MICHIGAN DUI LAW
The Citizen’s Guide to the Laws Against Intoxicated Driving

By
Patrick T. Barone
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Michigan DUI Law - A Citizen's Guide is dedicated to the many Michigan citizens, past and future, who have placed their confidence and trust in me and the Barone Defense Firm, and in doing so have expressed their ultimate belief in and respect for our system of self-government.

I would also like to thank William C. Head; a true champion of justice, whose leadership, support and confidence continues to inspire me as we fight our mutual battle, despite the considerable odds, for the rights of our clients, and for his overriding belief that it is still possible to obtain justice in our courts.

I also dedicate this book to my two wonderful daughters, Madeline and Olivia, who even as teenagers remain a constant source of fascination and joy. Most importantly I dedicate this book to, and thank my wife Elizabeth. Over the last many years she has demonstrated considerable patience, support and understanding as to why I am so driven to assist my clients in finding answers to their legal problems. Based on this understanding, she agreed to limit both our time together, as well as our family time, so that I could spend this time writing while still maintaining a busy law practice.

P.T.B.

May 8, 2013
I want to thank my office staff, associate and senior trial attorneys for their patience and understanding during my absence from the office department and for assisting me with my research, thereby freeing up the necessary time for me to devote to this important project.

I also want to thank paralegal Greg Guro, who greatly assisted me in both researching Michigan law and creating the edited final draft of this 2013 Edition; particularly as it relates to driver license restoration cases, an area of particular specialization for him. This edited edition would never have reached publication without his help.

Patrick T. Barone
Birmingham, Michigan
May 8, 2013
2.0. Purpose of this Chapter. The primary purpose of this chapter is to explain *when, where* and *how* you are most likely to be confronted by police in situations where you may be suspected of impaired driving and be asked to submit to an implied consent chemical testing of your breath, blood or urine. If you were already arrested for OWI it is critical you are aware of these factors. This chapter will then discuss which factors are most crucial for your possible defense, how to recognize them and how to help your attorney gather them.

2.1. The Two General Types of OWI - Alcohol. In Michigan, if you have been charged with drunk driving, then you are specifically charged with violating the law by operating a motor vehicle while you were either intoxicated or impaired by alcohol. The principal, or more serious, crime of drunk driving is known by the acronym “OWI,” standing for Operating While Intoxicated.

Regarding alcohol, this more serious charge can be proved in two ways. The first way is for the prosecutor to show you were OUIL, which stands for Operating a vehicle while Under the Influence of Liquor. To prove this crime, the prosecutor needs to prove beyond a reasonable doubt that your ability to operate a motor vehicle was substantially lessened because of drinking alcohol. This is known as the common law offense of drunk driving. The specific *elements* of OUIL (essential parts of a crime that must be proven by the prosecutor to get a conviction) are: (a) operating or being in actual physical control
of a “vehicle”; (b) on a roadway, public way or other place prohibited by Michigan’s laws (sometimes any place within the state); (c) while under the influence of an intoxicating beverage, substance, vapor or chemical, or some combination of these chemicals and substances. A breath or blood test result can be used by the judge or jury to determine if you have committed this crime, but a CHEMICAL TEST RESULT IS NOT REQUIRED TO PROVE THIS CRIME.

The second form of OWI is known as UBAL. This means that at the time you were operating your vehicle you had an Unlawful Blood Alcohol Level. As you are undoubtedly aware, for adults who are not driving commercial vehicles, the legal limit in Michigan is 0.08. So, if the prosecutor can prove beyond a reasonable doubt that your blood alcohol level at the time you were driving was 0.08 or greater, then you can be found guilty of drunk driving. This is known as a “per se” offense, meaning there is NO REQUIREMENT FOR PROVING IMPAIRMENT of the driver. The prosecutor does, however, have to prove that the chemical test result is both admissible and reliable. In Michigan, we do not have “trial by number,” and the jury must decide what meaning or what “weight” to give the chemical test evidence. Just because there is a breath or blood test result in your case does not automatically mean that the jury must or even will find you guilty.

You can be found guilty of UBAL based on different “legal” limits so long as you have consumed enough alcohol to exceed the applicable legal limit for your age group and vehicle type. Presently, Michigan the following laws covering these various situations:

<table>
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<th>“Super Drunk”</th>
<th>0.17%</th>
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<tr>
<td>Drivers age 21 and over, in a non-commercial vehicle</td>
<td>0.08%</td>
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<tr>
<td>Drivers under age 21 [ZERO TOLERANCE *]</td>
<td>&gt;0.02%</td>
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<tr>
<td>Any driver of a commercial motor vehicle</td>
<td>0.04%</td>
</tr>
<tr>
<td>Under 21. Commercial vehicle.</td>
<td>&gt;.02%</td>
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For those who take the state’s test and render a sample with an alcohol level at or over Michigan’s legal limit, this alone (assuming the test result gets into evidence and is believed by the jury or judge hearing your case) constitutes the separate offense of OWI “per se”). Note that “per se” limits for contraband drugs have not YET been “established” by the federal government, but that this legislation will be enacted within the next 2 to 5 years. Hence, today in Michigan, only ALCOHOL has “per se” limits for Driving with an Unlawful Bodily Alcohol Level UBAL. These two alcohol offenses cover 95% of all active OWI cases.

