

TEN DWI STATUTES EVERYONE SHOULD KNOW



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Memberships

- ◆ Founding Member, National College of DUI Defense
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- ◆ Supreme Court of the United States of America
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Advanced Professional Educational Achievements

- ◆ **National College of DUI Defense, Advanced DWI Training & Education; 1995, 1996, 1997, 1999;**
Harvard Law School, Boston, Massachusetts

This is the most advanced DWI practice course offered to attorneys. It consists of a given factual scenario and each attorney is required to prepare the case for trial. Upon arrival, lectures are given on each area of trial preparation and presentation by the nation's leading DWI defense attorneys. The class is then broken into smaller groups in which each student demonstrates his ability and understanding of the lecture topic. After each demonstration, the student is critiqued by a three member panel again composed of the best DWI defense attorneys in the United States. In addition to the legal training, extensive training is given in the areas of science involved with professional DWI defense. Attendees work closely in groups with scientists who explain the most advanced developments in chemical breath testing using the same scientific instruments employed in their home jurisdictions.

◆ **Certified Field Sobriety Instructor, National Highway Traffic Safety Administration**

This course is based upon the scientific study conducted by the Southern California Research Institute for DWI Detection and Field Sobriety Exercises. It includes instruction on administration, procedure and evaluation of data collected for the Horizontal Gaze Nystagmus, One Leg Stand and Walk & Turn tests used by police officers across the United States in identifying potentially intoxicated drivers during traffic detentions. Mr. Hoover is a certified instructor in this course of study.

◆ **Certified Intoxilyzer 5000 Operator, American Legal Education**

The Intoxilyzer 5000 is the breath test machine used throughout Texas to test possibly intoxicated persons who have been arrested for DWI and DUI under the current implied consent law. This machine is manufactured by CMI, Incorporated and is the predominant machine in the United States for breath testing by law enforcement personnel. This certification exceeds standards set by the Texas Alcohol Breath Testing Program for Breath Test Operators. In addition to learning how to conduct a valid breath test, this course also teaches the scientific aspects of breath alcohol testing, infrared photo-spectroscopy, the internal workings of the Intoxilyzer 5000, and calibration of the Intoxilyzer 5000 breath test machine.

◆ **Certified Blood & Urine Alcohol Testing, American Legal Education**

This course is specifically tailored to study and understand the chemical testing of blood and urine used in intoxication offenses (DWI, Intoxication Assault & Intoxication Manslaughter, etc.). It includes extensive study of gas chromatography testing procedure and protocol. This type of testing is widely used in most hospitals and criminal laboratories for blood and urine analysis for the presence and concentration of alcohol and other substances in these body fluids. In addition to gas chromatography, testing kits used by police and paramedics in the field were also explained. Enzymatic blood analysis is another type of blood analysis that is encountered in laboratory testing and covered with this instructional certification. All potential problems in the collection, storage and testing procedures for blood and urine are covered for a proper and thorough defense of these issues at trial.

Publications

- ◆ A Cross Examination of the Technical Supervisor@, *VOICE for Defense*, March 1999
- ◆ A Handling the Intoxilyzer Supervisor in a DWI Case@, *VOICE for the Defense*, March 1999
- ◆ A Spotlight on Chris Hoover@, *North Texas Relocation Journal*, Tarrant County, Spring Summer 1999
- ◆ A Spotlight on Chris Hoover@, *North Texas Relocation Journal*, Collin County, Spring Summer 1998
- ◆ A Constitutional Implications of DWI@, *Voice for the Defense*, June 1997
- ◆ A Constitutional Implications of DWI@, *National Law Journal*, April 28, 1997
- ◆ A DWI: A Scapegoat in Wolf's Clothing, Root out Juror's Attitudes on DWI Laws@, *The Texas Lawyer*, February 17, 1997
- ◆ A Attorney Christopher N. Hoover's top ten list on how to avoid DWI and have a safe holiday@, *Fort Worth, Texas Commercial Recorder*, December 31, 1996

Presentations

- ◆ Continuing Defense Lawyers Project; *DWI Trial Evidence*; Midland, Laredo, Texarkana and South Padre Island; 2003
- ◆ American Legal Education; Mastering Scientific Evidence; *Presentation of a Trial Before the Court*; April 2002
- ◆ American Legal Education; Mastering Scientific Evidence; *Top Ten Attacks of the Technical Supervisor*; March 2001, Atlanta, Georgia
- ◆ Texas Criminal Defense Lawyers Association; Winter President's Retreat; *Top Ten ALR Defenses & the Effect of Prior Alcohol Related Arrests on Occupational Drivers Licenses*; Banff Springs Canada; February 2001
- ◆ Texas Criminal Defense Lawyers Association, *DWI 2001*; *Cross Examination of the Technical Witness at ALR & Trial*; January 2001, Austin, Texas
- ◆ Texas Criminal Defense Lawyers Association, Annual Advanced Criminal Law Seminar, *Cross Examination of the Intoxilyzer Supervisor in a DWI Case*, June 2000 (San Antonio, Texas)
- ◆ Texas Criminal Defense Lawyers Association; Course Director & Speaker, *DWI 2000*", February 2000 (Lectures: *Effective Client Interviews & The Importance of Effective DWI Representation* (Galveston, Texas)
- ◆ Criminal Trial Advocacy Institute, Faculty, *Trial Advocacy Skills Course*, Sam Houston State University, March 2000 (Huntsville, Texas)
- ◆ Plano Bar Association; *What Civil Attorneys Should Know about DWI*; October 1999 (Plano, Texas)
- ◆ Harris County Criminal Defense Lawyers Association; *Cross Examination of the Technical Supervisor of the Intoxilyzer 5000*, Fall 1999 (Houston, Texas)
- ◆ Texas Criminal Defense Lawyers Association, Annual Advanced Criminal Law Seminar, *Handling the Intoxilyzer Supervisor* June 1999 (San Antonio Texas)
- ◆ Collin County Criminal Defense Lawyers Association, June 1999 (McKinney, Texas)
- ◆ Dallas/Tarrant County, *Winter DWI Specialty Program*, January 1999 (Purgatory, Colorado)
- ◆ Tarrant County Criminal Defense Lawyers Association, December 1998 (Fort Worth, Texas)
- ◆ Dallas County Criminal Defense Lawyers Association, October 1998 (Dallas, Texas)
- ◆ Dallas/Tarrant County, *Winter DWI Specialty Program*, January 1998 (Colorado)
- ◆ Dallas County Criminal Defense Lawyers Association, *First Annual DWI Seminar*, January 1997 (Dallas, Texas)

