OFFICE OF ADMINISTRATIVE HEARINGS

GUIDE TO OREGON IMPLIED CONSENT HEARINGS

JUNE 2011

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

*****

A. PURPOSE AND INTENDED USE OF THE MANUAL

The purpose of this manual is to review Oregon's process for suspending driving privileges of impaired drivers under the Implied Consent law. Because Oregon's Implied Consent law implicates significant portions of criminal law and procedure, these are essential elements of the discussion. However, the emphasis in this manual is on administrative law rather than the criminal trial aspects of the offense of Driving Under the Influence of Intoxicants (DUII). The prosecution and defense of DUII charges in court does not overlap with the Implied Consent process *per se*, other than through the possible use of the Implied Consent hearing record to impeach witnesses at a criminal trial.

The manual begins with an historical overview of the Implied Consent concept as it evolved nationally and in Oregon. It then moves into a discussion of the process involved in police investigation and arrest of an intoxicated driver for DUII. The remainder of the outline covers those subjects as they actually arise in the course of Implied Consent hearings and the elements of an Implied Consent suspension that are unique to the administrative hearing. Although the content is intended primarily for substantive legal topics, there are sections dealing with the two most important areas where substantive and procedural issues overlap in Implied Consent hearings. These include the ways that evidence is taken and evaluated at Implied Consent hearings and decisions that are sometimes required to postpone or dismiss Implied Consent hearings.

Case citations in this manual usually do not reflect every case covering a given topic. Parallel citations of Oregon cases to West's Pacific Reporter series are not given. No attempt has been made to collect all citations where a certain decision is simply mentioned in another later one. The reader is urged to bear in mind that a case may have been overruled as to other points not directly relating to the discussion at hand.

We tried to provide a balanced coverage of legal issues where different lines of cases or differing interpretations are known. There are a few places in the outline below where the reader will find a statement such as "Hearing Section policy is * * *." These are references to policies of the Transportation Section of the OAH. They represent a declaration of the legal policy or practice which ALJs are expected to follow in resolving certain legal problems, given comparable fact situations. We have attempted to apply a plain and reasonable approach to all issues of coverage and interpretation. Practical advice is contained in paragraphs entitled "*Practical notes.*" Any statements of opinion contained in this manual are just that, and do not represent policy.

Since 1994, "DMV" no longer refers to a separate department of state government, as it once did. "DMV" stands for the "Driver and Motor Vehicle Services" Division of the Oregon Department of Transportation (ODOT). The Implied Consent law is still administered from a program unit within DMV.

The Office of Administrative Hearings is part of the Department of Employment, and is referred herein as "the OAH." OAH conducts Implied Consent hearings on behalf of DMV. Implied Consent orders are final orders. Within the OAH, the Transportation Hearings Section is the legal successor to DMV's former Hearings Section.

B. ORGANIZATION OF THE MANUAL

The manual is organized chronologically. It begins with what the police officer does in the field and it ends with a Petitioner's request for reconsideration.

C. ACKNOWLEDGEMENTS

This manual began as the monumental effort of one now retired ALJ, Lee Grayson. The first edition of the manual, issued in 2001, was entirely his effort, which he wrote alone over a substantial period of time. Therefore, the majority of the credit for the concept and initial compilation belongs to Mr. Grayson. He is also the author of the history of the Implied Consent law.

Two years later, in 2003, sections of Mr. Grayson's manual were sent out to several ALJs for the addition of new cases and editing. It was during the up-date that a reorganization of the manual was proposed. For the reorganization of the manual, credit goes to Andrea Sloan and Susan Teppola. Re-writing credit goes to ALJs Bob Goss, Bill Halpert, Andrea Sloan, Susan Teppola and Alison Webster, all from the transportation section. The re-writing was overseen by Lee Grayson and Eric Moore. Both Michelle Suffian-Chilton and Andrea Johanson provided technical assistance in producing that edition of the manual.

The manual was updated in October 2004 by Alison Webster and again in April 2011 by Alison Webster and Susan Teppola. Technical support for the most recent update was provided by Phoebe Colman.

CHAPTER 2

IMPLIED CONSENT

HISTORICAL PERSPECTIVE

AND

SUBSEQUENT DEVELOPMENTS

*****

A. THE EARLY YEARS

Today's Implied Consent law is a product of historical progression in the criminal and administrative law fields and changing attitudes towards the use of intoxicants over the last half of the twentieth century. At mid-century, for instance, it was considered constitutionally acceptable for police to forcibly extract evidence of a person's illegal drug consumption from his/her body if there was probable cause to believe the person's body contained evidence of a crime. For practical reasons, and reasons of social acceptability, this technique was seldom employed in the standard intoxicated driver case. Thus, driving while intoxicated or "drunk" remained a fairly minor legal matter in Oregon and elsewhere. Without the ability to verify how much alcohol a person had consumed, police tended to arrest only the most obvious offenders. In general, DUII was viewed in Oregon and elsewhere as a moral issue for the offender to resolve rather than one of highway safety.

In 1952, the U.S. Supreme Court overruled a criminal conviction that was based upon evidence of drug ingestion derived from forcible stomach pumping. *California v. Rochin*, 342 US 165 (1952). While later cases upheld the state's right to continue taking actions of this kind, *e.g. Breithaupt v. Abram*, 352 US 432 (1957), finding a better way of dealing with intoxicated drivers continued to be an unanswered question both legally and practically. During this same period, another trend was emerging in the field of administrative law. Courts began finding more and more implications of the "liberty" interest in constitutional due process when government authorities tried to take "administrative" actions associated with individual rights and privileges. For instance, in the 1950s loyalty oaths as a basis to deny government employment grabbed the courts' attention on more than one occasion. By the 1970s, courts were requiring hearings before welfare benefits could be denied, or driver licenses suspended. *See e.g., Bell v. Burson*, 402 US 535 (1971); *Mathews v. Eldridge*, 424 US 319 (1976).

Yet a third trend was developing in the area of technology. As noted to above, one of the dilemmas posed for police in enforcing early "drunk driving" laws was that the evidence a driver was intoxicated was typically limited to an officer's own observations. When cases came to court, defendants were sober, very responsible looking, and tended to swear that they were not really as intoxicated as the officer thought. This could persuade juries. Thus, law enforcement authorities had long sought other, objective ways of proving alcohol consumption that could be produced in a reasonably prompt manner. In the 1950s, one form of technology intended to address this need was marketed to police agencies as the "Breathalyzer." The Breathalyzer relied upon the fact that ethyl alcohol, as found in beer and spirits, would react by causing a color change when exposed to certain quantities of a chemical "reagent" (potassium dichromate in a sulfuric acid solution). The Breathalyzer housed an ampoule containing this reagent, and it was opened prior to a person breathing into a chamber. The more color change an officer observed, the higher the blood-alcohol score. The Breathalyzer was perhaps the best known of the various breath testing devices that arrived in Oregon in the 1950s and 1960s. Although the name is still in common usage today, the device itself was not especially reliable and it faded from use in Oregon by the early 1970s.

A number of years after the Breathalyzer came into use, another technology for blood alcohol testing was introduced that was based on the long-recognized phenomenon of infrared light absorption. Ethyl alcohol, as it turned out, absorbed infrared light of a certain wavelength. When this principal was coupled with a light-metering system, it afforded a means for measuring alcohol in a person's breath by examining how much infrared light was absorbed from a chamber a person put his/her breath into. This result could be converted into a blood-alcohol score with the use of a calculated factor called the "partition" ratio (*i.e.*, the ratio of alcohol in the breath to alcohol in the blood). One of the leading early examples of this technology was a product known as the "Intoxilyzer." The Intoxilyzer was marketed nationally to the law enforcement community in the mid-1970s and soon arrived in Oregon. The model predominantly used in the 1980s was the 4011A. The next model, which arrived in Oregon in 1992 and afforded numerous technical advances, is known as the Model 5000. In 2006, Oregon law enforcement agencies phased out the Model 5000 and began using the Intoxilyzer 8000. The Model 8000 is substantially more sophisticated than the 5000. The Intoxilyzer 5000 and 8000 Models are the only breath testing devices currently authorized for use in Oregon for DUII detection.

The concept of a driver's "Implied Consent" to submit to a test for alcohol consumption was based on these converging trends and the long-held legal premise that driving on public highways is a "privilege." With encouragement from the federal government, Oregon and many other states adopted Implied Consent laws in the 1960s. Oregon's first legislative effort in the field dates to 1965 and became effective after a referendum and public vote. As it still does today, the original statute stated that a person impliedly consents to taking a breath test to determine the alcohol content of his/her blood after being arrested for DUII. A suspension of driving privileges for several months was imposed if an arrestee *refused* the test. Physical coercion by police to obtain a test result was forbidden. If a person agreed to the test, and failed it, his/her case was referred to the criminal justice system and there was no Implied Consent sanction. Only if a person refused the test did he/she become involved with the Implied Consent law. The sanctions were created mainly to encourage compliance. This was based on the principal that if arrestees allowed a breath sample to be taken, they were cooperating with the purpose of the law and no sanction should be imposed without full constitutional due process.

The pre-1984 version of Oregon's Implied Consent law provided for a brief hearing before the Department of Motor Vehicles prior to imposition of the suspension. The state's *prima facie* case was satisfied by the use of a "sworn report" asserting, under oath by a police officer, that certain events occurred. The officer in question was not in attendance at the hearing unless subpoenaed by the motorist (referred to as the "petitioner"). The burden of proof was on the petitioner to overcome the evidentiary weight given to the sworn report. Appeals were to the Circuit Court, and were *de novo*--meaning that an entirely new record was produced when the appeal was heard. Thus, conduct of the hearing required much less expertise than is the case today. Another important feature of the statute was that as long as the petitioner was appealing his/her Implied Consent suspension in court, the suspension was postponed. The result was that when the Implied Consent suspension was eventually imposed, it sometimes came years after the person's arrest.

One of the issues in these early hearings, still found in today's statute, was whether there were "reasonable grounds" for the police to believe at the time of the test that the person arrested had indeed been driving under the influence of intoxicants. This "reasonable grounds" term in Oregon's law was borrowed from Implied Consent laws already in use in other states. Its origins can be traced to early legal concerns that a collateral estoppel effect might emerge from having hearing officers in Implied Consent cases make a "probable cause" determination without the assistance of a prosecutor. However, the Oregon courts quickly came to the conclusion that "reasonable grounds" and "probable cause" amounted to the same legal standard. *See Thorp v. DMV*, 4 Or App 552 (1971). Had this not been the case, a person who *refused* the breath test could have a suspension of driving privileges imposed with less evidence than it would take if the person took the test and went to court. Many years later, the collateral estoppel issue also surfaced in an Oregon case and was rejected. *See State v. Ratliff*, 304 Or 254 (1987). The Implied Consent law withstood numerous constitutional challenges and stayed on the books. *See, e.g., Heer v. MVD*, 252 Or 455 (1969).

B. THE 1970S AND 1980S

While the above trends were underway, a changing social perspective regarding the intoxicated driver was also taking place. In the early 1970s, social concern with the issue was so modest that Oregon actually "de-criminalized" DUII in order to ease the burden these cases were imposing on the courts. The statute that de-criminalized DUII made it the equivalent of a traffic infraction. Only if a person produced a relatively high blood alcohol score of .15 percent was prosecution for the "crime" of DUII authorized.

The statutory process devised to handle the "infraction" versions of DUII still had significant criminal law overtones. In *Brown v. Multnomah County District Court*, 280 Or 95 (1977), Oregon's Supreme Court rejected the decriminalization concept because it imposed criminal sanctions without the availability of a trial by jury. This left Oregon's approach to DUII issues in disarray at a time when public perceptions of the risk posed by intoxicated drivers were growing. Scientific knowledge about the effects of alcohol consumption on reflexes and coordination had been developing steadily since WWII. Greater news media attention was focused on traffic accidents involving the use of alcohol. Interest groups such as the Mothers Against Drunk Driving (MADD) organized and eventually began pushing for new legislation to combat the problem.

Oregon's response to these developments came in several forms. DUII was re-criminalized in the early 1980s. The blood alcohol level needed to commit DUII was lowered first to .10 percent and, in 1984, to .08 percent. Most importantly, from ODOT's point of view, the 1983 Oregon Legislature drafted a major revision to the Implied Consent law (effective July 1, 1984) to follow a federal model which had been prepared by the National Highway Traffic Safety Commission (NHTSA). Among other things, this new law provided that, for the first time, failures of the breath test also led to a license suspension. To encourage taking the test,

suspensions for taking and failing the breath test were significantly shorter than for refusing it. Suspension periods were much longer overall than was previously the case. In almost all cases, suspensions were to start 30 days after the person's arrest for DUII.

For the first time, the hearings that were provided for were made subject to the contested case provisions of the state's Administrative Procedures Act (APA). The burden was on the state to demonstrate the validity of the suspension and the "sworn report" became a thing of the past. The scope of the issues to be covered in the Implied Consent hearing was delineated in the text of the statute (now found at ORS 813.410). It required that a person be "under arrest" for DUII to be subject to the Implied Consent law, and continued to require a showing that there were "reasonable grounds" to believe that the person arrested had been driving while intoxicated. The statute still deliberately avoided allowing the arrestee to challenge the validity of his/her arrest or the blood alcohol result. A number of other technical issues were included in the scope of the hearing for the first time including the proper following of breath testing methods and procedures.

In 1986, an important appellate case was decided that changed certain aspects of the arrangement adopted in 1984. An intoxicated driver, Mr. Pooler, was on his way home from a tavern when he saw a roadblock on a highway in Klamath Falls. To avoid it, he made a U-turn and went back the other way. A state trooper stopped him for trying to avoid the roadblock, found him to be intoxicated, and arrested him. A challenge to the legal validity of the stop was posed at hearing. The hearing officer rejected this because it was outside the scope of the hearing according to the issues listed in the Implied Consent statute. The suspension was thus upheld and Pooler appealed. By the time his appeal reached the Oregon Court of Appeals, however, roadblocks had been declared unconstitutional in Oregon.

If roadblocks were unconstitutional, then a driver's efforts to avoid going through one could not be the basis of a legal vehicle stop unless the police articulated some other valid reason. The court declared that an Implied Consent suspension must be based on a "valid" arrest. Included in this was the validity of any stop that necessarily led to the arrest. The Supreme Court agreed in *Pooler v. MVD*, 306 Or 47 (1988). As mentioned above, this is the reason why the criminal law associated with probable cause and all its implications is in the scope of today's Implied Consent hearing.

Later cases have added significantly to the evaluation of probable cause in the DUII area. For instance, in *State v. Nagel*, 122 Or App 638, *rev allowed* 318 Or 478, *aff'd* 320 Or 24 (1994), the court held that field sobriety tests represent a "search" under the Oregon Constitution. A police officer must have a warrant (or more realistically, an exception to the warrant requirement) before conducting any form of roadside sobriety testing. In 1995, Oregon's Supreme Court also held that the verbal portions of field sobriety tests were a form of questioning that was "testimonial" in nature. This meant that unless very specific legal exceptions to the "questioning" could be found, the verbal evidence from field tests was subject to exclusion as having been obtained in violation of the right against self-incrimination. *State v. Fish*, 115 Or App 609, *rev'd* 321 Or 48 (1995).

Outside the probable cause area, there are also other major areas of inquiry within the scope of the Implied Consent hearing that are based entirely on case law holdings. One of the most important of these is commonly referred to as the "*Moore* doctrine" and stems from the holding in *Moore v. MVD*, 293 Or 715 (1982). In *Moore*, Oregon's Supreme Court held that an arrested driver was entitled to a reasonable opportunity to communicate beyond the confines of custody before deciding to take or refuse the breath test. A denial of this opportunity could serve as a basis at hearing to invalidate the proposed suspension.

Another court ruling which occasionally surfaces as a hearing issue, and which is not evident from the face of the statute, revolves around the driving element in a DUII offense. In *Hilton v. MVD*, 308 Or 150 (1989), Oregon's Supreme Court held that a person was not subject to suspension under the Implied Consent law unless the person was *actually* driving (as opposed to demonstrating a reasonable belief the person was driving). Because the burden of proof in administrative hearings is on the proponent, this in effect made "not driving" an affirmative defense in an Implied Consent hearing. Significantly, in 1995 the Supreme Court refused to expand the scope of Implied Consent hearings to include direct challenges to the accuracy of the breath test reading. *Owens v. MVD*, 319 Or 259 (1994).

Fuller coverage of these cases is set out in the sections below. A reference for the historical overview of the Implied Consent law is *State v. Newton*, 46 Or App 461, *rev'd and rem'd* 291 Or 788 (1981). *See also Standardized Field Sobriety Tests (SFSTs): A Brief History*, by Marcelline Burns (1998).

C. SUBSEQUENT DEVELOPMENTS

1. Senate Bill 936 (1997)

Senate Bill 936, later codified as ORS 136.432, made significant changes in the "exclusionary rule" applicable to evidence obtained through unlawful police search or seizure. In essence, it did away with any exclusionary rules unless derived directly from the Oregon or federal constitutions. Oregon had several of these, related to traffic law enforcement, in ORS 810.410. ORS 136.432 is discussed in greater detail below.

2. House Bill (HB) 3051 (1999)

Although there were minor technical revisions in the Implied Consent law between 1984 and 1999, most changes during this period came through evolution in case law such as those recounted above. House Bill 3051, effective October 23, 1999, was the first legislative effort since 1984 to change the shape of the Implied Consent hearing process in a significant manner. The provisions of HB 3051 have since been added to ORS 813.410 and 813.440. Originally sponsored by the Oregon Chiefs of Police Association, it may fairly be said that the bill was

intended to deal with certain long-standing objections that police authorities had with the hearing process.

Section 1 of HB 3051 amended ORS 813.440 to allow a police officer's "illness" or "vacation" as grounds to grant one postponement of a Implied Consent hearing at the request of the officer. Since 1993, this privilege had been available where an officer was able to demonstrate an "official duty conflict" with the time or date available for a hearing involving that particular officer. Provided that the officer's vacation, illness, or official duty conflict request is received in a timely manner, and meets the required statutory and rule language, the hearing does not have be to be held within 30 days of a person's DUII arrest as ordinarily required. In any of these three scenarios, the suspension is rescinded pending the outcome of the hearing and the final order must be issued within 10 days of the hearing when it is eventually held. Only one postponement due to vacation, illness, or official duty conflict is allowed per case. Although ODOT has had administrative rules dealing with official duty conflict and the other procedural ramifications of ORS 813.440 (*See* OAR 735 Division 090), no rules have been adopted relating to the vacation and illness provisions of HB 3051.

Section 2 amended ORS 813.410(6), the statutory provision defining the scope of the Implied Consent hearing. According to the amendment, "This subsection shall be narrowly construed so as to effect the legislative purpose of limiting the scope of hearings under this section." Although there are varying interpretations of what this language was expected to accomplish, in practice it has had no legal effect. In *Pooler v. MVD*, the Supreme Court held that when the legislature put the words "The person...was under arrest for driving while under the influence of intoxicants" in the scope of the Implied Consent hearing, this was intended to mean *valid* arrest. *Pooler*, 306 Or at 51. It is unlikely that any interpretation of HB 3051 could be used to overturn application of the *Pooler* doctrine. While *Pooler* is usually thought of as a case of statutory analysis, there is a fundamental constitutional interpretation underlying the outcome. Moreover, on October 6, 1999, and again on December 22, 1999, ODOT was provided with advice from its Justice Department legal counsel that Section 2 of HB 3051 should cause no changes in interpretation of the *Pooler* doctrine or other cases affecting the scope of Implied Consent hearings. *See* Dwight Apple memo to Hearing Section dated October 20, 1999. *See also* Justice Department memorandum of Mary Q. Ruono to Department of Transportation dated December 22, 1999. The ALJ should seek assistance from his/her supervisor as to whether this or other Justice Department advice is subject to disclosure in a specific hearing.

Section 3 of HB 3051 (now ORS 813.324) had no direct impact on the hearing process. It provides that if a defense attorney or prosecutor obtains either a tape or transcript from an Implied Consent hearing, a copy must be provided by one to the other no less than seven days before the first date set for a DUII trial. This is intended to eliminate the surprise value that defense attorneys were occasionally able to achieve by bringing tapes and transcripts of a police officer's hearing testimony to court.

Section 4 of HB 3051 (ORS 813.412) reads as follows:

> Notwithstanding ORS 9.160 and 9.320, in any hearing under ORS 813.410 in which a city attorney or district attorney does not appear, the peace officer who issued the citation for the offense may present evidence, examine and cross-examine witnesses and make arguments relating to:
> (1) The application of statutes and rules to the facts in the case;
> (2) The literal meaning of the statutes or rules at issue in the case;
> (3) The admissibility of evidence; and
> (4) Proper procedures to be used in the hearing.

Traditionally, police officers have played the role of "witness" in Implied Consent hearings. While there are provisions for agency representatives in the Uniform Rules for Hearings, and even petitioner-representatives in some instances, there is nothing else in Oregon law like Section 4 of HB 3051. The above provisions give the police officer in the Implied Consent hearing a role that no lay representative has had and indeed, no attorney can have either.

Although lay representatives may "present" evidence, both the current and previous versions of the rules governing contested case hearings do not allow them to carry on an advocacy role. *See* OAR 137-003-0545. Attorneys are ethically prevented from testifying on behalf of their clients except in rare instances where a rule of necessity applies. As for the petitioners in Implied Consent hearings, they can always testify on their own behalf. However, even with the assistance of an ALJ, few will be as well prepared to defend their overall case as a professionally trained police officer witness.

Under these provisions, a police officer can not only testify but also have a legal opportunity to act much as an advocate on his police agency's behalf. While doing so, however, the officer will not be required to either be an attorney or to have "party" status under the Administrative Procedures Act (APA). In theory, a police officer may make opening and closing statements; question anyone who testifies; object to the lines of questioning posed by the ALJ or the defense counsel; and object to various rulings of the ALJ.

According to legal advice ODOT received from the Justice Department, ORS 813.412 does not make the officer a "party" to the Implied Consent hearing. The advice also indicated that the presence or absence of a city attorney or prosecutor at an Implied Consent hearing with a police officer, while permissible, does not elevate the officer's legal status or confer any additional legal privileges at hearing. Furthermore, the law does not confer the right of a police officer to appeal an adverse hearing decision, nor does it confer subpoena issuance powers to a police officer other than through a request to ODOT to issue one.

3. ORS 136.432

In other chapters we discuss the 1997 legislative modifications to ORS 131.615 and ORS 810.410. After these modifications, the police had greater latitude to ask questions during otherwise valid stops. The 1997 statutory changes essentially overruled *State v. Dominquez-Martinez,* 321 Or 206 (1995) and its progeny, cases that held the police could not expand the

scope of a traffic stop without reasonable suspicion of a crime unrelated to the reason for the traffic stop.

During the same 1997 Legislature, whatever limitations were left in the amendments to ORS 810.410 were rendered essentially meaningless by Senate Bill 936, section 1, now known as ORS 136.432, which provides as follows:

> *A court* may not exclude relevant and otherwise admissible evidence in a *criminal action* on the grounds that it was obtained in violation of any statutory provision unless exclusion of the evidence is required by:
> (1) The United States Constitution or the Oregon Constitution;
> (2) The rules of evidence governing privileges and the admission of hearsay; or
> (3) The rights of the press.

ORS 136.432 (emphasis added).

In other words, the exclusionary implications of ORS 810.410 were no longer universally applicable. Police conduct that violated provisions of ORS 810.410 would no longer require the exclusion of evidence in a *criminal proceeding*, unless the police conduct also violated a constitutional provision or right.

The history behind this legislation is directly tied to the law enforcement community's frustration over the *Dominguez-Martinez* decision and several other areas of constitutional law where Oregon was viewed as more restrictive of law enforcement authority than other states and the federal constitution. The authors of Ballot Measure 40 intended to make a "clean sweep" of these areas, including Oregon's approach to probable cause and the "exclusionary rule," and replace them with the prevailing federal standard. While the electorate approved the ballot measure in the 1996 general election, serious doubts about Ballot Measure 40 emerged because of the requirement that initiatives must change only one constitutional provision at a time. A court challenge was already in progress during the 1997 legislative session. Backers saw to it that the provision that mattered most to them was introduced as a separate statute, *e.g.*, Senate Bill 936. It became law before the litigation over Measure 40 was completed, and has remained on the books even though Measure 40 was declared unconstitutional in *Armatta v. Kitzhaber*, 327 Or 250 (1998).

Several cases decided in 1999, which applied ORS 136.432, have since been vacated and remanded. *See, e.g., State v. Jaehnig*, 158 Or App 348 (1999); *State v. Denny*, 158 Or App 616 (1999); *State v. Dolan*, 158 Or App 139 (1999); and *State v. Riley*, 150 Or App 649 (1999). The Department of Justice's *2010 Search and Seizure Manual* is a good source of additional information concerning ORS 136.432.[1]

[1] The *Search and Seizure Manual* is available on the OAH network at S:\Resources\ALJ\APA-IC\MANUALS\2010 Search and Seizure Manual.

ORS 136.432 and the Implied Consent law. Although the courts have analyzed ORS 136.432 in criminal cases, its application to administrative decisions under the Implied Consent law has not been specifically addressed.

Probable cause is a constitutional term. In *Pooler v. MVD*, 306 Or 47, 51 (1988), the court held that the validity of an arrest, *i.e.*, the probable cause relied upon by the officer, is an issue in an Implied Consent hearing. The application of *Pooler* in Implied Consent hearings does not, therefore, appear to be affected by ORS 136.432. Given that an Implied Consent hearing is not a "court" or a "criminal proceeding," it seems likely that evidence that would not be excluded by a trial court because of ORS 136.432, could be excluded by an Implied Consent ALJ.

There are potentially several areas where the criminal and Implied Consent law could end up going separate ways when faced with the application of ORS 136.432. This is particularly true with respect to the methods, procedures and equipment used to gather blood alcohol concentration (BAC) evidence. Under ORS 813.410, one of the elements of a valid breath test suspension is that the methods, procedures and equipment used by the police complied with the applicable statutes and rules.

For example, in an Implied Consent hearing, if the record shows that the officer failed to satisfy the 15-minute pretest requirement, this failure would lead to the exclusion of the breath test results. However, the 15-minute requirement is only based on an administrative rule; this is not a constitutional requirement. In *State v. Jubie*, 162 Or App 349 (1999), the court suggested that ORS 136.432 might well allow such evidence to be introduced in criminal court. But, because one of the elements within the scope of the hearing at ORS 813.410(6)(h) is whether "...the methods, procedures, and equipment used in the test complied with requirements under ORS 813.160," the *Jubie* rationale would not apply in an Implied Consent hearing.

In *State v. Warner*, 181 Or App 622 (2002), the court applied ORS 136.432 and permitted evidence of a blood test result, even though the record did not establish that the blood was drawn by a physician, or someone acting under the direction and control of a physician, as required by ORS 813.160(2). In an Implied Consent hearing, evidence taken in violation of ORS 813.160(2) would not be used to support a suspension.

Furthermore, if an officer failed to read the rights and consequences from the ICCR to the motorist before asking for a breath sample, in an Implied Consent hearing, the evidence of the breath test would not be used because ORS 813.120 and ORS 813.410 make reading the rights and consequences a prerequisite to using evidence of a breath sample in support of a suspension. *See State v. Lyons*, 118 Or App 660 (1993) (the court found a legislative intent for requiring that persons be read the "Rights" statement, and, therefore, a breath test result obtained without first doing so was deemed inadmissible). *But see State v. Bloom*, 216 Or App 245 (2007), where the court held that evidence obtained potentially in violation of the Implied Consent law, such as a breath test administered without fully informing the person of the consequences of refusal, need not be suppressed in the criminal case.

Because the reading of the rights and consequences is not a constitutional prerequisite, however, a criminal judge would be free to apply ORS 136.432 and deny a motion to exclude the breath test evidence, despite the violation of ORS 813.120 and 813.410.

4. HB 2525 (2000) and HB 2136 (2002)

a. Advent of the Office of Administrative Hearings

There had been discussion in Oregon since the 1970s of requiring that hearing services in state government be centralized and separated from the regulatory and policy-making arms of the state's agencies. These efforts did not turn into legislation until the 1997 legislative session. That year, both houses of the Legislature approved a measure (HB 2948) requiring many of Oregon's independent boards and commissions (along with certain larger agencies) to begin conducting hearings through a cabinet-level administrative hearing agency. Then-Governor Kitzhaber vetoed this measure and the override attempt fell short by two votes in the Senate.

The Governor subsequently appointed a panel comprised of legislators, agency experts, and other interested parties to prepare recommendations on a central hearing concept for introduction in the 1999 legislative session. This panel's recommendations eventually became HB 2525. HB 2525 was approved by wide margins in both houses and signed into law at the end of the 1999 regular legislative session. HB 2525 required that the hearing staffs of most of the larger administrative agencies of state government be transferred to the Department of Employment on January 1, 2000. From that date forward, those agencies and *most* of the state's independent boards and commissions were required to receive their hearing services from the Office of Administrative Hearings (OAH), a branch of the Department of Employment.

HB 2525 became Chapter 849, 1999 Oregon Session Laws, when the 1999 legislation was codified by the legislative counsel's office. Although Section 1 of HB 849 provided that sections 2 through 21 were made a part of ORS 183.310 through 183.550, all portions of Chapter 849 had an expiration date of January 1, 2004. For this reason, legislative counsel chose to set out sections 2 through 21, 213, and 214 on the pages following ORS 183.470. For convenience, the entirety of the legislation will continue being referred to in this outline as HB 2525/Chapter 849.

A "sunset" provision in HB 2525/Chapter 849 required that all employees who were transferred to positions in the panel will be restored to their original agency positions on January 1, 2004, unless the legislature acts to prevent it. Thereafter, on May 22, 2003, the Governor signed HB 2526, which rescinded the sunset provision and made the OAH permanent.

b. Administrative Changes

The OAH is organized into five major program areas. One of these is the Transportation program, which handles contested cases referred by ODOT. A Presiding Administrative Law

Judge manages this section, under the supervision of the Deputy Chief Administrative Law Judge.

There are two central offices for the conduct of Implied Consent hearings, one in Salem and the other in Tualatin. For purposes of service delivery, the two offices serve regions that are divided on an east-west line at approximately Canby. Most of the support staff for OAH is in Salem. The unit is responsible for assembling and distributing the files, scheduling the hearing, issuing orders and storage. There are OAH satellite offices in Bend, Eugene and Medford, Oregon where one or more ALJs from the Transportation section are stationed without additional support staff.

c. Attorney General Uniform and Model Rules

Oregon's Justice Department has for a number of years promulgated an *Administrative Law Manual* which included "model rules" of procedure that administrative agencies were recommended to adopt in order to standardize the processes of conducting contested cases and making rules. Formally these are known as the *Oregon Attorney General's Uniform and Model Rules of Administrative Procedure*. For the purposes of its hearings, ODOT adopted these model rules in their entirety as to cases conducted under the Administrative Procedures Act (also referred to as "APA" cases), but made only a limited adoption for the Implied Consent process. *See* former OAR 735-090-0010.

The rules applicable to administrative hearings including Implied Consent also changed on January 1, 2000. On that date the Justice Department formally adopted an entirely new set of administrative rules specific to hearings conducted by the OAH. Pursuant to Section 8(1) of HB 2525/Chapter 849, all hearings conducted by the Panel became subject to these rules in their entirety unless:

(a) The hearing was not subject to the procedural rules for contested cases;
(b) A partial or full exemption was granted by the Justice Department under subsection 8(2); or
(c) An exemption to the reassignment rules as found in Section 11 of HB 2525/Chapter 849 was granted by the Chief Hearing Officer pursuant to the provisions of Section 213(3).

See HB 2136 discussion below.

d. HB 2136 (2001)

The provisions of HB 2525/Chapter 849 relating to the reassignment of ALJs posed a special problem for Implied Consent hearings. Under ORS 813.410, Implied Consent hearings must be conducted in the county of a person's DUII arrest or within 100 miles of where the arrest occurred. For various reasons, including the venue requirement and the interest in minimizing police officer travel, all Implied Consent hearings are conducted "in person." If a reassignment

was requested in a remote area of the state near the legal deadline for issuing an Implied Consent hearing decision (within 30 days of arrest), it could become impossible to issue a timely decision. In a letter dated January 4, 2000, the Chief Hearing Officer granted ODOT an exemption from the reassignment provisions of HB 2525 for Implied Consent cases pursuant to Section 213(3). This was to continue through December 31, 2001, the maximum period defined in the enabling language of Section 213. The 2001 Legislature addressed this issue with the passage of HB 2136, effective January 1, 2002. Among other things, HB 2136 contained a permanent exemption for Implied Consent hearings from the reassignment provisions of the HB 2525/Chapter 849.

5. HB 2900 (2003)

HB 2900, effective January 1, 2004, created the offense of "refusal to take a breath test." A person commits the offense if he or she "refuses to take a breath test when requested to do so in accordance with the provisions of ORS 813.100." This offense, codified in ORS chapter 813, "is a traffic offense punishable by a fine of at least $500 and not more than $1000." This fine is in addition to any other consequence prescribed by law for refusal to take a breath test. Or. Laws 2003, chapter 814, section 2.

While this new law is not directly applicable to the Implied Consent hearing process, it does have some indirect implications. Section 3 of HB 2900 amended ORS 813.130, the section that sets out the information about rights and consequences, to include the additional consequence of refusal: "If the person refuses a breath test under ORS 813.100, the person is subject to a fine of at least $500 and not more than $1000." *Amended* ORS 813.130(2)(f), Or Laws 2003, chapter 814, section 3. Therefore, to satisfy the requirement of ORS 813.410(6)(e), *i.e.*, that the person be informed of the rights and consequences described in ORS 813.130 before being asked to take a breath, blood or urine test, the officer must also read this new provision to the arrested motorist. DMV revised Section 1 of the "Rights and Consequences" printed on the backside of the Implied Consent Combined Report in January 2004 to include this new provision.

6. HB 2968 (2009)

This bill, which became effective on January 1, 2010, expanded the grounds for resets under ORS 813.440. Resets of Implied Consent hearings may be granted on a one-time only basis for an attorney's illness, vacation or hearing/court conflict.

7. HB 3601 (2010)

This bill, effective January 1, 2011, made Implied Consent hearings telephone hearings unless in-person hearings are requested by either the officer or Petitioner/attorney. DMV passed new rules under OAR 735-090 to implement telephonic hearings.

CHAPTER 3

ENCOUNTERS

BETWEEN POLICE AND CITIZENS

WHICH MAY LEAD TO

REASONABLE SUSPICION OF A CRIME

*****

Not all contacts between police and citizens begin with a police officer exercising official authority or "stopping" the person. The court in *State v. Holmes*, 101 Or App 676, *rev'd and rem'd* 311 Or 400 (1991), provided a detailed analysis of the general spectrum of contacts between citizens and the police:

> There potentially is an infinite variety of encounters between law enforcement officers and citizens. Not every such encounter constitutes a "seizure" of the citizen within the meaning of Article 1, section 9. Encounters may range from friendly exchanges of pleasantries or mutually helpful information to hostile confrontations of armed persons involving arrests, injuries, or even loss of life. Such encounters begin in a friendly, voluntary, noncoercive atmosphere, but take a different direction upon the injection of some unexpected element into the encounter.

State v. Holmes, 311 Or at 406-7; *see also State v. Warner*, 284 Or 147, 161 (1978).

There are three general types of encounters between the police and citizens: (1) mere conversation in a noncoercive encounter, involving no restraint of liberty; (2) a temporary restraint of a person's liberty (a stop), which requires reasonable suspicion of the person's involvement in a crime; and (3) an arrest, which involves probable cause that the person has committed a crime. The analysis of the different types of contact is very fact-specific and depends on the "totality of the circumstances of a particular case." *Holmes* at 408; *see also State v. Warner*, 284 Or at 165; *State v. Caron*, 153 Or App 507 (1998). "Only encounters of the first two kinds are "seizures" for purposes of Article 1, section 9." *State v. Gerrish*, 96 Or App 582 (1989), *aff'd and rem'd* 311 Or 506, 510 (1991).

Below are some examples of the first category of encounters, which require no legal justification.

A. MERE ENCOUNTER OR CONVERSATION

A police officer may, if he or she wishes, simply come up to a person and start talking in the same manner that any private citizen could. Typically, an officer will approach a person and ask how he or she is doing. The officer will also generally ask for the person's name or identification. If the person chooses to, he or she can respond to the officer's questions. This is strictly a consensual encounter. Thus, if the person chooses not to speak with the officer, the officer must let the person walk away, unless the officer has developed a reasonable suspicion that the person has committed a crime. (*See* Chapter 5, *Reasonable Suspicion.*)

- *State v. Tetro*, 98 Or App 492 (1989): no stop when officer parked behind driver's car without lights or sirens, then approached driver on foot and asked what driver was doing.

- *State v. Calhoun,* 101 Or App 622 (1990): officer did not stop a vehicle after it pulled over on its own without the use of any lights or signals from the officer, even though officer had been following the vehicle closely.

- *State v. Lunow,* 114 Or App 239, *rev den* 314 Or 574 (1992): no stop when officer parked on a narrow road, but left enough room for the driver to drive around the patrol car and leave.

- *State v. Warner,* 136 Or App 475 (1995): officer parked near driver, who was sitting in a parked car in a remote area, and without using overhead lights, walked up to driver and asked for identification; this was not a stop.

- *State v. Moreno,* 150 Or App 306 (1997): asking personal questions, beyond "acceptable social intercourse," did not automatically make contact a stop.

- *State v. Baker*, 154 Or App 358, *rev den* 327 Or 553 (1998): police officer parked, approached a known drug-dealer who was seen leaving a drug house and asked whether he bought any "good crack;" this did not make the contact a stop.

- *State v. Blair,* 171 Or App 162, *rev den* 332 Or 137 (2001): the officer's use of emergency lights for safety reasons did not escalate contact to a stop when driver was straddling the fog line with his vehicle's emergency flashers on; *State v. Dubois,* 75 Or App 394, *rev den* 300 Or 451 (1985) (using emergency lights behind an already stopped vehicle was not a stop). *But see State v. Loud,* 149 Or App 250, *rev den* 326 Or 58 (1997) (use of spotlight and overhead lights to pull over a vehicle was a stop); *State v. Jacobus,* 106 Or App 496, *aff'd* 318 Or 234 (1993) (officer stopped behind driver's stopped vehicle, used his overhead lights, walked up to driver and requested identification, which was enough for a stop).

- *State v. Bond,* 189 Or App 198 (2003): the officer noticed a truck parked in the parking lot of a golf course for 45 minutes, beginning at 12:30 a.m. He knocked on window for quite some time to rouse driver, but the driver was unresponsive. The officer did not stop the driver under either the state or federal constitutions, and his conduct was lawful to check on driver's welfare.

If, during a casual encounter, the officer makes observations leading the officer to believe that DUII (or some other crime) has been committed, the officer may then make a "stop" and investigate the suspected crime. To justify a "stop," the officer must have a reasonable suspicion that the person committed a crime. (*See* Chapter V, *Stops*.)

B. COMMUNITY CARETAKING

Another category of encounters between citizens and the police involve an exercise of the officer's community caretaking responsibilities. ORS 133.033 provides, in part:

> As used in this section, "community caretaking functions" means any lawful acts that are inherent in the duty of the peace officer to serve and protect the public. "Community caretaking functions" include, but are not limited to:
>
> (a) The right to enter or remain upon the premises of another if it reasonably appears to be necessary to:
> (A) Prevent serious harm to any person or property;
> (B) Render aid to injured or ill persons;
> (C) Locate missing persons.
>
> (b) The right to stop or redirect traffic or aid motorists or other persons when such action reasonably appears to be necessary to:
> (A) Prevent serious harm to any person or property;
> (B) Render aid to injured or ill persons; or
> (C) Locate missing persons.

ORS 133.033.

In addition, under ORS 181.030(2)(f)(g), the Oregon State Police have authority to give first aid and "succor the helpless," which allows them to assist motorists and use any observations made during the course of such assistance. Some police agencies require their officers, when feasible, to contact every motorist they find stopped along a roadway and to inquire about whether the motorist requires assistance.

As long as the officer has an articulable and objectively reasonable reason to contact a possibly ill or stranded motorist, he or she may take advantage of observations that may also suggest criminal behavior. For example, in *State v. Rhodes*, 106 Or App 312, *aff'd* 315 Or 191 (1992), the officer saw a motorist parked on a public street, with the dome light on and motor running. The officer saw that the driver was slumped behind the steering wheel. The officer suspected that the driver might be impaired and was also concerned that the driver might need assistance. The court held that the officer had a dual purpose in contacting the driver, and that the officer lawfully opened the driver's door because he reasonably suspected the driver was DUII, and out of concern for the driver's safety. The dual purpose, concern for welfare and suspicion of impairment, was central to the court's ruling.

Another example of a common fact pattern justifying expansion of a "community caretaking" contact into a DUII investigation is found in *State v. Guerricagoitia*, 89 Or App 163 (1987). In *Guerricagoitia*, the officer observed a vehicle parked on the shoulder of the road for a period of time. He noticed that the engine was running and that the driver was behind the wheel, slumped toward the passenger side. After speaking with the driver, the officer observed several

indicia of impairment, which led the officer to suspect that the driver was DUII. *See also State v. Ziebart*, 172 Or App 288 (2001) (officer contacts defendant at a disabled vehicle after defendant stopped to assist and displayed indicia of impairment).

In *State v. Wood*, 210 Or App 126 (2006), the court held that an officer's objectively reasonable belief that the defendant was in need of immediate assistance was sufficient to justify opening the car door. There, the officer saw the defendant drive in to a parking lot and stop in a high-crime area. The officer pulled up beside the defendant's car, and heard loud music coming from the defendant's car. Despite the loud music, the defendant appeared unconscious in the driver's seat. The defendant was slow to respond to the officer's tapping on the window, and when he did, he simply gazed at the officer before passing out again. The officer opened the car door to check on the defendant's welfare, and when he did so, noted other signs and symptoms of intoxication that led to the defendant's arrest for DUII.

An officer's "community caretaking" function is inextricably intertwined with the next topic – the Emergency Aid Doctrine.

- *State v. Martin*, 222 Or App 138 (2008) *rev den* 345 Or 690 (2009): ORS 133.033 does not independently establish an exception to the warrant requirement. "Community caretaking" must fall within the universe of what is permitted by the statute *and* within one of the exceptions to the warrant requirement (Emergency Aid).

- *Sivik v. DMV*, 235 Or App 358 (2010): A "community caretaking" search or seizure (as distinct from a law enforcement search or seizure), must fall within ORS 133.033 and must also meet constitutional standards. ORS 133.033 is a grant of authority and the Emergency Aid Doctrine is a limit on that grant.

C. EMERGENCY OR EMERGENCY AID DOCTRINE

The Emergency Aid Doctrine is a recognized exception to the requirement that the police first obtain a warrant before a search is lawful. Other exceptions to the warrant requirement will be discussed in greater detail in subsequent chapters. Acting under the authority of this doctrine, officers will sometimes make discoveries that lead them to suspect a crime.

Oregon courts carefully protect the general prohibition against warrantless entry by the police into a citizen's home. An example of this is found in *State v. Christenson*, 181 Or App 345 (2002). In *Christenson*, two officers responded to a 9-1-1 call from a neighbor that the man's front door was open and his two pit bulls were loose. The neighbor had called into the home, with no response, and she considered the circumstances "suspicious." The officers received no answer to their (telephone) calls into the home and entered because there might have been a burglary, someone might have been ill or injured in the home and the dogs were at large. The court held that neither the community caretaking function nor the Emergency Aid Doctrine justified the entry into the home, and excluded evidence of drug use found while the officers

were in the home. *State v. McDonald*, 168 Or App 452, *rev den* 331 Or 193 (2000), is another example where the court held that the state must make a "strong showing" that "exceptional emergency circumstances truly existed" in order to rely on the Emergency Aid Doctrine exception to the warrant requirement.

In *State v. Follett,* 115 Or App 672, *rev den* 317 Or 163 (1993), the court adopted a four-part test to determine when the Emergency Aid Doctrine is applicable:

> (1) The police must have reasonable grounds to believe that there is an emergency and an immediate need for their assistance for the protection of life.
> (2) The emergency must be a true emergency – the officer's good faith belief alone is insufficient.
> (3) The search must not be primarily motivated by an intent to arrest or to seize evidence.
> (4) The officer must reasonably suspect that the area or place to be searched is associated with the emergency and that, by making a warrantless entry, the officer will discover something that will alleviate the emergency.

Id. at 680.

In *State v. Martofel,* 151 Or App 249 (1997), the court was convinced that a true emergency existed. In *Martofel*, eight patrol cars responded to a 9-1-1 call that there was a "man with a gun" in a residential neighborhood. One of the officers entered a backyard while looking for the gunman and found marijuana plants belonging to someone else. Because this was a true emergency, the police were able to use the seized evidence in court.

In *State v. Burdick,* 209 Or App 575, 581 (2006), the court compared cases in which a true emergency existed to ones in which none was found and concluded:

> Thus, a "true emergency" exists if there are reliable, objective indicia of a potential victim of a dangerous circumstance or a potential perpetrator of a dangerous act. Suspicious circumstances or "gut instinct" are insufficient. The existence of an identifiable victim or perpetrator is significant because whether an emergency exists depends on whether immediate action is required ("something that will alleviate the emergency"), which, in turn, depends on the relationship between the gravity of the harm to be prevented and the probability that the harm will occur if action is not taken.

In *State v. Salisbury,* 223 Or App 516 (2008), the court held the warrantless entry into the defendant's apartment was not justified by community caretaking/Emergency Aid Doctrine where the defendant drove a car without a license and had been speeding in the early morning hours. The defendant was uncooperative when officers tried to make a stop. A witness heard both male and female voices coming from the apartment yelling and screaming and heard profanity, but no one from the apartment called for help. The officer's belief that someone might be in "peril" was not enough to believe a true emergency existed. *See also State v. Goodall,* 219 Or App 325 (2008) (warrantless entry into a filthy home was not justified by community

caretaking/Emergency Aid Doctrine; the only person (a baby) who might have needed protecting to prevent serious harm was in the officer's presence in his mother's arms, and therefore a search of the home was not necessary to find the baby or to protect him).

The Emergency Aid Doctrine has also been used in a DUII case. In *State v. Martin*, 124 Or App 459 (1993), the court held that a true emergency existed when an officer found an unresponsive man slumped behind the wheel of a car, which was parked facing the street with the lights on and engine running. The court found that these factors, taken together, amounted to an emergency, which justified the officer opening the door to shake the man in an attempt to wake him. It was at this point that the officer noticed indicia of impairment, including an odor of an alcoholic beverage, watery and bloodshot eyes and incoherent speech. The *Martin* court held that the search, opening the door to shake the driver, was justified under the four-part test set out in *Follett*.

D. ACCIDENTS AND ACCIDENT INVESTIGATIONS

Police officers have inherent authority to investigate accidents, even where there may be no belief, at least initially, that a violation or crime has occurred. A police officer may simply come upon the scene of an accident, or be dispatched to one, and start investigating. *See State v. Anfield*, 100 Or App 692, *aff'd* 313 Or 554 (1992). When a police officer starts investigating an accident, the individuals involved in the accident are "detained" during this questioning. ORS 811.705 requires a driver to remain at the scene of an accident until all of his or her legal duties relative to the accident have been fulfilled. In *State v. Larson*, 141 Or App 186 (1996), the court held that this detention does not create a "seizure" of the person under Article I, section 9 of the Oregon Constitution. An accident investigation may last hours and a person may voluntarily remain at the scene even after the person has performed his or her duties. *State v. Nielsen*, 147 Or App 294 (1997). When the officer does more than would be necessary to complete the accident investigation and help the motorists exchange information, it becomes a "stop." To justify a stop, the officer must have a "reasonable suspicion" that then person has committed a crime. (*See* Chapter VI, *Stops Based on the Reasonable Suspicion of a Crime*).

In addition, ORS 133.033(2)(b), the community caretaking statute, authorizes the police to stop or redirect traffic or aid motorists at accident scenes and other emergencies. Directing traffic around an accident scene is not a stop or a seizure. *State v. Holmes*, 101 Or App 676, *rev'd and rem'd* 311 Or 400 (1991).

E. ROADBLOCKS

Roadblocks were once common in Oregon as a way for the police to make contact with a driver. Roadblocks could be set up to stop large numbers of drivers without the need to establish that a violation had been committed, or that there was a reasonable suspicion of criminal conduct. In the process of checking licenses and equipment at these roadblocks, officers would

come into contact with a fair number of intoxicated drivers. After observing indicia of impairment, the police were then justified in expanding their contact into a DUII investigation, based on a reasonable suspicion that the driver was committing a crime (DUII).

