

1) Positive aspects to the new DUI law- the ability for non-first time offenders and refusals to get a temporary restricted license. A vast improvement over the past DUI laws.

2) REFUSAL TO SUBMIT TO TESTING SHOULD NOT BE A CRIME, but if it is....

I know you are aware that many prosecutors are charging two crimes from the same incident (refusal and DUI). The legislature criminalized refusing a pre-arrest preliminary breath test AND a post-arrest chemical test. The pre-arrest test is inadmissible under section 39-20-14. So, it's a crime to refuse an inadmissible test. A person has an absolute 4th Amendment right to be free from an unreasonable search. If a person refuses testing, they should be subject to harsh administrative penalties (i.e., a long license loss). But, prosecuting a person for declining to urinate in a cup in the presence of a police officer seems inappropriate. This whole issue has created substantial litigation. ND is one of only a handful of states that has criminalized refusing a test. Since the law was changed, I have personally seen far more test refusal cases than before.

The legislature insisted that police provide detailed advisories to drivers (i.e., implied consent advisories). Since July, I've had at least a dozen cases where the police have not provided a post-arrest advisement as required by law. Every single administrative hearing officer has held that the driver has no remedy—stated differently, drivers are strictly held to the implied consent law, but police are not. The legislature should add a provision that indicates the DOT has no jurisdiction to suspend the license of a driver who has not received proper advisements!

a. Portable Test (N.D.C.C. §39-20-14) Refusal to Submit to Testing (N.D.C.C. 39-08-01(1)(e) and (2))

- i. It is currently the criminal equivalent of a DUI to refuse the preliminary breath test.
- ii. However, Even if he takes preliminary breath test, it cannot even be used against the Defendant at his DUI criminal trial.
- iii. It can only be used at the admin hearing.
 1. On the administrative side, he could lose his license for 180 days if he refuses.
 2. However, if arrested for a DUI and then later taking the (Intoxilyzer or blood), he will then have cured his refusal on the administrative side. (N.D.C.C. §39-20-14(4))
 - iv. The reason for the refusal crime is to get people to take the intoxilyzer or blood test. Therefore, it needs to be changed that a person cannot be convicted of a refusal of the portable if he provides intoxilyzer or blood.
3. If arrested for the refusal of the preliminary breath test, on the administrative side it has to be clear that a driver can cure by offering to take the test. (I currently have a case where the DOT revoked my client's driving privileges for refusal of the preliminary breath test, it was undisputed that he offered to cure his refusal within 2 minutes. However, because he was arrested for refusal and there is no clear law indicating a right to cure that refusal by

offering to take the intoxilyzer or other tests, the administrative officer found that we had no legal remedy to cure under the new law. The AG's office later voluntarily dismissed the revocation after an appeal was filed.

- b Standards in proving the refusal
 - 1. Criminal case. (Minnesota law follows this philosophy for a refusal case)
 - i. Proof needs to be in writing.
 - ii. Written verification that the client signs acknowledging understanding that refusal is a crime
 - iii. The statute can create a universal implied consent warning that all law enforcement officers needs to read.
 - c. If the refusal law is going to stay, then the implied consent law needs to change and advise the person that you have to take the test.
- 3) Abrogating the ability to use drug courts and imposing minimum mandatory penalties has created substantial unintended consequences.

As a defense attorney, my goal is very similar to the legislative aim: I want to make sure my client is never again in the position to have been charged with DUI. As a result, at the outset of a case, I often recommend that my clients obtain a chemical dependency assessment, or enroll in treatment, or otherwise address any underlying problems. Concededly, those efforts may also help with plea negotiations or employment concerns, but my primary concern is my client and her future. I have referred dozens of clients to the drug court. Of all clients, my DUI offending clients have had the most significant and long-lasting benefits of the drug court program. A large category of DUI offenders are no longer able to complete drug court as an alternative to imprisonment. I currently have a client that is a single mother with 3 young children, she is charged with a 3rd in 7 and both the prosecutor and I want to put her into the drug court but without an exception to the current law the drug court program will not be a benefit as there is no drug court exception to the minimum mandatory.

For a fourth offense lifetime DUI, a convicted offender must be sentenced to 1 year and 1 day in prison. Local jail time is not permitted. I have a current client with a very good job (a union manufacturing job). He is an alcoholic. He has 3 prior DUI/APC convictions, all of which are very old. (the last one was from 1992). Under the former law, his current charge would have been a "first offense," with no mandatory jail time. A conviction is likely—he had an alcohol concentration slightly above the legal limit. If convicted, he will lose his job, and his benefits. His dependents will be without healthcare, and his wife will be solely responsible for all household debt (mortgage, insurance, care of the kids, etc.). While I suspect he will not serve the entire 366 day prison sentence (he will be paroled), when he is released, he will be on supervised probation, and a probation officer can redouble efforts to try and help him find employment. If the minimum mandatory sentence was not required, he could serve local jail time (i.e., keep his job, support his family, and pay his own way). In truth, local jail time is "harder" than imprisonment. In Cass County, for example, there is no "good time." There is no parole on a local sentence. The mandatory prison sentence is cosmetic, but the impacts are significant (and reach far beyond the offender).