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TEN DWI STATUTES EVERYONE SHOULD KNOW

I. INTRODUCTION

Each year there are over 100,000 DWI arrests in Texas. DWI cases comprise almost one third of each county court docket. In the larger counties, this means that literally thousands of cases are DWI.

Statewide over 85% of these cases are resolved by plea bargain agreements and uncontested pleas of guilty or no contest. To the accused (and many in the criminal justice system), they are NOT criminals. This is because anyone who drinks alcohol and drives a car is likely to be stopped or arrested for DWI during his or her driving lifetime, no matter what the lifestyle.

The purpose of this article is threefold: 1) to educate judges, prosecutors and defense attorneys as to what the client feels is important in successful resolution of their case 2) provide an overview of ten DWI statutes and 3) provide a resource for license suspensions, occupational licenses, waiting periods and ignition interlock devices.

II. THE TYPICAL DWI CLIENT

As an attorney whose practice is limited to the defense of intoxication charges, I can truthfully say that there is no "typical" DWI client. Each client brings unique features and concerns related to the pending criminal case. Each arrestee therefore, in my opinion, should be looked at as being unique and the defense attorney has a duty to investigate and address the needs of the particular client in the criminal justice system.

The average DWI arrestee is not the average criminal offender. In fact, many of them are model citizens of the community. Because there is no criminal intent required to commit this offense, most DWI offenders are arrested and convicted without ever intending to break the law. Even people who speed have a greater criminal intent than the average DWI defendant.

Because of their "unique" characteristics, I suggest that they should be considered more carefully in plea negotiation and sentencing by all parties involved.

III. THE DEFENSE LAWYER

The criminal defense lawyer has a duty to listen to his or her clients and find out what is most important to them. More importantly, the defense lawyer should follow the client's wishes in pursuit of successful disposition of their case. Many defense lawyers forget that deciding whether or not to enter a plea of guilty or not guilty is a CLIENT DECISION, not a lawyer's. The attorney should advise the client of all possible

consequences of both the plea and the trial to help the client make an informed decision about the case.

I believe that the defense lawyer has a duty to investigate the personal qualities of his DWI client so that it can be effectively communicated to the prosecutor and judge for proper sentencing in a DWI case.

Consider these two situations. The first client is a 37 year old single mother with two children ages 7 and 12. She goes out for a "mother's night out" with her girlfriends, has a few glasses of wine with dinner and is arrested for DWI on her way home.

Her life is consumed with driving. She drives back and forth to work, back and forth to school, back and forth to extracurricular activities and performing normal household duties (grocery store, pharmacy, doctor's office visits, church, etc.). This woman **DEPENDS** on driving to keep her job and provide for her children. Any forfeiture of driving privileges will cause her world to crash before her own eyes. Mention more time in jail and the panic and fear is obvious.

On the other hand, the fact that she has a criminal conviction is the least of her worries. She has a good job and good relationship with her employer. A conviction for DWI will not cause her the loss of her job. Her future is solid and she is not anticipating any future employability issues. Even though the facts of the case make it a good one for trial, this client may choose a plea bargain if the details of probation conditions are not perceived as that onerous.

Contrast this client with a 23 year old college graduate in a new job. He has been out with some "college buddies" to the local tavern and indulged in his old college drinking practices only to learn that the metropolitan police department is not as kind as the old college campus police force.

This client has no children and his only responsibility is to himself. He needs to drive back and forth to work, but the 4 or 12 hour Occupational License does not seem to be such a life altering hardship if convicted. Even spending a few days in jail versus reporting to a probation officer for two years seems to be a viable option for resolution of his case.

He's learned a valuable lesson from the arrest, but has much different considerations about a conviction in his case. Namely, he is worried about his insurance rates and his future employability with a DWI conviction on his record. The price of a conviction is much higher than the possible punishment.

This client also presents an additional interested party: the parents. Parents are charged with looking after the best interests of their children. If Johnny is convicted of DWI, all of the money spent on college may have been spent in vain. Even if parents believe their child has an alcohol problem, they want them to be given a break. After all, in their early adult years, police used to look out for them and either call their

parents or give them a ride home. Parents do not typically appreciate that those days are no longer here.

Each of these clients presents many aspects of punishment considerations under current DWI laws in Texas. Without learning the personal characteristics of each client, neither the justice system nor the client will be served.

IV. CONSEQUENCES OF DWI

We need to begin considering the unique consequences of a DWI arrest and conviction from the point of view of the offender, not the lawyer or judge. By evaluating DWI from the offender's viewpoint, we can not only more adequately deter repeat offenders, but also more properly (and less emotionally) punish and individual for the crime that has been committed.

