

A Can't Miss "Wake-Up Call"  
Advice for the DWI Midnight Caller<sup>1</sup>  
By Rodd Tschida, J.D. (March 2014, with update in April 2018)

**I. FOSTERING THE PROPER ENVIRONMENT**

**A. Elicit "Yes" or "No" Answers**

I always ask if any police officer is within earshot. If so, advise the caller to answer your questions in a "yes" or "no" fashion, without exception. A driver does not have the right to a private room in consulting with an attorney, and although overheard statements are suppressed, State, Dep't of Pub. Safety v. Held, 246 N.W.2d 863, 864 (Minn.1976), the caller's communications have a way of finding their way into the ears of police and similarly into their incident report, which may or may not put you on notice how the officer actually obtained the statement.

Requiring "yes" or "no" answers obviously makes the job of framing your questions a bit more difficult. For example, instead of asking the caller how many alcoholic beverages they consumed, ask them to say "yes" when you have spoken the number of drinks they consumed, beginning with "0", "1", "2", etc. Follow this with questions like, "Was it beer you drank? (if no, "were they mixed drinks?", if no again, "were they shots?") And finally, "were they 12 oz?" (if no, "were they 24 oz.?").

**B. Take Notes**

It is imperative that you take notes during the midnight call, because not all issues for defense, or of other importance, will be presented by way of discovery rules. Tell the caller that you will be taking notes, and that you intend to use them in preparing their case.

**II. INFORMATION GATHERING RELEVANT TO THE TESTING DECISION**

**A. Basic information**

1. *Name*
2. *Home Address*
3. *Home Phone Number*

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<sup>1</sup> Under the Minnesota Constitution, drivers stopped for DWI have a limited right, upon request, to attempt to consult with counsel by telephone before deciding whether to comply with the statutory requirement of implied consent testing. Davis v. Comm'r. of Pub. Safety, 517 N.W.2d 901, 902 (Minn.1994) (citing Friedman v. Comm'r. of Pub. Safety, 473 N.W.2d 828, 837 (Minn.1991). (emphasis added).

4. *Prior (DWI) Record*
5. *Current Location*
6. *Phone Number at the Police Station -- in case of "disconnection"*

**B. Detailed information**

1. *What time was the suspect provided access to a telephone for the purpose of speaking with an attorney, and have they spoken to any others?*

I want to know how long my caller has spent trying to track down an attorney because they may ultimately cross into the forbidden area of "unreasonably delaying the administration of the test." See Minn. Stat. § 169A.51, subd. 2(4). When this takes place, an officer may reasonably see fit to terminate the call, in which case I would like to have made my best effort in completing the process.

Most police officers have heard of case law which suggests that 20-30 minutes is a reasonable time with which to reach an attorney (there is no strict time requirement). Ultimately, whether a driver's limited right to counsel has been vindicated is determined by the totality of the circumstances. Groe v. Comm'r of Pub. Safety, 615 N.W.2d 837, 841 (Minn.App.2000), *review denied* (Minn. Sept. 13, 2000); an analysis that focuses on the police officer's duties in vindicating the right, and the defendant's diligent exercise of the right. Gergen v. Comm'r of Pub. Safety, 548 N.W.2d 307, 309 (Minn.App.1996) (quotation omitted), *review denied* (Minn. Aug. 6, 1996).

You should be aware that an officer *may* legally terminate an arrestee's call placed to you, even where it lasts only a few minutes if it is toward the end of a 20 or 30-minute period, especially where the caller has dawdled in exercising his or her right to consult with an attorney. Sometimes drivers utilize the time to contact an attorney to call a family member, flipping lazily through the yellow pages, or otherwise stalling.

2. *Why was the person stopped, if they know*

Driving conduct may be important in your assessment of an individual's level of intoxication. This is not (yet) about evaluating a "search and seizure" defense.

3. *Did an injury to another occur?*

This question is designed to determine whether the caller faces a potential criminal vehicular operation (CVO) charges, which by the way requires injury to someone *other* than the driver. State v. Schauer, 501 N.W.2d 673, 675 n. 1 (Minn.App. 1993) (citing Minn. Stat. § 609.21, subd. 2 (1992)). If this is the case, you should advise your caller that a test will be taken with or without driver's consent. Minn. Stat. § 169A.51, subd. 2(3).

4. *How many drinks did the suspect have before driving, and over what period of time? Size? Type of Drink(s)?*

5. *Do they have any prior DWIs or Prior Impaired Driver's License Revocations or Incidents?*

6. *Did they take a Preliminary Breath Test (PBT) at the scene of the stop? And if so, do they know the Result?*

Chances are very good that the caller has failed a PBT (.08 or greater) because the officer made the arrest (and must allege probable cause to do so). *See* Minn. Stat. § 169A.41, subd. 2 (main use of preliminary screening test is to determine whether an arrest should be made)

**a) a BAC near .16 or more (twice the legal limit)**

We want to know the result of the roadside PBT because if it registered **.16 or greater**, a caller should seriously contemplate refusing the official test back at the station-house. Although refusing the test is similar to testing at or above .16 in that they will both be charged as gross misdemeanors, the .16 or more reading generally carries more serious consequences than a refusal, including mandatory bail, license plate impoundment, no limited license eligibility, and more punitive license consequences.<sup>2</sup>

If you aware that a caller has failed a PBT with a value near, or in excess of, .16, you should **vigorously stress** the "legal consequences" of failing a test with a .16 result or

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<sup>2</sup> Keep in mind that a lawyer cannot ethically "engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, [and may only] discuss the legal consequences of any proposed course of conduct." Rule 1.2 Minnesota Rules of Professional Conduct (MRPC).

higher. However, you may stop short of telling your caller to refuse the test, keeping ethics considerations at bay.

