

# MCLE FORM 1: Recordkeeping Form (Do Not Return This Form to the Bar)

**Instructions:**

Pursuant to MCLE Rule 7.2, every active member shall maintain records of participation in **accredited** CLE activities. You may wish to use this form to record your CLE activities, attaching it to a copy of the program brochure or other information regarding the CLE activity.

**Do not return this form to the Oregon State Bar. This is to be retained in your own MCLE file.**

Name:		Bar Number:	
Sponsor of CLE Activity:			
Title of CLE Activity:		Program Number:	
Date: 6/22/2019	Location:		
<input type="checkbox"/> <i>Activity has been accredited by the Oregon State Bar for the following credit:</i>  ___ General ___ Prof Resp-Ethics ___ Access to Justice ___ Abuse Reporting ___ Practical Skills ___ Pers. Mgmt/Bus. Dev.*	<input type="checkbox"/> <b>Full Credit.</b> <i>I attended the entire program and the total of authorized credits are:</i>  ___ General ___ Prof Resp-Ethics ___ Access to Justice ___ Abuse Reporting ___ Practical Skills ___ Pers. Mgmt/Bus. Dev.*	<input type="checkbox"/> <b>Partial Credit.</b> <i>I attended _____ hours of the program and am entitled to the following credits*:</i>  ___ General ___ Prof Resp-Ethics ___ Access to Justice ___ Abuse Reporting ___ Practical Skills ___ Pers. Mgmt/Bus. Dev.*	

**\*Credit Calculation:**

One (1) MCLE credit may be claimed for each sixty (60) minutes of actual participation. Do not include registration, introductions, business meetings and programs less than 30 minutes. MCLE credits may not be claimed for any activity that has not been accredited by the MCLE Administrator. If the program has not been accredited by the MCLE Administrator, you must submit a Group CLE Activity Accreditation application (See MCLE Form 2.)

**Caveat:**

If the actual program length is less than the credit hours approved, Bar members are responsible for making the appropriate adjustments in their compliance reports. Adjustments must also be made for late arrival, early departure or other periods of absence or non-participation.

\*Personal Management Assistance/Business Development. See MCLE Rule 5.12 and Regulation 5.300 for additional information regarding Category III activities. Maximum credit that may be claimed for Category III activities is 6.0 in a three-year reporting period and 3.0 in a short reporting period.

# What Every Lawyer Needs to Know About DUII

Zach Walsh

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## The Jail Call - Do I blow or not?

- It depends
- Implied Consent Law ORS 813.095 – 813.136
- Was there a prior DUII or suspension?
- Commercial Drivers License? If yes, ineligible for diversion – refuse
- Prior Diversion in last 15 years? If yes, no diversion – refuse
- If Diversion eligible – client may elect to blow because of potentially shorter suspension, however, more evidence at trial

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## Penalties

- **Increased License Suspension:** Suspensions lengths are increased if any of the following occurred in Oregon or any other jurisdiction with 5 years prior to the current arrest: DUII conviction, participation in a diversion or similar alcohol or drug program, a suspension of driving privileges under the Implied Consent Law.
- See DMV's Oregon Conviction guide - <https://www.oregon.gov/ODOT/Forms/DMV/7484.pdf>
- Note it has not been updated

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### Standard Suspensions

Type of Suspension	Length	Hardship Permit Wait
Breath/Blood Urine Test Refusal	1 year	90 days
BAC Failure	90 days	30 days
Urine Test Refusal	1 year	180 days

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### Increased Suspensions

Type of Suspension	Length	Hardship Permit Wait
Breath/Blood Urine Test Refusal	3 years	3 years
BAC Failure	1 year	1 years
Urine Test Refusal	3 year	3 years

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### Senate Bill 1538

Drivers convicted of their second DUII within five years are no longer able to obtain Hardship Permits. That means two DUII convictions within five years will result in a 3 years license suspension and not be allowed to obtain a Hardship Permit.

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### Jail?

- Your client may be cited. Meaning they will be arrested and released.
- If not, bail is typically 10 %.
- Whoever posts bail becomes liable for the remainder of the bail if there is a violation of the release agreement.
- Bail that is self-posted is returned to the client
- Bail that is posted by a third party is returned to third party
- Fines and fees are deducted before bail is returned and if there is a failure to appear during the case the person who posts is liable

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### Release Agreement

- Standard conditions:
  - No consumption of intoxicants
  - No entry into bars, liquor stores, or taverns
  - Travel restrictions
  - No contact with victims and witnesses

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### Where is my car?

- Police may impound a vehicle when the driver is arrested for DUII. ORS 809.720(1)(b)
- Police may keep a vehicle until the owner is sober. ORS 809.710
- If there is an accident, the vehicle is probably in a private lot or seized as evidence
- If no accident, the vehicle is probably releasable

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### Request the DMV Hearing

- Cons slim chance of winning and let your client know this
- Pros –
  - deposition of officer (within reason)
  - If you don't challenge, you won't win
- Do it immediately because the request must be received by 5 p.m. on the 10th day following your refusal
- You can request a hearing online or by fax or mail  
[https://www.oregon.gov/ODOT/DMV/Pages/email\\_forms/implicit\\_consent\\_hearing.aspx](https://www.oregon.gov/ODOT/DMV/Pages/email_forms/implicit_consent_hearing.aspx)

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### What to expect at a DMV Hearing?

- Your hearing will be presided over by an administrative law judge (ALJ). An ALJ oversees proceedings of administrative law and adjudicates the claims. In other words, he or she is both judge and jury.
- At the hearing, you'll be able to present evidence on your client's behalf.
- The police officer involved in the investigation will present evidence against the client.

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### What your client must establish?

- No reasonable grounds to request client to submit to a blood or breath test
- Not under arrest for DUII when client asked to give a blood or breath sample
- Did not receive proper notice of intent to suspend

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### DMV Hearing Cont'd

- What happens if you miss the deadline to request a hearing?
  - If client misses the deadline, you may request a hearing under ORS 813.440 if:
    - Physical injury and/or incapacitation and unable to request a hearing before the deadline. Get a doctor's note.
    - A death in the immediate family prevented from requesting a hearing.
    - A DMV error
- Opening Statement
  - Challenge the legality of the stop and legality of the arrest pursuant to *Bish v. MVD*, 97 Or Ap 648 and *Pooler v. MVD*, 306 OR 47
  - Challenge any resets
  - Move to exclude witness if more than one officer

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### What to Challenge?

- Validity of initial contact?
- Validity of continued contact?
- Validity of officer's request for client to perform FSTs?
  - Consent?
  - Probable cause and exigent circumstances?
- Validity of officer's arrest? Driving? Motor vehicle? Under the influence? Public highway or premises open to the public? Appropriate venue?
- Informed of rights and consequences? Communicate with counsel?

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### What to Challenge?

- BAC Failure
  - Checklist used?
  - Officer certified?
  - Machine certified 90 days prior?
  - Officer complied with all required testing procedures? Pre-test observation? Instructions to client? Contol sample? Observation?
- Refusal – Actual refusal?
- Required documents
  - Breath test report, certificate of accuracy for machine, and an ORS 813.420 report received by DOT the tenth date following the arrest

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### What to Challenge?

- Officer provided client a copy of the suspension notice
- In-person hearing is within the county where the alleged offense occurred or within 100 miles of where the alleged offense occurred

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### After the hearing

- If ALJ rules in your client's favor, no suspension. Wait for criminal case.
- If the ALJ holds the suspension is valid, you may appeal. Otherwise, suspension will begin.
  - You or client will receive a written decision
- Get ready to apply for a Hardship Permit
  - SR-22 - An SR-22 is a certificate which shows that you have liability insurance. An SR-22 is proof of "future responsibility" and is posted to your driving record. Your license will be suspended if you do not have an SR-22 on file when required, even if you don't own a vehicle. The SR-22 requirement begins when you apply for the permit and ends when the permit expires.

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### What happens at an arraignment?

- Prosecutor reviewed officers report and issued formal charges through an information or complaint (misdemeanor DUII)
- Does client need to be there?
  - No
  - ORS 135.030 When the accusatory instrument charges a crime punishable as a misdemeanor, the defendant may appear in person or by counsel
  - Have your client sign a waiver of appearance allowing you to enter a not guilty plea on their behalf without their presence
- Obtain an offer and ask the prosecutor if your client appears diversion eligible

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### Next Steps

- Request discovery immediately
- Set up a meeting with your client to review police reports and screen for diversion eligibility ORS 813.215
  - Any prior arrests for intoxicant-related traffic crimes anywhere?
  - Any diversion type offers in consideration for completing substance abuse treatment within 15 years?
    - *State v. Wright* 204 Or App 724 – previous participation in treatment during a dependency case
    - *State v. LaGrassa* 235 Or App 150 and *State v. Bentley* 29 Or Ap 18 – previous participation in a post-prison supervision treatment program and/or treatment while on probation
    - *State v. Young* 196 Or App 708 – previous participation in a drug diversion program

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### Next Steps Cont'd

- If prosecutor objects to diversion, ask for a hearing and ask the court to make a ruling
- Arguments:
  - Prior entry was counseled or uncounseled
  - Other jurisdiction – compare DUII statutes
  - Was the “other diversion” really a diversion within the meaning of *State v. Dunbrasky* 122 Or App 90
  - CDL even valid?
  - FTA? Negotiate with DA
  - Minor in the car – discretionary ORS 813.220(5)
  - Injury? Was there an injury?

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### Diversion Petition and Agreement

- Must be filed within 30 days of first appearance in court unless there is good cause
- File it even if prosecutor objects to diversion
- See attached terms of diversion
- Any violation of diversion results in a violation of the agreement and the court shall revoke client which results in a “first conviction”
- Ignition Interlock Device
  - Employer exception (in materials)
  - What if I don't drive?
    - DMV requires drivers to have one anyways for 90 days and must provide proof of clean blows

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### Property Damage and Other Common Charges

- Civil compromise?
- Other Common Charges
  - Reckless Driving ORS 811.140
  - Reckless Endangering ORS 163.195 (misdemeanor person crime)
  - Careless Driving ORS 811.135 (Violation)
  - Driving While Suspended ORS 811.182 (statutory \$1,000 or \$2,000 fine)
  - Refusal ORS 813.095 (Violation and a presumptive fine of \$650)
  - Assault ORS Chapter 163

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### Client Meeting Cont'd

- Discuss minimums and maximums
- Crimes carry immigration consequences here and abroad (i.e. Canada). Client should consult with an immigration attorney.
- Potential defenses
- Motions – search and seizure, confrontation issues, *Miranda*, *Banks*, testimony regarding .05 standard (see materials)
- Bench or jury trial
- Potential witnesses, including their own testimony
- Evaluate offer/terms of diversion/consequences of DUII

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### Client is not Diversion eligible

- What is my client looking at for a first conviction?
  - Fines (shall) ORS 813.010
    - First Conviction - \$1,000
    - Second Conviction - \$1,500
    - Third Conviction (not sentenced to prison) - \$2,000
    - BAC .15 or more - \$2,000
  - License Suspension – typically, 1 year
    - See suspension guide
  - Jail/Community Service
    - 48 hours or not less than 80 hours or more than 250 hours of community service
  - Ignition Interlock Device
  - Probation
  - Victims Impact Panel
  - Treatment and Random UAs

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### Other Deadlines and Considerations

- Filing a motion to extend diversion ORS 813.225
  - Must be filed within 30 days prior to the end of diversion
  - 180-day extension
- Until the dismissal happens your client is still on diversion
  - Some counties will file the dismissal for you
- Motion to vacate ignition interlock device requirement ORS 813.645
  - 6 consecutive months of diversion and no negative reports
  - In a treatment program and in compliance
  - Discretionary
- DUII is not expungable unless there is an acquittal or dismissal
- Prosecutors are prohibited from using a DUII charge in negotiations

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### New Case Law – *Banks* 364 Or 332

- Facts - Defendant was arrested for driving under the influence of intoxicants and, when asked, Defendant refused to take a breath test.
- Takeaway #1. Defendants have a constitutional basis (Art. I sec. 9 of the Oregon Constitution “unreasonable searches and seizures”) to refuse to provide a breath test because the implied-consent statutes preserve a driver’s right to decide at the point of arrest whether to consent to a search of his or her breath or blood.

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### *Banks* Cont’d

- Takeaway #2. “When the state seeks admission of a defendant’s refusal to take a breath test, the state, as the proponent of the evidence, has the burden to establish its admissibility. “The state has the burden, after appropriate objection has been raised, of establishing the admissibility of the evidence.” “The state must demonstrate that the officer’s question could reasonably be understood only as a request to provide physical cooperation and not as a request for constitutionally-significant consent to search. If the state fails to establish that fact, then a driver’s refusal cannot be admitted in evidence against the driver.”

