

## IMPLIED CONSENT

Why are we discussing Implied Consent? What does Implied Consent have to do with Breath Testing Operations? After stopping a motorist on suspicion of DUI, the officer typically checks for signs of impairment and may ask the driver to submit to a breathalyzer test to determine his or her breath-alcohol (BrAC) or blood alcohol concentration (BAC). But not everyone willingly provides a breath sample and police officers cannot force DUI suspects to blow into a tube. More than 20 percent of drunk driving suspects in the U.S. refuse to take a breathalyzer or other BAC test when an officer suspects drunk driving, according to the National Highway Traffic Safety Administration (NHTSA). It varies greatly from state to state, however the act of refusal, though, comes with its own penalties.

Under "implied consent" laws in all states, when they apply for a driver's license, motorists give consent to test or tests to determine impairment. Should a driver refuse to submit to testing when an officer has reasonable suspicion that the driver is under the influence, the driver risks automatic license suspension along with possible further penalties. Consequences for breathalyzer refusal vary by state, which may explain the wide variance in statewide refusal rates, but most states impose an automatic driver's license suspension upon refusal of a BAC/BrAC test. Suspensions usually increase for a refusing motorist with past DUI convictions, sometimes including jail time.

### DEFINITION OF IMPLIED CONSENT

- A. 1. Any person who operates a motor vehicle upon the public roads, highways, streets, turnpikes or other public place or upon any private road, street, alley or lane which provides access to one or more single or multi-family dwellings within this state shall be deemed to have given consent to a test or tests of such person's blood or breath, for the purpose of determining the alcohol concentration as defined in [Section 756](#) of this title, and such person's blood, saliva or urine for determining the presence or concentration of any other intoxicating substance therein as defined in this section, if arrested for any offense arising out of acts alleged to have been committed while the person was operating or in actual physical control of a motor vehicle upon the public roads, highways, streets, turnpikes or other public place or upon any private road, street, alley or lane which provides access to one or more single or multi-family dwellings while under the influence of alcohol or other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance, or if the person is involved in a traffic accident that resulted in the immediate death or serious injury of any person and is removed from the scene of the accident to a hospital or other health care facility outside the State of Oklahoma before a law enforcement officer can effect an arrest. (47 O.S. § 751)

### IMPLIED CONSENT LAWS WILL ONLY APPLY AS FOLLOWS:

The person must be operating or be in actual physical control of a motor vehicle;

Said operation must occur within this state;

Driving must also take place upon public roads, highways, streets, turnpikes, or other public place or upon any private road, street, alley, or lane, which provides access to one or more single or multi-family dwellings within this state.

And if the person is arrested for any offense arising out of acts alleged to have been committed while the person was operating or in actual physical control of a motor vehicle while under the influence of alcohol or other intoxicant. (47 O.S. § 751).

## **CONSEQUENCE OF OKLAHOMA'S IMPLIED CONSENT LAWS:**

### **PERIODS OF REVOCATION: 47 O.S. § 6-205.1**

A. The driving privilege of a person who is convicted of any offense as provided in paragraph 2 of subsection A of Section 6-205 of this title, or a person who has refused to submit to a test or tests as provided in Section 753 of this title, or a person whose alcohol concentration is subject to the provisions of Section 754 of this title shall be revoked or denied by Service Oklahoma for the following period, as applicable:

1. The first license revocation pursuant to paragraph 2 of subsection A of Section 6-205 of this title or Section 753 or 754 of this title, within ten (10) years preceding the date of arrest relating thereto, shall be for a period of no less than one hundred eighty (180) days and until the person completes the Impaired Driver Accountability Program in accordance with the rules of the Board of Tests for Alcohol and Drug Influence. The period of revocation and the Impaired Driver Accountability Program shall run concurrently, and each shall be for no less than one hundred eighty (180) days;
2. A revocation pursuant to paragraph 2 of subsection A of Section 6-205 of this title or Section 753 or 754 of this title shall be for a period of no less than one (1) year and until the person completes the Impaired Driver Accountability Program in accordance with the rules of the Board of Tests for Alcohol and Drug Influence, if within ten (10) years preceding the date of arrest relating thereto, as shown by the records of Service Oklahoma:
  - a. a prior revocation commenced pursuant to paragraph 2 or 6 of subsection A of Section 6-205 of this title or Section 753 or 754 of this title, or
  - b. the record of the person reflects a prior conviction in another jurisdiction which did not result in a revocation of Oklahoma driving privileges, for a violation substantially similar to paragraph 2 of subsection A of Section 6-205 of this title, and the person was not a resident or a licensee of Oklahoma at the time of the offense resulting in the conviction. The period of revocation and the Impaired Driver Accountability Program shall run concurrently, and each shall be for no less than one (1) year;
3. A revocation pursuant to paragraph 2 of subsection A of Section 6-205 of this title or Section 753 or 754 of this title shall be for a period of no less than two (2) years and until the person completes the Impaired Driver Accountability Program in accordance with the rules of the Board of Tests for Alcohol and Drug Influence, if within ten (10) years preceding the date of arrest relating thereto, as shown by the records of Service Oklahoma:

