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OVERVIEW OF WISCONSIN LAWS RELATING TO OPERATING A VEHICLE WHILE INTOXICATED AND POSSESSION OR DRINKING OF ALCOHOL BEVERAGES IN A MOTOR VEHICLE

Information Memorandum 92-8

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INTRODUCTION

This Information Memorandum provides an overview of current Wisconsin laws relating to: (1) operating a vehicle (i.e., a motor vehicle, all-terrain vehicle (ATV), boat or snowmobile) while intoxicated; and (2) possession or drinking of alcohol beverages (i.e., beer or intoxicating liquor) in a motor vehicle. This Information Memorandum also describes: (1) related laws on operating a motor vehicle after license suspension or revocation; and (2) innovative laws in several other states relating to sanctions for operating a motor vehicle while intoxicated (OWI).

This Information Memorandum includes relevant laws enacted through the 1991-92 Legislative Session. In particular, it refers to pertinent changes made in 1991 Wisconsin Act 277, relating to various changes in the drunk driving laws. Those changes take effect January 1, 1993.

This Information Memorandum replaces Wisconsin Legislative Council Staff Information Memorandum 90-7 of the same title, dated May 1, 1990.

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PART I

BACKGROUND ON CURRENT LAW

A. INTRODUCTION

The following quotation from a recent Wisconsin State Bar publication provides an overview of the history of drunk driving laws in Wisconsin:

> The Wisconsin Legislature first tackled the problem of impaired driving in 1911. ["No intoxicated person shall operate, ride or drive any automobile, motorcycle or other similar motor vehicle along or upon any public highway of this state." Section 1636-49, Stats. of 1911.] The relevant laws have since been repeatedly altered, each change representing a legislative design to grapple more effectively with a hazard that prior law had failed to check. This variegated legislative history in turn provides a reliable forecast of continued change in the definition of the impaired driving offenses, in the procedures for their enforcement and adjudication, and in the manner of dealing with convicted offenders.
>
> A significant overhaul of the impaired driving statutes occurred during the 1981-82 session of the Wisconsin Legislature [Ch. 20, Laws of 1981]. That revision constitutes the substantive core of present law, although a number of changes have been enacted in the interim. To that core must also be added the significant gloss of judicial interpretation generated in a plethora of appellate opinions on the subject [Hammer, Traffic Law and Practice in Wisconsin, ATS-CLE, State Bar of Wisconsin, pp. 4-6 and 4-7, (1987) (Revised 1989)].

B. MAJOR CHANGES IN CH. 20, LAWS OF 1981

The major changes in Ch. 20, Laws of 1981, which substantially revised the laws relating to operation of a motor vehicle while intoxicated, included:

1. Establishing 0.1% or more blood alcohol concentration (BAC) as a per se drunk driving violation (i.e., proof by the prosecutor that a driver's BAC was 0.1% or more is sufficient proof for a drunk driving conviction).

2. Requiring drivers convicted of drunk driving or improperly refusing to take a chemical test under the implied consent law to submit to an assessment of their use of alcohol or drugs and to submit to alcohol or drug treatment, if necessary.

3. Increasing and altering the structure of penalties and license sanctions for drunk driving violations.

4. Creating a driver improvement surcharge of $150, for OWI-related services provided by state and county agencies, whenever the court imposes a fine or forfeiture for a drunk driving violation. The surcharge is currently $250.

5. Revising the law relating to drinking, possession or keeping of alcohol beverages in a motor vehicle on a highway.

C. OTHER MAJOR CHANGES SINCE CH. 20, LAWS OF 1981

Since the enactment of Ch. 20, Laws of 1981, subsequent Acts which have made major changes in the drunk driving laws include:

1. 1985 Wisconsin Act 337 which, besides changing the legal drinking age to 21: (a) provided increased penalties for drivers with a BAC of 0.2% or more (so-called "aggravated drunk driving"); (b) changed the license sanction for first offense drunk driving from a suspension to the more severe revocation; (c) established increased waiting periods for obtaining occupational licenses; and (d) required 24 hours of community service with a public agency or nonprofit charitable organization for first-time offenders.

2. 1987 Wisconsin Act 3 which, among other things: (a) created an administrative suspension procedure applicable to drivers with a BAC of 0.1% or more; (b) deleted the "aggravated drunk driving" penalties and license sanctions created in 1985 Act 337; (c) made the license sanction for first offense drunk driving a suspension instead of a revocation; (d) increased the license sanctions and occupational license waiting periods for drunk drivers and for persons refusing to take a chemical test; (e) made the community service provision created in Act 337 optional instead of mandatory; and (f) permitted the court to order the drunk driver to pay restitution to the victim.

3. 1989 Wisconsin Act 7, which revised various procedures in the administrative suspension law to conform to constitutional due process concerns.

4. Various acts which have created provisions similar to the drunk driving laws and the implied consent law for boats (1985 Wisconsin Act 331), ATV's (1987 Wisconsin Act 399) and snowmobiles (1987 Wisconsin Act 399).

5. 1989 Wisconsin Act 105, which implemented the requirements of the federal commercial driver's license law, including prohibitions relating to the operation of a commercial motor vehicle (CMV) (e.g., a truck or a bus) while having a BAC of 0.04% or more but less than 0.1%. The provisions in Act 105 referred to in this Memorandum take effect on January 1, 1991.

6. 1991 Wisconsin Act 277, effective January 1, 1993, which, among other things: (a) imposes a 0.08% or more (in contrast to the current 0.1% or more) prohibited BAC on persons who

have two or more OWI or OWI-related (see Part II, intro., below) convictions, suspensions or revocations; (b) increases the penalty for causing death by OWI from a Class D felony to a Class C felony, thus increasing the maximum possible imprisonment period from five years to 10 years; (c) requires the court to order seizure and forfeiture of a motor vehicle owned by an OWI offender (i.e., sale of the vehicle with proceeds distributed to lienholders and others), immobilization of the vehicle or placement of an ignition interlock on the vehicle for a third OWI or OWI-related offense within a five-year period; (d) requires the court to order seizure and forfeiture of a motor vehicle owned by an OWI offender for a fourth OWI or OWI-related conviction within a five-year period; (e) requires "absolute sobriety" (0.0% BAC when driving or operating a motor vehicle) of holders of occupational licenses who have two or more OWI or OWI-related offenses; (f) repeals the current mandatory jail terms, forfeitures, fines and license revocations for operating a motor vehicle after revocation or suspension [operating after revocation (OAR) and operating after suspension (OAS), respectively] unless the underlying offense is OWI-related; and (g) requires the Department of Transportation (DOT) to maintain OWI and OWI-related records for a period of 10 years (but does not allow DOT to utilize these records beyond four years for purposes of license revocation).

D. REPEAT OWI OFFENDERS

In recent years, the major OWI focus of Wisconsin's legislative and executive branches has been on OWI repeat offenders. A May 1989 report by the DOT, Profile of Wisconsin's Repeat OWI Offenders, included the following key findings concerning repeat offenders:

1. OWI repeat offenders are slightly more likely to be involved in traffic accidents than are OWI one-time offenders, but they are several times more likely to be involved in crashes than are drivers with no OWI convictions on their record.

2. 25,309 drivers had two or more OWI-related convictions during 1984-88, accounting for 52,073 OWI convictions in that time period. Another 117,317 drivers had only one OWI-related conviction in 1984-88.

3. Fifty-two percent of Wisconsin's licensed drivers are males, but 90% of the state's OWI repeat offenders are males, and 83% of the OWI one-time offenders are males.

4. Drivers age 21 to 30 at the time of arrest account for 49% of the OWI convictions for repeat offenders and 44% of the one-time offenders, but this age group represents only 24% of Wisconsin's licensed drivers.

5. Eighty percent of the OWI repeat offenders have two OWI convictions on their current DOT, Division of Motor Vehicles (DMV), driver's record, and another 16% have three OWI convictions.

6. Simple OWI [s. 346.63 (1), Stats., described in Part II, A, below] accounts for 99% of the OWI-related convictions in Wisconsin. However, compared to OWI one-time offenders, repeat

offenders account for much more than their proportional share of serious OWI-related convictions (i.e., causing injury, great bodily harm or death by OWI).

7. Compared to OWI one-time offenders, OWI repeat offenders account for much more than their proportional share of convictions for OAS, OAR and operating a motor vehicle without a license.

In 1991, Governor Tommy G. Thompson formed a task force to consider possible legislative solutions to the repeat OWI offender problem. The Task Force on Repeat OWI Offenders issued its report in October 1991. A number of suggestions of that Task Force were incorporated into 1991 Wisconsin Act 277, briefly described in Section C, 6, above. Several other suggestions of the Task Force, which were not enacted into law, are referred to in Part VI of this Information Memorandum.

PART II

OWI AND OWI-RELATED OFFENSES

This Part of the Memorandum: (a) describes the basic elements of and penalties for the various violations involving operating a motor vehicle while under the influence of an intoxicant, drugs, or both; and (b) briefly describes violations involving operating an ATV, boat or snowmobile while under the influence of an intoxicant, drugs, or both.

In this Part and throughout the remainder of this Memorandum:

a. "OWI" refers to the basic offense of operating a motor vehicle while under the influence of an intoxicant, drugs, or both, or with a prohibited level of BAC, as described in Section A, below.

b. "OWI-related offense" refers to:

(1) Causing injury by OWI [s. 346.63 (2), Stats.], as described in Section B, 1, below.

(2) Causing great bodily harm by OWI [s. 940.25, Stats.], as described in Section B, 2, below.

(3) Causing death by OWI [s. 940.09, Stats.], as described in Section B, 3, below.

c. A person whose license is referred to as "revoked" must, in order to drive in this state, reapply for a license (with the required fee), submit to the DOT proof of financial responsibility (e.g., insurance) and pass all written and road motor vehicle operator's tests, as well as a vision screening. The reapplication and testing may occur only after the driver's revocation period has expired. A person whose license is referred to as "suspended" must, in order to drive in this state, have his or her license reinstated by the DOT, upon payment of a fee, once the suspension period has expired.

A. OWI: THE BASIC OFFENSE [s. 346.63 (1), Stats.]

1. Definitions; Where Law Enforceable

For purposes of the current OWI statute [and s. 346.63 (2), Stats., causing injury by OWI, discussed in Section B, below]:

a. "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.

b. "Motor vehicle" refers to self-propelled devices in, upon or by which persons or property may be transported or drawn upon a highway, but excludes snowmobiles, railroad trains and conveyances that are not self-propelled, such as bicycles and animal-drawn vehicles [s. 340.01 (35) and (74), Stats.; Hammer, supra, pp. 4-21 and 4-22].

c. "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion [s. 346.63 (3), Stats.]. A number of court decisions have held that an intoxicated driver seated behind the wheel of a parked vehicle with the engine running is an "operator" for purposes of the basic OWI statute [see, e.g., Village of Elkhart Lake v. Borzyskowski, 123 Wis. 2d 185, 366 N.W. 2d 506 (Ct. App. 1985)].

Enforcement of the OWI statute is limited to driving or operation on "highways" or upon "premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for use thereof" [s. 346.61, Stats.]. In City of Kenosha v. Phillips, 142 Wis. 2d 549, 419 N.W. 2d 236 (1988), the Wisconsin Supreme Court held that a privately owned parking lot for a company's employes was not within the purview of this statute just because the employes were members of the public; in order to come within the statute, the company would have had to intend to permit the public as a whole to use the premises for parking.

