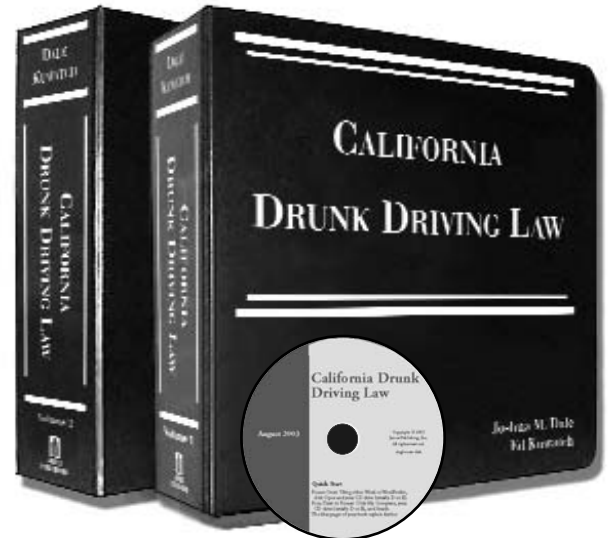


# DUI Answers, Arguments, and Tips

## Learn what to say to your client when:

- He asks, "What is the punishment for drunk driving?"
- Your client calls because his driver's license was taken at the time of arrest.
- The client refused a chemical test.
- The city or county sent your client a bill for "arrest services."
- Your client is worried about losing his job.
- The conviction occurred long ago, but now the DMV won't issue a driver's license.
- The car was impounded.
- Your client is worried about the future cost of insurance if he is convicted.
- You want to assure your client of your knowledge and expertise.



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## Comprehensive and practical

For answers to all your client's and your questions, turn to Josh Dale and Ed Kuwata's *California Drunk Driving Law*.

This two-volume book and CD provide the most complete coverage of state DUI practice available.

Its content focuses on the issues that arise in daily practice. You will find detailed forms, defenses, strategies, and solutions for:

- License suspensions and DMV hearings
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- Priors motion and trial
- Felony prosecutions based on priors
- Chemical test: discovery and evidence
- Injury and death offenses
- Motions to suppress evidence
- Plea bargaining
- Multiple pending charges
- Trial evidence
- Jury instructions
- P.A.S. and H.G.N.
- Punishment
- Alternative sentencing options
- Appeals and writs

## Loaded with valuable tips

The book is filled with solutions to the challenges facing DUI practitioners. From arrest to punishment, and additional charges to DMV hearings, *California Drunk Driving Law* overflows with practice-tested strategies and arguments like these:

### **Pretrial**

- How to deal with threats to punish the defendant for insisting on a trial. §356.4
- How to remind the prosecution of the police's potential civil liability for failure to turn over material evidence. §552.2
- Why you should not enter a general time waiver when setting trial for a defendant not in custody, but instead should consent to a date certain. §311.2
- How to avoid half-day trials. §311.8

*Continued inside...*

## Valuable Tips

Continued from page one

### Pretrial

- How to counter a discovery denial based on copyright infringement. §572
- How to overcome Lively's "could have been arrested for public intoxication" theory when the arrest is for attempted drunk driving. §717
- How to persuade a hospital not to disclose blood test results obtained during treatment, with model letter. §925

### Additional charges

- Use this defense to violation of the 55 mph maximum speed limit where appropriate signs are not posted, and this second defense if the highway has three lanes. §212.4
- How and when to assert jurisdictional speed trap defects. §213.1
- What to discover when airplanes or helicopters are used for speed enforcement. §214
- How to challenge radar-based speed trap violations of prima facie speed limits. §215.4

### Trial

- Four techniques for defending against the breath-based per se charge. §947.5
- Suppressing Preliminary Alcohol Screening (P.A.S.) test results at trial. §948.3
- Impeaching a cop's expert opinion on impairment by showing that the Federal NHTSA-recommended methods were not used. §950.4
- Proving a cop's method of administering the Horizontal Gaze Nystagmus test is not generally

accepted. §950.5

- How to block prosecution experts from testifying in low BAC cases that the defendant was mentally impaired even though he or she showed no signs of physical impairment. §111.10
- When to admit a prior conviction sentence enhancement allegation. §972.3

