



Eight steps to success in handling a DUI case

PI ATTORNEYS MAY OCCASIONALLY FIND THEMSELVES HANDLING A DUI MATTER; HERE ARE THE BASICS

DUI cases are arguably some of the hardest criminal cases because there are dual cases pending at the same time: through the DMV and criminal courts. There is an added layer of science with the chemical-test and blood-test results. Below are key steps to take to effectively advocate for your DUI client.

1. Fax DMV a letter of representation within 10 days

When your client is arrested for DUI, the client will receive a pink temporary license with the DMV Administrative Per Se (APS) contact information and issues the DMV needs to prove. The temporary license states that if DMV does not know within 10 days of your request to stay the suspension, the client's driver's license will be suspended 30 days after the date of incident. When you retain a DUI case, you should fax the Department of Motor Vehicles (DMV) a letter of representation within ten calendar days of the date of incident to preserve your client's driving privileges and right to a hearing regarding the suspension of their license.

There are four DMV APS locations in Los Angeles County, one in Orange County, one in San Bernardino County, etc. If you are uncertain which location you should fax, you can call any of the DMV APS locations to confirm the correct location and their fax number. Your letter of representation should include a request for a "stay" on your client's driver license so your client can continue driving while the case is pending and request that all of the department's evidence be sent at least 20 days prior to the scheduled hearing date. If discovery is sent to you untimely, you can request a good cause continuance of your client's hearing, which allows you time to review discovery while your client can continue to drive.

2. Review all DMV discovery and send a subpoena to the arresting agency for additional evidence

DMV will mail you the initial discovery for your APS hearing. The initial discovery should include: the DS367 form or the officer's sworn statement, your client's driving record, the unsworn breath test or blood test result(s), and sometimes the unsworn arrest report and/or unsworn traffic collision report. DMV can technically prove their case with the DS367 form, the breath or blood test results, and your client's driving record. However, DMV is allowed to supplement with unsworn documents as long as the arresting officer's sworn DS367 form contains "all information relevant to the enforcement action." (*MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 159.)

Review the initial discovery to determine what additional discovery is available to subpoena. For breath-result cases, you can always subpoena the breath calibration logs, accuracy logs and usage logs from the arresting agency. For blood results, you can subpoena the blood packet. Other items that are useful to subpoena are any audio/video, dashcam, dispatch logs, 911 calls, and officer DUI-training materials. Call the arresting agency to inquire how much the fee is to subpoena the requested items. If you see some discrepancy in the report and the additional evidence, it may be wise to subpoena the arresting officer for the DMV hearing. The subpoena duces tecum rate for any officer testifying is \$275 per day, made payable to the arresting agency. If your client's BAC is rising or there is something wrong with the blood or breath test result, it may be useful to hire and subpoena an expert or forensic toxicologist to testify at the APS hearing. You must disclose all your witnesses prior to the DMV hearing so DMV can properly

prepare to cross-examine your witnesses and provide rebuttal evidence such as their own forensic toxicologist.

3. Object during the DMV hearing and argue for a set aside

Once you have your evidence for your DMV APS hearing and have reviewed all additional discovery you have requested from the arresting agency, it is now time to do the DMV hearing. Unless you have good cause to continue your hearing, your APS hearing will go as scheduled.

Depending on the type of DMV APS hearing (e.g., excessive blood alcohol content, refusal and/or underage DUI), there are different consequences for hearing outcomes. Post-Covid, all DMV APS hearings are conducted telephonically. The DMV hearing officer trier of fact will state the issues DMV must prove beyond a preponderance of the evidence to suspend your client's license. Each of these issues should be addressed in the DS367 sworn statement.

Common objections during DMV for the DS367 sworn statement are Evidence Code 1280, hearsay in the probable cause statement, and Vehicle Code section 13380 violations such as if the arrest occurred prior to objective symptoms being observed, no time of driving, no time of objective symptoms, no time of arrest, no time of chemical test, no signature and thus not sworn, etc.

Common objections to unsworn statements are Evidence Code 1280, hearsay, and lack of foundation. Even if DMV does not sustain your objections, the objections will be noted for the record and thus, will preserve your right to appeal should you need to appeal the DMV decision in the future.

If you subpoenaed the arresting officer for your APS hearing, you may question the arresting officer regarding the case way in advance of a jury trial.

All testimony any witnesses give at the APS hearing is made under oath and can be used in court. Every DMV hearing is recorded, and you can order the entire recording from the APS office for a small fee and transcribe it for court use.

At the end of every DMV hearing, the hearing officer will ask you for your closing argument as to why DMV did not meet its burden. Always argue something during your closing. An argument that worked with one hearing may not work for another and preserving these arguments on the record will help establish a record for a departmental review or appeal, if needed. *DMV hearing officers are not lawyers.* The hearing officers are employees of DMV who make daily legal rulings. They make mistakes.

Lastly, even if you lose your DMV hearing, it can be a great discovery tool to prepare for your court case.

4. Calendar and attend the arraignment date

The date on the citation is a placeholder date for the arraignment. Many times, especially post-Covid, misdemeanor cases are not filed on time. For misdemeanor DUI, the prosecuting agency has up to one year from the date of incident to file the case. In many counties, there can be two prosecuting agencies – the district attorney’s office and the city attorney’s office. If you are checking on your client’s case, it is best to check with both prosecuting agencies in the area, as well as the court stated on the citation to see if your client’s case is filed.

