

# Twelve Tips to Avoid A DUI Conviction



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**MANUEL J. BARBA**

PRACTICE LIMITED TO DUI DEFENSE

Manuel J. Barba  
DUI Defense Attorney

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The holiday season is upon us, and with it usually comes a lot of good cheer. Family and friends get together to enjoy each other's company and celebrate the season. Office parties are a plenty this festive time of year. There always seems to be plenty of food and spirits available for everyone to enjoy.

With the holiday season also comes law enforcement looking for DUI arrests. Yes, that's right; they are looking for them. By using checkpoints, saturation patrols, or scoping out bar parking lots, law enforcement is actively looking for DUI arrests to make. What the public doesn't realize is that law enforcement officers get "brownie points" for every DUI arrest that they make. That's because their agencies get grant money for all the DUI arrests they make as an agency (it's practically a bounty) and it has become a mechanism for funding. In addition, for every DUI *conviction*, the DUI fine imposed by the courts is divided up and shared with other agencies, such as the DMV, the crime lab, and the law enforcement agency; all of these governmental agencies have a vested interest in seeing that the accused person is convicted. The politics are that DUI arrests and convictions are money-makers for various state agencies.

Now I am not saying that excessive consumption of alcohol and driving is a good thing – clearly it is not. People are needlessly killed on the roadways by drunk drivers, but the reality is that doesn't happen as much as the government would like you to believe. The government's statistics are not completely honest, but that's the subject of another article.

The point is, many people arrested for DUI are actually not DUI. Most people arrested for DUI went out to dinner and had a couple drinks (beer, wine, etc.), and then on their way home from the restaurant they are stopped by a cop for some lame reason - "you were driving kind of slow back there," or some basic driving error (i.e., speed, rolling a stop sign, not using turn signal, etc.). Wanting to cooperate, the unsuspecting driver admits to the cop that they drank a glass or two of wine with dinner. The cop then asks the person to perform some silly sobriety tests under the guise that "I just want to make sure you are safe to drive." The driver agrees to perform the tests thinking that they will do fine and the cop will let them continue on their way home. The cop then says "I'd like you to blow into this..." and the driver does so. The person is then arrested for DUI.

So just like the carol "Twelve days of Christmas" here are twelve tips to avoid a DUI conviction this holiday season, less the melody of course:

## **Tip #1 - Don't drink and drive.**

It kind of goes without saying, but if you have been drinking, call a taxi or have a friend drive you home. The reality is few people plan on going out drinking and driving; it just happens. A person is out for dinner and has some wine or a couple of beers. Then they get in their car to drive home. The next thing they know there are red and blue lights behind them, and then they are arrested for DUI.

## **Tip #2 - If you do drive, don't park near the bar.**

Police officers or their agents routinely drive through popular bar parking lots and note descriptions of cars. The officers wait for a car to leave, then invent some reason to stop the car. The next thing you know is the driver is arrested for a DUI. Park in a place less associated with the drinking establishment.

## **Tip #3 - Always drive safely.**

Most DUI stops are for basic traffic violations such as speeding, improper lane changes, rolling through a stop sign, not using turn signal, etc. Be focused and attentive while driving so that you don't give law enforcement a reason to pull you over. Drive at the speed limit, not too slow and not too fast. Be sure to turn on your headlights and fasten your seat belts. Do not send text messages, do not use your cell phone, do not play with your car stereo, do not eat while driving, or do anything else that will divert your attention from your driving.

## **Tip #4 - Do not drive through fast food restaurants.**

Law enforcement works with many fast food restaurants and trains their employees to report potential DUI drivers. If the fast food restaurant employee believes that you are under the influence or smells alcohol, they will call the police. The employee will use various tactics to stall you, such as *"it will take a few minutes to cook your order.. can you pull around and park and we'll bring your food out to your car."* While you are waiting for your food, law enforcement is on the way. And yes, the fast food restaurant took your money too!

