



THE KANSAS DUI MANUAL:

EVERYTHING

YOU NEED TO
KNOW TO
HANDLE YOUR
CASE, NAVIGATE
THE SYSTEM
AND COME
OUT ALIVE AFTER
A DUI ARREST

SECOND EDITION

JAY NORTON, ATTORNEY AT LAW

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Introduction

After having handled DUI cases in Kansas for well over two decades, I have talked with thousands of people suffering the aftermath of DUI arrests and all the anxiety, depression, inconvenience, and expense involved with such charges whether for themselves, a child, a spouse, or another loved one. This book is for those people. It is my sincere hope that the information I present here will educate them and—forewarned and forearmed—they will breathe a little easier, sleep a little sounder, and be able to make informed decisions about how to resolve their situations.

A little disclaimer is in order here. This book will give you a good overview of the law and issues involved with DUI cases in Kansas (but not any other state). The DUI law is extremely complicated and is the product of over thirty years of constant and nearly annual tinkering by the legislature and almost monthly interpretation by the appellate courts. The sands are always shifting in the DUI arena, and I am confident that the law and issues will continue to be a moving target for the foreseeable future. No book can represent the totality of DUI laws and issues in

Kansas or any other state. Even the information in this book will get outdated eventually, so I plan to update it as necessary. The information in this edition is accurate as of the date of publication in July of 2022.

Keep in mind that every case is different—one size won't fit all in the DUI world. Most important, this book is no substitute for the advice of an attorney; nobody should undertake the awesome challenge of handling a DUI case without competent counsel. You could remove your own appendix or pull your own tooth, but the likelihood of disaster is high. Handling your own DUI case is much the same. None of the information contained in these pages should be construed as legal advice, nor does it create any attorney-client relationship between Norton Hare L.L.C. and the reader. You need to check with an attorney. I am always available to discuss these cases at (913) 906-9633 or, better yet, email me directly at jay@nortonhare.com.

Jay Norton

July 1, 2022

Arrested For DUI? Now What?

Getting arrested for a DUI in Kansas is frightening and serious. Fear sometimes paralyzes people and leads them to make bad decisions such as ignoring the situation. Though fear can be a great motivator, it can also lead to poor decisions when people act too fast out of a sense of panic. If you have been arrested for a DUI in Kansas, the best thing you can do is take a deep breath, try to relax a little, and start methodically handling business. Here are the top ten things to do:

1. Get Rested and Get it Together

Getting arrested for a DUI in Kansas often means spending the night in a jail cell or at least hours in a police station before you can go home. By the time you're released, you will probably be tired, hungry, depressed, filled with anxiety, embarrassed, ashamed, angry—or all of the above. Try to get some rest. The problem will still be there the next day, but you will be in a better position to deal with it when you have had some sleep, eaten a decent meal, and had a chance to reflect a little on the situation.

2. Get Your Life Back

Often after a Kansas DUI arrest, you have to get your car out of tow, recover other property and deal with missed work or other appointments. Handle these matters to get your life back to normal so you have less stress to deal with. I do not recommend sharing the fact that you have been arrested with work or anyone other than your most trusted advisors from amongst your friends and family. There is no need to start adding more drama to the situation at this point.

3. Get the Best Kansas DUI Lawyer You Can Find

Once the dust has settled a little, once you're in a better frame of mind and have gotten things somewhat back on track, it's time to get a DUI lawyer. How to do this is covered in more detail in the next chapter. This is important, and you should do your research. Hiring the right attorney can make a big difference in the outcome of your case and to your peace of mind over the next few months.

4. Request an Administrative Hearing

In Kansas, if you get a DUI and fail or refuse a breath, blood, or urine test, you will likely be served with a form known as a DC-27 (sometimes it is pink, sometimes it is white), which acts as your driver's license. If you gave a blood or urine test, it may be months before the results are known and the form gets served on you. Breath tests and refusals result in immediate service of the form by the officer. Once you receive the form, the clock starts ticking. You have only fourteen days from the date of service to request a hearing or your license will be automatically suspended.

It is by far the better idea to have an experienced DUI lawyer request the hearing for you. It is the first thing we do when a client retains our services. If you decide to do it yourself, instructions on the bottom half of the back of the form will explain how to do it. You need to request an in-person hearing or you will get only a phone hearing. An in-person hearing means that the officer has to appear and be present to be cross-examined; it's more meaningful than a telephone hearing. You need to request a subpoena of the officer or the officer won't be ordered to appear, and it will be harder for you to win.

If you don't request the hearing properly you will not get a hearing, and your license will be suspended beginning thirty days after the arrest. We send our clients' requests by first-class certified mail, return-receipt requested so we can prove they got it, when they got it, and who signed for it. We also fax it and get a fax confirmation just for good measure.

5. Plan for the Court Date

Look at the tickets and/or bond information to see when your first court date is and where the court is. Put it in your calendar, on your phone, on the fridge, etc. so you don't miss court. A missed court date can mean a warrant for your arrest, suspension of your license, and getting off on the wrong foot with the judge in your case.

If you hire an attorney, as you should as soon as you can, he or she may be able to appear in court for you and have your appearance excused. Your lawyer may be able to continue the first date or two by telephone and/or by appearing for you so you

don't have to miss work or step away from other responsibilities. If you have not hired an attorney by the time of your court date, make sure to show up in court well-dressed and on time and ask for additional time to find an attorney. The court will usually grant at least one continuance so you can get a lawyer.

6. Lay Low

Trouble can sometimes come in waves, and even if you didn't do anything wrong in the first place, the last thing you need is any greater difficulty in your life. DUI arrests, divorces, and other domestic, professional, and personal problems sometimes seem to occur simultaneously, so watch out for other issues in life—do what you can to keep matters from getting out of control.

7. Check Your Facebook

Review your social media profiles such as Facebook, Instagram, and Snapchat for photos and other references you would not like shown in court. It is extremely rare, but pictures of people drinking and references to drinking have been used against people in DUI cases. If there was an accident or anything else that could make your case more sensitive, this is doubly important.

Watch out for other issues in life—do what you can to keep matters from getting out of control.

8. Get the “Discovery”

In a Kansas DUI case, the evidence is usually called the “discovery.” The main information you need in most DUI cases are the police reports, any and all video and audio recordings,

and all the documents concerning the breath test (logbooks, maintenance records, etc.)

If there was a blood test, you need your lawyer to serve a business records subpoena on the Kansas Bureau of Investigation (KBI) or other crime lab for all records related to it. Some video recordings (such as jail videos) are kept only for a matter of days before they are written over, so you may have to act quickly.

You pretty much have to have a lawyer to do all this. Hopefully you do. Ask your DUI lawyer to send you copies of all this information. Even if you hire an attorney to review the evidence for you, take a good look at everything yourself, make a list of issues you see, and get the list to your attorney.

9. Read Your Mail

And check your voicemails, emails, etc. However your attorney and you decide to communicate, make sure you're keeping up with the communications and that your attorney can always get hold of you for instructions and decisions. It is important that you and your lawyer have a good working relationship and are on the same page.

10. Get Treatment if You Need It

Just because you got a DUI doesn't mean you're guilty or have a problem. However, you should at least consider whether the use of alcohol or other substances has become a problem in your life. Certainly, the fact that someone receives a DUI charge does not all by itself mean that person is an alcoholic or has a drink-ing problem—so don't get me wrong here. However, an arrest and charge for a DUI may provide a good opportunity for some self-reflection and analysis of how you found yourself in the

situation. It may be due to no fault of your own, just bad luck, or it very well may be that alcohol or other issues have led you to make some questionable choices and engage in risky behavior. Your lawyer's job is to try to beat the case, but your job is to be happy and healthy, so do whatever that takes.

In all, if you are arrested for a DUI, you have to take some quick but well-advised action. You need to be businesslike about it and do it right. We hope that the ideas in this book will get you pointed in the right direction.

How to Find and Hire the Right DUI Attorney for Your Case

If you have been charged with a DUI, you are scared, anxious, worried, and confused. You may feel depressed, ashamed, or even victimized. All these emotions can take a heavy toll on you and will creep into—if not overwhelm—your work and personal lives.

Because you have only fourteen days to make a written request for a driver's license hearing and to get it done right, you have to make a decision about an attorney quickly. A DUI arrest and all the anxieties it can cause can lead you to make a mistake in hiring an attorney. You may be tempted to hire the first lawyer you talk to just to get the decision over with. You may allow someone to capitalize on your fears without giving you accurate information and without taking time to help you make the right decisions. You may base your decision purely on who's the cheapest because you're concerned about the financial impact a DUI conviction or driver's license suspension would have on

you. Think about these considerations when trying to find the best DUI attorney to assist you:

Do You Even Need An Attorney?

