

# State of Colorado

## Alcohol and Drug Impaired Driver

### Enforcement Manual

2008

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Driving Under the Influence of Alcohol (D.U.I.)  
Driving Under the Influence of Drugs (D.U.I.D.)

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

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**COLORADO OFFICE OF TRANSPORTATION SAFETY**

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

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## INTRODUCTION

In Colorado , and across the nation, approximately 50% of all highway traffic accident fatalities are alcohol or controlled substance related! In fact, DUI and DUID crashes in the United States have killed more people since 1982 than the total number of Americans killed in battle since 1950. This includes the Korean War, the Viet Nam war, Desert Storm, and Operation Iraqi Freedom combined.  
(Statistical Summary – America’s Major Wars)

Every 2 minutes, someone is injured in an alcohol related crash in America. In Colorado, one person dies every sixteen hours from injuries received in a motor vehicle related crash. The National Safety Council currently estimates each fatal crash to cost \$1,150,000, each injury crash to cost \$52,900, and each property damage crash to cost about \$7,500. (Drunk Driving Task Force 2007 report)

It is clear the economic and human toll involved is catastrophic and affects all of society. The drinking/drugged driver affects everyone through taxes for law enforcement services, ambulance services, medical facilities, costs of incarceration, rehabilitation agencies, social security and welfare costs for survivors, and increased insurance premiums for all. The law enforcement community is tasked with working together to reduce the number of drinking/drugged drivers on our streets and highways. Law enforcement officers are the first line of defense in the efforts to reduce alcohol and drug related driving incidents. Other components of the system, prosecutors, judges, probation departments, treatment centers, and other governmental agencies, are all a part of the solutions to reduce the number of drunk and drugged drivers on Colorado roadways.

This manual was written to complement the “Prosecution Manual” produced through the Colorado District Attorneys Council. Although the pronoun “he” is used throughout this manual, no sexist inference should be drawn, nor was such implication intended. The goal of this manual is to aid you, the Colorado peace officer, in detecting, apprehending, processing and testifying about the drinking/ drugged driver. It is designed to establish standardized, consistent guidelines and procedures for DUI/DUID detection, apprehension, and prosecution throughout the state. If used properly, you should find it a useful tool to clarify and simplify some portions of the enforcement task. This document is not the last nor only word in procedure, and is not intended to dictate policy to any law enforcement agency. However, it is intended to assist all agencies. Since this manual was first introduced in 1977, many Colorado law enforcement agencies have implemented it in its entirety as departmental policy, furthering the goal of statewide uniformity.

# CONTENTS

	Page
INTRODUCTION	5
CONTENTS	6
DUI DECISION FLOW CHART	9
<b>DETECTION AND APPREHENSION (PART 1)</b>	<b>10</b>
Making Initial Observations	11
Stopping the Vehicle	14
Contacting the Driver	14
Conducting Roadside Sobriety Evaluations	15
Deciding to Arrest or Release	22
Determining Disposition of Passengers and Vehicle	23
<b>PROCESSING (PART II)</b>	
The Processing Phase	24
Using Video Tape	24
Use of Audio Tape	26
Conducting a Test for Alcohol and other Drugs	26
Issuing the Summons and Complaint	29
Completing the Notice of Revocation or Denial Form	30

## **PROSECUTION (PART III)**

The Prosecution Phase	32
Persons Involved in Prosecution	32
Characteristics of a DUI Case/Consideration before Trial	33
Officer Testimony	34
Cross Examination	35
Summary	36

## **APPENDICES**

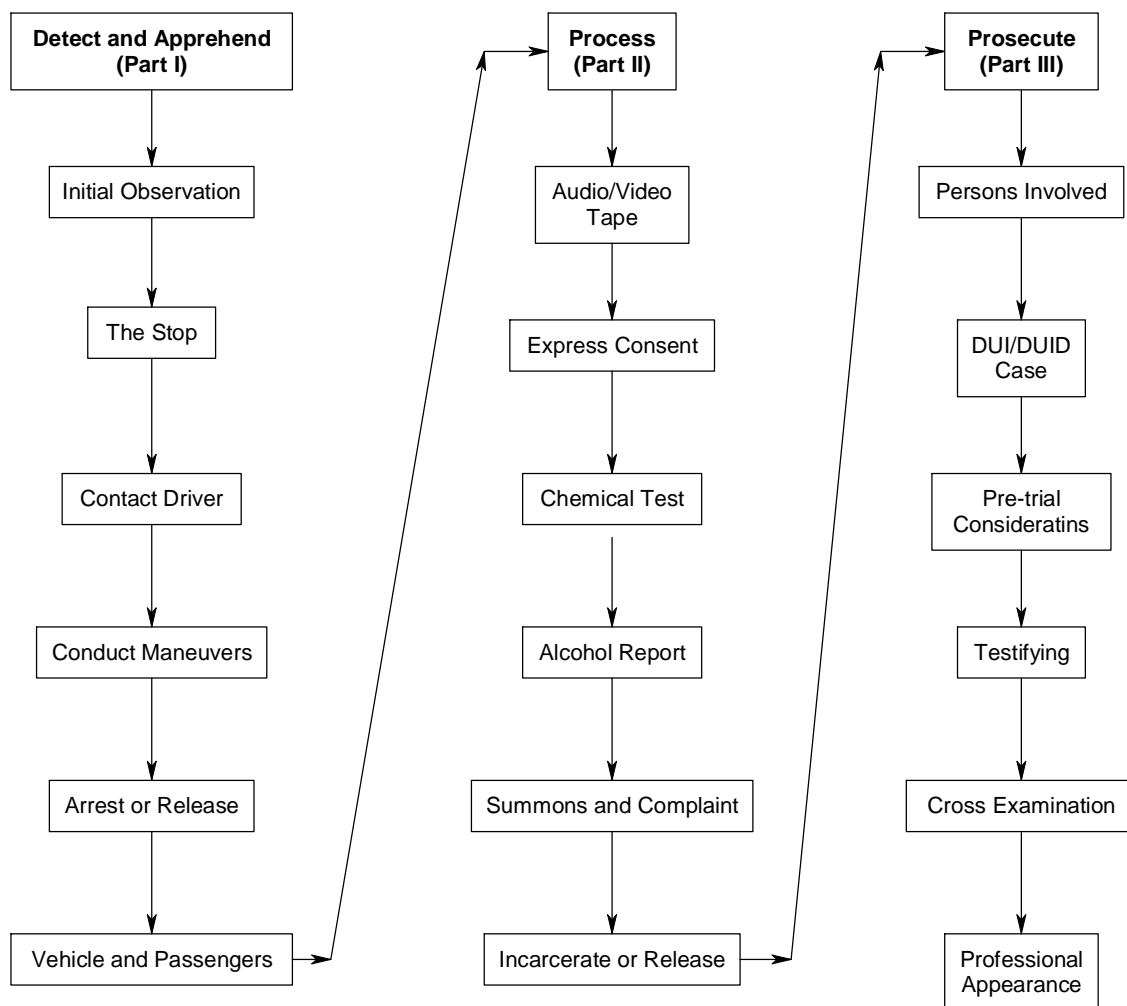
Appendix A.	ALCOHOL AND ITS EFFECTS	37
Appendix B.	DRIVING UNDER THE INFLUENCE OF DRUGS	39
Appendix C.	DRUG TESTING CONSIDERATIONS FOR DUID CASES	42
Appendix D.	MEDICAL CONSIDERATIONS	43
Appendix E.	DUI/DUID CRASH INVESTIGATIONS	46
Appendix F.	EXPRESS CONSENT AND PER SE HEARINGS	48
Appendix G.	THE LAW	54
Appendix H.	CASE LAW EVIDENTIARY TESTS (GENERAL)	62
Appendix I.	CASE LAW (ADMINISTRATIVE HEARINGS)	68
Appendix J.	HABITUAL TRAFFIC OFFENDER	69
Appendix K.	BOARD OF HEALTH RULES AND REGULATIONS	70
Appendix L.	EDUCATION AND TREATMENT PROGRAMS	102
Appendix M.	STANDARDIZED FIELD SOBRIETY TESTS	106
Appendix N.	Senate Bill 07-154	



## DUI DECISION FLOW CHART

The DUI/DUID process is divided into three separate parts. Part I is the Detection and Apprehension phase wherein an officer will make initial observations of a vehicle in motion, makes a decision as to arrest or release the subject, and flows through to the disposition of the subject's vehicle and passengers. Part II starts with the preservation of initial evidence, continues through the appropriate issuance of a summons and complaint, and flows through the officer's decision to incarcerate or to release the subject per agency policy. Part III consists of the documentation of all evidence, filing the case in court, and flows through the courtroom testimony and professional appearance of an officer. The attached flowchart depicts the associated steps in a DUI/DUID contact and are described through the manual.

### DUI/DUID Decision Flowchart



## **THE DETECTION AND APPREHENSION PHASE (Part I)**

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

The detection of persons driving under the influence is considered the most important of the three phases. Without good detection, enforcement action cannot be taken. We often think the detection process is easy; however, it is not. Anyone can spot a driver who is obviously under the influence. The driver may "weave" extremely, drive 10 miles per hour, run red lights - not even knowing they exist, or crash into anything in their path. It becomes an art, though, to spot the majority of drivers who fall into one of the two categories: the impaired driver (DWAI) or the intoxicated driver (DUI) alcohol and/or other drugs. The driver who operates a vehicle while their ability is impaired can be a real threat for several reasons. Although they feel their driving ability is sound, their reaction time is slowed. They have a false sense of control. Combine slow reaction time with the feeling of control and they are a very dangerous threat to themselves, other motorists, and pedestrians. Often, the impaired driver can be more dangerous than the obviously intoxicated driver. Often, the intoxicated, problem-drinking driver knows they are operating the vehicle below par and drive at slower speeds trying to compensate for their condition. However, the impaired driver feels in control of the vehicle and often tries to prove a point by driving at posted speed limits or higher.

The problem-drinking driver, which may include a person referred to as an alcoholic, can be extremely difficult to detect. Often, with many years of drinking experience behind them, they have developed the ability to partially compensate for intoxication. They can often attempt to mask the visual effects of alcohol in such a way as to escape detection by the average person. Even though they appear to compensate well, their perception and awareness is altered to the point that they may run over a pedestrian without even knowing it. Due to the increased numbers of drivers who are under the influence of drugs other than alcohol, it has become necessary for police officers to be alert to the masking techniques employed by the drugged driver. For instance, a driver under the influence of marijuana may drink one beer which leaves the odor of an alcoholic beverage on their breath. This driver, upon being arrested for DUI could request a breath test. The breath alcohol test would determine a BrAC below the presumptive level for DUI. An officer who is not alert to the possibility of a drug induced intoxication might release the driver without proper charges. The impaired problem-drinking or drugged driver is not as easy to detect as once thought. However, this driver is the most dangerous.

## MAKING INITIAL OBSERVATIONS

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

The cues presented in these categories predict a driver is DWI at least 35 percent of the time.

Generally, the probability of DWI increases substantially when a driver exhibits more than one of the cues.

Note: There is a brochure published by NHTSA that contains these cues. The title is "The Visual Detection of DWI Motorists" DOT HS 808677.

The driving behaviors are presented in four categories.

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

[P=.50-.75]

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**

[P=.45-.70]

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

Accelerating or decelerating for no apparent reason

Varying speed

Slow speed (10+ mph under limit)

### **Vigilance Problems**

[P=.55-.65]

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

### **Judgment Problem**

[P=.35-.90]

Following too closely  
Improper or unsafe lane change  
Illegal or improper turn  
Driving on other than designated roadway  
Stopping inappropriately in response to officer  
Inappropriate or unusual behavior (throwing objects, arguing, etc.)  
Appearing to be impaired

### **Ten Post-Stop Cues**

[P > .85]

Difficulty with motor vehicle controls  
Difficulty exiting the vehicle  
Fumbling with driver license or registration  
Repeating questions or comments  
Swaying, unsteady, or balance problems  
Leaning on the vehicle or other object  
Slurred speech  
Slow to respond to officer/officer must repeat  
Provides incorrect information, changes answers  
Odor of alcoholic beverage from the driver

### **Visual Cues of Impaired Motorcycle Operation**

#### **Excellent Cues**

(50% or greater probability)

Drifting during turn or curve  
Trouble with dismount  
Trouble with balance at a stop  
Turning problems  
(e.g., unsteady, sudden corrections, late braking, improper lean angle)  
Inattentive to surroundings  
Inappropriate or unusual behavior  
(e.g., carrying or dropping object, urinating at roadside, disorderly conduct, etc.)  
Weaving

### **Good Cues**

(30 to 50%probability)

Erratic movements while going straight

Operating without lights at night

Recklessness

Following too closely

Running stop light or sign

Evasion

Wrong way

**OBVIOUS TRAFFIC VIOLATIONS** - Anytime a driver fails to stop for a red light or a stop sign, travels at excessive or very slow speeds, especially during late evening or early morning hours, an officer should be alert to the possibility the driver may be under the influence of alcohol or a controlled substance.

**HEADLIGHTS** – A driver often fails to turn on the vehicle lights, or fails to dim them to oncoming traffic. Anytime an officer observes improper use of headlamps the possibility of an impaired driver exists.

**OVERDRIVING** - The problem-drinking driver will often display this characteristic. An impaired driver can become very careful, very slow, and very deliberate in their driving actions. The impaired driver often aims rather than drives the vehicle.

**SITTING AT OR THROUGH GREEN TRAFFIC SIGNALS** - The impaired driver may not be aware that a traffic signal light has changed and it is time to proceed. Likewise, an impaired driver may stop for a green light and proceed on a red light.

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

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

**TAILGATING** - Perception difficulties often develop when a person is under the influence of alcohol or a controlled substance. The impaired driver often fails to perceive that an object is closer than it appears or, in some instances, an object may not exist at all.

**DRINKING WHILE DRIVING** - The State of Colorado has adopted laws regulating open alcohol containers in vehicles. It is unlawful for a person while in the passenger area of a motor vehicle that is on a public highway of this state or the right-of-way of a public highway to knowingly drink an alcoholic beverage or have in their possession an open alcoholic beverage container. Local authorities can adopt more strict ordinances concerning open alcoholic beverage containers. Open alcoholic beverage containers in vehicles can be circumstantial evidence of drinking. An officer should be alert to the possibility the driver is intoxicated, and should alert the officer to begin focusing on indicators of alcohol or controlled substance impairment indicators.

**EXCESSIVE AND ERRATIC BACKING** – Improper backing of a vehicle often occurs in parking lots, especially at or near local bars. Impaired drivers often take wrong exits or entrances onto other traffic arteries. Anytime improper backing is observed, especially backing movements on a traffic ramp, it is possible an intoxicated driver is operating the vehicle.

## **STOPPING THE VEHICLE**

Driving behavior is the critical first part of establishing a valid vehicle contact and is the first portion of developing a DUI/DUID case. A DUI/DUID case does not start with the first smell of an odor of an alcoholic beverage. After developing a legal reason to make a valid traffic stop, an officer should be alert for the following before and after turning on the vehicle emergency lights.

**UNUSUAL REACTION TO EMERGENCY LIGHTS** – Often, the impaired driver may not observe the emergency vehicle lights on an emergency vehicle and may not react to the lights at all. The driver may continue a considerable distance before being aware an officer is behind them. An officer should also be alert to the possibility that a driver may react instantly to emergency vehicle lighting and make an immediate stop on the road or pull over quickly, making a sudden and hazardous stop. Officer's should look for items being thrown from the vehicle and movements of the driver and/or passenger(s) that could pose a risk when they are contacted.

**UNUSUAL REACTION TO SIREN** - If it becomes necessary to activate the siren on an emergency vehicle, do so with caution. An impaired driver's reaction can be just as unpredictable as with emergency lighting. Keep a safe, reasonable distance behind the subject; if possible, select a safe location where traffic is light. Keep officer safety, the safety of the subject, and the safety of the public in mind.

**SELECTION OF THE LOCATION** - If possible, the officer should select the location of the traffic stop. In selecting the location, consider the availability of lighting, traffic volume and, should an officer decide to conduct roadside maneuvers, the location should minimize exposure to vehicle traffic and should maximize visibility.

**DRIVER BEHAVIOR** - Just prior to and immediately after the stop, watch for suspicious movements on the part of the driver and of the passengers. Do not rush up to the subject's vehicle after the stop. Sit back and observe for a few seconds before approaching the vehicle.

## **CONTACTING THE DRIVER**

The traffic violations observed from the vehicle in motion provide identifiable clues as to the potential of an impaired driver. Being alert to cues and indicators of impaired driving, an officer should be able to recognize an impaired driver.

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

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

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

**PHYSICAL OBSERVATIONS OF DRIVER** - Begin making physical observations of the driver. Note the driver's eyes, speech, clothing, etc. If, at this point, you have detected objective signs such as an odor of an alcoholic beverage on the driver's breath, bloodshot eyes, slurred speech, etc., then you are ready to proceed to the CONDUCTING SOBRIETY EVALUATIONS phase of the process. Keep in mind that while individual observations such as inappropriate responses to questions, difficulty locating registration, unzipped or wet trousers aren't necessarily clues of impairment by themselves, they are often pieces to a puzzle. All observations should be documented; the smallest of details are often very important to the overall outcome.

## **CONDUCTING ROADSIDE SOBRIETY EVALUATIONS**

### **PURPOSE OF ROADSIDE SOBRIETY EVALUATIONS**

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

### **LEGAL CONSIDERATIONS**

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

Probable cause along with exigent circumstances: To meet this requirement, the officer must have reason to believe the person was driving under the influence, and circumstances exist which make the immediate administration of the maneuvers necessary. Since the effects of alcohol and other drugs dissipate with time, exigency exists with any sobriety evaluation. Consent: If a person consents to perform the maneuvers, it is not necessary for the officer to have probable cause prior to administering the maneuvers. Since the maneuvers can only be administered with the cooperation of the person being tested, consent is the primary consideration of the administering officer.

## DECISION TO CONDUCT

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

## ASKING THE DRIVER OUT OF THE VEHICLE

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

Ask the passengers to remain in the vehicle. Conduct the maneuvers in a position which allows you to observe the driver's actions, but still allows you to remain in a safe position should a passenger become a problem. While a perfectly flat, dry, hard surface with no debris is best, roadside maneuvers may be conducted in less than perfect conditions. Be reasonable in your decision when it comes to the evaluation of someone who has performed the roadside maneuvers on a less than perfect surface. Use whatever lighting is available for officer safety, the driver should be turned away from any patrol car strobe or rotating lights. If you haven't already asked the driver to turn the engine off, you should do so before they exit. Ask them to set the brake and put the keys on the dash or in a pocket. . Some things you might observe in an impaired driver before or as they are exiting are difficulty locating/operating windows or door handles, problems removing seatbelt, dropping paperwork in the car or on ground, pausing when they first stand up to gain balance, leaving door open when walking from vehicle, staggering /stumbling, and using the vehicle for support they first stand up to gain balance, leaving door open when walking from vehicle, staggering /stumbling, and using the vehicle for support

## ELIMINATION OF MEDICAL CONSIDERATIONS

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

## ADVISEMENT OR REFUSAL

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



## PERFORMANCE AND EVALUATION OF THE ROADSIDE MANEUVERS

It is important you establish a routine when administering these maneuvers. A well organized routine will allow the process to flow smoothly, and will allow you to testify more effectively at a later date because you will remember exactly how you instructed the driver to perform the maneuvers. . Your instructions should be the same each and every time and must be only those instructions in the SFST manual. Remember, your instructions must be complete and easy for a sober person to understand. Inform the driver to perform the maneuvers to the best of their ability, and if the instructions are not understood, the driver may ask you to repeat them. Speak slowly and clearly while giving the instructions, and loud enough to be heard distinctly under the existing conditions. After giving the instructions for each maneuver, ask the driver if the instructions are understood. Remember, you may later be asked to repeat the instructions to a jury, and if the jury cannot understand your instructions, they won't expect the driver to have understood them. Each maneuver should be demonstrated for the subject keeping officer safety in mind at all times.

Each time the SFST maneuvers are conducted the subject should be asked the following preparatory questions in order to better evaluate the performance of the maneuvers. If the subject should answer yes to any of the questions, follow-up questions to get clarification should be asked and the responses should be documented.

- Do you have any physical defects?
- Are you under the care of a doctor or dentist for anything?
- Are you taking any drugs or medication?
- Do you have any eye problems or wear glasses or contacts?
- Do you have anything in your mouth, like false teeth/partial plates, chewing tobacco, gum, or tongue/lip piercing?

(Jewelry in the mouth or lip should be removed them prior to breath testing).

A Preliminary Breath Test (PBT) using a device approved by CDPHE and your agency can be used after the SFST's have been completed and the officer has made the decision that the subject is impaired. In an instance where the SFST's cannot be preformed and there is other articulable evidence of impairment, the officer may decide to use the PBT alone.

Colorado Department of Transportation and the National Highway Traffic Administration recommend agencies adopt the following maneuvers. The three validated Standard Field Sobriety Test (SFST) maneuvers should be completed in the following order first, followed by approved maneuvers selected by the officer. Whenever practical, the officer should use the same maneuvers in the same order each time. Officers should not use any maneuver not listed in this manual.

