A LAWYER’S GUIDE TO DEFENDING YOUR O.V.I. CHARGE IN OHIO

TIPS AND ADVICE TO ENSURE YOUR RIGHTS ARE PROTECTED.

MATERIAL PROVIDED BY:
DiCAUDO & YODER, LLC
A LAWYER’S GUIDE TO DEFENDING
YOUR O.V.I. CHARGE IN OHIO

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# Table of Contents

**Introduction** ................................................................. 4

**Chapter 1**  
OVI and Related Offenses.............................................. 5

**Chapter 2**  
What To Do If You’ve Been Stopped  
Or Arrested For OVI....................................................... 9

**Chapter 3**  
Standardized Field Sobriety Tests..................... 16

**Chapter 4**  
Choosing The Right OVI Attorney ..................... 21

**Chapter 5**  
The “Hidden” Consequences  
Of An OVI Conviction .................................................. 26

**Chapter 6**  
OVI Myth Vs. Fact....................................................... 29

**Conclusion** ................................................................. 33
INTRODUCTION

Over the last several decades, various advocacy groups, such as Mothers Against Drunk Driving, have pushed for increased enforcement of drunk driving laws across America. In response to these demands, Ohio has passed stricter laws against impaired driving and stiffened penalties for those convicted of doing so.

In addition, Ohio’s law enforcement agencies have placed greater emphasis on apprehending and prosecuting drunk driving offenders. In 2011 alone, the Ohio State Highway Patrol reportedly made 23,708 arrests for Operating a Vehicle Under the Influence (“OVI”). These numbers are in addition to the tens of thousands of OVI arrests made on Ohio’s roadways by municipal and county law enforcement agencies.

Although there is certainly a need to curb instances of drunk driving, too often this goal is achieved without respect to the rights of the accused. Generally, alleged offenders fail to appreciate the consequences of incurring an OVI conviction and, as a result, do not consult with legal counsel prior to taking action to resolve the charges against them. This book is meant to provide information to those that have been charged with OVI in Ohio or wish to learn more about the laws governing the offense.
OVI AND PHYSICAL CONTROL OFFENSES

Ohio Revised Code 4511.19, *et seq.*, which defines the offense of OVI, prohibits any person from operating a motor vehicle under the influence of: (1) alcohol; (2) a drug of abuse; or (3) a combination of alcohol and a drug of abuse.

The Revised Code also makes it illegal for any person having blood-alcohol-concentration ("BAC") of 0.08 g/210L or higher to operate a motor vehicle. This type of offense, often known as a "*per se*" violation, could apply regardless of whether the individual is under the influence of alcohol at the time of the
operation. This means that a person can have alcohol in their system which is not significantly impairing their ability to drive yet still be charged with OVI.

OVI offenses with high level BAC, above .17 g/210L, are considered High Tier or “Super” OVI’s. These offenses carry stricter penalties such as mandatory jail sentences, longer jail sentences, and yellow OVI license plates.

In addition, Ohio law provides for a lesser, related offense in the event that an individual is not actually driving, but rather is in "physical control" of a vehicle while under the influence or with a BAC of 0.08 g/210L or higher. Physical control is defined as being in the driver's seat of a vehicle and having possession of the vehicle's keys or other ignition device. Generally speaking, penalties for physical control offenses are less severe than those for OVI.

**Penalties For OVI**

Penalties for OVI depend upon the type and number of the offense. The *minimum* penalty for a first time OVI offense with a BAC under .17 g/210L is three days in jail or a driver intervention program, a driver’s license suspension of six months, and a $375 fine. A first time offense with a .17 g/210L BAC or higher carries a minimum of six days in jail or three days jail and three day driver intervention program and imposition of yellow OVI license plates.
The *minimum* penalty for a second offense within six years is 10 consecutive days in jail, a driver’s license suspension of one year, a $525 fine, imposition of yellow OVI license plates and ignition interlock device.