Some people charged with a DUI think they don't need an attorney, especially if it is a first offense. Many police officers will tell people during their DUI arrests that they don't need an attorney. However, a DUI conviction, especially given the ever-tightening DUI laws in Kansas, can be like a disease. It can result in a loss of driving privileges, loss of a job, jail time, upheaval of personal relationships, enormous expense and inconvenience, higher insurance rates, a lifetime criminal record, and a long list of other social and legal problems. If you had a disease, you'd see a doctor; if you needed dental work, you'd head to your dentist's office. Because a DUI is a potentially life-altering situation, you need not just a lawyer but also one with a lot of experience and skill in the specialized area of DUI defense.

You can represent yourself if you want. Did you ever hear, "The lawyer who represents himself has a fool for a client"? That became a cliché for a good reason. You will likely lose your driver's license in the administrative proceeding and have the criminal case navigated for you by a prosecutor, the lawyer who is against you! He or she may seem helpful, but his or her job is to get convictions and collect money for the state or city, not help you.

Even if you elect to accept diversion (see the chapter on "Diversion"), the quality of your life while on diversion will be dictated by the terms of the diversion agreement, and you need a lawyer's

advice about that. DUI diversions are counted as convictions if you get charged with another DUI in Kansas ever again. A driver's license suspension will be on your driving record and can be used to enhance the penalties on future driver's license suspensions forever. This is no time for amateur hour. Get the best professional you can on your side.

Who Is the Right DUI Attorney?

The representation of those charged with DUI has become an extremely complex, Byzantine maze that few lawyers have really invested the time and energy into understanding. The laws concerning administrative driver's license ramifications and criminal case penalties change nearly every legislative session. Because decisions by the appellate and supreme courts are issued every few weeks, Kansas DUI laws change on an almost monthly basis. It takes serious dedication and focus on the part of a DUI lawyer to stay on top of the law and to be able to provide accurate, reliable advice.

Be careful about relying on advertising and sloganeering. Anybody who graduates from law school can set up a website or rent a billboard touting his or her DUI competency. In a local restaurant restroom, right above the toilet, there was recently a paid advertisement for a lawyer touting himself as the top DUI attorney in Kansas City, where

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our office is located, but we'd never heard of the guy. He might have been an awesome attorney, but you can't believe it just because it said so above the toilet. You need an attorney who doesn't just advertise about his or her DUI experience but can back it up with a solid reputation and a proven track record in this area of law.

Common Mistakes in Selecting A Kansas DUI Attorney

1. Hiring your friend, friend's dad, or your real estate attorney to represent you for a Kansas DUI charge

Not just anybody with a law license can give you effective representation in a DUI case because it's a particular area of the law. The attorney who handled your divorce, wrote your will, or helped you sue someone may not be the best attorney for your DUI. Even a general criminal defense attorney may not have the expertise a DUI defense requires. A Kansas DUI is a whole lot different from a speeding ticket, domestic violence charge, or a theft case. Your friend or a friend of a friend may sincerely be trying to help you, but without the knowledge a Kansas DUI case demands, he or she could unintentionally hurt you more than help you.

2. Hiring someone based on online advertising

Anyone can put up a webpage and declare himself or herself a DUI attorney whether it's true or not. The Internet has become

the modern-day Yellow Pages, and it's a lot cheaper. Attorneys have gotten very clever about creating websites, filling them with good-sounding content, and getting high search engine rankings, but that doesn't make them knowledgeable about trying DUI cases. In fact, a lawyer can just hire Scorpion or some other company that specializes in building lawyer websites and they deploy one of their templates to build a good looking website that ranks high with search engines and makes it look like their attorney customer is one of the best in town.

Many attorneys come straight out of law school, set up a website, and declare themselves experienced DUI defense attorneys though they have scarcely ever—maybe never—successfully litigated a difficult DUI to completion.

Other attorneys will advertise all their trial experience, but the truth is their experience was gained as prosecutors, trying to put people in jail for DUI! They don't have proven track records defending and beating DUI cases.

Watch out for the national “pay to play” websites, and there are a bunch of them. These sites claim to have a stable of the best DUI attorneys in the country—all you have to do is type in the name of your state or click on a map and up pops the name of an attorney in your area. In reality, these sites make money by selling advertising space to the first attorney who comes up with the money. Many of these sites offer an exclusive listing for a certain state or area of a state to a lawyer in exchange for dollars regardless of the lawyer's competency or experience in any area of the law. The first lawyer who ponies up the cash can be referred to every potential client who lands on the site.

Take a look at the pages of lawyers from other states that such sites offer. Usually, all the pages look the same because they are

just forms attorney advertisers fill out, complete with the same slogans and graphics. Some of these attorneys may actually emphasize DUI cases in their practice and be good at what they do, but others are running high-volume fee mills and may not be willing to actually try your DUI case.

Finally, the name of the game for attorneys online in the last few years has been in getting reviews. These reviews may or may not be legitimate. They also may be reviews for the attorney's services in fixing speeding tickets or handling cases other than DUI cases. So, they have to be viewed skeptically and with an eye for details about whether it was a DUI case or some other kind of case. Of course, good reviews that tell the story of an attorney taking on a DUI case and achieving a good result, communicating with the client appropriately and otherwise doing a professional job can be extremely helpful in finding a quality DUI lawyer. Of course, negative reviews may also not be legitimate.

The Internet can be a great resource, but just as with everything on the Internet, you have to do your due diligence and try to find other sources of information that are not purely the attorney's own advertising to corroborate advertising claims. You can do this through client reviews, ratings by professional organizations (AVVO.com, Martindale-Hubbell), published cases, case results, articles about the attorney in the newspaper, and articles published by the attorney in legitimate publications.

3. Hiring the first person you get hold of from the Yellow Pages

Though Yellow Pages advertising is almost dead in this age of the Internet, you'll be amazed at the enormous number of attorneys marketing themselves in the Kansas City area this way. It will

also give you some sense of the competition for clients in this market.

Anyone, however, can buy a Yellow Pages ad, and there's no one to check the accuracy of their advertisement's claims. You can also see from the ads that many attorneys are attempting to do it all—bankruptcy, divorce, immigration, and other disparate areas of the law in addition to doing some DUIs on the side.

Some attorneys who rely on advertising and yellow pages ads may be running “fee mills” in which they count on a high volume of random people finding them in the yellow pages. They have low fees, but their aim may be to resolve cases quickly and in large numbers just to make a living. It used to be that if you needed a plumber, electrician, lawyer, or other technical specialist, the Yellow Pages was the only place to look. Nowadays you can get much more information online, including reviews and better compare-and-contrast providers.

4. Hiring someone based on a newspaper or magazine advertisement

You can look at the back page of many papers or magazines and see the ads of attorneys touting their services for one thing or another, usually DUI, bankruptcy, and divorce. Often, when an attorney is just starting out, advertising this way is a good way to get one's name into the marketplace and to get some clients on whom to build a practice.

There comes a time, though, when an attorney's reputation in the community and word of mouth of former clients should be able to sustain a practice. Making a decision about an attorney based solely on such an advertisement may not be the best way to find a skilled attorney who will fight for you. Would

you feel comfortable leaving a life-threatening illness to a doctor you found on the back of a free paper? Probably not.

5. Hiring an attorney based on price

Another cliché that became a cliché because it was so true is “You get what you pay for,” and nothing could be more

accurate when it comes to lawyers. Another saying you might not have heard is, “There’s nothing more expensive than a cheap lawyer.” Making a decision about who to hire based on fees may end up being very costly. If you’ve had a DUI before and paid your attorney only a few hundred dollars, you may recall how that worked out.

A DUI charge can have serious long-term financial ramifications including fines, fees, and court costs; higher insurance rates; loss of employment; driver’s license reinstatement fees; the costs of court-ordered drug and alcohol treatment programs; ignition interlock devices; and “color-code” bodily fluids tests among others. Making an up-front investment in effective representation by someone who knows how to navigate the system well may save you thousands over the long term and greatly diminish the impact of this situation on your life.

An attorney who charges a high fee should be doing so based on his or her knowledge, skill, and reputation in the community as well as the amount of work required to defend you properly. Going the cheapest route possible may get you the opposite and cost you financially and otherwise for a long time to come.

Making a decision about an attorney based solely on an advertisement may not be the best way to find a skilled attorney who will fight for you.

HOW TO DO IT RIGHT

1. Get word of mouth

This can be a very effective way of determining which lawyer can best represent you. Almost everybody knows someone who has been cited for DUI. Ask them who represented them, whether they were satisfied that the lawyer did everything possible for them and if they would hire that person again. You should be able to get the names of two or three competent attorneys in addition to the names of attorneys to avoid. This should not be the end of your search, however.

2. Do your own research

Become familiar with Kansas DUI laws and be prepared with questions for the attorneys you want to talk with (and this book should help you with that). You should also try to research the attorneys themselves and get to know something about their experience with DUI cases. Besides checking on their ratings by Martindale Hubbell and Avvo.com, go to their websites to learn what you can about them. Are they just on pay sites? Do

Become familiar with Kansas DUI laws and be prepared with questions for the attorneys you want to talk with

their names come up often on sites concerning Kansas DUI cases? What organizations do they belong to? Attorneys who belong to organizations dedicated to the defense of persons charged with DUI or criminal defense in general are more likely to be dedicated themselves to effective representation of those charged with DUIs in Kansas.