- a. two or more prior revocations commenced pursuant to paragraph 2 or 6 of subsection A of Section 6-205 of this title or Section 753 or 754 of this title,
- b. two or more current enrollments in or previous completions of the Impaired Driver Accountability Program,
- c. the record of the person reflects two or more prior convictions in another jurisdiction which did not result in a revocation of Oklahoma driving privileges, for a violation substantially like paragraph 2 of subsection A of Section 6-205 of this title, and the person was not a resident or a licensee of Oklahoma at the time of the offense resulting in the conviction, or
- d. any combination of two or more prior revocations, current enrollments in or previous completions of the Impaired Driver Accountability Program, or convictions as described in subparagraphs a, b, and c of this paragraph. The period of revocation and the Impaired Driver Accountability Program shall run concurrently, and each shall be for no less than two (2) years; or

4. The revocation of the driving privilege of any person under Section 6-205, 6-205.1, 753, or 754 of this title shall not run concurrently with any other revocation of driving privilege under Section 6-205, 6-205.1, 753, or 754 of this title resulting from a different incident.

B. The driving privilege of a person who is convicted of any offense as provided in paragraph 3 or 6 of subsection A of Section 6-205 of this title shall be revoked or denied by Service Oklahoma for the following period, as applicable:

1. The first license revocation shall be for one hundred eighty (180) days, which shall be modified upon request; provided, any modification under this paragraph shall apply to Class D driver licenses only;

2. A revocation shall be for a period of one (1) year if within ten (10) years preceding the date of arrest relating thereto, as shown by the records of Service Oklahoma:

a. a prior revocation commenced pursuant to paragraph 2, 3 or 6 of subsection A of Section 6-205 of this title, or Section 753 or 754 of this title,

b. a prior revocation commenced pursuant to paragraph 2, 3 or 6 of subsection A of Section 6-205 of this title or Section 753 or 754 of this title, or current enrollment in or previous completion of the Impaired Driver Accountability Program, or

c. the record of the person reflects a prior conviction in another jurisdiction which did not result in a revocation of Oklahoma driving privileges, for a violation substantially similar to paragraph 2, 3 or 6 of subsection A of Section 6-205 of this title, and the person was not a resident or a licensee of Oklahoma at the time of the offense resulting in the conviction.

Such period shall not be modified; or

3. A revocation shall be for a period of three (3) years if within ten (10) years preceding the date of arrest relating thereto, as shown by the records of Service Oklahoma:

- a. two or more prior revocations commenced pursuant to paragraph 2 or 6 of subsection A of Section 6-205 of this title, or Section 753 or 754 of this title,
- b. two or more prior revocations commenced pursuant to paragraph 2 or 6 of subsection A of Section 6-205 of this title or Section 753 or 754 of this title, or two or more current enrollments in or previous completions of the Impaired Driver Accountability Program,
- c. the record of the person reflects two or more prior convictions in another jurisdiction which did not result in a revocation of Oklahoma driving privileges, for a violation substantially similar to paragraph 2 or 6 of subsection A of Section 6-205 of this title, and the person was not a resident or licensee of Oklahoma at the time of the offense resulting in the conviction, or
- d. any combination of two or more prior revocations, current enrollments in or previous completions of the Impaired Driver Accountability Program, or convictions as described in subparagraphs a and b or c of this paragraph.

Such period shall not be modified.

The revocation of the driving privilege of any person under this subsection shall not run concurrently with any other withdrawal of driving privilege resulting from a different incident and which requires the driving privilege to be withdrawn for a prescribed amount of time. A denial based on a conviction of any offense as provided in paragraph 6 of subsection A of Section 6-205 of this title shall become effective on the first day the convicted person is otherwise eligible to apply for and be granted driving privileges if the person was not eligible to do so at the time of the conviction.

C. For the purposes of this section:

- 1. The term "conviction" includes a juvenile delinquency adjudication by a court or any notification from a court pursuant to Section 6-107.1 of this title; and
- 2. The term "revocation" includes a denial of driving privileges by Service Oklahoma.

D. Each period of revocation in subsection A of this section shall be mandatory and neither Service Oklahoma nor any court shall grant driving privileges based upon hardship or otherwise for the duration of that period, except under the Impaired Driver Accountability Program in accordance with the rules of the Board of Tests for Alcohol and Drug Influence.