**IMPLIED CONSENT**

Ohio also has what is referred to as an “Implied Consent” law, codified by Ohio Revised Code Section 4511.19. Ohio’s implied consent law provides that any person who operates a vehicle on public roadways “shall be deemed to have given consent to a chemical test or tests of the person’s whole blood, blood serum or plasma, breath, or urine to determine the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance or combination content of the person’s whole blood, blood serum or plasma, breath, or urine…”

This means that any person who operates a motor vehicle within the state of Ohio is automatically considered to have given his consent to a chemical test of their blood, blood serum or plasma, breath, or urine to determine its alcohol content if arrested for OVI. A person suspected of OVI must submit to a request the chemical tests described by the statute within 2 hours or such failure will be considered a "refusal." Failing or refusing a chemical test automatically results in an administrative license suspension. An administrative license suspension can carry with it hefty penalties ranging from one year for a first refusal to five years for a fourth or greater.
Law enforcement officers are required to notify OVI suspects of the consequences of a refusal to submit to a chemical test. Failure to notify a suspect of these consequences may warrant the suppression of the test results.

**Ohio OVI Fact Sheet**

- **BAC Limit:** 0.08
- **BAC Limit Commercial Vehicle Drivers:** 0.04
- **BAC Limit Drivers Under Age 21:** 0.02
- **Enhanced Penalty BAC Level:** 0.17
- **Zero Tolerance Level:** 0.02
- **Implied Consent Law:** Yes
- **1st Offense Possible Penalties:** At least 72 consecutive hours in jail; court license suspension from six months to three years; $375 to $1,075 fine.
- **2nd Offense Possible Penalties:** At least 10 consecutive days in jail; court license suspension from one to five years; $525 to $1,625 fine; yellow OVI plates.
- **3rd Offense Possible Penalties:** At least 30 consecutive days in jail; license suspension from one year to 10 years; vehicle immobilization or forfeiture; $200 to $10,000 fine.
CHAPTER TWO
WHAT TO DO IF YOU’VE BEEN STOPPED OR ARRESTED FOR OVI

WHAT GENERALLY HAPPENS.

Most OVI charges stem from traffic stops during which the law enforcement officer comes to suspect the driver of being intoxicated. There are many reasons why an officer may choose to stop a driver, most commonly, however, the officer will have observed the driver do one or more of the following: engage in behavior such as swerving that indicates intoxication, commit one or more traffic violations such as speeding, or operating a vehicle with an equipment violation such as a broken taillight.
WHAT YOU SHOULD DO.

If a law enforcement officer effectuates a traffic stop on your vehicle, pull over to the side of the road as soon as safely possible, place the vehicle in park, and turn off the ignition. Do not move around in the vehicle or attempt to get out your driver’s license, insurance information, etc., until instructed to do so by the officer.

WHAT GENERALLY HAPPENS.

Once the officer pulls an individual over, he will approach the vehicle and being communicating with the driver while making several observations. The officer will be looking for common signs of intoxication, such as the odor of alcohol, redness or glassiness of the eyes, impaired speech or coordination, and degree of cooperation. Often, the officer will ask the driver if he has consumed any alcohol recently.

WHAT YOU SHOULD DO.

If you end up in this situation and have consumed any alcohol at all, politely decline to provide a response to the officer’s query. Instead, inform the officer that you wish to speak to your legal counsel. If the officer permits you to call your attorney, by all means do so. If not, inform the officer that you will not answer any further questions until given an opportunity to talk to your lawyer.
WHAT GENERALLY HAPPENS.

If the officer feels that he has observed sufficient facts indicating that an individual is intoxicated, he will usually request that the driver submit to a series of field sobriety tests. Generally, law enforcement officers utilize three standardized field sobriety tests: the one leg stand (requiring the driver to stand on one leg for thirty seconds), the horizontal gaze nystagmus (requiring the driver to follow a pen or other object with his eyes to test for smoothness of eye movement) and the walk and turn (requiring the driver to walk nine steps, turn, and walk nine steps back). The officer may also ask the driver to submit to a portable breath test to determine the driver’s blood alcohol content.

WHAT YOU SHOULD DO.

If asked to perform field sobriety tests, you should politely decline. Although the officer may still arrest and charge you with an OVI, it entirely legal to refuse to submit to field sobriety tests and you can do so without suffering additional penalties. Field sobriety test results and recordings of field sobriety tests taken by video cameras in police cruisers are usually admissible as evidence in court of a driver’s sobriety, or lack thereof.