**Tip #5 - If you've been stopped, DO NOT let the cop check your eyes and DO NOT agree to do other field sobriety tests. You don't have to!**

If you are suspected of DUI, the police officer will usually want to check your eyes first. He/she will ask you to hold your head still and follow their pen or finger with your eyes only. This is called the Horizontal Gaze Nystagmus (HGN) test which is a field sobriety test.

The HGN test has nothing to do with whether or not you can follow the officer's finger or pen without moving your head; it's about whether the officer observes the slight jerking movement of your eyeballs when they are moving from side to side; this is known as nystagmus. Nystagmus is involuntary, and you can't control it. When the test is administered *correctly* by the officer and nystagmus is detected, it can be an indicator that alcohol is *present* in the driver's blood stream. The reality is there are many reasons a person may have nystagmus and alcohol in the blood system is only one of them.

The problem is that many officers do not administer the test correctly and will often short-cut the test, but yet the officer will write in the arrest report that he/she observed the "clues" supporting an arrest for DUI. Even if the cop does administer the test correctly, and does observe all of the clues, it doesn't necessarily mean that the person is under the influence of alcohol. Studies have shown that a person with .06% blood alcohol concentration can have all of the HGN clues.

The HGN test is a tool for the officer to use to gather evidence that will be used against you. Since the HGN test is a *voluntary test*, it is your right to elect NOT to participate in the test. An honest officer cannot write in his arrest report that you failed a test that you elected not to do. Always be polite, but say to the officer "*on the advice of my attorney, I elect not to participate in any field sobriety tests.*"

In addition to the HGN test, other field sobriety tests (walking a straight line heel to toe, lifting one leg and holding it up while counting, finger to nose, tilting head back and estimating 30 seconds, etc.) are also completely voluntary tests and you don't have to participate. Always be polite, but say to the officer "*on the advice of my attorney, I elect not to perform any field sobriety tests.*"

Many law enforcement officers will tell you that if you pass the field sobriety tests you won't be arrested. This is just a ruse by the officer to get you to agree to perform the tests, so don't be fooled. Whether you perform the field sobriety tests or not, if the officer smells alcohol on your breath, it is very likely that you will be arrested anyway. So why agree to participate in tests that the officer will use against you?

Some cops will tell you that if you refuse to take the field sobriety tests, you will go to jail. Do not allow the officer to intimidate you; he is trying to scare you into agreeing to take the tests that way he can gather evidence that will be used against you. If you have been drinking, you will likely go to jail anyway; so the worst thing you can do is give the cop the opportunity to gather more evidence that he will use against you.

Some cops will also tell you that if you refuse to take the field sobriety tests, they will tell the court and it will be evidence that you are guilty. That is complete nonsense. **Field sobriety tests are completely voluntary and there is no law that requires anyone to perform them.** Remember, cops can legally tell you lies to get you to say or do things that are not in your best interest.

Think about this: by agreeing to participate in field sobriety tests, you are helping the officer gather evidence and build a case against you. You are giving the officer the opportunity to write in his report that you “failed” the tests or that “you didn’t perform the test as instructed.” Field sobriety tests are very subjective and the officer’s idea of “passing” is very different than yours. In addition, field sobriety tests are unnatural movements that you are probably not familiar with; the officer is not going to let you practice the tests so that you can get them right. You are better off not giving the officer “evidence” that he will use against you. Again, be polite, but say to the officer “*on the advice of my attorney, I elect not to perform any field sobriety tests.*”

**Note:** If you are on probation for a previous DUI conviction, a term of your probation may require you to “perform any tests that an officer requests,” and this may include field sobriety tests. Be sure to review your terms of probation if you are currently on probation for a previous DUI conviction and consult an expert DUI defense attorney.