2. Prohibited Alcohol Concentration

Under current law, a person may not operate a motor vehicle while he or she has a BAC of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more of alcohol in 210 liters of that person's breath [s. 346.63 (1) (b), Stats.]. The same BAC standard applies to OWI-related offenses involving causing injury, great bodily harm or death by operation of vehicles [ss. 94.09 (1) (b), 343.63 (2) (a) 2 and 940.25 (1) (b), Stats.]. In addition, this 0.1% BAC standard is used in:

a. The administrative suspension provisions in the implied consent law relating to drunk driving. Under s. 343.305 (7), Stats., if a driver submits to a chemical test for intoxication under the implied consent law and the test results indicate a BAC of 0.1% or more, the person's operating privilege is administratively suspended for six months.

b. The "absolute sobriety" provision applicable to drivers who have not attained the age of 19. Under s. 346.63 (2m), Stats., if a person has not attained the age of 19, the person may not drive or operate a motor vehicle while he or she has a BAC of more than 0.0% but not more than 0.1% or more than 0.0 grams, but not more than 0.1 grams of alcohol in 210 liters of that person's breath [ss. 23.33 (4c) (a) 3 and 350.101 (1) (c), Stats.].

c. The statutory legal presumptions applicable in any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a BAC of 0.1% or more while operating or driving a motor vehicle [s. 885.235, Stats.; see pages 1 and 2 of Appendix A, attached].

1991 Wisconsin Act 277, effective January 1, 1993, imposes a 0.08% or more (in contrast to 0.1% or more) prohibited BAC on persons who have two or more OWI or OWI-related convictions, suspensions or revocations within a five-year period. That is, once a driver has two or more of these violations in a five-year period, he or she is guilty of an OWI violation if he or she drives or operates a vehicle with a .08% or more BAC. The Act also revises the administrative suspension provisions in s. 343.305 (8), Stats., and the legal presumptions in s. 885.235, Stats., for chemical tests for intoxication to reflect this change in the BAC standard for persons with two or more OWI or OWI-related convictions, suspensions or revocations (see page 3 of Appendix A, attached).

3. Elements of the Offense

Under current law, no person may drive or operate a motor vehicle:

a. While under the influence of an intoxicant or a controlled substance, or both, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving (hereafter, referred to as "under the influence of an intoxicant or drugs, or both"); or

b. While the person has a prohibited alcohol concentration (see Section A, 2, above). In State v. Muehlenberg, 118 Wis. 2d 502, 508, 347 N.W. 2d 914, 917 (Ct. App. 1984), the Wisconsin Court of Appeals held that this provision, establishing a per se violation for driving with a BAC of 0.1% or more, was not unconstitutionally void for vagueness since persons of common intelligence could, with a fair degree of definiteness, know when they are in danger of violating that provision.

4. Single Conviction if Person Guilty of Both Violations

A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of item 3, a or 3, b, above, or both, for acts arising out of the same incident or occurrence. If the person is charged with violating both, the offenses must be joined. If the person is found guilty of both for acts arising out of the same incident or occurrence, there can be only a single conviction for purposes of: (a) sentencing; and (b) counting convictions under ss. 343.30 (1q) and 343.305, Stats. (see item 8, b, below, for a discussion of "counting convictions for purposes of OWI").

In State v. Bohacheff, 114 Wis. 2d, 338 N.W. 2d 466, 471-72 (1983), the Wisconsin Supreme Court held that this provision, permitting an OWI defendant to be charged with both driving under the influence and for having a BAC of 0.1% or more, did not violate the federal or state constitutional guarantees against double jeopardy because the Legislature intended prosecution for both offenses to terminate in one conviction for both charges.

This item (i.e., item 3) also applies to OWI-related offenses discussed in Section B, below.

5. Limits on Plea Bargaining

Under current law, if the prosecutor seeks to dismiss or amend an OWI or OWI-related charge, the prosecutor must apply to the court. The application must state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring OWI [s. 967.055 (2) (a), Stats.].

6. Deferred Prosecution Not Permitted

Current law specifies that a prosecutor may not place a person in a deferred prosecution program if the person is accused of or charged with an OWI or OWI-related violation [s. 967.055 (3), Stats.].

7. Consideration of Level of BAC in Sentencing

Under current law, in imposing a sentence for a violation based on the person's BAC, the court is required to review the record and consider the aggravating and mitigating factors in the matter. If the level of the person's blood alcohol level is known, the court is required to consider that level as a factor in sentencing. The chief judge of each judicial administrative district must adopt guidelines for the consideration of aggravating and mitigating factors [s. 346.65 (2m), Stats.].

8. Penalties and License and Other Sanctions

a. Appendix B

Appendix B, attached to this Information Memorandum, summarizes the various penalties and license sanctions, including the waiting period for obtaining an occupational license, applicable to OWI and OWI-related offenses (discussed in Section B, below).

1991 Wisconsin Act 277, effective January 1, 1993:

(1) Allows a court, if the court determines that a person does not have the ability to pay the costs, fine or forfeiture imposed for an OWI or OWI-related offense, to reduce the costs, fine or forfeiture and order that the person pay the difference toward the cost of the alcohol use assessment and driver safety plan.

(2) Requires that the penalty for repeat OWI offenders include a requirement that the person convicted remain in the county jail for not less than a 48 consecutive hour period.

b. Counting Offenses; Use of Date of Offense

With reference to OWI penalties, it must be noted that, in addition to prior OWI offenses, prior refusals to take chemical tests under the implied consent law (see Part III, below) and prior OWI-related offenses (i.e., causing injury, great bodily harm or death by OWI) are counted in determining whether an OWI offense is a first, second or third or subsequent offense in a five-year period. Examples are:

(1) Driver X is arrested for OWI. He has, within the past five years, been convicted (in a separate incident) of causing injury by OWI and has one prior improper refusal to take a chemical test. Driver X is subject to the penalties applicable to third offense OWI within a five-year period.

(2) Driver Y is arrested for OWI. She has, within the past five years, been found (in a separate incident) to have improperly refused to take a chemical test. Driver Y is subject to the penalties applicable to second offense OWI within a five-year period.

Under Act 277, which clarifies the current law on counting offenses, the court is required to count the following to determine: (1) the length of a revocation for refusing to submit to a chemical test; (2) the penalty for a CMV driver with a BAC of 0.04% or more but less than 0.1%; and (3) the prohibited alcohol concentration as used to determine the applicable penalty and license sanctions in the other OWI laws:

(1) OWI convictions and convictions for the CMV/OWI offense, described above, or a local ordinance in conformity with either of these.

(2) OWI or CMV/OWI convictions for violations of a law of a federally recognized American Indian tribe or band in this state in conformity with those state statutes.

(3) Convictions for causing injury by OWI or for a CMV driver causing injury by OWI.

(4) Convictions under the law of another jurisdiction that is in substantial conformity with 49 C.F.R. s. 383.51 (b) (2) (i) or (ii), or both.

(5) Convictions under the law of another jurisdiction that prohibits refusal of chemical testing or use of a motor vehicle while intoxicated or under the influence of a controlled substance, or a combination thereof, or with an excess of a specified range of alcohol concentration, or under the influence of any drug to a degree that renders the person incapable of safely driving, as those or substantially similar terms are used in that jurisdiction's laws.

(6) Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing.

(7) Revocations for refusing to submit to a chemical test.

(8) Convictions for causing great bodily harm or death by OWI under s. 940.09 (1) or 940.25, Stats.

Act 277 provides that if the same elements of the offense must be proven under a local ordinance or under a law of a federally recognized American Indian tribe or band in this state as under the OWI or OWI/CMV statutes, the local ordinance or the law of a federally recognized American Indian tribe or band in this state must be considered to be in conformity with those state statutory provisions [s. 343.307, Stats.].

With reference to identifying prior relevant convictions within a five-year period (the period used in the OWI statute for counting offenses), time is calculated with reference to date of offense and not date of conviction. For example, if Driver X committed an OWI offense on January 1, 1990 and then committed another OWI offense on January 5, 1995, the latter offense would not be considered Driver X's second OWI offense (subjecting Driver X to the criminal penalties applicable to such an offense), but a first OWI offense (a civil forfeiture offense).

c. Community Service

Under current law, in addition to the authority of the court under s. 973.05 (3) (a), Stats., to provide that a defendant perform community service work for a public agency or a nonprofit charitable organization in lieu of part or all of a criminal fine imposed for an OWI violation, the court may:

(1) Provide that an OWI violator perform community service work for a public agency or a nonprofit charitable organization in lieu of part or all of a forfeiture (i.e., penalty for first offense OWI); or

(2) Require an OWI violator to perform community service work for a public agency or a nonprofit charitable organization in addition to the penalties specified for OWI.

Current law specifies that:

(1) An order may only apply if agreed to by the organization or agency.

(2) The court must ensure that the violator is provided a written statement of the terms of the community service order and that the community service order is monitored.

(3) Any organization or agency acting in good faith to which a violator is assigned has immunity from any civil liability in excess of $25,000 for acts or omissions by or impacting on the defendant [s. 346.65 (2g) and (2i), Stats.].

1991 Wisconsin Act 277, effective January 1, 1993, authorizes a court to include, as a component of community service work, work that demonstrates the adverse effects of substance abuse or of OWI, including work at an alcoholism treatment facility, an emergency room of a general hospital or a driver awareness program. Other pertinent provisions specify that:

(1) The court may order the person to pay a reasonable fee, based on the person's ability to pay, to offset the cost of establishing, maintaining and monitoring the community service work.

(2) If the opportunities available to perform community service work are fewer in number than the number of defendants eligible, the court must, when making an order under this new provision, give preference to defendants who were under 21 years of age at the time of the offense.

(3) All the current OWI community service work provisions apply to this new provision [s. 346.65 (2g) (b), Stats.].

d. Visits to Sites Demonstrating Effects of OWI

1991 Wisconsin Act 277, effective January 1, 1993, authorizes a court to order a visit to a site that demonstrates the adverse effects of substance abuse or of OWI, including an alcoholism treatment facility or an emergency room of a general hospital. Other pertinent provisions specify that:

(1) The court may order the defendant to pay a reasonable fee, based on the person's ability to pay, to offset the costs of establishing, maintaining and monitoring the visits.

(2) The court may order a visit to the site only if agreed to by the person responsible for the site.

(3) If the opportunities available to visit sites are fewer than the number of defendants eligible for a visit, the court must, when making its order, give preference to defendants who were under 21 years of age at the time of the offense.

(4) The court must ensure that the visit is monitored. A visit to a site may be ordered for a specific time and a specific day to allow the defendant to observe victims of vehicle accidents involving intoxicated drivers.

(5) Any organization or agency acting in good faith to which a defendant is assigned has immunity from any civil liability in excess of $25,000 for acts or omissions by the defendant [s. 346.65 (2i), Stats.].

e. Seizing and Forfeiting Vehicle (Fourth Offense OWI)

Under 1991 Wisconsin Act 277, effective January 1, 1993:

(1) For a fourth OWI or OWI-related conviction within a five-year period, the court is required to order seizure and forfeiture of a vehicle owned by the offender. Act 277 sets forth procedures for: (a) notification of the owner and all lienholders of record of the seizure; (b) a hearing on forfeiture of the vehicle; (c) sale of the vehicle, if forfeited, by the

law enforcement agency or, if there is a perfected security interest, the lienholder; and (d) distribution of the proceeds of the sale. The Act exempts the following vehicles from seizure and forfeiture: a common carrier; a commercial motor vehicle; and a rented or leased motor vehicle used by a person other than the owner of the vehicle.

(2) As discussed in item f, below, for a third OWI or OWI-related offense within a five-year period, the court is permitted to order a motor vehicle owned by the violator to be seized and forfeited.

To ensure that the seizure and forfeiture provisions can be appropriately enforced (i.e., prevent the owner from transferring ownership of a vehicle to avoid this sanction), Act 277:

(1) Requires the district attorney to notify the DOT when he or she files a criminal complaint against a person who has been arrested for an OWI or OWI-related violation and who has two or more prior OWI or OWI-related convictions, suspensions or revocations within a five-year period. The DOT may not issue a certificate of title transferring ownership of any motor vehicle owned by the person upon receipt of a notice until the court assigned to hear the criminal complaint issues an order permitting the DOT to issue a certificate of title.