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

Officers who are certified in the use of HGN should establish a routine of preliminary questions to check the possibility the suspect is wearing corrective lenses. HGN may be conducted with contact lenses in place. The officer can administer this maneuver with the suspect in a standing, sitting, or lying position (The subject must be lying on their back with their head facing straight, not tilted to a side). Typically HGN will be administered when the officer is in an interview position with gun side away. When checking for end point nystagmus (distinct and sustained nystagmus at maximum deviation) it may be necessary for an officer to take a step with either the front or back foot to correctly look for this behavior during HGN maneuvers.

**Recommended instructions:** “Put your feet together, heels touching heels, toes touching toes and stand with your hands at your side. I am going to check at your eyes. Keep your head still and follow [this object] with your eyes only. Do you understand?”

When performing HGN, start with the stimulus held vertically, centered, approximately 12 to 15 inches in front of the subject’s face with the stimulus held slightly above the subject’s eyes. Move the stimulus across the left eye first with an approximate 2 second sweep. When reaching maximum deviation, without hesitation, move the stimulus from the left eye, across the face to maximum deviation with the right eye, then back to the nose. This sweep is to check for the subject’s eyes tracking equally. Remember to check for equal pupil size. This should be an approximate 4 second sweep (two seconds per eye). Repeat the sequence twice to determine if the subjects has a Lack of Smooth Pursuit. The next sweep should stop at maximum deviation of the left eye to determine if Distinct and Sustained nystagmus is visibly present, then at maximum deviation of the right eye. The stimulus should be held for a minimum of 4 seconds. The last sweep should determine onset of nystagmus prior to 45 degrees. Moving the stimulus slowly across the left eye taking approximately 4 seconds, look for onset prior to 45 degrees. If it is observed, hold the stimulus for approximately 4 seconds. Upon that determination, move the stimulus slowly across the right eye to look for onset prior to 45 degrees. Check for pupil size and equal tracking on first sweep.

- a. VERTICAL GAZE NYSTAGMUS (VGN) – VGN can be administered by an officer trained in HGN and VGN. Instruct the subject to continue to follow the object with their eyes, keeping the head still. Hold the stimulus horizontally approximately 12 to 15 inches at the brow line above the eyes. Slowly move the stimulus upward to approximately the hair line. A subject with a high blood alcohol or drug content will demonstrate VGN by the eyes jerking for a minimum of 4 seconds while at maximum elevation.

2. **WALK AND TURN (WAT)** - Recommended Instructions:

WAT maneuver is a “divided attention” maneuver. In order for the subject to perform this maneuver he must concentrate on performing more than one task at a time. It is important that the instructions be explained clearly and the subject understands what is expected. This maneuver is divided into two stages. The first stage is the instruction stage. During this stage the subject is required to balance and listen to your instructions. The second stage, walk and turn, the subject is again required to balance himself while walking heel-to-toe, but also, he must remember your instructions throughout the walking stage.

(If a physical line is not available, ask the subject to imagine a straight line).

**Recommended instructions:** "Place your left foot on the line, now place your right foot on the line in front of your left foot, touching heel-to-toe, with your hands at your side. Keep this position until I tell you to begin. Do you understand?" (Instruction stage)

"When I tell you to begin, take nine heel-to-toe steps down the line, counting each step out loud and watching your feet.

On the ninth step, leave your lead foot in place and use your other foot to take a series of small steps to turn, then take nine heel-to-toe steps back down the line, watching your feet and counting each step out loud. Keep your hands at your side and don't stop until you are finished. Do you understand the instructions? You may begin.

### 3. **ONE LEG STAND (OLS)**

The OLS maneuver is a "divided attention" maneuver. In order for the subject to perform this maneuver he must concentrate on performing more than one task at a time. It is important that the instructions be explained clearly and the subject understands what is expected. This maneuver is divided into two stages. The first stage is the instruction stage. During this stage the subject is required to balance and listen to your instructions. The second stage is the performance of the maneuver. The subject is required to balance while standing on one foot and counting properly.

**Recommended instructions:** "Please stand with your feet together heel-to-heel and toe to toe, arms at your sides. Stand in this position until I tell you to begin" Do you understand?" (pause) "When I tell you to I want you to raise one of your legs, either your left or right, whichever you are more comfortable with, straight out in front of you, pointing your toe down, approximately 6 inches off the ground. I want you to look at your foot and count out loud: one-thousand one, one-thousand two, one- thousand three and keep on counting until I tell you to stop."

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

### 4. **RHOMBERG (MODIFIED ATTENTION MANEUVER)**

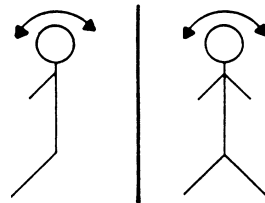
The Modified Rhomberg displays impairment through balance, the internal clock, and other physical reactions to impairment.

**Recommended instructions:** "Stand up straight with your arms to your side, put your feet together, your heels touching heels, your toes touching toes and listen to my instructions.

When I tell you to begin, close your eyes and tilt your head back slightly so I can see your eyes are closed. When I tell you to begin, close your eyes and estimate 30 seconds to yourself. When you think 30 seconds is up, open your eyes, tilt your head forward, and say, "Stop." Do you understand my instructions? Please begin." Remember to ask them , "How long was that." The maneuver should be stopped at 90 seconds if the subject has not opened their eyes yet.

Research has shown it is best for this maneuver to be performed by the suspect for 30 seconds. It has been found a sober person will demonstrate a slight motion during this maneuver. It can be either front to rear, side to side, circular or any combination. But usually it will be very slight movement. Whereas an intoxicated person may show a more pronounced front to rear, or side to side

behavior or may stand erect and rigid without any motion, or a combination of all of the above described behaviors. It is important for officer safety to maintain a good interview stance while checking for side to side swaying. It is helpful to step to one side to check for front to rear sways. Alcohol and some controlled substances will slow a person's perception of time (Time estimate will be longer than 30 seconds). Some controlled substances will "speed-up" a person's perception of time (Time estimate will be much quicker than 30 seconds).



5. **ALPHABET OR COUNTING MANEUVER**

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

- or -

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

- or -

"Would you please count backwards from the number "57" to the number "43". Keep your hands at your side and your feet together. Do you understand? Please begin."

You must determine if the subject is familiar with the English alphabet prior to asking them to perform this maneuver. If the subject is not familiar with the English alphabet ask them what grade of formal education has been completed.

If the subject is not able to recite the alphabet, determine if the subject is capable of either counting from "1" to "10" and then "10" to "1" or able to complete one of the other counting tasks.

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

To correctly administer the finger-to-nose, the starting position is with the subject's arms next to their side, slightly in front with the palms facing forward and their index fingers extended. Make sure the subject touches the **tip** of the finger to the **tip** of the nose. During this maneuver the subject may also sway (front to rear or side to side type movement) which can be evidence of intoxication as well.

**Recommended instructions:** "Stand-up straight, place your feet together, heels touching heels, toes touching toes, tilt your head back slightly so I can see your eyes are closed. Put your arms to your side palms facing forward and extend the index finger on each hand.

When we begin, I will say "left" or "right". If I say "left" touch the tip of your left index finger to the tip of your nose and return your hand to your side. If I say "right" touch the tip of your right index finger to the tip of your nose and return your hand to your side.

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

All maneuvers should be demonstrated for the subject, keeping officer safety in mind at all times.



## **PRELIMINARY BREATH TESTING (PBT)**

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

## **DECIDING TO ARREST OR RELEASE**

It is the officer's responsibility to make an appropriate decision either to arrest or release the driver based on observed driving behavior, the driver's physical and mental condition in the vehicle, and the observed driver's performance during the SFST maneuvers. These factors, taken together, constitute probable cause for arrest, or should influence the decision to release the driver.

The Thompson Instructions as given to a D.U.I. jury:

"In order to find the defendant guilty of the charge of Driving Under the Influence of Alcohol, the degree of influence must be substantial, so as to render the defendant incapable of safely operating a vehicle"

-or-

"In order to find the defendant guilty of the charge of Driving While Ability Impaired, the driver must find that he was less able than the driver ordinarily would have been, either mentally or physically, to exercise a clear judgment, and lacked the steady hands and nerves necessary to operate a motor vehicle with safety to himself and to the public."

**ARRESTING THE SUBJECT** - If probable cause exists to arrest the driver for driving under the influence alcohol or a controlled substance, consider the following recommended procedures: If possible, have another officer available at the time the driver is advised of the arrest. People can be very unpredictable when placed under arrest. Always complete a search of the subject to ensure no weapons or other contraband are present and properly handcuff the arrested drinking driver. Handcuffing the arrestee is for officer safety and the safety of the arrestee. Properly secure the arrestee in the patrol vehicle.

**RELEASING THE SUBJECT** - If probable cause to arrest for an alcohol or controlled substance violation has not been established after considering driving behaviors, physical observations, and observations of the SFST maneuvers, the appropriate decision is to release the driver. Appropriate enforcement actions on the observed violations may be taken. A great deal rests on an officer's effectiveness in properly detecting the drunk or drugged driver. The impaired or problem-drinking driver can be difficult to detect and can be very dangerous on the road. According to NHTSA statistics, approximately 40% of all traffic fatalities in the United States involved an alcohol or controlled substance impaired driver.

## **BE COURTEOUS AT ALL TIMES**

Personalities can change when a person is under the influence of alcohol or a controlled substance. When sober, many people can be very pleasant, but when impaired, especially when in contact with an authority figure like a peace officer, a person's personality can become aggressive and unpredictable. An officer should maintain a courteous and pleasant demeanor under all circumstances. Courteous conduct can diffuse a hostile situation and will often be appreciated by the subject when they are no longer impaired.

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

Anytime an arrest is made where the arrested person was in a vehicle, it is the arresting officer's responsibility to make arrangements for protecting the subject's vehicle and insuring the safety of the passengers. Departmental policy often gives specific direction in this area. The person responsible for the vehicle can give permission to leave the vehicle at the scene, to be removed as soon as possible, generally not more than 48 hours. If there is a sober friend or family member immediately available who can legally drive, that person can take custody of the vehicle with the permission of the arrested person. If not, it is recommended that the vehicle be towed to a safe, secure location. Ensure any passengers in the vehicle are properly taken care of and the disposition of the vehicle is appropriate. The passengers in the vehicle are also witnesses: Record their information.

## **THE PROCESSING PHASE (Part II)**

The objective of the processing phase is to prepare accurate reports, insuring all pertinent facts and information are recorded properly. The processing part is defined as the period of time commencing with the arrest of the driver and terminating when the driver has been jailed, placed in a detoxification center, released on bond, or released on a summons and complaint to appear at a later date. It is during this stage that the necessary forms required to prosecute the case successfully in a court of law are completed. Carefully note accurate times on each form.

The number of reports required to process a drunk or drugged driver varies from agency to agency. Forms required by state law when processing a drunk or drugged driver are:

- (1) The Affidavit of Revocation or Denial form (under circumstances defined by the Affidavit of Revocation and Denial form) and
- (2) The summons and complaint form.
- (3) If the subject is under suspension or denial, a Proof of Service must be completed.

Other forms, not required by law, but equally important, are a permission for a chemical test form, sobriety examination report form, and a chain of custody form. All agencies should examine their DUI reporting system to eliminate any unnecessary forms in order to reduce the processing time. Logical, effective, and organized work habits during the processing phase can do much to expedite the processing phase. The key is to keep the processing phase moving. The following recommended processing procedure is designed to help reduce the number of forms and the time required to process the driver.

### **USING VIDEO TAPE**

Some agencies may use video tape as part of DUI detection processing, either by means of video camera mounted in a patrol car or one at the station. Juries often give weight to the defendant's performance on such tapes. Video tape of the vehicle in motion and of a driver during the performance of SFST maneuvers are important evidence. Similarly, video tape of a subject shortly after arrest in an office or jail setting depicts the subject in the same or nearly the same manner as when the initial contact was made.

The ultimate issue is whether or not the driver was incapable of safely operating a vehicle due to the consumption of alcohol or drugs. Many law enforcement agencies use mobile video taping equipment. If this equipment is utilized by your agency, a standard operating procedure should be developed. When there is a camera mounted in the patrol car it is possible to video tape a vehicle in motion. Evidence of this nature can be quite convincing when viewed by a jury, and adds credence to the officer's reasonable suspicion to effect a traffic stop on the suspected violator. When the driver is captured on video tape, many defense issues are eliminated. For instance, identification of the driver, the vehicle identification and license number, the conditions of the stop and the demeanor of the driver and possible witnesses, to include the arresting officer's demeanor and action.

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



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

The following considerations should be utilized when using video tapes:

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

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

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

Every officer who comes in view of the camera should be aware of these guidelines. Agencies utilizing video/audio recordings for DUI processing should consult with their local district attorney's office for guidance in handling and storage of video/audio masters. It is recommended at a minimum, the following procedures should be employed:

1. Tapes are evidence and should be handled as such
2. Maintain a filing system of the recordings
3. Maintain strict control of the tapes and protect their integrity as evidence, under lock key

4. As evidence, **copies** of the tapes must be released to defense attorneys in a timely manner so as not to violate discovery rules
5. The tapes should be retained in their original form following department policy

## **USE OF AUDIO TAPE**

Describe the actions of the vehicle in motion and how it comes to a stop. Note the reaction of the driver and the vehicle once the emergency equipment is activated, i.e., "The green car continued two blocks after I activated my lights/siren, and then the driver slammed on the brakes, stopping in the traffic lane before pulling over to the curb to stop." A pocket recorder can be used during the roadside maneuvers to document the driver's speech and initial conversation. Upon contact with the driver state the reason for the stop. Describe the physical observations of the driver and any evidence in plain view. Describe the odors in the vehicle to include the odor of an alcoholic beverage or the odor on marijuana. Do not make inappropriate remarks. Explain any nods of the head, facial expressions, or hand gestures that the subject makes.

The use of audio equipment can usually bolster a DUI case by recording all of what occurred before and after the arrest. Audio tape is easy to make copies from and relatively inexpensive. Copies should always be distributed and the original kept in evidence. Consideration should be given to standardization of using the audio tape, i.e., vehicle in motion, driver contact and roadside maneuvers on side A of the tape, with the DUI arrest, express consent law advisement and responses on side B.

## **CONDUCTING A TEST FOR ALCOHOL AND OTHER DRUGS**

Under state law, a person who drives a vehicle in Colorado shall be deemed to have expressed his consent to a test of his blood or breath for the purpose of determining the alcohol content of his specimen. A person who drives a vehicle in Colorado shall be deemed to have expressed his consent to a test of his blood, saliva or urine or any combination for the purpose of determining the drug content, if you have reasonable grounds to believe he has been driving a vehicle while under the influence of, or impaired by alcohol or drugs or a combination of alcohol and drugs. The blood form consenting to perform a test should be completed before the sample is taken. The form itself may vary from agency to agency but should require the same basic information. The subject is required by law to sign the form giving consent to a blood test. If a subject refuses to sign the form, the law states this is a refusal to take the test. The type of test is specified by state statute. The Rules and Regulations of the Colorado Board of Health, relating to tests for alcohol and other drugs, govern the obtaining of blood, breath, saliva, and urine specimens for the analysis thereof to determine alcohol and/or other drug content by approved methods and procedures pursuant to Colorado Revised Statutes 42-4-1301 and 42- 4-1304. **Once the subject chooses which test to take, he may not change his mind. Effective July 1, 2007, under extraordinary circumstances, an officer can require a subject to complete a chemical test as chosen by the officer. See Appendix N.**

## **BREATH TEST**

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

The purpose of a breath alcohol test is to determine the actual amount of alcohol contained in the subject's breath. When alcohol is present in a person's blood stream a proportion of alcohol will be imparted to their breath as blood circulates through the lungs. A breath alcohol test is an

accurate, reliable and scientifically accepted method for measuring the alcohol content of a person's deep lung air sample when the test is conducted following the prescribed guidelines. Currently, breath testing instruments measure alcohol present in a breath sample using infrared analytical technology. Infrared light is absorbed by the alcohol molecule, the more alcohol present in the sample chamber the greater the amount of absorption thus resulting in a higher alcohol reading. By statute the results of a breath test are expressed as grams of alcohol per 210 liters of breath. Whenever a breath alcohol test is conducted a suitable reference sample, known as a standard simulator solution, shall be used with each direct breath test. The results of such a standard, when measured by the instrument, must be within an agreement of plus or minus ten (10) percent of the known reference value. This will establish the accuracy and calibration of the instrument when the test is performed.

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

## **BLOOD TEST**

If the subject chooses not to take a breath test, they will have the option to submit to a blood test for the determination of alcohol concentration. There are several very important steps to follow when obtaining a blood sample. Established procedures must be followed when collecting a blood sample. Medical facilities have established procedures for drawing blood and maintaining custody. In some instances it is the officer's to provide a specimen kit for collection. This specimen kit, as well as the specimen collection, must meet all the specifications as outlined in the Rules and Regulations of the Colorado Board of Health. Each blood alcohol collection kit shall include the following: a chain of custody form, two test tubes containing a 1% sodium fluoride preservative, evidence seals, and a non-alcohol antiseptic towelette. Make certain the person uses a non-alcohol solution for sterilizing the arm before blood withdrawal. The blood sample must be analyzed in accordance with the Colorado Board of Health Rules and Regulations.

### **A. WITHDRAWING THE SAMPLE:**

Blood samples shall be collected by venipuncture by a physician, registered nurse, certified paramedic, certified medical technologist, or person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse. Blood samples shall be collected only in an appropriate clinical or public safety facility. (e.g. hospital, medical clinic, police/sheriff's office etc.)

In no event shall the collection of the blood sample interfere with essential medical care or emergency medical services to the public. The sample must be collected, preserved, stored and maintained under the conditions as set forth in the Colorado Board of Health Rules and Regulations as outlined in Appendix A.

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

Maintaining the chain of custody for the blood sample is very important to ensure that the blood alcohol results will be admitted into evidence in court. If problems arise as a result of a broken chain of custody or improper procedures, then the sample and the test results may not be admitted into evidence and a very important element of the case is lost.

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

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

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

**D. MAILING THE BLOOD SAMPLE**

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

1. Make sure the chain of custody form is correctly completed.
2. Place the evidence seals around the top of the vacutainer tubes.
3. Place the chain of custody form inside the protective case which contains the blood samples.
4. Place the secured protective case containing the blood samples and chain of custody form in the mailing package, along with the permission for chemical test form, and seal both ends with evidence seals.
5. The mailing package should already have affixed to it the name and address of the laboratory. If it does not, make sure you correctly address it before mailing. Place your agencies return address on the package and check for proper postage.
6. Refrigerate the specimen in a secure location if there will be a delay exceeding 72 hours in the mailing of the package.
7. Take the package to a local post office and place it in an inside mail depository. If placed in an outside mail drop during cold weather, the sample could freeze and break, thus destroying the blood sample.

**E. MAILING A URINE SAMPLE**

1. Make sure the chain of custody form is correctly completed.
2. Place the evidence seals around the top of the container.
3. Place the chain of custody form inside the envelope which contains the sample.
4. Make sure you correctly address the package before mailing. Place your agencies return address on the package and check for proper postage.

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

**F. ISSUING THE SUMMONS AND COMPLAINT**

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

**NAME -** The citation must include the subject's first, middle, and last name. Ensure the name is spelled correctly.

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

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

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

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

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

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

**Underage Drinking and Driving – CRS 42-4-1301(2)(a.5), Person under 21 drove vehicle with BAC of 0.02 but less than 0.05.** The issuance of the summons and complaint is generally the last step completed prior to the incarceration or the release of a DUI subject. The summons and complaint must be served within 18 months after the date of offense. However, it is recommended it be served as soon as possible.

**DUI PRIOR CONVICTION -** Always note with special attention in your report, any information you obtain that suggests the DUI subject has a prior DUI conviction within five years (date of offense to date of offense). If necessary court records are adequate and available, the prosecutor may file a second, separate charge dealing with a prior conviction.

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

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

## COMPLETING THE AFFIDAVIT OF REVOCATION OR DENIAL FORM

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

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

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

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

1. The Element of "Driving" – The officer's own observations will usually be sufficient to establish a subject was "driving" a vehicle. However, further investigation is required when an officer did not make such observations, as when an officer is dispatched to the scene of a collision or a car off the road. In such situations, the officer's initial investigation should establish the driver of the vehicle. It is appropriate to ask witnesses, "Who was driving this vehicle?" Always ask for witnesses who can establish the subject was driving and note how each witness knows the subject was driving, i.e., he saw the subject driving his vehicle, he found the subject behind the steering wheel with the lights on and engine running, and/ or the subject told him he had been driving. Particularly in single vehicle situations, with only one party present when you arrive, look for evidence this party had been in actual physical control of the vehicle. Colorado law treats "actual physical control" as the equivalent of driving under the Express Consent and Per Se laws. Therefore, always note situations such as an individual passed out behind the steering wheel and the location of the vehicle, lights on, transmission in gear, the keys in the "on" position in the ignition, or the subject trying to put the vehicle into gear. Be alert for any evidence that demonstrates the subject was in a position to either move or restrain the movement of the vehicle.

