

State of
Colorado

Impaired Driver

Enforcement
Manual

2019

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IMPAIRED DRIVING ENFORCEMENT MANUAL FOR THE STATE OF COLORADO

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COLORADO OFFICE OF TRANSPORTATION SAFETY

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COLORADO TASK FORCE ON DRUNK AND IMPAIRED DRIVING

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INTRODUCTION

Across the nation, more people have died in driving under the influence (DUI) crashes since 1982 than the total number of American soldiers killed in battle since 1950. This includes the Korean War, Vietnam, Desert Storm, and Operation Iraqi Freedom combined. (Statistical Summary – America’s Major Wars)

Per National Highway Traffic Safety Administration (NHTSA) data, 65 deaths and injuries occur each hour in an impaired driving related crash. On average, in Colorado, one person dies every fourteen hours from injuries received in a motor vehicle related crash. NHTSA currently estimates each fatal crash costs, \$1,150,000, each injury crash costs \$52,900, and each property damage crash costs about \$7,500. (NHTSA 2017)

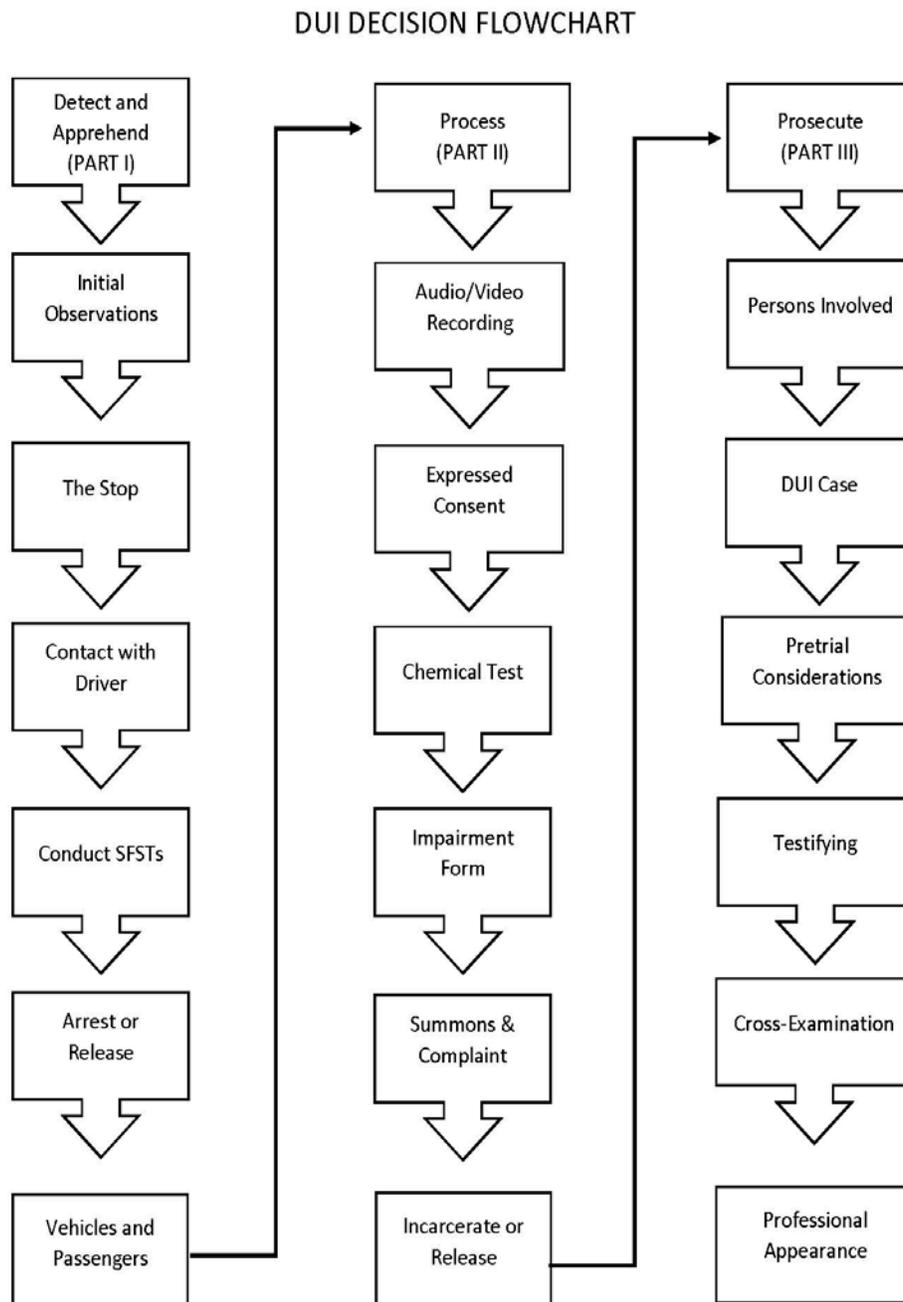
It is clear that the economic and human toll associated with impaired drivers is catastrophic and affects all of society through taxes for law enforcement services, ambulance services, medical facilities, costs of incarceration, rehabilitation agencies, social security and welfare costs for survivors, and increased insurance premiums.

Law enforcement officers are the first line of defense in the efforts to reduce alcohol and drug related driving incidents. Other components of the system include prosecutors, judges, probation departments, treatment centers, and other governmental agencies. These different agencies work together to enforce statutes aiming to reduce the number of impaired drivers on Colorado roadways.

This manual was written to complement the Colorado District Attorneys’ Council’s “DUI/DWAI Manual for Prosecutors.” The goal of this manual is to help Colorado peace officers, in detecting, apprehending, processing and testifying about the impaired driver. It is designed to establish standardized, consistent guidelines and procedures for DUI detection, apprehension, and prosecution throughout the state. It is meant to be a useful tool to clarify and simplify enforcement tasks. This document is not the last nor only word in procedure, and is not intended to dictate policy to any law enforcement agency. However, it is intended to assist all agencies. Since this manual was first introduced in 1977, many Colorado law enforcement agencies have implemented it in its entirety as departmental policy, furthering the goal of statewide uniformity.

DUI DECISION FLOW CHART

There are three parts to the DUI process. Part one is the Detection and Apprehension phase wherein an officer will make initial observations of a vehicle in motion, make a decision as to arrest or release the subject, and decides what to do with the defendant's vehicle and any passengers. Part two starts with the preservation of initial evidence, continues through the issuance of a summons and complaint, and the officer's decision to incarcerate or to release the defendant per agency policy. Part three consists of the documentation of all evidence, filing the case in court, and possibly courtroom testimony. The following flowchart depicts the associated steps in a DUI contact described throughout the manual.



DETECTION AND APPREHENSION (Part I)

Part one is the detection and apprehension phase and is the entire process of identifying and gathering evidence to determine whether a suspect should be arrested for an impaired driving violation. During this phase an officer will develop reasonable grounds to stop and probable cause to arrest the violator after observing the physical and mental effects of alcohol and or other drugs.

The detection of persons driving under the influence is considered the most important of the three phases. Without good detection, enforcement action cannot be taken. We often think the detection process is easy; however, it is not. Anyone can spot a driver who is obviously under the influence. The driver may weave, drive 10 miles per hour, and run red lights – not even knowing they exist – or crash into anything in his or her path. These drivers are a threat for several reasons. Although they may feel their driving ability is sound, their reaction time is slowed. They have a false sense of control. Combine slow reaction time with the feeling of control and they are a very dangerous threat to themselves, other motorists, and pedestrians.

Some intoxicated drivers can be extremely difficult to detect. Some people who have used drugs (including alcohol) for many years develop the ability to partially compensate for certain effects from intoxication. They can often attempt to mask the visual effects in such a way as to escape detection by the average person. Even though they appear to compensate well, their perception and awareness is altered to the point that they may run over a pedestrian without knowing it. Due to the increased numbers of drivers who are under the influence of drugs other than alcohol and polydrug use, it has become necessary for police officers to be alert to the masking techniques. For instance, a driver under the influence of marijuana may drink one beer which leaves the odor of an alcoholic beverage on his or her breath. This driver, upon being arrested for DUI, could request a breath test. The breath alcohol test would determine a breath alcohol concentration below the presumptive level for DUI. An officer who is not alert to the possibility of a drug induced intoxication might release the driver without proper charges.

INITIAL OBSERVATIONS

Several studies show that the impaired driver inherently makes certain mistakes while driving. Many of these mistakes are predictable. By being alert for these mistakes, the officer may develop reasonable grounds to stop the driver and investigate for DUI. Any one of the cues presented in these categories predict a driver is DUI at least 35 percent of the time. Generally, the probability of DUI increases substantially when a driver exhibits more than one of the cues.

Note: Besides the information in Session 5 of the International Association of Chiefs of Police (IACP) and NHTSA DWI Detection and Standardized Field Sobriety Testing (SFST Manual), there is a brochure published by NHTSA that contains these cues, The Visual Detection of DWI Motorists DOT HS 808 677.

The driving behaviors are presented in four categories.

PROBLEMS IN MAINTAINING PROPER LANE POSITION

- Weaving
- Weaving across lane lines
- Straddling a lane line
- Swerving
- Turning with a wide radius
- Drifting
- Almost striking a vehicle or other object

SPEED AND BRAKING PROBLEMS

- Stopping problems (too far, too short, or too jerky)
- Accelerating or decelerating for no apparent reason
- Varying speed
- Slow speed (10+ mph under limit)

VIGILANCE PROBLEMS

- Driving in opposing lanes or wrong way on one-way
- Slow response to traffic signals
- Slow or failure to respond to officer's signals
- Stopping in lane for no apparent reason
- Driving without headlights at night
- Failure to signal or signal inconsistent with action

JUDGMENT PROBLEMS

- Following too closely
- Improper or unsafe lane change

- Illegal or improper turn (too fast, jerky, sharp, etc.)
- Driving on other than designated roadway
- Stopping inappropriately in response to officer
- Inappropriate or unusual behavior (throwing, arguing, etc.)
- Appearing to be impaired

POST STOP CUES

- Difficulty with motor vehicle controls
- Difficulty exiting the vehicle
- Fumbling with driver's license or registration
- Repeating questions or comments
- Swaying, unsteady, or balance problems
- Leaning on the vehicle or other object
- Slurred speech
- Slow to respond to officer or officer must repeat
- Providing incorrect information, changes answers
- Odor of alcoholic beverage from the driver

VISUAL CUES OF IMPAIRED MOTORCYCLE OPERATION

EXCELLENT CUES (50% or greater probability)

- Drifting during turn or curve
- Trouble with dismount
- Trouble with balance at a stop
- Turning problems (e.g., unsteady, sudden corrections, late braking, improper lean angle)
- Inattentive to surroundings
- Inappropriate or unusual behavior (e.g., carrying or dropping object, urinating at roadside, disorderly conduct, etc.)
- Weaving

GOOD CUES (30 to 50% probability)

- Erratic movements while going straight
- Operating without lights at night
- Recklessness
- Following too closely
- Running stop light or sign
- Evasion
- Wrong way

The Detection of DWI Motorcyclists DOT HS 807 856 (revised March 2013).

OBVIOUS TRAFFIC VIOLATIONS - Anytime a driver fails to stop for a red light or a stop sign, travels at excessive or very slow speeds, especially during late evening or early morning hours, an officer should be alert to the possibility the driver may be under the influence of alcohol and or drugs.

HEADLIGHTS - Anytime an officer observes improper use of headlamps (fails to turn on the vehicle lights or to dim lights to oncoming traffic) the possibility of an impaired driver exists.

OVERDRIVING - Many times the impaired driver will display this characteristic. Conversely, an impaired driver can also become very careful, very slow, and very deliberate in his or her actions. The impaired driver often aims rather than drives the vehicle.

SITTING AT OR THROUGH GREEN TRAFFIC SIGNALS - The impaired driver may not be aware that a traffic signal light has changed and it is time to proceed. Likewise, an impaired driver may stop for a green light and proceed on a red light.

PERCEPTION PROBLEM IN STOPPING - The impaired driver often stops too short or far into the intersection. It is not uncommon for an officer to observe an impaired driver jerk excessively when stopping, or to suddenly stop the vehicle when conditions do not call for it.

WEAVING OR LANE HUGGING - Drifting from lane to lane, across center lines or off the roadway is not uncommon. An experienced drinker, while driving, may hug the lines thinking they can follow the lines to stay on the road.

TAILGATING - Perception difficulties often develop when a person is under the influence of alcohol and or another drug. The impaired driver often fails to perceive that an object is closer than it appears, or, in some instances, an object may not exist at all.

OPEN CONTAINERS - The State of Colorado has adopted laws regulating open alcohol and marijuana containers in vehicles. C.R.S. § § 42-4-1305 and 42-4-1305.5. It is unlawful for a person, while in the passenger area (front seat) of a motor vehicle that is on a public highway of this state or the right-of-way of a public highway, to knowingly drink an alcoholic beverage, have in his or her possession an open (or has broken seal) alcoholic beverage container. Open alcoholic beverage in vehicles can be circumstantial evidence of consuming the substance. The law which applies to marijuana is almost the same, except that it requires evidence that marijuana has been consumed in the motor vehicle. An officer should be alert to the possibility the driver is intoxicated, to begin focusing on indicators of impairment.

EXCESSIVE AND ERRATIC BACKING – Improper backing of a vehicle often occurs in parking lots, especially at or near local bars. Impaired drivers can take wrong exits or

entrances onto other traffic arteries. Anytime improper backing is observed, especially backing movements on a traffic ramp, it is possible an intoxicated driver is operating the vehicle.

STOPPING THE VEHICLE

Driving behavior is the critical first part of establishing valid vehicle contact and is the first portion of developing a DUI case. A DUI case does not start with the first smell of an odor of an alcoholic beverage and or drugs. After developing a legal reason to make a valid traffic stop, an officer should be alert for the following reactions before and after turning on emergency lights.

UNUSUAL REACTION TO EMERGENCY LIGHTS – The impaired driver may not observe the flashing lights on an emergency vehicle and may not react to the lights at all. The driver may continue a considerable distance before becoming aware that an officer is behind them. An impaired driver may also have a severe reaction to lights (e.g. someone with dilated pupils). Officers should be alert to the possibility that a driver may react instantly to emergency vehicle lighting and make an immediate stop on the road or pull over quickly, making a sudden and hazardous stop. An officer should also look for items being thrown from the vehicle and movements of the driver and or passenger(s) that could pose a risk when they are contacted.

UNUSUAL REACTION TO SIREN - If it becomes necessary to activate the siren, do so with caution. An impaired driver's reaction can be just as unpredictable as with emergency lighting. Keep a safe, reasonable distance behind the subject; if possible, select a safe location where traffic is light. Keep officer safety, the safety of the subject, and the safety of the public in mind.

SELECTION OF THE LOCATION - If possible, the officer should select the location of the traffic stop. In selecting the location, consider the availability of lighting, traffic volume and, should an officer decide to conduct field sobriety tests, the location should minimize exposure to vehicle traffic and should maximize visibility.

DRIVER BEHAVIOR - Just prior to and immediately after the stop, watch for suspicious movements on the part of the driver and of the passengers. Do not rush up to the subject's vehicle after the stop. Sit back and observe for a few seconds before approaching the vehicle.

CONTACTING THE DRIVER

The traffic violations observed from the vehicle in motion provide identifiable clues as to the potential of an impaired driver. Being alert to cues and indicators of impaired driving, an officer should be able to recognize an impaired driver.

APPROACH TO THE VEHICLE - Observe the driver's hands as soon as possible and keep them in view. Do not overlook the trunk or back seat when approaching. Keeping

safety in mind, get close enough to attempt to smell an odor of an alcoholic beverage on the driver's breath. Often, the car interior may contain a heavy odor of an alcoholic beverage and or drugs. You may also see containers of intoxicating substances or beverages lying on the floor or on the seat. Pay attention to other evidence which may be in view such as rolling papers, pipes, or other suspected drug paraphernalia. Be prepared to articulate any observations made relative to a DUI arrest, including the detection of smells which could be associated with drug usage and noting the difference between raw and burnt marijuana.

EXPLANATION FOR STOPPING - Identify yourself, your agency, and why you stopped the vehicle. Do not say you suspect the driver of DUI. This may place the driver on the defensive. State only the actual reason for the stop such as improper lane usage, speeding, and so on.

REQUEST FOR DRIVER'S LICENSE, VEHICLE REGISTRATION AND PROOF OF INSURANCE - Watch closely how the driver attempts to search for the driver's license and other documents. The driver may pass by them several times. If you ask for a license and the driver gives you a credit card, record it in your reports. At this point, mentally record verbal responses. Note if the driver's speech is slurred mumbled or *thick tongued* and how (i.e. articulate why you believe speech is slurred don't just make conclusory statements). Observe how well the driver can divide attention. Ask the driver a question that requires more than a "yes" or "no" answer while searching for the license and other documents. A sober person can do two or more simple tasks like these at the same time generally. For example, don't just ask the driver if they have been drinking. Consider asking the driver how much have you had to drink today?

PHYSICAL OBSERVATIONS OF DRIVER - Begin making physical observations of the driver. Note the driver's eyes, speech, clothing, and other observations. If, at this point, you have detected objective signs such as an odor of an alcoholic beverage on the driver's breath, bloodshot eyes, tremors, or others then you are ready to proceed to the CONDUCTING SOBRIETY EVALUATIONS phase of the process. Keep in mind that while individual observations such as inappropriate responses to questions, difficulty locating registration, unzipped or wet trousers aren't necessarily clues of impairment by themselves, they are often pieces to a puzzle. All observations should be documented; the smallest of details can be very important to the overall outcome.

CONDUCTING STANDARDIZED FIELD SOBRIETY TESTS (SFSTs)

PURPOSE OF SFSTs - Standardized Field Sobriety Tests allow an officer to evaluate the effects of alcohol and or drugs on a person suspected of being impaired. This may help the officer determine if probable cause exists to require the driver to submit to chemical testing, and also allows the officer to gather evidence of intoxication to present in court and related hearings.

LEGAL CONSIDERATIONS - Standardized field sobriety tests have been held to be a

search implicating Fourth Amendment protections. Thus, in order to conduct roadsides, an officer must have either probable cause and a search warrant, probable cause and an exception to the warrant requirement, or consent.

As a practical matter, it is not feasible to obtain a search warrant prior to administering SFSTs. The case of *McGuire v. People*, 749 P.2d 960 (1988) held that roadsides are a search incident to arrest **if** an officer has probable cause to believe that a driver is DUI **prior to administering the tests**. However, the nature of the SFSTs is such that they require at least a modicum of cooperation to complete, and an officer cannot force a person to perform the tests. If a driver chooses not to cooperate, his refusal to do roadsides may be used against the defendant at trial, because he has no right to refuse a lawful search incident to arrest. Moreover, the officer need not advise the defendant of this fact.

In most circumstances, however, the officer's observations of the defendant during the SFSTs provide additional evidence that, along with the other observed indicia of intoxication, gives rise to probable cause. If an officer does not have probable cause to believe that a driver is DUI prior to the administration of roadsides, ordering the driver to do said roadsides would be an illegal search, and so the roadsides must be conducted pursuant to voluntary consent by the driver.

DECISION TO CONDUCT SFSTs - Although this may be obvious, consideration of several factors should be done prior to requesting the driver to step out of the vehicle for the tests. The attitude of the driver, the condition and attitude of the passengers, the neighborhood, the availability of a cover officer, if the location presents a traffic hazard, and any adverse terrain or weather conditions are important considerations. If conducting the tests at the scene presents a hazard, and if probable cause to arrest exists based on driving behavior and physical observations, arrest the driver and remove the driver from the scene. Conduct the tests later in a safer environment. **Always wait for cover officer (if possible) when in doubt; officer safety is the first priority in any enforcement situation.**

ASKING THE DRIVER OUT OF THE VEHICLE - If it is safe and justified to administer SFSTs, choose a location which affords a hard, level surface, protected from the elements (if possible). Ask the driver (politely) to turn the vehicle off and to exit the car and walk to the predetermined location. Watch the driver closely as he or she goes to the area. If intoxicated, the driver may stumble or use the car for support. As the driver walks, watch for staggering or unsteadiness. Watch to see if the driver follows your directions and walks directly to the location you have pointed out, or if the driver becomes confused and needs to be redirected.

Order the passengers to remain in the vehicle. Conduct the tests in a position which allows you to observe the driver's actions, but still allows you to remain in a safe position should a passenger become a problem. While a perfectly flat, dry, hard surface with no debris is best, SFSTs may be conducted in less than perfect conditions. See the preface

in the SFST Manual. Be reasonable in your decision when it comes to the evaluation of someone who has performed SFSTs on a less than perfect surface. Use whatever lighting is available for officer safety, and the driver should be turned away from any patrol car flashing lights if possible.

Other possible observations of impairment may include difficulty locating and or operating windows or door handles, problems removing seatbelt, dropping paperwork in the car or on ground, pausing when first stand up to gain balance, using the vehicle for support, and leaving door open when walking from vehicle.

ELIMINATION OF MEDICAL CONSIDERATIONS - Before requesting the driver to perform SFSTs, attempt to determine if the driver has any medical reasons that may impact the person's ability to complete the tests. Ask the driver to describe any illnesses or medical conditions, if medication is being taken, and if the driver is a diabetic. If the driver has a medical condition which may affect balance, consider administering an alternative test(s). Ask these questions in a manner which will not give the driver the idea of creating an excuse for observed behavior. Eliminate all possible medical or physical reasons, if possible, which could affect driving behavior **except** alcohol or other drugs.

ADVISEMENT OR REFUSAL - Standardized field sobriety tests may be conducted only when: 1) the driver voluntarily consents to perform the tests; or 2) the law enforcement officer has probable cause to arrest the driver for an impaired driving charge. *People v. Carlson*, 667 P.2d 310 (Colo. 1984). When determining whether consent is voluntary, courts consider whether the officer had the consent of the driver to perform the tests. Although such advisement is not the only consideration, it is a factor to be considered. Consequently, develop the habit of advising the driver that SFSTs are voluntary prior to administering them.

In *McGuire*, 749 P.2d at 963, the Supreme Court held refusal to perform SFSTs is admissible at trial even though the officer did not advise the driver of the consequences of his refusal.

PERFORMANCE AND EVALUATION OF THE SFSTs - It is important to establish a routine when administering SFSTs. A well-organized routine will allow the process to flow smoothly. It will also assist with court testimony, if that becomes necessary, because consistency allows testimony to easily flow regarding how the instructions were given. The instructions should be the same each time, and must be only those instructions in the SFST manual. Remember, the instructions must be complete and easy for a sober person to understand. Inform the driver to perform the SFSTs, to the best of his or her ability, and if the instructions are not understood, the driver may ask you to repeat them. Speak slowly and clearly, and loud enough to be heard distinctly under the existing conditions. After giving the instructions for each test, ask the driver if the instructions are understood. Remember, the officer may later be asked to repeat the instructions to a jury, and if the jury cannot understand the instructions, they will not expect the driver to have understood them. Each test should be demonstrated for the subject but keep officer safety in mind at all

times.

Each time the SFSTs are conducted the subject should be asked the following preparatory questions to better evaluate the performance of the tests. If the subject should answer “yes” to any of the questions, ask clear follow-up questions and document the responses.

- Do you have any physical limitations?
- Are you under the care of a doctor or dentist for anything?
- Are you taking any drugs or medication?
- Do you have any eye problems or wear glasses or contacts?
- Do you have anything in your mouth, like false teeth, partial plates, chewing tobacco,
- gum, or jewelry (remove prior to breath testing)?

The tests should always be offered and administered in order, if possible. After the validated tests, the officer may ask the driver to complete additional tests. Whenever practical, the officer should use the same SFSTs in the same order each time.

1. **HORIZONTAL GAZE NYSTAGMUS (HGN) TEST**– only officers who have successfully completed an SFST class (currently 24-hours) taught by a credentialed SFST instructor may administer this test. Officers without the proper credentials who use this test as part of their investigation will jeopardize the creditability of their impaired driving arrests and the creditability of the HGN test. A police officer’s testimony concerning the administration and interpretation of the HGN test and results is expert testimony. *Campbell v. People*, 443 P.3d 72 (Colo. 2019).

Officers who are trained in the use of the HGN test should establish a routine of preliminary questions to include whether the suspect is wearing contact lenses. The HGN test may be conducted with contact lenses in place. The officer can administer this test with the suspect in a standing, sitting, or lying position. The subject must be lying on his or her back with head facing straight, not tilted to the side. Typically, the officer will administer the HGN test when the officer is in an interview position with gun side away. Glasses should be removed prior to the administration.

Recommended instructions: “Put your feet together, heels touching heels, toes touching toes and stand with your hands at your side. I am going to check at your eyes. Keep your head still and follow [this object] with your eyes only. Do you understand?”

When performing this test, start with the stimulus held vertically, centered, approximately 12 to 15 inches in front of the subject’s nose with the stimulus held slightly above the subject’s eyes. Check for equal pupil size and resting nystagmus. Move the stimulus across the left eye first with an

approximate two second sweep. When reaching maximum deviation, without hesitation, move the stimulus from the left eye, across the face to maximum deviation with the right eye, then back to the nose. This sweep is to check whether the subject's eyes track equally. This should be done twice. Once you have checked for equal tracking, there should be a noticeable pause before moving on. Again, sweep to the left eye at approximately two seconds out to maximum deviation and two seconds back to center. Continue across to the right eye at the same speed. Repeat the sequence twice to determine if the subject has a lack of smooth pursuit. This should be an approximate four second sweep (two seconds per eye). The next sweep should stop at maximum deviation of the left eye to determine if distinct and sustained nystagmus at maximum deviation is present, then at maximum deviation of the right eye. The stimulus should be held for a *minimum* of four seconds. Repeat the sequence twice to verify if the subject has distinct and sustained nystagmus at maximum deviation. The last sweep should determine onset of nystagmus prior to 45 degrees. Moving the stimulus slowly across the left eye taking approximately four seconds, look for onset prior to 45 degrees. If it is observed, stop moving the stimulus and hold it steady to verify any jerking of the eye. Upon that determination, move the stimulus slowly across the right eye to look for onset prior to 45 degrees. Repeat the sequence twice to verify if the subject has an onset of nystagmus prior to 45 degrees.

a. **VERTICAL GAZE NYSTAGMUS (VGN) TEST** – Instruct the subject to continue to follow the object with his or her eyes, keeping the head still. Hold the stimulus horizontally approximately 12 to 15 inches from the subject's nose. Slowly move the stimulus upward until the subject's eyes are elevated as far as possible for a minimum of four seconds. Repeat the sequence twice to verify whether VGN is distinct and sustained. VGN represents a high dose of alcohol for that individual or other drug impairment.

2. **WALK AND TURN (WAT)** - WAT test is a divided attention test. In order for the subject to perform WAT they must concentrate on performing more than one task at a time. It is important to explain instructions clearly, and the subject understands what is expected. This test is divided into two stages. The first stage is the instruction stage. During this stage the subject is required to balance and listen to and remember your instructions. The second stage, walking, requires the subject to balance, show small muscle control (counting out loud), and tests short term memory.

Recommended instructions: "Place your left foot on the line (real or imaginary) [demonstrate placement of left foot], now place your right foot on the line ahead of the left foot, with the heel of your right foot against the toe of the left foot [demonstrate placement of both feet]. Place your arms

down at your sides. Maintain this position until I have completed the instructions. Do not start to walk until told to do so. Do you understand?" (Instruction stage)

You must receive some affirmative response before continuing.

