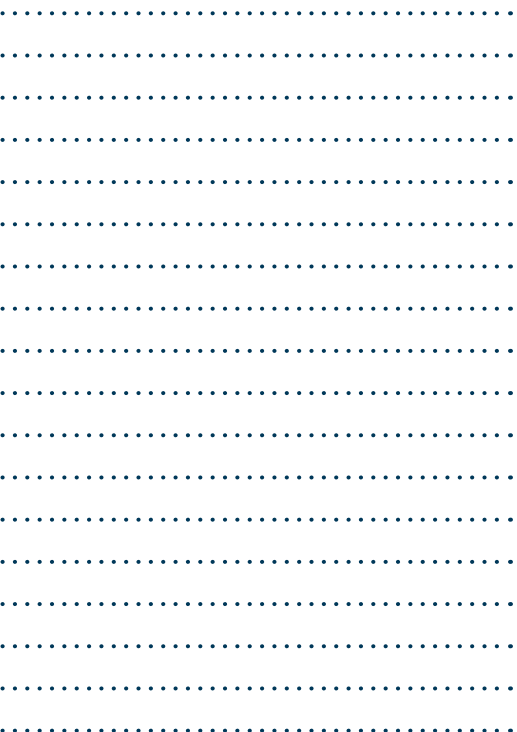




# DWI/Sobriety Court License and Summary Suspensions

By **James M. Flint**



**T**his article highlights perceived problems within the DWI/sobriety court restricted license program and the summary suspension process used in conjunction with the Michigan Department of State (department) enforcement provisions effective statewide since January 1, 2011. These problems can be categorized as:

- Major and minor breath alcohol ignition interlock device (BAIID) violations
- Statutory limitations on the department’s authority to summarily suspend
- Evidentiary and due process violations and oversight review

Because previously published articles have discussed how an individual might become involved in this court program,<sup>1</sup> it is assumed the reader has some familiarity with driver licensing law.

The court and the BAIID manufacturer, installer, or service provider (collectively, providers) are required to report BAIID violations to the department. This duty to report is imposed on the court by statute and on the providers via rules set forth in the Michigan Administrative Code.<sup>2</sup> The court judge is required to *immediately report* to the department:

- Any participant who has been removed from the program by court order before successfully completing the program;
- When the court becomes aware that a participant operated a motor vehicle without an interlock; or

- When a participant tampered with, circumvented, or removed a court-ordered interlock device without court approval.<sup>3</sup>

While providers are also required to submit BAIID violation reports to the department, one must remember the distinction that follows because only the department's *receipt of the court notification* under MCL 600.1084(6) shall result in *summary revocation or suspension* of the restricted license.<sup>4</sup> This requirement is also set forth in MCL 257.304(8).

## Major and minor BAIID violations

The court-restricted license *was not issued* pursuant to MCL 257.322(6), but rather MCL 257.304(1). MCL 257.304(9) and administrative rules strongly suggest that court participants cannot commit "major or minor violations" by definition before completing the court program because the licenses were not issued in accordance with section 322(6) by a hearing officer. Pursuant to the Michigan Administrative Code, Rule 257.301a(d) and (e):

- (d) "Major violation" means any of the following during a monitoring period if the BAIID is a requirement of a restricted license issued under section 322(6) of the act:
- A rolling retest violation.
  - The petitioner is issued a permit under section 625g of the act.
  - The petitioner is convicted of violating section 625l of the act.
  - Servicing of the BAIID indicates that the BAIID has been tampered with or circumvented or that there was an attempt to tamper with or circumvent the BAIID.
  - Three minor violations.
  - A BAIID is removed from a vehicle without an order from the department authorizing removal of the BAIID....
  - Operating any motor vehicle without a properly installed and functioning BAIID.
- (e) "Minor violation" means either of the following during a monitoring period if the BAIID is a requirement of a restricted license issued under section 322(6) of the act:
- After the BAIID has been installed for at least 2 months, 3 start-up test failures.
  - The petitioner fails to report to the BAIID manufacturer, installer, or service provider for monitoring within 7 days after his or her scheduled service date.

