be suspended instead.

## 2. WHO CAN ENROLL IN THE IGNITION INTERLOCK PROGRAM?

If your vehicle is required to be immobilized (such as drivers convicted of two or more DUI's or DUAC's), you can prevent the immobilization if you enroll in the Ignition Interlock Device Program. Also, if your license is suspended under South Carolina's Implied Consent Law, you can end the suspension by enrolling in the Program. For example, if the driver's license is suspended because the driver either

refused to blow into the breathalyzer or blew a 0.15% or greater, the driver can end the suspension by enrolling in the Program.

### **3. HOW LONG DO I HAVE TO USE THE IGNITION INTERLOCK DEVICE?**

The short answer is: for the same amount of time you would have lost your license for DUI, DUAC, or other violations. One exception to this rule is that you're convicted of DUI 4th offense, you must be enrolled in the Ignition Interlock Program for life.

If you are a SC driver and you get a DUI in another state where that state requires an ignition interlock, South Carolina will require you to use the ignition interlock device for whichever period is longer between South Carolina and the other state.

### **4. HOW DOES THE IGNITION INTERLOCK PROGRAM WORK?**

**Installation, Device Type & Cost for IID** – You must have the ignition interlock device installed by a vendor certified by SLED. Ignition interlock devices (IID's) must be certified by Department of Probation, Parole and Pardon Services (DPPPS). Certification is done pursuant to accuracy requirements and specifications in guidelines or regulations adopted by the National Highway Traffic Safety Administration (NHTSA). DPPPS will keep a list of certified

ignition interlock devices and manufacturers. Installers/Vendors must also be certified, and DPPPS will keep a current list of vendors that are certified to install the devices.

The driver must pay for the cost of the device's installation, maintenance, and monitoring, but the driver may qualify to have the State pay for it if the driver qualifies as "indigent" depending on the driver's income, assets, debts, number of dependents, and living situation.

**Point System for Violation of Program** – Once the IID is installed, you can't start your vehicle without blowing into the device. If the device registers a blood alcohol content (BAC) of 0.02% or greater, your car won't start. There is a point system that can be used to penalize you if you violate the program. Points are assessed as follows:

- 1/2 point assessed if you attempt to start your vehicle and your BAC is 0.02% or more but less than 0.04%.
- 1 point assessed if you attempt to start your vehicle and your BAC is 0.04% or more but less than 0.15%.
- 2 points assessed if you attempt to start your vehicle and your BAC is greater than 0.15%.
- 1 point is assessed if you fail to have the device inspected every 60 days by a certified vendor.
- 1 point if you fail to complete a "running re-test" as required by law.

**Penalties Based on Point System** – The penalties under the points system are as follows:

- If you receive 2 points or more, but less than 3 points, the period required to have the device in the car is extended by 2 months.
- If you receive 3 points or more, but less than 4 points, the period required to have the device in the car is extended by 4 months. You will also have to go for a substance abuse assessment and engage in treatment and education.
- If you receive over 4 points, your driving privileges will be suspended for 6 months. You will also have to go for a substance abuse assessment and engage in treatment and education.

If you're penalized for violations totaling less than 4 points, the person can appeal the penalties with a petition to the Department of Probation, Parole and Pardon Services (DPPPS). The appeal must be filed within 30 days of the issuance of the notice of the points assessment.

If you're penalized for violations totaling 4 points or greater, the appeal goes to the Office of Motor Vehicle Hearings (OMVH). During this appeal, you can still drive, but the device must remain in your vehicle.

## **5. WHAT HAPPENS IF I VIOLATE THE IGNITION INTERLOCK DEVICE PROGRAM?**

**Driving Without a IID** – If a person subject to the IID Program drives a motor vehicle that is not equipped with a properly operating, certified IID, penalties are as follows:

**First offense is a misdemeanor.** The penalty is a fine of at least \$1,000 or jail up to 1 year. The length of time to have IID will be extended by 6 months.

**Second offense is a misdemeanor.** The penalty is a fine of at least \$5,000 or jail up to 3 years. The length of time to have the IID will be extended by 1 year.

**Third or subsequent offense is a felony.** The penalty is a fine of at least \$10,000 or jail up to 10 years. The length of time to have the device will be extended by 3 years.

### **Tampering with IID or Obstructing Camera –**

Tampering with an IID or obstructing or obscuring the camera lens is a misdemeanor. The penalty is a fine up to \$500, jail up to 30 days, or both.

### **Allowing a IID Restricted Driver Operate a Vehicle**

**without IID** – Letting a person with an Ignition Interlock Device Restricted License rent, lease, or drive a vehicle that doesn't have a properly operating, certified ignition interlock device is a misdemeanor. The penalty is a fine up to \$500, jail up to 30 days, or both.

**Asking Someone Else to Blow Into IID** – If a person with an Ignition Interlock Device Restricted License asks someone else to blow into an IID to start the vehicle, the crime is a misdemeanor. The penalty is a fine up to \$500, jail up to 30 days, or both.

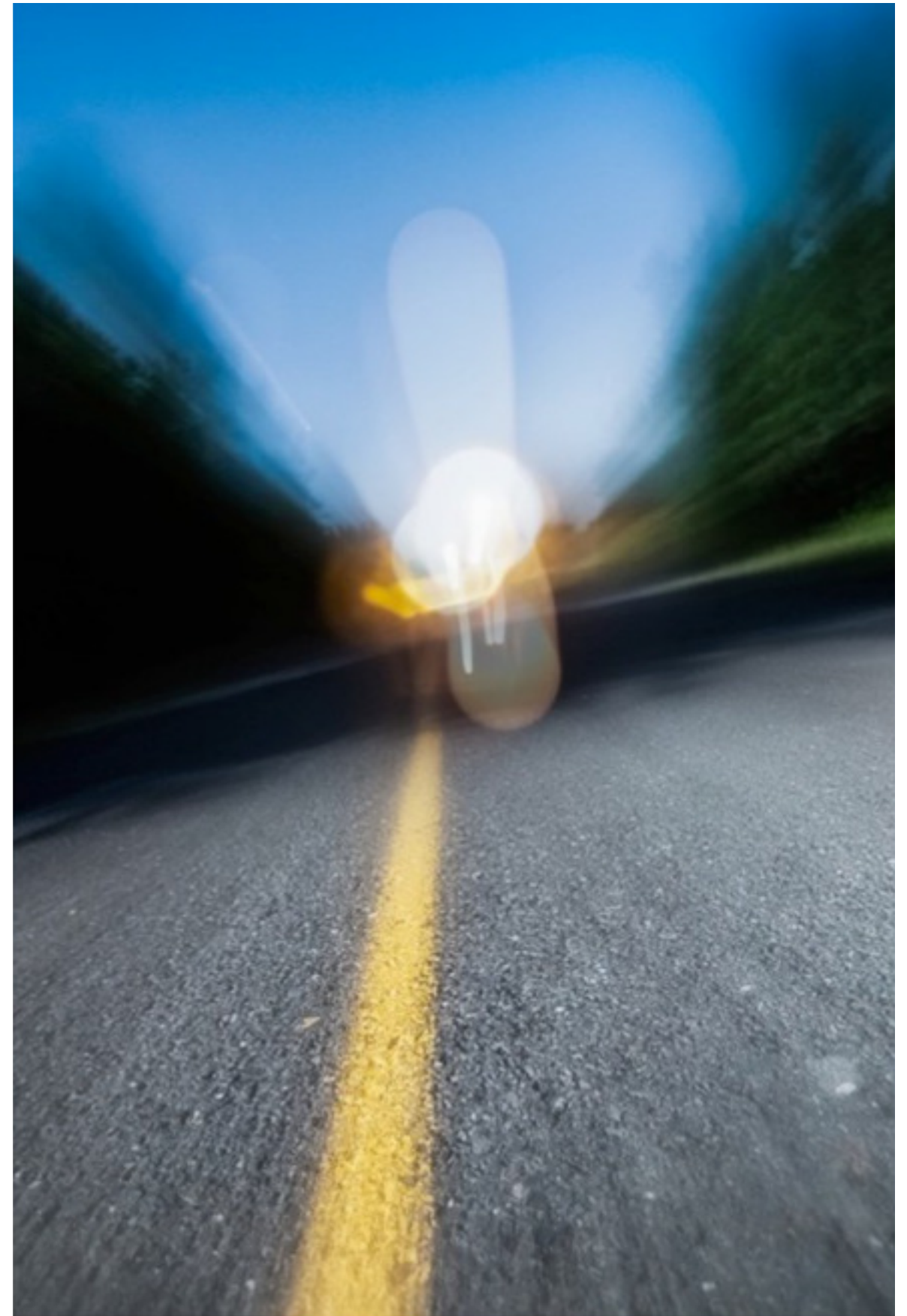
**Blowing Into an IID for a Restricted Driver** – Starting an ignition interlock device for someone with an Ignition Interlock Device Restricted License is a misdemeanor. The penalty is a fine up to \$500, jail up to 30 days, or both.

## **6. CAN I DRIVE A WORK VEHICLE IF I AM IN THE IID PROGRAM?**

There is an exception to allow you to drive an employer's vehicle without an Ignition Interlock Device in certain situations. The driving must be required in the course and scope of employment, and the use must be solely for the employer's business purposes. This exception doesn't apply to someone who is self-employed or who is employed by a member of the person's household or immediate family. The person must keep the DMV form pertaining to this employer vehicle authorization with him or her at all times while driving the employer's vehicle.

# Felony DUI

Defending a felony DUI is much more challenging, and the stakes are higher, than defending a municipal or magistrate level DUI such as a DUI 1st. A felony DUI differs from a DUI in both the proof of the offense and the penalties for a conviction.





