

**Bob Toy answers your questions about DUI and OVI charges:**

## **SHOULD I JUST PLEAD GUILTY?**

This is a great question and an option in every case. It is incumbent upon every lawyer to discuss this option, as some cases just aren't cut out for a full defense. However, as a doctor may say to their patient, "This virus is not going to cure itself. The risk of doing nothing is much worse than the risk of doing something".

As long as the case is analyzed up front with the most information available, and attorney and client have a candid discussion about the probabilities of success, each client will need to make his or her own independent decision. Normally, you will not have more than a week or so to make a decision. Remember this: **you cannot change your mind once you plead guilty and are sentenced.** However, **you can plead Not Guilty at the beginning of the case and opt to plead Guilty later** after the case is thoroughly investigated.

## **YELLOW LICENSE PLATES IN OHIO – DUI**

Will you have to drive around with yellow license plates? If you are convicted of DUI and any of the following apply, the answer is YES.

1. If you tested over .170% (breath or blood)
2. You refused testing and you have a prior DUI in the past 20 years
3. You have a prior DUI conviction in the past six (6) years

As a condition of restricted driving, you will need to drive a vehicle registered in your name with the yellow plates with red lettering (called Restricted Plates).

The plates can last as long as your license suspension.

## **DRIVING PRIVILEGES AFTER OHIO DUI ARREST**

It is often said, "**Driving is a Privilege, not a Right**". You will certainly feel this if you haven't already. Restoring limited driving for work, childcare, and/or medical needs is not automatic by any stretch. Your eligibility for petitioning for limited driving privileges will be determined by multiple factors such as whether or not you took a test, whether or not you have prior DUI convictions, and whether or not you had auto insurance when you were arrested.

Once your eligibility date comes for petitioning for driving privileges, we will still have to have a hearing before the judge. The prosecutor may or may not object. The judge may or may not grant the request for driving privileges.

Many other counties are much tougher on driving privileges than Athens. In fact, nearly every contiguous county has stricter policies on issuing limited driving privileges.

## OHIO DUI BREATH TEST MACHINES

Ohio's main breath testing machine is the **BAC DataMaster**. The two other primary machines are the **Intoxilyzer 5000** and the **BAC Verifier** (which is no longer manufactured). These machines use a principle called infrared analysis. There are newer models of these machines approved for use in Ohio.

In a nutshell, alcohol absorbs infrared energy at a certain frequency when an infrared beam is sent through the breath containing alcohol. A sample chamber inside the machine holds the breath. The beam is emitted from the infrared source, also located within the machine. The more alcohol present in the sample chamber (known as an alcohol concentration) the more infrared light is absorbed. The amount of infrared energy absorbed by the breath sample in the sample chamber is calculated by the machine's internal computer to calculate and print out a **breath alcohol reading** (known as a BAC evidence ticket).

There are a number of problems with this type of "science". Many people have heard that you should not take a breath test if under arrest. Have you ever wondered why? Keep reading...

Determination of BAC by use of a breath test is by far the most popular scientific test for drunk driving. This method involves the measurement of alcohol in an appropriate sample of breath, expired alveolar air. (Alveolar air is that part of the expired air, which is in equilibrium with the blood - the bottom of the lungs).

The breath test machine then converts the breath sample into a corresponding blood equivalent. Unfortunately, this conversion ratio assumes that all human beings are the same height, weight, body temperature, etc. The commonly used partition-ratio of 2100 can be expressed as follows:

In principle, this ratio is determined by simultaneously (or as close to simultaneous as experimentally possible) measuring the concentration of

alcohol in the blood and expired alveolar air of test subjects administered alcohol under controlled conditions. While values in the scientific literature for this ratio range from 1900 to 2400, an international panel chose in 1972, essentially by fiat, the currently accepted value of 2100. Brent, *supra* at 133.

Some factors that affect the partition-ratio, such as the effect of temperature, may be obvious, even to a non-scientist. There are others that are not so apparent. These factors can either increase or decrease the actual BAC.

