# DUI Overview

## How Is DUI Defined In Nevada?

It would be considered a DUI if the person was driving, meaning they were in actual physical control of a vehicle when their blood alcohol was 0.08 or more, or if they had any prohibited controlled substances in their blood.

They could also be convicted of a DUI if they were driving under the influence of alcohol to any degree, however slight, if it rendered them incapable of driving safely. This means people could be convicted of a DUI even if their blood alcohol level was lower than a 0.08.

The blood alcohol test results would be inadmissible if the test was taken two hours after the person had been driving, although it appears that the state gets two bites of the apple. In addition to the criminal case, there is a DMV hearing. The administrative law judge (ALJ) decides whether there is "Clear and Convincing evidence" that you were driving under the influence of alcohol or drugs. This is a lesser standard of proof beyond a reasonable doubt that is used in a criminal case. The DMV does not care about the 2-hour rule. So you could resolve your DUI case as a non-DUI disposition and STILL lose your license for 90 days based on the ruling of the ALJ

### Stereotypical DUI Defendant In Nevada

Anyone can get a DUI; it could be a man, a woman, someone young or someone old, although most of DUI clients are generally male.

Around 80% of DUI cases involve males. It is interesting because if a man and a woman, who weigh the same, drank the exact same amount of alcohol, the woman's blood alcohol level would be higher because women's bodies generally carry more fat, and because of that, the alcohol stays in the fat longer and the Blood Alcohol Concentration (BAC) will be higher.

### Prescription Drug DUI In Nevada

Another thing people do not realize is that they could be under the influence of a prescription drug even if they had a valid prescription. Hydrocodone and many other legally prescribed drugs can affect a person's perception. However, if there are no other drugs or alcohol in your system, and the prescription drug is in the therapeutic range, we are usually able to resolve your case so it is not a DUI. Nevada law has something called a rebuttable presumption, meaning that if someone had a controlled substance in their blood at certain levels then it would be presumed the person was driving under the influence. These levels are very low for marijuana and a lot of other drugs.

It is rebuttable because if the person had a prescription for 40mg of Hydrocodone every day, but they only had 20mg in their system when they were pulled over, then that would be within the therapeutic range and it would defeat the presumption.

Unfortunately, sometimes the person might have consumed much more than prescribed. For example, around 200mg of Hydrocodone, which is five times the limit prescribed per day so this would not rebut the presumption that the person was under the influence. Sometimes the prosecutors would be more flexible even if the person was over the prescribed limit of medication, than if they were under the influence of marijuana, cocaine, heroin or something like that.

**DUI Involving Death**

DUI involving death or substantial bodily harm (SBH) is a felony. The penalty is 2 to 20 years in the Nevada State Prison. The sentence is non-probationable. If you are convicted of DUI with death or SBH, you will go to prison. If you were in an auto accident and killed someone, or injured someone really badly so they had to go to the hospital or there was a broken bone and you have alcohol in your system, you will be charged with DUI with death or SBH.

The interesting thing about a misdemeanor DUI is that if the driver was in an accident even if it was not his fault could be convicted. It would not matter if the accused was rear ended. If the police determined that a driver had consumed alcohol then they would have probable cause to arrest him no matter who caused the accident.

There would need to be proximate cause that the accused caused the accident to be convicted of DUI with death or SBH. For example, the driver would be the proximate cause of the accident if they rear ended someone going 90 miles per hour and that person was killed.

The accused would not be considered the proximate cause of the accident, and they could not be convicted of DUI with death or substantial bodily harm in a situation in which they were driving correctly but then someone on the other side of the road crossed the median and it resulted in a head on collision and that person died.

The accused could be convicted of some other offense such as failure to use due care or something like that, but they would not be looking at mandatory prison time.

I recently handled a case involving my client and his friend who were out drinking. They were both over the limit. My client was about a .12, whereas the other person was a .34. My client was driving and they had a car accident which resulted in a rollover. The passenger did not have his seatbelt on so he was killed. It may seem that the reason he was killed was because he did not have his seatbelt on. However, that issue has been litigated and just because someone does not buckle their seatbelt doesn't mean that he or she was responsible for their own death.

In this particular case, my client was driving around a curve and driving properly. He was in a little two seater Mercedes. He told the passenger to put his seat belt on. The passenger was in the process of putting it on when he hit the steering wheel and they had the accident. It was a rollover. My client had a concussion and he was injured, but he was wearing his seatbelt, whereas the passenger died because he was not wearing his seatbelt.

My client was charged with DUI involving death and SBH because his blood alcohol was over the limit, 1.2. The legal limit is .08. It looked pretty bad. I believed the probable cause of the accident was the fact that the passenger had hit the steering wheel. When a vehicle is in an accident, the seatbelt freezes where it is. If the seatbelt was not used at all, it would freeze in the opening position, whereas if it was buckled, it would freeze there.