A short list of consequences is:

- A. Criminal conviction
- B. Loss of driver's license (\$125 fee)
- C. Community Service hours (24-100)
- D. M.A.D.D. Victim Impact Panel (3hrs)
- E. Fines and Court Costs (\$1,000)
- F. Monthly probation reporting
- G. Monthly probation fees (\$25-60/mo.)
- H. Ignition Interlock Device (\$75/mo.)
- I. A night in jail (\$500 bail)
- J. Trip to the impound lot (\$85)
- K. Embarrassment-Loss of Self Esteem
- L. Loss of social standing
- M. Multiple Court Appearances
- N. "Home Visits" by probation officer
- O. Interference with employment – time missed from work
- P. Future employability / Continued Employment
- Q. Increased Insurance rates/Cancellation of Insurance (300% for 4 years)
- R. Stress and Anxiety of pending case

V. WHY THIS INFORMATION IS IMPORTANT?

Because the prompt and successful resolution of criminal cases is high on the priority list for all parties involved, closer attention should be paid to the particulars of the DWI client. Judges want to move more cases, prosecutors want to advance in their respective offices and defense attorneys want to help their clients and receive payment for their services. Prolonging the life of a DWI case does not serve any of these purposes, but thoughtful and proper punishment does. Therefore, I believe that we should all pay closer attention to the client/accused's concerns for a more efficient resolution of these cases.

There is one other point to make here. Successful investigation and advice for a DWI case is timely. A client must be interviewed, the facts investigated, the prosecutor's case reviewed, that Administrative

License Hearing preparation and presentation, the retrieval and review of videotapes and client consultations and letters.

Another matter, from the defense attorney's point of view is fees. Most clients do not have all of the money it will take to resolve their case when they hire a lawyer. Most have never used an attorney before and are totally unaware of the time and costs involved for competent representation. Most attorneys accept a deposit toward a total flat fee. The remainder is financed over the life of the case. Being paid for representation is key in any business and necessary for continued existence.

VI. THE JUDGE

In Texas, judges are elected. They are therefore ultimately responsible to the voters for their jobs. One of the most touted election promises is "prompt and efficient resolution of cases". The other "vote getter" is the promise to be stern with "drunk drivers". Judges see the facts in the trials before them and should be aware that most DWI defendants are not "drunk drivers".

Judges have one "angel" sitting on each shoulder. "Discretion" and "harmless error" are their names. Harmless error is most helpful in the appellate process and discretion reigns supreme in the courtroom. I believe that judges should understand that DWI is a unique crime and use their discretion in fashioning the most appropriate punishment for each offender before them.

The first opportunity a judge has to exercise discretion in a DWI case is upon release from jail and whether or not to require a deep lung ignition device (DLD) on the offender's car.

I understand that all judges are sensitive to "bad press". The last thing any judge wants to do is open the morning paper to a story about a violent car wreck in which a mother and children were killed by "another drunk driver" who is "out on probation" in his or her court! But this requirement is quite punitive, embarrassing and expensive to the offender and this requirement is allowed under our law when a person is **presumed innocent**.

The specific statute (CODE CRIM. P. 17.441) is vague and does not specifically "require" a DLD on everyone who has ever had a prior DWI or alcohol related case. The statute states that it is required when this is a "subsequent offense" under Chapter 49 of the Penal Code. The language of the prior statutes (Vernons §67011) is omitted. This implies that if the "former" DWI is remote in time a DLD is not a mandatory requirement of bond.

The judge also has the power and authority to not require such a device when it would not be in the best interest of justice. Judges should ask probing questions

and rely on their wisdom and experience to effectively execute this powerful discretion.

Judges are lawyers too and should recognize be aware that DWI laws are quite harsh. One such reality is the inability to grant deferred adjudication.

Deferred adjudication is a very tempting offer and gracious order by the court in other cases. It provides the defense attorney with a real alternative than trial in severe cases

Typically touted as leaving “no record”, modern databases for criminal records do not make a distinction for jail time, regular probation and deferred adjudication. Deferred adjudication is a major victory from the client’s perspective in any other criminal case.

Deferred dispositions also increase the confidence in the defense attorney and convey a message of reasonableness, understanding and justice from the District Attorney’s office and criminal justice system. Deferred adjudication is a “win-win” method of disposition that is legally unavailable for the DWI offender.

I understand that granting deferred adjudication is not within the judge’s discretion. Some judges however frown upon a District Attorney recommendation for a DWI reduction or dismissal as a policy. Judges should be reminded that the prosecutor and defense lawyer are much more familiar with the facts of the case and have dealt in proper negotiation. These agreements are not presented on a regular basis. Judges should rely on the attorneys’ wisdom and experience.

Another opportunity for judicial discretion is the specific conditions of probation. First of all they should revisit the length of the probationary period ordered.

CODE CRIM. P. Art. 42.12 Sec. 3 (c) states that, “The maximum period of community supervision in a misdemeanor case is two years” (emphasis added). In almost every DWI case in which probation is granted, the term of probation ordered is two years. This seems unfair when comparing DWI to other misdemeanor cases.

Possession of marijuana under two ounces is typically a six month deferred adjudication sentence. Theft (even from your employer) is likewise a six month deferred adjudication time period. Criminal mischief, trespass, prostitution and most other misdemeanor probations are less than the two year maximum period.

When you combine the differences between those types of offenders and DWI defendants, it seems illogical and unfair that a DWI offender gets a more severe sentence from the client perspective.

