

MAINE STATE LEGISLATURE

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OFFENSE OF DRIVING UNDER
THE INFLUENCE OF
ILLEGAL DRUGS

A Study Document

Submitted by the
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OVERVIEW
Offense of Driving Under the Influence
of Illegal Drugs

STEP	COMMENTS	CHANGES NEEDED
I. Roadside Sobriety Test		1. Law Change: Implied consent for <u>drugs</u>
Impaired		
a. no →	Exit: No Further Testing	
b. yes ↓		
II. Roadside Breath Test		1. Law Changes:
a. BAC .10 or greater →	Evidential breath test Decision on OUI - <u>Alcohol</u> prosecution	a. Implied consent for both alcohol and <u>drugs</u>
b. BAC less than .10 ↓		b. Accept as part of OUI-Drug/Alcohol process
III. Qualified Professional Assessment of Impairment (physiological and behavioral) at Centralized Location		1. Law Changes:
Impaired		a. Implied consent for drugs
a. no →	Exit: No Further Testing	b. Accept assessment as part of OUI-Drug process
b. yes ↓		c. Assessment by professionals authorized by the Department of Human Services
IV. Blood and Urine Sampling at Centralized Location (same as III)		1. Law Changes:
↓		a. Allow for blood and urine sampling after breath test
		b. Implied consent for both tests
		c. Assessment by professionals authorized by the Department of Human Services
V. Blood and Urine Samples Submitted to Public Health Laboratory as Prima Facie Evidence		1. Law Changes:
Screen Blood for Alcohol		a. The limits of detection will be authorized by the Dept. of Human Services.
a. BAC .10 or greater →	Decision on OUI alcohol prosecution	b. Identify which drugs or drug classes are to be screened for
b. BAC less than .10 ↓		c. Accept presence of drug along with the results Steps I - III as evidence of OUI-Drug
Screen Blood for Drugs (RIA Technique)		
a. Positive →	Confirm by GC/MS Decision on OUI -Drug Prosecution	
b. Negative ↓		
Screen Urine for Drugs		
a. Positive →	Confirm by GC/MS Decision on OUI-Drug Prosecution	
b. Negative ↓		
VI. Discontinue Testing		

OUI - DRUGS OTHER THAN ALCOHOL

Background

Each year approximately 10,000 individuals are arrested and 8,500 convicted in Maine for driving under the influence of alcohol. It is estimated that as many as 20% (N = 2,000) of these individuals are also under the influence of, and significantly impaired by, mind/mood altering drugs such as cocaine and marijuana.

Utilizing the results of a recent survey involving selected Maine State Police, it is estimated that approximately 7% (N = 700) of the 10,000 drivers stopped each year for suspected OUI-Alcohol were (1) not legally (BAC was less than .1) impaired by alcohol and (2) were suspected of being impaired due to drugs other than alcohol. This estimate may be conservative as (1) local police make approximately 75% of the OUI arrests and (2) OUI-drug incidents may be higher in these jurisdictions. Regardless of the incidences and the existence of Maine law that makes it illegal to drive under the influence of drugs, it is almost impossible to convict these individuals of OUI-drugs under current Maine law unless they admit the offense.

In 1987, the Maine State Legislature passed a resolve (R.L. Chapter 21) to establish a study to set standards for driving under the influence of drugs other than alcohol. The task was assigned to the Alcohol and Drug Abuse Planning Committee with a report due March 1, 1988. The report is to include recommendations concerning impairment levels for drugs other than alcohol that could be included in laws concerning operating under the influence.¹

A Model Program

The Alcohol and Drug Abuse Planning Committee conducted a national search to identify methods utilized by other jurisdictions to determine OUI-Drugs. In addition, a literature review was completed to determine the efficiency and reliability of tests of impairment due to drugs other than alcohol. These efforts revealed the following results.

1. The technology necessary to accurately assess impairment levels due to drugs other than alcohol is not presently available.
2. Although the screening tests for the presence of drugs, other than alcohol, have an error rate, the final tests (e.g., gas chromatography/mass spectrometry) are highly accurate.
3. The Los Angeles, California, approach to OUI-Drugs (a) appears to be the most acceptable model, and (b) has been consistently supported by the courts.