"When I tell you to begin, take nine heel-to-toe steps down the line, counting each step out loud and watching your feet.

On the ninth step, leave your front foot in place and use your other foot to take a series of small steps to turn, face the opposite direction then take nine heel-to-toe steps back down the line, watching your feet and counting each step out loud. Keep your hands at your side and don't stop until you are finished. Do you understand the instructions (pause)? You may begin."

- 3. ONE LEG STAND (OLS)** - The OLS is a divided attention test. In order for the subject to perform this test he must concentrate on performing more than one task at a time. It is important that the instructions be explained clearly and the subject understands what is expected. This test is divided into two stages. The first stage is the instruction stage. During this stage the subject is required to balance and listen to your instructions. The second stage is the performance of the balancing and counting stage. The subject is required to balance while standing on one foot and counting properly.

Recommended instructions: "Please stand with your feet together heel-to-heel and toe to toe, arms at your sides. Stand in this position until I tell you to begin. Do you understand (pause)? When I tell you to, I want you to raise one of your legs, either your left or right, whichever you are more comfortable with, straight out in front of you, with your foot parallel to the ground, approximately 6 inches off the ground. Keep both legs straight with your arms at your side. I want you to look at your foot and count out loud: one-thousand one, one- thousand two, one- thousand three and keep on counting until I tell you to stop."

"Do you understand (pause)? Begin." It's important that the officer times this test for 30 seconds.

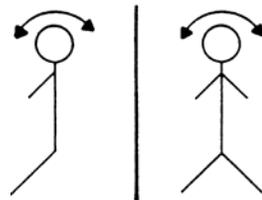
- 4. MODIFIED ROMBERG BALANCE (MRB) (MODIFIED ATTENTION TEST)** - The MRB displays impairment through balance, time estimation, and other physical reactions to impairment.

Recommended instructions: "Stand up straight with your arms to your side, put your feet together, your heels touching heels, your toes touching toes and listen to my instructions.

When I tell you to begin, close your eyes and tilt your head back slightly so I can see your eyes are closed. When I tell you to begin, close your eyes and estimate 30 seconds to yourself. When you think 30 seconds is up, open your eyes, tilt your head forward, and say, 'Stop.' Do you understand my instructions (pause)? Please begin." Remember to ask the subject, "how long was that and how did you estimate that?" The test should be stopped at 90 seconds if the subject has not opened his or her eyes yet.

Research has shown it is best for this test to be performed by the suspect for 30 seconds. It has been found a sober person will demonstrate a slight motion during this test. It can be either front to rear, side to side, circular or any combination. But usually it will be very slight movement. An intoxicated person may show a more pronounced front to rear, or side to side behavior or may stand erect and rigid without any motion, or a combination of all of the above described behaviors. It is important for officer safety to maintain a good interview stance while checking for side to side swaying. It is helpful to step to one side to check for front to rear sways. Alcohol and some drugs will slow a person's perception of time (i.e. time estimate will be longer than 30 seconds). Some drugs will speed-up a person's perception of time (time estimate will be much quicker than 30 seconds). Plus or minus 5 seconds is average.

To document, draw an arrow showing direction of sway and describe the sway in the narrative.



5. **ALPHABET OR COUNTING TEST - Recommended instructions:** "Would you please recite the English alphabet starting with the letter A and end with the letter Z. Do you understand (pause)? Please begin."

- or -

"Would you please count for me? Start with the number 1 and end with the number 10. Then count in reverse order, repeat the number 10 and end with the number 1. Do you understand my instructions (pause)? Please begin."

- or -

“Would you please count backwards from the number 57 to the number 43? Keep your hands at your side and your feet together. Do you understand (pause)? Please begin.”

You must determine if the subject is familiar with the English alphabet prior to asking him to perform this test. If the subject is not familiar with the English alphabet, ask him what grade of formal education has been completed.

If the subject is not able to recite the alphabet, determine if the subject is capable of either counting from 1 to 10 and then 10 to 1 or able to complete one of the other counting tasks.

6. **FINGER TO NOSE (FTN)** - To correctly administer the finger-to-nose, the starting position is with the subject's arms next to his or her side, slightly in front with the palms facing forward and index fingers extended. Make sure the subject touches the **tip** of the finger to the **tip** of the nose. During this test the subject may also sway (front to rear or side to side type movement) which can be evidence of intoxication as well.

Recommended instructions: “Stand-up straight, place your feet together, heels touching heels, toes touching toes, tilt your head back slightly so I can see your eyes are closed. Put your arms to your side palms facing forward and extend the index finger on each hand.

When we begin, I will say *left* or *right*. If I say *left* touch the tip of your *left* index finger to the tip of your nose and return your hand to your side. If I say *right* touch the tip of your *right* index finger to the tip of your nose and return your hand to your side.”

The proper sequence is left, right, left, right, right, left. It is necessary for you to establish a routine for this test. Your instructions should be given the same way every time. When you routinely use this method it is easier for you to remember how the subject performed when recording this in your police report and recalling this information when you testify to this test in court.

All tests should be demonstrated for the subject, keeping officer safety in mind at all times.



DECIDING TO ARREST OR RELEASE

It is the officer's responsibility to make an appropriate decision either to arrest or release the driver based on observed driving behavior, the driver's physical and mental condition in the vehicle, and the observed driver's performance during the SFSTs.

A CDPHE approved Preliminary Breath Test (PBT) device can be used to help an officer make an arrest decision. The best practice is to administer the PBT after the SFSTs have been completed. In an instance where the SFSTs cannot be performed, and there is other articulable evidence of impairment, the officer may decide to use the PBT alone. The actual result displayed by the PBT cannot be used in at trial, and is only used as a determination of probable cause and to require an evidentiary chemical test. C.R.S. § 42-4-1301(6)(i).

These factors, taken together, constitute probable cause for arrest, or should influence the decision to release the driver.

ARRESTING THE SUBJECT - If probable cause exists to arrest the driver for driving under the influence of alcohol or drugs, consider the following recommended procedures: If possible, have another officer available at the time the driver is advised of the arrest. People can be very unpredictable when placed under arrest. Always complete a search of the subject to ensure no weapons or other contraband are present and properly handcuff the arrestee. Handcuffing the arrestee is for officer safety and the safety of the arrestee. Always observe department policy. Properly secure the arrestee in the patrol vehicle.

RELEASING THE SUBJECT - If probable cause to arrest for an alcohol or drug violation has not been established after considering driving behaviors, physical observations, and observations of the SFSTs, the appropriate decision is to release the driver. Appropriate enforcement actions on the observed violations may be taken. A great deal rests on an officer's effectiveness in properly detecting the drunk or drugged driver. The impaired or problem-drinking driver can be difficult to detect and can be very dangerous on the road. According to NHTSA statistics, approximately 40 percent of all traffic fatalities in the United States involved an alcohol or drugs impaired driver.

BE COURTEOUS AT ALL TIMES - Personalities can change when a person is under the influence of alcohol or drugs. When sober, many people can be very pleasant, but when impaired, especially when in contact with an authority figure like a peace officer, a person's personality can become aggressive and unpredictable. An officer should maintain a courteous and pleasant demeanor under all circumstances. Courteous conduct can diffuse a hostile situation and will often be appreciated by the subject when they are no longer

impaired.

DETERMINING DISPOSITION OF THE PASSENGERS AND THE VEHICLE

Anytime an arrest is made where the arrested person was in a vehicle, it is the arresting officer's responsibility to make arrangements for protecting the subject's vehicle and insuring the safety of the passengers. Departmental policy often gives specific direction in this area. The person responsible for the vehicle can give permission to leave the vehicle at the scene, to be removed as soon as possible, generally not more than 48 hours. If there is a sober friend or family member immediately available who can legally drive, that person can take custody of the vehicle with the permission of the arrested person. If not, it is recommended that the vehicle be towed to a safe, secure location. Ensure any passengers in the vehicle are properly taken care of and the disposition of the vehicle is appropriate. The passengers in the vehicle are also witnesses so record their information.

THE PROCESSING PHASE (Part II)

The objective of the processing phase is to prepare accurate reports, insuring all pertinent facts and information are recorded properly. The processing part is defined as the period of time commencing with the arrest of the driver and terminating when the driver has been jailed, placed in a detoxification center, released on bond, or released on a summons and complaint to appear at a later date. It is during this stage that the necessary forms required to prosecute the case successfully are completed. Carefully note accurate times on each form.

The number of reports required to process a DUI driver varies from agency to agency. Forms required by state law are:

- The Affidavit and Notice of Revocation (depending upon the circumstances);
- Summons and complaint;
- If the subject's license is cancelled, denied, revoked and or suspended, a Proof of Service;
- Felony processing, if applicable (forms and procedures vary by jurisdiction).

Other forms, not required by law, but equally important, are a permission for a chemical test form, sobriety examination report form, a chain of custody form, and witness list. All agencies should examine their DUI reporting system to eliminate any unnecessary forms in order to reduce processing time. Logical, effective, and organized work habits during the processing phase can do much to expedite the processing phase. The key is to keep the processing phase moving. The following recommended processing procedure is designed to help reduce the number of forms and the time required to process the driver.

USING AUDIO and VIDEO

Some agencies may use audio and or video recordings as part of investigations, either by means of video camera mounted in a patrol car, body cameras and microphones, or cameras at the station. Jurors often give weight to what they see as the defendant's performance on such recordings. Recordings of the vehicle in motion and of a driver during the performance of SFSTs are important evidence. Similarly, video of a subject shortly after arrest in an office or jail setting depicts the subject in the same or nearly the same manner as when the initial contact was made.

The ultimate issue is whether or not the driver was incapable of safely operating a vehicle due to the consumption of alcohol and or drugs. Many law enforcement agencies use mobile video and audio equipment. If this equipment is utilized by your agency, a standard operating procedure should be developed and followed. When there is a camera mounted in the patrol car it is possible to video a vehicle in motion. Evidence of this nature can be quite convincing when viewed by a jury, and adds credence to the officer's reasonable

suspicion to affect a traffic stop on the suspected violator. When the driver is captured on video or audio recordings, many defense issues are eliminated. For instance, identification of the driver, vehicle identification and license number, the conditions of the stop and the demeanor of the driver and possible witnesses, to include the arresting officer's demeanor and action.

Officers must conduct themselves in a professional manner at all times because the recordings are making a record of what actually occurred. Sometimes the video is not as explicit to the audience as it is to the experienced officer as how the suspect performed the evaluation. Give consideration to making comprehensive notes on what occurred. A review of the video by the deputy district attorney and the officer should be done prior to court proceedings so there are no unexpected surprises.

Consider the following when using video recordings:

- Be professional and courteous;
- Give clear, simple and specific instructions;
- Speak clearly and in a normal tone of voice;
- Do not block the camera's view of the suspect;
- If audio is utilized, speak loud enough to be recorded, and ensure external mics are capturing audio;
- If a clock is not shown in the video, indicate the times when you begin and end SFSTs.

The above guidelines can also be utilized in video recording the suspect at the station. Think of the camera as a jury; remember to present the proper impression regarding your attitude toward the subject. Act as you would in the courtroom, testifying at trial. When recording the administration of SFSTs consider:

- Controlling the flow of the video;
- When using a video camera in the patrol unit, give the location;
- Do not block the camera view, try to capture the subject at all times;
- Be professional;
- Be polite and courteous;
- Be fair and do not belittle the subject;
- Speak clearly and in a normal tone of voice; all audio/visual is recorded (if it's not indicate why);
- Give instructions which are simple and specific;
- Demonstrate how the tests should be performed.

Every officer who comes in view of the camera should be aware of these guidelines. Agencies utilizing video/audio recordings for DUI processing should consult with the local district attorney's office for guidance in handling and storage of the files. It is recommended at a minimum, the following procedures should be employed:

1. Files are evidence and should be handled as such;
2. Maintain a filing system of the recordings;
3. Maintain strict control of the files and protect the integrity as evidence;
4. As evidence, copies of the files must be released to defense attorneys in a timely manner so as not to violate discovery rules;
5. The files should be retained in original form following department policy.

CONDUCTING A TEST FOR ALCOHOL AND OTHER DRUGS

Expressed Consent

Under state law, a person who drives a vehicle in Colorado shall be deemed to have expressed his consent to a test of his blood or breath for the purpose of determining the alcohol content of his specimen. A person who drives a vehicle in Colorado shall be deemed to have expressed his consent to a test of his blood for the purpose of determining the drug content, if you have reasonable grounds to believe he has been driving a vehicle while under the influence of, or impaired by alcohol or drugs or a combination of alcohol and drugs. The form showing consent to give a sample and to perform testing should be completed before the sample is taken. The form itself may vary from agency to agency but should require the same basic information. The subject is required by law to sign the form giving consent to a blood test. If a subject refuses to sign the form, the law states this is a refusal to take the test. The type of test is specified by state statute. The Colorado Department of Public Health and Environment (CDPHE) Rules and Regulations govern the collection of specimens for analysis thereof to determine alcohol and or other drug content by approved methods and procedures. C.R.S. §§ 42-4-1301 and 42-4-1304. **Once the subject chooses which type of sample to give, he may not change his mind. Under extraordinary circumstances, an officer can require a subject to complete a chemical test as chosen by the officer. See Appendix L.**

BREATH TEST

Following CDPHE guidelines, a breath test must be conducted on a certified evidential breath test instrument by a certified operator/instructor and performed following a standard operating procedure. The CDPHE Evidential Breath Alcohol Testing Unit of the Laboratory Services Division is responsible for the implementation of these requirements as outlined in Appendix J Part 4.

The purpose of a breath alcohol test is to determine the actual amount of alcohol contained in the subject's breath. When alcohol is present in a person's bloodstream a proportion of alcohol will be imparted to the breath as blood circulates through the lungs. A breath alcohol test is an accurate, reliable and scientifically accepted method for measuring the alcohol content of a person's deep lung air sample when the test is conducted following the prescribed guidelines. Currently, breath testing instruments measure alcohol present in a breath sample using infrared analytical technology. Infrared light is absorbed by the alcohol molecule, the more alcohol present in the sample chamber the greater the amount of absorption thus resulting in a higher alcohol reading. By statute, the results of a breath test are expressed as grams of alcohol per 210 liters of breath. Whenever a breath alcohol test is conducted a suitable reference sample, known as a standard simulator solution, shall be used with each direct breath test. The results of such a standard, when measured by the instrument, must be within an agreement of plus or minus ten percent of the known reference value. This will establish the accuracy and calibration of the instrument when the test is performed.

A breath sample is used for the direct breath test for determining alcohol concentration. A person must provide an adequate breath sample each time to fulfill the testing requirements of the breath testing instrument for a completed test. If the subject cannot satisfactorily perform the test after a reasonable amount of time, note the person's comments and efforts. Such activity is considered a refusal to comply with the expressed consent law.

BLOOD TEST

If the subject chooses not to take a breath test, they will have the option to submit to a blood test. If the driver is unconscious or if you suspect that the driver's intoxication was caused, in whole or in part, by drugs, the driver does not have the option to choose between a breath and a blood test. Rather, the officer chooses the type of test, and should offer the driver the option of a blood test only. Additionally, if you have probable cause to believe that the driver committed vehicular homicide [DUI based] pursuant to section 18-3-106(1)(b), C.R.S., vehicular assault [DUI based] pursuant to section 18-3-205(1)(b), C.R.S., criminally negligent homicide pursuant to section 18-3-105, C.R.S. or third degree assault pursuant to section 18-3-204, C.R.S., and the driver refuses to provide a sample for a chemical test, you may apply for a warrant to force a blood draw. C.R.S. § 42-4-1301.1(3). In felony cases such as vehicular homicide and vehicular assault (with suspected alcohol use) you should get six tubes of blood, with the third and fourth taken an hour after the first two tubes, and the fifth and sixth drawn an hour after the second set of tubes. While investigating these serious crimes, it is possible to obtain a blood sample pursuant to the Expressed Consent law if the driver is unconscious. C.R.S. § 42-4-1301.1(8). However, it is a much better practice to obtain a search warrant for the blood, if possible. Moreover, a search warrant or separate consent is necessary to conduct the subsequent blood draws. The purpose of taking blood samples three times, each an hour apart, is so that the driver's BAC at the time of driving can be estimated by extrapolating it back from the rate of decrease evidenced by three samples.

There are several very important steps to follow when obtaining a blood sample. Established procedures must be followed when collecting a blood sample. Medical facilities have established procedures for drawing blood and maintaining custody. In some instances, it is the officer's responsibility to provide a specimen kit for collection. This specimen kit, as well as the specimen collection, must meet all the specifications as outlined in CDPHE Rules and Regulations. Each blood alcohol collection kit shall include the following: a chain of custody form, two test tubes containing a 1% sodium fluoride preservative, evidence seals, and a non-alcohol antiseptic towelette. Make certain the person uses a non-alcohol solution for sterilizing the arm before blood withdrawal. The blood sample must be analyzed in accordance with the CDPHE Rules and Regulations.

A. WITHDRAWING THE SAMPLE:

Blood samples shall be collected by venipuncture by a physician, registered nurse, certified paramedic, certified medical technologist, or person whose normal duties include withdrawing blood samples under the supervision of a physician or

registered nurse. Blood samples shall be collected only in an appropriate clinical or public safety facility (e.g. hospital, medical clinic, ambulance, police/sheriff's office etc.).

In no event shall the collection of the blood sample interfere with essential medical care or emergency medical services. The sample must be collected, preserved, stored and maintained under the conditions as set forth in the CDPHE Rules and Regulations as outlined in Appendix J Part 6.

B. MAINTAINING CUSTODY OF THE BLOOD SAMPLE:

Maintaining the chain of custody for the blood sample is very important to ensure that the blood alcohol results will be admitted into evidence in court. If problems arise as a result of a broken chain of custody or improper procedures, then the sample and the test results may not be admitted into evidence and a very important part of the case is lost.

C. COMPLETING THE CHAIN OF CUSTODY FORM:

This form is used to record the custody of the blood sample from the time it is withdrawn from the subject until introduced as evidence at a court proceeding. The form should list the following information:

1. Subject's name.
2. Offense charged.
3. Date and time the sample was drawn.
4. Name and title of the person collecting the sample.
5. A peace officer must witness the blood being withdrawn.

D. MAILING THE BLOOD SAMPLE

If it is your agency's policy to mail the blood sample to the laboratory for analysis, then it is important the steps listed below be followed:

1. Make sure the chain of custody form is correctly completed.
2. Place the evidence seals around the top of the vacutainer tubes.
3. Place the chain of custody form inside the protective case which contains the blood samples.
4. Place the secured protective case containing the blood samples and chain of

custody form in the mailing package, along with the permission for chemical test form, and seal both ends with evidence seals.

5. The mailing package should already have affixed to it the name and address of the laboratory. If it does not, make sure you correctly address it before mailing. Place your agency's address on the package and check for proper postage.
6. Refrigerate the specimen in a secure location if there will be a delay exceeding 72 hours in the mailing of the package.
7. Take the package to a local post office and place it in an inside mail depository. If placed in an outside mail drop during cold weather, the sample could freeze and break, thus destroying the blood sample.
8. Samples must be mailed within 7 days of collection; however, mail as soon as possible to help prevent issues including speedy trial violations.

ISSUING THE SUMMONS AND COMPLAINT

Certain information is required when issuing a summons and complaint. If information is not accurate or is left off by mistake, the charge may be dismissed. The following information is essential when issuing the summons and complaint:

1. **NAME** - The citation must include the subject's first, middle, and last name. Ensure the name is spelled correctly.
2. **LOCATION OF OFFENSE** - If the subject's driving actions were observed over an extended distance, the entire description should be entered, e.g., 100 - 700 South Main St.
3. **DATE** - Write in the date on which the offense occurred.
4. **STATUTE NUMBER AND DESCRIPTION** - The following is one way a Summons and Complaint can be filled out, for misdemeanors. For felonies, see below, be sure to indicate the F-4 level of offense as well.
 - a. **DUI** - C.R.S. § 42-4-1301(1)(a) (M), Drove a vehicle under the influence of alcohol or drugs or both.
 - b. **DUI Second Alcohol-Related Offense** - C.R.S. §§ 42-4-1301(1)(a); 42-4-1307(5) (M), Drove a vehicle under the influence of alcohol or drugs or both. List the offense, conviction date, court, and jurisdiction of prior.
 - c. **DUI Third Alcohol-Related Offense** - C.R.S. §§ 42-4-1301(1)(a); 42-4-1307(6) (M), Drove a vehicle under the influence of alcohol or drugs or both. List the offense, conviction date, court, and jurisdiction of prior. List the offense, conviction date, court, and jurisdiction of both priors.

- d. **DWAI** - C.R.S. § 42-4-1301(1)(b) (M), Drove a vehicle while impaired by alcohol or drugs or both.
- e. **DWAI Second Alcohol-Related Offense** - C.R.S. §§ 42-4-1301(1)(a); 42-4-1307(5) (M), Drove a vehicle under the influence of alcohol or drugs or both. List the offense, conviction date, court, and jurisdiction of prior.
- f. **DWAI Third Alcohol-Related Offense** - C.R.S. §§ 42-4-1301(1)(a); 42-4-1307(6) (M), Drove a vehicle under the influence of alcohol or drugs or both. List the offense, conviction date, court, and jurisdiction of prior. List the offense, conviction date, court, and jurisdiction of both priors.
- g. **DUI per se** - C.R.S. § 42-4-1301(2)(a), Drove a vehicle with excessive alcoholic content.
- h. **DUI per se Second Alcohol-Related Offense** - C.R.S. §§ 42-4-1301(1)(a); 42-4-1307(5) (M), Drove a vehicle under the influence of alcohol or drugs or both. List the offense, conviction date, court, and jurisdiction of prior.
- i. **DUI per se Third Alcohol-Related Offense** - C.R.S. §§ 42-4-1301(1)(a); 42-4-1307(6) (M), Drove a vehicle under the influence of alcohol or drugs or both. List the offense, conviction date, court, and jurisdiction of prior. List the offense, conviction date, court, and jurisdiction of both priors.
- j. **Underage Drinking and Driving** – C.R.S. § 42-4-1301(2)(d), Person under 21 drove vehicle with BAC of 0.02 but less than 0.05.
- k. **DUI PRIOR CONVICTION** - Always note with special attention in your report, any information you obtain that suggests the DUI subject has a prior DUI conviction(s) even if there are not enough for a felony filing.
- l. **Felony DUI**- Driving under the influence is a misdemeanor, but it is a class 4 felony if the violation occurred after **three or more prior convictions**, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI section 42-4-1301, C.R.S; vehicular homicide, as described in section 18-3-106(1)(b), C.R.S. (DUI related); vehicular assault, as described in section 18-3-205(1)(b), C.R.S. (DUI related); or any combination thereof.

For the purposes of this section, a person is deemed to have a prior conviction for DUI, DUI per se, or DWAI; vehicular homicide, as described in section 18-3-106(1) (b), C.R.S.; or vehicular assault, as described in section 18-3-205(1)(b), C.R.S., if the person has been convicted under the laws of this state or under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of an act that, if committed within this state, would constitute any of these offenses. The

prosecution shall set forth such prior convictions in the indictment or information.

DO NOT ISSUE A SUMMONS AND COMPLAINT FOR SOMEONE YOU BELIEVE HAS COMMITTED A FELONY. Only the district attorney can file felony charges. Arrest the driver for the felony and follow the procedures set up in that judicial district for the submission of a felony filing request to the district attorney.

The issuance of the summons and complaint is generally the last step completed prior to the incarceration or the release of a subject. The summons and complaint must be served within 18 months after the date of offense for misdemeanors. C.R.S. §16-5-401(1)(a). For felonies, authorities have up to three years to commence criminal proceedings. *Id.* (see other subsections when there are charges relating to loss of life and or hit and run). However, it is recommended it be served as soon as possible.

ENDORISING WITNESSES - Some jurisdictions require endorsements of witnesses on the summons and complaint form. These witnesses will include persons at the scene, the instrument operator or any person administering a chemical test, vehicle passengers, and any expert required to testify as to the effects of alcohol or drugs on the individual.

COMPLETING THE AFFIDAVIT AND NOTICE OF REVOCATION FORM

Under state law, a person who drives a vehicle in Colorado shall be deemed to have expressed his or her consent to a chemical test of blood or breath for the purpose of determining the alcohol or drug content of the person's blood if an officer has reasonable grounds to believe the person has been driving a vehicle while under the influence of or impaired by alcohol and or drugs. If the person refuses to submit to a chemical test after a valid request has been made, the driver's driving privilege will be revoked. This will be in addition to any action taken in the criminal process. If the person submits to a blood or breath test within two hours of driving and the results are 0.08 or higher, the Colorado Department of Revenue Division of Motor Vehicles (DMV) may take action against the driver's license. However, a person who holds a commercial driver's license is subject to license revocation for driving a commercial motor vehicle with a blood alcohol content of 0.04 or 0.02 when transporting hazardous materials and, a driver under 21 years of age is subject to license revocation (Underage Drinking and Driving) for driving with a breath alcohol content between 0.02 and 0.05. The Affidavit and Notice of Revocation form shall be completed when the subject submits to a chemical test and the results are 0.08 or higher (0.04 or higher for commercial driver driving a commercial motor vehicle), if the test was administered within two hours of driving or actual physical control, or if the subject refused to submit to blood or breath testing. This will initiate the administrative revocation process in the DMV.

DATE OF NOTICE - The Affidavit and Notice of Revocation form defines the date of

notice as the date on which the driver was “asked to submit to a test(s) to determine the alcohol or drug concentration” within their system. In cases where the person is not personally served the notice (i.e. delayed blood test results), print “Notice Not Served” on the top of the form. When the department receives the notice, it will then serve the notice upon the driver by certified mail.

NAME AND DESCRIPTION - Fill in all the blanks. If the person has no license, write “NONE,” but fill in the rest.

PROBABLE CAUSE - The Notice of Revocation contains space for an officer to describe the probable cause to believe a person was driving a vehicle under the influence of, or impaired by alcohol or drugs or with a blood or breath alcohol content of 0.08 or more or one of the other limits for certain drivers. The following information should be included:

1. Driving – The officer’s own observations will usually be sufficient to establish a subject was “driving” a vehicle. However, further investigation is required when an officer did not make such observations, as when an officer is dispatched to the scene of a collision or a car off the road. In such situations, the officer’s initial investigation should establish the driver of the vehicle. It is appropriate to ask witnesses, “[w]ho was driving this vehicle?” Always ask for witnesses who can establish the subject was driving and note how each witness knows the subject was driving, i.e., he saw the subject driving his vehicle, he found the subject behind the steering wheel with the lights on and engine running, and or the subject told him he had been driving. Particularly in single vehicle situations, with only one party present when you arrive, look for evidence this party had been in actual physical control of the vehicle. Colorado law treats actual physical control as the equivalent of driving under the Expressed Consent and per se laws. Therefore, always note situations such as an individual passed out behind the steering wheel and the location of the vehicle, lights on, transmission in gear, the keys in the on position in the ignition, or the subject trying to put the vehicle into gear. Be alert for any evidence that demonstrates the subject was in a position to either move or restrain the movement of the vehicle.
2. Reasonable Suspicion of a Traffic Violation or other Lawful Reason for Making Contact - Note that you or another party observed the subject operating a vehicle, and indicate your reason for the stop, i.e., speeding or driving considerably below the posted speed limit, failure to use turn signals, involved in a traffic collision, etc. Note the location and direction of travel of the vehicle and the location of the actual traffic stop. When you have arrived at a collision situation and have not observed the driving, locate possible witnesses and obtain verbal statements. The statements can be used in recording the reasonable grounds for this element. When a citizen reports an impaired driver, obtain the citizen’s name and address and why they felt the subject was intoxicated. It is also important to

interview passengers in the arrested subject's vehicle, as statements made by them might become critical at trial. Report them accurately, quoting whenever possible. If the reason for contact was not based on reasonable suspicion of a traffic violation (domestic disturbance, sobriety checkpoint), simply state the reason for contacting the driver.