E. Any appeal of a revocation or denial of driving privileges in subsection A of this section shall be governed by Section 6-211 of this title.

## BRIEF OVERVIEW OF OKLAHOMA'S IMPLIED CONSENT LAW:

Implied consent revocations are civil in nature and not criminal. Therefore, to sustain an Implied Consent Revocation the officers must be able to show that the conditions of the Implied Consent Laws were met with "a preponderance of the evidence" and not "beyond a reasonable doubt".

The officer must keep in mind that this burden of proof will only sustain the revocation of driving privileges under Implied Consent and not necessarily meet the burden to obtain a criminal conviction. Therefore, the officer should also be certain that his evidence is strong enough to uphold a criminal conviction. If this is done the officer should have no trouble in meeting the burden of proof in an Implied Consent procedure as the preponderance of the evidence test is a lesser standard than the beyond a reasonable doubt test.



Civil Hearing

Another factor to consider in the civil-criminal dichotomy is that civil law does not necessarily afford all the same rights and protections of the criminal proceedings. According to William Geldart, Introduction to English Law 146 (D.C.M. Yardley ed., 9<sup>th</sup> ed. 1985),

"The difference between civil law and criminal law turns on the difference between two different objects which law seeks to pursue - redress or punishment. The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrongdoer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrongdoer; to give him and others a strong inducement not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution."

One of the notable differences between civil law and criminal law is the punishment. In cases of criminal law, a person found guilty is punished by incarceration in a prison, a fine, or on some occasion's death. Whereas, in the case of civil law pertaining to the Oklahoma Driver License, the driver either loses their driving privilege or retains them. A criminal litigation is more serious than civil litigation, so the criminal defendant will have more rights and protections provided to them than a civil defendant.

Oklahoma enacted the Implied Consent Laws in 1967 which went into effect January 1, 1969.

Initially, the Implied Consent Laws could only be invoked if the person were operating a motor vehicle or was in Actual Physical Control of a motor vehicle on the public streets, highways, and turnpikes. However, subsequent legislative enactments included "other public places, "and "public roads. "Public place has been defined by the Oklahoma Supreme Court as a privately owned property but generally open to the public, private road, street, alley, or lane which provides access to one or more single or multi-family dwellings. Further, the property must also be adjacent to a public road, highway, street, or turnpike with access to same. Prior to this enactment, the state could not revoke a person's driving privileges if arrested in a parking lot such as Target, Homeland, etc., under the Implied Consent laws of Oklahoma.

Further, Implied Consent Laws originally permitted the state to revoke driving privileges only if the arrested person refused to submit to the blood alcohol test. Then the statute was changed to provide that the state may revoke driving privileges if the person refuses to submit to a chemical test, or if they submit to a chemical test and have an alcohol concentration of 0.10 BrAC g/210L Breath Alcohol Concentration or more. Today the alcohol concentration limit is 0.08 BrAC g/210L.

A person previously had the choice to submit to a breath test or a blood test. However, the current statutes provide that each law enforcement agency may designate which test will be the state's test and if the agency does not designate a test, the test administered will be a breath test. Today a driver does not have the right to choose between a breath test or blood test;

Currently, a person is entitled to request an additional test of his/her choosing at their own expense, but only after he/she submits to the requested state's test.

A blood test is an authorized procedure to determine blood alcohol content (BAC). There are some limitations of the blood test which will be discussed in other areas of these lessons.

At this time, the only persons authorized to draw blood according to 47 O.S. §67-752.A:

1. Licensed medical doctors,
2. Licensed osteopathic physicians,
3. Licensed chiropractic physicians,
4. Registered nurses,
5. Licensed practical nurses,
6. Physician's assistants, certified by any state's appropriate licensing authority
7. Employees of a hospital or other health care facility authorized by the hospital or health care facility to withdraw blood
8. Intermediate Emergency Medical Technicians, Advanced Emergency Medical Technicians or Paramedics, acting within the scope of practice prescribed by their medical director.

## REASONABLE GROUNDS

Before a law enforcement officer may invoke the Implied Consent laws, he must have reasonable grounds to believe the person operated a motor vehicle while under the influence of alcohol or another intoxicant while on a public street, turnpike, road, or other public place.

Though a traffic violation provides a concrete foundation to initiate a traffic stop, a traffic violation is not required to stop a vehicle so long as the officer has reasonable suspicion to believe the driver is DUI or APC.