Portable breath tests are not admissible in court, although the results can be used by the officer to determine probable cause to arrest, discussed below. Further, it is a common misconception
that refusing to take a portable breath test will result in a violation of Ohio’s implied consent law. This is not true, as only a refusal to take a breath test using an approved breath-testing device, none of which are portable, will result in an administrative license suspension. If asked to take a portable breath test, politely decline and ask to contact your attorney.

**WHAT GENERALLY HAPPENS.**

Based upon his observations and results of field sobriety tests, if conducted, the officer may conclude that there is “probable cause” to believe that the driver was operating a motor vehicle under the influence of alcohol. Probable cause is defined as a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true. At this point, the officer will place the driver under arrest and transport them to a local police station or jail. Upon arriving at the police station or jail, the officer will likely question the driver about the circumstances surrounding the incident.

**WHAT YOU SHOULD DO.**

If placed under arrest for OVI, you should cooperate with the arresting officer and follow all directions given. Do not make any statements or answer any questions other than to provide the officer with your identifying information. You have the right to remain silent, use it. Respectfully inform the officer
that you would like the opportunity to contact your attorney as soon as possible.

**WHAT GENERALLY HAPPENS.**

A driver arrested for operating his vehicle under the influence will always be asked to provide a sample of his breath, blood, or urine for chemical testing to determine the level of alcohol or drugs in the individual’s system. Chemical test results showing that the driver is under the legal limit will not result in license suspension, but the individual may still be charged with OVI.

Chemical test results showing that the driver is over the legal limit will result in license suspension of 90 days, longer if the person has prior OVI convictions, and the results of said tests may be used as evidence in court.

Refusal of chemical testing will result in license suspension of one year, longer if the person has prior OVI convictions, and the person may still be charged with OVI, but there will be no test results to be used as evidence in court.

Ohio law provides that certain people may not legally refuse chemical tests, including those that been convicted of a OVI within 20 years. Further, individuals on probation and commercial drivers may face additional consequences for refusing chemical testing.
WHAT YOU SHOULD DO.

What to do in this situation is the most common, and most difficult, question posed to OVI defense attorneys. If you find yourself in this situation, take the following steps to determine whether or not it is in your best interest to submit to a breath tests.

First, make an honest assessment of how much you have had to drink. If you have only had one or maybe two drinks, you could take the test and potentially pass. However, you can, and likely will, still be charged with OVI.

If you refuse or fail the breath test, you automatically receive the administrative license suspension discussed in Chapter One. The refusal will result in a thirty day “hard” suspension, no driving privileges, and a one year “soft” suspension, certain privileges at the court’s discretion.

On the other hand, taking the test will always remove all doubt as to whether you’re over the legal limit and a high test will result in enhanced penalties. Although some scientific evidence has shown that certain chemical breath testers may suffer from problems that, due to recent Ohio court decisions, may be challenged in court, beating a test is still extremely difficult.

Generally, if there is any doubt in your mind as to whether you can pass a breath test, it is always better to refuse. However, a better option than attempting to determine your ability to pass a
breath test is to contact your attorney. If asked to take a breath test, you should always first ask the officer if he will allow you to call your lawyer first. If he says yes, do so. If not, follow the advice provided herein.
Standardized Field Sobriety Tests (“SFST”) are a set of tests administered by law enforcement officials to individuals suspected of being intoxicated and are designed to elicit certain indicators, known as “clues, of impairment. SFST’s were developed from research performed at the Southern California Research Institute and sponsored by the National Highway Traffic Safety Administration (“NHTSA”).

The three SFST’s developed by NHTSA, and most commonly used, are the Horizontal Gaze Nystagmus Test, the Walk and Turn Test, and the One-Leg Stand Test.
Ohio Revised Code 4511.19(D)(4)(b) establishes the standards for admissibility of the results of SFST’s in OVI/DUI cases. In order for SFST’s to admitted as evidence, the State is required to prove by clear and convincing evidence that the tests were administered in substantial compliance with standards for any reliable, credible, and generally accepted test such as those developed by NHTSA.