2.2. The Many Kinds of OWI - Drugs. As OWI alcohol cases continue to decline in Michigan, law enforcement is making up for the lost revenue by arresting ever increasing numbers of OWI drug cases. The legislature is obliging this effort by broadening the definition of “drug” making more and more people subject to potentially violating the new law.

This is all possible because the Michigan crime of “OWI” can be proven based on the presence of a drug in your system, or a combination of drugs and alcohol at the time you were operating a motor vehicle. If the drug in question is a prescribed or over-the-counter drug (having a potentially medicinal purpose), then the prosecutor must show that this drug or combination of this drug and alcohol caused your ability to operate the motor vehicle to be “substantially lessened.” This is essentially the same as the common law OUIL except the impairing or intoxicating substance in this case is a non-schedule 1 drug. The acronym for this crime is OID (Operating Under the Influence of Drugs).

On the other hand, if the drug in question is a recreation drug (having no generally recognized medicinal purpose), then the acronym for the intoxicated driving offense is OWPD, which stands for Operating With the Presence of Drugs. This crime is “zero tolerance,” meaning if the drug is present in your system while you
are driving, then you are guilty regardless of if the drug impacted your ability to drive. The zero tolerance drugs are set forth in “Schedule I” of the Michigan statutes.⁹

Additionally, on January 2, 2013, Governor Snyder signed into law Public Act 543 which broadly expands the legal definition of “drug” to include “intoxicating substances.” The effective date is March 31, 2013.

As used in this the new law¹⁰ “intoxicating substance” still embraces the old definition of “drug,” but significantly expands it to include any substance recognized as a drug in the official United States Pharmacopoeia (USP), Homeopathic Pharmacopoeia (HPUS) or the National Formulary. Although likely to be litigated due to the law’s ambiguity, it appears that these drugs do not require any intent on the part of the driver. If the prosecution can prove that these drugs are in the driver’s body, and the driver is impaired or intoxicated, then he/she has violated this law.

The law further defines intoxicating substance to include anything, other than food, that is taken into a person’s body that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication. This subsection appears to require the further element of intent.

In reading the law it is important to understand the difference between USP and HPUS in order to fully appreciate just how broad this proposed definition really is. The USP lists and monitors those substances that are commonly thought of as medicines; the kinds of things your medical doctor might prescribe or recommend. On the other hand, an osteopathic doctor, or a holistic healer might engage in homeopathy, which favors the use of herbal medicines; and it is in this arena that the proposed real expansion of the drug definition takes place. These herbal medicines are the province of the HPUS.
According to the HPUS website\textsuperscript{11} "any substance may be considered a homeopathic medicine if it has known "homeopathic provings" and/or known effects which mimic the symptoms, syndromes or conditions which it is administered to treat, and is manufactured according to the specifications of the Homeopathic Pharmacopoeia of the United States (HPUS). Official homeopathic drugs are those that have been monographed and accepted for inclusion in the HPUS." Alternative medicine websites as well as stores indicate a product is listed in the HPUS as a kind of selling point. Such medicines include: Chamomile, Bitter Cucumber, Yellow Jasmine, Tobacco, and Red Onion.\textsuperscript{12, 13} Therefore, certain teas and food ingested not even as a "drug" can get one arrested if an officer so deems fit.

Closely related is the "National Formulary." This compendium was "established in 1888 by the American Pharmaceutical Association and includes standards for excipients, botanicals, and other similar products." The VA National Formulary as of October 2012 includes the following: Insulin, Lithium, Multivitamins, and Amino Acids.\textsuperscript{14}

2.2.1 Drug Recognition "Experts". Based on the enactment of Public Act 543 (see section 2.2 above), and more generally the overall law enforcement environment in Michigan, increased emphasis is now being placed on law enforcement officers to find and arrest drivers who are impaired by any intoxicating substance. Beginning in 2012 officers from local and county police agencies and the Michigan State Police (MSP) began participating in an intensive three-week drug recognition course. The class also includes Michigan prosecutors. Upon graduating from this training the officers now carry the moniker of "Drug Recognition Expert" or DRE.

This DRE training program was developed in Los Angeles during the 1970s. In 1979 the drug recognition program received official recognition of the LAPD.\textsuperscript{1} The program itself is based on a three step process:
**Step One:** Verify that the subject is impaired, and verify that the
subjects' blood alcohol concentration is not consistent with the degree
of impairment.

**Step Two:** Determine whether the impairment is drug or medically
related (injury or illness).

**Step Three:** Use proven diagnostic procedures to determine the
category (or combination of categories) of drugs that are likely the
cause of impairment.\textsuperscript{ii}

The ostensible purpose of the program is to provide “the strongest
articulable evidence” that drugs are the cause of impairment, as
opposed to something else, to obtain probable cause for a driver who
refuses a blood test and to show that the drug is psychoactive (as
opposed to merely present).\textsuperscript{iii}

While based on a three step process, the drug influence evaluation
procedure includes the following twelve steps:

a. The breath test (machine number, time of test, test
administrator, etc.)

b. DRE interview with arresting officer

c. Preliminary examination by DRE (determination whether
suspect has suffered from any injury or illness or some other
condition other than drugs)

d. Eye examination (horizontal gaze nystagmus, vertical
nystagmus and lack of convergence)

e. Divided attention psycho-physical tests (Romberg balance,
walk-and-turn, one-leg stand and finger-to-nose)

f. Dark room examination (check for pupil dilation under three
different lighting conditions: near total darkness, indirect light
and direct light)

g. Vital sign examination (pulse, blood pressure and temperature;
certain drugs elevate vital signs while others lower them)
h. Muscle tone examination (certain drugs may cause muscles to become tense while others produce flaccidity)

i. Examination for any injection sites (evidence of hypodermic needles, fresh needle marks, scars or tracks)

j. Review of suspect statements and other observations (Miranda invocation, implied consent rights, warnings, etc.)

