

**OPERATING A (MOTOR VEHICLE) (BOAT)
UNDER THE INFLUENCE OF (ALCOHOL) (DRUGS)
WHILE (LICENSE) (RIGHT TO OPERATE) WAS
(SUSPENDED) (REVOKED) FOR OUI**

UNBIFURCATED TRIAL

G.L. c. 90, § 23, ¶4

[This instruction may be used when a judge determines that a jury's knowledge of the defendant's prior OUI conviction will not create undue prejudice and should be read after the applicable OUI instruction.]

NOTE: Even without a motion to bifurcate this charge, the court should take care to evaluate whether to bifurcate the aggravated portion of this offense that relies on a prior conviction. Bifurcation is not compelled, but the introduction of evidence regarding the defendant's prior conviction for OUI must be accompanied by repeated limiting instructions **both at the time the evidence is introduced and in the final instructions**. See *Commonwealth v. Leonard*, 103 Mass. App. Ct. 635, 640 (2023); *Commonwealth v. Lopes*, 85 Mass. App. Ct. 341, 349-350 (2014); *Commonwealth v. Beaulieu*, 79 Mass. App. Ct. 100, 103 (2011). See Limiting Instruction below.

This model instruction is drafted for the offense of Operating Under the Influence of Alcohol while Operating with a License Suspended for OUI. Based on the many possible theories of this offense, see note 2, the judge should make appropriate adjustments to the instruction where necessary. The word "drugs" may be substituted for the word "alcohol," the word "boat" may be substituted for the word "motor vehicle," and the word "revocation" or "revoked" may be substituted for the word "suspension" or "suspended". The statute applies to dispositions under §§ 24D, 24E, 24G, 24L and 24N as well as to pleas of *nolo contendere* and admissions to sufficient facts.

**The defendant is charged with operating a motor vehicle while
under the influence of alcohol at a time when the defendant's (license)
(right) to operate a vehicle had been (suspended) (revoked), as a
result of having previously been convicted of operating a motor
vehicle while under the influence of alcohol.**

**To prove the defendant guilty, the Commonwealth must prove
five things beyond a reasonable doubt:**

First: That the defendant operated a motor vehicle;

Second: That the defendant did so (on a public way) (or) (in a place where the public has a right of access) (or) (in a place where members of the public have access as invitees or licensees);

Third: That, at the time of operation, the defendant was under the influence of intoxicating liquor or alcohol;

Fourth: That, at the time of that operation, the defendant's (license) (right) to operate a motor vehicle was (suspended) (revoked) as a result of a previous Massachusetts conviction for operating a motor vehicle while under the influence of alcohol; and

Fifth: That the defendant had been notified of the (suspension) (revocation).

[Here, the trial judge may instruct the jury on the first three elements according to Criminal Model Jury Instruction 5.300, 5.310 or 5.400 for operating under the influence of alcohol, drugs, or while $\geq .08$. Alternatively, the trial judge may instruct the jury as follows:]

I have already instructed you on how the Commonwealth must prove the first three elements. That same explanation applies here.

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that, at the time of operation, the defendant's (license) (right) to operate a motor vehicle was (suspended) (revoked) as a result of a conviction in a Massachusetts court for the crime of operating a motor vehicle while under the influence of alcohol.

If a CWOFF: I instruct you that the (term “continued without a finding” is) (letters C-W-O-F are) a legal term which for purposes of this case constitutes a conviction.

The Commonwealth must prove beyond a reasonable doubt that the person previously convicted of operating a motor vehicle while under the influence of alcohol is actually the same person as the defendant in the present case. You must carefully examine and consider the evidence to make these determinations.

If you determine beyond a reasonable doubt that the defendant was *previously* convicted of operating a motor vehicle while under the influence of alcohol, you may not allow that determination to

influence your verdict as to whether the defendant operated a motor vehicle while under the influence of alcohol on [date of present offense].

The documents relating to the prior conviction are only relevant to the issue of whether and why the defendant's license was revoked on [date of present offense]. You are not to consider those documents for any other purpose. Specifically, you may not use this evidence to conclude that, if the defendant was convicted of the prior offense, they must also have committed this offense.

Your decision about whether the defendant operated a motor vehicle while under the influence of alcohol on [date of present offense] must be based solely on the evidence about what happened on that date.

You may examine the evidence in the case, all of the surrounding circumstances, and any reasonable inferences you draw from that evidence, to help you determine whether this defendant's (license) (right) to operate was (suspended) (revoked) at the time of the alleged offense on [date of present offense], because of a prior conviction in a Massachusetts court for operating while under the influence of alcohol.