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**Banks Cont'd**

- Takeaway #3. The fact that the state had a constitutional basis to search does not make defendant's refusal to provide consent admissible because:
  - The court isn't sure a refusal is probative
  - A Defendant's verbal refusal to consent to a warrantless search, would impose a "prohibitive cost upon an individual's assertion of their constitutional rights

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**Banks response**

- The Court in *Banks* said "Will you take a breath test?"—was ambiguous."
- OSP instructions to law enforcement:
  - Read Section I of the Implied Consent form sections (a)-(i) and ask the question, "Will you provide physical cooperation under implied consent by taking a breath (blood) test?"
  - The implied consent administrative process is now over. I have constitutional grounds to require you to physically submit to a breath (blood/urine) test without a warrant as a lawful exception to the search warrant requirement. I am only asking you to provide physical cooperation and not asking for your voluntary consent. If you physically submit to the breath (blood/urine) test, I will instruct you how to comply with the test. Will you physically submit to the test?
  - "Physical cooperation/physically submit"

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**The End**

Call me if you need anything

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**IN THE \_\_\_\_\_ COURT, THE STATE OF OREGON**  
**\_\_\_\_\_ COUNTY, CITY OF \_\_\_\_\_**

**State of Oregon**

**Case No:** \_\_\_\_\_

v.

**PETITION AND  
AGREEMENT**

\_\_\_\_\_  
Defendant

*DUII Diversion*

**Date of DUII Offense:** \_\_\_\_\_

Defendant's Residence:			
Street	City	State	ZIP
Mailing Address (if different)			
Date of Birth:	Phone #:	Driver License:	SID# (if known):
_____/_____/_____ Month Day Year	_____	_____ Number State	_____

**DEFENDANT'S AGREEMENT AND WAIVER**

I am the Defendant. I ask the court to grant a diversion under ORS 813.200 to 813.270 for the charge of driving under the influence of intoxicants (DUII). If the court allows this petition:

- (1) I have read and understand all of the information in the attached *Explanation of Rights and DUII Diversion Agreement* and I agree to:
  - a) Pay the required diversion fees and any restitution ordered
  - b) Complete an alcohol and drug abuse assessment and any recommended treatment
  - c) Attend a victim impact panel as ordered by the court
  - d) Not use alcohol or other intoxicants except as allowed in the attached *Explanation of Rights and DUII Diversion Agreement*
  - e) Install and use an approved Ignition Interlock Device (IID) if ordered by the court
  - f) Keep the court advised of my current mailing address
- 2) I plead guilty or no contest to the DUII charge as shown in the *Petition to Plead Guilty or No Contest* submitted with this diversion petition
- 3) I waive (give up) the rights listed in the *Petition to Plead Guilty or No Contest*
- 4) I waive my former jeopardy rights under the federal or state constitutions and ORS 131.505 to 131.525 in any future action on the charge or any other offenses based on the same criminal incident

**Certificate of Document Preparation.** Check all that apply:

- I chose this form for myself and completed it without paid help
- A legal help organization helped me choose or complete this form, but I did not pay money to anyone
- I paid (or will pay) \_\_\_\_\_ for help choosing, completing, or reviewing this form

\_\_\_\_\_  
Defendant's Signature

\_\_\_\_\_  
Defendant's Name (typed or printed)

\_\_\_\_\_  
Date

**NOTE:** The *Defendant's Declaration of Eligibility*, and *Petition to Plead Guilty or No Contest* must be filed with this form and served on the district attorney or city attorney who filed the charge

## EXPLANATION OF RIGHTS AND DUII DIVERSION AGREEMENT

**Read this entire form carefully.** You are charged with driving under the influence of intoxicants (DUII). You can apply for the DUII Diversion Program, but you can enter the program only if you meet all eligibility requirements. The court will appoint a lawyer to help you if you ask for one and you are financially eligible.

### ELIGIBILITY FOR DIVERSION PROGRAM

You are eligible to participate in the diversion program only if:

- you meet all requirements described in the attached *Defendant's Declaration of Eligibility* **and**
- you appeared in court on the date scheduled for your first appearance on the charge (unless the court finds good reason to excuse your failure to appear) **and**
- you file the *Petition and Agreement* with the court within thirty (30) days of your first appearance in court (unless the court finds there is good cause to allow a later date)

### AGREEMENT WITH THE COURT

The *DUII Diversion Petition and Agreement* is your agreement with the court. To have the DUII charge dismissed, you must do all the following (if ordered by the court):

- Pay the required diversion fees** to the court. Fees are listed in Section 1 of the *Summary of DUII Diversion Fees*. If you cannot afford to pay these fees, tell the judge. The court may waive some of the fees or allow you to make payments over time, depending on your financial situation.
- Pay restitution** (See Section 1 of the *Summary of DUII Diversion Fees*)
- Complete an alcohol and drug abuse assessment.** The court will assign you to an agency for assessment. You must give the agency accurate and truthful information about your use of drugs and alcohol. You must pay fees to the agency. The agency will recommend a treatment program if they find that you need treatment.
- Complete the recommended treatment program.** You must pay the treatment provider directly. If you cannot pay the cost of treatment, tell the treatment provider. They may be able to waive certain costs or let you make payments over time.
  - In addition to any other requirement to participate in an alcohol or drug treatment program, the court may order you to complete an alcohol or drug treatment program if the court receives 2 or more negative IID reports
- Attend a victim impact panel** and pay the participation fee
- Do not use any alcohol or other intoxicant** (includes marijuana) during the term of the diversion agreement. Comply with state laws that prohibit the use of intoxicants. You **can** use:
  - sacramental wine given or provided as part of a religious rite or service
  - alcohol or a controlled substance taken *as directed* with a valid prescription
  - a non-prescription drug that contains alcohol **if** you follow the directions for use that are printed on the label
- Keep the court advised of your current mailing address**
- Install and use an approved ignition interlock device (IID)** in all the vehicles you operate during the term of the diversion agreement when you have driving privileges, if ordered by the court

## **REQUIRED BOOKING**

If the court grants your petition, you will have to be booked and fingerprinted on the DUII charge, if you have not already been book and fingerprinted.

## **INFORMATION ON IGNITION INTERLOCK DEVICES (IIDs)**

- i. You must install and use an approved ignition interlock device (IID) in all vehicles you operate during the term of the diversion period when you have driving privileges if:
  - Your Blood Alcohol Content (BAC) was 0.08 or above
  - You refused a breath/blood test when requested by the arresting officer
  - Your BAC was greater than 0.00 and less than 0.08 and your blood test showed the presence of cannabis, a controlled substance, or an inhalant, or
  - Your BAC was less than 0.08 and your blood test did not show the presence of cannabis, a controlled substance, or an inhalant, when ordered by the court to do so
  
- j. The IID requirement applies in all cases and to all vehicles you operate during the term of the diversion agreement when you have driving privileges, except:
  - If the court finds that you meet requirements for a medical exemption under the rules of the Oregon Department of Transportation
  - While operating an employer's vehicle in the course and scope of your employment (contact DMV for more information), or
  - If your BAC was less than 0.08 and your blood test did not show the presence of cannabis, a controlled substance, or an inhalant, and the court does not order the installation and use of the IID
  
- k. The IID requirements continue until you submit a certificate to the DMV from the IID provider. The certificate must state that the device did not record a negative report for the last 90 consecutive days of the required installation period.
  
- l. After 6 months, you can apply for an order vacating (ending) the IID requirement as a condition of diversion if:
  - You provide the court with a certificate from the IID service provider stating that the device has not recorded a negative report for at least 6 consecutive months, **and**
  - You have been in compliance with any treatment program you were ordered to participate in as a condition of your diversion agreement

## **ADDITIONAL INFORMATION AND WAIVER OF RIGHTS**

- m. The diversion agreement applies only to the DUII charge. If you are charged with other offenses arising from the same incident, the other charges will be prosecuted separately. By entering into a diversion agreement, you give up the right to have the DUII charge decided at the same time as your other charges (former jeopardy - which means the right not to be prosecuted twice for the same offense).
  
- n. If you have a prior DUII conviction, the Interstate Compact for Adult Offender Supervision rules may prohibit you from leaving the state without permission during the diversion period
  
- o. Prosecution of the DUII charge will be delayed during the diversion period

- p. If you successfully complete the diversion agreement, the court may automatically dismiss the DUII charge at the end of one year. If you do not receive notice of dismissal, you must file a motion at the end of the diversion period asking the court to dismiss the DUII charge.
- q. If the court finds that you violated the terms of the diversion agreement or that you were not eligible for diversion, the court will terminate the diversion agreement. The court may hold a hearing where you can “show cause” why the court should not terminate your diversion agreement. **The court will send notice of such hearings by regular mail. If you fail to appear in court, the court can terminate the diversion agreement and may issue a warrant for your arrest.**
- r. The court will terminate the diversion agreement if at any time during the diversion period the court finds that you failed to fulfill all of the terms of the agreement. Among other things, a new DUII or breaking open container laws will violate the agreement.
- s. If the court terminates your diversion agreement or you fail to fulfill the terms of the agreement by the end of the diversion period, the court will sentence you without a trial
- t. You may file a motion asking the court to extend the diversion period, **but you must file the motion within the last 30 days of your scheduled diversion period.** The court may grant an extension if the court finds that you have made a good faith effort to complete the diversion program and that you can complete all remaining conditions within the extension period. The court may grant an extension **only once** and for **not more than 180 days.**
- u. If the court denies the diversion petition, the state cannot use your guilty or no contest plea (in the *Petition to Plead Guilty or No Contest*) when the state continues the prosecution

#### **ADDITIONAL INFORMATION FOR ACTIVE MILITARY PERSONNEL**

The following may apply if you are engaged in active military service:

- v. The court may not deny your petition for a DUII diversion agreement solely because military service will impair your ability to complete the diversion program **if**:
  - You are a member of the Armed Forces of the United States, the reserve components of the Armed Forces of the United States, or the National Guard **and**
  - You have been called to active duty
- w. You may ask the court to allow you to participate in a comparable treatment program conducted by or authorized by a government entity in another jurisdiction
- x. You may file a motion asking the court to extend the diversion period. The court may grant an extension if the court finds you have made a good faith effort to complete the diversion program and that you can complete all remaining conditions within the extension period. **If you are serving on active duty, you must file the motion by the end of your scheduled diversion period.** The court may extend the diversion period as necessary to allow you to complete the conditions of the diversion agreement.

IN THE \_\_\_\_\_ COURT, THE STATE OF OREGON

\_\_\_\_\_ COUNTY, CITY OF \_\_\_\_\_

State of Oregon

Case No: \_\_\_\_\_

v.

ORDER RE: DUII DIVERSION

\_\_\_\_\_  
Defendant

ODL: \_\_\_\_\_ DOB: \_\_\_\_\_

The alleged DUII occurred on (date) \_\_\_\_\_

Based on Defendant's *DUII Diversion Petition and Agreement*, **THE COURT ORDERS:**

The petition for diversion is

**Denied**

**Allowed.** The court withholds entry of a judgment of conviction pending completion or termination of the diversion agreement and orders that:

1) Defendant is ordered to comply with all terms in the *Petition and Agreement*  
Assessment Evaluator information: \_\_\_\_\_

2) The diversion period is 1 year beginning (date) \_\_\_\_\_ and ending (date) \_\_\_\_\_  
 Defendant must file a motion to dismiss after the diversion period ends in order for the court to dismiss the charge (if this option is not checked the defendant does not need to file a motion to dismiss)

3) Defendant must pay a fee of **\$490.00** to the court for the diversion as required by statute unless waived or deferred. Payment is due  **immediately** or  **per payment schedule:**  
\$ \_\_\_\_\_ / month due by the \_\_\_\_\_ day of each month beginning \_\_\_\_\_  
 other: \_\_\_\_\_

4)  Defendant must attend a victim impact panel approved by this court  **and** must pay a participation fee to that program **Victim Impact Panel Date:** \_\_\_\_\_

5)  Defendant must pay court-appointed attorney fees  
 in an amount of \$ \_\_\_\_\_ on a schedule determined by the court. The court finds that the defendant has the ability to pay court-appointed attorney fees.  
 as ordered in a separate limited judgment or order

6)  Defendant must install and use an **ignition interlock device (IID)** in any vehicle operated by the Defendant during the period of the agreement when the Defendant has driving privileges \*  
 Defendant need not install an IID because Defendant:  
 meets the requirements for medical exemption under Oregon Department of Transportation rules and is exempt from the IID requirement  
 submitted to a blood, breath, or urine test that showed no cannabis, inhalants, or controlled substances, and a BAC below 0.08%

7)  Defendant must be booked and fingerprinted

8) Restitution/Other: \_\_\_\_\_

Judge Signature: \_\_\_\_\_

\*if Defendant is required to operate an employer-owned motor vehicle, an IID need not be installed if Defendant notifies employer of the IID requirement and has written proof of the notification



IN THE \_\_\_\_\_ COURT, THE STATE OF OREGON  
\_\_\_\_\_ COUNTY, CITY OF \_\_\_\_\_

State of Oregon

Case No: \_\_\_\_\_

v.

