

# MAINE STATE LEGISLATURE

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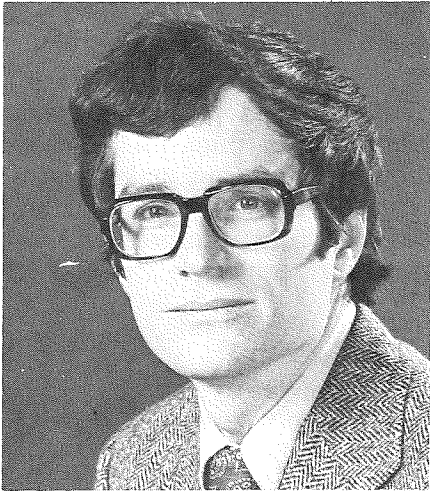


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NOVEMBER-DECEMBER 1981

MAINE DEPARTMENT OF  
THE ATTORNEY GENERALMAINE CRIMINAL  
JUSTICE ACADEMY

**MESSAGE FROM THE  
ATTORNEY GENERAL  
JAMES E. TIERNEY**

I would like to announce that the offices of most of the divisions of the Attorney General's Office are being moved to the sixth floor of the State Office Building. Once the move is completed, only the Assistant Attorneys General assigned to the Department of Human Services will remain in their present location at 221 State Street.

The Criminal Division, the Criminal Investigation Section, and the Medicaid Fraud Control Unit are now located in the north wing of the sixth floor of the State Office Building. Telephone numbers will remain as follows: Criminal Division — 289-2146; Criminal Investigation Section and Medicaid Fraud Control Unit — 289-3467. All correspondence to the Criminal Division should be sent to Criminal Division, Department of the Attorney General, State Office Building — Station 6, Augusta, Maine 04333.

The address of the Chief Medical Examiner's Office is 242 State Street — Station #37, Augusta, Maine 04333 and the telephone number is 289-2993.

*James E. Tierney*  
**JAMES E. TIERNEY**  
 Attorney General

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## THE NEW O.U.I. LAW I

### AND RELATED PROVISIONS

The First Regular Session of the 110th Maine Legislature recently enacted important amendments to Maine's laws dealing with operating a motor vehicle under the influence of intoxicating liquor. (O.U.I.) These amendments became effective on September 18, 1981. Highlights of the changes brought about by the amendments appeared in the July-August 1981 issue of **ALERT**, but because the changes are far-reaching and because of space limitations, that issue of **ALERT** could not provide a detailed discussion. Since the new law affects the powers and duties of law enforcement officers in several significant ways, this issue and the January-February 1982 issue of **ALERT** will be devoted to a detailed discussion of the recent O.U.I. amendments.

#### PURPOSE

Before beginning the discussion of the new O.U.I. amendments, it

is worthwhile to briefly state the Legislature's purpose in enacting the amendments. That purpose is to reduce fatalities, injuries, and property loss resulting from the operation of motor vehicles by persons who are under the influence of intoxicating liquor. Although the new O.U.I. law has been described as "the toughest drunk driving law in the nation," its purpose is not to get more convictions or to send more people to jail. Nevertheless, in order to create a credible serious deterrent to driving under the influence, the new law provides for swift and certain punishment, both criminally and civilly, including mandatory jail sentences, mandatory fines, and mandatory loss of license.

The remainder of this article will deal with the law enforcement officer's rights and duties under the new O.U.I. law. Throughout the discussion, and when on duty enforcing the new law, officers

should keep in mind the legislative purpose of reducing alcohol-related fatalities, injuries, and property loss.

### **PROBABLE CAUSE**

One of the more important changes in the new O.U.I. law is that in order to require a person to submit to a chemical test to determine his blood-alcohol level, the law enforcement officer needs *only* probable cause to believe that the person has operated or attempted to operate a motor vehicle while under the influence of intoxicating liquor. The prior law required an actual technical arrest in order to trigger the provisions of the law relating to chemical tests. The purpose of this change is to enable the officer to issue a citation (uniform traffic ticket) rather than to arrest the person for operating under the influence. It should be noted that in order to require a person to submit to a chemical test, the officer must either arrest the person or issue the person a uniform traffic ticket. Probable cause alone, without any further action by the officer, will not give the officer authority to require the person to submit to a chemical test.

This change in the law gives the officer more flexibility in dealing with persons whom the officer has probable cause to believe are operating or attempting to operate a motor vehicle while under the influence of intoxicating liquor. For example, if the person agrees to take a breath test and a breathalyzer (balloon) test can be administered on the spot, there may be legitimate reasons not to arrest the person but to simply administer the breathalyzer test and issue a uniform traffic ticket. Some of the considerations which might persuade an officer to take this alternative are: (1) the person

is close to home and need not drive further to get there; or (2) a sober person is present or readily available who is willing and able to drive the intoxicated person home and one or more of the following factors are present: (a) the person (operator) is undergoing medical treatment at a hospital which should not be interrupted; (b) the person is solely responsible for the daily care of a child, an elderly person, or a disabled or incapacitated person; (c) the person is an otherwise responsible member of the community who is likely to appear in court in response to a uniform traffic ticket.