(2) Prohibits the DOT from issuing a certificate of title transferring ownership of any motor vehicle owned by a person upon receipt of a notice of intent to revoke the person's driver's license for refusing to submit to a chemical test if the person has two or more prior OWI or OWI-related convictions, suspensions or revocations within a five-year period until the court assigned to the hearing on the refusal issues an order permitting the DOT to issue a certificate of title.

f. Seizing or Immobilizing Vehicle or Equipping Vehicle with Ignition Interlock (Third Offense OWI)

Under 1991 Wisconsin Act 277, effective January 1, 1993, for a third OWI or OWI-related offense within a five-year period, the court may order a law enforcement officer to seize a motor vehicle. If the vehicle is not ordered seized, the court must order either: (1) immobilization of the vehicle; or (2) that the vehicle be equipped with an ignition interlock. However, the court may not order immobilization or ignition interlock if that would result in undue hardship or extreme inconvenience or would endanger the health and safety of a person. The Act defines:

(1) "Ignition interlock device" to mean a device which measures the person's alcohol concentration and which is installed on a vehicle in such a manner that the vehicle will not start if the sample shows that the person has a prohibited alcohol concentration.

(2) "Immobilization device" to mean a device or mechanism which immobilizes a motor vehicle, making the motor vehicle inoperable.

Act 277 provides that no person may remove, disconnect, tamper with or otherwise circumvent the operation of such an ignition interlock device. A person violating this provision

may be required to forfeit not less than $150 nor more than $600 for the first offense. For a second or subsequent conviction within five years, the person may be fined not less than $300 nor more than $1,000 or imprisoned for not more than six months, or both. The Act requires the DOT to:

(1) Promulgate a rule establishing specifications and requirements for approved types of ignition interlock devices and their calibration, installation and maintenance.

(2) Design a warning label which must be affixed to each ignition interlock device upon installation and must provide notice of the penalties for tampering with or circumventing the operation of the ignition interlock device.

Act 277 also specifies that no person may remove, disconnect, tamper with or otherwise circumvent the operation of any such immobilization device. A person violating this prohibition may be required to forfeit not less than $150 nor more than $600 for the first offense. For a second or subsequent conviction within five years, the person may be fined not less than $300 nor more than $1,000 or imprisoned for not more than six months, or both. The Act requires the DOT to design a warning label which must be affixed by the owner of each immobilization device before the device is used to immobilize any motor vehicle. The label must provide notice of the penalties for removing, disconnecting, tampering with or otherwise circumventing the operation of the immobilization device.

g. Restitution

In addition to the other penalties for an OWI violation, current law permits a judge to order a violator to pay restitution under s. 973.20, Stats., which sets forth the requirements and procedures applicable to restitution orders under the Criminal Code. However, for purposes of OWI, s. 973.20, Stats., also applies to first offense OWI, whether a statutory violation or a violation of an ordinance in conformity with the statute [s. 346.65 (2r), Stats.].

h. Driver Improvement Surcharge

Current law specifies that if a court imposes a fine or a forfeiture for an OWI or OWI-related violation, it must impose a driver improvement surcharge in an amount of $250. This surcharge is in addition to the fine or forfeiture, penalty assessment, jail assessment, automatic reinstatement assessment and other assessments (see item i, below). Moneys collected from the driver improvement surcharge are used, as prescribed in the statutes:

(1) By county "51.42 boards" for drivers referred through drug or alcohol assessment (see item 8, below) to such boards.

(2) By the Department of Health and Social Services (DHSS) to finance state operations associated with administrative costs for services to drivers.

(3) By the Department of Public Instruction and the State Laboratory of Hygiene for services they provide to drivers.

(4) By the Department of Justice to provide crime victim compensation services [ss. 20.435 (6) (hx) and 346.655, Stats.].

As with other statutory assessments and surcharges, a person who fails to pay the driver improvement surcharge may be committed to county jail until the surcharge is paid, for a period fixed by the court not to exceed six months [s. 973.07, Stats.].

i. Other Surcharges and Special Assessments

The following other surcharges and special assessments may also be applicable depending on the OWI or OWI-related offense involved:

(1) Penalty Assessment. Whenever a court imposes a fine or forfeiture for any violation of state or municipal law, except nonmoving traffic violations or safety belt use violations, it must impose a penalty assessment equal to 20% of the fine or forfeiture [s. 165.87 (2) (a), Stats.].

(2) Crime Victim and Witness Surcharge. Whenever the court imposes a sentence or places a person on probation for any felony or misdemeanor violation, it must also impose a crime victim and witness surcharge of $30 for each misdemeanor count and $50 for each felony count [s. 973.045, Stats.].

(3) Restitution Surcharge. If the court orders restitution as part of a sentence or as a condition of probation, an amount equal to 10% of the restitution ordered is a statutory cost taxable against the defendant [s. 973.06 (1) (g), Stats.].

(4) Jail Assessment. Whenever a court imposes a fine or forfeiture for any violation of state or municipal law, except nonmoving traffic violations or safety belt use violations, it must impose a jail assessment of one percent of the fine or forfeiture, or $10, whichever is greater [s. 53.46 (1) (a), Stats.].

(5) Automatic Reinstatement Assessment. If a court suspends a person's driver's license as a result of, among others, an OWI offense, the court must impose an automatic reinstatement assessment of $50 [s. 345.54, Stats.].

(6) Court Automation Fee. Except for a safety belt use violation, the clerk of circuit court must charge and collect a $3 court automation fee on forfeiture actions that are filed in circuit court (i.e., not applicable to municipal costs) [s. 814.635, Stats.].

9. Assessment for Alcohol or Drug Use and Driver Safety Plan

a. Assessment

Under current law, except as otherwise provided in item (1) or (2), below, the court is required to order a person convicted of OWI or an OWI-related offense to submit to and comply with an assessment by an "approved public treatment facility" [defined in s. 51.45 (2) (c), Stats.] for examination of a person's use of alcohol or controlled substances and development of a driver safety plan for the person. The court must notify the DOT of the assessment order. The assessment order must:

(1) If the person is a resident, refer the person to an approved public treatment facility in the county in which the person resides. The facility named in the order may provide for assessment of the person in another approved public treatment facility. The order must provide that if the person is temporarily residing in another state, the facility named in the order may refer the person to an appropriate treatment facility in that state for assessment and development of a driver safety plan for the person satisfying the requirements of that state.

(2) If the person is a nonresident, refer the person to an approved public treatment facility in this state. The order must provide that the facility named in the order may refer the person to an appropriate treatment facility in the state in which the person resides for assessment and development of a driver safety plan for the person satisfying the requirements of that state.

(3) Require a person who is referred to a treatment facility in another state under item (1) or (2), above, to furnish the DOT written verification of his or her compliance from the agency which administers the assessment and driver safety plan program. The person must provide initial verification of compliance within 60 days after the date of his or her conviction.

b. Assessment Facility's Report and Driver Safety Plan

Prior to developing a plan which specifies treatment, the facility must make a finding that: (1) treatment is necessary; and (2) appropriate services are available. The facility must submit a report of the assessment and the driver safety plan within 14 days to the county 51.42 board, the plan provider, the DOT and the person. However, upon request by the facility and the person, the 51.42 board may extend the period for assessment for not more than 20 additional work days.

The assessment report must order compliance with a driver safety plan which may include: (1) treatment for the person's misuse, abuse or dependence on alcohol or controlled substances; (2) attendance at a driver's school under s. 345.60, Stats.; or (3) both. If the plan requires inpatient treatment, the treatment may not exceed 30 days.

1991 Wisconsin Act 277, effective January 1, 1993, specifies that the plan may also include a component that makes the person aware of the effect of his or her offense on a victim and a victim's family. The plan must include a termination date consistent with the plan which may not extend beyond one year.

c. Voluntary Submission to Assessment and Driver Safety Plan

Under 1991 Wisconsin Act 277, effective January 1, 1993, the person may voluntarily submit to an assessment by a facility and driver safety plan before the conviction. A prosecutor may not use that voluntary submission to justify a reduction in the charge made against the person. Upon notification of the person's submission to the voluntary assessment and driver safety plan, the court may take that voluntary submission into account when determining the person's sentence and must suspend the order applicable to the person to submit to an assessment pending the person's completion of the voluntary assessment and driver safety plan [s. 343.30 (1q) (c) 1m, Stats.].

d. Notification of Compliance or Noncompliance with Plan

The 51.42 board is required to assure notification of the DOT and the person of the person's compliance or noncompliance with assessment and with treatment. The driver's school is required to notify the DOT, the 51.42 board and the person of the person's compliance or noncompliance with the requirements of the school. If the DOT is notified of any noncompliance, it must suspend the person's license until the 51.42 board or the driver's school notifies the DOT that the person is in compliance with the assessment or the driver safety plan. The DOT must notify the person of the suspension, the reason for the suspension and the person's right to a review.

e. Review of Suspension for Inappropriateness of or Noncompliance with Plan

A person may request a review, by the DOT, of a suspension based upon failure to comply with a driver safety plan within 10 days of notification of suspension by the DOT. The issues at the review are limited to: (1) whether the driver safety plan, if challenged, is appropriate; and (2) whether the person is in compliance with the assessment order or the driver safety plan. The review must be conducted within 10 days after a request is received.

If the driver safety plan is determined to be inappropriate, the DOT must order a reassessment and if the person is otherwise eligible, the DOT must reinstate the person's operating privilege. If the person is determined to be in compliance with the assessment or driver safety plan, and if the person is otherwise eligible, the DOT must reinstate the person's operating privilege.

f. Fee for Assessment and Driver Safety Plan; Instalment Payments

Under current law, any person who submits to an assessment or driver safety plan is required to pay a reasonable fee therefor to the appropriate county department under s. 51.42, Stats., or traffic safety school. The fee for the driver safety plan may be reduced or waived if the person is unable to pay the complete fee, but no fee for assessment or attendance at a traffic safety school may be reduced or waived.

1991 Wisconsin Act 277, effective January 1, 1993, specifies that:

(1) The person may pay the fee in one, two, three or four equal instalments.

(2) Nonpayment of the fee is noncompliance with the court order that required completion of an assessment and driver safety plan.

g. When Order for Assessment and Plan Not Required

Notwithstanding the items above, if the court finds that the person is already covered by an assessment or is participating in a driver safety plan or has had evidence presented to it by a 51.42 board that the person has recently completed an assessment, a driver safety plan, or both, the court is not required to make an order for assessment and driver safety plan [s. 343.30 (1q) (c) to (e), Stats.].

B. OWI-RELATED OFFENSES

1. Injury by OWI [s. 346.63 (2), Stats.]

a. Elements of the Offense

Under current law, it is unlawful for any person to cause "injury" (which is not defined in the Motor Vehicle Code) to another person by the operation of a vehicle:

(1) While under the influence of an intoxicant or drugs, or both; or

(2) While the person has a BAC of 0.1% or more. Under 1991 Wisconsin Act 277, effective January 1, 1993, "a BAC of 0.1% or more" is changed to "prohibited alcohol concentration" (see Section A, 2, above).

b. Affirmative Defense

Current law specifies that the defendant has a defense if it appears by a preponderance of the evidence that the injury would have occurred even if: (1) he or she had been exercising due care; and (2) he or she had not been under the influence of an intoxicant or drugs, or both, or did not have a prohibited alcohol concentration. For example, this defense might be used by Driver X who, with a BAC of 0.17%, is stopped at a red light and is rear-ended by Driver Y, resulting in injury to a passenger in Driver Y's vehicle.

c. Penalties and License Sanctions

Appendix B, attached to this Memorandum, summarizes the various penalties and license sanctions, including the waiting period for obtaining an occupational license, applicable to causing injury by OWI.