Some facts which will give the officer reasonable grounds to believe a person is driving or in actual physical control of a motor vehicle while under the influence of intoxicants are:

The physical appearance of the driver (i.e., gives the impression that he is intoxicated);  
Any type of erratic, suspicious or unusual driving behavior indicative of intoxication (weaving, slow speed, abnormal starting and stopping, stopping for no apparent reason, improper signaling, etc.);

The results and findings of a traffic accident investigation may constitute reasonable grounds to arrest the driver of a vehicle involved in the accident.

## REASONABLE GROUNDS: TRAFFIC ACCIDENTS

An exception to the misdemeanor arrest for DUI as a result of a traffic accident even though the investigating officer did not witness driving. See Title 22 O.S. § 3.196.A.5

5. When the officer has probable cause to believe that the party was driving or in actual physical control of a motor vehicle involved in an accident upon the public highways, streets or turnpikes and was under the influence of alcohol or intoxicating liquor or who was under the influence of any substance included in the Uniform Controlled Dangerous Substances Act, Sections [2-101 et seq. of Title 63](#) of the Oklahoma Statutes;

Upon the conclusion of an accident investigation, the officer may arrest the driver for DUI without first obtaining a warrant. However, this may only be done when the officer establishes reasonable grounds to believe the person was driving under the influence. In addition to unusual driving or erratic behavior, the officer should observe the driver and look for physical appearance's indicative of intoxication such as:

Odor of an alcoholic beverage, Motor skills, the way the driver is dressed (soiled clothing, drinks spilled on clothing, hair, etc.), Contents of subject's conversation, Subject's demeanor (cooperative, combative, passive, indecisive, confusion, short attention span, talkative, silent, aggressive, apologetic, etc.).

Officers may ask questions prior to arrest pertaining to drinking activities without violating the civil rights of the subject.

Have they been drinking?

Number of drinks

What time did they have their last drink?

In accident cases, officers should ask if the driver has had a drink since the accident. Field sobriety test(s) may be given, but they are not required. Do not administer the standardized field sobriety tests if you have not received documented training.

Field sobriety tests are used for developing probable cause. They are not tests to determine actual levels of alcohol concentration. Record your observations, not estimated levels of alcohol concentration. Admissions against interest by the driver that he is the driver and is intoxicated are also admissible in a revocation hearing and may be used to establish probable cause.

Statements from witnesses will also enhance the officer's reasonable grounds and should be considered in the officer's final determination and any such statements included in the affidavit. Include names and addresses of all witnesses on the Officer's Affidavit.

There are numerous indicators that will support the officer's reasonable grounds and they should all be included on both the Officer's Affidavit and arrest reports to insure a strong case both civilly and criminally.

The term "reasonable grounds to believe" is synonymous with the term "probable cause", which is generally defined as:

"Any facts which exist upon reasonable inquiry and would tend to induce a reasonably intelligent man/female to believe that the accused had committed the crime charged."

## **ACTUAL PHYSICAL CONTROL (APC)**

Actual Physical Control requires the same reasonable grounds to believe that the person is under the influence of an intoxicant as does D.U.I. and that he is in actual physical control of his vehicle.

The key elements to look for are:

Is the vehicle operable under its own power?

Does the person have immediate control of said vehicle? (i.e., keys in his possession or control and is subject inside the vehicle).



Is the vehicle on a public road, street, highway, turnpike, or other public place? You cannot arrest a person in their own driveway unless you witnessed them driving or have established probable cause that they had previously been involved in an accident.

There has been some controversy in the courts as to whether an intoxicated driver passed out at the controls of their vehicle constitutes A.P.C... The majority view holds that unconscious drivers are A.P.C. and subject to arrest. Typically, a driver outside of the vehicle is not in A.P.C.

Factors to consider in A.P.C. are:

Whether vehicle is operable under its own power

Keys accessible

Position of person in vehicle

Admission of driver

It is not necessary for the engine to be running for the person to be committing the crime of Actual Physical Control (A.P.C.). All that is needed to constitute A.P.C. is for the person to have the ability to manage the automobile, regardless of whether they exercised that ability. *Hughes v. State* 535 P.2d 1023.

NOTE: When executing an A.P.C. arrest, the officer must check the car and ascertain whether it is operable. Start the vehicle, move the vehicle three feet forward, if possible, then backwards. Make sure the vehicle is drivable.

## ARREST

Invoking Implied Consent requires an arrest or if the person is involved in a traffic accident that resulted in the immediate death or serious injury of any person and is removed from the scene of the accident to a hospital or other health care facility outside the State of Oklahoma before a law enforcement officer can effect an arrest.

## §11-902. PERSONS UNDER THE INFLUENCE.

A. It is unlawful and punishable as provided in this section for any person to drive, operate, or be in actual physical control of a motor vehicle within this state, whether upon public roads, highways, streets, turnpikes, other public places or upon any private road, street, alley, or lane which provides access to one or more single or multi-family dwellings, who:

1. Has a blood or breath alcohol concentration, as defined in Section 756 of this title of eight-hundredths (0.08) or more at the time of a test of such person's blood or breath administered within two (2) hours after the arrest of such person.