With the decision in *Nelson v. Lane County*, 79 Or App 753, *aff'd* 304 Or 97 (1987), the ability to set up roadblocks in Oregon for routine license and vehicle checking came to an end. The courts held that under Oregon's constitution, there was a requirement for an "individualized" suspicion before the police could make a stop, and this level of suspicion could not be found in most roadblock scenarios.

Following *Nelson*, Oregon courts have upheld roadblock stops in very limited situations. For example, in *State v. Gerrish*, 311 Or 506 (1991) the court approved of the police setting up a roadblock to check all vehicles leaving a resort immediately following an armed robbery. In *Bissett v. MVD*, 122 Or App 622 (1993), the court upheld a DUII conviction stemming from the driver's failure to obey an officer's commands to stop at a roadblock set up because of a hazardous material spill.

F. CONTACTS DURING OTHER POLICE INVESTIGATIONS

Some DUII cases start with an officer investigating another crime. Common areas for this kind of crossover are domestic assaults, attempting to elude and hit and run. If the officer reasonably suspects that a crime has been committed, and during this investigation, the officer observes indicia of impairment, the officer can expand the original investigation to include DUII. This topic is addressed further in Chapter VI, *Stops Based on the Reasonable Suspicion of a Crime*.

CHAPTER 4

STOPS DEFINED

AND

WHO MAY MAKE THEM

*****

A. DEFINITION

"A 'stop' is a temporary restraint of a person's liberty by a peace officer lawfully present in any place." ORS 131.605(6). Oregon courts consider a show of police authority, sufficient for a reasonable person to believe that he or she is not free to leave, to be a stop. *See State v. Loud*, 149 Or App 250 (use of overhead lights and spotlight was a sufficient show of police authority); *State v. Puffenbarger*, 166 Or App 426 (2000) (closely following defendant for 12 blocks, in vehicle and on foot, was a show of police authority, even though defendant never submitted to the authority and there was no use of force).

A stop is analogous to a seizure. Thus, to be valid under Article 1, section 9 of the Oregon Constitution, a stop must be supported by a legal justification. But the first question to ask is, "Was it a stop?"

B. WHAT CONSTITUTES A STOP

A stop of a person occurs under Article I, section 9 of the Oregon Constitution if: (a) a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) if a reasonable person under the totality of circumstances would believe that (a) above has occurred. *State v. Ashbaugh*, 349 Or 297 (2010). The crucial question in determining whether a mere encounter has become a constitutionally significant seizure is whether, by word or deed, the law enforcement authority has manifested a "show of authority" that restricts a person's "freedom of movement." *Id., quoting State v. Rodgers/Kirkeby*, 347 Or 610, 622 (2010). It is the imposition, by physical force or a show of authority, of some restraint on the individual's liberty that distinguishes a "stop" from "mere conversation." *Id.*

The individual's subjective belief that he or she is not free to leave is not relevant to the analysis.[1] *Ashbaugh*, 349 Or 297, 316. Furthermore, a police officer's unarticulated subjective belief that a person is not free to leave does not convert an encounter into a stop or seizure. *State v. Sanchez*, 148 Or App 284, 290 (1997). The examination of whether police conduct amounts to a stop or a seizure of a person is a "fact specific inquiry into the totality of the circumstances of the particular case. The interference with liberty or freedom of movement must be significant." *State v. Blair*, 171 Or App 162, 173 (use of overhead lights for safety reasons was not a significant interference sufficient to constitute a stop).

[1] In *Ashbaugh*, the Oregon Supreme Court clarified a line of earlier cases, which found that the analysis of whether a stop occurred includes both an objective and a subjective component. *See, e.g., Juarez-Godinez*, 326 Or 1 (1997); *State v. Hall*, 339 Or 7 (2005). The *Ashbaugh* court expressly abandoned the subjective component, *i.e.*, whether person subjectively believed he or she had been seized, and directed the focus to an objective analysis: whether a reasonable person in those circumstances would believe a seizure occurred. 349 Or at 316.

> [T]he pivotal factor in deciding whether any interference with the citizen's liberty is "significant" is "whether the officer, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner that would be perceived as a nonoffensive contact if it had occurred between two ordinary citizens."

State v. Holmes, 311 Or 400 (1991).

C. EXAMPLES OF STOP SITUATIONS

The following cases are illustrative of fact situations where Oregon courts have determined that the police conduct amounted to a stop:

- *State v. Walp*, 65 Or App 781 (1983): use of overhead patrol car lights effected a stop.
- *State v. Mesenbrink*, 106 Or App 306, *rev den* 312 Or 235 (1991): officer stopped driver by parking so that driver could not leave.
- *State v. Pavelek*, 122 Or App 181 (1993): asking a driver to step out of his car was a stop.
- *State v. Jacobus*, 318 Or 234 (1993): officer pulled behind a stopped car, activated emergency lights and then contacted the driver to request identification.
- *State v. Ehly*, 317 Or 66 (1993): there was a stop when officer ordered defendant to back-up and officer put her hand on her weapon.
- *State v. Terhear*, 142 Or App 450 (1996): officers approached defendants on foot and told them that they had committed traffic violations.
- *State v. Gonzalez-Galindo*, 146 Or App 291 (1997): retaining ODL long enough to do "want and warrant" check created a stop (*C.f. State v. Duffy* , 176 Or App 49 (2001) (running a warrant check does not impermissibly expand scope of traffic stop so long as the check does not extend the length of the detention)).
- *State v. Loud*, 149 Or App 250 (1997): officer's use of spotlight and overhead lights was a stop.
- *State v. Langager*, 156 Or App 385 (1998): officer made a stop when he parked behind driver's car in an alley, blocking driver from leaving, and shined a spotlight inside the car.
- *State v. Finlay*, 170 Or App 359 (2000): officer stopped defendant when, after traffic violation investigation ended, the officer ordered defendant out of vehicle so officer could look at door post VIN.

- *State v. Puffenbarger*, 166 Or App 426 (2000): officers stopped defendant when they slowly followed him in their vehicle, and then chased him for a total of 12 blocks, before defendant collapsed in his yard; even without a use of force or submission to the show of authority, the officers' conduct was a "stop."
- *State v. Hall*, 339 Or 7 (2005): the officer motioned with two fingers for the person to come toward him, asked for ID from which he ran a records check, and asked the person if he had any weapons. Under the totality of the circumstances, such actions constituted a stop.
- *State v. Crandall*, 197 Or App 591 (2005): officers at apartment complex see known drug suspects leave apartment; defendant comes out next, sees officers and "freezes"; defendant then walks away; from 100 feet away, officer says, "Stop. Come here;" defendant starts to walk back; court held this was stop under totality because Petitioner was signaled to return and had to reverse course and walk 100 feet toward officer.
- *State v. Tiffin*, 202 Or App 199 (2005): speed posted 40 mph; defendant traveling 28-30 mph; officers follow; could have safely passed but chose not to; traffic stop for impeding traffic (ORS 811.130) was invalid.

D. EXAMPLES OF SITUATIONS THAT ARE NOT STOPS

(*See also*, Chapter 3: Encounters Between Police and Citizens Which May Lead to Reasonable Suspicion of a Crime.)

These cases illustrate factual scenarios where Oregon courts determined that the conduct of the police did not sufficiently interfere with the liberty of the person to constitute a stop:

- *State v. DuBois*, 75 Or App 394 *rev den* 300 Or 451(1985): use of patrol car lights was a safety precaution only and did not elevate contact to a stop; *See also, State v. Blair/Vanis*, 171 Or App 162 (2000).
- *State v. Spenst*, 62 Or App 755, *rev den* 295 Or 447 (1983): officer following closely, and then pulling in behind driver, who stopped on his own, was not a stop, even though driver believed that he had to pull over.
- *State v. Starr*, 91 Or App 267 (1988): when a driver license was requested but not retained by officer during a casual conversation the circumstances did not amount to a stop.
- *State v. Deptuch*, 95 Or App 54, *supplemented on recon*, 96 Or App 228 (1989): pulling alongside a car and van and shining a light on the occupants did not constitute a stop.

- *State v. Gerrish*, 311 Or 506 (1991): "insignificant" contacts, like using hand signals to stop a motorist in the course of a criminal investigation, was not a stop, even though the contact occurred during a roadblock search for an armed robbery and shooting suspect.
- *State v. Morelli*, 109 Or App 589 (1992): officer standing over a person seated in a restaurant, asking questions and shining a light on the person's hands was not a stop.
- *State v. Norman*, 114 Or App 395 (1992): following a vehicle into the driveway and parking behind it, without overhead lights, was not a stop when the defendant exited and initiated the contact with the officer.
- *State v. Ehly*, 317 Or 66 (1993): the police did not stop suspicious people by asking them to leave a motel room and dump their baggage onto the ground so that the room key could be located and returned to the motel manager (but, once the officer ordered the defendant to back up, and put her hand on her firearm, there was a stop).
- *State v. Jackson*, 91 Or App 425, *rev den* 306 Or 661 (1988): request for a motorist's identification is not a stop; but retention of the identification that keeps a person from leaving is a stop.
- *State v. Caron*, 153 Or App 507 (1998): accompanying a person to another location was not a stop unless there was a deprivation of liberty or freedom.
- *State v. Blair*, 171 Or App 162 (2000), *rev den* 332 Or 137 (2001): officer's use of overhead lights while following slow moving vehicle straddling the fog line and using hazard lights was not a "stop" because officer could articulate safety reason for lights.
- *State v. Bond*, 189 Or App 198 (2003): where the officer knew that the person had been sitting in the driver's seat of vehicle parked in a golf course parking lot late at night for 45 minutes with its courtesy lights on, it was not a stop when the officer knocked on the window to rouse the person to check on his welfare.

E. WHO MAY MAKE STOPS

1. Police Officers

Under ORS 131.615(1), "A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry." ORS 810.410(1) states, "A police officer may arrest or issue a citation to a person for a traffic crime at any place within or outside the jurisdictional authority of the governmental unit by which the police officer is authorized to act as provided by ORS 133.235 and 133.310."

Thus, police officers with the proper levels of information and beliefs are permitted to make stops anywhere in Oregon.

2. Citizens

At times, a private citizen will cause a motorist or pedestrian to stop, and will then detain the person while waiting for the police to arrive. This is not a stop in the legal sense, as long as there is no indication that the private citizen was acting in conjunction with, or under a show of authority from, police. Article 1, section 9 of the Oregon Constitution and the Fourth Amendment of the United States Constitution, only prohibit unreasonable searches and seizures by the *police*. A private citizen cannot make a stop, as that term is defined by ORS 131.605(6). A search or seizure, conducted by a private citizen acting on his or her own initiative, will not be subject to the same constitutional safeguards as a governmental action will be. A private citizen may, however, make an arrest for a crime committed in his or her presence under ORS 133.225.

The ALJ may hear testimony that the arresting officer responded to a call for assistance from a private citizen or a private security guard that has stopped and detained a motorist that he or she believes is impaired. In order to comply with the Implied Consent law, the responding police officer must be able to articulate his or her own suspicion that the person detained committed the crime of DUII before the officer can investigate that crime. Usually, the officer speaks to the citizen who detained the individual and learns the grounds for the detainment, which leads to an officer's suspicion that a crime has been committed. (*See* Chapters V through VII.)

3. Campus Security Guards

The powers of special campus security officers are defined by ORS 352.385, which provides, in part:

> Special campus security officers shall have stop and frisk authority as set forth in ORS 131.605 to 131.625 and probable cause arrest authority… as set forth in ORS 133.310 and 133.315 when acting in the scope of their employment as defined by the State Board of Higher Education.

ORS 131.615 provides in part:

> (1) A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry.
> (2) The detention and inquiry shall be conducted in the vicinity of the stop and for no longer than a reasonable time.
> (3) The inquiry shall be considered reasonable if it is limited to:
> (a) The immediate circumstances that aroused the officer's suspicion;
> (b) Other circumstances arising during the course of the detention and inquiry that give rise to a reasonable suspicion of criminal activity;
> * * * *

A "peace officer" is a law enforcement officer who is designated by Oregon law and granted police authority by the State of Oregon, its agencies or municipalities. That category may include campus police, liquor control personnel, and Department of Agriculture personnel. The authority to stop persons granted to special campus security officers is triggered by reasonable suspicion that the person to be stopped has committed or is about to commit a crime, or probable cause to believe that the person has committed a crime. *See* ORS 131.615 and ORS 133.310. A "crime" is an offense for which a sentence of imprisonment is authorized. ORS 161.515.

The plain language of the ORS 352.385 indicates, by omission, that the special campus security officers' authority does not include the power of police officers to conduct traffic stops under ORS 810.410.[2]

4. Tribal Police

In *State v. Pamperien*, 156 Or App 153 (1997), the court considered the scope of a tribal police officer's authority to stop a nontribal member on the reservation for a traffic infraction under the stop authority given to a "police officer" by ORS 810.410. It concluded:

> The authority of tribal police officers to stop drivers for speeding within the borders of the reservation does not derive from ORS 810.410. Rather, it derives from the tribe's inherent power as sovereign to maintain public order on the reservation.

Pamperien at 156. Therefore, a tribal officer can enforce tribal laws, including traffic laws, on tribal lands.

Recently, in *State v. Kurtz*, 350 Or 65 (2011), the Oregon Supreme Court found that tribal police, specifically Warm Springs tribal officers, are both "police officers" under ORS 801.395 and "peace officers" for purposes of ORS 161.015(4).

Furthermore, in many areas where tribal police work closely with other law enforcement agencies, the county in which the reservation is located may deputize the tribal officers so that they have the full authority granted to all police officers.

5. Port Police

There are numerous port authorities within the State of Oregon, including the Port of Portland police. The term "police officer" is used in both ORS 813.100 and 813.410. "Police officer" is defined under ORS 801.395 and includes "a city police officer" "a Port of Portland peace officer" and "a law enforcement officer employed by a service district established under

[2] Under Oregon law, police authority to make stops for traffic violations, which are generally not punishable by imprisonment, is derived from ORS 810.410 rather than ORS 131.615 (reasonable suspicion stops) and ORS 133.310 (probable cause arrests).

ORS 451.410 for the purpose of law enforcement services." A Port of Portland peace officer is also identified as an "enforcement officer" in ORS 153.005(1)(f). Therefore, a Port of Portland Police officer is considered a "police officer" under ORS 813.100 and 813.410. The same is most likely true for other port police. *See* ORS 153.005(1)(c).

F. LOCATION OF THE STOP

An Oregon law enforcement officer may follow a subject into Washington State and make a stop, if the officer believes that the person has committed a felony, is DUII, or has driven recklessly, but not for a speeding infraction. *State v. Meyer*, 183 Or App 536 (2002).

Indian lands: The State of Oregon has criminal jurisdiction over "[a]ll Indian country within the [s]tate except the Warm Springs Reservation." 18 USC § 1162(a); *State v. Jim*, 178 Or App 553, 557 (2002).

CHAPTER 5

TRAFFIC VIOLATION STOPS

AND

THEIR EXPANSION

*****

We have previously discussed what constitutes a stop and who is authorized to make a stop. The next question is what were *the legal grounds* for the stop. Although there are other means of justifying a stop, the two primary means are: (1) stops for a traffic violation(s), and (2) stops based on a reasonable suspicion of a crime. Stops based on traffic violations will be addressed in this chapter, as well as the expansion of those stops. Stops based on a reasonable suspicion of a crime are addressed in the following chapter.

A. AUTHORITY FOR A TRAFFIC STOP BASED ON A VIOLATION

Traffic violations are minor offenses that are not subject to either arrest (ORS 133.310; ORS 810.410(3)(a)) or imprisonment (ORS 153.008). The majority of these offenses are found within ORS chapter 811, which is the chapter on Rules of the Road for Drivers. However, Equipment Violations under ORS Chapter 815 and Lighting Equipment Violations under ORS Chapter 816 are not uncommon. There are other more obscure violations throughout the Vehicle Code. Under ORS 810.410(2), police officers are authorized to stop drivers (and sometimes passengers for such things as a seatbelt violation) and issue citations for traffic those violations.

ORS 810.410(2) provides, in pertinent part:

> A police officer may issue a citation to a person for a traffic violation at any place within or outside the jurisdictional authority or governmental unit by which the police officer is authorized to act:
>
> (a) When the traffic violation is committed in the officer's presence; or
>
> (b) When the police officer has probable cause to believe an offense has occurred based on a description of the vehicle or other information received from the police officer who observed the traffic violation.

The standard that the officer must meet when justifying the traffic violation stop is "probable cause" to believe a violation has been committed. *State v. Doherty*, 92 Or App 105, *rev den* 306 Or 660 (1988). An officer who stops and detains a person for a traffic violation must have probable cause to believe that a violation has occurred, and the belief must be objectively reasonable under the circumstances. *State v. Matthews*, 320 Or 398, 402-03 (1994).

The purpose of the stop is to give the officer an opportunity to investigate whether a violation has occurred. To require the officer to know all of the facts necessary to prove the violation before the stop "would make little sense." *State v. Jackson*, 149 Or App 662, 665 (1997). In *Jackson*, the court held that it will reserve for itself the decision about which law was violated, as long as the evidence supports the officer's belief that a law was violated. *See also State v. Doherty*, 92 Or App 105, *rev den* 306 Or 660 (1988); *State v. Matthews*, 320 Or 398 (1994). So, the fact that an officer identifies the wrong statute applicable to the violation is immaterial. *Matthews* at 404, citing *State v. Bea*, 318 Or 220, 224 28 (1993) (holding a stop was lawful even though based, in part, on a statute not relied upon by the state). The stop will be

invalid, however, if the officer does not believe than any violation has been committed. S*ee State v. Stoner*, 77 Or App 389 (1986). Further, the behavior described by the officer, if true, must actually be a violation for the stop to be valid. *State v. Hart*, 85 Or App 174 (1987).

To analyze whether the officer's subjective belief that a violation has been committed was objectively reasonable, the court, in *State v. Tiffin*, 202 Or. App. 199 (2005), laid out its methodology as follows:

> Several principles guide our inquiry into whether an officer's belief that an infraction occurred is objectively reasonable. First, an officer's belief may be objectively reasonable even if it turns out to be incorrect. For example, in *State v. Hayes*, 99 Or App 387, 782 P2d 177 (1989), *rev den*, 309 Or 441 (1990), an officer ran a radio check on the defendant's license plate and received a response that indicated that the vehicle was not properly registered, in violation of ORS 803.300. The officer stopped the vehicle, ran a further check, and discovered that the vehicle was properly registered. We concluded that the officer had probable cause to stop the vehicle because "the information that the officer had just before the stop gave him a reasonable basis for a belief that defendant's vehicle was not properly registered." *Id.* at 389; *see also Isley*, 182 Or App at 190 (probable cause determination requires examination of facts of which officer was cognizant and officer's beliefs about those facts need not turn out to be correct).
>
> Further, the facts, as the officer perceives them, must actually constitute an infraction in order for the officer's belief that an infraction occurred to be objectively reasonable. For example, in *State v. Hart*, 85 Or App 174, 176-77, 735 P2d 1283 (1987), we held that a vehicle stop was unlawful because the defendant had not violated any traffic law when he turned left in response to a malfunctioning traffic signal. Accordingly, the officer could not have had a reasonable belief that a traffic infraction had occurred. *See also State v. Stearns*, 196 Or App 272, 275, 101 P3d 811 (2004) ("subjective belief that a traffic infraction occurred was objectively reasonable only if, in fact, obstruction of the word 'Oregon' by a registration plate frame is a violation of ORS 803.550").
>
> As we explained in *Hayes*, the crucial difference between our decision in that case and those in the *Hart* line of cases is that, in *Hayes*, the officer was mistaken as to the facts, but in the *Hart* line of cases, "the facts observed by the officer, *even if true*, did not constitute a violation of any traffic law." *Hayes*, 99 Or App at 389 (emphasis added); *accord State v. Matthews*, 126 Or App 154, 868 P2d 14, *aff'd*, 320 Or 398, 884 P2d 1224 (1994) (relying on the distinction drawn in *Hayes* between an officer's mistake as to facts and mistake as to law).
>
> Finally, although the facts as perceived by the officer must constitute the *elements* of an offense, an officer need not eliminate the possibility that a defense or exception to the offense applies. *State v. Bourget-Goddard*, 164 Or App 573, 577, 993 P2d 814 (1999), *rev den*, 330 Or 331 (2000). In that case, an officer stopped the defendant after observing him drive a car without wearing a shoulder strap. The defendant argued that the officer did not have probable cause to believe that he had violated the seat-belt law because the officer did not have probable cause to believe that each of the exemptions to that law did not apply. We held that the officer's belief that an infraction had occurred was

> objectively reasonable because the state is not "required to eliminate the possible applicability of defenses or statutory exemptions that do not describe a necessary element of the offense itself." *Id.* at 578.
>
> In sum, an officer's subjective belief that a traffic infraction occurred is objectively reasonable if, and only if, the facts as the officer perceived them actually satisfy the elements of a traffic infraction. With that principle in mind, we turn to the facts of this case.

Tiffin at 203, 204.

1. Observations by Other Than the Stopping Officer

In addition to stops based on the officer's personal observation of the violation, ORS 810.410(2)(b) permits stops based on a fellow officer's observations. Such a stop was upheld in *State v. Soldahl*, 331 Or 420 (2000). According to *Soldahl*, the stopping officer is not required to have independent probable cause, and the requesting officer is not required to communicate his or her probable cause to the stopping officer.

2. Pretext Stops

Pretext stops, or stops ostensibly made for a reason other than the observation of a traffic violation, are lawful in Oregon, so long as there was a valid basis for the stop. For example, in *State v. Olaiz*, 100 Or App 380 (1990), the court held that the stop was lawful despite the officer's delay in making a traffic stop after observing a violation, and the fact that the officer had other reasons to want to speak with the vehicle's occupants. *See also State v. Allen*, 112 Or App 70, 73 (1992) ("[I]f there is a legitimate basis for a stop, the fact that an officer may also have other motives for the stop does not make it illegal.").

3. In Uniform and Displaying a Badge

ORS 810.400 states: "Any police officer attempting to enforce the traffic laws of this state shall be in uniform or shall conspicuously display an official identification card showing the officer's lawful authority." Despite this seemingly unambiguous requirement, Oregon courts have held that violation of this rule, by itself, does not invalidate a stop. *See State v. Mesa*, 110 Or App 261, *rev den* 313 Or. 211 (1992). In *State v. Gerttula*, 41 Or App 675 (1979), the court ruled that the attire of the arresting officer is not an element of the crime of DUII.

B. EXAMPLES OF VALID TRAFFIC VIOLATION STOPS

- *State v. Rodinsky*, 60 Or App 193 (1982): failing to obey a police officer.
- *State v. Niles*, 74 Or App 383 (1985): driving over downed power lines.

- *State v. Doherty*, 92 Or App 105 (1988): exhibition of acceleration.

- *State v. Hayes*, 99 Or App 387 (1989): stop based on computer check on license plate that comes back "unable to locate".

- *State v. Thomas*, 104 Or App 126 (1990): driving in a parking strip violated lane requirements. (This is the only definition of "lane" currently found anywhere in Oregon law).

- *State v. Olaiz*, 100 Or App 380 (1990): driving "a little fast" was enough to support a stop for speeding.

- *State v. Brown*, 107 Or App 280 (1991): proper stop for failing to display temporary registration.

- *State v. Belcher*, 108 Or App 741 (1991): signal required when merging onto highway.

- *State v. Nelson*, 109 Or App 97 (1991): driving too slowly.

- *State v. Faccio*, 114 Or App 112 (1992): driving at night without headlights.

- *State v. Bea*, 318 Or 220 (1993): turn signal required where car moved around "L-shaped" turn; because the two streets had different names, this was an intersection.

- *Bissett v. MVD*, 122 Or App 622 (1993): violation committed when motorist disobeyed officer's hand signals.

- *State v. Matthews*, 320 Or 398 (1994): improper use of high-beam headlights. (*Note*: the discussion of ORS 810.410(3)(b) should be disregarded in this opinion.)

- *State v. Mealer*, 129 Or App 456 (1994): driving on wrong side of highway is a violation even if no other cars coming.

- *State v. Gonzalez*, 150 Or App 220 (1997): stop for careless driving based on swerving and nearly striking another vehicle.

- *State v. Jackson*, 149 Or App 662 (1997): dragging tailpipe was a violation.

- *State v. Pamperien*, 156 Or App 153 (1997): tribal police officer found to have authority to make stops under state traffic laws.

- *State v. Testa*, 155 Or App 52 (1998): analysis of reckless driving.

- *State v. Arthur*, 158 Or App 623 (1999): signaling 100 feet prior to turning is required whether turning at a stop sign or at a light.

- *State v. Bourget-Goddard*, 164 Or App 573 (2000): stop for failure to wear a seatbelt valid because officer saw seatbelt hanging, unused, from door post; *but see State v. Rivera*, 121 Or App 246 (1993) (invalid stop because of a "possible" safety belt violation).

- *State v. McBroom*, 179 Or App 120 (2002): driving on a painted lane stripe, even the inside edge of the stripe, constitutes a violation of ORS 811.370, failure to drive within lane.

- *State v. Isley*, 182 Or App 186 (2002): even if the officer's headlights cause the driver's vehicle to weave over the lane lines, a stop was justified.

- *Efimoff v. DMV*, 204 Or App 648 (2006): the officer saw a violation (vehicle parked cock-eyed) and stopped the petitioner with no intention of issuing petitioner a citation for violation; court held that ORS 810.410(3)(b) does not require that officer intend to do all three permitted acts (investigate, identify and issue citation) to justify the stop.

- *State v. Nguyen*, 223 Or. App 286 (2008): displaying a registration plate in the front window of the vehicle gives rise to probable cause to believe that the driver is not displaying the registration plate on the front of the car as required by ORS 803.540(1)(b).

- *State v. Chilson*, 219 Or App 136, *rev den*, 344 Or 670 (2008): the driver failed to signal for at least 100 feet before a turn, because 100 feet did not exist between where driver came onto the street and where driver turned. The court held that the doctrine of impossibility might apply to her citation, but did not invalidate the stop.

- *State v. Kelly*, 229 Or. App 461 (2009): even considering legislative history, there was probable cause to believe a violation occurred when driver came to a full stop at a stop sign, then signaled. Driver claimed to have met the intent of the statute. The text and context of the statute, as well as the history, requires a continuous signal for a distance of 100 feet – which is a distance, not an amount of time.

- *State v. Vanlom*, 232 Or App 492 (2009): expands on *McBroom* and finds that brief, but repeated, driving on a line is enough to stop for failing to maintain lane.

- *State v. Boatright*, 222 Or. App. 406 (2008): the design of the bumper obscured the stickers on the registration plate; the officer had probable cause to believe that a violation had been committed.

C. EXAMPLES OF INVALID TRAFFIC VIOLATION STOPS

- *State v. Stearns*, 196 Or App 272 (2004): traffic stop under ORS 803.550 based on license plate frame obscuring "Oregon" at top of plate; court did *BOLI* analysis and concluded that intent of legislature was not to include name of state in statute prohibiting obscuring of license plates; stop invalid.

- *State v. Tiffin*, 202 Or App 199 (2005): speed posted 40 mph; defendant traveling 28-30 mph; officers follow; could have safely passed but chose not to; traffic stop for impeding traffic (ORS 811.130) was invalid.

D. SCOPE OF A TRAFFIC VIOLATION STOP

Once an officer has stopped a driver for an observed traffic violation, the officer's contact with the driver is still governed by ORS 810.410, which sets forth the permissible scope of a traffic stop.

ORS 810.410(3) provides, in pertinent part, that a police officer "[m]ay stop and detain a person for a traffic violation for the purposes of investigation reasonably related to the traffic violation, identification and issuance of citation." ORS 810.410(3)(b). The courts have interpreted this statute to require that an officer keep his or her contact with a stopped motorist related to the reason for the traffic stop. For example, an officer may ask questions related to the driving or equipment violation, may question the driver about his or her identity, and may ask questions necessary for issuance of a citation.

Traffic violation stops are subject to the same limitations as to length, location and scope as stops for criminal violations. *See State v. Finney*, 154 Or App 166, 170-71 (1998). In *State v. Toevs*, 327 Or 525 (1998), the court explained that the legislature intended that some legal terms, such as "stop" and "detain," which are used in both the vehicle and criminal codes, should have the same meaning and be interpreted in the same manner. *See also State v. Bailey*, 143 Or App 285 (1996) ("stop" has the same meaning in both traffic and criminal contexts).

ORS 810.410 was amended in 1997 to expand the permissible scope of traffic stop investigations. This expansion was in response to the holding in *Dominguez-Martinez*, 321 Or 206 (1995). In *Dominguez-Martinez*, the court held that a search was illegal after the police stopped a vehicle for a possible traffic violation, decided not to issue a citation, wished the driver on his way and then asked for consent to search the vehicle. The court reasoned that by standing

in the open door of the vehicle, the officer was essentially preventing the motorist from actually leaving, rendering the officer's offer to leave meaningless. The court ruled that the officer impermissibly expanded the scope of the traffic stop by detaining the driver beyond the time necessary to identify the driver, investigate the reason for the stop and issue a citation.

The statute now provides that an officer "[m]ay request consent to search in relation to the circumstances referred to in paragraph (c) of this subsection or to search for items of evidence otherwise subject to search or seizure under ORS 133.535."[1] ORS 810.410(3)(e). For example, in *State v. Duffy*, 176 Or App 49, 52-53 (2001), the court held that an officer is authorized, by ORS 810.410(3)(e), to request consent to search during the course of a traffic violation stop, without requiring that the officer first have reasonable suspicion of a crime.

The police may expand the scope of a traffic stop *if* the officer develops a reasonable suspicion, during the stop, that the driver has committed or is committing a crime. For example, in *State v. Brown*, 107 Or App 280 (1991), the court held that:

> After he stopped defendant, sights and smells gave rise to a reasonable belief that defendant had committed an offense other than the one for which he had been stopped. When performing a traffic stop, an officer does not act in a vacuum and need not be oblivious to evidence that is staring him in the face.

State v. Brown, 107 Or App at 283.

More recently, in *State v. Rodgers/Kirkeby*, 347 Or 610 (2010) the court expressed the authority to expand a stop for a violation as follows:

> In summary, Article I, section 9, and this court's case law establish the following principles that must guide the police in their contact with motorists stopped for routine noncriminal traffic violations. Police authority to perform a traffic stop arises out of the facts that created probable cause to believe that there has been unlawful, noncriminal activity, *viz.*, a traffic infraction. Police authority to detain a motorist dissipates when the investigation reasonably related to that traffic infraction, the identification of persons, and the issuance of a citation (if any) is completed or reasonably should be completed. Other or further conduct by the police, beyond that reasonably related to the traffic violation, must be *justified* on some basis other than the traffic violation.

Rodgers/Kirkeby at 623.

---

[1] ORS 133.535 Permissible objects of search and seizure. The following are subject to search and seizure under ORS 133.525 to 133.703: (1) Evidence of or information concerning the commission of a criminal offense; (2) Contraband, the fruits of crime, or things otherwise criminally possessed; (3) Property that has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense; and (4) A person for whose arrest there is probable cause or who is unlawfully held in concealment.

Practical Note: For a more in-depth discussion of the development of the dichotomy between the treatment of criminal cases under ORS 136.432 and current Implied Consent procedures, *See* Chapter II, *Implied Consent Historical Perspective and Recent Developments*.

E. EXAMPLES OF LAWFULLY EXPANDED TRAFFIC VIOLATION STOPS

- *State v. Kolendar*, 100 Or App 319, *rev den* 309 Or 698 (1990): officer expanded equipment violation stop after smelling an odor of an alcoholic beverage, seeing driver's bloodshot eyes, and concluding that driving with only one functional headlight was a sign of driver inattention.

- *State v. Liebrecht*, 120 Or App 617, *rev den* 317 Or 584 (1993): expansion of traffic stop to a DUII investigation was justified when, during the traffic violation investigation, the officer smelled an odor of an alcoholic beverage and the driver admitted to drinking two or three beers.

- *State v. Berg*, 140 Or App 388 (1996): following a traffic stop for speed racing, the officer smelled a moderate odor of an alcoholic beverage and saw that driver had bloodshot eyes.

- *State v. Hammonds*, 155 Or App 622 (1998): officer stopped driver for improper turn signal, then noticed an odor of an alcoholic beverage and observed that driver had both female passenger and pornographic material in vehicle; given officer's knowledge of neighborhood, it was reasonable for officer to suspect that crime of prostitution had occurred.

- *State v. Finney*, 154 Or App 166 (1998): officer observed a traffic violation and followed the driver to a driveway, where driver got out of vehicle and walked toward house; officer asked driver to come back to the rear of driver's vehicle; officer detected odor of an alcoholic beverage as he spoke with driver; court ruled that the traffic violation stop was lawful, and that permissible expansion of stop occurred when officer asked driver if he had been drinking.

- *State v. Ziebart*, 172 Or App 288 (2001): a moderate odor of alcohol – standing alone – is not sufficient to give rise to a reasonable suspicion that a defendant has been driving under the influence; the officer must be some additional evidence of intoxication to support reasonable suspicion.

F. EXAMPLES OF UNLAWFUL EXPANSIONS OF TRAFFIC STOPS

- *State v. Rodgers/Kirkeby*, 347 Or 610 (2010): Stop began as an equipment violation and resulted in convictions on drug charges. The Court concluded, "that each defendant was unlawfully seized in violation of Article I, section 9, because in each case the police conduct was not justified by reasonable suspicion of criminal activity; was unrelated to the traffic violation investigation, identification, or issuance of a citation; and significantly restricted each defendant's freedom of movement. Because there were no intervening circumstances or other circumstances mitigating the effect of the illegal seizures of each defendant, we conclude that each defendant's consent, even if voluntary, was the product of police conduct that violated Article I, section 9, of the Oregon Constitution. Because the consent to search in each case was a product of the unlawful seizure, the evidence obtained during the search, in both cases, must be suppressed."

CHAPTER 6

STOPS BASED ON

THE REASONABLE SUSPICION

OF A CRIME

*****

The second common basis for a police stop is a reasonable suspicion that a crime has been, or is about to be, committed. A crime is defined at ORS 161.515 to mean "an offense for which a sentence of imprisonment is authorized." Crimes are either misdemeanors, which carry a maximum term of imprisonment of less than one year, or felonies, which carry a maximum term of imprisonment of more than one year. Crimes may include traffic crimes. The primary traffic crimes are driving while under the influence of intoxicants (ORS 813.010), criminal driving while suspended or revoked (ORS 811.182), reckless driving (ORS 811.140) and failure to perform the duties of a driver involved in an accident (hit and run) (ORS 811.700 and .705.) But officers are not limited to only making stops for traffic crimes. Some DUII cases arise out of stops based upon a suspicion of domestic assault, car prowling, stolen vehicles, engaging in prostitution or some crime.

Often, officers have more than one reason for making a stop. For example, the officer may observe driving that leads to a suspicion that the driver is DUII, and may also witness one or more traffic violations. A complete hearing record should include testimony about all of the reasons for the stop. For a discussion of traffic violation stops, *see* Chapter 5. In the end, it takes only one valid reason to justify a stop.

A. REASONABLE SUSPICION DEFINED

Reasonable suspicion is defined at ORS 131.605(5) to mean "that a peace officer holds a belief that is reasonable under the totality of the circumstances existing at the time and place the peace officer acts as authorized ORS 131.605 to 131.625." Reasonable suspicion has subjective and objective components. *State v. Wiggins*, 184 Or App 333 (2002).

The concept of allowing the police to make a stop, for less than full probable cause, stems from *Terry v. Ohio,*, 392 US 1 (1968) (officers may briefly detain to identify the stopped person and to satisfy the officer's reasonable suspicion of imminent criminal activity). Prior to *Terry*, it was generally assumed that any police stop required probable cause.

A valid reasonable suspicion, either as the basis for a stop or as the basis for expansion of a traffic violation stop, must be supported by specific and articulable facts that give rise to a reasonable inference that a person has committed a crime. *State v. Ehly*, 317 Or 66 (1993) and *State v. Aguilar*, 139 Or App 175, *rev den* 323 Or 265 (1996); *Wiggins*, 184 Or App at 341-42. The quantum of information needed to establish a reasonable suspicion is lower than that of probable cause or reasonable grounds. *State v. Panko*, 101 Or App 6 (1990) and *State v. Gulley*, 324 Or 57 (1996). The possibility that there may be a non-criminal explanation for the facts observed or that the officer's suspicion may be wrong does not defeat the reasonableness of the suspicion. *State v. Kolendar*, 100 Or App 319 (1990).

The officer's suspicion may be based on the reasonable inferences that can be drawn from the objective and observable facts. *State v. Crites*, 151 Or App 313 (1997). An officer's

subjective belief may be objectively reasonable, even though the officer was in error. *State v. Lawton*, 194 Or App 190 (2004). An officer's subjective belief does not require express testimony. The subjective element may be inferred from the facts and the officer's actions. *State v. Belt*, 137 Or App 440 (1995), *aff'd and rem'd* 325 Or 6 (1997). *But see, State v. Olson*, 116 Or App 525 (1992) (the officer testified that he did not suspect a crime and the court held that if the officer does not have a subjective suspicion, the court will not supply it). The information that supports a reasonable suspicion may be somewhat conclusory. *State v. Wright*, 315 Or 124 (1992), (one officer's statement to another officer that he saw defendant driving and defendant was "very visibly intoxicated" was sufficient to the other officer's reasonable suspicion that driver was DUII).

A reasonable suspicion that a crime has been committed is distinguishable from mere hunches, which do not authorize the police to investigate. For example, an officer's articulation that he observed "suspicious persons in a suspicious vehicle" may not be sufficient, without more, to reach the level of a reasonable suspicion. *See State v. Greer*, 93 Or App 409 (1988). Further, a dispatcher's report that a man and a woman were arguing near a pickup truck and one of them was throwing things at a dumpster, did not give rise to a reasonable suspicion of domestic violence. *State v. Peterson*, 164 Or App 406 (1999). The court requires that the stop be based on more than an officer's intuition and experience. *See State v. Houghton*, 91 Or App 71 (1988).

B. SCOPE OF A STOP BASED ON REASONABLE SUSPICION OF A CRIME

ORS 131.615 sets out the scope of an officer's authority to stop a person and investigate a suspected crime, and provides as follows:

> (1) A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry.
> (2) The detention and inquiry shall be conducted in the vicinity of the stop and for no longer than a reasonable time.
> (3) The inquiry shall be considered reasonable if it is limited to:
> (a) The immediate circumstances that aroused the officer's suspicion;
> (b) Other circumstances arising during the course of the detention and inquiry that give rise to a reasonable suspicion of criminal activity; and
> (c) Ensuring the safety of the officer, the person stopped or other persons present, including an inquiry concerning the presence of weapons.
> (4) The inquiry may include a request for consent to search in relation to the circumstances specified in subsection (3) of this section or to search for items of evidence otherwise subject to search or seizure under ORS 133.535.

ORS 131.615(1) allows the police to detain a person, without arrest, if the purpose of the detention is reasonably related to the investigation. *See State v. Nevel*, 126 Or App 270 (1994). In *Nevel*, the police asked the defendant to sit in the back of a patrol car, unhandcuffed, while

they spoke privately with defendant's wife about suspected domestic assault. The court reasoned that having the defendant sit in the patrol vehicle for about three minutes was not an unreasonable detention or an arrest.

ORS 131.615(2) requires that the detention and inquiry be conducted "in the vicinity of the stop" and for no longer than a reasonable time. The court addressed this restriction in *Jasper v. MVD*, 130 Or App 603 (1994). In *Jasper*, the police drove an uncooperative suspect three blocks from the location of the stop to the scene of an accident that the officer believed the suspect had been involved in. The suspect was handcuffed and driven in a patrol car, although he was not yet under arrest. The court found that this movement of the suspect was unreasonable and exceeded the permissible scope of the traffic stop.

The court considered a similar issue in *State v. Hasan*, 93 Or App 142, 147 (1988), holding that the scope of a reasonable inquiry included arranging to have the victim, who was present at the scene, view the stopped person. The *Hasan* court concluded that the officer in that case conducted the detention and inquiry in the vicinity of the stop, even though the defendant had been moved from the front yard, where the stop occurred, to a police car parked several yards away, where the victim was sitting. Similarly, in *State v. Philpott*, 33 Or App 589, 593 (1978), the officer detained and questioned the defendant outside of a bar. The court held that the detention was still in the vicinity of the stop, which had been made in the men's room of the bar.

ORS 131.615(3) limits an officer's inquiry following a reasonable suspicion stop. For example, in *State v. Black*, 146 Or App 1, *rev den* 325 Or 247 (1997), the police stopped the suspect for suspicion of illegal dumping of trash. The officer requested the suspect's identification, proof of insurance and registration. While producing these documents, the suspect exhibited indicia of impairment, and the officer ultimately arrested him for DUII. The court ruled that, although asking for identification, registration and insurance documents was not directly related to the crime of illegal dumping, these documents were related to the ownership of the vehicle involved in the suspected crime, and to the identification of the suspect.

More recently, in *State v. Rodgers/Kirkeby*, 347 Or 610 (2010), the Oregon Supreme Court reiterated the grounds for justifying police activity that goes beyond the original reason for the contact. In the cases at issue, the Court concluded that each defendant's consent to search was the product of illegal policy conduct. The expansion of the investigation was not justified by reasonable suspicion of a crime or by the investigation, issuance of citation for a traffic violation, and the detentions significantly restricted each defendant's movement.

C. EXAMPLES OF VALID STOPS BASED ON REASONABLE SUSPICION OF DUII

- *State v. Bailey*, 51 Or App 173 (1981): the police observe poor or erratic driving, such as weaving within lane for several blocks.

- *State v. Madden*, 89 Or App 21 (1987): the driving is more or less normal but the driver "appears" intoxicated as he sits behind the wheel.

- *State v. Ratliff*, 304 Or 254 (1987): after spotting the police vehicle, driver engages in "hide and seek" driving behavior.

- *State v. Hibler*, 92 Or App 140 (1988): fluctuating speeds, driver yelling out window.

- *State v. Wright*, 94 Or App 468 (1989): police observed "jerky" driving.

- *State v. Foster*, 95 Or App 144 (1989): slow motion weave.

- *Fischer v. MVD*, 101 Or App 580 (1990): the driver weaved over the fog line twice at a late hour.

- *State v. Sulser*, 127 Or App 45 (1994): crossing centerline, weaving, fresh front-end damage.

- *State v. Whitman*, 144 Or App 385 (1996): person sitting behind the wheel of car parked near a bar at 3:00 a.m.; each time the officer drove by, the person ducked; officer could reasonably suspect DUII or other criminal activity.

- *State v. Busacker*, 154 Or App 528, *rev den* 327 Or 620 (1998): stop based on reasonable suspicion of boating under the influence valid because two named informants and one unnamed informant provided police with evidence of "inappropriate" boating behavior.

- *State v. Kusaj*, 174 Or App 575 (2001): weaving within a lane and a wide turn is enough for reasonable suspicion of DUII.

- *State v. Gilbertz*, 173 Or App 90 (2001): experienced police officer observed vehicle drifting within lane five times during early morning hours.

- *State v. Connell*, 186 Or App 620 (2003): speeding, crossing center line, pulling into a residential driveway (not the registered owner's address) and turning headlights off, and using "stop and go" tactics to avoid the police.

- *State v. Nelson*, 109 Or App 97 (1991): leaving a tavern at 2:00 a.m. and exhibiting difficulty walking, taking steps to avoid being seen by the officer, driving only after the officer was no longer present, and maintaining a speed of 35 mph even after the speed limit changed to 45 mph.

Practical Note: Because a reasonable suspicion of DUII is based on the totality of the circumstances, do not forget to inquire about surrounding circumstances during the hearing. For example, the time of night and proximity to local drinking establishments can contribute to an officer's suspicion that a driver may be DUII.

D. REASONABLE SUSPICION STOPS BASED ON INFORMATION FROM AN INFORMANT

Often, DUII arrests start with information relayed to the police by a citizen informant. Typically, the citizen will call 9-1-1 to report a "drunk driver," and the police will then locate the suspected driver based on the vehicle description and information about location provided by the informant. Informant information can provide police with grounds to stop a vehicle, provided certain factors are established.

In *State v. Mesenbrink*, 106 Or App 306 (1991), the court noted that the important factors to consider in determining whether information from a citizen is sufficient to justify a stop are whether the citizen is identified or at least readily identifiable, whether the information is based on the citizen's personal observation, and whether the tip is corroborated. The seminal Oregon case in this area is *State v. Black*, 80 Or App 12 (1986). *State v. Villegas-Varela*, 132 Or App 112 (1994) summarized and explained the law on citizen tips as follows:

> In *State v. Black*, 80 Or App 12 (1986), we identified three factors that are important in determining the reliability of a citizen informant's report. One is whether the informant is exposed to possible criminal and civil prosecution if the report is false. That factor is satisfied if the informant give his or her name to law enforcement authorities or if the informant delivers the information to the officer in person, *State v. Bybee*, 131 Or App 492 (1994); *State v. Koester*, 117 Or App 139, *rev den* 315 Or 644 (1993). The second factor is whether the report is based on the personal observations of the informant. An officer may infer that the information is based on the informant's personal observations if the information contains sufficient detail that
>
> > it is apparent that the informant had not been fabricating [the] report out of whole cloth * * * [and] the report [is] of the sort which in common experience may be recognized as having been obtained in a reliable way * * * . *Spinelli v. United States*, 393 US 410, 417-18, 89 S Ct 584, 21 L Ed 2d 637 (1969).
>
> *See also, State v. Shumway*, 124 Or App 131 (1993). The final factor is whether the officer's own observations corroborated the informant's information. The officer may corroborate the tip either by observing the illegal activity or by finding the person, the vehicle and the location substantially as described by the informant. *State v. Vanness*, 99 Or App 120, 125 (1989).

Villegas-Varela at 115.

Other informant cases include:

- *State v. Lindstrom*, 37 Or App 513 (1978): a citizen flagged down a police officer and reported that the driver of a yellow Ford pickup had nearly forced him off the road, had "pulled a rifle on him," and appeared to be "very intoxicated." *Id*. at 515 (internal quotation marks omitted). The informant did not provide his name, and the officer did not record the informant's license plate number. Shortly after speaking with the informant, and within a half-mile of where the conversation had taken place, the officer saw a yellow Ford pickup traveling in a normal manner and signaled the driver to pull over. The driver was then arrested for DUII. The trial court denied the defendant's motion to suppress, and the court affirmed.

- *State v. Vanness*, 99 Or App 120, 125 (1989): the officer may corroborate the tip either by observing the illegal activity or by finding the person, the vehicle and the location substantially as described by the informant.

- *State v. Faulkner*, 89 Or App 120 (1987): citizen informant deemed reliable where the desk clerk of a motel called the police and reported that a possibly drunk man had left the motel and was driving a silver Toyota van with an Oregon license plate on Clackamette Drive. The clerk identified himself and gave a phone number. A police observed a silver Toyota van turn onto Highway 99E from Clackamette Drive. The officer saw that the license plates matched the number given by the dispatcher.

- *State v. Walsh*, 103 Or App 517 (1990): even if an informant's identity is known to dispatch and not to the officers who make the arrest, the information is still within the collective knowledge of the department.

- *State v. Girard*, 106 Or App 463 (1991): a named informant officer called the Lincoln County Emergency Network and reported that a "very intoxicated" person had just driven away from a gas station at high speed in a four-door Mercedes and that the vehicle was headed north on Highway 101. The caller said there were four people in the car, and that the driver was a man in his late thirties with black hair, wearing a plaid shirt. An officer saw a car matching that description and began following it. The officer could see that there were more than two people inside, but could not see the driver. The officer did not observe any traffic violations or unusual driving. The court found the information possessed collectively by the arresting officer and the dispatcher gave rise to a reasonable suspicion that the driver was DUII.

- *State v. Shumway*, 124 Or App 131 (1993): reasonable suspicion existed where the informant did not give a name, but provided detailed information from personal observations, in person with no apparent motive to lie, and tip was partially corroborated.

- *State v. Rasheed*, 128 Or App 439 (1994): the tipster was unnamed, but the reliability of an unnamed informant may be determined by facts showing that the informant is credible or that the information is reliable, including whether the tipster has a history of providing truthful information to the police.

- *State v. Villegas-Varela*, 132 Or App 112 (1994): stop invalid when based on an anonymous tip with no independent corroboration.

- *State v. Bybee*, 131 Or App 492 (1994): stop valid because named informant actually saw defendant driving. The fact that the license plate number was off by one did not make the report unreliable.

- *State v. Perrin*, 143 Or App 123 (1996): information provided by an identified informant that there was an "intoxicated driver" was sufficient to create a reasonable suspicion.

- *State v. Busacker*, 154 Or App 528 (1998): although the informant was not named, nothing suggested that he was not willing to be named. Because of his position (navy security), he was readily identifiable.

- *State v. Peterson*, 164 Or App 406 (1999): example of tips that were insufficient to give the police reasonable suspicion that a crime had been or was about to be committed.