k. DRE opinion (suspect’s state of impairment in category or categories of drugs involved)

   Note: “The DRE must document this opinion in a formal report that specifies the basis for it.” *Id* at 40

l. Toxicological examination (a chemical test or urine or blood corroborate the DRE opinion into obtainable admissible scientific evidence)*\(^{2}\)

As part of the evaluation, the DRE will prepare a drug influence evaluation form or “Face Sheet” that will contain his or her observations made while or after conducting the above twelve steps. Then, pursuant to step twelve, the blood (or urine) is then sent to the state lab for testing. This twelve step examination takes about 45 minutes to one hour to complete.

As indicated the process suggests that a DRE is able to use this twelve step evaluation to determine the “category or combination of categories of drugs” causing the impairment. There are seven categories, which include:

- CNS Depressants: examples include alcohol, barbiturates and valium;
- CNS Stimulants: examples include cocaine, crystal “meth,” Ritalin and amphetamines;
- Hallucinogens: examples include LSD, peyote; mushrooms, ecstasy (MDMA), toad licking and nutmeg;
- Inhalants: examples include glue, gasoline, paint thinner, spray paint, nitrous oxide, Scotch guard and Freon;
- Cannabis: examples include marijuana, hashish, hash oil, Thai sticks, marinol and dronabinol;
- Narcotic Analgesics: examples include heroin, morphine, codeine and synthetic opiates (e.g., Demerol, methadone);
- Phencyclidine (PCP): examples include PCP, angel dust, dust, super kools, sherm, ketamine (special k) and vetelar.

The possible mixture of drugs and wide possible variance within one single category (LSD vs. nutmeg for example) leaves doubt that anybody within a forty five minute period can accurately know any one drug or all drugs present in one's system. How can one seriously know the difference between a single heroin needle injection or if one donated blood earlier that day?

2.2.2 Top Five Ways to Avoid a DRE Arrest or Conviction. There are many ways to avoid being arrested for drugged driving, and many more ways to avoid being convicted. Here are the top five:

1. Don’t carry any medications or pill bottles with you in your car. If the police spot such a container or find medications on you then you run the risk of the officer putting two and two together and getting a wrong answer: namely that the medications have caused you to be impaired.

2. Don’t admit to taking any drugs. A typical DRE arrest begins with the roadside officer’s investigation. Once the DRE gets called in he/she will ask the roadside officer if any admissions were made. The DRE will also ask you once more if not twice more if you are taking any medications or drugs. Just politely decline to answer these questions. You have no legal obligation to answer these questions from any police officer.

3. Refuse to take any roadside tests and refuse also to participate in the DRE evaluation. Again, the roadside
officer will be asking you questions and asking you to submit to “field sobriety evaluations.” Just politely say no. As of the date of this publication, as a Michigan driver you have no obligation legally to take these “tests.” Also, refuse to submit to any tests back at the station from the DRE officer. In other words, decline to submit to the DRE 12 step process.

4. (After you’ve taken the breath test at the station) - **Refuse to provide a blood sample.** A DRE evaluation requires that you be given an evidentiary breath test first. This is the one at the station not the one at the side of the road. After you’ve taken the station breath test (on the DataMaster) you can refuse any further testing without violating Michigan’s implied consent law or otherwise placing your license in jeopardy. If you blow all zeros or a low number, the DRE will ask for a blood test to “confirm” his “opinion” about the drugs you’ve taken. You can “just say no” to this request. (While this is true as of date of this book, the implied consent law is very likely subject to interpretation and change so as to make it mandatory to give a subsequent blood test! See section 2.9 for further details.)

5. **Find a DRE trained defense attorney.** If you follow the above advice and are arrested anyway, or don’t read this until after you’ve been arrested for drugged driving, make sure you find the best lawyer you can afford. Only a very small number of Michigan DUI lawyers have DRE training. If you’re charged with drugged driving, and don’t hire one of these lawyers, you’re chances of a favorable outcome will be significantly limited.

2.3. **Remain Silent — It Is Your Right!** The Fifth Amendment to the United States Constitution\(^\text{15}\) has been found to include that you have an absolute right to remain silent and not incriminate yourself during your arrest and booking process.\(^\text{16}\) This right applies to everyone once invoked by the suspect,\(^\text{17}\) is true in nearly every
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state,\textsuperscript{18} is true in Michigan and it is true even if you are an alien or an illegal alien.\textsuperscript{19} Once the arresting officer has read you your Miranda warnings, this silence cannot be used against you in court.\textsuperscript{20} In order to “activate” this right, you must tell the officer(s) you have made the choice to remain silent.\textsuperscript{21} This does not mean that you should not be appropriately polite with the law enforcement officers, using such terms as “please,” and “thank you.” Beyond providing the police identification information such as your name, address and showing them your driver’s license, you do not have to answer any questions relating to why you were arrested.

