

**FREE DOWNLOAD**

**THE MASSACHUSETTS  
DUI DEFENSE**

**HANDBOOK**

**The Comprehensive Guide to  
Defending Your Drunk Driving Case  
in Massachusetts**



**BY ATTORNEY  
IRWIN M. POLLACK**



**Massachusetts  
DUI Defense Group**

**THE LAW OFFICES OF IRWIN M. POLLACK**

The very fact that you are reading this Special Report suggests that you are going through a very traumatic time in your life with a Massachusetts OUI (Operating Under the Influence) or DUI (Driving Under the Influence) arrest or charge. You have already been subject to the humiliation of roadside field sobriety tests, been handcuffed and arrested, maybe even locked in jail like a “criminal” and maybe even had to face your family and friends with the related embarrassment associated with an arrest.

What you need right now is accurate and timely information that you can apply to your DUI case. You want to make sure you understand everything so you don’t get taken advantage of at any stage in the Massachusetts DUI Court Process. The laws are complex, and before you retain a lawyer, you should arm yourself with valuable information.

As the Founder and Lead Attorney of The Massachusetts DUI Defense Group, I’ve been blessed with the opportunity to organize a team of excellent DUI Defense Attorneys. We’ve designed websites – and this Special Report – to provide you tools that you can use immediately. Our resources are the product of a vision that we’ve each harbored and developed over the years. Think of us as your guide to making the best of your unfortunate situation...

We have local offices in Norwood, Plymouth, Woburn, Springfield and Worcester. We offer clients a FREE Case Evaluation – at night or over the weekend – *we even meet clients on Sundays!* **To schedule your no-obligation consultation, call any of our local offices or contact me on my cell phone: (800) 331-IRWIN.**

When you come to our office, bring everything that you have with you – the police report, documents dealing with your arrest or prior DUI cases – along with any questions you have about what happens next. When all you need is reasonable doubt, even the smallest details matter.

**An Important Message to Anybody  
Who Has Been Arrested  
For Drunk Driving in Massachusetts...**

Our first job as criminal defense trial attorneys is to ensure that justice is done. At this point, you are no more than a “citizen accused” and it is your right to hold the Commonwealth of Massachusetts (through the District Attorney’s office) to its high burden – guilt beyond a reasonable doubt.

There’s one particular area in our DUI Defense law practice where we stand out amongst our peers. This area relates to defending your constitutional rights pertaining to improper police activity.

If you were stopped, you should know that the police officer must have had probable cause to pull you over – otherwise, you have a right to challenge the improper stop, along with about 20 other defenses.

When you first meet with us, our attorneys are going to want to know why the police officer stopped your car, how well you performed on the field sobriety tests, whether the officer completed the 15-minute observation period prior to the breathalyzer test, and what information you have (if any) as to whether the machine had any history of malfunction.

## **Don't Make the Biggest Mistake Following a Drunk Driving Arrest...**

No matter what you do now, don't make the mistake of waiting too long to hire an attorney. Doing nothing but waiting and hoping it will all go away is a big mistake – and your drunk driving arrest and charge can turn into a bigger nightmare if it is not dealt with quickly and with action.

The good news is that most cases can be successfully defended based upon learning the details of the stop and the arrest.

If you choose to work with us, you'll be happy to learn that our fees are always quoted on a "flat-fee" basis and our fees fall somewhere in the middle to upper range of fees charged by the majority of criminal defense attorneys (we are not the cheapest lawyers, nor do we strive to be. If we were, we'd have too many clients to be able to give you the personal attention and quality representation you deserve). We accept credit cards, and have local offices throughout Massachusetts.

Read this Special Report, and when you're ready to give yourself the gift of aggressive and experienced DUI Defense, call us. The police and accusers are going to have their story, and as we champion your rights, we'll be presenting yours.

VERY TRULY YOURS,

A handwritten signature in black ink that reads "Irwin M. Pollack". The signature is written in a cursive style with a large, stylized "I" and "P".