3. Probable Cause to Request a Test(s) - In addition to any erratic driving, include other information supporting your decision to request a test such as odor of an alcoholic beverage on the driver's breath, physical appearance and actions and a general description of performance on any roadside sobriety tests.
4. Results of any blood or breath test or a statement the driver refused the test(s). You are not limited at an Expressed Consent or Per Se license revocation hearing to the probable cause observations listed on the form. However, good practice dictates you be as complete and concise as reasonably possible in preparing the form. The Notice of Revocation has boxes for the officer to check depending on whether a test was taken with results of 0.08 or more, other limits for certain drivers, or whether a test was refused.

TEMPORARY PERMIT - Issue a temporary driving permit to only those persons who surrender a valid license to you. C.R.S. § 42-2-126(5)(b)(II).

OTHER DOCUMENTS TO BE FILED WITH THE NOTICE OF REVOCATION - In a per se case you are required to forward to DMV a "verified report of all information relevant to the enforcement action...a report of the results of any tests which were conducted, and a copy of the citation and complaint filed with the." C.R.S. § 42-2-126. In a refusal case, the requirement is "a verified report of all relevant information." *Id.*

The statute does not further define "all information relevant to the enforcement action" or "all relevant information." Good police practice would include filing any written police reports including observations made during the administration of SFSTs, crash reports, notes of interviews of witnesses and information concerning certification of the breath testing instrument, operator, blood testing laboratory and confirmation concerning qualifications of any person drawing blood. If a refusal to submit to blood testing is based on failure to sign a consent form, the form should be included in the report.

THE PROSECUTION PHASE (Part III)

The prosecution phase is defined as the period of time commencing with the filing of a summons and complaint form for DUI until final resolution is arrived through court processes. If you followed the recommended procedure as described in the first two parts, you will have put together a solid case. You may be convinced the defendant is guilty; so why have a trial? The answer lies in our American system of criminal justice. It is the defendant's constitutional right to request a trial. Therefore, if he does not plead guilty, it is the prosecutor's job to convince members of a jury or the judge the defendant was driving under the influence beyond a reasonable doubt.

The issue at the trial is whether the defendant was:

1. Driving Under the Influence "...driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, that affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a motor vehicle" or,
2. Driving While Ability Impaired "...driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs that affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgement, sufficient physical control, or due care in the safe operation of a vehicle" or,
3. DUI per se "...the person's BAC is 0.08 or more at the time of driving or within two hours after driving" or,
4. Not guilty.

PERSONS INVOLVED IN PROSECUTION

The following persons may participate in a DUI trial:

JUDGE - Determines the admissibility of evidence, oversees the conduct of the trial, instructs the jury as to the law that will govern the case, and ultimately, upon conviction, imposes sentence. In a trial to the court, the judge will also make findings of fact and determine guilt.

JURY – Agrees on facts and applies those facts to the law and unanimously returns a

verdict of “guilty” or “not guilty.” In order to return a “guilty” finding, the jury must believe in the defendant’s guilt “beyond a reasonable doubt.” If the jury has “reasonable doubt,” they MUST find the defendant not guilty.

PROSECUTOR - Presents evidence and insures the defendant a fair trial.

DEFENSE ATTORNEY - To represent the best interest of the client.

DEFENDANT - Answers the formal charges brought against him or her.

ARRESTING OFFICER - Testifies to the location, offense (may include initial observation of erratic driving, the physical appearance of the defendant, observations of the scene and vehicle, SFSTs, any voluntary statements, arrest of the defendant, administration of the chemical test, and so on), venue, identification, date and time (may be a range), and defendant’s statements.

CIVILIAN WITNESS - May testify to the observation of defendant’s driving, drinking or physical condition either just before or after the stop, and any statements made by the defendant. A civilian witness can be a passenger in the defendant’s car, an observer, or a victim of a collision.

INSTRUMENT OPERATOR - Describes the instrument and the operation checklist used to take the breath sample, and may give the results of such test. In order to allow the jury to hear the results of a breath test, the prosecutor must present a foundation showing the test was done properly by an officer who was qualified to do so and the test was performed on an instrument which was improper working order. The prosecutor will usually try to admit a copy of the Evidential Breath Alcohol Test Report (including a CDPHE certificate and Instrument Performance Report).

TOXICOLOGIST - Analyzes samples and testifies to the method(s) used in the analysis, the reliability of the instrument(s) used, test results, and the amount of drug on the test results. May opine as to the effects of alcohol and or drugs on a person’s ability to operate a vehicle safely.

OTHER WITNESS - Other testimony that may be relevant to the case such as expert witnesses.

CHARACTERISTICS OF A DUI CASE

Most impaired driving cases involve the following:

OPINION OF ANOTHER - A person can be convicted of DUI based solely on the opinion of another as to his degree of intoxication. However, because most jurors would find a reasonable doubt based on the opinion of a single person, additional evidence is necessary.

CIRCUMSTANTIAL EVIDENCE - Such evidence is “that proof of facts or circumstances from which the existence or non-existence of other facts may reasonably be inferred.” While direct or eye witness evidence may be viewed as stronger evidence by some jurors, a jury can return a verdict of “guilty” based solely upon circumstantial evidence.

ADDITIONAL EVIDENCE - The use of audio and video tapes, chemical tests and expert witnesses make proving these crimes as complicated as any felony.

CONSIDERATIONS BEFORE TRIAL

The court may set hearings and trials in these cases without the knowledge of the prosecutor. Bring conflicts such as out-of-town training or vacation to the prosecutor's attention as soon as you are aware of them. Communication is the key. While the prosecutor can never guarantee another court date, the earlier you advise him or her of the conflict(s) and the fewer conflicts you have, the more likely prosecutors and judges will accommodate you.

PLEA NEGOTIATIONS – Judicial economy and other reasons require prosecutors to offer a plea bargain in most cases. The prosecutor will consider a variety of factors, e.g., defendant's record, any aggravated facts such as a collision and the degree of injury including damage, the defendant's attitude, the quality and quantity of evidence, number and availability of witnesses, provability of the case, and possible defenses, when crafting an appropriate offer.

OFFICER TESTIMONY

The jury will be instructed to consider certain factors when determining the credibility of all witnesses. There are four areas which can make you a believable witness.

KNOWLEDGE OF THE CASE - Be thoroughly familiar with the facts and all evidence. Bring only original documents, when possible. Bring all other evidence to court without being asked. Disclose possible weaknesses and strengths of the case to the prosecutor prior to court. Do not be offended by any of the prosecutor's questions. Ask what to expect from him or her and from the defense attorney. Court appearances require a team effort. If you have played any part, however slight, a prosecutor may call you to testify.

RECOLLECTION OF KNOWLEDGE - Make notes and reports thorough enough to recall facts clearly and accurately at the subsequent trial, which may not take place for months (or years). Thoroughly review your notes and the entire case file prior to court. Try to picture the scene by forming a mental image of what happened. As a general rule, you may ask to refer to notes or reports made at or near the time of the offense to refresh your recollection. “May I refer to my notes?” you ask. “Did you make them in the course of your duties at or near the time of the offense?” asks the prosecutor. “Yes,” you respond. The judge should then allow time for you to refresh your memory. If you remember something not in your reports, it is still evidence, and you may testify about it. Tell the prosecutor any

statements made by the defendant not recorded in the reports prior to court. The prosecutor may not use statements which he or she has not disclosed to the defense or which the court has suppressed. Before testimony may be admitted regarding the defendant's statements, a legal determination of admissibility may be made by the judge, outside the presence of the jury.

COMMUNICATION OF THE KNOWLEDGE - Remember everyone is visual. Make your story come to life for the fact finder.

- A. Project your story - Try to paint a word picture. Be descriptive. Be accurate. Convey and project your story, remembering you are selling yourself as well as your testimony. Relax. If you are prepared, you will undoubtedly be a convincing witness. Be professional. Detach yourself from a case and relate what happened as if you were a bystander and not an officer.
- B. Relate the facts - Do not display to the jury the "us against them" attitude. Let the prosecutor present and argue the case. Simply relate the facts. Never answer a question you do not understand. If you cannot understand it, how can the jury? Answer directly and only the question asked of you. Give short, direct answers unless asked a question calling for a narrative answer. Help the jury understand, use simple words: car not vehicle; use names instead of pronouns; go or arrive not respond; saw or met not contacted; red lights and siren not emergency equipment, etc. In so doing, the jury understands what you mean and can relate to your presentation. Do not use acronyms. If they don't know what you mean, they worry; if they worry, they don't listen, and when they don't listen, they acquit.
- C. Let the prosecutor maintain control - The prosecutor must control the tempo to avoid opening the door to some matters better left alone and to avoid mistrials.

BE POSITIVE - Talk to the members of the jury frankly, and openly, maintaining eye contact, as you would to a friend or neighbor. Listen to the questions put forth by the prosecutor or defense attorney, but talk to the jury, not the attorney (or defendant representing him or herself). Avoid the following language: a little, sort of, kind of, somewhat, impaired or it's possible. You arrested the defendant because, in your professional judgment, you would have been derelict in your duty as a peace officer if you had let the driver get back in a vehicle. You determined he or she could not drive with safety to himself or herself and others. If you thought someone was under the influence and you wrote a ticket, stand on your word. Let the defense attorney make his or her points, don't do it for him or her.

OPINION OF INTOXICATION - You have reached the point in your testimony where you will state your conclusions regarding the sobriety of the subject. These conclusions are

based on erratic driving, bloodshot, watery eyes, smell of an alcoholic beverage on the breath, inability to perform SFSTs, previous training and experience with drinkers and impaired drivers, etc. “Do you have an opinion with respect to the defendant’s sobriety?” asks the prosecutor. “Yes, I do,” you reply in your own words, your opinion of the state of sobriety of said subject.

CROSS EXAMINATION

Remember it is the defense attorney’s job on cross-examination to zealously represent the client. Do not take it personally and or become angry. If the attorney is hard on you, chances are the jury will be sympathetic toward you. Hard questioning and arguments do not sit well with a jury. If you reported a fact, stick to it. You were there. Think before you answer. Be on your guard for questions which attempt to discredit you regardless of your answer, such as: “[y]ou thought my client was under the influence as soon as you stopped him, didn’t you?” A simple “yes” casts doubt on why you investigated further with such things as SFSTs. A simple “no” suggest his driving was not really bad. Explain your actions. Never hesitate to ask for clarification or for the question to be repeated. Remember, an answer given in haste or based upon a question you misunderstood is still evidence the jury considers. Don’t fight the obvious. If you make a mistake, admit it. Do not argue, no matter how absurd the questions are, e.g., if you did not see the defendant drinking, or you do not know whether polio would affect a person’s results on the evaluations; just answer “no.” You control the manner in which you testify; do not let an attorney upset you. Always talk to the jury in a pleasant conversational tone. Don’t be afraid to say, “I don’t know.”

PROFESSIONAL APPEARANCE

Be neat in your appearance with proper dress (suit or uniform). Do not chew gum. Do not give snap answers. Be courteous at all times. Do not exaggerate or testify beyond training or knowledge. Avoid looking at the prosecutor or judge for answers. On your way to the courthouse and after you arrive, be on guard. You never know when jurors may be observing your actions. Avoid the appearance of being cocky. Project confidence and professionalism.

SUMMARY

Many thousands of hours have been spent in completing and revising this manual. Experts in the area of DUI enforcement have been consulted and have greatly assisted in establishing the GUIDELINES as set forth in this document. By stimulating your thinking, you can spread a more positive approach towards DUI enforcement. You are the key. Without your initial contact of the suspected intoxicated driver and the decision to arrest, the identification and reduction of impairment-related incidents cannot take place. The following sections of this manual are designed to give you additional information on situations and processes related to DUI enforcement. It is strongly suggested you become familiar with them. By becoming thoroughly familiar with the manual and its appendices, you will also be enhancing your image as a professional peace officer.

APPENDIX A. ALCOHOL AND ITS EFFECTS

PROPERTIES OF ALCOHOL - Although there are numerous types of alcohol, ethyl alcohol or ethanol is the type found in alcoholic beverages. Other types of alcohol (methanol, isopropanol) are generally toxic to the human body. Ethanol is the least toxic. **All alcohols are toxic, including ethanol, if consumed in sufficient quantities and will result in physical injury or death.**

Ethanol, in its purest form is a clear, colorless liquid which is practically odorless and causes a burning sensation when ingested. Ethanol will readily mix with water and evaporates very quickly. Ethanol is produced by the process of natural fermentation when an alcoholic beverage is manufactured. The concentration of alcohol varies in the type of beverage that is produced (beer contains 5%, wine 12%, 40% in hard liquor). One drink is considered as one and ½ ounces of 80 proof liquor, or one twelve-ounce serving of beer, or one five-ounce glass of wine. Beverages also contain congeners as a flavoring agent. Congeners do not contribute to the depressant effect of the alcohol but can be detected on a person's breath after a beverage has been consumed.

ALCOHOL IN THE BODY -

1. **Absorption Phase:** Once alcohol is ingested it is absorbed directly into the blood stream through the cell membranes of the digestive tract. Alcohol requires no digestion before it is absorbed. As the alcohol passes through the digestive tract, 20% will be absorbed through the stomach and 80% will be absorbed through the first eight to ten inches of the small intestine. A factor which influences the rate of absorption is the amount of food in the stomach. The average rate of absorption for the body is 30 minutes on an empty stomach up to 60 minutes or longer on a full stomach. The rate of absorption varies slightly from person to person, and for the same person at different times. Some alcohol passes into the blood stream, within minutes of consumption and most (90%) is absorbed within an hour.
2. **Distribution Phase:** When the alcohol is absorbed by the circulatory system it is then distributed to all parts of the body. Some organs, such as the brain, liver and kidneys, receive a larger amount of blood supply than others and consequently will receive a greater amount of alcohol. Alcohol is also distributed proportionally to parts of the body depending on the water content of the tissues.
3. **Metabolism Phase:** As the alcohol is being distributed in the circulatory system, the liver will excrete an enzyme (alcohol dehydrogenase, ADH) which will metabolize the alcohol. This enzyme will oxidize or break down the alcohol molecule to be used as a food source for the body. The average rate of metabolism for an individual is 0.015% (0.10-0.25%) or about one drink

per hour. The rate of metabolism will vary among individuals based on the body's ability to metabolize alcohol.

There is no known method of significantly increasing the rate at which alcohol is metabolized or eliminated. Neither hot coffee, cold showers, nor exercise speed up the process. Only time can sober the intoxicated person.

Approximately 90% of the ingested alcohol is eliminated through the liver. The other 10% of the alcohol is eliminated through the breath, urine, tears, saliva, and perspiration.

EFFECTS OF ALCOHOL ON BEHAVIOR - Alcohol is a central nervous system (CNS) depressant, not a stimulant. The higher the concentration of alcohol, the greater the influence on a person's physical as well as mental abilities. Alcohol greatly affects the central nervous system. The major activity of alcohol is to numb, depress, and finally paralyze nerve activity. The brain is the organ which is principally affected by alcohol. The first step of impairment is on the part of the brain which controls a person's judgment, reasoning, morals, and power of divided attention. If alcohol is ingested in sufficient quantities, functioning of the part of the brain which automatically controls a person's body functions can be affected. A person can lose complete control of himself, pass into a coma, and ultimately die when the respiratory center of the brain is depressed. Between the mild effects and severe effects of alcohol, there is a progression of deterioration in performance.

It is impossible to state all people will exhibit the same outward signs of intoxication at the same blood alcohol concentration. Some of the notable signs of intoxication are an odor of an alcoholic beverage on the breath, swaying, staggering, poor muscular coordination, inability to divide one's attention (do two or more simple tasks at the same time), confusion, speech difficulty, sleepiness, dizziness, nausea, glassy watery eyes, flushed face, inability to understand instructions, and horizontal gaze nystagmus. DUI subjects may exhibit all or part of these notable signs. The degree with which some signs are exhibited depends on the drinking experience of the subject.

Tolerance and compensation can affect a DUI subject's performance. Tolerance is defined as the capacity to adapt physiologically to alcohol. Compensation is merely the body's way to mask the visible signs of alcohol. An example is when the DUI subject talks slowly to avoid slurring his speech, or he sings the alphabet, so he won't become confused.

The above signs may or may not indicate intoxication, (see "Medical Considerations" for details), but when enough signs are observed, it will take you to the next step of requesting an evidentiary test or tests.

Colorado law presumes a person is under the influence if his BAC is 0.08 or greater. Experts agree no one can safely operate a vehicle when a person's blood alcohol concentration is 0.08% or greater.

Remember people react differently to the effects of alcohol. It is up to the courts to decide if a driver is DUI, DWAI, or DUI per se. You could obtain a DUI conviction for a subject who has a BAC of less than 0.08.

APPENDIX B. NON-ALCOHOL DRUGS

Drugged driving is on the rise. The expressed consent law addresses the problem of persons who drive under the influence of or are impaired by non-alcohol drugs. It is a violation of law to be driving under the influence of any drug (as defined in section 27-80-203(13), C.R.S.) or any other drug which renders a person incapable of safely operating a vehicle. Included within this definition are both illegal and legal drugs, whether prescription or not. Also included are toxic vapors such as glue and paint sniffing and aerosol inhalation.

One issue in court with non-alcohol drug intoxication is there are no presumed levels of intoxication resulting from a chemical test. The chemical test results will indicate the presence or absences of a drug and may state the measured quantity of the chemical/drug. But since a measured level does not equate to presumed intoxication by drugs, the observations, statements obtained and ability of the officer to articulate the suspect's impaired condition are important.

The Advanced Roadside Impaired Driving Enforcement (ARIDE) class and the International Drug Evaluation and Classification Program (DECP) were developed to provide advanced training on the investigation of intoxicated drivers. Law enforcement officers have been trained and certified as Drug Recognition Experts (DREs). DREs are trained to recognize the signs and symptoms of drug intoxication and to systematically evaluate motorists believed to be under the influence of drugs. This evaluation, performed in an indoor controlled environment, is done in addition to and not in lieu of, the initial arresting officer's field sobriety tests and observations.

An initial drugged driving violation can begin much like an alcohol driving violation. First, you may observe the vehicle weave or commit a violation. When contacting the driver and conducting a sobriety evaluation, you usually observe many of the physical and mental effects of alcohol, except there may be no odor of an alcoholic beverage. It is obvious, though, the driver is not normal and is under the influence of something. Prior to the field sobriety evaluation, the officer must be alert to the possibility the driver is suffering from a medical condition which is the reason for suspected impairment. Ask the driver if they are experiencing medical problems and be aware conditions such as a head injury, stroke, diabetes, and speech disorders can mimic an intoxicated appearance.

The field sobriety test for a potentially drug impaired driver should be the same as one used for a potentially alcohol impaired driver. Remember, the issue is whether or not the driver, in his or her condition, can safely operate a vehicle.

During contact with the driver, be alert for evidence of recent or current drug usage. Closely examine the subject's vehicle in an attempt to observe possible drugs or drug paraphernalia in plain view. Be alert to the subject's statements, especially those involving slang or street terms associated with drugs.

If following the field sobriety tests, you believe the driver is under the influence; arrest him and make sure you search him thoroughly for your own protection and note any evidence including drugs or medication. If applicable, search the interior of the driver's car within the permitted scope of search incident to a lawful arrest.

Remember, alcohol and other drugs are frequently taken together. If the officer has reason to believe the suspect has been using drugs other than alcohol, ask the suspect to give a blood sample. It is not the driver's choice. Refusal to submit to this chemical test is a violation of the expressed consent law and a notice of revocation should be completed.

If a breath test is given and the results indicate a level of alcohol 0.08 or greater, charge the driver with DUI. Alcohol at concentrations greater than 0.08 can mask the signs and symptoms of drug intoxication but a DRE may still want to do an evaluation. Higher alcohol concentrations should not preclude charging the driver with, and requesting an additional evidentiary test for driving under the influence of drugs where there is a clear indication of drug usage. When evidentiary test results are not readily available from a suspected driver under the influence of alcohol and there is a clear indication the driver is also under the influence of drugs, request an additional chemical test for drugs. If an officer requests a suspect take more than one type of chemical test for drugs (example: blood), a refusal to take any one or all of these tests constitutes a refusal and the suspect's driver's license may be revoked. It is highly recommended to utilize the abilities of a DRE whenever possible. A suspect has the right to refuse a DRE exam in which case an officer must make a decision to arrest based on available evidence and information. A DRE would normally be contacted after the arresting officer administers a breath test to a suspect and the results (usually less than 0.08) suggest the suspect's actions and behavior indicate greater impairment. The DRE will administer, with the arresting officer or other witness present, a series of evaluations designed to form an opinion as to whether or not drug impairment is present. These evaluations can also discover people who are medically ill and in need of assistance. The DRE will contact the arresting officer to obtain information about the suspect. This includes the officer's observations and any statements made by the suspect. Following an initial preliminary check of the suspect by the DRE, the evaluation will then consist of checks of the suspect's vital signs, including pulse rate, blood pressure and temperature. The suspect's eyes are also examined, which will include checking pupil size under varying light conditions. Inspection for horizontal and vertical nystagmus, eye convergence, and reaction of the eyes to light complete the eye exams. Also evaluated are the suspect's performance during several divided attention tests. The drug influence evaluation, which uses a standardized and systematic procedure is designed not to vary among DREs and usually lasts less than one hour. The evaluation concludes with the DRE's opinion as to the existence of drug impairment, followed by a chemical test.

Blood tests are the most common forms of chemical testing administered to determine drug content. To a much lesser extent, urine or saliva (swab) tests can also be utilized. It should be noted certain drugs are not easily identified under certain types of evidentiary tests. Chain of custody format and consent form procedures will vary according to the

department and laboratory testing facility. Refer to the evidentiary test section in this manual and contact your local laboratory for more information on evidentiary test procedures.

The DECP divides drugs into seven categories. These categories, listed below, are followed by possible effects commonly observed in persons found to be under the influence of drugs in the category. This list by no means includes all effects, nor are all of these effects always seen. This list is intended only for general comparison and identification purposes.

Drug Category	General Indicators
<p>Central Nervous System Depressants</p> 	<p>Disorientation, Droopy eyelids, Drowsiness, Drunk-like behavior, Slow, sluggish reactions, Thick, slurred speech, Uncoordinated, Unsteady walk</p>
<p>Central Nervous System Stimulants</p>  <p>COCAINE</p>	<p>Anxiety, Body tremors, Dry mouth, Euphoria, Exaggerated reflexes, Excited, Eyelid tremors, Grinding teeth, Increased alertness, Insomnia, Irritability, Redness to the nasal area, Restlessness, Runny nose, Talkative</p>
<p>Hallucinogens</p> 	<p>Body tremors, Dazed appearance, Difficulty with speech, Flashbacks, Hallucinations, Memory loss, Nausea, Paranoia, Perspiring, Poor perception of time and distance, Synesthesia, Uncoordinated NOTE: With LSD, Piloerection (goosebumps) may be observed</p>
<p>Dissociative Anesthetics</p>  <p>PCP in both crystalline form and a vial of PCP dissolved in water</p>	<p>Blank stare, Confusion, Chemical odor(PCP), Cyclic behavior, Difficulty with speech, Disoriented, Early HGN Onset, Hallucinations, Incomplete verbal responses, Increased pain threshold, "Moon Walking", Non-communicative, Perspiring (PCP), Possibly violent, Sensory distortions, Slow, slurred speech, Slowed Responses, Warm to touch (PCP)</p>
<p>Narcotic Analgesics</p> 	<p>Depressed reflexes, Droopy eyelids, Drowsiness, Dry mouth, Euphoria, Facial itching, Inability to concentrate, Nausea, "On the Nod", Puncture marks, Slow, low, raspy speech, Slow breathing, Slow, deliberate movements NOTE: Tolerant users exhibit relatively little psychomotor impairment</p>
<p>Inhalants</p> 	<p>Bloodshot eyes, Confusion, Disoriented, Flushed face, Intense headaches, Lack of muscle control, Non-communicative, Odor of Substance, Possible nausea, Residue of substance, Slow, thick, slurred speech, Watery eyes</p>
<p>Cannabis</p> 	<p>Altered time distance perception, Alteration in thought formation, Body tremors, Bloodshot eyes, Disoriented, Drowsiness, Eyelid tremors, Euphoria, Impaired memory, Increased appetite, Lack of concentration, Mood changes, Odor of Marijuana, Rebound Dilation, Relaxed inhibitions, Sedation</p>

APPENDIX C. DRUG TESTING CONSIDERATIONS FOR NON-ALCOHOL CASES

Building a good DUI case involves two phases. The first phase is a solid drug or roadside evaluation. DUI evaluations must accomplish two things. They must establish the existence of impairment and attempt to link impairment to the usage of some drug or drugs. The second phase is corroboration of the evaluation results with toxicological analysis of blood, urine, or saliva.

After an evaluation has been done the decision may be made to conduct a toxicological test on the subject. The next logical question is, “[w]hat specimen or specimens should be collected?” In general, urine and blood are adequate for the purpose of testing for drugs. Oral fluid is used mainly for the testing of recent drug usage. Both urine and blood have various advantages over one another. Urinary drug and metabolite levels are higher than blood levels. This makes the analysis easier to do and, therefore, less expensive. Also, urine as a matrix is easier to deal with than blood, contributing to the ease of testing. The advantage of blood is the ingested drug will be at its highest blood concentration when the person is impaired. This makes blood the most direct measure of what is going on in a person’s body at a specific time. Depending on the submitting agency’s policies and testing arrangements with the toxicology lab, urine and/or blood may be collected.

In Colorado, CDPHE regulations for the collection of urine and blood specimens are implemented under section 42-4-1301, C.R.S. These regulations appear in 5-CCR-1005-2 are contained in Appendix J. These regulations address specimen collection practices in great detail. One aspect of specimen collection requires special emphasis: strong chain of custody must be maintained by both the submitting department and the testing laboratory. After testing of the specimen(s) is complete, the results are returned to the submitting agency. The significance of toxicological results may be best thought of as identifying the presence of a drug and bracketing the probable time when the drug was taken. For various reasons, toxicological results cannot pinpoint the time a person was under the influence or impairment of a drug. There are no established levels for drugs (other than alcohol) in blood or urine which indicate legal influence or impairment.

Because of the toxicological uncertainties involved, the officer’s drug evaluation becomes crucial. If, for example, a subject is arrested for DUI drugs and the testing lab is unable to detect the presence of a drug(s) the emphasis in the case will shift to the officer’s evaluation. This situation could arise if the drug used by the subject is not covered by the testing lab or an inappropriate specimen type is submitted and tested. For example, urine is the specimen of choice for the detection of LSD; LSD levels in the blood are too low for practical detection methods. Another source for not detecting drug(s) is the level of a drug may be too low in the specimen. This could happen if the subject is tested either before the drug gets into the urine or after the drug is out of the blood. One strategy which helps eliminate the uncertainty of what type of sample is to collect both urine and blood in all cases. Another consideration which impacts the significance of toxicological results is the

bracketing of the probable time of usage of a drug. As the probable time bracket of usage narrows, the probability of the person being under the influence increases. In general, blood will give the narrowest time brackets. In conclusion, drug testing for DUI cases functions as a corroborative tool supporting a strong drug evaluation. Toxicological results give valuable, but limited, information which may assist in the outcome of a DUI case. In the absence of positive toxicological results, the DUI case is not lost, rather, emphasis shifts to the outcome of the drug evaluation.

