

**Representing DUI Revoked or
Suspended Drivers Before
The Secretary of State**

**Larry A. Davis
Attorney At Law
960 Rand Road
Ste. 210
Des Plaines, IL. 60016
847-390-8500**

This article first appeared in the Illinois Bar Journal, a publication of the Illinois State Bar Association, in June, 2002, Vol. 90, No. 6.

Representing DUI Revoked or Suspended Drivers Before The Secretary of State

By

Larry A. Davis

I. Introduction

In recent years, attorneys representing those charged with driving while under the influence (“DUI”) have seen stricter laws, increasingly aggressive enforcement, hardening of public attitudes towards DUI offenders, and more complex administrative rules and policies governing those who appear before the secretary of state (“SOS”) seeking restoration of their driving privileges. Given the legislature’s tough stance, lawyers who represent DUI offenders must work even harder to stay on top of driver licensing laws and SOS administrative rules and procedure.

In our car-centric culture, the loss of driving privileges is one of the most serious consequences of DUI arrestx yet most attorneys, even those who regularly represent DUI defendants, are not prepared to address it on behalf of their clients.

The SOS is known for its hard-nosed approach to applications for relief. Policies supporting this hard line have been implemented in administrative regulations and legislated through tougher DUI laws as the public has become increasingly concerned with the risk posed by impaired drivers. Nevertheless, offenders who can show that they have altered their attitudes and behavior and are no longer a risk to the public safety can succeed in winning back the privilege to drive.

This article is designed to guide attorneys who are seeking to help deserving DUI offenders get behind the wheel again. It provides background on the summary suspension/revocation process, explains how to obtain restricted driving permits and other relief, and describes the alcohol and drug evaluation and treatment standards that are so important to proving that an offender is not a risk to the public. The article continues on the ISBA Web site at www.isba.org/duisos.pdf with a discussion of the administrative hearing and review process.

II. DUI and Driving privileges

A DUI case almost always consists of the statutory summary suspension, a civil proceeding, and the DUI itself that may, depending on various factors, be charged as a criminal misdemeanor or felony.

A. Summary Suspension

A statutory summary suspension is the withdrawal of a person's driving privileges by the circuit court based on a refusal to submit to chemical testing or failing such testing. The suspension is "summary" because a request for a hearing challenging it does not delay its imposition 46 days after a law enforcement officer serves notice on the driver. Summary suspension is a significant change from prior law, which allowed the request for hearing to indefinitely delay the suspension.

The length of a summary suspension depends upon whether the driver is a "first offender" (defined as a person without a DUI disposition within five years of the current offense) and submitted to or failed testing. It ranges from three months to three years.

For those who have had a prior summary suspension or DUI disposition within five years of the current offense, no driving relief is available during the summary suspension period. For first offenders, the circuit court has exclusive jurisdiction to consider any petition for driving relief.

B. Revocations

"Revocation" is SOS termination of driving privileges. A conviction for the criminal offense of DUI results in mandatory revocation. A revocation continues indefinitely for minimum periods set by statute as follows:

- First conviction – one year
- Second conviction (offense occurring within 20 years) – five years
- Third conviction (regardless of date of offenses) – 10 years
- Fourth or subsequent conviction (for offenses occurring on or after 1/1/00 – lifetime revocation.

The SOS has exclusive jurisdiction over those seeking relief from a revocation order. Regardless of the minimum revocation period, no relief may be granted until an SOS hearing is held. A revocation unlike a suspension, does not automatically terminate on the date certain.

C. Interactions of Summary Suspensions and Revocations

Understanding the interaction between the summary suspension and revocation laws is critical to understanding a person's eligibility for reinstatement or a restricted driving permit ("RDP").

Generally, a person is eligible for an RDP effective immediately upon entry of the order of revocation and is eligible for reinstatement upon expiration of the minimum period of revocation. However, under new legislation, a person who has been convicted for two or more DUI violations (including similar out-of-state offenses) may not obtain an RDP for one year from the date of revocation.