Irwin M. Pollack

# TABLE OF CONTENTS

<b><u>TOPIC</u></b>	<b><u>PAGE #</u></b>
Your Constitutional Rights	5
Elements of the Law	5
Burden of Proof	6
The Initial Police Stop	7
Field Sobriety Tests	8
Breath Tests	9
Police Mistakes & Police Reports	10
Defending Your Arrest & Charges	11
What Happens at Court?	12
Protecting Your Driver's License at the Registry (RMV)	13
How Strong is My Case?	13

## **Your Constitutional Rights**

Every individual possesses certain Constitutional Rights which apply in a Massachusetts OUI case. Two of the most important rights include:

- **You Are Innocent Until Proven Guilty.** The presumption of innocence – being considered innocent until proven guilty – is your legal right. In this regard, the burden is on the Commonwealth of Massachusetts to prove each and every element of the offense beyond a reasonable doubt and, unless and until that burden is satisfied, you remain innocent.
- **You Have a Right Against Unreasonable Search & Seizure.** The Fourth Amendment protects Americans from unreasonable search and seizure by police. That means that police can't search you, arrest you, or even search your property without probable cause that you've committed a crime.

Our DUI Defense Attorneys aggressively present Motions to Suppress Evidence when illegally obtained evidence is being used in court following improper police activity. For example, if the police stopped your car without probable cause, any statements or evidence may be prevented from being used in court and your entire case may be dismissed.

## **Elements of the Law**

In order for the Commonwealth of Massachusetts, through the District Attorney's Office, to prove you were guilty of drunk driving, there are three separate and distinct elements of the offense that must be proven. The prosecutor must present evidence, beyond a reasonable doubt, that at the time of your arrest, you were:

- (1) Operating a motor vehicle,
- (2) On a public way, and
- (3) Under the influence of alcohol or drugs.

Our DUI Defense Attorneys know specific challenges that can be made to each one of the elements of the OUI charge. For example, is a parking lot a public way? If not, the prosecution cannot meet their burden. As it relates to "operating" a motor vehicle, should operation be presumed if the keys are in the ignition of a motor vehicle, but the vehicle isn't running? If not, the Commonwealth should not be able to prove their case.

## **Burden of Proof**

The burden of proof is the duty of one party in a lawsuit to convince the decision-maker (either the Judge or the jury) that their version of the facts is true. In an OUI case, this burden is on the District Attorney's office.

Civil cases involve conflicts between parties over property rights, personal injury, breach of contract, and the like. In these cases, the plaintiff carries the burden of proof and must demonstrate their version of the facts to be true by a preponderance of evidence. In layman's terms, this burden of proof requires that the plaintiff prove that their argument is more likely to be true than false. When a plaintiff wins a civil case, the courts will typically order the defendant to compensate the plaintiff for their damages.

Because in a criminal case a defendant is innocent until proven guilty, the burden of proof is carried by the prosecution in criminal trials. Because there is much more at stake in a criminal trial (such as the defendant's liberties), the burden of proof is much greater in a criminal trial than in a civil trial.

*Think about it:* In the O.J. Simpson case, Mr. Simpson was acquitted of the murder of Nicole Simpson and Ronal Goldman after a lengthy, highly publicized criminal trial. At the end of the case, the jury did not find the prosecution met the higher burden needed in a criminal case; however, the judgment against Simpson was awarded in civil court by a jury as the burden of proof was lower in the civil matter.

In your OUI matter, the District Attorney's Office must collect and present enough compelling evidence to convince the trier of fact, beyond a reasonable doubt, that you were guilty as charged. This is the highest burden of proof in the justice system.

To summarize:

- The lowest burden of proof is called "probable cause". If you've ever received a ticket for speeding on the Massachusetts Turnpike, and disagreed with it, the level of proof is such that all the police officer needs is less than a 50% chance to write you a ticket, or to arrest you.
- The next highest burden of proof is called a "preponderance of the evidence". This is the "more likely than not" amount of proof (some refer to it as the 51% standard) that is required in a Massachusetts civil court case where people sue each other for money damages.