CBI Toxicology – Frequently Asked Questions (FAQs) Revised 07-24-19

- 1. Why is CBI able to offer no cost Toxicology services at this time?**
 - Colorado legislators agreed to fund the cost of toxicology, thereby allowing the CBI to eliminate the fee we previously charged.

- 2. Who is eligible to submit to CBI for the no cost Toxicology services?**
 - Law Enforcement Agencies: DUI/DUID, DFSA investigations, and other criminal investigations.
 - Coroner/Medical Examiners: Medicolegal death investigations.
 - CBI toxicology cannot accept parole/probation, defense testing, and workplace drug samples at this time.

- 3. When can we start submitting to CBI for no cost Toxicology services?**
 - If the offense date is July 1, 2019 @ 0000 hours and later, toxicology testing will be performed at no cost.
 - If the offense date is June 30, 2019 @1159 hours and earlier, toxicology testing will be performed at cost. Existing customers will be billed accordingly. New customers will have to set up billing if cases are submitted with offense dates before July 1, 2019.
 - Existing and new customers will not be required to sign a contract with CBI for toxicology testing. Signing up with CBI is also not necessary. Simply submitting the evidence with the appropriate toxicology Request for Laboratory Examination (RFLE) is sufficient.

- 4. What is going to be tested in these DUI/DUID investigations?**
 - As of July 1, 2019, all submitted cases will have a Blood Alcohol Concentration (BAC)/Volatiles analysis, and a 14 panel Drugs of Abuse (DOA) screen. Submitted cases will also be analyzed for confirmations based on the 14 panel DOA screen. The laboratory can perform other screens and confirmations based on the case history, the results of the BAC and DOA analysis, and/or the toxicologist's expert opinion.

- 5. What type of blood collection kits are needed?**
 - Blood collection kits that comply with the CDPHE Rules and Regulations and contain the CBI toxicology RFLE are being sold by TriTech Forensics.

Please see below for TriTech Forensics ordering information and if unsure of which catalog number to order, please contact a CBI laboratory.

- Postmortem casework will require the Medical Examiner/Coroner to utilize their own toxicology collection supplies according to the submission guidelines posted on CBI's website.
- TriTech Forensics, 800-438-7884
 - Catalog numbers: BA-0CO-D for Denver Laboratory mailing address
BA-0CO-W for Grand Junction Laboratory mailing address
BA-0CO-P for Pueblo Laboratory mailing address
 - Kit pricing (as of 060619): Case of 25 for \$123.50 (\$4.94 each) or a case of 10 for \$54.00 (\$5.40 each).
 - TriTech Forensics are not able to ship kits until about July 15. While supplies last, kits are available from CBI at no cost to help bridge this time delay.

6. Our agency still has non-CBI, non-expired blood collection kits, can we use them?

- Yes. Please continue to use non-expired ChemaTox blood collection kits until your agency can arrange to purchase the appropriate CBI blood collection kits with TriTech Forensics.

7. How are the blood collection kits submitted to CBI?

- Blood collections kit can be delivered by USPS, overnight courier (UPS, FedEx, etc) or in person to one of the five CBI laboratories (Denver, Grand Junction, Pueblo, Boulder, and Greeley). Evidence submission receipts are sent via e-mail when submitted by mail or overnight courier.

8. What is CBI's turn-around-time?

- CBI Toxicology has maintained an average turn-around-time of 26 days. Please note this is an average turn-around time that represents all case work. Our goal turn-around-time is a 4-6 weeks for all cases. However, with more agencies requesting CBI's services, the turn-around-time may increase over time.

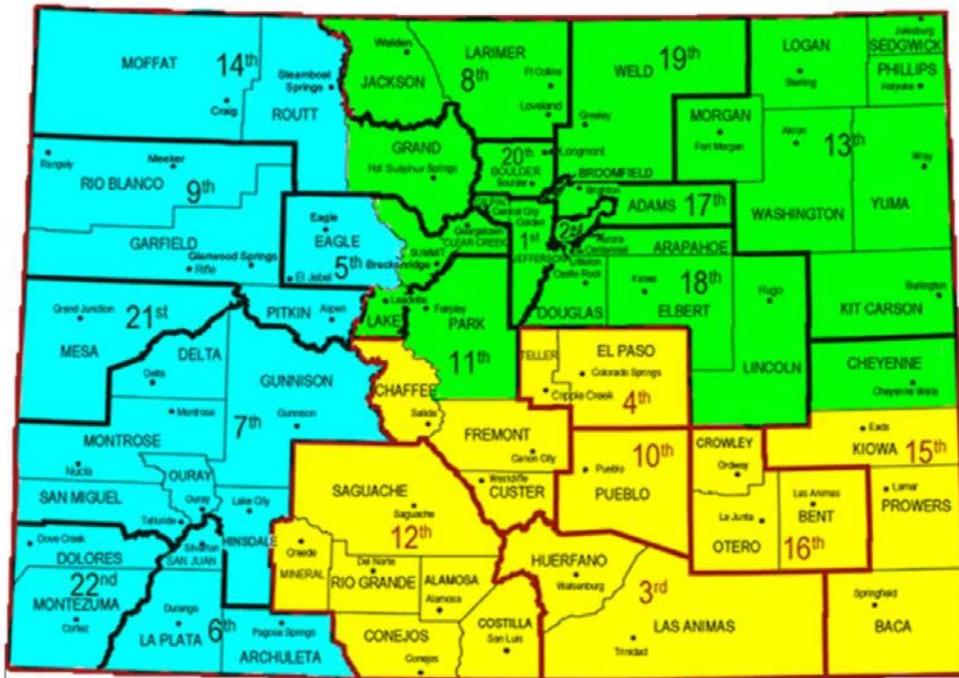
9. Are we able to speak directly to the Toxicologists?

- Yes, if you ever have a question regarding the status of a case or the results of a case you can contact the CBI laboratory directly and discuss the case with any Toxicologist. Email is also an option.

10. How are the laboratory reports distributed?

- Unless part of the CBI Forensics Web Portal, reports will be emailed to the person listed on the request form. If the customer prefers to have the report

emailed to a central location, that email address will have to be provided to CBI.



CBI GRAND JUNCTION TOXICOLOGY
Catalog # BA-0CO-W

CBI DENVER TOXICOLOGY
Catalog # BA-0CO-D

CBI PUEBLO TOXICOLOGY
Catalog # BA-0CO-P

TriTech Forensics 1-800-438-7884

APPENDIX D. MEDICAL CONSIDERATIONS

In recent years, the media has made public the rare instances when a subject who was arrested for DUI required medical attention due to medical conditions other than alcohol. These medical conditions may manifest themselves either alone or they may be magnified by the consumption of small or large amounts of alcohol or other drugs.

During the course of a DUI investigation, you may become concerned for the welfare of the subject because something just does not seem right. You may feel he is just too intoxicated or maybe he is exhibiting symptoms other than those of a DUI driver. In either case, you have an obligation to protect and safeguard the individual while he is in your custody. More importantly, if his condition is not caused by alcohol or drug intoxication, other actions are immediately called for. The first situation involves either the problem drinking driver or a person who has simply consumed large amounts of alcohol. In either case, a high BAC will be a good indicator of this, which should also alert you to the fact immediate medical attention may be necessary. If a person is arrested and you get immediate breath test results of a 0.30 BAC or higher, he should be seen by medical personnel, or at the very least, closely monitored. His BAC could be rising and possibly result in death. As in the case of any substance to which the problem drinker may become addicted, there are certain physiological effects which occur when the substance is withdrawn. This condition is known as delirium tremens or more commonly referred to as the D.T.'s. If the driver is an alcoholic, he may need medical attention once the withdrawal symptoms begin. Some guidelines to follow to insure your subject will be cared for properly are:

- A. Anyone with a BAC of 0.25 or higher should be lodged at a jail or detoxification (detox) center until their BAC level comes down to a safe level. The personnel at the detox center will be able to monitor the subject should his condition become worse.
- B. Anyone with a BAC of 0.30 or higher should be medically cleared. These are only guidelines. Depending on the arrestee's drinking experience, these levels may or may not apply. For example, someone who has very little drinking experience may have a BAC of 0.125 and he may be at the same risk as a conditioned drinker at 0.25. The second situation involves the fact many so-called "alcohol" symptoms could be associated with other illnesses. You should examine and question the subject carefully so his need for medical attention will not be overlooked. A low BAC or evidence of no alcohol may indicate the driver's abnormal behavior is due to a medical condition. Some of the various signs used to support your basis for believing the driver is intoxicated are as follows: Odor of the breath, flushed appearance, lack of muscular coordination, speech difficulties, disorderly or unusual conduct, mental disturbance, visual disorders, sleepiness, muscular tremors, dizziness, nausea, and divided attention impairment.

Physicians recognize each of the accepted signs or symptoms of intoxication might well be a symptom of disease or a condition entirely unrelated to the ingestion of alcohol. Following are descriptions of some pathological conditions having symptoms in common with those of alcohol influence. A symptom similar to alcohol influence is an acetone odor on the breath of the subject. This is a fruity odor, which can be mistaken for the odor of an alcoholic beverage on a person's breath. The most common pathological conditions causing an acetone odor are diabetes, vomiting, and stomach ulcer. In the course of a DUI investigation, you may determine the subject has experienced full or partial loss of memory (amnesia).

This may occur by consuming alcohol or by conditions such as epilepsy or traumatic injury of the brain (such as in a traffic collision). People suffering from Alzheimer's disease frequently exhibit signs of memory loss. A stroke victim or a diabetic may also exhibit a sense of disorientation or total memory loss.

Ataxia, or lack of muscle coordination, is given considerable weight as a measure of alcoholic influence. However, it may be caused by chemicals such as lead, drugs such as antihistamines, barbiturates and other sedatives, and gases such as carbon monoxide. It may also be due to injuries commonly sustained in traffic collisions (traumatic ataxia).

Individuals with a physical disability may perform poorly on field sobriety tests. If the subject has sustained any recent injuries to his legs or back, it could affect his performance. An individual with one leg notably shorter than the other may also exhibit poor performance.

The DUI subject may be in a stupor, lapsing into a coma (unnatural, heavy, deep sleep, sometimes ending in death). This may be a diabetic coma, or on the contrary, insulin shock due to an overdose of insulin. It may well be a coma brought on by head injuries such as a concussion or a skull fracture. Cases may be encountered when mental confusion is present. It may consist of hallucinations, incoherence, illusions, etc. Of course, it may result from alcoholic influence, but you should not overlook the possibility it may stem from diabetes, the stopping of a drug habit, or the use of legitimate and illegitimate drugs such as marijuana, cocaine, and opium derivatives. Drowsiness is a symptom frequently noted. It may stem from the liberal consumption of alcoholic beverages coupled with the late hour during which most drinking driver contacts are made. However, such drowsiness may be associated with a concussion (a common injury in traffic collisions), diabetes, or the use of many prescription and non-prescription drugs. The subject may have bloodshot eyes, dilated or constricted pupils, or sleepy looking eyes. The general effect of alcohol may slow the pupils' reaction to light. This occurs as part of the general depressant effect of alcohol or pathological conditions which may similarly affect the eyes. Those most frequently found include glaucoma, hay fever and other allergic disorders, farsightedness, nearsightedness, use of opium derivatives, concussion, and fright. A flushed face is often interpreted as a sign of alcoholic influence. Indeed, it may be caused by alcohol, but there are numerous body conditions which also produce a flushed face. They include chronic inflammations of the face, arteriosclerosis

(hardening of the arteries), diabetes, emotions (blushing), high fever, and chemical or drug poisoning (e.g., carbon monoxide). Shock and collapse may be caused by such things as heart trouble, skull fracture, insulin shock, and stroke.

Speech disorders are a clue you may consider to be significant in the identification of DUI subjects. You may certainly be correct in recognizing that speech is affected by alcohol, but you should keep in mind facial paralysis, mental deficiencies, and Parkinson's disease (shaking palsy) can be the cause of speech disorders as well. A stroke victim may lose all or part of their ability to speak. On occasion you may observe tremors or muscular twitching in DUI subjects. This can stem from numerous causes including senility, brain tumor, chemical or drug poisoning (e.g., narcotics, tobacco), and general paresis (softening of the brain), usually in older people.

Finally, vertigo or dizziness may be noted in the course of your DUI contact. This symptom can be caused by alcohol, but may stem from any one of the host of other causes as well. Some of these might be motion sickness, injuries to the brain, use of barbiturates, marijuana or opium, and Meniere's disease (congestion of the inner ear). A severe inflammation to the inner ear may cause the subject to lose his balance.

Two of the more serious and more common medical conditions you may come upon are a stroke and a diabetic reaction. A stroke occurs when the blood supply is cut off to the brain. This blood loss results in damage to specific brain cells. When this happens, the part of the body controlled by those cells stops functioning. Some of the common signs of a stroke are headache, slurred speech, blurred vision, sudden collapse, unconsciousness, vomiting, shock, and convulsions. A partial or complete paralysis to the legs or arms may occur. This condition requires immediate medical attention. If the subject does not get the needed attention, he could die. Most stroke victims survive and lead normal lives if they receive the proper medical attention. Diabetics, when in distress, suffer from either hypoglycemia or hyperglycemia. Hypoglycemia occurs when a diabetic's insulin intake doesn't match his blood sugar levels. The condition manifests itself when the diabetic's blood sugar is low and his insulin is high. Symptoms of hypoglycemia are sweating, dizziness, palpitations, shallow breathing, trembling, mental confusion, and loss of consciousness.

Hyperglycemia occurs when there is excess sugar in the blood from insufficient insulin production or it cannot utilize the insulin. If the situation continues, diabetic ketoacidosis occurs. During this, the body generates too many ketones because it is unable to process the sugars in the blood. Call for immediate medical attention. The treatment for Hyperglycemia requires regulated insulin injections. Symptoms of hyperglycemia are excessive urination, thirst, dry and hot skin, drowsiness, and coma.

Hypoglycemia occurs when there is excess insulin in the blood. This situation usually occurs when an insulin dependent diabetic takes their insulin but does not eat properly. The excess insulin rapidly depletes the blood glucose and coma rapidly occurs. Hypoglycemia is a dire medical emergency and the person needs rapid medical

intervention. Symptoms of hypoglycemia are confusion, shakiness, lightheadedness, anxiety, sweating, and coma.

If you find a subject unconscious due to a diabetic cause, treat the subject with sugar. The sugar will give immediate relief to a subject suffering from insulin shock, but it will not affect a person that is hyperglycemic. If the subject is unconscious, place the sugar between the cheek and teeth so choking won't occur.

If during the breath testing process you encounter an interferent display on the Intoxilyzer[®], you must have your subject medically checked. A diabetic with acetone or fruity smell on their breath could have some severe medical problems if it goes untreated. They could lapse into diabetic coma. Officers should make it part of their DUI procedure to question the subject with regards to medical conditions. Ask the subject if he or she is on any medications. Ask him or her if he or she has any medical problems, or physical disabilities which would affect the field sobriety test.

Always be aware of things such as medical alert bracelets and neck chains. Check the subject's wallet for medical I.D. cards. These cards will give you information on medical problems your subject may have. These tags and cards will be very helpful if your subject is unconscious or unable to talk to you. If a subject informs you of a medical problem, take appropriate action. The appropriate action may or may not require immediate medical attention. For example, if he tells you he is a diabetic, watch for the signs. The subject would need immediate medical attention if he was suffering from insulin shock or diabetic coma. On the other hand, the subject may inform you all he would require is an insulin injection or a form of sugar to ingest to bring his body back into equilibrium.

In summary, with so many conditions or symptoms resembling impairment from drugs, it could easily discourage you from placing much weight on your own observations. After all, some of these symptoms have been known to fool physicians. All of this is true and can be used as an excuse for not performing impaired driver enforcement since, if you don't make contacts of DUI subject, you are not faced with having to recognize those symptoms and determine their true cause. The vast majority of DUI arrests do not involve such medical problems. Such cases are in the minority, but the possible consequences dictate you know how to recognize basic symptoms of medical problems, problems which require some form of follow-up to protect the DUI subject and you.

APPENDIX E. DUI CRASH INVESTIGATIONS

The handling of crashes involving DUI drivers is not significantly different from other crash investigations. If possible, finish dealing with all other drivers before attempting to process the suspected DUI driver. Attempt to keep the subject under constant observation. Ideally, if assistance is available, allow one officer to investigate the crash and another to handle the DUI driver.

CHECKLIST FOR DUI CRASH INVESTIGATION

The following is a suggested checklist of tasks to perform for a DUI crash investigation.

- A. Respond quickly and safely to the scene.
- B. Check for injured parties and assist them until medical aid arrives. Protect all relevant evidence. (You may have a felony situation.)
- C. Determine who was driving the vehicle. Determine the time of the crash.
- D. Check the driver for any signs of DUI alcohol or drugs
 1. As soon as possible assign an officer to administer SFSTs and to be with the suspected driver at all times.
 2. Obtain a chemical test from the suspected driver as soon as constraints permit.
 3. If a felony is suspected, contact the District Attorney's Office.
- E. Locate all possible witnesses.
 1. Interview and obtain written statements. Ensure their information is complete; remember to include phone numbers, addresses, etc.
- F. Take photographs as soon as possible. Photographs should include the following items:
 1. vehicle damage;
 2. skid marks;
 3. obstructions, if any;
 4. position of vehicles;
 5. initial area of impact;
 6. weather and lighting conditions;

7. road conditions;
 8. injured parties and their position at the scene; and,
 9. pieces of wreckage.
- G. Use a tape, roll-a-tape or laser measuring device to obtain measurements of the following items:
1. area of impact;
 2. length of all skid marks
 3. street widths;
 4. distance traveled after impact;
 5. distance of bodies from vehicles; and,
 6. location of any object relevant to the crash.
 7. vehicles at rest.
- H. Draw a diagram of the scene with as much accuracy and detail as possible.
- I. Attempt to locate any nearby surveillance systems on nearby businesses
- J. Obtain roadway friction values
- K. If the collision is a vehicular assault or vehicular homicide tow vehicles and impound for evidence.

APPENDIX F. EXPRESSED CONSENT AND PER SE HEARINGS

A person will have their driving privilege revoked or, if a non-resident, their privilege to operate a motor vehicle within Colorado revoked, for refusing to submit to an evidentiary test for intoxication by alcohol or other drugs. This authorization is established in the Expressed Consent law set forth in section 42-4-1301.1(2)(a)(I), C.R.S. which states, in part:

A person who drives a motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to take and complete, and to cooperate in the taking and completing of, any test or tests of the person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI, DUI per se, DWAI, or UDD.

Section 42-4-1301.1(2)(b)(1), C.R.S. reads:

Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to submit to and to complete, and to cooperate in the completing of, a test or tests of such person's blood, saliva, and urine for the purpose of determining the drug content within the person's system when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI or DWAI and when it is reasonable to require such testing of blood, saliva, and urine to determine whether such person was under the influence of, or impaired by, one or more drugs, or one or more controlled substances, or a combination of both alcohol and one or more drugs, or a combination of both alcohol and one or more controlled substances.

The Expressed Consent law, however, does not force a person to take the test, but rather makes him or her obligated to take the test or tests.

After giving the driver the notice of revocation, the law enforcement officer shall forward to the department an affidavit containing information relevant to the legal issues and facts that shall be considered by the department to determine whether the person's license should be revoked. Section 42-2-126(5)(b)(III), C.R.S.

A driver can then request a hearing to contest whether his or her driver's license should be revoked. But, the written request must be filed within seven days with the DMV. This hearing is an administrative proceeding held pursuant to the Colorado Administrative Procedures Act. This hearing is unlike the criminal action brought against the person. The two are separate and independent of each other, and the result of one does not depend on nor affect the result in the other. In the criminal action the burden of proof is beyond a reasonable doubt. However, in an Expressed Consent hearing, the burden of proof is by a preponderance of the evidence. The administrative hearing affects only the driver's

license or driving privilege in Colorado.

The driver may challenge the validity of the law enforcement officer's initial contact with the driver and the driver's subsequent arrest for DUI, DUI per se, or DWAI. If a driver so challenges the validity of the law enforcement officer's initial contact, and the evidence does not establish that the initial contact or arrest was constitutionally and statutorily valid, the driver is not subject to license revocation. Section 42-2-126(8)(h), C.R.S.

The department shall consider all relevant evidence at the hearing, including the testimony of any law enforcement officer and the reports of any law enforcement officer that are submitted to the department. Section 42-2-126(8)(c), C.R.S.

EXPRESSED CONSENT (Refusal)

The basic considerations are:

1. Driving (including actual physical control). C.R.S. §§ 42-2-126(1)(a) and 42-4-1301.1(1).
2. Reasonable grounds to request a test (i.e. probable cause to believe the driver was in violation of an impaired driving law). C.R.S. §§ 42-4-1301.1(2)(a)(I) and (2)(b)(I).
3. Refusal to take, complete, or cooperate in giving a sample within two hours of driving. C.R.S. §§ 42-2-126(2)(h); 42-4-1301.1(2)(a)(III) and (2)(a.5)(III).

However, the expiration of two hours from the time of driving does not automatically mean the request was not made within a reasonable time. If there are factors which made it impossible to request a test earlier (e.g., a traffic crash was not discovered until two hours after it occurred or the driver was receiving medical attention) a request may be within a reasonable time even if it occurs more than two hours after driving.

PER SE

A Colorado resident's privilege to drive may be revoked or, if a non-resident, a driving privilege to operate a vehicle within Colorado may be revoked for driving a vehicle with a blood alcohol level of 0.08 (0.04 for a commercial driver in a commercial motor vehicle, 0.02 for a commercial driver hauling hazardous material, and 0.02 for Underage Drinking and Driving) or greater. This authorization is established in the excess BAC provisions of section 42-2-126 C.R.S.

The law prohibits a driver from changing her mind from one test to the other after electing a test. Section 42-4-1301.1(2)(a)(II), C.R.S provides:

If such person elects either a blood test or a breath, the person shall not be permitted to change the election, and, if the person fails to take and complete, and to cooperate in the completing of, the test elected, the failure shall be deemed to be a refusal to submit to testing.

The driver may, in the following circumstances, be required to take a blood test:

If the person is unable to take, or to complete, or to cooperate in the completing of a breath test because of injuries, illness, disease, physical infirmity, or physical incapacity, or if such person is receiving medical treatment at a location at which a breath testing instrument certified by the department of public health and environment is not available, the test shall be of the person's blood. *Id.*

Upon a per se violation the driver must request a hearing within seven days. C.R.S. § 42-2-126(7)(b). The request is made to the Colorado Department of Revenue Motor Vehicle Division. This hearing is an administrative proceeding held pursuant to the Colorado Administrative Procedures Act. This hearing is unlike the criminal action brought against the person. The two are separate and independent of each other, and the result of one does not depend on nor affect the result in the other. In the criminal action the burden of proof is beyond a reasonable doubt. However, in a per se hearing, the burden of proof is beyond a preponderance of the evidence. The administrative hearing affects only the driver's license or driving privilege in Colorado.

The following are issues addressed at a per se hearing might include:

1. Driving (including "actual physical control"). C.R.S. §§ 42-2-126(1)(a) and 42-4-1301.1(1).
2. A blood or breath test given within two hours of driving with results greater than or equal to 0.08 or one of the other limits set forth above after request from law enforcement officer having probable cause to believe the person was in violation of any alcohol related impaired driving offense within two hours of driving. C.R.S. §§ 42-2-126(2)(b) and 42-4-1301.1(2)(a)(I) and (III).
3. Sufficient compliance with the Department of Public Health and Environment to establish the accuracy of the test. The most important matters for a breath test include the administration of the test by a person certified or qualified to do so, use of certified and/or properly operating Intoxilyzer[®] and following the checklist for operation of the Intoxilyzer[®]. For a blood test the most important matters are drawing of blood by a person qualified to do so and testing by an accredited laboratory.
4. Alcohol consumption after driving stopped must be proven by the driver before it becomes an issue. If proven, the issue then is whether the blood alcohol content of 0.08 or greater was reached because of alcohol consumed before the person stopped driving. Concerning this issue, you may testify as to your observations and investigation concerning alcohol consumption after driving. The best practice is to simply ask the driver if alcohol was consumed after driving, and if so, what, how much, and when.

When a blood or breath test is taken, reasonable grounds to request the test is not an issue at the per se revocation hearing. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987) (court looks to statute [now section 42-2-126, C.R.S.] which provides that sole issue is whether the person drove a vehicle in Colorado with a specific BAC).

ATTENDANCE AT HEARINGS

The arresting officer who files the notice of Revocation form with the Department of Revenue is not automatically required to appear at the license revocation hearing. There are three ways in which the officer may be required to appear. First, at the time the driver requests a hearing, the driver may also request the officer to appear. Second, if the driver does not request the officer to appear, a review of the documents is made by the hearings section to determine if it is appropriate to require the officer to appear. In either case, the department shall send a notice requiring the officer's appearance. Third, the officer can be required to appear at the hearing if subpoenaed by the driver or his attorney at least five days prior to the hearing. The law also allows the officer to request the hearing to be rescheduled for a good cause. The officer may be allowed to appear by phone.

Hearings are typically held at the district office nearest the jurisdiction wherein the person was arrested or by phone depending on the jurisdiction. Those present will be you (if you receive a notice or subpoena to appear), the hearing officer, the person who refused the chemical test, that person's attorney (if desired), and any witnesses.

DEPARTMENT OF REVENUE HEARING PROCEDURES CHECKLIST

1. State that you prepared the Affidavit and Notice of Revocation, signed it, and sent it with accompanying documents to the Department of Revenue.
2. State the name of the defendant and identify who was driving the vehicle and later arrested and for what offense. Note: do not use acronyms (like DUI) when testifying.
3. Go into detail about why the defendant was contacted.
4. State where the traffic stop took place and the time and date the violation occurred.
5. State where the violation took place (within your jurisdiction) and that you were on duty.
6. Upon contact with the defendant, you observed a (strong, moderate, slight) odor of an unknown alcoholic beverage (or other odor) on the breath, bloodshot watery eyes, slurred speech and that the defendant consumed no alcoholic beverages from the time of the stop until release.
7. You offered the defendant SFSTs and how you offered the same.
8. How the defendant completed the voluntary SFSTs (do not use phrases like *failed*, *passed*, *satisfactorily*, *as a sober person*, and so on), or describe details of the defendant's refusal.