## **Proof of Felony DUI**

For a DUI case, the prosecution must prove that a person drove while under the influence of alcohol, drugs, or both, “to the extent that the person’s faculties to drive a motor vehicle are materially and appreciably impaired.” For a felony DUI, the prosecution must prove: (1) a person was driving under the influence of alcohol, drugs, or both; (2) while driving the person did “any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle;” and (3) the act or neglect caused great bodily injury or death to a person other than the driver.

According to South Carolina case law, the consumption of alcohol doesn’t have to be the “main” or “primary” cause of injury or death, so long as it contributed to the accident. So if you are sitting at a stop light within your lane, and a person slams into the back of you and gets seriously hurt, this may not result in a felony DUI conviction, although you could be charged with simple DUI. Even if the person injured was drinking with you and chose to be a passenger in your car, you can be charged with felony DUI.

Our law defines “great bodily injury” as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” So it may not take much for a DUI crash to result in a felony DUI charge. For example, if the person injured has a broken arm placed in a cast, the prosecutor can argue that the 8 weeks in the cast is

enough to be a “protracted loss or impairment of the function of a bodily member.”

## **Criminal Penalties for a Felony DUI**

In cases where there is great bodily injury, the driver faces between 30 days to 15 years in jail and a fine of \$5,100 to \$10,100. In the case of death, the jail sentence is between one to 25 years and the fine is between \$10,100 to \$25,100. These jail requirements are mandatory and cannot be suspended or substituted for probation.

Anyone convicted of a felony DUI is likely to spend significant time in jail. Many of these cases make the local headlines, and we keep our eye on what the judges are doing at the sentencing phases of these types of cases. Here are some examples:

- In June 2014, a woman was sentenced in Charleston County to 17 years after her car crossed the center line, hit oncoming traffic, and killed the other driver.
- In April 2013, an 85-year old man was sentenced in Charleston County to one year after he ran into a motorcycle and caused multiple pelvic fractures of the motorcycle driver. The man’s blood alcohol content (“BAC”) was 0.13 which is in the middle of 3 tiers of intoxication under our law. The man assisted the other driver financially while he recovered. This voluntary assistance likely helped the judge accept the lower-than-usual sentence.

- In November 2013, a man was sentenced to 10 years, suspended on service of 3 years in jail and 5 years probation, after he killed a man on a moped. His BAC was 0.12, which a male can reach on just 3 or 4 beers in some cases. He was charged with felony DUI but pled to reckless homicide instead.
- In March 2014, a man was sentenced to 10 years after he ran into the back of a car on the Cooper River Bridge and killed the other driver. He was charged with felony DUI but pled to reckless homicide.
- In August 2012, a 20-year old woman was sentenced to 8 years after killing a man on a motorcycle who was not wearing his helmet.

These are just a few examples of how drinking and driving can turn someone's life upside down in a matter of seconds. For example, if you're driving home after 3 beers and you injured a person who stepped out into the road in front of you, it is possible that you could face serious jail time.

### **Driver's License & Felony DUI**

Once a person has finished their jail sentence, the person's driver's license is suspended for 3 years (if great bodily injury) or 5 years (if death).

### **Breath Test for a Felony DUI**

You can refuse a breath test, but then the police will take you to the hospital and have your blood drawn. The law says you

can't refuse to give this sample, but if you become so obstructive that it is impossible to draw blood, then that resistance will come in at trial.

### **Bail for Felony DUI**

Bail for a felony DUI depends on the facts of the case, the person, and who the bond judge is. The 20-year old woman we described in this section had a bail of \$250,000. We have seen them as low as \$50,000. Because these two extremes will cost a difference of \$20,000 in bondsman fees, it is important to have your lawyer on board as soon as possible.

# Commercial Driver's License

We know that the inability to drive for any length of time can ruin a commercial driver's finances whether you're from South Carolina or you have a CDL from another state.



## **Disqualification of CDL in South Carolina for Alcohol-Related Offenses**

South Carolina drivers who possess a Commercial Driver's License (CDL) and who face a DUI or other violations are affected differently, and more severely, than noncommercial drivers. Please note that we use the term "disqualified" instead of "suspended" because the holder of a CDL may be eligible to drive a noncommercial vehicle even if he or she lost CDL privileges, depending on the situation.

In South Carolina, a CDL holder is disqualified from driving a commercial vehicle for one year if the driver:

1. Is convicted of Driving Under the Influence (DUI) or Driving With an Unlawful Alcohol Concentration (DUAC) while driving any vehicle;
2. Submits a breath sample of 0.04% BAC when arrested for DUI while driving a commercial vehicle; or
3. Refuses to submit to a blood, urine, or breath test.

Also, if you're convicted of DUI and you were transporting hazardous materials, then your CDL is disqualified for 3 years. If you're convicted twice for DUI, you will lose your CDL permanently.

## **Other Violations That May Disqualify a CDL in South Carolina**

We also want to describe some other violations that can cause you to lose your commercial driving privileges.

In South Carolina, a CDL holder is disqualified from driving a commercial vehicle for one year if the driver:

1. Leaves the scene of an accident.
2. Uses a motor vehicle in the commission of a felony.
3. Drives a motor vehicle while his or her license is suspended, cancelled, or revoked for a violation committed while operating a commercial motor vehicle.
4. Causes a fatality through the negligent operation of a commercial vehicle. If the person was transporting hazardous material to be placarded, the disqualification is for 3 years.

If a second of any of these offenses happens, or any combination of them, the CDL holder is disqualified for life.

If a CDL holder uses a commercial motor vehicle in the commission of a felony involving more than just the possession of a controlled substance, the holder is disqualified for life.

If a CDL holder is convicted of two serious traffic offenses within a 3-year period, the CDL holder is disqualified for 60

days, and if a third conviction occurs within the 3-year period, the disqualification is for 120 days. The following are considered “serious traffic offenses”:

1. Speeding 15 m.p.h. or more over the speed limit.
2. Reckless driving, including charges of driving a commercial vehicle in willful or wanton disregard of safety.
3. Improper or erratic traffic lane changes.
4. Following too closely.
5. Violating a traffic law that leads to an accident causing death or serious bodily injury.
6. Driving a commercial motor vehicle without obtaining a commercial driver's license.
7. Driving a commercial vehicle without having the CDL in possession.
8. Driving a commercial motor vehicle without the proper class of commercial driver's license, or endorsements for the specific vehicle group being operated or for the passengers or type of cargo being transported, or both.
9. Any other offenses as defined in 49 C.F.R. 383.5 and 383.51.

A person is disqualified from driving a commercial vehicle if a report under our state law (Section 56-1-2220) shows the

DMV that the person failed a drug or alcohol test or refused to take a test. The disqualification lasts until the person undergoes drug and alcohol counseling that meets federal regulations. If a person is disqualified for these things three times in a five-year period, the person is disqualified for life.

# Boating Under the Influence

Boating is one of the most popular pastimes in South Carolina. For some, boating also involves alcohol and being stopped by law enforcement.





To get a conviction for a BUI, the officer must prove that the driver was under the influence of alcohol, drugs, or both so that his or her faculties to operate the boat were “materially and appreciably impaired.”

**Boating Under the Influence 1st** - BUI 1st is a misdemeanor, and the judge can sentence a convicted person to imprisonment of 48 hours up to 30 days or a fine or community service. The person will also lose his privilege to operate a watercraft (aka boat) for 6 months. The person will have to complete the Alcohol and Drug Safety Action Program (ADSAP) as well, which costs about \$500. Finally, he or she will have to complete a boating safety course. If the intoxicated boater causes property damage or bodily injury that is something less than “great bodily injury” as defined below, the person’s boating privileges will be suspended for one year.

**BUI 2nd** - The judge can sentence the person to imprisonment of 48 hours up to one year and a fine of up to \$5,000. Heavy community service could come into play in lieu of the jail sentence. The person’s boating privileges will be suspended for one year, and the person must complete ADSAP and a boating safety course.

**BUI 3rd** - The judge can sentence the person to imprisonment of 60 days up to 3 years and a fine of \$3,500 up to \$6,000. The person’s boating privileges will be suspended for 2 years, and the person must complete ADSAP and a boating safety course.

Only violations that occurred within 10 years can cause later convictions to BUI 2nd, BUI 3rd, or greater.

## **FELONY BUI**

**Great Bodily Injury** - If the intoxicated boater causes great bodily injury to someone other than himself, he is guilty of a felony, and the judge will sentence him to up to 15 years in jail and fine the person between \$5,000 and \$10,000. “Great bodily injury” is defined as “bodily injury which creates substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.”

**Death** - If the intoxicated boater causes someone’s death, the jail sentence will be between 1 and 25 years, and the fine will be between \$10,000 and \$20,000. In either case, the person’s boating privileges will be suspended for 3 years starting after the person is released from jail.

## **RECKLESS HOMICIDE BY OPERATION OF A BOAT**

Even if a boater is not drunk, the boater can face serious criminal consequences if he or she is not careful. If a person operates a boat “in reckless disregard of the safety of others” and this reckless operation results in someone dying, the person can be charged with Reckless Homicide by Operation of Boat. The sentence for this charge is up to 10 years, fined up to \$5,000, or both. The prosecution, in some cases, may attempt to charge the person with murder, involuntary



manslaughter, or manslaughter, depending on how bad the facts of the case are. If charged with any of these, the boater will not be able to drive a boat for 5 years.