Even if your client’s case is not filed on time, I highly recommend going to the court to get a proof of appearance on the citation date. At times, mistakes occur, and your client’s case may have been filed under a different spelling or date of birth. If you were able to get the copy of your client’s citation stamped at the court clerk’s office (or prosecuting office, depending on the court location) on the date on the citation, then there is proof you/your client attended the arraignment date. Should there be a mishap where

the case was filed but you were not aware, you can later file a possible *Serna* motion to dismiss your client’s case. (*Serna v. Superior Court* (1985) 40 Cal.3d 239.)

Lastly, if your client’s case is not filed on time, you should continue checking bimonthly or monthly with the court clerk’s office and the prosecuting agency to see if the case is filed. Otherwise, if you/your client misses the arraignment date, the court can issue a warrant for your client’s arrest.

5. Build a mitigation packet for your client

Once you have arraigned your client and entered a not-guilty plea on their behalf, you should have reviewed all the additional evidence you received via the subpoena duces tecum process through the DMV APS hearing. If there is any evidence received through the DMV hearing that is helpful to your client, you should request the same evidence from the prosecutor so they have a copy of it or provide a copy to them for their review.

Understanding who your client is and their background is extremely important. Is your client a U.S. citizen? Does your client have DACA status? Does your client have a commercial driver’s license? Does your client have any sort of professional license (doctor, nurse, pharmacist, etc.) that can be affected by a DUI conviction? If your client has any collateral consequences, you should create a mitigation packet including this information for the prosecutor to review.

Additionally, if your client has bad facts (such as a traffic accident, excessive speeding, blood-alcohol content of .20% or more, or refusal of the blood or breath test), suggest to your client to start attending free self-help Alcoholics Anonymous classes, or the appropriate DUI class for their blood-alcohol level. A mitigation packet can also include letters from the community, volunteer work, school transcripts, work promotions, awards, etc. Mitigation packets work well when a cover sheet is prepared with a preview of the contents of the packet and a request for a specific counteroffer.

A well-put-together mitigation packet can reduce the consequences of a DUI or possibly reduce the DUI to a wet reckless, dry reckless or better.

6. Know your courthouse, judge, and prosecutor

Every courthouse in every county operates differently and has different standard offers for DUI. It is important to know what the standard offer is in your courthouse to know if your client’s offer is better or worse than the standard offer.

Knowing the judge is important as some judges will regularly undercut the prosecutor. In Orange County, this is more common than not. In LA County, this is much less common. One way to learn this information is to ask the public defender in the same courtroom, as s/he would know if their judge regularly undercuts the prosecutor for DUI cases. Remember, judges cannot offer a wet reckless or dry reckless or dismiss your case. Dismissals by judges can only be achieved through a filed motion. Thus, it is only wise to ask the judge for an offer only if your goal is to get less punishment for a plea to a DUI charge.

Lastly, at times, some courthouses consistently rotate prosecutors. That means you may have a different prosecutor every time you go to court. Sometimes, a different prosecutor may be more willing to provide you with a better offer. Learning whether a prosecutor has been there in that department for a long time or is a rotating prosecutor could help you strategically negotiate for your client.

7. Negotiate with the prosecutor (or judge) for a just offer

Once you have prepared your mitigation packet and have learned the ins and outs of your courtroom, you are ready to present your mitigation packet to the prosecutor and/or judge. Know what sort of offer you are asking for and always include that when you speak with the prosecutor and include it in your mitigation packet in case the prosecutor forgets your request.

Often, the prosecutor will need additional time to review your submitted mitigation packet. Sometimes, even after their review of the packet, they may be unwilling to reduce your case to your counteroffer. At this time, you can always schedule a meeting with their supervisor to see if s/he would allow such an offer. If that is not successful, you can also schedule to speak with the supervisor's supervisor. Even with all these avenues exhausted, the answer may still be no. However, persistence sometimes pays off in criminal cases. In criminal cases, it is always an uphill battle for your client and it's always important to keep consistently fighting for what you think is right.

8. Plead out your client or set your case for jury trial

If you believe you have negotiated the best outcome for your client's DUI facts, congratulations; you should contact your client to schedule a meeting to go over the evidence so they understand the outcome in their case. Show them the video/police report evidence so you can go

over possible defenses. A client needs to understand the strengths and weaknesses of their case before they can initial and sign a DUI *Tahl* waiver form for their DUI plea.

Almost every court in every county requires an initialed and signed DUI waiver of rights and plea form. Every county has their own DUI *Tahl* waiver form, so ask the court for the correct form. Most courts use the same form for a wet reckless plea as a DUI plea. However, if you win a coveted dry reckless or even lesser, such as an exhibition of speed, it may be a different plea form altogether.

If you believe the outcome you received for your client is not just or your client will not accept the offer, then the only other outcome is to set your case for jury trial or a bench trial. If you are going to trial, hopefully you subpoenaed the arresting officer for the DMV APS hearing so you can use those statements in trial. Prep your jury trial as you would your civil jury trial. What is the main weakness in your case? What are your strengths? Why should the jury not trust

the breath or blood test results? Why should the jury not trust the arresting officer? How will the prosecutor present their case? What type of jurors do you want on your case? What is the biggest issue in your case?

Criminal defense is a hard field to practice as many of our clients had a bad day and did something they would likely never do again. It is hard to see good people receive a conviction on their record for a mistake that could cost them their job, or their status in the United States.

To be a successful criminal-defense lawyer, you need to have empathy towards your clients, to be passionate about their case, and keep persisting even if the answer is constantly no. Hopefully these tips will help you persist in your fight for your DUI client.

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