**The most common problems with breath testing in Ohio DUI cases centers around irregular calibration checks, the presence of mouth alcohol in the motorist who is submitting a breath sample, smaller motorists who cannot muster enough breath volume to activate the machine, police radio interference (RFI), and machines that have sketchy maintenance and repair histories.**

### **BLOOD TESTS IN OHIO DUI CASES**

Blood testing in Ohio can produce accurate and reliable results for prosecutors to use in Ohio courtrooms for **DUI, aggravated vehicular assault, and aggravated vehicular homicide** cases.

However, it is critically important that the technical steps are taken from everyone in the chain of custody before the blood sample will be admissible against an accused.

Most blood tests in Ohio DUI cases are secured after a car accident. This raises the first evidentiary question: **Can the State prove that the blood was taken within two (2) hours of the accident?** Many times, for example, a motorist wrecks and it may take 15-90 minutes for law enforcement to arrive. That delay will count against the State's two (2) hour collection time limit. Proving the time of an accident when there are no witnesses (other than the accused) is nearly impossible.

Also, a major problem currently facing Ohio prosecutors is the fact that **less than ten percent (10%) of the hospitals in Ohio have licenses to perform blood testing for use in a courtroom** (known as "legal blood"). The Ohio Supreme Court recently reversed a four (4) year prison sentence of a man accused of killing a construction worker in Dayton after his blood test was determined to have been taken and analyzed by an unlicensed hospital.

Also, Ohio requires that the motorist be placed “under arrest”. What does this mean? If the motorist was injured, taken to the hospital, and the officer collects blood from him or her, then the motorist was not “under arrest”. That is a hotly litigated issue in Ohio right now.

There are many laboratory procedures that must be followed and proven in court before the accused’s blood sample will be admissible. These issues range from whether or not the blood was refrigerated, if the lab equipment was properly calibrated, and if the officer charged the motorist with the blood test within ninety (90) days of the blood being analyzed by the lab.

It is not unusual for blood to be the primary piece of evidence in the most serious DUI and/or accident cases. It is extremely important that the accused’s attorneys re-create the **“life of the blood”** (i.e. from the time it left the client’s arm to the time the results reached the courtroom). This is complex, labor-intensive, and requires an acute understanding of this area of law.

## URINE TESTING IN OHIO DUI CASES

**Urine testing** is currently permissible in the State of Ohio. Most states do not permit urine testing in DUI cases due to the inherent unreliability of it. There are many issues that I review when representing a client charged with DUI or a DUI-related felony if a urinalysis was performed:

1. Did the client void their bladder prior to testing?
2. Did the officer express the results correctly?
3. Has the lab kept all prior urine tests for the past 3 years?
4. What method was used to test the client’s urine?
5. Did the lab tech perform a confirming test?
6. Was the client’s urine sample collected correctly?
7. Was the urine sample properly witnessed and authenticated?
8. Was the client’s urine sample properly sealed and transported?
9. Was the lab tech properly licensed by Ohio?
10. Was the lab equipment calibrated and checked for calibration prior to, and after, the client’s urinalysis?
11. Has the lab tech been properly supervised and proficiency-tested?

## TEN TIPS TO AVOID AN OHIO DUI ARREST

1. The ONLY way to avoid a DUI in Ohio is NOT to drink and drive. However, it is not illegal to consume alcohol and operate a vehicle. Therefore, should you choose to consume a moderate amount of alcohol over a reasonable period time, then you should be aware of the following tips. Be aware that drinking a small amount of alcohol while fatigued or while taking medication can make you impaired. Do not admit to either fatigue or medication, as both facts will be used against you.
2. Try not to drive after 11:00 p.m. The majority of DUI traffic stops in Ohio are after the 3<sup>rd</sup> shift officers start. They are the most aggressive DUI enforcement officers in Ohio.
3. Make sure that all equipment on your vehicle is operational and that your license plate and registration sticker are not obscured. Under current Ohio law, officers can stop you for minuscule equipment violations.
4. If stopped by an officer, always be very polite and be aware of his or her safety. Try to pull over carefully and without any delay. Don't stop in the roadway without leaving a safe place for the cruiser and officer. Following this advice will demonstrate that you are thinking clearly and rationally. Make sure when the officer approaches you look at him or her and keep your hands upon the top of the steering wheel to let them know you are safe and, again, thinking clearly and rationally.
5. Questions regarding the consumption of alcohol should be answered honestly but without being too specific. If you had wine with dinner, explain that fact, but make sure to state that you would prefer not to answer any more specific questions without an attorney being present (i.e. quantity of alcohol).
6. If asked to do roadside field sobriety tests, politely explain to the officer that you have nothing to hide and you don't want to be difficult, but you would prefer not to do these tests as they are dangerously unreliable. These tests have a reliability rate of ONLY sixty-five to seventy-seven percent (65-77%) according to the National Highway Traffic Safety Administration. They are extremely unreliable "tests" to determine whether an individual

is fit to drive. However, be aware that refusing to submit to these tests will undoubtedly accelerate your arrest.

