

One Hour and Ten Minutes

SESSION III
THE LEGAL ENVIRONMENT

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Upon successfully completing this session, the participant will be able to:

- o State and discuss the elements of DWI offenses.
- o Discuss the provisions of the implied consent law.
- o Discuss the relevance of chemical test evidence.
- o Discuss precedents established through case law.

CONTENT SEGMENTS

- A. Basic DWI Statute: Driving While Under The Influence
- B. Implied Consent Law and Presumptions
- C. Illegal Per Se Statute: Driving With A Proscribed Blood Alcohol Concentration
- D. Preliminary Breath Testing
- E. Case Law Review

LEARNING ACTIVITIES

- o Instructor-Led Presentation
- o Reading Assignments



Display III-O (Session Objectives)



70 Minutes



10 Minutes

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III LEGAL ENVIRONMENT

A. Basic DWI Statute: Driving While Under the Influence

1. Elements of the offense: it is unlawful for any person to...
 - a. operate or be in actual physical control of...
 - b. any vehicle...
 - c. within this state...
 - d. while under the influence of alcohol and/or any drug.

2. In order to arrest someone for a basic DWI violation, officer must have probable cause to believe that all four elements are present.

(Time varies with the complexity and variation of your state's laws relating to drinking-driving and DWI enforcement).

INSTRUCTOR PLEASE NOTE: The lesson plans for this module are based on a generic set of drinking-driving laws, patterned after the Uniform Vehicle Code. Significant modification may be required to adapt this module to the current statutes of your state.

Discuss meaning/interpretation of "operational/actual physical control."

Discuss meaning of "vehicle".

i.e., public or private property anywhere in the state.



Ask class: "What does under the influence mean?" Probe for a variety of responses.

Note: If DWI is not a criminal offense, burden of proof is less than "beyond a reasonable doubt."



20 Minutes

3. In order to convict a person of DWI, the arresting officer must establish beyond a reasonable doubt that all four elements were present.
4. In particular, the arresting officer must establish that the accused was "under the influence".
 - a. Courts have generally held that "under the influence" means the ability to operate a vehicle has been affected, or impaired.
 - b. To convict a person of DWI, the arresting officer must be able to show that the person's capability of safe operation has been impaired.

B. Implied Consent Law and Presumptions

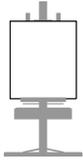
1. The question of how much impairment constitutes too much impairment is not completely clear.
 - a. Some courts have held that impairment of driving to the slightest degree means the person is "under the influence."
 - b. Other courts have insisted on evidence of substantial driving impairment before they will convict someone of DWI.

Emphasize: Participants must be prepared to articulate the impairment exhibited by the defendant at the time of the stop.

Aids

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- c. The element of "under the influence" thus historically was (and remains) very difficult to prove.
- 2. The principal purpose of the Implied Consent Law is to encourage people arrested for DWI to submit to chemical test, to provide scientific evidence of alcohol and/or drug influence.
- 3. Key features/elements of the Implied Consent Law generally include:
 - a. Any person who operates a motor vehicle upon the public highways of this state...
 - b. Shall be deemed to have given consent to a chemical test...
 - c. For the purpose of determining the alcohol and/or drug content of that person's blood...
 - d. When arrested for any acts alleged to have been committed while the person was operating or in actual physical control of a vehicle while under the influence of alcohol and/or any drug.
- 4. If a person so arrested refused to submit to the chemical test, no test shall be given.

Write "Implied Consent Law" on dry-erase board or flipchart.

NOTE: Present here the information relative to your state.

NOTE: Some states use breath alcohol concentration (BrAC).

Point out that the Implied Consent Law requires the driver to submit to a chemical test(s). The law provides penalties for refusal to submit to the test(s).



Display
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- a. However, the law provides that the person's driver's license may be suspended or revoked.
 - b. The provision for the license suspension (or revocation) exists to encourage DWI arrestees to submit to the test, so that valuable chemical evidence may be obtained.
5. Legal presumptions define the significance of scientific chemical test evidence. They are provided by your state's statutes.
- a. If test shows blood alcohol concentration is ____ or more: it shall be presumed that the person is under the influence.
 - b. If test shows BAC is ____ or less: it shall be presumed that the person is not under the influence.
 - c. If test shows BAC is more than ____ but less than ____, there is no presumption as to whether the person is or is not under the influence.

6. Key Point: As far as establishing that the person was "under the influence" is concerned, The weight of the chemical test evidence is presumptive, not conclusive.

The right to refuse the test is not an unlimited right: the license action is the "price" of the refusal.