CODE CRIM. P. Art. 42.12, Section 20 discusses the power of the judge to grant early release to a probationer. Again, DWI offenders have been differentiated. Paragraph (b) states that “this section

does not apply to a defendant convicted of an offense under Sections 49.04 - 49.08 Penal Code...”

Some judges have told me that they believe the two years are needed to fulfill all probation conditions. Let me offer them some information on the time involved in the typical DWI conditions of probation:

- 1) DWI Education Class – two four hour classes (that can be scheduled on weekends in most cases)
- 2) M.A.D.D. Victim Impact Panel – one three hour session
- 3) Community Service (80 hours) – requiring that this be completed at the rate of 8 hours per months = 8 months
- 4) Fines and Court Costs (\$1,000) – paid at \$100 per month = 10 months
- 5) Alcohol/Drug Evaluation – 30 minutes to one hour (done at orientation)

The remainder of the conditions of probation is identical to most other misdemeanor offenses. This means that a one year period of community supervision is more than adequate time to fully satisfy all probation conditions.

Because early release is not available for DWI, I believe that judges and prosecutors alike should revisit their respective positions on recommending or ordering 24 months for DWI supervision.

VII. PROSECUTORS

I have never been a prosecutor and will not pretend to try to explain the personal and bureaucratic policies in their work. I simply want to provide some input from the citizen’s viewpoint.

As discussed earlier, DWI defendants are different. Even in the State’s closing argument they tout that they are “not saying Mr. Smith is a bad guy, he just made the wrong decision”. If you truly believe this, why isn’t this considered in the plea bargain process?

In counties where prosecutors have some discretion, I suggest that they consider the offer they are recommending. If they truly want to dispose of cases that do not need to be tried or cannot be won, the particular facts of arrest and defendant’s characteristics should be considered.

Prosecutors should recognize that an offer of 180 days in jail, probated for two years is an offer of maximum punishment.. Taking a case to trial with this recommendation means that the client will lose nothing but a trial fee for requesting that the State prove its case. And, as we all know, anything can happen in a jury trial.

The fine should be thoughtfully measured. DWI offenders are punished more monetarily than any other misdemeanor offense. A few of the other costs are:

1) Towing fee	\$80
2) Bonding fee	\$500
3) Vacation days taken for court	\$???
4) Probation fees (\$40 X 24)	\$960
5) DWI Education Class	\$125
6) Attorney's fees	\$???
7) M.A.D.D. fee	\$20
8) Evaluation fee	\$25
9) Ignition Interlock	\$75/mo
Approximate total non-court costs	\$1800

The current legislature has also sent a bill to Governor Perry this year instituting a “point system” for driver’s license. The DWI provision states that the DPS “surcharge” for a DWI conviction is \$1,000. If it is a case with a breath test score of 0.160 or higher, the charge is increased to \$2,000 (the equivalent of a maximum fine for conviction!).

Community service should also be considered realistically and individually. Not all offenders should be ordered to complete 80 hours or 80% of the maximum number of hours allowed by law. A reduction in the amount of hours offered in a plea agreement can be quite enticing to a defendant considering probation.

VIII. DWI RECOGNITION AND DETERRENCE

The current DWI system has a major flaw, failure to identify problem drinkers during their first encounter with the criminal justice system.

Judges throughout Texas require all DWI offenders to submit to testing for potential alcohol and substance abuse problems. In the four counties in which I normally practice, there are four different “examinations” to attempt to identify “problem drinkers”. Each test is equally ineffective at identifying the repeat DWI offender. This is true because alcohol abusers are very unique and hard to identify.

Until the problem offenders can be better recognized, judges cannot abdicate their duty to inquire and evaluate the particular needs of the particular offender. Although this is time consuming and laborious, it is a better method to achieve safer roads for all Texans.

Judges should insist that the prosecutors, community supervision officers and defenders supply them with enough credible information for them to make accurate determinations as to what punishment or rehabilitation will prevent each offender from returning to the justice system.

Effective criminal justice is an intensely “interdependent” environment. Without all three parties taking more responsibility for the appropriate consequence or punishment, the prevention of repeat DWI offenders will remain unaddressed in the courtroom or the legislature.

IX. 10 DWI STATUTES TO KNOW

When I began writing this article and preparing this presentation I asked several people their ideas concerning a topic. All of the suggestions reminded me of common questions that I am stopped and asked about everyday in the courthouse.

The major dilemma in DWI law is that it is not contained in one section of the law. In fact, DWI laws are not even in the same book.

To practice DWI defense effectively, the lawyer must be very familiar with the penal code, code of criminal procedure, government code, administrative code, family code and traffic code. I decided that I would present the ten most confusing and most often misunderstood statutes that we face in every DWI case.

**A. Driving on Roadway Laned for Traffic
TEX. TRANSP. CODE §545.060**

The most often cited traffic violation for reasonable suspicion to stop a motorist is “failing to maintain a single lane of traffic” (T.T.C. §545.060).

Truthfully speaking, it is the most likely (and most subjective) reason a police officer can use to detain a motorist.

This violation also serves as the first “prong” to suspend a person’s driver’s license under the current Administrative License Revocation rules. When written in a police report, it requires little precision or description in the wording to overcome the preponderance standard for the burden of proof of reasonable suspicion.

In the world of appeals, it is virtually never appealed past the municipal court. It was not until it became a frequent justification for stops in DWI cases that it is found in an appellate decision (*Tarvin v. State*, 972 S.W.2d 910 (Tex.App.-Waco 1998)).