## **FIELD SOBRIETY TESTS ON THE WATER**

In South Carolina, one of the responsibilities of the Department of Natural Resources (DNR) or other law enforcement such as the City of Charleston is to enforce boating under the influence laws. Part of their training is derived from standards set forth by the National Association of State Boating Law Administrators (NASBLA). Due to the difficulty in administering standard field sobriety testing on the water, certain agencies such as DNR administer what is called the Afloat Test Battery.

The Afloat Test Battery for BUI's is the "marine" version of field sobriety tests for DUI's. In some situations, there isn't an opportunity for an investigating officer to conduct sobriety tests on land. Instead, the officer conducts several tests while the subject is seated on their boat or the officer's boat. The Afloat Test Battery consists of the following:

**Horizontal Gaze Nystagmus (HGN) Test** - The HGN test, also known as the "pen test," requires the officer to move a pen or other object back and forth across the suspect's line of sight in a particular manner. The officer then looks for an involuntary movement of the eye called nystagmus. Nystagmus can be an indicator that a person may be impaired.

**Finger to Nose (FTN) Test** - During the finger to nose test, the officer asks the BUI suspect to bring the tip of the suspect's index finger up to touch the tip of the nose while his/her eyes are closed and his/her head is tilted slightly back. The suspect must do this six times, three with each hand.

**Palm Pat (PP) Test** - In this test, the officer asks the suspect to extend one hand, palm up, in front of them with the other hand on top of the first facing down. Then, the suspect must rotate their top hand 180 degrees and pat their bottom hand alternating between the back of their hand and the bottom of their hand with the bottom hand remaining stationary. The suspect must count out loud - "One, Two . . . One, Two" etc. - with each pat.

**Hand Coordination (HC) Test** - This test requires the suspect to perform a series of tasks with their hands. The suspect is required to make fists with both hands and to place their left fist thumb against their sternum and the thumb side of their right fist against the fleshy side of their left fist. From that position, the suspect perform four tasks:

1. First, count aloud from one to four, placing one fist in front of the other, in step-like fashion, making sure the thumb side of one fist is touching the fleshy side of the other fist at each step.
2. Second, memorize the position of the fists after having counted to four, clap the hands three times (no aloud count required), and return the fists in the memorized position. Third, move the fists in step-like

fashion in reverse order counting aloud from five to eight, and return the left fist to the chest.

3. Fourth, return their hands, opened and palms down, to their laps.

Unlike driving under the influence (DUI), the BUI laws do not require the arresting officer to video tape the suspect, so it can be more difficult to defend an innocent person charged with BUI because evidence is often limited to the officer's testimony of the events, which may or may not be accurate and is always biased because the officer is attempting to obtain a conviction. Merely allowing a client to give a different story may not be enough in a jury's eyes. Therefore, it is important for your lawyer to be familiar with the Afloat Test Battery to successfully attack the administration and results of the FST's administered on the water. Often, the officer makes many mistakes which compromise the validity of the tests.

## BREATH TESTS

A person arrested for BUI will be taken to a jail or police station where he or she will be asked to blow into the breathalyzer (more formally known as the DataMaster DMT). The machine will give you a blood-alcohol content (BAC) reading. If you blow, your BAC will fall into one of these categories:

**0.00% - 0.05%** - It is conclusively presumed you were not under the influence of alcohol.

**More than 0.05% but less than 0.08%** - If the case goes to trial, the jury can make no inference of intoxication from the reading.

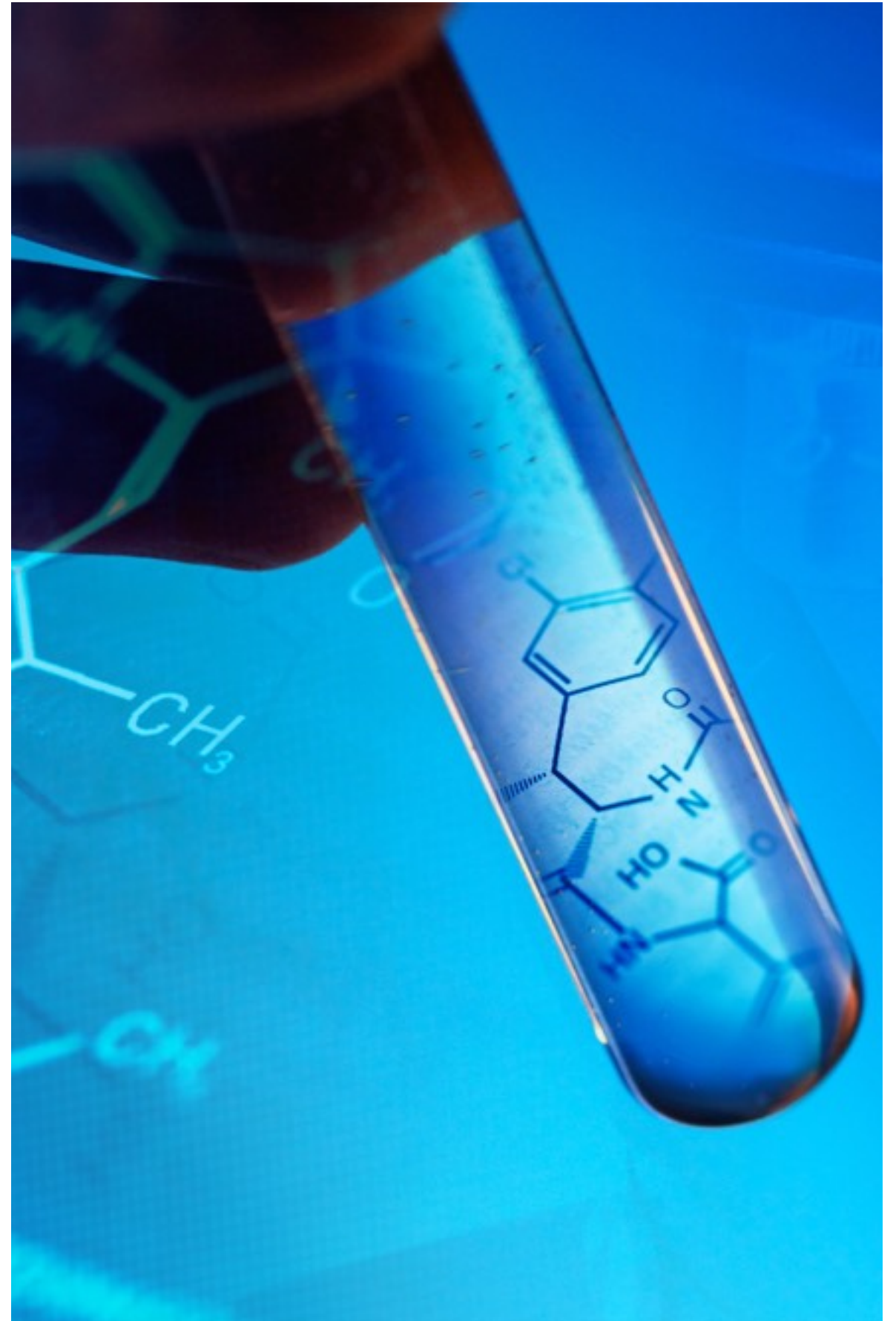
**0.08% or higher** - If the case goes to trial, the jury will be told they can infer the defendant was under the influence of alcohol.

You can refuse to take the breath test. However, if you don't take the test, then:

1. Your boating privileges will be suspended for 180 days. We can fight this suspension at a hearing if you come to us soon enough so that we can request a hearing within 30 days of the arrest.
2. The prosecution will be able to argue at trial "that only a drunk man would refuse the test." As BUI defense lawyers, we'd rather deal with this than a high reading.

# Breath & Blood Tests

In South Carolina, if a person is arrested for driving under the influence, law enforcement can request that the subject provide a breath sample, or sometimes blood, to measure blood alcohol content.



# DMT DataMaster

## IN THIS SECTION

1. How the DataMaster DMT Works
2. Why DataMaster Tests Can Be Wrong
3. Effect of Blowing Hard Into the DataMaster
4. DataMaster Maintenance

South Carolina uses the DataMaster DMT to test a suspect's breath for alcohol concentrations.

IMAGE 8.1 DMT DataMaster



## 1. HOW THE DATAMASTER DMT WORKS

The DataMaster DMT is a scientific instrument designed to analyze a sample of a person's breath and determine the Breath Alcohol Concentration (BAC) in that sample.

The DataMaster analyzes the breath sample using infrared absorption spectrometry which is an infrared light beam that measures an individual's BAC from his or her breath, as

alcohol (ethanol) absorbs infrared light. The DataMaster captures the sample, which is the air that an individual breathes out, as infrared light enters the machine's sample chamber. The ethanol molecules in the chamber then vibrate which causes these molecules to absorb infrared energy. At the other end of the chamber, the machine measures the amount of infrared energy and the individual's breath sample. The machine then calculates whether there is a presence of alcohol in the body if the energy that passes through the device's chamber is less at the other end.

## 2. WHY DATAMASTER TESTS CAN BE WRONG

Not only is the DataMaster DMT a complicated piece of machinery that doesn't always function properly, there are many reasons why the breath test results can be just plain wrong:

- **Abnormal Hematocrit** – Hematocrit is the ratio of red blood cells to the total volume of blood. The DataMaster DMT “assumes” a hematocrit of 47%. However, in the real world, hematocrit values range from 42% to 52% in men and from 37% to 47% in women. So, a person with a lower hematocrit will register a falsely high BAC reading.
- **Barometric Pressure** – Barometric pressure impacts partition ratio because it is part of the equation behind Henry's Law. So, as the pressure changes, so does the partition ratio of 2100:1, and so does your breath test result.

