

IMPLIED CONSENT

Why are we discussing Implied Consent? What does Implied Consent have to do with Intoxilyzer 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, from 2.4 percent in Delaware to 81 percent in New Hampshire (based on 2005 data cited by NHTSA). 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 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 the Department of Public Safety 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 to Section 753 or 754 of this title shall be for one hundred eighty (180) days, which may be modified; provided, any modification under this paragraph shall apply to Class D motor vehicles only;

2. A revocation pursuant to paragraph 2 of subsection A of Section 6-205 of this title, or to Section 753 or 754 of this title shall be for a period of one (1) year or longer if driving privileges are modified pursuant to the provisions of this paragraph if within ten (10) years preceding the date of arrest relating thereto, as shown by the records of the Department:

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

Such one-year period of revocation may be modified; provided, any modification under this paragraph shall apply to Class D motor vehicles only. For any modification, the person shall be required to install an ignition interlock device or devices, pursuant to Section 754.1 of this title. The period of revocation and the period of interlock installation shall run concurrently and each shall be for no less than one (1) year; or

3. A revocation pursuant to paragraph 2 of subsection A of Section 6-205 of this title, or to Section 753 or 754 of this title shall be for a period of three (3) years or longer if driving privileges are modified pursuant to the provisions of this paragraph if within ten (10) years preceding the date of arrest relating thereto, as shown by the records of the Department:

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

b. 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 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

c. Any combination of two or more prior revocations or convictions as described in subparagraphs a and b of this paragraph.

Such three-year period of revocation may be modified; provided, any modification under this paragraph shall apply to Class D motor vehicles only. For any modification, the person shall be required to install an ignition interlock device or devices, pursuant to Section 754.1 of this title. The period of revocation and the period of interlock installation shall run concurrently and each shall be for no less than three (3) years.

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

1. The first license revocation shall be for one hundred eighty (180) days, which may be modified; provided, for license revocations for a misdemeanor charge of possessing a controlled dangerous substance, the provisions of this paragraph shall apply to any such revocations by the Department on or after January 1, 1993; provided further, any modification under this paragraph shall apply to Class D motor vehicles 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 the Department:

a. a prior revocation commenced pursuant to paragraph 2 or 6 of subsection A of Section 6-205 of this title, or under 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 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 the Department:

a. two or more prior revocations commenced pursuant to paragraph 2 or 6 of subsection A of Section 6-205 of this title, or under Section 753 or 754 of this title,

b. 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

c. any combination of two or more prior revocations as described in subparagraphs a and b 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 privilege if the person was not eligible to do so at the time of the conviction.

C. For the purposes of this subsection:

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 the Department.

D. Each period of revocation not subject to modification shall be mandatory and neither the Department nor any court shall grant driving privileges based upon hardship or otherwise for the duration of that period. Each period of revocation, subject to modification as provided for in this section, may be modified as provided for in Section 754.1 or 755 of this title; provided, any modification under this paragraph shall apply to Class D motor vehicles only.

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

So, In a nutshell:

Loss of license for 180 days – First license revocation, may be modified to the Class D license only.

Loss of license for one year if there is one prior revocation for DUI, APC, 0.08 or more, or refusal or combination thereof within last 10 years. The one prior revocation or conviction maybe from another jurisdiction or even a municipality. May be modified only to a Class D license and the modification will require an Ignition Interlock device.

Three (3) years – if there are two or more revocations within the last 10 years. If the offender has two or more prior convictions in another jurisdiction which did not result in a revocation of Oklahoma driving privileges the convictions may count towards this revocation. This may be modified only to a Class D license and the modification will require an Ignition Interlock device.

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 complied with "by 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 of the same rights and protections of the criminal proceedings. According to William Geldart, Introduction to English Law 146 (D.C.M. Yardley ed., 9th 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 case of criminal law a person found guilty is punished by incarceration in a prison, a fine, or in some occasion's very harsh penalties. Whereas, in the case of civil law pertaining to the Oklahoma Driver's License, the driver either loses the driver's license or will get the driver's license back. A criminal litigation is more serious than civil litigation, so the criminal defendants have more rights and protections 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 was 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 in the event that 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 a test of his choosing only after he submits to the 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 and OAC Title 40:

1. Licensed medical doctors,
2. Licensed osteopathic physicians,
3. Chiropractors,
4. Registered nurses,
5. Licensed practical nurses,
6. Or physician's assistants
7. An employee of a hospital or health care facility authorized to draw blood.

NOTE: ACTION NO. 01-1 Certified technicians such as Intermediate EMT's or Paramedics are now authorized to draw blood for Implied Consent purposes, if they are authorized by their S.O.P. or medical control.