To prove the fifth element, the Commonwealth must prove beyond a reasonable doubt that the defendant was notified of the (suspension) (revocation). I instruct you as a matter of law that the (suspension) (revocation) begins on the date of conviction.

If additional instruction on notice is appropriate: **The Commonwealth may prove notice by proving beyond a reasonable doubt that an agent of the defendant such as a household member or employer was notified, provided, however, that the agent household member or employer was one who would reasonably be expected to notify the defendant.**

You may examine the evidence in the case, all of the surrounding circumstances, and any reasonable inferences you draw from that evidence, to help you determine whether the defendant received notice that their right to operate was (suspended) (revoked) due to the conviction.

If the Commonwealth proved each of the five elements beyond a reasonable doubt, you should return a verdict of guilty. If the

Commonwealth failed to prove any element beyond a reasonable doubt, you must return a verdict of not guilty.¹

LIMITING INSTRUCTION

1. Required to be given at the time that documents indicating prior conviction for OUI are admitted as evidence:

These documents are only relevant to the issue of whether the defendant's license was (suspended) (revoked) at the time of operation and why it was (suspended) (revoked).

You are not to consider these documents as evidence that the defendant was operating under the influence on [date of present offense]. They are not relevant for that purpose.

NOTES:

1. **Operating after suspension for OUI-related offense does not require bifurcated trial.** The aggravated charge of operating after suspension or revocation because of an OUI-related offense (G.L. c. 90, § 23, ¶ 2) does not require a bifurcated trial under G.L. c. 278, § 11A (which requires a bifurcated trial when a defendant is charged with a second or subsequent offense with a more severe penalty). *Commonwealth v. Beaulieu*, 79 Mass. App. Ct. 100, 102 (2011); *Commonwealth v. Blake*, 52 Mass. App. Ct. 526, 529-30 (2001).

2. **Applicable offenses.** A defendant may be charged under this statute for operating a motor vehicle in violation of any of the following offenses and while their license was suspended or revoked due to a violation of one of any of the following offenses:

- OUI Liquor, OUI Drugs or OUI while $\geq .08$ in violation of G.L. c.90, §§ 24(1)(a);
- Motor Vehicle Homicide in violation of G.L. c.90, § 24G;
- OUI with Serious Bodily Injury in violation of G.L. c.90, § 24L;

¹ The lesser included offense of operating after suspension does not include the element of public way. The judge may wish to discuss how to handle lesser included offenses with counsel early in the proceedings. The judge must give a charge on the lesser included offenses of operating after suspension or revocation, and operating under the influence, if requested.

- OUI Boat by means of Liquor, Drugs or $\geq .08$ in violation of G.L. c.90B, § 8(a),
- OUI Boat with Serious Bodily injury in violation of G.L. c.90B, § 8A,
- OUI Boat Homicide in violation of G.L. c.90B, § 8B,
- Manslaughter by means of OUI, in violation of G.L. c.265, § 13½

3. **Massachusetts OUI only.** The license suspension must be based on a criminal disposition for a prior conviction for operating under the influence of alcohol from a Massachusetts court. *Commonwealth v. Lee*, 466 Mass. 1028 (2013).

4. **Registrar's certificate of suspended or revoked status.** "A certificate of the registrar or his authorized agent that a license or right to operate motor vehicles . . . has not been restored or that the registrar has not issued a new license so to operate to the defendant . . . shall be admissible as evidence in any court of the commonwealth to prove the facts certified to therein, in any prosecution hereunder wherein such facts are material." G.L. c. 90, § 23, ¶ 5. However, a certification by the registrar that an attached notice of suspension was "mailed on the date(s) appearing on the notice to the last address on file" is not admissible to prove notice as it goes beyond attesting to the authenticity of the record and is thus testimonial. *Commonwealth v. Parenteau*, 460 Mass. 1, 4, 8 (2011). **Beware: The certification must be redacted if the RMV extended the suspension past the period of suspension for OUI (e.g. defendant failed to pay reinstatement fee).**

5. **RMV records require attestation.** Under G.L. c. 90, § 30, G.L. c. 233, § 76 and Mass. R. Crim. P. 40(a)(1), copies of official records of the Registry of Motor Vehicles are admissible in evidence if they are attested by the Registrar or his agent, that is, a written and signed certification that it is a true copy. A photocopy of the attestation does not satisfy this requirement. *Commonwealth v. Deramo*, 436 Mass. 40, 48 (2002) (photocopy of attestation insufficient). The attesting signature may be either holographic, stamped, or printed. See the notes to Instruction 2.540 (Subsequent Offense).