- The next highest burden of proof is called “clear and convincing evidence”. This burden applies to termination of parental rights cases in the Probate and Family Court and requires the Judge to have a “firm belief” in the matter to be proved.
- “Beyond a Reasonable Doubt” is the highest burden of proof. It is a much higher burden than the clear and convincing requirement. Because your freedom is at stake, the Judge or the jury must be absolutely positive that you were operating a motor vehicle, on a public way, under the influence of alcohol or drugs before they can find you guilty and thus brand you as a criminal for the rest of your life.

Simply put, if there is a single doubt, based on reason, as to your intoxication, a Judge or jury must follow the law and find you not guilty.

### **The Initial Police Stop**

Anytime a police officer pulls you over, he or she must have reasonable suspicion or probable cause to believe you are committing some sort of crime. As it relates to drunk driving, the officer must have first observed some type of behavior that would cause one to reasonably suspect the driver was under the influence of alcohol or drugs. This behavior may include:

- Swerving
- Speeding
- Driving recklessly
- Driving too slow
- Ignoring traffic laws
- Taking a corner too quickly
- Ignoring a stop sign or traffic light
- Weaving repeatedly within your lane or between lanes
- Driving without your headlights off after dark
- Another vehicle code violation

This type of behavior provides “reasonable cause” for an officer to pull you over. Oftentimes, officers may not have reasonable cause to stop you, rather they stop you on the chance you have been drinking – which is unconstitutional and violates your rights. These stops may occur at specific times, such as after 1am or 2am (when most bars and clubs throughout Massachusetts close) or on holidays. Additionally, law enforcement may cherry pick, or patrol areas surrounding bars and clubs at closing time, selectively stopping cars without sufficient legal cause.

### **Field Sobriety Tests**

When police officers stop motor vehicles and have concerns that the operator may be under the influence of alcohol or drugs, they may ask the operator of that vehicle to perform certain field sobriety tests. In Massachusetts, the most common are the alphabet test, the walk-and-turn test, the one-legged stand test, and the gaze nystagmus test.

The National Highway Traffic Safety Administration (NHTSA) has established specific procedures and guidelines for the administration of these tests, and each must be properly administered in order for them to have any validity.

Each test is supposed to be reasonably simple, and our DUI Defense Attorneys are able to exploit shortcomings and discredit an officer’s conclusions. You should also know that officers cannot “trick” test-takers in order to manipulate a field sobriety test.

Since the actions of law enforcement officials are governed by numerous procedures, their mistakes in conducting the field sobriety tests may help us win your case:

**Anonymous phone calls or “tips”** – In most cases, an officer cannot stop you based solely on an anonymous tip; he or she must have seen you and create their own suspicion or probable cause.

**Weaving in lane** – This observation alone is not a proper basis to stop a driver. Think about it: so long as you are within your own lane, how could you be swerving?

**Lack of proper procedure** – A police officer’s own “roadside gymnastic test” should not be allowed to be his or her own tool used to make an arrest decision. If the NHTSA guidelines are not followed, then any conclusion should be deemed improper and all evidence, favorable or otherwise, excluded.

**Weather or physical conditions** – Both of these can affect observations of driving and performance on field sobriety tests. For an officer to fail to consider these facts would be improper.

**Videos Don't Support Arrest Report** – Most, but not all of Massachusetts law enforcement agencies use videos. A video that does not support the arrest decision is key evidence in favor of getting your case dropped.

### **Breath Tests**

If you are taken to the police station and blow a .08% or higher on two samples, you are said to have failed the breath test. Under Massachusetts laws, we have what is known as a “per se” law, meaning if they can prove by means of a breathalyzer test or blood test that your blood-alcohol contest (BAC) is .08%, or above the legal limit, it is legally presumed that your ability to operate a motor vehicle is impaired.

If you failed the breathalyzer, it doesn't mean that our DUI Defense Attorneys can't get your case dropped. There are many situations when it makes good sense to fight the evidence, and take the case to trial. Using any of these methods in a trial will increase the likelihood of getting your case dropped or the charges lessened:

- Calibration records show that the breath machine was not working accurately at the time you took the breath test
- Absorptive phase defense: Breath alcohol levels read significantly higher than blood alcohol levels during the time when alcohol is being absorbed into the body.
- Alcohol trapped in dentures, or a person's body temperature and breathing patterns can skew a test.