2. Is under the influence of alcohol.
3. Has any amount of a Schedule I chemical or controlled substance, as defined in Section 2-204 of Title 63 of the Oklahoma Statutes, or one of its metabolites or analogs in the person's blood, saliva, urine, or any other bodily fluid at the time of a test of such person's blood, saliva, urine, or any other bodily fluid administered within two (2) hours after the arrest of such person.
4. Is under the influence of any intoxicating substance other than alcohol which may render such person incapable of safely driving or operating a motor vehicle; or
5. Is under the combined influence of alcohol and any other intoxicating substance which may render such person incapable of safely driving or operating a motor vehicle.

### **§47-751. Implied Consent to Breath, Blood, or Other Test for Determining Concentration of Alcohol or Other Intoxicating Substance**

A. 1. Any person who operates a motor vehicle upon the public roads, highways, streets, turnpikes or other public place or upon any private road, street, alley or lane which provides access to one or more single or multi-family dwellings within this state shall be deemed to have given consent to a test or tests of such person's blood or breath, for the purpose of determining the alcohol concentration as defined in [Section 756](#) of this title, and such person's blood, saliva or urine for determining the presence or concentration of any other intoxicating substance therein as defined in this section, if arrested for any offense arising out of acts alleged to have been committed while the person was operating or in actual physical control of a motor vehicle upon the public roads, highways, streets, turnpikes or other public place or upon any private road, street, alley or lane which provides access to one or more single or multi-family dwellings while under the influence of alcohol or other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance, or if the person is involved in a traffic accident that resulted in the immediate death or serious injury of any person and is removed from the scene of the accident to a hospital or other health care facility outside the State of Oklahoma before a law enforcement officer can effect an arrest.

If the officer has probable cause to believe a subject is under the influence of alcohol or some other intoxicant, the driver may then be placed under arrest for D.U.I. or A.P.C.

A traffic violation is not necessary to make a D.U.I. arrest.

There is no doubt a lawful arrest is required for the Implied Consent to be applied.

### **Traffic accidents where driving was not committed in the presence of an officer:**

22 O.S. § 196(5) Arrest Without Warrant by Officer

...5. When the officer has probable cause to believe that the party was driving or in actual physical control of a motor vehicle involved in an accident within this state, whether upon public roads, highways, streets, turnpikes, other public places, or upon any private road, street, alley or lane which provides access to one or more single- or multi-family dwellings and was under the influence of alcohol or intoxicating liquor or who was under the influence of any substance included in the Uniform Controlled Dangerous Substances Act;

**NOTE** -- If a person is to be transported to the hospital for treatment, do not place him/her under arrest at the scene. Wait until you arrive at the hospital, as treatment may take you beyond the 2-hour time limit.

## IMPLIED CONSENT TEST REQUEST:

The Implied consent should be read immediately upon arrest.

THE IMPLIED CONSENT TEST REQUEST MUST BE READ PRIOR TO MIRANDA.

Once the Implied Consent test request is made, the officer should seek a reply, then complete the entire portion of the Impaired Driving Investigation to include Breath Test, Refusal and or Blood Test. If during the Impaired Driving Investigation, you have forgotten information needed about the case or you located something on their person (i.e., illegal substances) then Miranda would apply after completing the impaired driving portion of your arrest for questioning.

Implied Consent Test Request: (11/1/2022)

1. You have been arrested and you are requested to submit to a test or tests to determine the presence and/or concentration of intoxicants in your body.
2. The test will be a [say ONE word, "BREATH" or say the word "BLOOD"] test. If a blood test is performed, it will be done by approved medical personnel under Oklahoma law.
3. Once you complete the state's test, you may have an additional test at your own expense.
4. You are not entitled to consult with an attorney prior to making your decision to submit to the state's tests.
5. You may refuse the state's test, but as a consequence your driving privileges will be revoked or denied.
6. If you are 21 years of age or older and the test result is 0.08 or more alcohol concentration, your driving privileges will be revoked or denied. If you are under age 21 and the test result is 0.02 or more alcohol concentration, your driving privileges will be revoked or denied.
7. Will you take the state's test?

NOTE: Read the Implied Consent Test Request verbatim. (Except paragraph 2 where the test to be given is specified and you fill in the word Breath or Blood).

ONCE THE IMPLIED CONSENT TEST REQUEST IS READ, THE DRIVER MAY:

**Consent** Any verbal or non-verbal communication indicating the willingness of the driver to take the test.

**Refuse** Anything that denotes an unwillingness to submit to the State's test. There are basically 4 types of refusals.