NOTE: Statutory presumption levels vary from state to state.
Know your state law!

Insert here: _____ your state statutory levels.

NOTE: Specific laws concerning underage drinkers or commercial motor vehicle operators should be addressed here.

Point out that, even though there is no presumption of alcohol influence in that range, the test result is still competent, admissible evidence.

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- a. If there is no evidence to the contrary, the court may accept the legal presumption, and conclude that the person was or was not under the influence on the basis of the chemical test alone.
- b. However, other evidence (such as testimony concerning observations of the accused's driving, demeanor, appearance, speech, etc.) may be sufficient to overcome the presumptive weight of the chemical test.
- c. Question number one: is it possible for a person whose blood alcohol concentration was above the per se or presumptive level to be acquitted of DWI?
- d. Question number two: is it possible for a person whose blood alcohol concentration was below the per se or presumptive level to be convicted of DWI?
- e. Summary point: The chemical test provides presumptive evidence of alcohol influence, but does

Example:

- o chemical test result 0.13;
- o arresting officer's testimony concerning defendant's driving, appearance, actions, etc., is sketchy or unclear;
- o defendant and/or other witnesses testify that defendant drove, acted, spoke, etc., in a normal fashion;
- o result: not guilty.

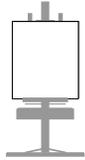
Example:

- o chemical test result 0.05;
- o arresting officer provides clear, descriptive testimony concerning defendant's impaired driving, stuporous appearance, slurred speech, difficulty in balancing, inability to perform field sobriety tests, etc.
- o result: guilty.

Solicit participant's questions concerning the nature and legal significance of "presumptive evidence."



5 Minutes

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not provide conclusive evidence.

**C. Illegal Per Se Statute:
Driving with a Prohibited
Blood Alcohol Concentration**

1. Illegal Per Se is another drinking-driving offense, related to, but different from DWI.

2. Elements of the Offense: it is unlawful for any person to...
 - a. operate or be in actual physical control of...
 - b. any vehicle...
 - c. within this state...
 - d. while having a blood alcohol concentration at or above state's level.

3. Illegal Per Se makes it an offense, in and of itself, to drive while having a BAC at or above state's level.
 - a. To convict someone of an Illegal Per Se violation, it is not necessary to establish that the driver was under the influence.
 - b. It is sufficient to establish that the driver's BAC was at or above state's level while operating a vehicle in this

Instructor please note: If your state does not have an Illegal Per Se law, you may wish to skip this segment.

Write "Illegal Per Se" on dry-erase board or flipchart.

Compare and contrast these elements with the elements of DWI.

Point out that "Per Se" roughly translates as "in and of itself."

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	<p>state.</p> <p>4. The Illegal Per Se law does not replace the DWI law: the two statutes work side-by-side.</p> <ul style="list-style-type: none">a. The two laws define two separate offenses.b. One law makes it an offense to drive while under the influence of alcohol and/or any drug.c. The other law makes it an offense to drive while having more than a certain percentage of alcohol in the blood.d. Since there is an Illegal Per Se law, why is it necessary to retain the old DWI law? <p>5. For the Illegal Per Se offense, the chemical test result is <u>conclusive</u> evidence.</p> <p>6. Principal purpose of Illegal Per Se law is to facilitate <u>prosecution</u> of drinking-driving</p>	<p> Pose the question to the class. Probe for responses until at least the following points have emerged:</p> <ul style="list-style-type: none">o some suspects refuse to submit to chemical testing;o some violators are under the influence of drugs other than alcohol;o some are under the influence of alcohol at BACs below state's level. <p>Contrast with the DWI offense.</p> <p>NOTE: Instructors must know their state law.</p>
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5 Minutes

- a. Usually, it is impossible to obtain a legally admissible chemical test result until after the suspect is arrested.
- b. In some cases, suspects will refuse the chemical test after being arrested; then, the case will depend strictly on the officer's observations and testimony.
- c. While making a DWI arrest, an officer should always assume that the suspect will refuse the chemical test.
- d. The officer should strive to organize and present all observations in the written report and in verbal testimony, in such a clear and convincing fashion that the violator will be convicted regardless of whether the test is taken and regardless of the test result.

D. Preliminary Breath Testing: Obtaining an indication of suspect's BAC prior to arrest

1. Purpose of the law: The preliminary breath testing law permits a police officer to request a DWI suspect to submit to an on-the-spot breath test prior to arresting the suspect for DWI.
2. Application of the law: When an officer has reason to believe...