The facts of *Tarvin* are quite clean and simple. The opinion states the following: “The sparse facts indicate that on June 8, around 2:00 a.m., Officer Diron Hill followed *Tarvin* and observed him drift to the right side of a two lane road causing his tires Page (911) to go “over” the solid white line at the right-hand side of the road on two or three occasions. [fn2] Hill activated his overhead emergency lights, and *Tarvin* pulled over in response. There is no evidence regarding what followed.”

The record also supports the single stated issue of this decision: “Did these facts support a reasonable suspicion to stop a motorist?”

The opinion noted that Officer “... Hill never testified that he was conducting an investigatory stop, nor did he testify to suspecting any criminal activity other than weaving out of the lane. In other cases where a stop was justified in part because of weaving, the activity involved something else, i.e., going into another lane of traffic, high rates of speed, or erratic

speed changes. [fn5] Hill testified that he did not observe any other driving infractions.”

Judge Daryl Coffey’s analysis of the facts were not disturbed or viewed as an abuse of discretion. The most memorable finding of fact comes right out of this opinion and is the best reason for a good attorney (or judge) to question and analyze all of the facts surrounding a stop and applying good old fashioned common sense to a case. Judge Coffey found that:

“The court found that Tarvin “doesn’t weave out of a lane, he’s within a lane. Driving a car, in and of itself, I mean, is a controlled weaving. . . . Itself, has to be “The record contains evidence that Tarvin either drove on or over the right-hand white line.”

This opinion stands for the proposition that motorists should be allowed some leniency in road travel. As long as someone is doing a fair job staying within the lanes, under the circumstances, it should not be a reasonable suspicion to stop if he poses no danger to himself or others.

I have tried cases and ALR hearings where I have presented photographic evidence that there are no lanes of traffic. No line separating oncoming traffic. The question became, which lane belonged to my client?”

Judges and lawyers alike should look for this type of detail when analyzing these DWI stops. Not all police officers will misrepresent a fact, but occasionally, it happens. Too many lawyers refuse to view the scene of the stop.

If an officer continually makes this mistake, it needs to be brought to someone’s attention and our right to privacy should not be jeopardized even if justified by “catching a drunk driver”.

I am amazed at how many lawyers and judges have never read this statute. I therefore list it as my # 1 statute everyone should know about DWI.

B. Conditions requiring motor vehicle ignition interlock

CODE CRIM. P. §17.441

This statute was previously discussed above in the section relating to judges. The only point that needs to be repeated is that the law is very exact on when this condition is required and judges should use their discretion to avoid discounting the presumption of innocence that all citizens are afforded when merely accused of a crime. They should also realize that an arresting officer does not have as much discretion in making an arrest when his computer reveals that the suspect has had a prior DWI arrest or conviction.

C. No Deferred Adjudication for Intoxication Offenses

CODE CRIM. P. Art. 42.12, Sec. 5 (d) (1) (A)

This statute was also discussed earlier. I include this statute because of the many times that I have to explain it to my clients. They typically do not

understand why they could receive deferred adjudication for murder, but not DWI.

It is most upsetting when the client tells me that another lawyer has told them that they were eligible for deferred adjudication for DWI. This implies to me that lawyers don’t know this law and they must if they choose to represent someone accused of DWI. I once even had an attorney approach me in court and asked what she needed to do to get the prosecutor to recommend deferred adjudication for her DWI client. She was quite embarrassed when presented with this statute.

D. No early release for DWI

CODE CRIM. P. Art. 42.12, Section 20(b)

I cannot tell you how many times I am asked a question about early release for DWI. I have also seen judges grant early release to DWI probationers. Although I would love to have all of my clients released early from probation, I do not believe that a defense attorney can ethically ask a judge to not follow a very specific law.

I include this statute in my “top ten” because everyone really needs to know it, prosecutors, judges and defense lawyers. Shorter probation periods should be requested in plea negotiations, considered by judges in punishment and correctly represented by defense counsel to clients and the court.

E. Jail Time as a Condition of Probation

CODE CRIM. P. Art. 42.12 Sec. 13 (a)(1)

Texas Penal Code §49.09

This too is a very misunderstood and confusing area of DWI law. The main reason for the confusion as to answer the question, “How much jail time is required?” is different depending on where you look.

Texas Penal Code §49.04(b) states that the minimum term of confinement for a DWI 1st offense is 72 hours with a maximum of 180 days. This is increased to a minimum of 6 days in jail if an open container was alleged and proven. Article 42.12 refers to §49.09 when discussing confinement.

CODE CRIM. P. Art. 42.12 Sec. 13 reads: “(a) a judge granting community supervision to a defendant convicted of an offense under Chapter 49, Penal Code shall require as a condition of community supervision that the defendant submit to:

(1) **not less than three days** of confinement in county jail if the defendant was punished under **Section 49.09(a); not less than five days** of confinement in county jail if the defendant was punished under **Section 49.09(a) and was subject to Section 49.09(g); not less than 10 days** of confinement in county jail if the defendant was punished **under Section 49.09(b) or (c); or not less than 30 days** of confinement in county

jail if the defendant was convicted under **Section 49.07;**” ...

The confusion comes with the references to §49.09 of the Penal Code. §49.09(a) is the provision that makes it a Class A misdemeanor if the defendant has **one prior DWI conviction**. The code is silent for confinement as a condition for a first time offender.

§49.09(g) was amended in 2001. It increases the minimum term of confinement as a probation condition to 5 days, if comparing the dates of offense of both cases shows that they were **committed within 5 years**.