3. Meet with the attorney

You need someone with whom you are comfortable, in whom you have confidence, and who has your best interests in mind. You should be able to gauge to some extent whether this attorney intends to fight for you or sell you out the first chance that comes up. You need to meet the lawyers you are considering in person, not just talk to them on the phone.

You want someone who is enthusiastic, inspired, and courageous, not someone who is complacent or dismissive. No attorney can or should make any promises or give any guarantees about a particular outcome in your case, but you should get some sense of whether those you talk to will be willing to flip over every rock and know what to do if they find anything there.

4. Make your decision based on who you believe can best represent you

Try to block out considerations of money, allegiance to friends or family, or any consideration other than in whose hands you feel most comfortable being. That person is probably the attorney for you, so find a way to secure his or her representation. Money is important, but you have the rest of your life to make money—you are likely to get only one chance to handle your DUI case right.

What You Should Expect from Your DUI Attorney

-
- 1.** Answers to your questions.
 - 2.** Prompt return of telephone calls and emails.
 - 3.** Copies of all police reports, video recordings, photographs, and other evidence he or she obtains.
 - 4.** A willingness to meet in person by appointment to discuss your case.
 - 5.** Correspondence concerning all activity in your case, including any upcoming court dates or driver's license hearings.
 - 6.** A thorough review of all the facts and laws applicable to your case.
 - 7.** An honest assessment of the strengths and weaknesses of your case.
 - 8.** A desire to talk to witnesses, review medical records, and come up with creative defenses.

- 9.** Good advice about strategy, evidence collection, and how best to resolve your case.
- 10.** Knowledge, experience, skill, confidence, and total honesty.

If you are willing to invest the time and resources necessary to find the lawyer who can best represent your interests in your case, you are likely to have far less anxiety about it. You'll have a far better chance at achieving a satisfactory result and minimizing the immediate and long-term impact of this charge on your life.

The rest of this book should provide you with information that will help you identify issues and get familiar with what's going to be important in defending your case and, I hope, will help you make an educated decision about hiring an attorney and helping that person get you the best result possible.

The Kansas DUI Case

“Driving under the influence” means operating or attempting to operate a vehicle when under the influence of alcohol and/or drugs, or a combination, to a degree that renders one unable to safely drive a vehicle, or that you took a breath, blood, or urine test within three hours of driving with a result of .08 or more. In Kansas, a driving under the influence charge is usually referred to as a DUI, but may be called a DWI or OUI in some jurisdictions.

Years ago, a drunk driving charge meant that someone was drunk in the way we all commonly understand the word—intoxicated, hammered, wasted, etc. In the mid-1980s, however, legislatures all over the United States began to toughen their DUI laws in response to public outcry and media coverage of the DUI issue. It’s not necessary today that a person be drunk to receive a DUI charge. In fact, if your breath or blood shows an alcohol concentration of .08 or over within three hours of operating a vehicle, you are presumed to have been too intoxicated to have safely driven in Kansas. You may not think you’re intoxicated. Those around you may not think

you're intoxicated. Indeed, you may not be considered intoxicated for any other purpose in the world other than driving. But you may have enough alcohol or drugs in your system to be considered too intoxicated to drive. And if you are convicted of a DUI in Kansas, you'll suffer harsh penalties.

When a person is cited for a Kansas DUI, two legal actions are usually initiated: a criminal charge brought by the city or state in which you were stopped, and a civil lawsuit brought against your driver's license by the Kansas Department of Revenue. These proceedings occur simultaneously, and both can have a severe impact on your driving record and quality of life. They will be discussed at length in the following pages.

When a person is cited for a Kansas DUI, they receive a criminal charge in addition to a civil lawsuit brought against their driver's license.

Keep in mind that every case is different and raises different issues. DUI cases rise or fall on the facts of each case and can depend on what jurisdiction your case is in, who the judge is, and what jurors are like in that location, among other variables. The quality of your defense in a DUI case depends on the details and facts of your particular case. There are two

primary sources of this information: you and the arresting officer. Thus, it is very important that you share with your attorney all the details and facts about your case and that you give him or her the truth. What you say to your attorney about your case is protected by the attorney-client privilege, so it will remain confidential.

Getting Stopped for a DUI

Before a driver can be cited for DUI, a police officer has to have a reason to contact that person. This contact can come about in several ways:

- A traffic accident
- A stop due to traffic infractions observed by the officer (speeding, for instance)
- A sobriety checkpoint
- Through investigation of another crime
- A stop due to unusual driving or actions observed by the officer

While these are the most typical, there are countless others.

For a police officer to lawfully stop a moving vehicle, he or she must have at least a “reasonable suspicion” that a crime is being, has been, or will be committed. Of course, this includes traffic infractions such as speeding, weaving out of a lane, or running a stop sign. In fact, the Kansas Supreme Court has determined that a police officer may lawfully stop a vehicle that is weaving inside its own lane even though doing so is not a traffic infraction if the officer has reasonable suspicion the person is drunk. We routinely see cases in which police officers stop people after midnight for things they would never stop them for during daylight hours or if they weren’t fishing for a DUI arrest, such as failing to turn into the nearest lane, illegal window tint, or an inoperable light above their license plate.

If you are involved in a traffic accident that involves an injury or death or that does more than \$500 in damage to the vehicles or property involved, you are required by law to contact the nearest police agency. In the event of an accident involving less damage, you must exchange information with the other driver and any police officer investigating the accident. An investigation of an accident will often include law enforcement checking to determine whether any driver is DUI.

Frequently, law enforcement agencies will set up “sobriety checkpoints” at which all drivers are required to stop. The Johnson County area has many checkpoints throughout the spring and summer. Very specific rules and regulations govern this practice, and they are illegal if not administered properly. In a checklane case, there is no evidence of any bad driving by the driver because somehow he or she safely arrived at the checklane, so the cases are inherently weaker than many traditional DUI cases.

What the Police Look for

When police contact a driver, they are looking for specific symptoms of intoxication. Typically—almost without fail—these include the odor of alcohol on a person’s breath or body, bloodshot or watery eyes, and slurred speech. The officer will also watch to see if the driver fumbles when trying to get a driver’s license out or looks lethargic, confused, or disoriented. Some people appear dirty, disheveled or otherwise have an unusual appearance and the officer will note this.

Generally, officers who observe one or more of these clues will ask the driver whether he or she has had anything to drink. No one is required to answer potentially incriminating questions and can refuse to answer or ask for an attorney. Most people say that they have had a “couple” of drinks, which is not necessarily incriminating. However, such “statements of consumption” will be used against them at later hearings. Whether a driver admits to drinking or not, if the officer believes the driver has consumed alcohol prior to driving, the driver will be asked to get out of the car. The officer will be looking to see if the driver stumbles or staggers when getting out, sways when walking, or leans against the car for support.

Field Sobriety Tests

In an attempt to confirm a suspicion that a driver is under the influence of alcohol or drugs, the police officer will typically ask the driver to submit to field sobriety testing. This request will usually be delivered more like a command, but a person

No one is required to answer potentially incriminating questions and can refuse to answer or ask for an attorney

may refuse to submit to field sobriety testing because they are completely voluntary. Field sobriety tests are referred to as “psycho-physical” tests—“psycho” as in mental, and “physical” as in coordination. “Field sobriety testing” is the name the police and prosecutors use. These exercises aren’t really tests; they have never really been scientifically validated to determine sobriety or subjected to peer review. The officer is looking to see whether a person can understand and remember instructions while performing these feats of gymnastics.

The National Highway Transportation Safety Administration (NHTSA) has approved and “validated” three field sobriety tests:

The Horizontal Gaze Nystagmus Test

This is a test during which the officer holds a pen or similar object in front of the subject’s eyes and has him or her follow it with his eyes only. The officer is also supposed to look for a “jerking” of the eye when the pen is held at a 45-degree angle. Such jerking is supposed to indicate an alcohol concentration of over .10. While many police officers feel this is the most reliable field test they have in their arsenal, it is not allowed in court in Kansas unless the prosecutor has an expert witness to testify to its scientific validity. Thus, it is almost never introduced in court in Kansas.

The One-Leg Stand Test

This test requires the subject to stand on one leg with their hands down at their sides and count to thirty. The officer will look for swaying, raising the hands for balance, and the ability to count properly, among other things. This test is difficult for most people to do even with no alcohol in their systems, and is

especially difficult for someone with bad knees, ankles, or back, inner-ear disorder, or any other physical limitation.

The Walk-and-Turn Test

This test is also called the heel-to-toe test; it requires a person to walk nine steps heel-to-toe in a straight line, turn around, and walk nine steps back. The officer will look to see if the subject stumbles, fails to touch heel to toe on each step, uses their arms for balance, or takes too many or too few steps, and how the subject executes the turn. Again, this test is hard for sober people, especially when taken on the side of a road with flashing police lights and traffic whizzing by.

All the NHTSA-approved tests must be administered exactly as prescribed in the NHTSA manual or their validity is compromised.