If your stop was based on the officer’s “reasonable suspicion,” the police officer has the right to expect you to identify yourself,\textsuperscript{22} and to have you produce your driver’s license.\textsuperscript{23} Police officers receive training, including mock trial practice, during which they must recite sufficient information to support their decision to arrest a suspect. The training has led to officers spouting off a litany of these “common” symptoms of apparent intoxication so that the officer can survive a pre-trial motion to suppress the arrest decision, due to lack of clear evidence of impairment. One handbook for prosecutors and police officers provides this partial list: smell of alcohol; impaired muscle (gross and fine motor) control; slurred speech; flushed face, bloodshot eyes; and other physical symptoms.\textsuperscript{24} Officers are also taught a list of explanations (excuses) that officers sometimes ask the driver about so as to eliminate these alternative reasons for the bad driving that has been observed. Remember that an officer WANTS to hear your speech patterns to determine if your speech is slurred or otherwise “impaired” sounding. Certain drugs will cause thick-tongued or very slow, halting speech patterns. If an officer can address any possible excuses immediately, it is more likely that the driver he or she is dealing with will not be able to find a viable explanation of the errant driving.
When the officer approaches your window, after asking for your license and possibly other documents, a question will usually start off the encounter. The *content* of your answer is relatively unimportant to the officer. The *manner* of speech is what is being observed. Unfortunately, even those with extensive training can be fooled, falsely leading officers to believe they can predict how much alcohol you have in your system through your speech patterns.\textsuperscript{25} Engaging in lengthy excuses does nothing to improve the chances that you will be allowed to leave the scene, if the smell of alcohol or of contraband drugs is present. If the officer smells or suspects that he or she smells anything that might impair you, the next step is usually to ask you to step out of the vehicle. Each part of this maneuver will be noted by the officer in detail later, from how quickly you exit, whether you use the side or frame of the car, whether you fumble with items in your hands, such as keys or wallet, whether you drop anything, how you balance yourself or possibly sway — *anything and everything*.

2.4. Assume that Everything is Being Recorded. A large number of police vehicles have the capability for either video or audio recording (or both) of everything that occurs in the general vicinity of the officer manning the vehicle. The camera usually is positioned to catch the scene in front of the vehicle, often next to the interior rearview mirror. That is why the officer usually does any field sobriety testing or questioning in front of his or her car. Most modern cameras can be rotated by the police officer 360 degrees to focus on you sitting in the backseat of the car while you are being transported to jail.

Audio microphones are located both on the officer’s shirt or vest and inside his or her vehicle. The officer often has the capability to turn these microphones on and off individually, so that he or she can have private conversations with other officers, their dispatcher or supervisor, yet catch any and every word you say on tape. \textbf{Remember: remain silent even when you think you are alone and in a “private” place.} It is safest for you to assume that everything from the time
the officer first stops your vehicle through being delivered to the jail is being recorded. This is especially true of anything you say, since the microphone in the back of the officer's patrol car can pick even a whisper that you utter under your breath.

2.5. Why The Police Stop You. The first interaction with a police officer usually occurs when errant driving conduct or some defective item of equipment or expired tags draws the officer's attention to your vehicle. Sometimes the "thing" that leads to your pullover may be unrelated to your driving actions, such as when an obvious equipment defect exists or an expired registration or inspection sticker is visible on your car.

However, the NHTSA (the National Highway Traffic Safety Administration, an arm of the federal Department of Transportation) has identified a number of visual driving cues (or clues, as they are sometimes referred to by officers) that the NHTSA suggests police officers use to identify possible alcohol-impaired driving. The list of clues or cues, as originally published, included weaving and swerving, following too closely, driving erratically or with your headlights off, or driving too slowly and signally inconsistently.26 For an up-to-date list of factors, check a recent pamphlet from the NHTSA.27 The two things that should immediately come to every reader's mind are (1) everyone has done these things, almost on a daily basis, especially in the era of the hand-held cell phone, and (2) that the most common traffic offense, speeding, is not on the list. ANY driving behavior, vehicle deficiency or activity that looks the slightest bit suspicious will usually result in an officer coming in contact with you, just to see if you display any signs of drinking or using drugs.

2.6. Driving a Vehicle that Invites Being Pulled Over. Equipment defects or vehicle safety problems sometimes provide the basis for an officer to pull you over. Examples include: tires with insufficient tread; a damaged windshield; dim or burned out headlights or brake lights;
someone in the vehicle not wearing a seatbelt; or smoke emerging from the vehicle.

These correctable items (which likely would never merit a pullover during morning rush hour) have led to many traffic stops that ultimately resulted in OWI arrests. Remember, the officer only needs a single REASON for coming in contact with your vehicle. His or her REAL purpose in stopping you is to see if you are impaired or have other smells, visible or audible evidence of possible impairment. If this sounds “unconstitutional” to you, it does NOT sound unconstitutional to the United States Supreme Court! The high court UNANIMOUSLY approved of this tactic in a decision that drastically reduced our legal and privacy rights as Americans. 28

2.7. When Being Followed by Police, Don’t Pull Over Before Being Required to do so. Intelligent people should not engage in conduct to “waive” or give up constitutional protections. One of the most basic of these constitutional protections is the right to be free from arbitrary traffic stops.

A driver that sees a police car following his or her car may instinctively think that pulling over is the correct thing to do. WRONG! Keep proceeding within the speed limit, obey all traffic laws, stay entirely within your lane and make sure that no “outward” (visible) problems exist with your vehicle. Use turn signals to make any lane changes or turns, no matter how minor. Stay off the cell phone and do nothing to distract your attention from the roadway.