Practical Note: Remember, the focus is on the reasonable reliability of the information in the hands of the *police*, not just the stopping officer, at the time the stop is made.

E. OTHER GROUNDS FOR A STOP

1. Warrants

There are also a few cases where stops have been made on probable cause grounds stemming from a warrant (not necessarily for DUII). Examples include *State v. Steinke*, 88 Or App 626 (1987) and *State v. Carmickle*, 97 Or App 269, *rev den* 308 Or 382 (1989). A very short reference to the concept of stopping for an outstanding warrant appears in *State v. Black*, 80 Or App 12 (1986). In *State v. McCoy*, 155 Or App 610 (1998), the fact that an arrest warrant existed for a person "cured" possible defects in the traffic violation stop that an officer made. This type of stop is rarely raised in Implied Consent hearings.

2. Officer Safety

Stops based exclusively on officer safety concerns are rare; however, officer safety considerations can be one of the bases for stop. *State v. Bates*, 304 Or 519 (1987) (officers can take reasonable steps to protect themselves during any lawful encounter with a citizen). *State v. Pavelek*, 122 Or App 181 (1993) (officer safety stop was justified by the presence of firearms in the back of the car). *But see State v. Senn* 145 Or App 538 (1996) (officer's concerns were not sufficient). In *State v. Blevins*, 142 Or App 237, *rev den* 327 Or 521 (1998), the court held that the officer safety doctrine applies to stops for traffic violations. *See also State v. Roe*, 154 Or App 71 (1998).

ORS 131.615(3)(c) codifies some of the officer safety authority. *State v. Amaya*, 336 Or 616 (2004) (officer's questions to defendant regarding the contents of her bag were permissible under Article I, section 9 where they were based on the officer's reasonable suspicion that the defendant posed an immediate threat of serious injury to him).

CHAPTER 7

THE OFFENSE OF

DRIVING

UNDER THE INFLUENCE

OF INTOXICANTS

*****

At the heart of every Implied Consent hearing is an arrest for driving under the influence of intoxicants, or DUII. Understanding the definition and individual components of this crime is crucial to conducting an effective Implied Consent hearing and to properly developing the hearing record.

A. DUII DEFINED

The definition for DUII is found at ORS 813.010. That statute provides, in pertinent part, as follows:

> (1) A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle[1] while the person:
> (a) Has .08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath or blood of the person made under ORS 813.100, 813.140, or 813.150;
> (b) Is under the influence of intoxicating liquor, a controlled substance or an inhalant; or
> (c) Is under the influence of any combination of intoxicating liquor, an inhalant and a controlled substance.
> * * *
> (4) * * * [T]he offense described in this section * * * is a Class A misdemeanor and is applicable upon any premises open to the public.

"Drunk driving" is not part of the definition of DUII. The person may not be "drunk," as that term is commonly understood, and there may be no evidence of bad or erratic driving, yet the person may still be "under the influence" of intoxicants. "Under the influence" means mentally or physically impaired to a noticeable and perceptible degree.

The crime of DUII does not have a *mens rea* requirement. A person can commit the crime of DUII without ever intending to drive while under the influence of intoxicants. Similarly, proof of intent to commit DUII is not required in order to affirm a suspension under the Implied Consent law. *See State v. Miller*, 309 Or 362 (1990).

> Having a certain [blood alcohol content] or being under the influence is a status, and a person's mental state has nothing to do with whether that status exists. The statute requires only that the state prove that a defendant had the status while driving, not that the defendant knew or should have known of it. One who drives after drinking intoxicating liquor takes the risk that his BAC violates the statute. * * *. The statute, in

[1] A "vehicle" is defined at ORS 801.590 as "any device in, upon or by which any person or property is or may be transported or drawn upon a public highway and includes vehicles that are propelled or powered by any means."

> the context of its history and surrounding circumstances, clearly indicates a legislative intent that the BAC element of DUII does not involve any culpable mental state.

Miller at 369.

A defendant may argue that he or she was forced to drive to avoid domestic violence or some other fate. So far, the "choice of evils" has not been a successful challenge to the "driving" element of DUII because there is almost always an alternative to driving. *See Teague v. MVD*, 124 Or App 25 (1993).

ORS 813.010 provides that a person may commit the crime of DUII by being under the influence of alcohol, an inhalant, a controlled substance or any combination of alcohol, inhalant or controlled substance.

A controlled substance is a drug "whose possession and use is regulated by law, including a narcotic, a stimulant or a hallucinogen." *Black's Law Dictionary*, 330 (7th ed 1999). ORS 475.005(6) defines "controlled substance" as a drug or its immediate precursor classified in Schedules I through V under the Federal Controlled Substances Act, 21 U.S.C. Sections 811 to 812, as modified under ORS 475.035.

Practical Note: In Implied Consent hearings where the definition of controlled substance is at issue, the ALJ should take Official Notice of the full list of controlled substances from the Code of Federal Regulations. For a case involving both alcohol and a controlled substance, see *State v. Anderson*, 117 Or App 495 (1992).

An "inhalant" is defined in ORS 801.317 as follows:

> 'Inhalant' means any glue, paint, cement or other substance that is capable of causing intoxication and that contains one or more of the following chemical compounds:
> (1) Acetone;
> (2) Amyl acetate;
> (3) Benzol or benzene;
> (4) Butane;
> (5) Butyl acetate;
> (6) Butyl alcohol;
> (7) Carbon tetrachloride;
> (8) Chloroform;
> (9) Cyclohexanone;
> (10) Difluoroethane;
> (11) Ethanol or ethyl alcohol;
> (12) Ethyl acetate;
> (13) Hexane;
> (14) Isopropanol or isopropyl alcohol;
> (15) Isopropyl acetate;
> (16) Methyl cellosolve acetate;

(17) Methyl ethyl ketone;
(18) Methyl isobutyl ketone;
(19) Nitrous oxide;
(20) Toluol or toluene;
(21) Trichloroethylene;
(22) Tricresyl phosphate;
(23) Xylol or xylene; or
(24) Any other solvent, material, substance, chemical or combination thereof having the property of releasing toxic vapors or fumes.

B. ELEMENTS OF DUII

The offense of DUII has five separate components. To commit the crime of DUII, a person must (1) *drive* (2) *a motor vehicle* (3) *while* (4) *under the influence of intoxicants* (5) *on a public highway or upon premises open to the public.*

1. Driving

The definition of driving is not found in the Oregon Vehicle Code. ORS 813.100, the Implied Consent law, provides that any person who "*operates* a motor vehicle upon premises open to the public or the highways of this state" is deemed to have consented to a chemical test of their breath or blood. ORS 813.100(1)(emphasis added). The term "operation" is defined in the Oregon Vehicle Code and means "any operation, towing, pushing, movement or otherwise propelling." ORS 801.370. In *State v. Cruz*, 121 Or App 241 (1993), the court explained that in enacting the Implied Consent law, the legislature intended that "driving" and "operating" were essentially synonymous terms. The *Cruz* court held that "a person who operates a motor vehicle, within the meaning of ORS 813.100, also "drives," under ORS 813.010." *Id.* at 244. *See also Moe v. MVD*, 133 Or App 75 (1995).

Movement of the vehicle is required, but even slight movement constitutes driving or operation of a vehicle. *State v. Martinelli*, 6 Or App 182 (1971). The court will even consider controlling a towed vehicle by steering and braking to be driving or operating. *See State v. Duggan*, 47 Or App 219 (1980), *rev'd on other grounds*, 290 Or 369 (1981); *State v. Dean*, 84 Or App 108 (1987). A person can be "driving," even though he or she is sitting in the passenger seat. In *State v. Cruz*, 121 Or App 241 (1993), the court held that the defendant drove from the passenger seat because he grabbed the steering wheel, causing the car to jerk, and then stopped the vehicle by applying the brakes. In *Moe v. MVD*, 133 Or App 75 (1995), the court held that the defendant drove from the passenger seat by turning on the ignition and inadvertently knocking the vehicle into gear, which caused the vehicle to lurch forward and collide with eight other vehicles. Starting an engine, putting on the lights or radio, stepping on the brake, etc. without physical movement of the vehicle are not enough to establish driving for a DUII conviction. *See also* Justice Department memo to Dwight Apple, dated April 9, 1993.

Practical Note: Make sure to fully develop the record if you hear testimony about unusual or minimal driving behavior. Ask what the officer, or other witnesses saw. Ask how far the vehicle moved. Ask how the petitioner controlled the vehicle. Some officers may confuse Oregon and Washington law because in Washington, a person can commit the crime of being in control of a vehicle while intoxicated, which is a lesser offense than actually driving a vehicle while impaired. Oregon does not have an equivalent lesser offense for being impaired while in control of a vehicle.

In most cases, the driving is observed by a police officer. Sometimes, however, driving is observed by a witness. *See* Chapter 6, *Stops Based on the Reasonable Suspicion of a Crime.* The police can rely on either direct or circumstantial evidence to establish the elements of DUII. *State v. Smith*, 31 Or App 321 (1977).

There are also instances in which the driving element is inferred from the other facts that are known. *See State v. Bilsborrow*, 230 Or App 413 (2009) for an example of where the driving was inferred. There, two officers responded to a report that a man was "passed out" at the wheel of a car parked against a curb at an address in downtown Portland. The officers found the defendant asleep in the car with his head on the steering wheel and his foot on the brake. The car was running, the headlights were off, the emergency brake was not engaged, and the brake lights were on. The car was in a lawful parking space, parallel to the sidewalk with its front wheels turned into the curb. The defendant gave inconsistent statements explaining what had happened. The court agreed with the officers' inference that the defendant had driven to that location while intoxicated.

Prior to 1989, the scope of an Implied Consent hearing was only concerned with whether the police had probable cause/reasonable grounds to believe that the person being offered the breath test had been driving. During an Implied Consent hearing, evidence that the police were wrong and someone else was the actual driver could be ignored. *See Ward v. MVD*, 50 Or App 19 (1981). But, in *Hilton v. MVD*, 308 Or 150 (1989), the Oregon Supreme Court held that a person can present evidence at the Implied Consent hearing that he or she was **not actually driving**, even though the officer had probable cause/reasonable grounds to believe that the person had, in fact, been driving. The *Hilton* defense shifts the burden of proof to the petitioner. ORS 183.450(2).

2. A "Motor Vehicle"

The Implied Consent statute, ORS 813.100, only applies to a person "who operates a *motor vehicle*," which is defined at ORS 801.360 as "a vehicle that is self-propelled or designed for self-propulsion." In *State v. Woodruff*, 81 Or App 484 (1986), the court held that the Implied Consent law "has no application to a bicyclist." *Id*. at 487. Thus, while a bicyclist could be charged with committing the crime of DUII, under ORS 813.010, which makes it a crime to operate a "vehicle" while impaired, an intoxicated bicyclist could not be subject to a suspension under the Implied Consent law (ORS 813.100), because a bicycle is not a "motor vehicle." *See e.g., State v. Curtis*, 182 Or App 166 (2002). But, a conviction for DUII on a bicycle could be

the basis for an enhanced suspension for a subsequent Implied Consent action under ORS 813.430. In yet another twist, there are bicycles that have a self-propulsion feature for riders that want help making the bicycle go uphill. Those bicycles are both "vehicles" and "motor vehicles," so they would be subject to both the offense of DUII and the suspension under the Implied Consent Law.

Mopeds, go-carts, ride-on lawn mowers and golf carts are "motor vehicles." Most are not designed to be, or allowed to be, on public streets and highways. But if they do appear on highways or premises open to the public, they are subject to the offense of DUII and the Implied Consent Law.

3. "While"

This component of the statutory definition of DUII is set out here as a separate element to stress that the DUII offense requires driving *while* in an intoxicated condition. There must be direct or circumstantial evidence that the person arrested was in an impaired condition at the time of driving. In the typical DUII case, where the police witness the impaired driving, this element is not difficult to establish.

Driving *while* impaired becomes an issue when significant time has passed between the driving and the person's first encounter with police. The police must infer, back to an earlier point in time, what the person's condition was *at the time of driving*. To make this inference, the police can rely on the subject's own statements, the statements of witnesses, or physical evidence. *See Wood v. MVD*, 93 Or App 575 (1988); *State v. Brown*, 5 Or App 412 (1971); *Lacey v. MVD*, 108 Or App 187 (1991); and *State v. Bond*, 189 Or App 198 (2003).

The inference is much more difficult to make, however, when the person admits to drinking alcoholic beverages after the driving and before contact with the police. Nonetheless, the police can infer from physical evidence, witness statements, admissions from the person, and their own observations of the person's impaired condition, that the person was under the influence at the time of driving. The success of this approach depends on the evidence presented at hearing and the reasonable inferences that can be drawn from the evidence. Certainly, the amount of intoxicants consumed following the driving, and the length of time that has elapsed since driving, are critical factors because the reasonableness of an inference that the person was driving while under the influence attenuates with the passage of time and the consumption of additional intoxicating beverages.

4. Under the Influence of Intoxicants

This is the most frequently challenged element of DUII. The generally accepted definition of "under the influence of intoxicants" is found in a criminal jury instruction: a person is considered to be under the influence of intoxicants if the person's "physical or mental faculties

were adversely affected by the use of intoxicants to a noticeable or perceptible degree.[2]" *Oregon State Bar Uniform Criminal Jury Instruction (UCrJI)*, No. 2702 (2001). *See also, State v. Robinson*, 235 Or 524, 532 (1963) *quoting State v. Noble*, 119 Or 674 (1926); *State v. Montieth*, 247 Or 43 (1966).

The conclusion that a person is under the influence of intoxicants is generally based on a variety of observations. These observations typically include impaired driving and some indicia of physical and mental impairment. The indicia of physical and mental impairment are usually observed during face-to-face contact between the officer and the driver. For a more detailed discussion of these indicia, *see* Chapter 8, *Probable Cause.*

5. On Public Highways or Upon Premises Open to the Public

"'Highway' means every public way, road, street, thoroughfare and place, including bridges, viaducts and other structures within the boundaries of this state, open, used or intended for of the general public for vehicles or vehicular traffic as a matter of right." ORS 801.305. Most Implied Consent hearings will involve allegations of driving on a "highway."

Sometimes, however, the officer will testify that the driving occurred in a parking lot, or some other non-highway location. The phrase "premises open to the public" includes "any premises open to the general public for the use of motor vehicles, whether the premises are publicly or privately owned and whether or not a fee is charged for the use of the premises." ORS 801.400.

***Practical Note*:** Remember to develop the record when the allegation is that the driving occurred on premises open to the public. Ask if the driving occurred in a parking lot. Ask whether there was a gate, chain or other barricade. Ask whether the premises was open to the general public. Even apartment complex parking lots are generally considered premises open to the public unless the public is specifically excluded from entering the parking lot. Consider the signage in the parking lot. Ask whether UPS delivery vans or US Mail trucks are allowed to enter the parking lot. Driveways at private residences will probably not be considered premises open to the public. Consider asking whether the officer knows how the person and the vehicle got to the driveway. Also ask whether the petitioner had to drive on public roads to get to the private driveway.

In rare cases, the police will venture onto truly private lands, such as where someone is "squirreling around" with a vehicle in a backyard. These cases usually fail the "premises" test. For example, in *State v. Poulos*, 149 Or App 351 (1997), the court held that an accumulation of "keep out" and other similar signs, although not associated with any barriers to entry, was

[2] "'Under the influence of intoxicants' includes not only the well-known and easily recognized conditions and degrees of intoxication, but also any abnormal mental or physical condition that results from consumption of intoxicants and that noticeably deprives the person of that clearness of intellect or control that the person would otherwise possess." *UCrJI No. 2702 (2001).*

enough to create a "private" area, and to render the driveway in question a premise that was not open to the public. *See also State v. Dixson*, 307 Or 195 (1988).

Below is a list of other cases that have considered the meaning of "premises open to the public":

- *State v. Mulder*, 290 Or 899, 904 (1981): there was no attempt to restrict public access to an apartment development's parking lot, so it was considered premises open to the public.

- *State v. Scott*, 61 Or App 205, 208 (1982): condominium parking lots, even though posted with "No Trespassing" signs, were premises open to the public.

- *State v. Martin*, 298 Or 264 (1984): conviction upheld for failing to perform the duties of a driver where the defendant, a parking lot attendant, was involved in an accident while parking a car in a downtown Portland parking lot.

- *State v. Aguilar*, 85 Or App 410 (1987): "Generally, when lands are held by the United States in a proprietary capacity, the property is subject to concurrent state and federal jurisdiction." Citing ORS 801.020(5) and Article IV, section 3 of the US Constitution.

- *State v. Baehr*, 85 Or App 155 (1987): in a hit and run case, there was no proof that the driveway from the street to the home was, in fact, premises open the general public for use of motor vehicles.

- *Pierce v. MVD*, 125 Or App 79 (1993): the ALJ found that Petitioner was not credible and that he did drive on the street in front of his girlfriend's house, but the court's opinion implied that the decision may have been different if the facts established that Petitioner had just driven on the lawn from the front yard to the back.

- *State v. Sterling*, 196 Or App 626 (2004): driving occurred on driveway with two homes, which connected to private road through condo complex, which connected with public road; court held that analysis must consider the purpose of "premises open to public" which is to protect the general public from serious driving offenses; the court considered as key the fact that the public had access to the driveway (including those with legitimate business purposes).

- *State v. Probe*, 200 Or App 708 (2005): evidence that the defendant drove on the fairway of a golf course, which itself was not open to the public, was sufficient to prove the charge of failing to perform the duties of a driver because the fairway was adjacent to a public road and parking lot.

CHAPTER 8

PROBABLE CAUSE

*****

Probable cause to arrest is one of the central issues in the Implied Consent hearing. Not only is it a prerequisite to a valid suspension, but it serves to establish the admissibility of certain evidence of the offense.

The most widely known and applied case associated with the scope of the Implied Consent hearing is *Pooler v. MVD*, 306 Or 47 (1988). *Pooler* stands for the propositions that (1) an Implied Consent suspension can only be imposed if the DUII arrest was legally valid (i.e., based on probable cause), and (2) if a police stop led to the arrest, the stop must also be valid (even if not originally for DUII). Because of the *Pooler* decision, search and seizure law is applicable to Implied Consent hearings. See *Bish v. MVD*, 97 Or App 648 (1989); *Crawford v. MVD*, 98 Or App 354 (1989).

A. PROBABLE CAUSE DEFINED

Probable cause is defined at ORS 131.005(11). "'Probable cause' means that there is a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it."

According to the Oregon Supreme Court, probable cause does not require "that the officer absolutely know that an offense is being committed." *State v. Elk*, 249 Or 614, 619-20 (1968). The court further held that "[t]o determine probable cause, we look to the totality of the circumstances, including all reasonable inferences that could be objectively drawn from the evidence in the light of the officer's experience." *State v. Plummer*, 160 Or App 275, 284 (1999), citing *State v. Martin*, 327 Or 17, 22-23 (1998).

Within the context of DUII, probable cause means that there is a substantial objective basis to believe that, more likely than not, the Petitioner was driving a motor vehicle while impaired to a perceptible degree by the consumption of intoxicants.

A warrantless arrest must be supported by valid probable cause. ORS 133.310. In federal court and in most other states, probable cause is evaluated from an objective standpoint: whether the probable cause is objectively reasonable. *Scott v. United States*, 436 US 128 (1978). In Oregon, however, probable cause has both objective and subjective components. In *State v. Owens*, 302 Or 196 (1986), the court set out the approach as follows:

> An officer must subjectively believe that a crime has been committed and thus that a person or thing is subject to seizure, and this belief must be objectively reasonable in the circumstances. The test is not simply what a reasonable officer *could have* believed when he conducted a warrantless search or seizure, but it is what this officer actually believed, based upon the underlying facts of which he was cognizant, together with his own training and experience.

State v. Owens, 302 Or at 204 (emphasis in original).

As the court later explained in *State v. Miller*, 345 Or 176, 184 (2008), the officer's subjective state of mind is an important part of the Oregon constitutional analysis. The subjective component of the probable cause inquiry is satisfied if the officer believes he or she has lawful authority to restrain the individual's liberty. *Id.*

The development of probable cause is based upon the weighing of the totality of the admissible evidence. *See, e.g., Wood v. MVD*, 93 Or App 575 (1988); and *State v. Smalley* 156 Or App 325 (1998). The quantum of proof necessary to establish probable cause is much lower than the proof necessary to gain a conviction. "The determination of probable cause is a legal, not a factual conclusion. Probable cause does not require certainty." *State v. Herbert*, 302 Or 237, 241 (1986). There must be some evidence of consumption of intoxicants, such as an admission to drinking or an odor of an alcoholic beverage coming from the person, *plus* some evidence of impairment. Impairment must be more than bloodshot or watery eyes; and typically includes some observations about driving, speech, memory, and balance or dexterity problems. Factors that may be meaningless to a lay person may be significant to a police officer. The weighing of the totality of the evidence should be done in light of the officer's experience and training. *State v. Reid*, 107 Or App 352 (1991); and *State v. Morgado*, 154 Or App 296 (1998).

Practical Note: The same subjective/objective standard applies to the probable cause needed to stop a motorist for a traffic violation (*State v. Matthews*, 320 Or 398 (1994)), and to the reasonable suspicion needed to investigate the possibility that a crime has been committed. *State v. Belt*, 325 Or 6 (1997).

1. Subjective Belief

Evidence that a police officer subjectively believed that he or she had probable cause can be established in several ways. Commonly, an officer will decide during the investigation that there is probable cause, and will then testify at the hearing about this belief. Or, the officer may tell another officer about his or her subjective belief, and this second officer will include the information in a written police report, or testify at the hearing about what the first officer told them. Under these circumstances, the subjective belief of the officer is directly established.

Sometimes, however, the officer's subjective belief can only be inferred from the officer's actions because there is no direct evidence about the arresting officer's subjective belief. The officer does not need to utter "magic words" in his testimony explicitly stating his belief that probable cause was present at a given time. *See, e.g., State v. Wetzell*, 148 Or App 122 (1997); *State v. Ehly*, 317 Or 66 (1993); *see also State v. Bickford*, 157 Or App 386, 390-391 (1998).

In *State v. Miller*, 345 Or 176, 188 (2008), the court explained that the officer's "in-court assessment of his or her degree of suspicion is not dispositive." Rather, the court must make that objective determination after considering all the circumstances relevant to the arrest. The

subjective belief component of the probable cause analysis requires only that the law enforcement officer have a reasonable belief that his or her conduct is legally justified and the officer must have acted on that belief in restraining the person's liberty. *Miller*, 345 Or at 188.

In *Miller*, a deputy responded to a single vehicle traffic crash in which a pickup truck had reportedly rolled over on the highway. En route, the deputy came across the defendant walking alone along the road, about a half mile from the reported crash site. The defendant matched the description of the pickup's driver. He also had debris in his hair and on his clothing and fresh cuts and scrapes on his arms. The deputy contacted the defendant, who denied driving and denied owning the pickup, but had knowledge of the crash. The deputy handcuffed defendant and took him back to the crash site. Deputies investigating the crash found evidence that the defendant was involved in the illegal manufacture of methamphetamine. At a later hearing to suppress all evidence against the defendant that had been seized at the crash site, the deputy testified that, at the time he took the defendant into custody, he had a reasonable suspicion of a crime but had not yet formed probable cause.

The trial court denied the motion to suppress, concluding that despite the deputy's testimony that he had a reasonable suspicion, the deputy actually had probable cause to arrest the defendant for failing to perform the duties of a driver involved in an accident. The defendant appealed, and the Court of Appeals reversed finding that the trial court improperly inferred that the deputy had subjective probable cause. The Oregon Supreme Court reversed the Court of Appeals and held that the arrest was valid because the deputy was aware of facts sufficient to establish probable cause. The court explained: "Even if the deputy believed that, legally, those facts only created a reasonable suspicion sufficient to stop the defendant and that he was doing nothing more than that, the deputy reasonably believed that he had the lawful authority to do so. That is enough to establish the subjective component of the inquiry. Because the facts also were sufficient objectively to establish probable cause, the deputy's actions did not violate the defendant's statutory or constitutional rights." *Miller*, 345 Or at 188-89.

The following cases also address the subjective probable cause component, and whether or not it can be inferred:

- *State v. Lesher*, 223 Or App 720 (2008): consistent with *State v. Miller*, the court held the trooper had probable cause to arrest the defendant for the offense of DUII where the trooper, while investigating a single vehicle accident, found the defendant at 4:00 a.m. standing alongside the highway shoulder a quarter mile south of the crash site. The defendant was soaking wet, covered in mud and smelled strongly of alcohol. The defendant also had slurred speech and stumbling balance. The trooper's mistaken belief that he had reasonable suspicion, but not probable cause, was not binding.

- *State v. Bickford*, 157 Or App 386 (1998): in a footnote, the court stated that an arrest, by itself, is not a sufficient basis for inferring an officer's subjective belief. "If a trial court could infer subjective probable cause from the arrest, we would not need

to inquire into subjective probable cause for the arrest." 157 Or App at 390 n 1. *Note: Bickford* has likely been overruled by implication in *Miller*.

- *State v. Wetzell*, 148 Or App 122, *rev den* 325 Or 621 (1997): "[i]n some cases the officer's belief that a crime has been committed by the defendant is evident from the circumstances and there is more than one way to express that it is more likely than not that a crime has been committed."

- *State v. Belt*, 325 Or 6 (1997): (reasonable suspicion to stop case) examine the totality of the circumstances, existing at the time and place of action, to determine whether it is reasonable to infer the officer's subjective belief.

- *Winroth v. DMV*, 140 Or App 622 (1996): equivocal testimony regarding probable cause to arrest for DUII was insufficient to establish subjective probable cause prong.

- *State v. Koester*, 117 Or App 139, 145 (1993): "Specific testimony that an officer believed that there was probable cause is not always required if a subjective belief reasonably may be inferred from the circumstances."

- *State v. Dowdy*, 117 Or App 414 (1992): *Owens* requires more than a showing that *if* the officer had probable cause, his or her belief *would have been* objectively reasonable.

Practical Note: If an officer testifies he or she does not have probable cause but the objective evidence shows otherwise and the officer believes his or her conduct was legally justified, the ALJ can find the subjective component of probable cause has been met. If the facts also establish objective probable cause, the arrest is valid.

An officer's subjective belief cannot be based on illegally obtained evidence.[1] In *Ezzell v. DMV*, 171 Or App 591, *rev den* 332 Or 316 (2001), the court held that if illegally obtained evidence forms an indispensable building block of the officer's subjective belief that he or she had probable cause, the probable cause is not valid. In *Ezzell*, the officer administered field sobriety tests, without valid consent, and before he believed that he had probable cause to arrest for DUII. Because the field sobriety test results were unlawfully obtained and were an indispensable building block of the officer's probable cause, the officer did not have valid probable cause to arrest for DUII. *See also State v. Stowers*, 136 Or App 448 (1995).

[1] Illegally obtained evidence must be distinguished from improperly obtained or flawed evidence that was legally obtained. The former cannot be used in determining whether probable cause existed for the arrest, whereas the latter may be considered but is generally given lesser weight in the objective analysis. An example of such flawed evidence would be the results of a field sobriety test that was administered improperly but with the driver's voluntary consent.

An officer's subjective belief may be based on a determination by other officers, if the officer making the arrest or conducting the search is reasonably relying on a request or order from another officer, and the other officer has probable cause. *State v. Soldahl*, 331 Or 420 (2000) (discussing the collective knowledge doctrine/fellow officer rule). The arresting officer must have a reasonable subjective belief that the requesting officer has probable cause. *State v. Pratt*, 309 Or 205, 216-17 (1990); *State v. Koester*, 117 Or App 139, *rev den* 315 Or 644 (1993).

2. Objectively Reasonable

In addition to proof of an officer's subjective belief, there is also an objective component of the arrest decision. There is substantial case law illustrating what the courts believe constitutes objectively reasonable probable cause to arrest for DUII. Analyzing whether or not the officer had probable cause is not a determination of the arrested person's guilt or innocence; rather it is an evaluation of the officer's decision to arrest.

As the court explained in *State v. Mendoza*, 123 Or App 237, 241 (1993), in determining whether an officer's belief is objectively reasonable,

> "[w]e look at the totality of the facts and circumstances, not isolated facts. Acts that might be viewed as innocent or equivocal to a lay person may be incriminating when viewed by a trained, experienced police officer."

A person may offer alternative, "innocent" explanations for the observations made by the police. For example, they may argue that bloodshot, watery eyes were not caused by drinking, but by exposure to smoke or by fatigue. In *Thorp v. MVD*, 4 Or App 552 (1971), the court addressed the issue of alternative explanations for observations made by the police:

> The explanation of the causes or conditions might rebut an inference that they arose from alcoholic consumption, but they affirmed the existence of the reasonable grounds for the officer's belief. A trier of fact, judge or jury, might have believed all these explanations, and found that the plaintiff was not under the influence of intoxicating liquor, but that is not the determination to be made here. Officers arresting for driving under the influence are often faced with citizens exhibiting physical characteristics that may arise from a variety of causes other than the influence of alcohol. Faced with the physical conditions here described, and detecting the odor of alcohol, an officer has reasonable grounds to believe that the physical condition is the result of alcohol.

Thorp v. DMV, 4 Or App at 561. *See also State v. Prince*, 93 Or App 106 (1988); *State v. Crites*, 151 Or App 313, *rev den* 327 Or 82 (1998); *State v. Bowcutt*, 62 Or App 591 (1983). Several years after *Thorp*, the court revisited the "innocent explanation" issue:

> Although there may have been other plausible explanations for defendant's behavior, [the officer] was not required to consider and eliminate those possible explanations before concluding that that behavior, in combination with the odor of alcohol on defendant's

> breath and his admission of drinking for five hours, gave rise to probable cause that defendant was driving under the influence of intoxicants.

State v. Spruill, 151 Or App 87 (1997).

Below are several cases where the court analyzed probable cause and found the circumstances objectively reasonable:

- *State v. Calderon*, 67 Or App 169 (1984): reckless driving and caused an accident, beer cans in the vehicle with liquid in them, strong odor of alcoholic beverage and admission to drinking.

- *State v. Niles*, 74 Or App 383 (1985): drove over a power line knocked down by a separate accident, told several times to put the vehicle in park, finally turned off the engine, watery and bloodshot eyes, swaying walk, odor of alcoholic beverage and slurred speech.

- *State v. Reddish*, 78 Or App 219, 222 (1986): defendant rear-ended a stopped vehicle at speeds between 45 and 60-mph, with no evidence of attempt to slow or stop prior to collision. This was "evidence of driving that is consistent with the inattentiveness commonly associated with people who drive intoxicated."

- *State v. Gotham*, 109 Or App 646 (1992): noise and tire smoke leading to stop; odor of intoxicants, strange statements, watery and bloodshot eyes.

- *State v. Nagel*, 320 Or 24 (1994): stop for one headlight out; eyes bloodshot and glassy, breath odor, difficulty removing license from wallet.

- *State v. Gilmour*, 136 Or App 294 (1995): left tavern at 2:00 a.m., paused before entering roadway, crossed two lanes of travel to get to the left turn lane without a signal, odor of alcoholic beverage in vehicle, bloodshot and watery eyes, refusal to roll window down farther.

- *State v. Clem*, 136 Or App 37 (1995): at 2:15 a.m., backed vehicle from parking space right into the path of the officer's vehicle, officer activated lights to make stop, vehicle continued without responding, making several infractions within a short distance and an odor of alcoholic beverage.

- *State v. Spruil*, 151 Or App 87 (1997): breath odor, unresponsive statements, admission of drinking after traffic infraction stop.

- *State v. Wetzell*, 148 Or App 122, *rev den* 325 Or 621 (1997): speeding, crossing fog line, strong odor of alcohol emanating from vehicle, very bloodshot eyes, and glazed look.

- *State v. Kimsey*, 147 Or App 456 (1997): failure to obey stop sign, bloodshot and watery eyes, odor of alcoholic beverage on breath, poor balance and belligerent attitude.

- *State v. Smalley*, 156 Or App 325 (1998): obliviousness and non-responsiveness, driving off, smell of burnt marijuana in the vehicle, bloodshot eyes, droopy eyelids and hugely dilated pupils.

- *State v. Barnes*, 172 Or App 408 (2001): two unsignaled lane changes, an odor of alcoholic beverages, bloodshot and watery eyes, balance problems and admission to drinking.

- *State v. Forrest*, 174 Or App 129 (2001): weaving within a lane, accelerate and decelerate, unsafe lane change, strong odor of alcohol in vehicle, watery eyes, halting speech and admission to drinking.

- *State v. Kappel*, 190 Or App 400 (2003): officers responded to a call regarding a vehicle in a ditch. They found the vehicle locked with no one inside or nearby. The vehicle's registered owners lived approximately one-half mile from the accident location. A half-hour later, an officer returned to the accident location and found the registered owner seated in the driver's seat of the vehicle. The owner exhibited signs of intoxication. Under the totality of circumstances, it was reasonable for the officer to believe that the registered owner was the driver, and had driven while intoxicated.

- *State v. Vantress*, 195 Or App 52 (2004): probable cause based on driver's involvement in an accident, a strong odor of alcoholic beverage, bloodshot and watery eyes, slow movements, leaning in toward the officer, then leaning against a vehicle for support and difficulty presenting documents. The defendant's alternative innocent explanations for his condition did not undermine the officer's probable cause for arrest.

Examples of cases where the courts held that the officer's probable cause *was not* objectively reasonable:

- *State v. Stroup*, 147 Or App 118 (1997): stop for equipment infraction at 3:20 a.m., slight odor of alcoholic beverage and bloodshot eyes, and admission to drinking the evening before did not equal probable cause where the HGN test results were not admissible.

- *State v. Petersen*, 164 Or App 406 (1999): (reasonable suspicion to stop case) officer thought that a domestic violence crime might be occurring, based on report of yelling and throwing of glass against a dumpster. Court held reasonable suspicion not objectively reasonable based on report plus fact that defendant drove away as officer approached him.

- *State v. Cardell*, 180 Or App 104 (2002): officer touched tires of vehicle parked in a residential driveway and determined that they were "hot." Based on this information, and observations of impairment, officer arrested for DUII. Court held that touching of tires was a warrantless search made without valid probable cause. Because the hot tire evidence was an essential building block of the officer's probable cause determination, the arrest was unlawful.

3. Minors

Oregon has a "zero tolerance" policy concerning young drivers and the use of intoxicants. Any person under age 21 who provides a chemical sample with a blood alcohol concentration (BAC) above .00 percent is subject to an Implied Consent suspension and prosecution for DUII. Although the standard for test failure is lower for minors than for adults, the probable cause necessary to arrest is the same. An officer cannot lawfully arrest a minor simply because the officer smells an odor of an alcoholic beverage on the minor's breath and believes that a chemical test will reveal more than .00 percent BAC. The officer still needs probable cause, *i.e.*, an objectively reasonable subjective belief that it was more likely than not that the minor drove a vehicle, on a public highway or on premises open to the public, while under the influence of intoxicants.

B. THE DUII INVESTIGATION

Before there can be an arrest for DUII, the officer must develop probable cause. To do this, the officer will use various investigative techniques to gather evidence of the crime of DUII. The Oregon State Police, the National Highway Traffic Safety Administration, and the Department of Public Safety Standards and Training have all developed extensive training materials and curricula to familiarize Oregon police officers with the most commonly used investigative techniques.

1. Making Initial Observations

Some investigative techniques require no special authority. An officer may use his sensory preceptors to make initial observations of the subject and to continue to make observations throughout the contact. According to *State v. Clark*, 286 Or 33 (1979):

> This court can properly take judicial notice of the fact that observable symptoms or 'signs' of alcohol intoxication include the following:

(1) Odor of the breath
(2) Flushed appearance
(3) Lack of muscle coordination
(4) Speech difficulties
(5) Disorderly conduct
(6) Mental disturbances
(7) Visual disorder
(8) Sleepiness
(9) Muscle tremors
(10) Dizziness
(11) Nausea

State v. Clark, 286 Or at 39. The court found that there was sufficient common knowledge or scientific and medical knowledge to support the use of observations of this type.

OAR 257-025-0010 contains a non-exhaustive list of acts, signs or symptoms that are typically present in circumstances of intoxicant impairment similar to those identified in *State v. Clark*. In addition, the US Department of Transportation's *DWI Detection and Standardized Field Sobriety Testing Student Manual* (HS 178 R2/06) (*NHTSA Manual*) contains a list of "typical investigation clues" that police officers are trained to look for.[2]

The *NHTSA Manual* also includes a chapter entitled "Vehicle in Motion," which describes the twenty most common driving cues officers may use to detect nighttime impaired drivers.[3] For a detailed description of driving behavior typically seen in DUII cases, *see* Chapter 5, *Traffic Violation Stops* and Chapter 6, *Stops Based on the Reasonable Suspicion of a Crime.* In addition, a driver's involvement in an accident may be evidence of impairment, so long as the other driver was not entirely at fault. *See State v. Reddish*, 78 Or App 219 (1986) (the demeanor

[2] Typical clues of impairment include: bloodshot eyes; soiled clothing; fumbling fingers; alcohol containers (visible in the vehicle); slurred speech; admission of drinking; inconsistent responses; odor of an alcoholic beverage; "cover up" odors like breath sprays; forgets to produce both documents (when two documents are requested); produces documents other than the ones requested; fails to see the license, registration or both while searching through wallet or purse; fumbles or drops wallet, purse, license or registration; and, is unable to retrieve documents using fingertips. NHTSA Manual, VI-2-4.

[3] The most commonly observed cues seen in nighttime impaired drivers include: (1) problems maintaining proper lane position, such as weaving, straddling a lane line, swerving, turning with wide radius, drifting and almost striking an object or vehicle; (2) speed and braking problems, such as stopping too far, too short or too jerky, accelerating or decelerating rapidly, varying speed or driving slower than 10 mph below limit; (3) vigilance problems, such as driving in opposing lanes or the wrong way on a one way street, slow response to traffic signals, slow response to emergency vehicles, and stopping in the lane for no apparent reason; driving without lights at night, and failing to signal or signaling inconsistent with driving action; and (4) judgment problems, including following too closely, improper or unsafe lane change, illegal or improper turn, driving off or at the edge of the roadway, stopping inappropriately, and other inappropriate or unusual conduct. (*NHTSA Manual*, V-4-7).

of the driver was consistent with the inattentiveness commonly associated with intoxicated drivers).

2. Asking Questions

Police officers are trained to ask suspected DUII drivers several questions during their initial contact. Officers typically ask where the person is coming from and where they are going. If the officer smells an odor of an alcoholic beverage, he or she may ask whether the person has been drinking, and if so, how much and what type of alcohol. Some officers also inquire about the person's health, to rule out that a medical condition might be responsible for the driver's impaired appearance. The officer will generally ask these questions while the person is looking for requested documents, such as their driver license, vehicle registration and proof of insurance. The driver's inability to continue searching for the documents while responding to questions indicates a lack of divided attention, a sign of impairment that can be used to establish probable cause. OAR 257-025-0010(15) (difficulty with divided attention is listed as a typical symptom of intoxicant impairment).

Officers are free to ask questions of the person until the person is taken into custody or in circumstances that are the functional equivalent of an arrest. Once in custody or subject to compelling circumstances, the person must be advised of *Miranda* rights prior to interrogation. This topic will be discussed in greater detail in Chapter 11, *Arrest*.

3. Opening Car Doors, Sticking Head in Window, or Touching the Car

Prior to ORS 136.432, asking a motorist to roll his window down was reasonably related to the purposes of a traffic violation stop. *Brown v. MVD*, 157 Or App 167 (1998). When the investigation is being conducted because there is a reasonable suspicion of DUII, or other criminal activity, there is legal authority for the officer to conduct an investigation in the *vicinity* of the stop. ORS 131.615(2). While not saying that in so many words, the Court of Appeals decided a case on that basis in *State v. Berg*, 140 Or App 388 (1996). There, the court said that because the officer had a reasonable suspicion that Petitioner was DUII, the officer could ask Petitioner to exit his vehicle, and the driver's acquiescence in that request was good enough.

Since the *Berg* decision, however, the courts have taken a different stance. The following cases illustrate this change:

- *State v. Hendricks*, 151 Or App 271 (1997): officer inserting his head through open car window for the purpose of delivering a traffic citation was a search; in the absence of a legal justification for this search, the officer's observations were invalid.

- *State v. Wetzell*, 148 Or App 122 (1997): opening a car door was a search, which was justified in this case because the officer's statement that there was a "good chance" that the subject was DUII adequately articulated probable cause.

- *State v. Denny*, 158 Or App 616 (1999): question of whether officer asked Petitioner to exit the vehicle, which would have been viewed as a compulsory act, or whether the officer merely made a request to which the subject voluntarily consented.

- *State v. Finlay*, 170 Or App 359 (2000): ordering occupants of a vehicle out so that the officer can inspect the VIN # requires an exception to the warrant requirement.

- *State v. Cardell*, 180 Or App 104 (2002): officers received a tip that a certain vehicle had been involved in "racing." Touching the vehicle's tires on the way to the front door of the house where the vehicle was parked was a search, which in this case was made without probable cause or other exception to the warrant requirement.

The clear trend is to require a recognized exception to the warrant requirement either for the officer to enter the vehicle or to have the occupants exit it.

4. Moving to Another Location After the Stop

ORS 131.615(2) requires that a detention and questioning of a person be conducted in the vicinity of the stop and for no longer than a reasonable time. For a more detailed discussion of this principle, *see* Chapter 4, *Stops Defined.*

Jasper v. MVD, 130 Or App 603 (1994), is an example of what happens when the police exceed their authority in this area. In *Jasper*, an officer found a subject three blocks from an accident scene and returned him to the site of the accident. The court held that the stop needs to take place in the vicinity of the stop – as opposed to in the vicinity of the accident that gave a reason for the stop. If, however, a person is under arrest for *any* crime, the police may move the person away from the scene of the stop. A person may also consent to be moved from the scene of the stop.

5. Entering a Residence or Curtilage

Occasionally, the police do not contact a suspected DUII driver until *after* the person has entered his home or surrounding property. Once a suspect has entered his or her home or property, the validity of the search or seizure requires careful analysis under search and seizure law.

Officers investigating a traffic violation or suspected impaired driver cannot rely on the "hot pursuit" or "fresh pursuit" doctrine to justify the warrantless entry into a private home. DUII is a misdemeanor and, by statute, the fresh pursuit doctrine applies only to felonies. ORS 133.420 ("fresh pursuit" means "a person who has committed a felony or who reasonably is suspected of having committed a felony"); *see also State v. DeKuyper*, 74 Or App 534 (1985) (warrantless entry of house to arrest for MIP, a violation, is not permitted under Oregon statutes); *but see State v. Niedermeyer*, 48 Or App 665 (1980) (warrantless entry into the defendant's home

lawful where the defendant had attempted to elude a police officer, but the officers who followed the defendant into his house through an open door also had reasonable grounds to believe that the defendant had been involved in a shooting incident earlier that same night).

Homes and their surroundings are given a higher level of legal protection than vehicles. Homes are one of the protected interests mentioned in Article I, section 9 of the Oregon Constitution, and the Fourth Amendment of the United States Constitution. Moreover, suspects are less likely to flee when they are in their homes and can be watched from a fixed vantage point. In these situations, there may be ample time for the police to obtain a search warrant. However, in *State v. Nagel*, 320 Or 24, 33 (1994), the court recognized that exigent circumstances exist in DUII investigations because, "[b]lood-alcohol content is a transitory condition, the evidence of which will dissipate in a relatively short time." Thus, waiting for a search warrant to investigate DUII may not be advisable.

Practical Note: If the police claim that exigent circumstances authorized their entry into a home or onto private property, the police must be prepared to testify with specificity about why they did not or could not wait to obtain a search warrant. Make sure to fully develop the record on this point. *See, e.g., State v. Roberts*, 75 Or App 292 (1985).

Below are cases that address the validity of police entry onto private property:

- *State v. Apodaca*, 85 Or App 128 (1987): while investigating an accident, officers went to the home of the vehicle's registered owner, where they found the door open. After knocking several times and getting no response, the officers entered the home and found the defendant sleeping. The entry was not justified by the emergency aid doctrine, or other exigent circumstances.

- *State v. Follett*, 115 Or App 672 (1993): warrantless search justified by emergency aid doctrine where there was a real emergency requiring immediate assistance.

- *State v. Gabbard*, 129 Or App 122 (1994): deputies were following up on a tip that the subject was cooking methamphetamine. The court found that probable cause and exigent circumstances justified the warrantless entry onto private property. Good discussion of lands outside the curtilage.

- *State v. McDonald*, 168 Or App 452 (2000): warrantless entry was justified by the emergency exception. Mom who had called 9-1-1 about over-dosed son allowed officer in. Officer's search of room to determine amount, quantity and combination of life-threatening drugs was legal.

- *State v. Somfleth*, 168 Or App 414 (2000): intrusions onto residential curtilage are trespasses unless the entry is privileged or there is consent, express or implied.

> Approaching from the front yard to the front door is generally okay; going into the backyard or back of the house is generally not.

State v. Tanner, 304 Or 312 (1987) is a theft case that analyzed the right to privacy in a residence, and standing to assert that right. The *Tanner* court utilized the following analysis:

1. Was there a warrantless entry onto private property? This includes actions by private parties acting under the direction of a police officer. *State v. Tucker*, 330 Or 85 (2000).

2. Did an exception to the warrant requirement apply, such as probable cause/exigent circumstances or consent? Was the entry otherwise justified by an emergency?

3. Assuming that an exception did not apply, was a protected privacy interest invaded? "The extent to which actions by state officials are governed by section 9 is defined by the general privacy interests of 'the people' rather than by privacy interests of particular individuals." *State v. Tanner*, 304 Or 312, 320 (1987).

And, in *State v. Tucker*, 330 Or 85 (2000), the Oregon Supreme Court held that:

> [I]n the context of a warrantless search, a defendant is not required to assert a protected property or privacy interest on which the state intruded. Rather, consistent with ORS 133.693(4), the burden is on the state to prove that the warrantless search did *not* violate a protected interest of the defendant.

State v. Tucker, 330 Or at 88-89.

- *State v. Kosta*, 304 Or 549 (1987): finding that police conducted an unlawful search does not justify suppression of evidence unless it is also demonstrated that "the defendant's *personal* Article I, section 9 rights were violated."

- *State v. Dixson*, 307 Or 195 (1988): the concept of "cartilage" is still valid and police are required to consider the presence of signs and postings intended to designate private property.

- *United States v. Padilla*, 508 US 77 (1993); *State v. Herrin*, 323 Or 188 (1996): unlawful police conduct does not entitle a defendant to suppression of evidence under either the Fourth Amendment to the U.S. Constitution, or Article I, section 9 of the Oregon Constitution, unless the conduct at issue violated the defendant's constitutionally protected rights.

- *State v. Mulholland*, 132 Or App 399 (1995): a resident or an invited guest will have a protected privacy interest while on private property, but this does not extend to a trespasser. *See also State v. Tanner*, 304 Or 312, 321 (1987).

In *State v. Juarez-Godinez*, 326 Or 1 (1997), the court discussed the meaning of search and seizure. In *Juarez-Godinez*, the police detained a vehicle after arresting the defendant, but this detention constituted an illegal seizure of the defendant's property. *See also State v. Poulos*, 149 Or App 351 (1997) ("keep out" sign); *State v. Brownlie*, 149 Or App 58 (1997) (search of purse); *State v. Ready*, 323 Or 645 (1996) (third party permission; plain view); *State v. Herrin*, 323 Or 188 (1996); *State v. Brown*, 301 Or 268 (1986) ("automobile exception" to warrant requirement for purposes of vehicle search).

If there is third party consent for the entry into the residence or curtilage, the issue becomes whether the third party had *actual authority* to give that consent. The analysis of actual authority is fact-dependent. The relationship between the person giving consent and the subject being investigated, the consenter's age, the consenter's joint use of the property that is going to be searched, are all facts that need to be developed and then weighed by the ALJ. *State v. Wrenn*, 150 Or App 96 (1997); and *State v. Ready*, 148 Or App 149 (1997).

6. Field Sobriety Tests

Most DUII arrests include evidence derived from field sobriety tests. While this evidence is very common, an officer may still have valid probable cause to arrest for DUII without any field sobriety test evidence. In other words, an officer is not required to administer field sobriety tests in every DUII investigation and arrest.

Practical Note: Petitioning parties may challenge the admissibility of field sobriety test evidence, in particular the results of the Horizontal Gaze Nystagmus (HGN) test in the Implied Consent hearing, asserting that the tests were not administered in the prescribed, standardized manner.[4] There are two points to keep in mind. First, the standard for admissibility in an administrative hearing differs significantly from that of a criminal trial. Second, in the Implied Consent context, the field sobriety test evidence is not being offered to prove the driver's guilt, but rather as a contributing factor to the officer's probable cause for arrest. Therefore, the evidence should not be excluded simply because the test was not standardized or scientifically validated. The test results may be considered, but perhaps given lesser weight.