The Ohio Supreme Court has addressed the meaning of “substantial compliance” only once, in the case State v. Burnside, 100 Ohio St. 3d 152, 2003-Ohio-5372 (2003). The Court determined that minor errors, referred to as “de minimus”, in the administration of SFST’s are not substantial and will not render the results of said tests inadmissible.

The effectiveness of SFST’s to determine impairment often depends on the law enforcement officer’s adherence to the standardized procedures for test administration and scoring. NHTSA has published materials describing ideal conditions for the administration of SFST’s, while also recognizing that ideal conditions do not always exist in the field. The effect of less-than-ideal conditions and errors in the administration SFST’s correlates with the weight such evidence should be given.

**Horizontal Gaze Nystagmus Test**

Horizontal Gaze Nystagmus ("HGN") is the involuntary jerking of an individual's eye that occurs naturally as the eyes gaze to the side. Normally, nystagmus only occurs when the eyes are
rotated at high peripheral angles. However, when a person is impaired by alcohol, nystagmus is exaggerated and may occur at lesser angles. An alcohol-impaired person will also often have difficulty smoothly tracking a moving object.

In the HGN test, the officer observes the eyes of a suspect as the suspect follows a slowly moving object such as a pen or small flashlight, horizontally with his or her eyes. The examiner looks for three indicators, or "clues", of impairment in each eye:

1. Is the eye following the moving object smoothly?
2. Is there jerking of the eye at maximum deviation, *i.e.* the farthest point it can move to the side?
3. Is the angle at which the jerking begins within 45 degrees of center

If the officer observes four or more clues, the individual is presumed likely to have a blood alcohol content of 0.08 or greater. The most often raised challenges to the HGN test are that it fails to account for various health conditions, such as inner ear problems, influenza, hypertension, arthritis, and glaucoma, that have been proven to affect an individual's performance. Further, the use of items like aspirin, antihistamines, caffeine, and nicotine can also cause signs of nystagmus.
WALK AND TURN TEST

The Walk and Turn Test ("WTT") is often referred to as a "divided attention" test, that, under normal circumstances, are easily performed by most people. The theory behind a divided attention test is that impaired people have difficulty with tasks requiring their attention for both mental and physical exercises.

In the WTT, the individual is instructed to take nine steps, heel-to-toe, along a straight line, turn on one foot and return in the same manner to the beginning point. In the WTT, there are eight clues indicating impairment:

1. Poor balance while listening to the instructions.
2. Beginning before instructed to do so.
3. Stopping to regain balance.
4. Failing to touch heel-to-toe.
5. Stepping off the line.
6. Using arms to balance.
7. Making an improper turn.
8. Taking an incorrect number of steps.

If the officer observes two or more clues, the individual is presumed likely to have a blood alcohol content of 0.08 or greater. The WTT has been criticized however, because the test is often administered on uneven surfaces, at night, on a surface with no actual line to walk on, or all three. Further, the test is unsuitable for people with back or leg injuries, individuals older than 65, and those with inner-ear disorders.
ONE LEG STAND TEST

In the One Leg Stand Test ("OLST"), is also a divided attention test wherein the individual is instructed to stand with one foot approximately six inches off the ground and count aloud by thousands until told to put the foot down. The test is timed for 30 seconds. In the OLST, there are four clues indicating impairment:

1. Swaying while balancing.
2. Using arms to balance.
3. Hopping to maintain balance.
4. Putting the foot down

If the officer observes two or more clues, the individual is presumed likely to have a blood alcohol content of 0.08 or greater. Many of the same criticism made of the WTT apply to the OLST, as both can be affected by the surface they are conducted on, as well as various health conditions, discussed above, of the test-taker discussed above.

An experienced OVI attorney will be familiar with the administration of FST’s as well as how to challenge their validity and admissibility in court. If you have additional questions about FST’s, feel free to contact the attorneys of DiCauddo & Yoder, LLC at any time.
Often, the most important step a person can take in successfully defending against an OVI charge is choosing the right attorney for their situation. In meeting with and ultimately deciding on an OVI defense attorney, you should keep the following questions in mind.
1. What How Much Experience Do You Have Defending OVI’s?