In this particular case, the seatbelt was frozen halfway. It was close to the steering wheel. This corroborated my client's testimony. I hired an accident Reconstructionist who examined everything and believed, as I did, that the passenger's behavior when he hit the steering wheel; caused my client to lose control of the vehicle. That was the proximate cause of accident.

I was able to get my client a non-DUI disposition for felony reckless driving. He did not go to prison.

## What Is The DUI Process After An Arrest?

People should be proactive. They should not drink and drive. They also shouldn't smoke, overeat or speed, but it happens. People attend parties and although there is nothing illegal about consuming alcohol, sometimes they drink a bit too much. They could be convicted of a DUI, if they were drinking and driving and over the legal limit.

Drivers are typically pulled over for DUI because they have committed some traffic offense. The officer would need to have reasonable suspicion that a traffic offense had occurred. This is not a very high standard. If someone was weaving between lanes or if they blew through a stop sign or they were speeding or committing a traffic violation of that nature, then the officer would have the right to pull them over.

Interestingly enough, certain kinds of driving would not be considered traffic offenses, for example if someone was weaving within one lane. It would also not be considered a traffic offense. Or if the driver made a turn without using their turn signal but there was absolutely no traffic that is not a traffic offense.

In case a traffic offense had occurred, the officer would come over and ask the person to roll down their window. He would ask to see the person's license, registration and proof of insurance. If officer suspected that the driver had been drinking, he would first be looking for signs of impairment i.e. whether the person was able to do this without any problems. If he or she was fumbling, uncoordinated or confused, the officer would take this as a sign of being under the influence. They always ask the person whether he or she had been drinking. Usually there is an odor if the person had been drinking. Although some people claim there is no odor when drinking straight vodka. I disagree.

### Top Misconceptions About Being Arrested For A DUI

Most people who come to me say they were not actually drunk and they were doing fine. The way the statute is written, you do not need to be falling down drunk to be deemed under the influence of alcohol. People generally think they did the roadside tests, field sobriety tests (FSTs) fine. But often they don't know how they actually performed. Alcohol affects people's judgment. Their recollection may not be the way it really happened. People often say the police had no reason to pull them over because they were driving fine. Sometimes they are right, often they are not.

Many people have the mindset that it is "only" a DUI, not a criminal case. People need to understand that a DUI is actually a criminal case, although if we were able to resolve it as a non-DUI disposition, like reckless driving that is much less serious than a DUI, then it would be considered a traffic offense instead of a criminal case.

People also have the misconception that their case would be dismissed if they were pulled over and made to do all these tests but no one had read them their Miranda rights. Miranda protects people from making incriminating statements when they are already in custody, whereas the law in Nevada and in most states says that DOING THE FIELD SOBRIETY TESTS IS NOT TESTIMONIAL.

If they did not read the person their Miranda rights, they would not be able to use the person's actual statements, if they made any incriminating statements while in custody. But, they would still be able to use other evidence such as witness statements, blood analysis and the officers' observations.

Let us suppose someone was pulled over, arrested for a DUI and were on their way to jail. In this situation they would be considered as being in custody. If the officer had not read the Miranda rights, even if the person made incriminating statements i.e. that they were driving, they had a lot to drink and rammed into a parking meter. These statements are incriminating, we would be able to get those statements suppressed.

## What Should Someone Do After Being Pulled Over?

I advise them to say as little as possible. Some people just roll their window down about an inch, give the license, registration and proof of insurance and not say anything. This would really annoy the police, but if the person was able to do this, they would have a really good chance of beating the DUI.

Someone who was arrested for a DUI and did not agree to a chemical test (breath or blood) at the police station would still lose their license for an additional year whether or not they were convicted of a DUI. The best idea is to use a designated driver or just call Uber, instead of drinking and driving.

Even if the police officer was very nice and said the person was really cooperative, it usually doesn't matter. If there was evidence the person was driving under the influence because they failed the field sobriety tests, the officer had probable cause to arrest them, no matter how cooperative they were. I often say, "What do a criminal defendant and a fish have in common? If they hadn't opened their mouth they would not have been hooked."

**How To Handle The Police In A Traffic Stop**?

There are a couple of ways to handle this situation. Some people might tell the officer they only had one or two drinks, which may or may not be true. The driver does not actually have to answer any questions, but the police usually try and bully them, which is why most people end up answering their questions.

You must identify yourself, if you provide license, registration and proof of insurance, you have identified yourself. You would not need to answer any questions. (easier said than done)

The back of my business card lists several things that one should say in this situation. The first thing the person should say is, “I want to talk to my lawyer. I do not want to take any chemical tests”, which would mean the person was not agreeing to any of these things without their lawyer being present, and this is a constitutional right.

The officer may tell the person they did not have a right to talk to their lawyer, which is accurate in Nevada. But, he or she could say they did not want to waive any of their constitutional rights. The back of my card also states: “I want to exercise my right to remain silent, consult with a lawyer without exception. I do not want to talk about giving up my rights until I’ve consulted my lawyer. I want to call my lawyer. I do not consent to a search of any kind, any test, any line ups, or any other identification procedures.”