Therefore, it is suggested that only *after* a participant completes the court program can he or she commit a major or minor violation and suffer sanctions given MCL 257.304(9). The Michigan legislature has made distinctions between who issued the BAIID restricted license and when major and minor violation may result in sanctions.

## Statutory limitations on the department's authority to summarily suspend

After participants achieve one year of violation-free driving and successfully complete the court's pilot program, the court will issue

## FAST FACTS

Although the Michigan legislature has determined it is desirable for substance abusers to be monitored by the court while receiving substance-abuse counseling, attorneys may want to think twice before subjecting clients to the state's DWI/sobriety court program.

The current procedures used in reviewing summary license suspensions within the Michigan Department of State raise serious due-process issues.

a certificate of completion and the status of the participants' master driving records will be updated.<sup>5</sup> Pursuant to MCL 257.304(9)(b), these participants may have their licenses *suspended or revoked/denied* as provided for in subsection 8 by the department if the restricted license was issued *under this section*, unless set aside under subsection (6), if any of the following occurs:

- The individual operates a motor vehicle without a BAIID
- The individual removes or causes the removal of the BAIID
- The individual commits any other act that would be a major violation
- The individual is arrested for any of the following:
  - Section 625
  - A local ordinance substantially corresponding to section 625
  - A law of the United States substantially corresponding to section 625<sup>6</sup>

The subsection 8 reference appears relevant only for determining the actual length of the suspension/revocation period as to be determined in MCL 257.304(8)(a) and (b). This should not be taken as granting the power to summarily suspend, because the word "summary" was not included in MCL 257.304(9)(b) and because the court normally does not file violation reports with the department after the participant completes the program.

## Evidentiary and due process violations and oversight review

Under current practice and unlike other licensing actions, upon a finding of causation, the department will issue an order of action indicating the suspension was imposed in accordance with the Michigan Vehicle Code, but no specific statute or rule will be specified. If a hearing is requested pursuant to MCL 257.322, the notice of hearing will not specify the relevant statute or rule either, despite R 257.303(6)(c) of the Michigan Administrative Code requiring such information be provided. Nor will the hearing officer necessarily provide the statute under which the suspension was imposed at the time of hearing. The only recourse is to request an adjournment

and hope that the department gets it right the second time or prepare to challenge every statute in the Michigan Vehicle Code that might apply. Meanwhile, your client has no license. The order of action also provides questionable language regarding the origination of your client's appeal rights.<sup>7</sup>

The department's reliance on unverified third-party reports for taking licensing actions has been challenged historically in Michigan courts and by our attorney general. By their nature, such reports are ex parte with no input or notice given to the licensee before the suspension is imposed.

The BAIID violation report submitted by the provider does not rise to the same status of a violation report submitted by a judge as distinguished in MCL 257.304(9)(b).

The author concedes that section 304(9) provides authority to suspend, but it does not grant unbridled power for the department to "summarily suspend without court notification." The department is likely aware of this legislative distinction because it attempts to obfuscate its statutory authority to act, as evidenced by its failure to provide the specific statutory basis for its actions as previously discussed.

Consider filing a pre-hearing motion to stay the summary suspension pending a full hearing and disclosure of the specific statutory authority relied on by the department. It may be prudent to request that the department provide additional time for your appeal beyond the one-hour hearing time allotted to present all objections. Unfortunately, such motions are ignored by the department.<sup>8</sup> At the hearing, the hearing officer may suggest an adjournment

and rescheduling, which only harm your client who remains on suspension as legal costs increase because of delay.