9. The results of a preliminary breath test, if one was taken.
10. You advised the defendant of arrest for which offense.
11. You explained the Colorado Expressed Consent Law to the defendant, including that you requested the defendant take a test or tests (specify).
12. You transported the defendant to the place where the evidentiary test was to be conducted. If there was a crash, describe what ambulance transported who, names of ambulance crew, and which hospital provided treatment to the defendant.
13. Breath Test
 - a. The breath testing instrument is certified by the Department of Public Health and Environment and certification was current at time of the test.
 - b. The instrument operator is certified by the Department of Public Health and Environment to administer the test on that instrument and certification was current at time of test.
 - c. The officer observed the defendant for the required 20-minute observation time. The defendant was okay to take the test.
 - d. How the test was administered
 - e. The time of the test was within two hours of the violation.
 - f. The test results were over 0.08 grams of alcohol per 210 liters of breath.
 - g. The officer followed department procedures for the breath testing instrument.
14. Blood Test
 - a. Where the blood sample was collected.
 - b. The officer observed blood being drawn from the defendant and noted the time and date the blood was drawn.
 - c. The person who withdrew the blood is qualified to do so as stated by Colorado Revised Statute.
 - d. The lab was properly accredited to analyze the blood for alcohol

content.

15. Refusal of Chemical Test
 - a. Details of how the defendant refused or refused to cooperate to take a breath test or blood test, for example the driver:
 1. Stated, “[n]o, I’m not taking a breath or blood test.”
 2. Would not answer you.
 3. Stated, “I want to talk to my lawyer.” Informed the defendant this is a refusal and there is no right to talk to a lawyer before taking a test.
16. The test was administered within two hours of driving (or physical control). If refused, the test was requested within a reasonable time after driving stopped.
17. The officer filled out the summons and complaint and “Affidavit and Notice of Revocation:”
 - a. The officer explained both the summons and complaint, and “Affidavit and Notice of Revocation” to the defendant.
 - b. The officer served both the summons and complaint, and “Affidavit and Notice of Revocation” to the defendant.
17. State all important times:
 - a. Time of the driving.
 - b. Time the defendant was arrested.
 - c. Time the defendant took the evidentiary test or refused all testing.

The fellow officer rule applies at administrative hearings. A peace officer may testify as to statements made by another peace officer on the conduct of their duties as a peace officer.

APPENDIX G. THE LAW

§ 42-4-1301. Driving under the influence - driving while impaired - driving with excessive alcoholic content - definitions - penalties

- (1) (a) A person who drives a motor vehicle or vehicle under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, commits driving under the influence. Driving under the influence is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI; vehicular homicide, as described in section 18-3-106(1)(b), C.R.S.; vehicular assault, as described in section 18-3-205(1)(b), C.R.S.; or any combination thereof.
- (b) A person who drives a motor vehicle or vehicle while impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, commits driving while ability impaired. Driving while ability impaired is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI; vehicular homicide, as described in section 18-3-106(1)(b), C.R.S.; vehicular assault, as described in section 18-3-205(1)(b), C.R.S.; or any combination thereof.
- (c) Repealed.
- (d) As used in this section, one or more drugs means any drug, as defined in section 27-80-203(13), C.R.S., any controlled substance, as defined in section 18-18-102(5), C.R.S., and any inhaled glue, aerosol, or other toxic vapor or vapors, as defined in section 18-18-412, C.R.S.
- (e) The fact that any person charged with a violation of this subsection (1) is or has been entitled to use one or more drugs under the laws of this state, including, but not limited to, the medical use of marijuana pursuant to section 18-18-406.3, C.R.S., shall not constitute a defense against any charge of violating this subsection (1).
- (f) "Driving under the influence" means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, that affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.
- (g) "Driving while ability impaired" means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, that affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.
- (h) Pursuant to section 16-2-106, C.R.S., in charging the offense of DUI, it shall be sufficient to describe the offense charged as "drove a vehicle under the influence of alcohol or drugs or both".

- (i) Pursuant to section 16-2-106, C.R.S., in charging the offense of DWAI, it shall be sufficient to describe the offense charged as "drove a vehicle while impaired by alcohol or drugs or both".
 - (j) For the purposes of this section, a person is deemed to have a prior conviction for DUI, DUI per se, or DWAI; vehicular homicide, as described in section 18-3-106(1)(b), C.R.S.; or vehicular assault, as described in section 18-3-205(1)(b), C.R.S., if the person has been convicted under the laws of this state or under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of an act that, if committed within this state, would constitute any of these offenses. The prosecution shall set forth such prior convictions in the indictment or information.
 - (k) Repealed.
- (2)
- (a) A person who drives a motor vehicle or vehicle when the person's BAC is 0.08 or more at the time of driving or within two hours after driving commits DUI per se. During a trial, if the state's evidence raises the issue, or if a defendant presents some credible evidence, that the defendant consumed alcohol between the time that the defendant stopped driving and the time that testing occurred, such issue shall be an affirmative defense, and the prosecution must establish beyond a reasonable doubt that the minimum 0.08 blood or breath alcohol content required in this paragraph (a) was reached as a result of alcohol consumed by the defendant before the defendant stopped driving. DUI per se is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI; vehicular homicide, as described in section 18-3-106(1)(b), C.R.S.; vehicular assault, as described in section 18-3-205(1)(b), C.R.S.; or any combination thereof.
 - (a.5) Repealed.
 - (b) In any prosecution for the offense of DUI per se, the defendant shall be entitled to offer direct and circumstantial evidence to show that there is a disparity between what any tests show and other facts so that the trier of fact could infer that the tests were in some way defective or inaccurate. Such evidence may include testimony of nonexpert witnesses relating to the absence of any or all of the common symptoms or signs of intoxication for the purpose of impeachment of the accuracy of the analysis of the person's blood or breath.
 - (c) Pursuant to section 16-2-106, C.R.S., in charging the offense of DUI per se, it shall be sufficient to describe the offense charged as "drove a vehicle with excessive alcohol content".
 - (d) (l) It is a class A traffic infraction for any person under twenty-one years of age to drive a motor vehicle or vehicle when the person's BAC, as shown by analysis of the person's breath, is at least 0.02 but not more than 0.05 at the time of driving or within two hours after driving. The court, upon sentencing a defendant pursuant to this subparagraph (l), may order, in addition to any penalty imposed under a class A traffic infraction, that the defendant perform up to twenty-four

hours of useful public service, subject to the conditions and restrictions of section 18-1.3-507, C.R.S., and may further order that the defendant submit to and complete an alcohol evaluation or assessment, an alcohol education program, or an alcohol treatment program at such defendant's own expense.

- (II) A second or subsequent violation of this paragraph (d) is a class 2 traffic misdemeanor.
- (3) The offenses described in subsections (1) and (2) of this section are strict liability offenses.
- (4) No court shall accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or guilty to the offense of UDD from a person charged with DUI or DUI per se; except that the court may accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or to UDD upon a good faith representation by the prosecuting attorney that the attorney could not establish a prima facie case if the defendant were brought to trial on the original alcohol-related or drug-related offense.
- (5) Notwithstanding the provisions of section 18-1-408, C.R.S., during a trial of any person accused of both DUI and DUI per se, the court shall not require the prosecution to elect between the two violations. The court or a jury may consider and convict the person of either DUI or DWAI, or DUI per se, or both DUI and DUI per se, or both DWAI and DUI per se. If the person is convicted of more than one violation, the sentences imposed shall run concurrently.
- (6) (a) In any prosecution for DUI or DWAI, the defendant's BAC or drug content at the time of the commission of the alleged offense or within a reasonable time thereafter gives rise to the following presumptions or inferences:
 - (I) *If at such time the defendant's BAC was 0.05 or less, it shall be presumed that the defendant was not under the influence of alcohol and that the defendant's ability to operate a motor vehicle or vehicle was not impaired by the consumption of alcohol.*
 - (II) If at such time the defendant's BAC was in excess of 0.05 but less than 0.08, such fact gives rise to the permissible inference that the defendant's ability to operate a motor vehicle or vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.
 - (III) If at such time the defendant's BAC was 0.08 or more, such fact gives rise to the permissible inference that the defendant was under the influence of alcohol.
 - (IV) If at such time the driver's blood contained five nanograms or more of delta 9-tetrahydrocannabinol per milliliter in whole blood, as shown by analysis of the

defendant's blood, such fact gives rise to a permissible inference that the defendant was under the influence of one or more drugs.

- (b) The limitations of this subsection (6) shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol or whether or not the defendant's ability to operate a motor vehicle or vehicle was impaired by the consumption of alcohol.
- (c)
 - (I) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine such person's alcohol or drug level. The department of public health and environment may, by rule, determine that, because of the reliability of the results from certain devices, the collection or preservation of a second sample of a person's blood, saliva, or urine or the collection and preservation of a delayed breath alcohol specimen is not required.
 - (II) Nothing in this paragraph (c) prevents the necessity of establishing during a trial that the testing devices used were working properly and were properly operated. Nothing in this paragraph (c) precludes a defendant from offering evidence concerning the accuracy of testing devices.
 - (III) The database compiled by the department of public health and environment containing personal identifying information relating to the results of tests of persons' breath alcohol content, and all personal identifying information thereof, are not public information. The department of public health and environment shall disclose such information only to:
 - (A) The individual who is the subject of the test, or to his or her legal representative;
 - (B) A named interested party in a civil or criminal action in which the test results are directly related, or to his or her legal representative;
 - (C) Any prosecuting attorney, law enforcement officer, state agency, or state and local public official legally authorized to utilize such information to carry out his or her duties; or
 - (D) Any party who obtains an order in a pending civil or criminal case if the court finds the party has shown good cause to have the information. In determining whether there is good cause, the court shall consider whether the materials sought exist; whether the materials sought are evidentiary and relevant; whether the materials are not otherwise procurable reasonably in advance of the proceeding by the exercise of due diligence; whether the party cannot properly prepare for the proceeding without such production

and inspection in advance of the proceeding, and the failure to obtain such inspection may tend to unreasonably delay the proceeding; and whether the request for the information is made in good faith and is not for the purposes of general discovery.

- (IV) The department of public health and environment may release nonpersonal identifying information from the database in accordance with sections 24-72-101 to 24-72-402, C.R.S.
- (d) If a person refuses to take or to complete, or to cooperate with the completing of, any test or tests as provided in section 42-4-1301.1 and such person subsequently stands trial for DUI or DWAI, the refusal to take or to complete, or to cooperate with the completing of, any test or tests shall be admissible into evidence at the trial, and a person may not claim the privilege against self-incrimination with regard to admission of refusal to take or to complete, or to cooperate with the completing of, any test or tests.
- (e) Involuntary blood test - admissibility. Evidence acquired through an involuntary blood test pursuant to section 42-4-1301.1(3) shall be admissible in any prosecution for DUI, DUI per se, DWAI, or UDD, and in any prosecution for criminally negligent homicide pursuant to section 18-3-105, C.R.S., vehicular homicide pursuant to section 18-3-106(1)(b), C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205(1)(b), C.R.S.
- (f) Chemical test - admissibility. Strict compliance with the rules and regulations prescribed by the department of public health and environment shall not be a prerequisite to the admissibility of test results at trial unless the court finds that the extent of noncompliance with a CDPHE rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results.
- (g) It shall not be a prerequisite to the admissibility of test results at trial that the prosecution present testimony concerning the composition of any kit used to obtain blood, urine, saliva, or breath specimens. A sufficient evidentiary foundation concerning the compliance of such kits with the rules and regulations of the department of public health and environment shall be established by the introduction of a copy of the manufacturer's or supplier's certificate of compliance with such rules and regulations if such certificate specifies the contents, sterility, chemical makeup, and amounts of chemicals contained in such kit.
- (h) In any trial for a violation of this section, the testimony of a law enforcement officer that he or she witnessed the taking of a blood specimen by a person who the law enforcement officer reasonably believed was authorized to withdraw blood specimens shall be sufficient evidence that such person was so authorized, and testimony from the person who obtained the blood specimens concerning such person's authorization to obtain blood specimens shall not be a prerequisite to the admissibility of test results

concerning the blood specimens obtained.

- (i) (I) Following the lawful contact with a person who has been driving a motor vehicle or vehicle and when a law enforcement officer reasonably suspects that a person was driving a motor vehicle or vehicle while under the influence of or while impaired by alcohol, the law enforcement officer may conduct a preliminary screening test using a device approved by the executive director of the department of public health and environment after first advising the driver that the driver may either refuse or agree to provide a sample of the driver's breath for such preliminary test; except that, if the driver is under twenty-one years of age, the law enforcement officer may, after providing such advisement to the person, conduct such preliminary screening test if the officer reasonably suspects that the person has consumed any alcohol.
 - (II) The results of this preliminary screening test may be used by a law enforcement officer in determining whether probable cause exists to believe such person was driving a motor vehicle or vehicle in violation of this section and whether to administer a test pursuant to section 42-4-1301.1(2).
 - (III) Neither the results of such preliminary screening test nor the fact that the person refused such test shall be used in any court action except in a hearing outside of the presence of a jury, when such hearing is held to determine if a law enforcement officer had probable cause to believe that the driver committed a violation of this section. The results of such preliminary screening test shall be made available to the driver or the driver's attorney on request.
 - (j) In any trial for a violation of this section, if, at the time of the alleged offense, the person possessed a valid medical marijuana registry identification card, as defined in section 25-1.5-106(2)(e), C.R.S., issued to himself or herself, the prosecution shall not use such fact as part of the prosecution's case in chief.
 - (k) In any traffic stop, the driver's possession of a valid medical marijuana registry identification card, as defined in section 25-1.5-106(2)(e), C.R.S., issued to himself or herself shall not, in the absence of other contributing factors, constitute probable cause for a peace officer to require the driver to submit to an analysis of his or her blood.
- (7) Repealed.
- (8) A second or subsequent violation of this section committed by a person under eighteen years of age may be filed in juvenile court.

Cite as C.R.S. § 42-4-1301

APPENDIX H. CASE LAW

EVIDENTIARY TESTS (GENERAL)

In *Delaware v. Prouse*, 440 U.S. 648 (1979), the United States Supreme Court held that randomly stopping vehicles to determine if the driver has a valid license and registration, and for no other reason, is unlawful. A stop of a vehicle without a warrant is likewise authorized, provided three conditions exist:

1. The officer stopping the vehicle has a reasonable suspicion that criminal activity has occurred, is taking place, or is about to take place;
2. The officer has a reasonable objective for the intrusion; and
3. There is a reasonable connection between the scope and character of the intrusion and its objective. *People v. Ingram*, 984 P.2d 597, 603 (Colo. 1999).

However, DUI checkpoints have been approved. *Orr v. People*, 803 P.2d 509 (Colo. 1990).

A person does not have a constitutional right to drive. Colorado's Expressed Consent law, section 42-4-1031.1, C.R.S., requires all drivers to submit to a blood and or breath test when an officer develops probable cause that the driver was operating his vehicle while under the influence or impaired by the consumption of alcohol and or drugs. Despite major changes in the law pertaining to securing blood, the law remains a valid means to gain evidence for prosecution. But, failure to conduct the evidentiary test properly could result in the suppression of the test results.

A DUI conviction requires proof beyond a reasonable doubt that the defendant drove a vehicle. See § 42-4-1301(1)(a), C.R.S. The term “drive” means to exercise “actual physical control” over a motor vehicle. *Stewart*, 55 P.3d at 115 (quoting *People v. Swain*, 959 P.2d 426, 431 (Colo. 1998) [actual physical control is determined by examining the totality of the circumstances and not an exclusive list of factors]).

Colorado impaired driving offenses require neither actual physical movement of a vehicle or that the vehicle travel any particular distance. See *Smith v. Charnes*, 728 P.2d 1287, 1292 (Colo. 1986) (holding the defendant exercised actual physical control of the vehicle when he was intoxicated and found asleep or unconscious behind the wheel of a stopped vehicle, with the engine running and the lights on); *People v. VanMatre*, 190 P.3d 770, 774 (Colo. App. 2008) (holding the defendant operated a vehicle even though the vehicle could not move because it lacked fuel and the battery was dead).

Prior to 2013, all of America thought that an officer with probable cause that a driver had alcohol in his system could force a blood draw without a search warrant merely because the natural dissipation of alcohol in the bloodstream presented an exigent circumstance

allowing for a warrantless search. *Schmerber v. California*, 384 U.S. 757 (1966). Then the United States Supreme Court issued its opinion in *Missouri v. McNeely*, 569 U.S. 141 (2013).

Any search or arrest must be supported by probable cause. An officer possesses probable cause to take blood when the facts and circumstances known to the police are enough for a reasonable and prudent person to believe the defendant committed an alcohol-or drug-related offense. This standard is far less than absolute certainty, only the certainty upon which people make everyday decisions. Making this evaluation requires examination of all the facts and circumstances known to the police, not whether each fact in isolation supports probable cause. *People v. Barry*, 349 P.3d 1139 (Colo. App. 2015).

Fellow Officer Rule - No individual officers need to possess all the information necessary to support probable cause. Often, traffic investigations involve multiple officers performing different tasks. Under the fellow officer rule, any information collected by one officer as part of a coordinated investigation is imputed to all officers working on the investigation. The rule requires that information have been collected when working with another officer or officers. The courts will apply the fellow officer rule to determine if probable cause was present at the time a search or arrest requiring probable cause was performed. Under this rule it does not matter if the officer actually doing the search or making the arrest had all the information, as long as the police as a whole had probable cause.

Warrantless Searches and Exigent Circumstances - Missouri has an implied consent statute which allows an officer to force blood collection from a driver who refuses to take a test on a standard DUI. When *McNeely* refused to take a test the officer had a blood sample taken. He did not document any exigent circumstances, believing that *Schmerber* did not require any. The United States Supreme Court reversed the conviction.

The Court held that a warrantless search of blood in a DUI case must be supported by an exception to the warrant requirement like any other warrantless search. Dissipation of alcohol in the bloodstream is one factor, but it alone cannot support a warrantless search. The Court did not explain or give examples of what factors would support a warrantless search, but length of time to secure a warrant, length of time from the time of first contact to the development of probable cause, and the amount of time necessary to get the blood drawn are all things which must be considered. The major factor, according to the Court, is whether the time it takes to secure a warrant will undermine the usefulness of the blood draw result.

The Colorado Supreme Court applied *McNeely* in *People v. Schaufele*, 325 P.3d 1060 (Colo. 2014), rejecting an argument that any length of time to get a warrant longer than it would take to get the defendant to a facility for drawing blood supports a warrantless draw. Although the period of delay is part of the totality of the circumstances, it cannot be the sole factor in deciding if a search warrant is required.

Search Incident to Arrest - In addition to asserting exigent circumstances as a ground to

take blood without a warrant, the government asserted that such a draw was a lawful search incident to arrest. In *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) the United States Supreme Court examined blood and breath tests in the context of evaluating the constitutionality of laws which criminalize the refusal to take such tests (Colorado does not have this kind of law). To make this determination the Court weighed the degree of intrusion on the defendant's privacy against the government's need to make the intrusion in support of a legitimate government purpose.

Breath tests, according to the Court, may lawfully be required incident to arrest, and therefore laws criminalizing the refusal to take one were constitutional. The amount of intrusion upon a person's privacy by blowing into a tube is minimal, and no person has a reasonable expectation of privacy in the air they exhale. Because there are no significant privacy concerns, and the government has a strong interest in enforcing the impaired driving laws, the government can require a breath test incident to a lawful arrest, and punish the refusal to take one.

A blood test, however, presents a different analysis. There can be no question that blood tests further invade a person's privacy than a breath test. Not only does it require piercing the skin to remove something which generally stays within the body, but it extracts something from which more information could be available than merely the amount of alcohol in the system (unlike a breath test). There is a much greater privacy invasion in taking blood than in taking breath. For that reason, states may not seize blood incident to arrest, and state laws which criminalize the refusal to submit to a blood test are unconstitutional.

In a recent Fourth Amendment case, *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019), the United States Supreme Court recently ruled “exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Because both conditions are met when a drunk-driving suspect is unconscious, *Schmerber* controls. A driver's unconsciousness does not just create pressing needs; it is itself a medical emergency.”

COLORADO'S EXPRESSED CONSENT LAW

The United States Supreme Court went out of its way in both *McNeely* and *Birchfield* to distinguish between state laws which criminalize the refusal to take a test, and state laws which contain only administrative consequences for drivers' licenses along with evidentiary consequences allowing the admission of evidence. Colorado has only the latter, and therefore for most purposes is not affected by *Birchfield* at all (except in terms of clarifying that Colorado is not affected at all).

The Colorado Supreme Court made that clear in three cases all decided on the same day in 2017. The Court upheld a search of a defendant's blood as not coerced by the expressed consent advisement. According to the Court, there was no need to determine if his consent was coerced by the officer reading the expressed consent form because the

law had already imputed his consent to him. *People v. Simpson*, 392 P.3d 1297 (Colo. 2017). The Court also allowed the use of a defendant's refusal as evidence of his consciousness of guilt because where there has been no search, anything other than criminalizing the refusal to take a blood test does not implicate any Fourth Amendment protection. *Fitzgerald v. People*, 394 P.3d 671 (Colo. 2017). Finally, the Court upheld a blood draw from an unconscious driver because by driving on the roadways he had already consented to a search. *People v. Hyde*, 393 P.3d 962 (Colo. 2017).

These cases do not mean the police may get a blood draw from any driver who refuses (and of course it would be impossible to get a breath test without the cooperation of the driver). Although Colorado would have the right to pass a law which allows the forced blood draw from any impaired driver (as long as *McNeely* is complied with), Colorado's statute only allows forced blood draws from drivers who present probable cause that they have committed a limited number of offenses other than DUI/DWAI. In DUI and other cases, the law allows a driver to revoke his statutory conferred consent and suffer the consequences to his license and in his trial without facing a forced blood draw. Any test must comply with CDPHE rules and regulations.

COLORADO'S EXPRESSED CONSENT LAW IN PRACTICE

Because our law has been upheld in its entirety, as long as constitutional requirements for the taking of blood are followed there should be no problem with the admission of evidence of the blood or breath test results or the refusal to comply with the taking of a test. A driver, however, may revoke his or her consent to take a test. Here is a sample of applicable case law from this arena.

Expressed Consent Advisements - There is no statutory requirement that you give a suspect a certain advisement of the expressed consent provisions. There is no requirement to advise a driver that his license will be revoked if he refuses. *Long v. Colo. Dep't of Revenue, Motor Veh. Div.*, 296 P.3d 329, 336-37 (Colo. App. 2012) (quoting *Brewer v. Motor Vehicle Div.*, 720 P.2d 564, 570 (Colo. 1986) [no constitutional or statutory requirement that law enforcement officer must tell driver legal consequences for refusal to submit to any tests]). See also *Dikeman v. Charnes*, 739 P.2d 870, 872 (Colo. App. 1987) (licensee presumed to know law involving consequences of refusing).

Choice of Test - The DUI statute sets forth certain specific rights of a suspect regarding the taking of a test in section 42-4-1301.1(2)(a)(I), C.R.S. If a suspect specifically requests a blood test, then he must be given must be a blood test. If the suspect specifically requests that they not have their blood drawn, then any test given must be a breath test. Failure to give a blood test to a driver who requests one can result in dismissal of the case. *People v. Null*, 233 P.3d 670 (Colo. 2010).

When an officer with probable cause believes that a suspect is DUI or DWAI, and has reasonable grounds to believe that drugs are involved, the officer may choose to require a blood test. The choice of test or tests does not in any way belong to the defendant. Section

42-4-1301.1(2)(b)(I), C.R.S.

1. Time limits and other legalities regarding the obtaining of tests can be difficult at times to comply with. It is essential to find out early whether the suspect will cooperate early rather than late. After probable cause of DUI or DWAI is established, the process of finding out if the suspect will agree to take a particular test, invoking a legal right to select a certain test once a test has been required, or simply receiving refusal to take a test, should be completed as soon as possible. Therefore, in rural settings, or in situations where contact is made with the suspect a considerable time after the suspect was last driving, time is of the essence if DUI per se is to be charged or if requirement that the test be given within a reasonable time after driving is to be satisfied.
2. Physical inability to take a breath test and hospital settings where a suspect is unable to take, or to complete, or to cooperate in the completing of a breath test because of injuries, illness, disease, physical infirmity, or physical incapacity, or if such person is receiving medical treatment at a location at which a breath testing instrument is not available, any test given must be a blood test. There is no election of a different test.

The need to obtain blood alcohol content evidence will not, as a general rule, create the level of immanency required to override the constitutional protection against warrantless entry. *People v. Wehmas*, 246 P.3d 642 (Colo. 2010).

REFUSALS

Determining if a driver has refused to take a test has been the subject of a great deal of litigation.

Waiver of liability - Some hospitals and medical personnel may attempt to require the subject to sign a form releasing them from any liability arising from the administration of that test. You may have the subject's permission to administer the test, but the subject may refuse to sign any waiver of liability. Refusal to sign any release form will be treated by the officer as a refusal. Section 42-4-1301.1(3), C.R.S.

In *Gallion v. Colo. Dep't of Revenue*, 171 P.3d 217 (Colo. 2007), the Supreme Court reaffirmed that the determination of whether a person refused is to be based on an objective, not a subjective, standard; it is the driver's external manifestations of unwillingness or his outright refusal to take the test which are relevant and not the driver's state of mind or later recollection of events.

A driver must consent to the test in order to allow the test to take place within a two-hour time period of the person's driving. Failure to do so constitutes a refusal. Section 42-4-1301.1(2)(a)(III), C.R.S.

A test that is sabotaged by the actions of the person tested is of the same legal effect as no test at all. Conduct constituting less than cooperation by the suspect in taking the test is the same as a refusal, or a revocation of prior consent. *Halter v. Dep't of Revenue*, 857 P.2d 535 (Colo. App. 1993).

When an arresting officer offers a driver a choice between blood or breath testing, the burden is on the driver to tell the officer which test he is willing to take. Where the suspect does not tell the arresting officer which test he is willing to take ("I'll take either one") despite an officer's requests and warnings, it is considered a refusal to submit to testing. *Shumate v. Dep't of Revenue*, 781 P.2d 181 (Colo. App. 1989).

Motorist's initial refusal to submit to chemical testing in accordance with expressed consent law could not be rectified by her later attempt to consent and cooperate, where, although motorist's attempt to recant her refusal came within two hours of driving as contemplated by expressed consent statute, the arresting officer had already completed his statutory obligations in dealing with a driver that refuses testing, the officer had left to resume duty and was no longer present to administer the test, and defendant was in the custody of an entirely different law enforcement agency that was not responsible for administering or directing the completion of her chemical test. *Gallion*, 171 P.3d at 223.

Motorist's statement that he wanted to speak to an attorney prior to alcohol testing objectively established a refusal of testing supporting driver's license revocation under the expressed consent law, even though the police officer responded to motorist's statement with "okay," where the police officer did not tell motorist that he had a right to an attorney under Miranda, motorist did not ask the officer to clarify what he meant by "okay," and the officer later had the motorist sign a form stating that motorist was "not allowed to speak to an attorney prior to responding to the Officer's request for test(s)" and indicating that motorist had refused testing by stating that he wanted to speak to a lawyer. *Haney v. DMV*, 361 P.3d 1093 (Colo. App. 2015).

Where a suspect either consents to take a test then refuses or simply refuses to take a test, the burden of expressing that one has changed one's mind is on the suspect. If the suspect does express a change of mind and finally consents to a test, and an officer or blood draw nurse is still available, the officer should provide a test unless the delay has made it impossible to complete a test within two hours of the last known point of driving or the delay has been long enough to materially affect the test results. *Gonzales v. Colo. Dep't of Revenue*, 728 P.2d 754 (Colo. App. 1986).

Under the expressed consent law, "a licensee cannot refuse to take a chemical test of breath or blood merely because he believes such testing equipment is unreliable or not working properly." *Long*, 296 P.3d at 335.