Nevada law just changed regarding consenting to a blood test or a breath test. If you don’t consent voluntarily to a test at the police station, you will lose your license for an additional year. I tell people that if they have been pulled over, they should keep their license, registration, proof of insurance, and my card in a convenient place. If you are not able to find these documents quickly, the officer may assume that you are confused because you could not find your license. This is an indication of alcohol impairment.

**The Police Might Try To Force Suspects To Incriminate Themselves**

Sometimes the police may try and bully you. They know that the information you provide the police, the easier it is to convict you. They ask you, why won’t you talk? What are you hiding? Why won’t you cooperate? Why won’t you do these roadside tests? But, you have an absolute right to refuse. Doing the tests will NOT help you.

You could just remain silent and not say anything, in which case the officer would probably get angry. Or you could just tell the officer that you would like to invoke their right to remain silent. Someone who was under the influence of alcohol would probably be slurring their words. This could become a probable cause for the arrest. Some people might be really aggressive and just refuse to answer any questions.

I always advise people to not do any roadside tests, no FSTs and no preliminary breath test (PBT). You are not required to do them by law. Some people say they just do not want to do them. Some people say their lawyer advised them not to do them. This usually upsets the police. I would rather have the police get upset because my client did not do the tests, than for my client to do the tests and provide the police more incriminating information.

But, you would not help yourself by slurring your words. I advise not to get into a discussion about constitutional law, such as the 5th amendment guaranteeing their right to remain silent, or the 6th amendment guaranteeing your right to a lawyer. The less you say, the better.

I think a better way to handle it would be for you to say you had a friend who is a police officer. He told you never take the test. It is difficult for the police officer who wanted you to do the FSTS to contradict a brother officer.

# What Happens At The DMV Hearing?

There is a DMV hearing in addition to the criminal case. We would have to go to court for the criminal case and the client would typically not appear on the first appearance as long as their lawyer appeared. The lawyer would plead not guilty on their client's behalf and set it for trial which would usually be set a couple of months down the line.

This is when we would get a copy of the discovery, which would include police reports, witness statements and blood analysis. I would review it with the client because hopefully the officer would have done something wrong or there would be some element they could prove, like placing the person behind the wheel, or the officer might not have actually had a reasonable suspicion to pull them over.

It might also happen that the person took the breath test but there was no alcohol in their breath, but then they gave them a blood test and there was a controlled substance. We would make a motion to dismiss because the law says the client would have to consent to a chemical test, but not more than one chemical test. I have been able to knock it out in the past.

The officer could make sure they did a blood test and not a breath test if they suspected the person was under the influence of a controlled substance like marijuana or something.

**The DMV Hearing Is An Important Part Of DUI Cases**

In addition to the criminal case there is an administrative proceeding called the DMV hearing. The DMV hearing would decide whether or not the person had 0.08 blood alcohol level, and was driving or in actual physical control of his vehicle case. The standard of proof in a criminal case would be "proof beyond a reasonable doubt", which is a much higher standard than "preponderance the evidence", which is a civil standard and it means "more likely than not".

"Clear or convincing evidence" is between preponderance of the evidence and beyond a reasonable doubt. This is supposed to be the standard for the DMV hearings which are conducted by an administrative law judge (ALJ). Unfortunately, most of the ALJs use the standard of proof of "more likely than not".

Usually the client will lose if the officer who saw them driving showed up for the DMV hearing. But, there are ways to win the DMV hearing; if the officer could not determine whether the person was driving or in actual physical control, if there was some problem with the blood draw, meaning the person who took the blood was not qualified as an expert in the State of Nevada. The officer is mistaken about what actually happened. This does not happen often. In any event, according to Nevada law, if the blood alcohol level was over a .08 and the person was convicted, or at the DMV hearing the person lost, their license would be revoked for 90 days, then after 45 days they could get a restricted license so they could go back and forth from work or school.

The person's license would be suspended for 90 days if they were convicted of a DUI or if they lost the DMV hearing. So the state gets two bites of the apple. The person could win the DUI case, or for example the criminal case could be resolved as a stay of adjudication so the client would not be convicted of a DUI. Because there was no DUI conviction, the person would not lose their license.

If the DMV determined the person had a blood alcohol level of over a .08 or if the officer had probable cause to determine whether or not the person was driving under the influence, they could still take the person's license because they have a lower standard and they generally do not care about the two hour rule.

I have argued this point on many occasions and cited the DUI law, but the DMV says that, "driving in the State of Nevada is a privilege not a right, so they can set up whatever restrictions or laws they want. Since it is not a criminal violation it does not need to be proven beyond a reasonable doubt."