When choosing an OVI attorney, you want someone who knows what they’re doing. The best way to assure yourself that the attorney you’ve chosen has the experience necessary to defend your case is to ask the following questions:

- Have many OVI cases have you tried?
- Have you ever handled a felony OVI case?
- Have you ever tried a case where the individual blew or refused to blow?
- How many OVI Motions to Suppress have you argued?
- How many Motions have you argued in the court where my case is pending?

Your attorney should be able to answer all of the above questions “yes”. If they can’t, you probably shouldn’t hire them.
2. **Will You Be The One Representing Me?**

You need to know that the attorney you hire is the one who will actually be representing you in court. Too often, attorneys are too busy to handle every case that walks through their door, so they will hand your case off to an associate once they’ve gotten your money. Avoid attorneys that claim everyone at their firm will be involved in your case. You don’t want everyone, you want that attorney!

3. **What Can You Tell Me About The Process?**

If your attorney is as knowledgeable and qualified as he or she claims, they should have no problem explaining to you how your case is going to proceed through court. The attorney should be able to explain each potential step and how it’s going to help your case. To get an idea of what your attorney knows about the process, ask him or her about some of the following:

- Potential defenses to your OVI charge.
- Negotiation tactics the attorney may use.
- How the attorney will decide whether to file a motion to suppress.
- Possible trial issues involved in your case.
4. **How Much Do You Charge?**

Many people shy away from discussing billing and fees with their attorney at first, waiting for him/her to bring it as a matter of course. There is no need, however, to be afraid to talk with your lawyer about how he/she bills for the work they will do on your behalf. In fact, your attorney should be very open and willing to talk about exactly how you will be billed for his/her services. Be wary of any attorney who is not at least willing to explain how he/she bills because you don’t want to be surprised when the final bill comes.

Generally, most attorneys will handle OVI cases for a flat-rate, however, some may charge extra for filing fees, court costs, trial representation, and an appeal, if necessary.

Your attorney should be willing to give you a straight answer to this question so you know how much his or her representation is going to cost you. Any attorney who can’t tell you what it’s going to cost upfront is not the attorney for you.

5. **What Can You Do For Me?**

Be wary of any OVI attorney who guarantees a particular result. Your attorney should discuss all the possible outcomes with you and then strive to achieve the most favorable result. No lawyer can win every case they handle, but qualified and experienced OVI defense attorneys are always more likely to recognize
potential issues and take steps to mitigate their effect on your case.

**QUICK TIP**

State and local bar associations often offer free or reduced-cost attorney referral services which help put individuals in contact with reputable legal representation.

Ohio’s State Bar Association has such a service located online at:

https://www.ohiobar.org/Pages/Find-A-Lawyer.aspx
In addition to the more obvious consequences of being convicted of an OVI, there are numerous ways in which such a charge can affect the accused’s life indirectly. The following are some of the most common “hidden” consequences of an OVI conviction:

1. **Car Insurance** – Many car insurance companies will drop an individual conviction of OVI from their coverage and even if they don’t, at the very least there will be a significant increase in monthly premiums.
2. Professionals – Certain professionals, such as doctors, lawyers, cosmetologists, and daycare workers, are required to hold a license in order to work in their field. These individuals may face sanctions from the licensing entity following a OVI which may include fines, probation, counseling, and, in severe cases, license suspension or revocation.

3. Child Custody/Adoption – The ramifications of an OVI conviction are especially impactful when the offender is involved in a child custody dispute or is attempting to adopt a child. Both Courts and adoption agencies will look at such a conviction when determining what is best for the child, placing the convicted at a disadvantage in such proceedings.

4. Pilots – Pilots holding an FAA Airman’s Certificate are required to report OVI convictions to the FAA, which could result in suspension or revocation of their license to fly.

5. Travel – In 2011, Canada passed the Immigration and Refugee Protection Act which may bar entry into Canada for any person convicted of an OVI.

6. Commercial Drivers – Any individual holding a commercial driver’s license convicted of OVI will lose their CDL for one year for the first offense and permanently on a second offense. Further, the driver
cannot receive privileges to operate a commercial vehicle while the OVI case is pending.