2. Causing Great Bodily Harm by OWI [s. 940.25, Stats.]

a. Elements of the Offense

Under current law, it is unlawful for any person to do either of the following:

(1) Cause great bodily harm to another human being by the operation of a vehicle while under the influence of an intoxicant. For purposes of s. 940.25, Stats.:

> (a) "Great bodily harm" is defined to mean "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury" [s. 939.22 (14), Stats.].
>
> (b) "Vehicle" is defined to mean any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air [s. 939.22 (44), Stats.]; this is broader than the "motor vehicle" definition applicable to OWI and injury by OWI under s. 346.63, Stats. This definition also applies to causing death by OWI, discussed in item 3, below.

(2) Cause great bodily harm to another human being by the operation of a vehicle while the person has a BAC of 0.1% or more. Under 1991 Wisconsin Act 277, effective January 1, 1993, "BAC of 0.1% or more" is changed to "prohibited alcohol concentration" (see Section A, 2, above).

b. Affirmative Defense

Current law specifies that the defendant has a defense if it appears by a preponderance of the evidence that the great bodily harm would have occurred even if: (1) he or she had been exercising due care; and (2) he or she had not been under the influence of an intoxicant or did not have a prohibited alcohol concentration.

c. Penalties and License Sanctions

Appendix B, attached to this Information Memorandum, summarizes the various penalties and license sanctions including the waiting period for obtaining an occupational license, applicable to causing great bodily harm by OWI.

3. Causing Death by OWI [s. 940.09, Stats.]

a. Elements of the Offense

Under current law, any person who does any of the following is guilty of a Class D felony (punishable by a fine of not more than $10,000, imprisonment for not more than five years, or both):

(1) Causes the death of another by the operation of a vehicle, while under the influence of an intoxicant. "Vehicle" is defined to mean any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air [s. 939.22 (44), Stats.]; this is broader than the "motor vehicle" definition applicable to OWI and injury by OWI under s. 346.63, Stats. (i.e., includes boats, snowmobiles, ATV's, trains and other vehicles in addition to motor vehicles).

(2) Causes the death of another by the operation of a vehicle, while the person has a BAC of 0.1% or more. Under 1991 Wisconsin Act 277, effective January 1, 1993, "BAC of 0.1% or more" is changed to "prohibited alcohol concentration" (see Section A, 2, above).

(3) Causes the death of another by the operation of a commercial motor vehicle [as defined in s. 340.01 (8), Stats.] while the person has a BAC of 0.04% or more but less than 0.1%.

Under Act 277, effective January 1, 1993, the penalty for this offense is increased to a Class C felony (punishable by a fine of not more than $10,000 or imprisonment for not more than 10 years, or both).

Thus, this change results in an increase in the maximum possible imprisonment from five years to 10 years. This provision is not applicable to causing the death of another by operation or handling of a firearm or airgun while under the influence of an intoxicant or with a prohibited alcohol concentration (see Section A, 2, above); these offenses are currently in the same statute as causing death by OWI. Under Act 277, those offenses are placed in a separate provision and remain Class D felonies.

b. Affirmative Defense

The defendant has a defense if it appears by a preponderance of the evidence that the death would have occurred even if: (1) he or she had been exercising due care; and (2) he or she had not been under the influence of an intoxicant or did not have a prohibited alcohol concentration.

c. Penalties and License Sanctions

Appendix B, attached to this Memorandum, summarizes the various penalties and license sanctions, including the waiting period for obtaining an occupational license, applicable to death by OWI.

4. Absolute Sobriety for Drivers Under Age 19 [s. 346.63 (2m), Stats.]

a. Elements of the Offense

Under current law, if a person has not attained the age of 19, the person may not drive or operate a motor vehicle while he or she has a BAC of more than 0.0% but not more than 0.1%. That is, the person may not drive or operate a motor vehicle with even a trace of alcohol in his or her system.

b. Penalties and License Sanctions

Appendix B, attached to this Memorandum, summarizes the various penalties and license sanctions applicable to violation of the "absolute sobriety" law.

C. OWI LAWS RELATING TO ATV'S, BOATING AND SNOWMOBILING

1. Elements of the Offense

Current law contains provisions relating to the operation of an ATV [s. 23.33, Stats.], a boat [s. 30.681, Stats.] or a snowmobile [s. 350.101, Stats.] while under the influence of an intoxicant or drugs, or both, or while having a BAC of 0.1% or more. In general, these provisions parallel the provisions described in Sections A and B, above, and include prohibitions against operating or causing injury by operating an ATV, boat or snowmobile while under the influence of an intoxicant or with a BAC of 0.1% or more. Causing great bodily harm or death by OWI is not included in these statutes because the term "vehicle" [as defined in s. 939.22 (44), Stats., for purposes of the Criminal Code] in ss. 940.09 and 940.25, Stats., is broad enough to include ATV's, boats and snowmobiles.

1991 Wisconsin Act 91 revised the law relating to where the intoxicated snowmobiling law is applicable (prior law paralleled the application of the OWI law provision described in Section A, 1, above). Under Act 91, in general, the intoxicated snowmobiling law is applicable to all property, whether the property is publicly or privately owned and whether or not a fee is charged for the use of that property. However, the intoxicated snowmobiling law does not apply to the operation of a snowmobile on private land not designated as a snowmobile trail, unless an accident involving personal injury occurs as the result of the operation of a snowmobile and the snowmobile was operated on private land without the consent of the owner of that land [s. 350.1025, Stats.].

2. Penalties

Appendix C, attached to this Memorandum, summarizes the various penalties applicable to ATV, boat and snowmobile OWI and causing injury by OWI.

D. SPECIAL OWI PROVISIONS APPLICABLE TO CMV DRIVERS

1989 Wisconsin Act 105 implemented the requirements of the Federal Commercial Motor Vehicle Safety Act of 1986 [P.L. 99-570] in Wisconsin. The Federal Act was enacted to, among other things, improve the quality of CMV drivers and to remove problem CMV drivers from the highways. The provisions in Act 105 referred to in this Memorandum took effect on January 1, 1991. As a result of that Act, current law contains, among others, the following provisions relating to OWI:

1. Prohibitions Against Operating CMV's with a BAC of 0.04% to 0.1%

Current law prohibits persons from: (a) driving or operating a CMV with a BAC between 0.04% and 0.1%; and (b) causing injury by driving or operating a CMV with a BAC between 0.04% and 0.1%. The penalties for these violations are the current fines and forfeitures and terms of imprisonment applicable to a person who operates, or causes injury by operation of, any vehicle while the person has a BAC of 0.1% or greater (see Appendix B, attached). However, there is no administrative suspension or assessment for alcohol or drug problems for these offenders. In addition, offenders are subject to disqualification from operating CMV's for a specified period of time, depending on the offense. Any CMV operator found to have a BAC of 0.1% or greater is subject to all the current OWI laws, including administrative suspension and assessment [s. 346.63 (5) and (6), Stats.].

2. Absolute Sobriety Provision

Current law prohibits a person from driving or operating or being on duty time with respect to a CMV:

(a) With a BAC above 0.0%;

(b) Within four hours of having consumed or having been under the influence of an intoxicating beverage, regardless of its alcohol content; or

(c) While possessing an intoxicating beverage (unless the beverage is unopened and is transported as part of a shipment).

If a law enforcement officer administers a BAC test which indicates a BAC above 0.0%, the officer must take possession of the license and retain it for 24 hours, during which time period the operator would be considered "out of service." In addition, the CMV operator is subject to a $10 forfeiture [s. 346.63 (7) (a), Stats.].

3. Requests for Breath, Blood and Urine Samples

Current law permits a law enforcement officer to request, under specified conditions, one or more samples of breath, blood or urine from a CMV operator for purposes of chemical testing prior to his or her arrest. In addition, current law provides that a person operating or "on duty time" with respect to a CMV is considered to have given his or her implied consent for chemical testing. "On duty time" is defined as the period the operator begins to work or is required to be in readiness to work until the time the operator is relieved from work and all responsibility for performing work.

4. Occupational Licenses

Current law prohibits disqualified CMV drivers from operating CMV's under the authority of an occupational license. However, if a person's commercial driver's license is suspended or revoked due to an OWI violation in a noncommercial motor vehicle and the person was not operating a CMV at the time of the violation, the person may petition the DOT for an occupational license that would authorize the operation of certain CMV's. There is no minimum waiting period for the petition to be considered, and the license may contain limitations and restrictions imposed by DOT [s. 343.10 (10), Stats.].

E. OTHER PROVISIONS APPLICABLE TO OWI AND OWI-RELATED OFFENSES

1. Time Period Prior to Release of Person Arrested for OWI or an OWI-Related Offense

A person arrested for OWI or an OWI-related offense may not be released: (a) until 12 hours have elapsed from the time of his or her arrest; or (b) unless a chemical test administered in accordance with s. 343.305, Stats. (the implied consent law), shows that the person has a BAC of 0.04%, or less. However, the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest.

If the person is a CMV operator who was issued an "out-of-service" order, the person may be released under the same conditions, but his or her license may be retained until the out-of-service order has expired [s. 345.24, Stats.].

2. Occupational Licenses

The waiting periods for occupational licenses applicable to persons convicted of OWI, OWI-related and other pertinent violations are set forth in Appendix B attached to this Memorandum.

a. Procedures and Requirements for Issuance of License

The current law relating to issuance of occupational licenses to persons whose licenses are revoked or suspended is set forth, for the most part, in s. 343.10, Stats. In general, provisions in that statute applicable to OWI and OWI-related offenses specify that:

(1) If a person's license is revoked or suspended and if the person is engaged in an occupation (including homemaking, full-time or part-time study, or a trade) making it essential that he or she operate a motor vehicle, the person, if he or she complies with the conditions in item (2), below, may file with a court in the county of his or her residence a petition setting forth in detail the need for operating a motor vehicle. There are special provisions permitting a CMV driver to file his or her petition directly with the DOT and to have the occupational license issued administratively by the DOT.

(2) Upon receipt of the petition, the judge may order the DOT to issue an occupational license to the person if both of the following apply:

(a) The person's license or operating privilege was not revoked or suspended within the one-year period immediately preceding the present revocation or suspension; and

(b) The person files proof of financial responsibility (e.g., insurance) covering all vehicles for which the person seeks permission to operate.

(3) Upon receipt of a petition, the judge may issue a 30-day temporary occupational license to the person if the conditions under item (2), above, are satisfied and after 15 days have elapsed since the date of revocation or suspension.

(4) The order for issuance of an occupational license must contain definite restrictions as to hours of the day, not to exceed 12; hours per week, not to exceed 60; type of occupation; and areas or routes of travel which are permitted under the license.

(5) The judge must consider the number and seriousness of prior traffic convictions in determining whether to order the issuance of an occupational license and what restrictions to specify. A copy of the petition and the order for the occupational license must be forwarded to the DOT.

(6) Occupational licenses are subject to the waiting periods set forth in Appendix B attached to this Memorandum.

(7) An occupational license is valid from the date of issuance by the DOT until termination of the period of revocation or suspension, unless the occupational license is revoked, suspended or canceled prior to termination of that period.

(8) 1991 Wisconsin Act 277, effective January 1, 1993:

(a) Requires, as a condition of eligibility for an occupational license after a second or subsequent OWI or OWI-related offense within a five-year period, that the applicant have completed the current requirement for an alcohol use assessment and be complying with the driver safety plan (required under current law).

(b) Imposes an absolute sobriety requirement (0.0% BAC when driving or operating a motor vehicle) on holders of occupational licenses who have two or more OWI or OWI-related offenses.

(c) Permits a court to order, as a condition of an occupational license for a person who has three or more OWI or OWI-related offenses, that the person operate only a vehicle equipped with an ignition interlock.

b. Penalty and License Sanction for Violation of Restriction

Any person who violates any restriction of an occupational license is subject to immediate revocation of the license and:

(1) Except under item (2), below, forfeiture of not less than $150 nor more than $600.

(2) A fine of not less than $300 nor more than $1,000 and imprisonment for not more than six months, if the number of convictions for violating occupational license restrictions equals two or more in a five-year period [s. 343.10, Stats.].