**Direct:** "No, I will not take the State's test," or refusing to submit to additional test.

**Implied:** Silence, indecisiveness, combativeness, stalling, refusing to blow, or any type of uncooperative action which interferes with the officers' or operators' ability to administer the test.

**Conditional:** Will submit upon occurrence of third (3rd) event, (i.e., "Let me talk to a lawyer", "Let me have a drink", "Let me call someone", "If you let me take a blood test", etc.) The rights of the motorist are expressed and certain. If the motorist requests a lawyer, etc., the officer should reread paragraph 4 & 5 of the Implied Consent test request.

**Conduct:** Often a licensee will orally consent to testing but will not fully cooperate with the testing procedure. The lack of cooperation may be evidenced by not providing an adequate air specimen or any other type of uncooperative or combative behavior. In such cases, document the exact behavior and obtain a witness (if you deem necessary). Ensure there is no physical impairment and advise the licensee that he must cooperate, or his behavior will be deemed a refusal. Give the licensee a couple attempts and advise of the refusal should the behavior continue.

## RECAIT OF THE REFUSAL

Many times, an officer will advise the driver of the Implied Consent Test Request at the scene -- the driver initially refuses but upon arrival at the booking facilities he/she will change their mind. If this occurs, the officer should go ahead and administer the test, if the testing device is readily available and it is not beyond the 2-hour time period. There are three reasons for this recommended procedure:

1. It is reasonable;
2. Builds your credibility before the judge or jury;
3. You may get more evidence in your favor, i.e.:
  - a. .01 - .05 prima facie evidence not under the influence of alcohol;
  - b. .06 - .07 relevant evidence that ability to operate a motor vehicle is impaired;
  - c. .08 or more - prima facie evidence under the influence of alcohol.

Drivers can refuse a test and later change their mind and consent.

Courts have adopted a five-part test to determine if the "assent is timely and given unequivocally".

After an initial refusal to take the State's test, the subsequent consent must be made:

Within a very short and reasonable time after the prior first refusal;

When a test administered upon the subsequent consent would still be accurate;

When testing equipment is still readily available;

When honoring the request will result in no substantial inconvenience or expense to the police;

When the individual requesting the test is still in the custody of the arresting officer and under observation for the whole time since arrest.

## **REFUSALS ARE:**

Any one or more of the following events or occurrences shall per se constitute refusal, or be deemed refusal, by a conscious person under arrest, to submit to testing of his or her breath to determine the alcohol concentration thereof.

1. An explicit or express verbal statement of refusal to undergo or to complete breath alcohol testing, however phrased.
2. Failure of the person to respond to a law enforcement officer's demand to submit to breath-alcohol testing, or comply with, or to follow the directions or instructions of a law enforcement officer with respect to any of breath-alcohol testing, or failure of the person to cooperate as required to carry out or to complete such testing, except by reason of illness or injury or other physical condition which makes such compliance or cooperation impossible for the test subject.
3. Obstructing, resisting, or interfering with the full and proper administration of a breath alcohol test by or at the direction of a law enforcement officer, or attempting by any means to circumvent or to defeat proper testing elements and procedures, or to alter the outcome of such test.

The burden of proving the above is on the driver, who must assert the subsequent consent as an affirmative defense to the refusal issue under the implied consent law.

## **REFUSAL AND THE REFUSAL STATEMENT**

If a person refuses to submit to the state's test or tests, attempt to have him/her sign the refusal statement on the Officer's Affidavit. It is not fatal to the case if he does not, but his signature is valuable evidence of the person's refusal. Also, be sure to write down the exact manner of refusal in detail in the blanks provided on the Officer's Affidavit.

## **THE TESTING PROCEDURE (BREATH) OAC 40: 30-1-3**

The procedure to be followed is that established by the State Director or the Board of Tests for Alcohol and Drug Influence. If the instrument prints an affidavit the procedure was followed, and the test is valid.

Test must be administered within two (2) hours of the arrest - not operation of the vehicle.

Be sure to physically look into the subject's mouth for foreign substances immediately prior to the beginning of the 15-minute deprivation period.

The operator should be the person observing the 15-minute deprivation period unless time does not permit. If the arresting officer (different from operator) observes the 15-minute deprivation period, then this should be noted.

A quote from a D.U.I. Defense Attorney as written in an on-line advertisement,

"It is highly unlikely that the 15-minute observation deprivation period was properly performed. The lack of a properly performed 15-minute observation deprivation period by the operator of the breathalyzer machine would invalidate the test."