When the arresting officer requests the suspected drunk driver to submit to testing, the driver has a statutory right and responsibility to choose between taking either a blood test or a breath test to determine the driver's BAC. When the driver has chosen a test, the

arresting officer generally has a corresponding duty to implement the particular type of test selected by the driver, without allowing the driver to change that test selection. *Bradt v. Colo. Dep't of Revenue*, 178 P.3d 1250, 1252 (Colo. App. 2007).

Warrantless Blood Draw - When a driver refuses to take a test an officer may only physically restrain any person for the purpose of obtaining a specimen of such person's blood, breath, saliva, or urine for testing when the officer has probable cause to believe that the person has committed criminally negligent homicide, vehicular homicide, assault in the third degree, or vehicular assault. Section 42-4-1301.1(3) C.R.S.

In those cases, the police may restrain a person for the purpose of securing a blood draw. A search warrant must be obtained to seize the driver's blood unless, under the totality of the exigent circumstances are present which would serve to undermine the results of the test due to the time it would take to get a warrant. There is no set length of time for this determination, nor any specific set of circumstances which would allow the taking of a warrantless blood draw. This puts the burden on the officer to evaluate and document the circumstances regarding getting a search warrant or the decision not to wait. Anything and everything which went into that decision must be reflected in the police reports. This includes the time necessary to investigate, develop probable cause, write the warrant affidavit and the warrant, contact a judge, get the affidavit and warrant to the judge, and receive the signed warrant or court approval back.

Factors like availability of officers to investigate, potential medical treatment of the driver which might affect the result, time from any known drinking to the time it took to develop probable cause, time to get to the place where the blood draw would be done if no other officer could at the same time be drafting and submitting the warrant application. In many, maybe even most, situations following a serious crash, this length of time is substantial and getting a warrant, at least for the first blood draw would take too long. Subsequent blood draws, however, will almost always require a warrant unless there is some extraordinary situation preventing it.

Two of the offenses allowing for forced blood draws are not what is normally thought of as traffic offenses: criminally negligent homicide and third degree assault. Historically these have not been the basis of forced blood draws, and there appears to be no case law where blood was taken based upon probable cause of the commission of these crimes. It appears these were placed into the expressed consent statute to deal with situations where there may not be probable cause of a more serious crime, but evidence needs to be collected to ascertain exactly what offense may have been committed.

1. Criminally negligent homicide is basically a lesser way of committing vehicular homicide by driving recklessly. Criminal negligence is the lower standard of mental state. Reckless conduct requires consciously disregarding a substantial and unjustifiable risk; criminal negligence is failing to perceive such a risk through a major deviation for the standard of care a reasonable person would exercise.

2. Similarly, third degree assault is a lesser offense than vehicular assault because it only requires bodily injury and not serious bodily injury. If the driver caused bodily injury either recklessly or negligently with a deadly weapon (the motor vehicle) then he committed third degree assault.

These statutes seemingly were put into the forced blood draw category to facilitate the collection of the blood draw while other evidence was being collected to determine if vehicular homicide or vehicular assault had been committed. There may be probable cause that a driver was affected by the consumption of alcohol or drugs, but perhaps not probable cause that the driver was under the influence. If the police have probable cause that the driver caused a death through negligence, and that evidence of some level of impairment can be found in his blood, the law would allow a forced blood draw.

Perhaps a more common situation occurs when the police are confronted with an obviously intoxicated driver who has caused a crash where the other driver and passengers are injured, but the nature and severity of their injuries is uncertain. Evaluation of those injuries by medical professionals might take a long time, long enough to result in the evacuation of alcohol or drug evidence in the blood. The legislature has determined that in these situations, assuming there is probable cause the driving was done recklessly or with criminal negligence (including the decision to drive after ingestion of drugs or alcohol), the police are allowed to forcibly take blood in compliance with constitutional requirements.

Exigent circumstances might allow for a blood draw prior to securing a warrant, but the police must be able to articulate why the actions of the defendant support a finding of recklessness or negligence. Actions like driving on the wrong side of the road, excessive speed, weaving in and out of heavy traffic and other extremely dangerous types of driving could be used to support this standard.

ADMINISTRATIVE HEARINGS

Hearsay evidence, if sufficiently reliable and probative may establish any element in a revocation hearing. *Colo. Dep't of Revenue v. Kirke*, 743 P.2d 16, 22 (Colo. 1987). A revocation can be obtained solely through hearsay, as long as the driver's ability to cross-examine the officer is preserved. *Hanson v. Dep't of Revenue*, 411 P.3d 1, 7 (Colo. App. 2012).

The exclusionary rule for Fourth Amendment violations does not apply to administrative hearings *v. Colo. Dep't of Revenue*, 328 P.3d 111, 114 (Colo. App. 2014).

An investigatory stop of a motor vehicle is permissible when a police officer has a reasonable suspicion that the driver has committed a traffic violation, such as weaving. *Nefzger v. Colo. Dep't of Revenue*, 739 P.2d 224, 229 (Colo.1987); *Wallace v. Colo. Dep't of Revenue*, 787 P.2d 181, 183 (Colo. 1989). Thus, if licensee was seen actually committing the traffic violation of weaving, the initial stop would be justified under the reasonable suspicion standard on that basis. *Baldwin v. Huber*, 223 P.3d 150 (Colo. App.

2009).

Deficiency in evidence of compliance with Department of Health Rules and Regulations does not automatically render the test result inadmissible. *Colo. Dep't of Revenue v. McBroom*, 753 P.2d 239, 242-43 (Colo. 1988) (lack of testimony about officer's certification to perform breath test did not invalidate test). Lab report is admissible in hearing to revoke driver's license. *Colo. Dep't of Revenue v. Rowland*, 408 P.3d 458 (Colo. 2018) (Court discusses reliability of report and affidavit requirements for evidence to be admissible). After the driver is given a full hearing, the department must make a final ruling on the revocation. If the driver's license is revoked, the driver can seek judicial review. *Francen*, 328 P.3d at 114.

APPENDIX I. HABITUAL TRAFFIC OFFENDERS

As a routine matter, you should determine whether the driver is driving under suspension, denial, and or revocation and, if so, whether he is categorized as revoked as a habitual offender. If he is, charging procedures should be followed, and charges should be filed under section 42-2-206, C.R.S. Two versions of driving with a revoked license (HTO) exist – the “regular” version, found subsection (1) (30-day mandatory minimum jail sentence), and the aggravated version, found in subsection (2) (60-day mandatory minimum jail sentence). Both are Class 1 Misdemeanors (not traffic misdemeanors).

The proof of the charge requires only evidence the driver was under a habitual offender revocation, had knowledge of such status, and was operating a vehicle. It is not necessary to prove a specific traffic violation, only he was operating a vehicle. In this type of situation, you should include as many details as possible in your reports to establish the fact he was driving the vehicle. Lay witnesses to his driving can be very helpful for independent corroboration. However, if the driver does commit a traffic violation while driving under a habitual offender revocation, he might have committed aggravated driving with a revoked license. The qualifying traffic offenses are:

1. Reckless Driving
2. Eluding or Attempted Eluding (Title 42)
3. Hit and Run (any version)
4. Vehicular Eluding (Title 18)

What constitutes a habitual traffic offender is found in section 42-2-202, C.R.S. By accumulating convictions for separate and distinct offenses, on separate dates, in the following manner:

- A. Within a seven-year period, three or more convictions of any of the following:
 1. DUI, DWAI, or DUI per se.
 2. Reckless Driving under state statute.
 3. DUS, DUR or DUD.
 4. False Affidavit or Swearing.
 5. Vehicular Assault or Vehicular Homicide.
 6. Manslaughter, Criminally Negligent Homicide or aggravated motor vehicle theft.

7. Hit and Run.

The violations must occur within seven years, not the convictions.

- B. Within a five-year period, ten or more convictions involving moving violations which provide for assessment of four or more points each.
- C. Within a five-year period, eighteen or more convictions involving moving violations which provide for assessment of three or less points each.

A person revoked as a habitual offender for five years. C.R.S. § 42-2-205. Any person found to be a habitual offender, who is thereafter convicted of operating a vehicle in this state while the revocation of the department prohibiting such operation is in effect, is guilty.

APPENDIX J. CDPHE RULES AND REGULATIONS

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Laboratory Services Division

5 CCR 1005-2

RULES PERTAINING TO TESTING FOR ALCOHOL AND OTHER DRUGS

(Promulgated by the State Board of Health)

Adopted by the Board of Health on December 19, 2018; effective February 14, 2019.

Part 1: General

Part 2: Certification Requirements for Operators and Instructors Performing Evidential Breath Alcohol Testing (EBAT)

Part 3: Certification Requirements for Evidential Breath Alcohol Testing (EBAT) Facilities

Part 4: Evidential Breath Alcohol Testing (EBAT) - Collection and Testing Procedures

Part 5: Certification Requirements for Forensic Toxicology Laboratories

Part 6: Blood Forensic Toxicology – Collection and Testing Requirements

Part 7: Urine Forensic Toxicology – Collection and Testing Requirements

Part 8: Post Mortem Forensic Toxicology – Collection and Testing Requirements

Part 9: DUI and DUID Forensic Toxicology Laboratory Certification Standards

Part 10: Violations and Remedies

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

Part 1. General

1.1 Purpose and Scope

This rule establishes minimum standards for certification and approval of entities and processes used for alcohol and drug testing. This rule is applicable to: samples taken from subjects driving under the influence, driving while impaired, driving with excessive alcohol content; vehicular assaults and vehicular homicides involving an

operator while under the influence of alcohol or one or more drugs or both; the testing of samples of blood or other bodily substances from the bodies of pilots in command, motorboat or sailboat operators in command, or drivers and pedestrians suspected of being impaired by alcohol and/or drugs who die within four hours after involvement in a crash involving a motor vehicle, a motorboat, a sailboat or an aircraft; and consumption of alcohol by underage persons and records related thereto.

1.2 The Colorado department of public health and environment has determined that results obtained from the certified EBAT instrument are scientifically accurate, precise, and analytically reliable when the certified EBAT instrument is properly operated as described in this rule. Recommendations made to the state board of health are evidence-based through analytic testing and evaluation conducted by the department.

1.3 Evidential Breath Alcohol Testing (EBAT) certified facilities, instructors and operators will operate under Parts 2 through 4 of these rules and regulations. All approved EBAT facilities and certified instructors and operators performing direct evidential breath alcohol testing must comply with all applicable requirements in this rule.

1.4 Testing of blood alcohol, blood drug, urine drug and postmortem samples operate under Parts 5 through 9 of these rules and regulations. All certified forensic toxicology laboratories performing testing in the categories of blood alcohol, blood drug, urine drug and postmortem testing must comply with all applicable requirements in this rule.

1.5 Definitions

“Analytical Non-Conformance” – refers to a result that has been reported by the certified laboratory that exceeds its established criteria of acceptability resulting in repeat analysis requiring amended reporting.

“Appropriate Clinical or Public Safety Facility” – provides for the health and safety of a person whose blood is collected (subject) and meets the following criteria: 1) provide for the washing or cleansing of hands of the blood collection personnel, 2) provide a comfortable chair for the subject with arm supports to assure the elbow remains straight and both arms are accessible to the blood collection personnel, 3) take precautions to assure the subject does not fall out of the chair, 4) provide for cot or other reclining surfaces for subjects who prefer to lie down or who have adverse response to the blood collection procedures, 5) provide for the adverse response to blood collection by providing procedures and equipment for subjects who become faint, nauseous, vomit, bleed excessively, or convulse including the provision of drinking water, and 6) provide for the cleaning and disinfection of the blood collection area.

“Approved Facility” – any location that meets the requirements of these regulations and which is approved by the Department to house the certified EBAT instrumentation.

“Certification” – the official approval by the Department of an Evidential Breath Alcohol Test (EBAT) instrument, instructor, operator, or forensic toxicology laboratory to function under these rules and regulations.

“Certified EBAT Instructor” – an employee of a law enforcement agency or the Colorado Department of Public Health and Environment who meets the requirements of section 2.2 et seq. of these regulations.

“Certified EBAT Instrument” – the instrumentation approved for use by the Department for performing evidential breath alcohol testing in approved facilities by certified instructors and operators in order to determine the alcohol content in a subject’s breath for evidentiary purposes as identified in section 42-4-1301, C.R.S.

“Certified EBAT Operator” – an employee of law enforcement agency or the Colorado Department of Public Health and Environment who meets the requirements of section 2.1 et seq. of these regulations.

“Certified Laboratory” – a forensic toxicology laboratory certified by the Department to perform analytical testing of bodily fluids for alcohol or other drugs in the categories of blood alcohol, blood drug, urine drug or postmortem testing.

“Department” – refers to The Colorado Department of Public Health and Environment, Laboratory Services Division.

“Discovery Packet” – refers to records requested for litigation purposes that include sufficient material to allow independent review by a qualified toxicologist. The records must include when applicable, but are not limited to; the request of analysis, chain of custody documents, test subject analytical data, calibration, standard, quality control data from the subject analytic run, limits of quantitation (LOQ), limits of detection (LOD), analyst curriculum vitae (CV), and the standard operating procedure used during the analysis.

“DUI” – refers to the term Driving Under the Influence of alcohol and/or other drugs as defined by section 42-4-1301(1)(f), C.R.S.

“DUI Packet” – refers to the documentation produced by the certified EBAT instrument that must be included by the certified EBAT instructor or operator. This must include but is not limited to the following; the completed subject EBAT, and any Exception Messages which may have been encountered during the subject test attempts.

“DWAI” – refers to the term Driving While Ability Impaired by alcohol and/or other drugs as defined by section 42-4-1301(1)(g), C.R.S.

“Evidential” or “Evidentiary” – refers to a sample which, when tested, gives rise to test results that are sufficiently reliable to be admissible as evidence in a court of law.

“Evidential Breath Alcohol Test (EBAT)” – is an evidentiary breath alcohol test performed using a certified evidential breath alcohol testing instrument approved by the Department as described by section 42-4-1301, C.R.S.

“Exception Message” – is the term used for a report generated by the certified EBAT instrument whenever an Evidential Breath Alcohol Test (EBAT) is unable to be successfully completed.

“Internal Standard” – refers to a reference material that has similar chemical and physical properties to the analyte being measured and is added at a known concentration to a sample prior to testing.

“Key Management” – refers to personnel designated as top management and additional personnel who do not have laboratory wide authority but are “key” to the laboratory providing testing services which may include the laboratory director, technical personnel or any other designated qualified individual who has supervisory responsibilities for the scientific aspects of the laboratory.

“Laboratory Director” – the individual meeting the qualification requirements specified in Part 5 and Part 9 of these rules who is responsible for the overall operation and results reported by the laboratory.

“Limit of Detection (LOD)” – the lowest concentration or amount of an analyte that can be reliably shown to be present or measured under defined conditions and is derived by adding three standard deviations to the true value of the blank.

“Limit of Quantitation (LOQ)” – the concentration at which quantitative results can be reported with a high degree of confidence and is derived by adding ten standard deviations to the true value of the blank or administratively defined in terms of the lowest concentration of the lowest calibrator used in the analytic run.

“Proficiency Testing (PT)” – The evaluation of unknown specimens which determines target alcohol or drug values for those unknown specimens that is manufactured by a provider accredited to the International Standards Organization (ISO/IEC 17043). A single evaluation is commonly referred to as a PT event.

“Representative of a Certified Laboratory” – any employee of a certified laboratory or a courier employed by or contracted by the certified laboratory to transport specimens for the certified laboratory.

“Satisfactory PT Performance” – results scored from an individual PT event that meet or exceed the minimum score allowable to be considered passing.

“Successful PT Performance” – ongoing satisfactory PT performance in multiple PT events that meet or exceed the minimum score allowable to be considered passing.

“Tampering” – to meddle with the certified EBAT instrument especially for the purpose of altering test results, damaging or misusing the instrument either by intentional or unintentional means.

“Technical Personnel” - individuals who are engaged in any aspect of the testing of samples and reporting of results under the supervision of the laboratory director or the laboratory director’s designee.

“Unsatisfactory PT Performance” – results scored from an individual PT event that are scored below the minimum allowable to be considered passing.

“Unsuccessful PT Performance” – two consecutive unsatisfactory individual PT events or 2 out of 3 unsatisfactory individual PT events that are scored below the minimum allowable to be considered passing.

Part 2 Certification Requirements for Operators and Instructors Performing Evidential Breath Alcohol Testing (EBAT)

- 2.1 Operators seeking initial EBAT certification or EBAT recertification by the department must meet the following criteria:
 - 2.1.1 To initially be certified as an EBAT operator an individual must:
 - 2.1.1.1 Be currently employed by a law enforcement agency or the Department, and
 - 2.1.1.2 Attend and successfully complete the Department's eight (8) hour EBAT operator certification course, and
 - 2.1.1.3 Successfully complete the Department's EBAT operator comprehensive practical, and
 - 2.1.1.4 Successfully pass the Department's EBAT operator exam with a score of 80% or greater.
 - 2.1.1.5 Upon successful completion of the Department's operator certification course, the certified EBAT operator will be issued an instrument access card by the department that may only be used by the certified EBAT operator to whom it was issued.
 - 2.1.2 To maintain active certification status, a certified EBAT operator must complete the following recertification requirements:
 - 2.1.2.1 Successfully perform and complete a recertification EBAT within a 180-day period, and
 - 2.1.2.2 Annually – Successfully complete the Department's certified EBAT operator recertification refresher course.
 - 2.1.2.3 Upon successful completion of the Department's operator recertification requirements, the certified EBAT operator card's active status will be updated and available for use during the next certification period.
 - 2.1.3 The certified EBAT operator card issued by the Department may serve as evidence of certification.
- 2.2 If the certified EBAT operator fails to meet the EBAT recertification requirements found in this part, the Department will;
 - 2.2.1 Decertify the EBAT operator, and
 - 2.2.2 Deactivate the EBAT operator certification card used to access the certified EBAT instrument, and
 - 2.2.3 Maintain the EBAT operator in an inactive status until the EBAT operator certification requirements found in Part 2.1 are met.
- 2.3 Instructors seeking initial EBAT certification or EBAT recertification by the Department must meet the following criteria:
 - 2.3.1 To initially be certified as an EBAT instructor an individual must:

- 2.3.1.1 Be currently employed by a law enforcement agency or the Department, and
- 2.3.1.2 Be a currently certified EBAT operator in active status, and
- 2.3.1.3 Attend and successfully complete the Department's sixteen (16) hour EBAT instructor certification course, and
- 2.3.1.4 Successfully complete the Department's EBAT instructor comprehensive practical, and
- 2.3.1.5 Successfully pass the Department's EBAT instructor exam with a score of 80% or greater.
- 2.3.1.6 Upon successful completion of the Department's instructor certification course, the certified EBAT instructor will be issued an instrument access card that may only be used by the certified EBAT instructor to whom it was issued.
- 2.3.2 To maintain active status, a certified EBAT instructor must complete the following recertification requirements:
 - 2.3.2.1 Biennially - Participate in teaching, at minimum, one EBAT operator certification course, and
 - 2.3.2.2 Annually - Successfully complete the Department's certified EBAT instructor recertification refresher course.
- 2.3.3 A certified EBAT instructor in active status is also recognized as a certified EBAT operator and may perform testing.
- 2.3.4 The certified EBAT instructor card issued by the Department may also serve as evidence of certification.
- 2.4 For any certified EBAT instructor that does not meet the EBAT recertification requirements found in this part the Department will;
 - 2.4.1 Decertify the EBAT instructor, and
 - 2.4.2 Deactivate the EBAT instructor certification card, used to access to the certified EBAT instrument, and
 - 2.4.3 Maintain the EBAT instructor in an inactive status until one of the following three recertification criteria are met:
 - 2.4.3.1 Within 30-days after expiration of the EBAT instructor certification expiration date, the inactive instructor must successfully complete a recertification evidential breath alcohol test to regain an active status as a certified EBAT operator. The certified EBAT operator must meet the requirements found at Part 2.1.2 in order to maintain certification, or,
 - 2.4.3.2 After 30-days from expiration of the EBAT instructor certification expiration date, the inactive instructor must meet the EBAT operator

certification requirements found at Part 2.1, or

2.4.3.3 The EBAT instructor meets the requirements found at Part 2.3 of the rule.

- 2.5 EBAT instructors or operators returning from active military service may reactivate their certification status by completing the following:
 - 2.5.1 Provide documentation of active duty status to the Department, (period of absence must not exceed 2 years), and
 - 2.5.2 Successfully pass the EBAT instructor or operator certification test with a score of 80% or greater, and
 - 2.5.3 Successfully perform and complete a recertification EBAT.
 - 2.5.4 Upon successful completion of the recertification requirements in this Part, the certified EBAT instructor or operator card will be updated to an active status and become available for use during the next certification period.
 - 2.5.5 The certified EBAT instructor or operator must meet the requirements found in this Part in order to maintain an active certification status.

Part 3 Requirements for Evidential Breath Alcohol Testing (EBAT) Facilities

- 3.1 Standards for approval of permanent, temporary and mobile Evidential Breath Alcohol Testing (EBAT) facilities.
 - 3.1.1 Evidential Breath Alcohol Test(s) must be conducted only in facilities that have been approved by the Department.
 - 3.1.2 Department standards for approval of EBAT facilities are specified in Part 3 of this rule.
 - 3.1.3 EBAT facilities meeting the standards of performance as specified in Part 3 of this rule may be approved.
 - 3.1.4 Onsite Inspections of permanent, temporary and mobile EBAT facilities must be performed prior to initial approval and once per calendar year thereafter by Department personnel.
 - 3.1.4.1 Facility inspection reports will be sent by the Department to the facility within 15 days of the inspection date.
 - 3.1.4.2 When deficiencies are cited in a facility inspection report, a plan of correction must be received by the Department for review and approval within 15 days of receipt of the facility inspection report by the agency.
 - 3.1.5 Initial approval – permanent, temporary, and mobile EBAT facilities.
 - 3.1.5.1 A facility representative must submit a written request to the Department for initial approval of an EBAT facility. The request will be in the form and manner required by the Department and must include:

- 3.1.5.1.1 Acknowledgement from the facility representative that the requirements found in Part 3 have been reviewed prior to requesting approval.
 - 3.1.5.1.2 Documentation from a certified electrician verifying the power to the certified EBAT instrument is on its own dedicated power circuit.
 - 3.1.5.1.3 Verification from the facility representative that a dedicated and active data and phone line are installed and available for communications by the certified EBAT instrument.
 - 3.1.5.2 Upon receipt of the initial facility approval request, Department personnel will schedule an onsite inspection to verify compliance with the requirements found in Part 3 prior to approval.
 - 3.1.6 The Department will perform an onsite inspection at an EBAT facility when any of the following occur:
 - 3.1.6.1 The EBAT facility is seeking initial approval, or
 - 3.1.6.2 The approved EBAT facility requests relocation of the certified EBAT instrument either temporarily or permanently within the facility, or
 - 3.1.6.3 A new EBAT facility is being constructed that will house the certified EBAT instrument, or
 - 3.1.6.4 A complaint is received by the Department that requires an onsite inspection to verify compliance.
- 3.2 Evidential Breath Alcohol Testing (EBAT) facility requirements
 - 3.2.1 Instrument power requirements
 - 3.2.1.1 Alternating current (AC) line voltage of 120 volts, 60 hertz (Hz) grounded outlet on a dedicated circuit.
 - 3.2.1.2 20 ampere maximum circuit breaker.
 - 3.2.1.3 Voltage 120 +/- 12v (108v – 132v).
 - 3.2.1.4 Grounded outlet.
 - 3.2.1.5 An adequate surge protection device must be placed between the EBAT instrumentation and the grounded outlet.
 - 3.2.2 Facility environmental requirements
 - 3.2.2.1 The temperature of the room where the EBAT instrumentation is operated must be maintained between (15.0 – 32.2) degrees Centigrade.
 - 3.2.2.2 The relative humidity of the room where the EBAT instrumentation is

operated must be maintained between (5% - 70%).

3.2.2.3 The EBAT instrumentation room must have adequate lighting.

3.2.2.4 The area around and under the EBAT instrumentation must be free of dust, dirt and kept orderly.

3.2.2.5 The EBAT instrumentation must be placed on a solid and adequate work surface.

3.2.2.6 The room where the EBAT instrumentation is located must receive adequate ventilation.

3.2.2.7 The ventilation to the room where the EBAT instrumentation is located must prevent automobile emissions from being introduced.

3.2.2.8 The room where the EBAT instrumentation is located must not be used to store cleaning compounds or volatile chemicals.

3.2.2.9 The room where the EBAT instrumentation is located must remain secure and not readily accessible to unauthorized personnel.

3.2.3 EBAT facility documents

3.2.3.1 The EBAT instrument calibration certificate must be posted next to the instrument.

3.2.3.2 The EBAT instrument Exception Message guide must be posted next to the instrument.

3.2.3.3 Corrective actions taken by the certified EBAT instructor or operator are appropriate and timely when Exception Messages are encountered.

3.2.3.4 The EBAT instrumentation records applicable to the agency must be retained by the approved facility for a minimum of 5 years.

3.2.4 EBAT instrumentation

3.2.4.1 The approved facility must have available an adequate supply of mouth pieces.

3.2.4.2 The approved facility must have available an adequate supply of standard simulator solution issued by the Department.

3.2.4.3 The standard simulator solution is changed as needed and correctly by a certified EBAT instructor.

3.2.4.4 EBAT instrumentation and supplies must be properly maintained, stored and available to authorized personnel.

3.2.4.5 The EBAT instrumentation is being operated in the location it was

approved for within the approved facility.

Part 4 Evidential Breath Alcohol Testing (EBAT) - Collection and Testing Procedures

- 4.1 This part establishes the minimum standards for collection and testing of evidential breath alcohol samples that include:
 - 4.1.1 A certified EBAT instructor or operator to perform the test that is in an active status meeting the requirements found in Part 2, and
 - 4.1.2 An approved EBAT facility where the test is to be conducted meeting the requirement found in Part 3, and
 - 4.1.3 A certified EBAT instrument used to perform the test.
 - 4.1.3.1 Evidential breath specimens must be analyzed using a certified EBAT instrument approved for use by the Department. Certification of the EBAT instrument will be based on scientific standards of performance established by the Department.
 - 4.1.3.2 The Department must certify each EBAT instrument initially and annually thereafter.
 - 4.1.3.3 The Department will issue a certificate for each certified EBAT instrument after initial certification and after each annual certification. The certificate will reflect the certified EBAT instrument serial number and the inclusive dates for the certification period.
 - 4.1.3.4 Every EBAT sequence must include an assayed reference standard(s) with a known ethanol concentration of 0.100 grams of alcohol/210 liters of breath that brackets the subject's breath samples. The assayed reference standard(s) target value(s) is 0.100 grams of alcohol/210 liters of breath and must fall within a range of (0.090 – 0.110 grams of alcohol/210 liters of breath).
 - 4.1.3.4.1 The results of the assayed reference standard(s) must agree with each other within $\pm 10\%$ during the calibration checks.
 - 4.1.3.4.2 If the correlation between calibration checks is not within $\pm 10\%$, the instrument will discontinue the test sequence and print a "No Calibration Correlation" Exception Message.
 - 4.1.3.5 For each EBAT, the results of the two subject samples must agree with each other within 0.020 grams of alcohol/210 liters of breath.
 - 4.1.3.5.1 If the 0.020 grams of alcohol/210 liters of breath correlation is not obtained with the subject samples, the instrument will discontinue the test sequence and print a "No .02 Agreement" Exception Message.
 - 4.1.3.5.2 When a "No .02 Agreement" Exception Message is obtained,

the certified EBAT instructor or operator must repeat the 20-minute deprivation period prior to retesting the subject.