The big problem is that the Nevada legislature recently enacted a law, NRS 484C.210, which was amended to state, "If a person failed to submit to an evidentiary test as requested by a police officer pursuant to NRS 484C.210, their license privilege to drive must be revoked for one year". This would be in addition to the 90 days, and that is what the person would be looking at if they refused to take the test and made the police get a warrant.

I think this is an impermissible constitutional violation and eventually someone will take this up to the Nevada Supreme Court and have them rule. Unfortunately, I believe they would side with the DMV and agree that driving is a privilege not a right, so it would be acceptable for the DMV to make these regulations.

**What Are Potential Penalties For A DUI In Nevada?**

In the past, DUIs were not really considered serious so it would be fine if someone had a couple of drinks, whereas nowadays, DUIs are taken much more seriously.

First time DUIs and a second DUI in Nevada are misdemeanors. In the past this was not really considered a big deal. But, groups like MADD, Mothers Against Drunk Driving, focused the spotlight on drunk driving because even though it is a misdemeanor, it is considered the most serious of misdemeanors, as is domestic violence.

DUI is considered a progressive crime, meaning that the penalties become more severe for a 2nd time and 3rd time DUI. For a first time DUI, the person would be looking at a minimum of two days in jail, with a maximum of six months.

They would be able to do 48 hours community service in lieu of the jail time, although we are usually able to resolve the case and have the client get credit for time served for the 48 hours, meaning the person would not need to do it.

It was a more serious situation if it was a second time DUI within seven years, because that would be a minimum of 10 days' jail and a maximum of 6 months. The fines would be higher and the person would be required to put a breath interlock device in their car and they would lose their license for 1 year.

In regards to the progressive nature of the crime, a third time DUI within seven years would be considered a felony and the penalties would be 1 to 6 years a fine ranging from $2,000 to $5,000, the person would lose their license for three years, and it would be non-probationable, so the person would have to go to prison.

They would have to spend one to six years in the Nevada state prison, although the people who were convicted of a third time DUI would be segregated and they would not be housed with killers and people who committed sexual assault or people who had used violence against somebody else, but the fact is that a prison is still prison.

**Case Study**

I handled a case recently in which my client was previously convicted of a DUI. He went to a casino and valet parked. When he came out, his BAC was over a 0.20 and the valet parking attendant told my client he should not get in the car because he would be driving drunk. My client insisted he wanted to get in the car. The attendant called the police, and the police officer told my client that he would arrest him if he got in the car after drinking.

There was some dispute as to what really happened, because my client claimed he went into the car just to get his cell phone charger but he did not drive, whereas the officer claimed my client did get into the car and that he drove but he did not even get out of the parking lot. He drove 20 feet so the officer arrested him.

This was a situation where as far as I was concerned, the officer did not see any bad driving so he did not have reasonable suspicion to pull the client over. But, of course, the DA said he did. It was a second time DUI. We were able to resolve the case by my client pleading to a second time DUI and they did a stay of adjudication. The sentencing was more severe than usual, but that was part of the give and take.

I felt that the most important thing was to prevent him from being convicted of a DUI, so he needed to go to DUI school, the victim impact panel and pay a fine, which is how it is for every DUI case. He also needed to undergo a chemical dependency evaluation because it was a second time DUI, and he would have to follow whatever the recommendations were from the evaluator. This particular client was from out of state and they did not have the people who were certified by the state of Nevada to do the chemical dependency evaluation. We agreed on a deal that in order to successfully complete his probation, he would have to go to Alcohol Anonymous for one day per week for six months.

At the end of the day my client was convicted of reckless driving, which was a non DUI disposition and, instead of a second time DUI which would have been a mandatory 10 days in jail. The third DUI within 7 years is a felony.

## Can DUI Charges Be Dropped Or Reduced?

Yes, if the case has some defects from the prosecution's standpoint, such as they did not have the chemist who did the test, the blood alcohol level was tested more than two hours after the arrest, the officer did not see the person driving, there was a missing witness or the client was home or someplace else when they drank more. In this situation, even though their blood alcohol level was over the limit it would be difficult to prove what the BAC was at the time of driving. In these cases, we are often able to resolve the case so it ends up as reckless driving instead of DUI.

## Charges Or Punishments Can Be Reduced In DUI Cases Under Certain Circumstances

There is actually no hard and fast rule, but it seems that between 60% and 75% of my clients end up with their charges being reduced to reckless driving.

Potential clients ask me about this all the time, and I tell them what I think their issues are, i. e. that the officer did not see them drive so they could not place them behind the wheel, their blood alcohol level was taken over two hours after they were driving so the police did the test improperly and therefore they did not have probable cause to arrest them. This is just my opinion which may or may not be shared by the judge.

Clients often ask me if I could guarantee them a reckless driving charge and I tell them that firstly under the cannons of ethics of a lawyer I could not guarantee a result. However, I have had success with their situation.

