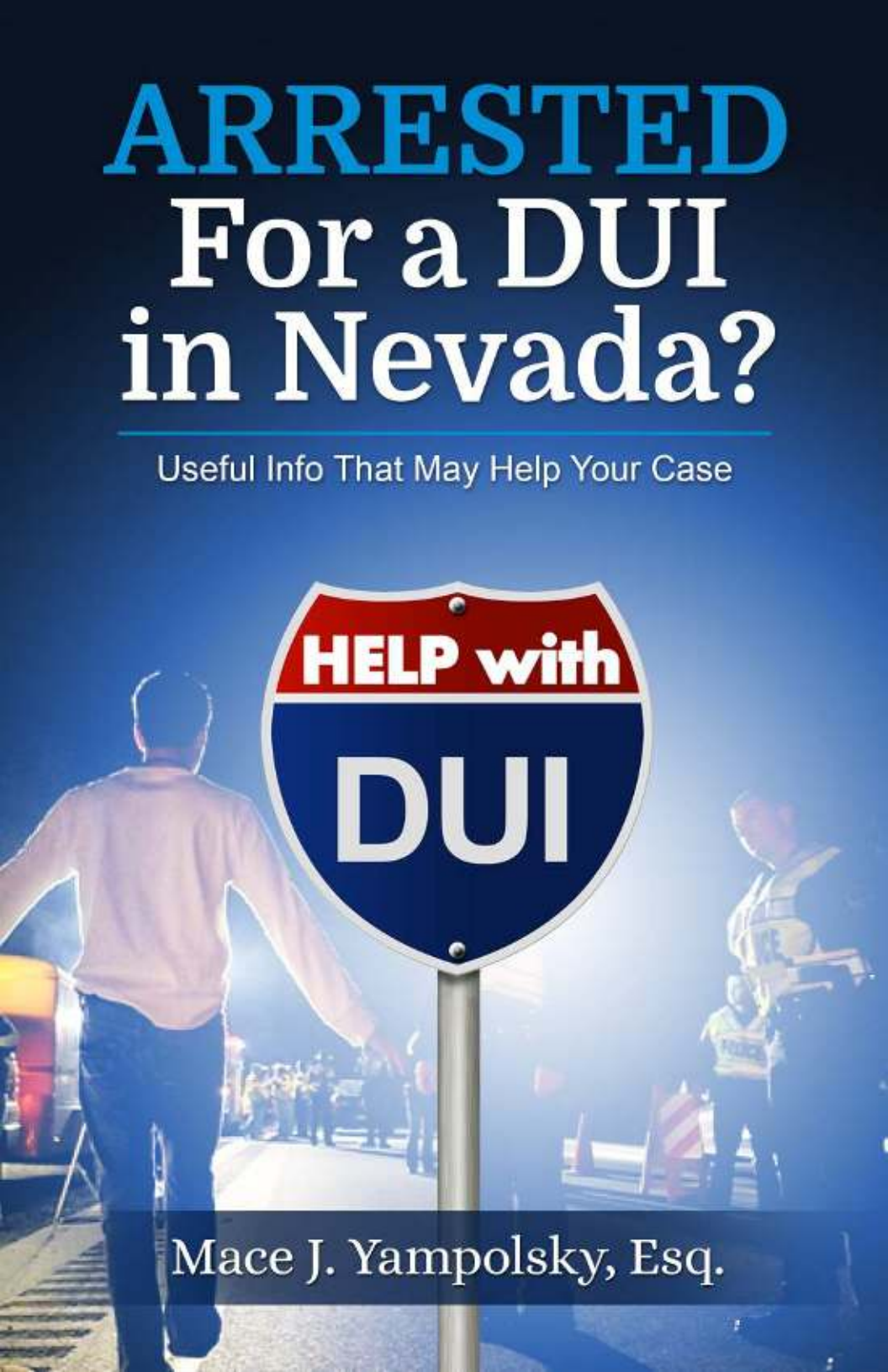
ARRESTED For a DUI in Nevada?