6. **Cruiser database check.** Registry notices that the defendant's license would be suspended if he did not comply with certain requirements, though possibly sufficient to prove notice, were insufficient to prove that the defendant's license was actually suspended. *Commonwealth v. Royal*, 89 Mass. App. Ct. 168, 173 n.7 (2016). A trooper's report that he checked the registry database, and the defendant's license came back with a status of suspended was inadmissible hearsay and could not be substitute for a properly certified registry driving history showing a suspension of a license. *Id.* at 171-73.

7. **Defendant's failure to report address change to RMV.** General Laws c. 90, § 26A(a) requires a licensed operator to notify the Registry of any change of residential or mailing address within thirty days. Query what effect a failure to do so has on the notice requirement in a prosecution under § 23. *Cf. Commonwealth v. Hampton*, 26 Mass. App. Ct. 938, 940 (in firearms prosecution where absence of license not an element of the offense, defendant herself was responsible for nonreceipt of license suspension notice by failing to report change of address as required by statute), *rev. denied*, 403 Mass. 1102 (1988).

8. **Clerk-magistrate's certificate of suspended status.** "A certificate of a clerk of court that a person's license or right to operate a motor vehicle was suspended for a specified period shall be admissible as prima facie evidence in any court of the commonwealth to prove the facts certified to therein in any prosecution commenced under this section." G.L. c. 90, § 23, ¶ 5.

9. **Public way not an element for the charge of operating a motor vehicle after suspension.** This offense does not require that the violation occur on a public way. *Commonwealth v. Murphy*, 409 Mass. 665, 667-68 (1991).

10. **Murphy's Law: Hardship license violation.** A defendant who operates a motor vehicle outside the hours of operation permitted by a hardship license issued after a license suspension cannot be charged with operating after suspension, G.L. c. 90, § 23, since that offense is defined as operation prior

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to the Registry's "issuance to him of a new license to operate." The appropriate charge is operating a motor vehicle without a license, G.L. c. 90, § 10. *Commonwealth v. Murphy*, 68 Mass. App. Ct. 152, 154-55, *rev. denied*, 449 Mass. 1102 (2007).

11. **Evidence of notice to defendant.** A business record that the suspension or revocation notice was mailed to the defendant on a given date, created by the Registry at the time the suspension or revocation notice was mailed to the defendant, is admissible at trial on the issue of the defendant's receipt of the notice. If the Registry later creates an attested record of the mailing for the purpose of trial, that record does not meet the requirements of the business records exception and is inadmissible as testimonial hearsay. G.L. c. 233, § 78; *Commonwealth v. Parenteau*, 460 Mass. 1, 5-10 (2011) (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309-11 (2009), and *Commonwealth v. Trapp*, 396 Mass. 202, 208 (1985)).

12. **Proof of prior conviction.** The Commonwealth may, but is not required to, introduce a certified copy of the defendant's prior conviction and may seek to introduce RMV documents to establish the reason for suspension. See *Commonwealth v. Lopes*, 85 Mass. App. Ct. 341, 351 (2014); *Commonwealth v. Beaulieu*, 79 Mass. App. Ct. 100, 103 (2011). Whether the Commonwealth seeks to admit the certified copy of conviction or RMV documents, they should be properly redacted prior admission. See *Commonwealth v. Burke*, 100 Mass. App. Ct. 1117 (2021); *Beaulieu*, *supra* at 103.

13. **Timing of running suspension.** License suspension for operating under the influence begins on the date of conviction. See *Commonwealth v. Fuerte*, 91 Mass. App. Ct. 1124 (2017), citing G.L. c. 90, § 24(1)(b), which commands that an OUI conviction "shall revoke the license... of the person so convicted" and *DiGregorio v. Registry of Motor Vehicles*, 78 Mass. App. Ct. 775, 779 (2011) ("§ 24(1)(c) serves to prohibit the registrar from restoring the driving privileges of the offender before a specified date"). See *Commonwealth v. Oyewole*, 470 Mass. 1015, 1016 (2014) (noting docket indicated suspension began on date of conviction, but docket did not indicate that defendant was told his license was suspended and the Commonwealth did not offer a transcript into evidence).

14. **Duplicative convictions.** If the defendant is convicted of both OUI subsequent offense and OUI while operating with license suspended for OUI, the defendant may be sentenced on both charges. If the defendant is convicted after trial of OUI first offense and OUI while operating with license suspended for OUI, the defendant may not be convicted and sentenced on both charges, as the OUI is duplicative of the OUI while OAS for OUI. In that case, the court must dismiss the OUI and sentence the defendant only on the charge of OUI while OAS for OUI. See *Commonwealth v. Vick*, 454 Mass. 418, 431 (2009); *Commonwealth v. Morey*, 108 Mass. 433, 434 (1871).