Court cases across the USA have consistently upheld the right of police to come in contact with you when you are on foot, or if you pull over and stop your vehicle. A legal farce that has helped perpetuate this practice is a doctrine known as the “community caretaking” doctrine. The theory goes, if an officer sees anything amiss in his or her community, he or she can and should investigate the “problem” area or suspicious behavior to clear up any problems.
If an officer sees you pull into a shopping center parking lot in an effort to get him or her to quit following you, the officer is hoping that you will come to a stop. Then, he or she is going to be able to legitimately come in contact with your car (and your face) without any legal basis to suspect a crime has been committed or is about to be committed. If you kept moving, and never pulled over until signaled to do so by the blue or red lights of the patrol car (or the siren or hand signals to stop), then any encounter created by the use of “color of law” (using the emergency equipment to force you to stop your vehicle) is called a “tier one Terry stop”.

The Terry decision embodies the Fourth Amendment’s protection against stopping a vehicle without a legal justification for doing so. Beyond the protections of Terry in prohibiting use of police power to stop a vehicle on a mere hunch, and for no real traffic violation (tier one stops), Terry further outlines the illegality of an officer fulfilling the original purpose of the stop and then (with no justifiable belief that criminal activity is afoot) start investigating for further potential crimes. This is a tier two detention.

Thousands of legal decisions have interpreted and made rulings on both tier one and tier two Terry issues. A recent case from Utah states that any further temporary detention for investigative questioning after fulfilling the purpose for initial traffic stop constitutes an illegal seizure, unless an officer has probable cause or a reasonable suspicion of a further illegality.

2.8. If You Don’t Take Field Tests, Will You Lose Your License? In Michigan, there is no requirement for you to take any of the field sobriety tests, and if you politely refuse, there is no automatic license suspension. A roadside portable breath test or Preliminary Breath Test “PBT” is one type of field sobriety test. You may also refuse this test, but if you do, you will be charged with a civil infraction and receive a fine. However, there is no mandatory driver license sanction for refusing a roadside breath test. This is a significant
difference between the refusal of any of the field sobriety tests and the refusal of a blood, breath or urine test at the station house or jail where there is a mechanism for the police to automatically take your driver’s license. Having a driver’s license is a qualified right for you, one that can and is continuously reviewed by the State of Michigan. That means Michigan can take your license away, but only with an adequate reason, and only with notice to you and an opportunity to be heard.  

Now, if you do not take the field sobriety tests, and you are eventually convicted of an OWI offense, you will lose your license as a part of that proceeding. However, that is likely months away from your stop, and may never occur if an experienced OWI attorney helps you with your case.

2.9. If You Refuse to be Tested at the Station House or Jail, Will You Lose Your License? Following your refusal to take the offered state testing of your blood, breath or urine, unless you are then able to get your driver’s license back at an administrative hearing, your driver’s license is automatically suspended for a year for a first refusal within 7 years, 2 years if a second refusal within 7 years. 

If you refuse the blood, breath or urine tests asked of you by the police, and the police take your plastic driver’s license, you will be given a paper license that will allow you to remain driving until either you fail to make a request for an “implied consent” hearing within 14 days of your arrest, or you lose the administrative hearing when it is scheduled. This paper license is called a “DI-93,” and also includes instructions on how to schedule your hearing. Your OWI specialist can better advise you of your rights with this temporary license, and can request the hearing for you, that is so long as you retain him or her prior to the 14 day deadline.

2.10. If You Take the State’s “Chemical” Test(s), Will You Get to Keep Your License? In Michigan, your license will not be suspended or revoked unless and until you are found guilty of an alcohol related
traffic offense. Upon learning of this conviction, the Michigan Department of State will take the appropriate licensing action, and will notify you of this sanction by mail. It is the court’s responsibility to notify the Department of State.

2.11. If You Refuse the State’s Tests, Can You Obtain a “Work” Permit? If you have lost your license because of an implied consent refusal, and you have no prior implied consent refusals, then you may appeal the one year suspension to the circuit court. Under these circumstances, this is called a “hardship” appeal, and is for the purpose of obtaining a restricted driving privilege. You may also file a legal appeal if you believe the hearing officer was wrong in his or her determination that you inappropriately refused the chemical test. If the legal appeal is successful, then you will obtain a full restoration of your driving privileges, but these appeals are rarely granted.

In order to obtain limited or restricted driver’s license privileges, you must meet certain statutory criteria such as true necessity, no other travel sources available to you, and no family members who can provide transportation for you. This is at the discretion of the court, not your choice and not the choice of your attorney. Certainly, the basic requirements are that you have a job which requires you to drive and that you have no other reasonable way to get around without a driver’s license. It is also likely that the circuit court judge will want to see a substance abuse evaluation showing that you are at low risk of repeat behavior. Even if your hardship appeal is successful such a license typically severely restricts your ability to drive, determining where and when you can operate a vehicle.

2.12. Who Can Refuse to be Tested? Unless someone was serious injured or killed as a result of an accident related to your OWI arrest, you have the right to refuse to allow the police to take a blood, breath or urine sample from you. In other words, the drawing of your blood, or the taking of a urine or a breath sample by the police must typically be voluntary. However, if incapacitated, either because you
are unconscious, incoherent or unable to consent for whatever reason (including being too intoxicated), you lose your right to refuse.  