### Punishment

- How to circumvent the court's lack of authority to grant a second offender work/DUI Program restricted license. §1025.3
- Obtaining an ignition interlock restricted license prior to the end of the full suspension or revocation period. §1054.9
- How to convince collection agencies to drop claims for emergency response costs. §10121
- Many attorneys mistakenly think the DMV is requiring completion of a DUI Program prior to reinstatement of full driving privileges after a wet reckless conviction. §359.1

### DMV Proceedings

- How to block DMV hearing continuances without good cause, with 8-page motion. §1139.3
- What to do when the DMV takes additional evidence in violation of Vehicle Code provisions. §1149.1
- Why you should always discover form DS 393, and how to use it to block admission of police-drafted documents, with pattern discovery request. §1163.4

## Over 60 Forms

### Additional Charges

Photo Red Light Discovery Request, Jury Instruction—Non-Resident Licensed Driver

### Arraignment, Demurrer, Plea and Pretrial

Demurrer to Bare Allegation of "Forbidden Act" and "Neglected Duty," Defendant's Rejection of Prosecution's Plea Bargain Offer and Court's Indication of Intended Sentence

### Prior Convictions of Separate Offenses

Letter Requesting Conviction Records, Conviction Record Checklist, Allegation in Support, Alternative Allegation in Support, Motion to Declare Prior Conviction Constitutionally Invalid, No Advice or Knowledge or Waiver of Constitutional Rights, No Verbatim Record, No Inquiry and Finding that Rights Waiver Was Knowing and Voluntary and Intelligent, Constitutional Invalidity Order

### Discovery

Jury Instruction—Biased Cop Refused to Discuss Case with Defense Attorney, Informal Request for Discovery from Prosecution, Motion for Discovery Compliance, Discovery Request—Blood and Urine Records Request, Letter Requesting Chemical Test Documents, Declaration for Subpoena Duces Tecum, Public Records Request: Chemical Test Documents, Motion to Suppress: Search and Seizure

### Trial

Letter to Hospital Regarding Patient Confidentiality, Jury Instructions: "Driving" Defined, Violation of Title 17, Chemical Test Validity, Calculating Blood Alcohol from Urine Alcohol, Mistake of Fact Defense, Failure to Follow Vehicle Code S23614, Acts Constituting Alleged Offense, "Wet" Reckless Sentence Enhancement, Credibility of Injured Witness

### Punishment

Letter Requesting Termination of Suspension or Provocation for Out-of-state Resident, Pilot's Report to FAA of Drunk Driving Conviction

# Abbreviated Contents

## 1. Drunk Driving Offenses

Basic Offenses, Drunk Driving with Injury, Vehicular Manslaughter, Commercial Vehicles and Common Carriers, Other Drinking/Driving Offenses, Federal Offenses

## 2. Additional Charges

Infraction Traffic Offenses, Suspended or Revoked License – Criminal Prosecution, Suspended or Revoked License – Civil Impound/Forfeiture, Reckless Driving, Driver's Licenses Offenses, Open Container Violations, Under 21 and Juvenile Alcohol Offense Suspensions, Hit and Run, Child Endangerment, Evading a Pursuing Cop

## 3. Arraignment, Demurrer, Plea and Pretrial

Speedy Trial Rights, Continuance, Arraignment, Demurrer and Plea, Pretrial Conference, Plea Bargaining, Law and Motion

## 4. Prior Convictions of Separate Offenses

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## 5. Discovery

Proposition 115, Direct Discovery from Law Enforcement, General Discovery Provisions, Discovery from the Defense, Discovery from the Prosecution, Informal Discovery Request, Motion for Compliance, Sanctions, Chemical Test Discovery, Discovery by Subpoena Duces Tecum, California Public Records Act, Discovery Denial Remedies and Review, Conditional Witness Examination

## 6. Preservation of Evidence

Historical Development, Suppression: Preservation of Evidence, Denial of Own Chemical Test

## 7. Search and Seizure

Presence of Arrestor – Detention and Arrest Issues, Additional Detention and Arrest Issues, Illegal Search Issues, Penal Code S1538.5: Motion to Suppress, Civil Remedies

## 8. Other Pretrial Motions

Challenge to Judge, Statements of Defendant, Nonstatutory Motion to Dismiss, Motion for Court Appointed Expert, No Dismissal for State Prison Inmates