In other words, anything that changes barometric pressure, including altitude and the weather, can impact your breath test results making them unreliable.

- **Breath Temperature** – Remember that Henry's Law and the partition ratio of 2100:1 depend, in part, on temperature. So, if you had a fever when you blew, your test result will be high.
- **Breathing Pattern** – The DataMaster DMT is supposed to analyze any alcohol contained in deep-lung or “alveolar” air. The DataMaster DMT is supposedly designed to warn the officer if you haven't provided enough of an air sample when you blow. This creates problems, and often false readings, depending on how the suspect blows into the machine. Essentially, the alcohol concentration in your breath depends upon whether the DataMaster DMT is testing the first or last part of your breath. When you exhale, the first part of your breath has a much lower alcohol concentration than the last part of your breath. In fact, the last part of your breath can register over 50% higher than your actual BAC. Many police officers know this and sometimes tell the suspect to keep blowing longer or to blow harder so the machine will give a higher reading.
- **Endogenous Ethanol Production** - The human body produces its own supply of alcohol naturally on a continuous basis, 24 hours a day, 7 days a week. It's called endogenous ethanol production. In some cases, people naturally produce enough to register as being “legally” intoxicated.

- **Gastroesophageal Reflux Disease (GERD)** – The DataMaster DMT is designed to test deep-lung air rather than “mouth alcohol.” Mouth alcohol exists at a much higher concentration than alcohol in the deep lung tissue. GERD, better known as heartburn or acid reflux, causes stomach acids (containing alcohol) to travel from your stomach back up to your mouth and throat. When stomach acid enters the mouth or throat, the DataMaster DMT will measure mouth alcohol instead of deep-lung air. As a result, the test results will register a false high reading.
- **Hypoglycemia** - Hypoglycemia is low blood sugar which is a condition that occurs in diabetics. Unfortunately, about 1 out of every 7 drivers is diabetic. Some of these drivers don’t even know they are diabetic. People who experience hypoglycemia often have slurred speech, they are disoriented, they are unsteady on their feet, they are drowsy, they exhibit poor motor control, and they have a flushed face. All of these conditions are similar, if not identical, to the conditions the police look for in drunk drivers. Hypoglycemia also causes acetone in the breath which the DataMaster DMT falsely registers as consumed alcohol.
- **Improper Machine Maintenance** – Over the years, our Charleston DUI lawyers have cross-examined the law enforcement officials who are responsible for keeping the DataMaster properly maintained. In many cases, we’ve found a lack of repair records that are required under SC law and maintenance procedures that weren’t followed. These

problems lead to faulty BAC readings and, in some cases, “not guilty” verdicts at trial or a dismissal of the case.

- **Operator Error** - In South Carolina, the law requires that law enforcement videotape the testing procedure. Many common problems that we see include: (1) failure to observe the subject for at least 20 minutes before administering the test as required by South Carolina law; (2) failure to check the suspect’s mouth before the test which is also required by law; and (3) failure to properly advise the suspect of their right to refuse the test which is likewise required by law.
- **Problems with Simulator Solutions** – In the DataMaster DMT, simulator solutions of water and alcohol are used during the test. If the simulators that are used to calibrate the DataMaster aren’t properly prepared or used, the DataMaster’s results are meaningless.
- **Radio-Frequency Interference** – Because the DataMaster DMT is a complicated electronic device, radio frequencies (RF) can interfere with the test’s results and cause a high reading. Supposedly, the DataMaster DMT will warn the officer performing the test if the DataMaster DMT detects any RF interference. However, I’ve watched test videos that show the officer has his or her radio on or was using a cell phone, yet the machine doesn’t report any RF interference. Warning or no warning, RF will impact the test’s reading.

If you think we’ve covered just about everything relating to DUI defense, we can assure you that there is much, much

more. But by now you should be getting the big picture – DUI’s are complicated, and “complicated” means MANY ways to defend you from a DUI!

### **3. EFFECT OF BLOWING HARD INTO THE DATAMASTER**

In defending DUI cases, we occasionally have clients who were told by law enforcement to “blow hard” into a breath test machine. We know that law enforcement may be telling people to “blow hard” because, under South Carolina law, the breath test operator must make a video recording of the entire breath test.

According to the DMT DataMaster’s Owner’s Manual, the “best breath sample is produced by a continuous exhalation. It does not need to be a hard blow . . . .” Essentially, the DMT DataMaster’s programming is designed to read from a “smooth exhalation,” not a hard burst of air. Further, the manual warns the operator – “Do not tell the subject to blow ‘hard.’” Instructing a subject to “blow hard” violates the proper operating procedures of the DMT DataMaster machine because blowing hard can deviate from the continuous and steady flow of air the 1.5 liters of air that the machine requires.

### **4. DATAMASTER MAINTENANCE**

Like other machines, the DataMaster DMT must be properly maintained for it to work properly, and the authorities must log all maintenance procedures. Based on records of the

various states using this machine, authorities tend to neglect the importance of keeping a maintenance log. One way to challenge the DataMaster results is through a “Landon” motion. If there are malfunctions, repairs, complaints, or other problems regarding the DataMaster machine that occurred close in time to when the driver took the test, then the defense may be entitled to an evidentiary hearing on the admissibility of the breath results. At this hearing, the prosecution must then prove that the machine was working properly at the time of the test. However, the fact that the machine registers a series of self checks every time a test is run may constitute enough evidence that the machine was working properly if enough tests were run between the time of the problem with the machine and the time of the driver’s test. In all, knowing what records to look for regarding the DataMaster, how to understand and interpret those records, and how to properly make a “Landon” motion is a vital part of any DUI defense.



# Blood Tests

## IN THIS SECTION

1. The Blood Test Kit
2. Drawing Blood
3. Testing Blood
4. Testing Procedure - Gas Chromatography
5. Chain of Custody

In South Carolina, under certain circumstances, an arresting officer can obtain a blood sample from a DUI suspect. An arrest based on a blood sample raises a number of different issues than cases involving an arrest based on a breath sample.

South Carolina law permits law enforcement to draw a blood sample from a suspect in a felony DUI case (meaning the impaired driver caused death or great bodily injury). Also, in misdemeanor DUI cases, law enforcement can obtain a blood sample where the person is unable to provide a breath sample because the person (1) is unconscious, (2) is dead, (3) has an injured mouth, or (4) for any other reason considered acceptable by licensed medical personnel.

### 1. THE BLOOD TEST KIT

Law enforcement uses Blood Test Kits for obtaining blood samples in DUI cases. Among other things, these kits contain Vacutainer™ test tubes. These kits have an expiration date, after which the vacuum in tube is no longer warranted. This is important because the precise vacuum in each tube ensures that the right amount of blood (10 ml.) will be drawn in proportion to the preservatives and the anticoagulant that mix with the blood in the tube. If there is too much chemical and not enough blood, your test results can be affected. Further, if a Vacutainer™ leaks, microorganisms from room air can enter the blood sample and cause the blood to ferment. Because alcohol is a byproduct of fermentation, it can affect blood

alcohol test results. Finally, the blood sample must be refrigerated to avoid further contamination.

## 2. DRAWING BLOOD

The medical personnel who actually draws the blood from a DUI suspect must be trained to do venipuncture (blood withdrawal). In drawing the sample, hospitals sometimes use isopropyl alcohol to clean the suspect's skin which can contaminate the blood sample.

## 3. TESTING BLOOD

Depending upon whether a test was conducted upon whole blood or plasma (serum), the results of the analysis can be affected:

- **Whole Blood** consists of serum plus cellular material and fibrinogen (clotting agent).
- **Serum or plasma** is blood which has been filtered to remove the cellular material and fibrinogen.

Typically, a blood alcohol content analysis of plasma or serum will result in approximately a 16% higher alcohol content than a test of whole blood.

Additionally, a suspect's hematocrit level can affect the blood alcohol test. Hematocrit is the percentage of your whole blood that is composed of cellular material. If you have a hematocrit of 47 (which is average for males), then 47% of your blood is cellular material and 53% is plasma (mostly water). However,

if you have a higher hematocrit, you are going to get a higher blood alcohol content (BAC) reading because you have less liquid in your blood.

Finally, IV fluids given before blood draw will result in a higher BAC reading because alcohol tends to follow/bond with water in the blood, and the water tends to draw alcohol out of your body tissues and into your blood stream.

## 4. TESTING PROCEDURE – GAS CHROMATOGRAPHY

Typically, blood is analyzed using gas chromatography (GC). GC is a method of (1) identifying a substance and (2) determining the concentration of that substance. There are two types of GC: (1) gas chromatography which directly measures the blood sample and (2) gas head space chromatography which tests the gas or vapor above the liquid—not the liquid itself. The head space is the space above the liquid. In this test, the alcohol evaporates (at a rate of speed determined by temperature) from the liquid to the gas in the head space above the liquid. The alcohol evaporates until it reaches the point of equilibrium, which is determined by temperature. The higher the temperature, the more alcohol in the gas above the liquid. With this process, the lab must heat the blood sample (mixed with internal standards), draw off the vapor, and inject the vapor into the chromatograph for analysis. The process assumes there is a relationship between the alcohol in this vapor and the actual alcohol in the blood. This relationship can be affected if the temperature is not

properly regulated. Further, the gas chromatography analysis depends on the validity and accuracy of the standards that are used to calibrate the chromatograph.

## **5. CHAIN OF CUSTODY**

As with all evidence collected by law enforcement, the prosecutor must show a proper chain of evidence. So, the prosecutor must show that the blood that was tested was the same blood that left the DUI suspect's arm.