[4] In the criminal context, field sobriety test evidence is admissible only when the tests were administered in the standardized manner and scientifically validated. *See, e.g., State v. O'Key*, 321 Or 285 (1995) (holding that in the context of a DUII trial, HGN test evidence is admissible only upon a showing that the officer who administered the test was properly qualified, the test was administered properly and the test results were recorded accurately); *State v. Bevan*, 235 Or App 533 (2010) (holding that vertical gaze nystagmus (VGN) has not been scientifically validated as evidence of impairment and therefore admission of the VGN test results was reversible error).

a. Officer's Training and Certification

After 1997, all police officers trained and certified by the Oregon Department of Public Safety Standards and Training received training on the administration of the three standardized field sobriety tests (SFST). Officers certified before 1998 had to take a separate class to obtain SFST certification. Some older officers have never been certified to administer the standardized tests.

Practical Note: Ask the officer if he or she is certified to administer the standardized field sobriety tests, and whether they administered these tests to the subject in accordance with their training.

The three standardized field sobriety tests are: the Horizontal Gaze Nystagmus (HGN) test; the Walk and Turn test; and the One Leg Stand test. These tests are "standardized" because the National Highway Traffic Safety Administration conducted extensive testing on the administration of these tests, and developed a standardized method for administering each. This standardized method includes detailed instructions that are to be given to the test subject, specific positions from which the subject is to start the test, and clues that the officers are trained to watch for. According to National Highway Traffic Safety Administration, these three tests, if administered in the standardized manner, are "a highly accurate and reliable battery of tests for distinguishing BACs above .10." *NHTSA Manual*, HS178 R2/06, VIII-1.

Practical Note: For a more detailed description of each of these standardized tests, refer to Chapter 8 of the *NHTSA Manual*. Consider taking notice of the manual in every Implied Consent hearing, particularly when there are questions about how the field sobriety tests were administered and interpreted.

In addition to the SFSTs, there are a number of other field tests that may be given to suspected DUII drivers. *See* OAR 257-025-0000 to 257-025-0020. These include: the Finger to Nose test; the Finger Count test; the Backward Count test; the Internal Clock test; recitation of the alphabet, generally starting from a letter other than A; and the modified Romberg test. Many of these tests are administered while the subject in standing in the modified Romberg position (head tilted back, arms at side, eyes closed). While these tests are not standardized, officers may nonetheless rely on evidence of impairment that these tests reveal.

b. Exceptions to Search Warrant Requirement

In *State v. Nagel*, 320 Or 24 (1994), the court held that field sobriety tests are searches. Almost without exception, field sobriety test searches will be conducted without a search warrant. The officer must, therefore, operate under an exception to the warrant requirement, otherwise the field sobriety test evidence will not be admissible in court or in an Implied Consent hearing. The principal exceptions to the warrant requirement are: (1) probable cause when coupled with exigent circumstances and (2) voluntary consent. There is also an emergency aid exception that very occasionally comes into play in the area of criminal and DUII investigations.

State v. Follet, 115 Or App 672, *rev den* 317 Or 163 (1993). When field sobriety tests are offered as evidence to support an arrest for DUII, the ALJ must determine whether the officer had probable cause to arrest or the driver's voluntary consent to the testing before the tests were administered. Without a valid exception, the field test results cannot be considered. *Winroth v. MVD*, 140 Or App 622 (1996).

i. Probable Cause and Exigent Circumstances

The probable cause exception to the warrant requirement includes the same objective/subjective criteria that were described earlier in this chapter. *State v. Rutherford*, 160 Or App 343 (1999). Exigent circumstances do not require any special analysis in a typical DUII stop or request for field sobriety tests. The *Nagel* court held that these situations, *i.e.*, stops of motorists, generally satisfy the exigency requirement because "[b]lood-alcohol content is a transitory condition, the evidence of which will dissipate in a relatively short time." *State v. Nagel*, 320 Or 24, 33 (1994).

ii. Voluntary Consent

In *State v. Greenough*, 142 Or App 506 (1996), the court held that voluntary consent to do field sobriety tests is a valid exception to the warrant requirement. Consent may be non-verbal. In *Greenough* the subject's consent to do the Horizontal Gaze Nystagmus test was manifested by the person's physical compliance with the officer's request. The following cases deal with consent to field sobriety tests:

- *State v. Freund*, 102 Or App 647 (1990): mere acquiescence is not equivalent to a finding of consent.

- *State v. Weaver*, 319 Or 212, 219 (1994): voluntary consent is an exception to the warrant requirement.

- *State v. Lowe*, 144 Or App 313, 317-18 (1996): officer's testimony that he "had" defendant get out of car to do field sobriety tests, coupled with defendant's testimony that he felt that he had no choice but to comply, did not establish voluntary consent.

- *State v. Maddux*, 144 Or App 34 (1996): officer made a simple request, and did not order, command or direct that defendant take field sobriety tests, and the defendant could only have perceived is as a request that was made without coercion or compulsion, express or implied.

- *Walls v. DMV*, 154 Or App 101 (1998): if an officer simply asks a subject to take field sobriety tests and the subject agrees to take them, voluntary consent is established.

- *State v. Forrest*, 174 Or App 129, 134 (2001): trial court's decision that officer must have "probable cause to even request the driver to do field sobriety tests" was incorrect. *Citing State v. Barber*, 151 Or App 84, 86 (1997) ("[C]onsent is a valid exception to the warrant requirement and * * * probable cause is not a necessary prerequisite to asking a defendant for consent to perform field sobriety tests in the context of a DUII stop." *Quoting State v. Ramos*, 149 Or App 269, 272 (1997).)

c. No Exceptions to Search Warrant Requirement

If a field sobriety test search is conducted without a search warrant and without a valid exception to the warrant requirement, the result of the testing is suppressible. In an Implied Consent hearing, the evidence would be admissible, but would be given little or no weight. *See* ORS 183.450.

If evidence of field sobriety tests is suppressed, the probable cause used to support the arrest may still be valid. An analysis of *objective* probable cause may continue by examining whether the evidence that *remains* after FST results are not given any weight, is sufficient to satisfy the "more likely than not" standard. *State v. Gilmour*, 136 Or App 294 (1995). However, in *Ezzell v. DMV*, 171 Or App 591 (2000), *rev den* 332 Or 316 (2001), the court held that the officer's subjective belief could not be based on unlawfully obtained evidence. In *Ezzell*, the officer did not have probable cause until after he administered FSTs, and the consent for the tests was invalid. The FST evidence was an indispensable building block of the officer's probable cause, and without this evidence, the officer's subjective belief was no longer valid. *See also State v. Stowers,* 136 Or App 448 (1995) (subjective belief based on results of preceding search without probable cause). The analysis in *State v. Koester*, 117 Or App 139 (1993), *i.e.*, inferring subjective probable cause from the arrest itself does not apply to situations where portions of the evidence offered in support of the probable cause is suppressed. Moreover, in *State v. Rutherford*, 160 Or App 343 (1999), the court held that the administration of field sobriety tests did not justify an inference that the officer believed he had probable cause to arrest for DUII.

Practical Note: If the officer did not have a valid exception to the search warrant requirement, and the FST evidence cannot be considered, the ALJ may want to ask the officer to eliminate the unlawfully obtained evidence, and decide whether he or she still believes that they had probable cause. *State v. Koester*, 117 Or App 139 (1993); *but see, State v. Dowdy*,117 Or App 414 (1992) and *State v. Miller*, 345 Or 176 (2008).

d. Refusal to do Field Sobriety Tests

ORS 813.135 and 813.136 state that a driver has impliedly consented to field sobriety testing if a police officer "reasonably suspects" that the person has been driving under the influence, and that refusal to submit to field sobriety testing can be used against the driver. The underlying purpose of the statutes was to give police an opportunity to consider the results of the field sobriety tests before deciding to arrest for DUII or not, and to sanction refusals of field tests in order to make it more likely that the stopped motorist would cooperate.

Following specific appellate rulings, the field sobriety test warning under ORS 813.136 is rarely given. In *State v. Trenary*, 114 Or App 608 (1990), *aff'd on other grounds* 316 Or 172 (1993), the court held that the field sobriety warning was legally and permissibly coercive with respect to the driver's decision to take field tests or not. This determination took on great significance after the holding in *State v. Nagel*, 320 Or 24 (1994). If field sobriety tests were searches, as the *Nagel* court held, then reasonable suspicion, which was required by ORS 813.135, was no longer a sufficient basis to request the tests. Warrantless searches require probable cause plus exigency or another exception to the warrant requirement. In addition, the coercive nature of the warning, originally developed from the statute, would destroy the ability to obtain constitutionally valid consent. Thus, field test results were inadmissible in most situations where the warning was given before testing *unless* the officer could establish that he had probable cause to make a DUII arrest before the warning was given. An exception to this result, which emerged in later case law, involved a person who voluntarily consented to field testing *before* the warning was given. In that instance, the field test results were admissible. *State v. Cuneo*, 148 Or App 71(1997).

Analysis of this subject was further complicated by the holding in *State v. Fish*, 321 Or 48 (1995). In *Fish*, the court ruled that if field sobriety tests are coerced from the suspect, the testimonial aspects of the tests must be excluded from the evidence supporting the state's case. This would apply both in criminal court and in Implied Consent hearings. *Fish* spawned a number of appellate decisions dealing with what parts of a field sobriety test might be testimonial. *See, e.g., State v. Nielsen*, 147 Or App 294 (1997).

In response to the *Nagel* and *Fish* decisions, many law enforcement agencies abandoned the practice of giving field test warnings entirely. The *Trenary* court held that the failure to give a warning was not prejudicial, provided that the motorist gave otherwise valid consent to field sobriety testing. After considering *State v. Nielsen*, 147 Or App 294 (1997), many law enforcement agencies adopted a "modified" field sobriety test warning that was used if the person refused an initial request to do testing. The modified warning asked motorists to perform certain physical field tests, and warned that refusal to do these physical tests could be held against them. The point behind the modified warnings was to avoid the situation identified in *State v. Fish*, 321 Or 48 (1995), and the agencies reasoned that if tests were physical, they would not be testimonial.

In *State v. Rohrs*, 157 Or App 494 (1998), *aff'd* 333 Or 397 (2002), the court did not approve of this modified warning because it lacked specificity about the actual tests proposed by the officer. To satisfy *Rohrs*, many officers now give what is referred to as the "*Rohrs* admonishment." The officer will advise the person that he or she will be asked to do purely physical tests that will not require the person to reveal thoughts, beliefs or state of mind. Then, the officer will give a brief explanation and demonstration of each test. These warnings do not appear to violate either *Fish* or *Rohrs*.

e. Additional Field Sobriety Test Cases

- *State v. Freund*, 102 Or App 647 (1990): mere acquiescence is not consent; the burden is on the state to demonstrate by a preponderance of the evidence that consent or one of the other exceptions applies. Mention of this principle can be found in many of the applicable cases, including *State v. Nagel*, 320 Or 24 (1994).

- *State v. Stowers*, 136 Or App 448 (1995): illegal search conducted as a prelude to FSTs, field test results suppressed.

- *State v. Demus*, 141 Or App 509 (1996): the court questioned how far the finder of fact can go in inferring that the subjective element of probable cause was present before field sobriety tests are requested; the court ultimately suppressed the field test results.

- *State v. Cuneo*, 148 Or App 71 (1997): effect of FST warning when suspect had already agreed to field sobriety testing. If the FTS admonition ruined voluntary consent, throw out the testimonial aspects of the tests.

- *State v. Cox*, 150 Or App 464 (1997): consent cannot be validly obtained under threat of arrest.

- *State v. Nielsen*, 147 Or App 294 (1997): officer believed he had probable cause before the tests but gave the FST admonition. The physical components of the divided attention tests are not testimonial. *See also State v. Spicer*, 147 Or App 418 (1997); and *State v. Gile*, 147 Or App 469 (1997).

- *State v. Riddle*, 149 Or App 141 (1997): if no probable cause and invalid consent, throw out the testimonial portions of the FSTs and see what is left.

- *State v. Kramyer*, 222 Or App 193 (2008): During the instructions for the One Leg Stand test, the defendant interrupted the officer and stated that he wanted a lawyer. Then, without stopping, he continued to perform the test. The officer was not sure whether the defendant was asking for a lawyer, so he stopped the defendant from continuing the test. The officer asked for clarification on whether the defendant had invoked his right to counsel and the defendant responded that he was willing to continue, and that he "wasn't refusing." The officer continued the investigation, and later advised the defendant of his *Miranda* rights. The defendant never again asked for a lawyer. Held: Although the defendant unequivocally invoked his right to counsel, he voluntarily reinitiated the interaction with the officer, thereby waiving his right. The officer was entitled to ask clarifying questions to determine the defendant's intent.

7. Gathering Information From Other Sources

In most cases, an officer will decide whether or not to arrest a person for DUII based on their own observations of the person's driving, performance on field sobriety tests, and readily observable indicia of impairment. Sometimes, however, the officer will rely on information from other sources.

Evidence of probable cause and reasonable suspicion can be aggregated between officers. This is referred to as the "fellow officer" or "collective knowledge" doctrine.

- *State v. Walsh*, 103 Or App 517 (1991): an officer who does not personally have probable cause to make an arrest can still arrest the suspect if the officer reasonably believes that other officers requesting the arrest do have probable cause, and if probable cause to arrest actually does exist.

- *State v. Pratt*, 309 Or 205 (1990): collective knowledge doctrine allowed Arizona officers to arrest an Oregon suspect, at the request of Oregon officers, without specific knowledge of basis for the request.

- *State v. Soldahl*, 331 Or 420, 427 (2000): collective knowledge doctrine allowed state trooper to stop a vehicle at the request of county deputy sheriff, even though deputy never communicated the reason for the stop to the trooper. "The collective knowledge doctrine focuses on the shared knowledge of the police as a unit rather than merely on the knowledge of the officer who acts."

- *State v. Radford*, 222 Or App 87 (2008): the arresting officer need not learn of the existence of probable cause directly from the officer with knowledge of the facts establishing that probable cause; the arresting officer may acquire knowledge from an officer who himself acquired it only from a third officer with actual knowledge.

Frequently, an officer will testify about what a witness said about a DUII suspect's driving or appearance. The general rule is that this hearsay evidence is admissible at an Implied Consent hearing. A thorough discussion of evidentiary issues that arise in Implied Consent hearings from application of the collective knowledge doctrine and the hearsay rule is found in Chapter 19, *Evidence.*

CHAPTER 9

ARREST AND CUSTODY

*****

A condition precedent to every Implied Consent suspension is an arrest for DUII. The Implied Consent statute requires that the person, "at the time the person was requested to submit to a test under ORS 813.100, was under arrest for driving while under the influence of intoxicants * * *." ORS 813.410(6)(a).

A. DEFINITION OF ARREST

Arrest is defined in ORS 133.005(1) and "means to place a person under actual or constructive restraint or to take a person into custody for the purpose of charging that person with an offense." An arrest can be made by a peace officer under a warrant, a peace officer without a warrant, a private person or a federal officer. ORS 133.220. As explained in previous chapters, there are three general categories of encounters between police officers and citizens, and an arrest is at the far end of the continuum. *State v. Holmes*, 311 Or 400, 407 (1991). Arrests are seizures, and under both the Oregon and Federal Constitutions, seizures must be made either pursuant to a warrant, or upon a showing of probable cause.

Almost without exception, the DUII arrests at issue in Implied Consent hearings are made without an arrest warrant. ORS 133.310 sets out the authority of a peace officer to arrest without a warrant. This statute provides, in pertinent part: "A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed any of the following: (a) A felony; (b) A misdemeanor; * * *; (d) Any other crime committed in the officer's presence." ORS 133.310(1). Thus, a person cannot be arrested for violating the basic speed rule, or for being a minor in possession of alcohol, because these offenses are violations, not crimes.

Every physical interference with a subject's movement does not automatically mean that an arrest has occurred. An officer may lawfully handcuff or otherwise physically restrain a person for other reasons, such as officer safety or the safety of others present. ORS 131.615(5); ORS 810.410(3)(f). Whether the interference is an arrest depends upon its length, manner, and purpose.

The following cases are examples of both arrest, and non-arrest factual situations:

- *State v. Smith*, 70 Or App 675 (1984), *aff'd* 301 Or 681 (1986): pre-arrest investigative questioning does not require *Miranda* warnings; *see also State v. Gainer*, 70 Or App 199 (1984).

- *State v. Morgan*, 106 Or App 138 (1991): where police received tip that person was put into a vehicle at gunpoint, it was reasonable for the police to initially handcuff the suspects for officer safety, but once the officers determined that the suspects were not a threat, the handcuffs should have been removed. Because the cuffs were not removed, the suspects were "arrested."

- *State v. McKinney*, 174 Or App 47, *rev den* 333 Or 260 (2002): taking hold of the defendant's arms, where she was holding drugs, was not an arrest.

- *State v. Dinsmore*, 182 Or App 505 (2002): driver was involved in a fatal motor vehicle accident and was told to remain at the scene while the police managed traffic and started their investigation. Driver remained for 1-1/2 hours, was denied request to leave with tow truck driver and denied access to restroom. Detention was so far beyond a stop that it constituted an arrest.

Normally, accident investigations where a person is detained to answer some questions, provide a license, vehicle registration and insurance information, does not create an arrest or a situation sufficient compelling to trigger *Miranda* warnings. *State v. Hackworth*, 69 Or App 358 (1984); and *State v. Wandle*, 75 Or App 746 (1985); and *State v. Larson*, 141 Or App 186 (1996). Nor does voluntarily remaining on the scene for two hours answering the officer's questions and explaining the accident create the functional equivalent of an arrest. *State v. Nielsen*, 147 Or App 294 (1997).

In addition, the police are not required to arrest a person at the moment the officer decides that he or she first has probable cause. The court rejected an argument to that effect in *State v. Matsen/Wilson*, 38 Or App 7 (1979). There, the court explained that defendants "have 'no right to be arrested' as soon as a quantum of evidence sufficient to constitute probable cause is found." *Id.* at 11. The officer may continue investigating and gathering evidence before actually making an arrest.

An arrest is not necessarily an instantaneous event. *State v. Bolden*, 104 Or App 356 (1990); and *State v. Morgan*, 106 Or App 138 (1991). And, the fact that someone is "under arrest" need not be expressly communicated. *State v. Scott*, 111 Or App 308 (1992); *Oviedo v. MVD*, 102 Or App 110 (1990) and *State v. Burreson*, 223 Or App 492 (2008).

The act of physically taking a person into custody is not synonymous with "charging" the person with a crime. For example, a person may be arrested on some other criminal charge, such as reckless driving, and then subsequently be charged with DUII if the officer develops evidence of DUII during contact with the person. There is only one "taking into custody" in this process. And, while an arrest or detention is over if an officer releases a person, a person who escapes an officer's custody after being arrested is still "under arrest." *State v. Bolden*, 104 Or App 356 (1990).

B. ARREST MADE BY A "POLICE OFFICER"

The Implied Consent law, at ORS 813.100, requires that a breath test be administered at the request of a "police officer." Under ORS 813.410(6)(b), there is a requirement that "the

police" had reasonable grounds to believe, at the time the test was requested, that the person had been driving under the influence of intoxicants.

While these sections refer to "police officers," the statutory authority to arrest for DUII, found in ORS 133.310, refers to "peace officers." Under ORS 801.395, "Police officer"' includes a member of the Oregon State Police, a sheriff, a deputy sheriff or a city police officer." Under ORS 161.015(4), "'Peace officer' means a sheriff, constable, marshal, municipal police officer, member of the Oregon State Police, investigator of the Oregon Criminal Justice Division of the Department of Justice or investigator of a district attorney's office and such other persons as may be designated by law."

As the Oregon Supreme Court held in *State v. Kurtz*, 350 Or 65 (2011), Indian tribal officers are both "police officers" and "peace officers" under Oregon law.

In the majority of Implied Consent hearings, the arrest was made by a city officer, county deputy, Port of Portland officer[1] or state police trooper. Occasionally, however, a private citizen, or a campus public safety officer will make an arrest. Almost without exception, campus public safety officers are treated as security guards or private citizens.

***Practical Note*:** When the person making the stop or arrest is a campus public safety officer, inquire about whether or not the person has a "DPSST" number. If they have a number that begins with the letters "PS," the person is certified as a private security officer, and not as a police or peace officer. The ALJ should also develop the record on the person's training and experience.

Each university campus in Oregon is authorized to employ a limited number of "special" campus public safety officers. ORS 352.385. These individuals have restricted police powers in that they have "stop and frisk" and "probable cause arrest" authority. They are not, however, considered police officers and are not authorized to carry weapons like police officers.

C. LOCATION OF THE ARREST

An arrest by a police, or peace officer, can be made within the geographical area of the officer's employment, or within the state, regardless of the situs of the offense. ORS 133.235(2). *See also* ORS 810.410.

In general, a police officer's authority to make an arrest ends at the boundaries of the state, unless he is taking advantage of the "Uniform Act on Fresh Pursuit." ORS 133.410, *et seq*.; *State v. Nearing*, 99 Or App 724, *rev den* 309 Or 698 (1990). Oregon officers are only

[1] The Port of Portland Police should be considered a "city police officer," and therefore, a "police officer" for purposes of the Implied Consent law. *See* Justice Department memo to Dwight Apple dated March 13, 1986.

authorized to arrest for felony crimes under the "Uniform Act on Fresh Pursuit." The Act would not authorize an arrest for DUII by an Oregon officer in Washington or Idaho. *But see State v. Weller*, 241 Or App 690 (2011) (holding that an Oregon officer can pursue a high speed driver across a bridge into Washington, arrest the driver in Washington for reckless driving in Oregon, and bring the driver back into Oregon for processing, citation and release; any due process violation under Washington's Fresh Pursuit Act did not require dismissal of the Oregon charges against the defendant).

Occasionally, an officer will enforce Oregon traffic laws on the interstate bridges between Oregon and Washington. In *State v. Nearing*, 99 Or App 724 (1990), the court held that Oregon and Washington police have concurrent jurisdiction on the interstate bridges in order to make a stop for possible DUII. However, in a later case involving an officer who observed erratic driving on the Oregon side of the Glenn Jackson Bridge, but arrested the subject on the Washington side, the court held that the officer lacked authority to arrest in Washington. *State v. Pepper*, 105 Or App 107 (1990).

The "Interstate Mutual Assistance Agreement" between the Washington State Patrol and Oregon State Police, effective January 1, 1997, may resolve this issue, at least in part, for state police troopers. The Agreement provides, in part:

> [A]ny law enforcement officer who is regularly employed by the Washington State Patrol or by the Oregon State Police is a peace officer in the other Party state whenever either of the following conditions are met: (a) In response to a request [for] services initiated by the Washington State Patrol or Oregon State Police; or (b) Upon the recognition by any such officers of a situation or circumstances within the jurisdiction or territory of the Parties to this Agreement which requires immediate law enforcement action * * * All assistance rendered under authority of this Section shall be limited to that area within fifty (50) statute miles of any point along the common border but within the states of Oregon or Washington * * *.

In *State v. Meyer*, 183 Or App 536 (2002), the court held that an Oregon law enforcement officer may follow a subject into Washington State and make a stop, if the officer believes that the person has committed a felony, is DUII, or has driven recklessly, but not for a speeding infraction. *State v. Meyer*, 183 Or App 536 (2002).

Indian lands: The State of Oregon has criminal jurisdiction over "[a]ll Indian country within the [s]tate except the Warm Springs Reservation." 18 USC § 1162(a); *State v. Jim*, 178 Or App 553, 557 (2002).

D. *MIRANDA* RIGHTS AND CUSTODIAL INTERROGATION

Before conducting a custodial interrogation, a person must be informed of *Miranda* rights. Under Oregon law, *Miranda* rights or warnings are required either when a subject is in

custody on a charge, or in circumstances that, although they do not rise to the level of full custody, create a setting that is sufficiently compelling to be the equivalent thereof. *State v. Smith*, 310 Or 1 (1990).

Factors the court considers in determining whether the circumstances under which a suspect was questioned were compelling include: (1) the location of the encounter; (2) the length of the encounter; (3) the amount of pressure exerted on the defendant; (4) the defendant's ability to terminate the encounter; (5) the number of officers and police cars at the scene; (6) the use of physical force or confinement during questioning; (7) the demeanor of the investigating officer; and (8) whether the defendant was confronted with evidence of the officer's probable cause. *See, e.g., State v. Shaff*, 343 Or 639 (2007); *State v. McMillan*, 184 Or App 63, 68, (2002), *rev den*, 335 Or 355 (2003).

Below are examples of cases dealing with whether, and when *Miranda* warnings were required in different situations:

- *State v. Hackworth* 69 Or App 358 (1984): roadside stop not compelling for purposes of *Miranda* warning.

- *State v. Schaffer*, 114 Or App 328 (1992): *Miranda* warnings are not required when field sobriety tests are requested and that requesting field sobriety tests does not create a compelling circumstance.

- *State v. Nevel*, 126 Or App 270 (1994): having a person sit in a locked patrol car while under investigation did not convert the detention into a "full custody" situation requiring *Miranda*-type warnings.

- *State v. Prickett*, 136 Or App 559 (1995), *rev'd in part* 324 Or 489 (1997): the situation does not become sufficiently compelling to trigger the issuance of *Miranda* warnings until after the field sobriety tests have been given.

- *State v. Miller*, 146 Or App 303 (1997): roadside stop not compelling for purposes of *Miranda* warning.

- *State v. Warner*, 181 Or App 622, *rev den* 335 Or 42 (2002): having been in a motor vehicle accident and receiving medical attention in a hospital while strapped to a backboard does not create a "compelling circumstance" equivalent to an arrest.

- *State v. Werowinski*, 179 Or App 522 (2002): being locked in the back of a patrol car with the doors shut and windows up for 10 to 15 minutes, even though not handcuffed, created a compelling circumstance.

- *State v. McMillan*, 184 Or App 63 (2002): confronting the person with the evidence of probable cause and preventing the person from calling anyone with his cell phone created a compelling situation where *Miranda* warnings were required.

- *State v. Burdick*, 186 Or App 460 (2003): finding compelling circumstances where seven officers forcibly entered a residence and ordered the defendant and others to the floor at gunpoint, handcuffed them for 15 to 20 minutes and confined them to the porch while searching the house and interviewing witnesses.

- *State v. Bush*, 203 Or App 605 (2006): confirming that an officer's inquiry during a routine stop ordinarily does not need to be preceded by *Miranda* warnings; distinguishing *McMillan* because the officer never said or did anything that would have lead the defendant to believe the officer had probable cause for arrest.

The Implied Consent law provides that a person arrested for DUII will be asked to submit to a chemical test. Because a chemical test, specifically a breath test, is physical rather than testimonial or communicative evidence, *Miranda* warnings are not implicated. A person has no constitutional right to refuse a breath test. *State v. Gardner*, 52 Or App 663, *rev den* 291 Or 419 (1981). Therefore, the protections of *Miranda* do not extend to the question of whether a person will submit to a breath test. *See also State v. Ratliff*, 82 Or App 479 (1986), *aff'd on other grounds*, 304 Or 254 (1987) and *Ahlbin v. MVD*, 113 Or App 441 (1992).

E. IMPLIED CONSENT LAW REQUIREMENTS

A valid arrest for DUII is a condition precedent to an Implied Consent suspension. In *Pooler v. MVD*, 306 Or 47 (1988), the court held that an Implied Consent suspension could only be imposed if the underlying DUII arrest was valid. The *Pooler* court also held that the stop, which led to the arrest, must be valid.

Below are additional important cases that affect Implied Consent suspensions:

- *Bish v. MVD*, 97 Or App 648 (1989): challenges to the validity of the stop must be raised by the driver during the evidentiary portion of the hearing and not, for the first time, at closing argument. *See also Crawford v. MVD*, 98 Or App 354 (1989).

- *Warner v. MVD*, 126 Or App 164 (1994): if defendant does not raise validity of arrest before ALJ at Implied Consent hearing, the defendant is precluded from raising the issue on appeal to the Circuit Court.

CHAPTER 10

REASONABLE GROUNDS

TO BELIEVE DUII

AND OTHER CONDITIONS PRECEDENT

TO REQUESTING A CHEMICAL TEST

*****

In the typical Implied Consent case, after the driver is arrested for DUII, he or she will be transported to a police facility for chemical testing and processing. Depending on where the person is transported, there may be a booking process and a wait in a holding cell before the Implied Consent processing actually begins. *See generally* ORS 813.100 *et seq*.

It is during this phase that the requirements under the Implied Consent law and the criminal law diverge. For example, under the Implied Consent law, if a person passes a chemical test the person is usually not subject to a license suspension (the exceptions are mentioned below). If the person fails the test, or refuses to take the test, the officer must complete and provide DMV and the person with specific Implied Consent paperwork. By contrast, a criminal charge of DUII is generally unaffected by whether a person fails or refuses a test.

In addition to a valid arrest for DUII, another condition precedent to requesting a chemical test is the requirement that the police have reasonable grounds to believe the subject had been driving under the influence. ORS 813.410(6)(b).

A. REASONABLE GROUNDS TO BELIEVE DUII

To establish one of the *prima facie* elements necessary to impose an Implied Consent suspension, the police requesting the chemical test must have "reasonable grounds to believe, at the time the request was made, that the person arrested had been driving under the influence of intoxicants in violation of ORS 813.010 or municipal ordinance." ORS 813.410(6)(b).

The court discussed the reasonable grounds requirement in *Thorp v. DMV*, 4 Or App 552 (1971):

> The trial court found that all of the prerequisite steps for the loss of driver's license for refusal to take the breathalyzer test, had been complied with except for the requirement that the police officer have reasonable grounds to believe the plaintiff was driving while intoxicated. Although the court correctly considered that reasonable grounds were the same as probable cause to make an arrest, it erroneously concluded that there was not probable cause.

Thorp v. *DMV*, 4 Or App at 559. The court explained that, "[p]robable cause or reasonable grounds is a conclusion of law which arises by inference from the facts found. If the facts support the inference, probable cause exists."

Usually, the evidence that establishes probable cause is also sufficient to establish reasonable grounds.

B. ADDING TO OR SUBTRACTING FROM PROBABLE CAUSE

Because probable cause and reasonable grounds are inferences made from the totality of the circumstances, if the circumstances change between the time of arrest and the point in which the person is asked to take a test under the Implied Consent law, then reasonable grounds to believe DUII may no longer exist.

This situation may occur where, after the arrest, but before the breath test request, the officer learns information that seriously undermines one of the elements of DUII. For instance, if the officer learns that the person was having a diabetic incident, it may no longer be reasonable for the officer to believe that the person was under the influence of intoxicants. Similarly, if a credible person came forward and admitted that he or she was the driver, then the officer's belief that the arrested person had been driving while intoxicated may no longer be reasonable.

During the interrogation that often occurs after the arrest, the officer may elicit additional evidence that adds to, or subtracts from, what was known at the time of arrest. If the most likely explanation for the evidence that the officer has collected is that the arrested person was not driving under the influence of intoxicants, the officer should not ask the person to submit to a chemical test under the Implied Consent law.

At the time the officer requests that the person submit to a chemical test, the officer still must have a reasonable belief that, more likely than not, the person was driving under the influence of intoxicants.

C. CONDITIONS PRECEDENT FOR VARIOUS CHEMICAL TESTS

1. Breath Tests

As a condition precedent to requesting a breath test, there must be: (1) a valid arrest for DUII (includes a valid stop); *and* (2) reasonable grounds to believe DUII at the time of the breath test request.

Practical Note: It is usually helpful to ask the testifying officer to go through his or her testimony in chronological order. That is, from the initial contact through the chemical testing process. This will assist the ALJ in determining what the officer knew and believed at each point in the process.

2. Blood Tests

For the police to validly request a blood test there must be: (1) a valid arrest for DUII (includes a valid stop); (2) reasonable grounds to believe DUII at the time of the blood test request; (3) the person must be receiving medical care in a health care facility; (4) immediately following a motor vehicle accident.

As with the other types of chemical tests, the person may refuse the blood test, or if they take the test, they will either pass or fail. Suspensions for failing or refusing blood tests are the same as for refusing or failing breath tests. The blood alcohol levels needed to fail the tests are the same as for breath tests.[1]

Procedurally, the blood is shipped to the state police crime lab, and the police have 45 days from the arrest date to report to DMV that the driver failed a blood test. DMV then sends a suspension notice to the driver, who has ten days to request a hearing from the date DMV sent the notice. The blood test failure suspension must start no later than 60 days after DMV receives the blood alcohol report, including any hearing that is conducted. *See* ORS 813.100; 813.410(6).

3. Urine Tests

To request a urine test, there must be:

- A valid arrest for DUII (includes a valid stop);
- Reasonable grounds to believe DUII at the time of the test request; *and either*
- A "low blow," *i.e.*, the breath test result of less than .08 percent BAC; *or*
- Evidence that the person was involved in an accident resulting in injury or property damage, regardless of whether a breath test has been requested and regardless of the outcome of the test; *and, in either case*;
- The officer must reasonably suspect that the person is under the influence of a controlled substance, an inhalant, or a any combination of an inhalant, a controlled substance, and intoxicating liquor;
- The officer must also be certified by the Board on Public Safety Standards and Training [or DPSST] as having completed at least 8 hours of training in recognition of drugs that impair driving;
- The requesting officer must also have a reasonable suspicion that the person was driving under the influence of a controlled substance, an inhalant or any combination of alcohol, controlled substance and inhalant.

[1] Blood alcohol concentrations that indicate failure of a chemical test are as follows: "(A) .08 percent or more by weight if the person was not driving a commercial motor vehicle; (B) .04 percent or more by weight if the person was driving a commercial motor vehicle; (C) Any amount if the person was under 21 years of age." ORS 813.410(6)(c).

ORS 813.131. Since 1993, motorists have impliedly consented to taking a urine test under the above circumstances.

In addition to the above requirements, before an officer can offer a urine test, the officer must read to the person Section 2 of the rights and consequences, found on the back of the Implied Consent Combined Report.

Also, it is a defense under the urine testing provisions that privacy was not offered for the test, or that the person was not able to produce any urine. ORS 813.131(3); 813.132(3).

The "reasonable suspicion" that the person was driving under the influence of a controlled substance, an inhalant, or a combination of alcohol, controlled substance and inhalant, may be based on a evaluation by a certified drug recognition evaluator (DRE). For instance, if a person's breath test result is less than .08 percent BAC, but the person shows signs of intoxicant impairment, the arresting officer may request a DRE evaluation. The DRE may conclude the person is under the influence of an intoxicant other than alcohol that could be detected in a urine test. In *State v. Sampson*, 167 Or App 489 (2000), the court upheld the admissibility of DRE evidence in support of a conviction for DUII-controlled substances.

Practical Note: Unless the DRE is the officer who requests the urine test, he or she will seldom be at the hearing. The DRE's qualifications and conclusions will have to be developed through hearsay from the officer who was subpoenaed.

If a person is involved in an accident, they do not have to pass a breath test before being offered a urine test. If the person is offered a breath test, they may refuse, pass, or fail the breath test and still be offered the urine test.

For specific information about urine testing procedures, *see* ORS 813.131 and 813.132.

The suspension for refusing a urine test is the same as for other chemical tests, with one notable exception. The suspension for a urine test *refusal* will be *consecutive* to any other Implied Consent suspension arising from the same arrest. ORS 813.132. For example, if the person refuses both the breath and urine tests, and is subject to enhancement under ORS 813.420, the possible suspension period is six years (three years for each refusal).

***Practical Note*:** The eight hour drugs that impair driving training is not the same training that an officer takes to become a DRE. The DRE certification program is much more extensive, requiring both classroom and in the field training.

There is no suspension under the Implied Consent law for *failing* a urine test.

CHAPTER 11

RIGHTS AND CONSEQUENCES

*****

One of the *prima facie* elements that must be established at every hearing challenging an Implied Consent suspension is that the person asked to take a chemical test was first informed of the "rights and consequences." ORS 813.410(6)(e). The rights and consequences are found on the back of the Implied Consent Combined Report (ICCR). This document is an exhibit in every Implied Consent hearing.

A. HISTORY

The present rights and consequences statement is the product of an historical progression. Under the 1960s version of Oregon's Implied Consent law, the arrested driver was not provided with any information about the rights and consequences of taking a chemical test. At that time, information was only given to people who refused to take the test. The purpose of this additional information was to coerce the person to actually give a breath sample. *See* former ORS 487.805; *State v. Newton*, 291 Or 788, 791 n.2 and 799 (1981). This additional information was the subject of repeated litigation. In an effort to reduce litigation over the issue, in 1985 the legislature added a provision to the "new" Implied Consent law (originally effective July 1, 1984) that specified the information to be included in the "rights" statement. The Implied Consent law also required that the rights information be given to *all persons* who were being asked to submit to a chemical test, and not just to the people who refused the test request.

B. CURRENT ISSUES

The present version of Oregon's Implied Consent law requires that an arrested driver be "informed" of rights and consequences described in ORS 813.130 before being asked to take a breath, blood, or urine test. ORS 813.410(6)(e). The "informed" requirement is satisfied if either the officer reads the printed rights and consequences from the ICCR to the person before requesting a chemical test, or the person reads the form on their own. *See Stavros v. DMV*, 12 Or App 356 (1973). The rights and consequences material needs to be "substantially in the form prepared by the Department of Transportation," ORS 813.130(1), and contain the information set out in ORS 813.130(2). If a CDL is involved, additional information substantially in compliance with 813.130(3) must also be given. For a urine test, the rights and consequences must provide additional information, which is set out in ORS 813.132(2).

The reading of the rights and consequences may prompt the arrested driver to request legal advice. The driver's right to communicate with counsel or others before deciding whether to take the chemical test is discussed in Chapter 12, below. But, as the court held in *Staglin v. DMV*, 227 Or App 240 (2009), this right to communicate is not linked to the reading of the rights and consequences and the test request. The *Staglin* court expressly rejected the petitioner's contention that the liberty to communicate arises only after the person is advised of the rights and consequences and asked to take a test.

1. Officer Fails to Correctly Read All of the Rights and Consequences, Or Adds Additional Information

ORS 813.410(6)(e) makes whether "the person was informed under ORS 813.100 of rights and consequences as described in ORS 813.130" a *prima facie* element in an Implied Consent hearing. That is, if a hearing is requested and this element is not established in the hearing record, there can be no Implied Consent suspension. A minor deviation or omission will not, however, be grounds to disaffirm the suspension. The critical question is whether the deviation or omission affected the person's decision to take or refuse the test. Sometimes an officer goes beyond the reading of the rights and consequences. This may be something essentially innocuous, like telling the person what the actual suspension periods would be based on the person's D07 report.[1]

In addition, if the officer misleads or tricks the person into taking or refusing the test by providing the person with false information, the suspension may be invalid. *State v. Freymuller,* 26 Or App 411 (1976); *Cf. State v. Herndon,* 116 Or App 457 (1992) (holding that although the officer provided inaccurate information to the petitioner regarding the petitioner's eligibility for diversion, that information did not trick or mislead the petitioner into thinking he had no choice but to take the breath test).

***Practical Note*:** When presented with facts indicating that the person was given inaccurate or false information during the reading of the rights and consequences, develop the record carefully. Based on the facts developed, the ALJ should be able to determine whether the inaccurate or false statement did, in fact, trick or mislead the person into taking or refusing the chemical test. If the false information was *de minimis*, and had little connection to the person's decision about the test, the ALJ may be able to conclude that the person was not actually tricked or misled by the information. Remember that the statute only requires that the rights and consequences be "substantially" as set out in ORS 813.130.

Occasionally, a petitioner will argue that, due to their particular circumstances, the officer was required to provide them with additional information before asking them to submit to a breath test. For example, drivers from other states may be concerned about the effect of an Oregon Implied Consent suspension on their out-of-state driver license. Similarly, juveniles may have concerns about the effect of a suspension on a provisional license. The rights and consequences do not address every concern that may come up at an Implied Consent hearing, but so long as the rights and consequences contain the statutorily required information, and they are properly read to the person, omission of some optional information is not a viable argument.

Below are some cases dealing with rights and consequences:

[1] A D07 report is an electronic document that the police can access from DMV computers. The D07 report is specific to an individual's drive record, and indicates whether the person is eligible for a temporary driving permit and what the suspension periods would be for either refusal or failure of the test, depending on the person's drive record.

- *State v. Romero*, 58 Or App 550 (1982): the results of the breath test are inadmissible in a criminal proceeding if the defendant was tricked or mislead into believing that he has no right to refuse the test. It is the objective accuracy of the officer's statements, and not the defendant's subjective interpretation, that determines the outcome.

- *State v. Greenough*, 7 Or App 520 (1972): an unconscious person cannot be regarded as having refused to submit to a test and therefore the person must be *conscious* at the time of the reading.

- *Anderson v. MVD*, 116 Or App 179 (1992): officer read the rights and consequences, but the petitioner refused to take the test unless the officer obtained his glasses so that he could read them for himself. Suspension upheld.

- *State v. Herndon*, 116 Or App 457 (1992): police officer misinformed subject and his attorney about the eligibility for diversion *after* reading the rights and consequences, and the court held that this did not violate substantial compliance with ORS 813.130.

- *State v. Lyons*, 118 Or App 660, 663 (1993): "Now an officer must always inform a driver of the 'rights and consequences' before administering a breath test." (Citations omitted). Failure to advise invalidates suspension.

- *State v. Bloom*, 216 Or App 245 (2007): the police officer misinformed the defendant as to the amount of the fine that could be imposed for refusing the breath test, saying it was between $5,000 to $10,000 (when the statute set the fine at $500 to $1000). The defendant took the breath test, but argued on appeal that the results should be suppressed because the officer violated ORS 813.100 and 813.130 by providing inaccurate information. The court did not address whether the inaccurate information violated the Implied Consent statutes, but held that even if it did, the breath test result was admissible in criminal court under ORS 136.432.

2. Another Officer Reads the Rights and Consequences

This situation is not very common in Implied Consent hearings, but it does come up from time to time. Hearsay testimony from the subpoenaed officer about what he heard the other officer do, or what the other officer told him, is generally admissible, so long as it is relevant, material and not unduly repetitious. ORS 183.450. *See Adams v. MVD*, 132 Or App 431 (1995) (another officer may read the rights and consequences so long as the witness officer knows it was done and can testify to that fact). For a detailed discussion of hearsay in Implied Consent hearings, *see* Chapter 19, *Evidence*.

C. NON-ISSUES

A person's inability to understand the rights and consequences is not a valid defense in an Implied Consent hearing.

- *State v. Fogle*, 254 Or 268 (1969): the court considered and rejected the argument that results of a breath test should be suppressed if the arrested person lacked the capacity due to intoxication to understand that he may refuse the test. The court commented that the defense offered would have the effect of defeating the essential purpose of the statute. *See also Garcia v. MVD*, 253 Or 505 (1969).

- *Stavros v. DMV*, 12 Or App 356 (1973): the statute requires that certain information be read to the driver *or* that the driver read the provisions on their own.

- *State v. Earley*, 78 Or App 646 (1986): the statute does not require that the driver fully understand the information given.

- *State v. Weishar*, 78 Or App 468, *rev den* 301 Or 338 (1986): the Implied Consent law does not require that an interpreter be provided for a hearing impaired person.

- *State v. Nguyen*, 107 Or App 716 (1991): interpreters do not need to be provided to non-English speaking defendants to assist in understanding the rights and consequences.

CHAPTER 12

REASONABLE OPPORTUNITY

TO COMMUNICATE

WITH COUNSEL

OR OTHERS

*****

A. SOURCE OF THE RIGHT TO COMMUNICATE

The right to communicate has its source in the Oregon Constitution. Because the right to communicate is not specifically addressed in ORS 813.410, the statute that sets out the scope of an Implied Consent hearing, it was originally thought that this concept was not applicable in the Implied Consent arena. This right to communicate was challenged in criminal cases. *See State v. Scharf*, 288 Or 451 (1980); and *State v. Newton*, 291 Or 788 (1981). In *Newton*, the court recognized that an arrested person had a right to communicate with legal counsel that attached as early as the time of arrest, and which could be invoked by the person prior to making a decision to take or refuse the breath test. This right was attributed to a "liberty" interest protected by the Fourteenth Amendment to the U.S. Constitution. Interestingly, the *Newton* court did not overturn the DUII conviction, reasoning that there was no showing of a "causal connection" between the violation of the rights involved and the arrested person's ultimate decision to take or not take the test.

Although initially considered to be a right only in criminal cases, the right to communicate can be a critical issue in an Implied Consent hearing as well. In the landmark case of *Moore v. MVD*, 293 Or 715 (1982), the court considered an appeal from an Implied Consent hearing involving a driver's request to communicate with counsel before deciding whether to take or refuse the test. The trial court, on appeal, ruled that there was no such right, and sustained the suspension. The appellate court, however, overturned the suspension and established the following principles: (1) the *request* by an arrested person to communicate with an attorney, or other person, is not, by itself, a refusal of the breath test; and (2) a person making the request is entitled to *a reasonable opportunity to communicate* before deciding about taking or refusing the breath test, within the limits of the Implied Consent process.

The *Moore* court utilized a due process analysis to reach its decision that the arrested driver had been denied a reasonable opportunity to communicate. In the years following *Newton* and *Moore*, several cases have addressed the right to communicate.

In *State v. Spencer*, 305 Or 59 (1988), the court held that a person under arrest had the right to communicate with an attorney that stemmed from Article I, section 11 of the Oregon Constitution. The *Spencer* court did not apply due process concepts as they had in *State v. Newton*, 291 Or 788 (1981) and *Moore v. MVD*, 293 Or 715 (1982). The *Spencer* court reasoned that the decision to take or refuse the breath test was a "critical stage" in the prosecution of the crime of DUII. Thus, the right to communicate attached at that stage and required that the person be afforded a "reasonable opportunity" to communicate with legal counsel.

Following the *Spencer* decision, there was considerable confusion about the source of the right to communicate that was involved in Implied Consent hearings. For example, in *Hoefling v. MVD*, 104 Or App 11 (1991), the court applied Article I, section 11 of the Oregon Constitution. The Oregon Supreme Court cleared up the confusion in *Gildroy v. MVD*, 315 Or 617, *aff'd on rem'd* 132 Or App 235 (1995). In *Gildroy*, the court held that the right to

communicate that can be invoked in the Implied Consent hearing stems from a constitutional liberty interest under the federal due process concept, and not Article I, section 11 of the Oregon Constitution. The *Hoefling* decision to the contrary was vacated and remanded to for further proceedings consistent with *Gildroy*. *Hoefling*, 125 Or App 22 (1993).

Since *Gildroy*, appellate cases have continued to clarify the difference between the right to contact counsel in the criminal context pursuant to Article I, section 11 and the right to a reasonable opportunity to communicate with counsel or others in the Implied Consent context. In *Brown v. DMV*, 219 Or App 607 (2008), the court confirmed that Article I, section 11 does not apply in a civil administrative proceeding such as a license suspension hearing, but a driver is entitled, upon request, to a reasonable opportunity to communicate unless or until it would interfere with the effective administration of the breath test.

B. INVOKING THE RIGHT TO COMMUNICATE

The long standing principle that has survived intact from the *Newton* and *Moore* decisions is that the person facing the breath test decision must request an opportunity to communicate before any constitutional right to communicate is triggered. The police are not required to ask the person if they wish to exercise their right to communicate. *Blackman v. MVD*, 90 Or App 408, 413 (1988).

In *State v. Trenary*, 114 Or App 608 (1992), *aff'd on other grounds* 316 Or 172 (1993), the court emphasized that an arrested person does not need to understand the "subtle contours" of the law in order to assert his or her right to communicate. More recently, in *State v. Ohm*, 224 Or App 390 (2008), the court held that a driver's statement during the DUII processing at the police station that she wanted to "ask someone" for "advice" was an equivocal invocation of her right to counsel. The court noted that the officer had an obligation to ask clarifying questions to ascertain whether the driver wanted to consult with counsel. *But see State v. Charboneau*, 323 Or 38 (1996) (finding that the question "will I have an opportunity to call an attorney tonight?" was not an unequivocal request for a lawyer).

While the above are criminal cases, the principal is applicable to Implied Consent cases because of the similarity of circumstances and relatively parallel legal requirements.

Although an arrested person has no right to have counsel present for the administration of the breath test, *State v. Gardner*, 52 Or App 663, *rev den* 291 Or 419 (1981), a request to have counsel present can constitute an invocation of the right to communicate.