Often, the police officer won't bother to ask the driver whether he or she has any physical issues before he puts the person through these exercises. It is extremely important that you inform your attorney of any physical injuries, disabilities, or illnesses you may have because bad knees, ankles, hips, or backs may explain lack of balance or coordination during these tests. People with learning disabilities such as attention deficit disorder may have trouble understanding and following an officer's instructions. Allergies, inner-ear disorders, and sinus problems may also cause imbalance. This is the type of information on which successful defenses are based.

Police officers usually have several other field sobriety tests they administer, although they have not been proven to be reliable for determining whether someone is impaired or not. These include

the finger-to-nose test, requiring people to say the alphabet or count backward, and touching their fingers together.

The Preliminary Breath Test

Another test frequently used by law enforcement officers is the preliminary breath test (PBT). This is a little machine that officers carry in their cars. Usually right before the officer makes a DUI arrest, he will have the driver blow into the PBT machine. The PBT will alert an officer if there is alcohol on the driver's breath, and most machines will give a specific reading that indicates whether a person is over the limit or not. Police officers are supposed to wait fifteen to twenty minutes before administering this test, but they rarely do. This machine is very unreliable and in fact is not admissible in court to prove a person was driving under the influence. It can be used as evidence in court only if the driver challenges the police officer's decision to arrest him. Officers can and do base their decisions to arrest people solely on the results of the PBT. The PBT and the breath test done later at the station are two different tests, on two different machines, and each has a different impact on your case.

If the officer finds that a driver did not perform these field sobriety tests to his or her satisfaction, the driver will be arrested for DUI. At that point the driver is often handcuffed, searched for weapons and/or contraband, and placed in the officer's car for transportation to the police station for booking and a blood or breath test. The officer is generally allowed to search the driver's car to look for alcohol or drugs that may be involved with the DUI. The car is often towed at that point.

Throughout this entire episode, from the point of initial contact until the driver is released, the officer will note the person's attitude and behavior. Combativeness and belligerence are considered signs of intoxication. It always pays to be courteous and polite to police officers even if you don't agree with what they are doing.

After the Arrest

Testing Notices

After a DUI arrest, the officer will almost always want a breath, blood, or urine test that can and will be used to try to prove a driver was over the legal limit or under the influence of drugs and/or alcohol.

Before a police officer can ask a driver to take such a test, however, the officer must give the driver written and oral notice of several facts about the ramifications of taking or refusing a test. These include telling the driver that:

- he or she has no right to consult with an attorney about whether to submit to the test,
- if a person refuses the test, he or she could lose driving privileges for a year, and that

- after the test the person has the right to get additional testing done at the place of his or her choice.

If you have been charged with a DUI in Kansas, you may recall the officer giving you a white piece of paper, a DC-70 form, and asking you to read along with it while he or she read it to you. That was your oral and written testing notices.

After the notice is given, the officer will ask a person if he or she will consent to a test. The driver has no choice as to what kind of test is administered. Only the officer decides whether to request a breath test, blood test, urine test, or some combination of the three. The officer can request more than one test. After the driver has submitted to the test or tests of the officer's choice, and only if the test or tests were completed, he or she is entitled to go and get an independent test from a doctor or hospital, but finding one that will do such a test is not easy.

Breath Test

The officer investigating a DUI will most often request a breath test of the driver. Blood tests are usually reserved for instances in which the officer believes the driver is under the influence of drugs other than alcohol that would not be detected by the breath testing machine, or when there has been serious injury or death and the driver has been taken to a hospital.

In Kansas, all police departments use an Intoxilyzer 9000 to test breath for alcohol. This machine is manufactured by CMI in Owensboro, Kentucky. The manufacturer claims the machine can filter out various compounds that often get mistaken for alcohol. It also claims that the machine can detect "mouth alcohol," that is, alcohol trapped in the mouth but not in the bloodstream.

These claims can and should be challenged judicially because scientific research has shown them to be largely without merit.

People who paint houses or work around solvents may produce a positive reading over the legal limit without ever having had a drink (due to breathing acetone and/or toluene). Residual mouth alcohol is a big problem for the machines, so a twenty-minute waiting period is required before a breath test is administered to attempt to ensure that any alcohol in the mouth has dissipated. Again, the “slope detector” that’s supposed to detect mouth alcohol has been found not to work in some instances.

The Intoxilyzer 9000 is also subject to radio and electrical interference. Variations in the voltage in the electrical lines or the use of mobile phones, radios, and police scanners around the machine may produce false-positive readings.

Each machine is inspected only once a year for accuracy by the Kansas Department of Health and Environment. Individual police agencies are supposed to do routine calibration checks and maintain records of them, and these are often important documents to obtain in DUI cases.



Intoxilyzer 9000

Police officers are required to be certified operators of the machine, so this is something that should be verified by the lawyer.

Before a breath test can be admitted into evidence at a trial, the prosecutor must show that the breath test operator (police officer) operated the machine according to the manufacturer's recommendations and the rules and regulations established by the Department of Health and Environment.

The "manufacturer's recommendations" means the owner's manual for the Intoxilyzer 9000. Most officers have never seen the owner's manual for the machine and have no idea what the manufacturer's recommendations are. The "rules and regulations established by the Department of Health and Environment" means, among other things, the protocol for running the Intoxilyzer as promulgated by the state agency.

You will hear the term "protocol" used a lot in your DUI case. The protocol for the Intoxilyzer 9000 is a set of seven steps that must be followed for a breath test to be valid.

First and most important is the twenty-minute "observation period." During this time, the officer must not leave the subject's presence and must ensure the subject doesn't belch, regurgitate, or put anything in his or her mouth. The other six steps deal with how the officer must prepare and utilize the Intoxilyzer 9000. If the officer misses any one of these steps, he or she has failed to follow the protocol, and the test should be thrown out.

The machine will do internal calibrations and checks. The subject then must blow into the machine for an extended period of time. The machine is designed to test only "alveolar air," which comes from deep in the lungs only after all the other

air in the lungs has been blown out. If a subject doesn't blow hard enough, the machine will read "deficient sample." Sometimes an officer will interpret an inability or unwillingness to blow hard enough as a refusal. The subject must be standing straight up to give a deep-lung sample. Tests given while a subject is sitting down or bending over are improper, although the practice is common. The breath test printout must be studied very carefully to determine whether the machine was functioning properly.

If the officer misses any one of these steps, he or she has failed to follow the protocol, and the test should be thrown out.

Despite the fact that the Intoxilyzer has been the subject of many challenges in the courtroom, judges and jurors tend to trust it, so it takes hard work on the part of the attorney to expose the fallacy of the machine. As mentioned earlier, if one of these machines says your breath alcohol was .08 or higher within three hours of driving, you may be convicted of DUI. When possible, knocking out the breath test is a very important element of your defense. You need an attorney with a lot of experience and knowledge about the machines and infrared spectography, the regulations of the Department of Health and Environment, and the physiology of alcohol in the body to challenge the breath test results.

Blood Test

The blood test is considered more reliable than the breath test. However, it is not used as often as the breath test due to the expense involved and the impracticality of taking every arrestee to the hospital. By law, evidential blood tests must be drawn by

a doctor, nurse, or other qualified medical technician. Another problem with the blood test is that it can be hard for the prosecutor to get the results into evidence because they need the arresting officer, the nurse or doctor who drew the blood, and the lab technician who tested the blood all to be present for trial.

A blood test is most often used when a person is suspected of being under the influence of something other than alcohol or when there has been an accident. If the driver was injured in an accident, blood will almost always be taken on arrival at the hospital. In the case in which blood is drawn for medical purposes (i.e., to type the blood or determine if anything in the blood would react adversely to medication) as opposed to legal purposes, the police may obtain the results by a search warrant served on the hospital records. In Kansas, no doctor-patient privilege protects such a test; there is, however, a federal law that prohibits hospitals from disclosing confidential information about patients treated in the hospital for drug- or alcohol-related issues. Thus, when blood is drawn without a request from law enforcement, it may be important to contact the hospital's attorneys immediately with notice of the federal confidentiality law and to assert the patient's right to confidentiality in the appropriate circumstances. When blood is drawn for legal purposes, at the request of the police, the driver must get the implied consent notices.

A recent trend has been for police officers to obtain search warrants to obtain a driver's blood by force if the driver refuses to take a breath or blood test. The officer has to contact a judge, get a signed warrant, and, if the driver resists, hold the person down and take the blood.

Blood tests in Kansas are usually sent to the KBI in Topeka for testing. In Johnson County, the blood sample is usually sent to the Johnson County Sheriff's Department Crime Lab. It generally takes two or three months for the results of the blood test to be returned. It is important to obtain all the records maintained by the KBI or crime lab, including:

- the calibration records of the testing machines,
- the records concerning the other samples tested at the same time,
- the chromatograms underlying the results,
- the chain of custody for the sample, and
- all the protocols for the calibration of testing machines and the storage, handling, and testing of samples.

This can end up being about 100 pages of documents.

