

What is the legal definition of intoxication?

The legal definition of intoxication in Texas is:

- not having the normal use of mental faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substances into the body; OR
- having an alcohol concentration of 0.08 or more.

One must understand that the Prosecutor only needs to prove one of the three ways in order to obtain a conviction. Therefore, if there is no Breath or Blood Test and the person has the normal use of their physical faculties, yet a jury believes that he or she lost the normal use of their mental faculties, they should find the person guilty. However, it has been our experience that people will lose both the normal use of their physical and mental faculties together. If the evidence shows they only lost one of them and not the other, there is a logical explanation for that, meaning, they are not intoxicated (Not Guilty).

Even though most people talk about "drunk driving" (i.e. friends don't let friends drive drunk), a person does not necessarily have to be drunk to be intoxicated. Most people agree that people become intoxicated before they become drunk. Therefore, if you are drunk, you most certainly are intoxicated.

By whose normal mental and physical faculties are we judged, and what is 'normal'?

A person is charged with not having the normal use of his or her mental or physical faculties, NOT those of the Judge, the Prosecutor, or the Jurors. You must also realize that everyone has a "range" of what normal is. It is not one particular point on a scale, and what is normal varies day to day. Some days are better than others. For example, on a scale of 1 to 10, normal is not one particular number, rather it is better described as a range between 3 and 8 for the average person.

What is .08 alcohol concentration?

"Alcohol concentration" is defined by statute as:

- a. the number of grams of alcohol per 100 milliliters of blood;
- b. the number of grams of alcohol per 210 liters of breath; or
- c. the number of grams of alcohol per 67 milliliters of urine.

Unless you are an expert on the effects of alcohol, you will not be able to determine if you have an alcohol concentration of .08 or greater. One must also understand that the amount of alcohol in each of the above definitions is not equal. Therefore, you could have the normal use of your physical and mental faculties and one test would confirm your innocence (below 0.08) while another may unjustly insinuate your guilt (above 0.08). This fact alone points out the importance of hiring an experienced DWI lawyer who understands the differences in these tests.

Does .08 apply to the time of the test or the time of driving?

It is only against the law to drive a car with an alcohol concentration of .08 or greater at the time of driving. If you were above a .08, waited until you were below a .08 and then drove, that does not violate the law. If you are driving below a .08, get stopped and then go above a .08, you did not violate the law. However, depending on when you were tested, the alcohol concentration may be relevant in determining what the actual alcohol concentration was in your body at the time of driving.

The time of the test is a hotly contested issue. It is extremely rare to have a test that was conducted immediately after driving. It is common for a chemical test to be conducted 30, 60, or even 90 minutes after driving. Without knowing how many drinks were consumed, the period of time they were consumed, the type of drinks consumed, and if there was food in the stomach, it is scientifically impossible to determine if the person was over a .08, or more importantly, whether the person was under a .08

For example, I finish my fourth drink at 12:55 a.m. and leave my favorite hangout. The bar was dark and many people filled the room with cigarette smoke. I leave at 1:00 a.m. for my short drive home. As I am driving home, an officer notices that I have a broken taillight and pulls me over. During the conversation, he smells the odor of alcohol on my breath and subsequently arrests me. I am taken to jail and offered a breath test at 1:30 a.m. Do you think the test will show I am at or above a 0.08? It is equally possible that my breath test result would be as low as .05 or as high as .11 at the time of driving. This illustrates the need for you to find an experienced DWI lawyer.

What signs do people exhibit while driving under the influence of alcohol?

The following signs listed below are indicators that a person might be driving while intoxicated. This list is based upon research conducted by the National Highway Traffic and Safety Administration:

- Turning with wide radius straddling center of lane marker
- "Appearing to be drunk"
 - Eye fixation
 - Tightly gripping the steering wheel
 - Slouching in the seat
 - Gesturing erratically or obscenely
 - Face close to the windshield
 - Drinking in the car
 - Driver's head protruding from the car
- Almost striking object or vehicle
- Weaving
- Driving on other than designated roadway
- Swerving
- Speed slower than 10 M.P.H. below limit
- Stopping in lane for no apparent reason

- Following too closely
- Drifting
- Tires on center or lane marker
- Braking erratically
- Driving into opposing or crossing traffic
- Slow response to traffic signals
- Signaling inconsistent with driving actions
- Stopping inappropriately (other than in traffic lane)
- Turning abruptly or illegally
- Accelerating or decelerating rapidly
- Headlights off at night

Although the police believe speeding is a factor, speeding is not a recognized sign of intoxication. The faster you drive, the quicker your reactions must be. In my opinion, if you are speeding and driving normally, it is an indicator of sobriety (i.e. having the normal use of physical and mental faculties).