**DEFENDANT'S DECLARATION OF  
ELIGIBILITY**

*DUII Diversion*

\_\_\_\_\_  
Defendant

I am eligible to participate in a driving under the influence of intoxicants (DUII) diversion program because:

1. I have never been convicted of a felony DUII offense in Oregon or any other place
2. On the date I sign the attached petition for a DUII diversion agreement:
  - a. Except for the DUII charge in this case, there is no charge pending against me in Oregon or any other place for an offense involving operation of a vehicle while:
    - under the influence of alcohol, cannabis, a controlled substance, an inhalant, or any combination of the four, or
    - having a blood alcohol content above the allowable blood alcohol content
  - b. I am not participating in a DUII diversion program or any similar alcohol or drug rehabilitation program in Oregon or any other place except:
    - a program I may have entered as a result of the DUII charge in this case, or
    - a charge for minor in possession of alcohol under ORS 471.430
  - c. There is no charge of an offense pending against me in Oregon or any other place for any degree of aggravated vehicular homicide, murder, manslaughter, criminally negligent homicide, or assault that resulted from the operation of a motor vehicle
3. During the fifteen (15) years before the date of the alleged DUII offense in this case and from the time between the alleged DUII offense and the date I sign the attached petition:
  - a. I have not been convicted in Oregon or any other place for an offense involving the operation of a vehicle while:
    - under the influence of alcohol, cannabis, a controlled substance, an inhalant, or any combination of the four, or
    - having a blood alcohol content above the allowable blood alcohol content
  - b. I have not participated in a DUII diversion program or any similar alcohol or drug rehabilitation program in Oregon or any other place except a program I may have entered as a result of a charge for minor in possession of alcohol under ORS 471.430
  - c. I have not been convicted, in Oregon or any other place, on any charge of an offense in any degree for aggravated vehicular homicide, murder, manslaughter, criminally negligent homicide, or assault that resulted from the operation of a motor vehicle, **and**

- d. If this is my second or subsequent diversion, I have not been convicted of any criminal offenses involving a motor vehicle
- 4. The DUII offense described in the attached petition did not involve any deaths or any physical injury to any other person (*“physical injury” means impairment of physical condition or substantial pain*)
- 5. At the time of the alleged offense, I did not have commercial driving privileges
- 6. At the time of the alleged offense, I was not operating a commercial motor vehicle

**Certificate of Document Preparation.** Check all that apply:

- I chose this form for myself and completed it without paid help
- A legal help organization helped me choose or complete this form, but I did not pay money to anyone
- I paid (or will pay) \_\_\_\_\_ for help choosing, completing, or reviewing this form

**I hereby declare that the above statement is true to the best of my knowledge and belief. I understand it is made for use as evidence in court and I am subject to penalty for perjury.**

\_\_\_\_\_  
 Defendant’s Signature                                      Defendant’s Name (printed)                                      Date

**NOTE:** this declaration must be completed by Defendant and filed with DUII diversion *Petition and Agreement (with attached Explanation of Rights and DUII Diversion Agreement), Order re: DUII Diversion, Petition to Plead Guilty or No Contest, and Order on Petition to Plead Guilty or No Contest*

IN THE \_\_\_\_\_ COURT, THE STATE OF OREGON  
\_\_\_\_\_ COUNTY, CITY OF \_\_\_\_\_

State of Oregon

Case No: \_\_\_\_\_

v.

**PETITION TO PLEAD  
GUILTY OR NO CONTEST**

\_\_\_\_\_  
Defendant

*DUII Diversion*

1. My true name is (*first, middle, last*) \_\_\_\_\_  
I also am known as \_\_\_\_\_
2. I am \_\_\_\_\_ years old. The highest grade level of school I have completed is \_\_\_\_\_
3. My physical and mental health are satisfactory. I am not under the influence of any drugs or intoxicants, except \_\_\_\_\_
4. The following statement best describes me:
  - I am able to read, write, and understand English, and I have read this petition completely
  - I am able to understand English, and this petition has been read aloud to me completely
  - I am unable to read English, and this petition has been read aloud to me completely in English
  - I am unable to read, write, or understand English, and this petition has been read aloud to me in the \_\_\_\_\_ language by \_\_\_\_\_, who is qualified to translate English into the \_\_\_\_\_ language
5. I  am  am not represented by a lawyer. I understand that I have the right to hire a lawyer or have the court appoint a lawyer to represent me if the court finds that I cannot afford to hire a lawyer.
  - I choose to give up my right to a lawyer. I will represent myself. (\_\_\_\_\_) [*initial here*]
6. If represented by a lawyer, I have told my lawyer all the facts I know about the charge against me. My lawyer has advised me of the nature of the charge and the defenses, if any, that I have in this case. I am satisfied with the advice and help my lawyer has given me.
7. I understand that I have the following rights: a) the right to jury trial; b) the right to confront and question all witnesses who testify against me at trial; c) the right to remain silent about all facts of the case; d) the right to subpoena witnesses and evidence in my favor; e) the right to have my lawyer assist me at trial; f) the right to testify at trial; g) the right to have the jury told, if I decided not to testify at trial, that they cannot hold that decision against me; and h) the right to require the prosecutor to prove my guilt beyond a reasonable doubt.
8. I understand that I give up all of the rights listed in paragraph 7 when I plead guilty or no contest. I understand I give up: a) any defenses I may have to the charge; b) objections to evidence; and c) challenges to the accusatory instrument.
9. By this petition, I am pleading  guilty  no contest to the crime of driving under the influence of intoxicants (DUII) which is a Class A misdemeanor under Oregon law. The maximum penalties, applicable if I do not enter diversion or if I fail to comply with the conditions of diversion are 364 days in jail and a fine of \$6,250 or \$10,000 if the offense was committed in a motor vehicle and there was a passenger younger than 18 and at least three years younger than me. The minimum penalties are 48 hours of imprisonment or 80 hours of community service and a fine of:
  - \$1,000 if this is my first conviction

- \$1,500 if this is my second conviction
- \$2,000 if this is my third conviction and I am not sentenced to a term of imprisonment
- \$2,000 if my blood alcohol level (BAC) was 0.15 percent or greater

If I do not enter diversion or if I fail to comply with the conditions of diversion, there will be a mandatory suspension of my driving privileges for:

- 1 year if this is my first conviction
- 3 years if this is my second conviction within 5 years
- my lifetime if this is my third or subsequent conviction

10. I understand that if I am not a U.S. citizen, this plea may result in my removal from this country, exclusion from admission to the United States, or denial of naturalization.
11. I understand that I will be required to pay all of the fees listed in the *Summary of DUII Diversion Fees*, unless the court finds me unable to pay and waives all or part of these fees. These fees include an alcohol or drug abuse assessment and any recommended or court-ordered treatment. The court may order me to attend a victim impact panel and pay a participation fee. I may be required to reimburse the state for the cost, if any, of a court-appointed attorney.
12. I am submitting this plea along with a petition to enter the diversion program under ORS 813.200 to 813.270. I understand that if the court grants the petition, the court will accept this plea but will not enter a judgment of conviction at this time.
13. I understand that:
  - a. If I fully comply with the conditions of the diversion agreement within the period authorized by law and by the court, the court will dismiss the charge with prejudice under ORS 813.250. If the court does not have a policy of automatically dismissing the DUII charge at the end of one year, I will have to file a motion at the end of the diversion period requesting that the charge be dismissed.
  - b. If I fail to comply with the diversion agreement within the diversion period, the court will enter a judgment of conviction on the charge and will sentence me
14. I understand that if the court enters judgment on this plea for failing to comply with the diversion agreement, it is the same as a conviction. This court can find me guilty of the crime of DUII based on this plea alone, without receiving any evidence.
15. I understand that if the court denies the diversion petition and I go to trial, nothing in this petition will be used against me
16. This plea is based only on what is written on this petition. No promises have been made to me by my lawyer or any officer or agent of any branch of government (federal, state, or local) that I will receive a particular sentence or form of treatment from this or any other court, on these or any other charges, other than what is set forth in this petition.
17.  I plead no contest *or*  
 I plead guilty because in \_\_\_\_\_ County, Oregon, I did the following:

18. I  am  am not currently on probation, parole, or post-prison supervision. I know that if I am and the court enters judgment on this plea, my failure to comply with the conditions of the diversion agreement may cause my probation, parole, or post-prison supervision to be revoked and I may be required to serve jail or prison time in that case in addition to any sentence imposed in this case.
19. I understand the charge against me and the information in this petition. I am signing this petition and entering this plea voluntarily, intelligently, and knowingly.
20. I understand that if I fail to comply with the terms of the diversion and the court enters a judgment of conviction, I have the right to appeal the conviction. My right to an appeal will be explained to me when the court enters the judgment of conviction.

**Certificate of Document Preparation.** Check all that apply:

- I chose this form for myself and completed it without paid help
- A legal help organization helped me choose or complete this form, but I did not pay money to anyone
- I paid (or will pay) \_\_\_\_\_ for help choosing, completing, or reviewing this form

\_\_\_\_\_  
Defendant's Signature

\_\_\_\_\_  
Defendant's Name (printed)

\_\_\_\_\_  
Date

**CERTIFICATE OF COUNSEL**

I am the attorney for the defendant in this proceeding and I certify that:

- 1. I have fully explained to my client the charge and possible defenses that may apply in this case
- 2. I have personally examined this plea petition, explained all of its provisions to my client, and discussed fully with my client all matters described and referred to in the petition
- 3. I have explained to my client the maximum penalty and other consequences of entering a guilty or no contest plea, including possible immigration consequences
- 4. To the best of my knowledge and belief, my client’s decision to enter this plea is made voluntarily, intelligently, and knowingly
- 5. I have told my client that if he or she is eligible for court-appointed counsel and wishes to pursue an appeal, I will transmit the information necessary to perfect the appeal to the Office of Public Defense Services

Signed by me in the presence of the above-named defendant/petitioner and after full discussion of the contents of the certificate with the defendant on *(date)*\_\_\_\_\_

\_\_\_\_\_  
Defendant’s Attorney’s Signature

\_\_\_\_\_  
Attorney Name (typed or printed)

\_\_\_\_\_  
Bar Number

**CERTIFICATE OF INTERPRETER**

I, the undersigned interpreter, certify that I have read aloud the petition to the above defendant in the \_\_\_\_\_ language

Signed by me in the presence of the above-named defendant on *(date)*\_\_\_\_\_

\_\_\_\_\_  
Interpreter’s Signature

\_\_\_\_\_  
Interpreter Name (printed)

IN THE \_\_\_\_\_ COURT, THE STATE OF OREGON  
\_\_\_\_\_ COUNTY, CITY OF \_\_\_\_\_

State of Oregon

Case No: \_\_\_\_\_

v.

**ORDER ON PETITION TO PLEAD  
GUILTY OR NO CONTEST**

\_\_\_\_\_  
Defendant

*(DUII Diversion)*

Regarding Count \_\_\_\_\_

**The court finds:**

That the defendant's plea of  **no contest**  **guilty** is knowingly, intelligently, and voluntarily made

**ORDER:**

The court  **accepts**  **denies** the plea petition for purposes of ORS 813.200 to 813.270

*Judge Signature:*

\_\_\_\_\_

## SUMMARY OF DUII DIVERSION FEES

You are required to pay the fees listed below to participate in a DUII diversion program

### **Section 1: Payment to the Court**

#### **A. Court Fees**

The court may waive all or part of these fees if it finds that you are low-income. The court may also allow you to pay in installments over time.

- \$490 filing fee
- Court-appointed attorney fees

#### **B. Restitution**

The court may order restitution in cases where a victim suffered economic damages. After the end of the diversion period, you must continue making payments if you have not paid the full amount of restitution. The court cannot terminate a diversion agreement for failure to pay restitution if you have otherwise complied with and performed all of the conditions of the diversion agreement.

### **Section 2: Other Fees**

#### **C. Alcohol and drug abuse assessment and treatment**

- You must pay \$150 directly to the agency or organization doing the assessment
- You must pay for any treatment recommended by the assessment or ordered by the court. The cost of treatment varies. You must pay treatment costs directly to the agency or organization providing the treatment. If you are unable to pay, the provider may allow payment in installments over time.

#### **D. Victim Impact Panel**

The court may order you to attend a Victim Impact Panel and pay a participation fee. The fee can range from \$5 to \$50. You must pay this fee directly to the panel coordinator on the day of the panel.

#### **E. Ignition Interlock Device**

The court may order you to install and use an approved ignition interlock device in any vehicle you operate during the term of the diversion agreement when you have driving privileges. You must pay the cost of installing, leasing, and maintaining the device to the provider of the device. The Department of Transportation may waive or defer (postpone) all or part of these fees if the Department finds you are low-income. The Department may also allow payment to be made in installments over time.



IN THE \_\_\_\_\_ COURT, THE STATE OF OREGON  
\_\_\_\_\_ COUNTY, CITY OF \_\_\_\_\_

State of Oregon

Case No: \_\_\_\_\_

v.