In *Bell v Burton*,<sup>9</sup> the court held that a driver's license is a constitutionally protected property interest subject to due process protection.<sup>10</sup> In accord, see *Shavers v Attorney General*,<sup>11</sup> in which the Michigan Supreme Court wrote that a driver's license, once issued, is a significant interest subject to constitutional due process protection.<sup>12</sup>

As indicated in the chart below, the department does not summarily suspend licenses based on other reports it receives.<sup>13</sup>

If a participant requests a hearing, it is important to determine if the hearing officer is a neutral fact-gatherer or the legal representative of the department. A hearing officer's bias can become apparent by how evidence is received into the record. Violation reports are not under seal, nor are they self-authenticating. Although hearsay statements are admissible at administrative hearings in Michigan, they *may not* be the sole basis for the administrative decision; there must be corroborative evidence to support hearsay statements.<sup>14</sup> Such evidence is normally lacking because the only justification for the suspension is the violation report! Therefore, it is wise to object to and attempt to exclude such documents from the record and move to have the suspension set aside; otherwise, challenge the tribunal composition as biased and unfair.<sup>15</sup>

The Michigan attorney general has found that due process provisions of the U.S. and Michigan constitutions require police officers who issue traffic citations to appear at informal hearings held pursuant to MCL 257.746 to present evidence of violations.<sup>16</sup> Should not a similar argument be raised to require the author of the violation

Report Type	Who Prepares	Pre-Appeal Suspension	Statute/Rule
Implied consent refusal report	Law enforcement	No	MCL 257.625d/R 257.303 and R 257.305
DI-4P	Medical professional	No	MCL 257.320/R 257.851 <i>et seq.</i>
DI-4V	Medical professional	No	MCL 257.320/R 257.1 <i>et seq.</i>
Request for driver evaluation—OC-88	Family/third parties	No	MCL 257.320/no rules
BAIID—Sobriety court violation report (pre one year)	Sobriety court judge	Yes	MCL 600.1084(7)/R 257.313 and R 257.313a
	Computer-generated BAIID provider	Yes	
BAIID—Sobriety court violation report (post one year)	Sobriety court judge	Yes	MCL 600.1084(7)/R 257.313 MCL 257.304(6)(d)/R 257.313 MCL 257.304(9)(b)
	Computer-generated BAIID provider	No*	
BAIID—Habitual offender violation report	Computer-generated BAIID provider	Yes	MCL 257.303, MCL 257.322(6) and R 257.313 and R 257.313a(6)–(11)
BAIID—High BAC violation report	Computer-generated BAIID provider	Yes	MCL 257.625 and MCL 257.319/R 257.313 and R 257.313a

\*The department will impose a summary suspension pre-appeal despite legislation and rules that suggest no authority to do so.

report to appear and give testimony at an informal hearing before or after suspending a license?

Another issue arises when the violation report alleges tampering or circumvention of a BAIID based solely on a computer printout. The BAIID violation report should not be the sole basis for a summary suspension without first conducting a *Frye* hearing to determine if scientific principles and general acceptance of this type of evidence exists in the relevant field to justify admission into evidence that a major or minor violation has occurred. In support, consider that under Michigan's implied consent law, we don't allow the breathalyzer instrument to prove a "technical refusal." Instead, we require the breathalyzer operator to testify that the individual was not blowing into the instrument as instructed.<sup>17</sup>

Many major and minor violation reports are generated entirely by a computer, and even the author's signature is auto-generated.<sup>18</sup> Such reports should be challenged. Subpoena the author of such reports to protect your client's right to confront a witness.<sup>19</sup>

Because a license is a constitutionally protected property interest subject to due process protections, you must preserve the record of all due process violations; otherwise, they are waived. So make your objections upon the record.

Other issues to consider:

- Is it a constitutional violation to require installation of a BAIID on every vehicle owned or to be operated by the client?<sup>20</sup>
- Can the costs imposed for a BAIID and paid to a third party arising from an underlying conviction be considered an additional criminal fee, fine, or direct tax and therefore unlawful?
- Are wealthier DWI/sobriety court licensees unlawfully subsidizing lower-income participants by paying higher costs for the same BAIID?
- Does due process require clients to be informed before entering the program of the total costs associated with the program and when their full license will be restored?
- Is the delay in scheduling a hearing to review a summary suspension and render the final decision prejudicial and a denial of due process, evidencing a hostile hearing environment?<sup>21</sup>

Counsel may find help in federal government publications that suggest current providers' violation reports are vague and insufficient to establish an actual violation or that the very rules under which a state's BAIID program operates may be deficient.<sup>22</sup> ■