Additionally, RDP eligibility may be delayed by the concurrent imposition of a summary suspension arising out of the same incident. The length of the preclusion depends on whether the person is a first or second offender for summary suspension purposes.

- First offender who submits to and fails testing (three-month suspension) – no relief for the first month of suspension.

- First offender who refuses testing (six-month suspension) – no relief for the first month of suspension.
- Second offender who submits to and fails testing (12-month suspension) – no driving relief during the entire suspension period.
- Second offender who refuses testing (three-year suspension) – no relief during the entire period of suspension.

These “hard” periods of summary suspension during which driving relief is prohibited apply even if the DUI is dismissed, the offense is reduced (e.g., to reckless driving) or the person is found not guilty. The Illinois Supreme Court has thus far upheld the constitutionality of these provisions.

III. Restricted Driving Permits and Other Relief

The SOS has authority to grant RDPs or, if the petitioner is eligible, full reinstatement of privileges. The SOS also has authority to rescind or modify discretionary revocations or suspensions for, e.g., possession or use of a fraudulent license. Revocations for Illinois DUI convictions are mandatory by statute and revocations for out-of-state DUI convictions are mandatory by administrative rule and therefore not subject to modification or rescission. No hearing may be held where the driver has a current case pending. Generally, a new resident whose license is suspended or revoked in another state may not get an RDP. However, if at least one year has passed since the entry of the revocation order, an RDP may be issued to a new resident under certain limited conditions.

Under new legislation, the SOS requires in many cases that the driver install a breath alcohol ignition interlock device (“BAIID”) before he or she can get driving relief.

A. *Restricted Driving Periods*

RDPs defined and distinguished. An RDP, limited to necessary times, days, hours, and radius, may be issued for employment, medical or educational purposes for up to 12 months. The person’s underlying driving privileges remain revoked or suspended except for the limited privileges granted, and exceeding the terms of the permit may constitute the offense of driving while suspended or revoked.

JDPs (judicial driving permits) are identical to RDPs in the type and scope of privileges but are within the circuit court’s jurisdiction for statutory first offenders not otherwise revoked or suspended. A person who is eligible for a JDP cannot be considered for an RDP.

Illinois law does not make probationary or conditional licenses available to suspended or revoked drivers unless they are suspended for short terms based upon minor moving violations or in the case of commercial drivers. This has presented a dilemma for the SOS when faced with a revoked driver who is otherwise eligible for full reinstatement of privileges in light of society’s interest in determining whether such persons can drive responsibly before granting full reinstatement.

In the vast majority of cases where the person is eligible for reinstatement and has demonstrated that he or she is not a risk to the public safety, the SOS will initially grant an RDP for probationary purposes rather than a full reinstatement. Accordingly, the best

course in such a situation is to request relief in the alternative rather than only full reinstatement. A person must drive on a permit for at least 75 percent of the RDP term before proceeding with a hearing for full reinstatement.

Undue hardship and risk to public safety. Generally, those seeking an RDP must address the two issues first identified by the appellate court in *Foege v. Edgar*. (1) whether the petitioner poses a risk to the public safety in light of the SOS's duty to protect that interest and (2) the degree of hardship the petitioner would suffer from the loss of driving privileges. However, a person who is beyond the "hard" or minimum mandated revocation or suspension period and therefore eligible for reinstatement need not demonstrate an undue hardship to obtain a "hardship" license, because what he or she really seeks is a probationary license.

In cases where actual hardship is an issue, the SOS must balance the risk to the public safety against the hardship to the petitioner caused by the loss of privileges. The secretary's interest in protecting the public safety is paramount, and the mere existence of a hardship will not support a petition for relief unless it outweighs any risk. However, an RDP should be granted if the SOS determines that doing so will not endanger the public safety and welfare.

It has been held that when balancing these interests, the risk to the public safety posed by issuing an RDP may be less than that posed by granting full reinstatement and that issuing an RDP may be justified while full reinstatement might not. Ordering the SOS to grant an RDP but not full reinstatement to the petitioner, the appellate court, in *Breiner v. Edgar* held that "[s]uch restrictions, will allow plaintiff to retain his full-time employment, but will prevent the type of recreational nocturnal excursions which previously resulted in plaintiff's tragic collision.