10 days confinement as a minimum term for confinement as a condition of probation is required when the defendant is punished under §49.09(b) or (c). Those provisions relate to defendants who have either one conviction for an Intoxication Manslaughter type offense or two prior convictions for intoxication operation offenses (DWI, BWI, FWI, Amusement Ride assembly or operation) in Texas or any other state.

30 days are required if the defendant is convicted of Intoxication Assault. The minimum term is increased to 120 days if the crime was Intoxication Manslaughter.

F. Jury may recommend that driver's license not be suspended

CODE CRIM. P. Art. 42.12 CCP, Section 13 (g)

This provision is virtually unknown by prosecutors, judges and defense attorneys alike. It is the only provision under any Texas law, to my knowledge, that grants discretion of whether or not to suspend a DWI 1st offender's license to anyone.

Because license suspension is an important concern of most DWI clients, it is a good one to know. Judges and prosecutors should also be aware of this provision when drafting their punishment jury charge in DWI cases.

Note that this provision applies to persons convicted of DWI, Intoxication Assault and Intoxication Manslaughter. It does not apply to persons punished with one or more prior DWI convictions or one prior Intoxication Manslaughter offense. The five year rule §49.09(g) is also inapplicable.

G. Drivers License Suspension Periods

CODE CRIM. P., Art. 42.12, Sec. 13 (k)

I find that again all parties involved are not familiar with this section of 42.12. License suspensions may not be a deterrent to repeat offenders, but they are certainly important to anyone arrested and convicted of DWI.

It seems to me that most courts and prosecutor offices operate more out of habit than knowledge when license suspensions are involved. Judges have much more discretion in this area than they realize. They too

should consider their options when sentencing a DWI defendant.

The minimum and maximum periods for license suspension for DWI convictions are:

- 1) 90 – 365 days for a first conviction for DWI, Intoxication Assault and Intoxication Manslaughter
- 2) 180 – 2 years with one or more prior convictions
- 3) 1 year – 2 years with a prior conviction where the dates of offense are within five years

It should not always be required that each DWI offender face the maximum suspension period as proper and fair punishment.

H. Suspension of Minor's License

CODE CRIM. P. Art. 42.12, Sec. 13 (n)

Minors are treated differently in most criminal cases. DWI is no exception. Many lawyers, prosecutors and judges are unacquainted with this statute. It is found at the end of Chapter 42, Section 13 of the Code of Criminal Procedure. It applies to persons who are convicted when they are younger than 21 years of age and placed on probation.

The provisions of this section are mandatory and not discretionary. It states that “... the judge who places on community supervision a defendant who is younger than 21 years of age and convicted for an offense under Sections 49.04 - 49.08, Penal Code, shall:

- (1) order that the defendant's driver's license be **suspended for 90 days beginning on the date that the person is placed on community supervision;** and
- (2) require as **a condition of community supervision that the defendant not operate a motor vehicle unless the vehicle is equipped with the device** described by Subsection (i) of this section.” (DLD)

The judge who follows this law should make an entry on the docket of the court of this order and be sure that his clerk's are aware of this condition. The clerk must then be sure that the Department of Public Safety receives this information for its records and actions. Unless this information is received, the department may suspend the license for a longer period of time.

The department is most familiar with the Traffic Code and they will follow it without further instruction. They will however defer to a judge's order in this instance.

T.T.C. §521.342 specifically concerns “Persons under 21 years of age”. Subsection (b) states that upon conviction for DWI, Intoxication Assault or

Intoxication Manslaughter, “The department shall suspend for one year the license of a person under 21 years of age ...” regardless of whether or not an educational class is ordered.

This is another instance in which the judge should use discretion and consider a different education program for the offender. The DWI class may not get the attention of the youthful offender. There are many other programs available for youthful offenders that should be investigated to assist in the deterrence of repeat offenders.

Another important aspect of this provision is that the suspension is immediate and not subject to a deferral of the suspension for thirty days. The thirty day extension of driving privileges only applies to persons over the age of 21.

I. Credit for ALR Refusal Suspension

Tex. Transp. Code § 521.344

This statute is virtually unknown and a surprise to anyone I talk with about DWI. In 1995 when DWI was brought into the Penal Code, this provision was added by the legislature. It is remarkable that this provision **only applies to persons who refuse to take a breath test.**

This is also not a discretionary matter. This statute states that, “(c) **The court shall credit** toward the period of suspension a suspension imposed on the person for refusal to give a specimen under **Chapter 724** (Refusal DWI) if the refusal followed an arrest for the same offense for which the court is suspending the person's license under this chapter.”

This credit is also not extended to repeat intoxication offenders.

J. Community Service Provisions

CODE CRIM. P., Art. 42.12, Sec. 16 (a)

As previously discussed, a judge and the prosecutor have wide discretion in plea offers and DWI punishment. Community Service is another one of those areas of discretion.

Under this provision the judge may not require community service hours of the defendant if the defendant suffers any type of physical or mental infirmity that would make him or her incapable of performing the work. It also allows the judge to forego this condition if the performance of the community service will work a hardship on the defendant or dependents of the defendant. A judge should investigate into these facts if a defendant appears pro se before them or the attorney is requesting that this condition be waived.

This provision requires a judge to waive community service if the defendant is ordered to be confined in any substance abuse facility. This means that completing a program like Substance Abuse

Felony Program (SAFP) should eliminate the community service requirement.

A judge's discretion to waive community service is also specifically preserved. with Subsection (a) (4) which states that community service may also be waived if “there is other **good cause shown.**”

Repeating the premise that DWI offenders are not typical “criminals” and subject to many extrajudicial punishments, I believe that courts should consider waiving or reducing community service hours ordered for DWI offenders.