What should I say if I am stopped by a police officer and asked if I have been drinking?

Be polite and courteous. Do not admit any type of guilt or apologize for anything. This is not the time to try and talk your way out of your situation. You will already be nervous enough and the chance of you saying something you do not mean will be greater. Also, if you do try and talk your way out of the stop, the officer will keep prompting you to further incriminate yourself, and you will most likely dig yourself into a deeper hole. Further, the officer most likely has already made up his or her mind to have you perform Field Sobriety Tests, so your answer may be irrelevant.

If the tongue slips, telling the officer that you have had 1 or 2 drinks is not incriminating and may explain the odor of alcohol coming from inside the car. If you only had 2 drinks, I would tell the officer the time of your first drink, the time of your second drink, and where you were drinking. This confident, truthful answer would certainly let the officer know that you did not have enough alcohol to possibly be intoxicated.

You need to understand that the number of drinks is not as important as the number of drinks within a certain amount of time. The State's experts testify (and officers have been trained) that the average male will absorb approximately 1 drink per hour and eliminate approximately 1 drink per hour. Therefore saying you had "6 drinks" sounds very incriminating compared to "I've had 6 drinks over the last 6 hours." Interestingly enough, far too many officers only ask how many drinks a person had – purposefully ignoring when the drinks were consumed, even though they know the time frame is more important than the number.

What should I do if asked to take Field Sobriety Tests?

If you know that you can pass these tests at the time you are asked to perform them, taking into account all the circumstances surrounding the request, I would suggest attempting them. If you pass them, the officer should let you go on your way. The difficult decision arises when you have never attempted any of these tests before. Are you nervous and scared about being stopped and asked to exit your car? How do you know if you can pass these tests, especially when the officer will not tell you what they are looking for? Further, the National Highway Traffic Safety Administration has admitted that not everyone can successfully perform these tests even when sober!

If you are not sure what to do, respond by stating "Officer, I would like to contact a lawyer before deciding whether or not to take the tests." They most likely will not give you the opportunity, but at this point, you have not refused to perform them. There is a huge difference between refusing to attempt the tests, and asking to talk to a lawyer before deciding what to do. Prosecutors like to argue that the only reason you refused to do the tests is because you knew you could not perform them due to your intoxication level versus my argument that you made a logical decision by exercising your normal mental faculties in wanting legal advice. Which sounds better to you?

Another approach to take would be as follows. "Officer, am I required to perform these field sobriety tests?" The honest answer is "No." Any other answer could leave a jury with the impression the officer is deceptive. You may then want to ask "Officer, are these tests 100% accurate?" The honest answer is "NO." The initial research conducted by the National Highway Traffic Safety Administration concluded that the Pen Test (Horizontal Gaze Nystagmus) is 77% accurate, the Walk & Turn is 68% accurate, and the One Leg Stand is 65% accurate, only when administered in the prescribed, standardized manner. Any deviation from the standardized manner will compromise the tests validity. Therefore, even with the most experienced officer and under ideal conditions, these tests will inaccurately label 23% - 35% of the people tested as intoxicated. And remember, these were the best DWI officers under strict surveillance, and that is the best they could do!

At this point, ask "Officer, I would like to contact a lawyer before deciding whether to take the tests or not." He or she will not give you this opportunity, but you would be justified in politely informing the officer that you are not refusing to do these tests. Instead, you simply want the opportunity to speak with a lawyer before making such an important decision.

You may also want to pose the question: "Officer, is there anything that can affect the tests other than alcohol?" Outside of just being uncoordinated, nervous or scared, you may fall into one of the recognized groups of people who cannot perform field sobriety tests even when sober.

Additionally, I would suggest inquiring "Officer, are you going to videotape me when I perform the Field Sobriety Tests?" Your performance on tape will be evaluated by a

group of your peers during a jury trial at a later time. Therefore, you may want to decline performing these tests if they are not going to be videotaped. Do you want to trust the officer's opinion as to how you performed or allow a jury to decide? Further, if the officer is not going to videotape you, you may want to elect not to perform the tests until you are being recorded because distractions such as police strobe lights, traffic, headlights, wind, dust, improper lighting, or improper police evaluation most likely will not be included in the police report. Without visual proof, do you think an officer would admit that he or she made a mistake?