In *State v. Ashley*, 137 Or App 561 (1995), the arrested driver made three requests for an attorney prior to the breath test: once before his arrest, once during the recitation of his *Miranda* rights and once immediately afterward. The driver did not restate his desire to contact counsel upon arrival at the jail, and the officer did not offer the driver use of a telephone before the breath test. The court framed the issue as whether the driver's "general request for the presence

of his attorney invoked his limited right to consult with an attorney before taking the breath test." The court then held: "if a person requests an attorney and has the right to an attorney under both Article I, section 12 and Article I, section 11, the state should honor that request, and, in doing so, comply with the requirements of both constitutional provisions. * * * Because of the plain reference to the desire for representation, Article I, section 11, also required [the officer] to give defendant a reasonable opportunity to consult with an attorney before taking the breath test." In short, the court held that the driver's request to have counsel present invoked both the *Miranda* right to refuse further questions without counsel present and the right to communicate with counsel.

Once the driver invokes his or her right to communicate, the police need not wait until after the driver has been advised of the rights and consequences and asked to take a breath test to accommodate that request. In *Staglin v. DMV*, 227 Or App 240 (2009), the driver asked to contact an attorney as he was being transported to the police station. Upon arrival at the station, the officer gave the driver a land line, the driver's cell phone, phone books and the opportunity to communicate in private for 22 minutes. The officer then began the pretest observation period and advised the driver of the rights and consequences. At some point during the observation period, the driver's cell phone rang, but he was not allowed to answer it. When the officer requested that the driver submit to the breath test, the driver asked for more time to contact counsel, explaining that he had been unable to reach an attorney earlier. The officer denied the driver's request to make further calls.

The driver appealed the suspension, asserting that the officer unreasonably restricted his communication opportunity. The court disagreed, holding that: (1) the mere fact that the driver requested and was given the opportunity to make calls before he was asked to take the breath test is insufficient to show unreasonable interference with his liberty interest; and (2) the officer was not required to give the driver a second opportunity to make calls. The court explained that *Moore v. MVD* "does not require endless opportunities to communicate so long as they do not interfere with test administration." *Id.* at 251.

As a practical matter, the issues of right to communicate and refusal are closely intertwined. One issue has been whether the request to communicate came before or after the refusal:

- *Ahlbin v. MVD*, 113 Or App 441 (1992): the statement, "No, I want a blood test, not a breath test. I want an attorney," was judged to be a refusal that preceded the request for counsel.

- *Brown v. MVD*, 157 Or App 167 (1998): the court held that the statement, "No, not without my lawyer," was validly taken as a refusal of the test.

For more information about refusals, *see* Chapter 13, *Refusing a Test*.

Once the driver invokes his or her right to communicate with counsel or others, he or she may later waive the opportunity to do so by expressly declining to make calls or through other statements or conduct.

C. CONTENT OF COMMUNICATION

The right to communicate provides the person, upon their request, with a *reasonable opportunity* to communicate. Whether the person was successful in making contact is not determinative. Instead, the relevant inquiry is whether, at the time he or she was asked to finally decide whether to take the test, the driver had been afforded a reasonable opportunity to contact counsel. *State v. Brazil-Kay*, 137 Or App 589 (1995); *Morgan v. MVD*, 85 Or App 267, *rev den* 304 Or 311 (1987); *see also State v. Smalls,* 201 Or App 652 (2005) (confirming that a driver arrested for DUII has a right upon request to a "reasonable opportunity" to obtain legal advice before deciding whether to submit to a breath test, which is not the same as an absolute right to consult an attorney before the breath test).

D. PRIVACY

The privacy question highlights the distinction between the right to communicate in the criminal law and Implied Consent law contexts. In *Gildroy v. MVD*, 315 Or 617 (1993), the court held that, for purposes of an Implied Consent hearing, there is no right to privacy attached to the right to communicate. *See also, Gildroy v. MVD, on remand* 132 Or App 235 (1995). More recently, in *Brown v. DMV*, 219 Or App 607, 615 (2008), the court held that an officer's mere presence in the room while a petitioner exercises her liberty interest in communicating before deciding whether to submit to a breath test does not constitute an unreasonable interference with that communication. *Brown* is consistent with Justice Department legal advice provided to DMV in 1988. *See* Sarah Castner memo of April 22, 1998 to Dwight Apple, concluding that privacy while communicating, and the denial thereof, is not a right that may be asserted in the Implied Consent hearing.

But, in criminal court, the denial of a defendant's the Article I, section 11 right to private consultation with counsel can have a significant impact on the outcome of the case. *State v. Durbin,* 335 Or 183 (2003) (a person who invokes the right to counsel need not specifically request to consult privately with the attorney); *State v. Matviyenko,* 212 Or App 125 (2007) (the officer did not fully honor the defendant's request to consult with counsel because the officer remained in the room and did not tell the defendant that he would have privacy once the call was made); *but see State v. Veach,* 223 Or App 444 (2008) (holding that the right to privacy attaches once the defendant actually contacts an attorney; thus, the defendant's reasonable opportunity to consult with counsel was not violated because the officer remained in the room while the defendant left messages and called his mother for a referral).

In *State v. Burghardt*, 234 Or App 61 *rev den* 349 Or 370 (2010), the court confirmed that, in the criminal context, person's right to private consultation with counsel is triggered by a request for legal advice, not merely a request to talk with an someone who happens to be a member of a bar association. *See also State v. Mendoza*, 234 Or App 366 (2010) (a DUII suspect's limited right to consult with an attorney before taking a breath test is triggered by his or her invocation of the right; if the defendant does not invoke the right the state cannot violate it by failing to advise the defendant he would be given privacy).

E. BURDEN OF PROOF

In *Walls*, 154 Or App 101 (1998), and *Ranger v. MVD*, 122 Or App 141 (1993), the court found that the burden is on the petitioner to establish that the police unreasonably interfered with his or her opportunity to communicate. "Whether he was denied a reasonable opportunity to communicate with his lawyer depends on the circumstances of the officer's interference with that opportunity and the reasons therefor." *Walls*, 154 Or App at 108. In *Ranger*, the court noted that the petitioner "must produce evidence of his factual assertion that his opportunity to consult with counsel was unreasonably restricted." 122 Or at 144. *See also Hoefling v. MVD*, 125 Or App 22 (l993).

F. REASONABLE OPPORTUNITY

In deciding whether a driver has been afforded a reasonable opportunity to communicate before the breath test, the court has considered the following circumstances: (1) the amount of time given for the communication; (2) the passage of time between the arrest and the request to communicate (because of the evanescent nature of blood alcohol evidence); (3) police needs, *i.e.*, the effective administration of the breath test; and (4) the purpose of the call, *i.e.*, whether it relates to the decision to take or refuse the chemical test.

As a general rule, when a driver arrested for DUII asks to speak to an attorney or others, the officer may satisfy the reasonable opportunity to communicate requirement by offering the person use of an operational telephone in the Intoxilyzer room during the observation period. *See, e.g., State v. Ashley*, 137 Or App 561, 566 (1995).

The right to communicate with counsel does not include the right to have handcuffs removed before placing a call to the attorney, so long as the person has some assistance in placing the call. *State v. Dumford*, 149 Or App 1 (1997); *State v. Carlson*, 225 Or App 9 (2008) (to afford defendant a reasonable opportunity to obtain legal advice, the state must prove that the inmate phone was operational and, because defendant was handcuffed, that the officer was able to use it for him).

Similarly, the right to contact counsel or others also does not include the right to reading glasses, so long as the person has some assistance in reading the phone book or dialing numbers.

State v. Tyon, 226 Or App 428, 438 (2009) ("Defendant also contends he was denied a means to contact an attorney because he could not read the phone book without reading glasses. We reject that argument because the jail staff offered to help defendant read the entries in the phone book."); *State v. Roesler*, 235 Or App 547 (2010) (noting that to show that the defendant had a reasonable opportunity to consult with an attorney, the state was required to show that the defendant was able to effectively use the telephone with the assistance of reading glasses or the officer's assistance in locating a number or dialing the phone).

1. Amount of Time Provided for Communication

As noted above, a person has a qualified right to a reasonable opportunity to communicate with counsel or others, unless or until the exercise of that right would interfere with the effective administration of the breath test. *Moore v. MVD*, 293 Or 715 (1982). In *Moore*, the court suggested that a person could be given the opportunity to call during the 15 minute observation period without affecting the validity of the breath test. 293 Or at 723. *See also State v. Spencer*, 305 Or 59 (1988).

There is, however, no "bright line" with regard to what constitutes a reasonable opportunity. In *Morgan v. MVD*, 85 Or App 267, *rev den* 304 Or 311 (1987), the court held that a period of 29 minutes was insufficient because the police failed to demonstrate any reason, such as the dissipation of blood alcohol evidence, to limit Petitioner's opportunity to communicate. In *Morgan*, the driver informed the police that he was waiting for a return call to the jail from his attorney, which the police noted as a refusal.

In *State v. Larrett*, 127 Or App 139 (l994), the person was afforded more than one half hour to communicate, and the court said that this was sufficient to qualify as a reasonable opportunity. In *Skinner v. MVD*, 107 Or App 529 (1991), the petitioner argued that he had the right to postpone breath testing until the next morning when he could reach his attorney. The court disagreed.

In *Blackman v. MVD*, 90 Or App 408 (1988), the court found that the arrested motorist was afforded a reasonable opportunity when, approximately 30 minutes after his arrest, he was given about 10 minutes to make some calls. In both *Hicks v. MVD*, 132 Or App 474 (1995) and *Farley v. MVD*, 137 Or App 492 (1995), the court found a reasonable opportunity to communicate even though the arrested driver was given 15 minutes or less to make calls. In *Walls v. MVD*, 154 Or App 101 (1998), the petitioner was given 25 minutes and made several calls in the officer's presence during that time. The court held that he was afforded a reasonable opportunity to contact counsel or others. The court remarked, "In light of the fact that blood alcohol dissipates over time, there is no requirement that a motorist be furnished an unending opportunity to obtain legal advice about taking a breath test." *Id*. at 108.

In *State v. Brazil-Kay*, 137 Or App 589 (1995), rather than calling an attorney directly, the driver spent 15 minutes talking to her father, during which time she asked her father to find an attorney for her. When the driver hung up the phone, she told the officer she was expecting a

call back. She did not request to make another call and did not protest when the officer asked her to take the breath test. The court held that the driver was afforded a reasonable opportunity to consult with counsel before the breath test. The court remarked that "the fact that she did not make better use of that opportunity did not mean that it was denied her." *Id.* at 597. *See also State v. Greenough,* 132 Or App 122 (1994).

In *Staglin v. DMV,* as discussed above, the court held that a 22 minute opportunity to communicate upon arrival at the police department was a reasonable accommodation. In *State v. Tyon*, 226 Or App 428 (2009), the defendant was afforded a reasonable opportunity where he was provided with a working phone, a phone book and approximately 45 minutes to use them.

In *Anderson v. MVD,* 116 Or App 179 (1992), the court held that there is no right to consult an attorney about a breath test that has already been refused. *Anderson* was later overturned on other grounds but is still good law on this point.

2. Time Since Arrest

In *Blackman v. MVD,* 90 Or App 408 (l988), as discussed above, the arrested person was afforded about 10 minutes to make a call. The court found that this was reasonable, in part because of the length of time that had already gone by between the arrest and the time the person first asked to communicate. Similarly, in *Hicks v. MVD,* 132 Or App 474 (l995), and *Farley v. MVD*, 137 Or App 492 (l995), where the arrested person was afforded less than 15 minutes to communicate, the court considered how much time had elapsed from the time of the stop to the time the driver was asked to take the breath test.

In *Walls v. DMV,* 154 Or App 101 (1998), where the petitioner was afforded 25 minutes and made several calls during that time, the court remarked, "In light of the fact that blood alcohol dissipates over time, there is no requirement that a motorist be furnished an unending opportunity to obtain legal advice about taking a breath test." *Id*. at 108. *See also State v. Milligan,* 304 Or 659 (1988) (recognizing that blood alcohol evidence begins to dissipate shortly after consumption ceases, and therefore a driver must be tested as soon as practicable).

3. Police Needs

In *Moore v. MVD,* 293 Or 715 (1982), the court held that the police must accommodate a request to communicate unless accommodating the request would interfere with the effective administration of a breath test. In *Luth v. MVD,* 87 Or App 137 (l987), the arrested person was afforded more than 30 minutes to communicate before the officer decided that the person had refused the test. The *Luth* court added the *reasonable needs of law enforcement* to the list of factors that should be considered when deciding if an opportunity to communicate is reasonable. Further, the need to preserve transitory evidence (*i.e.*, the person's blood alcohol level) has also been recognized as a reason to impose limits on the accommodation of a request to communicate. *See Moore v. MVD,* 293 Or 715, 723 (1982) and *Blackman v. MVD,* 90 Or App 408 (l988).

4. Purpose of the Telephone Call

The right to communicate outside one's confinement is linked to communications about whether to take the test. In *Green v. MVD*, 106 Or App 471 (l991), the court held that if the reason for the communication is something other than to discuss whether to take the test, then the failure of the police to allow the person to make the call before the breath test is not necessarily a deprivation of the person's liberty interest. In *Green*, during the DUII processing, the petitioner requested to call his mother to arrange a ride home. That was the only stated reason for the call. The court held that because the petitioner did not wish to discuss whether to take the test, there was no reason why he should not wait until after the test to make the call. The court specifically found that "postponing the phone call until after the breath test did not deprive petitioner of any liberty interest under the Fourteenth Amendment." 106 Or App at 477.

The police do not have the right to demand that the person state the purpose of their call. But, if the person offers a reason, the police can accept the person's explanation for the purpose of the call, and if that reason is unrelated to the decision on whether to take the breath test, the police may deny the phone call until after the breath test processing is completed. If the person does not offer a reason, the officer may need to inquire further into the purpose of the call. If the person declines to state the purpose for the desired communication, the officer should provide the person with a reasonable opportunity to communicate before the officer administers the test or declares a test refusal.

G. ATTORNEY OR OTHER PERSON

The right to communicate in the Implied Consent context is not limited to attorneys. As has been the standard since *Newton* and *Moore*, a petitioner may request to contact counsel *or others*, including a relative or friend, for advice about the breath test. One of the most common mistakes made by police officers in these situations is the denial of a request to communicate with a family member or a non-attorney friend.

In the criminal context, the right to communicate for advice about the breath test with a person who is not an attorney is less clear. In *State v. Freytag*, 230 Or App 694 (2009), the court expressly declined to resolve whether, in a criminal case, the defendant has a constitutional right to communicate with a non-attorney before the breath test. The *Freytag* court concluded that the defendant had not shown any nexus between the allegedly unlawful police conduct (denying defendant the opportunity to call his boss or insurance agent) and the defendant's decision to take the breath test.

H. SUMMARY

Above all else, the determination of whether a balance has been properly struck between an arrested person's right to communicate with counsel or others and the state's interest in collecting evanescent evidence, depends on the specific facts in each case. *State v. Brazil-Kay,* 137 Or App 589 (1995). If, after considering these factors, the evidence establishes that the petitioner *requested and was denied* a reasonable opportunity to communicate, then the proposed suspension under the Implied Consent law is not valid.

CHAPTER 13

REFUSING A TEST

*****

The Implied Consent law, ORS 813.100, provides, in pertinent part, that:

> Any person who operates a motor vehicle upon premises open to the public or the highways of this state *shall be deemed to have given consent*, subject to the implied consent law, *to a chemical test of the person's breath, * * *,* for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance.

ORS 813.100(1) (emphasis added).

A. NO RIGHT TO REFUSE

In the early 1980s, some court opinions seemed to indicate that a motorist had the *right* to refuse to submit to a breath test. *See, e.g., State v. Freymuller*, 26 Or App 411 (1976); *Chase v. MVD*, 63 Or App 15 (1983); *State v. Romero*, 58 Or App 550 (1982); *State v. Coy*, 48 Or App 267 (1980).

In *State v. Newton*, 291 Or 788, 793 (1981), however, the court opined that, "the implied consent law 'is designed to overcome the possibility of physical resistance, despite legal consent, without resort to physical compulsion' by imposing adverse legal consequences on a refusal to submit to the test." In *State v. Herndon*, 116 Or App 457, 463 (1992), the court held that, "The statutorily imposed consequences of a refusal are intended to coerce compliance with the Implied Consent law to supply real or physical evidence of the alcoholic content of blood." *Citing State v. Newton*, 291 Or 788 (1981). "The statute's reference to a 'refusal' does not reinstate a driver's right to choose whether to submit to the test; rather it recognizes the 'physical reality' of a driver's ability physically to resist the tests. *Newton*, 291 Or at 792-93.

In *State v. Gardner*, 52 Or App 663, *rev den* 291 Or 419 (1981), the court discussed whether evidence of a person's refusal to take a breath test violated the Fifth Amendment right against self-incrimination. The *Gardner* court held that because the breath test result is *physical* evidence, rather than *testimonial* evidence, a person has no constitutional right to refuse based on that basis. The decision in *State v. Gefre*, 137 Or App 77 (1995), noted that a person is wrong to assume that he or she has a right to refuse the test. With probable cause and the exigency of the evanescent nature of blood alcohol content, a person has no constitutional right to refuse the administration of a test.

B. FAILING TO PROMPTLY SUBMIT AS A REFUSAL

The word "refusal" is not defined in the Implied Consent law. In *Moore v. MVD*, 293 Or 715 (1982), the court provided the following guidance:

> [A] refusal to submit need not be explicit. [The Implied Consent statute] does not suggest that there is no refusal unless the arrested person says "I refuse." The word "refusal" as used in the Implied Consent Act means *non-submission*. *Newton*, 291 Or at 792-93. Thus if an arrested person is requested to submit to a breath test and, after the statutorily required advice is given he does not promptly do so, he has refused to submit. The refusal is implicit in his conduct. On the other hand, there is not necessarily a refusal every time an arrested person fails to snap to like a recruit at the command of a drill sergeant.

Moore, 293 Or at 722 (emphasis added).

The Oregon State Police created an administrative rule for these situations. OAR 257-030-0130(5)(b) provides, in pertinent part:

> If during either of the breath sample collection periods, the subject refuses, through some willful act, to follow the instructions to provide an adequate breath sample, the operator may depress the 'Start Test' button or the 'R' key on the instrument keyboard to terminate the breath testing sequence. The instrument will indicate 'Refused' on the display and a test result of 'Refused' will be produced.

The burden is on the state to demonstrate that a "willful act" led to a refusal of the test. But, when the officer determines that the person is willfully failing to provide a proper breath sample, the officer does not have to wait through the full three minute breath testing period before declaring a refusal. *Gilliam v. Oregon Dept. of Transp.*, 178 Or App 267 (2001).

The police are not required to first warn a person that their actions, inaction or statements may be taken as a refusal. *See State v. Gardner*, 52 Or App 663, *rev den* 291 Or 419 (1981); *see also Fitzpatrick v. DMV*, 236 Or App 113, 119 (2010), where the court explained that it may be the best practice for the officer to give ultimatums and warn the driver that his or her conduct would constitute a refusal, but "[n]othing in the implied consent statutes or the case law interpreting the statutes requires officers to give ultimatums." The *Fitzpatrick* court added that, "under the Implied Consent statutes the burden is on the driver to articulate a clear assent to the test, and not on officers to secure a clear refusal." *Id.*

Appellate cases have established that "anything substantially short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take the test constitutes a refusal to do so." *Caldeira v. MVD*, 181 Or App 168 (2002); *Lundquist v. Motor Vehicles Div.*, 23 Or App 507 (1975). Any attempt by the arrested driver to place conditions on the test or to delay the test (aside from requesting an opportunity to communicate with counsel or others) can constitute a refusal of the test.

***Practical Note*:** The requirement in ORS 813.410(6)(h) to show that a test complied with the proper methods, procedures and equipment applies to the scope of the hearing only if the person *took* the test. The officer is not required to follow the approved methods for operating the

Intoxilyzer where the driver refuses the test. *See, e.g., Tidwell v. DMV*, 238 Or App 43 (2010) (holding that where petitioner refused the breath test by not giving his unqualified, unequivocal assent to the test, the officer's possible failure to follow the proper procedures for administering the test was "irrelevant.").

C. NON-RESPONSIVE ANSWER

An arrested person's silence, when asked to take the test, can be deemed a refusal. *State v. Gardner*, 52 Or App 663, *rev den* 291 Or 419 (1981).

Cases such as *State v. Fogle*, 254 Or 268 (1969) and *Garcia v. MVD*, 253 Or 505 (1969), establish that a specific mental state is not required to find that the person refused the breath test. Otherwise, the person's own intoxication could be advanced as a defense to the assertion that the person refused. If, however, the person does not respond to the test request because he or she is unconscious, the person's lack of response is not a refusal. *State v. Greenough*, 7 Or App 520 (1972).

D. EXAMPLES OF REFUSALS

Below are several cases analyzing refusals:

- *Jones v. MVD*, 83 Or App 209 (1986): the court refused to place a burden on the state to demonstrate that an Intoxilyzer was available and could have been used to give a test if the arrested person had decided to take the test, because the arrested person did not know at that time that there was no working Intoxilyzer available.

- *Luth v. MVD*, 87 Or App 137 (1987): control of the testing process lies with the Intoxilyzer operator, not with the test subject, and continued insistence on something before taking the test can be taken as a refusal.

- *Morgan v. MVD*, 85 Or App 267, *rev den* 304 Or 311 (1987): the petitioner made two calls, and within 29 minutes of arriving at the jail, a third attorney called and spoke with petitioner, telling him to take the test. The petitioner told the officer that he wanted to take the test, but officer decided that repeated requests to make calls was a refusal. The court disagreed because there was no showing that attempts to communicate interfered with the temporal requirements of the testing process.

- *State v. Forney*, 72 Or App 220 (1985): valid refusal when the officer accepted the person's refusal when they were several miles away from nearest Intoxilyzer, and the person and officer never set foot in a room with an Intoxilyzer.

- *Jones v. MVD*, 90 Or App 143 (1988): valid refusal where Petitioner repeatedly failed to blow long enough or with sufficient force to produce a printout, despite the officer's warnings that he would record a refusal.

- *Schrier v. MVD*, 99 Or App 209 (1989): The petitioner's statement, "No, not without the advice of an attorney" was a refusal.

- *Shakerin v. MVD*, 101 Or App 357 (1990): arrested person was not illegally coerced into refusing the breath test because an officer refused his non-urgent need to urinate.

- *Skinner v. MVD*, 107 Or App 529 (1991). The petitioner had been offered a reasonable opportunity to contact counsel, but was unsuccessful. When asked to submit to the test, he said he would not until his attorney could be present, which would be the next day. The court upheld the refusal.

- *Anderson v. MVD*, 116 Or App 179 (1992): the court refused to overturn an officer's determination that the arrested person had refused the breath test by repeatedly demanding that he be taken to a location where he could get his eyeglasses and read the "rights and consequences" himself. Although *Anderson* was later overturned in *Gildroy v. MVD*, 315 Or 617 (1993), because of a faulty constitutional interpretation of the arrested person's right to communicate, it is still good law on the interpretation of this fact situation.

- *Ahlbin v. MVD*, 113 Or App 441 (1992): the petitioner's statement, "No, I want a blood test, not a breath test. I want an attorney," was a refusal, because the request to speak to an attorney was viewed as an afterthought.

- *Altree v. MVD*, 125 Or App 215 (1993): a slight departure from the printed language required to be read by an officer to request a test did not vitiate a refusal of the test.

- *Brown v. MVD*, 157 Or App 167 (1998): the petitioner's statement, "No, not without my attorney," was a refusal, not a *conditional acceptance* of the officer's request to take the breath test.

- *Gilliam v. ODOT*, 178 Or App 267 (2001): the officer declared a refusal and terminated the testing sequence where the petitioner was feigning an inability to provide a breath sample.

- *Caldeira v. MVD*, 181 Or App 168 (2002): anything short of unequivocal, unqualified assent is a refusal, including insisting on a blood test when asked to submit to a breath test.

- *Rabbani v. DMV,* 187 Or App 272 (2003): refusal upheld where the petitioner initially agreed to take the test but when the "Please Blow" prompt appeared on the Intoxilyzer and the officer asked the petitioner to blow, he stated "No, I wasn't driving."

- *Robinson v. DMV,* 191 Or App 122 (2003): the petitioner refused the urine test by stating that she could not produce a sample and would not even try.

- *Fisher v. DMV,* 203 Or App 202 (2005): the petitioner's actions in placing the mouthpiece between her lips but not sealing her lips around it and not directing her breath into the breath tube constituted a refusal of the test.

- *Davis v. DMV*, 209 Or App 39 (2006): the petitioner refused by evading the officer's request rather than providing unqualified, unequivocal assent. The petitioner asked to personally examine the rights and consequences and when the officer refused, she asked him to reread them to her. When the officer declined, the petitioner said she would not take the breath test unless the officer repeated the rights and consequences to her.

E. PHYSICAL INCAPACITY

At times, ALJs must consider whether the petitioner was physically capable of taking the breath test. Petitioners sometimes come to the hearing room with oxygen tanks, or present evidence that, at the time of the breath test refusal, they were suffering from a medical condition, such as asthma, pneumonia, bronchitis, or emphysema. The ALJ must initially decide if this information is credible. Assuming that evidence passes this first hurdle, the ALJ must then decide whether a medical condition is a defense to a refusal. The ALJ should elicit evidence as to whether the person showed breathing difficulties or shortness of breath during his or her DUII processing.

In *Cobine v. MVD*, 102 Or App 17 (1990), the court evaluated a refusal suspension where the arrested person argued that he was too sick to finish the test and the officer felt he was just faking it. The court wrote, "If a suspect is physically capable and the Intoxilyzer is in proper working order, the suspect must blow as many times as necessary to obtain a sample. Failure to do so constitutes a refusal." *Id.* at 20. Under the right circumstances, physical incapacity *can* be a defense to an assertion that a person refused a breath test.

F. CHANGING ONE'S MIND ABOUT REFUSING THE TEST

In *Bergstrom v. MVD*, 104 Or App 141 (1990), the court held that once a person refuses the breath test, the person does not have a right to change his or her mind and take the test. The

Bergstrom court interpreted ORS 813.100(2) to mean that an officer *might* allow the person to change his or her mind, but the officer was not required to do so. Occasionally, a petitioner will argue that *Bergstrom* means that an officer has discretion about *when* to consider an action or statement as a refusal of the test. This is erroneous. *Bergstrom* stands for the principle that the officer has discretion to allow a person to change his or her mind after initially refusing the test. This, however, is up to the officer.

In *State v. Kirsch*, 215 Or App 67 (2007), the court confirmed that an officer may, in his or her discretion, lawfully invite the motorist to reconsider the refusal. There, when the officer asked the defendant if he would be willing to take a breath test, the defendant said he did not want to do so. Despite this refusal, the officer initiated a testing sequence on the Intoxilyzer and invited the defendant to blow once the machine was ready. The defendant agreed and provided a breath sample. The court held that "ORS 813.100(2) does not preclude the giving of a breath test in circumstances in which a driver who initially refuses to take a breath test is later invited to reconsider and agrees to take the test." *Id.* at 75.

G. ISSUES SPECIFIC TO URINE REFUSALS

With regard to urine test refusals, there are some limited defenses. A person may provide documentation from a physician, *licensed by this state*, showing that the person has a medical condition that makes it impossible for the person to provide a urine sample. ORS 813.132(3). A person may also assert that he or she was not granted privacy to give a urine sample. ORS 813.131(3).

In *Robinson v. DMV*, 191 Or App 122 (2003), the court recognized that "a more flexible standard must be applied" to urine test refusals, such that an officer may need to give the person a reasonable amount of time to produce a urine sample. But, in that case, as noted above, the petitioner's assertion that she could not produce a sample "and would not even try" constituted a refusal to take the urine test.

CHAPTER 14

METHODS, PROCEDURES

AND EQUIPMENT

USED TO ADMINISTER

A VALID TEST

*****

ORS 813.410(6)(h) provides that if a person submitted to "a test" under ORS 813.100, the "methods, procedures, and equipment" used in the test are within the scope of the Implied Consent hearing. Under subpart (g), the qualifications of the person administering the test are also included within the scope of the hearing.

The exact requirements for the methods, procedures, equipment, and operator, and the legal responsibilities relating to each, are set out in ORS 813.160. For breath testing, jurisdiction is vested in the Department of State Police (OSP). ORS 813.160(1)(b). With regard to blood tests, the qualifications of a person analyzing blood are administered by the Oregon Health Division (ORS 813.160(1)(a)), and the test is to be administered by a "duly licensed physician" or a "qualified person acting under the direction or control of" such a physician. ORS 813.160(2).

A. BREATH TESTS

The State Police have adopted extensive administrative rules associated with breath testing "methods." These are found in OAR 257-030-0000 to 257-030-0100. Since 2006, the Intoxilyzer Model 8000 has been the "equipment" approved for use in the State of Oregon.

Evidence of the methods, procedures, equipment, and operator's credentials will come into a breath-test failure hearing record in documentary form. The ALJ should find the following documents in the hearing file in cases where the petitioner has allegedly failed a breath test:

- An Intoxilyzer 8000 Certificate of Accuracy;
- An Intoxilyzer 8000 Operator's Checklist; and
- An Intoxilyzer 8000 Breath Test Report, combined with the operator's name and permit number and approval to operate the equipment.

Typically, police officers will forward a copy of the completed checklist along with the breath test report to the Department, and these documents are placed in the Implied Consent hearing file. There are, however, occasions where the officer has not supplied either the checklist or the test report to the Department. There is no absolute requirement to do so prior to hearing. In these instances, if there is a request for an in person hearing, a *subpoena duces tecum* will be issued to the officer to bring these documents to the hearing. In the case of a telephone hearing, OAH will issue a subpoena directing the officer to submit these documents to OAH at least 72 hours before the scheduled hearing.

Petitioners sometimes argue that "these documents have not been certified." This objection is without merit. A document does not have to be certified as long as it is capable of

passing the "reasonable reliability" standard for all administrative hearing evidence found in ORS 183.450(1). This is notwithstanding the holding in *Lake v. MVD*, 133 Or App 550 (1995), which addressed the meaning of ORS 813.160(1)(b)(C) and the requirement to "certify" the accuracy of equipment. In *Lake*, Justice Leeson held that the process of certifying the Intoxilyzer 5000 (the approved breath testing instrument prior to 2006) required that the technician put a signature on the Intoxilyzer certification document in order to make it valid. This does not mean that the Department has to "certify" that the document in the hearing file is a true and accurate copy of the document it received from OSP.

Other challenges to the admissibility of the Intoxilyzer certificate should also be rejected. In the criminal context, the court has held that the certificates are admissible under the public records exception to the hearsay rule. *State v. Smith*, 66 Or App 703 (1984). More recently, the court held that the certificates are nontestimonial, and their admission, even without oral testimony of the technicians who prepared them, did not violate the defendant's right to confrontation under the Sixth Amendment. *State v. Norman*, 203 Or App 1 (2005); *see also State v. Bergin*, 231 Or App 36 (2009) (upholding *Norman*).

The OSP rules require that the test operator use and complete a checklist with each breath test, but the failure to record the information on a checklist does not invalidate the breath test if the testing procedures were otherwise followed. OAR 257-030-0130(1). *See* Section 6.c below.

An Implied Consent suspension may be based on verbal testimony that the testing procedure was correctly followed and that the checklist did not have to be supplied to the hearing record to create a valid basis for suspension. *Andries v. MVD*, 88 Or App 425 (1987). If the hearing record lacks a breath test report, the breath test result may be established by the officer's testimony that the Intoxilyzer printed a test report with a specific result. *State v. Holcomb*, 99 Or App 156 (1989). But, absent such testimony, a result on the instrument's digital display alone would not overcome the petitioner's assertion that he or she did not refuse to submit to a breath test. *Jones v. MVD*, 90 Or App 143 (1988).

***Practical Note*:** If you do not have a copy of the checklist, either in the file or provided by the officer at the time of hearing, remember the *Andries* case and OAR 257-030-0130(1). Obtain a blank checklist to use as an exemplar from which the officer can testify as to the procedures he or she used in administering the test.

1. Pretest Requirement

The first item on the Intoxilyzer Operator's Checklist is the pretest observation period. After a person has been arrested for DUII, the breath testing process begins with a requirement that the person be observed for a minimum of 15 minutes before taking the test.

OAR 257-030-0130(2) provides as follows:

(2) Pre-Test Requirement:

> (a) The operator is certain that the subject has not taken anything by mouth (drinking, smoking, eating, taking medication, etc.), vomited, or regurgitated liquid from the stomach into mouth, for at least fifteen minutes before taking the test;
> (b) There is no requirement that the operator be the person who makes observation of the subject. The person performing the Pre-Test Requirement (observation period) need not possess a permit for the testing of alcoholic content of blood;
> (c) The Pre-Test Requirement (observation period) does not require that the subject rinse the mouth or remove dentures prior to providing a breath sample;
> (d) The use of a mouthpiece by the subject during the testing sequence does not constitute a violation of the Pre-Test Requirement.

During the pretest observation period the officer may read the person the "rights and consequences" of the Implied Consent law and ask the person to take a breath test. If the person agrees to take the test, the officer will proceed through the testing sequence spelled out in the rule, once at least 15 minutes have passed. All required steps are listed on the Intoxilyzer Checklist and the practice of better officers is to check off each step as it is done, but this is not absolutely required.

a. Length of Observation

There has been extensive litigation over the years about the pretest observation. For instance, all the case law to date indicates that interpretations of the *time requirement* are strict. If the evidence does not establish that a 15-minute observation period preceded the taking of the first breath sample, the test results are deemed invalid because they were obtained in violation of the rule. *See, e.g., State v. Leach*, 94 Or App 778 (1989). The Operator's Checklist has the officer record not only when the observation started, but also when it ended.

***Practical Note*:** Make sure that the record contains evidence about both the start and stop times of the observation period. If there is a discrepancy between the stop time and the time that the sample was given, see whether the officer can account for this discrepancy. Ask the officer if there were any pretest violations during this intervening period.

Another Practical Note: Officers have varying approaches to identifying the "end" time of the observation period. Some officers document the end time as the time they start the testing sequence on the Intoxilyzer. Others officers note it as the time the person submits his or her first breath sample. And some other officers use the point at which the person provides his or her second breath sample as the end time. If the observation period end time noted on the Operator's Checklist is different from, or earlier than, the time of the second breath sample on the Intoxilyzer report, the ALJ should determine whether the officer continued to observe the person for any pretest violations until the person provided both samples necessary to complete the test.

The Intoxilyzer itself has a digital timepiece that is visible to the officer and is the source of time recordings appearing on the Intoxilyzer evidence card. A description of the Intoxilyzer, as an instrument, is found in the *Intoxilyzer 8000 Operator's Guide* published by the Oregon

State Police Forensic Services Division.[1] The digital timepiece may or may not coincide with other clocks or watches used by the officer to time the observation period.

***Practical Note*:** If two timepieces were used, such as the officer's watch to start the observation and the Intoxilyzer itself to establish the ending time, does the evidence establish that there actually was 15 minutes of *elapsed* time before the test? Two timepieces are not necessarily fatal to the pre-test observation. *See State v. Snuggerud*, 153 Or App 300 (1998).

Objections to the breath test based on the lapse of time between the arrest and the test should also be rejected. While a delay in the breath test administration may form the basis for a defense in a DUII criminal trial, it has no application in the Implied Consent forum. The Implied Consent laws apply to the time of the breath test, not the time of the driving. ORS 813.100(3); *see also Heaverin v. MVD*, 80 Or App 384, *rev den* 302 Or 159 (1986).

b. Manner of Observation

A great deal of litigation has surrounded the *manner* in which the pretest observation is conducted. In *State v. Lessar*, 105 Or App 512 (1991), however, the court held that absolute certainty was not required to satisfy the pretest requirement. The state's burden respecting the observation may be met with evidence that supports a conclusion that the subject was observed in a "reasonable" manner. In *Lessar*, this included one minute of time when the person was still in the police car.

The Intoxilyzer 8000 breath test procedure involves two breath samples. Under OAR 257-030-0130(3)(f), the operator is required to continue to observe the test subject and remain certain that the subject has not committed any of the prohibited acts (drink, smoke, eat, take medication, etc., vomit or regurgitate) until the second breath sample request period is completed.

Below are additional cases dealing with the manner of pretest observation:

- *State v. Hanson*, 19 Or App 498 (1974): "coughing" was not an activity that violates the pre-test requirement and momentary breaks in visual contact with the subject's face do not violate the pre-test requirements, so long as the officer is "in position" to observe with his or her other senses.

- *State v. Allen*, 74 Or App 275 (1985): a person is not required to remove his or her dentures before the test (this rule is now captured in OAR 257-030-0070(2)(c)).

[1] The current Oregon State Police Forensic Services Division Intoxilyzer 8000 Operator's Guide is available online at: http://www.oregon.gov/OSP/FORENSICS/docs/8000_Oper_Guide_1.1_eff_090806.pdf.

- *State v. Goddard*, 87 Or App 130 (1987): there is no requirement that the subject rinse his or her mouth before the test. The fact that the petitioner had a few flecks or grains of chewing tobacco in his mouth during the breath test did not invalidate the test.

- *State v. Demings*, 116 Or App 394 (1993): officer does not have to check a subject's mouth before the test.

- *State v. Snuggerud*, 153 Or App 300 (1998): (1) two timepieces can be used to measure the appropriate time passage for pretest purposes; (2) the officer does not have to check the subject's mouth before the test; (3) coughing and blowing the nose does not violate the pre-test requirements.

In *State v. Balderson*, 138 Or App 531 (1996), the defendant presented evidence that she regurgitated a liquid from her stomach into her mouth, *and* that the officer did a careful enough observation to be able to establish a reasonable certainty, *at the time* of the observation, that no violation took place. The question posed to the court was whether the validity of a pretest observation is solely a subjective test. That is, does legal validity depend entirely on the officer's belief that no violations occurred, or upon this belief *and* the ability to find at some later time that no violations actually occurred? A divided court ruled that the pretest requirement *is a subjective test only* and cited the language in the pre-test rule. In 1996, the Supreme Court granted review of *Balderson*, but then reversed itself, stating that review had been granted improvidently. *State v. Balderson*, 138 Or App 531 (1996).

***Practical Note*:** Essentially, the *Balderson* ruling allows the ALJ to ignore evidence of a violation as long as the officer was watching the subject closely enough to create a reasonable certainty that there were no violations. The court's majority decision suggests, however, that the fact that credible evidence of a violation is being offered might cast doubt on the reasonableness of the officer's observation.

In *State v. Barletta*, 188 Or App 113 (2003), the court held that the officer did not comply with the pretest requirement where he allowed the defendant to use the restroom during the pretest observation period. Although the officer subjectively believed that the defendant did not engage in any of the prohibited pretest acts while in the restroom, the court found the belief was not objectively reasonable. The officer did not ask the defendant whether she vomited, burped or regurgitated when she returned from the restroom. Also, there was no evidence as to whether the officer could have heard what the petitioner was doing while she was out of his sight.

c. Help From Others in Completing Pre-test Observation

Several cases address the issue of having different people involved in the pretest observation of the person to be tested.

- *State v. McVay*, 83 Or App 312 (1987): officer merely asked another officer, who had been sharing in the observation, if the subject had put anything in his mouth, and although the answer was "no," the court held this questioning was insufficient since nothing was asked about the other possible pre-test violations, such as vomiting.

- *State v. McCormack*, 92 Or App 84 (1988): the court held that it was permissible to satisfy the state's burden of proof when one officer testified about how another officer (not present to testify) conducted the breath test.

- *State v. Herring*, 112 Or App 83 (1992): a police officer was allowed to delegate the observation period to another officer for a while, and properly asked the other officer whether the arrested person had done "anything." Given the understanding between the two officers, which was described in the record, the court held this was legally sufficient; *see also*, OAR 257-030-0070(2)(b).

- *Gildroy v. MVD*, 102 Or App 138, *aff'd on other grounds*, 315 Or 617 (1993): a police officer was allowed to demonstrate his certainty that no violations took place during the pre-test by consulting *after* the breath test with another officer who had been sharing the observation with him

- *State v. Tynon*, 152 Or App 693 (1998), *rev den* 328 Or 365 (1999): the fact that there has been no *express* communication between the operator of the Intoxilyzer and the observer of the arrested person does not preclude a finding that, under the totality of the circumstances, the operator formed the belief required by rule, but the operator must have a *subjective belief* that the rule's requirements were met, and this belief must be *objectively reasonable*.

2. Other Procedures

Once the pretest has been completed, the officer is required to proceed with the test according to OAR 257-030-0130(3)-(6). These steps, set out on the Operator's Checklist, are:

> Push the start test button;
> Enter the operator and test subject information using the bar code scanner or keyboard;
> Instruct the test subject on how to blow and take the sample;
> Have the subject provide the first breath sample when "Please blow into the mouthpiece to activate tone" appears on the display;
> Continue the observation period until the instrument is ready to accept the subject's second breath sample;
> Have the subject provide the second breath sample when "Please blow into the mouthpiece to activate tone" again appears on the display;
> Enter any appropriate comments regarding the testing sequence; and
> Remove the test report from the printer.

The test procedure is outlined in OAR 257-030-0130(3) and the Intoxilyzer's testing sequence is set out in OAR 257-030-0130(4). In short, once an authorized operator initiates a testing sequence and completes the data entry process, the Intoxilyzer draws in air for an "air blank" to purge any contaminants in the sample cell and check the room air. After that, the instrument performs a diagnostic check, and then draws another air blank. If all parameters are met, the instrument proceeds to the next step, the first breath sample. When the sampling phase starts, the Intoxilyzer allows about three minutes for the test subject to provide a valid breath sample. After two more air blank checks, if all parameters are still met, the instrument will be ready to accept the second breath sample. That sample is followed by another air blank, a control sample, and a final air blank.

3. Officer's Qualifications

In *Fleming v. MVD*, 87 Or App 613 (1987), the court held that a police officer need not physically possess a permit to operate the Intoxilyzer, so long as the State Police have a valid permit on file for the officer. An officer's qualifications may be established at hearing with evidence that the officer took the training course, passed the written examination and was issued a certification by the State Police.

In *State v. Valero,* 231 Or App 538 (2009), the court held that an officer need not physically possess a permit to operate the Intoxilyzer, so long as the evidence establishes that the officer has completed the training course, passed the test and been issued a permit. In *Valero,* the officer had been trained and certified to use the Intoxilyzer 8000 just a few days before he arrested the defendant, but his information and PIN number had yet to be entered into the statewide data system. Because of this, the instrument did not recognize the officer's PIN and he was unable to initiate a testing sequence. In accordance with the training he had received, the officer borrowed a fellow officer's PIN and used it to administer the test. The court also found the fact that the officer had used another officer's PIN did not affect in any way the accuracy of the test result.

According to ORS 813.160(1)(b)(E), a person must be a "police officer" to receive a permit. Under OAR 257-030-0150(2), this includes reserve officers. The administrative rules also provide that an officer will attend a course of study prescribed by the OSP, and pass a test before receiving a permit. OAR 257-030-0160.

In a breath test failure hearing, the officer's name and Intoxilyzer permit number will be printed on the bottom of the breath test report page.

***Practical Note*:** While all Intoxilyzer certifications are issued by the OSP, the rules provide that the training necessary to qualify for a permit may have been presented by another police agency acting under the auspices of the OSP. This is a subject that occasionally requires development in the hearing record.

Under ORS 813.160, officer certifications for the Intoxilyzer have no expiration date, as long as the person remains a police officer. *See State v. Spencer*, 82 Or App 358 (1986), *rev'd and rem'd* 305 Or 59 (1988). But, pursuant to OAR 257-030-0160(4), permits expire at intervals not to exceed three years from the date of issuance unless renewed for an additional three year period. Renewal, suspension and reinstatement and revocation of permits are addressed in OAR 257-030-0160(5), (6) and (7). As a practical matter, however, the expiration or revocation of an officer's Intoxilyzer permit is not likely to be an issue in an Implied Consent hearing because only officers who possess both a valid permit and PIN will be able to administer a breath test. OAR 257-030-0130(4)(a) ("Only officers who possess both a valid permit and PIN will be authorized to conduct a test sequence.")

4. Equipment Certification

ORS 813.160(1)(b) and State Police administrative rules associated with breath testing provide for regular testing of the approved equipment to see that it remains in proper working order.

A broad challenge to the use of the Intoxilyzer was made in *State v. Allen*, 104 Or App 622, 627 (1990), but the court rejected the defendant's argument as "an attempt to challenge the validity and reliability of the scientific principles underlying alcohol breath tests. Those tests have been approved by the legislature, and defendant's argument can only be addressed to that body." In *State v. Palomino*, 37 Or App 309 (1978), however, the court held that evidence of a *later* malfunction did not necessarily rebut the accuracy of a test given before the malfunction apparently occurred.

The accuracy of a given test result is not, however, within the scope of an Implied Consent hearing. In *Owens v. MVD*, 319 Or 259 (1994), the court held:

> [E]vidence impeaching the test result of a chemical breath test that is administered to determine the blood alcohol content of a person who has been arrested for DUII, other than the evidence permitted under ORS 813.410(5)(g) and (h), is not relevant to any issue that is within the permissible scope of a license suspension hearing as set forth in ORS 813.410(5).

Owens v. MVD, 319 Or at 271-272.

Each Intoxilyzer is identified by a unique serial number issued by the Oregon State Police. The serial number of the Intoxilyzer used to test a person is recorded on the ICCR. The Intoxilyzer certification provided to ALJs for hearings is a copy of the certification that the state police are required to prepare. The Department is to submit the appropriate Intoxilyzer certification to OAH as part of the hearing file. Without evidence in the record to certify the accuracy of the equipment in accordance with ORS 813.160(1)(b)(C), the suspension will not be valid.

Practical Note: Occasionally, the Department will neglect to include the Intoxilyzer certificate, or will submit the wrong certificate with the file. When this occurs, the ALJ may in his or her discretion, leave the record open to allow the Department's witness (the subpoenaed police officer) to submit the document. The officer may access the certificate on line from the Oregon State Police Forensic Services Division Laboratory Online Information System (LOIS).[2]

By statute, all Intoxilyzer devices must be tested and certified as accurate "at intervals of not more than 90 days." ORS 813.160(1)(b)(C). If a certification expired before a person's breath was tested on a given Intoxilyzer, the certification document will not satisfy the *prima facie* element under ORS 813.410(6)(h). *State v. McClary*, 59 Or App 553 (1982). The type of testing that OSP conducts in order to certify the Intoxilyzer is briefly explained in OAR 257-030-0170. An Intoxilyzer may produce test readings that are as much as .01 percent higher or .02 percent lower than the expected test value, and still pass the certification process.

"Although the Intoxilyzer used by OSP in these cases is capable of providing readings to three decimal places, OSP's practice is not to use the third decimal. In fact, the machines are set so that only two digits are printed." *State v. Acosta*, 112 Or App 191, 195 (1992). The *Acosta* court held that "the fact that use of the third digit provides a more precise measure of the accuracy of an Intoxilyzer machine does not compel OSP to interpret its rule to require use of the third digit." *Id*.

DMV's *prima facie* case is based on the equipment certification that was in effect *when the breath test was administered*. There is no burden to produce prior certifications, or any certifications that were issued following the test at issue.

5. Independent Tests

The Implied Consent law provides that a person arrested for DUII is entitled to a reasonable opportunity to an independent test *if* he or she has agreed to take the breath test. In the criminal law arena, the failure of the police to honor this right may affect the admissibility of the breath test results. *See State v. Hilditch,* 36 Or App 435 (1978). Under the Implied Consent law, however, the denial of a request for an independent test does not affect the validity of the suspension and falls outside the scope of the hearing. *Lawrie v. MVD,* 134 Or App 575 (1995).

6. Breath Test Reports

OAR 257-030-0130(3)(c) identifies the ways the breath testing phase is concluded:

- The instrument completes the test sequence and the operator obtains a completed test report;

[2] The certificates and may be retrieved by serial number and /or location by specific dates at: https://xn.osp.state.or.us/LOIS/other/ReportView.aspx

- The operator presses the "Start Test" button or the "R" key to indicate that the subject refused the test; or

- The operator or the instrument aborts the testing sequence.

a. Completed Evidence Reports

According to OAR 257-030-0130(5), a "completed" test report is one that indicates a numeric breath test result (such as ".13"), a refusal or the presence of an interfering substance. If the instrument detects the presence of an interfering substance, the print out on the breath test report will indicate "Interfering Substance" and "*Invalid Test – Interfering Substance Detected." This is a completed test, and the operator is directed not to restart the testing sequence.

A test report bearing the result "Refused" is generated when the officer pushes the start test button a second time or the "R" key. An officer might do so once the test subject has expressly, or by other conduct, refused to submit to a breath test. There is no requirement, in either the statute or the case law, which requires that a "refusal" test report be generated, however.

b. Incomplete Test Report

According to OAR 257-030-0130(6), the following conditions will result in an incomplete test report:

> (1) If the arrested person fails to blow with sufficient force to activate the instrument's minimum breath flow requirements during either of the three minute breath sampling periods, the instrument will issue a report stating "Invalid Test - No Sample Given."
>
> (2) If the operator receives an exception message and printout from the instrument with the result of "Invalid Sample – Residual Alcohol Present" or simply "*Invalid Test," the operator is directed to consult the "Suggested Corrective Action" set out at the bottom of the test report page, take the appropriate action and restart the testing sequence.