7. Always be on your best behavior. Most jurisdictions in Ohio have in-car cameras and/or video equipment at the police station. Always assume that everything you do and say will be recorded for your prosecution.
8. The decision to take a breath test is a difficult one to make. Until Ohio adopts "dual testing" (taking two breath samples two to ten minutes apart), it is recommended that you politely decline to take a breath test for this reason. Dual testing is the federal government's MINIMUM recommendation for breath testing in the United States. Ohio refuses to adopt it for unknown reasons.
9. Upon being released, IMMEDIATELY write a narrative of all events from the time the officer stopped you to the time you were released. Try to remember everything, even the smallest detail.
10. Retain an experienced DUI defense attorney to represent you. Find an attorney you are comfortable with and can afford. Legal fees for a privately retained criminal defense attorney with a practice concentration in DUI defense will probably be at a premium rate.

## **THERE ARE SEVEN (7) STAGES OF ALCOHOL INFLUENCE**

### **Sobriety**

(.01 - .05)

No apparent influence

### **Euphoria**

(.03 - .12)

Sociability, talkativeness, increased self-confidence, decreased inhibitions, diminution of attention, judgment, and control.

### **Excitement**

(.09 - .25)

Emotional instability, loss of critical judgment, impairment of memory and comprehension, decreased sensory response, delayed reactions

**Confusion**

(.18 - .30)

Disorientation, mental confusion, dizziness, decreased pain senses, impaired balance, staggering gait, slurred speech.

**Stupor**

(.27 - .40)

Apathy, markedly decreased response to stimuli, inability to stand or walk, vomiting, incontinence.

**Coma**

(.35 - .50)

Complete unconsciousness, coma, anesthesia.

**Death**

(.45 +)

DEATH

## **THE PROFESSIONS AND PROFESSIONAL BOARDS**

Without a doubt, the **Ohio State Medical Board, Dental Board, Pharmacy Board, Nursing Board, Accounting Board, and Oho Supreme Court** take an aggressive stance on their licensees who are triggering the DUI laws of Ohio. One DUI does not make a problem – **two DUIs make a major problem**. How do you avoid having two DUIs? Keep the first one off your record.

There are unique issues that need to be addressed for the Professions. Remedial steps will need to be taken to possibly disclose the arrest and/or get an assessment to rule out alcohol/drug abuse or dependence.

## **TEACHERS & OHIO DUI/OHIO OVI**

We recommend that you meet your Union Rep immediately. Chances are, you are not the first teacher in your district to be arrested for DUI. Let's find out what the procedures are for protecting your job and good name.

If you are a student teacher or working towards your career in education, we really need to find a non-DUI resolution for you. You may be the best candidate out there, but a DUI conviction may tarnish all the hard work you've done.

## **COMMERCIAL DRIVERS (CDL) & OHIO DUI/OHIO OVI**

Effective 2005, any person driving a non-commercial vehicle but possessing a CDL charged with Ohio DUI/Ohio OVI will result in CDL

sanctions. For instance, being charged with Ohio DUI/Ohio OVI in your private vehicle will be just as detrimental to your CDL as if you were driving your commercial vehicle.

**Be aware, that effective 2005, DUI arrests in private vehicles will impact your CDL.** Make sure your lawyer completely understands the 2005 CDL amendments.

## **GETTING A NEW PHOTO ID AFTER AN OHIO DUI ARREST**

If you have lost your driver's license to a DUI arrest, here is what you do. If you have a passport, figure out where you have stored it since your last trip abroad. They are normally good for 10 years. If you are at Year 9, then you ought to renew it. If you don't have a Passport, then go to the local BMV. If the employee tells you that you are not under suspension according to the computer, then ask to have a duplicate license issued to you. **DO NOT drive with that license**, just use it as ID. If the BMV computer states you are under suspension, then pay for a **TEMPORARY STATE ID**.