The reality is that the officer most likely has already made up his or her mind to arrest you, and the request for Field Sobriety Tests is simply made to get additional evidence against you. Remember, regardless of how well you actually perform the Field Sobriety Tests, it is the officer's opinion on how you performed them that will be held against you.

Am I required to take Field Sobriety Tests?

No! The law does not require that you perform any type of test. You have the right to refuse Field Sobriety Tests. Interestingly enough, the officer is not required to tell you this. However, if you refuse to attempt these tests, the officer most likely is going to arrest you. Further, the National Highway Traffic Safety Administration has admitted not everyone can successfully perform these tests even when sober!

The reality is that the officer most likely has already made up his mind to arrest you and the request for field sobriety tests is simply made to get additional evidence against you. Remember, regardless of how well you actually perform the field sobriety tests, it is the officers' opinion on how you performed them that will be held against you.

Are Field Sobriety Tests very accurate?

If performed in a controlled environment by a skilled officer who administers the tests in the prescribed standardized manner, the tests can be a good indicator of intoxication. However, this is rarely done.

The initial research conducted by the National Highway Traffic Safety Administration concluded that the Pen Test (Horizontal Gaze Nystagmus) is 77% accurate, the Walk & Turn is 68% accurate, and the One Leg Stand is 65% accurate only when administered in the prescribed, standardized manner. Any deviation from the standardized manner will compromise the tests validity.

Therefore, with the most experienced officer under ideal conditions, these tests will inaccurately label 23% - 35% of the people tested as intoxicated. And remember, these were the best DWI officers under strict surveillance, and that is the best they could do!

What can affect my performance on Field Sobriety Tests?

The National Highway Traffic Safety Administration has admitted that SOBER people can have difficulty with these tests! One's ability to perform the Field Sobriety Tests can be affected by many factors other than alcohol, including;

- Nervousness
- Fear
- Fatigue
- Illness
- Traffic
- Wind
- Dust in your eyes
- Head lights
- The police officers strobe lights
- Weather conditions
- Back problems
- Leg and/or Knee injuries
- Inner ear disorders
- Ankle and/or Foot problems
- Road or sidewalk conditions
- Weight
- Age
- Footwear
- Lack of coordination

Why was I arrested when I passed my Field Sobriety Tests?

DWI is an opinion crime and if, in the officer's opinion, you did not pass the field sobriety tests, he or she will arrest you. In addition, the officer likely does not tell you what he or she is looking for, so you may have made a mistake without even knowing it. For example, if you have a slight sway due to the unfamiliarity of standing on one foot, (although perfectly normal for you), the officer most likely will have the opinion that alcohol caused the sway. I have seen far too many video tapes that show people with excellent balance, only to have the officer testify that, in their opinion, the balance was poor. Officers have even gone as far as to complain about the camera angle, the size of the prosecutors' TV (i.e. not being big enough), and making the assumption that the only reason my client looked better on video at the station than he did at the scene (not on video) was because he was eliminating alcohol from his body. The bottom line is that most officers would rather be safe than sorry, and are more apt to arrest people who have alcohol on their breath, regardless of their facilities, which is why you need to hire an experienced DWI lawyer.

Further, the officer only needs PROBABLE CAUSE to arrest you. The law states that Probable Cause exists when "facts and circumstances within (an) officer's knowledge, and of which he has reasonable trustworthy information, are sufficient in themselves to

warrant a man of reasonable caution in the belief that a particular person has committed or is committing an offense." But, before you can be convicted, the State of Texas is required to prove your guilt BEYOND a Reasonable Doubt, which is a much, MUCH higher burden of proof.

Can I refuse to be videotaped?

The law does not mandate that a person has to be recorded, nor does it provide an arrested person with the right to refuse videotaping. We have had clients who peacefully refused to be recorded until entering the videotaping room at the jail. If you do refuse to be videotaped, several things may occur. First, the officers may try and forcefully put you in front of the camera because some officers believe they have to videotape you.

Second, without being on tape, all a jury will be able to consider is the officer's opinion as to your mental and physical faculties. It has been our experience that arrested people look better on the videotape than what the officers describe in their offense report.

Third, the prosecutors argue that the only reason a person refused taping is that he or she was intoxicated and just did not want a jury to watch. However, if you are recorded, you do not have to answer any questions on the tape, nor do you have to perform any Field Sobriety Tests.