**MOTION TO EXTEND DUII  
DIVERSION PERIOD,  
and DECLARATION IN SUPPORT**

\_\_\_\_\_  
Defendant

**MOTION**

I am the defendant in this case and I ask the court to extend my diversion agreement for \_\_\_\_\_ (insert time that is not longer than 180 days; however, if you are active military personnel, then insert time that will allow you to complete the diversion agreement)

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**DECLARATION IN SUPPORT**

1. I have made a good faith effort to complete the conditions of the diversion agreement

a. I have completed the following conditions of the diversion agreement:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

b. I have not completed the following conditions of the diversion agreement:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

c. I have not completed the diversion conditions listed in "b" above because (*explain*):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. I will be able to complete the conditions of the diversion agreement within the extended period because (*explain*):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. I have not asked for or been granted any previous extension of the diversion agreement under ORS 813.225 (except as necessary to accommodate military service)

4. I understand that:
- a. If I fully comply with the conditions of the diversion agreement within the extended diversion period, the court may dismiss the charge with prejudice if I file a motion under ORS 813.250
  - b. If I fail to comply with the diversion agreement within the extended diversion period, the court will enter a judgment of conviction on the DUII charge and proceed to sentence me without a trial
5.  I am a member of the Armed Forces of the United States, the reserve components of the Armed Forces of the United States, or the National Guard. I have been called to active duty or received orders that I will be called to active duty. The military service will prevent me from completing the conditions of the diversion agreement and no comparable treatment program is available because (*explain*):

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**Certificate of Document Preparation.** Check all that apply:

- I chose this form for myself and completed it without paid help
- A legal help organization helped me choose or complete this form, but I did not pay money to anyone
- I paid (or will pay) \_\_\_\_\_ for help choosing, completing, or reviewing this form

**I hereby declare that the above statements are true to the best of my knowledge and belief. I understand they are made for use as evidence in court and I am subject to penalty for perjury.**

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name (typed or printed)

\_\_\_\_\_  
Address

\_\_\_\_\_  
City/State/Zip

\_\_\_\_\_  
Phone Number

IN THE \_\_\_\_\_ COURT, THE STATE OF OREGON

\_\_\_\_\_ COUNTY, CITY OF \_\_\_\_\_

State of Oregon

Case No: \_\_\_\_\_

v.

**ORDER ON MOTION TO EXTEND  
DUII DIVERSION PERIOD**

\_\_\_\_\_  
Defendant

ODL: \_\_\_\_\_ DOB: \_\_\_\_\_

The defendant in this case has filed a *Motion to Extend DUII Diversion Period*

**The court finds:**

The defendant:

- has**  **has not** made a good faith effort to complete the conditions of the diversion agreement *and*
- can**  **cannot** complete the conditions of the diversion agreement in the requested extended diversion period

**The court orders:**

The motion is  **granted**  **denied**

The diversion period is extended for \_\_\_\_\_ days\* beginning on \_\_\_\_\_ and ending on \_\_\_\_\_

*\*(not longer than 180 days; however, if the defendant is active military personnel, then extend the diversion period as necessary for the defendant to complete the agreement)*

Additional orders: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Judge Signature:*

\_\_\_\_\_

IN THE \_\_\_\_\_ COURT, THE STATE OF OREGON

\_\_\_\_\_ COUNTY, CITY OF \_\_\_\_\_

State of Oregon

Case No: \_\_\_\_\_

v.

**MOTION TO VACATE USE OF IID AS  
CONDITION OF DIVERSION  
AGREEMENT,  
and DECLARATION IN SUPPORT**  
*DUII Diversion*

\_\_\_\_\_  
Defendant

**MOTION**

I am the defendant in this case. I ask the court to vacate the condition of my diversion agreement requiring me to install and use an approved ignition interlock device.

**DECLARATION IN SUPPORT**

I qualify for a medical exemption under Oregon Department of Transportation rules (see the medical exemption form provided)

**OR**

All of the following conditions are true:

- I installed an approved IID in accordance with the diversion agreement I entered into on (date): \_\_\_\_\_
- I used the approved IID for at least 6 consecutive months since the date of installation, which was (date) \_\_\_\_\_
- I submitted to the court a certificate from the IID service provider that the device has not recorded a negative report for at least 6 months
- I have entered into and am in compliance with any treatment I may have been required to participate in as a condition of my diversion agreement

**Other information:**

\_\_\_\_\_  
\_\_\_\_\_

**Certificate of Document Preparation.** Check all that apply:

- I chose this form for myself and completed it without paid help
- A legal help organization helped me choose or complete this form, but I did not pay money to anyone
- I paid (or will pay) \_\_\_\_\_ for help choosing, completing, or reviewing this form

**I hereby declare that the above statements are true to the best of my knowledge and belief. I understand they are made for use as evidence in court and I am subject to penalty for perjury.**

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name (printed)

\_\_\_\_\_  
Address

\_\_\_\_\_  
City/State/Zip

\_\_\_\_\_  
Phone

IN THE \_\_\_\_\_ COURT, THE STATE OF OREGON

\_\_\_\_\_ COUNTY, CITY OF \_\_\_\_\_

State of Oregon

Case No: \_\_\_\_\_

v

**ORDER ON MOTION TO VACATE  
USE OF IID AS CONDITION OF  
DIVERSION AGREEMENT**

\_\_\_\_\_  
Defendant

*DUII Diversion*

ODL: \_\_\_\_\_ DOB: \_\_\_\_\_

Defendant has filed a *Motion to Vacate Requirement Use of IID As Condition of Diversion Agreement and Declaration in Support*

**The court finds:**

That the defendant

**does**  **does not** qualify for a medical exemption under Oregon Department of Transportation rules

*or*

**has**  **has not** complied with the condition of the diversion agreement to install and use an approved IID for at least six consecutive months with no negative reports

*and*

**has**  **has not** entered into and complied with any treatment program required as a condition of diversion.

**ORDER:**

The court  **grants**  **denies** the motion

*Judge Signature:*

\_\_\_\_\_



DEPARTMENT OF TRANSPORTATION  
DRIVER AND MOTOR VEHICLE SERVICES  
1905 LANA AVE NE, SALEM OREGON 97314

# EMPLOYER IGNITION INTERLOCK DEVICE (IID) EXCEPTION

Oregon Revised Statute (ORS) 813.602 states a person convicted of driving under the influence of intoxicants (DUII) or a person entering into a DUII diversion agreement shall be required to install and use an approved IID in any vehicle operated by the person.

ORS 813.606 states if a person is required, in the course and scope of the person's employment, to operate a motor vehicle owned by the person's employer, the person may operate that vehicle without an IID if:

- The employer has been notified that the employee is required to install an IID; and
- The employee has proof of the notification and a valid driver license or valid hardship/probationary permit in their possession while operating the employer's vehicle in the course of employment.

**NOTE: A person who is self-employed is NOT eligible for an Employer IID Exception.**

**EMPLOYER:**

- Complete and sign Section 1, "Employer Exception From IID Requirement."
- Give Copy to employee.

**Note:** If employee has been issued a hardship permit and is no longer required to drive vehicles registered to your company, complete Section 2, "Notification of Termination of Exception" and send a copy to DMV.

**EMPLOYEE:** You **must** carry a copy of this exception signed by your employer, *in addition to a valid driver license or valid hardship/probationary permit*, at all times when operating vehicles registered to your employer while driving for employment purposes.

To obtain the ending date of your IID requirement, call Customer Assistance at (503) 945-5000.

## SECTION 1 ▼ EMPLOYER EXCEPTION FROM IID REQUIREMENT ▼

EMPLOYEE NAME	ODL / CUSTOMER NUMBER	DATE OF BIRTH
---------------	-----------------------	---------------

By signing this form, I verify:

- I have been notified the above named employee must have an IID installed in any motor vehicle he/she operates;
- The above named employee has a valid driver license or valid hardship/probationary permit; and
- This form serves as proof of the notification.

The above named employee is required, in the course and scope of his/her employment, to operate a motor vehicle owned by the employer as follows:

**Please mark the appropriate box:**

- Drives company vehicle to and from work for employment purposes only.
- Drives company vehicle on-the-job for employment purposes only.
- Drives company vehicle to and from work and on-the-job for employment purposes only.

COMPANY NAME

EMPLOYER NAME (type or print)	PHONE NUMBER
-------------------------------	--------------

EMPLOYER SIGNATURE X	DATE
-------------------------	------

## SECTION 2 ▼ NOTIFICATION OF TERMINATION OF EXCEPTION ▼

Employer must complete and sign this section **ONLY** if DMV has issued the person a hardship/probationary permit and the employee is no longer employed by this company or no longer required to operate company vehicles. Submit copy to DMV, Driver Suspensions Unit, 1905 Lana Ave NE, Salem OR 97314.

- Employee no longer operates company vehicle(s).
- Employee no longer works for this company.

EMPLOYER SIGNATURE X	DATE
-------------------------	------

# Oregon Suspension/Revocation/Cancellation Guide

*If eligible for a hardship permit, "Yes" will be noted in the "HARDSHIP?" column along with the wait time a person must serve before DMV can issue a permit. Wait times begin on the suspension effective date or incarceration release date.*

## Implied Consent (IC) (ORS 813.100)

TYPE	LENGTH	HARDSHIP?
<b>Breath/Blood/Urine Test Refusal</b>	1 year	Yes (90 days)
<b>Breath/Blood/Urine Test Refusal – Increased</b>	3 years	Yes (3 years)
<b>BAC Failure</b>	90 days	Yes (30 days)
<b>BAC Failure – Increased</b>	1 year	Yes (1 year)
<b>Urine Test Refusal</b> (Consecutive suspension)	1 years	Yes (180 days)
<b>Urine Test Refusal – Increased</b> (Consecutive suspension)	3 years	Yes (3 years)

- Suspension lengths increase if any of the following occurred in Oregon or any other jurisdiction within 5 years prior to current arrest: DUII conviction; participation in a diversion or similar alcohol or drug program; or a suspension of driving privileges under the Implied Consent Law. (ORS 813.430)
- A suspension for refusing to take a urine test shall be consecutive to any other suspension imposed under the Motorist Implied Consent law and the wait time for a hardship permit shall double. (ORS 813.132)
- A court may impose a presumptive fine of \$650 if the person refuses to submit to a breath or urine test. This is separate from any other court fine resulting from the DUII arrest. (ORS 813.095)

↑ *A person may be suspended for the same offense under the IC laws and the DUII laws. IC actions are DMV administrative suspensions separate from any suspension or revocation imposed by a court on the DUII conviction for the same offense.* ↓

- DMV will credit any wait time served on a DUII/IC suspension resulting from the same offense to the wait time for the corresponding DUII/IC suspension.*

## DUII (ORS 813.010)

CONVICTION	ORDERED BY	TYPE	LENGTH	HARDSHIP?
<b>DUII- 1<sup>st</sup> Conviction</b> ORS 813.400, 809.428	Court or DMV Form 735-6116	Suspension	1 year	*Yes
<b>2<sup>nd</sup> w/in 5 yrs</b> ORS 813.400, 809.428	Court or DMV Form 735-6116	Suspension	3 years	No
<b>3<sup>rd</sup> or Felony DUII</b> ORS 813.400(2), 809.235	Court Form 735-6116	Revocation	**Permanent	No

\* There is a 30 day wait time if the person has been convicted of a separate traffic crime within the previous year.

\*\*Person may petition the court to restore driving privileges after minimum 10 years from the revocation effective date.

## CRIMINAL CONVICTIONS

CONVICTION	ORDERED BY	TYPE	LENGTH	HARDSHIP?
<b>Aggravated Driving While Suspended or Revoked (DWS/DWR)</b> ORS 163.196, 809.409(2)	Court or DMV Form 735-6116	Revocation	Not<10 years	No
<b>Assault</b> Resulting from the Operation of a Motor Vehicle				
<b>First Degree</b> ORS 163.185, 809.235(1)(a)	Court Form 735-6116	Revocation	Permanent	No
<b>Second Degree</b> ORS 163.175, 809.411(9)(b)	Court or DMV Form 735-6116	Suspension	Not<8 yrs	Yes (4 years)
<b>Third Degree</b> ORS 163.165, 809.411(9)(c)	Court or DMV Form 735-6116	Suspension	Not<5 yrs	Yes (2 years)
<b>Fourth Degree</b> ORS 163.160, 809.411(9)(d)	Court or DMV Form 735-6116	Suspension	Not<1 year	Yes (6 months)
<b>Attempt to Elude Police</b> ORS 811.540, 809.411(5)	Court or DMV Form 735-6116	Suspension	Schedule 1	Yes
<b>Criminal Mischief Resulting from Op of MV</b> ORS 164.345, 164.354, 164.365, 809.411(2)	Court or DMV Form 735-6116	Suspension	Schedule 1	Yes
<b>Criminal Trespass II w/MV</b> ORS 164.245, 809.411(7)	Court or DMV Form 735-6116	Suspension	6 months	Yes
<b>DWS/DWR (Felony)</b> ORS 809.409(4), 811.182	See OTHER on page 2			
<b>DUII</b> ORS 813.010	See DUII section above			