NOTE: Stress the importance of thorough documentation, i.e., "The DWI Investigative Field Notes" that will be explained in Session IV.

Instructor please note: If your state does not have a preliminary breath testing law, skip this segment.

Aids	Lesson Plan	Instructor Notes
	<ul style="list-style-type: none"> a. From the manner in which a person is operating or has operated a motor vehicle... b. That the person has or may have committed the offense of operating while under the influence... c. The officer may request that person to provide a sample of breath for a preliminary test of the alcohol content of the blood... d. Using a device approved for this purpose. <p>3. Application of preliminary breath test results.</p> <ul style="list-style-type: none"> a. The preliminary breath test shall be used for helping to determine whether an arrest should be made. b. Results of the preliminary breath test may not be used as evidence against the defendant in court. <p>4. There may be penalties for refusal to submit to the preliminary breath test.</p> <ul style="list-style-type: none"> a. License action (suspension, etc.) b. Fine c. Other penalty provisions 	<p><u>Please note:</u> Preliminary breath testing laws differ significantly from one state to another. Substantial modification of this segment of lesson plans may be needed to reflect your state's laws accurately.</p> <p>Instructor please note: Outline the statutory/ administrative penalties for PBT refusal in your state, if any.</p>

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30 Minutes



E. Case Law Review

The following cases are landmark court decisions relevant to the admissibility of the SFSTs including Horizontal Gaze Nystagmus.

Challenges to the admissibility have been based on:

1. Scientific validity and reliability.
2. Relationship of HGN to specific BAC level.
3. Officer training, experience, and application.

The National Traffic Law Center (NTLC) has a list of every state's Appellate Court/ Supreme Court case addressing HGN and SFST issues. The materials are available to law enforcement at www.ndaa.org/apri/NTLC or by phone (703) 549-4253.

See Blake case.

See Loomis case.

See Murphy case.
See Homan case.
See Smith

NOTE: Prepare the following matrix on the dry-erase board or flipchart using Blake, Loomis, Murphy, Homan, and Smith. Refer to Attachment A to select case law applicable to your state.

<u>CASE NAME</u>	<u>STATE</u>	<u>YEAR</u>	<u>APPELLATE/ SUPREME COURT</u>	<u>ADMISSIBLE</u>	<u>EVIDENCE OF BAC</u>
Blake					
Loomis					
Murphy					
Homan					
Smith					

4. State vs. Blake

- a. This is considered a landmark case on HGN,

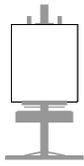
Write "Arizona; 1986" opposite **Blake** on the matrix.

Place a large asterisk on the matrix next to **Blake**.

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because it was the **first State Supreme Court-level** ruling.

- b. The Arizona Supreme Court found that HGN satisfies the **Frye** standards for evidence to corroborate, or attack, the issue of a suspect's impairment.

- c. In effect, in the **Blake** case, the Arizona Supreme Court took judicial notice of HGN: Henceforth, in Arizona, it is not necessary to introduce expert scientific testimony to secure the admissibility of HGN.

- d. The court also set standards governing the training of officers who would be qualified to testify about HGN.

- e. The Court also explicitly found that HGN **cannot** be used to establish BAC quantitatively in the absence of a chemical test.

5. People vs. Loomis

- a. Court held that the officer was not entitled to testify as either a lay or expert witness about HGN, or to give his opinion about the defendant's BAC.



Write "**Frye Standards**" on the dry-erase board or flipchart. Clarification: The **Frye** case (decided by the U.S. Supreme Court) set the standards governing the admissibility of "new" scientific evidence.

Under "Admissibility" opposite **Blake**, write "**Absolutely YES**".

Under "Evid of BAC" opposite **Blake**, write "**Absolutely NO**".

Write "California; 1984" opposite Loomis on the matrix.

Point out that the arresting officer attempted to use the onset angle to give a quantitative estimate of BAC. The court would not accept it.

Under "Evid of BAC" opposite **Loomis**, write **NO**.

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- b. Court held that HGN is new form of scientific evidence that will be allowed only when there is preliminary showing of its general acceptance in the scientific community.

6. State vs. Murphy

- a. The court ruled that the results of a HGN test could be admitted into evidence because HGN was one of the SFSTs and the observations of intoxication obtained from the test were objective in nature.
- b. The court noted that the officer was properly trained to administer the test and that there was no need that an officer be specially qualified to be able to interpret the results.
- c. The court also ruled that HGN test results could not be used to determine a specific BAC level.