The Intoxilyzer is capable of detecting mouth alcohol. When the test report indicates "Residual Alcohol Present," the operator is required to conduct another pretest observation of at least 15 minutes before restarting the test. Forgetting to conduct another 15 minute observation period following a residual alcohol present report is one of the most frequent police officer mistakes, and, if not corrected, will invalidate the Implied Consent suspension for failing a breath test.

The Intoxilyzer is also capable of testing room air for fumes and contaminants. The "Check Ambient Conditions" message relates to alcohol or other vapors detected in room air near the Intoxilyzer. If this occurs, the officer may wait and retest with the same Intoxilyzer, or

move the test subject to continue with the testing. Some officers fan the area around the Intoxilyzer, after moving the subject a distance away, and then restart the testing sequence. And, if there is radio frequency interference in the area, the words "RFI Detected" are printed on the report. Other error messages are listed in the *Intoxilyzer 8000 Operator's Guide* and are too numerous to set out here. Depending on the type of message, the Intoxilyzer may be reset and reused, or the process may have to be terminated, at least with that particular Intoxilyzer.

c. Omissions from the Checklist and Test Report

As noted above, the officer's failure to record specified information on the Operator's Checklist or to enter specific data into the instrument will not invalidate a breath test result if the officer otherwise followed the approved testing procedures. OAR 257-030-0130(7). *See also State v. Olson*, 88 Or App 271 (1987), where the officer filled out a checklist, as the rules required, but did not check a box related to one of the steps. The officer testified that he had completed the unchecked step and the rest of the test properly. The court stated that, "[c]ompletion of the checklist is not an act performed for its own sake. The checklist and the officer's testimony together establish that a valid result was produced." *Olson*, 88 Or at 274. In *State v. Roe*, 95 Or App 477 (1989), the court reached a similar conclusion in a case where the officer incorrectly recorded the serial number of the Intoxilyzer being used. *See also State v. Sweeney*, 88 Or App 358 (1988).

The leading case in the area of procedural omissions during the breath test is *State v. Hemkin*, 102 Or App 79 (1990). In *Hemkin*, the officer failed to copy down the breath test result from the evidence card to the Intoxilyzer checklist. The court stated:

> We have tried to make it clear that the Intoxilyzer checklist is merely a means to record how the officer performed the breath test and that its completion or lack of it does not necessarily affect the validity of the test results.
> * * *
> [T]he failure to comply with a procedural step in administering the breath test is not a basis to suppress if the accuracy of the test result is not jeopardized.

Hemkin, 102 Or App at 81-82. This decision is potentially applicable to many types of errors and omissions in the breath testing area, probably well beyond the mere failure to record data accurately.

d. Ambiguous Results

In the time before the Intoxilyzer 8000, it was possible for the test operator to insert a test card upside down or backwards and get multiple print-overs, thus making the results hard to read. The court evaluated such a situation in *State v. Holcomb*, 99 Or App 156 (1989). In *Holcomb*, the evidence card could be interpreted as showing a .07, .08, .17, or .18 percent test result. The *Holcomb* court held that because the error related to recording the result, rather than the performance of the Intoxilyzer, the results were admissible and it was up to the trier of fact to

determine the correct interpretation. The court then found reliable evidence in the record to support the findings that the result was .17 percent. Cases of this nature are almost non-existent today with the Intoxilyzer model 8000. *See also State v. Roberts*, 241 Or App 582 (2011), holding that a problem with the test result printout (on a test performed with the Intoxilyzer 5000) did not render the test result invalid. "[T]he evidence card that was printed is complete. It reflects results for all the testing steps: diagnostics, the first air blank, the subject test, and the second air blank. It contains no error message of any kind. That the printing problem makes the card difficult to read is immaterial." *Id.* at 596.

B. BLOOD TESTS

In addition to basic *prima facie* elements of: being under arrest for DUII, receiving medical attention, in a health care facility, immediately following a motor vehicle accident, and having been read Section I of the rights and consequences, there are several other *prima facie* elements for a blood test suspension:

- The blood was drawn at the request of a police officer. ORS 813.100.
- The blood was drawn by a duly licensed physician or a person acting under the direction and control of a duly licensed physician. ORS 813.160(2).
- The blood analysis of the person's blood alcohol content was performed in an accredited or certified laboratory, such as a forensic laboratory established by the Department of State Police under ORS 181.080 that is accredited by a national forensic accrediting organization. ORS 813.160(1).
- The written report prepared by the individual who performed the test shall contain the name of the police officer upon whose request the test was administered. ORS 813.160(3).

Practical Note: As a general rule, the blood test result will be in the file in the form of a letter from the testing laboratory. The letter will identify the officer who requested the blood draw, and the manner in which the analysis was performed. The letterhead should document the laboratory's accreditation.

In *State v. Warner*, 181 Or App 622 (2002), the criminal court allowed evidence of the results of a blood test, even though the state could not establish that the sample was drawn by a doctor, or someone acting under the direction and control of a doctor, as required by ORS 813.160(2). That case was analyzed under ORS 136.432,[3] and without consideration of the requirements of ORS 813.410, which states that an Implied Consent suspension is valid if,

[3] For a more detailed discussion of ORS 136.432, see Chapter 2, Implied Consent Historical Perspective and Subsequent Developments.

among other things, the methods, procedures and equipment involved in the test complied with the statutes and rules.

***Practical Note*:** The evidence that the person is under arrest and was receiving medical treatment in a health care facility following a motor vehicle accident will come from the police officer witness, as will most of the other *prima facie* elements. In addition, however, there may be a written report in the file from the person who drew blood. The file should also contain a written report from the person who tested the blood. Although hearsay, the reports are admissible and will establish some of the elements listed above.

C. URINE TEST REFUSALS

Legal advice from the Department of Justice instructed the Department that in urine test refusal hearings where the person originally passed the breath test, full documentation of all aspects of the breath test was still required. *See* Sarah Castner memo to Dwight Apple dated August 21, 1996.

CHAPTER 15

FAILURE OF A TEST

AND THE APPROPRIATE

LENGTH OF SUSPENSION

*****

The Implied Consent law, ORS 813.100, authorizes suspension of the driving privileges of a person arrested for DUII who either refuses or fails a chemical test. Refusal to take a chemical test was addressed in Chapter 13, *Refusing a Test*, and this chapter will focus on what constitutes a failure of the tests, and what the consequences of that failure will be.

A. THE MOST COMMON FAILURE

The majority of motorists arrested for DUII will face an Implied Consent suspension for failing a chemical test if the result of the test discloses a blood alcohol content (BAC) of .08 percent or higher. ORS 813.410(6)(c)(A).

As discussed in Chapter 14, *Methods, Equipment and Procedures Used to Administer a Valid Test*, the question of the accuracy of the breath test reading is not within the scope of an Implied Consent hearing. *Owens v. MVD*, 319 Or 259, 272-273 (1994). There is a conclusive presumption in the Implied Consent statutes that if a person is at a .08 percent or above blood alcohol level, he or she is under the influence of intoxicants. In addition, the breath test result is also conclusively presumed to be accurate. The methods, procedures, and proper certification of the equipment and/or officer involved are of course still subject to challenge.

Practical Note: Do not confuse *Owens v. MVD*, 319 Or 259 (1994), with *State v. Owens*, 302 Or 196 (1986). *State v. Owens* contains the classic probable cause analysis, while *Owens v. MVD*, addresses a challenge to the accuracy of a breath test result.

A fairly common defense used in DUII *criminal* trials is that the arrested person had consumed a few drinks just before driving, and therefore, was not under the influence at the time of driving because the alcohol had not yet been absorbed into the bloodstream. The argument in support of the "rising BAC" defense is that the blood alcohol content at the time of driving was actually much lower than the blood alcohol content that was measured by the Intoxilyzer. Occasionally, this defense is successful in criminal court. The "rising BAC" defense is not, however, successful in Implied Consent cases. In *Heaverin v. MVD*, 80 Or App 384, *rev den* 302 Or 159 (1986), and *Updegraff v. MVD*, 80 Or App 378, *rev den* 302 Or 36 (1986), the court held that the Implied Consent law is concerned with the BAC at *the time of the test*, not at the time of driving. *See also*, ORS 813.410(6)(c) (focusing on the level of alcohol in the person's blood at the time of the test). As a result, a challenge based on the fact that the test was delayed is not viable in the Implied Consent context.

B. RESULTS <.08 PERCENT THAT STILL CONSTITUTE A FAILURE

If a person arrested for DUII produces a breath test result under .08 percent (i.e., "passes" the breath test), the person will not be subject to an Implied Consent suspension unless one of the following exceptions applies:

- The person was driving a "commercial motor vehicle", as defined in ORS 801.208;

- The person is under 21 years of age;

- An officer reasonably suspects that a person who "passed" the breath test is under the influence of something in addition to alcohol, such as a controlled substance or inhalant or combination thereof. (See conditions precedent to a urine test.)

ORS 801.208 defines a commercial vehicle as one with a gross vehicle weight rating of 26,001 pounds or one that transports 16 or more passengers, including the driver. A person driving a commercial vehicle will fail a chemical test if the result of the test is a BAC of .04 percent or higher. If the person is driving a commercial vehicle at the time of the arrest, and produces a BAC between .04 and .07 percent, the person is subject to suspension of their Commercial Driving License (CDL). ORS 813.410(2). If, however, the person is arrested while driving a commercial vehicle, and produces a BAC of .08 percent or more, the person faces suspension of both the CDL and his or her base driver license. ORS 813.410(6)(c)(B) and ORS 813.410(2). The suspension period will be increased if, at the time of arrest, the person was driving a commercial vehicle containing a hazardous material. The suspension periods for an Implied Consent suspension of a commercial license are set out at ORS 813.404.

If the person arrested for DUII is less than 21 years old, *any* amount of alcohol in the blood at the time of the test is a test failure. ORS 813.410(6)(c)(C) and 813.300(3).

***Practical Note*:** Remember that the zero tolerance policy for alcohol in minor drivers does not affect the standard of probable cause that is required to lawfully arrest the minor. The four elements of probable cause for DUII are the same. *See* Chapter 8, *Probable Cause.*

C. ENHANCED SUSPENSIONS

ORS 813.420 sets out the suspension periods for most test failures. Some Implied Consent suspensions, however, are subject to *enhancement*, because of the person's drive record and other circumstances. These are set out at ORS 813.430. If, at the time of the arrest for DUII, any of the following factors are present, the person will be subject to an enhanced suspension period:

- The person is *currently* participating in a DUII diversion program in Oregon, or a similar program in any other state;

- Within *five years* of the arrest, the person was suspended under the Implied Consent law;

- Within *five years* of the arrest, the person was convicted of DUII in Oregon, or the statutory counterpart of DUII in any other jurisdiction, or a similar municipal ordinance in this state or another jurisdiction;

- Within *five* years of the arrest, the person commenced participating in a DUII diversion program in Oregon, or a similar program in any other state.

***Practical Note*:** If an officer alleges that the person is subject to an enhanced suspension, you should find a certified copy of the person's drive record in the file. Verify that the qualifying entries (suspension, conviction or diversion) were *within five years* of the arrest that is the subject of the hearing.

The following DMV charts summarize the lengths of suspension given all the variables:

OREGON IMPLIED CONSENT (BASE LICENSE)

CODE	SUSPENSION TYPE	LENGTH	HARDSHIP WAIT
096	REFUSE BT	1 year	90 days
097	REFUSE BT*****	3 years	3 year
786	REFUSE UA	1 year	90 days
787	REFUSE UA*	3 years	3 years
792	REFUSE UA (Consecutive)	1 year	180 days
793	REFUSE UA***** (Consecutive)	3 years	3 years
328	R/BLD TST	1 year	90 days
329	R/BLD TST*	3 years	3 year
094	BAC FAIL	90 days	30 days
095	BAC FAIL*****	1 year	1 year
779	F/BLD TST	90 days	30 days
780	F/BLD TST*	1 year	1 year

OREGON IMPLIED CONSENT (CDL)

CODE	SUSPENSION TYPE	LENGTH	HARDSHIP WAIT
350	REFUSE CDL	3 years	N/A
354	REFUSE CDL*****	Lifetime	N/A
351	REFUSE HAZ	5 years	N/A
355	REFUSE HAZ*****	Lifetime	N/A
788	R/UA CDL	3 years	N/A
789	R/UA HAZ	5 years	N/A

790	R/UA CDL*	Lifetime	N/A
791	R/UA HAZ*	Lifetime	N/A
388	R/BLD CDL	3 years	N/A
390	R/BLD CDL*	Lifetime	N/A
389	R/BLD HAZ	5 years	N/A
391	R/BLD HAZ*	Lifetime	N/A
352	BFAIL CMV	1 year	N/A
356	BFAIL CMV*****	Lifetime	N/A
353	BFAIL HAZ	3 years	N/A
357	BFAIL HAZ*	Lifetime	N/A
781	F/BLD CMV	1 year	N/A
782	F/BLD CMV*	Lifetime	N/A
783	F/BLD HAZ	3 years	N/A
784	F/BLD HAZ *	Lifetime	N/A

* indicates that the suspension is enhanced for one or more of the reasons permitted by statute.

CHAPTER 16

IMPLIED CONSENT

PAPERWORK

*****

Three of the *prima facie* elements[1] of the Department's case in support of an Implied Consent suspension involve what is commonly referred to as the Implied Consent Combined Report (ICCR), the Implied Consent form. The ICCR will be included in every Implied Consent file. Not only does the ICCR serve as the notice of suspension, but it also contains the rights and consequences that must be read to all drivers prior to requesting a chemical test. *See* Chapter 11, *Rights and Consequences*. This chapter describes the ICCR and discusses common errors that come up during Implied Consent hearings.

A. THE IMPLIED CONSENT COMBINED REPORT

Following enactment of the Implied Consent law in 1984, DMV developed a multi-part form that was distributed to all Oregon police agencies for use with DUII arrests. This form is entitled, "Implied Consent Combined Report, Notice of Intent to Suspend Driver, and Temporary Driver Permit" (ICCR). The first four pages of the ICCR consist of an original and three copies, a white one marked "DMV copy," a green one marked "Police copy" and a yellow one marked "Driver copy." The fifth page is entitled, "Notice of Rights and Procedures in Driver and Motor Vehicle Services Implied Consent Hearings" (Notice of Rights and Procedures). After completing the form, the officer should distribute the pages in accordance with their labeling.

The original (top page) and DMV copy of the ICCR are sent to the Department. One copy is routed to the Department's Driver Suspension unit and, if a hearing is requested, the other copy eventually makes its way to OAH via the hearing referral process. The latter copy will appear in the file sent to the ALJ. OAR 735-090-0040 requires that the Department's copies of the ICCR must be received within 10 days of the date of arrest in order to be admissible in an Implied Consent hearing. If no hearing is requested, however, the Department will post the suspension to the person's driving record as long as the police send the ICCR to the Department *before* the suspension is scheduled to start, even if it is beyond the tenth day.

The yellow Driver copy of the ICCR is about two inches longer than the other copies because it contains a temporary driving permit. The permit is located at the bottom of the page. The officer completes the form with information from a D07 report, and then has the driver sign the permit. Issues concerning the temporary permit and errors on the permit are not within the scope of an Implied Consent hearing, and will have no bearing on the validity of a suspension. ORS 813.410(6).

B. THE NOTICE OF RIGHTS AND PROCEDURES

The fifth page in the ICCR, the Notice of Rights and Procedures, is generally given to the arrested person by the police, along with the Driver copy of the ICCR. Because the police are

[1] *See, e.g.*, ORS 813.410(6)(f): "The person was given written notice required under ORS 813.100."

not required to provide the arrested driver with a copy of the Notice of Rights and Procedures, the failure to do so will not invalidate a suspension. A copy of the Notice of Rights and Procedures is generally included in the hearing file and should be shared with the petitioner and/or counsel prior to commencing the hearing. The Notice of Rights and Procedures outlines the hearing process and includes the following information:

- the right to have an attorney present;
- the applicable laws;
- the scope of the hearing;
- the procedure for obtaining subpoenas;
- information about the ALJ;
- the time for the hearing;
- information about late requests;
- the order of the evidence;
- the burden of presenting evidence;
- requirement that witnesses testify under oath or affirmation to tell the truth;
- broad categories of admissible evidence;
- objections to evidence;
- rulings on evidence;
- the hearing record;
- the final order and appeal.

The information contained in the Notice of Rights and Procedures generally follows the notice requirements for contested case hearings in the Administrative Procedures Act (APA). ORS 183.413. Although the Notice of Rights and Procedures is part of the multi-part ICCR, it is a separate document from the ICCR. Giving the arrested person a copy of the Notice of Rights and Procedures will not establish the *prima facie* notice element required by ORS 813.410(6)(f). The *prima facie* element can only be established by providing the person with a copy of the ICCR.

Practical Note: To insure compliance with the APA's notice requirements, ALJs can show the Notice of Rights and Procedures document to the petitioner, and if applicable, to counsel, at the start of the hearing. Many ALJs ask the petitioner or counsel if they will "waive reading" of the document, and in the case of a *pro se* petitioner, will spend a few moments ensuring that the petitioner has read and generally understands the information contained in the document. The Notice of Rights and Procedures is typically marked and admitted as an exhibit. *See Cobine v. MVD*, 102 Or App 17 (1990).

C. COMMON ERRORS ON THE ICCR

The ICCR contains important information concerning the length and reason for the suspension, the procedure for requesting a hearing, and the rights and consequences. Officers

must complete portions of the ICCR before providing the driver with his or her copy. In addition, the officer must sign the ICCR somewhere below the printed words, "I affirm by my signature that the foregoing events occurred." *See* Justice Department memos to Dwight Apple dated March 27, 1986, December 23, 1986, and April 11, 1994.

1. Scrivener's Errors

A scrivener's or clerical error is defined as "[a]n error resulting from a minor mistake or inadvertence, esp. [*sic*] in writing or copying something on the record, and not from judicial reasoning or determination." *Black's Law Dictionary* 563 (7th ed 1999). In Implied Consent hearings, typical scrivener's errors include writing the wrong date or time of arrest, or an incorrect address or date of birth, or a misspelled name. These errors do not affect the validity of the suspension. *See, e.g., State v. Dalton*, 132 Or App 36, *rev den* 321 Or 94 (1995) (scrivener's error in date did not invalidate otherwise valid warrant).

***Practical Note*:** If the error was made in the spelling of the person's name or in the date of birth, clarify with the officer how he or she knows that the petitioner is the person who was arrested. How was the identity of petitioner confirmed? If the officer wrote the wrong arrest date or time, make sure the hearing record reflects the accurate information. *See* Justice Department memo to Norman Chun dated February 12, 1991.

2. Length of Suspension

If the officer mistakenly marks the ICCR to indicate that the driver is subject to an enhanced suspension, the ALJ may correct this mistake on the record and in the Final Order. There is no prejudice to the driver if the suspension period is ultimately shorter than what the driver was led to expect by the ICCR.

The driver would be prejudiced, however, if the suspension period were increased beyond what is noted on the ICCR. For example, if the ICCR indicated a one-year suspension, but evidence adduced at hearing supported an enhanced, three-year suspension, the petitioner would be prejudiced if the ALJ ordered the longer suspension.

3. Wrong Boxes or No Boxes Checked on Department's Copy

In *Coulter v. DMV*, 168 Or App 442 (2000), the court addressed the issue of errors or omissions in the suspension boxes on the ICCR. In *Coulter*, the petitioner *refused* the breath test but the ICCR given to petitioner and sent to DMV both indicated that petitioner *failed* the test. This error was discovered at the time of hearing. The ALJ in *Coulter* concluded that the error was harmless because the petitioner knew that he had refused the test. The ALJ imposed the suspension. Petitioner appealed and won at the circuit court. The Department appealed, and the Court of Appeals affirmed.

The *Coulter* court held that the ICCR is a jurisdictional document. The court reasoned that unless the ICCR received by the Department is properly completed, the Department lacks jurisdiction to suspend the person's driving privileges. The court ruled that ORS 813.410 requires that the ICCR be in substantial compliance with ORS 813.120[2], and that substantial compliance requirement is jurisdictional. *Coulter v. DMV*, 168 Or App at 449. The *Coulter* court further held that, "Giving no reason for the suspension would neither comply nor substantially comply with ORS 813.120. Similarly, giving an erroneous reason also cannot constitute substantial compliance with ORS 813.120." *Id*.

When read closely, the *Coulter* opinion contains several confusing elements. For instance, in finding that the ICCR is jurisdictional, the court repeatedly referred to the copy sent by the police to the Department. Presumably, this is because ORS 813.410(1) requires that "*If the Department of Transportation receives* from a police officer a report that is in substantial compliance with ORS 813.120, the Department shall suspend the driving privileges." (Emphasis added.) If the *Coulter* opinion is taken at face value, then only the copy received by the Department can establish jurisdiction.

The *Coulter* court suggested that a defective ICCR could be amended before or during a hearing. As a practical matter, if the officer waits until the hearing to amend the ICCR, jurisdiction would still not exist unless the amended ICCR was timely received by the Department. Receipt by an ALJ is not receipt by the Department for purposes of ORS 813.120.

Practical Note: If you start a hearing and discover that the ICCR alleges the wrong basis for the suspension, and there is no attempt to amend, the case should be dismissed for lack of jurisdiction. If the officer attempts to cure the defect at hearing, inquire into whether the Department has received an amended ICCR, and if so, when. If the amended ICCR was received after the 10 days, or not submitted to the Department at all, there is still no jurisdiction.

4. Wrong Boxes or No Boxes Checked on Petitioner's Copy

The *Coulter* opinion provides no guidance to the situation in which the boxes marked on the ICCR sent to DMV differs from the copy that is given to the petitioner. Where the form sent to DMV correctly reflects the officer's actions, but the one issued to the petitioner fails to show any basis for the suspension, or shows the wrong basis, the problem is notice to the petitioner rather than jurisdiction of the Department. *Coulter* dictates that the Department would have jurisdiction, but the ALJ needs to analyze the case from the APA standpoint, *i.e.* was the person provided with "a short and plain statement of the matters asserted or charged." ORS 183.415(2)(d). It is the Department's responsibility to ensure that the requirements of ORS 183.415 have been met.

[2] ORS 813.120 provides, in pertinent part, that the police submit a report that discloses substantially all of the following information: "(c) whether the person refused to submit to a test or if the person submitted to a breath or blood test whether the level of alcohol in the person's blood, as shown by the test, was sufficient to constitute being under the influence of intoxicating liquor under ORS 813.300."

In *Basile v. MVD*, 167 Or App 335 (2000), the petitioner was given an Implied Consent suspension notice that correctly advised him of the reason for the suspension (test refusal) but failed to advise him of any suspension length. The court held that, considering the information petitioner *did* receive, he was "adequately advised" of the matters asserted. The court thus upheld the imposition of a suspension supported by the evidence in the hearing record.

Although *Coulter* rejected the petitioner's notice challenge, finding adequate notice and no prejudice, the court did not address the APA notice requirements. Therefore, the court's notice determination is of little legal significance. *Basile* is much more instructive on the notice issue.

In considering whether a notice is fatally defective, the burden is on the petitioner to show that he or she was prejudiced by the error when petitioner has been provided a corrected prior to the hearing. In *Marcoules v. OLCC*, 91 Or App 573 (1988), the court held that the petitioning parties were not prejudiced by a defective emergency suspension notice that failed to include the applicable statutes and rules because they received a second, separate license cancellation notice that correctly referred to the statutes and rules involved. The *Marcoules* court found that the defect had been cured, and that the petitioner had not been prejudiced.

If an officer discovers that he or she has made an error in the ICCR issued to the arrested person, and if the officer is able to remedy this by physically issuing a corrected ICCR within the applicable time constraints, the case may go forward. In this instance, the best practice would be for the officer to personally deliver the corrected ICCR to the driver, or mail the corrected the ICCR to the driver's address of record via certified or registered mail.[3] The corrected copy would still have to reach the Department within ten days of arrest in order to be admissible under OAR 735-090-0040 if a person asked for a hearing in a normal, timely manner.

5. Issues With the Officer's Signature

Although there is no statutory requirement that a driver license suspension order be signed, the ICCR form requires that the officer affirm the document's contents by his or her signature. Petitioners may challenge the validity of the suspension where the officer's signature is pre-printed, typed, rubber stamped or otherwise applied to the document, but such challenges should be rejected. A completely unsigned or unmarked signature box may be problematic, however, because OAR 735-070-0054(2)(b)(D) requires "[t]he reporting officer's signature below the statement, 'I affirm by my signature that the foregoing events occurred.'" The rule further provides that "[t]he officer's signature will be considered acceptable if located anywhere on the line of the form directly below the statement."

[3] Under the APA, notice of agency action must be "served personally or by registered or certified mail." ORS 183.415(2).

In a 1971 Department of Justice Opinion Letter, the Department was advised that "signed" means "any symbol executed or adopted with present intention to authenticate a writing," and therefore the officer's signature may take any printed, stamped or written form. *See* Senior Counsel Peter S. Herman's letter to Chester Ott, Motor Vehicles Division Administrator, dated March 11, 1971. *See also* ORS 71.2010(2)(kk), defining the term "signed" as "using any symbol executed or adopted with present intention to adopt or accept a writing."

D. PROVIDE NOTICE OF INTENT TO SUSPEND

1. In General

ORS 813.100 requires that an officer "provide" the arrested person with a written copy of the notice of intent to suspend document. According to ORS 813.410(6)(f), the ability to prove that the arrested person was "given" a written notice of intent to suspend from the Department is one of several *prima facie* issues that must be established at hearing in order to impose the suspension. Proper notice is a prerequisite for *any* Implied Consent suspension, and is not dependent on whether the arrested person later was able to appear at a hearing.

The word "provide" is defined as, among other things, "to supply or make available," "afford." *See Webster's Third New International Dictionary* 1827 (2002 ed).
In this context, the question is whether or not the police gave or made the ICCR available to the petitioner. Thus, the officer could satisfy the statutory requirement to provide or give written notice by either handing the ICCR to the petitioner, or by making it available to the petitioner in some other way. Unlike the Civil Code,[4] the Implied Consent law does not require personal service.

If the officer forgets to hand the document to the petitioner or otherwise make the document available while the person is in custody, the best practice would be for the officer to deliver the notice in person or send it by registered or certified mail within the 10 day window. *See* ORS 183.415(2).

In cases appealed to the Circuit Court, the Department of Justice has been successful in having the suspension upheld where the record shows that the officer made reasonable attempts to see that the notice was likely to end up with petitioner, in the absence of testimony from petitioner that he did not receive it. Where such testimony does come in, the next questions are whether that evidence is credible, and if so, is there was any prejudice. *See* Department of Justice memo to Dwight Apple, May 9, 1990.

On the other hand, if the petitioner can demonstrate, through reliable evidence, that he or she was not provided a copy of the ICCR (as distinct from did not receive a copy), a *prima facie*

[4] *See* ORCP 7D and 9B.

element cannot be established and the suspension must be disaffirmed. In this case it would not be necessary to analyze potential prejudice to the petitioner.

2. Jail Property Bags

Given the definition of "provide," the fact that an officer places the ICCR into the person's property bag at the jail would not necessarily be fatal to the suspension action. The requirements of ORS 813.100 can be established as long as the officer can testify that he or she took steps to make sure that the person would receive the ICCR upon release. The officer does not need to have specific knowledge about what happened with the petitioner's property bag, as long as the officer is generally familiar with the jail procedures, and can testify that to their knowledge, the property is kept separately and the contents of the property bag are returned to the person upon release from custody.

Practical Note: Develop the record on this point by asking the officer what he or she knows about jail procedures concerning inmate property. If the officer testifies that he or she has no idea what happens with property upon an inmate's release, the ALJ must decide, based on the hearing record, if the requirements of ORS 813.100 have been met.

3. Given to a Third Person

In some hearings, the evidence establishes that the officer gave the ICCR to a third person, typically the individual who arrived at the police department to drive the petitioner home. If the officer knows that the third person is accepting the documents on behalf of the petitioner, ORS 813.100 is satisfied. The record should contain some detail, however, about the relationship of the third person to the petitioner, and why the officer believed that the third person would give the documents to the petitioner.

E. LESS COMMON SITUATIONS

1. Blood Test Failures

When the suspension is based on an alleged blood test failure, the requirements for providing the petitioner with the ICCR change. For example, ORS 813.100(4) provides as follows:

> If a blood test under this section discloses that the person, at the time of the test, had a level of alcohol in the person's blood that constitutes being under the influence of intoxicating liquor under ORS 813.300, the person's driving privileges are subject to suspension under ORS 813.410 and *the police officer shall report to the department within 45 days of the date of arrest that the person failed the blood test*.

ORS 813.100(4) (emphasis added). Upon receipt of information that a person has failed a blood test, the Department will mail a Notice of Suspension to the person. A suspension for a blood test failure will start on the 60th day after receipt of the report from the police officer (unless a hearing is granted and the petitioner prevails at hearing). ORS 813.410(1). Even though the officer will not be providing a copy of the ICCR to petitioner following a blood test, the officer must still advise the petitioner of the rights and consequences prior to asking for the test.

***Practical Note**:* In a blood test failure hearing, include a blank copy of an ICCR as an exhibit. Ask the officer if he or she read the rights and consequences to the petitioner prior to asking for a blood test.

2. Urine Test Failures

At present, there is no Implied Consent suspension for failing a urine test; only urine test refusals are subject to a DMV suspension.

3. Commercial Driver License

If the petitioner was driving a commercial motor vehicle at the time of arrest, and if the result of the chemical test disclosed that the petitioner had a blood alcohol concentration between .04 percent and .08 percent, the officer must read from and provide the petitioner with an additional *Notice of Intent to Suspend CDL* document. In these situations, only the CDL driving privilege is subject to suspension, although oftentimes the CDL suspension hearing is combined with the underlying driver license suspension hearing.

CHAPTER 17

LATE HEARING REQUESTS

HEARING RESETS

AND CONTINUANCES

*****

The general rule under the Implied Consent law is that a suspension for failure or refusal of a breath test, or refusal of a blood or urine test, will commence on the 30th day following the date of arrest. If a hearing is requested, the hearing must be conducted and a Final Order issued prior to the 30th day. ORS 813.410.

Hearing requests must be received by DMV in Salem by the 10th day following arrest. OAR 735-090-0020(2). If a hearing request is timely, a hearing will be scheduled under ORS 813.410. DMV applies ORCP 10A to calculate the ten-day period following arrest.[1]

As with most general rules, there are exceptions. For example, late hearing requests may be accepted under certain circumstances, and a failure to appear at the hearing, by either the petitioner or the subpoenaed officer, may be excusable. In addition, there are instances in which a hearing will be continued. The exceptions to timely requesting a hearing, attending a scheduled hearing, and concluding a hearing in 30 days are the topic of this chapter.

A. LATE HEARING REQUESTS

The Department's authority to accept late hearing requests is set out at ORS 813.440, which provides, in part, as follows:

> (1) Notwithstanding ORS 813.410, the Department of Transportation may provide a hearing to determine the validity of a suspension under ORS 813.410 only if the time requirements under ORS 813.410 could not be met because of any of the following:
> (a) The person's physical incapacity, verified by a physician to the satisfaction of the department to be of a nature that would prevent the person from making the appropriate request or attending the hearing.
> (b) A death in the immediate family of the person, verified to the satisfaction of the department.
> * * * *
> (f) Other just cause as defined by the department by administrative rule.
> * * * *
> (2) A hearing held under this section is subject to the same provisions as a hearing held under ORS 813.410, except that the department is not required to hold the hearing and make the determination within the time required by ORS 813.410.

---

[1] ORCP 10A provides in pertinent part as follows:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any court or by order of court, the day of the act, event, or default from which the designated period of time begins to run shall not be included. *The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday.*

(Emphasis added.)

> (3) The granting of a hearing under this section shall not delay the imposition of a suspension under ORS 813.410 within the time required under ORS 813.410. * * * *.
> (4)(a) The department shall issue a final order within 10 days after the hearing described in this section.
> * * * *.

ORS.813.440.

The term "other just cause" is defined at OAR 735-090-0000(5)(a):

> "Other just cause" as used in ORS 813.440(1)(f) means:
> (a) Circumstances beyond the reasonable control of the petitioning party and beyond the ability of a reasonable person to foresee, which:
> (A) Prevented the petitioning party from filing a timely request for a hearing as set forth in ORS 813.410(3).

If a petitioner or his or her attorney submits a hearing request beyond the 10th day following arrest, DMV reviews the file to determine whether the petitioner meets the physical incapacity, death in the family or "other just cause" requirements. Just cause requires both that the petitioner was prevented from requesting a hearing and that the reason was not reasonably foreseeable. Both the petitioner and to the petitioner's attorney are considered to be the "petitioning party" under OAR 735-090-0000(9).

A petitioner has the burden to explain to DMV the reason for the late hearing request.

Limited scope, "just cause" hearings are granted when the Department is unable to decide whether the petitioner has met the burden of establishing that the circumstances surrounding the late hearing request truly constitute "other just cause." Most often this occurs when the late hearing request contains an allegation that the petitioner never received the ICCR, and thus, did not know that he or she only had ten days to request a hearing. In that event, a limited scope hearing will be scheduled for an ALJ to determine whether the petitioner had just cause for the late request. If the ALJ finds just cause for the late request, the ALJ will conduct a hearing on the merits of the Implied Consent suspension immediately after the "limited scope" hearing. OAH will subpoena the police officer to attend the just cause hearing.

The ALJ should explain to the petitioner and the officer that the purpose of the just cause hearing is to determine whether there were adequate grounds to accept the late hearing request. The petitioner has the burden of proof at the just cause hearing. Below are four common scenarios in just cause limited scope hearings:

(1) The petitioner received the ICCR from the officer and offers no good reason for failing to file the request for hearing within 10 days: rule on the record that just cause not established and do not proceed with hearing on the merits;

(2) The petitioner did not receive the ICCR: if confident that officer did not provide the form to the petitioner, rule on record that just cause has been established, and then at the hearing on the merits dismiss the suspension for failure of a *prima facie* element, *i.e.* failure to provide Notice of Intent to Suspend;

(3) The petitioner *probably* did not receive the ICCR: reserve ruling on the just cause issue and proceed to hearing on the merits;
   a) if ALJ later decides there is no just cause for the late request: issue an order denying late hearing request;
   b) if ALJ later decides that just cause was shown: issue an order on the merits under ORS 813.440;

(4) The petitioner received the ICCR, but through no fault of his or her own, lost it: grant just cause and go forward on merits, or reserve ruling on just cause and go forward on merits.

If the petitioner and/or attorney fail to appear at the just cause hearing, the petitioner is in default and a default order should be issued. If the subpoenaed officer fails to appear at the just cause hearing, the hearing will go forward. If the petitioner successfully establishes that he or she had just cause because they were never provided with the ICCR, then the ALJ can grant just cause and, at the hearing on the merits, rule on the record that the suspension is disaffirmed for lack of a *prima facie* element, *i.e.*, no testimony from the officer to support the written notice requirement of ORS 813.410(6)(f). If just cause is established *and* the petitioner received the ICCR, the ALJ should grant the petitioner a hearing on the merits, and treat the absence of the subpoenaed officer as an ordinary "officer no show." If the officer submits documentation of an official duty conflict, illness or vacation, the hearing on the merits will be rescheduled to a future date.

B. RESET REQUESTS

Once DMV accepts the hearing request, it refers the matter to OAH. OAH operations schedulers then set the matter for hearing and send out Notices of Hearing to the petitioner and counsel. Schedulers also issue subpoena(s) to the officer(s) identified by DMV as the witnesses for the case. If the matter is to be heard as a telephone hearing, the subpoena will be a subpoena duces tecum asking that the police reports be brought to the telephone hearing.

Often, after the hearing is scheduled, OAH receives a request for a reset from the petitioner, counsel or a subpoenaed officer.

1. Officer Requested Resets

ORS 813.440(1)(d) provides that a hearing will be held beyond the 30th day following arrest under these circumstances: "The inability of a subpoenaed police officer to appear due to

the officer's illness, vacation or official duty conflicts. The department shall set forth by rule the conditions that constitute 'official duty conflicts.' A hearing may not be rescheduled more than once for reasons described in this paragraph."

a. Official Duty Conflict

OAR 735-090-0120(4) defines "official duty conflicts:"

> An official duty conflict exists if the subpoenaed police officer is unable to attend the hearing due to any of the following conditions:
> (a) Community caretaking pursuant to ORS 133.033;
> (b) Court;
> (c) Hazardous or impeding travel conditions;
> (d) Participating in employer approved training;
> (e) Physical incapacity; or
> (f) Service in the US Armed Forced, military reserves, National Guard or the organized militia.

Frequently, OAH operations schedulers learn before a hearing that a subpoenaed officer has a legitimate reason under the statute and rule that would allow the matter to be reset. The pertinent information will be forwarded to an ALJ who will issue an appropriate "Order on Police Officer Unavailablity Due to Official Duty Conflict."

If, on the other hand, OAH does not receive any information about the officer prior to the hearing and if the subpoenaed officer does not appear at a scheduled Implied Consent hearing, the ALJ will complete what is known as an "Officer Default" form. When an officer fails to appear, the suspension will not go into effect on the 30th day following arrest.

If an officer fails to appear at a scheduled hearing, the Department may reset the hearing only if OAH receives notification of the official duty conflict within 10 days following the scheduled hearing date. Generally, the officer's department will forward a notice to OAH through the Law Enforcement Data System (LEDS). The LEDS notice will include information about why the officer was unavailable for hearing, and will list the name of the officer's supervisor. If, within 10 days of the missed hearing, the officer's department does not submit documentation regarding the officer's failure to appear the suspension will not be imposed.

Most often, an officer's failure to appear at hearing is due to either a conflicting court appearance, or training. Sometimes, however, the officer will fail to appear because of participation in a parade honor guard, or because he or she was assigned to provide protection or ride in a motorcade for a visiting dignitary. Consider whether these work-related assignments are within the "community caretaking" provisions of ORS 133.033. Under ORS 133.033(2), "'community caretaking functions' means any lawful acts that are inherent in the duty of the peace officer to serve and protect the public."

Arguably, providing protection to a visiting dignitary, or participating as part of an honor guard may fall within the definition of community caretaking functions. In *Blaisdell v. MVD*, 145 Or App 468 (1996), the court did not support DMV's decision allowing an officer's *personal and non-duty* reasons to be the basis for an ODC hearing reset.

Note: Although the official duty conflict rule does not address furlough days or administrative leave, consider whether the circumstances for the officer's unavailability for hearing are encompassed by vacation or illness, as discussed below.

b. Officer's Illness or Vacation

Unlike "official duty conflict," the Department has not defined what constitutes an officer's illness or vacation. In the absence of any rule setting forth the conditions that constitute either illness or vacation, it is best to look to the ordinary meanings of these terms.

Webster's Third New Int'l Dictionary 1252 (unabridged ed. 2002) defines "vacation" as follows:

> 1: A respite or a time of respite from something: INTERMISSION, REST ***2. *obs* a: freedom from work or care: LEISURE b: time free for something else; *specif* : time for contemplation, 3 a: a scheduled period which activity or work is suspended: RECESS, ***

The term "illness" is defined as: "an unhealthy condition of the body or mind: MALADY." *Webster's Third New Int'l Dictionary* at 1127.

Vacation does not require a showing that the officer is out of town, so long as there is evidence to show that he or she is on a respite from otherwise scheduled work. And, the officer's illness does not require a showing of physical incapacity or a physician's verification, just an evidence that the officer's unhealthy condition prevented his or her from appearing for the hearing.

Practical Note: An officer may be unavailable for hearing because he or she is on "family medical leave" due to the birth of a child or to care for an ill family member. While a family member's illness or, in the case of a male officer, the birth of his child, does not qualify as an officer illness, consider whether the approved leave constitutes "vacation."

An officer's scheduled furlough day may also constitute vacation, because the definition of furlough, like vacation, includes "a leave of absence granted by an employer to an employee," and "leave of absence granted at the employee's request." *See Webster's Third New Int'l Dictionary* at 923.

c. Challenging the Validity of the Reset for Officer Availability

Regardless of the reason for the officer's unavailability at the originally scheduled hearing, the petitioner is entitled to make a record concerning the propriety of the reset. *Higgins v. MVD*, 139 Or App 314 (1996). This can either happen during the opening moments of the hearing, or be reserved until cross-examination of the officer. Questioning about the reason for non-appearance at an earlier hearing is within the scope of the Implied Consent hearing. The ALJ can either rule on the record, or reserve ruling and address the reset in the final order. The ALJ has the authority to decide that an ODC, illness or vacation reset was improvidently granted.

If the petitioner challenges the reset, he or she has the burden of establishing that it was improvidently granted. The petitioner will not meet his or her burden by showing that, sometime after a hearing was reset for an official duty conflict (*i.e.*, a scheduled court appearance, training or military duty), the conflict disappeared. The reset would still be proper if, at the time it was requested, there was a valid conflict. Similarly, the petitioner's burden is not met by showing that, during the 30 days after a person's arrest, the officer was available at another date or time in which the hearing could have been held. OAH has discretion to schedule hearings as necessary and convenient, provided the 30-day requirement is satisfied. The issue before the ALJ is whether the conditions constituting official duty conflict, vacation, or illness applied at the time and place at which the hearing was originally scheduled. If the ALJ feels uncertain as to how to rule on the reset issue, the best approach is to reserve ruling on the matter and conduct the entire hearing. After reflection, the decision on the officer unavailability reset can be addressed in the final order.

Practical Note: If the hearing involves a reset for officer unavailability, mark the original notice of hearing and subpoena, the LEDS notice, and any Order on Police Officer Unavailability as exhibits.

d. When More Than One Officer is Subpoenaed But Only One Shows

If, pursuant to DMV's request, OAH subpoenas more than one officer to the Implied Consent hearing, and *prior to the hearing* an officer requests a reset due to illness, vacation or official duty conflict, the policy is to grant the reset if the officer's circumstances meet the standards of the statute and rule.

If one of the subpoenaed officers appears for hearing and the other does not, the policy is as follows:

i. Initially Scheduled Hearing

The ALJ should wait 15 minutes to see if all subpoenaed officers appear. If not, ask the officer who appeared if he or she is the one who issued the DUII citation and/or administered the breath test. If so, ask that officer whether he or she wants to proceed to hearing without the other officer(s).

The officer may chose to do so if he or she believes that the entire case could be made through his or her testimony and perhaps the hearsay reports of other officers. The officer may elect not to go forward, in which case the ALJ should issue an Officer Default order. In the latter situation, the matter will be rescheduled only of the other officer's failure to appear meets the conditions of ORS 813.440(1)(d).

ii. Hearing Rescheduled Once Before for Officer Unavailability

Go forward with the hearing, regardless of whether one or more subpoenaed officers have not appeared.

DMV approved this method. DMV would like the responsibility for the decision as to whether to go forward to be with the citing officer. *See,* S:\Resources\ALJ\APA-IC\PROCEDURES\Hearings Procedures.

As previously noted, a hearing may be rescheduled *only once* for any officer's illness, vacation or official duty conflict. If a hearing is rescheduled for official duty conflict, vacation or illness, the ALJ must issue the final order within 10 days of the rescheduled hearing date.

2. Attorney Requested Resets

Until 2010, there were no special provisions that applied to attorney requested resets. Because the petitioner and attorney are considered one unit, attorneys could apply for a reset under the physical incapacity, death in the family or other just cause provisions that always applied to the petitioner. Seeking something more tailor made to their circumstances, the defense bar approached the legislature in 2009 and requested an amendment to ORS 813.440.

ORS 813.440(1)(f) now provides that a hearing may be held more than 30 days after the date of an arrest if the delay is due to:

> The inability of the person's attorney to appear due to the attorney's illness, vacation or scheduling conflict arising from other court or administrative hearing appearances. A hearing must be rescheduled no later than 45 days after the date of the original hearing and may not be rescheduled more than once for reasons described in this paragraph.

Parallel to the provisions of officer resets, an attorney reset for these special reasons may be granted on only one occasion, although an attorney may still qualify for physical incapacity, death in the family or other just cause. If OAH receives such a request from counsel, the pertinent information is forwarded to the ALJ for an Order on Attorney Unavailability. When the matter is reset and the hearing eventually held, the ALJ has 10 days from the rescheduled hearing in which to issue the order.

3. Petitioner/Attorney Requested Resets

There are instances in which a petitioner has made a timely hearing request, or the untimely request has been accepted under one of the allowed excuses, but a new problem arises when the petitioner and/or attorney cannot make it to the hearing. OAR 735-090-0000(5)(a)(C) defines other just cause to include:

Circumstances beyond the reasonable control of the petitioning party and beyond the ability of a reasonable person to foresee, which "[p]revented the petitioning party from participating in a recorded or reported hearing that determines the validity of a suspension of driving privileges."

a. Prior to the hearing

After a hearing has been scheduled and prior to the hearing, OAH may receive a reset request from petitioner or counsel. Both the petitioner and the petitioner's attorney are considered to be the "petitioning party" under OAR 735-090-0000(9), and a just cause reset is available to both. These requests may be because the petitioner cannot be excused from work or cannot secure a ride to the hearing, or cannot find daycare. The ordinary logistics of getting to a hearing that the petitioner has requested are not normally considered situations outside of petitioner's ability to control or foresee. But, the analysis is very fact dependent. In a worthy case, an ALJ may grant a reset due to either the petitioner or attorney's physical incapacity, death in the family or other just cause.

b. At the Time of Hearing

Sometimes, the petitioner or attorney will be late for the scheduled hearing. By practice, a person is considered late for a hearing, and in default, if the person does not appear within 15 minutes of the scheduled hearing time. The ALJ may require the petitioner to submit the reason for the failure to appear in writing.

If the ALJ accepts an oral explanation (and the best practice is to go on the record to make this determination), the ALJ will determine if just cause exists, and then either proceed with the hearing on the merits, or, if the officer has been released from the subpoena or declines to stay, will have OAH reschedule the hearing. Any hearing started beyond 15 minutes after the scheduled time is conducted under ORS 813.440 and the grounds to support the reason for the decision to proceed under that provision must be in the record.

If the petitioner is represented by counsel, the attorney may appear on the petitioner's behalf with or without the petitioner. *Pro se* petitioners must appear at the scheduled hearing. If a *pro se* petitioner fails or the attorney and petitioner fail to appear at a scheduled hearing, the ALJ will issue a default order, with the suspension beginning on the 30th day following arrest.

If a represented petitioner appears at hearing and their attorney does not, petitioner may either choose to proceed with the hearing without the attorney or hope that the attorney's failure to be present will qualify for a reset under the provisions of ORS 813.440(1)(a) (physical incapacity), (b) (death in the immediate family), (f) (attorney illness, vacation or scheduling conflict) or (g) (other just cause). The ALJ should specifically advise the petitioner that a reset will not automatically be granted simply because their attorney is not present. It is only in limited circumstances under the statute that a reset will be granted.

Practical Note: The ALJ may want to suggest to the petitioner to contact the attorney or the attorney's office to help inform the petitioner's decision.

In the event of a petitioner default, there is no need to proceed on the merits because, under ORS 813.410(4)(d), the department need not make any showing. Petitioners can request relief from default under the just cause statute. If the reason for petitioner's failure to appear was due to one of the factors set out by statute or administrative rule, the suspension will begin on the 30th day, and a hearing under ORS 813.440 will be scheduled.

c. After the Hearing

Physical incapacity, death in the family or other just cause may also excuse a petitioner's failure to appear at a hearing. Just cause requires both that the petitioner was prevented from attending a hearing and that the reason was not reasonably foreseeable. If an ALJ has issued a default order, then DMV will make the determination as to whether the petitioner is entitled to relief from default because the file has been returned to it with the issuance of the default order.

If the petitioner and/or attorney do not appear at the hearing, *and* the subpoenaed officer also fails to appear, it is considered a petitioner default. The hearing will be reset, if at all, only if one of the legitimate excuses for missing the hearing established. Either way, the suspension will start on the 30th day following arrest.

4. Department Error Resets

ORS 813.440(1) (c) provides that hearings may be held and orders issued more than 30 days after the date the arrest where there has been, "[a]n error of the department."

According to OAR 735-090-0000(2), "error of the department" means:

> (a) An act or omission of the agency or OAH, which by its occurrence, prevented the petitioning party from participating in a recorded or reported hearing that determines the validity of a suspension of driving privileges; or
>
> (b) An act or omission of the agency or OAH in issuing a subpoena to a witness, including a police officer, to a recorded or reported hearing that determines the validity of a suspension of driving privileges and where the witness' participation at the reported or

recorded hearing is required in order for the agency to establish the required elements under ORS 813.410(6); or

(c) An act or omission of the agency or OAH in issuing a subpoena to a necessary witness where:

(A) The agency receives the petitioning party's request to subpoena a necessary witness more than 72 hours prior to the time and date that a recorded or reported hearing that determines the validity of a suspension of driving privileges is scheduled; and
(B) The act or omission, by its occurrence, prevented the necessary witness from participating in the hearing; or

(d) An act or omission of the agency or OAH that prevents a recorded or reported hearing that determines the validity of a suspension of driving privileges from being conducted.