Many other issues come up with regard to blood tests, such as, Was the person's arm swabbed with alcohol prior to the test? Was anticoagulant mixed with the sample? Was a preservative used? Did the test measure whole blood or just plasma? Blood tests always warrant serious and immediate action and investigation. This often includes obtaining the driver's medical records to see what the impressions of the doctors and nurses were.

Urine Test

Urine tests are fairly rare, although we are seeing more of them recently as law enforcement becomes more interested in determining the presence of drugs as opposed to alcohol in a driver's

system. Urine tests for alcohol are extremely unreliable and not often used in Kansas. A whole host of issues is involved with urine testing that may aid in suppressing the result. This is something to discuss with your DUI lawyer.

Refusal of Testing for Alcohol and/or Drugs

If, after being read the testing notice, the driver opts not to take a breath, blood, or urine test or is unable to submit to one of these tests, the driver will be considered to have refused the test. A refusal to take breath, blood, or urine tests may be a positive in defending a DUI case because there is no way to prove a person was over the legal limit of .08 within three hours of driving. Thus, the prosecutor must prove that a person was driving while under the influence to a degree that rendered him or her incapable of safely operating the vehicle. A refusal eliminates the prosecution's strongest evidence. However, many people are prosecuted and convicted of DUI despite the absence of a test. This is an issue an attorney must deftly handle before a judge or jury.

In July of 2012, the Kansas Legislature made it a crime to refuse a test. However, the Kansas Supreme Court declared that law to be unconstitutional and struck it down. But a refusal can and will be introduced as evidence in a DUI trial.

Penalties for DUI

This chapter deals only with the DUI criminal case and does not address the civil or administrative action against your driver's license. Further, it deals only with the judicial penalties for a conviction for the criminal offense of a Kansas DUI. Many nonjudicial penalties will follow a no-contest plea, guilty plea, or conviction for a DUI. These include increased insurance costs, problems renting cars, and job barriers. These nonjudicial penalties will be addressed in a separate chapter.

Two Types of DUI

There are two separate ways for the prosecutor to prove a Kansas DUI case:

1. By proving that the defendant was a less-safe driver due to impairment by alcohol and/or drugs (including prescription or nonprescription drugs) by using the officer's observations, including manner of driving, field sobriety tests, the smell of alcohol, etc.

restricted license that would allow driving with an ignition interlock device installed.

DUI Second Offense

Conviction of a second Kansas DUI in a lifetime is a Class A misdemeanor.

Jail: a minimum of five days up to a maximum of one year.

Fine: \$1,250 to \$1,750, and court costs of between \$10 and \$200, plus any additional fees.

Probation: Only those who have served a mandatory minimum of five days of incarceration are eligible for probation. Two of the days of imprisonment must be served consecutively in a jail facility or weekend treatment program. The remaining days of confinement may be served by spending 120 hours in a work release program or on house arrest (excluding any hours spent outside of the house for work, etc.). The terms of probation are standard: no breaking the law, no drinking, no going to places where alcohol is served, etc.

Court-ordered AA meetings, outpatient treatment, or inpatient treatment programs are also possibilities.

The bottom line is for a second-time DUI conviction in Kansas you have to spend two days in jail or in a treatment program and do several days of house arrest before you can be put on probation.

Suspension of Driver's License: If a defendant tests at less than .150, a criminal conviction of a second-time DUI results in a one-year suspension of driving privileges followed by one year of driving restricted to operating only a motor vehicle equipped

with an ignition interlock. However, the driver may apply for a restricted license which would allow driving with an ignition interlock device installed.

If the test is .150 or higher, a conviction for DUI will mean a license suspended for one year followed by two years of driving only a vehicle with an ignition interlock device. However, the driver may apply for a restricted license after which would allow driving with an ignition interlock device installed instead of being suspended.

DUI Third Offense

Conviction of three DUIs in a lifetime is a felony in Kansas if there has been a diversion or conviction for a DUI within the previous ten years. If there has not been a DUI within the preceding ten years, it is a Class A misdemeanor

Third-Time Misdemeanor

Jail: a minimum of thirty days up to a maximum of one year.

Fine: \$1,750 up to \$2,500, and court costs of between \$10 and \$200.

Probation: No person can get probation until after having served at least thirty days in custody. After 48 hours in jail, the remainder of the incarceration may be spent in a work release program during which the inmate goes back to jail each night after work, or on house arrest with GPS. On house arrest, the first 240 hours will only include those hours spent in the person's home (i.e., not the hours spent at work).

Suspension of Driving Privileges: Upon a third criminal conviction for a Kansas DUI, a person who took a test and was under .150 will be suspended for one year followed by one year of driving restricted to operating only a motor vehicle equipped with an ignition interlock device. Those who tested at .150 or higher will have their licenses suspended for one year followed by a three-year restriction to driving only with an ignition interlock device. However, the driver may apply for a restricted license that allows driving with an ignition interlock device installed.

Habitual-violator proceedings may be instituted by the Department of Revenue to revoke the defendant's driver's license for three years.

Third-Time Felony

Jail: a minimum of 30 days up to the maximum allowed under the Kansas Sentencing Guidelines. A felony DUI is a Level 6 felony on the Kansas Sentencing Guidelines grid, so the amount of time in prison will be controlled by where a person lands on the grid.

Fine: \$1,750 up to \$2,500, and court costs around \$200.

Probation: If the DUI conviction lands in a box that allows for probation, it may be granted by the court. No person can get probation until after having served at least 30 days in custody. After 48 hours in jail, the remainder of the incarceration may be spent in a work release program during which the inmate goes back to jail each night after work, or on house arrest with GPS monitoring (excluding the hours spent at work or out of the house for the first 240 hours).

Suspension of Driving Privileges: A person who took a test and was under .150 will be suspended for one year followed by two years of driving restricted to operating only a motor vehicle equipped with an ignition interlock device. Those who tested at .150 or higher will have their licenses suspended for one year followed by a three-year restriction to driving only with an ignition interlock device. However, the driver may apply for a restricted license to drive with an ignition interlock device installed.

DUI Fourth or Subsequent Offense

Conviction of four or more DUIs in a lifetime is a Level 6 felony on the Kansas Sentencing Guidelines.

Jail: A minimum of 30 days of confinement up to the maximum allowed under the Sentencing Guidelines.

Fine: \$2,500, plus the ADSAP fee of \$150, and court costs of between \$10 and \$100.

Probation: No person can get probation until after having served at least 30 days in custody. After 48 hours in jail, the remainder of the incarceration may be spent by doing work release or house arrest monitoring with GPS (excluding the hours spent out of the house for the first 240 hours).

After serving the term of incarceration, the person must be placed on one year of supervision during which the person must participate in substance abuse treatment and any mental health treatment recommended by Social and Rehabilitative Services.

If the Sentencing Guidelines call for prison, that prison time will be served in the custody of the Secretary of Corrections. In other words, state prison - the big house.

Suspension of Driving Privileges: Upon a fourth or subsequent criminal conviction for DUI, those people who took a test and were under .150 can have their driver's licenses suspended for one year followed by three years of driving restricted to operating only a motor vehicle equipped with an ignition interlock device. Persons who tested at .150 or higher will be suspended for one year and then restricted to driving only vehicles equipped with an ignition interlock device for four years. However, the driver may apply for a restricted allowing him or her to drive during the period of suspension with an ignition interlock device installed.

Habitual-violator proceedings may be instituted by the Department of Revenue to revoke the defendant's driver's license for three years.

DUI With a Child Under 14

Any person convicted of a DUI while having a child under the age of 18 in the vehicle will have an additional 30 days of imprisonment added on to whatever jail sentence he or she receives for the underlying DUI conviction.

Plea Bargaining

Plea bargaining on DUIs to avoid the mandatory minimum penalties is generally prohibited by law in Kansas unless the prosecutor does not believe that he or she can prove their case beyond a reasonable doubt.

Expungement

Expungement is the process whereby convictions are removed from a person's criminal record. A person convicted or diverted for a Kansas DUI may petition for expungement of the incident from his or her record five years after being released from diversion, probation, parole, or otherwise completing a sentence for a first time DUI and ten years after completing the sentence for a second or subsequent DUI.

The Administrative Driver's License Suspension Hearing

As discussed previously, two separate proceedings are initiated when a person is cited for a DUI in Kansas. At the same time a person is being prosecuted criminally, a civil administrative suit is brought by the Kansas Department of Revenue against his or her driver's license. Neither case has any direct bearing on the other.

After a person has been read the testing notices, been breath tested, or refused the test, the police officer will keep his or her plastic driver's license and serve the person with a form filled out by the officer. This form, titled "Officer's Certification and Notice of Suspension," and commonly called a DC-27, will serve as the person's driver's license during the pendency of the administrative action. If a failure of a test is determined by a blood test, the form may be served by mail a couple of months later, after the results have been returned by the lab.

On the form DC-27, in the fine print, are instructions informing drivers they must make a written request for a hearing concerning their driving privileges within fourteen days. If

the driver fails to do so or doesn't make the request properly, his or her license will be automatically suspended by the Department of Revenue.