There is another favorable disposition we get for clients when they are charged with a second time DUI. Under the law the penalties include installing a breath interlock device in their car. They must blow into it prior to driving or the car will not start. If there is any alcohol in their system, the car will not start. And they would need to spend at least 10 days in jail.

We plead to a second time DUI for enhancements, but it would be a first for penalties. This means they would not have to do the 10 days in jail, only 2 days or 48 hours community service. Usually we can get the community service waived. They would not need to install the breath interlock device, or do the ten days, but it would be a second for enhancement.

This means that if the client was convicted of another DUI and it was the third time within seven years, then the DUI conviction that was the first for penalties would be a second time DUI conviction for purposes of enhancement, and the person would therefore be looking at a felony.

It is the luck of the draw, because I can sometimes go through two weeks in which every case I handle will be a reckless driving. But sometimes two weeks will go by and I cannot get any of them reduced to a reckless driving. It is impossible to predict because each case is different.

## Plea Bargains In A DUI Case

The offer by the DA usually is not that great during the first trial setting, so we would typically continue it. Sometimes the offer would not get better, but many times it does. The DA may give a more favorable offer if something happened that weakens his case, i.e. witness moved away, a chemical technician moved away or died, and in that case the offer gets better and our client pleads to a stay of adjudication. When the case is finished, they would end up with a reckless driving conviction as opposed to a DUI.

## Stayed Adjudications

We like this result but the case will certainly end up as a reckless driving charge, if the client did what he was supposed to do. There is an expression 'The key to the jailhouse is in your hand." Usually if the client does not complete all of the requirements in addition to a DUI conviction, they usually would spend some time in jail. But the client himself determines whether he goes to jail or not. This is called a "Stay of

Adjudication", and it works by the client pleading guilty to DUI, but the DUI would not be entered, so in a way it would be floating out there in cyberspace. Anybody who tried to look for it would see that the person had been charged with DUI, but they would not be able to see whether they had been convicted.

The client would typically need to fulfill the requirements for a first time DUI, meaning they would have to go to DUI School and attend a victim impact panel (VIP), pay a fine and stay out of trouble (no further arrests)

The victim impact panel is essentially a seminar in which people talk about how they had been adversely affected by a DUI. Victims would tell stories about how they got a back injury because they were rear-ended by a drunk driver, so they ended up having to go to therapy for six months etc. It is mandatory to attend the victim impact panel, and you must be physically present. Unlike the DUI School, you cannot do the VIP online.

Nowadays computers have become very sophisticated, and a recent development has enabled DUI school classes to be completed online. A fine would be imposed, and a first time DUI would cost somewhere between $580 to $1,175. The stay out of trouble component would require the person to stay out of trouble during the probation. No further arrests and no additional criminal violations. There couldn't be any arrests for DUI or anything else. It would be okay if the person was cited with a minor traffic ticket. Usually the court will impose a suspended sentence for around 30 days, but there would be no jail time as long as the person did everything, although they would usually need to spend 6 months in in custody if they were arrested for another DUI.

**Ignition Interlock Device**

A breath interlock device would be installed in the car. The person who was driving must breathe into it to make sure there was no alcohol in their system prior to drving. If there is, the car would not start. This device is also expensive to install, it is actually a huge hassle.

## What Is The Court Process For A DUI?

A misdemeanor DUI case would typically take about a year to fully resolve from the time the person was pulled over. They would be pulled over and given a court date in a month or six weeks, depending on how busy the courts are. We would plead not guilty at the first court date and set the trial date out a couple of months.

Each defendant would have a right to go to trial within 15 days, and this would normally be invoked by people who are in custody, or sometimes for whatever reason the person may want to go to trial right away. I tell clients that I do not think this would be in their best interest for the most part. But this is the client's decision.

Usually we will continue the trial a few times. (If they don't try you, they can't convict you!) Eventually we would either plead or go to trial. The time until the case is over usually takes longer for felony DUIs, such as a third time DUI or a DUI involving death or substantial bodily harm. Because instead of going to trial at the justice court level, it would be set for a preliminary hearing. The justice court does not have jurisdiction to hear felony trials.

**Preliminary Hearing**

The Preliminary hearing is the probable cause hearing in which the prosecution would need to establish whether there was probable cause to believe the person had committed this offense and have him bound over, to district court. This means have the case moved to the felony courts, because a third time DUI is a felony which means the penalties are at least 1 year in prison. The penalty for a third time DUI is one to six years in the Nevada State Prison and a $2,000 to $5,000 fine.

If the case moved up to the felony court, we would try and resolve it so it was not a DUI, and it would be some other charge such as reckless driving, leaving the scene of the accident or something else which does not carry mandatory prison time.

**Serious Offenders Program**

Another possibility would be the serious offender's program which has very stringent requirements. Someone who entered a plea to a third time DUI and was accepted into the program, would be on house arrest for six months. They would have to do counseling to help overcome the alcohol addiction, and they would be on three years probation. It would be a very rigorous program. If they successfully complete the program, the third time DUI would then be reduced to a second time DUI (a misdemeanor) and the person would receive credit for time served, meaning they would not need to do any additional jail time.