Throughout our careers as Massachusetts DUI Defense Attorneys, a commonly-asked question is, “Can you beat the breath machine?” Simple answer – yes. One only has to look at the rules the law enforcement must follow, and then answer some of the most basic questions relating to your case:

- Did the officer observe you for 15 minutes prior to taking the breath test?
- Did the officer tell you to “keep blowing” during the breath test?
- Did the law enforcement officer have their radio on during the breath test?

- Was the initial stop by the officer unlawful?
- Was the arrest made by the officer unlawful?
- Was the breath machine properly maintained?
- Were you absorbing alcohol or eliminating alcohol at the time of the stop?
- Did you finish drinking just prior to being pulled over?
- Is your body's partition ratio above or below 2100:1?

You cannot be forced to take a breath test, but refusing to do so may not be the best option because this automatically results in a driver's license suspension for six months for a first offense. All operators are deemed to have consented to a breath test as a condition of driving in Massachusetts.

### **Police Mistakes & Police Reports**

There are certain things in police reports over and over again. For the most part, these are the general descriptions of people all exhibiting the same symptoms of being under the influence of alcohol or drugs. Once you've looked at ten or twenty of them, you'll see how the prosecutor will try to show that your alcohol impairment caused your bad driving. For example, the District Attorney will argue that speeding or failing to stop fully at a stop sign is consistent with being impaired.

Our DUI Defense Attorneys will emphasize all of your good driving. For example, we should show, if factually correct, that when the officer turned his or her overhead lights on to pull you over, you immediately reacted to the lights – consistent with sobriety.

Police officers are trained to divide a driver's attention when they speak to them by asking for two things simultaneously (driver's license and other documents), asking interrupting and distracting questions, and asking unusual questions. If no evidence of impairment or divided attention problems were observed by the officers, we'll show how you were able to produce your driver's license and provide it without difficulty.

Throughout our independent investigation of your case, we will find specific examples and introduce evidence at trial of every instance where:

- The officer did not follow his or her training
- The officer did not perform the Field Sobriety Tests according to standards
- The officer made observations consistent with conditions other than intoxication

Once we review the police report in your specific instance, you can count on us to concentrate on a breakdown of the important facts for your own case. Once again, since law enforcement officers are trained to write complete and accurate reports and include all the information in the report that is supportive to the case and their arrest decision, it is very important for us to pay attention to what's not in the report as well as what is.

**EXAMPLE:** Let's say that, after you were pulled over, the officer motioned for you to pull off the road. This is important because it is not reasonable for an officer to have you drive a car any further if they actually believed that you were impaired. There is too much risk and liability involved in having an impaired person drive their car down the road – even if it's a short distance.

## **Defending Your Arrest & Charges**

From the minute we are retained to defend a case, we go out and get the evidence necessary to successfully have your case dropped. We have analysts review your case for scientific issues. Many times we will investigate the breath machine, its maintenance and calibration, and the training of the police officer for that machine. We will visit the scene where you were pulled over, so that on cross-examination we know what we are talking about. When applicable, we will file a Motion to Suppress the evidence based upon 4th Amendment constitutional violations. They occur much more frequently that they should.

When we meet with you, we'll ask about your medical history because when the officer testifies in court that you did poorly on field sobriety tests prior to your arrest, we need to reveal how physical reasons may have caused this poor performance. If you have prior foot injuries, knee problems, inner ear problems, difficulty seeing at night, speech problems, or recent visits to the dentist...each of these can provide a valid defense in court.

We also research weather and road conditions. Since both play an important part in how people drive, rain, snow, potholes, glare, road

markings, or obstructions may provide some justification for what happened when you were arrested.

Eventually, we either obtain a settlement acceptable to you, or we announce that we are ready for trial. The choice is yours. When we prepare your case for trial, it is with an eye for a winning verdict.

