



# Legislative Testimony

Oregon Criminal Defense Lawyers Association

April 13, 2017

The Honorable Jeff Barker, Chair  
House Judiciary Committee, Members

**RE: House Bill 2614–1, testimony in opposition**

Dear Chair Barker and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and parents in juvenile dependency proceedings, juvenile delinquency proceedings, adult criminal prosecutions and appeals, and civil commitment proceedings throughout the state of Oregon. Thank you for the opportunity to submit the following comments in opposition to House Bill 2614–1.

**OCDLA addresses its comments to the Dash 1 amendment:**

The Dash 1 amendment amends Oregon’s implied consent laws to include the completion of a drug recognition evaluation (DRE) after the person has been arrested on a charge of impaired driving. If the person either refuses or fails to submit to the DRE, the fact of such refusal or failure will be admissible in any criminal or civil action or proceeding arising out of the allegations of impaired driving.

**A drug recognition evaluation is unlike field sobriety tests such that comment on refusal is inappropriate:**

A drug recognition evaluation (DRE) is unlike field sobriety tests (FST) in significant respects. These differences make it inappropriate to comment on a refusal or failure to complete the DRE evaluation.

- Unlike DRE evaluations, FST’s can be completed without speech and still have statistical validity. Normally FST’s require the person to count as they complete the steps, but it is possible and valid for a person to complete the steps while remaining silent. Additionally, it is not necessary for all FST’s to be completed before any one discreet test has relevance or statistical meaning. Each discrete FST has relevance and significance in and of itself in determining whether a person is impaired. Accordingly, if one FST test is eliminated but another is completed, it does not affect the validity and significance of the tests that are completed. Similarly, if a FST is completed without the person speaking: i.e., without asking the person to count as they are completing the steps, this does not affect the validity and significance of the tests. Accordingly, commenting on the refusal or failure of a person to complete one or more FST’s is to comment upon the person refusing or failing to take **a valid test**.

- In contrast, the validity of a DRE evaluation is much more fragile. A DRE is valid **only** if a rigid 12-step protocol is adhered to with exactitude and in its entirety. Each step must be undertaken in order, completed in order, and administered in strict accordance with protocol. Variation in any respect from this protocol invalidates the results of the entire evaluation such that it is rendered invalid.<sup>1</sup>

- It is in this respect that parsing out the testimonial aspects of the DRE evaluation from the non-testimonial aspects poses problems that are not present with FST's. Step #2 of the DRE protocol requires the DRE expert to conduct an interview of the person, as does step #10 which entails an "interrogation, statements & other observations." Eliminating steps #2 and #10 that entail speech from the 12-step protocol **invalidates the results of the entire DRE evaluation**. Parsing out the testimonial aspects of **some** of the 12 steps from the entire whole **invalidates the significance and relevance of the non-testimonial steps**. Accordingly, then, commenting on the refusal or failure of a person to complete some of the 12 steps (excepting speech) is to comment upon the person refusing or failing to take **an invalid test that has no scientific validity**.

- A person subject to arrest has the absolute right to remain silent and to put the government to its burden of proof. It is improper to penalize a person for exercising that right by commenting upon their refusal to participate in an **invalid test which lacks scientific validity**.

**HB 2614-1 is unique and will generate years of appellate litigation:**

- In examining other states' laws, we cannot find another state which includes completion of a DRE evaluation in its implied consent laws such that it is permissible to comment upon refusal or failure to undertake the partial, non-testimonial steps of the DRE protocol.

- It is for these reasons that OCDLA anticipates HB 2614-1 would generate years of appellate litigation should it become law in Oregon.

OCDLA respectfully urges your "nay" vote on HB 2614-1.

Gail L. Meyer, JD  
Legislative Representative  
Oregon Criminal Defense Lawyers Association  
gmeyer@ocdla.org

---

<sup>1</sup> IACP Highway Safety Committee, International Standards of the Drug Evaluation Classification Program, Revised May 2015.