## 9. Trial

Constitutional Trial Rights, General Trial Procedure, Evidence and Objections, Scientific Evidence (Literature, Admissibility of Chemical Test Result, Kelly/Frye – General Acceptance of Scientific Evidence, Blood: Samples and Analysis, Hospital/Medical Blood Alcohol Test Results, Blood Alcohol Changes with Time, Breath Alcohol Testing, Preliminary Alcohol Screening Devices, Urine Alcohol as Evidence of Blood Alcohol, Field Sobriety Tests, Radio Frequency Interference, Expert Witnesses, Lay Opinion, Accident Reconstruction, Handwriting, Hypnosis to Enhance Recall, Expert Opinion on Past Mental State, Sodium Amytal), Affirmative Defenses, Prior Conviction Enhancement Allegations, Jury Instructions, Closing Argument, Mistrial and Retrial

## 10. Punishment

Effectiveness of Punishment, Punishment at Time of Sentencing (Vehicle Code S23140: BAC > .05%, Vehicle Manslaughter Intoxicated, Drunk Driving Punishment Charts, Probation Length and Standard Terms, Additional Punishment and Probation Terms, Prohibited and Disfavored Probation Terms, Restitution, Ignition Interlock Device, Probation Report and Sentencing Hearing, Felony Sentencing, Work Furlough, Experiments and Pilot Projects, Multiple Punishment, Time Credits), Residential Alcohol Treatment, DMV Sanctions for Conviction, Interstate Implication of Drunk Driving Convictions, DUI Program, Probation Violation: Drunk Driving Issues, Juveniles and Persons Under 21, Other Consequences of Conviction

## 11. DMV Proceedings

Zero Tolerance, Procedure Prior to Hearing, The Hearing, Evidence Issues and Objections, Chemical Test Refusal Hearing, Excessive BAC Hearing, Judicial Review: Grounds for Attack, Other Methods of Attack, Length of Suspension and Revocation, Relation to Criminal Case, Other DMV Actions

## 12. Appeal

Appeal Proceedings in Trial Court, Proceedings in the Appellate Division, Proceedings Following Decision, Writs in Criminal Cases

## Appendix A

Telephone Directory

## DMV Proceedings

DMV Hearing Request—Admin Per Se—In Pro Per, Request for Hearing and Discovery and Subpoenas, Motion for Set Aside on the Grounds that a Continuance Was Granted for Good Cause, Motion for Set Aside for Delayed Hearing and Decision, Declaration for Challenge for Cause Against DMV Hearing Officer

*Martinez Did Not Overrule Downer*, Declaration of Counsel in Support of Ex Parte Application for Stay, Motion for Stay of Suspension with Points and Authorities, Order Staying Suspension, Petition for Writ: Review of DMV Decision, Alternative Writ: Review of DMV Decision, Judgment Granting Writ, Order of Acquittal of Vehicle Code S23152(B) Charge

## Appeal

Notice of Appeal, Proposed Statement on Appeal, Notice of Filing of Reporter's Transcript, Settled Statement on Appeal, Letter to Court Regarding Settled Statement, Opening Brief Title Page

## Bonus Coverage

A 97-page chapter explains how to defend the typical additional charges that may be included in a drunk driving case.

For example, effective speeding defenses are provided for prima facie speed limits, maximum speed limits, photo radar, and speed traps. Supporting authority, pattern arguments, and practice tips are included for these charges:

Infraction traffic offenses	Reckless driving
Speeding	Without injury
Red lights, stop and yield signs	With injury
Turns and signaling	Other offenses
License plate	Driver's license
Seatbelt and child restraint	Open container
Motorcycle violations	Under 21 and juvenile alcohol suspensions
Suspended or revoked license	Hit and run
Criminal prosecution	Child endangerment
Civil impoundment/forfeiture	Evading a pursuing cop

## About the Book and CD

**California Drunk Driving Law** contains 1,058 letter-sized pages and 15 tabbed dividers in two sturdy 3-ring binders. The book cites over 1,700 cases, with each one personally read, analyzed, and explained by Josh Dale or Ed Kuwatch.

Included at no extra charge is a full-text, boolean-searchable, intuitive CD-ROM that requires no installation before use. If you would rather not use the CD's database, its 63 custom-drafted forms may be accessed and modified simply by using your word processor.

The book costs \$149. It is updated twice-annually with change pages and a replacement CD. Both the book and its updates are sold on a 30-day trial basis, and may be returned if not to your liking. The update service may be cancelled at any time.