2. Reasonable Suspicion of a Traffic Violation or other Lawful Reason for Making Contact - Note that you or another party observed the subject operating a vehicle, and indicate your reason for the stop, i.e., speeding or driving considerably below the posted speed limit, failure to use turn signals, involved in a traffic collision, etc. Note the location and direction of travel of the vehicle and the location of the actual traffic stop. When you have arrived at a collision situation and have not observed the driving, locate possible witnesses and obtain verbal statements. The statements can be used in recording the reasonable grounds for this element. When a citizen advises you of a drinking driver, obtain the citizen's name and address and why they felt the subject was intoxicated. It is also important to interview passengers in the arrested subject's vehicle, as statements made by them might become critical at trial. Report them accurately, quoting whenever possible. If the reason for contact was not based on reasonable suspicion of a traffic violation (domestic disturbance, sobriety checkpoint), simply state the reason for contacting the driver.
3. Probable Cause to Request a Test(s) - In addition to any erratic driving, include other information supporting your decision to request a test such as odor of an alcoholic beverage on the driver's breath, physical appearance and actions and a general description of performance on any roadside sobriety tests.
4. Results of any blood or breath test or a statement the driver refused the test(s). You are not limited at an Express Consent or Per Se license revocation hearing to the probable cause observations listed on the form. However, good practice dictates you be as complete and concise as reasonably possible in preparing the form. The Notice of Revocation or Denial has boxes for the officer to check depending on whether a test was taken with results over 0.08% or whether a test was refused.

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

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

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

**VERIFICATION** - There are two methods of verification available. The first is standard notarization in which you attach all documents to be filed with the Notice of Revocation or Denial and take the entire set of documents to a notary, raise your right hand and swear the information is true and correct and sign the form. The notary should then complete the process by signing and attaching the notary seal. The second does not require notarization. It requires you swear to the accuracy of the material in the Notice of Revocation or Denial. To do so, add the words "under penalty of perjury" before the words "I affirm that the documents..." in the Verification Section on the reverse side of the Notice of Revocation or Denial and then sign on the Officer's Signature line.

## **THE PROSECUTION PHASE (Part III)**

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

The issue at the trial is whether the defendant was:

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

### **PERSONS INVOLVED IN PROSECUTION**

The following persons may participate in a DUI trial:

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

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

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

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

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

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

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



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

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

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

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

**OTHER WITNESS** - Other testimony that may be relevant to the case such as expert witnesses.

## **CHARACTERISTICS OF A DUI CASE**

Most DUI cases involve the following:

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

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

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

## **CONSIDERATIONS BEFORE TRIAL**

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

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

## **OFFICER TESTIMONY**

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

**KNOWLEDGE OF THE CASE** - Be thoroughly familiar with the facts and all the evidence. Bring only original documents, when possible. Bring all other evidence to court without being asked. Disclose possible weaknesses and strengths of the case to the prosecutor prior to the trial. Do not take offense at questions put to you by the prosecutor prior to the trial; he is trying to help. Ask what to expect from him and from the defense attorney. A trial is a team effort. If you have played any part, however slight, you may be called to testify.

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

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

- A. Project your own story - Try to paint a word picture. Be descriptive. Be accurate. Convey and project your story, remembering you are selling yourself as well as your testimony. Relax. If you are prepared, you will undoubtedly be a convincing witness. Be professional. Detach yourself from a case and relate what happened as if you were merely a bystander and not an officer.
- B. Relate the facts - Do not display to the jury the "us against them" attitude. Let the prosecutor present and argue the case. You simply relate the facts. Never answer a question you do not understand. If you cannot understand it, how can the jury? Answer directly and simply only the question asked of you. Give only short, direct answers unless asked a question calling for a narrative answer. Help the jury to understand, use simple words: Car not vehicle; man, woman, child or person not male, female, juvenile or subject; go

or arrive not respond; saw or met not contacted; red lights and siren not emergency equipment, etc. In so doing, the jury understands what you mean and can relate to your presentation. If they don't know what you mean, they worry; if they worry, they don't listen, and when they don't listen, they acquit.

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

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

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

### **CROSS EXAMINATION**

Seemingly, the area most feared by you is the time when the defense attorney has the opportunity to ask you questions. Remember it is his job on cross-examination to put words in your mouth. Do not take it personally and become angry. If he is hard on you, chances are the jury will be sympathetic toward you. Hard questioning and arguments do not set well with a jury. If you reported a fact, stick to it. You were there, not the defense attorney. Think before you answer. Be on your guard for questions which attempt to discredit you regardless of your answer, such as: "You thought my client was under the influence as soon as you stopped him, didn't you?" A simple "yes" casts doubt on why you "investigated" further with such things as the maneuvers. A simple "no" suggest his driving wasn't really bad. Don't be lead, explain your actions. Never hesitate to ask for clarification or for the question to be repeated. Remember, an answer given in haste or based upon a question you misunderstood is still evidence for the jury to consider. Don't fight the obvious. If the defense attorney catches a mistake you made on direct examination, admit it. Do not argue, no matter how absurd the questions are, e.g., if you did not see the defendant drinking, or you do not know whether polio would affect a person's results on the evaluations; just answer "no." You control the manner in which you testify; do not let the defense attorney upset you. When the defense attorney is shouting, keep talking to the jury in a pleasant conversational tone. Don't be afraid to say, "I don't know."

### **PROFESSIONAL APPEARANCE**

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

## **SUMMARY**

Many thousands of hours have been spent in completing and revising this manual. Experts in the area of DUI/DUID enforcement has been consulted and have greatly assisted in establishing the GUIDELINES as set forth in this document. Although there are other publications in existence, this manual is believed to be one of the best of its kind. It specifically addresses Colorado's problems, laws, and suggested procedures in dealing with the DUI/DUID enforcement. By stimulating your thinking, you can gain a more positive approach towards DUI/DUID enforcement. You alone are the key. Without your initial contact of the suspected intoxicated driver and the decision to arrest, the identification and reduction of alcohol-related incidents cannot take place. Looking for reasons not to arrest is justifying lack of responsibility on your part, and amounts to contributing to a serious social problem - the intoxicated driver. The following sections of this manual are designed to give you additional information on situations and processes related to DUI enforcement. It is strongly suggested you become familiar with them. There are sections which are sure to contain answers to questions you may still have. By becoming thoroughly familiar with the manual and its appendices, you will also be enhancing your image as a professional peace officer.

## APPENDIX A

### ALCOHOL AND ITS EFFECTS

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

Ethanol, in its purest form is a clear, colorless liquid which is practically odorless and causes a burning sensation when ingested. Ethanol will readily mix with water and evaporates very quickly. Ethanol is produced by the process of natural fermentation when an alcoholic beverage is manufactured. The concentration of alcohol varies in the type of beverage that is produced (beer contains 4%, wine 12%, 43% in hard liquor). One drink is considered as one ounce of 86 proof liquor, or one twelve ounce can of beer, or one four ounce glass of wine. Beverages also contain congeners as a flavoring agent. Congeners do not contribute to the depressant affect of the alcohol but can be detected on a person's breath after a beverage has been consumed.

#### ALCOHOL IN THE BODY -

- (1) **Absorption Phase:** Once alcohol is ingested it is absorbed directly into the blood stream through the cell membranes of the digestive tract. Alcohol requires no digestion before it is absorbed. As the alcohol passes through the digestive tract 5% will be absorbed by the mouth, 25% will be absorbed from the stomach and the remainder, 70%, will be absorbed from the first eight to ten inches of the small intestine. A factor which influences the rate of absorption is the amount of food in the stomach. The average rate of absorption for the body is 30 minutes on an empty stomach up to 60 minutes or longer on a full stomach. The rate of absorption varies slightly from person to person, and for the same person at different times. Some alcohol passes into the blood stream, within minutes of consumption and most (90%) is absorbed within an hour.
- (2) **Distribution Phase:** When the alcohol is absorbed by the circulatory system it is then distributed to all parts of the body. Some organs, such as the brain, liver and kidneys, receive a larger amount of blood supply than others and consequently will receive a greater amount of alcohol. Alcohol is also distributed proportionally to parts of the body depending on the water content of the tissues.
- (3) **Metabolism Phase:** As the alcohol is being distributed in the circulatory system, the liver will excrete an enzyme (alcohol dehydrogenase, ADH) which will metabolize the alcohol. This enzyme will oxidize or break down the alcohol molecule to be used as a food source for the body. The average rate of metabolism for an individual is 0.015% or about one drink per hour. The rate of metabolism will vary among individuals based on the body's ability to metabolize alcohol.

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

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

It is impossible to state all people will exhibit the same outward signs of intoxication at the same blood alcohol concentration. Some of the notable signs of intoxication are an odor of an alcoholic beverage on the breath, swaying, staggering, poor muscular coordination, inability to divide ones attention (do two or more simple tasks at the same time), confusion, speech difficulty, sleepiness, dizziness, nausea, glassy watery eyes, flushed face, inability to understand instructions, and horizontal gaze nystagmus. DUI subjects may exhibit all or part of these notable signs. The degree with which some signs are exhibited depends on the drinking experience of the subject.

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

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

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

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

## **APPENDIX B**

### **DRIVING UNDER THE INFLUENCE OF DRUGS**

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

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

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

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

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

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

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

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








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

If a breath test is given and the results indicate a level of alcohol .08% or greater, charge the driver with DUI. Alcohol at concentrations greater than .08% can mask the signs and symptoms of drug intoxication but a DRE may still want to do an evaluation. Higher alcohol concentrations should not preclude charging the driver with and requesting an additional evidentiary tests for driving under the influence of drugs where there is a clear indication of drug usage. When evidentiary test results are not readily available from a suspected driver under the influence of alcohol and there is a clear indication the driver is also under the influence of drugs, request an additional chemical test for drugs. If an officer requests a suspect take more than one type of chemical test for drugs (example: blood and urine), a refusal to take any one or all of these tests constitutes a refusal and the suspect's driver's license may be revoked. It is highly recommended to utilize the abilities of a DRE whenever possible. A suspect has the right to refuse a DRE exam in which case an officer must make a decision to arrest based on available evidence and information. A DRE would normally be contacted after the arresting officer administers a breath test to a suspect and the results (usually less than .08%) suggest the suspect's actions and behavior indicate greater impairment. The DRE will administer, with the arresting officer or other witness present, a series of evaluations designed to form an opinion as to whether or not drug impairment is present. These evaluations can also discover people who are medically ill and in need of assistance. The DRE will contact the arresting officer to obtain information about the suspect. This includes the officer's observations and any statements made by the suspect. Following an initial preliminary check of the suspect by the DRE, the evaluation will then consist of checks of the suspect's vital signs, including pulse rate, blood pressure and temperature. The suspect's eyes are also examined, including darkroom checks of pupil size under varying light conditions. Inspection for horizontal and vertical nystagmus, eye convergence, and reaction of the eyes to light complete the eye exams. Also evaluated are the suspect's performance during several "divided attention" (roadside type) maneuvers. Although very similar to the standard roadside sobriety maneuvers, they are not designed for street use by non-DRE personnel. The DRE evaluation, which uses a standardized and systematic procedure is designed not to vary among DREs and lasts less than one hour. The evaluation concludes with the DRE's opinion as to the existence of drug impairment, followed by a chemical test.

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

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



Drug Category	Some Common Effects
Central Nervous System Stimulants 	Talkativeness, loss of appetite, anxiety, dry mouth, grinding teeth, restlessness, rigid muscles, dilated pupils, tachycardia, elevated blood pressure, perspiration or chills, nausea or vomiting, evidence of weight loss, psychomotor agitation or retardation, muscular weakness, respiratory depression, chest pain or cardiac arrhythmias and confusion, seizures, dyskinesias, dystonias or coma.
Dissociative Anesthetics 	Perspiring, uncommunicative, cyclic behavior, possible combativeness, disorientation, rigid muscles, blank stare, horizontal and vertical nystagmus, hypertension or tachycardia, numbness or diminished responsiveness to pain, ataxia, dysarthria, seizures or coma and hyperacusis.
Hallucinogens 	Perspiring, paranoia, nausea, hallucinations, "lost" or dazed appearance, rigid muscles, tremors, loss of memory, dilated pupils, blurring of vision, tachycardia and incoordination.
Cannabis 	Bloodshot eyes, odor of burnt material, increased appetite, relaxed inhibitions, paranoid, body tremors, possibly dilated pupils and tachycardia.
Inhalants 	Paint/chemical odor, possible residue on hands or face, slurred speech, possible nystagmus, incoordination, unsteady gait, HGN/VGN, lethargy, depressed reflexes, psychomotor retardation, tremors, generalized muscle weakness, blurred vision, stupor or coma and euphoria.
Narcotic Analgesics 	Droopy eyelids, dry mouth, on the nod, drowsiness, needle marks, facial itching, low raspy voice, constricted pupils slurred speech, and impairment in attention or memory.
Central Nervous System Depressants 	Droopy eyelids, drowsiness, uncoordinated, drunken appearance, nystagmus, unsteady gait, impairment in attention or memory, stupor or coma, and HGN/VGN.

## APPENDIX C

### DRUG TESTING CONSIDERATIONS FOR DUID CASES

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

After an evaluation has been done the decision may be made to conduct a toxicological test on the subject. The next logical question is, "What specimen or specimens should be collected?" In general, either urine or blood are adequate for the purpose of testing for drugs. Saliva is used mainly for the testing of recent marijuana usage. Both urine and blood have various advantages over one another. Urinary drug and metabolite levels are higher than blood levels. This makes the analysis easier to do and, therefore, less expensive. Also, urine as a matrix is easier to deal with than blood, contributing to the ease of testing. The advantage of blood is the ingested drug will be at its highest blood concentration when the person is impaired. This makes blood the most direct measure of what is going on in a person's body at a specific time. Depending on the submitting agency's policies and testing arrangements with the toxicology lab, urine and/or blood may be collected.

In Colorado regulations for the collection of urine and blood specimens are promulgated by the Department of Public Health and Environment under C.R.S. 42-4-1301. These regulations appear in 5-CCR-1005-2 and are contained in Appendix K. The Department of Health regulations address specimen collection practices in great detail. One aspect of specimen collection requires special emphasis: strong chain of custody must be maintained by both the submitting department and the testing laboratory. After testing of the specimen(s) is complete, the results are returned to the submitting department. The significance of toxicological results may be best thought of as identifying the presence of a drug and bracketing the probable time when the drug was taken. For various reasons, toxicological results cannot pinpoint the time a person was under the influence or impairment of a drug. One reason for this is little research in this area has been done on most drugs as they relate to driving a vehicle; another is there is a wide range of drug tolerance among individuals. There are no established levels for drugs (other than alcohol) in blood or urine which indicate legal influence or impairment.

Because of the toxicological uncertainties involved, the officer's drug evaluation becomes crucial. If, for example, a subject is arrested for DUID and the testing lab is unable to detect the presence of a drug(s) the emphasis in the case will shift to the officer's evaluation. This situation could arise if the drug used by the subject is not covered by the testing lab or an inappropriate specimen type is submitted and tested. For example, urine is the specimen of choice for the detection of LSD; LSD levels in the blood are too low for practical detection methods. Another source for not detecting drug(s) is the level of a drug may be too low in the specimen. This could happen if the subject is tested either before the drug gets into the urine or after the drug is out of the blood. One strategy which helps eliminate the uncertainty of what type of sample is to collect both urine and blood in all cases. Another consideration which impacts the significance of toxicological results is the bracketing of the probable time of usage of a drug. As the probable time bracket of usage narrows, the probability of the person being under the influence increases. In general, blood will give the narrowest time brackets. In conclusion, drug testing for DUID cases functions as a corroborative tool supporting a strong drug evaluation. Toxicological results give valuable, but limited, information which may assist in the outcome of a DUID case. In the absence of positive toxicological results, the DUID case is not lost, rather, emphasis shifts to the outcome of the drug evaluation.

## APPENDIX D

### MEDICAL CONSIDERATIONS

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

During the course of a DUI investigation, you may become concerned for the welfare of the subject because something just does not seem right. You may feel he is just too intoxicated or maybe he is exhibiting symptoms other than those of a DUI driver. In either case, you have an obligation to protect and safeguard the individual while he is in your custody. More importantly, if his condition is not caused by alcohol or drug intoxication, other actions are immediately called for. The first situation involves either the problem drinking driver or a person who has simply consumed large amounts of alcohol. In either case, a high BAC will be a good indicator of this, which should also alert you to the fact immediate medical attention may be necessary. If a person is arrested and you get immediate breath test results of a 0.30% BAC or higher, he should be seen by medical personnel, or, at the very least, closely monitored. His BAC could be rising and possibly result in his death. As in the case of any substance to which the problem drinker may become addicted, there are certain physiological effects which occur when the substance is withdrawn. This condition is known as delirium tremens or more commonly referred to as the D.T.'s. If the driver is an alcoholic, he may need medical attention once the withdrawal symptoms begin. Some guidelines to follow to insure your subject will be cared for properly are as follows:

- A. Anyone with a BAC of 0.250% or higher should be lodged at a jail or detoxification (detox) center until their BAC level comes down to a safe level. The personnel at the detox center will be able to monitor the subject should his condition become worse.
- B. Anyone with a BAC of 0.300% or higher should be medically cleared. These are only guidelines. Depending on the arrestee's drinking experience, these levels may or may not apply. For example, someone who has very little drinking experience may have a BAC of 0.125% and he may be at the same risk as a conditioned drinker at 0.250%.  
The second situation involves the fact many so-called "alcohol" symptoms could be associated with other illnesses. You should examine and question the subject carefully so his need for medical attention will not be overlooked. A low BAC or evidence of no alcohol may indicate the driver's abnormal behavior is due to a medical condition. Some of the various signs used to support your basis for believing the driver is intoxicated are as follows:  
Odor of the breath, flushed appearance, lack of muscular coordination, speech difficulties, disorderly or unusual conduct, mental disturbance, visual disorders, sleepiness, muscular tremors, dizziness, nausea, and divided attention impairment.

Physicians recognize each of the accepted signs or symptoms of intoxication might well be a symptom of disease or a condition entirely unrelated to the ingestion of alcohol. Following are descriptions of some pathological conditions having symptoms in common with those of alcohol influence. A symptom similar to alcohol influence is an acetone odor on the breath of the subject. This is a fruity odor, which can be mistaken for the odor of an alcoholic beverage on a person's breath. The most common pathological conditions causing an acetone odor are diabetes, vomiting, and stomach ulcer. In the course of a DUI investigation, you may determine the subject has experienced full or partial loss of memory (amnesia).

This may occur by consuming alcohol or by conditions such as epilepsy or traumatic injury of the brain (such as in a traffic collision). People suffering from Alzheimer's disease frequently exhibit signs of memory loss. A stroke victim or a diabetic may also exhibit a sense of disorientation or total memory loss.

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

Individuals with a physical disability may perform poorly on roadside maneuvers. If the subject has sustained any recent injuries to his legs or back, it could affect his performance. An individual with one leg notably shorter than the other may also exhibit poor performance.

The DUI subject may be in a stupor, lapsing into a coma (unnatural, heavy, deep sleep, sometimes ending in death). Such a coma may be a diabetic coma, or on the contrary, insulin shock due to an overdose of insulin. It may well be a coma brought on by head injuries such as a concussion or a skull fracture. Cases may be encountered when mental confusion is present. It may consist of hallucinations, incoherence, illusions, etc. Of course, it may result from alcoholic influence, but you should not overlook the possibility it may stem from diabetes, the stopping of a drug habit, or the use of legitimate and illegitimate drugs such as marijuana, cocaine, and opium derivatives. Injections of horse serum and penicillin may also cause mental confusion. Drowsiness is a symptom frequently noted. It may stem from the liberal consumption of alcoholic beverages coupled with the late hour during which most drinking driver contacts are made. However, such drowsiness may be associated with a brain concussion (a common injury in traffic collisions), diabetes, or the use of many prescription and non-prescription drugs. The subject may have bloodshot eyes, dilated or constricted pupils, or sleepy looking eyes. The general effect of alcohol may slow the pupils reaction to light. This occurs as part of the general depressant effect alcohol pathological conditions which may similarly affect the eyes. Those most frequently found include glaucoma, hay fever and other allergic disorders, farsightedness, nearsightedness, use of opium derivatives, concussion, and fright. A flushed face is often interpreted as a sign of alcoholic influence. Indeed, it may be caused by alcohol, but there are numerous body conditions which also produce a flushed face. They include chronic inflammations of the face, arteriosclerosis (hardening of the arteries), diabetes, emotions (blushing), high fever, and chemical or drug poisoning (e.g., carbon monoxide). Shock and collapse may be caused by such things as heart trouble, skull fracture, insulin shock, and stroke.

Speech disorders are a clue you may consider to be significant in the identification of DUI subjects. You may certainly be correct in recognizing that speech is affected by alcohol, but you should keep in mind facial paralysis, mental deficiencies, and Parkinson disease (shaking palsy) can be the cause of speech disorders as well. A stroke victim may lose all or part of his speech. On occasion you may observe tremors or muscular twitching in DUI subjects. This can stem from numerous causes including senility, brain tumor, chemical or drug poisoning (e.g., narcotics, tobacco), and general pareses (softening of the brain), usually in older people.

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

Two of the more serious and more common medical conditions you may come upon are a stroke and a diabetic reaction. A stroke occurs when the blood supply is cut off to the brain. This blood loss results in damage to specific brain cells. When this happens, the part of the body

controlled by those cells stops functioning. Some of the common signs of a stroke are headache, slurred speech, blurred vision, sudden collapse, unconsciousness, vomiting, shock, and convulsions. A partial or complete paralysis to the legs or arms may occur. This condition requires immediate medical attention. If the subject does not get the needed attention, he could die. Most stroke victims survive and lead normal lives if they receive the proper medical attention. Diabetics, when in distress, suffer from either hypoglycemia or hyperglycemia. Hypoglycemia occurs when a diabetics insulin intake doesn't match his blood sugar. The condition manifests itself when the diabetic's blood sugar is low and his insulin is high. Symptoms of hypoglycemia are sweating, dizziness, palpitations, shallow breathing, trembling, mental confusion, and loss of consciousness.