¹The Alcohol and Drug Abuse Planning Committee formed an OUI-Drug committee, Chaired by John Atwood, Commissioner of Public Safety who's Department would coordinate OUI-Drug enforcement activities once approved.

4. The Los Angeles model emphasizes a many step process which (a) starts with a suspicion of impairment (roadside impairment test), (b) eliminates alcohol as a cause (breath and blood test), (c) verifies impairment (assessment by a qualified person), and (d) verifies the presence of one or more of 8 drugs or classes of drugs (blood test). All tests such as the roadside impairment test, the breath test, the blood test, etc., must be positive if the material is to be submitted to the courts as evidence of OUI-Drugs.

Based upon these reviews and meetings with Maine individuals representing various interests (see attached), the ADPC staff have suggested that the Los Angeles model could be implemented in Maine. This would require minimal changes if we modify the current Maine OUI-Alcohol system to include other drugs.²

A Maine Model

It would be relatively easy to test and possibly implement the Los Angeles model in Maine. York and Cumberland Counties would be excellent test sites due to population concentrations, the potential involvement of State, County and local police, the availability of services and the possibility of centralized evaluation services. The OUI-Drug only population in this two (2) county area is estimated to be approximately 400 annually.

The York/Cumberland test site would allow for the consideration of factors such as the police who are most involved in traffic law enforcement and the accessibility/cost of the services (e.g., blood test) that are required to implement the OUI-Drug model. At the present time, 75% of the OUI arrests are made by local city/town police, 20% by State Police and 5% by County Sheriffs. Cumberland and York County have relatively large local police departments as well as numerous State and County police. The attached listing of potential health care and substance abuse agencies show that such services are strategically located throughout this two (2) county area.

The following model and process, including changes in law and costs, are presented for your consideration.

1. Roadside impairment test: This is currently part of the process used in Maine for assessing impairment due to OUI-Alcohol. This could also be used as the test of impairment due to OUI-Drug. This is the first step which if failed, allows the officer to proceed to step 2 to assess for OUI-Alcohol.

² If legislation is enacted changing the BAC limit from .10 to .08%, modifications to this OUI-Drug process will be necessary.

2. Pre-arrest screening breath test: This roadside test is conducted by a large majority of officers as a screening for OUI-Alcohol. It tests for BAC .00 - .09 and .10 or greater. This is currently the second step in the OUI-Alcohol process for many officers. A number of changes are required in Maine law.
 - (a) Accept the results of the pre-arrest breath test as part of the OUI-Drugs assessment process.
 - (b) Accept the results as evidence of OUI-Alcohol (.10 or greater) or not OUI-Alcohol (.00 to .09) at this step in the process.
 - (c) Allow the officer to proceed to administer an evidential breath test (if BAC is .10 or greater) or proceed to step III to assess for not OUI-Alcohol (if BAC is between .00 to .09).
 - (d) Implied consent is required. Refusal to take the pre-arrest breath test as part of the assessment process for OUI alcohol, drugs, or both, leads to automatic suspension of license.
 - (e) Note: All appropriate officers (local, county and state) would require this test equipment. The total cost is estimated at \$24,000 to provide the test equipment.
3. Evidential Breath Test (EBT): If the BAC is .10 or greater EBT is administered. At the present time, the results of the intoxilizer are accepted in court as evidence of BAC levels. This is the third step in the process and is utilized as a more accurate assessment of BAC.
 - (a) This procedure is currently standard for all Maine police departments.
 - (b) Note: If the BAC is .10 or greater, individuals are prosecuted for OUI-Alcohol and the process to assess for OUI-Drugs is terminated.
 - (c) Note: if the BAC is less than .10, implement step III.
4. Assessment for Impairment by Qualified Substance Abuse Person: If the intoxilizer is less than .10, a more extensive and sophisticated impairment assessment is done by a qualified person. This 3rd step in the process does not exist in Maine. A number of changes in Maine law are required.
 - (a) The impairment assessment and the use of the results must be accepted as a step in the OUI-Drugs enforcement process.
 - (b) Qualifications of the assessors and the acceptability of their report/testimony in court must be established.
 - (c) Implied consent is required. Failure to comply with the request to take this test results in automatic suspension of license.