If the driver or an attorney requests a hearing, the driver will be given what is called an administrative hearing. It will be conducted by telephone unless the driver or attorney requests a face-to-face hearing. The request must also request that the certifying officer or officers be subpoenaed to the hearing or else the department will not require that officers' appearance and the driver will lose virtually any opportunity to prevail at the administrative hearing.

American due process procedures provide that before the government can take away your property, you must be given an administrative hearing to determine whether it's lawful. Of course, you have to make the request described above for that hearing to get one. When the Department of Revenue receives your request, it will send notice to you and your attorney that it has received it. The driver's privileges will be extended until the date of the hearing. Usually, about three to six weeks after the request is mailed in, the driver and/or attorney will receive notice of the hearing date and time, but sometimes it takes much longer. The hearing date is chosen by the department and generally cannot be changed, moved, or continued without good cause and usually not more than once, if at all. The department will also subpoena the arresting officer to be present for the hearing if you request it.

The Kansas Department of Revenue will issue an order requiring that any video or audio recordings and reports be provided by the police to the driver prior to the hearing. They will also mail the driver or his attorney certain documents that are important for the hearing. It is important that discovery be obtained through the criminal case prior to the hearing so your attorney is

prepared with all the police reports, video recordings, audio recordings, documents concerning the breath testing machinery and its maintenance, the officer's field sobriety training manuals, and other documentation so you get a full, fair hearing and the officer can be properly cross examined.

Many years ago, the parallel administrative driver's license suspension system was created to suspend the licenses of those charged with DUI. The powers that be know that people can beat the criminal case in some circumstances because the government has the burden of proof and has to prove the case beyond a reasonable doubt. The driver is presumed innocent and is entitled to all the protections of our Constitution—the full set of rights that define us as Americans and separate us from the totalitarian reigns of lesser governments.

In the administrative proceeding, however, the driver is presumed guilty and bears the burden of proving his or her license should not be suspended. Unfortunately, the Kansas Supreme Court has recently found that many of the protections of our

Before the government can take away your property, you must be given an administrative hearing to determine whether it's lawful.

Constitution do not apply to the administrative hearing. Even so, with proper investigation, knowledge of the law, and creativity on behalf of the attorney, there is always hope that the driver's license hearing can be won and the driving privileges protected.

If You Took the Test

At the administrative hearing of drivers who took and failed a test, the drivers have the burden to prove that:

- the officer did not have reasonable grounds to believe they were operating a vehicle under the influence of alcohol and/or drugs, or
- they were not arrested or were improperly arrested, or
- they were not given the testing notices, or
- the testing procedure was done incorrectly.

Those are about the only issues at the hearing. Drivers who can't prove one of these points will lose their licenses.

If You Refused the Test

At the administrative hearing of those who refused a test, the drivers have the burden to prove that:

- the officer did not have reasonable grounds to believe they were operating a vehicle under the influence, or
- they were not arrested or were improperly arrested, or
- they were not given the testing notices, or
- they did not refuse the test.

Again, the list of issues is short, but drivers who can't prove one will lose their licenses.

If You Were in a Traffic Accident

At the administrative hearing of a person involved in a traffic accident, no matter how minimal the damage was to persons or property, the issues are the same except that if there is any indication alcohol was involved, the only issues are if there were reasonable grounds to believe the driver was under the influence, whether the implied consent notice was given, and whether the test was done properly.

If You Were Under Twenty-one and Took the Test

Anyone under twenty-one who operates a motor vehicle with an alcohol concentration of .02 or greater is subject to having driving privileges suspended. The issues at the hearing are the same as those for those over twenty-one who took the test.

If the underage person tested between .02 and .08, the suspension period is 30 days followed by 180 days of restriction to only operating a vehicle with an ignition interlock device on the first occurrence and a one-year suspension followed by a restriction to ignition interlock on the second.

If the underage person tests between .08 and .149, the suspension period is 30 days followed by six months to one year of ignition interlock device.

If the test result is .150 or higher, the license is suspended for one year followed by one year of restriction to operating only a motor vehicle equipped with an ignition interlock device.

Appealing the Suspension

Every driver has the right to appeal the administrative driver's license suspension to the district court of the county in which the hearing was held. This petition for review must be filed within fourteen days or the suspension will stand. If an appeal is taken, the matter is heard anew but objections and issues at the district court level must have been previously raised at the administrative level or they may be deemed waived.

The driver's privileges will most likely remain valid while the case is pending before the district court. Appealing an administrative hearing is an exceptionally complex task. The Kansas Department of Revenue will assign one of its attorneys to "defend" against your petition for review, and those lawyers do little else all day every day other than try these cases, making them as difficult as possible. These types of appeals require the most experienced and knowledgeable of Kansas DUI attorneys.

**Every driver has
the right to appeal
the administrative
driver's license
suspension**

The Ignition Interlock Device

Every Kansas DUI suspension is now followed by some period of restriction to driving only with an ignition interlock device. When you get charged with a Kansas DUI, two separate proceedings are instigated: a criminal charge for driving under the influence of alcohol, and an administrative action to suspend your driver's license, which is represented by the form served by the officer (the DC-27 form), an action against your license brought by the Kansas Department of Revenue. The form tells you in the fine print that you have fourteen days to request an administrative hearing about whether your license should be suspended or else it will be automatically suspended on the thirtieth day after the service of the pink DC-27 form.

Your driver's license will also be in jeopardy if you are convicted of the DUI in the criminal case. Therefore, the government has two shots at your driver's license in just about every Kansas DUI case.

The length of the suspension depends on what your alcohol level was, whether you refused a test, and whether you have a prior

DUI “occurrence” in your past. If you blew over .150, refused a test, or have a prior, the suspension is for one year followed by some period of ignition interlock device.

If you have no prior DUI occurrence and blew over .08 but under .150, the suspension should be for thirty days followed by six months of ignition interlock device.

The Kansas Department of Revenue has approved many providers of ignition interlock devices throughout the state.

If you get suspended in Kansas, you should be eligible for what some people call a “hardship” license. Generally, you can get a license that will allow you to drive with an ignition interlock device during the time that you would otherwise be suspended.

You cannot get this restricted license if you are suspended for another reason (i.e., driving while suspended, habitual violator, outstanding traffic tickets). If eligible, you will have to complete the time of the suspension under the “hardship” or restricted license requiring the interlock and then do the additional time of restriction to ignition interlock device after that.

In Kansas, ignition interlock providers have made sure they get paid. They have a very strong lobby, and they convinced the legislature to insert into the law a requirement that not only are you restricted to driving with an ignition interlock, but you have to prove you actually had the device in your car for the entire period it was required. So when you get an ignition interlock

device installed, the provider faxes a form to the Kansas Department of Revenue that says you have the device. The Department of Revenue then sends you a letter authorizing you to drive with the device.

The interlock provider has to send proof to the Department of Revenue at the end of the period stating how many months you had the device for. If you don't obtain proof that you had and paid for the device, you cannot get your driver's license fully reinstated. Thus, if you are an out-of-state driver who gets a DUI in Kansas even if your state does not respect the Kansas suspension and interlock requirement, you still have to get the interlock and prove to Kansas you had it. Otherwise, you will continue to have a hold on your license even outside Kansas, and when it is time to renew your license in your home state or another state, you will have a problem.

The cost of leasing an ignition interlock device varies slightly from provider to provider. Generally, it's about \$150 to have the device installed and \$75 per month while you have it. If you have to have it transferred from one car to another, that costs as well.

If you blow into it and have "alcohol" in your system, the car won't start. After so many of these failures, you will be "locked out"; your car won't start until the ignition interlock provider comes out and resets the machine, and that costs money. To remain on the ignition interlock program, you have to take your car to the provider every month so they can download data from the device. If they have to recalibrate the device, that may cost you money. If the data shows that you were unable to start the car due to alcohol in your system, the provider may report that to the Kansas Department of Revenue and/or your probation

officer or diversion monitor. This could be a problem for any probation or diversion program you might be on.

One inconvenience is that you have to fire up the device and wait a minute and a half for it to be ready for the blow. If you are free of alcohol, your car should start. If you blow .04 or higher, it won't. While you are driving, the device will require periodic "rolling" tests, requiring you to blow into the machine while you're driving to keep the car running.

Ignition interlock devices aren't perfect. A recent article details the fact the energy drinks will often cause failures on the ignition interlock device. Other foods, beverages, medicines, and mouthwash can cause failures and lockouts. Again, this could cause you a problem if the machine is reporting failures for alcohol and you are on a DUI diversion or probation that is conditioned on your not drinking any alcohol.

You have to be careful while on the Kansas ignition interlock restriction and know that it may take you longer to drive places. Of course, the ignition interlock restriction is much better than not being able to drive at all.

Drug Recognition: The Gathering Storm

Now that laws concerning DUI are firmly in place in every state, having survived many challenges to their constitutionality, lawmakers are now being pushed to address drivers who may be under the influence of drugs, prescription or otherwise. Many Kansas officers have received training to become so-called “drug recognition experts” (DRE).