## **Tip #6 - Do not answer any questions.**

Politely elect not to answer any questions during a DUI investigation or even after you are arrested. You must provide the officer with your driver's license, registration, and proof of insurance, but other than that **REMAIN SILENT**. If the officer asks you if you have been drinking alcohol, you don't have to lie, simply say “*on the advice of my attorney, I choose to exercise my 5th amendment right and remain silent.*” The Fifth Amendment to the United States Constitution gives you, and every citizen, the right to remain silent and not say anything that may incriminate you.

During a DUI investigation, the officer will want to ask you questions like "where are you coming from? where are you going? when did you last eat? what did you eat? have you had any drinks? when did you start drinking? when did you have your last drink? what did you drink? where were you drinking? do you feel the effects of the alcohol? do you think you should be driving? etc. By asking these questions the officer is gathering "evidence" - your statements - that will be used against you. Again, politely say "*Officer, I choose to exercise my 5th amendment right and remain silent.*"

### **Tip #7 - If you are age 21 or over, DECLINE to blow into any machines.**

After you've been stopped, if the cop suspects that you've been drinking, he/she may ask you to blow into a Preliminary Alcohol Screen Breath Test (PAS) device, which is a hand-held device used to detect alcohol in your breath. This test is voluntary and you have the right to refuse this test. [VC23612\(i\)](#) states "the officer shall advise... of the person's right to refuse to take the preliminary alcohol screening test." Although officers are required by law to advise you that the PAS test is voluntary, many officers won't tell you that, and will simply say "I want you to blow into this..." or they will say that "you *must* blow" into the PAS device.

**Note: If you are *under* 21 years of age, you must agree to take the PAS test if an officer requests.**

Keep in mind that, although the law requires that a person arrested for DUI must take a "chemical test" to measure the alcohol or drug level in the person's blood, the PAS device is not one of the evidential chemical tests. The PAS device is a "preliminary" breath alcohol screen test to help an officer determine if a driver is under the influence. If you agree to take the PAS test you will still be required to take a chemical test after being arrested (breath or blood). In reality, the officer will use the PAS device results to determine if you will be arrested for DUI; but if you refuse to take the PAS test, the officer will likely arrest you anyway. PAS devices do not always give accurate results. The bottom line is this: if you agree to blow into the PAS device, you will be helping the officer gather more evidence that will be used against you in court.

**Note: If you are on probation for a previous DUI conviction, a term of your probation requires that you submit to the Preliminary Alcohol Screen Breath Test (PAS). If you refuse, the DMV may suspend your driver's license. Be sure to review your terms of probation if you are on probation for a previous DUI conviction and consult a DUI defense attorney.**

## **Tip #8 - Choose a blood test.**

If you choose a blood test, the arresting officer will not know the results of the blood test for weeks. The arrest report will more than likely have been written prior to the blood test results being available. The arresting officer's report will likely be more objective and honest because the officer wrote it without knowing the level of your blood alcohol concentration.

In addition, if you choose a blood test, an expert DUI defense attorney will have the opportunity to review the documentation relating to the drawing of the blood sample, the transportation and storage of the blood sample before it was analyzed, and the actual analysis of the blood sample, to determine if any problems exist that could affect the accuracy and reliability of the blood test results. There are many factors that can affect the accuracy and reliability of the blood test results.

It is important that you take only one test! Some officers will talk the arrested person into taking a breath and a blood test. That's like having two smoking guns. Take one test only, and take a blood test. Blow into nothing.

**Note:** If you recently smoked or ingested marijuana or some other drug, you may want to consider taking a breath test instead of a blood test, as crime labs often run drug screens on blood samples.

## **Tip #9 - Make sure your tail lights, turn signals, etc. are working properly.**

Inspect your car and make sure all lights are working. Also make sure that your car windows are not overly tinted. Many times drivers are stopped by an officer because a tail light is out or the car has some other problem. The officer then walks up to the driver's window, smells alcohol, and DUI investigation follows. Remember, usually from 9:00 p.m. on, officers are on patrol looking for DUI drivers and will use any little reason to stop a car.