- (d) Note: Maine has licensed substance abuse counselors (LSAC) that are recognized in Maine law as experts and eligible for third party reimbursement. They could serve as qualified substance abuse persons.
 - (e) There are sufficient numbers of Licensed Substance Abuse Counselors available to provide timely assessments (within 1 hour of arrest).
 - (f) The assessment would take about 1/2 hour and would cost about \$100.00 for the assessment and report.
 - (g) Costs could be reimbursed through increased fines. However, there may be constraints related to other laws which require the prosecutor to assume all costs related to the prosecution.
 - (h) The assessments could be accomplished at a designated central location as would step IV.
 - (i) If the assessment shows impairment, implement step IV.
5. Blood and Urine Test Assessment for Drugs Other Than Alcohol: At the present time, a system is in place to assess blood and urine samples for BAC and screen for the presence of drugs other than alcohol.
- (a) The confirmation tests for drugs (blood or urine sample) are major new tasks.
 - (b) The use of blood and urine tests after a breath test must be allowed. Current law allows either a blood or breath test.
 - (c) A two (2) step blood test process must be allowed. This would involve a screening, which if positive, would be confirmed by gas chromatography/mass spectrometry.
 - (d) Levels of "presumptive positive samples" must be established. These may exist.
 - (e) Drugs and drug classes to be screened for must be identified. Note: Los Angeles screens for eight.
 - (f) The identification of a mood/mind altering drug and the results of steps 1-3, must be acceptable evidence of OUI-Drug.
 - (g) Implied consent is required. Refusal to take the blood and/or urine test would result in the automatic suspension of license.
 - (h) Blood and urine samples would be taken at a central location (e.g., hospital) and at the same place where the substance abuse assessment takes place. A qualified professional will take both samples. See attached for recommendations.
 - (i) Maine presently uses a two (2) vial blood sample for assessing alcohol and other drugs. We would add a urine sample. These are sent to the State laboratory or private labs approved by the State.

- (j) The Maine State Public Health laboratory has the capacity to do the screening. We would be required to increase their funds by \$40,000 a year (for a 5-year period) to allow for confirmation activities.
 - (k) Although this could possibly be self-supporting through fines, up-front funding would guarantee stability. Fines could go into the General Fund.
 - (l) THC/marijuana testing for its presence in blood is very difficult when THC concentrations are low. The Los Angeles Police Department collects urine samples for analysis as well. THC metabolites in urine are easier to analyze as they are at higher concentrations and persist in the urine.
 - (m) A strong link should be made between impairment and analysis of results. The Drug Recognition Expert (DRE) concept utilized by the LAPD was based upon a sophisticated study that utilized blood samples from impaired subjects. Wisconsin retains a Ph.D. Toxicologist for courtroom testimony.
 - (n) Screening techniques are available for multiple drug testing. In most cases, positives are recommended to be retested and confirmed by a uniquely different analytical procedure. GC/MS is the confirmation method of choice.
 - (o) Much like the OUI program, State chemists must expect significant court room testimony time, only to support analytical results, not impairment. Courtroom time is charged under a separate State Statute.
6. Conviction of OUI-Drugs Other than Alcohol: The process is important. If impaired (step 1), and BAC is less than .10 (step 2) and the individual is impaired as determined by a qualified person (step 3) and mood/mind altering drugs are present in the blood (step 5), there is evidence, which is acceptable to the courts, that the person was OUI-Drugs.
7. Other Factors
- a. Penalty: It has been suggested that we utilize the penalties used for alcohol.
 - b. Education/treatment: The DEEP adult program would need modifications to include drugs and to consider adults and multiple offenders.
 - c. Data information: The current DEEP data system and reporting procedures could be utilized but Motor Vehicle and Public Safety data would need to be included.

POTENTIAL LOCATIONS FOR OUI-DRUG ASSESSMENT
AND THE TAKING OF BLOOD/URINE SAMPLES

A number of central locations have been identified that would allow for centralized OUI-Drug assessments by a substance abuse counselor and the taking of blood and urine samples (by qualified persons) that would be analyzed for the presence of drugs. It has been suggested that hospitals, rural health centers, or any other center that has 24-hour access to health care professionals, would be appropriate for taking the blood/urine samples. There are sufficient numbers of licensed substance abuse counselors located throughout the two (2) county (Cumberland and York) area, to develop a pool that could be on 24-hour call. The "pool" may include an agency that has staff and/or private practitioners. The police may be considered as alternate urine collectors. The Department of Human Services will authorize specific professionals to conduct the sampling.