Showing undue hardship. If not eligible for reinstatement, the petitioner must show by clear and convincing evidence undue hardship in employment, medical care, support/recovery meetings, community service and/or educational pursuits because of the lack of driving privileges.

This means showing a lack of any reasonable alternatives to driving, such as walking, public transportation, car pools, or rides from others. Mere inconvenience does not constitute an undue hardship. Generally, hardship will not be found unless the lack of transportation poses a real and imminent threat to the driver's ability to maintain employment (or accept an actual, verifiable written offer of employment) or will substantially impair the petitioner financially.

Addressing risk to the public safety and welfare. As previously stated, an RDP may not be granted unless the petitioner demonstrates that he or she will not be a risk to the public safety and welfare. SOS regulations provide for the consideration of factors such as the petitioner's age, number of years licensed, prior arrests for driving while revoked/suspended, duration of present employment, number, severity and frequency of accidents and traffic violations, efforts at rehabilitation or reform of past driving practices, and credibility of petitioner and witnesses..

In alcohol-related cases the petitioner is required to demonstrate that he or she does not have a problem with alcohol or other drugs and is a low risk to repeat such behavior. The petitioner must also demonstrate compliance with all alcohol/drug evaluation standards as well as compliance with all evaluation recommendations. Over time, the weight to be accorded prior offenses decreases, and may no longer justify a

finding that restoration of an applicant's driving privileges will cause harm to public safety and the welfare.

B. Reinstatement

Courts consider the risk to the public safety to be greater where the petitioner seeks full reinstatement rather than an RDP. They thus impose a greater burden on the petitioner seeking full reinstatement to show that he or she is not a risk. In practice, however, the SOS imposes a like burden on petitioners seeking either reinstatement or an RDP. Indeed, the factors enumerated by SOS administrative regulations for considering reinstatement are substantially identical to those for an RDP.

IV. Alcohol/Drug Evaluation and Treatment Standards

Petitioners who seek relief from an alcohol/drug-related revocation or suspension must complete an alcohol/drug evaluation and, if required by the treatment provider, comply with its recommendations. The SOS may deny relief to a petitioner who fails to complete or submit to an evaluation.

With certain limited exceptions, for Illinois residents, the evaluation must be completed by an agency licensed by the Office of Alcoholism and Substance Abuse ("OASA") and comply with the standards set by that office. Treatment must be completed by an agency licensed by OASA, the Department of Public Health, a therapist licensed by the Illinois Department of Professional Regulation or an out-of-state therapist employed by an agency licensed by that state.

The evaluation is the single most important document at the hearing. It must be complete, reliable, and accurate. The probative value of any evaluation that deviates from these standards is diminished. While the SOS may not ignore a properly prepared evaluation it is not the sole factor to be considered.

A. Evaluation Requirements

The SOS has adopted evaluation classification standards and requirements for treatment and/or education established by OASA. In addition to being based on the correct number of DUI dispositions and blood alcohol concentration ("BAC") levels or test refusals, classifications must also be based upon the subject's past symptoms of abuse or dependency. Even for a person with an extended period of non-problematic use that would make him or her a minimal risk at the time of the evaluation, the classification decision must take into account any previous pattern of heavier use or symptoms of abuse or dependence.

A significant number of petitions for relief are denied. There are three major problem areas: (1) evaluations and testimony that fail to support the petitioner's classification; (2) failure to meet requirements for treatment or education or current alcohol/drug use habits inappropriate for the assigned classification; (3) if applicable, failure to appropriately address prior hearing denials.

Improper classification. The failure to properly classify an individual is a major reason petitions for relief are denied. It is often commonly and wrongly assumed that

petitioners' classification is dictated by the number of DUI dispositions they have, their BAC, or their refusal to undergo a test. In fact, these factors only mandate the *minimum* classification to be given.