However, it is very possible to ethically encourage a refusal over testing at these levels, because a criminal charge for refusal is generally quite manageable for a first-timer, whereas license consequences at .16 or more tend to be more inflexible.<sup>3</sup>

**b) a BAC near .08**

On the other hand, if the PBT registered **near .08** (the legal limit), then obviously there is a chance that the caller will pass the test, and not face any civil (license) consequences, and perhaps no criminal ones either.

**III. GIVING LEGAL ADVICE**

**A. Advise Caller Not to Answer any Questions**

Advise your caller that their right to silence (Miranda) is limited in the Implied Consent context, e.g., every driver consents to a chemical test to determine the presence of alcohol or drugs. *See* Minn. Stat. § 169A.51, subd. 1. Similarly, it is not police interrogation to provide a driver with relevant information about chemical testing and the Implied Consent Law. State v. Kieley, 413 N.W.2d 886 (Minn.App.1987). However, a DWI arrestee clearly has no duty to submit to police interrogation that is either not attendant to the advisory, or that is previous or subsequent to the advisory. Therefore, you should prepare the caller for the possible post-testing Miranda interview, and advise them not to answer any post-testing questions put to them, and to not volunteer information.

**B. Implied Consent Advisory**

1. Have a Copy of an Implied Consent Advisory in Your Possession
2. Inform and Verify that the Caller Understands the Various Portions of the Advisory, especially the fact that:
  - a) Minnesota Law requires that he/she take a test to determine whether they are under the influence of alcohol (or for the presence of a controlled substance). Minn. Stat. § 169A.51, subd. 2.

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<sup>3</sup> Keep in mind, however, that all license revocations should be brought to court with the assistance of counsel.

- b) Refusal to Test is a Crime. Minn. Stat. § 169A.20, subd. 2.<sup>4</sup>

**C. Knowing the Consequences of Your Caller’s Proposed Course of Conduct (as authorized by MRPC 1.2);**

- 1. Implied Consent Law (Minn. Stat. § 169A.50-53)

- a) Implied Consent Revocation Periods (Minn. Stat. § 169A.52)

**TEST FAILURE?**

- i) 90 days (.08 to .15)
- ii) 16 or more? → 1 Year
- iii) Prior w/in 10 or 2 Lifetime priors? → 1 Year  
(2 Years if .16 or more)
- iv) 2 Priors w/in 10 or 3 Lifetime priors? → 3 Years
- v) 3 Priors w/in 10 → 4 Years
- vi) 4 Priors (or more) Lifetime → 6 Years

**TEST REFUSAL?**

- i) One year
- ii) Prior w/in 10 or 2 Lifetime priors? → 2 Years
- iii) 2 Priors w/in 10 or 3 Lifetime priors? → 3 Years
- iv) 3 Priors w/in 10 → 4 Years
- v) 4 Priors (or more) Lifetime → 6 Years

- b) Effect of *Criminal Conviction* on these Revocations  
(See Minn. Stat. § 169A.54)<sup>5</sup>

- i) Convicted of DUI? → Convert to 30 days if under .16
- ii) Convicted of Refusal? → Convert to 90 days

**D. Limited License/Work Permit (Minn. Stat. § 171.30)**

- 1. May be issued where

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<sup>4</sup> These mandates apparently support the notion that the subject’s decision to test will be free and voluntary, providing the “consent exception” to the search warrant requirement. *State v. Brooks*, A11-1042, A11-1043, (Minn. Oct. 23, 2013).

<sup>5</sup> Note that the statute does not allow for conversions to a shorter revocation period if the person is under 21, has a prior, tested .16 or more, or had a child under 16 in the car. Minn. Stat. § 169A.54, subd. 6(b).