## Reader Comments

*"In more than 30 years of DUI practice, I have found no more comprehensive, current or entertaining book on California DUI law. Simply the most comprehensive, up to date treatment of California DUI law ever written."*

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Former President, CPDA

*"Absolutely the best drunk driving book in the state. With California Drunk Driving Law and nothing else, you'll look like an old hand even in your first case. And you'll still be using it in your one hundredth case."*

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San Francisco  
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*"California Drunk Driving Law is a must for any criminal practitioner. I have used CDDL not only for DUI cases but in homicide cases, search and seizure cases and non-alcohol related traffic offenses. CDDL is a necessary book to anyone practicing criminal law – even if you don't get a lot of criminal cases."*

**William M. Thornbury**  
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*"You can't expect even a chance at a fair trial for an accused drunk driver without this indispensable research tool on California law. Even experienced DUI lawyers will find that they consult it almost daily."*

**Richard Erwin**  
Carpinteria

## About the Authors



**Joshua M. Dale** has been in private practice representing drinking drivers since 1995. Before that, he spent many years in the criminal justice system as a law enforcement officer in the U.S. Army Military Police and for two California police departments.

He is a credentialed Fatality Accident Investigator as well as a former DUI Investigator. He is Secretary of California Deuce Defenders, and a member of National Association of Criminal Defense Lawyers, California Public Defenders Association, and National College for DUI Defense.

Mr. Dale took over authorship of *California Drunk Driving Law* in 2003. He may be contacted at [jdale@joshdale.com](mailto:jdale@joshdale.com).

Prior editions of the book were written by **Ed "Fast Eddie" Kuwatch**, at one time the best-known commentator on drunk driving law in California.

In addition to writing his own book, Mr. Kuwatch contributed to: *Erwin's Defense of Drunk Driving Cases*, *DWI Journal*, *CPDA Drunk Driving Manual*, *California DUI Reporter*, and *Defending the Drunk Driving Charge*. He wrote the shareware program *EZ-ALC™ Blood Alcohol Chart Software*.

In 1988 Mr. Kuwatch founded the California Deuce Defenders, a statewide organization of 200 attorneys and other professionals dedicated to the vigorous defense of persons accused of drunk driving.

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Loaded with tips from experts. Author Ed Kuwath shares the lessons he and colleagues have learned from decades of top-level DUI work.

§§12805(b), 12809(e), 13359, and 14250. Look for a DMV "Order of Probation and Suspension" (Code 316 or 317) with alcohol conditions of probation if there are two or more of three or more regular alcohol-related incidents on the driver's license record within a three-year period (§13800(c)). Count a drunk driving with an accident as two of the three. Request a hearing and the suspension may be reduced to just probation.

is simply added to the record. To be certain, you should be sure to state that the defendant is not in accordance with §23103.5. And be sure the clerk understands that Division Code "R" does not go to the abstract sent to the DMV.

Be aware of Vehicle Impoundment for Reckless Driving. Veh. C. §14602.7, added by Stats. 1997, Chap. 743 (AB 662, Hertzberg), allows a separate judicial proceeding to impound the vehicle of anyone who violates Veh. C. §23103 (reckless driving). Be sure your plea bargain precludes any chance of that happening.

**PRAC TICE TIP:** It's crucial that any conviction of reckless driving in a case originally charging drunk driving occur after, not before, any conviction on a pending drunk driving case. The DMV acts on the conviction based upon the state of the record on the day it receives an abstract reporting the conviction. They do not consider offense dates to be significant (except to be sure the offenses are within seven years of each other). Where you are arranging multiple convictions of drunk driving and reckless driving, the reckless driving conviction to occur last. Arrange the DMV fees that way by arranging the reckless driving conviction on the same day as the convictions occur on the same day, where the convictions occur with a letter or order stating what order the convictions occurred in.