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## ENDNOTES

1. 2010 PA 154; MCL 257.304 and MCL 600.1084; see Barone, *Michigan's New DWI/Sobriety Court Law*, 91 Mich B J 42-44 (January 2012); see also Kierkus & Johnson, *Michigan DWI/Sobriety Court Ignition Interlock Evaluation: 2014 Report*, Michigan Association of Drug Court Professionals, p. 5.
2. MCL 600.1084(6) applies only to the court and Mich Admin Code, R 257.313a(6) applies only to providers.
3. MCL 600.1084(6).
4. MCL 600.1084(7).
5. MCL 257.304(9).
6. MCL 257.304(9)(b); see also Mich Admin Code, R 257.301a(d).
7. The department order of action cites "Michigan Administrative Rules, R 313A(7)(b)" as the basis for an individual's right to appeal. Unfortunately, the author has been unable to locate this alleged rule, but see *Green v Secretary of State*, unpublished order of the Court of Appeals, issued June 13, 2013 (Docket No. 311633) and MCL 257.322 (allowing for an appeal hearing when a licensee is aggrieved by "other licensing action.").
8. The department hearing officer has ignored formal motions made to stay the suspension pending a hearing. This appears to be a policy directive per department staff, but as yet is unconfirmed.
9. *Bell v Burton*, 402 US 535; 91 S Ct 1586; 29 L Ed 2d 90 (1971).
10. *Id.* at 542.
11. *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978).
12. *Id.* at 599.
13. DI-4P (Physician Statement), DI-4V (Vision Statement), and OC-88 (Requests for Re-examination) reports are routinely received by the department making allegations that the licensee is incapacitated or unfit to operate a motor vehicle and a danger to the public safety because of blackouts, blindness, vision impairment, senility, etc. Yet even these licensees are afforded a hearing at which the department must show good cause before the imposition of a suspension. See MCL 257.320(2).
14. MRE 901; *Reck v Whittlesberger*, 181 Mich 463; 148 NW 247 (1914); see *Labenski v Goldberg*, 33 Conn App 727; 638 A2d 614 (1994) (rejecting the physician's report because of hearsay upon hearsay when dealing with otherwise normally relied-upon physicians' reports). The author believes the same rational should apply to BAIID violation reports, which are nothing more than a computer printout. See MRE 805.
15. See *Crampton v Dep't of State*, 395 Mich 347; 235 NW2d 352 (1975).
16. OAG, 1983, No. 6174 (August 3, 1983).
17. A technical refusal occurs when the breathalyzer instrument indicates no breath sample entered the instrument.
18. Telephone interview with Steve Cleveland, archivist/record keeper, Smart Start, Incorporated (October 22, 2014), who confirmed that the alleged author of the violation report, "Lisa Page," did not reside or work for this company in Michigan and that her signature was an auto-executed computer signature. The violation report indicated she worked for the company in Michigan and provided a Michigan address. Hence, the violation report contains falsehood on its face, and Ms. Page's certification that the information provided was accurate was misleading.
19. Mich Admin Code, R 257.308.
20. See *People v Walters*, 30 Misc 3d 737; 913 NYS2d 893 (2010).
21. See *In re Conklin*, Michigan Department of State Decision (Case No. C245016), issued 10/21/14 (where license was suspended effective 9/1/14 through 2/28/15 with no statutory basis for the action provided and the appeal hearing was held 10/21/14 with the final order containing a certificate of mailing dated 11/26/14). All pre-hearing motions were ignored. Currently, the petitioners are experiencing a two- to four-month delay from the time the license is suspended and the final order is received. In such cases, consider dicta in *McConnell v Secretary of State*, 76 Mich App 162; 255 NW2d 800 (1977), finding that such delays are prejudicial.
22. See U.S. Department of Transportation National Highway Traffic Safety Administration, *Ignition Interlocks—What You Need to Know: A Toolkit for Policymakers, Highway Safety Professionals, and Advocates* (2d ed) (February 2014); U.S. Department of Transportation National Highway Traffic Safety Administration, *Key Features for Ignition Interlock Programs* (March 2010).