**CRIMINAL CONVICTIONS (Continued from page 1)**

<b>CRIMINAL CONVICTIONS (Continued from page 1)</b>					
<b>CONVICTION</b>	<b>ORDERED BY</b>	<b>TYPE</b>	<b>LENGTH</b>	<b>HARDSHIP?</b>	
<b>Failure to Perform Duties of a Driver – Injury/Serious Injury/Fatal</b> ORS 811.705, 809.409(3)	Court or DMV Form 735-6116	Revocation	Injury→ 1 yr Serious-not<3 yrs Fatal-not<5 yrs	No	
<b>Failure to Perform Duties of a Driver– Property Damage</b> ORS 811.700, 809.411(4)	Court or DMV Form 735-6116	Suspension	Schedule 1	Yes	
<b>False App for DL or ID</b> ORS 807.430, 807.530, 809.310(3)(a)	Court or DMV Form 735-6116	Suspension /Cancel	1 year	No	
<b>False Swearing to Receive DL</b> ORS 807.520, 809.310(3)(b)	Court or DMV Form 735-6116	Suspension /Cancel	1 year	No	
<b>Fleeing From Police Officer</b> ORS 811.540, 809.411(5)	Court or DMV Form 735-6116	Suspension	Schedule 1	Yes	
<b>Hit and Run</b>	See Failure to Perform Duties of a Driver				
<b>HOMICIDE</b>	<b>Aggravated Vehicular Homicide</b> ORS 163.149, 809.235(1)(a)	Court Form 735-6116	Revocation	Permanent	No
	<b>Criminally Negligent Homicide Resulting from Op of MV</b> ORS 163.145, 809.235(1)(a)	Court Form 735-6116	Revocation	Permanent	No
	<b>Manslaughter 1<sup>st</sup> or 2<sup>nd</sup> Degree Resulting from OP of MV</b> ORS 163.118, 163.125, 809.235(1)(a)	Court Form 735-6116	Revocation	Permanent	No
	<b>Murder (any Degree) w/MV used as a dangerous weapon</b> ORS 809.235(1)(a)	Court Form 735-6116	Revocation	Permanent	No
	<b>ALL - Vehicular Homicide, Murder resulting from Op of a MV, Aggravated DWS or DWR, Assault I, Criminally Negligent Homicide or Manslaughter</b> ORS 809.409(2)	DMV	Revocation	Not<10 yrs	No
<b>Menacing Resulting from Operation of MV</b> ORS 163.190, 809.411(2)	Court or DMV Form 735-6116	Suspension	Schedule 1	Yes	
<b>Misrepresentation of Age to Purchase/Consume/ Possess Alcohol</b> ORS 165.805(3),471.430(5),809.280(8)	Court Form 735-6115D	Suspension	Not >1 yr	Yes	
<b>Permit Misuse of DL or ID</b> ORS 807.430, 807.590, 809.310(3)(d)	Court or DMV Form 735-6116	Suspension	1 year	No	
<b>Reckless Driving</b> ORS 811.140, 809.411(3)	Court or DMV Form 735-6116	Suspension	Schedule 1	Yes	
<b>Reckless Endangering Resulting from Op of MV</b> ORS 163.195, 809.411(2)	Court or DMV Form 735-6116	Suspension	Schedule 1	Yes	
<b>Reckless Endangerment of Highway Workers</b> ORS 811.231, 809.411(6)	Court or DMV Form 735-6116	Suspension	Schedule 1	Yes	
<b>Unlawfully Producing ID/DL/Permits, Etc.</b> ORS 807.500, 809.310(3)(f)	Court or DMV Form 735-6116	Suspension /Cancel	1 year	No	
<b>Using DL or ID of Another</b> ORS 807.430, 807.600, 809.310(3)(e)	Court or DMV Form 735-6116	Suspension	1 year	No	
<b>Using Invalid DL or ID</b> ORS 807.430, 807.580, 809.310(3)(c)	Court or DMV Form 735-6116	Suspension	1 year	No	
<b>Unlawful Use of MV (Felony)</b> ORS 809.409(4)	See OTHER below				
<b>Vehicular Assault of Bicyclist/Pedestrian</b> ORS 811.060, 809.411(9)(d)	Court or DMV Form 735-6116	Suspension	Not<1 year	Yes (6 months)	
<b>OTHER</b>	<b>Any Felony w/Material Element Involving Op of Motor Vehicle</b> ORS 809.409(4)	Court or DMV Form 735-6116	Revocation	1 year	No
	<b>Guilty Except for Insanity of Traffic Offense and Committed to PSRB</b> ORS 809.419(6)	Court or DMV Form 735-6116	Suspension	Until Eligible ORS 807.090	No



## JUVENILE

CAUSE	ORDERED BY	TYPE	LENGTH	HARDSHIP?
<b>Offense Involving:</b> <ul style="list-style-type: none"> <li>Possession, use or abuse of alcohol or cannabis by a minor (13-20 years of age at time of offense) (ORS 809.260(3))</li> <li>Delivery, possession, manufacture of controlled substances or any marijuana/cannabinoid offense described in ORS 475B.341, 475B.346 or 475B.349 (13-17 years of age at time of offense) (ORS 809.260(1))</li> </ul> <p>The court may suspend if it is the person's:</p> <ul style="list-style-type: none"> <li>Second or subsequent conviction or adjudication;</li> <li>First conviction or adjudication and the person previously entered into a formal accountability agreement under ORS 419C.230; or</li> <li>First conviction or adjudication and the offense involved the operation of a motor vehicle.</li> </ul> <p>The suspension remains in effect for: (809.280(6))</p> <ul style="list-style-type: none"> <li>1 year or until the juvenile turns 17 years old, whichever is longer, if it is the juvenile's 1<sup>st</sup> order</li> <li>1 year or until the juvenile turns 18 years old, whichever is longer, if it is the juvenile's 2<sup>nd</sup> or subsequent order</li> </ul> <p><b>Note:</b> If the person is 18-20 years of age, suspension is for 1 year (the "until 17" or "until 18" options do not apply)</p> <p>The court may reinstate privileges after 90 days (180 days if controlled substance offense) for 1<sup>st</sup> conviction; or after 1 year on 2<sup>nd</sup> or subsequent conviction (ORS 809.260)</p>	Court Form 735-6115A	Suspension	See below	Yes
<b>Failure to Appear on MIP</b> (alcohol or marijuana) ORS 809.220, 809.280 471.430, 475B.316 419C.472	Court Form 735-6115	Suspension	Not >10 yrs	No
<b>Misrepresentation of Age to Purchase/Consume Alcohol</b> ORS 165.805(3), 471.430(5), 809.280(8)	Court Form 735-6115D	Suspension	Not >1 year	Yes
<b>Withdrawal of Parent/Guardian License Approval</b> ORS 809.320	DMV	Cancellation	Approved or 18 yrs old	No

## DMV DRIVER IMPROVEMENT PROGRAMS

CAUSE	TYPE	LENGTH	HARDSHIP?	
<b>Adult Driver Improvement Program:</b> ORS 809.480, OAR 735-072-0027	Three convictions or three accidents, or a combination that totals three, in an 18-month period.	Restriction	30 days	No
	Four conviction or four accidents, or a combination that totals four, in a 24-month period.	Suspension	30 days	Yes
<b>Provisional (under 18 years) Driver Improvement Program:</b> ORS 809.480, OAR 735-072-0023	Two convictions or two accidents, or a combination that totals two.	Restriction	90 days	No
	Three convictions or three accidents, or a combination that totals three.	Suspension	Six months	Yes
	A conviction for a traffic crime (e.g. DUII)	Suspension	One year	Yes
<b>Habitual Incompetent, Reckless, or Criminally Negligent Driver/Serious Violation of MV Laws</b> ORS 809.421(1)		Suspension	Indefinite	No
<b>Habitual Offender Program:</b> ORS 809.600, 809.610, 809.640, 809.650(2) Two convictions or a combination that totals two, within a 5-year period for DUII; Criminal DWS/DWR; Reckless driving; Failure to perform duties of a driver; Flee/Attempt to elude; Vehicular homicide; Aggravated DWS/DWR, Murder, Manslaughter, Negligent homicide, Assault, Reckless endangering, Menacing or Criminal mischief resulting from operation of a MV.		Restriction	---	No
Nineteen convictions within a five-year period.		Restriction	---	No
Three convictions or a combination that totals three, within a 5-year period for DUII; Criminal DWS/DWR; Reckless driving; Failure to perform duties of a driver; Flee/Attempt to elude; Vehicular homicide; or Murder, manslaughter, negligent homicide, assault, reckless endangering, menacing or criminal mischief resulting from operation of a MV.		Revocation	5 years	Yes
Twenty convictions (traffic violations and/or traffic crimes) within a five-year period.		Revocation	5 years	Yes

## NON-CRIMINAL CAUSES

CAUSE	ORDERED BY	TYPE	LENGTH	HARDSHIP?	
<b>Accident – Cause or Contribute to Death by Operating a MV – DMV Determined Immediate Endangerment</b> ORS 809.417(3)(c)	DMV	Suspension	1 year	No	
<b>Accident – Cause or Contribute to Death by Operating a MV</b> ORS 809.417(3)(a)	DMV	Suspension	1 year	Yes	
<b>Accident Report – Fail to File</b> ORS 809.417(1)	DMV	Suspension	Not > 5 yrs	Yes	
<b>Careless Driving w/Serious Injury/Death to Vulnerable User</b> ORS 811.135, 809.280(13)	Court Form 735-6115D	Suspension	1 year	Yes	
<b>Dishonored Check/Payment to DMV</b> ORS 802.170	DMV	Cancellation	Indefinite	No	
<b>Driver Improvement Course –Court Order to Complete</b> ORS 809.270	Court Form 735-6115B	Suspension	Not > 5 yrs	Yes	
<b>Failure to Appear for Major or Other Traffic Offense</b> ORS 809.220, ORS 809.280(4)	Court Form 735-6115	Suspension	Not >10 yrs	Yes	
<b>Failure to Install Ignition Interlock</b> ORS 813.602(7)	DMV	Suspension	Not > 5 yrs	Yes	
<b>Failure to Make Future Responsibility Filing</b> ORS 809.415(3)	DMV	Suspension	Not > 3 yrs	No	
<b>Failure to Obtain Medical Clearance</b> ORS 809.419(2), 807.070, 807.090	DMV	Suspension	Indefinite	No	
<b>Failure to Pay Child Support</b> ORS 25.750, 25.780	DOJ or DA	Suspension	Indefinite	No	
<b>Failure to Pay Traffic Offense Fine</b> ORS 809.210	Court Form 735-6115	Suspension	Not > 20 yrs	Yes	
<b>Failure to Appear or Satisfactorily Complete Required Exam</b> ORS 809.419(1)	DMV	Suspension	Indefinite	No	
<b>False Certification of Financial Responsibility</b> ORS 809.415(2)	DMV	Suspension	Not > 3 yrs	No	
<b>Hospital Notice of Mental Condition</b> ORS 809.419(5), 807.700	DMV	Suspension	Indefinite	No	
<b>Incompetence to Drive MV Because of Mental/Physical Condition</b> ORS 809.419(3)	DMV	Suspension	Indefinite	No	
<b>Motor Vehicle Registration – Court Order</b> ORS 809.010 (Suspension only impacts vehicle registration – not driving privileges)	Court Form 735-6128	Vehicle Suspension	Up to 120 days	No	
<b>Tampering of Ignition Interlock Device</b> ORS 813.602(7)	DMV	Suspension	Not > 5 yrs	Yes	
<b>Uninsured Accident</b> ORS 809.417(2)	DMV	Suspension	1 year	Yes	
<b>Unsettled Judgment</b> ORS 809.415(1)	Court Form 735-6702	Suspension	Not > 7 yrs	Yes	
<b>Violation of Driving Restrictions</b> ORS 809.421(3)	DMV	Suspension	Not > 1 yr	No	
<b>Incompetence to Operate Motorcycle</b> ORS 809.419(4)	DMV	Revocation	Indefinite	No	
<b>Speeding:</b> ORS 811.109(4)(5), 809.280(11)(12)	Speeding over 30 mph and has a previous speeding conviction within 12 months.	Court Form 735-6115C	Suspension	Up to 30 days	Yes
	Speeding over 100 mph.	Court Form 735-6115C	Suspension	30-90 days	Yes

**COMMERCIAL DRIVER LICENSE (CDL) / COMMERCIAL MOTOR VEHICLE (CMV)**

- DMV can NOT issue a Hardship Permit for commercial driving privileges
- Other than Implied Consent, DMV provides the notice for all suspensions of CDL/CMV privileges