The following situations have been considered "error of the Department":

- OAH sends the Notice of Hearing to petitioner or the attorney to the wrong address, street, zip code, etc.

- The Notice of Hearing or the subpoena sends the petitioner and/or attorney or subpoenaed officer(s) to wrong location.

- The Department fails to subpoena the proper officer.

- The Department is aware that the petitioner requires the assistance of an interpreter, but fails to schedule the interpreter to the hearing, or the interpreter fails to appear at the hearing.

- OAH schedules hearings involving the same petitioner or attorney at the same time or conflicting times at two different locations.

- The ALJ is unable to make it to the hearing due to weather, traffic, scheduling error or mistake on the part of the ALJ.

The following are *not* considered error of the Department:

- Failure to mail discovery (at least at an in-person hearing this can be covered by the ALJ at hearing).

- Scheduling a hearing on a known conflict date where schedulers have made a good faith effort to avoid the conflicts and are unable to find a time that meets all needs.

C. REQUESTS FOR CHANGE OF ALJ

Pursuant to ORS 813.440(1)(e), a petitioner may request a change of ALJ under ORS 183.645. In the Implied Consent hearing context, there must be a showing of good cause to justify reassigning the case to a different judge. ORS 183.645(3). Pursuant to OAR 471-060-0005(5), all requests for a change of ALJ must be in writing.

For purposes of this section, "good cause" is any reason why an ALJ's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding. OAR 471-060-0005(2)(b).

If the petitioner makes a written request for an ALJ change at the time of the scheduled hearing, and if the Chief ALJ or designee is available to consider the written submission regarding that ALJ's alleged bias, prejudice or conflict of interest and make a written ruling, a determination can be made at that time. But, as will be more likely, if the Chief ALJ or designee is not available or if the petitioner wants to supplement the petition for change of ALJ, the Implied Consent hearing may be reset or continued under ORS 813.440(1)(e) to allow the Chief ALJ or designee to make that determination and, if good cause is shown, to reassign the case to a different ALJ.

D. CONTINUANCES

Most Implied Consent hearings are concluded by the end of the initial hearing. However, there are limited circumstances under which a hearing may be continued for the gathering of additional evidence.

1. Petitioner Did Not Have Time to Subpoena a Necessary Witness.

There may be witnesses whose identity is not known by Petitioner until shortly before, or at the time of, the hearing. If such a witness is "necessary witness," and the petitioner was not aware of the witness more than 72 hours prior to the hearing, the he or she may move for an "other just cause" continuance at the beginning of or during the hearing.

Under OAR 735-090-0000(5)(b), "Other just cause" as used in ORS 813.440(1)(f) also means:

> Circumstances where a petitioning party moves for a continuance of a hearing or a request that a necessary witness be subpoenaed to a hearing and, due to circumstances beyond the control of the petitioning party:

> (A) The necessary witness does not appear at the hearing because the necessary witness was unknown to the petitioning party prior to a recorded or reported hearing that determines the validity of a suspension of driving privileges; or
>
> (B) The necessary witness does not appear at the hearing and could not be served with a subpoena at least 72 hours prior to a recorded or reported hearing that determines the validity of a suspension of driving privileges.

To qualify for a continuance, the petitioner must show that the witness is "necessary" and that due to circumstances beyond petitioner's control, he or she was not aware of the witness prior to the hearing or could not serve a subpoena on the witness more than 72 hours in advance of the hearing.

"Necessary witness" as defined in OAR 735-090-0000(6), "means a witness whose testimony is essential to support a material fact or position of the petitioning party. The fact or position to be supported by the necessary witness must be within the scope of an implied consent hearing as set forth in ORS 813.410(6)."

This situation most frequently arises when the petitioner wishes to challenge the validity of the stop or arrest and did not learn the stopping and/or arresting officer's identity until the hearing. The petitioner then asks to continue the hearing to another date and time and request that a subpoena be prepared for the stopping and/or arresting officer.

Practical Note: Before granting a continuance, the ALJ should look over all the documents and the citations that were issued to determine whether the stopping and/or arresting officer's name was listed on any of the documents provided to the petitioner either at the time of the arrest or through the discovery process. If this is an individual whose identity the petitioner or counsel knew about, or should have known about, then question the basis for a continuance. The ALJ should inquire of the petitioner or counsel what efforts were made, if any, to secure the witness's appearance at hearing.

If the ALJ grants the continuance, the ALJ should nevertheless gather as much evidence as possible at the first hearing. Take testimony from the witnesses who are present. Ask the subpoenaed officer if he or she wants to be notified of the time/place for the continued hearing.

Upon granting the continuance, the ALJ must contact the scheduler for that hearing and notify him or her of the reset. The ALJ must also issue an Order Granting a Continuance for Just Cause to Subpoena Necessary Witness. This order gives the petitioner 10 days to contact OAH with a new hearing date. OAH will prepare a subpoena, but responsibility for serving the subpoena at least 72 hours in advance of the hearing lies with the petitioning party. If the petitioner does not follow through with the continuance (*i.e.*, by failing to follow up with OAH Operations within 10 days of the Continuance Order), the ALJ will close the record and issue an order based on the record developed at that time. If the hearing is successfully continued, allow

the petitioner to call the new witness, cross-examine as appropriate, close the record and issue an order within 10 days of the reconvened hearing.

2. Department's Request for a Continuance Due to Controverted Hearsay

There are occasions when the Department has asked that OAH continue a hearing to allow the Department to subpoena another police witness. This is made possible by OAR 735-090-0130 which provides:

> In accordance with the definition of "Error of the Department" specified in OAR 735-090-0000(2), in a hearing that determines the validity of a suspension of driving privileges under ORS 813.410, if hearsay evidence is used to establish the required elements under ORS 813.410(6) and a petitioning party presents substantial evidence that contradicts the hearsay evidence, DMV will rescind the suspension and OAH will continue the hearing pursuant to ORS 813.440(1)(c) and subpoena the hearsay witness to the continued hearing.

The typical way that this situation arises is as follows: The stop and arrest were made by officer A, but the processing was done by officer B. For the first hearing, the Department has only asked OAH to subpoena officer B, the one who signed the ICCR. Officer B comes to the hearing and establishes the validity of the stop and arrest by hearsay testimony, or a hearsay police report, from officer A.

Petitioner then testifies contrary to officer A's hearsay testimony (for example, claiming that he or she stopped at the stop sign, or that he or she drove within the lane and never weaved). If the ALJ finds that the petitioner's testimony substantially controverted the hearsay evidence from officer A, the ALJ should grant the Department a continuance to allow it to secure the appearance of officer A who can then testify under oath. The ALJ should issue the Ruling and Interim Order on Department's Motion for Continuance, and notify word processing and scheduling of the circumstances. At that point, OAH Operations should schedule the continued hearing within 10 days. Once the ALJ holds the continued hearing, he or she must issue a Final Order on the merits of the suspension within 10 days.

Practical Note: Before granting a continuance under this rule, the ALJ should determine whether petitioner's evidence is, in fact, hearsay,[2] whether it is contradictory and, if so, whether it constitutes "substantial evidence." If the petitioner's contradictory evidence is unreliable or if the witness is not credible, the continuance would not be necessary. Again, upon granting this type of continuance, the ALJ should notify the appropriate scheduler and prepare and issue an order on continuance.

[2] For a discussion on what is, or is not, hearsay, *see* Chapter 19, *Evidence.*

3. Continuances Due to Lack of Documents

As of January 1, 2011, Implied Consent hearings are by telephone, unless either the petitioning party or the officer requests an in-person hearing within 10 days of the date of arrest.

OAH has rules which generally govern the conduct of administrative hearings. OAR 137-003-0605 provides in pertinent part:

> (2) If a hearing is to be held by telephone, each party and the agency, if participating in the contested case hearing, shall provide, before the commencement of the hearing, to all other parties, to the agency and to the administrative law judge copies of the exhibits it intends to offer into evidence at the hearing.
>
> (3) If a witness is to testify by telephone, the party or agency that intends to call the witness shall provide, before commencement of the hearing, to the witness, to the other parties, to the agency, if participating in the contested case hearing, and to the administrative law judge a copy of each document about which the witness will be questioned.

Sharing documents that will become exhibits of from which witnesses will testify is considered part of fundamental due process and the responsibility to provide a meaningful hearing. To that end, when OAH schedules a telephone Implied Consent hearing, it sends a letter to the custodian of the officer's records asking for copies of the police reports to be sent to a secure fax number in Salem not less than 72 hours in advance of the hearing. OAH also issues a subpoena duces tecum to the officer asking the officer to bring the report to hearing. If the report has not already been shared with the petitioner and/or counsel by the time of hearing, then it may be shared by faxing at the time of hearing.

If the officer's report, or any report the officer intends to offer into evidence, cannot be shared at least by the time of hearing, and the petitioner requests the report to facilitate cross-examination, OAR 735-090-0000(5)(c) provides that "other just cause" includes:

> Circumstances beyond the control of a petitioning party that require a continuance of a hearing because documentary evidence referred to or presented at the hearing by a necessary witness was not provided to the petitioning party either before or during the hearing.

When such a situation arises, the ALJ should conduct as much of the hearing as possible during the initial hearing, then the ALJ will issue an Order Granting Continuance for Lack of Documents. The ALJ should notify word processing and scheduling of the circumstances. The hearing will be reconvened at an appropriate rescheduled time for the completion of the record. The ALJ must issue a Final Order on the merits of the suspension within 10 days of the reconvened hearing.

CHAPTER 18

CONDUCTING

THE HEARING

*****

This chapter is designed to explain, very generally, the role of the ALJ and the police officer in Implied Consent hearings. There is also a discussion about the role played by Department of Justice attorneys. Finally, commonly encountered issues are set out, in chart form, to aid ALJs while conducting Implied Consent hearings.

A. ROLE OF ADMINISTRATIVE LAW JUDGE

Implied Consent hearings are one-party proceedings and the role of the ALJ is that of an active inquisitor. As a general rule, an ALJ presiding over a non-adversarial administrative hearing has a duty to assist pro se petitioners and make a full and fair inquiry into the facts. *Berwick v. AFSD*, 74 Or App 460 (1985); *see also Dennis v. Employment Div.*, 302 Or 160 (1986); *Hyde v. Employment Div.*, 302 Or 171 (1986); *Gosda v. J.B. Hunt Transportation*, 155 Or App 120 (1998); and *Bauerle v. Employment Dept.*, 161 Or App 280 (1999). But, in *Wahlgren v. DMV*, 196 Or App 452 (2004), the court questioned whether the *Berwick* duty applies in an Implied Consent hearing:

> Unlike the hearings officer in [*Berwick*], the ALJ in this case is not an employee of DMV but rather is drawn from a centralized panel of administrative law judges who are charged by law with the responsibility of impartiality and fairness. Or Laws 2003, ch 75, § 5. Unlike the hearings officer's decision in *Berwick*, the ALJ's decision in implied consent hearings is final and appealable.

196 Or App at 459.

Because an Assistant Attorney General or a case presenter does not represent the Department at an Implied Consent hearing, the ALJ is responsible for questioning the Department's witness and offering the Department's exhibits into the record. The ALJ must take a very active part in the development of the record, rather than merely asking a handful of clarifying questions. And, notwithstanding the court's comments in *Wahlgren*, it is still the best practice to be mindful of the *Berwick* duty and follow up on any potentially favorable lines of inquiry.

The Department's case is presented through the testimony of a subpoenaed police officer. It is the ALJ's job to ask open-ended questions that allow the police witness to provide testimony on the *prima facie* elements, without leading the witness. Typically, the witness is asked questions calling for a narrative answer. More specific, follow-up questions help to ensure that the witness presents what he or she knows about the contact with the driver. An experienced officer can often establish the *prima facie* case during a narrative answer, whereas officers who are new to Implied Consent hearings may need more specific questioning. If the record becomes confused after cross-examination, the ALJ should ask clarifying questions. It is not an ALJ's responsibility to rehabilitate the witness.

In addition, the ALJ is responsible for ruling on any evidentiary issues that arise during the hearing, and for ensuring that the hearing is conducted in an orderly and professional manner.

With the enactment of ORS 813.412, the provision that authorizes the police officer to examine and cross-examine witnesses and make argument on the DMV's behalf, ALJs may be required to take on a more judicial-like role in Implied Consent hearings where the petitioner is represented by an attorney. Where a subpoenaed officer assumes the role authorized by ORS 813.412, both "sides" of the hearing will have an advocate. But, the ALJ nevertheless remains responsible for eliciting evidence on the Department's behalf.

B. ROLE OF POLICE OFFICERS

ORS 813.412 sets out the role of a police officer in an Implied Consent hearing:

> [I]n any hearing under ORS 813.410 in which a city attorney or district attorney does not appear, a police officer actively involved in the investigation of the offense may present evidence, examine and cross-examine witnesses and make arguments relating to:
> (1) The application of statutes and rules to the facts in the case;
> (2) The literal meaning of the statutes or rules at issue in the case;
> (3) The admissibility of evidence; and
> (4) Proper procedures to be used in the hearing.

Prior to 1999, police officers were simply witnesses at Implied Consent hearings. Now, however, the officer may, under certain circumstances, assume a much more active role, and may appear to be assuming the role of an attorney. Despite the appearance, the officers' expanded role is still limited and the officer does not have party status.

As a practical matter, few officers exercise their right to participate under ORS 813.412.

C. ROLE OF JUSTICE DEPARTMENT ATTORNEYS

Justice Department attorneys do not have an active role in Implied Consent hearings. At times, however, the Department may receive written advice from the Justice Department in advance of a hearing. In addition, the OAH may seek legal advice from the Department of Justice. Because of the *ex parte* disclosure requirements imposed on the OAH, assistant attorneys general that counsel the ALJ working for OAH must be legally separate from those that advise an agency taking an action or represent an agency at hearing. The Attorney General's contested case rules contain extensive coverage of *ex parte* communications. *See* OAR 137-003-0625; OAR 137-003-0660.

D. OUTLINE OF COMMON HEARING ISSUES

1. Breath Test Failure and Refusal ("BAC" and "BTR")

The most common types of Implied Consent hearings are the breath test failure, or BAC hearing, and the breath test refusal, or BTR hearing. The scope of these hearings is defined in ORS 813.410(5) and is dictated mainly by whether the person took or refused the breath test. A table below summarizes these elements.

Practical Note: These tables attempt to simplify the somewhat technical provisions of the various subparts under ORS 813.410(5). Refer to the statute for the full text.

Enhancements: If the person has other driving record entries associated with alcohol in the five years preceding the present arrest, the scope of the hearing will also include evidence of these in order to support an enhanced suspension period. A *certified copy* of the person's driving record will generally establish whether or not enhancement is appropriate. *See* ORS 802.240 (a certified record is *prima facie* evidence that all the listed things took place).

All Implied Consent final orders begin with a finding of venue, stating that the hearing was held by telephone (under ORS 813.410(4)(b)) or in the county of arrest or within 100 miles of the arrest (under ORS 813.410(5)(c). In the hearing record, this may be covered by the testimony given by an officer or by judicial notice.

SCOPE OF HEARING	
BREATH TEST FAILURE ("BAC")	**BREATH TEST REFUSAL ("BTR")**
1. The hearing is being held in the county of the DUII arrest or within 100 miles of the location where the alleged DUII offense occurred or by telephone.	1. The hearing is being held in the county of the DUII arrest or within 100 miles of the location where the alleged DUII offense occurred or by telephone.
2. When asked to take the breath test, the person was under arrest for DUII. ORS 813.410(6)(a).	2. When asked to take the breath test, the person was under arrest for DUII. ORS 813.410(6)(a).
3. At the time of the request, the police had reasonable grounds to believe the person had been driving under the influence of intoxicants. ORS 813.410(6)(b).	3. At the time of the request, the police had reasonable grounds to believe the person had been driving under the influence of intoxicants. ORS 813.410(6)(b).
4. Before being asked to take the breath test, the person was read the "Rights and Consequences" information from ORS 813.130 (found in Section I on the back of the ICCR). ORS 813.410(6)(e).	4. Before being asked to take the breath test, the person was read the "Rights and Consequences" information from ORS 813.130 (found in Section I on the back of the ICCR). ORS 813.410(6)(e).

5. The person produced a breath test reading of .08% or more. ORS 813.410(6)(c). 5A. If a minor, .01% or more. *See* section C3 below.	5. The person refused the test. ORS 813.410(6)(c).
6. The Intoxilyzer was properly certified. ORS 813.410(6)(h).	6. Following the refusal, the person was given a copy of the Notice of Intent to Suspend document (ICCR). ORS 813.410(6)(f).
7. The testing procedure complied with applicable legal requirements (*i.e.*, followed the "Intoxilyzer Operator's Checklist"). ORS 813.410(6)(h).	7. ***If an enhanced suspension is proposed in the notice of suspension***, the person's driving record indicates that he or she was subject to an enhanced suspension period for any of the three reasons listed in ORS 813.430.
8. The officer operating the Intoxilyzer was properly certified to do so. ORS 813.410(6)(g).	8. Other issues required by the applicable case law, such as, the validity of the stop and arrest and, upon the person's request, a reasonable opportunity to contact counsel or others was afforded.
9. Following the test, the person was given a copy of the Notice of Intent to Suspend document (ICCR). ORS 813.410(6)(f).	
10. ***If an enhanced suspension is proposed in the notice of suspension***, the person's driving record indicates that he or she was subject to an enhanced suspension period for any of the three reasons listed in ORS 813.430.	
11. Other issues required by the applicable case law, such as, the validity of the stop and arrest and, upon the person's request, a reasonable opportunity to contact counsel or others was afforded.	

2. Commercial Driver Licenses (CDL)

Oregon law provides that persons driving "commercial motor vehicles" (ORS 801.208) must hold a "CDL" or commercial driver license. ORS 801.207. A CDL can now be issued by any state to a license holder in that state, and may be viewed as a sort of special driving privilege that overlays the regular driver license. Oregon's CDL legislation was adopted in 1989 in order to comply with federal legislation applying to the entire trucking industry. When the CDL became part of the Oregon driver-licensing scheme, CDL provisions were also added to the

Implied Consent law. While certain driving violations that a commercial driver commits may affect just the CDL, other violations, including DUII, can affect both licenses because if the base license is suspended, so is the CDL.

When a driver operating a commercial motor vehicle is arrested for DUII and requests a hearing, the scope of the hearing is defined not only by whether the person took or refused the test, but also by the outcome of the breath test. This is because the failing breath test result is only .04 percent for CDL purposes. Thus, if someone produces a .04 percent result, only the CDL can be suspended, but if the result is .08 percent or more, both licenses will be suspended. *See* ORS 813.410(6)(c)(B). In the latter case, two hearing files are assembled, there are two suspensions on the driving record, and two orders must be issued. There is, however, just one *combined* hearing. If the person produces a breath test score of at least .04 percent, but less than .08 percent, there is only one CDL hearing file, one order, one suspension on the driving record, and of course, one hearing.

Enhancements: The base suspension lengths for commercial driver license Implied Consent suspensions are one year for .04 or higher BAC, or three years for refusing a breath test. Commercial driver licenses are also subject to enhanced suspension penalties. These apply if entries on the person's driving record demonstrate that:

- the person was driving a commercial motor vehicle containing a hazardous material at the time of the offense (enhanced to three or five years); or

- the person had previously been convicted of an offense described in ORS 809.404 or had a commercial driver license suspended as described in ORS 809.404. (Lifetime suspension.)

See ORS 813.404 for more detail on commercial license enhanced suspension.

SCOPE OF HEARING	
CDL BREATH TEST FAILURE	**CDL BREATH TEST REFUSAL**
1. The hearing is being held in the county of the DUII arrest or within 100 miles of the location where the alleged DUII offense occurred or by telephone.	1. The hearing is being held in the county of the DUII arrest or within 100 miles of the location where the alleged DUII offense occurred or by telephone.
2. When asked to take the breath test, the person was under arrest for driving a Commercial Motor Vehicle under the influence of intoxicants. DUII. ORS 813.410(6)(a).	2. When asked to take the breath test, the person was under arrest for driving a Commercial Motor Vehicle under the influence of intoxicants. DUII. ORS 813.410(6)(a).
3. At the time of the request, the police had reasonable grounds to believe that the person had been driving under the	3. At the time of the request, the police had reasonable grounds to believe that the person had been driving under the

influence of intoxicants. 813.410(6)(b).	influence of intoxicants. 813.410(6)(b).
4. Before being asked to take the breath test, the person was informed of the regular "Rights and Consequences" on the back of the ICCR and the information applicable to persons driving Commercial Motor Vehicles as provided in ORS 813.130(3). (This is found on back of CDL Implied Consent Form).	4. Before being asked to take the breath test, the person was informed of the regular "Rights and Consequences" on the back of the ICCR and the information applicable to persons driving Commercial Motor Vehicles as provided in ORS 813.130(3). (This is found on back of CDL Implied Consent Form).
5. The person produced a breath test result of .04% or more. ORS 813.410(6)(c)(B).	5. The person refused the breath test. ORS 813.410(6)(c).
6. The vehicle being driven by the person was "in fact" a *commercial* motor vehicle. ORS 813.410(6)(d).	6. The vehicle being driven by the person was "in fact" a *commercial* motor vehicle. ORS 813.410(6)(d).
6A. If the proposed suspension involved driving a "hazardous materials" commercial motor vehicle, the vehicle *actually contained* a hazardous material. ORS 813.404.	6A. If the proposed suspension involved driving a "hazardous materials" commercial motor vehicle, the vehicle *actually contained* a hazardous material. ORS 813.404.
7. The Intoxilyzer was properly certified. ORS 813.410(6)(h).	7. Following the refusal, the person was given a copy of the Notice of Intent to Suspend the Commercial Driver License. ("CDL Implied Consent Report") ORS 813.410(6)(f).
8. The testing procedure complied with applicable legal requirements (*i.e.*, followed the "Intoxilyzer Operator's Checklist"). ORS 813.410(6)(h).	8. ***If an enhanced CDL suspension is proposed in the CDL Notice of Suspension***, the person's driving record indicates that he or she was subject to an enhanced suspension of his or her CDL for any of the reasons listed in ORS 813.404. ***Note:*** this only applies if an enhanced suspension was proposed in the Notice of Suspension.
9. The officer operating the Intoxilyzer was properly certified to do so. ORS 813.410(6)(g).	9. Other issues required to be covered by the applicable case law, such as, the validity of the stop and arrest and, upon the person's request, a reasonable opportunity to contact counsel or others was afforded.

10. Following the test, the person was given a copy of the Notice of Intent to Suspend the Commercial Driver License. ("CDL Implied Consent Report") ORS 813.410(6)(f).	
11. ***If an enhanced CDL suspension is proposed in the CDL Notice of Suspension***, the person's driving record indicates that he or she was subject to an enhanced suspension of his or her CDL for any of the reasons listed in ORS 813.404. ***Note:*** this only applies if an enhanced suspension was proposed in the Notice of Suspension.	
12. Other issues required by the applicable case law, such as, the validity of the stop and upon a person's request, a reasonable opportunity to contact counsel or others was afforded.	

3. Minors

The legal drinking age in Oregon is 21. In the early 1990s, Oregon incorporated this requirement into the Implied Consent law. The Implied Consent law for drivers in this age group provides that a failing breath test is .01 percent or more. *See* ORS 813.300(3); 813.410(6)(c)(C). The scope of these hearings is exactly the same as those for any of the blood or breath test hearings described in this section except that: (1) the record must show that the person was under 21 at the time of arrest; and (2) the breath test reading may be .01 percent or higher.

Commercial driver licenses may not be issued to anyone under the age of 18. If the hearing involves the suspension of a CDL for a person who is at least 18 years old, but less than 21, the applicable blood alcohol level is .04 percent at the CDL hearing, and .01 percent at a hearing regarding the base driving privileges. Since any alcohol in the blood at all fails the breath test for a person under the age of 21, as a practical matter, these persons will always receive suspensions of both sets of driving privileges (requiring two orders) as a result of one, combined hearing.

4. Urine Test Refusals

URINE TEST REFUSALS	
"PASSED TEST" ALTERNATIVE	**"ACCIDENT" ALTERNATIVE**
1. The hearing was held in the county of arrest or within 100 miles of the location	1. The hearing was held in the county of arrest or within 100 miles of the location

where the alleged DUII offense occurred or by telephone.	where the alleged DUII offense occurred or by telephone.
2. The person was arrested for DUII.	2. The person was arrested for DUII.
3. The person was offered a breath test, and at that time the police had reasonable grounds to believe the person had been driving under the influence of intoxicants in violation of ORS 813.010.	3. The person was involved in a motor vehicle accident resulting in injuries or property damage.
4. Before being asked to take the breath test, the person was read the "Rights and Consequences" information from ORS 813.130 (found in Section I on the back of the ICCR). ORS 813.410(6)(e).	4. The person was requested to take a urine test. At that time the police had a "reasonable suspicion" that the person had been driving under the influence of a controlled substance, an inhalant or any combination of an inhalant, a controlled substance and intoxicating liquor. ORS 813.131(2)
5. The person produced a breath test result of .07% or less (if under 21: anything over .00%).	5. Before being asked to take the urine test, the person was read the "Rights and Consequences" information from ORS 813.130 (found in Section II on the back of the ICCR). ORS 813.410(6)(e).
6. The Intoxilyzer was properly certified. ORS 813.410(6)(h).	6. The officer requesting the urine test had been certified by the DPSST as having received a minimum of 8 hours of training in drugs that impair as required by ORS 813.131 and 813.132.
7. The testing procedure complied with applicable legal requirements (*i.e.*, followed the "Intoxilyzer Operator's Checklist"). ORS 813.410(6)(h).	7. The person refused the urine test. (***Note:*** These individuals may have previously passed, failed, refused, or not have been offered the breath test. ORS 813.131(1)(b).
8. The officer operating the Intoxilyzer was properly certified to do so. ORS 813.410(6)(g).	8. Following the urine test refusal, the person was given a copy of the Notice of Intent to Suspend document (ICCR). ORS 813.410(6)(f).
9. After the police obtained a passing score from the breath test, the person was requested to take a urine test. At that time the police had a "reasonable suspicion" that the person had been driving under the influence of a controlled substance, an inhalant or any combination of an inhalant, a controlled	9. ***If an enhanced suspension is proposed in the Notice of Suspension***, the person's driving record indicates that he or she was subject to an enhanced suspension period for any of the three reasons listed.

substance and intoxicating liquor.	
10. The officer requesting the urine test had been certified by the DPSST as having received a minimum of 8 hours of training in drugs that impair as required by ORS 813.131 and 813.132.	10. Other issues required by the applicable case law, such as, the validity of the stop and arrest and, upon a person's request, a reasonable opportunity to contact counsel or others was afforded.
11. Before being asked to take the urine test, the person was read the "Rights and Consequences" information from ORS 813.130 (found in Section II on the back of the ICCR). ORS 813.410(6)(e).	
12. The person refused the urine test.	
13. Following the urine test refusal, the person was given a copy of the Notice of Intent to Suspend document (ICCR). ORS 813.410(6)(f).	
14. ***If an enhanced suspension is proposed in the Notice of Suspension***, the person's driving record indicates that he or she was subject to an enhanced suspension period for any of the three reasons listed in ORS 813.430.	
15. Other issues required by the applicable case law, such as, the validity of the stop and arrest and, upon a person's request, a reasonable opportunity to contact counsel or others was afforded.	

Special Scope Note: The Justice Department's advice for situations where a breath test was administered before the urine test was requested, is that the breath test result and all accompanying evidence (*i.e.*, test record and officer permit, Intoxilyzer certification, etc.) is foundational to showing that the police had the authority to request a urine test. See Sarah Castner memo to Dwight Apple, August 21, 1996. Therefore, the ALJ will conduct a regular BAC hearing, except that the test result will be .07 percent or lower, and then continue the hearing to inquire into why the urine test was requested and whether that procedure was done correctly.

5. Blood Test Failure and Refusals

SCOPE OF HEARING	
BLOOD TEST FAILURE ("BLF")	**BLOOD TEST REFUSAL ("BLR")**
1. The hearing is being held in the county of the DUII arrest or within 100 miles of the location where the alleged DUII offense occurred or by telephone.	1. The hearing is being held in the county of the DUII arrest or within 100 miles of the location where the alleged DUII offense occurred or by telephone.
2. When asked to take the blood test, the person was under arrest for DUII. ORS 813.410(6)(a).	2. When asked to take the blood test, the person was under arrest for DUII. ORS 813.410(6)(a).
3. Subsequent to the arrest, the person was requested to submit to a blood test while receiving medical care in a health care facility immediately after a motor vehicle accident. At the time of the request, the police had reasonable grounds to believe the person had been driving under the influence of intoxicants. ORS 813.410(6)(b).	3. Subsequent to the arrest, the person was requested to submit to a blood test while receiving medical care in a health care facility immediately after a motor vehicle accident. At the time of the request, the police had reasonable grounds to believe the person had been driving under the influence of intoxicants. ORS 813.410(6)(b).
4. Before being asked to take the blood test, the person was informed of the "Rights and Consequences" information from ORS 813.130 (found in Section I on the back of the ICCR). ORS 813.410(6)(e).	4. Before being asked to take the blood test, the person was informed of the "Rights and Consequences" information from ORS 813.130 (found in Section I on the back of the ICCR). ORS 813.410(6)(e).
5. The person submitted to the blood test and it produced a blood alcohol reading of .08% or more. ORS 813.410(6)(c); .04% or more if CDL; .01% or more if under 21.	5. The person refused the test. ORS 813.410(6)(c).
6. The department received the results of the blood test within 45 days of the date of the arrest. ORS 813.100(4).	6. Following the refusal, the person was given a copy of the Notice of Intent to Suspend document (ICCR). ORS 813.410(6)(f).
7. The methods, procedures, and equipment complied with applicable legal requirements of ORS 813.160.	7. ***If an enhanced suspension is proposed***, the person's driving record indicates that he or she was subject to an enhanced suspension period for any of the three reasons listed in ORS 813.430.

8. The person administering the test was qualified to do so under ORS 813.160.	8. Other issues required by the applicable case law, such as, the validity of the stop and arrest, and upon the person's request, a reasonable opportunity to contact counsel or others was afforded.
9. Following receipt of the test results, the department issued under ORS 813.410(3) a notice of intent to suspend conforming to the requirements of ORS 813.100. ORS 813.410(6)(f).	
10. ***If an enhanced suspension is proposed***, the person's driving record indicates that he or she was subject to an enhanced suspension period for any of the three reasons listed in ORS 813.430.	
11. Other issues required by the applicable case law, such as, the validity of the stop and arrest, and upon a person's request, a reasonable opportunity to contact counsel or others was afforded.	

Special Scope Note: The current procedure followed by Oregon police officers is that if the person agrees to a blood test, the officer will give the ICCR to the person at the conclusion of the testing process, even though there is no way that the officer could know by that point whether the alcohol level is .08 percent or more. The suspension portion of the form is left unmarked. The reason for this is that the officer affirms, by signing the ICCR, that he or she has given a copy of the form to the arrested person. Later, after the Department receives the blood test result, and if it discloses a BAC of .08 percent or more, the Department will send a suspension letter to the person to conform to the requirements of ORS 813.410(3) and to give the person the opportunity to request a hearing. Either this letter, or a form given to the person *after* the blood is drawn, is necessary to satisfy the requirements of ORS 813.410(6)(f). *See* memo from Senior Trooper TA Mitchell, Oregon State Police, dated October 3, 1995.

E. SPECIAL HEARING TIPS

1. Know the rule of evidence that applies. ORS 183.450(1) provides:

> **Irrelevant, immaterial or unduly repetitious evidence shall be excluded** but erroneous rulings on evidence shall not preclude agency action on the record unless shown to have substantially prejudiced the rights of a party. All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible.

(Emphasis added.) You are required to protect the record from irrelevant, immaterial or unduly repetitious information.

2. Use 137-003-0595 to control the hearing, including excluding or expelling people whose behavior prevents you from conducting a full/fair hearing. The rule provides, in pertinent part, as follows:

> (2) The administrative law judge may exclude witnesses from the hearing, except for a party, a party's authorized representative, expert witnesses, the agency representative, one agency officer or employee and any persons authorized by statute to attend.
> (3) An administrative law judge may expel any person from the contested case hearing if that person engages in conduct that disrupts the hearing.

3. Despite the more informal setting of administrative hearings, the hearing is not a free-wheeling dialogue. There is a set pattern for how a hearing is to be conducted. OAR 137-003-0600(4) provides:

> The hearing shall be conducted so as to include the following:
> (a) The statement and evidence of the proponent in support of its action
> (b) The statement and evidence of the opponents * * *
> (c) Any rebuttal evidence, and
> (d) Any closing arguments.

4. The rules of ethics apply to administrative hearings. Lawyers are prohibited from behaving in an undignified or discourteous manner that is degrading to the tribunal. "Degrade" means to "bring to low esteem or disrepute." *In re Complaint as to the Conduct of Meyer*, 328 Or 211 (1999) (where an attorney appeared on behalf of a client at a DMV hearing while under the influence of intoxicants). *See also, In the Matter of Goude*, 296 S.C. 510 (1988).

F. IMPLIED CONSENT HEARING CHECKLIST ESSENTIALS

Preliminary Matters

- Turn on the recorder, or otherwise ensure the hearing is being recorded.
- State the date and time of the hearing.
- Introduce yourself and state the case name and number.
- Identify the participants present.
- Ensure that the petitioner and/or counsel have reviewed the proposed exhibits.
- Ask for any opening statement from the petitioner/counsel.
- Swear in the Department's witness.

Substantive Issues

- Reason(s) for the stop:
  - if a violation, which one?
  - if reasonable suspicion, of what and why?
  - more than one reason?
- Reason(s) for expanding the scope of the stop
- Was there consent for the FSTs or PC for DUII?
- Develop all the evidence that led to the arrest.
- Ask when, in the series of events, the officer first believed it was more likely than not that the petitioner was DUII.
- Arrest for DUII: state statute or municipal ordinance? What time?
- Driving:
  - on highway or premises open to the public?
  - if premises open to the public, develop the record.
- Venue: is the hearing within county of arrest or within 100 air miles of the point of arrest (does not apply to telephone hearings)?
- Reasonable Grounds to believe DUII at time of breath test request: did anything change between time of arrest and time of breath test request?
- Rights and Consequences: read in their entirety before the breath test request?
- Communication with counsel or others: if requested by the petitioner, ask how the officer accommodated the request.
- Pretest observation period: what were the circumstances and times up to and through last breath sample?
- Test administration:
  - if a refusal, ask what words or conduct led to the refusal;
  - if a breath test failure, ask if the officer is certified to operate the Intoxilyer 8000;
  - if a failure, determine that the instrument was properly certified 90 days or less before the test;
  - if a failure, have officer witness authenticate test report.
- Notice: how was the petitioner provided with a copy of the ICCR?
- Enhanced Suspension: if applicable, take notice of the petitioner's drive record and the relevant entries therein.
- Allow for cross-examination of the Department's witness(es).
- Allow for testimony on the petitioner's behalf, and cross-examination of any witness**.**
- **ADMIT ALL EXHIBITS.**
- Allow for closing argument.
- State the time before going off the record.

G. TIPS FOR CONDUCTING A WELL CONTROLLED HEARING IN DIFFICULT CIRCUMSTANCES

1. Other than saying "Good Morning/Good Afternoon," be very careful about engaging in dialogue with witnesses/attorneys prior to the hearing or during any breaks. Perception is its own reality, so protect the perception of fairness.

2. Start the hearing on time and get the recorder going as soon as you sit down.

3. Keep your tone of voice even and neutral.

4. If a hearing becomes difficult, take a break. Leave the room and go someplace where the witness/attorney/officer can not engage you in conversation, even if that means five minutes in your car. When you come back to the hearing, reiterate that the ruling has been made and you are moving on from wherever you left off. If you are unable to break contact with difficult parties, keep the recorder on and advise the parties you are doing so.

5. If you are able to do so, take a break to confer with another ALJ, the Lead or your Presiding about ways to cope with the difficult party or diffuse the difficult situation.

6. Do not argue or engage in dialogue when hearing objections or making rulings. Listen to the objection, ask clarifying questions (if necessary), make the ruling and stop talking. If you hear more talking from someone else, explain that the record reflects the argument and the ruling, the record is now preserved and you are moving forward to the next question. Repeat as many times as necessary. Sometimes allowing the party to have a continuing objection will resolve the problem, especially on hearsay objections.

7. If the participant claims that you are biased and unable to provide a full/fair hearing, you may want to remind the participant that a request for change of ALJ must be in writing. If the participant submits a written request for a change of ALJ in an Implied Consent hearing, he or she has the burden to show cause why the ALJ cannot provide a fair hearing. The hearing may need to be stayed or continued pending a good cause hearing before the Chief ALJ or designee (*i.e.*, a Presiding ALJ). The process and procedure for this recusal situation is addressed in Chapter 17.

8. If a participant offers to make an "offer of proof," let him or her do so, but consider options in receiving the offered evidence. Instead of calling the witness, swearing him or her in and listening to the testimony, ask the party making the offer to summarize what he would expect the witness to say if called, or what the evidence would show if admitted.

9. Write closing arguments down as they are made and say, "Thank you. I will take those into consideration as I make my findings and conclusions." Do not ask questions about the argument in order to clarify and/or get counsel to abandon them and/or to make counsel seem uninformed. You get to write the order. Let your order do your talking.

10. Remain polite and composed. Remember, the record may be reviewed by others (either on appeal or by a supervisor), and be mindful of projecting a professional demeanor at all times.

11. Finally, watch your body language. Do not spin in your chair, roll your eyes, yawn, smirk, drop your pen (which says to the participants, you are not interested in what the witness or counsel has to say), or look questioningly at the petitioner or the officer (which may be perceived as asking what is the attorney doing).

CHAPTER 19

EVIDENCE

*****

The rules of evidence are different under the APA than in criminal court, yet many defense attorneys do not appreciate these differences. The purpose of this chapter is to provide the ALJ with material that can be used to address evidentiary arguments.

A. ADMISSIBILITY

One of the central functions of the ALJ is to take evidence into the hearing record from which findings of fact can be made. Receiving evidence into the record implies that a decision about admissibility is being made. "Admissibility" refers to the concept of what evidence the ALJ will consider in making his or her findings. The admissibility of evidence in administrative hearings in Oregon is governed not by the Oregon Evidence Code, but by the language in ORS 183.450(1):

> Irrelevant, immaterial or unduly repetitive evidence shall be excluded . . . All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible.

See also OAR 137-003-0610, which essentially restates the statute.

There is always some firsthand evidence (*e.g.,* from the person who took an action) in the record of an Implied Consent hearing. To meet the evidentiary burden, DMV has made it a practice since 1984 to subpoena the police officer who signed the Implied Consent report. The form also provides for the identification of a second officer that can be subpoenaed if someone other than the signing officer was involved in the "Rights and Consequences" process. This is a fairly rare occurrence in police procedure and thus, it rarely arises at hearing.

There may also be hearsay evidence offered in an Implied Consent hearing, *i.e.*, testimony relating what another person or officer, who is not at the hearing, said or saw. Some hearsay may be verbal, but much may be offered in written form. Based on the provisions of ORS 183.450(1), hearsay evidence is generally considered admissible in DMV hearings. For a good short review of hearsay and the law of evidence generally, see Goldberg's *Deskbook on Evidence for Administrative Law Judges*, prepared by Professor Mel Goldberg of the National Judicial College faculty.

Caveat on Administrative Rules: Because this outline is aimed primarily at generating awareness of the substantive law in the Implied Consent area, references to procedure are only offered where they assist the discussion. The administrative rules of procedure should be consulted in connection with any procedural decision an ALJ is making.

The admissibility standard in ORS 183.450(1) can also present a trap for the unwary. A good example of this relates back to evidence of the "Horizontal Gaze Nystagmus" field sobriety test. Prior to the decision in *State v. O'Key*, 321 Or 285 (1995), some ALJs were of the opinion

that this particular field test had not reached the level of scientific acceptability needed to make it something that a "reasonable and prudent person" would rely on. But, police officers kept offering it as one of the grounds for their probable cause to make a DUII arrest. Did this mean that the gaze test results should be denied admissibility under the APA? No. The subjective portion of the reasonable suspicion/probable cause test (discussed elsewhere in this outline) requires a demonstration of what the officer relied on in forming his or her conclusion. From that standpoint, all the things the officer saw and factored into his or her decision were admissible because all were "of a type" that a reasonable person would rely on in determining what made up the officer's probable cause. To be admissible, the evidence does not have to be on what the ALJ, as a reasonable person, would base the objective evaluation of probable cause or reasonable suspicion.

B. HEARSAY

As noted above, "hearsay" is a statement made by someone other than the testifying witness that is offered into evidence to prove the truth of the matter asserted. Hearsay evidence is generally considered *admissible* in DMV hearings. Under ORS 183.450(1), "All other evidence of a type commonly relied on * * * shall be admissible." The judgment about admissibility does not really require that an ALJ evaluate the *content* of the evidence offered, just whether it is "of a type" commonly relied on. Thus, in reality, an ALJ is free to admit evidence into the record if it is of a "type" commonly relied on, then give it full, limited or no weight depending on its apparent reliability, probative quality and substantiality once the specific content has been examined after the hearing.

1. Police Reports

In *Cole v. DMV*, 336 Or 565 (2004), the Oregon Supreme Court considered whether and when hearsay evidence may be substantial evidence in an Implied Consent proceeding. The court reiterated that the analytical model originally set out in *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991) was the appropriate method to determine whether such evidence is sufficiently reliable to be substantial evidence. In *Reguero*, the court established the following criteria for assessing the substantiality of hearsay evidence: (1) whether there are alternatives to relying on the hearsay evidence; (2) the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy; (3) the state of the supporting or opposing evidence, if any; (4) the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements; and (5) the consequences of the decision either way. *Reguero*, 312 Or at 418.

In *Cole*, a police sergeant stopped Cole's vehicle. According to a written report the sergeant prepared, he made the stop after observing Cole commit a number of traffic violations. When another officer, Nguyen, arrived at the scene, the sergeant advised Nguyen that he suspected Cole had been DUII. Nguyen took over the investigation, administered field sobriety tests and subsequently arrested Cole for DUII. Following the arrest, Cole failed a breath test,

and was served with notice of DMV's intent to suspend his driving privileges. Cole requested a hearing. The Department subpoenaed Officer Nguyen to the hearing. At the hearing, the Department offered the sergeant's written report to support the validity of the stop. Cole objected to the report's admission, asserting that he did not have a copy of the report prior to hearing and did not know the identity of the stopping officer until the hearing. Cole also contended that the sergeant's report was hearsay, and he did not have an adequate opportunity to confront and cross-examine the stopping officer.[1] The ALJ overruled the objection and admitted the sergeant's report. In affirming the suspension, the ALJ relied on the sergeant's report to find that Cole was lawfully stopped.

Cole appealed the order. The circuit court found that Cole was denied due process because he had no means available to determine the stopping officer's identity before the hearing. The Department appealed the circuit court decision and, in *Cole v. DMV*, 172 Or App 132 (2001), the appellate court held that, by itself, the sergeant's hearsay police report did not constitute substantial evidence. The Department petitioned for review. The Supreme Court found that the sergeant's hearsay police report was sufficiently reliable and probative for the agency to use it as a basis for its findings of fact.

The *Cole* Court further found, however, that Cole's hearing did not comport with the fundamental requirements of due process because, despite Cole's discovery request, the Department did not provide him with the sergeant's name or a copy of his report prior to the hearing. Because Cole did not know the sergeant's identity at the time of the hearing, he lacked a meaningful opportunity to subpoena the sergeant and secure his attendance.

In conducting the *Reguero* hearsay analysis, the court noted that DMV could have subpoenaed the sergeant, which is a viable alternative to relying upon the hearsay. Thus, the first factor favored Cole. The court also found that the potential efficacy of cross-examination slightly favored Cole because the sergeant, like the officer who was subpoenaed, might well have had an independent recollection of the events. Next, the state of corroborating and opposing evidence favored DMV. Of significance was the fact Cole did not submit evidence contradicting the report. Also, the report was primarily a record of direct observations made by the sergeant and was prepared in the ordinary course of business and pursuant to the sergeant's official duties. Finally, the court considered the importance of the facts sought to be proved by the report and the considerations of economy. Though the legality of the traffic stop is a matter that DMV must prove in order to support the suspension, the court noted that the considerations of economy "loom large." DMV is responsible for holding hundreds of Implied Consent hearings monthly under strict timelines. The court determined that, in general, when a party fails to exercise its right to have DMV issue a subpoena to an officer, the agency is not obligated to procure the

[1] Petitioner also sought a continuance, which the ALJ denied. At the time of Cole's hearing, the ALJ had no authority to grant a continuance to allow Cole to subpoena the stopping officer. Since that time, however, the Department has revised OAR 735-090-0000(5), to allow a petitioning party an "other just cause" continuance to subpoena a necessary witness that was unknown to the petitioner prior to the hearing.

officer's attendance and may submit the report as evidence. On balance, the court held that the hearsay report was sufficiently reliable and probative to constitute substantial evidence.[2]

Other court cases have also upheld ALJ findings based on hearsay police reports:

- *Petteys v. DMV*, 195 Or App 644 (2004): the court addressed the *Reguero* factors in light of *Cole/Dinsmore*, and held that given the quality and quantity of corroborating and opposing evidence, a hearsay police report was reliable and constituted substantial evidence.

- *Golliher v. DMV*, 173 Or App 586 (2001): noting that the ALJ was entitled to rely on the contents of a stopping officer's report.

- *Hause v. MVD*, 127 Or App 421, *rev den* 319 Or 281 (1994): other evidence in the record, including Petitioner's testimony that he "may well have been weaving," supported the agency's determination.

- *Pierce v. MVD*, 125 Or App 79 (1993): ALJ rejected the petitioner's testimony as not credible in favor of a hearsay witness' statement to the arresting officer that the petitioner had driven on a public road.

As discussed in Chapter 17, the Department enacted OAR 735-090-0130 to address the situation where "the Department presents hearsay testimony to establish the required elements under ORS 813.410(6) and the petitioning party presents substantial evidence that contradicts that hearsay evidence." The Department's rule empowers the ALJ to continue the hearing to allow the Department to subpoena the hearsay witness to the continued hearing where appropriate.

Practical Note: Before granting a continuance under this rule, the ALJ should determine whether the challenged evidence is, in fact, hearsay. For example, information from a citizen informant or dispatcher that a police officer relies upon to make a stop is not hearsay, because it is not being offered to prove the truth of the matter asserted. Rather, the evidence is being offered to show that the officer reasonably suspected a crime.

2. Other Exhibits Challenged As Hearsay

As noted elsewhere in this manual, an Implied Consent hearing file generally contains several documents, depending upon the nature of the case. Petitioners or attorneys may object to one or more of the documents as hearsay, but these objections should be overruled. Indeed, if

[2] The court noted that while Cole has an interest in maintaining his driver license, DMV has an interest in removing unsafe drivers from the road. Consequently, the fifth *Reguero* factor, "the consequences of the decision either way," was neutral.

these documents are properly in evidence in a criminal proceeding, the ALJ may admit and rely on the ministerial forms and reports offered in an Implied Consent hearing.

Intoxilyzer Certifications: In the criminal context, the courts have held that Intoxilyzer certifications are admissible under the public records exception to the hearsay rule. *State v. Smith*, 66 Or App 703 (1984); *State v. Norman,* 203 Or App 1 (2005) (holding that the certificates are "nontestimonial"); *see also State v. Bergin,* 231 Or App 36 (2009) (upholding *Norman*).

Operator's Checklists: The courts have also found the Intoxilyzer Operator's Checklist to be admissible under the same exception. *State v. Spencer*, 82 Or App 358 (1986), *rev'd and rem'd on other grounds* 305 Or 59 (1988).

DMV Driver Records: In *State v. Rust*, 240 Or App 749 (2011), the court held that a DMV driver record was admissible under the public records exception to the hearsay rule, and that the notations in record were not too cryptic to establish a previous conviction and suspension.