**§359.2 Striking Prior Conviction Sentence Enhancement Allegations**  
Sentence enhancement allegations are always considered strikeable by the court without the prosecutor's consent, unless a statute specifically provides otherwise (Pen. C. §1385(a), *People v. Luckett* (1996) 48 CA4th 1214, 56 CR2d 37; *People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497, 53 CR2d 789, though (Romero) (1996) 13 Cal. 4th 497, 53 CR2d 789, though prior serious or violent felonies alleged under the three strikes law may not be struck if doing so would "strike the heart of the scheme's spirit." (*People v. Williams* (1998) 17 Cal. 4th 148, 69 CR2d 917—Trial court erred in vacating two prior strike findings at sentencing, in order to sentence fourth offense drunk driving. Veh. C. §23175 (new Veh. C. §23550) as though he had one prior strike rather than three.)

**PRAC TICE TIP:** Offers to strike prior drunk driving conviction sentence enhancement allegations, whether made by the court or the prosecution, are of significant benefit to the defendant in only two situations (see chapter 10).

**"Dry Reckless" Offense:** A "dry" reckless is also an occasional disposition in a drunk driving case, though it is rare. Where dry reckless is the disposition, there need not be any compliance with §23103.5. That's (and must not) be compliance with §23103.5. That's because reckless driving could have been charged in the future. Therefore it's not a satisfaction or substitution in place. Therefore it's not a "dry" reckless (§23103.5(a)) for a drunk driving charge. A "dry" reckless conviction results where a charge of violation of §23103

is somewhat reduced by the fact that it imposes only to conduct the engineering and traffic survey to the higher limit ought to be established. Vehicle Code §22349, subdivision (b), sets a speed limit of 55 mph on two-lane undivided highways, unless an engineering and traffic survey justifies a higher limit. Proprietarily, it states that "A two-lane, undivided highway is a highway with not more than one through lane of travel in each direction." But adds, "Passing lanes may not be considered when determining the number of through lanes."

**PRAC TICE TIP:** What's the passing lane referred to in Veh. C. §22349(b)? That term isn't defined anywhere in the Vehicle Code. As for a three-lane highway, Veh. C. §21659 says:  
Upon a roadway which is divided into three lanes a vehicle shall not be driven in the extreme left lane at any time, nor in the center lane except when overtaking and passing another vehicle where the roadway ahead is clearly visible and the center lane is clear of traffic within a safe distance, or in preparation for a left turn, or where the center lane is at the time allocated exclusively to traffic moving in the direction of the vehicle is proceeding and is signposted to give notice of such allocation. This section does not apply upon a one-way roadway.

**Traffic chapter.** Effective defenses against additional charges like speeding, reckless driving, suspended license and more are detailed and supported with pattern language, practice tips, and supporting authority.

Again, the statute allows a higher speed limit than 55 on two-lane undivided highways, but doesn't require that such a survey be conducted except to justify an increased speed limit. In other words, if there's no desire by local officials to increase the speed limit, they have no duty to conduct the survey to see if one would be safe. So, even if a higher speed would be safe, the lower 55 mph remains legal in the absence of the non-mandatory survey.  
In light of all the foregoing, as of January 1, 1997, the maximum speed limit is 55 mph on highways that are both (1) undivided and (2) have more than two lanes excluding passing lanes, unless a 70 mph limit is justified by an engineering and traffic survey.

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INFORMAL DISCOVERY REQUEST; MOTION FOR COMPLIANCE; SANCTIONS  
Without stretching the Pen. C. §§1335 et seq. authorization a bit, the defense would have no similar means of did not make a statement in writing.  
In drunk driving cases, many attorneys use the DMV very helpful in writing a deposition. This is often a driver's license is sacrificed when the hearing is lost and in person.

**Valuable forms. 53 discovery requests** (like this detailed 13-page), heavily-supported motions, jury instruction, letters, checklists, and more ... all in print and on the free CD.

**FORM 8-3: INFORMAL REQUEST FOR DISCOVERY FROM PROSECUTION**  
Office of the District Attorney  
Date: \_\_\_\_\_  
Re: People v. \_\_\_\_\_  
Court: \_\_\_\_\_  
Dkt#: \_\_\_\_\_  
INFORMAL REQUEST FOR DISCOVERY  
The following paragraph provides discovery from the defense prior to requesting discovery from the prosecution. There is some authority in *Lozada's footnote 11* for the argument that you don't have to make any disclosures until before or after, but always before sanctions can be requested.

The defendant hereby states that the names and addresses of statements of those persons, or reports of the statements or oral or written examinations, scientific tests, experiments, or aids to offer in evidence at the trial, and any real evidence in evidence at the trial are as follows:  
or note that it is included with this letter.