## **FIELD SOBRIETY TESTING IN OHIO DUI/OHIO OVI**

We discourage motorists from submitting to these tests for many reasons. First, the most accurate FST can only predict impairment at a reliability rate of just 77%! The pen in front of the eye test is called the Horizontal Gaze Nystagmus test or HGN. This test is designed for emergency room doctors to diagnose head injuries, not for police officers to check for alcohol impairment along side a freeway. There is scientific literature to support the proposition that alcohol can cause the eyeballs to "bounce" or move like a marble over sandpaper if a motorist has a BAC of .100 or greater. However, there are dozens of reasons OTHER than alcohol as to why an eyeball may be "bouncy" or "jumpy".

The other two FSTs are called the One-Legged Stand (OLS) and the Walk-and-Turn (WAT). The OLS has a reliability rate of just 65% and the WAT has a reliability rate of only 68%! With these margins of error, it is highly recommended not to submit to field sobriety testing. In fact, Ohio does not sanction the refusal to do these tests. **BEWARE: FAILURE TO DO THESE ROADSIDE TESTS WILL CERTAINLY RESULT IN YOUR ARREST FOR DUI!! ASSESS YOUR OWN SITUATION IF ASKED TO DO THESE TESTS AND MAKE YOUR OWN DECISION.**

I will immediately evaluate the Officer's performance on the FSTs. In other words, I will re-create each and every step, word, and action of the

arresting officer in the instruction, administration, evaluation, and scoring of the field sobriety tests.

**When deciding who to hire as a DUI defense attorney, it is crucial that your attorney be extremely well-versed in the testing procedures!**

## **COMMON DRIVING SIGNS OF AN IMPAIRED MOTORIST**

I will completely evaluate the driving signs of my clients. Many times my clients are accused of impaired driving even when they do not display a single common driving sign of impairment. You may have a reasonable, plausible, alternative explanation consistent with innocence. I will assess the allegations and request that you provide an explanation for the driving signs if alcohol was NOT the cause. Such counter-evidence is crucial in the defense of the accused DUI motorist.

### **Problems Maintaining Proper Lane Position**

Weaving

Weaving across lane lines

Straddling a lane line

Swerving

Turning with a wide radius

Drifting

Almost striking a vehicle or other object

### **Speed and Braking Problems**

Stopping problems (too far, too short, or too jerky)

Accelerating or decelerating for no apparent reason

Varying speed

Slow speed (15+ mph under limit)

Driving in opposing lanes or wrong way on one-way

Slow response to traffic signals

Slow or failure to respond to officer's signals

Stopping in lane for no apparent reason

Driving without headlights at night

Failure to signal or signal inconsistent with action  
Following too closely  
Improper or unsafe lane change  
Illegal or improper turn driving on other than the designated roadway  
Stopping inappropriately in response to officer  
Inappropriate or unusual behavior

## **OHIO TRAFFIC VIOLATIONS & POINTS**

Drunk Driving	6
Hit-skip/Leave Scene	6
Driving Under Suspension or Revocation	6
Drag Racing	6
Flee/Elude Officer	6
Vehicular Assault	6
Driving w/o Owner's Consent	6
Vehicular Homicide	6
Reckless Operation	4
Juvenile DUI	4
Stop Sign	2
Disregard Traffic Lights	2
Railroad Crossing Violation	2
Disregard Traffic Signs	2
Hit-skip on Private Property	2
Speeding (varies)	2
Slow Speed	2
Following Too Closely	2
Wrong Way on One-Way	2
Left of Center	2
Fail to Yield to Pedestrian/Blind	2
Failure to Yield to Emergency/Funeral	2

Fail to Stay within Marked Lanes	2
Fail to Yield Right of Way	2
Improper Passing	2
Stopped School Bus Violation	2
Fail to Maintain Assured Clear Distance	2
Improper Backing	2
Driving on Closed Highway	2
U-Turn	2
Fail to Signal	2
Fail to Control	2
Impaired Alertness	2
Temporary Permit w/o Adult	2
Curfew Violation	2

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