F. OWI-RELATED PENALTIES FOR OPERATING A MOTOR VEHICLE AFTER LICENSE REVOCATION OR SUSPENSION

1. Current Law

The current penalties and license sanctions for OAR or OAS are set forth in Appendix D attached to this Information Memorandum.

2. 1991 Wisconsin Act 277

1991 Wisconsin Act 277 repeals the current mandatory jail terms, forfeitures, fines and license revocations for operating a motor vehicle after revocation or suspension (OAR or OAS, respectively) unless the underlying offense is OWI-related. Attached, as Appendix E, is a chart that sets forth the new penalties, effective January 1, 1993, for OAR and OAS violations under the Act. The Act expresses legislative intent that courts use the home detention option under s. 973.03 (4),

Stats. (attached as Appendix F) in OAR or OAS cases, unless the underlying offense is OWI-related.

With reference to license sanctions for OAR or OAS, Act 277 provides that:

a. A court may revoke a person's driver's license for any period not exceeding six months if the underlying offense is not OWI-related.

b. It appears that a court must revoke a person's driver's license for six months if the underlying offense is OWI-related. One provision in Act 277 [s. 343.30 (1g), created by the Act] seems to indicate that the revocation period for this offense is "any period not exceeding six months" (i.e., the same language applicable to the offense in item a, above). However, another provision [s. 343.31 (3) (g), amended by the Act] states that the revocation period for this offense must be six months, not up to six months. It appears that the latter provision was the intended provision, but this apparent inconsistency is likely to be rectified by the Legislature in trailer legislation early in the 1993-94 Legislative Session.

G. MOTOR VEHICLE OPERATOR RECORD RETENTION BY THE DOT

1. Current Law

Under current law, the DOT is required to maintain a file for each motor vehicle licensee containing, among other things, a record of reports or an abstract of the licensee's convictions for motor vehicle violations. The DOT is required to retain these records so that the complete operator's record is available for use of by the Secretary of DOT in determining whether a person's operator's license must be suspended, revoked, canceled or withheld in the interest of public safety.

Current law contains no specific record retention periods relative to files of motor vehicle licensees in general. However, current law does contain the following specific record retention periods for commercial motor vehicle operators:

a. The record of convictions for disqualifying offenses for CMV operators under s. 343.315 (2) (f), Stats., must be maintained for at least three years.

b. The record of convictions for disqualifying offenses for a CMV operator under s. 343.315 (2) (a) to (e), Stats., must be maintained permanently, except that 10 years after a licensee transfers residency to another state, the record may be transferred to another state of licensure of the licensee if that state accepts responsibility for maintaining a permanent record of convictions for disqualifying offenses.

Current law provides that reports and records retained by the DOT may be cumulative beyond the period for which a license is granted, but the Secretary of DOT, in exercising his or her power or revocation under s. 343.32 (2), Stats. (revocation where the Secretary determines a driver to be habitually reckless or negligent in the operation of a motor vehicle or to have

repeatedly violated state traffic laws, local traffic ordinances or, under certain circumstances, any traffic laws enacted by a federally recognized American Indian tribe or band), may consider only those reports and records entered during the four-year period immediately preceding the exercise of such power of revocation [s. 343.23 (2), Stats.].

2. 1991 Wisconsin Act 277

1991 Wisconsin Act 277, effective January 1, 1993, requires the DOT to maintain OWI and OWI-related records, including records of refusals, for a period of 10 years. However, as under current law, the Act does not allow DOT to utilize these records beyond four years for purposes of license revocation.

PART III

IMPLIED CONSENT LAW

This Part of the Memorandum discusses the implied consent law applicable to motor vehicles. However, very similar implied consent laws are to be found in the statutes relating to OWI boating [ss. 30.682 and 30.684, Stats.], snowmobiling [ss. 350.102 and 350.104, Stats.] and operation of an ATV [s. 23.33 (4L) and (4p), Stats.].

A. IMPLIED CONSENT LAW IN GENERAL [s. 343.305 (2), Stats.]

Under current law, any person who drives or operates a motor vehicle upon the public highways of this state is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, a combination of alcohol and controlled substances, other drugs or a combination of alcohol and other drugs when requested to do so by a law enforcement officer or when required to do so. Any such tests must be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed must be prepared to administer, either at its agency or any other agency or facility, two of the three tests and may designate which of the tests shall be administered first.

B. PRELIMINARY BREATH SCREENING TEST [s. 343.303, Stats.]

Under current law, if a law enforcement officer has probable cause to believe that the person is violating or has violated an OWI or OWI-related offense, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test (PBT) using a device approved by the DOT for this purpose. The result of the PBT may be used by the officer for the purpose of deciding: (1) whether or not the person should be arrested for an OWI violation; and (2) whether or not to require or request chemical tests as authorized under the implied consent law. The result of the PBT is not admissible in any action or proceeding except: (1) to show probable cause for an arrest, if the arrest is challenged; or (2) to prove that a chemical test was properly required or requested of a person. Following the screening test, additional tests may be required or requested of the driver under the implied consent law.

There is no penalty applicable to refusal to take a PBT.

C. LAW AND PROCEDURES RELATING TO INVOKING THE LAW [s. 343.305 (3) to (6), Stats.]

1. When Test Requested or Required

Current law specifies that upon arrest of a person for an OWI or OWI-related violation, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified in Section A, above. Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent, and if an officer has probable cause to believe that the person has committed a violation, one or more tests may be administered to the person.

Current law specifies that these provisions do not limit the right of a law enforcement officer to obtain evidence by any other lawful means (e.g., by a search incident to lawful arrest or pursuant to a search warrant; by an emergency search supported by probable cause for arrest).

2. Information to be Provided at Time Test Requested

At the time a chemical test specimen is requested, the person must be orally informed by the law enforcement officer that:

a. He or she is deemed to have consented to tests under the implied consent law;

b. If testing is refused, the person's operating privilege will be revoked;

c. If one or more tests are taken and the results of any test indicate that the person has a prohibited alcohol concentration, the person will be subject to penalties and the person's operating privilege will be suspended under the administrative suspension law (discussed in Part IV, below); and

d. After submitting to testing, the person tested has the right to have an additional test made by a person of his or her own choosing.

D. CHEMICAL TEST PROCEDURES AND REQUIREMENTS

1. Alternative Test

A person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test.

2. Persons Permitted to Withdraw Blood; Immunity

Blood may be withdrawn from the person arrested for an OWI or OWI-related offense only by a physician, registered nurse, medical technologist, physician's assistant or person acting under the direction of a physician. A person so acting, the employer of any such person and any hospital where blood is withdrawn by any such person have immunity from civil or criminal liability under s. 895.53, Stats.

3. Admissibility of Tests at Trial

At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have committed an OWI violation, the results of a properly administered chemical test are admissible on: (a) the issue of whether the person was under the influence of an intoxicant or drugs, or both; or (b) any issue relating to the person's BAC. The test results are admissible (i.e., no other proof is required for admissibility) on the issue of intoxication or prohibited alcohol concentration if the test sample is taken within three hours after the event to be proved. If the sample is not taken within the three-hour limit, expert testimony is required to establish the probative value of the analysis. Test results must be given the effect required under s. 885.235, Stats. (see Appendix A, attached).

4. Requirements Applicable to Analysis

To be considered valid, chemical analyses of blood or urine must have been performed substantially according to methods approved by the State Laboratory of Hygiene and by an individual possessing a valid permit to perform the analyses issued by the DHSS.

The DOT is required to approve techniques or methods of performing chemical analysis of the breath and must:

a. Approve training manuals and courses throughout the state for the training of officers in the chemical analysis of a person's breath;

b. Certify the qualifications and competence of individuals to conduct the analysis;

c. Have trained technicians, approved by the DOT Secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath before regular use of the equipment and periodically thereafter at intervals of not more than 120 days; and

d. Issue permits to individuals according to their qualifications.

5. Separate Adequate Breath Sample Requirement

Current law specifies that if a breath test is administered using an infrared breath-testing instrument:

a. The test must consist of analyses in the following sequence: one adequate breath sample analysis, one calibration standard analysis, and a second, adequate breath sample analysis.

b. A sample is adequate if the instrument analyzes the sample and does not indicate the sample is deficient.

c. Failure of a person to provide two separate adequate breath samples in the proper sequence constitutes a refusal.

E. EFFECTS OF SUBMITTING TO THE TEST

See the discussion of administrative suspension of license in Part IV of this Memorandum and the penalties for having a prohibited alcohol concentration set forth in Appendix B attached to this Memorandum.

F. REFUSAL TO SUBMIT TO CHEMICAL TEST [s. 343.305 (9) and (10), Stats.]

1. Procedures Prior to Hearing on Refusal

Current law specifies that if a person refuses to take a chemical test, the officer must immediately prepare a notice of intent to revoke the person's operating privilege. The officer must issue a copy of the notice to the person and submit or mail a copy to the circuit court for the county in which the refusal is made, the district attorney for that county and the DOT. The notice of the person's operating privilege must contain substantially the following information:

a. That prior to a request for a chemical test, the officer had placed the person under arrest and issued a citation, if appropriate, for an OWI or OWI-related violation.

b. That the officer complied with the oral information requirements set forth in Section B, 2, above.

c. That the person refused a request for a chemical test.

d. That the person may request a hearing on the revocation within 10 days by mailing or delivering a written request to the court whose address is specified in the notice. If no request for a hearing is received within the 10-day period, the revocation period commences 30 days after the notice is issued.

e. That the issues of the hearing are limited to:

(1) Whether the officer had probable cause to believe the person was driving or operating a motor vehicle: (a) while under the influence of alcohol, a controlled substance, or both; (b) while under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders him or her incapable of safely driving; or (c) while having a prohibited alcohol concentration.

(2) Whether the person was lawfully placed under arrest for an OWI or OWI-related violation.

(3) Whether the officer complied with the oral information requirements set forth in Section C, 2, above.

(4) Whether the person refused to permit the test. The person must be deemed not to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances or other drugs.

f. That, if it is determined that the person refused the test, there will be an order for the person to comply with assessment and a driver safety plan.

The use of this notice by an officer is adequate process to give the appropriate court jurisdiction over the person.

2. Hearing on Refusal

If a law enforcement officer informs the circuit court that a person has refused to submit to a test, the court must be prepared to hold any requested hearing to determine if the refusal was proper. The scope of the hearing is limited to the issues outlined in item 1, e, above.

At the close of the hearing, or within five days thereafter, the court must determine the issues under item 1, e, above. If all issues are determined adversely to the person, the court must proceed under items 3 and 4, below, relating to revocation and assessment. If one or more of the issues is determined favorably to the person, the court must order that no action be taken on the operating privilege on account of the person's refusal to take the test in question. However, this does not preclude the prosecution of the person for an OWI or OWI-related violation.

3. Court-Ordered Revocation

If the court determines that a person improperly refused to take a test or if the person does not request a hearing within 10 days after the person has been served with the notice of intent to revoke the person's operating privilege, the court is required to proceed as follows:

a. No hearing requested. If no hearing was requested, the revocation period must begin 30 days after the date of the refusal.

b. Hearing requested. If a hearing was requested, the revocation period must commence 30 days after the date of refusal or immediately upon a final determination that the refusal was improper, whichever is later.

The periods of revocation, which depend on the number of prior refusals or OWI or OWI-related violations in a five-year period, are set forth in Appendix B attached to this Information Memorandum. An example of how this counting of prior refusals and OWI or OWI-related violations operates follows:

> Driver Z improperly refuses to take a chemical test under the implied consent law. He has, within the past five years, been convicted, in separate incidents, of OWI and causing great bodily harm by OWI. Driver Z is subject to the license revocation periods and related provisions applicable to a third improper refusal within a five-year period.