The 15-minute deprivation period is the tool used to ensure the dissipation of residual mouth alcohol. According to numerous studies, "Alcohol in the oral cavity arising from recent alcohol ingestion, regurgitation of stomach contents containing alcohol or by eructation of gas containing significant amounts of alcohol can possibly contaminate the breath sample and cause falsely elevated results. During exhalation, breath samples contaminated with residual mouth alcohol are characterized by an initial rapid alcohol concentration rise followed by a rapid decline of the concentration to zero or to the base line breath alcohol concentration (Dubowski, 1992) It is well established that a pre-test alcohol deprivation period of at least 15 minutes provides sufficient time to dissipate residual mouth alcohol (Dubowski, 1960)." Quoted from Garriott's *Medicolegal Aspects of Alcohol*, pg. 230.

Numerous studies have shown that 15-minute deprivation period will dissipate residual mouth alcohol. This is very important to note, due to the officer's ability to become distracted during the 15-minute deprivation period. This distraction can lead to issues when conducting the breath test. If the instrument indicates a message that the "Range Exceeded" or "Sample Rejected", this may be an indication of Residual Mouth Alcohol.

The deprivation period should be completed by the Operator. The Observer should have visual contact for the entire 15 minutes; this is not staring at the person but being able to observe the individual sufficient to determine if the person has put something in their mouth, smoked, or vomited. If any of these happen, the 15-minute deprivation period should be restarted.

The rule states:

The testing officer must now observe the individual sufficient to determine that, basically, nothing went into or out of the persons mouth, and that (s)he did not smoke. The rule was intentionally written to allow an officer to tailor the method of deprivation to his/her circumstances.

As an Officer, if your circumstances allow for you to observe the person while in the vehicle, enroute to the instrument, this is permissible, but not recommended. The best route is to use the timer on the instrument and observe the person for the entire 15 minutes.

## THE TESTING PROCEDURE (BLOOD)

According to Oklahoma State Statute 47 Chapter 67 Section 752 A. (47:67-752A.) the only persons qualified to withdraw blood are:

1. Licensed medical doctors,
2. Licensed osteopathic physicians,
3. Licensed chiropractic physicians,
4. Registered nurses,
5. Licensed practical nurses,
6. Physician's assistants, certified by any state's appropriate licensing authority
7. Employees of a hospital or other health care facility authorized by the hospital or health care facility to withdraw blood
8. Intermediate Emergency Medical Technicians, Advanced Emergency Medical Technicians or Paramedics, acting within the scope of practice prescribed by their medical director.

The arresting officer must witness withdrawal after making a reasonable inquiry into the qualifications of person taking the blood. If a person is unconscious, the officer may request a withdrawal of blood. Some entities will not do this in fear of civil action taken against them. However, Title 47 O.S. § 752(C) states: "No person specified in subsection A of this section, no employer of such person and no hospital or other health care facility where blood is withdrawn shall incur any civil or criminal liability as a result of the proper withdrawal of blood when acting at the request of a law enforcement officer by the provisions of [Section 751](#) or [753](#) of this title, or when acting in reliance upon a signed statement or court order as provided in this section, if the act is performed in a reasonable manner according to generally accepted clinical practice. No person specified in subsection A of this section shall incur any civil or criminal liability as a result of the proper collection of breath, saliva or urine when acting at the request of a law enforcement officer under the provisions of [Section 751](#) or [753](#) of this title or when acting pursuant to a court order."

**NOTE -- There is an exception to the right to counsel:  
When blood is taken from an unconscious person.**

Arrest of unconscious persons before test:

If a driver is rendered unconscious, the officer may have blood withdrawn. When the driver regains consciousness, one of the following conditions must be met:

1. The arresting officer must leave a copy of the citation with the arrested person which may be accomplished by handing it to the arrested person, or by leaving it with the personal effects of the arrested party, to inform the unconscious person of the arrest.
2. An arrestee who is unconscious or injured and requires immediate medical treatment as determined by a treating physician may be released on the person's own recognizance for medical reasons by the arresting officer. The arresting officer who releases an arrested person on the person's own recognizance must indicate the release on the face of the citation. Any person released on his or her own recognizance for medical reasons shall remain at liberty pending the filing of charges.

## **§751. IMPLIED CONSENT TO ANY TEST FOR DETERMINING CONCENTRATION OF ALCOHOL OR OTHER INTOXICATING SUBSTANCE.**

D. Any person who is unconscious or otherwise incapable of refusing to submit to a test of such person's blood or breath to determine the alcohol concentration thereof, or to a test of such person's blood, saliva or urine to determine the presence or concentration of any other intoxicating substance therein, shall be deemed not to have withdrawn the consent provided by subsection A of this section, and such test may be administered as provided herein.