Based upon our estimate of 400 OUI-Drug arrests a year in the two (2) county area, an average of slightly over 1 assessment would occur each day for OUI-Drugs only. It is highly unlikely that the existing system would be over extended.

A review of a listing of health/hospital locations revealed a number of potential central assessment sites strategically located throughout the two (2) county area.

- a. Kittery/York: York Hospital, Hospital Drive, York
- b. Sanford: Goodall Hospital, June Street, Sanford
- c. Saco/Biddeford: So. Maine Medical Center, Mountain Road, Biddeford
- d. Portland/South Portland: Mercy/Maine Medical/Osteopathic/Westbrook
- e. Bridgton: Northern Cumberland Memorial Hospital, South High Street, Bridgton
- f. Brunswick: Parkview Memorial Hospital/Regional Memorial Hospital
- g. Kezar Falls: Sacopee Valley Rural Health Center, Maine Street, Kezar Falls

In addition to the private practitioners, there are a number of substance abuse agencies that could possibly provide the 24-hour impairment assessment service.

- a. Kittery/York: York Hospital
- b. Sanford: York County Counseling Service
- c. Saco/Biddeford: York County Counseling Services
- d. Portland: Community Counseling Services, Portland
- e. Bridgton: Western Maine Counseling Service
- f. Brunswick: Bath-Brunswick Mental Health Association
- g. Kezar Falls: York County Counseling Services

A number of areas do not appear to be located near these resources. These include Freeport, Gray, Raymond, Standish and Hollis Center. The following present some possibilities for service locations for these areas.

- a. Freeport north: Brunswick?
- b. Freeport south: Portland?
- c. Gray north: Lewiston?
- d. Gray south: Portland?
- e. Raymond north: Bridgton?
- f. Raymond south: Westbrook?
- g. Standish south: Westbrook/Portland?
- h. Standish north: Kezar Falls?
- i. Hollis Center: Sanford/Biddeford?

Unless we are able to identify individual health care providers, group providers, or other independent providers that could service these populations, we would have to utilize the resources in the larger population areas.

TESTING WOULD INCLUDE THE FOLLOWING DRUGS

BLOOD SAMPLES BY RIA (RADIO IMMUNO ASSAY)

Drug	Claimed Sensitivity (ng/ml)
THC/Cannabinoids	5
Cocaine	5
Opiates (Morphine, Codeine)	5
Barbiturates	5
Benzodiazepines (Valium)	5
* Amphetamines	5
* Phencyclidine (PCP)	2.5

* There is little data in Maine to suggest testing for these drugs at the present.

The concentration of cannabinoids associated with impairment averages at 2.5 ng/ml. The level of confirmation by GC/MS is not as low as the screening sensitivity level.

URINE SAMPLED BY TDx

Drug	Claimed Sensitivity (ng/ml)
Cannabinoids	25
Cocaine	30
Opiates	100
Barbiturates	200
Benzodiazepines	200

MAINE PUBLIC HEALTH LABORATORY
NEW COSTS TO COMPLETE TESTING

A program such as this one will require certain capital purchases, personnel training, and supplies in order to properly proceed. A five-year plan at approximately 400 samples/year or at 2000 samples/five years would cost approximately \$40,000 per year. The following presents the cost items.

<u>ITEM</u>	<u>COST</u> (<u>\$1000's</u>)
Gamma Counter for RIA (Radio Immuno Assay)	6
GC/MS (leased, depreciating 2/3 of its use to this program)	55
Supplies	50
Chemist Personnel (Chemist II at 0.5 FTE/year X 5 years)	87.5
Other (training, travel, administration, repair, State Cap, etc.)	15
TOTAL	\$213,500
or	\$105/sample

NOTE: These costs do not include blood alcohol testing.

This approach to planning and development is preferable to an individual charge/sample as shown on the above flow diagram. The PHL would prefer a General Fund allocation for its development and program costs. Most States with such a program have reimbursed their General Fund for analytical costs by use of financial penalties for the guilty.