4) The revisions have shifted the costs to the government

Like most defense attorneys, I recommend that my clients complete treatment in advance of trial (or a guilty plea). Oftentimes my clients will complete a substantial period of residential treatment (at least 30 days, sometimes 60 or more). Formerly, clients would do this at their own expense (or with help from their insurer). Now, particularly with felony DUI cases, I recommend that my clients save their resources, because if convicted, they will have to serve a year and a day in prison, and it does not help them meaningfully reduce their sentence by being proactive. Simply, the State will pay for treatment costs.

5) Withholding a work permit for drivers who appeal an implied consent suspension serves no legitimate purpose

The new law prohibits a driver from obtaining a work permit if she appeals her implied consent suspension to the district court. This is punitive, and fails to hold the DOT accountable to anyone. The implied consent hearing process is exceedingly biased. The hearing officers present the DOT's case, and then rule on the case. I have experienced substantial collusion between hearing officers and witnesses. I have witnessed improprieties (ex parte contact, collusion, result-oriented fact finding, direct failure to follow the law, and others) which have required an appeal to a district court to remedy. Abandoning the principal of an ability to have independent review by the judiciary has emboldened some hearing officers who know a driver will not appeal because they do not want to lose the ability to obtain a work permit. This is, in my opinion, the worst part of the law revisions. I could spend hours providing you examples, and would readily do so if you want more information. I acknowledge there are some hearing officers who now take a closer look at cases, knowing a driver has limited recourse. Some, however, have taken license by ignoring the law and the facts with impunity.

6) Work permit issues.

The law revisions positively allow issuance of work permits for offenders, but condition the permit on continued participation in the 24/7 program. In fact, that program is mandated for second or subsequent offenders. There are no exceptions for out-of-state defendants. There are no exceptions for military members who are deployed. There are no exceptions for drivers who have completed intensive treatment. There is no alternative (like an ignition interlock). Participation is mandated for first offense juvenile offenders (who are guilty of DUI with an alcohol concentration of .02)! This requirement resulted in adolescents going to the jail, intermingling with adult offenders. Does the legislature really believe the county sheriff, through the 24/7 program, is better able to parent children than parents or guardians?

Another issue with this, is that most jails are requiring a "court order" mandating 24/7 before they will allow my clients to be on the program. Thus, a client who is not already on the program has to ask the court to amend bond conditions in order to be placed on the program. Rather than the court allowing participation with the NDDOT hearing officers order, many jails are requiring a separate order from the criminal court.

7) Harmonize 39-08-01(5)(f) and (h).

- a. The particular issue is the language in subsection 5. It is unclear how to harmonize sub 5f and sub 5h. 5f apparently allows the judge to suspend a portion of jail time on a 3rd or 4th or subsequent upon completion of rehab and 24/7 BEFORE sentencing. 5h allows day for day credit against a sentence for a rehab program that an offender does AFTER sentencing. Aside from the issue that the inclusion of the 24/7 phrase in 5f looks like it mandates that the offender complete 1 or 2 years of probation under 24/7 before being eligible for a suspended sentence (which makes a suspended sentence practically impossible), it also looks like defendants (and judges, in order to have a legal sentence) must choose at sentencing between credit for time in a treatment program or a portion of the sentence suspended, but not both.
- 8) Mandatory 24/7 Testing as part of probation
- a. The facts: A Defendant committed several crimes one of which was an A misd. DUI. The Defendant was sentenced to 2 years straight time at DOCR for the felonies and all the misdemeanors were 1 years straight time concurrent. The question to the court was, "How is it going to be mandatory for the Defendant to do 24/7 while on probation when there is no probation and he is maxing out the sentence. Also, he was facing federal time after his state time, so by the time he would get out of prison the probationary period for a misdemeanor would have long expired. The court wasn't sure either and decided not to order the mandatory 24/7 and automatically made the mandatory fine a civil judgment.
 - b. The NDCC mentions ending a sentence early if the prisoner goes to DOCR and gets treatment, but it is silent on the other "mandatories"
- 9) Look back period for 4th offense or more- Lifetime
- a. It seems kind of harsh for someone who gets 3 DUI's in the 1990s and then 20 +years later gets a DUI. He is looking at 1 year and 1 day.
 - b. Possibly reducing it down to 10 years as the look back period.