K. Community Supervision Period

CODE CRIM. P. Art 42.12, Sec. 3 (c)

I have discussed this provision briefly in the beginning of this paper and add it as #11 on my “top ten” list.

I don't know whether judges believe that two years probation is mandatory for DWI cases, it is a custom of habit or just plain apathy to the hardship of community supervision. I include this provision just to put to rest that a judge **does not always have to make DWI probation period two years!** It is perfectly within your discretion whether you or a jury recommended probation. Revisit your position on this issue, please. Compare it with other punishments you order in misdemeanor cases. Review the times that I have stated are needed to complete the other conditions of probation. And, finally, seriously consider ordering less than two years for the DWI cases that truly deserve it.

X. CONCLUSION

DWI is different and everyone knows it. It is one of the most complex areas of criminal law in Texas. Judges, prosecutors and defense lawyers should take time to revisit all of the DWI laws.

This paper is intended to educate enlighten and encourage you to re-read the DWI statutes. We are all on the same side. Nobody supports drunk driving. Responsible social drinking and driving is our goal. We must remain vigilant to our primary purpose: To promote justice and defend our Constitutions.

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1. Driving on Roadway Laned for Traffic
TEX. TRANSP. CODE §545.060

- (a) An operator on a roadway divided into two or more clearly marked lanes for traffic:
- (1) shall drive **as nearly as practical** entirely within a single lane; and
 - (2) may not move from the lane **unless that movement can be made safely.**

2. Conditions requiring motor vehicle ignition interlock
CODE CRIM. P. §17.441

- (a) Except as provided by Subsection (b), a magistrate shall require on release that a defendant charged with a **subsequent offense under Sections 49.04 - 49.06 PENAL, Penal Code, or an offense under Section 49.07 or 49.08 of that code:**
- (b) The magistrate may not require the installation of the device if the magistrate finds that to require the device would **not be in the best interest of justice.**

3. No Deferred Adjudication for Intoxication Offenses
CODE CRIM. P. Art. 42.12, Sec. 5 (d) (1) (A)

- (d) In **all other cases** the judge may grant deferred adjudication **unless:**
- (1) the defendant is charged with an offense:
 - (A) under **Section 49.04, 49.05, 49.06, 49.07, or 49.08 PENAL CODE**

4. No early release for DWI
CODE CRIM. P. Art. 42.12, Section 20(b)

- (b) **This section does not apply** to a defendant convicted of an offense under **Sections 49.04 - 49.08 PENAL, Penal Code ...**

5. Jail Time As Condition of DWI Conviction
CODE CRIM. P. Art. 42.12 Sec. 13 (a) (1)

- (a) A judge granting community supervision to a defendant convicted of an offense under Chapter 49, Penal Code shall require as a condition of community supervision that the defendant submit to:
- (1) **not less than three days** of confinement in county jail if the defendant was punished under **Section 49.09(a); not less than five days** of confinement in county jail if the

defendant was punished under Section **49.09(a)** and was subject to Section **49.09(g); not less than 10 days** of confinement in county jail if the defendant was punished **under Section 49.09(b) or (c); or not less than 30 days** of confinement in county jail if the defendant was convicted under **Section 49.07;**

TEXAS PENAL CODE § 49.09 (a)

Except as provided by Subsection (b), an offense under **Section 49.04, 49.05, 49.06, or 49.065 is a Class A misdemeanor, with a minimum term of confinement of 30 days, if it is shown on the trial** of the offense that the person has **previously been convicted one time** of an offense relating to the **operating of a motor vehicle while intoxicated, an offense of operating an aircraft while intoxicated, an offense of operating a watercraft while intoxicated, or an offense of operating or assembling an amusement ride while intoxicated.**

TEXAS PENAL CODE § 49.09 (b)

An offense under **Section 49.04, 49.05, 49.06, or 49.065 is a felony of the third degree if it is shown on the trial** of the offense that the person has previously been convicted:

- (1) **one time of an offense under Section 49.08** or an offense under the laws of another state if the offense contains elements that are substantially similar to the elements of an offense under Section 49.08; or
- (2) **two times of any other offense relating to the operating of a motor vehicle while intoxicated, operating an aircraft while intoxicated, operating a watercraft while intoxicated, or operating or assembling an amusement ride while intoxicated.**

6. Jury may recommend that license not be suspended
CODE CRIM. P. Art. 42.12 CCP, Section 13 (g)

- (g) *A jury that recommends community supervision* for a person convicted of an offense under Sections 49.04 - 49.08 PENAL, Penal Code, *may recommend that any driver's license issued to the defendant under Chapter 521, Transportation Code, not be suspended.* This subsection does not apply to a person punished under Section 49.09(a) or (b), Penal Code, and subject to Section 49.09(g) of that code.