If you do not want to do anything on tape, simply tell the officer you want to speak to a lawyer before doing anything. They most likely will not give you the opportunity to do this. But, by asking this, you are not refusing to cooperate or do any tests; you just want the advice of a lawyer before making a decision. Many jurors have told me in the past that if arrested, they too would want to talk to a lawyer before deciding what to do or not do. This type of decision is also indicative of a person having the normal use of your mental faculties.

The Officer never read me my Miranda rights. What can we do about it?

Your Miranda rights only apply when an officer tries to question you once you are under arrest or in custody (i.e., not free to leave). Once you become the focus of the investigation, the officer must read you your Miranda rights prior to asking you any incriminating questions or interrogating you. Texas Courts have ruled, however, that being asked to perform Field Sobriety Tests is non-testimonial. Therefore, your response to being asked to count backward or recite the alphabet is admissible. But remember, you are not required to do these tests.

If an officer does ask you questions when you should have been read your Miranda rights, the only consequence is that those questions and answers will be suppressed in court (which means that the jury will never hear them). However, if a person testifies differently than what he or she told the officer at the scene, such prior statements can then be admissible in court in an attempt to impeach that testimony. Therefore, an officer can violate your rights and potentially still be able to use those statements against you. This

illustrates the need to hire a qualified DWI attorney. Remember, your freedom is on the line.

What is the State's burden of proof to prove me guilty?

The State of Texas must prove your guilt "beyond a reasonable doubt," which is the highest burden of proof in the justice system. It is not defined, so you may wonder how we explain it to a jury.

Here it is in a nutshell:

The lowest burden of proof is called Probable Cause. Have you ever received a ticket that you disagreed with (as opposed to just not liking the fact you received the ticket)? This level of proof is less than a 50/50 chance that you violated the law but is all the officer needs to write you a ticket - or arrest you.

The next highest burden of proof is called a Preponderance of the Evidence. This amount of proof occurs in civil courtrooms where people are suing each other for money. A Preponderance of the Evidence is proof amounting to you being 51% correct.

The next highest burden of proof is called Clear and Convincing Evidence. This burden applies to child custody cases. This amount of proof will cause a juror to have a "firm belief" in the matter to be proved. To let the jury understand just how high this burden is, I find two women on the jury panel. I then will ask "Ms. Jones, I want you to look over at Ms. Smith sitting next to you. She has children. How much evidence do you think the government would have to have before they could take Ms. Smith's children away from her?" I ask several other jurors the same question. I then ask "Ms. Jones, how much evidence would the government have to have to take your kids away from you?" I record their answers and will use them in my final argument. Jurors have told me that the amount of evidence the government would need to take children away would have ranged from "a whole lot," "tons," "beyond a shadow of a doubt," to "I don't think the government could ever have enough to take my kids away!"

Beyond a Reasonable Doubt is the highest burden of proof. Although not defined, it is a much higher burden than Clear and Convincing Evidence. Why? Your freedom is on the line! A jury must have more than "tons" of evidence that you were intoxicated before they could find you guilty. This is a very simple, yet extremely convincing manner of making a jury understand just how much evidence is required before they can convict a person, thus branding them a criminal for the rest of their life. Simply put, if a juror has a single doubt, based on reason, as to a person being intoxicated, the juror must follow the law and find the defendant not guilty.

Do I have the right to an attorney before deciding whether to take a Breath or Blood Test?

Texas law does not give you the right to speak with an attorney prior to making the decision of whether or not to take the Field Sobriety Tests, the Breath Test or Blood Test. Texas law also does not prohibit an officer from allowing you to call an attorney prior to making the decision on whether to take any Field Sobriety Tests or the Breath or Blood Test. Additionally, the law does not require you to perform any Field Sobriety Tests or to take a Breath or Blood Test.

It has been my experience that individuals who request to speak with a lawyer prior to taking a breath or blood test are exercising good, normal judgment. You are already under arrest and most jurors have told me that if they had been under arrest, they too would have wanted to speak with a lawyer prior to making their decision of whether or not to take a breath or blood test. The officer will repeatedly tell you that you do not have the right to contact a lawyer at that time, and the decision to take a Breath or Blood Test is up to you. I do not believe jurors like this response, because most people believe that you are entitled to a lawyer once you are arrested. Further, when the officer tells you that the Courts have ruled they do not have to allow you to contact a lawyer, it does not seem as if they are being fair.