Hyperglycemia occurs when there is excess sugar in the blood from insufficient insulin use. If the situation continues, diabetic coma occurs. A person in this condition needs an insulin injection. If diabetic coma occurs, this person needs immediate medical attention. The treatment for a diabetic coma requires regulated insulin injections. Symptoms of hyperglycemia are excessive urination, thirst, dry and hot skin, drowsiness, and coma. If you find a diabetic in a coma, and you do not know if it's insulin shock or diabetic coma, treat the subject with sugar. The sugar will give immediate relief to a subject suffering from insulin shock, but it will not affect a person in a diabetic coma. If the subject is unconscious, place the sugar between the cheek and teeth so choking won't occur.

If during the breath testing process you encounter an interferant display on the Model 5000 EN Intoxilyzer, you should have your subject medically checked. A diabetic with acetone on his breath could have some severe medical problems if he goes untreated. He could lapse into diabetic coma. Officers should make it part of their DUI procedure to question the subject with regards to his medical conditions. Ask the subject if he is on any medications. Ask him if he has any medical problems, or physical disabilities which would affect his roadside maneuvers.

Always be aware of things such as medical alert bracelets and neck chains. Check the subject's wallet for medical I.D. cards. These cards will give you information on medical problems your subject may have. These tags and cards will be very helpful if your subject is unconscious or unable to talk to you. If a subject informs you of a medical problem, take appropriate action. The appropriate action may or may not require immediate medical attention. For example, if he tells you he is a diabetic, watch for the signs. The subject would need immediate medical attention if he was suffering from insulin shock or diabetic coma. On the other hand, the subject may inform you all he would require is an insulin injection or a form of sugar to ingest to bring his body back into equilibrium.

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

## APPENDIX E

### DUI/DUID CRASH INVESTIGATIONS

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

### CHECKLIST FOR DUI/DUID CRASH INVESTIGATION

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

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

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

## APPENDIX F

### EXPRESS CONSENT AND PER SE HEARINGS

#### EXPRESS CONSENT (Refusal)

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

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

(III) "Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to submit to and complete, and to cooperate in the completing of a test or tests of such person's blood, saliva, and urine for the purpose of determining the drug content within the person's system when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of paragraph (a), (b), or (c) of subsection (1) of this section. The Express Consent law, however, does not force a person to take the test, but rather makes him obligated to take the test or tests.

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

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

"The sole issue at the hearing shall be whether by a preponderance of the evidence the person refused to take or to complete or to cooperate in the completing of any test or tests of his blood, breath, saliva, or urine as required by section 42-4-1301(6)." However, the incorporation of 42-4-1307 into 42-2-126(9)(c) and judicial decisions indicate the issues at an Express Consent hearing are:

1. Driving (including "actual physical control").
2. Lawful contact of the driver (reasonable suspicion of a traffic violation or other proper reason for contact such as investigation of a domestic disturbance or a valid roadside sobriety checkpoint).



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

### **PER SE**

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

"Drove a vehicle in this state when the amount of alcohol, as shown by analysis of the person's blood or breath, in such person's blood was 0.08 or more grams of alcohol per hundred milliliters of blood or 0.08 or more grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving. If the preponderance of the evidence establishes that person consumed alcohol between the time that such person stopped driving and the time that testing occurred, the preponderance of the evidence must also establish that the minimum 0.08 blood or breath alcohol content required in subparagraph (1) of subsection (2) of this section was reached as a result of alcohol consumed before the person stopped driving..."

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

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

Notwithstanding the above language, no appellate court has ruled a revocation invalid where a person was allowed to change from the test originally selected to the other test and actually took the test not originally selected. The driver may, in the following circumstances, be required to take a blood test:

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

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

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

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

Judicial decisions indicate the following issues to address at a Per Se hearing:

1. Driving (including "actual physical control")
2. Lawful contact of the driver (reasonable suspicion or probable cause for a traffic violation or other proper reason for contact such as investigation of a domestic disturbance or a valid roadside sobriety checkpoint).
3. An arrest for an alcohol or drug related driving offense was made before requesting an evidentiary test for alcohol or drug content. The standard for determining whether a person is under arrest is whether a reasonable person under the circumstances would understand that they are not free to leave( An officer may state, "You are under arrest for driving under the influence of alcohol or drugs or both" serves to eliminate any question on this issue).
4. A blood or breath test given within two hours of driving with results greater than or equal to 0.08.
5. Sufficient compliance with the Department of Public Health and Environment to establish the accuracy of the test. The most important matters for a breath test include the administration of the test by a person certified or qualified to do so, use of certified and/or properly operating Intoxilyzer and following the checklist for operation of the Intoxilyzer. For a blood test the most important matters are drawing of blood by a person qualified to do so and testing by a certified laboratory.

6. Alcohol consumption after driving stopped must be proven by the driver before it becomes an issue. If proven, the issue then is whether the blood alcohol content of 0.08 or greater was reached because of alcohol consumed before the person stopped driving. Concerning this issue, you may testify as to your observations and investigation concerning alcohol consumption after driving. The best practice is to simply ask the driver if alcohol was consumed after driving, and if so, what, how much, and when.

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

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

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

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

- 10) You explained the Colorado Expressed Consent Law to the defendant, including that you requested the defendant take a breath test or blood test or that the defendant could refuse a tests but could lose driving privileges for one year for refusing to take a chemical test.
- 11) You transported the defendant to the place where the evidentiary test was to be conducted. If there was a traffic accident describe what ambulance transported, names of ambulance crew and what hospital defendant went to.
- 12) Breath Test
  - a) The breath testing instrument is certified by the Department of Public Health and Environment and certification was current at time of test.
  - b) The instrument operator is certified by the Department of Public Health and Environment to administer the test on that instrument and certification was current at time of test.
  - c) Instrument Calibration was within Department of Public Health and Environment rules and regulations (.090 - .110).
  - d) The officer observed the defendant for the required 20 minute observation time. The defendant was okay to take the test.
  - e) The officer observed the defendant blow into the instrument and noted the results.
  - f) The officer informed the defendant of the test results.
  - g) The time of the test was within two hours of the violation.
  - h) The test results were over .080 grams of alcohol per 210 liters of breath.
  - l) The officer followed the operational checklist and department procedures for the breath testing instrument.
- 13) Blood Test
  - a) The officer transported the defendant to a facility for a blood test.
  - b) The officer observed blood being drawn from the defendant and noted the time and date the blood was drawn.
  - c) The person who withdrew the blood is qualified to do so as stated by Colorado Revised Statute.
  - d) The lab is certified to analyze the blood for alcohol content and the lab's certification is current.

- 14) Refusal of Chemical Test
- a) The defendant refused or refused to cooperate to take a breath test or blood test and was informed of the consequences of a refusal.
  - b) How defendant refused chemical test:
    - 1. Stated, "No, I'm not taking a breath or blood test".
    - 2. Would not answer you.
    - 3. Stated, "I want to talk to my lawyer". Inform the defendant this is a refusal. You should make it clear there is no right to talk to a lawyer before taking a blood or breath test.
- 15) The test was administered within two hours of the traffic violation or time of the traffic accident. If refused, the test was requested within a reasonable time after driving stopped.
- 16) The officer filled out the summons and complaint and "Affidavit and Notice of Revocation or Denial":
- a) The officer explained both the summons and complaint, and "Affidavit and Notice of Revocation or Denial" to the defendant.
  - b) The officer served both the summons and complaint, and "Affidavit and Notice of Revocation or Denial" to the defendant.
- 17) State all important times:
- a) Time of the driving violation.
  - b) Time the defendant was arrested.
  - c) Time the defendant took the evidentiary test or refused all testing.

The fellow officer rule applies at D.O.R. hearings. A peace officer may testify as to statements made by another peace officer on the conduct of their duties as a peace officer.

## APPENDIX G

### THE LAW

#### **42-4-1301. Driving under the influence - driving while impaired - driving with excessive alcoholic content - penalties.**

##### **42-4-1301(1)**

- (a) It is a misdemeanor for any person who is under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, to drive any vehicle in this state.
- (b) It is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, to drive any vehicle in this state.
- (c) It is a misdemeanor for any person who is an habitual user of any controlled substance defined in section 12-22-303 (7), C.R.S., to drive any vehicle in this state.
- (d) For the purposes of this subsection (1), one or more drugs shall mean all substances defined as a drug in section 12-22-303 (13), C.R.S., and all controlled substances defined in section 12-22-303 (7), C.R.S., and glue sniffing, aerosol inhalation, and the inhalation of any other toxic vapor or vapors.
- (e) The fact that any person charged with a violation of this subsection
  - (1) is or has been entitled to use one or more drugs under the laws of this state, including, but not limited to, the medical use of marijuana pursuant to section 18-18-406.3, C.R.S., shall not constitute a defense against any charge of violating this subsection (1).
- (f) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.
- (g) "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.
- (h) Pursuant to section 16-2-106, C.R.S., in charging the offense of DUI, it shall be sufficient to describe the offense charged as "drove a vehicle under the influence of alcohol or drugs or both".
- (i) Pursuant to section 16-2-106, C.R.S., in charging the offense of DWAI, it shall be sufficient to describe the offense charged as "drove a vehicle while impaired by alcohol or drugs or both".

**42-4-1301(2)**

- (a) It is a misdemeanor for any person to drive any vehicle in this state when the person's BAC is 0.08 or more at the time of driving or within two hours after driving. During a trial, if the state's evidence raises the issue, or if a defendant presents some credible evidence, that the defendant consumed alcohol between the time that the defendant stopped driving and the time that testing occurred, such issue shall be an affirmative defense, and the prosecution must establish beyond a reasonable doubt that the minimum 0.08 blood or breath alcohol content required in this paragraph (a) was reached as a result of alcohol consumed by the defendant before the defendant stopped driving.
- (a.5) (I) It is a class A traffic infraction for any person under twenty-one years of age to drive any vehicle in this state when the person's BAC, as shown by analysis of the person's breath, is at least 0.02 but not more than 0.05 at the time of driving or within two hours after driving. The court, upon sentencing a defendant pursuant to this subparagraph (I), may, in addition to any penalty imposed under a class A traffic infraction, order that the defendant perform up to twenty-four hours of useful public service, subject to the conditions and restrictions of section 18-1.3-507, C.R.S., and may further order that the defendant submit to and complete an alcohol evaluation or assessment, an alcohol education program, or an alcohol treatment program at such defendant's own expense.
- (II) A second or subsequent violation of this paragraph (a.5) shall be a class 2 traffic misdemeanor.
- (b) In any prosecution for the offense of DUI per se, the defendant shall be entitled to offer direct and circumstantial evidence to show that there is a disparity between what the tests show and other facts so that the trier of fact could infer that the tests were in some way defective or inaccurate. Such evidence may include testimony of nonexpert witnesses relating to the absence of any or all of the common symptoms or signs of intoxication for the purpose of impeachment of the accuracy of the analysis of the person's blood or breath.
- (c) Pursuant to section 16-2-106, C.R.S., in charging the offense of DUI per se, it shall be sufficient to describe the offense charged as "drove a vehicle with excessive alcohol content".

**42-4-1301(3)** The offenses described in subsections (1) and (2) of this section are strict liability offenses.

**42-4-1301(4)** No court shall accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or guilty to the offense of UDD from a person charged with DUI, DUI per se, or habitual user; except that the court may accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or to UDD upon a good faith representation by the prosecuting attorney that the attorney could not establish a prima facie case if the defendant were brought to trial on the original alcohol-related or drug-related offense.

**42-4-1301(5)** Notwithstanding the provisions of section 18-1-408, C.R.S., during a trial of any person accused of both DUI and DUI per se, the court shall not require the prosecution to elect between the two violations. The court or a jury may consider and convict the person of either DUI or DWAI, or DUI per se, or both DUI and DUI per se, or both DWAI and DUI per se. If the person is convicted of more than one violation, the sentences imposed shall run concurrently.

**42-4-1301(6)**

- (a) In any prosecution for DUI or DWAI, the defendant's BAC at the time of the commission of the alleged offense or within a reasonable time thereafter gives rise to the following presumptions or inferences:
  - (I) If at such time the defendant's BAC was 0.05 or less, it shall be presumed that the defendant was not under the influence of alcohol and that the defendant's ability to operate a vehicle was not impaired by the consumption of alcohol.
  - (II) If at such time the defendant's BAC was in excess of 0.05 but less than 0.08, such fact gives rise to the permissible inference that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.
  - (III) If at such time the defendant's BAC was 0.08 or more, such fact gives rise to the permissible inference that the defendant was under the influence of alcohol.
- (b) The limitations of this subsection (6) shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol or whether or not the defendant's ability to operate a vehicle was impaired by the consumption of alcohol.
- (c) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine such person's alcohol or drug level. The department of public health and environment may, by rule, determine that, because of the reliability of the results from certain devices, the collection or preservation of a second sample of a person's blood, saliva, or urine or the collection and preservation of a delayed breath alcohol specimen is not required. This paragraph (c) shall not prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this paragraph (c) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.
- (d) If a person refuses to take or to complete, or to cooperate with the completing of, any test or tests as provided in section 42-4-1301.1 and such person subsequently stands trial for DUI or DWAI, the refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to admission of refusal to take or to complete, or to cooperate with the completing of, any test or tests.
- (e) **Involuntary blood test - admissibility.** Evidence acquired through an involuntary blood test pursuant to section 42-4-1301.1 (3) shall be admissible in any prosecution for DUI, DUI per se, DWAI, habitual user, or UDD, and in any prosecution for criminally negligent homicide pursuant to section 18-3-105, C.R.S., vehicular homicide pursuant to section 18-3-106 (1) (b), C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b), C.R.S.



- (f) **Chemical test - admissibility.** Strict compliance with the rules and regulations prescribed by the department of public health and environment shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results.
- (g) It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.
- (h) In any trial for a violation of this section, the testimony of a law enforcement officer that he or she witnessed the taking of a blood specimen by a person who the law enforcement officer reasonably believed was authorized to withdraw blood specimens shall be sufficient evidence that such person was so authorized, and testimony from the person who obtained the blood specimens concerning such person's authorization to obtain blood specimens shall not be a prerequisite to the admissibility of test results concerning the blood specimens obtained.
- (i)(I) Following the lawful contact with a person who has been driving a vehicle, and when a law enforcement officer reasonably suspects that a person was driving a vehicle while under the influence of or while impaired by alcohol, the law enforcement officer may conduct a preliminary screening test using a device approved by the executive director of the department of public health and environment after first advising the driver that the driver may either refuse or agree to provide a sample of the driver's breath for such preliminary test; except that, if the driver is under twenty-one years of age, the law enforcement officer may, after providing such advisement to the person, conduct such preliminary screening test if the officer reasonably suspects that the person has consumed any alcohol.
- (II) The results of this preliminary screening test may be used by a law enforcement officer in determining whether probable cause exists to believe such person was driving a vehicle in violation of this section and whether to administer a test pursuant to section 42-4-1301.1 (2).
- (III) Neither the results of such preliminary screening test nor the fact that the person refused such test shall be used in any court action except in a hearing outside of the presence of a jury, when such hearing is held to determine if a law enforcement officer had probable cause to believe that the driver committed a violation of this section. The results of such preliminary screening test shall be made available to the driver or the driver's attorney on request.

**42-4-1301(7) Penalties.**

- (a)(I) Except as otherwise provided in subparagraphs (II) and (IV) of this paragraph (a), every person who is convicted of DUI, DUI per se, or habitual user shall be punished by:
- (A) Imprisonment in the county jail for not less than five days nor more than one year, the minimum period of which shall be mandatory except as otherwise provided in section 42-4-1301.3; and
  - (B) In the court's discretion, a fine of not less than three hundred dollars nor more than one thousand dollars; and
  - (C) Not less than forty-eight hours nor more than ninety-six hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.
- (II) Upon conviction of a violation described in sub-subparagraph (A) or (B) of subparagraph (III) of this paragraph (a), an offender shall be punished by:
- (A) Imprisonment in the county jail for not less than ninety days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to eighty days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and
  - (B) In the court's discretion, a fine of not less than five hundred dollars nor more than one thousand five hundred dollars; and
  - (C) Not less than sixty hours nor more than one hundred twenty hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.
- (III) Subparagraph (II) of this paragraph (a) shall apply to:
- (A) A conviction for DUI, DUI per se, or habitual user, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DUI, DUI per se, or habitual user, or for vehicular homicide pursuant to section 18-3-106 (1) (b) (I), C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b) (I), C.R.S., or of driving while such person's driver's license was under restraint pursuant to section 42-2-138 (4) (b); or
  - (B) A conviction for DUI, DWAI, or DUI per se when the person's BAC was 0.20 or more at the time of driving or within two hours after driving.
- (IV) Upon a conviction for DUI, DUI per se, or habitual user, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DWAI, an offender shall be punished by:
- (A) Imprisonment in the county jail for not less than seventy days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to sixty-three days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and

- (B) In the court's discretion, a fine of not less than four hundred fifty dollars nor more than one thousand five hundred dollars; and
  - (C) Not less than fifty-six hours nor more than one hundred twelve hours of useful public service, the performance of the minimum period of service which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.
- (b)(I) Except as otherwise provided in subparagraphs (II) and (III) of this paragraph (b), every person who is convicted of DWAI shall be punished by:
- (A) Imprisonment in the county jail for not less than two days nor more than one hundred eighty days, the minimum period of which shall be mandatory except as provided in section 42-4-1301.3; and
  - (B) In the court's discretion, a fine of not less than one hundred dollars nor more than five hundred dollars; and
  - (C) Not less than twenty-four hours nor more than forty-eight hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.
- (II) Upon conviction of a second or subsequent offense of DWAI, an offender shall be punished by:
- (A) Imprisonment in the county jail for not less than forty-five days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to forty days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and
  - (B) In the court's discretion, a fine of not less than three hundred dollars nor more than one thousand dollars; and
  - (C) Not less than forty-eight hours nor more than ninety-six hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.
- (III) Upon conviction for DWAI, which violation occurred at any time after the date of a previous violation, for which there has been a conviction, for DUI, DUI per se, or habitual user, or vehicular homicide pursuant to section 18-3-106 (1) (b) (I), C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b) (I), C.R.S., or of driving while such person's driver's license was under restraint as described in section 42-2-138 (4) (b), an offender shall be punished by:
- (A) Imprisonment in the county jail for not less than sixty days nor more than one year, the minimum period of which shall be mandatory; except that the court may suspend up to fifty-four days of the period of imprisonment if the offender complies with the provisions of section 42-4-1301.3; and
  - (B) In the court's discretion, a fine of not less than four hundred dollars nor more than one thousand two hundred dollars; and

- (C) Not less than fifty-two hours nor more than one hundred four hours of useful public service, the performance of the minimum period of which shall be mandatory, and the court shall have no discretion to suspend the mandatory minimum period of performance of such service.
- (IV) (Deleted by amendment, L. 2002, p. 1898, ' 2, effective July 1, 2002.)
- (c)(I) For the purposes of paragraphs (a) and (b) of this subsection (7), a person shall be deemed to have a previous conviction for DUI, DUI per se, DWAI, or habitual user, or vehicular homicide pursuant to section 18-3-106 (1) (b) (I), C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b) (I), C.R.S., if such person has been convicted under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States of an act that, if committed within this state, would constitute the offense of DUI, DUI per se, DWAI, or habitual user, or vehicular homicide pursuant to section 18-3-106 (1) (b) (I), C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b) (I), C.R.S.
- (II) For sentencing purposes concerning convictions for second and subsequent offenses, prima facie proof of a defendant's previous convictions shall be established when the prosecuting attorney and the defendant stipulate to the existence of the prior conviction or convictions or the prosecuting attorney presents to the court a copy of the driving record of the defendant provided by the department of revenue of this state, or provided by a similar agency in another state, that contains a reference to such previous conviction or convictions or presents an authenticated copy of the record of the previous conviction or judgment from any court of record of this state or from a court of any other state, the United States, or any territory subject to the jurisdiction of the United States. The court shall not proceed to immediate sentencing when there is not a stipulation to prior convictions or if the prosecution requests an opportunity to obtain a driving record or a copy of a court record. The prosecuting attorney shall not be required to plead or prove any previous convictions at trial, and sentencing concerning convictions for second and subsequent offenses shall be a matter to be determined by the court at sentencing.
- (III) As used in this part 13, "convicted" includes a plea of no contest accepted by the court.
- (d) In addition to the penalties prescribed in this subsection (7):
  - (I) Persons convicted of DUI, DUI per se, DWAI, habitual user, and UDD are subject to the costs imposed by section 24-4.1-119 (1) (c), C.R.S., relating to the crime victim compensation fund;
  - (II) Persons convicted of DUI, DUI per se, DWAI, and habitual user are subject to an additional penalty surcharge of not less than twenty-five dollars and not more than five hundred dollars for programs to address persistent drunk drivers. Any moneys collected for such surcharge shall be transmitted to the state treasurer, who shall credit the same to the persistent drunk driver cash fund created by section 42-3-130.5.