**Advice For People Who Just Want To Plead Guilty**

When clients want to just plead guilty to get the case over as soon as possible, I tell them that under the law it does not matter what they actually did, what matters is what the state could prove.

Let us suppose the client told me they were drunk, they went around the corner and hit a parking meter and then walked home. Because they were drunk, they felt they should just plead guilty. The police saw the vehicle and then either saw the client when he was at home or they saw him when he was walking across the side of the road. But they never saw him behind the wheel.

The question would be whether he was under the influence when he was behind the wheel, or whether he had been drinking at home, because they would just not know. If we ever have this defense then we need to plead it specifically, meaning we need to tell the prosecutor that we wanted to rely on drinking after he stopped driving as a defense.

The other scenario would be if the police saw him walking down the road and he was about a half mile, or a mile away. The police would not be able to prove when he was actually driving so they would not be able to prove beyond a reasonable doubt whether or not his blood alcohol level was over a 0.08 at the time he was driving.

Since he had had an accident, one could assume that he was under the influence of alcohol to any degree however slight, which made him incapable of driving safely. But could you prove it? We could defend that by saying that although he had had an accident, hundreds of thousands of people have accidents every single day even when they are stone cold sober. I actually handled a case just like that and it was a third time DUI. We were able to resolve it as felony reckless driving so there was no mandatory prison time.

**Decreased Probable Cause Needed For The Prosecution If Someone Had A Previous DUI**

The burden of proof is a term we only use at trial. A previous DUI might give the officer more reason for probable cause, although I think it should not make a difference. Each case would have to be evaluated on its own merit.

If it was a first time DUI and the officer did not have a reasonable suspicion to pull the driver over because he was weaving within a lane and it was not a traffic offense, then it would be the same thing if it was a potential second DUI. The penalties would be more severe and the prosecutors would not be as flexible when negotiating the case.

## What Are Some Interesting DUI Cases You Have Handled?

One of my clients was a methamphetamine user who was in an accident and he was out of the car. He assumed they could not tell he was driving because the officer did not see him drive, whereas there were actually two other witnesses there who did talk to the officer. But, there still was a question regarding the identification of my client. So he avoided a DUI.

I had a case in which a client approached a police officer with a wad of money to bail out her friend who the police had pulled over. Unfortunately it was not her friend. The cop suspected she was drunk. He told her to walk the line. She was a gymnast. She walked the line on her hands. The cop was so pissed he handcuffed her and threw her into the front seat of his police car. Big mistake! Gymnasts have strong legs. She kicked out his windshield.

They beat the crap out of her at the jail. The DA was pissed but they could not prove a DUI. They never saw her drive. They only gave her 1 FST, even though she didn't follow instructions. She did walk the line. She paid for the cop's windshield and pled guilty to disorderly conduct. I thought it was a great result.

Some people go to trial when they should not. I represented someone who was in the military. He was going to the PX in the morning, but unfortunately had some drinks the night before. He had a lot to drink, because the next morning someone saw that he was walking unsteadily. He got into his car and started driving but was pulled over.

I was able to have a plea bargain on the table for a stay of adjudication but the client absolutely would not take it. I told him he would be convicted if we moved forward, but he decided he wanted to go forward. It is the client's right to decide how they wanted to proceed (plead or go to trial) in any type of criminal case.

The client has two decisions, whether to plead or go to trial, and whether or not to testify if they went to trial. Everything else is the lawyer's responsibility such as tactics, which witnesses to put on or not put on and how to conduct cross examination.

Many clients become upset at that because they feel that since it is their case, they should be able to direct how to proceed. I recently had a federal case that was a drug case instead of a DUI. The client wanted me to file certain motions and do certain things that I did not think were appropriate.

He had a pretty storied criminal history, and based on that kind of criminal history, the federal court and the state would most likely sentence him to prison. Without a criminal record, he would be more likely to get probation depending on the severity of crime.

I once had a case in which my client and his wife were fighting while the car was parked he was in the driver's seat. His wife took off all of her clothes. I asked why? She said, "I always take my clothes off when I get drunk." She became belligerent with the officer and he told her if she didn't leave he would arrest her. She walked home Buck Naked! Another police are approached her and asked what she was doing. He drove her home, but not before he put a tarp on the back seat of his car. You just can't make this stuff up.

## Can A DUI Case Be Defended Without An Attorney?

It would be a huge mistake to try to handle a DUI case without proper legal representation by an attorney who knew what they were doing. When clients talk to me about wanting to handle their DUI themselves, I ask them whether they would operate on themselves, because if the answer to that is no, then they should not try to handle their DUI case themselves either.