Useful Info That May Help Your Case



Mace J. Yampolsky, Esq.

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CLIENT TESTIMONIALS

"Mace is no-nonsense, to the point, effective, personable, comforting, kind, phenomenal is an inadequate description, but I can't think of a better word to use. Mace is still, and always will be my go-to guy for legal matters."

- Terri

"Mace Yampolsky and staff were extremely knowledgeable and efficient. The service we received was expedited quickly and was successful. I recommend consulting Mace Yampolsky for any legal service needed."

- Mike

"I got the most for the money I paid for Mace. During the whole process I had to go thru, my nerves were not as bad with Mace taking care of all the legal stuff for me. Highly recommended."

- A Criminal Defense Client

"I went to Mace after getting into some trouble with the law in Las Vegas. Mace and his team also helped my partner get some charges dropped. They kept both of us out of jail, and we are thankful for their help. I highly recommend Mace and his staff if you face legal problems."

- Serenity

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ATTORNEY INTRODUCTION

Mr. Yampolsky is AV rated by Martindale-Hubbell, the highest rating available to any attorney. This rating is obtained by an independent rating of lawyers and judges who are familiar with his representation of clients. Less than seven percent of all law firms in the United States are accorded this honor. Mr. Yampolsky is past President of the Nevada Attorneys for Criminal Justice.

Mr. Yampolsky graduated from Boston University in 1976 and the University Of San Diego School Of Law in 1980. He was admitted to California State Bar in 1981, admitted to Massachusetts State Bar in 1982 (currently inactive), admitted to Nevada State Bar in 1984, admitted to Colorado State Bar in 1994, and admitted to Washington D.C. State Bar in 1999.

How Is DUI Defined In Nevada?

It is considered a DUI if the person was driving, or 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. Therefore, 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 many 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. Usually 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 some other street drug.

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-probation able. 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 he 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 driver 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 that he did not have his seatbelt on. However, that issue has been litigated and just because someone does not buckle their seatbelt does not 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 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 were not used at all, it would freeze in the opening position, whereas if it were 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 should not 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. Alternatively, 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 were 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. However, often they do not 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, 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 these field sobriety tests is considered 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. However, 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 his or her 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.

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 were able to do this, they would have a 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 cooperative, it usually does not 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 to 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, "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. Nevertheless, 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 have 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 do not 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 to bully you. They know that the information you provide the police, the easier it is to convict you. They ask you, why will you not talk? What are you hiding? Why will you not cooperate? Why will you not do these roadside tests? Nevertheless, 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. On the other hand, 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 his or her words. This could become a probable cause for the arrest. Some people might be 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.

However, you would not help yourself by slurring your words. I advise not to get into a discussion about constitutional law, such as the Fifth Amendment guaranteeing their right to remain silent, or the sixth 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 more difficult for the police officer who wanted you to do the FSTS to contradict a brother officer. However, it is easy to denigrate what a sleazy defense lawyer would tell you.

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. Therefore, if someone were 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 very high standard 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. Therefore, 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 driver 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. However, the other 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.

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 would interview the person. 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 is 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 were 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. Therefore, 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 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. Therefore, 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 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 NOT 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 exclude the second test 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 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. Therefore, 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 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 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 roadside 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 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. Now you can insist that the police get a warrant.

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. However, 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 second time and third time DUI convictions. 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 as part of the deal the client will get credit for time served for the 48 hours of jail time, meaning he would not need to do the jail time or the 48 hours of community service.

It is a more serious situation if it is 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, the person would be required to put a breath interlock device in their car, and they would lose their license for 1 year.

A third time DUI within seven years would be considered a felony and the penalties are 1 to 6 years in Nevada State Prison, a fine ranging from $2,000 to $5,000, and you would lose your license for three years.

This is non-probation able, so you must go to prison. However, the people who are convicted of a third time DUI are segregated. 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 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 entered 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.