7. **Enhanceable Offense** – In Ohio, OVI is considered an “enhanceable offense”. This means that it can never be expunged from a criminal record and, following a second offense within six years, the accused will face enhanced penalties. Further, following an OVI conviction, the offender is required to submit to chemical testing, *i.e.* they can’t refuse a breath, blood, or urine test for 20 years.

These are just a few of the many ways in an OVI conviction can indirectly affect an accused individual’s life. A knowledgeable OVI attorney will be able to recognize and successfully avoid or mitigate the impact of many of these issues. If you have additional questions about the consequences of an OVI conviction, feel free to contact the attorneys of DiCauo & Yoder, LLC at any time.
Everyone knows someone who seems to know how to beat a breathalyzer or who heard a story about a guy who got cited for OVI because he had used mouthwash prior to taking the test. For every one of these myths that has a grain of truth, there are five that are completely bogus.

**MYTH**

Placing pennies under your tongue will allow you to pass a breathalyzer test.

**FACT**

A breathalyzer measures the chemical reaction between the amount of alcohol expelled on the breath and the contents of a vial in a breathalyzer machine. Despite your friend’s claims to the contrary, pennies will do nothing to affect this chemical
reaction. Putting pennies under your tongue in order to beat a breathalyzer will do nothing but leave a bad taste in your mouth.

**MYTH**

Using mouthwash immediately prior to taking a breathalyzer test will actually increase your B.A.C. reading.

**FACT**

Because most mouthwashes contain significant amount of alcohol (up to 27%), using them prior to taking a breathalyzer test will actually raise your B.A.C. reading by increasing your amount of “mouth alcohol.” In analyzing a subject's breath sample, a breathalyzer's internal computer assumes that the alcohol in the breath sample came from alveolar air exhaled from deep within the lungs. However, alcohol may also come from the mouth, throat or stomach for a number of reasons. Mouth alcohol can affect a breathalyzer reading for more than twenty minutes after ingestion.

**MYTH**

An average sized person can consume up to five drinks in an hour and not exceed the B.A.C. threshold in Ohio.

**FACT**

A person’s B.A.C. will increase in their system for several hours after they have stopped drinking, even while their level of impairment declines. As little as three drinks in one hour can be
enough to cause someone to fail a breathalyzer test for an extended period of time after they have stopped drinking. There are independent factors that cause on person’s B.A.C. to be higher than another such as weight, height, age, and how recently they’ve eaten.

MYTH
It is always better to refuse to take a breathalyzer test because you won’t get an OVI.

FACT
Ohio law mandates an automatic one-year license suspension for a refusal to submit to a breathalyzer test. However, sometimes it can be to your advantage to refuse to submit to the breathalyzer, but that decision must be made based on the individual’s current situation and driving history. The best way to determine what to do under these circumstances is to consult with an attorney now who can provide you with the tools you need to make an informed decision. If you are not able to speak directly to an attorney, remember that it is probably in your best interest to err on the side of caution and refuse the breathalyzer if you have consumed more than one alcoholic beverage an hour.

MYTH
One attorney is just as good as another to defend an OVI charge.
FACT
Most people, and many attorneys as well, believe that defending charges of drunk-driving is a relatively straight-forward task that can be performed by just about any competent attorney. However, an individual charged with OVI must take precautions to hire an attorney with experience dealing with these types of allegations.

The penalties for OVI, such as license suspension, fines, community service, probation, mandatory counseling or alcohol treatment, and possible incarceration (even for first offenders), are not only serious but affect the lives of the convicted for years to come. An attorney who has experience dealing with these types of offenses will appreciate the gravity of the charges and be able to use his expertise to obtain a favorable result. For advice on how to choose an OVI attorney that is right for you, refer to Chapter 4 of this guide.
CONCLUSION

Following the advice and tips contained in this book will help to ensure that should you or someone you know, be faced with an OVI, you preserve your ability to defend against the charge and possibly avoid a conviction. In the event that this informational booklet does not answer all of your questions, feel free to contact the attorneys of DiCaudo & Yoder, LLC at any time. They will be happy to speak with you regarding any legal issues you may be experiencing.

The attorneys of DiCaudo & Yoder, LLC are available for phone consultations 24 hours a day, 7 days a week. To speak to one of the attorneys of DiCaudo & Yoder, LLC today call 1-888-498-7153.