4.1.3.6 The two subject breath samples must meet the minimum measurement requirements in order to obtain a result. Samples not meeting the minimum sample requirements may result in an “Invalid Sample” Exception Message.

4.1.3.6.1 If an “Invalid Sample” Exception Message is obtained, the certified EBAT instructor or operator must repeat the 20-minute deprivation period prior to retesting the subject.

4.2 Pre-Analytic EBAT requirements include:

4.2.1 Unless otherwise provided by law, at the request of the subject, the subject must be given a choice of which type of evidential chemical test (evidential breath or blood alcohol) they prefer to take to determine the alcohol concentration in their body, or the choice to refuse either evidential chemical test. Nothing in this rule is intended to exempt or exonerate an individual from the penalties proscribed in sections 42-4-1301.1 and 42-4-1301.2, C.R.S., or any other relevant law, for the failure to submit to such test.

4.2.2 Ensure the certified EBAT instrument is in the “Ready” mode. If the certified EBAT instrument is in “Not Ready” mode, wait until the instrument completes the warm-up period prior initiating any testing.

4.2.3 Completion of a 20-minute deprivation period must be conducted at the approved EBAT facility by a certified EBAT instructor or operator that is in an active status that must include;

4.2.3.1 Removal of any foreign material from the subject’s mouth cavity that is not permanent in nature, prior to starting the 20-minute deprivation period, and

4.2.3.2 Depriving the subject access to foreign material that may be introduced into the mouth cavity during the 20-minute deprivation period, and

4.2.3.3 Observing the subject for signs of belching, regurgitation, or intake of any foreign material into the mouth cavity during the 20-minute deprivation period. If such observations occur, the 20-minute deprivation period must be repeated under the same conditions prior to testing.

4.2.4 Entry of the certified EBAT instructor or operator information into the certified EBAT instrument.

4.2.5 Entry of the arresting officer information into the certified EBAT instrument.

4.2.6 Entry of the subject information into the certified EBAT instrument to include the start time of the 20-minute deprivation period.

4.3 Analytic EBAT requirements include:

- 4.3.1 Providing the subject instruction for delivery of a breath sample that contains end- expiratory air from the lungs.
 - 4.3.2 Starting the test sequence and following the test instructions displayed by the certified EBAT instrument.
 - 4.3.3 Providing a clean mouthpiece with each breath sample provided by the subject.
 - 4.3.4 Observing the subject through completion of the second breath sample to look for signs of belching, regurgitation, or intake of any foreign material into the mouth cavity. If such observations occur, the test sequence must be discontinued by the certified EBAT instructor or operator and another 20-minute deprivation period must be repeated under the same conditions prior to retesting.
 - 4.3.5 Removal of the subject from the area in close proximity to the certified EBAT instrument during the two-minute period between breath samples in order to prevent tampering of the instrument during the test sequence.
- 4.4 Post-Analytic EBAT requirements include:
- 4.4.1 The certified EBAT instructor or operator must sign the completed EBAT report attestation statement indicating the test was performed in compliance with the procedures set forth by the Department and as prescribed by this rule.
 - 4.4.2 The certified EBAT instructor or operator must review the final report(s) for completeness.
 - 4.4.3 The certified EBAT instructor or operator must include all printouts generated by the certified EBAT instrument to include any associated Exception Message(s) (if applicable) that may have been encountered during the subject test attempt(s).
 - 4.4.4 All printouts generated from the certified EBAT instrument for the subject must be included in the DUI packet as defined in Part 1.5.
 - 4.4.5 All certified EBAT instrumentation records must be retained for a minimum of 5-years by either the certified EBAT facility or the Department as applicable.

Part 5. Certification Requirements for Forensic Toxicology Laboratories

- 5.1 Laboratory Analysis of Blood, Urine and Post Mortem Specimens
- 5.1.1 Laboratories must be certified by the Department to provide analysis. Participation in the Forensic Toxicology Laboratory certification program is based upon either: successful onsite annual inspection for non-accredited labs, or, ongoing accreditation status for accredited labs, in addition to successful proficiency testing performance in the category or categories the laboratory is certified in and ongoing compliance with Parts 5 through 9 of this rule.
 - 5.1.2 Laboratories seeking certification that are accredited by a nationally or

internationally recognized accreditation organization that includes the scope of forensic toxicology may elect to forgo the annual onsite inspection as long as accreditation remains active, and, the biennial inspection performed by the accrediting organization includes review of the specialty of toxicology.

- 5.1.3 Accredited laboratories requesting certification from the Department must provide the Department a copy of the accrediting organizations most recent and final biennial inspection report within 30-days of receipt of accreditation in the scope of forensic toxicology in addition to, any accepted plan of correction submitted to the accrediting organization by the laboratory.
 - 5.1.4 The Department will perform an onsite inspection of an accredited laboratory in the event that the specialty of toxicology is not reviewed by the accrediting organization during the biennial inspection.
 - 5.1.5 Laboratories certified by the Department who send samples to a reference laboratory for testing, must send those samples to a forensic toxicology laboratory certified by the Department.
 - 5.1.6 Laboratories may be certified to perform tests for one or more of the following categories: blood alcohol, blood drug, urine drug, and postmortem testing.
 - 5.1.7 Laboratories must meet standards of performance as established by these regulations. Standards of performance include; personnel qualifications, standard operating procedure manual, analytical process, proficiency testing, quality assurance, quality control, laboratory security, chain of custody, specimen retention, space, records, and result reporting.
 - 5.1.8 Laboratory inspections must be performed prior to initial certification and annually thereafter by Department personnel as established by this rule. A laboratory meeting the certification requirements of these regulations will be issued a certificate. Recertification shall be required annually and will be effective each July 1.
- 5.2 Initial Application
- 5.2.1 Laboratory Directors requesting certification of their laboratory must submit to the Department a completed application. The application will be in the form and manner required by the Department and includes: laboratory name, laboratory director, facility address, laboratory correspondence information, and analytical categories for which the laboratory requests certification.
 - 5.2.2 The Department will acknowledge the request and provide a copy of this rule to the laboratory.
 - 5.2.3 To be certified, laboratories must demonstrate compliance with all applicable requirements in Parts 5 through 9 and participate in an initial onsite inspection. The onsite inspection may be waived for accredited laboratories so long as the requirements at 5.1.3 are satisfied as determined by the Department at its sole discretion.

5.3 Application for Continued Certification

- 5.3.1 Annually the Laboratory Director must request to be considered for continued certification by providing a completed application to the Department no later than June 1. The application will be in the form and manner required by the Department and will include: laboratory name, laboratory director, facility address, laboratory correspondence information, analytical categories for which the laboratory requests certification and case load totals.
- 5.3.2 Laboratories must be recertified annually starting July 1, and certification will be for a period of 1 year.
- 5.3.3 Laboratories must maintain a listing of all analytical methods used by the laboratory and all analytes tested and reported by the laboratory. The laboratory must provide this listing to the Department.
- 5.3.4 To maintain certification, laboratories shall meet all applicable requirements found in Parts 5 through 9. Non-accredited laboratories or accredited laboratories identified in 5.1.4 must participate in an annual onsite inspection.

5.4 General Requirements

- 5.4.1 In addition to the laboratory's application, the laboratory must provide an updated listing of all technical personnel engaged in testing to the Department. The listing will be in the form and manner required by the Department.
- 5.4.2 Prior to independently analyzing samples, technical personnel must demonstrate acceptable performance on precision, accuracy, specificity, reportable ranges, blanks, and unknown challenge samples (proficiency samples or internally generated quality controls). The laboratory must have a system to evaluate and document the competency of technical personnel as specified in Part 9.
- 5.4.3 The laboratory must notify the Department in writing within thirty days of any changes pertaining to laboratory location and/or key management.
- 5.4.4 The Laboratory Director is directly responsible for the accuracy of the tests performed, the accuracy of the reports issued, and adherence to the applicable requirements in this rule.
- 5.4.5 The laboratory must have adequate space, equipment, materials, and use reference materials from a manufacturer accredited to the International Standards Organization (ISO) requirements for certified reference materials and certified reference standards, ISO/IEC 17034 when available.
- 5.4.6 The laboratory must establish and adhere to written methods of analysis (Standard Operating Procedure (SOP) used to perform the tests reported. Critical elements that must be addressed in the SOP are in Part 9.
- 5.4.7 The laboratory must demonstrate compliance with these regulations through a successful onsite inspection conducted by Department personnel prior to certification. Certified laboratories will be inspected on an annual announced

basis. Certified laboratories may be inspected on an unannounced basis to evaluate complaints.

- 5.4.8 The laboratory must maintain all records related to analysis for a minimum of 5 years. Records to be maintained include instrument maintenance, calibration, quality control and quality assurance documentation for all analyses performed, specimen processing, test results and test reports of analysis, dates of analysis and the identity of the person performing the analysis. Retained records must be made available for review by Department personnel.
- 5.4.9 The laboratory must investigate all analytical non-conformances. Whenever subject test results are impacted, further testing using the affected method(s) may not resume until the laboratory has performed a root cause analysis and corrected the non-conformance. All subject tests impacted by the non-conformance must be reviewed by the laboratory director and amended reports issued when necessary. Copies of the non-conformance, root cause analysis and corrective action plan must be provided to the Department upon request.
- 5.5 Proficiency Testing (PT) requirements for certified forensic toxicology laboratories.
 - 5.5.1 Proficiency Testing (PT) is the evaluation of unknown specimens which determines target values for those unknown specimens and is required for each approved category the laboratory is certified in.
 - 5.5.2 PT material must be obtained from a PT provider that is accredited to the ISO/IEC 17043 standards and can provide appropriate biological specimens that are applicable to the testing the laboratory performs.
 - 5.5.3 Prior to initial certification, the laboratory must at minimum, have successfully participated in one proficiency testing event(s) within the preceding 12 months in the category for which the laboratory seeks certification and must have received a satisfactory score(s) for each of those event(s) as defined in Part 5.
 - 5.5.4 To maintain continued laboratory certification, a laboratory must demonstrate successful PT performance for each category in which the laboratory is certified.
 - 5.5.5 For each approved category of testing, PT samples shall be:
 - 5.5.5.1 Tested for all analytes reported by the laboratory that are present in the PT samples, and
 - 5.5.5.2 Tested by each technical personnel annually, and
 - 5.5.5.3 Tested using approved standard operating procedures, and
 - 5.5.5.4 Tested in the same manner as subject samples, and
 - 5.5.5.5 Reported to the PT provider, and
 - 5.5.5.6 The laboratory must request that the proficiency testing provider provide a consultant copy of their PT survey results to:

**Colorado Department of Public Health and
Environment
Laboratory Services Division
Certification Program
8100 Lowry Boulevard
Denver, CO 80230-6828**

5.5.6 Blood Alcohol Testing

5.5.6.1 A laboratory must demonstrate successful PT performance in a minimum of 3 alcohol PT testing events per year. Each event must consist of a minimum of 4 specimens each. The PT provider will evaluate the results and forward them to the laboratory as well as to the Department.

5.5.6.2 Other forensically significant volatiles, such as acetone, methanol and isopropanol, maybe included in one or more PT samples in each of the 3 events. The laboratory must be able to detect any volatile included in the PT samples and must retain documentation of this detection with the PT results.

5.5.6.3 Scoring Criteria for Blood Alcohol Proficiency Testing

5.5.6.3.1 PT results must be returned to the PT provider within the time specified by the PT provider. Results received after the due date will not be scored and will be considered an unsatisfactory performance resulting in a score of 0 for the testing event. The laboratory must contact the PT provider and the Department if extenuating circumstances prevent timely response to a PT event.

5.5.6.3.2 An acceptable blood alcohol PT result is one that falls within +/- 10% of the reported mean.

5.5.6.3.3 The laboratory must investigate any score less than 100% and undertake corrective action as needed. The investigation outcome and corrective action must be provided to the Department upon request.

5.5.5.3.4 The PT results will be reviewed by the Department to determine if successful PT performance has been achieved. If a laboratory has consecutive "Unsatisfactory" evaluations, or achieves an "Unsatisfactory" score in 2 of any 3 consecutive PT events, the PT performance is deemed "Unsuccessful". The "Unsuccessful" determination may result in a "Directed Plan of Correction" specified by the Department, or suspension/limitation of certification for the failed analyte.

5.5.7 Urine, Blood and Postmortem Drug Testing

5.5.7.1 For blood drug, urine drug and postmortem screening and

confirmation certification, the laboratory must demonstrate successful PT performance.

5.5.7.1.1 For blood drug certification the laboratory must participate in a minimum of two PT events annually that include blood samples.

5.5.7.1.2 For urine drug certification the laboratory must participate in a minimum of two PT events annually that include urine samples.

5.5.7.1.3 For laboratories performing only postmortem forensic toxicology testing the laboratory must participate in a minimum of two PT events annually that include a combination of blood and urine samples and other postmortem matrices when available.

5.5.7.2 Scoring criteria for drug proficiency testing

5.5.7.2.1 PT results must be returned to the PT provider within the time specified by the PT provider. Results received after the due date will not be scored and will be considered an “Unsatisfactory” performance resulting in a score of 0 for the testing event. The laboratory must contact the PT provider and the Department if extenuating circumstances prevent timely response to a PT event.

5.5.7.2.2 All analytes listed and reported (qualitatively and quantitatively) by the laboratory must be analytically tested in the PT challenges in the same manner as subject samples.

5.5.7.2.3 A satisfactory event score is the positive identification and when applicable, quantitation of 80% of the target analytes present with no false positives. Any false positive will result in an “Unsatisfactory” score for the PT event.

5.5.7.2.3.1 Scoring is as follows: if a laboratory only reports an analyte qualitatively, the total possible points for that analyte will be 4 points.

Total points possible:

- A. Each possible positive identification is 4 points.
- B. Each quantitative result is worth a possible 2 points.

Note: quantitative results will be subject to further point restrictions when standard deviation (SD) values are given by the PT provider.

Laboratory’s points:

- A. Each correctly identified analyte is 4 points.
- B. Each false negative is 0 points (i.e., no

- qualitative result given).
- C. Each quantitative result within 1 standard deviation (SD) is 2 points.
- D. Each quantitative result within 2 SD is 1 point.
- E. Each quantitative result outside 2 SD is 0 points.
- F. Each correctly identified negative specimen is 4 points.
- G. Each false positive is minus (-) 25 points and is automatically considered an unsatisfactory event.

Laboratory's Score = (laboratory's points / total possible points) * 100

5.5.7.2.4 Whenever a laboratory receives an unsatisfactory PT event (less than 80%), the laboratory must investigate and undertake corrective action as needed. The investigation outcome and corrective action documentation must be provided to the Department upon request.

5.5.7.2.5 Whenever a quantitative result reported by the laboratory in a PT challenge is considered "Unacceptable" by the PT provider (outside $\pm 2SD$ or 30% from the mean, whichever is greater), the laboratory must undertake and document corrective action. The corrective action documentation must be retained with the PT results.

5.5.7.2.6 A laboratory will be suspended from a category for "Unsuccessful" PT performance if consecutive "Unsatisfactory" PT events occur, or two out of three consecutive "Unsatisfactory" PT events occur. A laboratory may be reinstated to active status after successful participation in the next PT challenge. Failure to achieve a "Satisfactory" score in the next test event will result in the revocation of the certificate and require two successful PT events before the laboratory may be eligible to reapply for certification. The laboratory may request the PT provider send one extra set of PT samples when suspension status occurs.

5.6 Onsite Laboratory Inspection

- 5.6.1 Onsite laboratory inspections must be performed prior to initial certification and annually thereafter for non-accredited labs by the Department in accordance with this rule.
- 5.6.2 The onsite inspection will include a review of the laboratory's practices to ensure compliance with these regulations. Laboratories must demonstrate compliance with all applicable requirements in Parts 5 through 9.
- 5.6.3 Laboratories will be contacted by the Department to schedule the annual onsite inspection after receipt of the application requesting certification. A letter confirming the inspection date will be sent to the laboratory.

- 5.6.4 The Department will evaluate compliance with the laboratory certification standards listed in Part 9 during the onsite inspection.
- 5.6.5 Following the onsite inspection, a written report will be prepared that will list any non- conformances identified. The report should be sent to the laboratory within 30-days of inspection.
- 5.6.6 Within 30-days of receipt of the inspection report, the laboratory must provide to the Department for review and approval a written plan of correction that addresses each non- conformance listed in the inspection report.
- 5.6.7 Any requested objective evidence must be provided to the Department within 60-days of receipt of the inspection report. Any items requiring clarification will be resolved by phone or written correspondence.
- 5.6.8 Identification of non-conformance practices that impact test results or, failure to provide an acceptable plan of correction or, failure to provide adequate objective evidence within the specified timelines, may result in limitation, suspension, revocation or denial of certification. Such action shall be governed by section 24-4-104, C.R.S.
- 5.6.9 Upon the laboratory's successful completion of the annual inspection and certification process, the department will issue a certificate. The certificate will include the name and location of the laboratory, the categories the laboratory is certified to perform testing in and the certification period.
- 5.6.10 The Department will annually publish a list of certified laboratories.

Part 6. Blood Forensic Toxicology – Collection and Testing Requirements

6.1 Blood Specimen Collection

- 6.1.1 Blood Specimen(s) must be:
 - 6.1.1.1 Collected in the presence of the arresting officer or other responsible person who can authenticate the specimens.
 - 6.1.1.2 Collected and labeled following the instruction provided in the forensic blood collection kit.
 - 6.1.1.3 Collected by venipuncture by a physician, nurse, paramedic, emergency medical technician, medical technologist, or a person who's training and normal duties include collecting blood specimens.
 - 6.1.1.4 Collected only in an appropriate clinical or public safety facility (e.g., hospital, medical clinic, ambulance, police station, fire station or other approved facility). In no event will the collection of blood specimens interfere with the provision of essential medical care to the subject or the ready availability of emergency medical services to the public.
 - 6.1.1.5 Collected using sterile equipment. The skin at the area of puncture must be thoroughly cleansed and disinfected with an

aqueous solution of nonvolatile antiseptic. Ethyl alcohol or phenol solutions must not be used as a skin antiseptic.

6.1.1.6 Dispensed or collected directly into two 10ml sterile tubes set to draw a (Nominal 10 ml) volume containing Sodium Fluoride (Nominal 100mg) and Potassium Oxalate (Nominal 20mg) preservative.

6.1.1.7 Properly mixed in accordance with the instructions provided in the forensic blood collection kit.

6.1.1.8 The blood collection tubes must be affixed with a unique identification label that includes the subject name and evidence seal.

6.1.1.9 The specimens must be placed in secured storage until shipped.

6.1.1.10 If shipping is delayed by more than 48-hours, samples must be refrigerated at or below 8 degrees centigrade and not frozen in order to prevent the container(s) from breaking.

6.1.1.11 Whenever possible, specimens should be shipped within 7-days of collection by the law enforcement agency.

6.2 Blood Specimen Testing

6.2.1 One tube of blood must be analyzed for the State's test(s). The State's test(s) must be performed and completed in a reasonable period of time as not to affect the validity of the test(s). Specimens found to be positive on the initial test(s) must be confirmed using a different chemical principle from the initial screening test when available, prior to reporting the results.

6.2.2 In the event that not enough specimen is provided to complete the State's test(s) and the second sample must be used, the laboratory must obtain authorization from the appropriate authority prior to testing.

6.2.3 Any remaining blood specimen must be retained and stored by the certified laboratory at or below 8 degrees Centigrade or frozen in an appropriate container for a period of not less than 12-months from the date of collection unless requested and receipted by a representative of another certified laboratory, acting on behalf of the defendant.

6.2.4 The second blood specimen must be analyzed by a Department certified laboratory when requested by the defendant or defendant's legal counsel. The test(s) must be performed and completed in a reasonable period of time as not to affect the validity of the test(s). Specimens found to be positive on the initial test(s) must be confirmed using a different chemical principle from the initial screening test when available, prior to reporting the results to a court of law.

Part 7. Urine Forensic Toxicology – Collection and Testing Requirements

7.1 Urine Specimen Collection

- 7.1.1 Urine specimen(s) must be:
 - 7.1.1.1 Collected in the presence of collection personnel who can authenticate the specimen(s).
 - 7.1.1.2 Collected in a clean, sterile container.
 - 7.1.1.3 Affixed with a unique identification label that includes the subject name and evidence seal.
 - 7.1.1.4 The specimens must be placed in secured storage until shipped.
 - 7.1.1.5 If shipping is delayed by more than 48-hours, samples must be refrigerated at or below 8 degrees centigrade in an appropriate container.
 - 7.1.1.6 Whenever possible, specimens should be shipped within 7-days of collection by the law enforcement agency.
- 7.2 Urine Specimen Testing
 - 7.2.1 The State's test(s) must be performed and completed in a reasonable period of time as not to affect the validity of the test(s). Specimens found to be positive on the initial test(s) must be confirmed using a different chemical principle from the initial screening test when available, prior to reporting the results.
 - 7.2.2 Any remaining urine specimen(s) must be retained by the certified laboratory at or below 8 degrees centigrade in an appropriate container for a period of not less than 12-months unless requested and receipted by a representative from another certified laboratory acting on behalf of the defendant.
 - 7.2.3 Any remaining urine specimen(s) must be analyzed by a Department certified laboratory when requested by the defendant or defendant's legal counsel. The test(s) must be performed and completed in a reasonable period of time as not to affect the validity of the test(s). Specimens found to be positive on the initial test(s) must be confirmed using a different chemical principle from the initial screening test when available, prior to reporting the results to a court of law.

Part 8. Postmortem Forensic Toxicology – Collection and Testing Requirements

8.1 Postmortem Specimen Collection

- 8.1.1 Collection of specimens from deceased persons conducted per section 42-4-1304, C.R.S. will be performed by a person whose training and normal duties include the collection of blood or other bodily substances from deceased persons.
 - 8.1.1.1 Any person collecting specimens pursuant to section 42-4-1304, C.R.S., must be certified by the Department.
 - 8.1.1.2 To become certified, any person collecting specimens pursuant to section 42-4-1304, C.R.S., will demonstrate in the form and manner

required by the Department that they satisfy Rule 8.1.2.

- 8.1.2 Individuals who collect specimens from deceased persons may be certified by the Department when any of the following requirements are met.
 - 8.1.2.1 A medical provider as defined by section 12-36-106, C.R.S., licensed to practice medicine in the state of Colorado whose scope of practice and normal duties include the collection of specimens from deceased persons.
 - 8.1.2.1.2 Individuals supervised by a medical provider, as defined in 8.1.2.1, whose scope of practice and normal duties include the collection of specimens from deceased persons.
 - 8.1.2.2 An individual serving as a Colorado county coroner and whose normal duties include the collection of specimens from deceased persons.
 - 8.1.2.2.1 Individuals supervised by a Colorado county coroner, as defined in 8.1.2.2, whose normal duties include the collection of specimens from deceased persons.
 - 8.1.2.3 Emergency medical service providers certified by the Department as defined by section 25-3.5-203, C.R.S., whose normal duties include the collection of specimens from deceased persons.
- 8.1.3 No person having custody of the body of the deceased shall perform any internal embalming procedure until a blood and urine specimen to be tested for alcohol, drugs and carbon monoxide concentrations has been taken.
- 8.1.4 The laboratory must develop and provide detailed guidelines and instructions for the collection of postmortem specimens that include the date and time of collection, the time of the incident and the time of death.
- 8.1.5 Each specimen should be labeled with the name of the subject from whom the specimens were collected together with other appropriate identification; for example, the medical examiner's case number and/or a unique identification number.
- 8.1.6 Whenever possible, the amount of specimen collected should be sufficient to allow for analysis of one or more analytes if needed at a later date.

8.2 Postmortem Specimen Testing

- 8.2.1 Postmortem test(s) must be performed and completed within a reasonable period of time as to not affect the validity of the test(s). Specimens found to be positive on the initial test(s) must be confirmed prior to reporting the results.
- 8.2.2 Any remaining postmortem specimens must be retained and stored by the certified laboratory at or below 8 degrees centigrade in an appropriate container for a period of not less than 12-months from the date of collection unless requested and receipted by a representative from another certified

laboratory for additional testing.

Part 9. DUI and DUID Forensic Toxicology Laboratory Certification Standards

9.1 Personnel

- 9.1.1 The laboratory must have a Laboratory Director. The Laboratory Director is responsible for the overall operation and administration of the laboratory as well as for assuring compliance with these regulations and the accuracy of the results reported by the laboratory.
- 9.1.2 The Laboratory Director must meet one of the following qualifications: board certified in clinical pathology by the American Board of Pathology; or certified as a Diplomate by the American Board of Forensic Toxicology (ABFT); or alternatively, have a doctoral degree in one of the natural sciences and at least three years of full-time laboratory experience in forensic toxicology; or a master's degree in one of the natural sciences and at least four years of full-time experience in forensic toxicology; or a bachelor's degree in one of the natural sciences and at least five years full-time experience in forensic toxicology.
- 9.1.3 The Laboratory Director is ultimately responsible for the supervision of all laboratory operations and personnel and to ensure compliance with the requirements of this rule. The Laboratory Director may delegate supervisory responsibilities to a designee if those responsibilities are designated in writing.
- 9.1.4 The Technical Personnel must have a minimum of an associate degree in a laboratory science or, one-year training in an accredited laboratory sciences program and one year documented on-the-job laboratory experience.
- 9.1.5 The Laboratory Director or designee must ensure policies and procedures to assess the competency of Technical Personnel engaged in testing are established, followed and documented.
- 9.1.6 Competency assessments must be performed and documented on all new Technical Personnel prior to reporting results; on existing Technical Personnel on an annual basis; and on all Technical Personnel when a method or instrumentation is added or modified by the laboratory prior to reporting subject results. The competency assessments and documentation must be consistent with the laboratory's written training policies and procedures.
- 9.1.7 The laboratory must maintain documentation of formal education, training, and experience for the Laboratory Director and Technical Personnel.
- 9.1.8 The laboratory must have a written job description for each position in the laboratory.

9.2 Standard operating procedure manual

- 9.2.1 The laboratory must have a written procedure manual for the performance of all methods of analytes it reports available for Technical Personnel to follow at

all times.