Better guides to the correct classification are the symptoms (or lack thereof) exhibited by the petitioner in the past considered in light of the minimum classification provided for by the rules. It is thus essential that an experienced, competent program prepare for the evaluation.

Regardless of the number of prior DUI dispositions or the BAC results that led to those dispositions, a prior history of substance abuse mandates a "significant risk" classification. Similarly, a prior history of symptoms supporting a finding of substance dependence mandates a "high-risk" ("dependent") classification.

Classification standards. Following, is a summary of the minimum classification standards and the general characteristics of each classification.

A. *Minimal risk.* No prior convictions/supervisions for DUI or reckless driving conviction reduced from DUI and no prior summary suspension and a BAC of less than .15 as a result of the current arrest and no other symptoms of substance abuse or dependence.

B. *Moderate risk.* Same as minimal risk except the BAC as a result of the current arrest is .15-.19 or the person has refused testing.

Typically, minimal- and moderate-risk persons have no significant history or symptoms of alcohol abuse. In most cases, the DUI incident is singular and not symptomatic of a history of alcohol abuse.

C. *Significant risk.* One prior conviction/supervision for DUI, one prior reckless driving conviction reduced from DUI, or one prior summary suspension and/or a BAC of .20 or higher as a result of the current arrest and/or symptoms of substance abuse.

D. *High risk (non-dependent).* Within a 10-year period of the most current (third) arrest, any combination of two prior convictions/supervisions for DUI or prior summary suspensions or prior reckless driving convictions reduced from DUI.

Significant-and high-risk (non-dependent)classifications generally apply to those with a demonstrated history of alcohol/drug abuse and symptoms supporting a finding of abuse. The DUI incident(s) are generally considered to be a symptom of an underlying abusive drinking or drug use history. However, individuals falling into these classifications do not demonstrate symptoms supporting a classification of dependency.

E. *High risk (dependent).* Symptoms of substance dependence.

This classification is reserved for those who demonstrate symptoms of alcoholism or drug dependence. OASA regulations dictate a high-risk (dependent) classification upon a finding of three or more symptoms of dependency.

Deficient evaluations. A deficient evaluation will usually result in a denial of relief. The most common deficiencies are as follows:

1. Failure to include all alcohol/drug related arrests, whether or not they resulted in conviction or involved use of a motor vehicle.

2. Failure to demonstrate a correlation between the person's alcohol/drug use prior to the arrest and any BAC results obtained as a result of the arrest (e.g., reported consumption of two to three beers with an indicated BAC of .15 would suggest minimization and lack of credibility).

3. Denial of impairment/intoxication at the time of an arrest that resulted in a conviction. It is important to understand that SOS rules provide that a conviction by way of plea or trial is evidence of a person's guilt. The SOS will not entertain the "relitigation" of a DUI offense in an administrative hearing, based upon a petitioner's subsequent denial of guilt.

4. Failure to correlate a person's alcohol/drug use history to his or her arrest history, particularly to the number and time of the arrests or any BAC results that demonstrate a significant tolerance for alcohol (e.g., an evaluation reporting a consumption pattern of one drink per week and one or two beers per occasion is inconsistent with two DUI arrests with elevated BACs, again suggesting a minimization and thus a lack of credibility).

5. Failure to include symptoms – or lack thereof – supporting the classification (e.g., a person classified as minimal risk should not suffer loss of control when drinking, and a person classified as significant risk should not be without symptoms such as increased tolerance).

6. An objective test score (administered as part of every evaluation), which is inconsistent with the person's classification (e.g., a Mortimer-Filkins scoring of 25 indicating a "social drinker" would be inconsistent with a significant or high-risk classification and would suggest minimization of drinking or symptoms).

7. Failure to include a history of illegal drug use, even if only experimental.

8. Failure to include other non-traffic alcohol/drug related criminal offenses.

The evaluation must be completed within six months of the hearing date. If the evaluation is out of date, an update may be provided only by the same program that performed the original. There are three exceptions to this rule: (a) a different program providing treatment services pursuant to the original evaluation may perform the update; (b) if the program providing the original evaluation has ceased providing services (or the licensee has been suspended/revoked), then the agency assuming responsibility for its case files pursuant to OASA authorization may provide the update; or (c) the subject has the right to obtain a completely new evaluation from an OASA licensed agency of his or her own choosing.