CAUSE	TYPE	LENGTH
<b>Implied Consent:</b> While operating a commercial motor vehicle (>.04% BAC) ORS 813.410(2), 809.510	<b>Breath/Blood/Urine Test Refusal</b>	Suspension 3 years
	<b>Breath/Blood/Urine Test Refusal – Transporting Hazardous Material</b>	Suspension 5 years
	<b>Breath/Blood/Urine Test Refusal – Increased</b>	Suspension Lifetime
	<b>BAC Failure</b>	Suspension 1 year
	<b>BAC Failure – Transporting Hazardous Material</b>	Suspension 3 years
<b>DUII:</b> While operating a commercial motor vehicle. ORS 809.510, 809.520	<b>BAC Failure – Increased</b>	Suspension Lifetime
	<b>1<sup>st</sup> conviction</b>	Suspension 1 year
	<b>1<sup>st</sup> conviction – Transporting Hazardous Material</b>	Suspension 3 years
<b>2<sup>nd</sup> or subsequent conviction</b>	Suspension Lifetime	
<b>Driving CMV While Suspended/Revoked for CMV Violations</b> ORS 809.510(1)(c)	Suspension	1 year
<b>Driving CMV While Suspended/Revoked for CMV Violations – Transporting Hazardous Material</b> ORS 809.510(2)	Suspension	3 years
<b>Failure to File a Tax Return or Pay a Tax</b> ORS 305.385	Suspension	Indefinite
<b>Failure to Pay Child Support</b> ORS 25.750, 25.780	Suspension	Indefinite
<b>Failure to Perform Duties of a Driver</b> ORS 809.510(1)(a), 811.700, 811.705	Suspension	1 year
<b>Failure to Perform Duties of a Driver – Transporting Hazardous Material</b> ORS 809.510(2), 811.700, 811.705	Suspension	3 years
<b>Felony Involving Op of MV</b> ORS 809.510(1)(b)	Suspension	1 year
<b>Felony Involving Op of MV – Transporting Hazardous Material</b> ORS 809.510(2)	Suspension	3 years
<b>Hit &amp; Run – Injury/Property</b> ORS 809.510(1)	See Failure to Perform Duties above	
<b>Imminent Hazard</b> ORS 809.515(2)	Suspension	Not>1 year
<b>Murder/Manslaughter/Criminally Negligent Homicide or Assault Conviction while in a CMV</b> – ORS 809.510(1)(d)	Suspension	1 year
<b>Murder/Manslaughter/Criminally Negligent Homicide or Assault Conviction while in a CMV – Hazardous Material</b> – ORS 809.510(2)	Suspension	3 years
<b>Out-of-Service Order Violation</b> ORS 809.530(1), 809.530(3)	Suspension	180 days or 3 years
<b>Out-of-Service Order Violation – Transporting Hazardous Material</b> ORS 809.530(2), 809.530(4)	Suspension	1 year or 5 years
<b>Railroad Related Violation</b> ORS 809.535, 811.455, 811.460, 811.475, 811.462	Suspension	60 days, 120 days or 1 year
<b>Serious Traffic Violation</b> Two or three convictions within a 3-year period ORS 809.525, OAR 735-063-0130	Suspension	2→60 days 3→120 days
<b>Use of Commercial MV in felony involving Manufacture/Distribution of Controlled Substance</b> ORS 809.520(1)	Suspension	Lifetime
<b>Violation of Posted Weight Limits</b> ORS 809.120(1)	Suspension	Not>90 days
<b>Two or more below circumstances in any combination (ORS 809.520(2)):</b> <ul style="list-style-type: none"> <li>• <b>DUII Conviction in MV or CMV</b></li> <li>• <b>Implied Consent Breath Test Refusal in MV or CMV</b></li> <li>• <b>Implied Consent Suspension (&gt;.04% in CMV)</b></li> <li>• <b>Failure to Perform Duties of a Driver in MV or CMV</b></li> <li>• <b>Felony Conviction in MV or CMV</b></li> <li>• <b>DWS/DWR Conviction in MV while suspended or revoked for CMV Violation</b></li> <li>• <b>Murder/Manslaughter/Criminally Negligent Homicide/Aggravated Driving While Suspended or Revoked, or Assault Conviction while in CMV</b></li> </ul>	Suspension	Lifetime

## MISCELLANEOUS INFORMATION

### Incarceration

Other than Habitual Offender, any suspension or revocation "Length" noted with "not<" indicates the time length is established by the persons release from incarceration.

- If the sentencing did **not** include incarceration, the sanction time length is as noted above from the beginning date of the revocation or suspension.
- If the sentencing included incarceration, the sanction time length is as noted above from the date the person is released from incarceration for all crimes arising out of the same criminal episode.

### Non-Resident / No Current Driving Privileges

A court may suspend or revoke the driving privileges of any nonresident for any cause for which the driving privileges of a resident of this state may be suspended or revoked. ORS 809.230

If a person is not currently licensed or the person's privileges expire within the suspension period, DMV or the Court shall suspend or revoke the person's right to apply for driving privileges to operate motor vehicles in this state. ORS 809.360

### Out-of-Jurisdiction

DMV may suspend Oregon driving privileges and/or commercial driving privileges if the driver is suspended or revoked out-of-state or based on an out-of-state conviction. ORS 809.400, 809.510(6)

### Suspension Schedule (ORS 809.428)

	Schedule I	Schedule II
1 <sup>st</sup> Offense	90 days	1 year
2 <sup>nd</sup> Offense	1 year	3 years
3 <sup>rd</sup> or subsequent w/in 5 years	3 years	3 years

### Court Possession of License (ORS 809.240 and 809.275)

A court shall take immediate possession of any license or driver permit held by a defendant upon ordering a suspension or revocation under:

ORS 165.805	ORS 809.240	ORS 809.409	ORS 811.135
ORS 471.430	ORS 809.260	ORS 809.411	ORS 813.400
ORS 809.120	ORS 809.265	ORS 809.510-809.545	
ORS 809.235	ORS 809.270	ORS 811.109	

### Hardship Wait Times

Oregon Revised Statutes 807.240 and 813.520



NTSB 2017–2018

# MOST WANTED LIST OF TRANSPORTATION SAFETY IMPROVEMENTS

End Alcohol and Other Drug Impairment in Transportation



# NTSB

# .05 BAC Safety Briefing Facts

FEBRUARY 2017

## Decades of research show that .05% BAC laws can save lives on the roads *(Howat, Sleet, Smith, 1991)*

### How does a .05 BAC law prevent crashes? What about high BAC drivers and other risky behaviors?

- A .05 BAC law has a **broad deterrent effect** because it helps **prevent** drinking drivers from getting behind the wheel in the first place (it does not necessarily result in more DUI arrests).
- Research on effectiveness of laws shows that lowering the BAC changes behavior at all BAC levels, by reducing driving after drinking, so it is an effective intervention for preventing driving at both high and low BAC levels. *(Wagenaar et al, 2007)*
- Intoxicated drivers exhibit other risky behaviors, such as not wearing their seatbelt. A [University of Utah study](#) showed that drivers who are intoxicated are less likely to be wearing a safety belt (which further increases their risk of injury) and are more likely to have contributed to the crash.

### What does .05 vs. .08 mean in terms of impairment and crash risk? How many drinks?

For drivers with BACs of .05%–.079%, the risk of being in a fatal crash (single-vehicle) is at least seven times higher than for drivers with no alcohol in their system *(Zador et al 2000, NIH/NIAAA Alcohol Alert 2001, Voas et al 2012)*.

#### Impairment by BAC and drinks *(CDC and NHTSA/USDOT)*

<b>.02 BAC*</b>	<i>About 2 alcoholic drinks**</i>	Decline in visual functions (rapid tracking of moving target) Decline in ability to perform two tasks at same time
<b>.05 BAC*</b>	<i>About 3 alcoholic drinks**</i>	Reduced coordination Reduced ability to track moving objects Difficulty steering Reduced response to emergency driving situations
<b>.08 BAC*</b>	<i>About 4 alcoholic drinks**</i>	Reduced ability to concentrate Short-term memory loss Difficulty controlling speed Reduced information processing capability Impaired perception

*\*Blood Alcohol Concentration measurement. \*\*The number of drinks represents the approximate amount of alcohol that a 160-pound man would need to drink in one hour to reach the listed BAC in each category.*

NIH/NIAAA reported that a review of 112 studies concluded that certain skills required to operate motorized vehicles become impaired at modest departures from zero BAC. At 0.05 percent BAC, most studies reported significant impairment *(NIH/NIAAA Alcohol Alert, 2001)*.

### What was the impact on safety of moving from .10 to .08?

A comprehensive 2017 independent research study shows that from 1982 to 2014, in 50 States and DC, lowering BAC from .10 to .08 resulted in a 10.4% reduction in alcohol-related fatalities, with no change in alcohol consumption. This means that lowering the BAC to .08 in the U.S. has saved 1,736 lives annually. A total of 24,868 lives were saved between 1983 and 2014 due to lowering the BAC to .08. It is estimated that a .05 or lower BAC would result in an 11.1% decline in fatal alcohol crashes and save 1,790 lives annually in the United States *(NORC, 2017)*.

Continued on the next page ➤

## .05 BAC Safety Briefing Facts

Continued from  
previous page






NTSB

www.nts.gov

## What is the international experience with .05?

Approximately 100 countries have some type of .05 or lower BAC laws and, while their average alcohol consumption is the same or higher than the U.S., their alcohol-related deaths are lower.

Examples	 U.S. .08 BAC	 Sweden .02 BAC	 Netherlands .05 BAC
% alcohol related crash* deaths	31%	19%	19%
Average alcohol consumption (liters pure alcohol per capita)**	9.2	9.2	9.9

\*data from *Global Status Report on Road Safety 2015* \*\*from *WHO World Health Statistics 2015*

Twenty years of international studies have shown that when a country lowers BAC limits from .08 to .05, alcohol-related fatal and injury crashes decrease between 5% and 10% (Mann et al, 2001, Fell & Voas, 2006, and others).

## Who supports a .05 BAC limit?

- The [National Transportation Safety Board \(NTSB\)](#) has recommended that all 50 states establish a per se BAC limit of .05 or lower because it would lead to reductions in crashes, injuries, and fatalities.
- [AAA Foundation](#) recent surveys show that 63% of Americans support .05 BAC laws.
- National Highway Traffic Safety Administration (NHTSA) national opinion surveys show that most people would not drive after consuming 2 or 3 drinks in an hour and believe the limit should be no higher than the BAC associated with that amount of drinking [Moulton et al., 2010], or .05 BAC or lower for most drivers.
- The American Medical Association, World Health Organization, Association for the Advancement of Automotive Medicine, AAA Utah, & other organizations support a .05 BAC limit.

## Brief history of .08 BAC laws

Beginning in the 1970's, national efforts began to reduce alcohol-impaired driving. Even from the outset of the movement to adopt .10 BAC as the national standard, there were advocates for lower BAC levels. Utah and Oregon were the first states to pass a .08 BAC law in 1983. The grassroots movement started in the early 1980's, federal grant funding to states began to be tied to .08 BAC laws in the 1990's, Congress adopted .08 BAC as the national illegal limit for impaired driving in 2000, and all 50 states & DC had .08 BAC as the illegal limit by 2005. ■

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MORINAKA *Schworm* LLC

Chase Morinaka

# Estate Planning for New Lawyers







# Welcome!

Estate Planning can be a rewarding field of law. It is also very challenging.

There are numerous issues you need to navigate with your clients.



# Laws

- + **Probate**
- + **Protective Proceedings:  
(Guardianships and  
Conservatorships)**
- + **Deeds**
- + **Bank & Retirement  
Accounts**
- + **Elder Abuse**
- + **Medicaid**
- + **Estate Taxation**



**Basic  
Areas of  
Law**

# Laws

- + **Family Law**
- + **Business Law**
- + **Real Estate**
- + **Income Tax**

You don't have to know it all today.

Know your limits.

Know where to look.



**Supplemental  
Areas of Law**



# Tools

- + **Last Will & Testament**
- + **Power of Attorney**
- + **Advance Directive**
- + **Deeds**
- + **PODs & TODs**
- + **Trusts**



## The Basics





## The Client(s)

Someone calls you for a Will.

They want to keep it simple.

## Issues?

What can we learn about the clients during the intake process?

- H and W are both 68 years old.
- Married for 16 years.
- W's first marriage.
- H's first wife died 20 years ago.
- H has 1 child from first marriage. Age 38.
- Together they have 2 other children. Ages 26 & 24.
- They own a residence in Portland and a summer home in Garibaldi.
- They both have retirement accounts. W 250k; H 150k
- They have checking and savings accounts totaling 200k
- They both collect on social security.
- W has a small pension that comes in monthly.

## What else do you want to know?



## What are their goals?

- Who do they want to take care of?
- Realistic Goals?
- Why are those the goals?

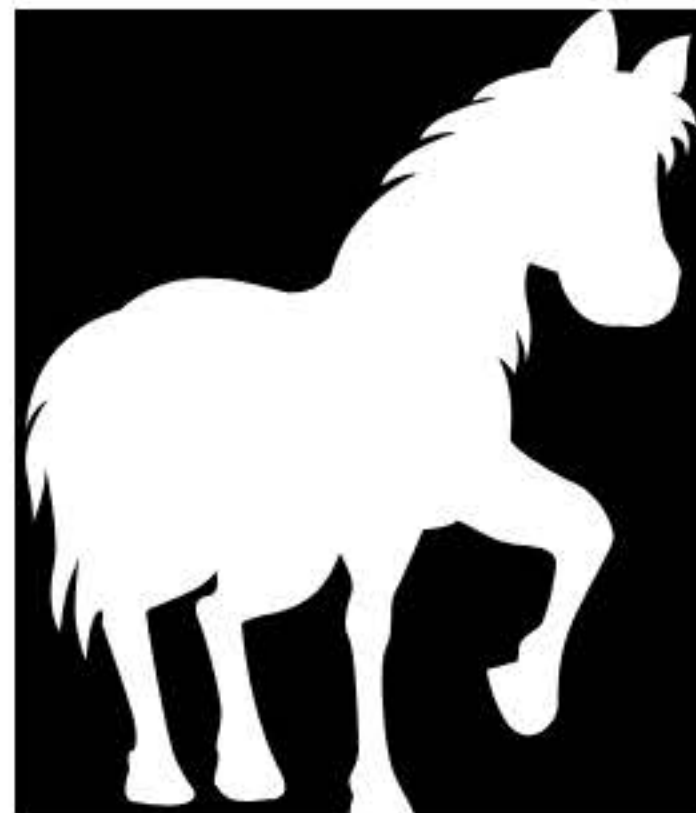
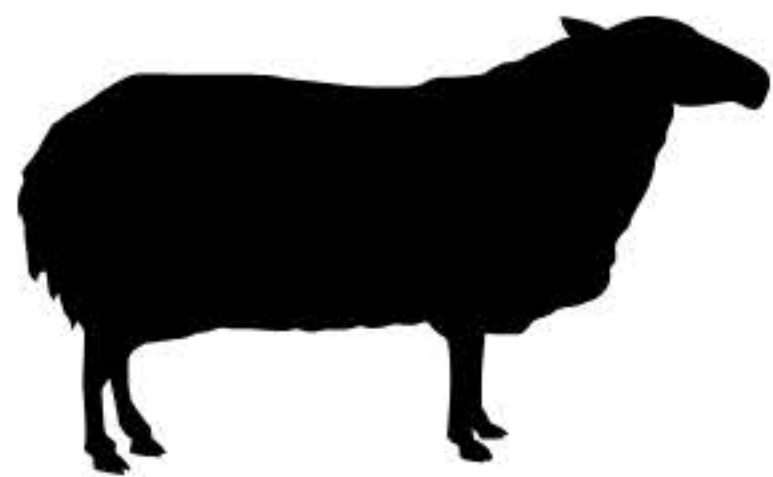
## We can write that in a Will, but should we?