In almost all circumstances, however, if you are arrested in Michigan, and you refuse a chemical test, the arresting officer will obtain a warrant to draw your blood. Thus, instead of a breath test result, you will be faced with a more accurate blood test and automatic license sanctions. Not only that, but the results of your independent test are also admissible at your trial. If your independent test confirms the State's test, then your attorney will have two tests to confront and overcome at trial.

An increasing trend, now seen in more than a dozen states including Michigan, is a situation where a person who refuses breath testing to be restrained or even physically harmed to have their blood forcibly drawn, or have a catheter inserted in the person for a urine sample, if the officer gets a warrant. Typically, this occurs when another person (as a result of your alleged bad driving) has been seriously injured or killed as a result of your accident.

2.13. Who Should Refuse to be Tested? Perhaps because of prior OWI convictions, or because even a single OWI conviction on your criminal record would be devastating to your life, the punishment for any OWI conviction may be significantly worse than anything you face as a penalty from the refusal to be tested. It is certainly more difficult for the police to prove most OWI charges against you when there is no scientific testing of any kind which the prosecution can use as evidence.

Also, keep in mind that the punishment against you for a refusal (an administrative loss of your driver's license of a year for a first refusal in seven years) is automatic, while the punishment against you for the criminal charges of OWI must be subsequently proven in court beyond a reasonable doubt. Many other reasons may exist for the criminal charges against you to be dropped or reduced, or you might win at trial. Some case facts are so favorable that it is best for
you to fight the charges against you, accepting no punishment for the OWI, while giving a blood, breath or urine sample as requested by the police.

Thus, if you are someone for whom even a single OWI on your record might be devastating, or if you have prior OWI convictions on your criminal record, especially if there is a chance you may place yourself or be placed in a position where you may be stopped and questioned regarding a subsequent OWI charge, it is a good idea to sit down beforehand with a well-seasoned OWI specialist and figure out what is best for you to do in these situations. Each circumstance and every client is different, and these sometimes subtle variances may make all the difference in your future. If you refuse to consent, however, understand that as indicated in § 2.12 above, the police are likely to get a warrant. If you continue to refuse, force may be used to extract your blood.

2.14. Will Your “Refusal” be Used Against You in Court? Your refusal can typically be used against you in some way in your criminal OWI trial. The admission into evidence by the prosecution of your chemical test refusal is invariably detrimental and this admission has been held to be constitutional. Unless satisfactorily explained, the jury will normally assume that you refused to be tested because you had consumed too much alcohol and were afraid of failing the test, an assumption that the prosecutor seldom fails to bring to the jury’s attention. In Michigan, though, there is a standard jury instruction that they not consider the refusal in any way, and that the only reason it came into evidence is to prove that a test was offered.

Nevertheless, as a practical matter when evidence of a refusal is admitted during the prosecution’s case, it is often necessary for you to have to testify in order to effectively explain your reasons for refusing to submit. If your attorney gets to question you on all the things that may help your case, the prosecution gets to question you on all the things that may harm it. Obviously then, the admission into evidence
of a chemical test refusal should be avoided, if at all possible. Most experienced trial lawyers prefer to NOT put their clients on the witness stand.

2.15. Never Attempt to Perform the SFST’s or Other Voluntary Field Tests. Police officers usually ask drivers whom they suspect of driving under the influence of either drugs or alcohol to perform “standard field sobriety tests.” Exactly what tests you are asked to perform varies, but may include the horizontal gaze nystagmus, a nine-step walk and turn, and a straight leg raise. Other tests often include giving parts of the alphabet (without singing), adding or subtracting numbers in your mind, or giving a breath sample into a handheld alcohol device.

The field sobriety tests are, without a doubt, the greatest source of bad arrests and faulty convictions in OWI cases in this nation. Virtually no American is aware that they have an absolute right to NOT attempt to perform these agility and medically-created evaluations that are being offered by an officer who may even have an arrest quota to fill. They are all subjective. If you attempt any of them and fail in any small portion, the officer is going to testify to this at your trial. Your failures may also be caught and recorded on any video or audio recordings. Judges and juries find such evidence very strong in their decision whether or not to convict you of OWI.

In the end, the chances of a field sobriety test helping you are so slight, and the chances of them hurting you so great, few situations exist where you should agree to performing the tests. Just say no - politely.

2.16. Avoid “Verbal Gymnastics” or Police Officers’ “Catch-22’s.” If you are stopped by the police, be polite and respond appropriately. You cannot and will not win in a battle of mental or verbal gymnastics with a law enforcement officer. He or she is not interested so much in your answers as the manner in which you give them.
The more you talk, no matter what you say, the worse the situation is likely to become. You are not in charge of the situation. The officer is. Most officers take formal training on how to use questioning to keep you “off balance.” One such course is called “verbal judo.” Remember, that the officer is going to go home at the end of their shift, while you are trying to stay out of jail. Your adherence to these guidelines could prevent you from spending the next several years of your life straightening out a life-changing and job-ending nightmare.

2.17. Don’t Lose Your Composure or use Bad Language. Police officers are in charge when they stop you and start an evaluation for OWI. Most stops are in the middle of the night, when you are already tired. It is very easy to lose your composure or use harsh or bad language if you are stopped, especially if you think you have done nothing wrong.

Take a deep breath. Remember that everything you say or do is likely to be recorded. You may be technically correct that the officer is not treating you well. However, the jury or the judge is not going to think highly of your bad language or of you if you lose your composure. In their eyes, that is another sign that you may have been intoxicated. In the brief minutes of your traffic stop, or the hours during the processing of your arrest, you MUST be on your best behavior. Think always of how you will appear to a jury.