# Accidents, Air Bags & the Tyndall Effect

Under South Carolina law, Section 56-6-6170, “no police officer in investigating a traffic accident shall necessarily deem the fact that an accident has occurred as giving rise to the presumption that a violation of the law has occurred.”



Yet, if you're involved in an auto accident, and the police suspect that you've consumed ANY amount of alcohol, chances are you'll be arrested for DUI.

### **Physical and Mental Abilities of an Accident Victim**

A driver who's been in an accident will seem physically and mentally impaired due to trauma of the collision. While many people may be shaken up due to the accident, others will experience shock. Doctors define shock as a "circulatory collapse" that occurs when blood pressure dips too low to maintain an adequate supply of blood to the body's tissues. Symptoms include cold and sweaty skin, weak and rapid pulse, irregular breathing, dry mouth, and dilated pupils. Whether the driver is simply shaken up or in shock, they will exhibit signs of mental confusion and physical impairment as a result of the accident. Under these circumstances, it is no wonder that drivers in accidents mirror many of the symptoms of being under the influence of alcohol and will likely fail any field sobriety tests. Under these circumstances, it is difficult for any prosecutor to show that the driver's physical or mental impairment was alcohol-related as opposed to the natural consequences of being involved in a vehicular collision.

### **Air Bags & the Tyndall Effect On Breath Tests**

Any person who's experienced an air bag will tell you that they get an awful taste in their mouths and sometimes it is difficult to breathe. When an air bag inflates, a puff of "smoke" can be seen coming from the steering column or side air bags. This

"smoke" is as a result of cornstarch or talcum powder that was commonly used to line the inside of the air bag to aid in deployment. Although newer air bag fabrics are sufficiently "slippery" that additional powder lubricants aren't necessary, most side air bags are still lubricated with talcum powder. In any event, the driver typically inhales microscopic particles of the powder lubricant at impact that they cough up for hours.

South Carolina's breath test machine, the DMT Datamaster, uses infrared lasers to measure how the infrared light is obscured by the presence of alcohol particles in your breath. If you take to a breath test after an air bag has deployed in an accident, the Tyndall effect, also known as Tyndall scattering, can cause a false high reading.

The Tyndall effect happens when light is scattering by particles. When you blow into the Datamaster, you will also blow some of the microscopic particles of lubricant powder into the sample chamber at testing. The powder acts like little mirrors deflecting and diffusing the infrared laser beam inside the Datamaster (the Tyndall Effect). The diffraction and diffusion of the infrared light causes a false high result in the breath test. In other words, if a person has been exposed to an air bag deflation before breath testing, then the accuracy of the breath test results is highly questionable.



# Drug Recognition Experts

South Carolina law makes it illegal to drive a motor vehicle while under the influence of any drug or a combination of other drugs or substances. In other words, a driver can be charged with a DUI despite there being zero evidence of whether the driver consumed alcohol.



Drug Recognition Experts is a program that was developed by police officers from the Los Angeles Police Department and, in 1979, the Drug Recognition program received the official recognition of the LAPD. Drug Recognition Expert Certification is issued by the International Association of Chiefs of Police (IACP).

In South Carolina, some police officers are attempting to offer their “expert” opinion as DRE’s regarding whether a driver is under the influence of a one of seven categories of narcotics (central nervous system depressants, inhalants, dissociative anesthetics, cannabis, central nervous system stimulants, hallucinogens, or narcotic analgesics).

There are 12 steps to a DRE’s Drug Evaluation Process:

1. **Breath Alcohol Test** – A sample of breath is taken from the driver to determine the concentration of alcohol.
2. **Interview of Arresting Officer** – The DRE consults with the investigating officer to determine the circumstances surrounding the driver’s apprehension.
3. **Preliminary Examination** – During an initial examination, the DRE asks the driver questions regarding the driver’s medical and physical limitations.
4. **Eye Examination** – The DRE conducts tests for Horizontal Gaze Nystagmus (HGN) and Vertical Gaze Nystagmus (VGN).
5. **Divided Attention Tests** – The DRE has the driver perform the One Leg Stand test with both legs, the Walk and Turn test, a Modified Romberg Balance test, and the Finger-to-Nose test.
6. **Examination of Vital Signs** – The DRE records the driver’s blood pressure, pulse, and body temperature.
7. **Dark Room Examination** – The DRE examines the driver’s pupils in near total darkness, under direct light, and in normal room light. The DRE also examines the driver’s oral and nasal cavities.
8. **Examination of Muscle Tone** – The DRE examines the flexion and the extension of the driver’s muscles to see if there is any flaccidity or rigidity.
9. **Examination of Injection Sites** – The DRE examines common injection sites to determine if the driver is using injected substances.
10. **Driver’s Statements/Other Observations** – The DRE tries to solicit information from the driver which will corroborate any signs and symptoms that the DRE has observed.
11. **DRE’s Opinion** – The DRE makes a determination of the class or classes of drugs that is influencing the driver based on a matrix of the symptomology associated with known classes of drugs.

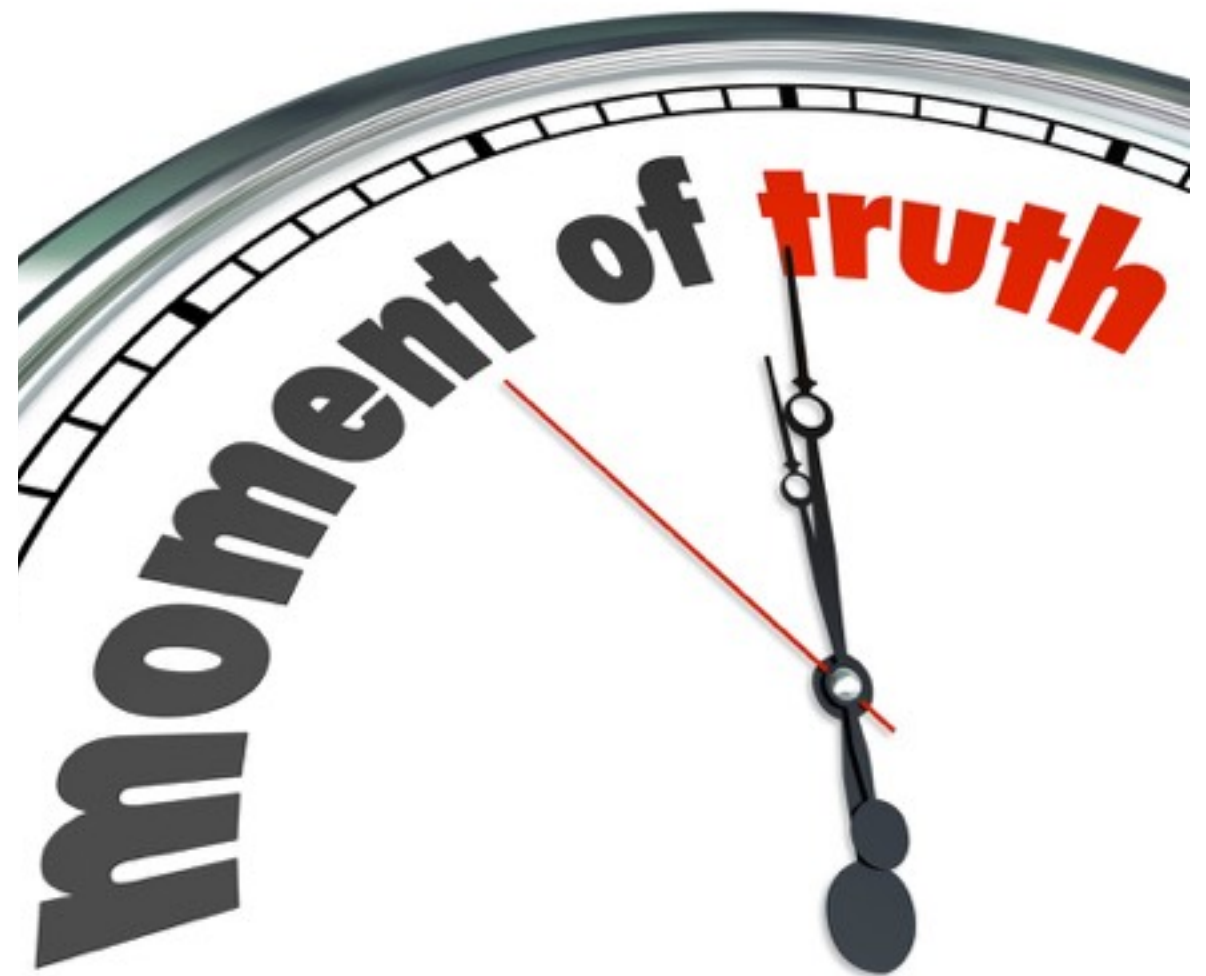


**12. Toxicological Examination** – Blood, saliva or urine is obtained from the driver and is analyzed to determine what class of substances are present that corroborates the DRE's opinion.

The reliability of DRE's has been as widely criticized and has been challenged by defense attorneys in many states. For example, one of the things that DRE's look for is dilated pupils. There are numerous medical reasons why one's pupils may become dilated which include sexual arousal, excitement, and performing complex cognitive tasks. Ironically, most people who get pulled over even for a simple traffic ticket experience a bit of fight or flight response to flashing blue lights. Just the sheer fact of being pulled over can cause enough excitement, and consequently the release of enough adrenaline, to cause your pupils to become dilated.

# Going to Court

If a deal can't be worked out, you may find yourself testifying in your defense. If so, you need to understand what the prosecution is trying to do and to know the best means of sharing the truth while you're on the witness stand.