### Hiring An Experienced DUI Professional Versus Handling The Case Oneself

Firstly, anyone should never represent themselves. There is a saying that if a lawyer represents himself he has a fool for a client. Even a DUI lawyer, who was accused of driving under the influence, should hire someone else, and that is what I would do. Thankfully, I have never been convicted of a DUI or been in that situation.

It would not be a good idea to have a general lawyer, or even someone who handled criminal cases but did not do DUIs, because there may be defenses and ways to handle the case that an experienced DUI lawyer would know, whereas even an experienced criminal lawyer who did not have the expertise in a DUI case may miss.

I tell my clients they should not go to a foot doctor for a heart problem, which is why they would need a specialist.

### Defending The Case Through A Public Defender

Regarding hiring a PD, or public defender, the good news is that public defenders are free, although the bad news is the person would never know which public defender they would get. Some public defenders may be good whereas some may be not so good.

The other reason why people really should not have a public defender handling their DUI case is because the public defender would only represent them for the criminal case, not the DMV hearing which is a a civil proceeding so the public defender would not represent them for that portion of the case.

I have often seen the public defender do a great job so the client was not convicted of a DUI, but then no one went to the DMV hearing because the client did not realize the PD would not handle the DMV hearing and they needed to go. Unfortunately, they ended up with their license revoked for 90 days, which could have been avoided.

The public defender could not represent him on a civil case or the DMV hearing, which is considered an administrative proceeding, not a criminal action. He did not get the opportunity to defend himself, which is why it would generally not be a good idea to have a public defender represent you in a DUI case or if they did have a public defender represent them, they could hire another experienced DUI lawyer to just handle the DMV hearing. But it is usually better to have 1 lawyer handle the entire case.

**How Attorney Mace Yampolsky Can Help You?**

My experience sets my firm apart in handling DUI cases, because I have been practicing since 1981. I have handled thousands of DUIs and I have attended innumerable DUI seminars. I have actually given DUI seminars and taught other lawyers how to practice DUI defense.

I handle everything when I handle a case, meaning I handle the criminal case and the DMV hearing. We charge a flat fee, so it would not matter whether we went to two, three or five court appearances or whether we plead or went to trial, it would just be a flat fee.

Most criminal cases in state court have flat fees. We charge a flat fee for a first time DUI and for a second time DUI, although we would only charge a flat fee for a third time DUI through the preliminary hearing, or if the case was negotiated.

We might charge a flat fee if we went to trial although sometimes we do it hourly. My hourly rate is $500 an hour, so the client would not want me to handle a case on an hourly rate because I am very thorough and it would cost them more money.

## Seek The Help Of A Skilled DUI Attorney

A DUI lawyer who knows how to defend your rights is necessary if you have been arrested for a DUI. If you have been charged with a DUI, you could be facing some extremely severe penalties including loss of your license, fines, and jail time. These Las Vegas DUI cases can become quite complex, and it is important to have an experienced DUI attorney on your side to help protect your interests and guide you through the process.

At Mace Yampolsky & Associates, we have helped thousands of clients throughout Las Vegas who have been charged with DUI. I have more than 30 years of experience in these cases, and I know what it takes to build a successful defense on your behalf.

When a law enforcement official stops you on suspicion of drunk driving, the law dictates specific rules that must be followed leading up to and during the stop. Any violation of these procedures can constitute a violation of your rights, which can seriously weaken the prosecution's case against you.

When you hire my firm, I will closely examine your case to determine if your rights were respected at all times. If they were not, I will immediately seek to have your charges dropped, or at least reduced. I will pursue every legal option available to find weaknesses in the evidence against you, including the following:

- Whether the law enforcement official had reasonable suspicion to stop you
- If the breath test was properly administered

- If the person who administered the breath test was qualified to do so
- If the breathalyzer equipment was accurate and working properly

# Blood & Field Sobriety Tests

## How Does Blood Alcohol Level Affect DUI Cases?

In Nevada the legal limit is a 0.08, so someone who the police can prove was driving or in actual physical control whose blood alcohol concentration was over a 0.08 could be convicted of a DU. However, the breath test has an error factor of up to 10%, meaning it could be 10% higher, or 10% lower. So if someone is a .09 or less, we would use that in our argument that the prosecution would not be able to prove that the blood alcohol level was 0.8 or more beyond a reasonable doubt. This is a very high standard that is used in all criminal cases.

We would typically resolve this kind of case as a stay of adjudication. The client would actually plead guilty to a DUI, but the court would "stay the adjudication". The guilty plea would NOT be entered into the record. So if anyone checks, your case would still be pending. Then you would need to complete certain requirements; usually attend and complete a DUI school, attend a Victim Impact Panel (VIP) which is basically a seminar in which people tell you how their life has been adversely affected by a drunk driver (i.e. My sister was rear ended by a drunk drive and she broke her arm), pay a fine, stay out of trouble and possibly do some community service. If you successfully complete these requirements your case would end up as reckless driving. This is NOT a DUI conviction. But the flip side is, if you do not successfully complete, you will be convicted of a DUI.