## **Tip #10 - Always be on your best behavior.**

Today many police cars are equipped with video cameras that record the stop, the DUI investigation, the arrest, as well as the car ride to the jail. In addition, some officers have body cameras to video the contact with a citizen. Other officers have digital audio recorders and use them to record conversations with suspects. Even the jail has video cameras, so you are being recorded while you are being processed at the jail.

Although you have no obligation to assist an officer in gathering evidence to be used against you, you should always be courteous and polite. If your case was to go to trial, you want a jury to see how courteous and polite you were during this dreadful situation.

### **Tip #11 - Insist on your three completed telephone calls and make a record.**

[Penal Code § 851.5\(a\)\(1\)](#) entitles an arrested person to three completed telephone calls. This is your right and therefore you should insist. Call your cell phone and leave yourself a voice message to record your voice, that way if your speech is not slurred the recording can be used as evidence in your defense.

After being released from jail, remember to make a detailed written record of all the events that occurred before being stopped by the cop, the events that happened during the DUI investigation, the arrest, and up to and including being released from jail. Do this while everything is fresh in your mind. This information may be helpful in defending your case.

### **Tip #12 - Hire an expert DUI defense attorney to represent you.**

Don't listen to friends or family who say that you don't need an attorney. That could be true, but only if you don't care about what happens to you and your case.

Some people think: I drank, I drove, I got arrested, so therefore I must be guilty. This is simply not true, as it is not illegal to drink alcohol and then drive a car.

It is only illegal if, at the time of driving, a person is "*under the influence of alcohol and/or drugs*" - [VC23152](#) (a)(f)(g). It is also illegal if, at the time of driving, the person's "*blood alcohol concentration is .08% or more*" - [VC23152](#)(b). These conclusions must be proved by the prosecutor beyond reasonable doubt with evidence that is accurate and reliable. And that is not always so easy for the prosecutor to do.

Do your research. For a DUI case, you want an attorney with specialized training and experience with DUI cases. You want an expert.

Look up the attorney's bar record at the California State Bar website to see how long they have practiced law. Look at the attorney's website(s). Google the attorney's name and see what comes up. Does the attorney have extensive knowledge relating to defending DUI cases? Is the attorney an expert in DUI defense? Or, does the attorney handle all types of cases, such as bankruptcy, family law, and personal injury cases. Remember the adage: *Jack of all trades, master of none.*

In addition, don't be fooled by paid search engine advertising, or lead generation websites such as Avvo.com; these websites put an attorney's profile at the top of the list because the attorney is paying them to do so. On Avvo.com many attorneys that are listed as a "#10" have never taken a DUI case to trial. Don't be fooled by "pay to play" websites.

Keep in mind that even if an attorney works in criminal defense, he or she is not necessarily qualified to handle a DUI defense case. DUI cases are very complex to defend and require specialized knowledge in, not only the applicable law, but also in DUI investigation, field sobriety testing, how the human body processes alcohol and/or drugs, as well as breath, blood and urine test analysis.

Without an expert DUI defense attorney defending you, you will likely not be able to get the best possible result in your DUI case.

For more information on what to do after being arrested for a DUI, you can download and read the following e-book: [I got a DUI - What do I do now?](#)



***About the Author:*** [DUI Defense Attorney Manuel J. Barba](#) defends persons accused of DUI throughout Southern California. Attorney Barba has been awarded the prestigious [Forensic Lawyer-Scientist designation](#) by the Chemistry and Law division of the American Chemical Society (ACS-CHAL), and is the *only* DUI Defense Attorney in the Los Angeles, Orange, San Bernardino, Riverside, and Imperial County areas with this designation, which gives him the necessary knowledge and expertise to defend those persons accused of DUI. For more information on attorney Manuel J. Barba, you can visit his [website](#) or call **866-442-2722** for a free consultation.