**PRAC TICE TIP:** This statute doesn't refer anywhere to a passing lane either. Instead, it calls the lane used for passing the center lane. Thus, it appears that the three-lane highways described in §21659 have a maximum speed limit of 65 mph, unless the posting of a sign calling the third lane a "Passing Lane" changes the speed limit.  
But note the peculiar situation of a four-lane highway where the driver has been informed, by a sign, that the extra lane in his direction of travel is a passing lane. This fact does not necessarily mean that the extra lane of travel in the opposite direction of travel is a passing lane. Unless informed otherwise, the driver has a right to assume the extra traffic lane in the opposite direction is a normal traffic lane and not a passing lane, and that he is traveling on a three-lane, 65 mph highway which has one additional lane for passing in his direction only. Perhaps this is why some such locations are posted as 55 mph zones.

**PRAC TICE TIP:** In a prosecution for exceeding the 55 mph maximum speed limit (§22349) on a three-lane highway, and in fact anywhere there is a lane that might be characterized as a passing lane, one should demurrer to the charge based upon the statute's unconstitutional vagueness in its use of the term "passing lane." That term falls to give notice of the conduct that is prohibited and cannot be the basis of a criminal charge.

**For more information:** BAJI 5.32—The Maximum Speed Limit (California Civil Jury Instructions—Civil, 8th ed. (St. Paul, MN: West Publishing, Chapter 5).

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DUI Journal, 5 No. 8, Aug 1990  
N. Whitaker Newsletters) 7.  
and the *Wich* Drunk Drivers, Roadblocks  
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Chapter 8, "Sobriety Checkpoints" in California  
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9 No. 3, March 1994 (Fairwood, NJ: Whitaker  
Newsletters Inc.).

**Best starting point.** California Drunk Driving Law will answer 95% of your questions. When it does not, its extensive cross-references and citations will tell you where to look next.

Figure 10-1: Drunk Driving Punishment Chart for Offenses On and After July 1, 1999

CURRENT OFFENSE	SEPARATE OFFENSES	WITHOUT PROBATION	WITH PROBATION FOR 3 TO 5 YEARS
23152	NONE	\$23536	\$23538

**WITHOUT PROBATION**  
• \$390 to \$1000 fine, plus assessments (23538(a), 23538(b)).  
• May impound car up to 6 months (23592).  
• Up to 3 years optional ignition interlock (23575(a)(1), see §1028).  
• If under 14-year-old passenger pled and proved, additional 48 hours jail (23572(a)(1)), unless convicted of Pen. C. §27373(b).  
• If DP suspended, no return DP III DUI Program done (1352(a)(1), 1353.4(c), see §1053).

**WITH PROBATION**  
96 hours to 6 months jail (23536).  
At least 48 continuous hours behind bars (23536(b)) (but see Pen. C. §2390.5(f)).  
Suspend DP 6 months (1352(a)(1)).  
3 months/30 hours or longer (6 months/45 hours or longer if BAC .020% or refusal) if first offender DUI Program (DP, see §1082) (23538(b), 1352(a)(1), H&S §11837(c)).  
**AND EITHER**  
48 hours jail and suspend DP 6 months (23538(a)(1), 1352(a)(1)).  
**OR, if no refusal (23577(a)(1))**  
90-day work/DUI Program-only driving restriction following 1353.2 (APS) suspension (see §1144.5 reinstatement) (23538(b)(2), 1352(a)(1)) (commercial different, see p. 10-86).

Additional probation terms, see §1025. Mandatory probation violation terms, see §1093.2.

**Helpful charts.** Address directories, dozens of checklists of additional cases, and this 7-page punishment chart quickly answer common questions.

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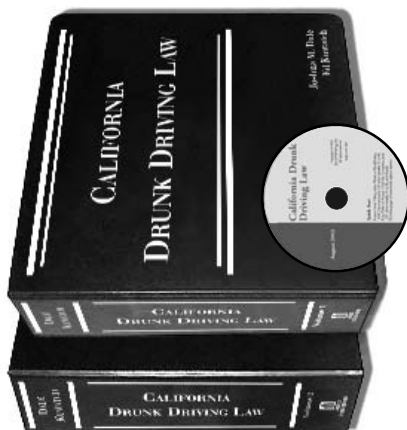
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*Practice tips, sample pages,  
and table of contents inside ...*