# Preparing for & Attending Court

## IN THIS SECTION

1. Before You Go to Court
2. Dressing for Court
3. What to Bring & Not to Bring to Court
4. Arrive Early to Court
5. How to Behave in and Around the Courthouse
6. How to Speak to the Judge

For most persons, court can be an intimidating experience. Here are some pointers for anyone who has to go to court in South Carolina.

## 1. BEFORE YOU GO TO COURT

Try to get a good night's rest before you go to court. Furthermore, most courts don't allow food or drink, but they do have water fountains. Don't go on an empty stomach. When you are tired, hungry, or thirsty, you aren't at your best!

## 2. DRESSING FOR COURT

Dress properly and conservatively for each court hearing. Dress "business casual" or "dress like you are going to church." Failure to dress appropriately could result in your case being continued or you being excluded from the courtroom during the case. The judge hearing your case will associate your attire with the level of respect you are giving to the court.

Women should wear dresses which are knee length or longer or tailored slacks and a blouse. Men should wear tailored slacks and a shirt with a collar. Clothing should be clean.

Some examples of clothing that are *not* allowed include baseball caps, sleeveless tops, halter tops, backless dresses, low cuts dresses, miniskirts, shorts, blue jeans, t-shirts, flip-flops, and sandals. Tuck in your shirt.

Remove any piercings other than one pair of ear rings for women, cover any tattoos if possible, and have a conservative hair style and color. Even if you feel these things represent a particular belief or who you are, remember that you are presenting in front of a judge who may be deciding your fate. A “middle-of-the-road” appearance will minimize the chance of offending the court or jeopardizing your credibility. While most people don’t like being “judged,” that is exactly what going to court is all about.

### **3. WHAT TO BRING & NOT TO BRING TO COURT**

Bring your entire file, which includes every document, CD-ROM, or thumb drive that relates to your case. You never know what could happen, and it’s best to be prepared. Even if you have a lawyer, some portion of your lawyer’s file may have accidentally stayed on his or her desk at the office, and you can actually save the day by having a copy of some document handy.

In some counties, you aren’t allowed to bring your cell phone, so it’s best to just leave it in your car if you’re unsure. If you’re allowed to have your phone, turn it off or put it on silent! If your cell phone goes off in the courtroom, the judge can take your phone and can possibly hold you in contempt (put you in jail). In fact, one Charleston County judge made the local headlines by putting a participant in a holding cell because her phone rang during court. At a minimum, the judge may take a ringing cell phone as a sign of disrespect.

For security reasons, you can’t bring any knives, scissors, nail files, tweezers, or other sharp objects into court. Also, you can’t bring in any mace.

You can bring a friend or a family member for moral support if it would make you more comfortable. Although this person won’t be able to sit at the table with you, he or she will at least be there in the courtroom to talk to you before and after.

### **4. ARRIVE EARLY TO COURT**

The court won’t wait on you if you’re late. Talk to court staff upon arrival to make sure you’re in the right place and waiting outside of the right courtroom.

Another advantage of arriving early is that you’re able to sit down, to relax, and to gather your thoughts as you wait on your hearing. You’re more likely to present well in court if you walk inside in a relaxed state than if you’re running down the hallway trying to make your hearing on time.

### **5. HOW TO BEHAVE IN AND AROUND THE COURTHOUSE**

You may find yourself waiting in a hallway outside of the courtroom. Be aware that people around you could be lawyers, witnesses, jurors, or others involved in your case. Don’t talk about your case because you never know who might overhear you. Also, don’t “cut up” or joke around (as many nervous people will do) as it could give someone a bad impression of you.

Even when parking your car, be polite and let other cars in front of you. Don't cut people off or exhibit frustration towards other drivers. You never know when your judge is in the other car.

If you find yourself waiting inside of the courtroom, just sit there, watch, and be silent. Judges may take whispering to your neighbor, sleeping, or certain other acts as a sign of disrespect. Your sincerity, or lack thereof, will be noticed. If the judge isn't telling a joke or laughing at a joke from one of the lawyers, you shouldn't be laughing either. Also, don't chew gum in the courtroom.

When your case is up, meaning you and your lawyer are addressing the court, continue to maintain a sincere demeanor at the table even if you don't like what others are saying. We've seen people scolded by judges on numerous occasions for making facial expressions, talking, or shaking their head in protest of what a lawyer or a witness is saying about their case. If you must speak, do it through your lawyer. Showing respect is of utmost importance. If you don't have a lawyer, be very careful of how you make any objections and be sure not to be disruptive to the proceedings.

## **6. HOW TO SPEAK TO THE JUDGE**

Be humble, respectful, and polite. Address the judge as "Your Honor," "Sir," or "Ma'am." Address parties, witnesses, and lawyers as "Mr." or "Ms." I can't emphasize enough – show absolute respect, and it will likely be returned. Don't speak

unless the judge asks you to. Stand up when you speak to the judge unless he or she tells you that you can keep your seat. If the judge cuts you off, let it happen. We've seen numerous instances of people attempting to "talk over" judges, and it doesn't usually go well for that person. We've also seen people penalized by the judge for being too argumentative.

### **IMPORTANT**

One BIG pet peeve of many judges is when a witness doesn't directly answer the question asked. If the question calls for a "yes" or "no" answer, don't beat around the bush. Answer yes or no. If you feel that your answer needs some explanation, first answer the question and then explain it.

# You as a Witness

## IN THIS SECTION

1. What the Prosecutor Is Trying To Do
2. How the Prosecutor Will Do It
3. Golden Rules of Testifying

## 1. WHAT THE PROSECUTOR IS TRYING TO DO

The prosecutor's goal on cross-examination is threefold:

1. To establish facts favorable to the state through defense witnesses;
2. To discredit your testimony through other evidence or other witnesses; and
3. To discredit your witnesses' through their own testimony.

## 2. HOW THE PROSECUTOR WILL DO IT

**Filling in the Gaps** - Generally, the prosecutor's case is made up of sketchy information from a few witnesses. Often the arresting officer, the breath test operator, a videotape, and a breath/blood test result are the entire case. The prosecutor will try to fill in the gaps in the case by using your testimony and the testimony of your witnesses to establish facts favorable to the prosecution. Testimony specifying times of drinking and eating, for example, may provide the prosecution with facts necessary to tie in breath test results to the time you were driving.

**Prior Inconsistent Statements** - You must understand what a prior inconsistent statement is, how it is used, why it is used, and what to do when faced with one. Ideally, prior inconsistent statements are best explained away by simple

testimony that a subsequent answer is based on more information and a better understanding of the facts and law.

For example, a defendant is usually asked by the arresting officer at the time of the arrest, "Are you under the influence of alcohol now?" You, thinking that you must be because alcohol was in your body, may have responded "yes." At trial, you may testify on direct "I was not intoxicated" and the prosecutor will hit you with your prior statement from the arrest scene. Here, you can easily explain the seeming inconsistency by saying "I've learned since my arrest what the legal definition of intoxication is, and I know there was no loss of either my normal, mental or physical faculties."

Moreover, you may answer to the officer's question about being under the influence meant simply that you had alcohol in your body.

**Ability to Observe** - A witness who will testify that he saw the accused walking, talking or behaving normally must be prepared for questions from the prosecutor in the following areas (this list is not exhaustive):

1. **Physical Impairment:** For DUI witnesses, this category generally means the witness's own state of intoxication or sobriety. The prosecutor will argue that this witness was in no shape to observe or remember what happened.
2. **Distance:** Generally, defense witnesses testify about their observations of the defendant at some point before

his arrest. Sometimes, however, witnesses are present at the scene of the arrest. They may or may not be close enough to observe the field tests or questioning performed by the defendant.

3. **Lighting:** In many DUI cases, the defendant was at a bar, nightclub or restaurant before his arrest. The lighting may have been poor and the noise level may have been high. For example, the prosecutor will assert this might affect your witness's ability to see your client's eyes or hear his voice.
4. **Observations:** When witnesses testify about their observations of a Defendant over a period of time, the prosecutor will invariably attempt to establish that the Defendant was not within the sight of the witness continuously, and the accused could have "sneaked a drink."

**Memory** - Witnesses will never remember all details. The prosecutor may ask specific questions about details. Some will be irrelevant except to show that our witnesses' memories are not as great as we want the jury to believe. Some questions are designed to set our witnesses up to disagree with each other. Others are to elicit from our witnesses favorable facts, i.e., those which reinforce the police officer's testimony or fill in gaps in the state's case. Finally, if you remember too many details or witnesses remember all the same details, the prosecutor can argue that it is unnatural to remember so much and it was likely made up.



**Bias** - You as an accused obviously have something to lose. Friends, relatives and loved ones will, of course, be willing to help you. The prosecutor will attempt to insinuate that you and your friends will be willing to lie (perjure themselves) to help you. Unprepared witnesses can be caught off guard with questions of this nature. Some typical reactions of unprepared witnesses on which the prosecutor can capitalize include:

1. **The reluctant witness:** A nervous or overcautious witness may too often repeat phrases, such as “Please repeat your question,” or “I don’t understand your question,” or “as best as I can recall.” These phrases are common stalling devices to allow the witness time to formulate a well-reasoned response to a difficult or tricky question and make the witness appear too cautious and less truthful. If you know what to expect and what types of questions the prosecutor will ask, there will be minimal need to clarify questions and you will not have to hesitate and appear reluctant to answer.
2. **The volunteering witness:** Not only is this objectionable, it often gives the prosecutor food for more cross-examination. It is natural to want to explain some answers, but too much explaining may cause the jury to see you or your witnesses as insincere, biased and/or prejudiced. A prepared witness not only knows what to volunteer, but when to do it.
3. **The excessively opinionated, hostile, or belligerent witness:** A witness should be prepared to

remain firm in his position, i.e., that you were not intoxicated. However, the witness must remain calm, cooperative and seemingly objective. The last thing you want the jury to see is that you or your witnesses are not objective and reasonable--translation: “believable,” as opposed to biased and/or prejudiced.