- 9.2.2 The current Laboratory Director or designee must approve, sign and date each procedure.
- 9.2.3 The Laboratory Director or designee must approve, initial, and date each change or revision to the procedure.
- 9.2.4 The laboratory must maintain copies of previous standard operating procedures with effective dates of use for a minimum of 5-years from the date last used.
- 9.2.5 The Standard Operating Procedure (SOP) manual must include the following criteria and processes for laboratory personnel to follow.
 - 9.2.5.1 Specimen receiving
 - 9.2.5.2 Specimen accessioning
 - 9.2.5.3 Specimen storage
 - 9.2.5.4 Identifying and rejecting unacceptable specimens
 - 9.2.5.5 Recording and reporting discrepancies
 - 9.2.5.6 Security of specimens, aliquots and/or extracts and records
 - 9.2.5.7 Validation of a new or revised method prior to testing specimens to include: accuracy, precision, analytical sensitivity, analytical specificity (interferences), Limit Of Detection (LOD), Limit Of Quantitation (LOQ) and verification of the reportable range
 - 9.2.5.8 Aliquoting specimens to avoid contamination and/or carry-over
 - 9.2.5.9 Sample retention to assure stability for one year
 - 9.2.5.10 Disposal of specimens
 - 9.2.5.11 The theory and principles behind each assay
 - 9.2.5.12 Preparation and identification of reagents, standards, calibrators and controls
 - 9.2.5.13 Special requirements and safety precautions involved in performing assays
 - 9.2.5.14 Frequency and number of control and calibration materials
 - 9.2.5.15 Recording and reporting assay results
 - 9.2.5.16 Protocol and criteria for accepting or rejecting analytical data

- 9.2.5.17 Procedure to verify the accuracy of the final report
- 9.2.5.18 Pertinent literature references for each method
- 9.2.5.19 Current step-by-step instructions with sufficient detail to perform the assay to include equipment operation and any abbreviated versions used by the Technical Personnel.
- 9.2.5.20 Acceptability criteria for the results of calibration standards and controls as well as for the comparison between two aliquots or columns.
- 9.2.5.21 A documented system for reviewing the results of testing calibrators, controls, standards, and subject tests results, as well as reviewing for clerical errors, analytical errors and any unusual analytical results.
- 9.2.5.22 A documented system for the review, notification and implementation of corrective actions to include, when applicable, contacting the requesting agency.
- 9.2.5.23 Policies and procedures to follow when specimens are requested for referral and testing by another certified laboratory.

9.3 Proficiency Testing (PT)

- 9.3.1 The laboratory must have a documented system for timely review and evaluation of all PT results by the Laboratory Director and by all Technical Personnel who participated in the PT event.
- 9.3.2 The laboratory must maintain a copy of all records and documentation for a minimum of 5 years from the date of the proficiency testing event.

9.4 Quality Assurance and Quality Control

- 9.4.1 The laboratory must check and document the accuracy of automatic and/or adjustable pipettes and other measuring devices when placed into service and annually thereafter.
- 9.4.2 The laboratory must clean, maintain, and calibrate, as needed, the analytical balances and in addition, verify the performance of the balance annually using certified weights to include three or more weights bracketing the ranges of measurements used by the laboratory.
- 9.4.3 The laboratory must annually verify and document the accuracy of thermometers using a reference thermometer.
- 9.4.4 The laboratory must record temperatures on all equipment when in use where temperature control is specified in SOP's, such as water baths, heating blocks, incubators, ovens, refrigerators, and freezers.
- 9.4.5 The laboratory must properly label reagents as to the identity, the concentration, date of preparation, storage conditions, lot number tracking, expiration date, and the identity of the preparer (when applicable).

- 9.4.6 The laboratory must avoid mixing different lots of reagents in the same analytical run.
- 9.4.7 For quantitative analysis, the laboratory must perform and document a calibration curve that has a correlation coefficient of 0.99 or greater using, at a minimum, four calibrators that encompass the reportable range.
- 9.4.8 If the laboratory uses historical calibration data for an assay, control materials must be included with each batch of specimens tested to verify the validity of the calibration including at or close to the reporting limits. Laboratories may use historical calibration curves only if they have demonstrated and documented the linearity and precision of the curve over time. Calibration must be validated by using control materials with each batch of specimens tested to cover the entire range of the calibration curve.
- 9.4.9 For qualitative analyses, the laboratory must analyze, at minimum, a negative control and a positive control with each analytical run of samples analyzed.
- 9.4.10 For quantitative analyses, the laboratory must analyze, at minimum, a negative control and two levels of positive controls that challenge the entire calibration curve.
- 9.4.11 The laboratory must use control material(s) (when possible) that differs in source, lot number, or concentration from the calibration material used with each analytical run. In instances where the same source must be utilized, separate weighing's or solutions must be used to prepare these controls.
- 9.4.12 For multi-analyte assays, the laboratory must perform and document calibration curves and controls specific to each analyte, or at minimum, one with similar chemical properties as reported in the analytical run.
- 9.4.13 The laboratory must analyze at least one control that is made using reference material from an ISO/IEC 17034 accredited manufacturer when available. For quantitative purposes, the control must be within (10% for ethanol and 20% for blood and urine drugs) of the stated assayed value with each analytic run.
- 9.4.14 The laboratory must analyze an appropriate matrix matched negative and positive control with each analytical run, when available.
- 9.4.15 The laboratory must analyze calibrators and controls in the same manner as unknowns.
- 9.4.16 The laboratory must define acceptability criteria for calibration standards and controls for all assays, such that they are within 10% for ethanol and 20% for blood and urine drugs, of the target value.
- Note: a slightly wider acceptable value (e.g. +/-25% or +/-30%) for calibrators and controls that approach the Limit Of Quantitation (LOQ) of the assay is permitted.
- 9.4.17 The laboratory must monitor and document the performance of calibrator and control materials on an ongoing basis to ensure performance does not exceed the laboratory's established criteria of acceptability.

- 9.4.18 The laboratory must have written criteria to follow when corrective action is required for any unacceptable calibration, control, and standard or instrument performance.
- 9.4.19 The laboratory must document the corrective actions taken when an unacceptable calibration, control, standard, or other reagent result exceeds the laboratory's criteria of acceptability.
- 9.4.20 Corrective actions must be documented and reviewed by the Laboratory Director or designee on an ongoing basis to ensure the effectiveness of the actions taken.
- 9.4.21 The laboratory must maintain records of validation data for any new or modified methods to include; accuracy, precision, analytical specificity (interferences), Limit Of Detection (LOD), LOQ and verification of the regression model.
- 9.4.22 Analytical methods must be developed by the laboratory such that screening and confirmation testing can be completed on no more than 5 ml of sample volume.
- 9.4.23 The analyst must follow the SOP for the tests performed.
- 9.5 Chain of Custody, Security, and Specimen Retention Facility Space
 - 9.5.1 The laboratory must have a system to document the complete chain of custody of all forensic specimens to include receipt, storage, personnel handling the specimens, external transfers and disposal.
 - 9.5.2 The laboratory must issue instructions to user agencies that include the requirements for specimen types(s), unique identification, and volume.
 - 9.5.3 The laboratory must document the condition of the sample, external package and individual evidence seals.
 - 9.5.4 The laboratory must compare the evidence seals against the corresponding requisition and document any discrepancies. When discrepancies occur, documentation must state how the discrepancy was resolved.
 - 9.5.5 The laboratory must maintain a current list of authorized personnel.
 - 9.5.6 The laboratory must restrict entry into the laboratory only to authorized personnel.
 - 9.5.7 The laboratory must have provisions for securing the laboratory during non-working hours.
 - 9.5.8 The laboratory must secure short and long-term storage areas when not in use.
 - 9.5.9 The laboratory must log in and aliquot specimens in a secure area.
 - 9.5.10 There must be adequate space to perform the analyses in the laboratory.
- 9.6 Records and Reporting

- 9.6.1 All instrumentation and analysis records maintained by the testing laboratory must be retained for a period of not less than 5-years.
- 9.6.2 Prior to reporting results, all specimens that have been identified as positive on an initial screening drug test must be confirmed using a second analytical procedure using a different chemical principle from the initial screening test when available or as applicable.
- 9.6.3 The laboratory must confirm the identity of an analyte using a different extract of the same specimen than was used for the screening test.
- 9.6.4 Prior to reporting results, all blood ethanol results must be confirmed using a second GC column where the results from the second column had a significant difference in retention time and a change in elution order of some of the common volatiles from the column utilized in the initial column.
- 9.6.5 When blood samples are screened for ethanol by head space gas chromatography with flame ionization detection (if applicable), a separate aliquot from the original specimen must be used for confirmation. (e.g. two separate aliquots should be tested for blood alcohol).
- 9.6.6 For postmortem testing (if applicable), the laboratory must confirm the identity of a drug analyte or alcohol concentration using a second column and a different extract from the same sample, or use a different sample matrix from the same subject when possible.
- 9.6.7 The laboratory must only report quantitative results that are within the calibration curve.
- 9.6.8 The laboratory must verify results that are outside the calibration curve in a manner consistent with the laboratory's SOPs.
- 9.6.9 The laboratory must qualitatively report results below the lowest concentration of calibrator or standard and above the Limit Of Detection (LOD) as a semi-quantitative result. (e.g. less than or greater than X mg/L).
- 9.6.10 The laboratory must maintain records of testing for at least 5-years to include: accession numbers, specimen type, raw data from the analytical run, controls, subject results, final and/or amended reports, acceptable reference range parameters, identification of Technical Personnel who performed the testing, and date of analysis.
- 9.6.11 The laboratory's final report must contain the name and location of the laboratory where the testing was performed, name and unique identifier of subject, submitting agency, sample received date, date of report, type of specimen tested, test result, units of measure, and any other information or qualifiers needed for interpretation when applicable to the test method and results being reported, to include any identified and documented discrepancies.
- 9.6.12 The laboratory must develop an adequate discovery packet that meets the requirements specified in Part 1.5 of these rules and regulations.

9.7 Analytical Process

9.7.1 General Requirements

- 9.7.1.1 The laboratory must document the conditions of the instruments to include the detector response, tune and validation of new chromatography columns (when applicable).
- 9.7.1.2 The laboratory must perform and document preventative maintenance as required by the manufacturer.
- 9.7.1.3 The maintenance records must be readily available to the Technical Personnel.
- 9.7.1.4 The laboratory must use an internal standard for each qualitative and quantitative analysis that has similar chemical and physical properties to that of the compound identified and is isotopically labeled when available.
- 9.7.1.5 The laboratory must document the monitoring of the response (area or peak height) of the internal standard to ensure consistency over time of the analytical system.
- 9.7.1.6 The laboratory must monitor analyses to check for contamination and/or carry-over.
- 9.7.1.7 The laboratory must have written acceptability criteria for variance between the results when the same analyte is quantified in multiple analyses.
- 9.7.1.8 The laboratory must evaluate the performance of the instrument after routine and preventative maintenance prior to analyzing subject samples.
- 9.7.1.9 If the laboratory has written its own software, the laboratory must have documentation that the software's accuracy was verified.

9.7.2 Head Space-Gas Chromatography with Flame Ionization Detection (HS-GC-FID)

- 9.7.2.1 The laboratory must have established criteria of acceptability not to exceed 10% for variances between the results of the blood ethanol analysis using different aliquots and between different columns.

9.7.3 Gas Chromatography with Mass Spectrometry (GC-MS)

- 9.7.3.1 The laboratory must document the changes of septa as specified in the SOP.
- 9.7.3.2 The laboratory must document changes and/or replacements of liners as specified in the SOP.
- 9.7.3.3 The laboratory must have written criteria for an acceptable tune for the mass spectrometer. When the tune is unacceptable, corrective action to include additional maintenance must be documented (if applicable).

9.7.3.4 If the laboratory uses selected ion monitoring, the laboratory must compare ion ratios and retention times between calibrators, controls and samples for identification of an analyte within the same analytical run.

9.7.3.5 If the laboratory uses a library match to qualitatively identify an analyte, the laboratory must compare the relative retention time and mass spectra from a known standard or control run that has been tested on the same instrument before reporting the results.

9.7.4 Immunoassays

9.7.4.1 If the laboratory tests specimens differently from what the manufacturer has approved for the assay, or if the laboratory has modified the test method from the manufacturer instructions, the laboratory must have documentation of the validation for the modified test method or test system.

9.7.5 Liquid Chromatography with Mass Spectrometry or with Tandem Mass Spectrometry (LCMS, LCMS/MS)

9.7.5.1 The laboratory must maintain records of the mass spectrometer calibration.

9.7.5.2 The laboratory must confirm the identity of an analyte by LC-MS/MS (screening or quantitation) with at least two transitions in addition to the laboratory's retention time criteria.

9.7.5.3 If the laboratory recycles eluting solvents, it must maintain written acceptability standards for each type of eluting solvent it recycles.

Part 10. Violations and Remedies

10.1 Violations

10.1.1 It is a violation of these rules and regulations to perform EBAT testing without the appropriate certification for the EBAT instrument, operator or instructor.

10.1.2 Violation of these rules and regulations may result in denial, suspension or revocation of certification as described in 10.4.

10.1.3 Generally, a violation will not be cited if:

10.1.3.1 The violation was unavoidable to prevent loss of life, personal injury or severe property damage or there were no feasible alternatives, and provided that proper notification was given to the Department.

10.1.3.2 The violations resulted from matters beyond the control of the facility or laboratory, such as equipment failures that were unavoidable by reasonable quality assurance measures or management controls.

10.2 Complaints

10.2.1 Complaints received by the Department will be investigated to determine if the claim is substantiated or unsubstantiated. Complaints received will be documented and an investigation may include and result in, but is not limited to, the following actions: desk review of documentation requested by the Department from the laboratory, unannounced onsite survey, limitation, suspension, or revocation of the laboratory's certification.

10.3 Right to appeal the denial, suspension or revocation of certification.

10.3.1 Any certified facility, certified laboratory, operator or instructor whose certification is denied, suspended or revoked under these regulations may seek appeal of that determination pursuant to section 24-4-105, C.R.S.

10.4 Denial, Suspension or Revocation of Certification:

10.4.1 The Department may deny, suspend or revoke the certification of EBAT instrument(s) located in an approved facility, the certification of an instructor, the certification of an operator or the certification of a laboratory for one or more of the following causes:

10.4.1.1 Falsification of data or other deceptive practices including false statements by omission or commission relevant to the certification process.

10.4.1.2 Refusing authorized Department personnel access to the laboratory or facility, or failure to provide requested records to the Department for the purpose of determining compliance with these rules and regulations.

10.4.1.3 Gross incompetence or negligent practice.

10.4.1.4 Willful or repeated violation of any lawful rule, regulation or order of the Department or the Board of Health and its officers.

10.4.1.5 Inadequate space, equipment, personnel or methods utilized for testing.

10.4.1.6 Submission of any test results of another person as those of the subject being evaluated.

10.4.1.7 For a laboratory, failure to successfully participate in proficiency testing.

10.4.1.8 For a laboratory, the receipt of consecutive "Unsatisfactory" evaluations, or achievement of an "Unsatisfactory" score in 2 of any 3 consecutive proficiency testing events.

10.4.1.9 For a laboratory, contact with another laboratory concerning proficiency test results prior to the due date of those results.

10.5 Injunction

10.5.1 The Department may seek an injunction against any entity for failure to comply with these rules and regulations.

Editor's Notes

History

Entire rule eff. 10/01/2011. Entire rule eff. 02/01/2013.

Parts 5.1, 5.3.3, 5.3.5 eff. 03/17/2018.

Entire rule eff. 02/14/2019.

APPENDIX K. STANDARDIZED FIELD SOBRIETY TESTS (SFSTs)

The SFSTs should be performed in this order at the beginning of each roadside evaluation, if practicable.

Horizontal Gaze Nystagmus Test

Walk and Turn

One Leg Stand

This order allows for consistency in test administration and is also important for officer safety. A practiced plan removes distractions and improves officer safety.

Horizontal Gaze Nystagmus Test

Prior to administering the HGN and VGN tests, the officer will check the eyes for equal pupil size, resting nystagmus, equal tracking, and any other eye condition. It should be noted that after checking equal tracking and before checking for lack of smooth pursuit, there should be a noticeable break in the movement of the stimulus.

The administrative procedures for the HGN and VGN tests are as follows:

1. Check for eyeglasses
2. Verbal instructions
3. Position stimulus (12-15 inches and slightly above eye level) (30-38 cm)
4. Check for equal pupil size and resting nystagmus
5. Check for equal tracking
6. Check for lack of smooth pursuit
7. Check for distinct and sustained nystagmus at maximum deviation
8. Check for onset of nystagmus prior to 45 degrees
9. Total the clues (the maximum number of clues you can see on a person with two working eyes is six)
10. Check for Vertical Gaze Nystagmus

Check each eye independently beginning with the suspect's left and compare.

The three clues for the Horizontal Gaze Nystagmus test are:

- Lack of smooth pursuit

- Distinct and sustained nystagmus at maximum deviation
- Onset of nystagmus prior to 45 degrees

Walk and Turn

The Walk and Turn test (WAT) is a divided attention task requiring both mental and physical acuity. Observations for clues of the WAT include both the Instruction Stage and the Walking Stage. The administrative procedures for the WAT include the following:

The line can be real or implied, a physical line is recommended. In a field environment, if safe to do so, a side marker line, or a parking lot line may be used. At the end of each phase of the explanation, ask the subject if they understand. The officer should then demonstrate the SFST to the subject by taking a minimum of three steps and showing the subject the turn.

1. Verbal Instructions: Ask the subject to assume a heel-to-toe stance with the right foot in front of the left foot, arms down at the side. Instruct the subject not begin until told to.
2. Take nine heel-to-toe steps on the line.
3. Turn Procedures:
Turn around on the line by leaving your front foot on the line. Use your other foot to take several small steps to face the opposite direction and walk nine heel-to-toe steps back.
4. While Walking: Watch your feet

 Arms down at sides

 Count your steps out loud

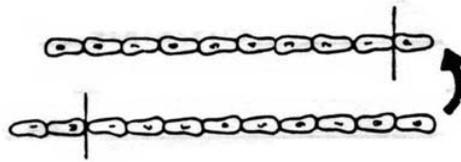
 Don't stop once you begin the test

Walk and Turn Clues:

1. Can't balance during instructions. (Can only be assessed during the instruction stage)
2. Starts too soon (Can only be assessed during the instruction stage)
3. Stops while walking
4. Doesn't touch heel-to-toe
5. Steps off line
6. Uses arms to balance

7. Improper turn (or loses balance on turn)
8. Wrong number of steps

Note: If suspect can't do the test, record only observed clues and document the reason for not completing the test.



One Leg Stand

The One Leg Stand (OLS) test is a divided attention test that requires both mental and physical acuity. The OLS consists of two stages; the instruction stage, and the balance and counting stage.

The administrative procedures for the OLS include the following:

Instructions Stage:

Stand straight, feet together

Keep your arms at sides

Maintain this position until I tell you to begin. Do you understand so far?

Balance and Counting Stage:

When I tell you, raise one foot off of the ground approximately six inches (either foot).

Keep raised foot approximately six inches off the ground, keeping the bottom of your foot parallel to the ground.

Keep both legs straight and arms at your side.

Keep your eyes on the elevated foot.

Count out loud in the following manner: "One thousand one, one thousand two, one thousand three and so on," until I tell you to stop.

One Leg



L	R	
<input type="checkbox"/>	<input type="checkbox"/>	Sways while Balancing
<input type="checkbox"/>	<input type="checkbox"/>	Uses Arms to Balance
<input type="checkbox"/>	<input type="checkbox"/>	Hopping
<input type="checkbox"/>	<input type="checkbox"/>	Puts Foot Down
<input type="checkbox"/>	<input type="checkbox"/>	

Type of Footwear _____

Other _____

Note: It's important for the officer to time the 30 second count for the test. If suspect can't do the test, record observed clues and document the reason for not completing the test (e.g. subject's safety).

APPENDIX L. EXPRESSED CONSENT § 42-4-1301.1 C.R.S.

42-4-1301.1. Expressed consent for the taking of blood, breath, urine, or saliva sample - testing - fund - rules - repeal

(1) Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be deemed to have expressed such person's consent to the provisions of this section.

(2)(a)(I) A person who drives a motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to take and complete, and to cooperate in the taking and completing of, any test or tests of the person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI, DUI per se, DWAI, or UDD. Except as otherwise provided in this section, if a person who is twenty-one years of age or older requests that the test be a blood test, then the test shall be of his or her blood; but, if the person requests that a specimen of his or her blood not be drawn, then a specimen of the person's breath shall be obtained and tested. A person who is under twenty-one years of age shall be entitled to request a blood test unless the alleged violation is UDD, in which case a specimen of the person's breath shall be obtained and tested, except as provided in subparagraph (II) of this paragraph (a).

(II) Except as otherwise provided in paragraph (a.5) of this subsection (2), if a person elects either a blood test or a breath test, the person shall not be permitted to change the election, and, if the person fails to take and complete, and to cooperate in the completing of, the test elected, the failure shall be deemed to be a refusal to submit to testing. If the person is unable to take, or to complete, or to cooperate in the completing of a breath test because of injuries, illness, disease, physical infirmity, or physical incapacity, or if the person is receiving medical treatment at a location at which a breath testing instrument certified by the department of public health and environment is not available, the test shall be of the person's blood.

(III) If a law enforcement officer requests a test under this paragraph (a), the person must cooperate with the request such that the sample of blood or breath can be obtained within two hours of the person's driving.

(a.5)(I) If a law enforcement officer who requests a person to take a breath or blood test under paragraph (a) of this subsection (2) determines there are extraordinary circumstances that prevent the completion of the test elected by the person within the two-hour time period required by subparagraph (III) of paragraph (a) of this subsection (2), the officer shall inform the person of the extraordinary circumstances and request and direct the person to take and complete the other test described in paragraph (a) of this subsection (2). The person shall then be required to take and complete, and to cooperate in the completing of, the other test.

(II) A person who initially requests and elects to take a blood or breath test, but who is requested and directed by the law enforcement officer to take the other test because of the extraordinary circumstances described in subparagraph (I) of this paragraph (a.5), may change his or her election for the purpose of complying with the officer's request. The change in the election of which test to take shall not be deemed to be a refusal to submit to testing.

(III) If the person fails to take and complete, and to cooperate in the completing of, the other test requested by the law enforcement officer pursuant to subparagraph (I) of this paragraph (a.5), the failure shall be deemed to be a refusal to submit to testing.

(IV)(A) As used in this paragraph (a.5), "extraordinary circumstances" means circumstances beyond the control of, and not created by, the law enforcement officer who requests and directs a person to take a blood or breath test in accordance with this subsection (2) or the law enforcement authority with whom the officer is employed.

(B) "Extraordinary circumstances" includes, but shall not be limited to, weather-related delays, high call volume affecting medical personnel, power outages, malfunctioning breath test equipment, and other circumstances that preclude the timely collection and testing of a blood or breath sample by a qualified person in accordance with law.

(C) "Extraordinary circumstances" does not include inconvenience, a busy workload on the part of the law enforcement officer or law enforcement authority, minor delay that does not compromise the two-hour test period specified in subparagraph (III) of paragraph (a) of this subsection (2), or routine circumstances that are subject to the control of the law enforcement officer or law enforcement authority.

(b)(I) Any person who drives any motor vehicle upon the streets and highways and elsewhere throughout this state shall be required to submit to and to complete, and to cooperate in the completing of, a test or tests of such person's blood, saliva, and urine for the purpose of determining the drug content within the person's system when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of the prohibitions against DUI or DWAI and when it is reasonable to require such testing of blood, saliva, and urine to determine whether such person was under the influence of, or impaired by, one or more drugs, or one or more controlled substances, or a combination of both alcohol and one or more drugs, or a combination of both alcohol and one or more controlled substances.

(II) If a law enforcement officer requests a test under this paragraph (b), the person must cooperate with the request such that the sample of blood, saliva, or urine can be obtained within two hours of the person's driving.

(3) Any person who is required to take and to complete, and to cooperate in the completing of, any test or tests shall cooperate with the person authorized to obtain specimens of such person's blood, breath, saliva, or urine, including the signing of any

release or consent forms required by any person, hospital, clinic, or association authorized to obtain such specimens. If such person does not cooperate with the person, hospital, clinic, or association authorized to obtain such specimens, including the signing of any release or consent forms, such noncooperation shall be considered a refusal to submit to testing. No law enforcement officer shall physically restrain any person for the purpose of obtaining a specimen of such person's blood, breath, saliva, or urine for testing except when the officer has probable cause to believe that the person has committed criminally negligent homicide pursuant to section 18-3-105, C.R.S., vehicular homicide pursuant to section 18-3-106 (1) (b), C.R.S., assault in the third degree pursuant to section 18-3-204, C.R.S., or vehicular assault pursuant to section 18-3-205 (1) (b), C.R.S., and the person is refusing to take or to complete, or to cooperate in the completing of, any test or tests, then, in such event, the law enforcement officer may require a blood test.

(4) Any driver of a commercial motor vehicle requested to submit to a test as provided in paragraph (a) or (b) of subsection (2) of this section shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test shall result in an out-of-service order as defined under section 42-2-402 (8) for a period of twenty-four hours and a revocation of the privilege to operate a commercial motor vehicle for one year as provided under section 42-2-126.

(5) The tests shall be administered at the direction of a law enforcement officer having probable cause to believe that the person had been driving a motor vehicle in violation of section 42-4-1301 and in accordance with rules and regulations prescribed by the department of public health and environment concerning the health of the person being tested and the accuracy of such testing.

(6)(a) No person except a physician, a registered nurse, an emergency medical service provider certified or licensed under part 2 of article 3.5 of title 25 who is authorized within his or her scope of practice to draw blood, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse shall withdraw blood to determine the alcohol or drug content of the blood for purposes of this section.

(b) No civil liability shall attach to any person authorized to obtain blood, breath, saliva, or urine specimens or to any hospital, clinic, or association in or for which such specimens are obtained as provided in this section as a result of the act of obtaining such specimens from any person submitting thereto if such specimens were obtained according to the rules and regulations prescribed by the department of public health and environment; except that this provision shall not relieve any such person from liability for negligence in the obtaining of any specimen sample.

(7) A preliminary screening test conducted by a law enforcement officer pursuant to section 42-4-1301(6)(i) shall not substitute for or qualify as the test or tests required by subsection (2) of this section.

(8) Any person who is dead or unconscious shall be tested to determine the alcohol or drug content of the person's blood or any drug content within such person's system as provided in this section. If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency shall be allowed to test any blood, urine, or saliva that was obtained and not utilized by a health care provider and shall have access to that portion of the analysis and results of any tests administered by such provider that shows the alcohol or drug content of the person's blood, urine, or saliva or any drug content within the person's system. Such test results shall not be considered privileged communications, and the provisions of section 13-90-107, C.R.S., relating to the physician-patient privilege shall not apply. Any person who is dead, in addition to the tests prescribed, shall also have the person's blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of public health and environment. Such information obtained shall be made a part of the crash report.

(9)(a) There is created in the state treasury the evidential breath-testing cash fund, referred to in this section as the "fund", for the collection of moneys to purchase breath-testing devices for law enforcement agencies. The fund includes any moneys appropriated to the fund by the general assembly and any moneys credited to the fund pursuant to paragraph (c) of this subsection (9). The moneys in the fund are subject to annual appropriation by the general assembly to the department of public health and environment created in section 25-1-102, C.R.S., for the purposes described in this subsection (9).

(b) All interest derived from the deposit and investment of moneys in the fund must remain in the fund. Any unexpended or unencumbered moneys remaining in the fund at the end of a fiscal year must remain in the fund and not be transferred or credited to the general fund or another fund; except that any such unexpended and unencumbered moneys in excess of two million dollars must be credited to the general fund.

(c) The department of public health and environment is authorized to accept any gifts, grants, or donations from any private or public source on behalf of the state for the purposes described in this section. The department of public health and environment shall transmit all such gifts, grants, and donations to the state treasurer, who shall credit the same to the fund.

(d) The state board of health created in section 25-1-103, C.R.S., may promulgate rules for the administration of the fund for the purposes described in this subsection (9).

(e) This subsection (9) is repealed, effective September 1, 2024. Before repeal, the department of regulatory agencies, pursuant to 24-34-104, shall review the use of the fund by the department of public health and environment for the purposes described in this subsection (9).