- (III) Persons convicted of DUI, DUI per se, DWAI, habitual user, and UDD are subject to a surcharge of fifteen dollars to be transmitted to the state treasurer who shall deposit said surcharges in the Colorado traumatic brain injury trust fund created pursuant to section 26-1-309, C.R.S.
  - (e) In addition to any other penalty provided by law, the court may sentence a defendant who is convicted pursuant to this section to a period of probation for purposes of treatment not to exceed two years; in addition, a court may also sentence a defendant who is twice or more convicted pursuant to this section to a period of probation not to exceed two additional years for the purpose of monitoring compliance with court orders. As a condition of probation, the defendant shall be required to make restitution in accordance with the provisions of section 18-1.3-205, C.R.S.
  - (f) In addition to any other penalty provided by law, the court may sentence a defendant to attend and pay for one appearance at a victim impact panel approved by the court, for which the fee assessed to the defendant shall not exceed twenty-five dollars.
  - (g) In addition to any fines, fees, or costs levied against a person convicted of DUI, DUI per se, DWAI, habitual user, and UDD, the judge shall assess each such person for the cost of the pre-sentence or post-sentence alcohol and drug evaluation and supervision services.
  - (h) In addition to any other penalties prescribed in this part 13, the court shall assess an amount, not to exceed one hundred twenty dollars, upon any person required to perform useful public service.
- 42-4-1301(8)** A second or subsequent violation of this section committed by a person under eighteen years of age may be filed in juvenile court.

## APPENDIX H

### CASE LAW

#### EVIDENTIARY TESTS (GENERAL)

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

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

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

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

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

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

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

- A. Random Stops/License Registration Checks - When first read, 42-2-113 C.R.S. seems to require any citizen to display a driver's license upon demand by any peace officer. 43-5-113 (1) (b) C.R.S. also seems to authorize any officer of the Colorado State Patrol to stop any vehicle and demand from the driver a license and registration. However, the Colorado Supreme court, in *People vs. McPherson*, 550 P2d 311, determined such statutes do not "confer upon a peace officer unlimited discretionary authority to stop any car at any time for any reason as long as he asked contemporaneously for display of a driver's license." The Court concluded the clear intent of 42-2-113 "is simply to permit the officer to

demand the license of the driver whose vehicle has been stopped for an otherwise proper purpose.” The United States Supreme Court agreed with such reasoning in *Delaware vs. Prouse*, 99 S. Ct. 1391, concluding randomly stopping vehicles to determine if the driver has a valid license and registration, and for no other reason, is unlawful. However, a DUI case which began with a contact at for example, a State Patrol “safety check” station should be lawful.

- D. Lawful Contact Unrelated to Traffic Violation - At least for the purposes of the administrative express consent or per se hearing, a lawful contact unrelated to a traffic violation (e.g., investigation of domestic dispute) is sufficient grounds for the stop.
- E. Other - When you observe a person getting into a vehicle and driving off, and your observations have given you grounds to believe he is intoxicated, you have reasonable suspicion on the initial stop, to stop for possible DUI. NOTE: It is probably preferable for you to prevent him from driving in the first place, if you can. If you are unable to persuade him from driving, it is arguable you may arrest him for a violation of one of the following statutes, depending on the fact situation:
  - 1. Obedience to Police Officers, C.R.S., 1973, 42-4-105, provides that no one “shall willfully fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control or regulate traffic.” Arguably then, you can order an intoxicated person not to drive as a form of controlling or regulating traffic. Willful failure or refusal to comply with your order, when you have probable cause to believe the person is “under the influence,” would give you grounds to arrest under the statute.
  - 2. Obstructing a Peace Officer, C.R.S., 1973, 18-8-104, provides if such an intoxicated person, by threatening to use violence, force, or interference, intentionally obstructs or impairs enforcement of the penal law, he is subject to arrest under the statute.

Such a situation will generally arise when you contact an intoxicated individual on the street under circumstances which make it obvious to you the individual intends to get into a vehicle and drive. You can ask him to perform various maneuvers prior to allowing him to drive. If he is “under the influence,” but refuses to find another means of transportation, consider taking him into custody, depending upon your facts, for violating one of the statutes set out above, and holding him on that charge, or until a responsible individual can take charge of him and his vehicle.
- F. There are three situations which might be confusing when you conduct the chemical test.
  - 1. Waiver of liability. Some hospitals and medical personnel may attempt to require the subject to sign a form releasing them from any liability arising from the administration of that test. You may have the subject’s permission to administer the test but the subject may refuse to sign any waiver of liability. Refusal to sign any release form will be treated by the officer as refusal.

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

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

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

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

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

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

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



## B. Choice of Test

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

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

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

- (1) “Request” for Particular Test Time Limits and other legalities regarding the obtaining of tests can be difficult at times to comply with. It is essential to find out early whether the suspect will cooperate early rather than late. After probable cause of DUI or DWAI is established, the process of finding out if the suspect will agree to take a particular test, invoking a legal right to select a certain test once a test has been required, or simply receiving refusal to take a test, should be completed as soon as possible. Therefore, in rural settings, or in situations where contact is made with the suspect a considerable time after the suspect was last driving, time is of the essence if DUI Per Se is to be charged or if the criminal trial requirement that the test be given within a reasonable time after driving is to be satisfied.
- (2) Physical inability to take a breath test and hospital settings Where a suspect is unable to take, or to complete, or to cooperate in the completing of a breath test because of injuries, illness, disease, physical infirmity, or physical incapacity, or if such person is receiving medical treatment at a location at which a breath testing instrument is not available, any test given **must be a blood test**. There is no election of a different test.

## C. Refusal to submit to testing

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

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

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

The following points of law are provided for your guidance:

- (1) A test that is sabotaged by the actions of the person tested is of the same legal effect as no test at all. Conduct constituting less than cooperation by the suspect in taking the test is the same as a refusal, or a revocation of prior consent. *Baker v. Department of Revenue*, 593 P.2d 1384 ( ).
- (2) There is no requirement under the express consent law that a driver be "capable of rationally deciding" whether to submit to testing. *Boom v. Charnes*, 739 P.2d 868 (Colo. App. 1987), reversed on other grounds, 766 P.2d 665 (Colo. 1988). Rather, the determination by the trier of fact of whether a driver refused testing for the purposes of the DUI statute is based solely on the objective standard of the driver's words and other external manifestations of willingness or unwillingness to take a test, not on a subjective standard, such as the driver's state of mind or his later recollection of events. *Dolan v. Rust*, 195 Colo. 173, 576 P.2d 560 (Colo. 1978); *Alford v. Tipton*, 822 P.2d 513 (Colo. App. 1991).
- (3) When an arresting officer offers a driver a choice between blood or breath testing, the burden is on the driver to tell the officer which test he is willing to take. Where the suspect does not tell the arresting officer which test he is willing to take (I'll take either one") despite an officer's requests and warnings, it is considered a refusal to submit to testing. *Shumate v. Department of Revenue*, 781 P.2d 181 (Colo. App. 1989).

- (4) C.R.S. 42-4-1301(3)(a) does not require an arresting officer to offer an alternate type of test once the driver has consented to but later refused to submit to a test. *Gonzales v. Department of Revenue*, 728 P.2d 754 (Colo. App. 1986).
- (5) If an arresting officer, in his own discretion, allows a suspect to change a previously made election of a type of test and tells the suspect that he may switch tests, the officer must find a way to provide the new type of test. If that alternate form of test does not then turn out to be available, it is not a refusal to submit to testing and the officer has a problem.
- (6) Where a suspect either consents to take a test then refuses or simply refuses to take a test, the burden of expressing that one has changed one's mind is on the suspect. If the suspect does express a change of mind and finally consents to a test, and an officer or blood draw nurse is still available, the officer should provide a test unless the delay has made it impossible to complete a test within two hours of the last known point of driving or the delay has been long enough to materially affect the test results. *Gonzales v. Department of Revenue*, 728 P.2d (Colo. App. 1986); *Zahita v. Department of Revenue*, 560 P.2d 847 (Colo. App. 1977).
- (7) A refusal by a driver to take a test until the driver is allowed to speak to an attorney is a refusal as a matter of law. A suspect has no such right. *Dikeman v. Charnes*, 739 P.2d 870 (Colo. App. 1987).
  - a. For example, if you give a full advisement which advises a suspect that by driving in the State of Colorado they have expressly consented to the taking of a "blood or a breath" test when an officer, who has probable cause to believe they are impaired or under the influence of alcohol or drugs, so requests, and the suspect chooses either a "blood" or a "breath" test, then you must honor either request. In general, if you advise a suspect that they have certain options beyond what is granted in the law, then as far as your case is concerned the suspect now has those additional options. The subject is discussed in more detail later.

## APPENDIX I

### CASE LAW

(Express Consent and Per Se Administrative Hearings)

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

## APPENDIX J

### HABITUAL TRAFFIC OFFENDER

As a routine matter, you should determine whether the driver is driving under suspension, denial, or revocation and, if so, whether he is categorized as revoked as an habitual offender. If he is, charging procedures should be followed, and charges should be filed under Section 42-4-206, C.R.S. The proof of the charge requires only evidence he was under an habitual offender revocation, had notice of such status, and was operating a vehicle. It is not even necessary to prove a specific traffic violation, only he was operating a vehicle. In this type of situation, you should include in your reports as many details as possible to establish the fact he was driving the vehicle. Lay witnesses to his driving can be very helpful for independent corroboration. What constitutes an habitual traffic offender is found in Section 42-2-202, C.R.S.. By accumulating convictions for separate and distinct offenses, on separate dates, in the following manner:

- A. Within a seven-year period, three or more convictions of any of the following:
  - 1. DUI, DUID, DWAI, DUI Per Se or DWAIID.
  - 2. Reckless Driving under state statute.
  - 3. DUS, DUR or DUD.
  - 4. False Affidavit or Swearing.
  - 5. Vehicular Assault or Vehicular Homicide.
  - 6. Manslaughter, Criminally Negligent Homicide or aggravated motor vehicle theft.
  - 7. Hit and Run.

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

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

A person revoked as an habitual offender for five years. (42-2-205, C.R.S.) Any person found to be an habitual offender, who is thereafter convicted of operating a vehicle in this state while the revocation of the department prohibiting such operation is in effect, is guilty.

**APPENDIX K**

**DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**

**Laboratory Services Division**

**5 CCR 1005-2**

**RULES PERTAINING TO TESTING FOR ALCOHOL AND OTHER DRUGS  
(PROMULGATED BY THE STATE BOARD OF HEALTH)**

*Last amended 11/15/06, effective 1/30/07*

**DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**

**Laboratory Services Division**

**5 CCR 1005-2**

**STATE BOARD OF HEALTH RULES PERTAINING TO TESTING FOR  
ALCOHOL AND OTHER DRUGS**

**Table of Contents**

Part 1: General

Part 2: Certified Operators and Instructors of Evidential Breath Alcohol Test (EBAT) Devices

Part 3: Blood Testing

Part 4: Urine Testing

Part 5: Evidential Breath Testing – Collection and Testing Procedures under Intoxilyzer Software Prior to Software Upgrade

Part 6: Evidential Breath Testing – Collection and Testing Procedures after Installation of Intoxilyzer 5000EN Software Revision 1358.XX

Part 7: Certification of Laboratories

Part 8: Violations and Remedies

## Part 1: General

### 1.1 Purpose and Scope

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

- 1.2 Based on evidence gathered through testing and evaluation by the Colorado Department of Public Health and Environment and presented to the Board, the Department and the State Board of Health have determined that the results obtained from the Intoxilyzer 5000EN with software 1358.XX installed are scientifically accurate, precise and reliable, and the collection and preservation of a delayed breath alcohol specimen is not required when this device is properly operated as described in these rules and regulations.
- 1.3 Evidential Breath Alcohol Testing (EBAT) facilities will operate under Part 5 of these rules and regulations until their Intoxilyzer 5000EN software is upgraded. After an EBAT facility's Intoxilyzer 5000EN software is upgraded, the EBAT facility will operate under Part 6 of these rules and regulations. All EBAT facilities performing direct evidential breath alcohol tests must comply with Part 6 of these rules and regulations by June 30, 2007.
- 1.4 Testing of delayed breath specimens operates under Part 5 of these rules and regulations. Testing of blood alcohol, blood drugs and urine drugs operates under Parts 5 and 6 of these rules and regulations.

### 1.5 Definitions

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

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

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

“Certified Instructor” – an employee of any approved law enforcement agency or the Colorado Department of Public Health and Environment who meets the requirements of Section 2.2 *Et. Seq.* of these regulations.

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

“Certified Operator” – an employee of any approved law enforcement agency or the Colorado Department of Public Health and Environment who meets the requirements of Section 2.1 *Et. Seq.* of these regulations.

“Delayed Breath Alcohol Specimens” – the saved ethanol or other analytical components of the EBAT specimen(s).

“Department” – refers to The Colorado Department of Public Health and Environment, Laboratory Services Division.

“Evidential” or “Evidentiary” – refers to a sample which, when tested, gives rise to test results that are sufficiently reliable to be admissible as evidence in a court of law.

“Evidential Breath Alcohol Test (EBAT)” – is an evidentiary breath alcohol test performed using a certified evidential breath alcohol test device approved by the Department as described by Section 42-4-1301, C.R.S. (2006).

“Evidential Breath Alcohol Test (EBAT) device” – any instrument certified to perform “Evidential” Breath Alcohol Tests as identified in Section 42-4-1301, C.R.S. (2006). The Intoxilyzer 5000EN is the only evidential breath alcohol testing device certified for use in performing evidential breath alcohol tests.

“Facility” – any location that meets the requirements of these regulations and which is approved by the Department to perform evidential breath alcohol testing.

“Proficiency Testing” – The evaluation of unknown specimens supplied by a provider which determines target values for those unknown specimens.

“Representative of a certified laboratory” – any employee of a certified laboratory or a courier employed by or contracted by the certified laboratory to transport specimens for the certified laboratory.

## **Part 2: Certified Operators and Instructors of Evidential Breath Alcohol Test (EBAT) Devices**

2.1 Certification of Operators of EBAT Devices to Determine Alcohol Concentration of Breath Specimens.

2.1.1 To initially be certified as an EBAT operator an individual must:

2.1.1.1 be currently employed by a law enforcement agency or the Department;

2.1.1.2 attend a minimum of eight (8) hours of instruction following the Department’s Operator Training Manual;

2.1.1.3 score 80% or greater on a written exam; and



2.1.1.4 complete a comprehensive practical exam as specified in the Department Operator Training Manual.

2.1.1.5 upon successful completion of the course requirements, a certificate shall be issued by the Department stating the operator's name, the course instructor(s) and the initial date of certification.

2.1.2 To maintain certification an operator must:

2.1.2.1 proficiently perform without errors, one EBAT following the procedure specified in Appendix 2A of this regulation in the presence of a certified instructor within a 180 day period.

2.1.2.2 the test performed must be a complete EBAT test.

2.1.2.3 the printout obtained from the certification test shall be signed and dated by the certifying operator and the instructor.

2.1.2.4 the printout must be retained by the law enforcement agency as proof that the certification test was performed in accordance with this regulation.

2.1.3 An operator who fails to certify within the 180 day period must:

2.1.3.1 be decertified by the instructor, and

2.1.3.2 must repeat the 8-hour operator course.

2.1.4 Operators who return after being called to active military service may renew their expired certification by completing the following procedure:

2.1.4.1 document proof of active duty (period of absence must not exceed 2 years.);

2.1.4.2 document proof of last operator certification prior to going on active duty;

2.1.4.3 pass the current operator test with a score of 80% or better;

2.1.4.4 proficiently perform without errors, one Evidential Breath Alcohol Test (EBAT) following the procedure specified in Appendix 2A in the presence of a certified instructor;

2.1.4.5 the documented proof of active duty, documented proof of last operator certification prior to going on active duty, operator test material and *print-out* of the certification EBAT must be sent to the Department's Evidential Breath Alcohol Testing Program.

2.1.4.6 upon successful completion of the requirements in Section 2.1.4 *Et. Seq.*, a certificate shall be issued by the Department indicating the operator name, the agency certified instructor, the date of certification and "Reinstatement After Military Service."

2.1.5 A facility must retain records showing each certified operator's date of original certification and all subsequent dates of certification.

## 2.2 Certification of Operator Instructors of EBAT Devices to Determine Alcohol Concentration of Breath Specimens

2.2.1 To initially be certified as an EBAT instructor an individual must:

2.2.1.1 be currently employed by a law enforcement agency or the Department;

2.2.1.2 be a currently certified EBAT operator;

2.2.1.3 attend a minimum of sixteen (16) hours of instruction provided by the Department using the Instructor Training Manual;

2.2.1.4 score 80% or greater on a written exam; and

2.2.1.5 complete a comprehensive practical exam as specified in the Department Instructor Training Manual.

2.2.2 Upon successful completion of the course requirements, a certificate shall be issued by the Department stating the instructor's name, the Department's course trainer(s) and the initial date of certification.

2.2.3 A certified instructor is also a certified operator and is authorized to train and certify operators of EBAT devices.

2.2.4 To maintain certification an instructor must:

2.2.4.1 participate in teaching one EBAT operator certification class, or

2.2.4.2 pass a written instructor certification examination within a 365-day period.

2.2.5 An instructor who fails to certify in the 365-day period must be decertified by the Department and must repeat the 16-hour instructor course provided by the Department.

2.2.6 EBAT Instructors who return after being called to active military service may renew their expired certification by completing the following procedure:

2.2.6.1 document proof of active duty (period of absence must not exceed 2 years.);

2.2.6.2 document proof of last instructor certification prior to going on active duty;

2.2.6.3 pass the current instructor test with a score of 80% or better; and

2.2.6.4 proficiently perform without errors, one EBAT test following the procedures specified in Appendix 2A in the presence of a certified instructor.

2.2.6.5 the documented proof of active duty, documented proof of last instructor certification prior to going on active duty, instructor test material and *print-out* of the certification EBAT must be sent to the Department's Evidential Breath Alcohol Testing Program.

2.2.7 Upon successful completion of the above requirements, a certificate shall be issued by the Department stating the instructor's name, the agency certifying the instructor, the Department's Program Manager or designee, the date of certification and "Reinstatement After Military Service."

2.2.8 A facility must retain records showing each certified instructor's date of original certification and dates of all classes taught and written exams taken.

## **Part 3 Blood Testing**

### 3.1 Evidential Specimen Collection

#### 3.1.1 Living Persons

##### 3.1.1.1 Evidential Blood specimen(s) must be:

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

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

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

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

#### 3.1.2 Deceased Persons

3.1.2.1 Collection of specimens from deceased persons is conducted as per Section 42-4-1304, C.R.S. (2006), by a person whose training and normal duties include the collection of blood specimens from deceased persons.

#### 3.1.3 Living and Deceased Persons

##### 3.1.3.1 After collection, evidential blood specimens must be:

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

3.1.3.1.2 inverted several times to properly mix the blood with the sodium fluoride.

3.1.3.1.3 affixed with an identification label and evidence seal.

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

##### 3.1.3.2 At the Certified Laboratory:

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

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

3.1.3.2.3 The second specimen may be released if it is requested and receipted for by a representative of another Certified Laboratory.

3.1.3.2.4 The second specimen must be analyzed within 15 days of its receipt by the Certified Laboratory representative.

#### **Part 4: Urine Testing**

##### 4.1 Evidential Specimen Collection

###### 4.1.1 Living Persons

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

###### 4.2 Deceased Persons

4.2.1 Collection of specimens from deceased persons is conducted as per Section 42-4-1304, C.R.S. (2006) by a person whose training and normal duties include the collection of urine samples from deceased persons.

###### 4.3 Living and Deceased Persons

###### 4.3.1 Urine specimen(s) must be:

4.3.1.1 collected in a clean container.

4.3.1.2 affixed with an identification label and evidence seal.

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

###### 4.3.2 At the Certified Laboratory:

4.3.2.1 The State's test must be completed within 15 days of collection.

4.3.2.2 Any remaining specimen(s) must be retained by the laboratory in frozen storage for a period of not less than 12 months unless requested and receipted for by a representative of another Certified Laboratory.

4.3.2.3 The second specimen must be analyzed by a certified laboratory designated by the defendant or defendant's legal counsel within 15 days of its receipt by the representative of that Certified Laboratory.

#### **Part 5 Evidential Breath Testing - Collection and Testing Procedures Under Intoxilyzer 5000EN Software Prior to Software Upgrade**

##### 5.1 Scope

5.1.1 Part 5 establishes minimum standards for certification and approval of entities and processes utilized for alcohol and drug testing prior to the installation of Intoxilyzer 5000EN software revision 1358.XX.

## 5.2 Evidential Specimen Collection

### 5.2.1 Breath – Evidential

5.2.1.1 Evidential breath specimens must be analyzed on EBAT devices approved by the Department. Approval or disapproval of EBAT devices will be based on scientific standards of performance established by the Department. The Intoxilyzer 5000EN is the only EBAT device that may be used for evidential breath alcohol testing.

5.2.1.2 The Department must certify each EBAT device initially and annually thereafter.

5.2.1.3 The Department must issue a certificate for each certified EBAT device after initial certification and after each annual certification. The certificate must reflect the EBAT device approved facility name, the EBAT device serial number and the inclusive dates for the certification period. The certificate for EBAT devices placed in approved mobile facilities must also include the vehicle identification number.

5.2.1.4 An evidential breath alcohol test specimen must only be collected and tested by certified EBAT operators or instructors using a certified EBAT device and following the steps outlined in these regulations.

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

### 5.2.2 Breath – Delayed

5.2.2.1 A delayed breath alcohol specimen must be collected with each evidential breath alcohol test pursuant to Appendix 1A.

5.2.2.2 Delayed breath alcohol specimens are considered the personal property of the defendant and retained by the facility for 12 months from the date of collection unless requested and receipted for by a representative of another Certified Laboratory.