### **What Happens at Court?**

Your first court appearance is the arraignment. The Clerk of the Court calls your name and reads the charges into the record. Your DUI Defense Attorney files his or her appearance and is provided with a copy of the police report. A pre-trial is scheduled.

At your Pre-Trial Conference, your attorney and the District Attorney complete a report regarding the exchange of information. Your attorney will likely file a request for discovery relating to all the information that the District Attorney intends to use against you and a date is set for compliance for the exchange of the information. This is also the time when a Motion to Dismiss or Motion to Suppress the evidence is filed.

At your trial, you'll have the option of having a trial before a single Judge or a jury of six. Your DUI Defense Attorney will have prepared a trial notebook which includes all aspects of the trial including opening argument, direct examination of witnesses, cross examination of witnesses, documentary evidence, and the closing argument.

Throughout the case, a theme will be presented on your behalf. We've used a carnival "hit the balloons with a dart" board and talked about how hard it is to pop three balloons with three darts. Then, we'll write all types of potential doubt words on the drawing of each balloon and challenge the officer by popping all the balloons (or emphasize how it's impossible to pop the balloons if they aren't filled all the way with air) in attacking the weak points of the state's case.

With females on the jury, we may compare the District Attorney's case to a young bride's wedding dress. One of our attorneys would then ask the jurors if they would accept a wedding dress that they had paid for on the day of the wedding if it had a visible spot or stain on it. None would, and we then emphasize how the District Attorney has the job of dressmaker and that the jury's job is to inspect the dress and find any blemishes. Just one, and reasonable doubt is created – enough so that they must return a not guilty verdict.

## **Protecting Your Driver's License**

There are two cases for every Massachusetts DUI arrest. Your criminal case works through the District Court (in Greater Boston, it's the Boston Municipal Court), and the case which deals with your driver's license and right to drive is with the Registry of Motor Vehicles (RMV).

For a first offense, your license will be revoked for a period of one year, unless you get a first-offender's 24D Disposition. While you can apply for a work license after three-to-six months, the decision of whether or not to grant you this privilege is at the sole discretion of the RMV.

For a second offense, your license will be revoked for two years. You have a right to apply for a hardship license after one year.

You should know that when counting Massachusetts OUI offenses, it usually does not matter how old they are. Under Melanie's Law, there is now a lifetime look-back period. Additionally, if the Massachusetts RMV becomes aware of out-of-state convictions, these will also count against you.

If you refuse to take the breathalyzer test, your license will be immediately taken by the police officer. Think back to the day that you got your driver's license. There was most likely a long line and a form to sign whereas you agreed to Massachusetts' Implied Consent Law. In exchange for being given driving privileges, you consented to take a chemical test should police have probable cause you are operating a vehicle under the influence of alcohol or drugs.

You must act immediately in order to request a hearing before the RMV to contest the license suspension because once 15 days from the date of the arrest has past, (including weekends and holidays) you will no longer be able to challenge this administrative suspension for refusing the breathalyzer.

## **How Strong is My Case?**

During the course of a Massachusetts DUI case, the police are required to follow certain procedures. Failure to do so can lead to the dismissal of your case. What many people refer to as a "technicality" or "loophole," is actually a way to using the United States Constitution to protect your rights.

The following is a list of questions which can dramatically impact the outcome of your case:

- Did the officer stop you for any of the following reasons: speeding, weaving, failure to maintain a single lane, obstruction of traffic?
- Do you suffer from injuries or illnesses which might affect your balance?
- Did the officer mistake nervousness or exhaustion for intoxication?
- Were roadside sobriety tests conducted on a surface that was not flat, dry and well-lit?
- Did the officer fail to observe you for 15 minutes immediately prior to the breath test?

If you answer “yes” to any one of them, you owe it to yourself to call us for a FREE Case Evaluation and no-obligation consultation. We have local offices in Norwood, Plymouth, Woburn, Springfield and Worcester and offer clients a FREE Case Evaluation – at night or over the weekend – *we even meet clients on Sundays!*

**To schedule your no-obligation consultation, call any of our local offices or contact our Founder and Lead Attorney, Irwin Pollack on his cell phone: (800) 331-IRWIN.**