Provisions discussed in Part II, A, 8, b, relating to counting offenses for OWI violations, are applicable to counting offenses for refusals.

4. Assessment and Treatment

If a person unlawfully refuses to take a chemical test, he or she is subject to assessment and treatment provisions similar to those discussed in Part II, A, 9, above, for persons convicted of OWI or OWI-related offenses.

PART IV

ADMINISTRATIVE SUSPENSION FOR HIGH LEVEL CHEMICAL TEST

A. ADMINISTRATIVE SUSPENSION BY DOT [s. 343.305 (7) and (8), Stats.]

1. Action by Officer if High Test; Period of Suspension

If a person submits to chemical testing administered in accordance with the implied consent law and any test results indicate a prohibited alcohol concentration (see Part II, A, 2, above), the officer must: (a) report the results to the DOT; and (b) take possession of the person's license and forward it to the DOT. The person's operating privilege is then administratively suspended for six months.

2. Request for Administrative Review of Suspension

Within 10 days after the notification or, if the notification is by mail, within 13 days, excluding Saturdays, Sundays and holidays, after the date of the mailing, the person may request, in writing, that the DOT review the administrative suspension. The review procedure is not subject to ch. 227, Stats. (the Administrative Procedures Act).

The officer must provide the person with a separate form for the person to use to request the administrative review. The form must clearly indicate how to request an administrative review and must clearly notify the person that this form must be submitted within 10 days from the notice date indicated on the form.

3. Administrative Hearing

If the offense allegedly occurred in the County of Milwaukee, Waukesha or Dane, the DOT must refer the matter to the Office of the Commissioner of Transportation (OCT) and the OCT must hold the hearing on the matter. The DOT must hold the hearing on the matter if the offense allegedly occurred in any other county. Hearings by the DOT must be held in the county in which the offense allegedly occurred or at the nearest office of the DOT if the offense allegedly occurred in a county in which the DOT does not maintain an office.

The DOT or the OCT, respectively, must hold a hearing regarding the administrative suspension within 30 days after the date of notification. The person may present evidence and may be represented by counsel. The arresting officer need not appear at the administrative hearing unless subpoenaed under s. 805.07, Stats., but he or she must submit a copy of his or her report and the results of the chemical test to the hearing examiner. The hearing is limited to the following issues:

a. The correct identity of the person.

b. Whether the person was informed of the options regarding tests.

c. Whether the person had a prohibited alcohol concentration at the time the offense allegedly occurred.

d. Whether one or more tests were administered in accordance with the implied consent law.

e. If one or more tests were administered, whether each of the test results for those tests indicates the person had a prohibited alcohol concentration.

f. Whether probable cause existed for the arrest.

The hearing examiner must conduct the administrative hearing in an informal manner. No testimony given by any witness may be used in any subsequent action or proceeding. The hearing examiner may permit testimony by telephone if the site of the administrative hearing is equipped with telephone facilities to allow multiple-party conversations.

4. Findings of Hearing Examiner

If the hearing examiner finds that the criteria for administrative suspension have not been satisfied or that the person did not have a prohibited alcohol concentration at the time the offense allegedly occurred, the examiner must order that the administrative suspension of the person's operating privilege be rescinded. If the hearing examiner finds that the criteria for administrative suspension have been satisfied and that the person had a prohibited alcohol concentration at the time the offense allegedly occurred, the administrative suspension must continue.

5. Notice of Decision, Right to Judicial Review and Possible Stay of Suspension

The hearing examiner must notify the person in writing of the hearing decision, of the right to judicial review and of the court's authority to issue a stay of the suspension under Section B, 3, below. The administrative suspension is vacated and the person's operating privilege must be automatically reinstated if the hearing examiner fails to mail this notice to the person within 30 days after the date of the notification.

B. JUDICIAL REVIEW [s. 343.305 (8) (c), Stats.]

1. Request for Review; Request Does Not Stay Suspension

An individual aggrieved by the determination of the hearing examiner may have the determination reviewed by the court hearing the action relating to the OWI or OWI-related violation

applicable to the individual. If the individual seeks judicial review, he or she must file the request for judicial review with the court within 20 days of the issuance of the hearing examiner's decision. The court must send a copy of that request to the DOT.

A request for judicial review does not stay any administrative suspension order (i.e., the suspension continues during the review period).

2. Judicial Review

The judicial review must be conducted at the time of the trial of the underlying offense. The prosecutor of the underlying offense is required to represent the interests of the DOT.

3. Court Order

The court must order that the administrative suspension be either rescinded or sustained and forward its order to the DOT. The DOT must vacate the administrative suspension unless, within 60 days of the date of the request for judicial review of the administrative hearing decision, the DOT has been notified of the result of the judicial review or of an order of the court entering a stay of the hearing examiner's order continuing the suspension.

4. Appeal of Lower Court Order

Any party aggrieved by the order of a circuit court may appeal to the court of appeals. Any party aggrieved by the order of a municipal court may appeal to the circuit court for the county where the offense allegedly occurred.

C. ELIGIBILITY FOR OCCUPATIONAL LICENSE [s. 343.305 (8) (d), Stats.]

A person who has his or her operating privilege administratively suspended is eligible for an occupational license under s. 343.10, Stats., at any time.

PART V

INTOXICANTS IN MOTOR VEHICLES

A. POSSESSION OR TRANSPORTATION OF INTOXICANTS IN MOTOR VEHICLES BY PERSONS UNDER THE LEGAL DRINKING AGE [s. 346.93, Stats.]

1. Elements of the Offense

Current law specifies that no person under the legal drinking age (i.e., under 21 years of age) may knowingly possess, transport or have under his or her control any alcohol beverage in any motor vehicle unless:

a. The person is employed by a brewer, an alcohol beverage licensee, wholesaler, retailer, distributor, manufacturer or rectifier; and

b. The person is possessing, transporting or having such a beverage in a motor vehicle under his or her control during his or her working hours and in the course of employment, as provided under s. 125.07 (4) (bm), Stats.

2. Penalty

An underage person violating this prohibition may be required to forfeit not less than $20 nor more than $400 [s. 346.95 (2), Stats.]. However, if the underage person is driving or operating or on duty time with respect to a CMV, the underage person will also be issued an "out-of-service" order for a 24-hour period [ss. 346.65 (2u) and 346.93, Stats.].

B. DRINKING OR POSSESSION OF INTOXICANTS IN MOTOR VEHICLES; GENERAL PROHIBITION [s. 346.935, Stats.]

1. Elements of the Offense

Under current law:

a. Drinking in motor vehicle. No person may drink alcohol beverages in any motor vehicle when the vehicle is upon a highway.

b. Possession on person in motor vehicle. No person may possess on his or her person, in a privately owned motor vehicle upon a public highway, any bottle or receptacle containing alcohol beverages if: (1) the bottle or receptacle has been opened; (2) the seal has been broken; or (3) the contents of the bottle or receptacle have been partially removed.

c. Kept in motor vehicle. The owner of a privately owned motor vehicle, or the driver of the vehicle if the owner is not present in the vehicle, may not keep, or allow to be kept, in the motor vehicle when it is upon a highway any bottle or receptacle containing alcohol beverages if: (1) the bottle or receptacle has been opened; (2) the seal has been broken; or (3) the contents of the bottle or receptacle have been partially removed. This prohibition does not apply if the bottle or receptacle is kept in the trunk of the vehicle or, if the vehicle has no trunk, in some other area of the vehicle not normally occupied by the driver or passengers. A utility compartment or glove compartment is considered to be within the area normally occupied by the driver and passengers.

Current law specifies that these prohibitions do not apply to: (1) passengers in a motor bus; or (2) passengers in a limousine if the vehicle is operated by a chauffeur holding a valid license and endorsements authorizing operation of the vehicle as provided in ch. 343, Stats. [the motor vehicle licensing chapter], and is in compliance with any local ordinance or regulation adopted under s. 349.24, Stats. [authority to license taxicab operators and taxicabs] [s. 346.935, Stats.].

2. Penalty

A person violating any of these prohibitions may be required to forfeit not more than $100 [s. 346.95 (2m), Stats.]. However, if the violation is committed by a CMV operator, he or she will also be issued an "out-of-service" order for a 24-hour period [ss. 346.65 (2u) and 346.93, Stats.].

PART VI

SELECTED LAWS IN OTHER STATES AND RECENT PROPOSALS RELATING TO OWI

This Part of the Information Memorandum briefly describes: (a) statutory provisions in a number of other states which have enacted penalties for and procedures applicable to OWI and OWI-related offenses which are not found in current Wisconsin law; and (b) certain proposals of Wisconsin Governor Tommy G. Thompson's 1991 Task Force on Repeat OWI Offenders.

A. LICENSE PLATE STICKER AND PLATE IMPOUNDMENT PROGRAMS [Georgia, Iowa, Minnesota, Oregon and Washington]

1. Sticker Programs

The States of Oregon and Washington have laws requiring the placement of a reflective striped sticker (referred to in Oregon as a "zebra sticker") on the license plates of vehicles of drivers who are arrested for operating a motor vehicle after revocation or suspension of operating privileges and certain other statutorily-specified violations. A chart briefly describing those programs is set forth in Appendix G attached to this Memorandum.

The Wisconsin Governor's Task Force Report on Repeat OWI Offenders, dated October 1991, indicates that the Task Force strongly supported a sticker program to identify repeat OWI offenders to the public and law enforcement officers (vote: 24 in support, 3 opposed, 2 with no position). Under the Task Force proposal, a reflective sticker would be applied to the license plate of the vehicle involved by a law enforcement officer: (a) at the time of a driver's second or subsequent OWI arrest; or (b) at the time of a driver's refusal to submit to a chemical test where the driver has a prior OWI conviction or refusal. The Task Force also supported proposals to:

a. Provide administrative relief if the owner of the vehicle was not the driver of the vehicle at the time of the arrest.

b. Require that the sticker program administrative hearing procedure be the same as the procedure currently applicable to administrative license suspensions for receiving a citation for driving with a BAC of 0.1% or more.

c. Provide that the presence of a sticker on a license plate would serve as probable cause for a law enforcement officer to stop the vehicle to verify license information only.

d. Require that the stickers remain on the plates for at least six months after the arrest or until the person has completed a driver safety plan, whichever is later.

e. Require that for a third or subsequent OWI or OWI-related offense, the sticker would remain on the plates for the length of the license revocation period.

2. License Plate Impoundment Programs

The States of Georgia and Minnesota have laws requiring the actual impoundment of license plates for all vehicles owned, leased or registered in the name of certain OWI repeat offenders. A chart briefly describing these programs is set forth in Appendix G attached to this Memorandum.

Under an Iowa law, effective July 1, 1991, upon a third or subsequent drunk driving offense, the court is required to issue an impoundment order requiring the surrender to the court of the registration certificate and registration plates of all of the following:

a. All vehicles registered to the violator, or jointly to the violator and the violator's spouse.

b. All vehicles owned by the violator, or jointly by the violator and the violator's spouse.

c. All vehicles leased to the violator, or jointly to the violator and the violator's spouse. This provision does not apply to a rental vehicle which is one of a fleet of two or more vehicles rented for periods of four months or less.

In general, new registration plates may not be issued to the violator or owner until the violator's driver's license has been reissued or reinstated. However, a violator or an owner may apply to the DOT for new registration plates, which must bear a special series of numbers or letters so as to be readily identified by traffic law enforcement officers. Application for and acceptance of special plates constitutes implied consent for law enforcement officers to stop the vehicle bearing special plates at any time. The DOT is authorized to issue special plates if any of the following apply:

a. A member of the violator's household has a valid driver's license.

b. The violator or owner has a temporary restricted license (i.e., occupational license) [s. 321J.4A, Iowa Code Annotated].