## 5.3 Methods of Analysis

### 5.3.1 Alcohol in Evidential Breath Specimens

5.3.1.1 The checklist for Evidential Breath Alcohol Tests must be followed as found in Appendix 1A.

5.3.1.2 A system blank(s) analysis must be used with each EBAT.

5.3.1.3 For each EBAT, a Department certified reference standard(s) of known ethanol concentration must be used.

5.3.1.4 A completed EBAT is one in which the checklist contained within Appendix 1A is followed and a printout obtained.

### 5.4 Laboratory Analysis of Delayed Breath Specimens

5.4.1 Laboratories must be certified by the Department to provide analysis. Certification is based on successful on-site inspection, successful participation in proficiency testing and ongoing compliance.

5.4.2 Laboratories will be certified to perform tests for delayed breath alcohol.

5.4.3 Laboratories must meet standards of performance as established by these regulations. Standards of performance will include personnel qualifications, standard operating procedure manual, analytical process, proficiency testing, quality control, security, chain of custody, specimen retention, space, records, and results reporting.

5.4.4 Laboratory inspections must be performed prior to initial certification and annually thereafter by Department staff as established by these regulations. A laboratory meeting the certification requirements of these regulations will be issued a certificate initially. Recertification shall be required each July 1.

## **Part 6: Evidential Breath Testing - Collection and Testing Procedures After Installation of Intoxilyzer 5000EN software revision 1358.XX**

### 6.1 Purpose and Scope

6.1.1 Part 6 establishes minimum standards for certification and approval of entities and processes utilized for alcohol and drug testing after installation of Intoxilyzer 5000EN software revision 1358.XX.

### 6.2 Evidential Specimen Collection

#### 6.2.1 Breath

6.2.1.1 Evidential breath specimens must be analyzed on EBAT devices approved by the Department. Approval or disapproval of EBAT devices will be based on scientific standards of performance established by the Department. The Intoxilyzer 5000EN is the only EBAT device that may be used for Evidential Breath Alcohol Testing.

6.2.1.2 The Department must certify each EBAT device initially and annually thereafter.

6.2.1.3 The Department must issue a certificate for each certified EBAT device after initial certification and after each annual certification. The certificate must reflect the EBAT device approved facility name, the EBAT device serial number and the inclusive dates for the certification period. The certificate for EBAT devices placed in approved mobile EBAT facilities must also include the vehicle identification number.

6.2.1.4 An evidential breath alcohol test specimen must only be collected and tested by certified EBAT operators or instructors using a certified EBAT device and following the steps outlined in these regulations.

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

6.2.1.6 Unless otherwise provided by law, the subject must be given a choice of which type of evidential chemical test they wish to take to determine the alcohol concentration in their body (evidential breath alcohol test or evidential blood alcohol test) or they may refuse to take either evidential chemical test. Nothing in this regulation is intended to exempt or exonerate an individual from the penalties proscribed in Sections 42-4-1301.1 and 42-4-1301.2, C.R.S, or any other relevant law, for the failure to submit to such test.

6.2.1.7 Before the subject is given the choice of the type of evidential chemical test they will take, the certified operator or instructor will include the following information:

“You are required to take, complete or cooperate in completing an evidential chemical test to determine the alcoholic content of your blood or breath (C.R.S. 42-4- 1301.1(2) (A) (I). The chemical test you choose is the test you will be taking. You cannot choose a different test later. (C.R.S. 42-4- 1301.1(2) (A) (II). If you choose a blood test, two (2) tubes of blood will be drawn. One tube belongs to you and you may have it tested at a Health Department Certified Independent Laboratory of your choice. If you choose a breath test, two (2) breath samples will be analyzed by a certified evidential breath alcohol testing device following an approved standard operating procedure. You will not receive a sample to have independently tested by a certified laboratory.

If you refuse to take, complete or cooperate in completing an evidential chemical test to determine the alcoholic content of your blood or breath your driving privilege may be revoked. (C.R.S. 42-2-126(2)(A)(II))”

### 6.3 Methods of Analysis

#### 6.3.1 Alcohol in Evidential Breath Specimens

6.3.1.1 The EBAT operator or instructor must follow the procedures specified in these regulations for evidential breath alcohol tests.

6.3.1.2 The EBAT operator or instructor must document compliance with these testing procedures by completion of the Department's checklist form, which is available in Appendix 2A of these regulations or on the Department's website.

6.3.1.2.1 Information included in Steps 1 through 7 of Appendix 2A must not be changed in any way.

6.3.1.2.2 Steps 1 through 7 must be performed in the order listed.

6.3.1.3 The certified operator or instructor conducting the EBAT test must initial inside the parentheses to the left of each step (1 through 7). Initialing each step indicates that step is properly completed.

6.3.1.4 Step 1. “Turn power switch on or observe the power switch has been activated. If the EBAT device is in the standby mode, press the start test switch.”

6.3.1.4.1 EBAT devices at approved EBAT facilities must always be powered on. This is indicated by the small red light below the power switch being illuminated.

6.3.1.4.2 When the certified operator or instructor first enters the EBAT room he/she shall determine if the EBAT device is in the standby mode. The EBAT device is in the standby mode if the display is blank, the small red light under the power switch is lit and the simulator display reads “idle.”

6.3.1.4.3 If the EBAT device is in the standby mode, press the start test switch.

6.3.1.4.4 If the EBAT device is in the ready mode, instrument display scrolling or flashing and simulator display lit, proceed to Step 2.

6.3.1.5 Step 2. “The subject must remove foreign objects from the nose and mouth including dentures. The subject must be closely and continuously observed for 20 minutes prior to testing to assure no belching, regurgitation or intake of any foreign material by nose or mouth has occurred. If such occurs, another 20 minutes of close and continuous observation must elapse under the same conditions.”

6.3.1.5.1 Check the subject for foreign objects in the nose or mouth including dentures. There are two types of dentures, permanent and removable. Permanent dentures are typically anchored to the mouth and cannot be removed. Permanent dentures need not be removed. They will not interfere with the results obtained during the EBAT. Removable dentures are typically held in place by an adhesive and must be removed.

6.3.1.5.2 During the observation period the operator or instructor must be close enough to the subject to detect any belching, regurgitation or intake of foreign material.

6.3.1.5.3 The observation period must be conducted at the EBAT facility by a certified operator, instructor or law enforcement officer.

6.3.1.5.4 The observation period must not be conducted in the patrol car while driving to the EBAT facility.

6.3.1.5.5 Start and stop times for the observation period must be recorded from the EBAT device or the facility dispatch clock.

6.3.1.6 Step 3. “Verify that the external breath tube and simulator vapor tube are both warm.”

6.3.1.6.1 Touch the external breath tube to ensure that it is warm.

6.3.1.6.2 Touch the simulator vapor tube to ensure that it is warm.

6.3.1.6.3 If either tube is cold to the touch, stop the test and call an intoxilyzer instructor for assistance.

6.3.1.7 Step 4. “Observe the simulator temperature is between 33.8 degrees centigrade and 34.2 degrees centigrade.”

6.3.1.7.1 Allow the simulator to equilibrate for a minimum of ten (10) minutes after reaching the correct temperature when it has been in standby mode or is first turned on.

6.3.1.8 Step 5. “Press the start test switch.”

6.3.1.8.1 Press the green start test switch to initiate the automated test sequence.

6.3.1.9 Step 6. “Follow the instructions and sequence of events as they appear on the EBAT device display.”

6.3.1.9.1 A system blank(s) analysis must be used during the test sequence of each evidential breath alcohol test.

6.3.1.9.2 For each EBAT, Department certified reference standard(s) of known ethanol concentration must be analyzed. The results of such analysis must agree with the reference standard(s) target value (s) of 0.100 grams of alcohol/210 liters of breath within  $\pm 10\%$  (0.090 – 0.110 grams of alcohol/ 210 liters of breath).



6.3.1.9.3 The results of analyzing more than one reference standard of the same value for each EBAT must agree with each other within  $\pm 10\%$ .

6.3.1.9.4 If the  $\pm 10\%$  calibration correlation is not obtained, the instrument will abort the test and print a "No Calibration Correlation" error message.

6.3.1.9.5 For each EBAT, the results of the two subject breath alcohol tests must agree with each other within 0.020 grams of alcohol/210 liters of breath.

6.3.1.9.5.1 If the 0.020 grams of alcohol/210 liters of breath correlation is not obtained, the instrument will abort the test and print a "No .02 agreement" error message.

6.3.1.9.5.1.1 The EBAT operator must perform the EBAT test procedure over again after another 20-minute observation period. A new checklist, Appendix 2A, must be filled out for this test.

6.3.1.9.6 During the two minute period between subject breath tests the subject must be closely and continuously observed and the operator or instructor must be close enough to the subject to detect any belching, regurgitation or foreign material in the mouth or nose.

6.3.1.9.7 During the two minute period between subject breath tests the subject must be removed from the area in close proximity to the EBAT device.

6.3.1.9.8 A clean mouth piece will be used each time the subject blows into the intoxilyzer.

6.3.1.10 Step 7. "Retain all printouts generated by the EBAT device with the DUI packet. (ie., error message printouts)

6.3.1.10.1 The officer conducting the EBAT must sign the checklist(s) and completed EBAT printout(s).

6.3.1.10.2 All printouts generated by the EBAT device must be retained with the DUI packet, including error message printouts.

6.3.1.10.3 All records pertaining to the EBAT specimens must be retained by the facility for 2 years.

6.3.1.10.4 A new checklist, Appendix 2A, must be filled out for each EBAT performed.

6.3.1.10.4.1 A completed evidential breath alcohol Test (EBAT) is one in which the checklist, Appendix 2A, is followed and a printout with no error messages is obtained.

## **Part 7: Certification of Laboratories**

### **7.1 Laboratory Analysis of Blood, and Urine Specimens**

7.1.1 Laboratories must be certified by the Department to provide analysis. Certification is based on successful on-site inspection, successful participation in proficiency testing and ongoing compliance.

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

7.1.3 Laboratories must meet standards of performance as established by these regulations. Standards of performance will include personnel qualifications, standard operating procedure manual, analytical process, proficiency testing, quality control, security, chain of custody, specimen retention, space, records, and results reporting.

7.1.4 Laboratory inspections must be performed prior to initial certification and annually thereafter by Department staff as established by these regulations. A laboratory meeting their certification requirements of these regulations will be issued a certificate initially. Recertification shall be required each July 1.

## 7.2 Initial Application

7.2.1 Laboratory directors must submit to the Department a written request for certification of their laboratory.

7.2.2 The Department will acknowledge request and provide a copy of the rules and regulations.

7.2.3 To be certified, laboratories shall meet all requirements in Part 7 of these regulations and pass an on-site inspection.

## 7.3 Application for Continued Certification

7.3.1 Annually the laboratory director must provide a completed application (Appendix 2B) to the Department to be considered for continued certification.

7.3.2 Laboratories must be recertified every July 1.

7.3.3 In order to be recertified on July 1, laboratories must submit their applications for continued certification no later than June 1, which is 30 days prior to the date for recertification.

7.3.4 To maintain certification, laboratories shall meet all requirements in Part 7 of these regulations and pass an on-site inspection.

## 7.4 General Requirements

7.4.1 In addition to the laboratory's application, the laboratory must provide the following information to the Department: written evidence concerning the education, scientific training, and experience of the laboratory director and personnel performing the testing.

7.4.2 Prior to independently analyzing samples, testing personnel must demonstrate acceptable performance on precision, accuracy, specificity, reportable ranges, blanks, and unknown challenge samples (proficiency samples or internally generated quality controls). The laboratory must have a system to evaluate employee competency at regular intervals, not to exceed 12 months.

7.4.3 The laboratory must notify the Department in writing within thirty days of any changes pertaining to Laboratory location, personnel, and analytical methods.

7.4.4 The laboratory director is directly responsible for the accuracy of the tests performed, the accuracy of the reports issued, and adherence to these regulations.

7.4.5 The laboratory must have adequate space, equipment, materials, and controls available to perform the tests reported.

7.4.5.1 Samples which serve as test controls must be of such quality as could be determined "Certifiable" by National Institute of Standards and Technology ("NIST") standards, although such samples need not actually be NIST-Certified. Relevant documentation must be available for inspection.

7.4.5.2 If non-traceable standards are used, the laboratory must establish a system to identify each standard, document its preparation, and data to prove agreement within 5% of the expected value when compared to a NIST traceable standard.

7.4.6 The laboratory must document evidence of the utilization of a written method of analysis (Standard Operating Procedure (SOP)) to perform the tests reported. Critical elements that must be addressed in the SOP are in Appendix 2C, Section B5 (a-t).

7.4.7 The laboratory must demonstrate compliance with these regulations through a successful on-site inspection conducted by Department staff prior to certification. Certified laboratories will be inspected on an annual announced basis. Certified laboratories will be inspected on an unannounced basis to evaluate complaints.

7.4.8 The laboratory must maintain all records related to analysis for a minimum of two years. Records to be maintained include instrument maintenance, quality control and quality assurance of all analyses performed, specimen processing, results and reports of analysis, dates of analysis and the identity of the person performing the analysis. Retained records must be open to inspection by Department personnel.

## 7.5 Proficiency Testing of Blood and Urine Samples

7.5.1 Proficiency Testing (PT) is the evaluation of unknown specimens supplied by a provider that determines target values for those unknown specimens. PT is required for each approved category.

7.5.2 Prior to initial certification the laboratory must have successfully participated in one proficiency test event within the past 12 months.

7.5.3 To maintain continued laboratory certification, a laboratory must participate in the PT program and maintain satisfactory performance.

7.5.4 PT samples shall be tested by the same procedure used for all samples, including, but not limited to, the same number of replicate analyses, the same standards, same testing personnel and equipment, and all other pertinent factors.

### 7.5.5 Blood Alcohol

7.5.5.1 The Department will make arrangements to provide blood alcohol PT samples to the laboratories through a PT provider.

7.5.5.2 A laboratory must participate in PT testing through 3 events per year, consisting of 5 specimens each. The laboratory will submit results to the PT provider. The PT provider will evaluate the results and forward them to the laboratory as well as the Department.

7.5.5.3 Other volatile forensically significant interferents, such as acetone or toluene, may be included in one or more samples. The inclusions of interferents determine the laboratory's capability of differentiating the volatile interferent from ethyl alcohol. Identification of these interfering volatiles will be used as a criterion for acceptable performance.

### 7.5.5.4 Grading Criteria for Blood Alcohol Proficiency Testing

7.5.5.4.1 Proficiency test results must be returned to the PT provider within the time specified by the PT provider. Results received after the due date will not be graded and will be considered an unsatisfactory performance resulting in a score of 0 for the testing event. The laboratory must contact the PT provider if extenuating circumstances prevent timely response to a PT event.

7.5.5.4.2 The laboratory must investigate any score less than 100% and undertake corrective action as needed. The investigation outcome and corrective action shall be submitted to and approved by the Department.

7.5.5.4.3 The PT provider will score each event as “satisfactory or “unsatisfactory”. If a laboratory has two consecutive “unsatisfactory” evaluations, or achieves an “unsatisfactory” score in 2 of any 3 consecutive PT events, the PT performance is deemed “unsuccessful”. The “unsuccessful” determination may result in a “directed plan of correction” specified by the Department, or suspension/ limitation of certification for the failed analyte.

#### 7.5.6 Urine-drugs and Blood-drugs

7.5.6.1 For blood and urine drug analyte screening and confirmation certification a laboratory must successfully participate in the appropriate College of American Pathologists (CAP) proficiency test programs.

7.5.6.1.1 For blood-drug certification the required program is the Forensic Toxicology (Criminalistics) FTC.

7.5.6.1.2 For urine-drug certification the required program is Urine Drug Testing (Confirmatory) UDC.

7.5.6.2 A satisfactory event score is the identification of 80% of the target analytes present with no false positives.

7.5.6.3 The laboratory must request CAP to mail a consultant copy of their survey results to:

Colorado Department of Public Health and Environment Laboratory Services Division Certification Program 8100 Lowry Boulevard Denver, CO 80230-6828

7.5.6.4 A laboratory will be suspended from a category if two consecutive unsuccessful PT events occur. A laboratory may be reinstated to active status after successful participation in the next test event. Failure to successfully participate in the next test event will result in the denial, suspension or revocation of the certificate and require two successful PT events before the laboratory may reapply for certification. The laboratory may request the PT provider to send, at the expense of the laboratory, one extra set of PT samples when in suspension status.

#### 7.6 On-Site Laboratory Inspection

7.6.1 On-site laboratory inspections must be performed prior to initial certification and annually thereafter by the Department.

7.6.2 The on-site inspection will include a review of the laboratory’s practices to assure compliance with these regulations. The requirements are in checklist format in Appendix 2C.

7.6.3 Laboratories will be contacted to arrange routine inspection dates approximately three weeks prior to a proposed date. A letter confirming the inspection date will be sent to the laboratory.

7.6.4 The on-site inspection's checklist will be used systematically to evaluate and assess a laboratory's compliance. Each item listed on the checklist will be answered by the department inspector as, Yes ("Y"), No ("N") or Not Applicable ("NA"). Each item answered as "N" will be described in a report to include the noncompliant practice, the source of information and the scope and extent of the noncompliant practice.

7.6.5 Following the on-site inspection, a written report will be prepared and reviewed by a peer inspector or supervisor prior to mailing. The report should be mailed to the laboratory within 15 days of inspection.

7.6.6 The laboratory must provide a written response to the report when noncompliant practices are identified. The laboratory must provide a written plan of correction within 15 days of receipt of the written inspection report for each noncompliant item cited as a result of items marked "N" on the inspection checklist. A response will not be required from the laboratory if all items on an inspection checklist are marked either "Y" or "NA".

7.6.7 The written plan of correction will be reviewed by the inspector and if appropriate will be approved. Any items requiring clarification will be resolved by phone or written correspondence.

7.6.8 Documents must be provided to the Department by the laboratory within 90 days of the inspection for verification and proof of implementation of the corrections described in the written plan of correction. A subsequent on-site inspection will be conducted if the verification documents are not received, if compliance with corrective actions are difficult to verify by documentation, or if practices subject to correction have significant potential for direct impact on the quality of laboratory results.

7.6.9 Identification of noncompliant practices directly resulting in inaccurate laboratory reports, failure to provide a plan of correction or failure to correct adequately any noncompliant practice may result in inspector's recommendation to deny initial certification or limit, deny, suspend or revoke the laboratory certificate. Such action shall be governed by section 24-4-105, C.R.S.

7.6.10 A certificate will be issued by the Department to the laboratory to show certification has been approved. The certificate will reflect the laboratory name, location, the analytical categories approved and the effective dates of the certification period. The certification period will not exceed twelve months.

7.6.11 The Department will annually publish a list of certified laboratories.

7.7 Standards for approved permanent, temporary and mobile Evidential Breath Alcohol Testing (EBAT) facilities

7.7.1 Evidential Breath Alcohol Test(s) must be conducted only in facilities that have been approved by the Department.

7.7.2 Department standards for all approved EBAT facilities are specified in these regulations.

7.7.3 All approved EBAT facilities must meet standards of performance as established by this section of these regulations.

7.7.4 Inspections of permanent, temporary and mobile facilities must be performed prior to initial approval and once in a calendar year thereafter by Department staff.

7.7.5 Initial inspections of permanent and temporary EBAT facilities must be conducted by Department staff using sections 7.7.12.1 *Et. Seq.* to 7.7.12.7 *Et. Seq.* of these regulations.

7.7.6 Annual, complaint and follow up inspections of permanent and temporary EBAT facilities must be conducted by Department staff using sections 7.7.12.2 *Et. Seq.* to 7.7.12.8 *Et. Seq.* of these regulations.

7.7.7 Initial inspections of mobile EBAT facilities must be conducted by Department staff using sections 7.7.12.1 *Et. Seq.*; 7.7.12.3 *Et. Seq.* to 7.7.12.7 *Et. Seq.*; and 7.7.12.9 *Et. Seq.* of these regulations.

7.7.8 Annual complaint and follow up inspections of mobile EBAT facilities must be conducted by Department staff using sections 7.7.12.3 *Et. Seq.* to 7.7.12.9 *Et. Seq.* of these regulations.

7.7.9 Mobile EBAT facilities, the EBAT device and its associated equipment must be brought to the Department each time a facility inspection is required.

7.7.10 An EBAT device that is used in a mobile EBAT facility must not be used at a permanent or temporary facility unless approved by the Department.

7.7.11 An EBAT device that is used in a permanent or temporary facility must not be used at a mobile facility unless approved by the Department

7.7.12 Department inspection procedure for permanent, temporary and mobile Evidential Breath Alcohol Test Facilities

7.7.12.1 Initial approval – permanent, temporary and mobile EBAT facilities

7.7.12.1.1 Facilities must submit a written request to the Department for approval of an EBAT facility.

7.7.12.1.2 After receipt of the written request for approval, the Department shall supply a copy of these regulations to the requesting facility.

7.7.12.1.3 The facility EBAT device instructor or DUI enforcement officer is responsible for monitoring the construction of the EBAT facility and verifying compliance with the requirements of this section.

7.7.12.1.4 After the facility is constructed and ready for use, written verification of compliance with the requirement of this section must be sent to the Department by the facility. The written verification must include a letter from a certified electrician that the power line to the EBAT device is an isolated line.

7.7.12.1.5 Department staff must perform an initial facility inspection to verify compliance with the requirements of this section. Subsequent facility inspections must be performed once in a calendar year by department staff.