Blood Test Reports and Blood Sample Technician Certifications: Objections to documents relating to the certification of the person who collected the blood, the person who performed the chemical analysis and the letter documenting the lab test result should also be overruled. In an informal opinion, the Justice Department has concluded that these documents are admissible and constitute substantial evidence. This conclusion is based in part on ORS 475.235, a provision that allows the state to introduce the written report of a criminalist in a drug offense prosecution without the testimony of the criminalist. The statute provides that a certified copy of an analytical report signed by the director of the state police crime detection laboratory or the criminalist conducting the analysis shall be accepted as *prima facie* evidence of the results of the analytical findings. The Oregon Supreme Court upheld this provision in the face of a confrontation clause challenge in *State v. Hancock*, 317 Or 5 (1993). If such criminalist reports are sufficient evidence on which to base a conviction in a criminal trial, one would be hard pressed to find that similar documents do not constitute substantial evidence in an administrative proceeding. The challenged forms and reports are the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.

3. Oral Testimony Challenged As Hearsay

Petitioners and counsel may also object on hearsay grounds when an officer begins to testify as to statements made to the officer by other officers or witnesses. For example, in *Adams v. MVD*, 132 Or App 431 (1995), the arresting officer who appeared at the hearing testified that another officer had advised the petitioner of the rights and consequences. The officer testified that the other officer told him that the officer had read the rights and consequences to the petitioner. The arresting officer also testified that he had heard part of the reading. Acknowledging that hearsay evidence can constitute substantial evidence, the court held that, on

the evidence presented, substantial evidence supported the agency's determination that the petitioner was informed of the rights and consequences before he refused the breath test.

In the criminal context, the court has held that a trial court may rely on the hearsay statement of one police officer to another officer to determine whether a stop was based on reasonable suspicion. *See State v. Wright*, 112 Or App 567, *aff'd and rem'd* 315 Or 124 (1992), where, in a hearing on a motion to suppress, the court relied on hearsay to find that the stopping officer had a reasonable suspicion that the defendant was DUII.

As long as the ALJ is satisfied with the sufficiency of the evidence, hearsay may be used to support most of the required elements in an Implied Consent hearing, including the elements of the stop, the DUII arrest, the police officer's "reasonable grounds" to believe the person was DUII when requesting the breath test, the administration of the breath test (in this regard, see *Andries v. MVD*, 88 Or App 425 (1987)), and provision of the Notice of Intent to Suspend document to the arrestee.

***Practical Note**:* An officer's testimony regarding statements made by other officers or witnesses is *not* hearsay when it is not offered to prove the truth of the matter asserted but rather to show that the officer reasonably believed that the petitioner was DUII. The court recognized this distinction in *Clark v.* MVD, 89 Or App 254 (1988).

4. Testimony In Lieu of Documentation

The absence of a breath test report may be explained and other documents or testimony may sufficiently establish the breath test result. For an analogous situation, s*ee State v. Holcomb*, 99 Or App 156 (1989), where the court recognized that the evidence card is a means to record the results of the test, but it does not affect the accuracy of the way in which the test was administered.

While the absence of a breath test report may not be fatal, the absence of an Intoxilyzer certification still poses an evidentiary problem, as the subpoenaed officer is probably not qualified to attest to the accuracy of the Intoxilyzer or its certification record. As discussed above in Chapter 14, if the Department has neglected to include the Intoxilyzer certificate in the file, the ALJ may leave the record open to allow the Department's witness (the subpoenaed police officer) to submit the document. The officer should be able to access the certificate on line from the State Police Forensic Services Divison.

C. HOW EVIDENCE IS DEVELOPED

As to the types of testimony offered in an Implied Consent hearing, much of the evidence given to substantiate the grounds for a stop or an arrest will be from an officer's memory. The officer may permissibly refresh his or her memory from a written police report. The officer may also permissibly read from the report. In any of these forms, the evidence is admissible, and

objections to these practices *per se* should be overruled. The latter received specific approval in *Clark v. MVD*, 89 Or App 254 (1988).

Sometimes a police officer will begin testifying at the hearing by referring to a report he or she has in front of him or her, and counsel for the petitioner will object that there is some sort of "right" to have the officer's testimony from memory and without referring to reports. There is no such right. Objections to this effect should also be overruled. An officer or any other witness is entitled to give his or her testimony in the manner that best suits the witness' responsibility to produce the requested answers under oath. If anything, the different styles that witnesses choose for their testimony may go to the weight to be eventually assigned. Counsel can always inquire on cross-examination into what part of the testimony was remembered, or refreshed from the report, or read from the report.

If an officer or other witness is simply reading from a document or report, the ALJ may choose to receive the report into evidence. This is partly to judge the consistency of the report against the other evidence in the record, and partly to judge what kind of report-writer the officer is. In this context, a limited "reasonable person" foundation needs to be laid for the report, such as who wrote it and when.

1. Documents Testified From

If a police officer testifies from a report, either directly or by reference to a report he has with him, the ALJ may allow the person to see it before cross-examination of the officer. An officer's refusal to allow this may result in a denial of the right to cross-examination in a reasonable manner. Continued refusal by the officer may lead to dismissal of the hearing and suspension.

With the law change in 2011 making Implied Consent hearings by telephone unless the petitioner or officer requests an in-person hearing, the OAH is now requiring the officer to submit to OAH a copy of any exhibits and documents from which he or she intends to testify. OAR 137-003-0605 specifically requires parties and agency witnesses to submit such records to OAH before the commencement of the hearing.

2. Documents Offered As Evidence

A long-standing Hearings Section policy is that if a document or other evidence is held admissible in part, the ALJ is entitled to demand that the entire document (or tape, etc.) be placed in the record to ensure that the ALJ is not being misled by something taken out of proper context. This is based on the principle in ORS 40.040, Oregon Evidence Code Rule 106.

Practical Note: An ALJ should never be persuaded to receive only part of a tape or document into the record if there is any danger of being mislead. It is never a reversible error to admit too much evidence into a hearing record. There may be other things on the tape of great relevance to the outcome of a case that the offeror may not wish the ALJ to hear or see, and in

some instances, the offeror himself may not even know about. On the other hand, if the ALJ is not concerned about this possibility, there is no requirement that an entire document or tape be received in order to listen to or use a small portion of it.

3. Presumptions

Presumptions are legal combinations of known fact(s), as found in the hearing record, and an assumed fact. There is a fairly long list of evidentiary presumptions to be found in Oregon Evidence Code at ORS 40.135. For example, it is presumed that if a letter is properly addressed and stamped, it will be delivered to the addressee after being mailed. ORS 40.135(1)(q). Another useful presumption in the hearing environment is as follows: "Evidence willfully suppressed would be adverse to the party suppressing it." ORS 40.135 (1)(c). If the "known" facts are properly established, presumptions of the types listed in the statute are "evidence" entitled to appropriate weight in determining whether a burden of proof has been met. ORS 40.120.

4. Officer Refusals to Testify

If a police officer refuses to answer questions that are material and relevant to the proceeding, be they from counsel, the ALJ, or the petitioner, and the officer continues to refuse after receiving an explanation of the relevancy and a warning that dismissal of the proceeding could result, it is within the ALJ's discretion to end the hearing and dismiss the proposed suspension action.

5. Petitioner or Other Witness Refusals to Be Cross-Examined: The "Scope" Objection

The petitioner or petitioner's counsel may attempt to wrest control of the hearing record away from the ALJ by limiting the ALJ's ability to cross-examine. One such tactic is to object to the ALJ's questioning as being "outside the scope" of the person's direct testimony. Another form of this tactic emerges when a witness refuses to testify based on the privilege against self-incrimination.

When these situations develop, the ALJ needs to assess the reasons given for the objection or refusal. The objection that the ALJ's questions are "outside the scope of direct" is disposed of easily. The right of the ALJ to cross-examine witnesses in an administrative hearing is guaranteed under OAR 137-003-0600. Cross-examination is not restricted to the scope of "direct" examination, as is true under the Oregon Rules of Evidence applicable in court. While attorneys not accustomed to administrative hearings have been known to make this objection in good faith, when it comes from an attorney experienced in the Implied Consent area it is usually a sign that the attorney is attempting to prevent certain matters from being disclosed. The ALJ should never accept this tactic.

Even under the Oregon Rules of Evidence, cross-examination in trial may always go to matters affecting the witness's credibility regardless of what was answered in direct. *See* Oregon

Rule of Evidence 611(2). Moreover, cross-examination is within the discretion of the court. With court approval, cross may properly be directed to matters outside the scope of direct. The ALJ serves in the same capacity in the hearing process that the judge serves in court. If an attorney refuses to accept the ALJ's ruling here, and continues to direct his client not to answer a certain line of questioning for this reason, the ALJ may respond by denying counsel the opportunity to make any use of the witness's testimony to support the petitioner's case. See below.

6. Petitioner Refusals to Be Cross-Examined: Privilege Against Self-Incrimination

A petitioner's or a petitioner's witness' refusal to answer a question based on the privilege against self-incrimination, requires a different and more complicated line of analysis. If the person in question has already answered questions material and relevant to the issues at hand, it is probably appropriate to advise counsel and the petitioner that the petitioner has waived his right to assert the privilege. This is sometimes referred to as the "material question" doctrine, and a discussion of this concept may be found in *McGautha v. California*, 402 US 183 (1971). *McGautha* involves assertion of the Fifth Amendment privilege against self-incrimination where immunity had not previously been granted. The court wrote, in part, that a defendant "who takes the stand in his own behalf cannot then claim the privilege against self-incrimination on matters reasonably related to the subject matter of his direct examination." *See* ORS 136.643 for a parallel Oregon provision. Although there is no Oregon case law on this issue, there is no reason why a similar doctrine should not apply in the hearing environment.

It is not permissible to draw a negative inference as to witness credibility solely because of the assertion of the privilege. *See John Deere Co. v. Epstein*, 307 Or 348 (1989). But the ALJ may try another approach to resolve the matter. Cross-examination is one of the cornerstones of credible fact-finding. Although it goes beyond the need to cite case law, an ALJ could cite *Goldberg v. Kelly*, 397 US 254 (1970) for this proposition. There, the court held that where agency "decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *See also Greene v. McElroy*, 360 US 474, 497 (1959). Just as the petitioner has a right to cross-examine the witnesses against him, the ALJ, in his or her role as a representative of the public, has the right to cross-examine witnesses offering testimony against the state's case. Thus, if the ALJ's right to cross-examine is being impaired by a self-incrimination objection, he or she would be entitled to give no weight to any testimony the witness has already given under direct. This is an appropriate response to the ALJ's inability to carry out the hearing according to the dictates of constitutional due process. This does not run afoul of the *Epstein* holding. Rather than taking a negative inference from the assertion of privilege, the ALJ is simply treating the petitioner's testimony as a nullity because of denial of the opportunity to assess credibility. If the ALJ announces this determination during the hearing and gives counsel every opportunity for a change in posture, it is highly unlikely to be overturned on appeal.

7. Audio and Video Tapes

Audio and videotapes recorded in connection with a DUII investigation are admissible in the same manner as documents. If a tape is offered as an exhibit, the ALJ should advise the person proffering the tape that once admitted into the record as an exhibit, the tape will not be returned because it becomes an official part of the agency record that must be preserved for purposes of appeal. An ALJ may listen to or view a tape at hearing if the need arises. If an audio recording is played at hearing, it should be recorded on the record. Videotapes cannot be visually "played into" the record of a hearing and thus should always be received as exhibits. The ALJ may reserve viewing or listening for later by placing the record in continuance.

The ALJ should be careful to capture any interpretive remarks that witnesses make regarding the evidence that the offeror of the evidence believes to be probative. If the tape, be it audio or video, is used as the basis for a finding that is not covered by evidence elsewhere in the record, the ALJ should note this in the order so that a court can find it if the decision is appealed.

The introduction of tapes into the record of an administrative hearing creates various opportunities for an ALJ to commit procedural or judgmental errors. For instance, an ALJ should never make the mistake of assuming that he or she knows what is on a tape before viewing it. Although a tape recording may be deemed admissible as repetitive or cumulative, an ALJ should not refuse to receive the tape simply because it will take too long to listen to it. If it contains potentially relevant evidence, it should be received. Tapes should be authenticated, preferably by a police officer who was present during the incident being taped.

Practical Note: During any portion of a hearing, but especially when viewing or listening to tapes, an ALJ should remember that it is undesirable and completely unnecessary to state what judgment is being made about the probative value or "weight" of the evidence. This can and should be left for the opinion section in the order.

D. WEIGHT OR "CREDIBILITY" DETERMINATIONS

The decision that an ALJ eventually makes in a final or proposed order is to be based on the "reliable, probative, and substantial evidence" taking into account the "whole record." ORS 183.450(5). In the absence of legislative language to the contrary, the standard of proof in administrative hearings in Oregon is a preponderance of the evidence. *Sobel v. Board of Pharmacy,* 130 Or App 374 *rev den* 320 Or 588 (1995). The burden of proof in an administrative hearing is on the proponent of a given fact or proposition. ORS 183.450(2). In applying these principles, it is implicit that there will be a degree of "weighing" of the evidence in administrative hearings to find the preponderance of the evidence and decide whether agency action is supportable.

Not all evidence is created equally. Some evidence is capable of use at face value. But the ALJ may be faced with deceptive witnesses, inaccuracies, contradictions, written evidence of

varying levels of quality, and plenty of apparently believable hearsay testimony. There may be evidence the ALJ believes he or she can appropriately use that is blended in with other, unacceptable evidence in the same document or same set of answers from the same witness. The reasons to disbelieve evidence may be obvious, or they may be so subtle that they only appear after hearing when the ALJ has compared different portions of the record.

Judgments about the weight given to evidence at hearing are typically referred to as "credibility" findings. This is somewhat a misnomer. Credibility judgments seldom get made in the form of a flatly stated "finding" such as "Witness A was lying about the incident and Witness B was telling the truth." Generally, an ALJ's decision about what evidence to accept or reject for the purpose of making findings receives discussion in the order, either in a credibility determination paragraph that precedes the findings or in the opinion section. The findings of fact should reflect the determination about which version of a certain event was accepted.

Moreover, a technical distinction may arise about what is included in a credibility determination. "Credibility" relates to whether a person (either in person or as hearsay) is *telling the truth and/or is willing to do so*, while "reliability" refers to whether the person is *able to tell the truth and/or is competent to do so*. For instance, an ALJ may be convinced that a witness is trying to be truthful, but may doubt that the person was in a position to see what he claims to have seen or may doubt the person's observational abilities. It would be appropriate to discuss this witness's testimony by finding him or her an "unreliable" witness for the findings needed in the case rather than referring to the person as untruthful or using terminology tending to cast doubt on the person's willingness to be truthful.

Reliability and credibility are nevertheless often lumped together for discussion purposes. If two witnesses contradict each other under oath, it may not be possible to determine whether it is because one witness is lying or because one or maybe both are honestly mistaken. There are various means that are usually helpful in resolving difficulties of this nature and they are commonly referred to as a credibility determination.

When a witness offers testimony about a certain subject, the ALJ should be prepared with a mental checklist of qualifying questions to consider in order to make a general assessment of the person's reliability and competence to testify on the matter:

- Is the witness offering first-hand testimony or hearsay?
- If hearsay, what was the originating person's basis for observing the events in question?
- Did the originating person observe what he is reported as having said, or merely overhear what someone else said?

- How were the originating person's observations passed on to the testifying person, *i.e.*, contemporaneous with the event or later; verbal, written, or both; voluntary or coerced?

- Was there any corroborating evidence of the hearsay, or contemporaneous recording of it such as a written report?

- And, *whether the evidence is in hearsay form or not, the ALJ should be asking him or herself whether there was anything about the evidence offered, the manner it was gathered, the person gathering it, or the manner in which it was ultimately presented, that would cause a reasonable person to discount its value to any degree*.

Many Implied Consent hearings produce various kinds of unreliable or contradictory evidence that cannot be resolved by resorting to "innocent" explanations alone, *i.e.*, explanations that do not require evaluation of the motives of the witness or declarant. The ALJ must then go further and judge the weight of the evidence in question based on whether or not he or she finds the declarant is telling the truth. Two important principles must be remembered in evaluating the credibility of any witness's testimony. The first is that a person testifying under oath or affirmation is *presumed* to be truthful unless it can be demonstrated otherwise. *See* ORS 44.370:

> A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

The Oregon Code of Civil Procedure, and the APA at ORS 183.417(6), both provide that a person may only be a "witness" if he or she testifies under oath or affirmation, so the above presumption should apply equally in the administrative hearing environment.

The second principle is that unless otherwise provided by statute or rule, corroboration is not required to use a witness's testimony – presuming it to be found credible – for the purposes of meeting a burden of proof concerning any particular fact or issue. *See, e.g.*, *Charbonneau v. Employment Division*, 75 Or App 78, 80-81 (1985). It is partly because of these two principles that, in *Dennis v. Employment Division*, 302 Or 160 (1986), the Court of Appeals reversed a denial of benefits where the hearing officer failed or declined to use a claimant's sworn testimony as the basis for a finding even though that testimony was uncontradicted in the hearing record.

The *Dennis* court also noted as follows: "Where there is evidence in the record both to make more probable and to make less probable the existence of any particular fact, a referee need not explain why he or she chose which evidence to believe." *Dennis*, at 169-70. While this passage may be technically and analytically correct, the best practice is for the ALJ to explain his or her determination. The following standard has stood the test of numerous appeals in Implied Consent hearings:

Some ALJs utilize witness demeanor in the process of judging witness credibility. A witness's voice control, eye and hand movements, body language, level of nervousness, concentration level, and similar characteristics can sometimes tell a great deal to a trier of fact who is experienced in recognizing these factors while a person is testifying. If properly articulated, this is an acceptable basis for a credibility determination. *See International Paper v. McElroy*, 101 Or App 61 (1990). Appellate cases speak of the "deference" given to the hearings officer or trial court judge that had the opportunity to see the witnesses and hear them testify. *See, e.g., Lewis v. Employment Division*, 66 Or App 303, 307 (1984). Demeanor-based credibility findings should be used with caution, however. Studies have found that "demeanor" evidence can sometimes create a false clue to a person's credibility because the person is behaving in an uncharacteristic manner. Also, the tape-recorded record of a hearing will not necessarily reflect some of these observations, such as a witness's body language or demeanor, unless there are verbal comments about this in the record by the ALJ.

There are other grounds on which an ALJ may assess a witness' credibility aside from demeanor. One of the most useful passages about credibility determinations, frequently cited in Implied Consent orders, comes from a concurring opinion written by Justice Richardson in *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256 (1979):

> [T]he simple answer is that credibility (more properly weight) is determinable from a number of factors other than witness demeanor. The credibility, *e.g.*, weight, that attaches to testimony can be determined in terms of the inherent probability, or improbability of the testimony, the possible internal inconsistencies, the fact it is or is not corroborated, that it is contradicted by other testimony or evidence and finally that human experience demonstrates it is logically incredible.

Witness bias can serve as another strong basis for a credibility finding. "Self-interest" is one of the most obvious forms of bias that emerges in Implied Consent hearings: *i.e.*, the petitioner's desire to save his or her driving privileges. Yet, the mere fact a person is being subjected to a possible suspension of his license as a result of the hearing is *not* enough, by itself, to form the basis of a credibility determination. To make a credibility determination based on witness bias, the ALJ needs to find indications in the hearing record that the petitioner demonstrated such a strong personal interest in the outcome that his or her testimony is entitled to little or no weight. This may or may not emerge in a person's testimony in any given case.

In *Tew v. DMV*, 179 Or App 443 (2002), the court found "substantial evidence and substantial reason" to support the ALJ's credibility determination where the ALJ discussed several factors that she used to discount the petitioner's testimony, including the petitioner's personal interest in the outcome of the proceeding and his apparent hostility toward his local police department.

In *Tew*, the court discussed the following factors that may be used to assess a witness' credibility in an Implied Consent case: (a) the police officer is a trained observer who had the

benefit of a written report to refresh his memory of the events in question; (b) the officer, unlike the petitioner, had no specific interest in the outcome of the case, whereas the petitioner was facing a license suspension and potential criminal charge; (c) the petitioner and his witness were intoxicated at the time of the events in issue and alcohol consumption can affect a person's ability to perceive and remember; (d) the petitioner had been less than truthful with the officer at the time of the arrest about the amount of alcohol he had consumed; and (e) the petitioner was apparently hostile toward the police. 179 Or App at 449-50.

Classic examples of self-interest bias arise when a person arrested for DUII attempts to deny the validly of his arrest by denying drinking or minimizing it ("I only had two beers.") But two beers does not explain an Intoxilyzer test reading of .08 percent or more and would seldom explain the numerous symptoms of intoxication that the police officer has testified to and which the petitioner has given the ALJ no reason to doubt. Assuming there were no doubts about the Intoxilyzer test, the witness was either fabricating his or her testimony or was too intoxicated to be able to remember in a reliable manner what he drank.

Another fairly common testimony pattern from petitioners in Implied Consent hearings is the "general denial." A petitioner may insist that everything the officer did in stopping or arresting him or her was either a lie, wrong, or unjustified. Generally, however, these petitioners are unable to persuasively explain why a police officer would commit perjury and potentially ruin his or her entire police career just to get the person suspended under the Implied Consent Law. This is a valid basis to consider in finding the petitioner partly or wholly without credibility.

The ALJ should also be alert to bias on the part of supposedly "neutral" witnesses called on the petitioner's behalf. For example, the situation where a whole series of witnesses work together before hearing to contrive a story intended to achieve one central purpose: *i.e.*, saving the petitioner's driver license. The record in these types of cases can be challenging to sort out and while the ALJ may have suspicions, it may not always be possible to find other, more objectively reliable evidence on which to base the findings. A useful tool in this situation is to cite ORS 10.095(4), which sets for principles a jury may use in determining the credibility of witnesses. This statute recognizes that "the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party with caution."

On the other hand, there have also been hearings where the petitioner or a witness was able to be just as dispassionate in testifying as the arresting officer and remembered things the officer did not. In those cases, an ALJ would be hard pressed to make a supportable credibility determination on the basis of "self-interest" alone. The ALJ must make a determination on the basis of what is in the hearing record, not on unstated assumptions.

Alcohol consumption may be another factor in credibility assessments, as it has a well-recognized effect on the faculties of perception, memory, and recall. In *Tew*, the court acknowledged this well-known fact. 179 Or App at 450. But mere evidence of alcohol consumption at the time of a certain event, even if in excess of the legal limit, does not

necessarily destroy a witness's ability to perform as a reliable witness later. Thus, an ALJ's judgments about the effects of alcohol on a witness' testimony must be made on a case-by-case basis.

In order to base a proper credibility finding, the ALJ must be able to point to instances in the record where the consumption of alcohol had an apparent affect on the witness' perception and testimony. Missing time periods and grossly disproportionate accounts of how time passed are good clues to the effects of alcohol. Along the same line, even if the ALJ concludes alcohol consumption affected a witness' testimony in one part of the record, it does not require that the entire testimony be disregarded. While an ALJ may disregard the entire testimony, he or she may also choose to accept or reject various portions of the testimony based on the apparent effects the alcohol was having at the time along with other factors such as corroboration or logical inference.

Yet another form of bias that can occur is "prosecutorial" bias. That is, has a police officer witness demonstrated such a strong interest in having the hearing decided against the petitioner that it appeared to affect his or her ability to testify truthfully? To date, this has been a very rare occurrence. For one thing, the officer's role in the Implied Consent hearing, as defined by law, has been that of "witness," not an advocate. Indeed, traditionally it has been part of the ALJ's job to steer an officer clear of attempts at advocacy. Second, the officer may be expected to have a normal professional interest in having his or her work properly recognized. This is usually all that an ALJ will detect at hearing. Although it is possible that a police officer may take on the role of an advocate by cross-examining witnesses, objecting to evidence, and making legal arguments (as permitted under ORS 813.412) this situation does not occur frequently. As a "witness/advocate," however, a police officer could be in a position to testify in a way that helps "win" his or her case and then make a closing argument in support of his own testimony. To the degree that it becomes noticeable during the hearing, a police officer who pursues this opportunity may convey the same sort of bias that sometimes emerges with the petitioner and other witnesses.

Finally, another kind of witness behavior that may come into play is "substitutional" testimony. That is, substituting carefully worded opinions or conclusions for testimony as to the facts, or answering a question other than the one asked. The ALJ needs to insure that a person is not merely using a phrase or idiom unconscious of its meaning. But when a witness repeatedly answers questions other than the one asked, or answers with statements such as "I think it was …," or "I don't feel that I …," this is generally a clue to deceptive intent on the witness's part and/or a reason to doubt that the person remembers the true answer.

E. INFERENCES IN ADMINISTRATIVE PROCEEDINGS

An ALJ is entitled to make inferences from other evidence in the record, but the facts on which the ALJ relies must bear the weight of the inference drawn. In *SAIF v. Alton*, 171 Or App 491 (2000), the court discussed the principles that apply to factual inferences in administrative

cases: evidence to support a finding of fact ordinarily can include reasonable inferences derived from facts expressly adduced, as long as the facts on which the inference is based are themselves supported by substantial evidence in the record and as long as there is a "basis in reason" for connecting the inference to the facts from which it is derived.

There must be substantial evidence to support the inferences and the reasoning must satisfy the substantial basis in reason test. To support appellate review of inferences for substantial reason, the ALJ should explain the rationale that led from the facts to the reasonable inference. In *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266 (1981), the court explained the standard as follows:

> Sometimes a rational nexus between an evidenced fact and an inference drawn from it is obvious from common experience (*e.g.*, we may infer from the fact of a wet street that it recently rained). In other cases, however, and particularly in cases involving expertise, the reasoning is not obvious (*e.g.*, we may not infer from present meteorological conditions that it will snow tomorrow). In such an inference, we will not assume the existence of a rationale. Rather we look to the order to state the rational basis of the agency's inference. The explanation need not be complex, but it should be sufficient to demonstrate the existence of a rational basis and to allow for judicial review.

F. EVIDENTIARY RULINGS; OFFERS OF PROOF; SUBPOENAS

1. Evidentiary Rulings

In the Implied Consent hearing, the principal objections to evidence are:

- constitutional challenges, such as those related to the search and seizure exclusionary doctrine;
- failures to meet the admissibility threshold under ORS 183.450(1);
- procedural violations (*e.g.*, failure to properly serve a subpoena). This would ordinarily lead to a ruling by the ALJ barring the evidence or witness on procedural grounds. Another example is OAR 735-090-0040, where it is provided that an Implied Consent "notice of intent to suspend" document must be received by DMV within 10 days of a person's arrest to be admissible at the person's hearing. While another mailing day is afforded if a weekend or holiday comes on the 10th day, it is ordinarily the case that a failure to meet this requirement causes the document to be barred from the record on procedural grounds.
- assertions of privilege (see below); and
- relevancy, materiality, or repetition.

Objections to evidentiary offers may be made and should be noted in the record. *See* ORS 183.450(1); *see also* ORS 183.415(9): "The record in a contested case shall include: * * * (b) Evidence received or considered[;] (c) Stipulations[;] (d) A statement of matters officially noticed[; and] (e) Questions and offers of proof, objections, and rulings thereon." The ALJ is responsible for ruling on all objections, either on the record or in the order. *See* OAR 137-003-0610(4). The ALJ may either (a) sustain an objection (in whole or part); (b) overrule (in whole or part); or (c) defer ruling. In the latter case, it must be stated on the record when the ruling will be made, *i.e.*, at some later time during the hearing or postponed until an order is issued.

Postponing an evidentiary ruling until the order offers the advantage of giving the ALJ more time to consider the matter and may help reduce friction with the objecting party during the hearing itself. The more critical the ruling appears to be to the outcome of the hearing, or the more debatable the decision appears to be, the more appropriate it is to hear argument and take the matter under advisement. There may be no recovery from an erroneous ruling that leads to certain evidence not being heard. However, the practice of postponing a ruling also carries with it the disadvantage of requiring the ALJ to address the ruling in the order. If a ruling is made on a certain evidentiary issue during the hearing, the ALJ need not discuss it again in the order (although the right to do so may be reserved). Other reasons not to postpone the ruling include avoiding the impression of indecisiveness, especially if an attorney is accustomed to receiving a ruling on the record from other ALJs. Postponing the ruling may also stimulate the petitioner or counsel to make other objections that the ALJ might not have had to deal with if a ruling had been made earlier. Also, if the ALJ postpones ruling on an objection covering some apparently pivotal evidence, it may force much of the rest of the hearing to be couched in terms of alternatives.

***Practical Note**:* Regardless of the source of an evidentiary objection, *i.e.*, constitutional, statutory, procedural, privilege, etc., it should be absolutely clear by the time an order is issued (a) what evidence was excluded from the record, if any; (b) what evidence was excluded from the ALJ's decision-making process, if any; and (c) the reasons for the exclusions.

Although it can never be a reversible error to admit *too much* evidence into a hearing record, the failure to make evidentiary rulings or other procedural motions can give a reviewing court a good reason to grant a remand of the case under ORS 813.450.

The principal evidentiary grounds for objecting to evidence during a hearing are found in ORS 183.450(1): "(1) Irrelevant, immaterial or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude agency action on the record unless shown to have substantially prejudiced the rights of a party." *See also* OAR 137-003-0610(2) and (3). Relevant evidence is evidence having a tendency, however slight, to prove a fact or proposition. However, evidence is immaterial if it is not capable of proving facts or propositions that fall within the scope of the hearing. A good example of immaterial evidence comes from *Owens v. MVD*, 319 Or 259 (1994): the petitioner may be able to unearth evidence having a good

tendency to prove that the Intoxilyzer reading was inaccurate, but under the *Owens* holding, this is outside the scope of an Implied Consent hearing and thus, immaterial.

The objection based on undue repetition may seem self-evident but should not be overlooked as an important control mechanism for an ALJ in certain situations. For instance, it may allow the paring down of the number of witnesses called, the scope of their testimony, or documents submitted. This provision also allows an ALJ to bar an attorney or other questioner from asking the same question again and again unless there is *some* suggestion of an ambiguity or doubt in the earlier answers or other evidence.

Generally, evidentiary and procedural objections are raised by the attorney representing the petitioning party (or an unusually well-versed petitioner). The ALJ also has the authority and responsibility to raise objections to evidence on his or her own motion if the law appears to require it. This is based on the statutory and rule-based authority given to conduct the hearing. Police officers also have the authority to make objections under ORS 813.412. *See* discussion below.

Regardless of who voices an objection to certain evidence, the ALJ has the final word with respect to the evidentiary ruling. *The ALJ is solely responsible for the content of the hearing record. See generally,* ORS 183.413 and ORS 183.415. The responsibility for the ALJ to control evidence on his or her own motion is also based partly on the duties found in the *Berwick v. AFSD*, 74 Or App 460, *rev den* 300 Or 332 (1985) and *Gosda v. JB Hunt Transportation*, 155 Or App 120 (1998), decisions, discussed elsewhere in this manual. Thus, the ALJ does not have to allow irrelevant, immaterial, or unduly repetitive evidence into the hearing record just because no one has objected to it.

The same is true with respect to evidence that appears to have been produced in violation of procedural, privilege, statutory, or constitutional provisions. In these instances, it would be advisable for the ALJ to point out to the parties that he or she detects a potential evidentiary issue, and see if further development of the record is offered. Because of the consequences, it is also advisable for the ALJ to defer ruling in such situations until the hearing is completed.

2. ORS 813.412

Under this provision, the police officer who has issued a citation for DUII may also exercise certain rights in an Implied Consent hearing. Included in these are rights to object to the admissibility of evidence and object on the grounds of "proper procedures." Barring an interpretation to the contrary from the courts, these privileges do not make the officer a "party" under the APA regardless of whether he appears with or without a prosecutor. Thus, officers will still be subpoenaed to Implied Consent hearings, they will not have subpoena issuing powers of their own, and their departments will not have appeal rights. Presumably, though, the officer's role will be much as if he *were* a party, with the opportunity for opening statements, objections, cross-examination of any witnesses, and closing remarks.

3. Offers of Proof

Occasionally, an ALJ will encounter resistance from a party when ruling against certain evidence on admissibility or other grounds. If the party can not be satisfied with the ALJ's explanation, and the ALJ still chooses to exclude the evidence, the party may request an offer of proof. If an offer of proof is requested, the ALJ should provide one. *See* OAR 137-003-0610(5). The purpose is to preserve evidence that the ALJ is deliberately choosing not to use or place in the record for purposes of appeal. The ALJ announces that the following evidence is being included in the record as an offer of proof, and turns to the party making the offer. In the "Evidentiary Rulings" section, the ALJ should reiterate the objection to the evidence, the ruling, and clearly identify what was covered in the offer.

By rule, the ALJ has authority to control in what form an offer of proof is made and when it takes place in the hearing. If in documentary form, the evidence covered by an offer of proof can simply be marked with an exhibit number and designated in the record as an offer of proof. There may also be offers of proof that require testimony from a witness. The ALJ may listen to this testimony, being careful to label it on the record just as if it were in written form. If it appears tedious to do so, the ALJ may also require offeror to summarize the proffered evidence to avoid having the matter testified to in its entirety. This practice has received approval for trial court use in Oregon (*see State v. Luke*, 104 Or App 541 (1990)), and there appears to be no reason why the same practice would not receive approval in the contested case context. According to OAR 137-003-0610(5), the summary must contain "sufficient detail" for a reviewing court or agency to determine the propriety of the ruling.

4. Subpoenas

Administrative subpoenas are authorized in ORS 183.440 and OAR 137-003-0585. According to OAR 137-003-0585, subpoenas may be issued as follows:

> (a) By an agency on its own motion or by an Assistant Attorney General on behalf of the agency;
>
> (b) By the agency or hearings officer upon the request of a party to a contested case upon a showing of general relevance and reasonable scope of the evidence sought; and
>
> (c) By an attorney representing a party on behalf of that party.

According to ORS 183.440, administrative agencies covered by the APA have the authority to issue subpoenas to compel the attendance of persons, and persons along with documents (*i.e.*, *duces tecum*), at the initiation of a contested case. Thus, if there is no contested case underway, there is no authority, at least in the APA, to issue a subpoena.

As has been mentioned previously, OAH will subpoena the police officer who signed the Implied Consent Report to testify at the Implied Consent hearing and, occasionally, a second

officer identified on the Implied Consent Report or other police documents. These subpoenas are never issued by an individual ALJ, although OAR 137-003-0585(1)(b) authorizes a hearing officer to do so upon the request of a party "upon a showing of general relevance and reasonable scope of the evidence sought." All subpoenas to police for the purposes of accomplishing DMV's case are sent by teletype both for speed and confidentiality reasons. The petitioner's attorney may request OAH to issue a subpoena. When an attorney does so, it is usually in connection with a challenge to the validity of a stop and/or arrest, or an Intoxilyzer pretest observation. More than any others, these situations tend to involve multiple officers. OAH has the discretion by rule to deny such requests.

Service of, and costs associated with, a petitioner's subpoena remains the responsibility of the petitioner or attorney under the Contested Case Rules. OAR 137-003-0585(5).

Subpoena issues must occasionally be resolved at hearing. For instance, a defense attorney may fill out a subpoena form, attempt unsuccessfully to serve it on a police officer, and then argue that the officer was never at work or never could be found. Generally, this position is technically inaccurate because the rules of civil procedure (which govern subpoenas on subjects not covered by the APA or a uniform rule) provide for substitution of service to other police officers at the officer's place of work. Attorneys have also been known to assert the prejudicial effect of subpoenaing a police officer who failed to appear at the hearing, but at hearing it is revealed that (a) there was no proof of service; or (b) the proof of service demonstrates that service was accomplished in an unreasonably short period of time before hearing. These arguments can be disposed of fairly easily because the technical rules related to the service of subpoenas are strictly interpreted. *See, e.g., Carney v. MVD,* 100 Or App 533 (1990). If a subpoena is not drafted in accordance with applicable rules, or not served in the proper manner, the officer's or other person's failure to obey a party's subpoena has no legal significance to the outcome of a hearing.

There have also been hearings where a defense attorney has subpoenaed every police officer who was on duty at a particular time when a person was arrested for DUII. This is usually without any knowledge of what any of them know, but in hopes of finding one that knows something contradictory to what one of the others knows. It is also done in hopes that, if one fails to appear, the petitioner can move for dismissal of the suspension because of the prejudice to the petitioner's ability to defend himself. This is not, however, a viable strategy. The failure of a witness subpoenaed by the petitioner to appear does not give rise to a default order and withdrawal of the suspension.

The ALJ always has the authority to refuse to hear, or exclude from the record, irrelevant, immaterial and unduly repetitive evidence, including potentially irrelevant witnesses. If an attorney has subpoenaed four or five police officers, but does not know what, if anything, these officers have to offer in the way of testimony, then it is impossible to demonstrate that their testimony is relevant. *The burden of demonstrating the relevancy of evidence rests with the offeror*. If an ALJ is so inclined, this principle provides the basis for a ruling dismissing any subpoenaed officers for which counsel is unable to make at least a preliminary showing of

relevancy. This is not to say that an ALJ should judge the relevancy of evidence before hearing it, for this would probably be a reversible error. However, an ALJ might also choose to hear one such officer and dismiss the others if their testimony appears purely cumulative in nature.

In a few instances, ALJs have "quashed" subpoenas, either on their own motion, or upon the motion of an attorney who was "specially appearing" on behalf of a police officer. These cases led to considerable debate but no long-term settlement of the issue. There is no mention of a motion to quash in the APA, but the Contested Case Rules recognize the ALJ's authority to quash a subpoena. OAR 137-003-0585(2). Motions to quash have occasionally been used in Implied Consent hearings. In 1992, DMV's Hearings Branch issued a directive requiring hearing officers "to quash any subpoena seeking disclosure of an arresting officer's field notes and to deny motions to continue a hearing or strike testimony because of an order quashing such a subpoena." This directive is referred to in footnote 5 of *State ex rel MVD v. Norblad*, 320 Or 307 (1994), and was based on verbal advice from an Assistant Attorney General.

There has been at least one court of appeals case in Oregon besides *Norblad* where a motion to quash, made at a hearing, was taken up for discussion by the court on review as if it was a valid part of the hearing procedure. *See Oregon Health Care Association v. Health Division*, 148 Or App 568 (1996), *rev'd* 329 Or 480 (1999).

When confronted with subpoena issues or motions to quash, the ALJ should break them down by issue and rule accordingly:

- Were all subpoena procedures followed properly, as dictated by administrative rule or other applicable law?

- Was service of the subpoena entirely proper, and is proof of the service and reimbursement in evidence?

- Is the evidence or witness demonstrably relevant?

- Is the sought-after evidence already at hearing, in another admissible form (*e.g.*, in hearsay form or in a document that another witness has)?

- If physical evidence is being subpoenaed, such as a tape or document, was it accessible to and in the control of the person identified in the subpoena? Is the subpoenaed evidence beyond the scope of discovery, such as "fragmentary police field notes" (which are not discoverable under rules of trial court procedure). *See, e.g., State v. Morrison,* 33 Or App 9 (1978).

- If there is non-compliance with an apparently valid subpoena, is the evidence nonetheless covered by a valid assertion of one of the privileges listed in the Oregon Evidence Code?

It is currently the Transportation Section policy that, at the first setting of the hearing, a subpoenaed officer's failure to appear prevents the hearing from going forward and gives rise to an "officer default" order.[3] However, if the absent officer is one who has been subpoenaed by the petitioner, the petitioner has the option of going forward with the hearing without that officer's testimony. Under these circumstances, the ALJ should warn the petitioner that, by going forward without the subpoenaed officer(s), any hearsay objections would in effect be waived. If that same matter does not go forward as scheduled because of an officer's failure to appear and is later reset for an officer's official duty conflict, illness or vacation, the reset hearing should go forward as scheduled with or without any subpoenaed officer who fails to appear.

During the reset hearing, the ALJ must make a determination whether the officer is a necessary witness and/or whether a *prima facie* case can be established with the officer(s) who have appeared. A dismissal should be declared only when the ALJ is satisfied that the Department's case cannot be made with the officer or officers who appeared.

At ORS 183.440(2), the APA also provides certain enforcement provisions with respect to subpoenas not complied with:

> If any person fails to comply with any subpoena so issued [under subsection (1)], or any party or witness refuses to testify on any matters on which the party or witness may be lawfully interrogated, the judge of the circuit court of any county, on the application of the agency or of a designated representative of the agency or of a party requesting the issuance of or issuing the subpoena, shall compel obedience by proceedings for contempt * * *.

This language is essentially copied at OAR 137-003-0585(3). Only the party issuing the subpoena may seek enforcement; *i.e.*, the petitioner would not be authorized by ORS 183.440(2) to seek enforcement of a subpoena issued by DMV. Generally, the proceedings of a hearing being held under the APA can be continued by an ALJ if refusal to comply with an agency's or party's subpoena becomes an issue of this magnitude and is properly raised. However, the time deadlines applicable to the Implied Consent hearing process are often too short for this to be arranged.

G. PRIVILEGE

Although rarely raised in DMV hearings, privileges recognized in the Oregon Evidence Code (Rules 503 – 514) are protected under the APA. ORS 183.450(1). As mentioned above,

[3] There is an exception to this rule. Where the Department has subpoenaed more than one officer, and one officer appears but another does not, the appearing officer has the option of going forward and presenting the Department's case without the other officer(s).

assertions of privilege, including the privilege against self-incrimination, may not *per se* be the basis of a negative inference in an administrative hearing. There have been privilege objections raised at Implied Consent hearings when police officers attempted to offer incriminating statements from spouses and emergency room physicians. Unless the ALJ has a high level of expertise on the privilege in question, objections based on privilege should be reserved for ruling after the hearing with testimony received on a conditional basis.

H. JUDICIAL NOTICE; OFFICIAL NOTICE; INCORPORATION BY REFERENCE

Judicial notice, official notice, and incorporation by reference are all means by which various types of evidence can be inserted into a hearing record when it may not be convenient or even possible to do so in any other way. *See* ORS 183.450(4). Judicial and official notice are now governed by OAR 137-003-0615 and the reader is urged to consult them. Under the Contested Case rules, parties must be notified of facts judicially and officially noticed, and they must be afforded an opportunity to contest the facts so noticed.

Judicial notice can be used to place something into the record without supporting evidence if it is not reasonably subject to dispute or is capable of verification through readily accessible sources. For instance, judicial notice is appropriate to support a finding as to venue or geographical facts. *See, e.g., State v. Cervantes*, 319 Or 121, 124 n3 (1994). Pursuant to Oregon Evidence Code (OEC) 201(b), judicial notice may be taken of an adjudicative fact that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* ORS 40.060 *et seq.* An ALJ need not take judicial notice of statutes or rules. Laws and rules may be cited and discussed in an order without notice and an opportunity to contest by the parties, even if the law or rule is not one that is ordinarily pertinent to an Implied Consent hearing.

Official notice is appropriate to include general, technical, or scientific evidence in the hearing record which falls below the level of judicially noticeable information in reliability, but nonetheless is solidly founded on information the ALJ can cite during the hearing. One example is the technical knowledge about alcohol dissipation such as "Widmark's formula." Another example is an ALJ's interpretation of a driving record.

Incorporation by reference is rarely used, at least in the practice of Implied Consent hearings, but it is potentially quite useful. The purpose is to include documents that are too lengthy, too expensive, or too inconvenient to place in a hearing record in copy form. Examples include the records of prior hearings that may contain findings applicable to a hearing in progress, reference works, procedural manuals, and maps. A street map of the Portland area might be judicially noticed, for instance, then incorporated into a hearing record by reference in whole or part to cover the need for a finding in a particular case.

CHAPTER 20

POST-HEARING PROCESS

AND

COMPARISON TO CRIMINAL CASES

*****

A. APPEALS

If an Implied Consent suspension is imposed, the petitioner has 30 days from the date the Final Order is issued to file an appeal. A petition for judicial review must be filed with the circuit court for the county where the petitioner resides, if he or she is an Oregon resident, or for nonresidents, in the county where the arrest took place. Appeals are based on the record produced by the ALJ at hearing, and appellate review is confined to: (a) substantial evidence to support the ALJ's factual findings; and (b) errors of law. ORS 813.450. The court may affirm, set aside, or remand an Implied Consent order depending on the nature of the appeal. Because neither the Department nor any police agencies are "parties" to the Implied Consent hearing, neither can appeal an order dismissing a suspension.

The record and transcript for appeal is prepared by DMV. OAH files, including digital recordings, are sent to DMV immediately after the OAH order is issued.

B. IMPLIED CONSENT AND COURT PROCESS COMPARISON

Because the Implied Consent system is required to work more rapidly than the court system, the legal process that an individual arrested for DUII goes through with the courts typically comes *after* his or her Implied Consent hearing. In many cases, the person will not have made his or her first appearance in court on the criminal charge of DUII by the time the Implied Consent Final Order is issued. For that reason, a brief comparison of the two processes is useful.

The procedural differences become visible at the point a breath test is either refused or failed. The procedure involved from the time of arrest for DUII is essentially as follows:

- Arrest; opportunity to take or refusal of breath test after hearing Implied Consent "Rights and Consequences"; receipt of ICCR if test refused or failed; receipt of DUII citation scheduling first appearance in court; release.

- If requested, Implied Consent hearing within 30 days of arrest.

- First appearance in court in county of arrest (typically in 15 to 30 days after arrest); arraignment; guilty plea or not guilty plea (leading to scheduling of trial) or request for enrollment in "diversion" (if no other DUII offense in last 10 years); approval of diversion petition. Upon completion of diversion, hearing and dismissal of DUII charge.

- If guilty plea, conviction; pre-sentence investigation; sentencing.

- If not guilty plea, pre-trial proceedings and Omnibus (suppression) hearing if requested; jury selection; trial; verdict; acquittal or conviction; pre-sentence investigation; sentencing; appeal; post-conviction relief.

Refer to ORS Chapter 813 and the Oregon Criminal Code for more information.

C. DUII AND IMPLIED CONSENT SUBSTANTIVE COMPARISON

While not intended to be an exhaustive list, the following sets out differences between the Implied Consent law and DUII substantive law:

- There is no "double jeopardy" if a person is convicted of DUII and suspended under the Implied Consent law from the same arrest. *State v. Phillips*, 138 Or App 468 (1996). The Implied Consent hearing is a "civil" proceeding.

- There is no collateral estoppel between Implied Consent hearings and criminal proceedings. *State v. Ratliff*, 303 Or 254 (1987). Thus, a plea of guilty in criminal court would have no bearing on whether an Implied Consent suspension will be imposed, and by the same token, an Implied Consent suspension has no impact on the findings made or actions taken in criminal court. *See also State v. Krueger*, 170 Or App 12 (2000) (a circuit court's holding in the license suspension case does not preclude relitigation of the stop issue in the criminal proceeding.)

- DUII is one offense, not a different offense for driving under the influence of alcohol, drugs and alcohol, or drugs alone. Although prosecution must be based on one of the three, probable cause to arrest may be based on any of the three. *State v. King*, 316 Or 437 (1993).

- A person receiving a first conviction for DUII faces a mandatory suspension of driving privileges, by court order, of one year. This increases to three years for subsequent convictions. These are independent of any Implied Consent suspensions and may or may not overlap with a particular Implied Consent suspension. Implied Consent suspensions have no impact on enrollment or denial of enrollment in DUII diversion programs for first offenders.

- In criminal court, the accuracy of results of the breath or other tests for intoxicants may be challenged. The same is not true in the Implied Consent forum. *See Owens v. MVD*, 319 Or 259 (1994) (the results of the Intoxilyzer test were not intended to be within the scope of the Implied Consent hearing).

- Because the burden of proof in the Implied Consent and all other administrative hearings is by a preponderance, a valid suspension might be based on evidence that is

too weak to convict. By the same token, a defense that might allow a defendant to escape guilt in criminal court may have no significance at hearing.

- The APA guarantees a right to cross-examine witnesses. It does not guarantee that any particular person will be called as a witness, because hearsay evidence may be substituted for a live witness. Neither the Oregon Constitution, nor the APA, extends the right to confront or cross-examine witnesses whose testimony is offered by means of hearsay to an Implied Consent hearing. *See Carney v. MVD*, 100 Or App 533 (1990). *See* Chapter 19, *Evidence*.

- The general arrangement under the APA and the Uniform Hearing Rules is for ALJs to issue proposed orders. ORS 183.464(1) and OAR 137-003-0501(3). However, the Department has delegated final order authority to ALJs hearing Implied Consent cases. In general, final orders in contested cases are appealed to the court of appeals. ORS 183.480. Appeals of Implied Consent orders are appealed first to the circuit court in the county where the petitioner resides, and then to the Court of Appeals and Supreme Court. ORS 813.450. Convictions for DUII, coming from the circuit courts, can be appealed to the court of appeals.

- If an Implied Consent suspension is overturned by a circuit court, and the circuit court is subsequently reversed on appeal to the Court of Appeals or Supreme Court, the arrestee must serve all remaining suspension time. *Wimmer v. MVD*, 75 Or App 287 (1985), *modified* 83 Or App 268 (1986).

APPENDIX

INDEX OF CASES

*****

INDEX OF CASES

A

B

C

H

I

J

L

M

N

O

P

R

S

STATE v.

A

B

C

H

L

M

N

O

P

R

S

Z