Drug recognition experts aren’t exactly experts. When the DRE program was started in the 1970s, officers trained in detecting intoxication by drugs were referred to as “drug recognition evaluators.” Somewhere along the line, they decided to start referring to themselves as “experts” instead of evaluators. “Expert” as used in a courtroom is a legal term applied only to certain people with certain credentials and expertise. A judge has to find that a person is an “expert” before he or she can be referred to as such and render an expert opinion. The police have tried to short-circuit that and designate themselves experts because they say so, but this can be challenged in court.

Usually, a DRE officer will be called in when a driver appears intoxicated but passes a breath test. DREs are trained to follow a twelve-step process to evaluate whether a driver may be under the influence of drugs. The DRE interviews the arresting officer, contacts the arrested driver, and makes observations to determine if a medical condition might explain the driver's behavior. The DRE will measure the size of the driver's pupils, perform the Horizontal Gaze Nystagmus test, do field sobriety testing, and measure vital signs such as blood pressure and pulse.

Next is a "darkroom examination" in which an instrument called a "pupilometer" is used to measure the size of the driver's pupils under various lighting conditions. The officer will move the person's arms to check muscle tone and to look for track marks, indication that drugs may have been injected. The DRE will interview the suspect, render an opinion, and if he or she believes it is warranted, request a blood or urine test.

DRE is a relatively new phenomenon in Kansas DUI law. There will be many challenges to its use to convict people of the crime of DUI. Police officers are not medical doctors and do not possess the training or skill to accurately interpret medical conditions, take vital signs, and determine muscle rigidity or its causes. There are literally hundreds of explanations for why a person's blood pressure, pulse, or eyes may appear the way that they do that have nothing to do with drugs. In fact, getting stopped, much less arrested, is enough to make most people's blood pressure rise! There may be drugs, including those that have been prescribed, that cause these conditions but do not impair the user to the point that he or she cannot safely operate a car.

There are questions as to whether this type of pseudoscience is even admissible in court as "expert opinion." One of the primary

“tests” involved in the DRE battery is the Horizontal Gaze Nystagmus test. This test is not even admissible in court in the state of Kansas because it is considered so unreliable.

Drugs or the metabolites thereof may remain in a person’s blood or urine for days or even weeks after their use. Long after the intoxicating effect of the drug has worn off, remnants of its use may still be detected by forensic testing; a driver might test positive for marijuana but not be under the influence of it while driving days later.

Also, forensic toxicologists disagree on what level of drug presence causes or indicates impairment. Because of the difficulty in proving a person was driving under the influence of drugs based on DRE testimony and forensic testing, legislators are moving to zero-tolerance laws that conveniently ignore the fact that a positive drug test does not mean a person drove a car while impaired. Under these laws, any detectable level of drug metabolite in a person’s blood or urine renders the driver guilty automatically of DUI. Eleven states have already enacted such laws.

The area of drugged driving is a gathering storm that promises to sweep up many safe and innocent drivers in its wrath.

Long after the intoxicating effect of the drug has worn off, remnants of its use may still be detected by forensic testing.

Nonjudicial Penalties for Kansas DUI: What Does It Really Cost to Plead Guilty?

We have discussed the judicial and administrative expenses and penalties in DUI cases. Let's look at some of its nonjudicial costs.

Ignition Interlock Device

If you are suspended due to a Kansas DUI conviction or administrative suspension, your period of suspension will be followed by a requirement that you operate only a vehicle equipped with an ignition interlock device. This will typically cost \$150 up-front for installation of the device and \$75 per month.

Car Insurance

Your car insurance rates depend on, among other things, what kind of a car you drive, your age, and your driving record. Most insurance companies will look only at the past three years of your driving record, but some go back five years. A DUI on your driving record could double or triple your insurance premiums.

Some insurance companies will drop you as a customer, especially if you have had other traffic tickets or DUIs.

A DUI on the driving record of one member of a household can affect the premiums of every other member of that household. Insurance companies insure vehicles and not people. They assume it is likely that members of the same household may drive each other's cars, so one "high-risk" driver may raise the insurance rates of other members of a household.

If you currently have a car insurance policy, that company may not find out about a DUI, at least not immediately, but many insurance companies do random driving record checks. If you pay your premiums on time and don't make any waves, you may increase your chances of going by undetected for a while.

The requirement of proof of insurance through the filing of an SR-22 form is covered in the next chapter.

Car Rentals

Many car rental companies are beginning to run driver's license checks on prospective customers to minimize their losses and avoid lawsuits. If you have a DUI or multiple traffic infractions on your driving record, you could find it hard to rent a vehicle. Of course, the officer who arrests you takes away your plastic license and gives you the DC-27 form, but you're not likely to be able to rent a car with that.

Employment

Some employers screen out job applicants by pulling their criminal and/or driving records, which are public. A driver in the transportation industry will be subject to annual random driving

record checks by his employer and the employer's insurance carrier. If a DUI pops up, that person's job is usually terminated. This kind of screening is done on everyone from pizza delivery drivers to school bus drivers. It does not matter whether the DUI was received off the job.

Further, if you have a job that requires you to drive or have transportation (i.e., outside sales) even a thirty-day suspension could cost you your job. Also, as everyone knows, most job applications ask about criminal convictions.

Transportation

The costs for alternate means of transportation during a suspension can add up quickly. Taxis, even buses, get expensive when used daily. Personal relationships can suffer when an adult has to be driven to and from work and activities by friends and loved ones.

School

Most universities take a serious look at criminal records or substance abuse problems when considering an application for entrance to the school. Further, scholarship or grant eligibility may be greatly diminished and existing grants can be taken away for substance abuse or legal problems.

Significant Expenses

Inherent in a conviction for DUI are incidental expenses that mount up quickly. Here are a few examples: If convicted of a DUI, or if applying for diversion, the judge will require you to get an evaluation by an approved alcohol counselor. This will usually cost \$150. While on probation or diversion, you

will have to pay a monthly monitoring fee to the counselor or another agency of between \$20 and \$40. You will also be required to pay for random urinalysis or blood tests (\$18 to \$80) and any treatment or counseling you're required to get. AA meetings are free but time-consuming. After a driver's license suspension, you must pay a reinstatement fee to get your driver's license reinstated and retake the written and driving portions of the driver's license test (\$15).

Travel

Some countries will not allow entry to persons who have been convicted of DUIs. Canada, in fact, will turn you away at the border or at the airport. The country has comprehensive access to the criminal records of the United States and will run a background check on you. When a conviction for DUI is revealed, you will be sent home. This is a major problem for those who intend to travel to Canada for business, fishing, or vacation, and other countries have similar rules.

Some countries will not allow entry to persons who have been convicted of DUIs. Canada will turn you away at the border or at the airport.

The SR-22 Form

An SR-22 is a form submitted by an insurance company that proves a driver has automobile insurance. An SR-22 is usually required by the Kansas Department of Revenue after a driver's license has been suspended due to a conviction. Before the Department of Revenue will reinstate a license, it will often require an SR-22 be on file. If you

get your driver's license suspended for a DUI in Kansas because of a conviction for DUI, you will be required to submit an SR-22 at the end of the suspension to get your driving privileges back.

Many people we talk to about Kansas DUI cases are very worried about the insurance ramifications of a Kansas DUI conviction or suspension. A Kansas DUI diversion does not require the submission of an SR-22. That's because there is no driver's license suspension as a result of a diversion since diversion does not result in a conviction. A driver's license will be suspended because of a Kansas DUI conviction.

If your driver's license is suspended, no one will notify your insurance company of that, but at the end of the suspension, the Kansas Department of Revenue will require you to do certain things to get your driving privileges reinstated, including paying a reinstatement fee and submitting an SR-22. To get the SR-22, you have to contact your insurance company and request that it be sent to the Department of Revenue on your behalf. This will alert the insurance company there's been a suspension, and it will likely pull your driving record. If you were suspended due to a DUI conviction, the insurance company may raise your rates or cancel your policy.

If your driver's license is suspended because of a Kansas DUI conviction, you can count on having to submit an SR-22 for the Kansas DUI to get your license back. In addition to having a permanent criminal record, going to jail, doing house arrest, getting mandatory alcohol treatment, losing your license, and many other collateral consequences of a Kansas DUI conviction, the SR-22 requirement is another reason to fight your Kansas DUI because the ramifications are serious.

Criminal Background Checks After a Kansas DUI

We get a lot of phone calls and emails wanting to know whether a Kansas DUI will show up on a criminal background check. The answer is almost always “It depends.” These days, ninety percent of all employers conduct a criminal background check before hiring someone, and the Internet and other databases make this easy. In fact, many businesses are doing background checks on employees who have worked for them for years and have done a great job just because they can. You can’t even get a job delivering pizzas for Domino’s without first passing a criminal background check, and you get to pay for it yourself. Criminal background checks are also extremely common before you can rent an apartment.