4. **The “questioning” witness:** Answering a question with a question makes the witness appear sarcastic, insincere and evasive. The jury will see this as an unwillingness to answer the question. This type of excessively biased defense witness defeats the purpose of his testimony for you because of his loss of credibility.
5. **The professional witness:** Experts are “hired guns” (not unlike the state’s chemist and even the police) and have generally been paid to testify. We may determine to use an expert and if so, they will be properly prepared for testimony.
6. **Prior Convictions:** Many defendants and defense witnesses do not have admissible prior convictions. If you have prior convictions, you should bring these to the attention of your lawyer so you can discuss their admissibility and how to handle that issue at trial.

### 3. GOLDEN RULES OF TESTIFYING

1. Tell the truth.

2. Think about the question asked, then answer it. Don't avoid the question, but do not be afraid to say "I don't know."
3. Ask the prosecutor to clarify the question, if necessary. Remember not to ask repeatedly merely to stall for time.
4. Pause slightly before answering to give your lawyer time to object, if necessary. Silence can be an attention getter, too! Listen carefully to objections. They signify that the question is potentially misleading or the response can be potentially damaging to the defense.
5. Do not argue; remain calm and cooperative.
6. Do not be afraid to say "I don't remember" or "I'm not sure, it has been a long time since then."
7. Do not attempt to "match wits" with the prosecutor.

# The Best Answer to Every Legal Question

We've been handling DUI's in South Carolina for many years, and we've been asked THOUSANDS of legal questions. Of course, there's the most important question asked most often by any client – "What are my chances of winning or losing?"



No matter what the legal question might be, here is the BEST ANSWER TO EVERY LEGAL QUESTION. Ready? Here it is:

**“IT DEPENDS.”**

Disappointed? Please don't be; this is NOT a trick answer or a joke. It truly is the BEST answer that any lawyer can ever give to any client. It's also the most important thing about any case a client needs to understand. Please read on, and we'll explain why:

When Stephan Futeral was a law professor, he'd ask his students questions about different legal problems. Their answers (much like young lawyers' answers to their clients) were always the same – “statute blah blah blah says X, Y, and Z” or “in the case of so and so, the court said A, B, and C.” Technically, their answers may have been correct, but they missed the point. The best answer to any legal question depends on many more things besides statutes or case law. The answer to any legal question, and what is more important the question of whether you win or lose, always depends on a combination of the following 5 things: The judge, the jurors, the facts, the client, and the lawyer.

### **There is Nothing “Absolute” About the Law**

Very rarely is the law black or white; it works in shades of gray. The outcome depends on the judge, the jury, the facts, the client, and the lawyer:

**1) The Judge** – Despite what statutes or higher courts may have to say about the law, judges interpret the law as they see fit. Because judges are human, sometimes they're mistaken about the law. That's why we have higher courts (appellate courts), to correct any mistakes (hopefully) made by the lower courts. On top of that, judges have their own personal views about the cases they hear, the parties and witnesses involved, and so on. Some judges do very little to hide the fact that they don't like certain types of cases such as DUI's. Some judges are known for being very strict when it comes to sentencing anyone convicted of a crime. So, as you can see, the answers to any legal question, and in particular the outcome of a case, depends on who the judge might be.

**2) The Jurors** – Every juror is unique. Some are rich and some are poor. Some are liberal and some are conservative. The list of differences goes on. In the end, you wind up with a mix of jurors from all walks of life who bring their own personal views into the court room. This too should come as no big surprise – many jurors don't care for criminal defense lawyers or their clients. From the minute a defendant walks into the courtroom with their lawyer, it is an uphill challenge for both the lawyer and the client to convince the jurors of their sincerity and the righteousness of the defense. Although the jurors don't decide the law (that's the judge's job) they do decide whether you win or lose.

There is another thing that you should know about jurors. No matter how well-crafted the presentation of your case may be, they're all going to hear and see your case differently. I'll give

you a real world example of how this happens all the time – Hollywood movies. In bringing a movie to the theaters, incredible amounts of time, effort, and money are put into creating a single production. Despite all these efforts, not everybody sees the film the same way. Some audience members liked it and some didn't. Some laughed at parts that weren't funny and others didn't laugh at all at the punch lines. Some missed parts of the movie by fiddling around with their popcorn or talking to the person next to them. In other words, although the audience all saw and heard the same movie, they all had a different view of it. The same is true for a number of jurors sitting in a box together and listening to the lawyers and their clients present their case. So, as you can see, the answer to the question of whether you win or lose your case depends on who your jurors might be on any given day.

**3) The Facts** – To prove your case, you must establish the facts. Facts can be documents, witnesses, physical evidence, and all sorts of things. Some of the facts are established by “direct evidence” and some by “circumstantial evidence.” Let's say at trial you are trying to prove to the jurors that it was raining outside. If you took the jurors outside and into the rain, that's “direct evidence” of the fact that it's raining. If, instead, you pointed out to the jurors that everyone walking into the courtroom was carrying an umbrella and was dripping wet, that's “circumstantial evidence” that it's raining. Unfortunately, many cases are based on circumstantial evidence which makes it more difficult to “connect the dots” before a judge or jury. Also, if you're proving your facts by

other witnesses' testimony, not everyone says the same thing, some don't have a good recollection of events, and some will contradict the testimony of other witnesses. So, when it comes to the important question of whether you win or lose, the answer depends on the facts of the case.

**4) The Client** – Every client is unique. Some clients are capable of doing a great job of testifying before a judge and a jury. Some clients are nervous when they speak in public and need a lot of work to be able to share their story. Some clients are more sympathetic than others. Some clients are well-prepared and well-organized and very helpful to their lawyer. Some clients aren't so helpful. The list of differences goes on and on, but the point is, the answers to your questions and the outcome of your case, depends on you the client.

**5) The Lawyer** – The answers you get to your legal questions and the outcome of your case also depend on who you choose as your lawyer. Just like judges do, lawyers differ in their views and their interpretations of the law. So, it's not surprising that when some clients speak to more than one lawyer about their situation, they get different answers. Some lawyers tell their clients what they want to hear to make the client feel better. These lawyers aren't necessarily trying to be sneaky or dishonest; they do it out of compassion for the client. But at the end of the day, clients need to hear real, truthful answers from their lawyer and not just the things that are going to make them feel better about their case. As a client, you need to know the positives and negatives about your case so you can make the best informed decision about

how to move forward such as whether to take your case to trial.

Some lawyers have an excellent understanding of the law, but they're not familiar with judges or juries. Some lawyers are very prepared for court and some lawyers fly by the seat of their pants (there's no substitute for preparation). Some lawyers, despite all their efforts, just can't seem to connect with judges or jurors. Good trial lawyers must be good storytellers. They must present your case to a judge or jury, including the facts and the law, in a way that is understandable, compelling, sincere, and convincing. Just like a great, best-selling novel can be ruined by the movie director who brings the book's adaption to the big screen, the wrong lawyer can take the best set of facts and favorable law, and turn it into a jumbled mess before a judge or jury. So, the answers to your legal questions, including whether you win or lose, depend on who you choose as your lawyer.

## **Final Thoughts**

As much as lawyers would love to give their clients a definite answer to all of their questions, the truthful and BEST answer is – “it depends.” When a lawyer tells you this, that means that the lawyer is considering ALL of the circumstances and not just what is written in a statute or a text book on case law. That's a good thing because, in the end, whatever the answers to your questions might be, it's the results that count.

# Your Attorney

*“If there were no bad people there would be no good lawyers.”*

*~ Charles Dickens*

If you're facing a DUI, then it is time to give some thought to reviewing and comparing defense lawyers. Choosing from the many available DUI defense attorneys also can be confusing. Here are some suggestions for how to choose the best attorney for you.





# Choosing Your Lawyer

## IN THIS SECTION

1. Ask Yourself . . .
2. Your Legal Budget vs. Your Legal Needs
3. Do Your Homework
4. Interview Your Lawyer
5. How You Feel

If you've never hired a lawyer, you may not know where to start. If you know someone who recently hired a DUI defense attorney, then they may have a personal recommendation for you. However, you may feel uncomfortable asking for recommendations or discussing your case with people close to you. That's why the Internet can also be a valuable resource to research and compare lawyers and their professional backgrounds. Sites such as Avvo, LinkedIn, and others can help you compare the experience and reputation of various DUI lawyers.

## 1. ASK YOURSELF . . .

When you are meeting with potential lawyers, you must remember that not all attorneys are created equal. Here are some questions you should ask yourself before making your decision as to which lawyer to hire:

**1) Does the lawyer pay attention to you while you are talking?** You need an attorney who will be compassionate and dedicated to your needs. If the lawyer is distracted, taking other calls, checking emails, and so on, perhaps that lawyer is not the best for you.

**2) Does the lawyer try to educate you and answer your questions?** A skilled DUI lawyer knows that educating the client is important so that the client can make sound and informed decisions about the future.

**3) Is the lawyer assertive without being arrogant?** Some clients believe that having a "pit-bull" for a lawyer is

their best move. Obnoxious and egotistical does not mean better or skilled. You need an attorney that will calmly assert your rights and who will always act professionally.

**4) Is the lawyer guaranteeing you results?** If so, be cautious! Litigation in any court, including criminal court, is risky and the outcome can't be predicted with any certainty. The outcome of your DUI charges depends on many things such as the present circumstances, future developments, and the decisions and attitudes of judges and jurors. You need a lawyer who shoots straight with you and tells you like it is and not what you want to hear.