As far as I was concerned, the officer did not see any bad driving so he did not have reasonable suspicion to pull my client over in this situation. Nevertheless, 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 we

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 attend DUI School, the victim impact panel and pay a fine, which is statutorily required 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 that state 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 attend 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 is a non-DUI disposition, instead of a second time DUI that would carry a mandatory 10-day jail sentence. A third DUI conviction 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 the chemist who did the test was unavailable as a witness, 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 and were not driving 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 types of cases, we are often able to resolve the matter so it ends up as reckless driving instead of a 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. I tell them what I think their issues are, for example, the officer did not see them drive so he or she could not place them behind the wheel; their blood alcohol test was done more than two

hours after they were driving so the breath or blood test would not be admissible at trial. 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 canons 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 often obtain for clients when they are charged with a second time DUI. For a second time DUI conviction, the penalties include installing a breath interlock device in their car. The client must blow into it prior to driving or their car will not start. If there is any alcohol in their system, the car will not start. In addition, they would need to spend at least 10 days in jail.

We pled to a second-time DUI for enhancement, but it would be considered a first time DUI 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 jail time, but the conviction would be a second time DUI 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 and a second time for enhancements would be a second time DUI conviction for purposes of enhancement, and he or she 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. However, 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 does 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, etc., 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! The case will end up as a reckless driving charge, if the client completes all of his requirements. 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, the client usually would spend some time in jail. However, 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 conviction would not be entered in the court records, so in a way it would be floating out there in cyberspace. Anybody who looked for it would see that the person had been charged with DUI, but they would not be able to see whether he or she had been convicted.

The client would typically need to fulfill the requirements for a first time DUI, meaning they would need to attend and complete DUI School, attend and complete 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 received 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 in person. 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 and $1,175 in fines.

The stay out of trouble component requires the Defendant to stay out of trouble during the pendency of the case or for a certain period. No further arrests and no additional criminal violations. No arrests for DUI or anything else. It is okay if the client is cited for a minor traffic ticket. Usually the court will impose a suspended sentence for approximately 30 days, but there would be no jail time as long as the client completed all of the requirements. In addition, they would usually need to

spend 6 months 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 driving. If there were, the car would not start. This device is also expensive to install. It is a huge hassle.

WHAT IS THE COURT PROCESS FOR A DUI?

A misdemeanor DUI case typically takes about a year to fully resolve from the time the person was pulled over. They would be pulled over, arrested, 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 has a right to go to trial within 15 days. People who are in custody, or sometimes for a different tactical reason, etc. would normally invoke this Speedy Trial Right. The only witness that can put the Defendant behind the wheel will be unavailable on that trial date. A defendant 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 to proceed to trial quickly. Nevertheless, this is the client's decision.

Usually we will continue the trial a few times. (If they do not try you, they cannot convict you!) Eventually we would either plead or go to trial. The time until the case is completed usually takes longer for felony DUIs, such as a third time DUI or a DUI involving death or substantial bodily harm. Instead

of going to trial at the justice court level, they would be set for a preliminary hearing at the justice court level. The justice court does not have jurisdiction to hear felony trials. Felony (and gross misdemeanor) trials must proceed to District Court.

Preliminary Hearing

The preliminary hearing is a probable cause hearing in which the prosecution needs 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 the case must proceed to the district court, which has jurisdiction over felony cases, because a third-time DUI is a felony. This 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 proceeds to district court, we try to resolve it so it is not a DUI conviction. The conviction would be to 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 that 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. He or she would need to attend counseling to help overcome the alcohol addiction, and he or she would be on three-year probation.

It is 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 he or she 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, 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 saw the client when either he was at home or they saw him when he was walking across the side of the road. Nevertheless, they never saw him behind the wheel.

The question would be whether he was under the influence when he was behind the wheel (according to the terms of the DUI statute, driving or in actual physical control), or whether he had been drinking at home or somewhere else. If we assert this defense, we need to plead it specifically, meaning we need to tell the prosecutor that we wanted to rely on the defense of drinking after he stopped driving. 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 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. Nevertheless, could you prove it?

We could defend this case 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. My client did not go to prison.