The Wisconsin Governor's Task Force narrowly supported a proposal to give specific authority to judges and court commissioners to set, as a condition of bail for second or subsequent OWI offenses, the requirement that the defendant turn over his or her license plates to the court. This condition of bond would be reviewable so that a defendant could present evidence as to any hardship or necessity that the confiscation of license plates might inflict on his or her household or relatives. A district attorney would be at the bail hearing to present evidence as to why the license plates should be confiscated. The confiscation could continue until the case is completed. The Task Force vote was 15 in support, 10 opposed and 4 with no position.

B. COST OF EMERGENCY RESPONSE [s. 53150 et seq., California Government Code]

California law makes a drunk driver responsible for the cost of an "emergency response" to an OWI "incident," including the cost of providing police, fire fighting, rescue and emergency and medical services at the scene of the incident.

1989 Senate Bill 306 (introduced by Senator Cowles and others; cosponsored by Representative Huelsman and others), which failed to pass, would have created a similar law in Wisconsin.

C. STRICT OCCUPATIONAL LICENSE LIMITS [s. 28.15.181, Alaska Stats.]

A number of states have stricter provisions than Wisconsin's relating to obtaining an occupational license after an OWI or OWI-related conviction and the resulting suspension or revocation of a driver's license. For example, under Alaska law, the court may grant "limited license privileges" (i.e., occupational licenses) as follows:

1. First offense OWI within 10-year period: The court must revoke the offender's license for "not less than 90 days" (no maximum is specified) and may grant limited license privileges for the "final 60 days during which the license is revoked" (i.e., except where the court imposes a revocation longer than 90 days, after the first 30 days).

2. First offense refusal to take a chemical test under the implied consent law within 10-year period: The court must revoke the offender's license for "not less than 90 days" (no maximum is specified) and may not grant limited license privileges.

3. Second offense OWI or refusal within 10-year period: The court must revoke the offender's license for not less than one year and may not grant limited license privileges.

4. Third or subsequent OWI or refusal within 10-year period: The court must revoke the offender's license for not less than 10 years and may not grant limited license privileges.

The waiting periods for occupational licenses for OWI and OWI-related offenses in Wisconsin are set forth in Appendix B, attached.

D. "PERMANENT" LICENSE REVOCATION [s. 46.1-421, Code of Virginia]

Under Virginia law, if a person is convicted of a third drunk driving offense in a 10-year period, the Commissioner of the Department of Motor Vehicles is directed to "forthwith revoke and not thereafter reissue" the person's driver's license (i.e., permanent revocation). However, there are two ways in which such a "permanently-revoked" driver can regain his or her license:

1. At the expiration of five years from the date of the last conviction, the person may petition the circuit court for restoration of his or her license. The court may, in its discretion, restore the person's license "upon such terms and conditions as the court may prescribed," if the court is satisfied from the evidence presented that: (a) at the time of such previous convictions, the petitioner was addicted to or psychologically dependent upon the use of alcohol or other drugs; (b) at the time of the hearing on the petition, he or she is no longer addicted to or psychologically dependent upon the use of alcohol or such other drugs; and (c) the defendant does not constitute a threat to the safety and welfare of himself or herself or of others with regard to the operation of a motor vehicle.

2. At the expiration of 10 years from the date of the revocation, the person may petition the circuit court for restoration of his or her license. For good cause shown, the license may, in the discretion of the court, be restored "on such terms and conditions as the court may prescribe."

E. PENALTY FOR PERMITTING UNAUTHORIZED PERSON TO DRIVE [Articles 67011-5 and 67011-6, Texas Revised Civil Statutes]

Under a Texas law (entitled "Allowing a Dangerous Driver to Borrow Motor Vehicle"), a person commits a Class C misdemeanor (punishable by a fine not to exceed $200) if he or she "knowingly or intentionally" permits another to operate a motor vehicle owned by the person and he or she knows that, at the time permission is given, the other person's license has been suspended:

1. As a result of a drunk driving offense.

2. As a result of a failure to give a specimen under the Texas Implied Consent Law.

DLS:kja:jt;kja

Section 885.235, Stats.

[Subsection (1) (intro.) effective until January 1, 1993; then amendment in 1991 Wisconsin Act 277 takes effect (see page 3 of this Appendix).]

885.235 Chemical tests for intoxication. (1) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a blood alcohol concentration of 0.1% or more or a specified alcohol concentration while operating or driving a motor vehicle or, if the vehicle is a commercial motor vehicle, on duty time, while operating a motorboat, except a sailboat operating under sail alone, while operating a snowmobile, while operating an all-terrain vehicle or while handling a firearm, evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a blood alcohol concentration of 0.1% or more or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

(a) 2. The fact that the analysis shows that there was more than 0.0% but less than 0.1% by weight of alcohol in the person's blood or more than 0.0 grams but less than 0.1 grams of alcohol in 210 liters of the person's breath is relevant evidence on the issue of being under the combined influence of alcohol and a controlled substance or any other drug but, except as provided in par. (d) or sub. (1m), is not to be given any prima facie effect.

(b) Except with respect to the operation of a commercial motor vehicle as provided in par. (d), the fact that the analysis shows that there was more than 0.04% but less than 0.1% by weight of alcohol in the person's blood or more than 0.04 grams but less than 0.1 grams of alcohol in 210 liters of the person's breath is relevant evidence on the issue of intoxication or an alcohol concentration of 0.1 or more but is not to be given any prima facie effect.

(c) The fact that the analysis shows that there was 0.1% or more by weight of alcohol in the person's blood or 0.1 grams or more of alcohol in 210 liters of the person's breath is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.1 or more.

(d) The fact that the analysis shows that there was 0.04% or more by weight of alcohol in the person's blood or 0.04 grams or more of alcohol in 210 liters of the person's breath is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more.

(1m) In any action under s. 23.33 (4c) (a) 3, 346.63 (2m) or (7) or 350.101 (1) (c), evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she had a blood alcohol concentration in the range specified in s. 23.33 (4c) (a) 3, 346.63 (2m) or 350.101 (1) (c) or a measured alcohol concentration under s. 346.63 (7) if the sample was taken within 3 hours after the event to be proved. The fact that the analysis shows that there was more than 0.0% but not more than 0.1% by weight of alcohol in the person's blood or more than 0.0 grams but not more than 0.1 grams of alcohol in 210 liters of the person's breath is prima facie evidence that the person had a blood alcohol concentration in the range specified in s. 23.33 (4c) (a) 3, 346.63 (2m) or 350.101 (1) (c) or a measured alcohol concentration under s. 346.63 (7).

(2) The concentration of alcohol in the blood shall be taken prima facie to be three-fourths of the concentration of alcohol in the urine.

(3) If the sample of breath, blood or urine was not taken within 3 hours after the event to be proved, evidence of the amount of alcohol in the person's blood or breath as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony.

(4) The provisions of this section relating to the admissibility of chemical tests for alcohol concentration, intoxication or blood alcohol concentration shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant, had a specified alcohol concentration or had a blood alcohol concentration in the range specified in s. 23.33 (4c) (a) 3, 346.63 (2m) or 350.101 (1) (c).

(5) In this section:

(a) "Alcohol concentration" means the number of grams of alcohol in 100 milliliters of a person's blood or the number of grams of alcohol in 210 liters of a person's breath.

(b) "Controlled substance" has the meaning specified in s. 161.01 (4).

(c) "Drug" has the meaning specified in s. 450.01 (10).

PROVISIONS OF SECTION 885.235, STATS., AFFECTED BY 1991 WISCONSIN ACT 277, EFFECTIVE JANUARY 1, 1993

[Material Taken From 1991 Wisconsin Act 277]

SECTION 50. 885.235 (1) (intro.) of the statutes is amended to read:

885.235 (1) (intro.) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a ~~blood~~ prohibited alcohol concentration ~~of 0.1% or more~~ or a specified alcohol concentration while operating or driving a motor vehicle or, if the vehicle is a commercial motor vehicle, on duty time, while operating a motorboat, except a sailboat operating under sail alone, while operating a snowmobile, while operating an all-terrain vehicle or while handling a firearm, evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a ~~blood~~ prohibited alcohol concentration ~~of 0.1% or more~~ or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

SECTION 51. 885.235 (1) (a) 1 of the statutes is created to read:

885.235 (1) (a) 1. The fact that the analysis shows that there was more than 0.0% but less than 0.08% by weight of alcohol in the person's blood or more than 0.0 grams but less than 0.08 grams of alcohol in 210 liters of the person's breath is relevant evidence on the issue of being under the combined influence of alcohol and a controlled substance or any other drug, but, except as provided in par. (d) or sub. (1m), is not to be given any prima facie effect.

SECTION 52. 885.235 (1) (bd) and (cd) of the statutes are created to read:

885.235 (1) (bd) Except with respect to the operation of a commercial motor vehicle as provided in par. (d), the fact that the analysis shows that there was more than 0.04% but less than 0.08% by weight of alcohol in the person's blood or more than 0.04 grams but less than 0.08 grams of alcohol in 210 liters of the person's breath is relevant evidence on the issue of intoxication or an alcohol concentration of 0.08 or more, but is not to be given any prima facie effect.

(cd) In cases involving persons who have 2 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1), the fact that the analysis shows that there was 0.08% or more by weight of alcohol in the person's blood or 0.08 grams or more of alcohol in 210 liters of the person's breath is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

PENALTIES AND LICENSE SANCTIONS FOR MOTOR VEHICLE OWI AND OWI-RELATED OFFENSES

CONVICTION	FINE OR FORFEITURE	JAIL	SUSPENSION OR REVOCATION OF LICENSE[1]	OCCUPATIONAL LICENSE[1]	ASSESSMENT FOR ALCOHOL OR DRUG PROBLEMS	POINTS ON DRIVER'S RECORD
OWI, First Offense[2]	$150 to $300 forfeiture (plus $250 surcharge)[3]	--	Six to nine months suspension[2]	Immediately	Yes	6
OWI, Second Offense Within Five-Year Period[2]	$300 to $1,000 fine (plus $250 surcharge)[3]	Five days to six months jail	Twelve to 18 months revocation	After 60 days	Yes	6
OWI, Third Offense Within Five-Year Period[4]	$600 to $2,000 fine (plus $250 surcharge)[3]	Thirty days to one year jail	Twenty-four to 36 months revocation	After 90 days	Yes	6
OWI, Fourth Offense Within Five-Year Period[5]	$600 to $2,000 fine (plus $250 surcharge)[3]	Sixty days to one year jail	Twenty-four to 36 months revocation	After 90 days	Yes	6
OWI, Fifth Offense Within Five-Year Period[5]	$600 to $2,000 fine (plus $250 surcharge)[3]	Six months to one year jail	Twenty-four to 36 months revocation	After 90 days	Yes	6
Causing Injury While OWI	$300 to $2,000 fine (plus $250 surcharge)[3]	Thirty days to one year jail	One to two years revocation	After 60 days	Yes	6
Causing Great Bodily Harm While OWI	Up to $10,000 fine (plus $250 surcharge)	Up to two years imprisonment	Two years revocation	After 120 days	Yes	0
Homicide While OWI	Up to $10,000 fine (plus $250 surcharge)	Up to 10 years imprisonment (up to five years imprisonment until January 1, 1993)	Five years revocation	After 120 days	Yes	0

CONVICTION	FINE OR FORFEITURE	JAIL	SUSPENSION OR REVOCATION OF LICENSE[1]	OCCUPATIONAL LICENSE[1]	ASSESSMENT FOR ALCOHOL OR DRUG PROBLEMS	POINTS ON DRIVER'S RECORD
Absolute Sobriety for Drivers Under Age 19						
--First Offense	$10 forfeiture		Thirty to 90 days suspension	Immediately	No	0
--Second Offense Within 12 Months	$10 forfeiture		Twelve months suspension	Immediately	No	0
--Third or Subsequent Offense Within 12 Months	$10 forfeiture		Twenty-four months revocation	Immediately	No	0
Chemical Test Refusal, First Offense			Twelve months revocation	After 30 days	Yes	
Chemical Test Refusal, Second Offense Within Five-Year Period			Twenty-four months revocation	After 90 days	Yes	
Chemical Test Refusal, Third Offense Within Five-Year Period			Thirty-six months revocation	After 120 days	Yes	
BAC at or Over .10% (Administrative Suspension Law)			Six months suspension (administrative)	Immediately		

[1]If the offense results in the driver meeting the criteria for a habitual traffic offender (HTO) under ch. 351, Stats., and the driver is so prosecuted, the revocation period is five years and the waiting period for an occupational license is two years. In general, a HTO is a driver who has: (a) four or more serious traffic violations within a five-year period; or (b) 12 or more convictions of moving traffic violations or of crimes in the operation of a motor vehicle. OWI and OWI-related offenses are specified in the list of serious traffic violations.