An unconscious person who has been issued a citation by a law enforcement officer for one of the offenses listed in subsection A of this section is arrested for purposes of this section. The arresting officer must leave a copy of the citation with the arrested person which may be accomplished by handing it to the arrested person, or by leaving it with the personal effects of the arrested party, to inform the unconscious person of the arrest.

Any person who has been arrested for one of the offenses listed in subsection A of this section who is unconscious or injured and who requires immediate medical treatment as determined by a treating physician may be released on the person's own recognizance for medical reasons by the arresting officer. The arresting officer who releases an arrested person on the person's own recognizance must indicate the release on the face of the citation. Any person released on his or her own recognizance for medical reasons shall remain at liberty pending the filing of charges.

The means of actual restraint necessary to comply with this statutory requirement may vary according to what is reasonable under the circumstances of each situation.

Some hospitals require the person to sign a consent form. Section 752(B) expressly exempts authorized personnel from criminal or civil liability resulting from the proper withdrawal of blood if presented with a written statement authorizing blood withdrawal signed by the person whose blood is to be withdrawn; signed by a peace officer that the person has agreed, or an order from a district court that blood be withdrawn.



The hospital may rely on such a statement or order that the person has agreed to the withdrawal and shall not require any additional consent and the facility/employee shall not be liable in any action alleging lack of consent/informed consent.

If the hospitals' form is also a disclaimer relieving the hospital of all liability, it will not be considered a refusal if the driver refuses to sign it. We cannot compel a driver to waive his legal rights to sue for damages caused by negligence.

## **THE AFFIDAVIT**

Follow the procedure for completing the Affidavit.

Mail or email the Officer's Impaired Driving Affidavit to Service Oklahoma Records Division.

Do not take the driver's license.

## **THE IMPLIED CONSENT APPEALS HEARING:**

Any person who is denied driving privileges, or whose driving privilege has been canceled, denied, suspended, or revoked by Service Oklahoma shall have the right of appeal to the district court.

The appeal will be held at the district court in the county in which the arrest occurred relating to the test refusal or test result. The arresting officer may be asked to testify in this proceeding. The scope of the hearing will continue to be the elements of the DUI. The hearing will cover the following:

Whether the officer had reasonable grounds to arrest;  
Whether defendant was arrested;  
Whether the defendant refused to submit to the test;  
Whether defendant was informed of consequence of refusal.  
Whether specimen was obtained within two (2) hours of arrest.  
Whether defendant was informed of consequence of .08 or more BAC (.02 or more BAC Under 21);

Additionally...pursuant to 47 O.S. §759(C):

C. Collection of a person's breath, to be considered valid and admissible in evidence:

1. Shall have been performed by an individual possessing a valid permit issued by the Board of Tests for Alcohol and Drug Influence for this purpose; and
2. Shall have been performed on a breath alcohol measurement device appearing on the most current conforming products list of such devices published by the U.S. Department of Transportation in the

Federal Register, and utilizing a calibrating unit appearing on the most current conforming products list of such devices published by the U.S. Department of Transportation in the Federal Register;

3. Shall have been performed on a device maintained by the Board of Tests for Alcohol and Drug Influence; and

4. Shall have been performed in accordance with the operating procedure prescribed by the State Director of Tests or the Board of Test for Alcohol and Drug Influence.

OR

...pursuant to 47 O.S. §759(B):

B. Collection of a person's blood to be considered valid and admissible in evidence, whether performed by or at the direction of a law enforcement officer or at the request of the tested person, shall have been performed by a person authorized to collect blood pursuant to the provisions of [Section 752](#) of this title. Analysis of a person's blood to be considered valid and admissible in evidence, whether performed by or at the direction of a law enforcement officer or at the request of the tested person, shall have been performed by a laboratory accredited in accordance with ISO/IEC 17025 as defined in [Section 150.37 of Title 74](#) of the Oklahoma Statutes.

If a refusal, the hearing will cover:

Whether the officer had reasonable grounds to arrest;

Whether defendant was arrested;

Whether the defendant refused to submit to the test;

What makes you as the officer believe the defendant refused?

Whether defendant was informed of consequence of refusal.

## Procedural Aspect of Hearing

All witnesses are sworn;

Witnesses for state are not represented by counsel;

Witness for state will give narrative statement as to issues above and will be subject to cross examination by defendant or his counsel;

Revocation will be set aside if:

States' witness, who is instrumental to the case, fails to appear.

Evidence is not sufficient to sustain or prove the conditions of Implied Consent Law were met by a preponderance of evidence.

Revocation will be sustained if:

Licensee and/or attorney fails to appear;

Evidence is sufficient to sustain or prove the conditions of Implied Consent Law were met by a preponderance of evidence.