2.18. Politely Attempt to Leave by Cab, on Foot or with a Friend Even if Your Car is Towed. If you have been drinking any alcohol, or done any illegal drugs on the day before you have an accident, after you have traded insurance information with any other driver involved in the accident and before the police show up to investigate, politely attempt to leave the scene. Try walking away, call a cab, or use your cell phone to have a friend come and get you. If you have traded insurance and license information with the other drivers, you are not leaving the scene of the accident. This assumes that no one is injured and needs medical assistance.
If you have been stopped by an officer who is asking you questions about drinking or the use of drugs, make no admission of any usage. If you are not detained by the officer after your refusal to perform any field sobriety tests, attempt to call a cab, call a friend to come get you, or start walking home. State to the officer that you are willing to satisfy his or her concerns for safety by handing him or her the keys to your ignition and taking a cab home, but that you will not submit to testing that you do not trust to be reliable or accurate.

If the officer responds by challenging your awareness that you are unsafe to be driving or something similar, be sure to respond, "Absolutely not true. I am merely trying to satisfy you that I am cooperative in every way, even if I believe your concerns are not reasonable." If taking the cab results in your car being towed, that is a small price to pay to avoid being arrested and possibly convicted of OWI.

2.19. You are Being Arrested Anyway — Why is That? Under the "police" power inherent in the authority given to the States, the police officer has the right to arrest you if he or she feels they have an articulable suspicion that you are committing a crime or have recently committed one. Please understand that you can be arrested for a routine traffic offense like speeding, a lane violation, or aggressive driving. While such minor offenses do not usually lead to an arrest, it is within the officer's power to arrest someone rather than just give them a ticket at the scene.

Certain conduct by you or items observed by the officer will almost always get you arrested for OWI. First, if you admit you have been drinking, even one or two drinks, the officer is going to believe you have been driving with lessened ability or that you are under the influence. Second, if the officer can smell what he or she believes is alcohol on your breath, then he or she will likely arrest you whether or not you perform any field tests. The police are going to ask you to provide a blood or breath sample if they suspect the tests will reveal
alcohol in your system. If they have any evidence of drug usage, blood or a urine samples will be requested. In Michigan, you can be forced to give a sample.

2.20. You Were Given an Advisement, and it was not the *Miranda* Warning. What is it? The *Miranda* warnings are statements of your rights the police have to give you when they arrest you.\(^{45}\) If you have ever heard these from a police officer before you were being arrested for some criminal offense, that offense is likely OWI if you are reading this book.

By driving your vehicle on a public road in Michigan, you have given your implied consent to have your blood, breath or urine tested to assure you are not impaired by some chemical substance (legal or illegal drugs, or alcohol).\(^ {46}\) By law, before the police officer can ask you for a sample based on your “implied consent” associated with your operating a vehicle on a public road, he or she must inform you of your rights. In Michigan, you need to be arrested before being informed of these rights.\(^ {47}\) Your implied consent rights will be further discussed in Chapter 9. If your rights were violated, any results from these tests could be deemed inadmissible against you, leading to the OWI charges against you being dismissed or reduced.\(^ {48}\) That is why it is critical for you to remember everything the officer told you (as close to word-for-word as possible).

2.21. Can You Obtain Your Own Test(s)? If so, When and Who Pays? The Michigan implied consent statute provides that a person who submits to the requested chemical testing of the state may, at his or her own expense, have an additional “independent” blood, breath or urine test performed.\(^ {49}\) If you request an independent test, the law enforcement officer must do what he or she reasonably can to accommodate that request, including taking you to a hospital of your choice, if your choice of hospital is reasonable.\(^ {50}\) If you are denied your right of an independent chemical test the first test is still applicable, but a jury instruction shall be given that the police violated
your statutory right to a reasonable opportunity for an independent chemical test.31

2.22. Here Are Some Precautions You Can Take if You are Going Out this Evening and May have Anything Alcoholic at all to Drink. Most people are so certain that being confronted by a police officer investigating a possible OWI offense will not happen to them that they make little or no preparation for the possibility. About one million people made that error last year, and not a single one thought it could happen to him or her either. Before you head out, make sure you have the following:

1. The name and phone number for the top OWI attorney in your area.
2. The “hard line” phone number for a person who will be willing and able to bail you out of jail. Many jails only allow “collect” calls to be made, and cell phones can’t take collect calls. Don’t plan on using stored numbers on your cell phone, because it will be confiscated.
3. The phone number of someone who can remove your vehicle from the roadway.
4. Clean your vehicle totally of any alcoholic beverage containers, including empties.
5. $500 cash or more to cover your bond, more if you have a criminal record.
6. Take a credit card and a debit card. You may be forced to use one or the other to pay for bond fees or an independent test, if one is available.
7. Because police have an unbelievable amount of latitude about towing your vehicle, do NOT have even the slightest amount (this includes ashes in the ash tray) of contraband drugs or any other medications in your vehicle that: (a) are not prescribed to you; (b) are not in their individual, proper containers (original
pill bottles from the pharmacy); and (c) be sure to remove all paraphernalia (pipes, wrapping papers, bongs, clips, etc.).

8. Keep in your possession the phone numbers of a co-worker who can cover for you if you do not get bonded out of jail in time for the next work day.

9. Get the red out. Take Visine® with you to use after being in the smoky rooms and harsh lights. Red eyes are a symptom of a long day. Don’t let the police use this against you.