- Different Schools of Thought
- How well do you know the dispute process?





# Remember



There's one in every family

## Things to Think About

- Simplify when you can
- Flexibility can be a good thing
- Planning is a process and clients should reevaluate their plans periodically





## Resources

- Barbooks
- [oregonlaws.org](http://oregonlaws.org)
- law library cles
- [thetaxadvisor.com](http://thetaxadvisor.com)
- Mentors
- Colleagues





# Estate Planning

Good Luck!

Be Patient with Yourself





A photograph of a white laptop keyboard on a light-colored wooden desk. In the background, there is a small succulent in a white pot. The image is overlaid with a semi-transparent white rectangle containing text.

# THANK YOU!

[chase@lawyerpdx.com](mailto:chase@lawyerpdx.com)

MORINAKA *Schworm* LLC



## **Estate Planning for New Lawyers**

### **Welcome**

Welcome to Estate Planning for new lawyers. The goal for this CLE is provide a primer of what you will need to know to be an effective estate planner.

This can be a rewarding practice. You will assist your clients in preparing Wills, Trusts, and other estate planning documents. You will help them carry out their last wishes and take care of their family. Here is a brief look at the bodies of law you should be familiar with and how they will interact with your estate planning.

### **The Laws**

#### **Probate and Intestate Succession.**

Writing a Will and any other estate planning document starts with an understanding of the probate code and intestate succession. Take care in planning distributions and naming future fiduciaries.

Review the probate code to understand how creditor's rights will affect your client's future probate administration.

#### **Protective Proceedings.**

Guardianships and Conservatorships will play a large role in most of your practices. You should think about incapacity planning when working with your clients. Protective proceedings may be critical in protecting your clients' health and finances, but they are also costly. You should explore avenues to reduce or eliminate the need for protective proceedings.

#### **Deeds.**

You need to be familiar with the different types of deeds and their purposes. You will likely be drafting and recording deeds regularly. How your clients' hold their property will play an important role in distribution.

#### **Bank & Retirement Accounts.**

Understand the rules for payable-on-death and transfer-on-death accounts and deeds. Know that every bank has their own forms.

#### **Elder Abuse.**

Aside from being mandatory reporters, when you come across physical or financial elder abuse, you want to have some strategies ready to address it.

EPPDAPA Restraining Orders.

Civil Cases come with treble damages & attorneys fees.

**Medicaid.**

The need for long-term care is growing. Medicaid is how we currently provide coverage to elderly at the government level. Some of your practices may develop into elder law practices with a heavy Medicaid case load. Every probate practitioner needs to understand the basics.

**Estate Taxation.**

Oregon's exemption is only \$1 million dollars. That should affect a great many Oregonians. Get familiar with the basics of estate taxation.

**Family Law.**

Check for prenuptial agreements with your clients. There may be rules regarding their assets that you need to take into account with your planning process.

**Real Estate.**

In addition to deeds, you need to know the basics of real estate finance (mortgages, loans, deeds of trusts) for your practice.

**Income Tax.**

Some of your practices will deal with income tax issues beyond the tax basis of assets. You just need to understand the basics so you know when to get your clients back to their tax advisor.

## **The Tools**

**Last Wills and Testaments** – Distribution, fiduciaries, many other planning choices.  
(Notes)

**Powers of Attorney** - Helps with incapacity planning.  
(Notes)

**Advance Directives** – End of Life choices  
(Notes)

**Deeds** - Distributions  
(Notes)

**PODs & TODs** - Distributions  
(Notes) Bank account names also help with incapacity planning.

**Trusts** – Distributions, Incapacity  
(Notes)

**Issue Spotting Exercise**  
(Space for Notes)

## Intro to Consumer Law

SuperSaturday CLE – OSB - June 22, 2019

Kelly D. Jones – The Law Office of Kelly D. Jones

- I. Intro: what is consumer law?
- II. Debt collection: (a) FDCPA and (b) OUDCPA
- III. Trade practices/false advertising: UTPA
- IV. Credit reporting: FCRA
- V. Unwanted phone calls/texts: TCPA
- VI. Misc.: TILA, FCBA, bankruptcy, ORLTA, torts, class

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## I. Intro

- I call myself a consumer rights lawyer
- What is consumer law?
  - FDCPA, OUDCPA, UTPA, TCPA, FCRA, etc.
  - Is there a better name?
- Why practice consumer law?
  - Protect public from unfair business practices
  - Fight the man/system; "underdog"; Robin Hood; politics; morality
  - Lots of work/clients/not many of us
  - Mostly prevailing plaintiff (only) attorney fees (and costs)
  - Drawbacks: contingency; uncertainty; frustration; fatigue

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## The American Rule



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## Fee Shifting Statutes

- A **fee shifting statute** is an exception to the **American rule**
- Lawmakers shift fees to **encourage private enforcement** of consumer protection laws
- Judges shift fees as **sanctions** for bad-faith conduct and rule violations



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## II. Debt Collection

### A. Fair Debt Collection Practices Act (FDCPA) 15 U.S.C. § 1692, et seq.

"A debt collector may not engage in any conduct the natural consequence of which is to **harass, oppress, or abuse** any person in connection with the collection of a debt."



- 15 U.S.C. § 1692d



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## Fair Debt Collection Practices Act

"A debt collector may not use any **false, deceptive, or misleading** representation or means in connection with the collection of any debt."



- 15 U.S.C. § 1692e



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### Fair Debt Collection Practices Act

"A debt collector may not use **unfair or unconscionable** means to collect or attempt to collect any debt."

- 15 U.S.C. § 1692f



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### Fair Debt Collection Practices Act Private Right of Action

- A private right of action exists for **any** violation of the FDCPA. 15 U.S.C. § 1692k.
- The FDCPA is a **strict liability** statute, making "debt collectors liable for violations that are not knowing or intentional." *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008).



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### Fair Debt Collection Practices Act Private Right of Action

- A collector is not liable for violations that were **"not intentional"** and resulted from a **bona fide error** notwithstanding the maintenance of **procedures** reasonably **adapted** to avoid any such error." 15 U.S.C. § 1692k(c).



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### FDCPA Elements

#### A "consumer"

"The term 'consumer' means any **natural person** obligated or allegedly obligated to pay any debt."

§ 1692a(3)



#### A "consumer debt"

"The term 'debt' means any obligation of alleged obligation of a consumer to pay money arising out of a transaction ... for **personal, family or household purposes.**"

§ 1692a(5)



#### A "debt collector"

"The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the **principal purpose** of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be **owed or due another.**"

§ 1692a(6)



#### A "violation"

Any abusive practice, false representation, or unfair practice.

§ 1692d, e, f, and g



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### Collection Communications

- No collection calls before **9am** or **after 8pm**
- No collection calls or letters to consumers represented **by an attorney**
- No collection calls or letters **at work** if prohibited by a consumer's employer
- No collection calls or letters to **third parties** except to verify location information
- No collection calls or letters after a consumer asks to be left alone **in writing**

15 U.S.C. § 1692c



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### Validation of Debts

In its initial communication (or within five days), a collector must send **written notice** of the amount of debt, the creditor name, and the right to request verification of debt.

If the consumer requests validation in writing within 30 days, **collections must stop** until the debt is verified.

15 U.S.C. § 1692g



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## Fair Debt Collection Practices Act Damages

- Consumers may recover **actual** damages and up to \$1,000 **statutory** damages. 15 U.S.C. § 1692k(a)(1), (2)(A).
- No punitive damages are available under the FDCPA. 15 U.S.C. § 1692k.
- Class statutory damages limited to greater of 1% of net worth or \$500k. 15 U.S.C. § 1692k(a)(2)(B).



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## Fair Debt Collection Practices Act Attorney Fees

- Unlike the American rule, a **prevailing plaintiff** under the FDCPA may recover reasonable attorney fees and costs at trial and on appeal. 15 U.S.C. § 1692k(a)(3).
- A defendant may only recover its fees in a FDCPA claim as **sanctions**, or after successfully defending an action brought in **bad faith** or for purposes of **harassment**. FRCP 11, FRCP 37, 15 U.S.C. § 1692k(a)(3).
- A reasonable fee award under the UTPA is based on the **lodestar** method, which takes into account the time expended and hourly rate. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973 (9th Cir. 2008).



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## Fair Debt Collection Practices Act Statute of Limitations

- Actions brought under the FDCPA must be commenced within **one year** after discovery of the violation. 15 U.S.C. § 1692k(d).



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## Fair Debt Collection Practices Act

PRIVATE RIGHT OF ACTION	CLAIM ELEMENTS	DAMAGES	ATTORNEY FEES	STATUTE OF LIMITATIONS
15 U.S.C. § 1692k	(1) consumer (2) consumer debt (3) debt collector (4) violation	Actual and statutory damages	Prevailing plaintiff	One year

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### II. Debt Collection

#### B. Oregon Unlawful Debt Collection Practices Act (OUDCPA) ORS 646.639-646.656

- Prohibits certain practices by individuals or businesses in the course of collecting consumer debts. The OUDCPA applies to third-party debt collectors/agencies, and commercial creditors attempting to collect their own debts.
- A consumer is "a natural person who purchases or acquires property, services or credit for personal, family or household purposes." ORS 646.639(1)(a).
- Does not apply to a business debt or involuntary transaction (shoplifting, traffic, etc.).
- Not used often because of bad pitfalls (prevailing party fees and unfortunate decisions interpreting the Act). Sad.

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### Violations of the OUDCPA

- A debt collector may not use, or threaten the use of, force or violence to a debtor or to the debtor's family or property. ORS 646.639(2)(a).
- A debt collector may not threaten arrest or criminal prosecution. ORS 646.639(2)(b).
- It is an unlawful collection practice for a debt collector to threaten the seizure, attachment, or sale of a debtor's property when such an action can be taken only pursuant to a court order, unless the debt collector discloses that prior court proceedings are required. ORS 646.639(2)(c).
- It is an unlawful collection practice for a debt collector to use profane, obscene, or abusive language in communicating with a debtor or a debtor's family. ORS 646.639(2)(d).
- It is an unlawful collection practice for a debt collector to communicate with the debtor or any member of the debtor's family repeatedly or continuously, or at times known to be inconvenient to that person with the intent to harass or annoy the debtor or any member of the debtor's family. ORS 646.639(2)(e).

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### Violations of the OUDCPA

- It is an unlawful collection practice for a debt collector to "[c]ommunicate or threaten to communicate with a debtor's employer concerning the nature or existence of the debt." ORS 646.639(2)(f).
- It is an unlawful collection practice for a debt collector to communicate with the debtor in writing without, on all of the initial communications, "clearly identifying the name of the debt collector, the name of the person, if any, for whom the debt collector is attempting to collect the debt and the debt collector's business address." ORS 646.639(2)(h).
- It is an unlawful collection practice for a debt collector to cause any expense to the debtor in the form of communication charges "by concealing the true purpose of the debt collector's communication." ORS 646.639(2)(j).
- It is an unlawful collection practice for a debt collector to "[a]ttempt to or threaten to enforce a right or remedy with knowledge or reason to know that the right or remedy does not exist, or threaten to take any action that the debt collector in the regular course of business does not take." ORS 646.639(2)(k).

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### Violations of the OUDCPA

- It is an unlawful collection practice for a debt collector to use any form of communication that simulates legal or judicial process, or that falsely gives the appearance of being authorized, issued, or approved by a governmental agency, a governmental official, or an attorney at law. ORS 646.639(2)(L).
- It is an unlawful collection practice for a debt collector to represent that an existing debt may be increased by the addition of fees or charges that may not legally be added to the existing debt. ORS 646.639(2)(m).
- It is an unlawful collection practice for a debt collector to collect or attempt to collect any interest or other charges or fees in excess of the actual debt, unless they are expressly authorized by the agreement creating the debt, or expressly allowed by law. ORS 646.639(2)(n).
- It is an unlawful collection practice for a debt collector to threaten to assign or sell the debtor's account, with an attending misrepresentation or implication that the debtor would lose any defense to the debt or would be subjected to harsh, vindictive, or abusive collection tactics. ORS 646.639(2)(o).

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### OUDCPA: Damages

- ORS 646.641(1):
  - Any person injured as a result of **wilful** use or employment by another person of an unlawful collection practice may bring an action in an appropriate court to **enjoin** the practice or to **recover actual damages or \$200**, whichever is greater. The court or the jury may award **punitive damages**, and the court may provide **such equitable relief** as it deems necessary or proper.
  - Actual damages includes "emotional distress" type damages.