In deciding whether or not to merely issue a ticket in this situation, the officer should keep in mind that the purpose of the law is to save lives, not to unreasonably disrupt them. Nevertheless, because of the unique nature of the O.U.I. situation and the officer's responsibility for the safety of the public, the officer usually will be required to make an arrest.

### **THE ARREST**

Most situations in which the officer has probable cause to believe that a person has operated or attempted to operate a motor vehicle while under the influence of intoxicating liquor will require the officer to make a full-scale custodial arrest of the person. The main reason for this is that the driver under the influence should not be allowed to continue driving. Additionally, if a blood test or Intoxilyzer (self-contained breath-alcohol testing apparatus) test is to be used, the person must be taken into custody in order to administer the test. Therefore, although an arrest need not be made in order to require a person to submit to a chemical test to determine blood-alcohol level, an arrest usually should be made.

### **Legality of Arrest**

The first point of advice regarding an O.U.I. arrest is that it must conform to all the legal requirements for any arrest. These requirements are discussed in the Maine Law Enforcement Officer's Manual and in standard texts on criminal procedure. In addition, the new O.U.I. law makes several changes affecting the duties and powers of law enforcement officers with respect to arrest.

### **Warrantless Arrest on Probable Cause**

One of the most important changes expands the law enforcement officer's power to arrest without a warrant for operating under the influence of intoxicating liquor. Under the prior law, the officer could arrest only if the offense had been or was being committed in his presence, unless the offender had been involved in an accident. If the offender had been involved in an accident, the officer could arrest on probable cause to believe the person was operating under the influence. The new law gives the officer power to arrest without a warrant for O.U.I. on probable cause in all situations. There is no longer any requirement that the offender be involved in an accident.

The Legislature specifically imposed one condition on a warrantless probable cause arrest for O.U.I., however. 29 M.R.S.A. §1312(11) (B) requires that such an arrest occur "within a period following the offense reasonably likely to result in the obtaining of probative evidence of blood alcohol level." If too much time has passed to obtain a valid blood-alcohol test, the reason for permitting a warrantless arrest on probable cause disappears, and the officer must obtain a warrant before he arrests. It is difficult to

give any specific guideline as to how long a time period after the offense an officer may wait before he arrests an O.U.I. offender. The rate at which alcohol dissipates in a person's blood depends on many factors including the person's size, metabolism rate, and activity level. Therefore, an O.U.I. arrest should be made as soon as possible after the officer has probable cause that the offense has been committed or attempted. As a rule of thumb, an arrest without a warrant probably should not be made more than two hours after the officer last perceives the operation of a vehicle by a person under the influence.

### **Abolition of Corpus Delicti Rule**

Another important change affecting the law enforcement officer's power to arrest for O.U.I. is the abolition of the rule of evidence known as the *corpus delicti* rule in O.U.I. cases. The *corpus delicti* rule made inadmissible an O.U.I. suspect's perfectly valid admission or confession that he or she was driving the vehicle, unless the state could prove by independent evidence that *someone* was operating under the influence. A problem would arise in the typical situation where a law enforcement officer arrived at the scene of an auto accident and a person, appearing to be under the influence, stated that he was driving the vehicle. Many cases of this nature were lost because it was often virtually impossible to prove that *someone* was operating *under the influence* without using the admission or confession.

Under the new law, such admissions or confessions are now admissible without further proof of the *corpus delicti*. Therefore, if a person admits to operating a motor vehicle *and* the officer has probable cause to believe that the person operated under the influence, the officer should take

the necessary steps to obtain a chemical test to determine blood alcohol level, including arresting the person if an arrest is called for under the circumstances.

It should be noted that any admission or confession obtained in the O.U.I. situation must be voluntary and must satisfy the *Miranda* requirements, when applicable, in order to be admissible in court. If *Miranda* warnings were not necessary, the officer should be able to testify to facts demonstrating that they were not necessary, e.g., no custody or no interrogation.

### **Investigation of Prior Convictions**

Finally, 29 M.R.S.A. §1312(11) (A) requires that "[a]fter a person has been charged with a violation of [O.U.I.], the investigating or arresting officer shall investigate to determine whether the charged person has any prior convictions [for O.U.I.]. As a part of his investigation, the officer shall make the necessary inquiries of the Secretary of State." This requirement is basically the same as it was under the prior law.