10. Use gum or mints, or even brush and floss your teeth before leaving to drive home. Take steps to freshen your breath before getting in your vehicle and remove that alcohol odor.

2.23. Summary - What Do I Say and do if I am Confronted by a Police Officer and Suspected of OWI? No single answer will suffice for all people in all situations. For example, if an accident has occurred involving serious bodily injury or death of another person, you may have no choice but to either voluntarily submit to testing or suffer forcible blood or urine extraction if the police get a court order for this testing. Here are five universally sound things to do, if stopped by the police:

1. If asked (or told) about an alleged traffic violation, do not try to appease the officer by agreeing with him or her that you committed some traffic offense. Don’t get belligerent. Remember, everything you are saying is likely being recorded, and your OWI attorney may be able to use the favorable things said by you in your favor.

2. If asked about alcohol use or drugs, either admit nothing, or blame it on your bottle of mouthwash.

3. If asked for your license or any documents, have them ready to show the officer. Stay inside the vehicle, seated, with your hands visible on the steering wheel. If the officer asks you to step out of the vehicle, explain that you prefer to not get out,
due to safety concerns. If the officer claims to smell or detect alcohol or drugs, do not admit to having consumed anything. Only when he or she ORDERS you to get out, and physically opens your door should you reluctantly leave your car.

4. Once out of the car, do nothing and walk no place other than where he or she insists, or forces you to go. Explain your desire to not get out of the car at the roadside, and your desire to not be asked to walk, balance, count or perform any voluntary roadside evaluations of any type. If offered a hand-held breath analyzer, decline doing it, if you can.

5. Ask to call your attorney on your cell phone as soon as the officer starts getting “pushy”. Tell the officer that you are willing to satisfy his or her concerns for safety by handing your keys to him or her and taking a cab home.

2.24. Are Penalties Worse for a Second Offense? Yes. The look-back period for criminal enhancement to a second offense penalty is 7 years. The calculation goes from date of arrest to date of arrest. The penalty for a second offense is enhanced to 5 days to one year in jail, and also carries with it a one year license revocation, provided the conviction for the second offense is within 7 years of the prior conviction. The fine is $200.00 to $1,000.00.

2.25. What is Felony OWI / DUI Intoxicated Driving? On January 3, 2007 Governor Granholm signed into law legislation that removes the 10 year “look back” period for all intoxicated driving offenses. Under prior law, a third offense would be considered a felony only if it occurred within a prior 10-year time period. With this new amendment a driver arrested for intoxicated driving with two prior offenses, regardless of their age, will face felony charges.

The law was championed by the parents of Heidi Steiner, a northern Michigan high school senior who was killed by Danny Buffman. Mr. Buffman plead no contest to the charge of intoxicated
driving causing death, and was sentenced to ten years in prison. Then, in 2005, he was arrested again and charged with a first offense intoxicated driving because the prior offense, committed in 1991, was more than 10 years old. A first offense intoxicated driving is a misdemeanor punishable by up to 93 days. The new law would have allowed him to be charged with felony intoxicated driving punishable by 1-5 years in the state prison.

Other changes to the law include a relaxing of the proof necessary to prove a defendant’s prior record. This was necessary because very old convictions were sometimes difficult to prove because under the old law there were only three ways to establish the record in court.

The new law expands the options available to prosecutors to seven. These include a copy of the court’s register of actions and information contained in pre-sentencing reports or the defendant’s driving record. The Michigan Secretary of State will also now maintain records of intoxicated driving convictions for the life of the driver.
Michigan Criminal Justice System Overview for Felony Arrests

Arrest

Pre-Trial Screening (Possibly Post Bond and Release)

Arraignment on the "Complaint and Warrant" (Defendant enters Plea of Guilty, Not Guilty or Nolo Contendere)

Preliminary Examination (Judge determines by "probable cause" if crime was committed and if defendant committed it)

Bindover to Trial (Circuit) Court (Provided prosecutor meets burden of proof at exam)

Arraignment on the "Complaint and Warrant" (Defendant enters Plea of Guilty, Not Guilty or Nolo Contendere)

Pretrial

Possible negotiated plea to a compromise before or after pre-trial motions are conducted

Motions or Evidentiary Hearings

Possible dismissal of charges before or after pre-trial motions are conducted

TRIAL (Case not resolved by motions or Plea bargaining)

Guilty

Judge Decides Punishment Within limits authorized by law

Mistrial
(If Jury Cannot Reach Unanimous Verdict or mistakes Are made)

Possible re-trial on any mistrial counts

Freedom

Not Guilty

Freedom
Michigan Criminal Justice System Overview for Misdemeanor Arrests

Arrest

Pre-Trial Screening
(Possibly Post Bond and Release)

Arraignment
(Defendant enters Plea of Guilty, Not Guilty or Nolo Contendere)

Pretrial

Possible negotiated plea to a compromise before or after pre-trial motions are conducted

Motions or Evidentiary Hearings

Possible dismissal of charges before or after pre-trial motions are conducted

Negotiated Plea to reduced or New/Different charge

Judge Decides Punishment Within limits authorized by law

TRIAL
(Case not resolved by motions or Plea bargaining)

Mistrial
(If Jury Cannot Reach Unanimous Verdict or mistakes Are made)

Guilty

Judge Decides Punishment Within limits authorized by law

Not Guilty

Freedom

Freedom