[2]Court may order community service to reduce the amount of a fine or forfeiture. May also order restitution as part of penalty.

[3]Violator also subject, if applicable, to penalty assessment, crime victim and witness surcharge, restitution surcharge, jail assessment, automatic reinstatement assessment and court automation fee. [See Part II, A., 2, i, in this Memorandum.]

[4]For a third OWI or OWI-related conviction or revocation for refusal within a five-year period, the court: (a) may order seizure of a motor vehicle; or (b) if vehicle is not seized, must order equipping vehicle with ignition interlock or immobilization of vehicle.

[5]For a fourth or subsequent OWI or OWI-related conviction or revocation for refusal within a five-year period, the court must order seizure and forfeiture of motor vehicle unless vehicle is exempted under s. 346.65 (6), Stats.

APPENDIX C

PENALTIES FOR ATV, BOAT AND SNOWMOBILE OWI VIOLATIONS

CONVICTION	FINE OR FORFEITURE	JAIL	ASSESSMENT FOR ALCOHOL OR DRUG PROBLEMS
ATV, Boat or Snowmobile OWI, First Offense or Refusal	$150 to $300 forfeiture[1]	--	Yes
ATV, Boat or Snowmobile OWI, Second Offense or Refusal Within Five-Year Period	$300 to $1,000 fine[1]	Five days to six months jail	Yes
ATV, Boat or Snowmobile OWI, Third or Subsequent Offense or Refusal Within Five-Year Period	$600 to $2,000 fine[1]	30 days to one year	Yes
Causing Injury While OWI (ATV, Boat or Snowmobile)	$300 to $2,000 fine[1]	30 days to one year in county jail	Yes
Homicide or Causing Great Bodily Harm While OWI[1]	See footnote[2] below	See footnote[2] below	See footnote[2] below
Absolute Sobriety for Operators Under Age 19 (Snowmobiles Only)	Forfeiture of not more than $50	--	--

[1]Violator also subject, if applicable, to penalty assessment, crime victim and witness surcharge, restitution surcharge, jail assessment and court automation fee. [See Part II, A, 8, i, in this Memorandum.]

[2]Provisions for causing great bodily harm or death by ATV, boat or snowmobile OWI are not included in this Appendix, because the term "vehicle" in ss. 940.09 and 940.25, Stats., includes ATV's, boats and snowmobiles and the penalties in those statutes, as set forth in Appendix B, apply to those offenses.

CURRENT PENALTIES FOR OPERATING A MOTOR VEHICLE AFTER LICENSE SUSPENSION OR REVOCATION

CONVICTION	FINE OR FORFEITURE[1]	JAIL[1]	SUSPENSION OR REVOCATION	OCCUPATIONAL LICENSE[2]	POINTS
Driving After Revocation or Suspension, First	$150 - $600 [s. 343.44 (2) (a), Stats.]	--	Six-month revocation [s. 343.31 (3) (g), Stats.]	After 15 days [s. 343.10 (1) (b), Stats.]	6
Driving After Revocation or Suspension, Second	$300 - $1,000 [s. 343.44 (2) (b), Stats.]	10 days to six months [s. 343.44 (2) (b), Stats.]	Six-month revocation [s. 343.31 (3) (g), Stats.]	After 15 days [s. 343.10 (1) (b), Stats.]	6
Driving after Revocation or Suspension, Third	$1,000 - $2,000 [s. 343.44 (2) (c), Stats.]	30 days to nine months [s. 343.44 (2) (c), Stats.]	Six-month revocation [s. 343.31 (3) (g), Stats.]	After 15 days [s. 343.10 (1) (b), Stats.]	6
Driving after Revocation or Suspension, Fourth	$1,500 - $2,000 [s. 343.44 (2) (d), Stats.]	60-day mandatory jail to one year [s. 343.44 (2) (d), Stats.]	Six-month revocation [s. 343.31 (3) (g), Stats.]	After 15 days [s. 343.10 (1) (b), Stats.]	6
Driving after Revocation or Suspension, Fifth	$2,000 - $2,500 [s. 343.44 (2) (e), Stats.]	Six months mandatory jail to one year [s. 343.44 (2) (e), Stats.]	Six-month revocation [s. 343.31 (3) (g), Stats.]	After 15 days [s. 343.10 (1) (b), Stats.]	6

[1] Effective until January 1, 1993; then, penalties in Act 277, set forth in Appendix E, apply.

[2] If the offense results in the driver meeting the criteria for an habitual traffic offender (HTO) under ch. 351, Stats., and the driver is so prosecuted, the revocation period is five years and the waiting period for an occupational license is two years. In general, an HTO is a driver who has: (1) four or more serious traffic violations within a five-year period; or (2) 12 or more convictions of moving traffic violations or of crimes in the operation of a motor vehicle. OAR and OAS are specified in the list of serious traffic violations.

PENALTIES FOR OPERATING A MOTOR VEHICLE AFTER SUSPENSION (OAS) OR REVOCATION (OAR) UNDER 1991 WISCONSIN ACT 277 (EFFECTIVE JANUARY 1, 1993)

CONVICTION WITHIN A FIVE-YEAR PERIOD	PENALTY		
	(1)	(2)	(3)
	WHERE COLUMN (2) OR (3) DOES NOT APPLY	WHERE REVOCATION OR SUSPENSION IS BASED SOLELY ON FAILURE TO PAY A FINE OR FORFEITURE AND/OR ONE OR MORE SUBSEQUENT CONVICTIONS	WHERE PERSON'S LICENSE WAS SUSPENDED OR REVOKED FOR OWI OR OWI-RELATED OFFENSE
First Conviction	May be required to forfeit not more than $600, except if license revoked under ch. 351, Stats., at time of offense, may be required to pay fine of not more than $600.	May be required to forfeit not more than $1,000.	Must forfeit not less than $150 nor more than $600, except if revoked under ch. 351, Stats., at time of offense, must be fined not less than $150 nor more than $600.
Second Conviction	May be fined not more than $1,000 and must be imprisoned not more than six months.	May be required to forfeit not more than $1,000.	Must be fined not less than $300 nor more than $1,000 and must be imprisoned for not less than five days nor more than six months.
Third Conviction	May be fined not more than $2,000 and may be imprisoned not more than nine months.	May be required to forfeit not more than $2,000.	Must be fined not less than $1,000 nor more than $2,000 and must be imprisoned not less than 30 days nor more than nine months.
Fourth Conviction	May be fined not more than $2,000 and may be imprisoned not more than one year in county jail.	May be required to forfeit not more than $2,000.	Must be fined not less than $1,500 nor more than $2,000 and must be imprisoned not less than 60 days nor more than one year in the county jail.
Fifth Conviction	May be fined not more than $2,500 and may be imprisoned not more than one year in the county jail.	May be required to forfeit not more than $2,500.	Must be fined not less than $2,000 nor more than $2,500 and must be imprisoned not less than six months nor more than one year in the county jail.

APPENDIX F

Section 973.03 (4), Stats.
[Home Detention]

973.03 (4) (a) In lieu of a sentence of imprisonment to the county jail, a court may impose a sentence of detention at the defendant's place of residence or other place designated by the court. The length of detention may not exceed the maximum possible period of imprisonment. The detention shall be monitored by the use of an electronic device worn continuously on the defendant's person and capable of providing positive identification of the wearer at the detention location at any time. A sentence of detention in lieu of jail confinement may be imposed only if agreed to by the defendant. The court shall ensure that the defendant is provided a written statement of the terms of the sentence of detention, including a description of the detention monitoring procedures and requirements and of any applicable liability issues. The terms of the sentence of detention may include a requirement that the defendant pay a daily fee to cover the costs associated with monitoring him or her. In that case, the terms must specify to whom the payments are made.

(b) A person sentenced to detention under par. (a) is eligible to earn good time in the amount of one-fourth of his or her term for good behavior if sentenced to at least 4 days, but fractions of a day shall be ignored. The person shall be given credit for time served prior to sentencing under s. 973.155, including good time under s. 973.155 (4). If the defendant fails to comply with the terms of the sentence of detention, the court may order the defendant brought before the court and the court may order the defendant deprived of good time.

(c) If the defendant fails to comply with the terms of the sentence of detention, the court may order the defendant brought before the court and the court may order that the remainder of the sentence of detention be served in the county jail.

(d) A sentence under this subsection is not a sentence of imprisonment, except for purposes of ss. 973.04, 973.15 (8) (a) and 973.19.

APPENDIX G

PLATE IMPOUNDMENT PROGRAMS

OREGON	WASHINGTON	GEORGIA	MINNESOTA
When officers encounter: (1) any driver after a felony suspension/revocation; (2) a driver violating financial responsibility suspension; or (3) any driver without valid license (except those expired less than one year), officer puts "zebra sticker" on plate and issues cancellation notice/temporary registration good for 60 days. [Driver does not have to be owner of vehicle.]	When officer stops suspended/revoked driver and determines driver is an owner of the vehicle, officer confiscates registration, marks license plates with red/orange striped tab, issues notice to cancel plates on 61st day.	Upon third OWI conviction, court shall issue plate impoundment order for all vehicles owned, leased, registered to defendant or defendant and spouse. Plates surrendered to court within three days or at specified time.	When officer arrests person for a third DUI violation in five years or fourth in 10 years, officer takes the plates. Seven-day temporary permit issued if driver is owner, 45-day permit if someone else is owner. Order requires driver to surrender all license plates of vehicles owned, leased or registered in his name.
Driver has 15 days to request administrative hearing. Driver has 60 days to regain license. Can get stickers for $5 fee. Registered owner who was not the driver can get new stickers issued.	Driver has 15 days to request administrative hearing or 60 days to reinstate driver's license.	If someone in household has valid license or defendant gets restricted license, can get special plates for $50 fee. Special plates are readily identifiable to law enforcement. Person gives implied consent to be stopped at any time when vehicle bears special plates.	Driver may request administrative hearing any time during impoundment period. Special plates available as in Georgia.
Title can be transferred to anyone but the driver. [See about 15% transfer rate; lienholders will not let second party be taken off in most cases.] No "accomplice liability" clause, but vehicle could be restickered if ineligible driver drives it again.	Title can be transferred. It is a misdemeanor to knowingly allow an ineligible driver to use your vehicle.	Vehicle cannot be sold when registration surrendered or when subject to special plates unless department is satisfied that sale is in "good faith and for valid consideration."	Owner who was not the driver may have order rescinded if they sign a sworn statement saying they were not a passenger and they now know violator may not operate a vehicle. Vehicle subject to impoundment cannot be sold unless sale is for "a valid consideration" and buyer does not reside in same household.
Took effect January 1, 1990. Will be repealed January 1, 1994. Preliminary evaluation (first three months) not real favorable because of startup problems. But system very popular with law enforcement.	Law went into effect January 1, 1990, will expire January 1, 1993. Interim report to Legislature January 1, 1991.	Effective July 1, 1991.	Program changed from court ordered to administrative on January 1, 1991. Court ordered plate impoundment in less than 10% of eligible cases.

SOURCE: Department of Transportation: Materials prepared for the Governor's 1991 Task Force on Repeat OWI Offenders (undated).