

**Determination of Blood Alcohol Content (BAC) in  
Driving Under the Influence Cases  
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In California, detention for **Driving Under the Influence (DUI)** can result in three different types of alcohol analysis tests given. These tests include a **Preliminary Alcohol Screening (PAS) test**, which is typically given at the scene of the arrest. This test is used primarily as a field sobriety screening test to determine if there is sufficient evidence for an arrest. Once arrested, a detainee is offered a choice between a more sophisticated analysis test or blood test. These "**chemical tests**" must be offered to an arrestee for a more accurate determination of the subject's blood alcohol level.

**PRELIMINARY ALCOHOL SCREENING TESTS (PAS)**

The first test typically encountered is the **Preliminary Alcohol Screening (PAS) test**. This mobile, hand-held breath analyzer is battery operated and used at the scene of an arrest. The roadside test, is utilized by officers as part of the "**field coordination tests**" (**FST's**) to determine if enough evidence exists for an arrest. For the test results to be admissible, the officer must typically take two separate breath samples and the results must be close enough to one another (.02%) to demonstrate scientific accuracy.

The arresting officer is required by law to advise a detainee that this test is not a "chemical test" and may be refused. This is simply because these tests are not as accurate as chemical breath tests given at the police station and there is no record (or evidence) printed with the results.. This advice is part of the "**PAS admonition**" or warning, which is required and found printed in most police reports. The **PAS admonition** states that:"I am requesting that you take the **Preliminary Alcohol Screening test** in further assisting me in determining you are under the influence of alcohol. You may refuse to take this test; however, this does not comply to the test, you will be asked to give a sample of your blood for the actual drug/alcohol content of your blood."

These field breath tests have quickly become the favorite tool utilized by police, to make arrests for **driving under the influence**.

Many counties in California are now using **E-PAS tests** which do qualify as a chemical test in California. These machines immediately print out a **blood alcohol content ( BAC)**, and these results may be offered by the prosecution in court as evidence if the test was properly administered. An experienced **DUI** attorney may be able to exclude this evidence and keep it from being admitted in court if; (1) the officer was not properly trained on this machine,(2) the machine was not in proper working order, and (3) the breath test was not conducted by the police officer in a proper manner. The use of expert witnesses is crucial in neutralizing this evidence against you.

## CHEMICAL BREATH ALCOHOL TEST

Once arrested, the law requires that you are to be advised of "**implied consent**". This is the requirement to submit to a chemical test if you are requested to do so by a peace officer. The arrestee must then be given a choice or option of a blood or breath test. This test usually takes place down at the police station or at separate facility such as a hospital. The officer's failure to give a choice of tests (i.e **Forced blood draw**), may result in a violation of the arrestee's right to **Due Process of Law**. An experienced attorney may be able to get your case dismissed for this constitutional violation if proven.

The more accurate and evidential breath tests are the machines used at the police station or jail. These machines, such as the **Intoxilizer Draeger or Intoximeter**, are far more accurate than the **PAS field tests** and the results are printed out immediately after the test is completed. These results may be used against you in court by the prosecution, to determine your actual blood alcohol level at the time of driving.

Many people opt for the breath test, because they are faster and less intrusive than a blood draw. The officer is required by **Title Seventeen (17) of the California Code of Regulations**, to take two samples of the subject's breath within two minutes of one another. Prior to commencing the test, the officer must conduct a continuous fifteen (15) minute observation of the subject. This is to avoid mouth alcohol contamination from within the body (i.e burping or regurgitation) or outside by drinking or eating. If the officer fails to conduct a proper observation period, then the breath test results may not be admissible at a DMV hearing or in court. Further, the results must also be close enough to one another to demonstrate consistency and accuracy. Under California law a valid breath test must have two separate results within .02% of each other. Thus, results of .08% and .10% on the same printout are acceptable and admissible in court.

There are many technical defenses an attorney can utilize to have breath test results thrown out of court and win your case. Using expert witnesses "**Forensic Toxicologists**" to review the evidence and testify on your behalf is crucial in developing defenses, both in court and at the **DMV Administrative Per Se Hearing**. These include but are not limited to; tolerance of the breath machine, lack of proper training of operator, failure to conduct the test properly, failure to complete a proper 15 minute observation of the subject, rising blood alcohol level and mouth alcohol contamination.

## **BLOOD ALCOHOL TESTS (VENOUS BLOOD DRAW)**

The other option given to an individual arrested for **driving under the influence (DUI)** in California is the **intravenous blood draw**. This is the most accurate blood alcohol test and also the most intrusive. If you have been arrested for **Driving Under the Influence**, you should avoid a blood test for many reasons.

First, these tests are far more accurate in helping the prosecution team prove their case and as a result, there are fewer defenses to the test. **The margin of error in a blood draw is generally .005%** in either direction (please see *People v. Campos (1982) 138 CA 3d Supp 1*). Second, having needles stuck into your arm by an inexperienced phlebotomist is painful and possibly dangerous in light of the multiple diseases and medical conditions which can be contracted by unsanitary needles. Third, an intravenous blood alcohol test allows for the prosecution to have your blood tested for drugs in addition to alcohol. Clearly, if there are drugs in the individuals' system (whether legally prescribed or illicit) other than alcohol, the blood test should be avoided at all costs. Obviously in **driving under the influence cases involving injury** or other felony charges, the officer can **force a blood draw** on you. The law also allows for a **"forced" blood draw** in cases where the arrestee has **"refused"** a chemical test. There are some positive aspects of a blood draw including the defendants' right to have the blood sample retested at an independent laboratory. This can help to confirm an accurate testing process. Obviously a breath test does not preserve the breath sample and an arrestee would not be able to retest a breath test. The arrestee is read the **Trombetta Admonishment** after conducting an **Intoxilizer test**. (Please see *California v. Trombetta (1984) 467 US 479*) Other issues can be raised such as proper or improper storage of the blood sample and or fermentation of the sample. Accordingly, one should take a breath test it to minimize your exposure to these problems.

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