Decreased Probable Cause IS Needed 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 reasonable suspicion for a traffic stop. I think it should not make a difference. Each case should 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 he did not have a reasonable suspicion if it was a potential second time DUI. The penalties are more severe

and the prosecutors are not 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 when the police arrived. He assumed they could not tell he was driving because the officer did not see him drive. There were actually two other witnesses who did talk to the officer. Nevertheless, there still was a question regarding the identification of my client. No one was able to put him behind the wheel. Therefore, 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, the stopped driver 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 one FST. Even though she did not follow instructions as the officer had anticipated, she did walk the line. Moreover, they never gave her a chemical test. The DA was upset, but I told him that he could not put my client behind the wheel, so he could not prove the DUI case. She paid for the cop's windshield and pled guilty to a parking ticket. 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, he was walking unsteadily. He entered his car and started driving but was pulled over almost immediately.

I was able to negotiate a plea for a stay of adjudication (No DUI conviction) 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 want 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 if he proceeds to trial, whether or not to testify. Everything else is the lawyer's responsibility, strategy, 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 drug case. The client wanted me to file certain motions and do certain things that I did not think were appropriate.

He had a storied criminal history, and based on that kind of criminal history, if convicted, the federal court and/or the state court 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 that pulled up to the car. He told her if she did not leave, he would arrest her. She walked home Buck Naked! Another police officer

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 cannot 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, not anyone should ever represent himself or herself. There is a saying that if a lawyer represents himself he has a fool for a client. Even a DUI lawyer, who is 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 is not a good idea to have a general lawyer, or even someone who handled criminal cases but did not specialize in DUIs, handle your case. 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 could miss.

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

Defending The Case By Using A Public Defender

Regarding hiring a PD, or public defender, the good news is that public defenders are free; the bad news is they may not be experienced in DUI defense. The Defendant would never know which public defender they would get. In addition, they may not be aware of the PD's experience in DUI cases. Some public defenders are good but some are bad, just like any profession.

The other reason why people really should not have a public defender handling their DUI case is that the public defender would only represent them in the criminal case, not the DMV hearing. The DMV hearing is 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 appeared at the DMV hearing because the client did not realize the PD would not handle the DMV hearing. If an attorney did not attend, the defendant needed to attend or else they would automatically lose and have their license revoked. Unfortunately, the Defendant ended up having his 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 is generally not be a good idea to have a public defender represent you in the entire DUI case. If DUI Defendant does have a public defender represent them, he or she could hire an experienced DUI lawyer to just handle the DMV hearing. Nevertheless, it is usually better to have one 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, both the criminal case and the DMV hearing. We charge a flat fee, so it would not matter whether we attend two, three, five, or more court appearances or whether we plead or go to trial. We charge a flat fee.

Most criminal cases in state court are on a flat fee basis, not hourly. We charge a flat fee for a first time DUI and for a second time DUI. We usually 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 might enter into an hourly fee arrangement. My hourly rate is $500 an hour, so the client would not want me to handle a case on an hourly basis, because I am very thorough and it would cost them more money than if I

handled the matter on an hourly basis. However, the client has a right to enter into any fee arrangement that is mutually agreeable.

Arrested For a DUI in Nevada?

Useful Info That May Help Your Case

"Mace is no-nonsense, to the point, effective, personable, comforting, kind, phenomenal is an inadequate description but I can't think of a better word to use. Mace is still, and always will be my go-to guy for legal matters."

- Terri

"Mace Yampolsky and staff were extremely knowledgeable and efficient. The service we received was expedited quickly and was successful. I recommend consulting Mace Yampolsky for any legal service needed."

- Mike

"I got the most for the money I paid for Mace. During the whole process I had to go thru, my nerves weren't as bad with Mace taking care of all the legal stuff for me. Highly recommended."

- A Criminal Defense Client

"I went to Mace after getting into some trouble with the law in Las Vegas. Mace and his team also helped my partner get some charges dropped. They kept both of us out of jail, and we are thankful for their help. I highly recommend Mace and his staff if you face legal problems."

- Serenity

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