B. Risk Education

Risk education (formerly known as remedial education) is required for those in all classifications except "high risk". Its primary purpose is to provide information about the impact of alcohol/drug use on individual behavior and driving skills.

Risk education is offered by OASA-licensed programs and consists of 10 hours of instruction provided over four separate sessions with no session to exceed three hours. The program staff must complete a written risk-education verification on behalf of the subject. The verification must include the subject's pre-test and post-test scores based on an objective test administered before and after the completion of the course. A post-test score of 75 percent is passing. Risk education must be completed after the subject's last arrest resulting in a DUI disposition. Failure to successfully complete the course is a basis for denial of relief.

C. Primary Treatment and Treatment Documentation.

Background. The purpose of treatment is to address the problems identified through the alcohol/drug evaluation or later diagnosed during the treatment process and to reduce the risk the treatment subject may pose to the public safety. The SOS has adopted minimum treatment requirements for each evaluation, classification and required documentation to be provided at the hearing for each classification, all of which are in accord with OASA requirements. The only classification for which treatment is not required is “minimal risk”.

Only persons and programs licensed by OASA or the Department of Public Health, a therapist licensed by the Illinois Department of Professional Regulation, or an out-of-state therapist of an agency licensed by that state can provide treatment.

A subject driver who has more than one DUI disposition must overcome a rebuttable presumption that he or she has an alcohol or drug problem. In practice, that presumption is almost irrefutable. This approach is consistent with the SOS’s philosophy that multiple DUI dispositions reveal an underlying drinking problem. It is the treatment provider’s job to identify the problem and its chronological relationship to the driver’s arrests. Everyone classified as “significant” or “high risk” (dependent and non-dependent), and some classified as moderate risk, is presumed to have a substance-abuse problem.

Underlying causes. As part of the treatment process, the provider should identify the underlying causes for abuse (e.g., peer- or stress-related behavior), and the treatment plan should be geared towards addressing the identified causes. The discharge summary prepared at the conclusion of primary treatment should identify the reasons for the abusive use, how treatment addressed these problems, and the person’s response to treatment and prognosis.

Too many programs provide what might be called “generic” treatment documentation, which provides little if any information about the underlying causes of the abuse or how it has been addressed. Such non-specific treatment documentation increases the risk that the SOS will fail to conclude that treatment has identified or adequately addressed identified problems.

Required documentation. Treatment documentation for moderate-, significant-, and high-risk subjects must include the following information.

- The name and telephone number of the treatment center, primary treatment admission and discharge dates, number of days or hours of primary treatment, admitting, and discharge diagnoses, type of treatment administered (e.g., outpatient, inpatient, individual, or group), subject’s prognosis for maintaining a non-problematic pattern and what he or she gained from treatment, whether treatment was sufficient to minimize recurrence of an alcohol/drug related problem, recommendations for continuing care, and continuing care status (continuing care is not required for moderate-risk subjects);
- An individualized treatment plan (not required for moderate-risk subjects);
- A continuing-care plan (not required for moderate-risk subjects);
- A discharge summary;
- A continuing-care plan (not required for moderate-risk subjects).

D. Continuing Care

Continuing care (formerly known as “aftercare” is generally required for all “significant-“ and “high-risk” classifications unless waived by the provider. Continuing care need not be completed prior to the hearing date.

If, as of the date of the hearing, the subject is receiving continuing care, the provider should prepare a separate report describing the subject’s progress in completing the activities and goals outlined in the continuing-care plan. If continuing care has already been completed as of the date of the hearing, a summary report should be prepared describing the subject’s progress in completing these activities and goals.

E. Treatment Waivers

If the subject has not been required to complete any primary treatment or continuing care, ask the provider to prepare a treatment waiver (also called a “treatment needs assessment”). Even if treatment is being waived, the alcohol/drug evaluator must make a treatment referral for the subject, after which the treatment provider determines whether treatment is required or should be waived.