- a) driver's livelihood or attendance at CD treatment counseling depends on use of driver's license;
  - b) use of driver's license needed by homemaker to prevent substantial disruption of education, medical, nutritional needs of family; or
  - c) attendance at a post-secondary institution of education by enrolled student depends on use of driver's license
2. Some Waiting Periods for Limited License
- a) 15 days if test failure under .16, or refusal case (must have no priors)
  - b) for those under age 18, waiting period is minimum 90 days

**E. Criminal and (other Civil) Consequences**

<b>DUI</b>	<b>ATV/Boat (Gross or Misd.)</b>	<b>First Degree (Felony)</b>	<b>2nd Degree (Gross)</b>	<b>3rd Degree (Gross)</b>	<b>4<sup>th</sup> Degree (Misd.)</b>
<b>Law</b>	<b>169A.20 169A.07</b>	<b>169A.20 169A.24</b>  <b>3 priors** within 10 years or a prior felony DWI/CVO</b>	<b>169A.20 169A.25</b>  <b>2 or More Aggravating Factors* (or Refusal plus 1 Agg. Factor)</b>	<b>169A.20 169A.26</b>  <b>1 or More Aggravating Factors* (or Refusal)</b>	<b>169A.20 169A.27</b>  <b>No Aggravating Factors*</b>
<b>Maximum Penalty</b>	<b>One Year \$3,000</b>	<b>7 Years \$14,000</b>	<b>One Year \$3,000</b>	<b>One Year \$3,000</b>	<b>90 days \$1,000</b>
<b>Plate Impoundment (§ 169A.60)</b>		<b>Yes</b>	<b>Yes</b>	<b>Mandatory (unless first- time Refusal)</b>	<b>If .16 or more</b>
<b>Vehicle Forfeiture (§ 169A.63)</b>		<b>Yes</b>	<b>Yes</b>	<b>None</b>	<b>None</b>

\*Aggravating Factors; Minn. Stat. § 169A.03 include any of the following:

- 1) A prior\*\* within the preceding 10 years;
- 2) .16 alcohol concentration at the time, or within two hours, of the offense; or

3) Child Under Age of 16 in Vehicle (if child more than 36 months younger than offender).

**\*\*Priors** include prior impaired driving convictions, or prior impaired driving-related losses of license. Minn. Stat. § 169A.03, subd. 20-22 (a conviction and loss of license arising out of same incident is not counted twice)

**F. Does the Driver have a Choice between Blood, Breath, or Urine?**

No. An officer may direct whether the test is of blood, breath, or urine. Minn. Stat. § 169A.51, subd. 3. However, keep in mind that no action may be taken against a person who refuses a blood test unless an alternative test was offered, and no action may be taken against a person who refuses urine unless an alternative test was offered. Id.

**G. An Additional (or Independent) Test<sup>6</sup>?**

Advise your caller that they have the right to have someone of their own choosing administer a test or tests in addition to those at the direction of the police officer. Minn. Stat. § 169A.51, subd. 7(b). This is your job because an officer in Minnesota has no duty to tell the driver of the right to additional testing. If a person in custody requests an independent test, “[a]ll that an officer is required to do...is to furnish the use of a telephone.” DeBoer v. Comm'r of Pub. Safety, 406 N.W.2d 43, 46 (Minn.App.1987). But the officer also has a duty not to hamper the person’s effort to obtain an additional test. Theel v. Comm'r of Pub. Safety, 447 N.W.2d 472, 474 (Minn.App.1989), *review denied* (Minn. Jan. 8.1990).

**H. Administrative or Judicial Review of License Revocation**

1. Administrative Review (Minn. Stat. § 169A.53, subd. 1)

A written request for administrative review may be made at any time during the period of license revocation. The review will be completed by the Commissioner of Public Safety, so don’t expect them to rescind the license revocation. However, the Commissioner must respond in writing within 15 days of your request, and if they fail to do so, you may have an issue for rescission of the revocation.

2. Judicial Review (Minn. Stat. § 169A.53, subd. 2)

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<sup>6</sup> A company providing additional testing services is Accurate Testing, (612) 619-6595.

Advise your caller to call you back (or follow-up yourself) within a couple of days concerning a judicial review of the license revocation (if they refused or failed the test, in which case they should also be served by the arresting officer with a notice and order of license revocation which outlines the procedure for obtaining judicial review).

A petition for judicial review must be made within 60 days of your caller's receipt of the notice and order of revocation supplied by the arresting officer. Some counties also offer temporary reinstatement while your petition is pending before the Court, which can be months, or even years.

## **I. The Ultimate Advice – “to Take, or Not Take the Test...”**

Your advice to the client will be to take the test, or perhaps to ethically encourage them to refuse the test, based upon the circumstances of their particular case.

### **1. Advice to Test?**

The Client may also choose to communicate to the officer that their decision to test is not given freely and voluntarily. *See State v. Brooks*, A11-1042, A11-1043, (Minn. Oct. 23, 2013) (holding that no search warrant for testing is needed if the driver freely consents to the test under the totality of the circumstances).

### **2. “Advice” or “Encouragement” to Refuse?**

If the Client plans on refusing based on your advice or some other reason, prepare the suspect for the officer's follow-up question, “what is your reason for refusing?” While this standard question likely would implicate Miranda and is, coincidentally, not found in the statute, the driver's response should be that they decline to answer. No further questioning should be answered by the suspect, aside from trivial booking information.

## **IV. CLOSING**

As we can see, the decision of whether to test has no “one size fits all” answer. It depends on the person and the circumstances. However, the better the attorney understands the law of DWI and Implied Consent, the better off the client will be in the long run.