Here are some additional considerations before you choose which lawyer to represent you:

## **2. YOUR LEGAL BUDGET VS. YOUR LEGAL NEEDS**

As a general rule, well-seasoned attorneys charge higher fees, and newer lawyers are cheaper. You pay higher fees for experience. If you have a simple issue such as a speeding ticket and you are on a budget, then a recent law school graduate may fit the bill. However, if you are facing complex legal challenges, then your legal needs may justify the costs of a more knowledgeable attorney. Additionally, although younger lawyers may charge a lower hourly rate, it may actually take them longer to do the work (meaning more fees) than a veteran attorney who has been performing the same service for years.

## **3. DO YOUR HOMEWORK**

When you are searching for lawyers on the Internet, you should read beyond the marketing rhetoric if you really want to know who you are hiring. Here are some examples:

- If you visit a website that has plenty of descriptions of the lawyer's services but little information about the lawyer, then you may be missing the most important part of the picture – the lawyer's experience.
- If the lawyer's biography does not include the year that the lawyer graduated from law school, then chances are likely that the lawyer has not been practicing for very long and he or she has left this information out of their website for "marketing" purposes. This does not necessarily mean that the lawyer is not able to handle your case, but it may mean that the lawyer is still learning the ropes.

Here are some resources to learn more about your lawyer's background and experience:

- Look for the lawyer's Martindale Hubbell Rating. The Martindale Hubbell® Directory has been rating lawyers for the past 140 years. According to Martindale, "Peer Review Ratings™ help buyers of legal services identify, evaluate and select the most appropriate lawyer for a specific task at hand." Using information supplied by other lawyers and judges, Martindale rates lawyers based on performance in the areas of: (1) legal knowledge, (2) analytical capabilities, (3) judgment, (4) communication ability, and (5) legal

experience. The highest rating a lawyer or law firm may have is AV Preeminent. For more information about how the rating system works and to search for a lawyer's rating, visit [www.martindale.com](http://www.martindale.com).

- A newcomer to the business of rating lawyers is Avvo. Avvo rates lawyers by "using a mathematical model that considers elements such as years of experience, board certification, education, disciplinary history, professional achievement, and industry recognition-all factors that are relevant to assessing a lawyer's qualifications." Their ratings rank from the highest of 9 – 10 (Superb) to the lowest of 1.0-1.9 (Extreme Caution). Also, Avvo posts reviews and comments by both other lawyers and by clients. Avvo's website can be found at [www.avvo.com](http://www.avvo.com).

#### 4. INTERVIEW YOUR LAWYER

Often when people meet with a lawyer for the first time, they are under significant stress because of their legal problems, and the conversation tends to focus solely on those problems. While you are discussing your case and seeking answers to your questions, take the time to ask the lawyer about his or her background and experience such as:

- How long they have practiced;
- Whether the lawyer has handled any cases similar to yours;
- How many similar cases has the lawyer handled;

- Who will handle the case (sometimes other lawyers within a firm besides the one you meet with will handle some of your work, and you should know more about the legal team working on your case); and
- Whether the attorney has malpractice insurance (malpractice insurance is not required for many lawyers).

Here are two common questions that clients ask that will NOT help you to choose the right lawyer for you:

- "How many cases have you won?" - As any seasoned lawyer will tell you, "You can't win them all." Even if the lawyer has won every case up to that point, your case may be the first that they lose. So, if the lawyer boasts about their track record or gives you the impression that you cannot lose, then perhaps you are not dealing with the most straightforward attorney.
- "What are the odds of winning my case?" - Although a lawyer may comfort you by telling you what you want to hear, you are better off getting a straight answer from the very beginning. The honest answer is - "It depends." Every case is unique, and your case's outcome depends on many variables which, realistically, cannot be predicted from "day one."

#### 5. HOW YOU FEEL

The final, and perhaps the most important, thing you should consider when you hire your attorney is how you feel about

your first meeting. The bottom line is that if, for any reason, you don't feel comfortable with the lawyer you met with, then go interview others (and there are many) until you are satisfied that you are choosing the best lawyer to represent you.

# Working with Your Lawyer

One of the problem is that many people try to oversimplify their situation. There are many aspects to any type of case or legal problems, so the more your attorney knows about your case, the better it is for you.

**1) Tell your lawyer the ENTIRE truth.** Some folks are embarrassed about their situation. Some are concerned that they'll be criticized or judged by their lawyer if they share all of the truth. If you don't tell your lawyer the truth, you're hurting your chances of a favorable outcome. The more your lawyer knows about the "bad stuff," the more your lawyer can prepare to deal with any claims thrown your way. Remember, your lawyer took an oath of confidentiality. **EVERYTHING** you tell your lawyer stays with your lawyer. Don't hold back; tell the entire truth to your lawyer.

**2) Explain without venting.** There are many ways you can make your lawyer's job easier and to keep your legal fees and

costs down. First, you should tell your lawyer as much as you can about your current situation. However, you shouldn't spend too much time venting about your situation. Lawyers understand that their clients are going through an emotionally difficult time in their lives. Often, however, you would do better to talk to your friends, family, or a counselor to address these issues (and the cost is usually much less than paying your lawyer to listen).

**3) Read everything your lawyer sends you.** Another way to work better with your attorney is to read carefully everything that is sent to you. Some paperwork requires that you respond to the other party or the court within a certain time period, otherwise you may jeopardize your case. In all, there is no substitute for early, thorough preparation. Do all that is required of you within the time frames that your lawyer gives you, and your case may run smoother.

**4) Don't contact a judge about your case.** If you're represented by a lawyer, let all official communications come through and from your lawyer. Additionally, there are rules that prohibit one side or another from communicating directly with a judge.

**5) Be patient.** As a final note, you should understand that legal cases take time. First, it will take some time for your lawyer to gather all the information needed to proceed with your case. Part of this time depends on how quickly you provide the information your attorney requests. Then, your attorney may need to request information from the other side

through “discovery.” Afterward, it will take some time, depending on the court's schedule, before your case is resolved. So, try to have patience with your attorney and with the courts. Impatience will not speed up the process but it will cause you more concern and could cost you more money.

# Are “Aggressive” Lawyers “Effective” Lawyers?

Practicing law in South Carolina is remarkably genteel. In fact, the practice of law in Charleston, where we practice, is so well-mannered that in 2001 the ABA Journal ran, as its cover story, an article regarding southern collegiality and practicing law here in the Lowcountry. Of course, there are always exceptions, but overall our Bar prides itself on supporting one another and acting as professional colleagues and not as professional antagonists. To echo that sentiment, members of the South Carolina Bar must take an “Oath of Civility” toward one another and to members of the public. Unfortunately, lawyers throughout the country are not exactly revered for their congenial nature or their civility toward each other. To make matters worse, TV, movies, and dramatic fiction play to an audience that expects lawyers to shout at the witness during cross-examination - “YOU CAN’T HANDLE THE TRUTH!” The unfortunate “truth” is that even in the real world, many lawyers market themselves as being “aggressive” or are endorsed by other lawyers as such.

If you look up the word “aggressive,” you will find definitions that include “ready or likely to attack or confront,” “pursuing one's aims and interests forcefully, sometimes unduly so,” or “characterized by or tending toward unprovoked offensives or attacks.” Being “aggressive” is not the same thing as being “zealous.” “Zeal” is defined as “great energy or enthusiasm in the pursuit of a cause or an objective.” Zealousness is an admirable attribute; aggressiveness is not. Here is why:

## **1) Aggressive Lawyers Are On The “Short-List” -**

Judges don't care for “aggressive” lawyers. Ask any judge, and they'll tell you that they are worn out from baby-sitting lawyers who can't get along with one another, who quibble over the most mundane aspects of their case, who accuse other lawyers of misdeeds, who complain about imagined slights, who hold hard-and-fast to deadlines without accommodation or courtesy, and the list goes on. Lawyers who place themselves on a judge's “short list” of intolerable lawyers are doing a great disservice to their clients.

Regrettably, many of the lawyers who place themselves on the “short-list” are either oblivious to (or “willfully dense” to) how their attitude negatively impacts upon the court's scheduling of matters, the court's receptiveness to the lawyer's concerns (“Cry Wolf Syndrome”) or even, at times, the court's rulings.

## **2) Aggressive Lawyers Get As Good As They Give -**

We've let other lawyers out of default or extended firm deadlines as a professional courtesy. We can unequivocally state that in those cases, the outcome was positive for the clients and, in some cases, made more positive by acting



professionally. Of course, there will always be those parties, or their lawyers, who foster a hard-line approach to the case. However, perhaps a better practice is to set a positive tone from the beginning before you come out swinging the day the client walks into your door. If you're a lawyer who sets negative, aggressive tone from the outset, then don't be shocked when opposing counsel doesn't return your phone calls, doesn't grant you any extensions you request, doesn't work with you to complete discovery, etc. In all, what goes around does, indeed, come around. In the end, it would be best to have a reputation as being respected and a "lawyer's lawyer" than to be the attorney to whom everyone else is looking to dish out a little "payback."

**3) Good Lawyers Don't Just "Try" Cases; Good Lawyers Try to "Resolve" Cases** - Before we hop down off of our soapbox, there is one last point to be made. "Scorched earth" policies and aggressive behaviors don't benefit clients (except in the movies). Aggressive behaviors run up legal fees. Sparring with opposing counsel or writing threatening "paper tiger" letters or emails is, in a word, useless. As we say here in the South, "you catch more flies with honey than with vinegar."