7. State vs. Homan

- a. The court ruled that SFSTs conducted in a manner that departs from the methods established by NHTSA are “inherently unreliable.”

Point out that the officer's testimony clearly demonstrated that he was not properly trained in HGN, and didn't really understand how the test is to be given.

Under "Admissibility?" opposite **Loomis**, write **NO**.

Write "Iowa; 1990" opposite **Murphy** on the matrix.

Under "Appellate Court Case" write "**YES**".

Under "Admissibility" opposite **Murphy** write "**YES**".

Under "Evidence of BAC" write "**NO**".

Write "Ohio; 2000" opposite **Homan** on the matrix.

Under "Supreme/Appellate Court" write "**YES**".

Under “Admissibility” write “**NO**”.

Under “Evidence of BAC” write “**NO**”.

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- b. The court noted the statement in the NHTSA Participant Manual which states “if any of the SFST elements is changed, the validity of the tests is compromised.”
- c. This decision was based upon an older edition of this manual and was a strict interpretation by the court. The phrase in question only applied to the use of SFSTs for training purposes.

8. Smith vs. Wyoming

- a. For the purpose of establishing probable cause, an officer may testify to the results of field sobriety tests (including HGN) if it is shown that the officer has been adequately trained and conducted them in substantial accordance with that training.
- b. Deficiencies in the administration of the SFSTs go to the weight accorded the evidence and not to its admissibility.

9. Summary of HGN Case Law.

Note: “FOR TRAINING PURPOSES, THE SFSTs ARE NOT AT ALL FLEXIBLE. THEY MUST BE ADMINISTERED EACH TIME, EXACTLY AS OUTLINED IN THE COURSE.”

Regarding Homan and State vs. Schmitt, 101 Ohio St 3d 19, 2004.

Also: See SFST Instructor’s Manual, Session VII, page 4, Instructor’s Notes column.

See the Administrator’s Guide, page 8, number 8.

Note: The Homan decision does not preclude officers from testifying to observations even if SFSTs are barred. See *Ohio v. Schmitt*, 101 Ohio St.3d 79, 2004.

Write “Wyoming; 2000” opposite **Smith** on the matrix.

Under “Supreme/Appellate Court” write “**SUPREME**”.

Under “Admissibility” opposite Smith write “**YES**”.

Under “Evidence of BAC” opposite Smith write “**N/A**”.

Solicit participants' questions and comments about case law.

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- a. The prevailing trend, in recent years, is for courts to admit HGN as evidence of impairment, provided the proper scientific foundation has been laid.
- b. But courts consistently reject all attempts to introduce HGN as evidence of a quantitative BAC.

10. Case Law of Relative Importance.

- a. State vs. Ricke
 - (1) The court held that HGN test results could be admitted into evidence to **corroborate chemical test evidence** that a person was operating a motor vehicle with a BAC level at or above 0.10.
 - (2) The court also held that HGN results could be admitted as **independent proof** for the offense of DWI.
- b. State vs. City Court of City of Mesa
 - (1) The court ruled that in cases where there is no chemical test to determine a BAC level, HGN test results can be admitted the same as of field sobriety tests to show a **neurological dysfunction**, one cause of which could be the ingestion of alcohol.

NOTE: For further information, contact: American Prosecutors Research Institute's National Traffic Law Center, 99 Canal Center Plaza, Suite 510, Alexandria, Virginia, 22314, (703) 549-4253 to obtain a copy of Frye v. Federal Rules, May 1994 (an in-depth discussion of Frye).

Write each case on dry-erase board or flipchart.

Write "AZ; 1989" on dry-erase board or flipchart.

Write "In An Illegal Per Se Case" on dry-erase board or flipchart.

Cannot be used as evidence of specific BAC level.

Write "AZ; 1990" on dry-erase board or flipchart.

Write "No Chemical Test - HGN Admissible".

Write on dry-erase board or flipchart - "Cannot be used as evidence of specific BAC level".

NOTE: Use Attachment B for any relevant discussion.

TEST YOUR KNOWLEDGE

INSTRUCTIONS: Complete the following sentences.

1. The elements of the Basic DWI Law are:
 - a.
 - b.
 - c.
 - d.
2. If DWI is a criminal offense, the standard of proof is _____

3. The purpose of the Implied Consent Law is _____

4. Under the Implied Consent Law, chemical test evidence is _____
_____ evidence.
5. The Illegal Per Se Law makes it unlawful to _____

6. The PBT law permits a police officer to request a driver suspected of DWI to ____

7. PBT results are used to help determine _____