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### OUDCPA: The Bad

- Statute of limitations
- The limitation period is **one year** from the date of the injury. ORS 646.641(3). However, pursuant to ORS 646.638(7), [but] the limitation period is inapplicable to counterclaims in "any action brought by a seller or lessor against a purchaser or lessee of real estate, goods or services."
- **Attorney Fees**
- The court may award attorney fees to the **prevailing party**, whether or not that party is the consumer. ORS 646.641 !!!
- Bad decisions interpreting the Act: The *Porter v. Hill* problems.

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### OUDCPA: Porter v. Hill Problems

- In *Porter v. Hill*, 314 Or. 86, 94 (1992), the Oregon Supreme Court held that **filing a civil action** to collect an alleged debt is not an act attempting to enforce a "right" or a "remedy" under this statute (merely because all or part of the alleged debt does not exist). The court reasoned that no paragraph of the OUDCPA suggested that actually filing a legal action is prohibited, because filing a legal action resolves issues surrounding the debt in a proper manner, not duplicitously or coercively.
- In *Hedrick v. Spear*, 138 Or. App. 53 (1995), the court ruled that filing a lawsuit for the **wrong amount** was not a violation of ORS 646.639(2)(n). "We conclude that the filing of a legal action seeking to recover allegedly unauthorized charges is not 'the collection or attempt to collect' prohibited by ORS 646.639(2)(n). Rather, it is a correct means of resolving a disputed debt and charges."
- In *Pro Car Care, Inc. v. Johnson*, 201 Or. App. 250 (2005), the court again applied *Porter* and *Hedrick* to deny a plaintiff recovery after she was sued by a debt collector for stopping payment on a check, even though she had cause to stop the payment.

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### OUDCPA: New Amendments 2017

- The new subsections/violations - ORS 646.639(2)...
  - **(7)** Files a legal action to collect or files a legal action to attempt to collect a debt if the debt collector knows, or after exercising reasonable diligence would know, that an applicable statute of limitations bars the collection or the collection attempt.
  - **(8)** Knowingly collects any amount, including any interest fee, charge or expense incidental to the principal obligation, unless the amount is expressly authorized by the agreement creating the debt or permitted by law.
  - **(9)** Collects or attempts to collect a debt before providing to a debtor, within 30 days after the date of the debtor's request, all of the documents listed in subsection (4)(b) of this section.
- Debt buyer litigation requirements: ORS 636.639(4).

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III. UNLAWFUL TRADE PRACTICES ACT (UTPA)  
ORS 646.605 – 646.656

- The UTPA applies to any person who, in the course of a business, vocation, or occupation, commits an unlawful trade practice as defined by the UTPA. The majority of the proscribed trade practices involve real estate, goods, or services (or loans or extensions of credit obtained primarily for personal, family, or household purposes). ORS 646.605 (definitions).
- For the most part, the UTPA does not apply to transactions for business purposes but only for consumer purposes.
- The UTPA "is to be interpreted liberally as a protection to consumers." *State ex rel. Redden v. Discount Fabrics, Inc.*, 289 Or. 375, 386 n.8 (1980); *Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or. 85, 90 n4 (1977).

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UTPA: Elements

- To bring a private cause of action under the UTPA, "a plaintiff is required to show that (1) the defendant [willfully] committed an unlawful trade practice; (2) plaintiff suffered an ascertainable loss of money or property; and (3) plaintiff's injury (ascertainable loss) was the result of the unlawful trade practice." *Mendoza v. Lithia Motors, Inc.*, No. 6:16-cv-01264-AA, 2017 U.S. Dist. LEXIS 4716, at \*8 (D. Or. Jan. 11, 2017) (quoting *Pearson v. Philip Morris Inc.*, 358 Or. 88, 127 (2015)); ORS ORS 646.638(1).
- Statutory damages under subsection (1) of this section may be recovered on behalf of class members only if the plaintiffs in the action establish that the members have sustained an ascertainable loss of money or property as a result of a reckless or knowing use or employment by the defendant of a method, act or practice declared unlawful by ORS 646.608. ORS 646.638(8)(a).
- "Ascertainable loss" under the UTPA is amorphous. Any loss will satisfy [the] requirement so long as it is "capable of being discovered, observed, or established." *Feitler v. Animation Celection, Inc.*, 170 Or. App. 702, 712 (2000) (citation omitted).

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UTPA: Elements

- The UTPA was enacted as an alternative to common-law fraud, and a plaintiff need not prove the elements of common-law fraud to recover under the UTPA. *Raudebaugh v. Action Pest Control, Inc.*, 59 Or. App. 166, 171 (1982).
- But is reliance required? It depends: Yes, if (1) pure misrepresentation and (2) theory of ascertainable loss = refund of the purchase price. Read Justice Walters' concurrence in *Pearson v. Philip Morris Inc.*, 358 Or. 88, 127 (2015). Very important if class action because of certification issues.
- A representation under subsection...may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact. ORS 646.608(2).

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### UTPA: Violations/Laundry List

- ORS 646.607 (unlawful business, trade practices), including, but not limited to, unconscionability, can be enforced only by the AG/DOJ. **No** private right of action exists for violations of ORS 646.607!
- ORS 646.608 violations (the "laundry list").
- Most common: **(1)** A person engages in an unlawful practice if in the course of the person's business, vocation or occupation the person does any of the following:
  - **(b)** Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.
  - **(e)** Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that the real estate, goods or services do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.
  - **(t)** Concurrent with tender or delivery of any real estate, goods or services fails to disclose any known material defect or material nonconformity.

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### UTPA Violations



- No ORS 646.608(1)(u) violations unless AG adopts a rule (OAR)!!!
- ORS 646.608(1)(u): Engages in any other unfair or deceptive conduct in trade or commerce.
- ORS 646.608(1)(4) An action or a suit may not be brought under subsection (1)(u) of this section unless the AG has first established a rule in accordance with the provisions of ORS chapter 183 declaring the conduct to be unfair or deceptive in trade or commerce.

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### UTPA: Damages

- ORS 646.638(1): a person that suffers an ascertainable loss of money or property, real or personal, as a result of another person's willful use or employment of a method, act or practice declared unlawful under ORS 646.608...may bring an individual action in an appropriate court to **recover actual damages or statutory damages of \$200**, whichever is greater. The court or the jury may award **punitive damages** and the court may provide any **equitable relief** the court considers necessary or proper.
- Probably **no emotional distress** type damages because ascertainable loss = loss of money or property!

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UTPA: Statute of Limitations

- 1 year
- ORS 646.638(6): Actions brought under this section must be commenced within **one year** after the **discovery** of the unlawful method, act or practice.

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UTPA: Attorney Fees

- Prevailing plaintiff only
- ORS 646.638(3) : The court may award reasonable attorney fees and costs at trial and on appeal to a **prevailing plaintiff** in an action under this section. The court may award reasonable attorney fees and costs at trial and on appeal to a prevailing defendant **only if the court finds that an objectively reasonable basis for bringing the action or asserting the ground for appeal did not exist.**

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IV. Fair Credit Reporting Act (FCRA)  
Private Right of Action

- Duties of **CRAs** and **furnishers** to reinvestigate after a consumer **sends notice** of dispute **to a CRA** are enforceable by private right of action and federal or state agencies. 15 U.S.C. § 1681s-2(b).
- General duties regarding the initial furnishing of accurate credit information are only enforceable by **federal or state agencies**. 15 U.S.C. § 1681s-2(a), (c).



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## FCRA Claim Elements

- Within **5 business days** after receiving a dispute, a CRA must **provide all relevant** information regarding the dispute (an "ACDW form") to the furnisher. 15 U.S.C. § 1681(a)(2).
- If a CRA determines a dispute is **frivolous**, it must notify the consumer within **5 business days**. 15 U.S.C. § 1681(a)(3).
- Within **30 days** after receiving a dispute, CRAs and furnishers must **investigate, review** all relevant information, and **delete** any incorrect credit information. 15 U.S.C. § 1681s-2(b)(1)(A). *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th Cir. 2009).
- A CRA must provide reinvestigation **results** to a consumer within **5 business days**. 15 U.S.C. § 1681(a)(6).




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## FCRA Damages

- The FCRA provides for **actual damages, statutory damages, punitive damages, and attorney fees**. 15 U.S.C. § 1681n, o.
- The most important factor in determining a reasonable amount of punitive damages is the degree of **reprehensibility** of the defendant's conduct. *BMW v. Gore*, 517 U.S. 559, 575 (1996).
- An \$18.4 million punitive damages award in light of \$180,000 actual damages was reduced to \$1.62 million under the 14<sup>th</sup> amendment's **due process** clause. *Miller v. Equifax*, 2014 U.S. Dist. LEXIS 69450 (D. Or. May 20, 2014).



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## FCRA Attorney Fees

- Unlike the American rule, a **prevailing plaintiff** under the FCRA may recover reasonable attorney fees and costs. 15 U.S.C. § 1681n(a)(3), o(a)(2).
- A defendant may only recover its fees in an FCRA claim as **sanctions**, or after successfully responding to a complaint or motion filed in **bad faith** or for purposes of **harassment**. FRCP 11, FRCP 37, 15 U.S.C. § 1681n(b), o(b).
- A reasonable fee award under the FCRA is based on the **lodestar** method, which takes into account the time expended and hourly rate. *Garnacho v. Bridgport Fin., Inc.*, 523 F.3d 973 (9th Cir. 2008).



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## FCRA Statute of Limitations

- The statute of limitations under the FCRA expires the earlier of **2 years** after the date of **discovery** by the plaintiff of the violation that is the basis for such liability; or **5 years** after the date on which the violation that is the basis for such liability **occurs**. 15 U.S.C. § 1681p.



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## Fair Credit Reporting Act

PRIVATE RIGHT OF ACTION	CLAIM ELEMENTS	DAMAGES	ATTORNEY FEES	STATUTE OF LIMITATIONS
15 U.S.C. § 1681n, o	(1) Failure of a furnisher or CRA to properly reinvestigate (2) After a consumer (3) Sends notice of a dispute to a CRA	Actual or statutory damages, punitive damages	Prevailing plaintiff	Two years

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## V. Telephone Consumer Protection Act TCPA

PRIVATE RIGHT OF ACTION	CLAIM ELEMENTS	DAMAGES	ATTORNEY FEES	STATUTE OF LIMITATIONS
47 U.S.C. § 227(b)(3)	(1) An automatic telephone dialing system or artificial or prerecorded voice message (2) Used to dial a cell phone without prior consent	Actual or statutory damages	American rule	Four years

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## TCPA Private Right of Action

- Consumers may recover actual monetary loss or **\$500** per violation, whichever is greater. 47 U.S.C. § 227(b)(3)(B).
- Courts may increase statutory damages up to **\$1,500** for willful or knowing violations. 47 U.S.C. § 227(b)(3) (hanging paragraph).



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## TCPA Claim Elements

- The TCPA generally prohibits use of an **automatic telephone dialing system** to make **any call** to a consumer's **cell phone** without express prior **consent**. 47 U.S.C. § 227(b).
- An **automatic telephone dialing system** means "equipment which has the **capacity** to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." 47 U.S.C. § 227(a)(1).
- The **capacity** of an autodialer is not limited to its current configuration but also includes its **potential** functionalities. July 10, 2015 FCC Order ¶¶ 15-16.
- The TCPA prohibits **artificial or prerecorded voice** calls even if no ATDS is used. 47 U.S.C. § 227(b).



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## TCPA Claim Elements

- Calls made to collect **student loans** and **taxes** are exempt from the TCPA. 47 U.S.C. § 227(b)(1)(A)(iii).
- Under the FCC's safe harbor rule, callers are permitted **one** wrong number call to a party who has not consented to be called after a number is **reassigned**, so long as the caller doesn't have actual knowledge of the reassignment. July 10, 2015 FCC Order ¶ 2.
- The TCPA covers both calls **and texts** to cell phones. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009); July 10, 2015 FCC Order ¶ 2.
- Consent may be revoked at **any time** in **any reasonable way**. July 10, 2015 FCC Order ¶ 2.



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## TCPA Statute of Limitations

- "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than **4 years** after the cause of action accrues." 28 U.S.C. § 1658(a).



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## TCPA Damages

- Consumers may recover actual monetary loss or **\$500** per violation, whichever is greater. 47 U.S.C. § 227(b)(3)(B).
- Courts may increase statutory damages up to **\$1,500** for willful or knowing violations. 47 U.S.C. § 227(b)(3) (hanging paragraph).



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## TCPA Attorney Fees

- The TCPA follows the **American rule** because the statute includes no private right of action to recover attorney fees.
- A party may only recover its fees in a TCPA case as **sanctions** for bad-faith litigation conduct or rule violations. FRCP 11; FRCP 37.



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## VI. Miscellaneous

- TILA (Truth in Lending Act)
- FCBA (Fair Credit Billing Act)
- Bankruptcy (Automatic Stay and Discharge Violations)
- ORLTA (Landlord/Tenant Act)
- Torts (common law, statute)
- Class actions

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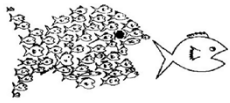
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## Why consider a consumer class action?

### CLASS ACTION



- Common fund doctrine
- Shine a light on and change corporate practices
- Utilitarianism: most good for the greatest amount of people
- Individual case not cost effective
- Many consumer violations lend themselves to certification (common letters, lawsuits, purchases)
- Cons: time, difficulty, expense, certification, arbitration and class waivers

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# Thanks!

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