Full or partial treatment waivers are most common in the following scenario: an individual did not complete treatment following his or her last arrest resulting in a DUI disposition, but – after a lengthy period - he or she has established a history of non-problematic use or sobriety and support-group involvement, depending on the applicable classification. Note that while treatment may sometimes be waived, risk education where otherwise required (e.g., for minimal-, moderate-, and significant-risk persons) cannot be waived.

F. General Treatment and Other Requirements for Moderate-, Significant- and High-Risk Persons

Moderate Risk. Those classified as “moderate risk” must undergo 12 hours of early intervention treatment and 10 hours of risk education. Indicators for a moderate-risk classification are no prior history of regular substance abuse, a demonstrated understanding of the limited situations in which abuse would occur (e.g., in isolated social situations), and an established, extended, and stable period of non-problematic use.

Significant risk. Significant-risk subjects must receive 20 hours of counseling, 10 hours of risk education, and continuing care as recommended by the treatment provider.

High risk (non-dependent). High-risk (non-dependent) subjects must receive 75 hours of counseling and continuing care as recommended by the treatment provider. Indicators for a significant risk classification are a substance-use history consistent with the legal presumption of past abuse based on such factors as the number or prior alcohol/drug-related arrests and dispositions and a marked increase in tolerance for alcohol as demonstrated by any BAC levels.

The evaluation and treatment documentation, as well as testimony and any other evidence, should demonstrate the reasons for the abuse (e.g., peer- or stress-related

reasons) and whether and how the reasons have been addressed (e.g., new peer-group affiliation or stress-reduction techniques). Lifestyle changes that have been in place for some time on the hearing date are more likely to appear permanent than shorter-term changes.

Individuals classified as “high risk (non-dependent)” must demonstrate at least 12 months of non-problematic use or abstinence, though the SOS has discretion to reduce the period to six months. High-risk (non-dependent) subjects must provide three letters from those who know and regularly see them stating the following, at minimum: their relationship to the subject, how long they have known and how often they see the subject, the subject’s current (non-problematic) drinking habits and length of time these habits have existed. Letters must be originals, signed and dated within 45 days of the hearing date.

Those classified high risk (non-dependent) must also provide a detailed explanation from their treatment provider of why dependency has been ruled out.

High risk (dependent). Those classified high-risk dependent must receive 75 hours of counseling and continuing care as recommended by the treatment provider. Indicators for high-risk dependent classification are sufficient symptoms consistent with alcohol/drug dependency.

These persons must demonstrate 12 months of continuous abstinence. Again, waivers based on as few as six months may be granted for purposes of seeking an RDP. However, such waivers are almost never granted unless the person has no significant relapse history, a strong support program, and a significant hardship due to the lack of driving privileges. The subject must provide at least three letters verifying abstinence like those required for persons classified high risk (non-dependent).

High-risk (dependent) persons must also demonstrate participation in an ongoing support/recovery program. A support/recovery program is defined by specific activities that a recovering person has incorporated into his or her lifestyle to support abstinence. These activities may include involvement in a self-help program (e.g., AA), a professional support group, or religious or other activities that provide a specific contribution to a person’s continued abstinence. Abstinence itself is not enough – relief can be denied based on failure to participate in a support program.

The subject must provide three letters from co-support group program members, signed and dated within 45 days of the hearing date, that describe how long the author has known the person and how long and how often the person attended the program. If the person is a member of a 12-step program, one of the letters should be from his or her sponsor.

If the support system is not an organized program such as a 12-step group, the subject must demonstrate specifically what the program is and how it helps him or her maintain abstinence. Three letter signed and dated within 45 days of the hearing must indicate the writer’s relationship to subject, how long and how often the writer sees him or her, how the writer is involved in his or her recovery program, what role the writer played in helping him or her maintain abstinence, and what changes the writer has seen in him or her.

In practice, the SOS is extremely skeptical of non-traditional alternatives to established support programs such as AA. The longer that such an alternative has been in place, the higher the odds that the SOS will accept it.