### **THE BLOOD-ALCOHOL TEST**

The chemical test to determine blood-alcohol level is usually the most important element of an O.U.I. case, both as a key factor in deciding whether and how to prosecute the case, and as the prime evidence in the case, if it is brought to trial. It is therefore essential that the law enforcement officer investigating the O.U.I. case obtain valid test results in a manner that complies with the law. This part of the article will discuss the powers and duties of law enforcement officers with respect to obtaining blood-alcohol tests with particular emphasis on the changes brought about by the new O.U.I. law.

First of all, it is worthwhile to re-emphasize that the officer need not arrest a person in order to require the person to submit to a blood-alcohol test. The officer may demand the test if he has probable cause to believe that a person has operated or attempted to operate a motor vehicle while under the influence of intoxicating liquor and if he issues a uniform traffic ticket to the person.

Once the officer has probable cause, and has either arrested or summonsed the offender, the officer must give certain warnings before any blood-alcohol test is given. The warnings are similar to those required under the prior law. The officer must inform the arrested or summonsed person:

1. That he or she may choose between a blood test and a breath test to determine blood-alcohol level;
2. That if he or she refuses to permit a test at the direction of the officer, his or her license will be suspended for 180 days; and
3. That the refusal to permit the test shall be admissible in evidence against the person at any trial for operating under the influence of intoxicating liquor.

Although an officer's failure to give the second and third warnings will not result in exclusion of test results, the failure could have adverse effects with respect to license suspensions or admissibility of evidence. Therefore, the officer should *always* give all three warnings.

The Secretary of State's Office has made available a standard form to be used by law enforcement officers in O.U.I. situations. That form contains additional warnings which, although not legally required, should be given. The form appears on page 4. Every officer should have an adequate supply of forms.



LINWOOD F. ROSS  
DEPUTY SECRETARY OF STATE

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**Department of State**

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DRIVER LICENSE CONTROL  
George E. Storer 289-2286  
EXAMS AND ENFORCEMENT  
William E. Dowling 289-2585  
PUBLIC SERVICES  
George N. Whalen 289-3656

CHEMICAL TEST PROCEDURE OF:	NAME _____	DATE OF OFFENSE _____
	ADDRESS _____	TIME OF OFFENSE _____
	D.O.B. _____	PLACE OF OFFENSE _____

- You have been (arrested) (summonsed) for  operating a motor vehicle while under the influence of intoxicating liquor.  
 attempting to operate a motor vehicle while under the influence of intoxicating liquor.
- By operating or attempting to operate a motor vehicle in this state you have, by law, consented to a chemical test to determine the alcoholic content of your blood.
- You are entitled to and may select either the blood or breath test to determine your blood alcohol level.
- I must inform you that if you refuse to take one of these tests your Maine driver's license and/or right to operate will be suspended for 180 days.
- I must also inform you that if you refuse to take one of these tests your refusal will be admissible as evidence against you at any trial for operating under the influence of intoxicating liquor.
- The expenses for any test taken at my request will be paid for by the State.
- The results of any test taken will be made available to you or your attorney, if requested.
- The blood test, if selected, may be administered by a physician of your choice if the physician is reasonably available.

I have been advised of the consequences of refusal to take a blood or breath test at the request of the officer and DO NOT WISH TO SUBMIT TO EITHER A BLOOD OR BREATH TEST.

\_\_\_\_\_  
Signature of Person Refusing Test

To Whom It May Concern:

This officer had probable cause to believe that the above named \_\_\_\_\_ was (operating) (attempting to operate) a motor vehicle while under the influence of intoxicating liquor. After having been informed of the tests available to him and the consequences of refusing to take a test, the above named person refused to submit to a chemical test of his blood-alcohol level by analysis of his blood or breath.

Sworn before me under oath:

\_\_\_\_\_  
Signature of Officer

\_\_\_\_\_  
Notary Public/Justice of the Peace

\_\_\_\_\_  
Department of Officer

Dated: \_\_\_\_\_

THIS FORM MUST BE RETURNED TO THE SECRETARY OF STATE WITHIN 72 HOURS OF THE REFUSAL.

MVCR-140 Revised 9/81

NOTE: Since other forms for notifying the Secretary of State may be in circulation, officers should make sure to use only the form bearing the notation "MVCR-140 Revised 9/81" in the lower left-hand corner.

*This article will be concluded in the January-February 1982 issue of ALERT.*

*Comments directed toward the improvement of this bulletin are welcome. Please contact the Criminal Division, Department of the Attorney General, State Office Building, Station #6, Augusta, Maine 04333.*

## ALERT

The matter contained in this bulletin is intended for the use and information of all those involved in the criminal justice system. Nothing contained herein is to be construed as an official opinion or expression of policy by the Attorney General or any other law enforcement official of the State of Maine unless expressly so indicated.

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