Instead of just refusing to take a Breath or Blood Test, you should tell the officer that you are NOT refusing to take the test, only that you want to talk to a lawyer before making that decision. This answer demonstrates you have the normal use of your mental faculties and most of the jurors will be thinking that is what they would want to do if they were under arrest for DWI. And remember, most officers I know would not take the Breath Test either!

However, the law does state that the officer shall take the person arrested or have him or her taken without unnecessary delay before a magistrate.

The magistrate shall then inform the arrested person of the charges and his or her rights:

- hire a lawyer;
- remain silent;
- have an attorney present during any interview with peace officer or attorneys representing the state;
- terminate the interview at any time;
- request appointment of a lawyer if they cannot afford one; and
- an examining trial.

When an officer testifies that you do not have a right to an attorney, is that really a fair and true statement? If a jury believes you should have been taken to a magistrate prior to being offered a Breath or Blood Test, the jury most likely will feel your rights were violated, and that the officer intentionally deprived you of your rights.

Further, the officer's credibility is now on trial in front of the jury. "If the officer misled me once, how many other times has he/she done so?" is what the jury will be thinking. Furthermore, isn't the "justice system" about fairness?

Your chances of being found NOT GUILTY have increased!

When does a person arrested for DWI have an absolute right to an attorney?

Everyone has an absolute right to an attorney if the police are going to interrogate them or ask questions about the DWI arrest. You do not have a right to a lawyer in deciding whether or not to take a Breath or Blood Test. Everyone has an absolute right to an attorney at his or her criminal trial.

Any person who is in custody of a police officer where it can be assumed that one is under arrest, even if the person was not specifically told "you're under arrest," is entitled to be informed of their rights if the officer is going to ask you questions. Such questions include the right to remain silent, the right to a lawyer prior to and during any questioning, the right to a free lawyer if you cannot afford one, and the right to terminate interrogation (questioning) at any time. However, if the police violate these rights, it does not necessarily mean your case will be dismissed. Rather, any incriminating statements illegally obtained will be prevented from being admitted against you in trial.

One must also understand that if the police arrest you and do not plan on interrogating you, they do not have to inform you of your rights. Further, if they do plan on questioning you, the police have to prove that they informed you of your rights and you freely and voluntarily gave up those rights prior to interrogation.

Will I have to have an Ignition Interlock put in my car as a condition of bond?

For a first offense, conditions of bond are a matter of discretion for the Court. Most Judges will not put an ignition interlock as a condition of your bond if it is your 1st DWI. However, recent changes in the law require that you have an interlock installed upon conviction if breath/blood tests indicate your intoxication level was .15 or over. In addition, some Judges are choosing to require defendants with results of .15 or over to have the interlock device installed as a condition of their bond.

If you are charged with Intoxication Assault, Manslaughter, or a subsequent DWI (no matter how long ago your 1st DWI was), you are required by law to install an ignition interlock device on your car. You also are not allowed to drive any vehicle that is not equipped with an interlock device. If the device determines a certain level of alcohol on your breath, it will temporarily disable your vehicle. When driving, you have to continuously blow into the device about every 20 minutes. It becomes extremely difficult to entertain a client, conduct real estate business, or drive the kids with their friends to school with this device in your car.

How long will a DWI arrest stay on my record?

If you are convicted of the DWI, it will be on your record forever. If you are found Not Guilty, you can have the arrest and DWI charge "expunged" from your record, thus erasing it. No judge, prosecutor, police officer, friend or employer will ever be able to find any evidence of the expunged case.

How will a DWI affect my insurance?

If you are convicted, you can expect your insurance rates to increase 300-500% for 3-5 years. Your insurance company also may drop you from coverage, thus forcing you to find new insurance.

Is it legal to drink alcohol while you are driving?

No. It is a class "C" misdemeanor for a driver to have an open container of alcohol in his/her personal possession. It is also illegal for any passenger to have an open container of alcohol in their possession. However, if you are a passenger in a bus, taxi, limousine, or living quarters of a mobile home, you can legally consume alcohol while being driven around.

If you go to a party and take wine or bottles of liquor and subsequently leave with them after the seal has been broken, you potentially can be ticketed for possessing an open container of alcohol. However, you may legally carry them in your car under certain circumstances. First, if the seal has not been broken, you may carry them anywhere in your car (even in your lap). Second, if the seal has been broken, the bottle(s) must be placed in the trunk of your car, or if in a truck or SUV, behind the last row of seats. Therefore, you could go to a party where you did not drink a drop, take a bottle with you home that has a broken seal, put it in the passenger seat beside you and receive a ticket for having an open container in your possession if stopped by the police.