If a client took a blood test and the blood alcohol level was 0.085, then he or she could have the blood retested because it sometimes might come back lower. Some clients have a much higher blood alcohol level. According to Nevada law, if the blood alcohol level was in fact over a 0.18, then in addition to the other penalties we would need to get a chemical dependency assessment.

The person would be interviewed by a psychologist to determine whether or not the person had an alcohol problem or what other requirements they may need as part of their sentencing. They would typically want people to go to AA once a week or maybe even twice a week depending on the blood alcohol level and the history of the individual's driving record and previous incidents involving alcohol.

### Blood Tests Are Only Valid If Taken Within A Certain Time Frame

The chemical test for alcohol would need to be done within two hours from the time of driving. The alcohol test would not be admissible in court if it was not done within those two hours. The 2 hour time limit does not apply to drugs.

I handled a case involving a motorcycle in which my client actually came back to the scene of the accident because his friend wiped out on his motorcycle. When the officer arrived, my client was standing with his

motorcycle. He was not driving and by the time they took the blood alcohol level it had been over two hours.

There was another witness for this incident, who had seen both motorcycles. She said the other motorcyclist passed unsafely, whereas my client did not. I asked whether there had been any bad driving by my client, and she said no.

They were not able to convict my client of a DUI because the blood alcohol level was not admissible because it was taken more than 2 hours from driving. I went to trial on this. I spoke to the officer ahead of time and told them they would not be able to prove their case. All I wanted was for the DA to reduce it to a reckless driving conviction. The cop would not agree. So we went to trial and I won.

### The Police Need A Search Warrant For Taking Your Blood If You Don't Agree

A US Supreme Court case, Missouri vs. McNeely held that the police are not allowed to take the person's blood without their consent or a warrant. This is federal law.

I would assert this in many State DUI cases because there was no Nevada case on point, but in 2014 "The Byars Case", essentially codified the federal law, saying under Nevada law the person would not need to take a test unless there was a search warrant.

In order to get a search warrant, the officer would have to get a judge to approve it. Obviously, there would be no judge riding around with the officers so they would usually get a telephonic search warrant, meaning they could call the judge and record it. The officer would be sworn in, and would state that they had suspicion to believe John Doe had been driving under the influence so they wanted to take his blood. Since he had not consented, the officer would request that the judge would authorize swear out a warrant to search the blood.

The blood test would be taken, although what often happens is, without consent, the blood would be taken after two hours, and that would then not be admissible in the criminal case. The Nevada legislature recently decided if a suspect wanted to exercise their constitutional right and not to give blood, then they would punish them. So if you will not voluntarily give blood and make the police get warrant, you will lose your license for a year (in addition to the 90 days that you will lose your license if you are convicted of a DUI or lose the DMV hearing.

## What Happens During The Standardized Field Sobriety Tests?

Roadside tests are also known as "field sobriety tests" FSTs. I call them roadside tests because they are generally taken on the road side and most people may not understand the term field sobriety test. Three tests are usually given.

### Horizontal Gaze Nystagmus Test (HGN)

The first test would be the horizontal gaze nystagmus test abbreviated as HGN. In this test the officer would stand in front of the client and move his finger or a pen from right to left in front of the client's eyes

to a distance of about two feet each way. The person would be instructed to follow the finger with their eyes without turning their head.

In this test, the officer would be looking for nystagmus, which is an involuntary jerking of the eye. It would be an evidence of nystagmus if the person followed the officer's finger and their eye jerked prior to the officer stopping his finger. That would be considered evidence that the person was under the influence. It would also be considered nystagmus if the person had involuntary jerking of their eyes prior to forty-five degrees.

**How The Breath Test Can Overrule Other Field Sobriety Tests?**

The officers would probably have a portable breath tester (PBT) with them, so the person could blow into it and it would show a reading of their blood alcohol level. The actual reading itself would not be admissible in court, but it would be a factor in determining whether there was probable cause to arrest them.

The officer would sometimes feel the person did okay on the field sobriety test, but then they would give the portable breath test which would come back over a .08 so they would decide to arrest the person based on that. There is no requirement that you need to take a PBT at the scene.

**Nevada's Law Regarding Refusing Sobriety Tests**

Whatever the person does, they should not consent to any roadside tests. The law in Nevada used to state there was no right to refuse, so if the person refused to take the test, a group of officers would hold them down and take a blood sample whether they liked it or not. But now you can insist that the police get a warrant.

Click here for Video Info on FAQ concerning DUIs

- Will I Be Convicted Of DUI If An Accident Was Not My Fault?
- Can I Refuse A Chemical Test After A DUI Charge?
- Do I Have To Be Under The Influence Of Alcohol Or Drugs For DUI Charge?
- Do I Need To Be Impaired Or Over The Legal Limit To Get A DUI?
- Do I Need To Take A Roadside Test For The Police?