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 other 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 if and 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 appearances indicative of intoxication such as:

Odor of an alcoholic beverage, Motor skills, The manner in which 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 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 or not 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 or not 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

The statute does not specifically state that the person must be arrested for D.U.I. or A.P.C., but it would probably be interpreted to mean that.

§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. 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
4. 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 test, blood test 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 and 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) A peace officer may, without a warrant, arrest a person:

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;

All testing must be administered within 2 hours of the arrest for the test to be valid and admissible in evidence.

NOTE -- If a person is to be transported to the hospital for treatment, don't place him 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.

Once the person replies, the officer then may proceed to advise the arrested driver of the Miranda warning, if s/he desires. The Oklahoma Courts have held that if the reasonable possibility of confusion exists regarding the rights under Miranda and the Implied Consent test request that it will be held in the driver's favor, (i.e., if advised he has the right to talk with counsel under Miranda and then subsequently advised under Implied Consent request that he does not have that right, yet the driver demands an attorney, the court will not likely find that the driver refused.)

Implied Consent Test Request: (December 1, 2011)

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 state's test will be a [insert ONE word "breath" OR the word "blood"] test. If a blood test is performed, it will be done by approved medical personnel.
3. Once you complete the state's test, you may have an additional test at your own expense, provided that a sufficient quantity of any specimen obtained shall be available to the state for testing.
4. You are not entitled to consult with an attorney prior to making your decision whether or not to submit to the state's tests.
5. You may refuse the state's test, but as a consequence your driver's license will be revoked or denied by the Department of Public Safety.
6. If you are age 21 years or older and the test result is 0.08 or more alcohol concentration, your driver's license will be revoked or denied by the Department of Public Safety. If you are under age 21 and the test result is 0.02 or more alcohol concentration, your driver's license will be revoked or denied by the Department of Public Safety.
7. If your driver's license is revoked or denied by the Department of Public Safety, you may be required to have an ignition interlock installed.
8. Will you take the state's test?

NOTE: Read the Implied Consent Test Request from the card or affidavit verbatim (except paragraph 2 where the test to be given is specified).

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 express and certain. In the event that the motorist requests a lawyer, etc., the officer should reread paragraph 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). Insure there is no physical impairment and advise the licensee that he must cooperate or his behavior will be deemed a refusal. Give the licensee several 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 will change his 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;
and

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

ACTION NO. 97-1 ACTIONS OR EVENTS CONSTITUTING REFUSAL TO SUBMIT TO TESTING OF THE BREATH FOR ALCOHOL

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 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 his 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 of the Board of Tests for Alcohol and Drug Influence. If the Intoxilyzer 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 Intoxilyzer 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 the course of 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 officers ability to become distracted during the 15 minute deprivation period. This distraction can lead to issues when conducting the

Intoxilyzer test. If the Intoxilyzer indicates with a message that the “Range Exceeded” or “Sample Rejected”, this may be an indication of Residual Mouth Alcohol.

The deprivation period should be by the Intoxilyzer Operator. The Observer should have visual contact for the entire 15 minutes; this is not staring at the person, but, being able 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 start over.

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 particular circumstances.

As an Officer if your circumstances allow for you to observe the person while in the vehicle, enroute to the Intoxilyzer, this is permissible, but, not recommended. The best route is to use the Deprivation timer on the Intoxilyzer 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.) and Oklahoma Board of Tests Rules and Actions all blood is required to be withdrawn at a medical facility. And the only persons qualified to withdraw blood are:

M.D.

Osteopathic physician

Chiropractor

R.N.

L.P.N.

Physicians' Assistant

Authorized hospital or health care facility employee

Paramedics and Intermediate EMTs, **ACTION NO. 01-1.**

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 the hospital to withdraw the blood. Some hospitals 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 a 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, the following conditions must be met:

Some type of physical restraint is necessary so that when an individual regains consciousness, he may immediately be made aware that he has been arrested and that his liberty has been restricted so that he is not free to go or charges are pending.

§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 and 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, so as 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 is told by the officer that the person is under arrest and the officer has probable cause to believe that the person has caused death or serious injury while operating a motor vehicle while intoxicated; 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 can't 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 the original to:

D.P.S. Legal Division.

Do not take driver's license if:

Blood test (DPS will be responsible for getting license from licensee);

Any person released on his or her own recognizance.

Less than .08 g/210L BAC for 21 y.o.a. and older Do not issue the temporary license if:

Licensee's driving privileges are suspended,

Expired,

Not in possession,

Blood is the State's test.