7.7.12.1.5.1 The EBAT device must not be moved from its approved location within the approved facility without authorization from the department.

7.7.12.2 Power requirements – permanent and temporary facilities

7.7.12.2.1 AC line voltage of 120VAC  $\pm$ 10%, 60 HZ with a grounded 3 prong outlet(s) and a 20 ampere or less circuit breaker.

7.7.12.2.2 The power line to the EBAT device must be an isolated line. Written verification of compliance with this requirement from a certified electrician must be provided to the Department.

7.7.12.2.3 A surge protection device approved by the Department must be placed between the EBAT device and the isolated power outlet.

7.7.12.2.4 Only the EBAT device and its associated equipment shall be connected to the surge protection device or the isolated power outlet.

7.7.12.3 Environment – permanent, temporary and mobile EBAT facilities

7.7.12.3.1 The temperature of the EBAT device facility must be maintained between 70 and 80 degrees Fahrenheit.

7.7.12.3.2 The facility must have adequate lighting so the EBAT operator can see to safely conduct the evidential breath alcohol test and complete the required forms.

7.7.12.3.3 The area around and under the EBAT device must be free of dust and dirt.

7.7.12.3.4 The Evidential Breath Alcohol Testing facility must be kept orderly.

7.7.12.3.5 The EBAT device and breath alcohol simulator must be located on the organizer stand.

7.7.12.3.6 The organizer stand must be placed on a sturdy and adequate work surface.

7.7.12.3.7 The EBAT device shall be in a smoke free environment.

7.7.12.3.8 The facility must have adequate ventilation to prevent vapor build up around the EBAT device be ventilated.

7.7.12.3.9 The facility must not be used to store any cleaning compounds or volatile organics to include gasoline and petroleum products.

7.7.12.3.10 The facility must be secure and not readily accessible to unauthorized individuals.

7.7.12.4 Documents – Permanent, temporary and mobile EBAT facilities

7.7.12.4.1 The following documents must be maintained at the EBAT facility with the EBAT device.

7.7.12.4.1.1 Current original certificate for the Evidential Breath Alcohol Testing device.

7.7.12.4.1.2 Checklist, Appendix 2A

7.7.12.4.1.3 No Smoking sign (not necessary if facility is in a no smoking building)

7.7.12.4.1.4 Error message sheet

7.7.12.4.1.5 Current list of certified operators and instructors from all agencies that regularly use this EBAT device to include original date of certification, date of last certification and date next certification is due.

7.7.12.4.1.6 Current Standard Solution Log Sheet.

7.7.12.5 Supplies – permanent, temporary and mobile EBAT facilities

7.7.12.5.1 The following supplies must be maintained at the EBAT facility with the EBAT device.

7.7.12.5.1.1 Mouth pieces;

7.7.12.5.1.2 Standard simulator solution;

7.7.12.5.1.3 Printer paper; and

7.7.12.5.1.4 DMV and DUI forms.

7.7.12.6 Evidential Breath Alcohol device functions – permanent, temporary and mobile EBAT facilities

7.7.12.6.1 EBAT device time and date must be correct.

7.7.12.6.2 External breath tube must be heating.

7.7.12.6.3 Simulator vapor tube must be heating

7.7.12.6.4 EBAT device test sequence must be correct.

7.7.12.6.5 EBAT device certification date on the printout must be the same as the EBAT device certification date on the posted EBAT device certificate.– Permanent locations only.

7.7.12.6.6 EBAT device must be connected to an active analog telephone line at all times – Permanent locations only.

7.7.12.7 Simulator functions – Permanent, temporary and mobile EBAT facilities

7.7.12.7.1 Active simulator

7.7.12.7.1.1 Record serial number

7.7.12.7.1.2 Display must read between 33.8°C and 34.2°C.

7.7.12.7.1.3 Simulator solution temperature must be between 33.8°C and 34.2°C measured by a calibrated, NIST traceable, digital thermometer.

7.7.12.7.1.4 Simulator must be functioning properly.

7.7.12.7.2 Backup simulator(s)

7.7.12.7.2.1 Record serial number(s).

7.7.12.7.2.2 Display(s) must read between 33.8°C and 34.2°C.

7.7.12.7.2.3 Simulator solution temperature must be between 33.8°C and 34.2°C measured by a calibrated, NIST traceable, digital thermometer.

7.7.12.7.2.4 Simulator must be functioning properly.

7.7.12.8 Records review – Permanent, temporary and mobile EBAT facilities.

7.7.12.8.1 Review of the Standard Solution Log Sheets must show precise standard results within  $\pm 10\%$  of the target value.



7.7.12.8.2 Review of the Standard Solution Log Sheet must not indicate an unacceptable number of error messages.

7.7.12.8.3 The Standard Simulator Solution must be changed every 30 days or 100 tests, whichever comes first.

7.7.12.8.4 Diagnostic checks must be performed every 30 days and printouts must be retained with the Standard Solution Log Sheet.

7.7.12.8.5 Calibration checks must be performed every 7 days and printouts must be retained with the Standard Solution Log Sheet.

7.7.12.8.6 All EBAT sequence numbers must be recorded on the Standard Solution Log Sheet.

7.7.12.8.7 All records pertaining to Evidential Breath Alcohol Tests must be retained by the EBAT facility for 2 years.

7.7.12.9 Additional requirements for mobile EBAT facilities

7.7.12.9.1 Power

7.7.12.9.1.1 Acceptable power sources are:

7.7.12.9.1.1.1 Square wave power inverter capable of generating an AC line voltage of 140 volts RMS $\pm$  10%.

7.7.12.9.1.1.2 Power inverter/sine wave converter combination that generates 120 volts AC  $\pm$  10% from 14 VOLTS DC.

7.7.12.9.1.1.3 Electric motor/generator combinations that use a 12 volt AC  $\pm$  10% 60 HZ generator.

7.7.12.9.1.1.4 The isolated power line to the EBAT device must be verified by Department staff.

7.7.12.9.1.1.5 A surge protection device approved by the Department must be placed between the EBAT device and the isolated power outlet.

7.7.12.9.1.1.6 Only the EBAT device and its associated equipment shall be connected to the surge protection device or the isolated power outlet.

7.7.12.9.2 Environment

7.7.12.9.2.1 Automobile emissions must not be allowed in the EBAT facility.

## **PART 8: Violations and Remedies**

### 8.1 Violations

8.1.1 It is a violation of these rules and regulations to perform testing without an appropriate certificate.

8.1.2 Violation of these rules and regulations may result in denial, suspension or revocation of certification as outlined in Part 8 of these rules and regulations.

8.1.3 Generally, a violation will not be cited if:

8.1.3.1 The violation was unavoidable to prevent loss of life, personal injury or severe property damage or there were no feasible alternatives, and provided that proper notification was given to the Department.

8.1.3.2 The violations resulted from matters beyond the control of the facility or laboratory, such as equipment failures that were unavoidable by reasonable quality assurance measures or management controls.

8.2 Right to appeal the denial, suspension or revocation of certification.

8.2.1 Any facility, laboratory, operator or operator instructor whose certification is denied, suspended or revoked under these regulations may seek appeal of that determination pursuant to section 24-4-105, C.R.S. (2006).

8.3 Denial, Suspension or Revocation of Certification:

8.3.1 The Department may deny, suspend or revoke the certification of EBAT device(s) located in a facility, the certification of an operator, the certification of an operator instructor or the certification of a laboratory for one or more of the following causes:

8.3.1.1 Falsification of data or other deceptive practices including false statements by omission or commission relevant to the certification process.

8.3.1.2 Gross incompetence or negligent practice.

8.3.1.3 Willful or repeated violation of any lawful rule, regulation or order of the Department or the Board of Health and its officers.

8.3.1.4 Inadequate space, equipment, or methods utilized for testing.

8.3.1.5 Submission of any test results of another person as those of the subject being evaluated.

8.3.1.6 For a laboratory, failure to continuously participate in proficiency testing.

8.3.1.7 For a laboratory, the receipt of two consecutive "unsatisfactory" evaluations, or achievement of an "unsatisfactory" score in 2 of any 3 consecutive proficiency test events.

8.3.1.8 For a laboratory, contact with another laboratory concerning proficiency test results prior to the due date of those results.

8.4 Injunction

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

## APPENDIX 1A

### **TITLE: Checklist for Evidential Breath Alcohol Test(s).**

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

APPENDIX 2A

**Colorado Department of Public Health and Environment  
Laboratory Services Division  
Breath Alcohol Testing Program**

Approved checklist for Evidential Breath Alcohol Test(s) after upgrade to Intoxilyzer 5000EN software revision 1358.XX, in compliance with the Colorado Board of Health Rules and Regulations concerning testing for alcohol and other drugs, 5-CCR1005-2, as amended.

**SUBJECT:** \_\_\_\_\_

**DATE:** \_\_\_\_\_

Certified operator or instructor conducting the EBAT must initial inside the parentheses to the left of each step and sign in the space provided at the bottom.

- ( ) 1. Turn power switch on or observe the power switch has been activated. If the EBAT device is in the STANDBY mode, press the START TEST switch.
  
- ( ) 2. The subject must remove foreign objects from the nose and mouth including dentures. The subject must be closely and continuously observed for 20 minutes prior to testing to assure no belching, regurgitation or intake of any foreign material by nose or mouth has occurred. If such occurs, another 20 minutes of close and continuous observation must elapse under the same conditions.

**Start Time:** \_\_\_\_\_ **Stop Time:** \_\_\_\_\_

- ( ) 3. Verify that the external breath tube and simulator vapor tube are both warm.
  
- ( ) 4. Observe the simulator temperature is between 33.8 degrees Centigrade and 34.2 degrees Centigrade.
  
- ( ) 5. Press the START TEST switch.
  
- ( ) 6. Follow the instructions and sequence of events as they appear on the EBAT device display.
  
- ( ) 7. Retain all printouts generated by the EBAT device with the DUI packet. (ie. Error message printouts)

**THIS EVIDENTIAL BREATH ALCOHOL TEST WAS CONDUCTED IN ACCORDANCE WITH THE COLORADO BOARD OF HEALTH RULES AND REGULATIONS, 5-CCR1005-2.**

\_\_\_\_\_  
Certified Operator or Instructor Conducting Test

**APPENDIX 2B**

**DUI and DUID Laboratory Certification Application**

Laboratories are certified by the Colorado Department of Public Health and Environment as authorized by the Colorado Board of Health Rules and Regulations 5 CCR 1005-2, Testing for Alcohol and Other Drugs

(for re-certification, complete the following and submit at least 30 days prior to the current expiration date)

**LABORATORY NAME:**

**ADDRESS (LOCATION):**

**ADDRESS MAIL:**  
(if different from above)

**CONTACT PERSON  
TO ADDRESS MAIL:**  
(name) (title)

**E MAIL ADDRESS:**

**PHONE NUMBER:**

**FAX NUMBER:**  
**ANALYTICAL CATEGORIES:**

<b>Screening or Initial Testing</b>	method (list)	number of samples in past year	<b>Confirmation or Repeat Testing</b>	method (list)	number of samples in past year
Blood Alcohol			Blood Alcohol		
Blood drug			Blood Drug		
Urine Drug			Urine Drug		

**For each director, supervisor and analyst, submit a current Curriculum Vitae with this application.**

Return signed and completed application to: Colorado Department of Public Health and Environment  
Laboratory Services Division  
Certification Program  
8100 Lowry Blvd  
Denver CO 80230-6928

This information is a true and accurate representation of the methods and personnel employed by this laboratory on the date of this application.  
(signature of director or designated responsible party) (Title) (Date)

**APPENDIX 2C**

**DUI and DUID Laboratory Certification Onsite Evaluation Standards**

**Laboratory Name:**

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**Inspector(s) Name: Date of inspection:** \_\_\_\_\_

**Laboratory Staff interviewed:** \_\_\_\_\_

**A. PERSONNEL**

- 1. Y N NA Does the laboratory have a director?
- 2. Y N NA Does the director have a Bachelor degree in chemical, physical or biological science or medical technology, forensic science, or equivalent, from an accredited institution, and 2 years of laboratory experience?

(Answer NA if question #4 is Yes)

- 3. Y N NA Is the director responsible for the overall management and operation of the laboratory? How is this documented? What documented tasks does the director perform relating to management and operation of the laboratory?
- 4. Y N NA If the director does not supervise the daily function of the laboratory, has this responsibility been delegated to a qualified technical supervisor (TS)? (See question 2 in this section for qualifications) How is this documented? What documented tasks does the TS perform relating to management and operation of the laboratory?
- 5. Y N NA Do the analysts have at minimum an associate degree in a laboratory science or one year training in a nationally recognized accredited laboratory program or one year documented on the job laboratory training?
- 6. Y N NA Does the laboratory director or TS ensure laboratory personnel are adequately trained? What system is used to evaluate and ensure personnel competency?  
(Such as observation, written test, analysis of unknown samples or quality control materials)
- 7. Y N NA Does the laboratory maintain documentation for the director and all personnel's education, training and experience?

8. Does the laboratory maintain records of personnel training and annual competency checks in the following areas:

Y N NA a) sample processing procedures

Y N NA b) theory of instrument operation and software

Y N NA c) analytical procedures

Y N NA d) quantification and calculations

Y N NA e) reporting results

9. Y N NA Does each laboratory position have a written job description?

**B. STANDARD OPERATING PROCEDURE MANUAL**

1. Y N NA Does the laboratory have a written procedure manual for the performance of all methods of analytes it reports?

1.1 Y N NA Do the Standard Operating Procedures (SOP) contain the critical elements in this Appendix 2C, section B5 (a-t)?

2. Y N NA Has the current laboratory director or technical supervisor approved, signed and dated each procedure?

3. Y N NA Has the laboratory director or technical supervisor approved, initialed and dated each change in the procedure?

4. Y N NA Does the laboratory have a written procedure manual available to the laboratory analyst at the bench? What system is used to ensure all staff are familiar with the SOP, including any revisions?

5. Does the procedure manual include criteria and process for:

Y N NA a) specimen receiving?

Y N NA b) specimen accessioning?

Y N NA c) specimen storage?

Y N NA d) identifying and rejecting unacceptable specimens?

Y N NA e) recording discrepancies?

Y N NA f) security of specimens, aliquots or extracts?

Y N NA g) validating a new or revised method prior to testing specimens for accuracy, precision, specificity (interferences), detection limits and reporting range?

Y N NA h) aliquoting specimens to avoid contamination and/or carry-over?

Y N NA i) sample retention to assure stability for one year?

- Y N NA j) disposal of specimens?
  - Y N NA k) the theory and principles behind each assay?
  - Y N NA l) preparation and identification of reagents, standards, calibrators and controls? How does the laboratory ensure all standards are traceable to NIST as specified in section D?
  - Y N NA m) special requirements and safety precautions involved in performing assays?
  - Y N NA n) frequency and number of control and calibration materials?
  - Y N NA o) recording and reporting assay results?
  - Y N NA p) protocol and criteria for accepting or rejecting analytical data?
  - Y N NA q) procedure to verify the accuracy of the final report?
  - Y N NA r) pertinent literature references for each method?
  - Y N NA s) current step by step instructions with sufficient detail to perform the assay to include equipment operation?
  - Y N NA t) a documented review system of control, standard, tests results, clerical errors, analytical errors and any unusual analytical results? How are corrective actions implemented and documented? What system does the laboratory use to contact affected clients?
6. Y N NA Does the laboratory maintain copies of previous standard operating procedures and the dates they were in effect and analytical results for a least 5 years from date last used?

**C. PROFICIENCY TESTING**

- 1. Y N NA Has the laboratory successfully participated in approved proficiency test (PT) programs for the categories in which they are seeking certification?
- 2. Identify Programs and Results:
  - Y N NA Does the laboratory participate in additional proficiency testing programs other than those required under these standards?
- 3. Y N NA Does the laboratory analyze PT samples with the same number of replicates, standards, equipment and testing personnel as used for specimen testing?
- 4. Y N NA Does the laboratory maintain a copy of all records and documentation for a minimum of two years from the date of the proficiency testing event?
- 5. Y N NA Has the laboratory director reviewed and evaluated all PT results?
- 6. Y N NA Has the laboratory taken and documented remedial action for unacceptable PT and specimen results?



**D. QUALITY ASSURANCE AND QUALITY CONTROL**

1. Y N NA Are there records of preventive maintenance, repair and calibration of all instruments used to perform approved tests?
2. Y N NA Does the laboratory check and document the accuracy of automatic and/or adjustable pipettors and other measuring devices when placed into service and annually thereafter?
3. Y N NA Does the laboratory have the analytical balances cleaned, serviced and checked annually by qualified service personnel?
4. Y N NA Does the laboratory record temperatures daily on all equipment where temperature control is specified in SOP's, such as water baths, heating blocks, incubators, ovens, refrigerators, and freezers?
5. Y N NA Does the laboratory properly label reagents as to identity, concentration, date of preparation, storage conditions, expiration date and identity of the preparer?
6. Y N NA If the laboratory prepares its own calibrators and controls, are these made using independently prepared stock drug solutions? How does the laboratory ensure / document agreement with NIST traceable standards within 5%?
7. Y N NA Does the laboratory avoid mixing different lots of reagents in the same analytical run?
8. Y N NA Does the laboratory perform and document calibration curve for each assay performed using a blank and at least three calibrators throughout the reporting range to include the "detection limit" at least every six months or whenever there is a change in or to a procedure or equipment used?
9. Y N NA Does the laboratory analyze two levels of calibrators and/or controls with each batch of specimens?
10. Y N NA Does the laboratory analyze an appropriate matrix blank and control with each batch of specimens analyzed?
11. Y N NA Does the laboratory analyze calibrators and controls in the same manner as unknowns?
12. Y N NA Does the laboratory define control limits for all assays?
13. Y N NA Does the laboratory monitor and document the performance of calibrators and control specimens?
14. Y N NA Does the laboratory have written criteria for corrective action of unacceptable control, standard, or instrument performance?
15. Y N NA Does the laboratory take remedial action if control results exceed reference ranges?
16. Y N NA Is the remedial action documented?

17. Y N NA Does the laboratory maintain records of validation data for new and modified assays to include interferent studies?

18. Y N NA Does the analyst follow the SOP for the tests performed?

**E. CHAIN OF CUSTODY-SECURITY-SPECIMEN RETENTION FACILITY SPACE**

1. Y N NA Is there a system to document the complete chain of custody of all forensic specimens from receipt to disposal?

2. Y N NA Does the laboratory issue instructions to user agencies, including the types and amount of specimens required?

3. Y N NA Does the laboratory document the condition of the external package and individual evidence seals?

4. Y N NA Does the laboratory compare the evidence seals against requisition and document any discrepancies? How are discrepancies resolved?

5. Y N NA Does the laboratory document the condition of the specimens at the time of receipt?

6. Y N NA Does the laboratory document all persons handling the original specimens, aliquots, and extracts?

7. Y N NA Does the laboratory document all transfers of specimens, aliquots, and extracts when requested for by defendant's legal counsel and sent to another certified laboratory?

8. Y N NA Does the laboratory maintain a current list of authorized personnel?

9. Y N NA Does the laboratory restrict entry into the laboratory to only authorized personnel?

10. Y N NA Does the laboratory have provisions for securing the laboratory during non-working hours?

11. Y N NA Does the laboratory secure short and long term storage areas when not in use?

12. Y N NA Does the laboratory log-in and aliquot specimens in a secure area?

13. Y N NA Are urine specimens stored for at least 1 year at -20 degrees C. or less?

14. Y N NA Are blood specimens stored for at least 1 year at less than 8 degrees C.?

15. Y N NA Does the laboratory document the disposal of samples, aliquots, and extracts?

16. Y N NA Is there adequate space to perform the analyses?

17. Y N NA Is the lighting, ventilation and temperature control adequate?

**F. RECORDS -- REPORTING**

1. Y N NA Are records of analyses and instrumentation printouts maintained by the testing laboratory for a period of not less than 5 years?
2. Y N NA Are all specimens identified as positive on an initial drug test confirmed using a second analytical procedure utilizing different technique and chemical principle from the initial test?
3. Y N NA If blood samples are screened for ethanol by gas chromatography, is a separate aliquot from the original specimen used for confirmation? i.e. (two separate aliquots should be tested for blood alcohol)
4. Y N NA Does the laboratory maintain records, accession numbers, specimen type, QC results, acceptable reference range parameters, analyst and date of analysis for at least 5 years?
5. Y N NA Does the laboratory adequately document the available external chain of custody information?

**G. ANALYTICAL PROCESS**

**G.1 Gas Chromatography**

1. Y N NA Does the laboratory document the conditions of the gas chromatograph, including the detector response daily?
2. Y N NA Does the laboratory document changes of septa as specified in the SOP?
3. Y N NA Is there documentation of liners being cleaned or replaced as specified in the SOP?
4. Y N NA Does the laboratory document the performance of new columns before use?
6. Y N NA Does the laboratory use an internal standard for qualitative and quantitative analysis?
7. Y N NA For quantitative analysis does the internal standard have similar chemical and physical properties to that of the analyte?
8. Y N NA Does the laboratory monitor the response (area or peak height) for the internal standard to ensure consistency of the analytical system over time?

**G2. Gas Chromatography Mass Spectrometry (GC-MS)**

1. Y N NA Does the laboratory maintain records of mass spectrometric tuning?
2. Y N NA Does the laboratory have written criteria for an acceptable mass-spectrometric tune?
3. Y N NA If the tune is unacceptable, is corrective action documented?