7. Drivers License Suspension Periods for DWI Conviction

CODE CRIM. P., Art. 42.12, Sec. 13 (k)

(k) Notwithstanding Sections 521.344(d) - (i), Transportation Code, if the judge, under Subsection (h) or (j) of this section, permits or requires a defendant punished under Section 49.09 PENAL, Penal Code, to attend an educational program as a condition of community supervision, or waives the required attendance for such a program, and the defendant has **previously been required to attend such a program**, or the required attendance at the program had been waived, the judge nonetheless shall order the suspension of the driver's license, permit, or operating privilege of that person for a period determined by the judge according to the following schedule:

- (1) **not less than 90 days or more than 365 days**, if the defendant is convicted under **Sections 49.04 - 49.08 PENAL, Penal Code;**
- (2) **not less than 180 days or more than two years**, if the defendant is punished under **Section 49.09(a) or (b), Penal Code; or**
- (3) **not less than one year or more than two years**, if the person is **convicted of a second or subsequent offense under Sections 49.04 - 49.08 PENAL, Penal Code, committed within five years of the date on which the most recent preceding offense was committed.**

8. Suspension of Minor's License Upon DWI Conviction

CODE CRIM. P. Art. 42.12, Sec. 13 (n)

(n) Notwithstanding any other provision of this section or other law, **the judge who places on community supervision a defendant who is younger than 21 years of age and convicted for an offense under Sections 49.04 - 49.08 PENAL, Penal Code, shall:**

- (1) order that the defendant's driver's **license be suspended for 90 days beginning on the date that the person is placed on community supervision; and**
- (2) require as **a condition of community supervision that the defendant not operate a motor vehicle unless the vehicle is equipped with the device** described by Subsection (i) of this section.

9. Credit for ALR Refusal Suspension
Tex. Transp. Code § 521.344

(c) **The court shall credit** toward the period of suspension a suspension imposed on the person for refusal to give a specimen **under Chapter 724 if the refusal followed an arrest for the same offense** for which the court is suspending the person's license under this chapter. The court **may not extend** the credit to a person:

- (1) who has **been previously convicted of an offense under Section 49.04, 49.07, or 49.08 PENAL, Penal Code; or**
- (2) whose period of suspension is governed by **Section 521.342(b).**

10. Community Service Provisions

CODE CRIM. P., Art. 42.12, Sec. 16(a)

(a) A judge shall require as a condition of community supervision, that the defendant work a specified number of hours at a community service project or projects for an organization or organizations approved by the judge and designated by the department, unless the judge determines and notes on the order placing the defendant on community supervision that:

- (1) the defendant is physically **or mentally incapable** of participating in the project;
- (2) participating in the project will work a **hardship on the defendant or the defendant's dependents;**
- (3) the defendant is to be confined in a substance abuse punishment facility as a condition of community supervision; or
- (4) there is other **good cause shown.**

11. Community Supervision Does Not Have to be for Two Years

CODE CRIM. P. Art 42.12, Sec. 3(c)

(c) The **MAXIMUM** period of community supervision in a misdemeanor case is **two years.**

Occupational License Waiting Periods

Administration License Suspension - Adults

Statute	Prior Alcohol Related Contact Type	Waiting Period
TTC §521.251(a)	No Prior Contact Suspensions	None
TTC §521.251(b)	Prior ALR Contact within 5 years	90 days
TTC §521.251(c)	Prior DWI Conviction Contact within 5 years	180 days

Administration License Suspension - MINORS

NOTE: Not applicable to refusals. Only for failure or detected by other means cases See TTC §522.022(d)

1 st DWI or DUI arrest and ALR Suspension	30 days
1 Prior <u>Conviction</u> ABC §106.041, Penal §49.04, 49.07 or 49.08	60 days
2 Prior <u>Convictions</u> ABC §106.041, Penal §49.04, 49.07 or 49.08	Entire Suspension Period

DWI 1st Offense (or beyond 10 years) - Conviction Suspension

(No DWI Education Class)

Prior Alcohol Related Contact Type	Waiting Period
No Prior Contact Suspensions	None
Prior ALR Contact within 5 years	90 days
Prior DWI Contact within 5 years	180 Days

DWI 2nd Offense (§49.09 punishment)

Prior Alcohol Related Contact Type	Fact Situations to Look For	Waiting Period
No Prior Contact Suspensions within 5 years	Prior Obstruction & ALR Win	None
Prior ALR Contact within 5 years	Prior Obstruction & ALR Loss	90 days
Prior DWI Contact within 5 years	Prior DWI with No education Class	180 days
New Statute TTC §525.251(d)	*****	Waiting Period
If final conviction or offense dates within 5 years of instant case.	DWI 2 nd offense committed within 5 years	1 year from date suspension begins

Suspension Periods

ADULTS - Administrative License hearing

Statute	Type	No Prior Contact*	Prior contact w/in 10 years
TTC §524.022(a)	Refusal	180 days	2 years
TTC §524.022(a)	Failure	90 days	1 year

* §524.001(3) "... 'contact' means a *driver's license suspension* from:

1. Conviction for intoxicated offense
2. Refusal to submit to taking of specimen
3. BAC test ≥ 0.080

MINORS - Administrative License Hearing

Statute	Type	No prior convictions*	1 prior conviction	2 prior convictions
TTC §524.022(b)	Failure ≥ 0.080	60 days	120 days	180 days
TTC §524.022(b)	Detected by Other Means	60 days	120 days	180 days

*Conviction for 106.041, 49.04, 49.07 or 49.08 (deferred adjudication for 106.041 is considered a conviction)

DWI Conviction Suspension Periods

Statute	Offense Level	Least Amount	Highest Amount
CCP §42.12 Sec. 13 (k)	First DWI Offense	90 days	1 year
CCP §42.12 Sec. 13 (k)	Second DWI within 10 years	180 Days	2 years
CCP §42.12 Sec. 13 (k)	Second DWI within 5 years	1 year	2 years
CCP §42.12 Sec. 13 (m)	MINOR DWI Probated	90 days	DLD required as condition of probation

***NOTE: TTC§521.344(c) - "The court **shall credit** toward the period of suspension a suspension imposed ... for **refusal** to provide a specimen..." (180 days credit) {Not applicable to DWI 2nd or Minors §521.342(b)}