When the affidavit is completely filled out, serve licensee his copy by explaining the consequences of it to him, and tell him to read it in order that he may preserve his rights.

Always directly serve the driver, if humanly possible. If jail policy requires all items be placed in property, after the driver has been personally served, collect the Affidavit and record it as property on the driver's personal property inventory. If subject is physically unable to receive the copy, you may place in his property IF:

- It is listed on the property record and he acknowledges when released that it has been received by signing the property log.

DO NOT:

- Put it into his property without serving him
- Mail it to him

ALL TIME COMPUTATIONS FOR HEARINGS, ETC., ARE DETERMINED AND BEGIN RUNNING FROM THE DAY THAT THE LICENSEE RECEIVES NOTICE OF REVOCATION - NOT THE DAY OF ARREST.

THE IMPLIED CONSENT HEARING: 47 O.S. § 754 (E)

Normally occurs in the county of arrest at the county seat if it is not a telephonic hearing.

Written request must be received by DPS within fifteen (15) days of the date notice of revocation. In the event an administrative hearing is requested and received within fifteen (15) days, DPS will set up a hearing and notify officer(s).

If any officer is unable to attend, DPS must be notified in time to reschedule, preferably one (1) to two (2) weeks before hearing date.

Hearings may be telephonic. Be sure you provide a telephone number where you can be reached.

FAILURE TO PROVIDE A TELEPHONE NUMBER MAY RESULT IN THE REVOCATION BEING SET ASIDE.

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;
Whether defendant was informed of consequence of refusal.

If a .08 or more BAC, the hearing will cover:

Reasonable grounds to arrest;
Whether defendant was arrested;
Whether testing procedures complied with existent rules of Board of Tests for Alcohol and Drug Influence;

Whether defendant was informed of consequence of .08 or more BAC;
Whether test result in fact was .10 or more BAC;
Whether specimen was obtained within two (2) hours of arrest.
Procedural Aspect of Hearing
All witnesses 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 case, fails to appear (hence, the need to provide telephone number for telephonic hearings)
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;
Issues are proved by a preponderance of the evidence.
A decision will not be ordered at the hearing, but normally five (5) to ten (10) days from the hearing date.

COURT ORDERED MODIFICATIONS AND D.P.S. ISSUED MODIFICATIONS:

Anytime an officer comes into contact with a person driving under a court ordered modification prepared by D.P.S., the officer should do the following:

Read the order to determine whether or not the driver is driving within the scope of that order. (i.e., the allowable times, and the scope of driving such as, business driving only, Ignition Interlock device installes.)

The D.P.S. modification will contain essentially the same information and will be on D.P.S. letterhead, signed by a representative of the legal division. It must have D.P.S. embossed seal to be valid. The officer should confiscate the Modification and mail it to the D.P.S. Legal Division along with a police report as to the circumstances of said seizure only under the following conditions:

The driver is driving outside the allowable times as set out in the order;
The driver is not driving within the scope of employment or to and from work;
Driver has consumed or is under the influence of an intoxicant;
If the order appears to be forged or altered.

NOTE - Do not take the order if the driver merely committed a violation while driving within the scope of the order unless it is alcohol related. Upon receipt of the said order and police report, D.P.S. will initiate revocation proceedings against the licensee.

If revocation proceedings are contested, the reporting officer will need to appear to testify.

If revocation proceedings are not contested, the modification order will be revoked and the licensee goes under full revocation.

Revocation will be sustained if:

Licensee and/or attorney fail to appear.

Issues are proved by a preponderance of the evidence.

A decision will not be ordered at the hearing, but normally five (5) to ten (10) days from the hearing date.

Hearing examiner does the following:

Swears witnesses;

Listens to testimony;

Rules on objections to evidence;

Listens to arguments;

Maintains order and attempts to prevent harassment of witnesses and;

Makes decision.

NOTE: Be prepared. Bring arrest reports, Affidavit, testing procedure you followed, etc.

IF REVOCATION SUSTAINED - THE DISTRICT COURT APPEAL:

Licensee may appeal to District Court in county of arrest 47 O.S. § 6-211

Must appeal within thirty (30) days from date of notice of the revocation;

May appeal on one (1) of two (2) grounds:

TRIAL DE NOVO: This will cover the issues that heard at the administrative hearing.

However, the state, at the district court appeal will be represented by a D.P.S. attorney.

HARDSHIP MODIFICATION OF REVOCATION: In addition to issues, the licensee may request the court to modify the revocation to allow them to drive in limited circumstances. 47 O.S. § 755.

The licensee may appeal under one or both theories. In the event the licensee appeals only for a modification, the officer(s) are not be required to appear.