4. Y N NA If the laboratory uses full scan mass spectral identification through library searching, are there documented criteria for acceptability?
5. Y N NA If the laboratory uses selected ion monitoring for identification does it compare ion ratios and retention times between calibrators, controls and specimens?
6. Y N NA If the laboratory has written its' own software, has it been documented and the accuracy verified?

**G3. Immunoassays**

1. Y N NA Do the calibrators give adequate separation or measurement units (absorbance intensity or counts per minute)?
2. Y N NA If the laboratory uses radioimmunoassay does it determine background counts before each run or daily, including the background in each well of a multi-well counter?
3. Y N NA Do the background counts meet the acceptable criteria?

**G4. Thin Layer Chromatography**

1. Y N NA Does the laboratory apply unextracted standards to each thin layer chromatographic plate?
2. Y N NA Does the laboratory evaluate new thin layer chromatographic plates before placing them into service? How does the laboratory establish and document acceptable performance?
3. Y N NA Does the spotting technique preclude the possibility of contamination and/or carry-over? How is this verified?
4. Y N NA Does the laboratory measure all appropriate RF values for qualitative identification purposes?
5. Y N NA If the laboratory uses sequential color reactions, are these recorded?
6. Y N NA Does the laboratory maintain records of thin layer chromatographic plates?
7. Y N NA Does the laboratory analyze an appropriate matrix blank with each batch of specimens analyzed?

**G5. High Pressure Liquid Chromatography (HPLC)**

1. Y N NA Does the laboratory evaluate the performance of new columns before use? How?
2. Y N NA If the laboratory recycles eluting solvents, are there standards for acceptability?
3. Y N NA Does the laboratory use an internal standard with each batch of specimens for qualitative and quantitative analysis?

4. Y N NA If an internal standard is used for quantitative analysis, are its chemical and physical properties similar to the analyte?
5. Y N NA Does the laboratory monitor the response (area or peak height) for the internal standard to ensure consistency of the analytical system over time?

## APPENDIX L

### EDUCATION AND TREATMENT PROGRAMS

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

- I. Problem Drinker/Drug User
  - A. A client who exhibits one of the following indicators:
    1. Two or more previous alcohol/drug related arrests and/or convictions;
    2. BAC of equal to or greater than .25;
    3. Loss of control of alcohol/drug use;
    4. Self admission of problem drinking/drug use;
    5. Prior diagnosis of problem drinking/drug use by a competent authority;
    6. Organic brain disease associated with alcohol/drug use.
  - B. A client who exhibits two or more of the following indicators:
    1. One prior alcohol/drug related arrest and/or conviction;
    2. M-F score equal to or greater than 12;
    3. BAC equal to or greater than .15;
    4. Employment problems due to alcohol/drug use;
    5. Previous contact with social and/or medical facilities for problems associated with alcohol/drug use;
    6. Blackouts associated with alcohol/drug use;
    7. Passing out associated with alcohol/drug use;

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

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

III. Non-problem Social Drinker/Drug User: A client who exhibits none of the above listed indicators. Traditionally, all DUI/DWAI offenders have been handled by means of punitive sanctions including fines and jail sentences. While sanctions of this variety do provide a deterrent for the social user, there is considerable evidence punitive sanctions have little effect on the problem-drinking/drugging driver. Therefore, it is recognized more positive rehabilitation efforts must be attempted if the driver is to be helped. It is true the Problem Drinker/Drug User cannot be helped until the individual(s) is ready to do something. However, it is also true the decision may not be made until some kind of crisis is reached. Problem Drinkers/Drug users are treatable. Their problem should be approached in much the same way as other chronic medical and psychological problems. The goal of treatment is then viewed as one of control rather than absolute cure. Abstinence is often sought as a primary objective, but other considerations such as improved social or job adjustments are often better guides in evaluating the success or failure of therapy. Thus, temporary relapses should not always be termed as failure any more than a diabetic's slip in diet. Education/Treatment is designed to help the problem drinking or drugging driver find, face up to and understand the problems or influences causing the inappropriate drinking and drug behavior.

## **Level I Programs**

Level I Programs are short term, didactic alcohol and drug driving education programs. They are not designed to be therapy sessions although they certainly may be therapeutic. It is intended this type of program provide information about alcohol, drugs and effects on driving so non-problem social drinkers can learn the facts and decide whether they need to make any changes in their drinking patterns. If they should decide to change, they will have some knowledge on which to base a decision. In most cases, the trauma of being arrested and/or being involved in a crash, along with the possibility of fine, jail sentence, community service and a screening evaluation has provided a learning experience. People will state firmly they have “learned their lesson” and will never drive under the influence or even impaired again. This may be correct, but research shows non-problem social drinkers who successfully complete a program shows better in regard to traffic safety matters than do those who do not attend. We should not cut their lesson by not providing education about drinking, drugs and driving. Any agency or individual may operate a Level I program after certification by ADAD. In addition to program certification, instructors must have ADAD counselor certification as well as have education, experience and/or training in either social science, psychology, counseling, alcohol/drug rehabilitation, education traffic safety or other related fields. Non certified volunteers may be used if supervised by a certified instructor. Only the non-problem social drinker, according to ADAD criteria, shall be enrolled in this type of program unless certain procedures involving the referring court are followed and appropriate client file charting is done. The Level I programs shall range between four and eight sessions in length. Each session should be at least two hours long and total 8-16 hours. While the majority of programs are conducted once a week for 6-8 weeks, it is permissible to have “marathon” on-day programs if there are at least four, two-hour sessions in which all content/topic requirements are met. There are other formats which may meet standards. The content/topic requirements of a Level I program are: 1) an ADAD approved pre-post test; 2) history, use and definition of alcohol, alcohol as a drug; 3) physiological effects of alcohol, other drugs, legal and illegal and their effects on driving; 4) psychological and sociological consequences of use/abuse of alcohol or drugs; 5) blood alcohol concentration and effects on driving performance; 6) court penalties; 7) motor vehicle division laws and penalties; 8) review of treatment approaches; and, 9) various programs and alternatives to drinking and driving. Level I programs must be conducted in facilities which meet ADAD physical requirements for outpatient programs. The group size is limited to a maximum of 25 persons and an individual client record has to be maintained on each client. The Level I client record must contain court documents, release(s) of information, pre-post tests results, attendance/completion data and generalized group notes as to content/topic requirements covered per session. The Level I program must have a written policy concerning reporting of absences, failure to enroll in and/or complete, failure to meet fiscal obligations, and progress to the courts, ADAD, probation department, ADES and Revenue Department Hearing Section.

## **Level II Programs**

Level II programs are outpatient and/or intensive residential treatment (IRT) programs which have ADAD certification and licensure. They are designed to be used for incipient and problem drinkers/drug abusers. Counseling staff must meet ADAD counselor certification requirements within the prescribed time frame, and all uncertified counselors must be supervised by a Level III counselor. Clients must be processed at intake utilizing ADAD client management methodology and a differential diagnostic procedure in a standardized manner. The educational component consists of therapeutically oriented sessions which simultaneously combine cognitive education on alcohol and driving with group process. This component must range between 8 and 12 sessions in length and be 20-30 hours long. No more than one three-hour session can be conducted within 24 hours and no more than two sessions can be conducted per week. The content/topic requirements which must be combined with group process are: an ADAD approved pre-post test; history, use and definition of alcohol; alcohol as a drug; physiological effects of alcohol; other drugs, legal and illegal and their effects on driving; psychological and sociological consequences of use/ abuse of alcohol or drugs; blood alcohol concentration and effects on driving performance; court penalties; motor vehicle division laws and penalties;



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

The length of Level II therapy must be a minimum of 26 hours long over 16 weeks for an incipient and a minimum of 40 hours over 20 weeks for a problem drinker/drug abuser. With both drinker types, the minimum hourly requirements as well as the minimum length of treatment must be met; and no part of the educational component can be counted as part of the 26 or 40 hours. There are not time frames attached to individual session length, but group therapy sessions cannot be less than 90 minutes long. The goal of rehabilitation is to reduce the probability of another impaired driving offense. Treatment is not intended to take the place of traditional sanctions, but rather to work in conjunction with them.

### **Detoxification Centers**

As a result of legislation which decriminalized public intoxication, the detoxification (detox) center was instituted. Any person who is in an extremely intoxicated condition may be taken directly to one of these centers. You may encounter such a person either walking in the street or in any public place, possibly causing a disturbance. This individual may be an obvious danger to himself and/or others and should receive professional help immediately. The detox center is equipped and staffed to monitor and safeguard the problem drinker through the withdrawal period. Any person brought in is immediately given an in-take evaluation to determine their general health condition and the severity of alcohol dependence. The person may be released after a few hours, if the evaluation shows the present intoxication to be isolated and not indicative of long term alcohol abuse or dependency. If the evaluation does indicate chronic or severe alcoholism, the patient may remain at the center for five full days. The center may then refer the individual to a long term program. Most drinking drivers encountered will not be in such an intoxicated state that referral to a detox center would be appropriate. However, if the condition does warrant referral, the individual should first be processed as any other person arrested for DUI. You should not only be familiar with those agencies available, but also with the agency's particular procedures as well. There may be an occasion when no arrest will be made. However, that occasion may provide the opportunity for you to give the subject the name and telephone number of a treatment agency if the person wishes to seek help on their own.

## APPENDIX M

### Standardized Field Sobriety Tests (SFST)

Examples of the SFST maneuvers adopted from the National Highway Traffic Safety Administration (NHTSA) are presented in this section. The SFST maneuvers should be performed in this specific order at the beginning of each roadside evaluation. Other authorized maneuvers may be performed in conjunction with the SFSTs. It is recommended that the three validated maneuvers be performed first in the following order, with other approved, subsequent maneuvers chosen by the officer performed after the validated SFST maneuvers.

Horizontal Gaze Nystagmus

Walk and Turn

One-Leg Stand

It is recommended that any subsequent maneuvers be performed in the same order each time roadside maneuvers are administered. A specific order allows for consistency in maneuver administration and is also important for officer safety. A practiced plan removes distractions and improves officer safety.

#### Horizontal Gaze Nystagmus

While conducting the HGN and VGN maneuvers, the officer should also be checking the eyes for **Equal Tracking, Equal Pupil Size, and any Other eye condition.**

The administrative procedures for HGN and VGN are as follows:

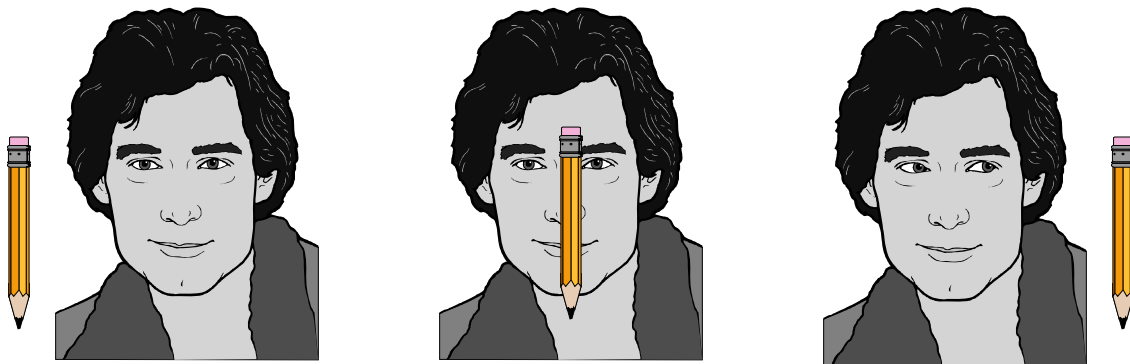
1. Eyeglasses
2. Verbal instructions
3. Position object (12-15 inches) (30-38 cm)
4. Pupil size and resting nystagmus
5. Equal tracking
6. Check for lack of smooth pursuit
7. Check for distinct and sustained nystagmus at maximum deviation
8. Check for onset of nystagmus prior to 45 degrees
9. Total the clues
10. Check for Vertical Gaze Nystagmus

**Check each eye independently beginning with the suspect's left and compare.**

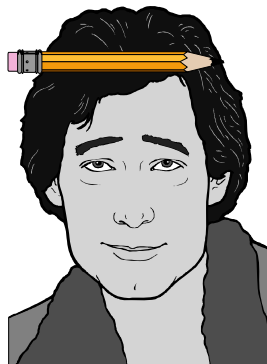
The three clues for Horizontal Gaze Nystagmus are:

- Lack of smooth pursuit.
- Distinct and sustained nystagmus at maximum deviation.
- Onset of nystagmus prior to 45 degrees

### Horizontal Gaze Nystagmus



### Vertical Gaze Nystagmus



## Walk and Turn

The Walk and Turn is a divided attention task requiring both mental and physical acuity. Observations for clues of the Walk and Turn test include both the Instruction Stage and the Walking Stage. The administrative procedures for the Walk and Turn test include the following:

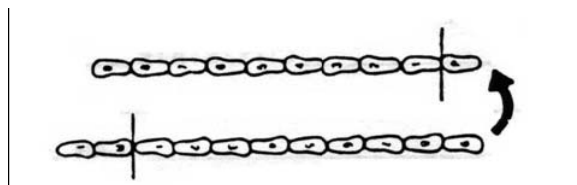
The line can be real or implied. In a controlled environment, a physical line is recommended. In a field environment, if safe to do so, a side marker line, a parking lot line, or a sidewalk seam may be used.

1. Verbal Instructions: Ask the subject to assume a heel to toe stance with the with the right front foot in front of the left foot, arms down at the side. Instruct the subject, Do not begin until told to do so. If the line is implied, the instructions can state, "Take 9 heel to toe steps in straight line..."
2. Take 9 heel-to-toe Steps, Turn, 9 heel-to-toe Steps
3. Turn Procedures: Turn around on the line using several small steps
4. While Walking: Keep watching feet  
Arms down at sides  
Count your steps out loud  
Don't stop during the walk

### Walk and Turn Clues

1. Can't balance during instructions
2. Starts too soon
3. Stops while walking
4. Doesn't touch heel-to-toe
5. Steps off line
6. Uses arms to balance
7. Improper turn (or loses balance on turn)
8. Wrong number of steps

**Note: If suspect can't do the test, record observed clues and document the reason for not completing the test.**



## One Leg Stand

The One Leg Stand maneuver is a divided attention test that requires both mental and physical acuity. The One Leg Stand test consists of two stages; the instruction stage, and the balance and counting stage.

The administrative procedures for the One Leg stand test include the following:

Instructions Stage:

Stand straight, feet together

Keep your arms at sides

Maintain this position until I tell you to begin. Do you understand so far?

Balance and Counting Stage:

When I tell you, raise one foot off of the ground approximately 6 inches (either left or right foot).

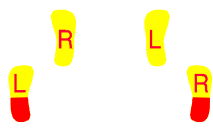
Keep raised foot approximately six inches (15 cm) off the ground, pointing your foot parallel to the ground

Keep both legs straight.

Keep your eyes on the elevated foot.

Count out loud in the following manner: "One thousand and one, one thousand and two, one thousand and three and so on", until I tell you to stop

**One Leg**



L

<input type="checkbox"/>	<input type="checkbox"/>	Sways while Balancing
<input type="checkbox"/>	<input type="checkbox"/>	Uses Arms to Balance
<input type="checkbox"/>	<input type="checkbox"/>	Hopping
<input type="checkbox"/>	<input type="checkbox"/>	Puts Foot Down
<input type="checkbox"/>	<input type="checkbox"/>	

Type of Footwear \_\_\_\_\_

Other \_\_\_\_\_

**Note: It's important for the officer to time the 30 second count for the test.**

## APPENDIX N

SENATE BILL 07-154

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** 42-4-1301.1 (2) (a), Colorado Revised Statutes, is amended, and the said 42-4-1301.1 (2) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

**42-4-1301.1. Expressed consent for the taking of blood, breath, urine, or saliva sample - testing.**

(2) (a) (I) Any A person who drives any A motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to take and complete, and to cooperate in the taking and completing of, any test or tests of such THE person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI, DUI per se, DWAI, habitual user, or UDD. Except as otherwise provided in this section, if a person who is twenty-one years of age or older requests that said THE test be a blood test, then the test shall be of his or her blood; but, if such THE person requests that a specimen of his or her blood not be drawn, then a specimen of such THE person's breath shall be obtained and tested. A person who is under twenty-one years of age shall be entitled to request a blood test unless the alleged violation is UDD, in which case a specimen of such THE person's breath shall be obtained and tested, except as provided in subparagraph (II) of this paragraph (a).

(II) EXCEPT AS OTHERWISE PROVIDED IN PARAGRAPH (a.5) OF THIS SUBSECTION (2), if a person elects either a blood test or a breath test, such THE person shall not be permitted to change such THE election, and, if such THE person fails to take and complete, and to cooperate in the completing of, the test elected, such THE failure shall be deemed to be a refusal to submit to testing. If such THE person is unable to take, or to complete, or to cooperate in the completing of a breath test because of injuries, illness, disease, physical infirmity, or physical incapacity, or if such THE person is receiving medical treatment at a location at which a breath testing instrument certified by the department of public health and environment is not available, the test shall be of such THE person's blood.

(III) If a law enforcement officer requests a test under this paragraph (a), the person must cooperate with the request such that the sample of blood or breath can be obtained within two hours of the person's driving.

(a.5) (I) IF A LAW ENFORCEMENT OFFICER WHO REQUESTS A PERSON TO TAKE A BREATH OR BLOOD TEST UNDER PARAGRAPH (a) OF THIS SUBSECTION (2) DETERMINES THERE ARE EXTRAORDINARY CIRCUMSTANCES THAT PREVENT THE COMPLETION OF THE TEST ELECTED BY THE PERSON WITHIN THE TWO-HOUR TIME PERIOD REQUIRED BY SUBPARAGRAPH (III) OF PARAGRAPH (a) OF THIS SUBSECTION (2), THE OFFICER SHALL INFORM THE PERSON OF THE EXTRAORDINARY CIRCUMSTANCES AND REQUEST AND DIRECT THE PERSON TO TAKE AND COMPLETE THE OTHER TEST DESCRIBED IN PARAGRAPH (a) OF THIS SUBSECTION (2). THE PERSON SHALL THEN BE REQUIRED TO TAKE AND COMPLETE, AND TO COOPERATE IN THE COMPLETING OF, THE OTHER TEST.

(II) A PERSON WHO INITIALLY REQUESTS AND ELECTS TO TAKE A PAGE 3-SENATE BILL 07-154 BLOOD OR BREATH TEST, BUT WHO IS REQUESTED AND DIRECTED BY THE LAW ENFORCEMENT OFFICER TO TAKE THE OTHER TEST BECAUSE OF THE EXTRAORDINARY CIRCUMSTANCES DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (a.5), MAY CHANGE HIS OR HER ELECTION FOR THE PURPOSE OF COMPLYING WITH THE OFFICER'S REQUEST. THE CHANGE IN THE ELECTION OF WHICH TEST TO TAKE SHALL NOT BE DEEMED TO BE A REFUSAL TO SUBMIT TO TESTING.

(III) IF THE PERSON FAILS TO TAKE AND COMPLETE, AND TO COOPERATE IN THE COMPLETING OF, THE OTHER TEST REQUESTED BY THE LAW ENFORCEMENT OFFICER PURSUANT TO SUBPARAGRAPH (I) OF THIS PARAGRAPH (a.5), THE FAILURE SHALL BE DEEMED TO BE A REFUSAL TO SUBMIT TO TESTING.

(IV) (A) AS USED IN THIS PARAGRAPH (a.5), "EXTRAORDINARY CIRCUMSTANCES" MEANS CIRCUMSTANCES BEYOND THE CONTROL OF, AND NOT CREATED BY, THE LAW ENFORCEMENT OFFICER WHO REQUESTS AND DIRECTS A PERSON TO TAKE A BLOOD OR BREATH TEST IN ACCORDANCE WITH THIS SUBSECTION (2) OR THE LAW ENFORCEMENT AUTHORITY WITH WHOM THE OFFICER IS EMPLOYED.

(B) "EXTRAORDINARY CIRCUMSTANCES" INCLUDE, BUT SHALL NOT BE LIMITED TO, WEATHER-RELATED DELAYS, HIGH CALL VOLUME AFFECTING MEDICAL PERSONNEL, POWER OUTAGES, MALFUNCTIONING BREATH TEST EQUIPMENT, AND OTHER CIRCUMSTANCES THAT PRECLUDE THE TIMELY COLLECTION AND TESTING OF A BLOOD OR BREATH SAMPLE BY A QUALIFIED PERSON IN ACCORDANCE WITH LAW.

(C) "EXTRAORDINARY CIRCUMSTANCES" DO NOT INCLUDE INCONVENIENCE, A BUSY WORK LOAD ON THE PART OF THE LAW ENFORCEMENT OFFICER OR LAW ENFORCEMENT AUTHORITY, MINOR DELAY THAT DOES NOT COMPROMISE THE TWO-HOUR TEST PERIOD SPECIFIED IN SUBPARAGRAPH (III) OF PARAGRAPH (a) OF THIS SUBSECTION (2), OR ROUTINE CIRCUMSTANCES THAT ARE SUBJECT TO THE CONTROL OF THE LAW ENFORCEMENT OFFICER OR LAW ENFORCEMENT AUTHORITY.

**SECTION 2. Effective date - applicability.** This act shall take effect July 1, 2007, and shall apply to offenses committed on or after said date.