The reason “it depends” with respect to whether a Kansas DUI arrest, diversion, or conviction will appear on a background check is that it depends on who is doing the looking, what database they are looking at, what they are looking with, and what they are looking for. If law enforcement (police or prosecutors) are doing the background check, they have access to the National Crime Information Center (NCIC) database, the FBI’s records. This is sometimes known as the “Triple I,” and it’s where the term “rap sheet” comes from (Reports of Arrest and Prosecution). Every time you have ever spoken with a police officer is likely to be recorded there. Even if you were arrested for a DUI and were acquitted (found “not guilty”) or the case was dismissed for lack of evidence, it will be on your NCIC record. However, this type of a background check is rare because not just anyone can access this information.

If you are applying for a job in law enforcement or with a state lottery board or some job that requires a security clearance, they may run a background check on you with the NCIC, and any

Kansas DUI arrest, diversion, or conviction will be there as well as a lot of other information about you.

Most employers will hire private companies to do criminal background checks, but private companies do not have access to the NCIC. They rely on other databases that are not as complete. So whether your Kansas DUI arrest will show up in a background check depends on where they are looking. The private companies access public record databases such as county criminal records, state criminal records, the National Sex Offender Registry, etc. They have to go specifically to each of those databases for each county you have lived in or to each state database to get your records. Unless they know where you have lived or what county you were arrested in, they may likely not find the record. In addition, not every county has a good database, and some computerized their database only in recent years. Finally, these databases often won't include municipal court DUI cases from Kansas because the DUI occurred and was prosecuted in a Kansas city court, not a county court.

There are national databases of arrest, diversion, and conviction information, but not all states participate and/or don't provide complete information.

The Federal Fair Credit Reporting Act limits some background checks by third parties (private companies) to seven years, but the restriction does not apply to jobs that pay more than \$75,000. Some states have more-restrictive laws, so how far they can go back depends on these factors as well.

Whether current or future employers will find out about a Kansas DUI also depends on what information they have about you. I already discussed them using your former places of residences, but they also need other identifying information. If they

are searching under your married name, they may not see the case you caught under your maiden name. Social Security numbers, birthdates, middle names, addresses, and other identifying characteristics may or may not come in to play, and again, the information in the database may not be complete or correct. A prior could be missed, or worse, a prior DUI could be attributed to you that actually belonged to someone else. Typographical errors among others (i.e., acquittals being noted as convictions) are not uncommon.

If your new job may involve driving or a company car, you can just about bet your prospective employer will want to check your driving record. How far back a driving record goes depends on the state. In Kansas, it's usually three years for this type of a Kansas driving record check. The only thing that will be reported on a driving record with respect to a Kansas DUI case is an administrative suspension, diversion, or conviction. All states belong to the Interstate Driver's License Compact and share information about DUI suspensions and convictions.

Another question we get a lot is what to put on a job application or recertification application for professionals such as nurses, doctors, pilots, etc. Again, of course, it depends. This is where it pays to be a very careful reader in terms of what the application is asking. In the not-too-distant past, most job applications would ask, "Have you ever been convicted of a felony?" Most DUI cases are misdemeanors, so the answer would be no for most people. However, in recent years, and with the explosive proliferation of criminal background checks, it seems more and more applications are casting a much wider net with respect to inquiries about prior criminal history. If the application asks whether you have ever been convicted of a crime, criminal offense, or misdemeanor, the answer may be yes if you were actually convicted.

However, diversion is not a conviction under Kansas DUI law. So if you were placed on diversion and the question asks, “Have you ever been convicted?” you can answer no.

Some applications ask, “Have you ever been arrested?” which is casting a really wide net; this would include situations in which people were arrested but never formally charged, where people were acquitted, or charges were dismissed. If you were arrested, i.e., put in handcuffs, you may have to answer yes. If you received a Kansas DUI ticket in the mail and were never formally arrested, you could answer no.

Our experience in representing doctors, nurses, and other professionals required to submit annual recertification applications is that they can get in more trouble with their state licensing boards for not disclosing an arrest, diversion, or conviction than they can for actually getting the DUI. A state licensing board usually won't take any action for a first-time DUI arrest or a Kansas DUI diversion. A second-time case can draw some additional scrutiny from a licensing board, and it might recommend substance abuse treatment, but it will usually work with the licensed professional. A felony DUI in Kansas, however, can mean real trouble for a licensed professional.

Expungement is a process available in Kansas whereby a prior arrest, diversion, or conviction may be removed from a person's record and treated as though it had never happened (which means it would not have to be listed on most applications and theoretically would not appear on most criminal background checks). Kansas is one of the few states that have expungement processes and which give people who have stayed out of trouble a chance to clean up their records. For most crimes in Kansas, a prior case can be expunged after three years. Naturally, DUIs are

the exception. A first-time Kansas DUI can be expunged after five years. A second or subsequent DUI can be expunged only after ten years. Previously, DUI cases could never be expunged in a person's lifetime. So today, the law is five years from the time you get off diversion or probation for a first DUI, and ten years for a second or subsequent, before a DUI can be expunged. Obviously, this is subject to change.

All the foregoing underscores an important point: a DUI case will have serious ramifications on your future, even if it is a first-time misdemeanor. You can expect a criminal background check for just about any job you apply for, to get into colleges and graduate schools, and to keep any job or professional license you have. This is why it is essential that those charged with DUIs in Kansas get the best representation they can—they get only one chance to do it right.

Every DUI case is important, and every one deserves to be fought. You have to get the best DUI lawyer you can, someone who will flip over every rock, know what to look for underneath, and what to do with it if it is there. Anything less can haunt you for a long time and cost you a lot more than the cost of effective representation in the first place.

Conclusion

Hopefully, you know a little bit more now about the law and issues involved in a Kansas DUI case. Obviously, the stakes are very high and the ramifications of a conviction are extremely serious. Unfortunately, many DUIs are premised on police officers' subjective analysis and junk science. It takes hard work and effective advocacy to expose the fallacies common to DUI cases. Pleading guilty means you'll be found guilty and subject to all the penalties and expenses that follow a DUI conviction. These cases must be fought aggressively.

If you have further questions regarding this area of law, please feel free to call any of the attorneys in our firm at (913) 906-9633 or email lawyers@nortonhare.com. We wish you all the best.

About the Author



Jay Norton is an aggressive lawyer practicing primarily in the areas of Kansas DUI and criminal defense. He is a graduate of the University of Kansas School of Law and a Johnson County native.

Mr. Norton handles all manner of criminal cases, from DUIs to major felonies and homicides in the municipal, district, and federal courts of eastern Kansas. He has developed a strong reputation for obtaining dismissals, acquittals, and other favorable dispositions for his clients since 1994.

Mr. Norton was selected for inclusion in Super Lawyers in 2018 and every previous year going back to 2006. He is rated 5 out of 5 by Martindale-Hubbell, the highest possible ranking reserved for attorneys who have reached the height of professional excellence and who are recognized for the highest levels of skill and integrity.

He is also rated 10 out of 10 by Avvo.com, has been named to the Top 100 Trial Attorneys by the American Trial Attorneys Association and was recently named “Best of the Bar” for Criminal Defense by the Kansas City Business Journal. He is currently the State Delegate for the National College for DUI Defense for the state of Kansas.

Mr. Norton emphasizes a thorough discovery and pretrial motions practice in DUI and criminal cases to maximize the potential benefits to those he represents. Mr. Norton is a member of the Kansas Bar Association, the Johnson County Bar Association, the National Association of Criminal Defense Lawyers, the Kansas Association of Criminal Defense Lawyers, and the National College for DUI Defense, and is a Fellow of the Johnson County Bar Association. At age twenty-seven, he was named one of the twenty-nine most influential people under age thirty by Kansas City Magazine (“29 Under 30,” August 1996). He can be found in court on daily basis fighting for his clients.

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THE KANSAS DUI MANUAL:

! **EVERYTHING** YOU NEED TO KNOW
TO HANDLE YOUR CASE, NAVIGATE
THE SYSTEM, AND COME OUT ALIVE
■ AFTER A DUI ARREST

JAY NORTON, ATTORNEY AT LAW

A Kansas DUI is a frightening and very serious situation that could have implications—legal, social, and financial—for years. Jay Norton, a veteran lawyer practicing primarily in the area of Kansas DUI, has some critical advice for those facing such charges.

Mr. Norton, who knows firsthand that one size *doesn't* fit all in the world of DUI cases, has a well-earned reputation for obtaining dismissals, acquittals, and other favorable dispositions for his clients since 1994. He stresses the importance of a thorough discovery process and pretrial motions to maximize the potential benefits to his clients.

The author leads off this book with a Top-Ten list someone facing a DUI should do a.s.a.p. Among the topics he covers are:

- Kansas DUI law
- Penalties for DUI and refusing DUI tests
- After the Arrest
- What You Should Expect from Your DUI Attorney

A graduate of the University of Kansas School of Law, Jay Norton is a member of the National College for DUI Defense and the National Association of Criminal Defense Lawyers. He was listed in Super Lawyers from 2006 to 2018, and was recently named “Best of the Bar” for criminal defense.

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